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Title: Administrative Adjudication in Antitrust: Still a Controversy?

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Abstract: Administrative adjudication in antitrust has often been the starting point for debate and dissent. Both in the United States (“US”) and in the European Union (“EU”), controversy on the application due process principles to case allocation methods, institutional design and decision-making in antitrust has caught the attention of the legal scholarship, and continues to trigger important discussions. In the US, the jurisdictional overlaps between the two Federal antitrust enforcement agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission are the principal source for the debate. In the EU, the main concerns are connected to the enforcer’s eyebrow-raising trifecta role as investigator, prosecutor and judge.

This essay constitutes an attempt at summarizing the current main points of discussion and arguments surrounding antitrust, administrative adjudication and the rule of law, in the United States and in the European Union. It was prepared as a support tool (in conjunction with a bibliography on the same topic) for the panel discussions under the same title held at the American Antitrust Institute 14th Annual Conference: Counseling Antitrust Compliance on the Frontier, on 12 June 2013.

Keywords: Antitrust, Competition, Administrative Adjudication, Enforcement, Due Process, Rule of Law, Judicial Review, Institutional/Agency Design, DG-COMP, ECHR, ECtHR, FTC, DOJ.

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Administrative Adjudication in Antitrust:

Still a Controversy?

Maria Barroso Gomes¹²

I. Introduction

Adjudicatory decisions are described as involving the ‘application of general norms to particular facts’ and imposing ‘legal consequences ... on parties’.³ Associated to the application of antitrust rules, this concept has often been the starting point for debate and dissent; it is frequently preferred over a regulatory mode, for ‘adjudicatory decision-making tends to be more fact specific, incremental, adaptive, and flexible than regulation’.⁴ Conversely, it also has the disadvantage of requiring ‘a binary determination about the conformity of the defendant’s comportment with abstract norms’.⁵ Here lies the source of all controversies.

Both in the United States (‘US’) and in the European Union (‘EU’), controversy on the application of due process principles to case allocation methods, institutional design and decision-making in antitrust has always caught the attention of the legal scholarship, and as we will see, continues to trigger important discussions. In the US, the jurisdictional overlaps between the two Federal antitrust enforcement agencies, the Antitrust Division of the Department of Justice, and the

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³ Michael Asimow and Lisl Dunlop, 61 *Admin. L. Rev.* 131 (2009), at p. 134.

⁴ Daniel Crane, *The Institutional Structure of Antitrust Enforcement*, Oxford, 2011, at p. 96 [citations omitted].

⁵ Crane, *supra* no.4, at p. 97 [citations omitted].

Federal Trade Commission are the principal source for the discussions.⁶ In the EU, the main concerns are connected to the enforcer's eyebrow-raising trifecta role as investigator, prosecutor and judge.⁷ Much has been written on topics surrounding these core factors, whether defending the maintenance of the *status quo*, or proposing (in some cases, radical) solutions to identified problems, such as merging the two agencies in the US case, or creating a new independent agency bringing cases directly to an independent court in the EU.⁸

Due process, a notion which is associated with fairness, impartiality and legality,⁹ goes hand-in-hand with adjudication concerns on many occasions. Due process problems are often identified in the current institutional design of both EU and US systems, especially regarding the integrated agency model. Both the US and the EU are often categorized as following this model, which has identified advantages (higher levels of expertise, accountability, consistency, continuity of decision-making, administrative efficiency) and disadvantages (bias by decision-makers in undertaking its formal adjudicative functions, due process sacrifice).¹⁰ The bias factor is an important one for our analysis of administrative adjudication in antitrust. As often highlighted by the scholarship, it is crucial to know that the decision is made by an impartial and unbiased party. Following a long-established legal tradition, the rule of law¹¹ dictates the predictability¹² and replicability of the rules, and the guarantees of accountability, independence and fairness of the decision-makers.¹³ Two of the most preliminary

⁶ Fox, Eleanor M. and Trebilcock, Michael J., "The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project" (2012). New York University Law and Economics Working Papers. Paper 304, at p. 35.

⁷ 'At least in perception, integration of these functions may render the agencies "judges in their own cause"'. Fox and Trebilcock, *ib. supra* no. 6, at p. 13.

⁸ 'Dramatic changes may be difficult to execute especially at a mature stage of the institutions'. Fox and Trebilcock, *ib. supra* no.6 at p. 11.

⁹ Due process can be defined as 'the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case', in Black's Law Dictionary, Deluxe Ninth Edition, West, 2009.

¹⁰ '[A]dministrative efficiency may come at some cost in terms of due process values', in Michael J. Trebilcock and Edward M. Iacobucci 41 Loy. U. Chi. L.J. 455 2009-2010, p. 464.

¹¹ 'The fundamental issue that the rule of law seeks to address is: 'Who guards the guardians?' Who ensures that they use the powers we have granted them to protect us, in an appropriate, just and fair manner, and that we never need to be protected from them? In the context of competition law, much centres on the use of both the power and the discretion that we have given the authorities. Where are the guarantees that they will be accountable, independent and fair?', Phillip Marsden, Checks and Balances: European Competition Law and the Rule of Law, BIICL, 2010, at p. 1.

¹² Rachid Abdullah Khan and Gareth Davies, Merger Control and the Rule of Law, 2 Erasmus L. Rev. 25 (2009) p.4.

¹³ 'Dicey's three principles of the rule of law require: the absolute supremacy of the law over arbitrary power/discretion;

questions could be: “[m]ight Europe have been better served by a standalone competition authority? Might the U.S. have been better served by a single federal competition authority?”¹⁴

The issues involved in administrative adjudication in antitrust are complex and intertwined. Hence, in this essay we try to present the full extent of the debate (though not in full depth), which reaches as far as institutional design, due process rights and judicial review. Though not attempting to provide answers, this essay constitutes an attempt at summarizing the current main points of discussion and arguments surrounding antitrust, administrative adjudication and the rule of law, in the United States and in the European Union. It was prepared as a support tool (in conjunction with a bibliography on the same topic¹⁵) for the panel discussions under the same title held at the American Antitrust Institute 14th Annual Conference: Counseling Antitrust Compliance on the Frontier, on 12 June 2013.

The two parts of this essay address the focal points of the adjudication in antitrust debate in the US and the EU: part II focuses on the United States (US), and part III describes the current debate in the European Union (EU).

II. United States

In the United States, ‘the bulk of public federal antitrust enforcement’¹⁶ is done jointly by the

equality before the law; and that the law be defined and enforced by the courts’. Marsden, *supra* no. 11, at p. 1.

¹⁴ Eleanor Fox, 41 *Loy. U. Chi. L.J.* 473 2009-2010, at p. 476.

¹⁵ Available for download at the AAI [website](#).

¹⁶ [T]he U.S. “system” is highly fragmented, consisting of numerous competition enforcement agencies with the legal authority to act completely independently of each other’, in First, Harry; Fox, Eleanor M.; and Hemli, Daniel E., “Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System” (2012). New York University Law and Economics Working Papers. Paper 303, at p. 21; ‘Both FTC and DOJ deal with a wide set of other agencies on competition matters involving industries within those agencies’ domains: the US Department of Health and Human Services on health care, the Food and Drug Administration within HHS on pharmaceuticals (mainly FTC), the Federal Communications Commission on telecommunications (mainly ATR) and cable (both), the US Department of Energy and the Federal Energy Regulatory Commission (both), the Securities and Exchange Commission (mainly ATR), the Department of Transportation (mainly ATR), and the banking regulatory agencies (mainly ATR). But on the FTC’s consumer protection side, it deals with many of the same agencies that are principally ATR on the competition side’. [footnotes omitted], in William Blumenthal, *Models for Merging the US Antitrust Agencies*, *Journal of Antitrust Enforcement* (2012), at p. 18.

Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).¹⁷ This situation of having two different enforcers, or dual-agency system, is the result of what has been described as a “historical accident”,¹⁸ but which was part of a ‘deliberate policy choice’ of having the possibility of substitution between the agencies.¹⁹

The FTC’s and the DOJ’s mandates are similar. Both agencies have “divided” the expertise and “jurisdiction” on certain areas,²⁰ but they can evaluate the ‘same range of competition issues’, with the greatest difference being that the FTC has no power to bring criminal proceedings or represent the United States in a criminal proceeding.²¹ On the other hand, the FTC has a greater role in competition policy advocacy (federal and state level), and consumer protection under the FTC Act.²² Both the FTC and the DOJ can bring civil lawsuits.²³ The system by which the agencies allocate the cases is called ‘clearance process’, and it depends on the sector of the case; the agency with less expertise on that will concede it to the more experienced agency.^{24 25}

The DOJ is part of the Executive Branch, whereas the FTC is an independent regulatory

¹⁷ There is also the often raised concern of the dual enforcement when the case involves other agencies with competencies on specific industries, namely telecommunications; this discussion falls outside the scope of this paper. For more on this topic see Philip Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 *Fed. Comm. L.J.* 167 (2008-2009); Laura Kaplan, *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and a Proposal for Reform*, *Boston College Law Review*, 2012.

¹⁸ To learn more about the historical development of antitrust enforcement in the US see, First, Fox and Hemli, *supra* no. 16.

¹⁹ ‘This policy choice was most evident in the adoption of the Clayton Act in 1914, through which Congress placed both agencies in essentially the same policy domain’. William Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, *Geo. Mason L. Rev.* Vol. 19, 5, 2012, at p. 1104.

²⁰ ‘Whether the FTC or DOJ has jurisdiction over a proposed merger depends on the agency’s experience in a particular industry’. John Carroll, *The Widening Gap Between FTC, DOJ Merger Review*, *Law360*, 2009, at p. 1.

²¹ First, Fox and Hemli, *supra* no.16, at p. 18.

²² Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, as amended); ‘The second major difference is that the FTC has a consumer protection mandate under the FTC Act to prevent “unfair or deceptive acts or practices,” as well as its competition mandate to prevent “unfair methods of competition.” This consumer protection mandate involves practices that do not necessarily have a connection with competition issues’. First, Fox and Hemli, *supra* no.16, at p. 18.

²³ ‘The Antitrust Division is responsible for civil and criminal antitrust enforcement, even though federal criminal prosecutions are generally the responsibility of the Justice Department’s Criminal Division and the 93 U.S. Attorneys Offices located throughout the United States’. First, Fox and Hemli, *supra* no. 16, at p. 9.

²⁴ The FTC focuses, for example, on supermarkets, oil and gas, and the DOJ, e.g., on airlines and banking. See Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 *Geo. Mason L. Rev.* 1055 2009-(2010), at p. 1076.

²⁵ ‘Generally, one agency will have more expertise in that industry than the other. In that situation, the less experienced agency will concede the merger, and the other agency will proceed with its review’, Nathan Chubb, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, *George Mason Law Review*, Volume 18, Number 2, Winter 2011, 533. To learn more about the clearance process see, i.a. Kovacic, *supra* no. 19.

Commission²⁶ (with a connection to the Executive^{27 28}). The Antitrust Division of the DOJ follows the bifurcated judicial model, where it investigates cases and internally decides whether to charge the violation or, where required, file suit in federal court.²⁹ Conversely, the FTC is structured following the integrated agency model, comprising both investigatory and adjudicatory functions internally.³⁰

In 2011, the FTC had a budget of \$125,000 and a staff of 536³¹, dedicated exclusively to maintaining competition. The Antitrust Division's budget for the same period was of \$163,000, and its staff composed by 851 professionals.³² While the latter's budget and staff has remained constant for the past few years, the FTC has seen a steady increase in its budget.³³

Regarding the decision-making, the FTC and the DOJ follow different structures. In the DOJ, the decision is taken by the Assistant Attorney General for Antitrust alone, whereas in the FTC the decisions are adopted by a majority of Commissioners ('by majority vote of five Commissioners, no more than three of whom may be from a single political party'³⁴). The case is initially heard by an internal Administrative Law Judge ('ALJ'), and after appeal, the Commissioners adopt a final decision.

²⁶ 'The Federal Trade Commission is an independent regulatory Commission consisting of five Commissioners appointed for seven-year terms by the President, subject to Senate confirmation. To help assure political independence, no more than three can be from the same political party and Commissioners can be removed by the President only for cause. The President chooses the chairman of the FTC, with a new chairman being selected when presidential administrations change'. [footnotes omitted]. First, Fox and Hemli, *supra* no.16, at p. 10.

²⁷ 'Turning to FTC and ATR, both agencies are within the Executive Branch of the US government (a fact that is often misunderstood), but they have different attributes. ATR is a division of DOJ, a Cabinet agency with direct reporting lines to the White House; the President has both appointment and removal power over its senior officials. The FTC, in contrast, is treated by statute as an 'independent establishment' within the Branch; the President has appointment power over its Commissioners, but lacks the ability to remove Commissioners once they have been sworn in. The President is authorized to determine which of the FTC's Commissioners will serve as Chairman, including authority to shift the Chairman designation among Commissioners, so the President can remove an individual from the Chairman's post but not from the predicate Commissionership'. [footnotes omitted], Blumenthal, *supra* no. 16 at 4.

²⁸ In practice, the FTC is generally thought to be more responsive to Congress, formally reporting to the Commerce Committees, and overseen by the Judiciary Committees in most antitrust cases. The DOJ reports to the Judiciary Committees in Congress. In addition, both agencies also need to work with the Appropriations Committees.

²⁹ First, Fox and Hemli, *supra* no.16, at p. 9.

³⁰ First, Fox and Hemli, *supra* no.16, at p. 10.

³¹ Federal Trade Commission, Fiscal Year 2012, Congressional Budget Justification Summary at 44, available at <http://www.ftc.gov/ftc/oed/fmo/budgetsummary12.pdf>.

³² Appropriation figures for the Antitrust Division Fiscal Years 1903-2013, available at www.justice.gov/atr/public/atr-appropriation-figures.html.

³³ The increase in the overall budget of the FTC is due mostly to the consumer protection functions, though maintaining competition has seen also progressive increase over the past few years. See, for an evolution of the budget of FTC and DOJ, Crane, *supra* no. 4, pp. 28-32.

³⁴ Blumenthal, *supra* no. 16, at p. 5.

³⁵ Hence, the FTC comprises both prosecutorial and quasijudicial functions.³⁶ The FTC will also ‘take some matters, such as applications for injunctive relief, to the general courts,’³⁷ As for the DOJ, ‘the ‘decision’ is whether to file a complaint challenging conduct before a federal court; the agency engages in prosecution, but the determination of legality or illegality rests with a judge, who is not aligned with the agency.’³⁸

As emphasized by Blumenthal, ‘[t]he differences between the agencies result in differing skill sets, cultures, and capabilities.’³⁹ The dual enforcement and partial overlap of competences usually represents the core of the discussion.

The main statutes containing the antitrust rules are the Sherman Act and the Clayton Act.⁴⁰ Regarding mergers, both the DOJ and the FTC must be notified by the companies intending to merge, and both are responsible for the review of a potential merger, as per the Hart-Scott-Rodino Antitrust Improvements Act.⁴¹ They both investigate mergers under the Horizontal Merger Guidelines.^{42 43}

In the light of the above, some aspects of the federal antitrust enforcement have been subject to criticism over the years, in connection with due process concerns. First, the overlap between two enforcement agencies has given rise to interesting discussions on how necessary, effective or fair it is to keep both the FTC and the DOJ in operation. The identified pathologies are, i.e., as pointed out by Crane, clearance problems, cost duplication, inconsistent treatment, and squabbling among the agencies.⁴⁴ Though this discussion has been ongoing for 30 years, it has been rekindled by recent

³⁵ ‘The federal judge’s decision in an ATR action or the Commission’s decision in an FTC action are both appealable to a federal court of appeals’. Blumenthal, *ib. no. 16*, at p. 5.

³⁶ Blumenthal, *ib. no. 16*, at p. 5.

³⁷ See Trebilcock and Iacobucci, *supra no. 10*, at 463. It is important to note that the majority of FTC merger cases get resolved in federal court rather than via administrative hearings. The reason for this is that it is usually much faster to see if a district court will issue a preliminary injunction, and this is beneficial to the merging parties.

³⁸ Blumenthal, *supra no. 16*, at p. 5.

³⁹ Blumenthal, *ib. no. 16*, at p. 6.

⁴⁰ The Sherman Antitrust Act (Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7), and the Clayton Antitrust Act of 1914 (Pub.L. 63–212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53). For a detailed overview of the enforcement of the DOJ and links to the acts see <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>.

⁴¹ Section 7A of the Clayton Act, also called the Hart–Scott–Rodino Antitrust Improvements Act of 1976.

⁴² Issued jointly by the two agencies, and available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

⁴³ Carroll, *supra no. 20*, at 1.

⁴⁴ For more on each one of them see Crane, *supra no. 4*.

developments at the FTC.⁴⁵ The most serious recent concern 'is that the FTC has created a wide gap in the standards applied by the FTC and the DOJ in connection with federal antitrust review of proposed mergers'.⁴⁶ Without evaluating the validity of the criticism, one can see how this could lead to other problems. Having different standards and, as we will see below, an "agency draw" possibility, can undermine business planning and 'decrease public confidence in the U.S. antitrust system'.⁴⁷ The differences between the FTC and the DOJ lead some authors to question the future viability of the current 'path dependency'.⁴⁸

Below we will expose the three central topics amidst the recent literature debates, and the most frequently mentioned arguments relating to each of them. These are (1) the dual enforcement by the FTC and the DOJ, (2) the FTC's dual role, and (3) the rule of reason/rule of law dilemma.

(1) The dual enforcement by the FTC and the DOJ

The most recurring issues mentioned by the critical scholarship are connected to having a partially overlapping dual federal enforcement system⁴⁹, and different forms of adjudication. Especially in what regards merger review, in particular Section 13(b) of the FTC Act⁵⁰ and Section 7 of the Clayton Act⁵¹, the frequent critique is that the two agencies have two different enforcement intensities⁵² and redundancies⁵³, as well as differences in the applied tests and standards. Similar comments are made

⁴⁵ Carroll, supra no. 20, at p. 5.

⁴⁶ Carroll, ib. no, 20, at p. 4.

⁴⁷ Sokol, supra no. 24, at 1078.

⁴⁸ Sokol, in. no. 24, at 1079.

⁴⁹ 'Agency overlap has always been an issue in the United States', in Sokol, ib. no. 24, at 1076.

⁵⁰ Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b), authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." Under the first proviso of Section 13(b), whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct, pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful. Further, under the second proviso of Section 13(b), "in proper cases," the Commission may seek, and the court may grant, a *permanent* injunction (source: <http://www.ftc.gov/ogc/brfovrwv.shtm>).

⁵¹ See <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>.

⁵² 'That there are two federal antitrust agencies with different substantive standards for preliminary injunction, different levels of intensity of merger enforcement, and different institutional designs remains a potential problem. These problems appear fundamental', in Sokol, Antitrust, supra no. 24, at 1141.

⁵³ 'The United States maintains two antitrust agencies, which creates confusion due to differing substantive standards and

regarding single-firm conduct, mentioning the differences between Section 5 of the FTC Act⁵⁴ and Section 2 of the Sherman Act⁵⁵. This may cause uncertainty, questions the fairness of the process, and bring in extra costs for market operators. Additionally, questioning the fairness of the process raises the idea of a possibility of abuse in administrative adjudication by means of lobbying, influence or bribery.

However, scholars disagree as to the necessity to change the agencies' structure. Arguments in favour of a merger between FTC and DOJ, or a complete remodelling of the agency design on one side, and the "leave it as it is" doctrine on the other side represent the most frequent dichotomy.

In the words of Blumenthal, '[m]any commentators say that the US has at least one federal antitrust agency too many.'⁵⁶ However, and as Blumenthal underlines, this negative view of the current enforcement structure and its adverse consequences - for businesses, agencies and general public alike - is not uniformly shared.⁵⁷ Indeed, other authors consider that it would be more harmful to restructure the enforcement than to maintain the *status quo*. The mentioned negative points of the dual system are the duplication of effort and of fixed costs, the need to coordinate workflow and policy direction, and the potential for yielding different outcomes, besides the generation of higher compliance costs for companies.⁵⁸ Having one of the agencies assume the 'leadership' by taking a more aggressive stand in its activities can lead to increased divergence (such as having two enforcement intensity levels). As for positive reasons to keep the system as it is, the literature points out the fact that diversification in enforcement mechanisms and procedures generates more specialized and efficient outcomes, insures against the failure of the agency in charge to execute its responsibilities (e.g. 'through sloth, corruption, or flawed institutional design'⁵⁹). Also pointed out is the fact that dual enforcement generates an inter-agency competition, which can be beneficial to the public. Lastly, the costs of disruption and transition

also creates certain redundancies', in Sokol, *ib. no. 24*, at 1080.

⁵⁴ Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."

⁵⁵ Available at <http://www.law.cornell.edu/uscode/text/15/2>.

⁵⁶ Blumenthal, *supra no. 17*, at p. 1.

⁵⁷ '[O]thers contend that the existence of multiple agencies has more-than-offsetting benefits—or at least benefits sufficient to justify the maintenance of the current institutional structure, once the substantial transition costs of migration to a new structure are taken into account', in Blumenthal, *supra no. 16*, at p. 1; 'For example, the Antitrust Modernization Commission stated, "[t]he Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws."', in Sokol, *supra no. 24*, at 1080.

⁵⁸ Blumenthal, *supra no. 16*.

⁵⁹ Kovacic, cited by Blumenthal, in *ib. no. 16*, at p. 6.

on both government and businesses of a new system would be substantial and its benefits not enough to justify modifying a well-established and understood system.⁶⁰

Though ‘[t]he potential for divergence between the FTC and the DOJ on mergers has always existed’⁶¹, recent changes regarding merger review triggered a new set of concerns. After *Whole Foods*⁶² and *CCC Holdings*⁶³, the possibility of “agency draw”, i.e., the possibility of facing ‘two different prospective outcomes for the same merger depending solely on which agency chooses to review or challenge the merger’,⁶⁴ which did not exist before these decisions, became real. The *Whole Foods* decision established a new preliminary injunction test for the FTC only, the “serious questions” test. Before this, the processes and requirements for the FTC and the DOJ to obtain injunctive relief were different, but ‘had only a minor impact on the outcome of the merger review process.’⁶⁵ Some critics point out that now, additionally to party rights being different by adjudicating agency, the tests for preliminary injunctions are also different.⁶⁶

Indeed, as some critics say, now the new test in the important DC Circuit is ‘more deferential to the FTC’⁶⁷ in comparison with the traditional preliminary injunction test *vis-a-vis* the DOJ, and for procedural reasons, the courts cannot apply it to the DOJ. This creates a diverging standard: while the DOJ has to satisfy a four-part test, the FTC ‘must show that the preliminary injunction is in the public interest by demonstrating that the equities weigh against the merger and that there is likelihood of success by the FTC.’⁶⁸

Though the transparency in merger proceedings has been said to have increased⁶⁹, issues of lack of clarity and fairness are still said to arise. The differences in the language used by the ‘likelihood of

⁶⁰ ‘Depending on the relative benefit of a single-agency system, one might strike the balance differently; a predicate finding for the expressed preference for the status quo is the empirical judgment that there is ‘little, if any, duplication of effort between the two agencies, and they typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy’ Citing the AMC Report, Blumenthal, supra no. 16, at p. 9.

⁶¹ Sokol, Antitrust, supra no. 24, at 1076.

⁶² *Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

⁶³ *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009).

⁶⁴ Chubb, supra no. 25, at p. 557.

⁶⁵ Carroll, supra no. 20, at p. 2.

⁶⁶ Chubb, supra no. 25, at p. 544.

⁶⁷ Chubb, ib. no. 25, at p. 564.

⁶⁸ Chubb, ib. no. 25, at p. 556.

⁶⁹ Among others, recently through the publication of the 2006 joint DOJ/FTC Commentary on the Horizontal Merger

success test’ and the ‘serious questions test’, namely that the latter seems to be less rigorous, can lead to differences in the success of the agencies. Indeed, ‘it seems likely that there will be areas in which the FTC will succeed when it could not before, as well as areas in which the DOJ will still not be able to succeed.’⁷⁰ Kovacic points out that the DOJ has the tendency to see Section 5 as an ‘irritant or a threat’, which puts FTC in the position of guiding the development of the doctrine and putting the DOJ in a ‘subordinate policymaking role’.⁷¹

Regarding single-firm conduct, a ‘similar unsustainable institutional issue exists’⁷² for the distinct standards under Section 5 of the FTC Act and Section 2 of the Sherman Act. Sokol suggests that it is not impossible to construe Section 5 to cover conduct that is not under the umbrella of Section 2, but underlines that ‘just as with merger conduct [.] having two agencies with two separate standards for firm conduct is not a long-term, sustainable equilibrium’.⁷³

Kovacic further suggests that the two agencies work in tandem to surpass these difficulties, as we will see below.

The last frequent criticism is the question of timing. In other words, ‘the speed (or lack thereof) of administrative proceedings’.⁷⁴ It is said to negatively affect the clearance ‘battles’ between the agencies⁷⁵, and to impact the parties, that can ‘now find themselves subject not only to a different standard of review but to vastly different timeframes’.⁷⁶

(2) FTC’s dual role

Other controvert issues concern the FTC in particular. The most frequent concerns are ‘the

Guidelines. See Sokol, supra no. 24, at 1117.

⁷⁰ Chubb, supra no. 25, at p. 557.

⁷¹ Kovacic also suggests that the DOJ should instead ‘approach Section 5 as a potentially useful element in the full portfolio of instruments that the federal antitrust laws make available to the two agencies’. Kovacic, supra no. 19, at p. 1113.

⁷² Sokol, supra no. 24, at 1079.

⁷³ Sokol, ib. no. 24, at 1079.

⁷⁴ See First, Fox, and Hemli, supra no. 16, at p. 26.

⁷⁵ Sokol mentions as an example the possibility that the DOJ asks for a secondary request, ‘when it might not have otherwise done so if it had not fought with the FTC over which agency should get clearance for most of the Hart-Scott-Rodino review’s thirty-day window’. Sokol, supra no. 24, at 1078.

⁷⁶ Carroll, supra no. 20, at p. 4.

identity and choice of Administrative Law Judges, [and] the FTC's dual roles as both prosecutor and appellate tribunal', which also trigger some due process implications.⁷⁷

A number of checks and balances have been fully incorporated into the FTC procedure. The initial decision is taken by an Administrative Law Judge ('ALJ'), after a full trial with both parties. The Commissioners do not participate in the discussions of the matter with the FTC staff before the adjudication (they are 'walled-off'⁷⁸), and when deciding the appeal, both sides are able to expose their arguments directly to them.⁷⁹

The ALJ has been criticized for being part of the FTC, instead of being part of the independent judiciary mentioned in the Constitution.⁸⁰ Nevertheless, the ALJ acts 'primarily as if he were a judge'⁸¹, and ensures the respect for the due process guarantee of 'direct hearing' of the parties. In some cases, the ALJ judging on the merits may have previously been an FTC Commissioner involved in the decision to bring action.⁸² However, despite the criticism, the argument that the simple fact of combining prosecutorial and adjudicative functions violates due process has never been accepted by the courts 'absent a strong factual showing of actual bias'.⁸³

Regarding the role under Section 5 of the FTC Act, it has been argued that the FTC does not perform as well as a generalist judge,⁸⁴ though the opposite argument, evoking judges and juries have better capabilities to be less prone to bias, also has followers.⁸⁵

⁷⁷ See First, Fox, and Hemli, *supra* no. 16, at p. 26.

⁷⁸ Wouter Wils, *Principles of European Antitrust Enforcement*, Hart, 2005. Daniel E., "Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System" (2012). New York University Law and Economics Working Papers. Paper 303, at p. 157.

⁷⁹ Different from the system used by the European Commission, as we will see below. For a brief comparison see Wils, *ib. supra* no. 78, at p. 157.

⁸⁰ 'Though called a judge, the ALJ is not a judge in constitutional terminology'. Anna Gerbrandy, *Models of Judicial Review – The Search for Instances of the Dialogue-Model of Judicial Review in the USA or: USA, Part II*, in *Traditions and Change in European Administrative Law*, Europa Law Publishing 2011, at p. 320.

⁸¹ Gerbrandy, *ib. supra* no. 80, at p. 321[citation omitted].

⁸² Carroll, *supra* no. 20, at p. 4.

⁸³ Wils, *supra* no. 78, at p. 159.

⁸⁴ See Joshua Wright and Angela Dively, *Do Expert Agencies outperform Generalist Judges? Some Preliminary evidence from the Federal Trade Commission*, *Journal of Antitrust Enforcement*, George Mason University Law and Economics Research Paper Series, 2012.

⁸⁵ '[T]he very characteristics that make juries less expert make them less subject to systematic influence and bias. (...) Administrative agencies, in contrast, are fixed targets hearing many cases of a particular type and are easier and more worthwhile to influence via activities like propaganda, lobbying, bribery, or restaffing'. Neil Komesar, *Stranger in a Strange Land: An Outsider's view of Antitrust and the Courts*, 41 *Loy. U. Chi. L.J.* 443 2009-2010, at p. 445.

(3) the rule of reason/rule of law ‘dilemma’

Another topic of concern pointed out to be affecting antitrust adjudication is the rule of reason.

The rule of reason doctrine has been developed and applied by the Supreme Court for over 100 years.⁸⁶ This rule (or rather ‘standard’⁸⁷) competes with the *per se* rule in categorizing restraints of trade.⁸⁸ The latter is ‘absolutely prohibited’, while the former ‘must be examined under a wide range of criteria, including the structure of the relevant industry, the justifications for the restraint, and its effects on prices and output levels’.⁸⁹

Hence, as part of the scholarship defends, its little predictability undermines the capacity of companies to foresee the legal consequences of their actions and ultimately causes them to incur unnecessary costs and risks, as well as potentially lose important business opportunities. Also, the impression that there may be an influence or bias factor on the decision-maker can damage the enforcement and make the system prone to corruption.⁹⁰

The dilemma, as explained by Crane, is to find the optimal balance between having clearer rules without conducting a ‘careful inquiry’ of the ‘motivation and market effects’ of the industrial behavior at stake, being able to provide predictability but also the right incentives.⁹¹ Clear standards make it easier for businesses to ‘reduce transaction costs, rentseeking behavior by market participants, and decision errors by the antitrust agencies and courts’.⁹²

Currently, the raised problems surrounding the rule of reason concern its interpretation: ‘the

⁸⁶ Standard Oil Co. of New Jersey v. United States, 221 US 1 (1911).

⁸⁷ Daniel Crane, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev.49, at p.57.

⁸⁸ Crane, *ib. supra* no. 87, at p. 57.

⁸⁹ Citing the Chicago Board of Trade formulation, Crane, *ib. supra* no. 87, at p. 57.

⁹⁰ Like Cesar's wife, the system must be above suspicion.

⁹¹ ‘Predictability in antitrust is important, but it is not sufficient to justify rules even for a system concerned primarily with incentive effects. If the rules cannot be framed to correspond closely to socially optimal behavioral criteria, then the rules will provide predictability but not the right incentives. Broad rules often fail to capture socially optimal outcomes. (...) *Per se* rules of illegality are often vastly overbroad but an open-ended rule of reason approach would create excessive litigation costs and uncertainty’, in Crane, *supra* no. 87, at p. 86.

⁹² Maurice Stucke, Does the Rule of Reason violate the Rule of Law?, University of California, Davis, School of Law, Vol. 42, No. 5, 2009, at 1377 [citations omitted].

rule is inherently confusing, unadministrable, unpredictable’, and many questions remain on its application details.⁹³ This adversely affects ‘[t]he administration of antitrust litigation, business planning, and the efficacy of the law.’⁹⁴

Stucke considers the rule of law to be a ‘precondition for effective antitrust policy’, and clarifies that it is essential for fair enforcement that agencies apply ‘clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly’.⁹⁵ In that light, the author goes on to identify seven ‘infirmities’ of the rule of reason from the perspective of the rule of law principles⁹⁶, and concludes that ‘antitrust standards must be reoriented toward rule-of-law ideals’.⁹⁷

Following the recent developments already introduced in the above mentioned discussion, we understand that ‘antitrust is moving in the direction of flexible, *post hoc* standards and that this has significant consequences for antitrust adjudication’.⁹⁸ As explained by Markham, though some flexibility of the rule of reason is undesirable or unavoidable, that it is not the same as having ‘object indeterminateness’.⁹⁹ Indeed, it is desirable that standards used in antitrust adjudication function in a manner which ensures predictability, but without undermining the also necessary flexibility to guarantee the fairness of the decisions. Moreover, a rule-based approach either requires an enormous number of

⁹³ Jesse Markham, 17 *Fordham J. Corp. & Fin. L.* 591 2012, at p. 596.

⁹⁴ Markham, *ib. supra* no. 93, at p. 598.

⁹⁵ Stucke, *supra* no. 92 at 1418.

⁹⁶ ‘(1)Under the rule of reason, market participants cannot foresee with fair certainty how the authority will use its coercive power in given circumstances and therefore cannot effectively plan their affairs, (2) the rule of reason is ill suited to a legal system in which the Supreme Court reviews an insignificant proportion of decided cases, (3) in changing the Sherman Act’s goals, the Court further reduces accuracy, objectivity, and predictability under its rule-of-reason standard, (4) in making competition policy tradeoffs, the Court further reduces accuracy, objectivity, and predictability under the rule of reason, (5) because the rule of reason is not prospective, accessible, and clear, it does not constrain the executive branch from exercising power arbitrarily, (6) because the rule of reason is not prospective, accessible, and clear, it does not constrain rent-seeking nor prevent the judiciary from exercising its power arbitrarily, (7) the rule of reason prevents courts from enforcing the antitrust laws quickly and inexpensively.’ Stucke, *ib. supra* no. 92.

⁹⁷ Stucke, *ib. supra* no. 92, at 1473. [*re. Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007) at 2709.]. Also see Elbert Robertson, Does Antitrust Regulation violate the Rule of Law? 22 *Loy. Consumer L. Rev.* 108 2009-2010, at p. 113: ‘If antitrust law is to be successfully integrated into the broader body of a legal system that promotes both justice and economy under the Rule of Law, then the Rule of Reason must be more than a rubric for neoclassical efficiency balancing. In interpreting the Sherman Act under the Rule of Law, the rule must be reasonable, fair, efficient and consistent’.

⁹⁸ Crane, *supra* no. 87, at p. 80.

⁹⁹ Markham, *supra* no. 93, at p. 598.

highly specific rules or relatively general rules that require constant interpretation.¹⁰⁰

New controversy surrounding the rule of reason was introduced recently by the Cal. Dental decision.¹⁰¹ This judgment introduced industry specific exemptions¹⁰² and more ‘openendedness’ into the concept. This is a concern for both enforcement agencies and private parties, for both alike need to know – rather than guess - what is allowed conduct or not. In Markham’s words, ‘[j]ust as vague rules discourage desirable business conduct, uncertainty likewise begets agency reluctance to bring desirable cases’.¹⁰³

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For the dissonant opinions and variety of arguments, it seems that, in the United States, ‘the system is not broken enough to warrant fixing’,¹⁰⁴ and the maintenance of the *status quo* is preferred to a thorough reform. Furthermore, the possibility of a thorough reform is for the majority practically unthinkable, and structural changes are deemed unnecessary.¹⁰⁵ However, there are nonetheless various alternatives to the current system put on the table by the scholarship. The solutions commonly pointed out in order to resolve fully or partially the possible problems identified above can be summarized as follows:

i. redesign of the institutional structure (including the possibility of dividing enforcement responsibilities between the FTC and the DOJ, or merging both agencies),^{106 107 108}

¹⁰⁰ For this reason, much energy is being directed toward various types of middling standards such as “quick look” or rebuttable presumptions of illegality.

¹⁰¹ California Dental Assn. V. FTC 526 U.S. 756 (1999).

¹⁰² ‘Cal. Dental took an ill-advised step toward remaking antitrust rules on an industry specific basis, and indeed forging exemptions in response to industry complaints that competition is a bad idea for them’. Markham, supra no. 93, at p. 619.

¹⁰³ Markham, ib. supra no. 93, at p. 622.

¹⁰⁴ ‘If there is one abiding principle of American pragmatism, it’s “if it ain’t broke, don’t fix it”’, Crane, supra no. 4, at p. 48.

¹⁰⁵ First, Fox, and Hemli, supra no. 16.

¹⁰⁶ ‘Alternatives to the current system include dividing enforcement responsibilities between the two agencies or housing the FTC within the DOJ. (...) The best institutional solution may depend in part on the optimal level of antitrust enforcement desired. The FTC seems to be capable of a stronger level of enforcement based on broader standards.’ Sokol, supra no. 24, at 1141.

¹⁰⁷ Blumenthal compiled the six models for merging FTC and DOJ most frequently suggested by the literature: (1) combining only the merger control functions, (2) transferring FTC’s competences to the Antitrust Division

- ii. application of the same substantive standards,^{109 110 111}
- iii. reviving jury trials,^{112 113 114} and
- iv. improving the rule of reason.¹¹⁵

It is important to highlight that these possibilities are a mere summary of the numerous suggestions, and the number of possible mentioned combinations is close to exponential. There is no visible consensus on any of these points.

What seems to have gathered a stronger support of the scholarship is the hypothesis of establishing more cooperation and coordinated interaction between the federal agencies, with the ultimate goal of reaching more transparency, accountability, and efficiency of the decision-making.¹¹⁶

All in all, the advanced stage of development of antitrust in the United States calls –without consensus - for important, though not urgent, improvements.

(prosecutorial approach), (3) transferring the Antitrust Division's competences to the FTC (administrative approach), (4) combining competences at the FTC, but separating prosecutorial and administrative functions, (5) creating a new single-administrator agency with limited administrative powers, and (6) creating a single-administrator subordinate agency. For a detailed analysis of each hypothesis see Blumenthal, *supra* no. 16.

¹⁰⁸ In the late 1990s, I wrote that DOJ was the appropriate survivor if there was to be a single U.S. antitrust agency. In the past fifteen years, I have changed my assessment. The FTC improved its performance by realizing more of the possibilities inherent in its original charter. My experiences in working with DOJ since 2001 have also left me with a somewhat diminished view of its own capabilities and performance. I am at a loss to say what the ideal federal structure would be. Possibilities include continuation of the status quo, the consolidation of all civil enforcement authority in the FTC, or the unification of all enforcement power in the DOJ.[citations omitted]' Kovacic, *supra* no. 19, at p. 1107.

¹⁰⁹ See Chubb, *supra* no. 25, at p. 534.

¹¹⁰ Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5,GCP, no.1 2008.*

¹¹¹ See Chubb, *supra* no. 25, at p. 561.

¹¹² See David Boies, *Judicial Independence and the Rule of Law*, 22 Wash. U. J. L. & Pol'y 57 2006.

¹¹³ See Thomas Hortont, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and revive Antitrust Jury Trials*, 41 U. Balt. L. Rev. 615 2011-2012.

¹¹⁴ Komesar, *supra* no. 85.

¹¹⁵ 'There are three steps that the Supreme Court (or Congress) could take to alleviate the problems that have been identified with the rule of reason. First, Board of Trade should be abandoned. Its articulation of the rule of reason standard is too open-ended to guide courts through the maze of issues it includes as relevant to antitrust conspiracy analysis. Second, *Cal. Dental* should also be overruled as setting an unworkable standard, indeed as having abandoned standards altogether. Finally, the Court should return Section 1 to categorical analysis. If the categories of "per se," "truncated or quick look," and "full-blown" are deemed too likely to generate false outcomes, then the solution is not necessarily to abandon all hope of predictability and transparency in antitrust law. Instead, the courts should begin the task of generating categories that work'. Markham, *supra* no. 93, at p. 654.

¹¹⁶ 'Working as a team, the federal agencies could discuss how antitrust doctrine ought to evolve over the coming decade and could analyze the selection of cases that would serve to advance these doctrinal objectives'. Kovacic, *supra* no. 19, at p. 1113.

III. European Union

European Union competition rules are enforced by the European Commission (primarily by its Directorate-General for Competition, or DG-Comp) together with the national competition authority ('NCA') of each of the 27 Member States.¹¹⁷ The European Union competition rules are in essence contained in articles 101 through 109 of the Treaty on the Functioning of the European Union.¹¹⁸ Regulation 1/2003,¹¹⁹ Regulation 773/2004,¹²⁰ and the EC Merger Regulation¹²¹ implemented rights of defence for the concerned parties.

DG-Comp may be categorized as following the integrated agency model.¹²² Its role comprises numerous functions which include market monitoring, conducting sector inquiries, analysing merger notifications, advocacy and policy making, as well as opening proceedings against anti-competitive activities.¹²³

Since the most recent modernization wave in the EC in 2003¹²⁴, the DG works with the NCAs to ensure harmonized application of the EU competition rules. The NCAs apply EU competition rules independently (though applying the same substantive standards) when the case is essentially national.¹²⁵ Though the NCAs nowadays review most of the cases, the possibility of the European Commission

¹¹⁷ Please note that the EU is less "federalized" than the US. For a more detailed explanation on the functioning and structure of the European Union institutions please see http://europa.eu/about-eu/institutions-bodies/index_en.htm. For a more information on DG-COMP see <http://ec.europa.eu/dgs/competition/>.

¹¹⁸ For access to the Treaty articles and the competition legislation in force see http://ec.europa.eu/competition/index_en.html.

¹¹⁹ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 [now 101 and 102] of the EC Treaty [2003] OJ L1/1 (available at <http://ec.europa.eu/competition/antitrust/legislation/regulations.html>).

¹²⁰ Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 [now 101 and 102] of the EC Treaty [2004] OJ L 123, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0773:20080701:EN:PDF>.

¹²¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22 (available at <http://ec.europa.eu/competition/mergers/legislation/regulations.html>).

¹²² See, for example, Fox and Trebilcock, *supra* no. 6; Trebilcock and Iacobucci, *supra* no. 10; Dempsey, 75 *Brook. L. Rev.* 1489 2009-2010.

¹²³ For a detailed explanation on the decision making powers in the EU see http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf.

¹²⁴ For more on this topic see Ben Depoorter and Francesco Parisi, *The Modernization of European Antitrust: The Economics of Regulatory Competition*, *Geo. Mason L.Rev.* Vol. 13:2, 2005.

¹²⁵ Despite the Commission's efforts of procedural convergence among the NCAs, differences in due process may still be present. This question will not be addressed by this essay. For more on this topic see Fox, and Trebilcock, *supra* no. 6; Marsden, *supra* no. 11.

(‘EC’, or ‘Commission’) deciding to pursue a matter remains open.¹²⁶

DG Comp has a staff of around 900 professionals¹²⁷, mostly consisting of lawyers and economists, and a budget of ‘less than 100 million Euro’ (approximately 128 million USD).¹²⁸ The European Commissioner for Competition (who at the moment is also Vice-President of the Commission) is a political appointee from one of the Member States, responsible for implementing and enforcing competition rules, developing market monitoring, and applying an economic and legal approach to the assessment of competition issues. Additionally, the Competition Commissioner is responsible for competition advocacy and promotion of international co-operation.¹²⁹

The Commission was granted adjudicatory competence in 1962 to enforce the competition rules contained in the 1957 Treaty of Rome¹³⁰, vital for the implementation of the common market. Until 1982, the case handler accumulated prosecutor and judge functions. Since then, the EU has put in efforts to improve due process by introducing the independent functions of Hearing Officer and Chief Economist, in 1982 and 2003 respectively. Today, two independent Hearing Officers (reporting directly to the EU Commissioner for Competition) ensure the respect for procedural rights, safeguarding the parties involved and guaranteeing better decision-making proceedings.¹³¹ The Hearing Officer does not ‘make findings on the substantive issues in the case’¹³² (though he can do so), and issues a separate report to the Commission regarding the respect of procedural rights. According to Temple Lang, the Hearing Officer would be the official better positioned to perform a substantive review ‘objectively on

¹²⁶ The majority of cases under articles 101 and 102 TFEU are handled in the Member States by the NCAs: the NCAs turn out between 80 and 100 cases per year, while the Commission gets to analyze an average of 5 or 6 cases.

¹²⁷ 400 of which work on state aid.

¹²⁸ http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf

¹²⁹ For more on the Competition Commissioner see http://ec.europa.eu/commission_2010-2014/almunia/.

¹³⁰ Asimow and Dunlop, supra no. 3, at 138.

¹³¹ See the Terms of Reference of the Hearing Officer, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011D0695:EN:NOT>; For more detailed information on the evolution of the Hearing Officer’s role see Michael Albers and Jeremie Jourdan ‘The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective’, *Journal of European Competition Law & Practice*, Vol 2, No.3 2011.

¹³² Asimow and Dunlop, supra no. 3, at 143. The role and mandate of the Hearing Officer has suffered a few changes since its introduction in 1982, moving ‘away from the sort of peer-review focus for which it had been initially conceived, growing into a form of external control’ of procedural guarantees. See Nicolo Zingales, ‘The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?’ *The Competition Law Review*, vol.7 Issue 1, 2010, at p. 148.

the basis of a study of the entire Competition DG file'.¹³³

The Chief Economist is in charge of providing independent and specialized guidance on methodological issues of economics and econometrics, and evaluating the economic and policy impact of the DGs' actions.¹³⁴ However, the Chief Economist's opinion is not made available to the companies formally, and even if it is written, it does not form part of the file disclosed to the companies, and therefore is not available to the General Court if there is an appeal'.¹³⁵

According to critics, despite the improvements, the EU competition system remained 'perforated with points of material procedural unfairness'.¹³⁶ In the words of the OECD, the Commission's 'multiple roles raised 'serious doubts' about the absence of checks and balances'¹³⁷, and the criticism would give rise to a further calibration of the Commission procedures. Indeed, in 2011, the Commission implemented a 'procedural rights package' which established more rights for the parties and revised the mandate of the Hearing Officer.¹³⁸¹³⁹

DG Comp is responsible for the investigation and initial adjudication, 'subject to approval of the Commission'¹⁴⁰ ¹⁴¹. DG Comp has the capacity to initiate a proceeding by starting an investigation following a complaint, on its own initiative, or by referral from a Member State.¹⁴² The investigation is conducted by a DG Comp team composed by a case manager and several case handlers. In case of cartels, investigations may begin via a customer complaint, *ex officio* or through a leniency

¹³³ John Temple Lang, Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003, CEPS Special Report, 2011, at p. 213.

¹³⁴ See http://ec.europa.eu/dgs/competition/economist/role_en.html

¹³⁵ Temple Lang, supra no. 133, at p. 200.

¹³⁶ David Anderson & Rachel Cuff, Cartels in the EU: Procedural Fairness for Defendants and Claimants, in International Antitrust Law & Policy, Fordham University School of Law, 2010, at p. 198.

¹³⁷ Marsden, supra no. 11, at p. 2; see OECD, European Commission – Peer Review of Competition Law and Policy (OECD: Paris, 2005)

¹³⁸ For more information see http://europa.eu/rapid/press-release_IP-11-1201_en.htm.

¹³⁹ For more information on the rights of the parties see <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

¹⁴⁰ Trebilcock and Iacobucci, supra no. 10, at 463.

¹⁴¹ Represented by the Competition Commissioner, the EC Legal Service 'and, in some cases, of an advisory committee of competition authorities from Member States.', in Asimow and Dunlop, supra no. 3, at 156.

¹⁴² There are differences in the adjudicatory proceedings in different regulatory sectors (competition, trade regulation, trademarks, food safety, pharmaceutical licensing or state aids), including differences in the investigative procedure, rights of access to file and oral hearings. Only those concerning competition, and in particular mergers and cartels, are addressed in this paper. For more on this topic see Asimow and Dunlop, supra no. 3, at 133.

application.¹⁴³ As for merger cases, the process initiates when merging parties file a notification to the Commission.¹⁴⁴

Both the procedure and the rights of the parties triggered by the beginning of the procedure differ slightly depending on the type of case (antitrust, merger, anti-dumping/anti-subsidies or state aid).¹⁴⁵ As some say, the 'legal nature of competition law proceedings remains ambiguous', consisting of an administrative procedure with criminal law characteristics.¹⁴⁶ It has also been referred to as having an inquisitorial and Kafkaesque nature.¹⁴⁷

If the result of the investigations leads DG-COMP to decide to further pursue the case, 'it issues a "statement of objections" (SO) consisting of a factual description of the conduct involved and a legal assessment'.¹⁴⁸ The filing of the SO activates the concerned parties' rights of defence (right of access to documents, right to be heard).^{149 150}

The hearing is conducted by the Hearing Officer, who ensures the compliance with the procedural rights of the parties.¹⁵¹ The participation is voluntary, and the attendees 'do not have either the duty to respond to every chief accusation nor the right to receive specific answers from the Commission'.¹⁵² As there is no examination by *subpoena*, there is also no cross-examination, and this factor has also been subject to criticism.^{153 154} However, all information on the file, including witness

¹⁴³ Dempsey, supra no. 122, at p. 1507.

¹⁴⁴ Asimow and Dunlop, supra no. 3, at 157.

¹⁴⁵ For a comprehensive and simplified visual representation of the rights and obligations of complainants and target parties in the four different procedures see Themistoklis Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-Dumping/Anti-Subsidies Proceedings*, (Annexed Tables pp. 555-562) Wolters Kluwer, 2011.

¹⁴⁶ Ivo Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer 2011, at p. 98-99.

¹⁴⁷ Van Bael, ib. supra no. 146, at p. 325.

¹⁴⁸ 'If a compromise is reached, the Commission issues a "preliminary assessment" which contains commitments by the companies involved'. Asimow and Dunlop, supra no.3, at 156.

¹⁴⁹ See p. 82 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C 308/06), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:308:0006:0032:EN:PDF>.

¹⁵⁰ As explained by Asimow and Dunlop, 'the parties may file written objections and attach relevant documents or can request a hearing. The Commission must provide full access to all documents in its file to the target companies, other than business secrets or other confidential information or internal Commission documents. (...) While the right to be heard is primarily exercised through filing written materials, the Commission must provide an oral hearing upon request in antitrust and merger cases'. Asimow and Dunlop, supra no. 3, at 157.

¹⁵¹ See 'Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU', available at http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf.

¹⁵² See Zingales, supra 132.

¹⁵³ 'There is no right to cross-examination or confrontation, but the Commission officials may question any witness who

statements, can be accessed and examined, allowing for ‘cross’ arguments to be made. The hearing takes place at an ‘advanced stage of the case’, which, some say, makes it possible that the Commission’s case-team ‘have already formed concrete views regarding the involvement of the parties’.¹⁵⁵ The ultimate decision is taken by the College of Commissioners, who are political appointees by the Member States, who ‘have little day-to-day involvement with these questions’¹⁵⁶, and with whom it is not possible for the parties to have a hearing.¹⁵⁷ ¹⁵⁸ Some have said that ‘the real decision-making power rests with the casehandlers, from start to finish’¹⁵⁹, despite the implemented system of layers that allows for different officials to veto even in-house the proposals.

The Commission has been criticized over the years not only for due process concerns, but additionally for the danger of exposure to bias and partiality. With the number of registered lobbying organizations surpassing 5500 ¹⁶⁰, and with the ‘increased amount of lobbying of Commissioners and officials, at least in important cases’¹⁶¹, the scholarship often ponders how much of the decision can be exposed to political influences - or is perceived as being exposed to political influences. Some authors point out that the difficulty in ascertaining what influences the decision-making may carry the risk of reducing the development of the proceedings by the parties to a lobbying power play of influences¹⁶²,

appears’. Asimow and Dunlop, *supra* no. 3, at 157.

¹⁵⁴ ‘While trends in EC cartel enforcement have kept pace with global cartel enforcement with respect to investigation and punishment, the EC has not made parallel strides in the area of procedural protections. One fundamental right above all is lacking in EC competition procedure: the right of confrontation’. Dempsey, *supra* no. 122, at p. 1523.

¹⁵⁵ Anderson and Cuff, *supra* no. 136, at p. 206.

¹⁵⁶ Trebilcock and Iacobucci, *supra* no. 10, at p. 463.

¹⁵⁷ ‘The decision should be taken by a tribunal or in a quasi-judicial manner by an official, yet it is taken by a college of 27 political appointees who take such a decision collectively by majority vote. (...) There is the institutional possibility that political considerations will influence—pollute is perhaps too strong—the decision making. (...) Politicians, no matter how eminent and no matter how well advised, should not decide private litigations, still less public prosecutions’. Ian Forrester, *Due process in EC Competition cases: a distinguished institution with flawed procedures*, White & Case, 2009, at p. 4.

¹⁵⁸ The decisions adopted by the College of Commissioners ‘may overrule judgments of the highest national courts’. Van Bael, *supra* no. 146, at p. 107.

¹⁵⁹ Van Bael, *ib. supra* no. 146, at p. 107.

¹⁶⁰ As of May 1st 2013, there are 5669 organizations registered to the EU’s Transparency Registry, including consultancies, trade associations, law firms, NGOs and think-tanks. The number of registered lobbyists in Brussels is difficult to ascertain, but it is estimated to be well over 10.000. Spending on lobbying activities surpasses 1 billion EUR per year (source: <http://www.eulobbytours.org/>). Advocating for industry interests before the European institutions is part of a common job description. For more information the EU Transparency Registry see <http://europa.eu/transparency-register/>.

¹⁶¹ Temple Lang, *supra* no. 133, at p. 204.

¹⁶² See Temple Lang, *ib. supra* no. 133, at p. 205: ‘Much time is spent trying to find out who has been approached, and by

or to an instinct-based guessing game.¹⁶³ On the other hand, however, the Commission's integrity has not been challenged to this date, making it possible to assume the efficacy of the implemented check and balances.¹⁶⁴

The possible concerns about the procedure draw attention to the importance of judicial review. The ultimate review of legality is exercised in the last instance by the Court of Justice of the European Union¹⁶⁵ with the judicial review of the decisions¹⁶⁶, and it generally takes several years before the final decisions are adopted.¹⁶⁷ Hence, much has been discussed on how big of a role the Court should play, especially in the light of the ECHR requirements, as we will analyse below.

Multiple issues concerning due process in EU competition adjudication can already be pinpointed; the main issues under discussion regarding administrative adjudication in the EU can be grouped into two overarching categories: (1) concerns on the rules of procedure and rights of defence, and (2) the (lack of) separation of functions and the role of judicial review. Below we can find the main arguments and proposed solutions currently under discussion in the literature.

(1) concerns on the rules of procedure and rights of defence

The rules of procedure have been often criticized for fear of being incompatible with the

whom, what was said, and whether it was thought convincing. A large and unmeasurable proportion of the overall consideration of a case by the Commission as a whole is informal, unstructured, unregulated, and substantially unrecorded.'

¹⁶³ 'Reliance on economics leaves a 'gap' in the decision-making process that is not filled by any binding or constraining reasoning process. The Commission simply 'interprets'. However, since these premises are crucial to outcomes, this means that the final outcomes are not in fact constrained by economics, but rather by the Commission's intuition. Not only economic rationality but predictability is gone; or rather it is reduced to knowing people in the Commission well and having a good instinct for what they feel about different industrial, political and economic issues'. Khan and Davies, *supra* no. 12, at p. 24.

¹⁶⁴ As explained by Forrester "the personal reputation of these men and women is of the highest. Their appointment honors them." Ian Forrester, *Ex Post Assessment of Regulation 1/2003*, White&Case, 2008.

¹⁶⁵ First to the General Court, with appeal to the Court of Justice. See article 263 TFEU.

¹⁶⁶ 'The EU system of competition law contrasts with that in the US in that the European guarantee of legality is provided by judicial review of decisions. The Commission may initially function not just as prosecutor but as judge as well, under the ultimate supervision of the courts'. Khan and Davies, *supra* no. 12, at p. 49.

¹⁶⁷ 'Cases can take an average of two and a half to five years, and sometimes eight to nine years from initial decision to final appeal. This is too long, and various initiatives have been suggested to speed things up'. Marsden, *supra* no. 11, at p. 3; 'To the extent that there is an important time lag between the administrative decision and the judgment upon review, the beneficial effect of the judicial review in neutralizing the risks of prosecutorial bias is weakened'. Wils, *supra* no. 78, at p. 170.

European Convention on Human Rights ('ECHR'), for the inquisitorial nature of the procedure and the increasingly criminal nature of the sanctions. Other concerns regard the rights of defence of companies in the hearings.

The entry into force in 2009 of the Treaty of Lisbon gave the Charter of Fundamental Rights ('CFR')¹⁶⁸ the same legal value as the EU Treaties. It results thereof that Article 47 CFR, establishing the right to 'an effective remedy before ... an independent and impartial tribunal previously established by law' must be in meaning and scope of rights at least equivalent to Article 6 ECHR¹⁶⁹ (as established by Article 52(3) CFR). Therefore, EU Courts are prevented from 'adopting a lower standard of protection than the European Court of Human Rights' (ECtHR).^{170 171}

Article 6 establishes, for anyone¹⁷² facing criminal charges, the right to a fair and public hearing, and that the judgement be given at first instance by an independent and impartial tribunal established by law.¹⁷³ The fact that Article 6 mentions 'criminal' charges, and that the DG-Comp's procedure is, according to Regulation 1/2003¹⁷⁴, explicitly classified as non-criminal, has been in the center of a fierce debate. In effect, the scholarship is almost unanimous in considering that 'EC competition law proceedings leading to fines can only be considered as "criminal" within the meaning of Article 6 ECHR'.

¹⁶⁸ Charter of Fundamental Rights of the European Union, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁶⁹ James Killick and Pascal Berghe, This is not time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in, *The Competition Law Review*, Vol.6, Issue 2 (2010), at p. 2.

¹⁷⁰ Killick and Berghe, *ib. supra* no. 169, at p. 3.

¹⁷¹ Temple Lang, *supra* no. 133.

¹⁷² The applicability of Article 6 ECHR rights to legal persons has been confirmed by the jurisprudence of the ECtHR. See ECtHR, Judgment of 20 December 2007, *Paykar Yev Haghtanak Ltd v. Armenia*, Appl. 21638/03, par. 37, 50. See also ECtHR, Decision of 17 June 2008, *Synnelius & Edsbergs Taxi AB v. Sweden*, Appl. 44298/02, par. 1; ECtHR, Decision 28 February 2006, *MAC-STRO S.R.L. v. Moldova*, Appl. 35779/03. Cf. ECtHR, Judgment of 15 July 2006, *Zlinsat, spol. s r.o. v. Bulgaria*, Appl. 57785/00, par. 58-63, 70-85 (civil). ECtHR, Judgment of 23 October 1997, *The National & Provincial Building Society, the Leeds Permanent Building Society & the Yorkshire Building Society v. the United Kingdom*, Appl. 21319/93, par. 99, 105-113.

¹⁷³ Article 6 (1): '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 (...) by an independent and impartial tribunal (...).

¹⁷⁴ For an in-depth analysis and consideration of the arguments regarding the nature of the fines and the procedure in the light of Art. 6 ECHR see, i.a., Slater, Thomas and Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?* *The Global Competition Law Centre Working Paper 04/08 2008*; Arianna Andreangeli, *Toward an EU Competition Court: "Article-6-Proofing" Antitrust Proceedings before the Commission?*, 30 *World Competition* 595 (2007); Ian Forrester, *supra* no.157; Killick and Berghe, *supra* no. 169; Wouter Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, *W. Comp.* 2010.

The European Court of Human Rights (ECtHR) clarified¹⁷⁵ that an administrative authority may impose criminal fines, ‘provided that the persons concerned are able to challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantees of article 6 (1) ECHR’.¹⁷⁶ Notwithstanding, the recently imposed ‘billionaire’ fines¹⁷⁷, rising both in amount as in media attention, and the more aggressive investigations¹⁷⁸ made it imperative to focus on understanding if the procedure is adequate or not,¹⁷⁹ and which procedural guarantees to implement.

Other important factors pointed out for giving rise to due process concerns were connected to how the hearing takes place. In the forefront of the criticism is the impossibility of having a hearing with the decision-maker. Forrester argued that the hearing with the Hearing Officer did not comply with the requirements of Article 6, as ‘[a] hearing at which the decision-maker is absent and the decision-drafters, although present and politely attentive, are deeply sceptical, although their minds may not formally already be made up, is not a “public hearing by an independent and impartial tribunal”’.¹⁸⁰ As mentioned above, the final decision is adopted by the College of Commissioners (the 27 Commissioners each responsible for a different policy area and from each one of the 27 Member States) 26 of whom have never had contact with the case file. Only the Competition Commissioner will have had limited contact with the case.¹⁸¹ Forrester pointed out that, though the Commissioner might have been briefed by the staff, received copies of key documents and on occasions, received delegations from interested parties, this is ‘not enough to make the process lawful’.¹⁸²

In 2011, the Court of Justice of the EU and the ECtHR¹⁸³ (some say, partially¹⁸⁴) settled the

¹⁷⁵ Recently, in the *Ozturk* (ECtHR case A/73, 1984) and *Bendenoun* (ECtHR case A/284, 1994) judgments.

¹⁷⁶ Wils, supra no. 78, at p. 159.

¹⁷⁷ 1.1 billion euros, or \$1.4 billion, against Intel in 2009. The 2006 Guidelines on the method of setting fines are available at <http://ec.europa.eu/competition/antitrust/legislation/fines.html>. Cartel fines statistics are available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁷⁸ Dempsey, supra no. 122, at p. 1531.

¹⁷⁹ ‘The question raised here is not whether a large fine was justified in any particular case, or whether large fines are justified in European competition cases in general (...). The question is whether the existing procedures are adequate and satisfactory now that such large fines are imposed, or whether the procedures should be improved.’ Temple Lang, supra no. 133, at p. 203.

¹⁸⁰ Forrester, supra no. 157, at p. 11.

¹⁸¹ Forrester, ib. supra no.157, at p. 9.

¹⁸² Forrester, ib. supra no.157, at p. 8.

¹⁸³ Case No. 43509/08, *Menarini Diagnostics v. Italy*.

¹⁸⁴ See, for example, Wesseling and van der Woude, *The Lawfulness and Acceptability of Enforcement of European Cartel*

discussion¹⁸⁵, establishing that an administrative system for the adjudication of decisions with fines is compliant with the fundamental rights principles contained in Article 6, as long as the decisions of the administrative authority are subject to review by a judicial body with unlimited jurisdiction, and provided that this judicial authority does in fact exercise this unlimited jurisdiction, as we will see below.

Another important aspect often mentioned is the lack of cross-examination or confrontation during the hearing, which is essential to ‘protect against overzealousness in law enforcement and dishonesty in testimonial statements by co-conspirators’.¹⁸⁶ It ‘allows for the opposing positions to be directly confronted and challenged’, but should also in any case be done before the decision-maker.¹⁸⁷

(2) the (lack of) separation of functions and the role of judicial review

Within the source of the adjudicatory controversies in the EU is the absence of a separation of functions, which seems to be ‘on the most basic level, (...) inconsistent with the rule of law and with due process’.¹⁸⁸ Despite the fact that over the years, the Commission has introduced procedures ‘increasingly "judicialized," adopting structures to provide independence of decision-making and to sever the often criticized role of the EC as investigator, prosecutor, and judge’¹⁸⁹, criticism remains concerning various aspects, including the potential exposure of the decision-makers to ‘prosecutorial bias’¹⁹⁰. Authors say that the accumulation of functions can lead a case handler to ‘naturally tend to have a bias in favor of finding a violation once proceedings have been commenced’, and the EC can be

Law, *World Competition* 35, no. 4 (2012): 573—598, Bellamy, ECHR and competition law post Menarini : An overview of EU and national case law, e-Competitions, N°47946, 5 July 2012, and, Montag, A critical assessment of the EU enforcement system, available at <http://www.ikk2013.de/pdf/Montag.pdf>.

¹⁸⁵ See Forrester, Due process after Menarini and Halcor: is there any more to say? White & Case, available at <http://www.expertguides.com/default.asp?Page=9&GuideID=310&Ed=175>.

¹⁸⁶ ‘[I]n order to ensure procedural fairness in the EC, there must be a right for accused undertakings to confront and cross-examine those witnesses on whose oral statements the EC intends to rely as evidence’. Dempsey, *supra* no. 122, at p. 1534.

¹⁸⁷ Slater, Thomas and Waelbroeck, *supra* no. 174, at p. 38.

¹⁸⁸ Anderson and Cuff, *supra* no. 136, at p. 218.

¹⁸⁹ Dempsey, *supra* no. 122, at p. 1517.

¹⁹⁰ Three types of bias are often mentioned: confirmation bias, hindsight bias and policy bias. For more on the possibilities of bias see Wils, *supra* no. 78, at pp. 164-168; Slater, Thomas and Waelbroeck, *supra* no. 174, at p. 33; Forrester, *supra* no.157, at p. 11.

‘more inclined to find the existence of a breach (...) and to take a decision imposing sanctions than if this decision was taken by an independent and impartial tribunal which played no role whatsoever during the investigation of the case’.¹⁹¹ As explained by Temple Lang, since the decisions and the SOs are written by the same authors, these ‘cannot be relied on to have made an objective, impartial reconsideration and assessment of the evidence’.¹⁹²

The scholarship seems to agree that even if the staff following the highest standards of professional ethics, it ‘might not be entirely immune’ to some types of bias.¹⁹³ Even in the cases where prosecutorial bias would never occur, its mere theoretical hypothesis or risk could trigger the possibility to ‘claim with some credibility that the decisions concerning them are erroneous’.¹⁹⁴

Some authors explore possible alternatives of separation of functions and/or introducing extensive judicial review.¹⁹⁵ The critics affirmed that judicial review remained ‘marginal and procedural’¹⁹⁶, and relying heavily on findings of the Commission.¹⁹⁷ As explained by Marsden, there is the risk that agency findings and opinions ‘end up being treated as if they are ‘facts’’.¹⁹⁸ Additionally, this can have the added danger of possibly being based on ‘facts’ that were themselves tainted by prosecutorial bias.¹⁹⁹ Moreover, ‘in that certain relevant assessments in the administrative decision are not reassessed, the risks of prosecutorial bias remain unaltered with respect to those assessments’.²⁰⁰

As said above, Article 6 ECHR calls for a ‘full judicial review’, factor which was not being

¹⁹¹ Slater, Thomas and Waelbroeck, *supra* no. 174, at p. 33.

¹⁹² Temple Lang, *supra* no. 133, at p. 194.

¹⁹³ Wils, *supra* no. 78, at p. 168.

¹⁹⁴ Wils, *ib. supra* no. 78, at p. 168.

¹⁹⁵ ‘We personally share the view that separation of functions is normally desirable, particularly in cases where much is at stake. Where separation is not practical, the tasks of investigation and prosecution, and the task of drafting the decision, might be assigned to different individuals in order better to preserve the right to argue to an open mind. The separation of functions and the right to cross-examination increase in importance as the consequences of the violation become more severe’. Fox and Trebilcock, *supra* no. 6, at 14.

¹⁹⁶ Khan and Davies, *supra* no. 12, at p. 3.

¹⁹⁷ Marsden, *supra* no. 11, at p. 4.

¹⁹⁸ Marsden, *ib. supra* no. 11, at p. 4.

¹⁹⁹ Prosecutorial bias can be defined as ‘the fact that a case handler will naturally tend to have a bias in favor of finding a violation once proceedings have been commenced’. Compared to a defense lawyer, in the case of the Commission, this means that ‘the Commission will be naturally more inclined to find the existence of a breach (...) and to take a decision imposing sanctions than if this decision was taken by an independent and impartial tribunal which played no role whatsoever during the investigation of the case’. Slater, Thomas and Waelbroeck, *supra* no. 174, at p. 33.

²⁰⁰ Wils, *supra* no. 78, at p. 170.

observed according to the literature.²⁰¹ In 2011, the Court of Justice of the European Union²⁰² has alleviated the debate, ruling that “the review provided for by the Treaties ... involves review ... of both the law and the facts, and means that [the Courts of the EU] have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine”, and that for that reason, “[t]he review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter”. This means that the Court has unlimited jurisdiction regarding the fines, being able to maintain, increase or decrease the fine.

The criticism before this decision was that the Court gave the Commission a wide margin of discretion, in practice limiting its review to the assessment of the legal issues and fine levels, making sure that the Commission’s ‘conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account’.^{203 204} Some authors have defended that judicial review ‘should also extend to a full reassessment of the facts and to the expediency of the Commission’s decision’.²⁰⁵ The limitation of judicial review raised concerns of a ‘constitutional, economic and practical nature’.²⁰⁶ The Court has meanwhile clarified that it will review any argument brought by the parties in full, as long as it is motivated and supported by evidence.

²⁰¹ Slater, Thomas and Waelbroeck, supra no. 174, at p. 42.

²⁰² Case C-272/09 P - KME Germany and Others v Commission, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-272/09%20P>.

²⁰³ Marsden, supra no. 11, at p. 4: ‘The limited standard of review is of course a deferential bow to the relevant agency’s expertise, the technical and economic issues at hand, and its discretion. But it is not a full appeal; nor even judicial review’.

²⁰⁴ ‘[T]he competence of EU Courts is limited to review the Commission’s legal and manifest errors (review of legality, not de novo review). They do not carry out a new and independent determination of the competition law charges contained in the SO. EU Courts also have tended to exercise self-restraint when it comes to ‘complex factual or economic assessments’.[citation omitted] Killick and Berghe, supra no. 169, at p. 18.

²⁰⁵ Slater, Thomas and Waelbroeck, supra no. 174, at p. 44.

²⁰⁶ Frank Montag, Shaping or Administrating the Law? Reflections on the European Courts’ decision-making practice in the field of competition law, in Trade and Competition Law in the EU and Beyond, Edward Elgar, 2011, p. 462.

Nevertheless, critics have said that '[t]he thoroughness and quality of the judicial review by the General Court are not enough to make the whole system satisfactory',²⁰⁷ and improvements to the system are still defended by some authors.

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Many solutions have been put forward by the literature to solve the abovementioned issues altogether. Some authors would advocate a deep reform; however, since the recent developments in jurisprudence and the Commission's due process package in 2011, simpler or temporary improvements are also encouraged.

The most frequently suggested solutions are:

- i. setting up a separate European Competition Authority,^{208 209}
- ii. granting the decision power to the EU Courts (or to a new Competition Court or separate chamber),^{210 211 212 213 214 215}
- iii. reorganizing the Commission and having new decision-makers/new independent adjudicator (before the Commission adopts a final decision),^{216 217 218 219}
- iv. broadening the review powers of the EU Courts,²²⁰ and
- v. broadening the competences of the Hearing Officers.^{221 222}

²⁰⁷ Temple Lang, *supra* no. 133, at p. 210.

²⁰⁸ See Temple Lang, *supra* no. 133, at p. 214.

²⁰⁹ See Killick and Berghe, *supra* no. 169.

²¹⁰ See Marsden, *supra* no. 11, at page 4.

²¹¹ See Temple Lang, *supra* no. 133, at p. 214.

²¹² See Slater, Thomas and Waelbroeck, *supra* no. 174.

²¹³ See Killick and Berghe, *supra* no. 169.

²¹⁴ See Wils, *supra* no. 78, at p. 174.

²¹⁵ See Anderson and Cuff, *supra* no. 136.

²¹⁶ See Marsden, *supra* no. 11, at p. 5.

²¹⁷ See Temple Lang, *supra* no. 133, at p. 215.

²¹⁸ See Killick and Berghe, *supra* no. 169.

²¹⁹ See Anderson and Cuff, *supra* no. 136.

²²⁰ See Killick and Berghe, *supra* no. 169.

²²¹ See Albers and Jourdan, *supra* no. 131.

²²² See Asimow and Dunlop, *supra* no. 3, at 160.

The solution that seemed to gather most consensus among the scholarship would be to grant the decision power to the EU Courts. This would be justified because this solution would not entail Treaty changes, and would be compatible with the current wording of TFEU. Since the rulings by the Court of Justice of the EU and the ECtHR, this argument may have lost some steam. However, it remains pertinent and is presented by some authors.

Despite the efforts of the Commission to make the procedure more transparent and fair, namely by creating more rights for the parties, there is plenty of room for improvement. In the many-times cited words of Lord Chief Justice Hewart, 'it is of fundamental importance that the justice should not only be done, but should manifestly and undoubtedly be seen to be done'.²²³ For example, important systemic improvements can be achieved regarding the delays occurring at the European Court of Justice, as timely decisions also constitute an important aspect of due process rights safeguard.

IV. Concluding remarks

As a conclusion, may we be able to say that there is still a controversy in administrative adjudication in antitrust? All of what we have exposed above leads us to think that some controversy exists in the EU system, whereas in the US system, issues mentioned raise concerns of a less urgent nature.

In the European Union, the accession to the ECHR and the subsequent due process guarantees that must be associated to the adjudication uncovered the latent faults of the system. It is questionable whether the recent efforts made by the Commission in developing a more transparent and efficient system are sufficient. Despite the variety of recent suggestions of reform made by the scholarship - some of which would not need a Treaty reform while still providing due process conformity - the recent measures adopted by the Commission providing more rights to the parties, and at the same time, the recent rulings by the Court of Justice of the EU and the ECtHR do not allow the foreseeing of

²²³ Lord Chief Justice Hewart, *R v. Sussex Justices*, 1924, cited by, i. a., Temple Lang, *supra* no. 133, at p. 194.

short-term changes in the horizon.

Adjudication controversy in the United States, though present since the beginning, seems to have reached a constant value. There is room for debate on some points, in particular regarding the application of standards, or regarding duplication costs and efficacy, but it cannot be said that the administrative adjudication is a controversy. Though the application of different standards may, in itself, be controversial, the whole of the system as it is today ensures that checks and balances and due process are respected, and judicial review safeguards the legality of the decisions. As some authors point out, the flaws in the system may not suffice to justify deep changes to the agency design.

Notwithstanding, there is room for improvement of both the EU and the US institutions. In the US, mitigating the effects of the application of different standards seems to be the next topic on the better adjudication agenda. In the EU, further improvements to the system will probably continue to trigger important discussions in the next few years.