The Lawfulness and Acceptability of Enforcement of European Cartel Law

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In 2011, the European Court of Human Rights and the Court of Justice of the European Union rendered two important judgments about the compatibility of an administrative system for the enforcement of competition rules with Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union (Menarini and KME/Challker). Both jurisdictions consider that these systems meet the requirements imposed by these provisions, provided that the decisions taken by the administrative enforcement body are subject to independent judicial review. In a judgment issued in 2012, the EFTA Court provided further clarifications on the nature of the judicial review (Posten Norge). The present article concerns the intensity of this review. It is argued that the review should focus on the specific facts of the case and that the reviewing courts should be cautious when applying abstract concepts and presumptions.

1 INTRODUCTION

Over the past few years, significant concern has arisen over the application of European competition law. The administrative enforcement system by which the administrative authority both brings charges and metes out punishment, is said to conflict with fundamental legal principles, especially since the European Commission has significantly increased the level of fines.

This criticism was partially rejected by the European Court of Human Rights (ECHR) in the recent Menarini case; a system of administrative enforcement is not incompatible with Article 6 of the European Convention on Human Rights (ECHR), 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. The Menarini

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3 Judgment of the ECtHR of Sep. 27, 2011, Case No. 43593/08, Menarini Diagnostic s n. Italy, para. 59.


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case concerned the administrative system enforcing Italian competition law. As far as the European system is concerned, the Court of Justice of the EU (the Court of Justice) recently held in the KME and Chalkor cases that the judicial review performed by the General Court complies with the requirements of Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union (the Charter). The ECHR and the Court of Justice therefore hold the view that administrative enforcement systems are compatible with fundamental rights as long as the decisions of the administrative authority and the facts underlying the decision are subject to in-depth judicial review and the reviewing judge can substitute his opinion on punishment for that of the administrative authority. In a well-reasoned judgment (Posten Norge) the EFTA Court subsequently applied the principles and ruled explicitly that administrative authorities cannot be regarded as having any margin of discretion – even in the assessment of ‘complex economic matters’ – and that the reviewing court must examine whether it is itself convinced that the conclusions drawn by the administrative authority are supported by the facts.

Will the rulings in Menarini, KME and Chalkor (and Posten Norge) put an end to the discontent and criticism of the system in which European competition law is applied? We do not think so.

According to our interpretation of the rulings, the crux is not whether the system has the 'external characteristics' of a system that complies with the necessary guarantees but rather how the system operates in practice. Judicial procedures should not be characterized by formalistic applications of theoretically acceptable legal principles or by citing abstract formulas on the nature of judicial review. No, the enforcement system is only compatible with the requirements of due process as long as the authorities properly consider the specific facts and circumstances of the case. Where authorities revert to formalism and blanket application of generally formulated legal qualifications, the parties involved should have effective means to persuade the review courts to assess in detail whether the authorities examined all facts and circumstances which are relevant to their specific and individual case.

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4 Judgment of the EFTA Court of Apr. 18, 2012, Case E-15/10, Posten Norge AS v. EFTA Surveillance Authority, see paras. 100 and 101.

ENFORCEMENT OF EUROPEAN CARTEL LAW

As we shall discuss below, we fear that the current enforcement system does not offer the guarantee that this customized approach will always be provided. For the past few decades, the legal definitions underlying the application of Article 101 TFEU to cartel infringements have developed in a rather abstract manner. The same applies to the methodology used for fining purposes. We believe that there is a tendency to apply abstract legal principles in a formalistic way and that such application can conflict with the requirements of Article 6 ECHR. In that sense, the judgments *Menarini*, *KME* and *Chalkor* mark the start rather than the end of a debate on the reassessment of the current enforcement system.

It is against that backdrop that we will try to sketch the contours of this reassessment process. First, we shall discuss the content of the judgments in the cases mentioned above (2). This will be followed by an examination of the legal concepts that the Courts have developed in cases relating to cartel infringements and fines (3). We shall then make a few suggestions on how to avoid their formalistic application, in particular in situations that do not correspond to the well-defined circumstances in which these concepts were developed (4).

We submit that a reassessment is in the interest of both undertakings and enforcers. Enforcing competition rules should not be (or be perceived to be) an abstract affair disconnected from the real world in which companies and business people operate. It should, on the contrary, lead to results that the outside world (although not necessarily the fined parties themselves) accepts as fact specific and fair. By making enforcement systems evolve, resentments felt by the European business community towards current enforcement procedures in competition cases can be transformed into continued support for the internal market project. That support is very much needed given that political support for further European integration appears uncertain. Great projects, such as ensuring the rule of law and fostering European integration, will only be able to count on public acceptance and support if their individual components are visibly in balance.

2 RECENT JUDGMENTS ON THE ENFORCEMENT OF COMPETITION LAW UNDER ADMINISTRATIVE LAW

2.1 THE MENARINI CASE

As mentioned in the introduction, the EcrHR recently ruled on the compatibility of the Italian antitrust enforcement system with Article 6 ECHR. The case concerned a EUR 6 million fine which the Italian competition authority (AGCM), which is organized along the lines of an administrative authority, had imposed on a dealer in diabetes tests for its participation in a price and market-sharing cartel.
The dealer in question, Menarini, challenged the ruling before the Administrative Court of Lati. One of the grounds for appeal concerned the unconstitutionality of the fine because the administrative court seemingly did not have unlimited jurisdiction (un contrôle de pleine juridiction). The Lati court rejected the appeal, although the ruling indicates that its jurisdiction is limited to a review of legality (un contrôle de légalité) and that it does not have the power to substitute its opinion for that of the AGCM. Menarini challenged that ruling before the Italian Council of State. The latter ruled differently to the lower court. Whilst it is true that the jurisdiction of the Administrative Court is limited to a review of legality, it is nevertheless competent to assess the evidence adduced by the AGCM and to consider whether the AGCM remained within the limits of its discretionary power. The Council of State moreover held that the Administrative Court has unlimited jurisdiction in the sense that it can decide on the appropriateness of the sanction in light of the committed infringement and, if necessary, replace the sanction. After a detour via the Italian Court of Cassation, Menarini instituted proceedings in Strasbourg.

The EctHR found that the imposed sanction is based on rules that are both preventative and repressive in nature and is punitive in character due to the size of the sanction. This accordingly corresponds to a criminal sanction falling within the scope of Article 6 ECHR. However, the EctHR held the view that this provision does not prohibit a system in which an administrative authority imposes such fines, so long as the party involved is able to contest the sanction before a judicial body that offers all the guarantees required by Article 6 ECHR. As such, the answer to the question whether an administrative enforcement system for competition law is lawful or not depends on the nature and depth of the judicial review of the administrative authority.

As far as that judicial review is concerned, the EctHR explained that administrative fines of a criminal law nature can only be consistent with Article 6 ECHR if the fining decision is subject to review by a judicial body with unlimited jurisdiction. This jurisdiction assumes that this judicial body has the power to review all aspects of the decision and that it can consider all relevant factual and legal questions.

According to the majority opinion of the EctHR, these conditions were satisfied in this case. The Italian courts could rule on all of Menarini's factual and legal arguments and examine the evidence adduced by the AGCM. Even if the AGCM has a discretionary power, the Italian courts could check whether this administrative authority used this power appropriately. In particular, they could consider whether the AGCM's policy choices were well-founded and balanced, even if these choices related to technical assessments. The EctHR therefore considered that the review options of the Italian Administrative Court in this
system go beyond a mere legality review. Moreover, since this court could rule on the appropriateness and proportionality of the fine and replace it, if necessary, it had unlimited jurisdiction.

In our opinion, the Menarini case puts an end to the debate as to whether or not (European) competition law has a criminal law nature – insofar as that debate was not already previously concluded. Having regard to the far-reaching nature of this area of law and its sanctions, the ECHR naturally answers this question in the affirmative. With what degree of stringency all rights and guarantees flowing from the ECHR will apply in individual cases must then be determined with regard to the weight of the criminal charge at issue. Concerning the nature and severity of charges in competition law procedures, the EFTA Court concluded in the recent Posen Norge case that these cannot be considered as criminal charges of minor weight. In view of the amount of the fine and the stigma attached to a violation of the competition rules, the guarantees provided in the criminal head of Article 6 ECHR must be guaranteed in substance.

Another issue that is resolved in the Menarini case concerns compatibility of an administrative enforcement system with Article 6 ECHR. Contrary to the answer to the question on the applicability of Article 6 ECHR, the ECHR does not give an unconditional answer to the question of compatibility. As we have already stated in the introduction, an administrative enforcement system is only compatible if it satisfies two conditions.

The first condition comes explicitly from the Menarini judgment and relates to the judicial review to which the administrative authority is subject. Although the ECHR does not require the appeal court to conduct a complete and independent review of all relevant facts and circumstances on its own motion, it does require that it has unlimited jurisdiction. The appeal court must be able to intrusively test the underlying facts of the contested ruling, even if this involves technical assessments and it must be able to substitute its opinion on the appropriateness of the sanction for the sanction imposed by the administrative authority.

In our opinion, the second condition comes implicitly from the Menarini case and relates to how the ECHR hands down judgments. Even though principles with general effect can be inferred from judgments of the ECHR, one must always realize that those judgments are tailored to the facts of a particular case. The finding that the Italian system, as applied in the Menarini case, complied with Article 6 ECHR, does not mean that all administrative enforcement systems

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6 See earlier ECHR cases concerning competition systems: judgment of Feb. 27, 1992, Société Sucrur
7 Posen Norge, cited n. 4 above, para. 89 and 90.
within which competition rules are being enforced do so as well. And even if such a system theoretically complies with those requirements, it cannot be automatically concluded that this also applies to the application thereof in a specific case.\(^8\)

Accordingly, we interpret the *Menarini* judgment as *conditional approval* of a system of administrative enforcement of competition rules. We also wish to point out that this approval only relates to Article 6 ECHR and does not extend to other rules, such as the principle of proportionality, the obligation to provide reasons and other specific rights of the defence (e.g., the right to remain silent), which an administrative authority must observe.

2.2 The KME and Chalkor cases

Three months after the ruling in *Menarini*, the Court of Justice ruled on the compatibility of the European administrative enforcement system with Article 47 of the Charter (the EU law equivalent of Article 6 ECHR). Just as in the *Menarini* case, the question of law focused on the depth of the judicial review, in this case the review by the General Court.

The General Court had indicated in its judgments that it had to assess the legality of the fine in light of the guidelines on the method of setting fines (the fining guidelines). According to the General Court, the limitation of the Commission’s discretionary powers arising from these guidelines does not exclude the Commission from departing from the guidelines, provided that this deviation is justified and duly motivated. The General Court does however point out that this discretion does not affect it exercising its unlimited jurisdiction.

The undertakings concerned appealed against this ruling to the Court of Justice arguing that the manner in which the General Court had exercised its jurisdiction was incompatible with Article 6 ECHR.

By way of introduction, the Court of Justice distanced itself in the three judgments\(^9\) from how the General Court had described its jurisdiction in the contested ruling. According to the Court of Justice, this description was abstract in nature and not designed to respond to an argument that the parties had put forward. The Court of Justice also noted that it would not judge whether the case law of the General Court is consistent. Its judgment only relates to how the General Court exercised its jurisdiction in the cases at hand. After having pointed

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\(^8\) According to the dissenting opinion of Judge Pinto de Albuquerquen in the *Menarini* case, the ECHR should not only have analyzed the Italian enforcement system in the abstract, but should also have looked at how it was applied in practice. In his opinion, this practical application would not have entailed an in-depth assessment.

out the importance of Article 47 of the Charter as the EU law’s mirror provision of Article 6 ECHR, the Court of Justice investigated the powers of the General Court.

The Court of Justice raised three points regarding the review of legality. It first referred to the formula that it used in the Tenta Laval case to describe the scope of the judicial review in cases in which the Commission has discretionary powers. This discretion does not change the fact that the interpretation of economic data is subject to judicial review. In particular, the EU judicature should not only review the factual accuracy, reliability and consistency of the evidence 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.\(^{10}\)

The Court of Justice secondly emphasized the need for the Commission to carry out a thorough investigation into all factors that are important for assessing the seriousness of the infringement. In this regard, the guidelines are only binding on the Commission. The General Court must thirdly consider, on its motion, whether the Commission properly reasoned the factors that it took into account and how it weighed them up. In carrying out this threefold review of legality, the General Court must base itself on the evidence adduced by the applicant. It cannot rely on the Commission’s margin of discretion, neither as regards the choice of the factors taken into account for the application of the fining guidelines nor for the assessment of these factors. The Commission’s discretionary power cannot dispense the General Court from conducting an in-depth review of the law and of the facts.

In reference to the unlimited jurisdiction of the General Court, the Court of Justice described the jurisdiction of the former as the power to substitute its opinion of the sanction for that of the Commission’s and thus to withdraw, reduce or increase the imposed fine. However, the General Court can only exercise this supervision in relation to the arguments that the applicant puts forward and on the basis of the evidence that is submitted in substantiation thereof. The fact that there is thus no ex officio supervision is, according to the Court of Justice, not incompatible with the principle of effective judicial protection. As such, the General Court is not obliged to review the entire case file again. After this analysis, the Court of Justice concluded that the combination of the legality review and the unlimited jurisdiction with regard to the fines complies with Article 47 of the Charter.

It then considered whether this review was correctly exercised in these cases. This analysis essentially boils down to a validation of the General Court’s ruling, with reference to the Guidelines, the case law of the Court of Justice regarding the factors mentioned in the Guidelines and a number of factual aspects in relation to determining the duration of the infringement.

In our opinion, two of these elements merit further attention. In the first instance, the Court of Justice noted that Chalkor had not put forward any specific evidence to substantiate its argument concerning the disproportionate nature of the fine. In this way, the Court of Justice placed the ball back into the applicant’s court. The Court of Justice secondly stated, without going into detail, that the General Court had not only assessed the sanction under the Guidelines but that it had also examined the appropriateness of the sanction itself.

2.3 Preliminary Conclusions on the Unlawfulness of the European System

On the face of it, the judgments in KME and Chalkor confirm the lawfulness of the existing system of judicial review by the General Court and, in doing so, the lawfulness of administrative enforcement by the Commission. Even so, it seems to us that these judgments will bring about some change in how the General Court has operated in cartel cases until now.

The Court of Justice firstly expressly distanced itself from how the General Court described its jurisdiction in cartel cases. This is a signal that things must change, without the Court of Justice clearly indicating what those changes would have to entail. One suggestion concerns the use of the standard formula for describing the scope of the judicial review in cases that are factually complex and that generally imply a margin of assessment for the Commission. The Court of Justice no longer stated in the KME and Chalkor cases that the General Court must limit its review to manifest errors of assessment. It referred directly to the formula that it used in the Tetra Laval case, in which the General Court and, on appeal, the Court of Justice reversed a prohibition decision in a factually complicated merger case. In other words, by choosing this formula, the Court of

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11 The standard formula normally reads as follows: ‘The Court observes that it follows from consistent case law that, although 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 acceptance or misuse of powers.’ (Judgment of the General Court of Sep. 17, 2007, Case T-201/04, Microsoft v. Commission [2007] ECR II-3601, para. 87).
Justice indicates that the complexity of the facts does not shield the Commission from judicial review.

The Court of Justice secondly emphasized several times that the General Court cannot limit its review to checking whether the Commission has correctly applied the fining guidelines. The General Court should form its own opinion on the appropriateness of the fine. More specifically, it ought to assess for itself whether the fine is proportionate and must determine for itself whether all relevant factors for determining the fine have been taken into consideration, on the understanding that the General Court must also be able for that purpose to revert to the facts and circumstances put forward by the applicants. However, the Court of Justice specified that the appeal at the General Court does not amount to an ex officio review of the entire case file.

The Court of Justice thirdly focused on the Commission’s obligation to state the reasons for its decision. It must motivate how it weighed up and assessed the factors for determining the fine. The Court of Justice further stated that the General Court ought to assess this motivation on its own motion. This means that the General Court ought to check for itself whether the motivation is valid and refer any doubts to the parties. The fact that the General Court carries out an ex officio assessment, does not release it from the obligation to observe the principle of audi alteram partem.¹²

All in all, we see a tightening up of the way in which the General Court must perform its review in these three factors. This brings us to the question of whether this tightening up will suffice to ward off the criticism expressed in legal literature regarding the ‘lightness’ of the General Court’s judicial review. According to this criticism, as recently summarized in the Editorial Comments of the Common Market Law Review, the General Court supposedly demonstrates too much respect for the Commission as a policymaker and limits its review to checking compliance with the guidelines.¹³

The first point of criticism relates to the Commission’s margin of discretion when assessing complex factual situations. The General Court would only intervene if a manifest error was made during that assessment (the ‘manifest error doctrine’).¹⁴ Such a margin of discretion would no longer be appropriate in cases of a criminal nature. The Court of Justice seems to have countered this criticism in the Chalker and KME cases. As we have already discussed above, the Court of

¹³ See the literature in footnote 10 of the Editorial Comments in Comm. Mkt. L. Rev. 48-5, 1405-1416 (2011), cited n. 1 above.
Justice stayed away from the formula using the ‘manifest error of assessment’ (the formula was applied, for instance, in the Microsoft judgment). We are further of the opinion that the use of a formula does not say much about how a judicial body actually carries out a review. What constitutes a manifest error of assessment for one judge does not necessarily constitute the same for another judge: ‘manifest’ is a relative concept. M. Jaeger seems to hold the same view. In his response to the criticism against the judicial deference for the Commission, he argues, in reference to the Tita Lucaf case, that the formula for a manifest error of assessment does not exclude an in-depth review and that economic studies and evidence are used for this purpose. He rather regards the formula for the manifest error of assessment as a reference to the division of duties between the Commission as policymaker and the Court of Justice and General Court as review bodies.\footnote{M. Jaeger, Today’s Multilayered Legal Order, Liber Arsitum Arjen Meij, 115–140 (Paris Legal Publishers 2011).}

Regardless of how the European courts describe the scope of their judicial review, we submit that both the ECtHR and the Court of Justice require a thorough review of the facts on which fining decisions are based and that the appropriateness of the sanction is assessed in light of the specific facts of the case and not in light of general policy rules. As such, the Commission and the General Court are forced to involve themselves with the facts – the Commission on its own motion and the General Court at the request of the applicant. A refusal to do so may imply an infringement of Article 6 ECHR and Article 47 of the Charter.

As we shall discuss below, these requirements of in-depth factual investigation and extensive judicial review may eventually conflict with the manner in which certain substantive concepts from European competition law are currently applied, as well as how the fines for cartel infringements are calculated.

3 FORMAL CONCEPTS, PRESUMPTIONS AND ABSTRACT FINE CALCULATIONS

3.1 A MORE ECONOMIC AND FOCUSED ENFORCEMENT POLICY

Under the Treaties, prohibitions are generally interpreted broadly, while exceptions are interpreted narrowly. The same applies to Article 101 TFEU. The Court of Justice has systematically opted for broadly formulated definitions of the conditions for applying this provision.\footnote{See, for instance, Höfler for the concept of undertaking judgment of the Court of Justice of Apr. 23, 1991, Case C-41/90, Höfler and Eber [1991] ECR I-1979, VCH for the concept of influence on trade between Member States judgment of the Court of Justice of Oct. 17, 1972, Case 8/72, Vereniging van Chemischhandelaren v Commission [1972] ECR 977, Sandoz for the concept of collusion judgment of the Court of Justice of Jan. 11, 1990, Case C-277/87, Sandoz prodotti farmaceutici u.} It has also ruled, however, that collusive
practices must be examined in their economic and legal context and that only practices with appreciable effect on competition and trade between Member States fall within the scope of the cartel prohibition.17

This contextual, or if one prefers, economic, approach to competition law gained ground during the 1990s. With the entry into force of Council Regulation (EC) No 1/200318 and an associated series of notices on 1 May 2004, the Commission officially redirected its enforcement policy.19 It no longer enjoys the exclusive power and corresponding duty to apply Article 101(3) TFEU. The Commission was then able to concentrate better on cases that actually cause harm to competition within the larger internal market. These cases include the larger institutionalized cartels, such as those which the Commission started tackling from the end of the 1980s. The Polypropylene, PVC and Cement cases marked the beginning of this trend which eventually led to the cartel cases of the past decade in which the Commission ended up imposing fines of up to hundreds of millions of Euros on individual undertakings.

As part of this decision-making practice and the associated case law, the Commission, General Court and Court of Justice have developed a number of legal concepts and instruments which have significantly enhanced the ‘efficiency’ of the Commission’s administrative procedure. Although we have no principled objections to the legal concepts developed in the Commission’s practice if and when they are applied in the legal and economic context in which they were originally applied (i.e., long-standing, highly institutionalized, sector-wide cartels with comparable roles of all participants), there is a risk that the concepts and legal presumptions can also be used outside of such a context because of their general formulation. As such, the enforcement of competition law would become alienated from the specific facts of the case which could then conflict with the principles set out in the Menarini ruling.

We will illustrate the risks involved in using the generalized legal concepts below. We are particularly concerned about a process of formalization in the application of the competition rules. The rules of competition must ensure the proper functioning of the European internal market and, particularly after the modernization exercise of the previous decade, should have an economically

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For the background, see ibid. Also R. Wesseling, The Modernisation of EC Antitrust Law (Hart Publishing 2000).
sound application. They should not degenerate into blunt abstract rules that are not in accordance with the reality of the market, or at least the experience of all those who operate in it. In our opinion, the T-Mobile judgment of the Court of Justice demonstrates that this risk is not theoretical. Lastly, we shall deal with the fining guidelines of the European Commission that further increase the potentially harmful consequences of the mechanical application of generally formulated rules of law.

3.2 THE CONCEPTS

The first concept that we wish to deal with concerns the concept of ‘concerted practice’. With increased awareness of the European ban on cartels, the chance that undertakings set out their restrictive arrangements in (written or oral) agreements has decreased significantly (as the risk that undertakings agree to cartel practices at all will hopefully have increased). The Commission has thus increasingly resorted to the concept of ‘concerted practices’ as a way to characterize collusion that restricts competition. Progressing from the assumption that every undertaking must independently determine its own market conduct, Article 101 TFEU precludes any contact between undertakings if that contact is aimed at either influencing the market conduct of a competitor or indicating one’s own adopted or intended market conduct to that competitor. Such a qualification has significantly alleviated the Commission’s burden of proof in relation to proving competition infringements.20

Second, this burden of proof was further alleviated in the Polypropylene cases in which the Court of Justice held that it is not required that the concerted practices actually have the effect of restricting competition in order for there to be an infringement, even if the word ‘practice’ suggests some effect. Subject to proof to the contrary, which the economic operators concerned must adduce, it may be presumed that the undertakings participating in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period.21

Third, according to the case law of the EU Courts, the Commission may assume that an undertaking is involved in a concerted action if it transpires that it


was present during a meeting at which that concerted action was put into practice, unless that undertaking ‘publicly’ distanced itself from what was discussed during that meeting.\textsuperscript{22}

There is also a presumption of involvement in the case of the fourth concept that the Commission can apply in cartel cases: the single continuous infringement. The concept relates to the classification of various types of infringing practices as one single continuous (complex) infringement in pursuit of a single economic aim. According to the case law, it would be artificial to split up such continuous conduct, characterized by a single purpose, into different infringements, when what is essentially involved is a single infringement which progressively manifests itself. The advantage of this approach is that the Commission is not only relieved of the obligation to separately prove for each part of the body of facts that the components of Article 101 TFEU have been fulfilled, but also that the five-year limitation period, as provided for in Article 25 of Council Regulation (EC) No. 1/2003, is calculated for the whole infringement and not for its separate parts. It moreover follows from the case law that an undertaking that participates in the uniform and continuing infringement is liable for the entire infringement, even if it only participated in limited parts of the ‘greater’ infringement. This is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.\textsuperscript{23}

Fifth, and finally, the Commission may impute responsibility for the infringement to the parent company of the group to which the infringing undertaking belongs. In order to presume that the parent company has a decisive influence on its subsidiary’s commercial policy, it suffices for the Commission to prove that the entire capital of a subsidiary is held directly or directly by its parent company. This results in the maximum fine of 10% of the turnover, as laid down in Council Regulation (EC) No 1/2003, being calculated on the basis of the entire group’s turnover. The Commission will be able to hold the parent company jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.\textsuperscript{24} This legal presumption can thus also significantly determine the outcome of sanction proceedings, irrespective of the question whether the

\textsuperscript{22} See, for instance, the judgment of the General Court of Apr. 6, 1995, Case T-141/89, Théféleumpe v Commission [1995] ECR II-791 para. 85.

\textsuperscript{23} Commission v Arc, cited n. 21 above, paras. 82 and 83.

rationale underlying the presumption actually corresponds to the reality of the situation in which it is being applied.

3.3 The Risk of Formalization

The concise summary above of some of the relevant concepts and legal presumptions merely forms the backdrop against which the decision-making practice of the European Commission — and that of the national competition authorities — has developed. The summary does not contain any news for cartel law practitioners. On the contrary, the summary is boilerplate text that is included under the chapter ‘Legal assessment’ in practically every Statement of Objections of the EU Commission as well as national equivalents in Member State cartel procedures. It remains difficult in practice — almost regardless of the factual situation — to rebut the legal presumptions formulated in general terms. We shall explain this below.

A relatively new and very broadly phrased legal rule was formulated in the Court of Justice judgment relating to the Dutch T-Mobile case.25 As we know, Article 101 TFEU prohibits both conduct that has the effect of appreciably restricting competition and conduct that has the restriction of competition as its object. In the T-Mobile case, the Dutch Trade and Industry Appeals Tribunal (CBB) asked the Court of Justice precisely when conduct can be considered to have the restriction of competition as its object. Defining the boundaries of that concept was very important, precisely because the qualification of a practice as an ‘object’ restriction dispenses the prosecuting authority from having to prove that this practice had (or could have had) any appreciable effect on competition.26 In addition, the classification of an infringement as a restriction by object (or hardcore restriction) at present inexorably triggers the qualification of the practice as ‘cartel’ behaviour, which has practical and legal implications in itself.

In a certain sense, the object restriction is the European counterpart of the ‘per se’ infringement under US antitrust law. In US antitrust law, this concept relates to practices that, according to earlier experiences and analyses, will in practice always result in a restriction of competition. For reasons of judicial efficiency, it is justified not to require in those cases that claimants (which include antitrust authorities in the American context) have to prove again that ‘per se’ type behaviour will have led to a restriction of competition. It is clear from the preliminary question asked by the Dutch Industrial and Trade Appeals Tribunal in

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25 Judgment of the Court of Justice of June 4, 2009 in Case C-8/08, T-Mobile, cited n. 16 above.
26 Nota bene: the requirement of appreciable effects on competition also applies to hardcore restrictions, see Völk v. Vossius, cited n. 17 above.
T-Mobile that it assumed that the term 'hardcore restriction' could be defined in a comparable way in European competition law. Its judgment contained the following observation:

In this respect, the Trade and Industry Appeals Tribunal considers that based on case law and by applying competition provisions it can be concluded that an agreement or concerted practice has the object of restricting competition if experience shows that such an agreement or concerted practice, regardless the economic circumstances, always or nearly always prevent, restrict or distort competition.

Every undertaking participating in such a concerted practice should be aware of its illegality because the actual negative effects will be undeniable and will occur regardless of other powers on the relevant market, and will only not occur in highly exceptional circumstances [...].

Such an interpretation also seems to be necessary in order to avoid that an agreement or concerted practice will be attributed the object of prevention, restriction or distortion of competition, whereas an examination — which can be left out following the judgment in Consten/Grundig — would have shown that in fact these effects are not taking place (false positive result).\(^{27}\)

However, the Court of Justice chose in T-Mobile not to restrict the category of hardcore restrictions to those practices that, according to experience, will always or almost always result in the restriction of competition. Following the opinion of the Advocate General in T-Mobile, the Court of Justice held that:

a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market.\(^{28}\)

It cannot be said that this legal rule was formulated in the context of a long-standing and highly institutionalized cartel. On the contrary, the preliminary question arose in the factual context consisting of a single exchange of information during a meeting which was clearly not intended beforehand to deal with that specific commercially sensitive information.

There is a risk that the T-Mobile criterion will lead, together with other legal presumptions in cartel law, to incorrect and unfair results. The first signs that this risk will materialize have already emerged. The focus in the cartel law enforcement activities of the Commission and national competition authorities has shifted from major actual cartels to 'exchanges of information'. To a certain extent, it is not the Commission or the national competition authorities that have determined this prioritization. After all, it is the undertakings themselves that present these issues.

\(^{27}\) Trade and Industry Appeals Tribunal, ruling of Dec. 31, 2007, informal translation of ground 9.5.3.3 of the ruling (T-JN BC1396).

\(^{28}\) T-Mobile, cited n. 16 above, para. 43.
to the competition authorities in the context of leniency applications aimed at protecting themselves against future charges. If the leniency applicants (the undertakings which participated in the contacts themselves) qualify these discussions of potentially commercially sensitive information as cartel infringements, there is a natural tendency for the competition authorities to treat these practices as ‘object’ restrictions, without the leniency applicants or the competition authorities asking themselves the question whether the knowledge of that information can actually influence competition according to general empirical rules. Why should a competition authority doubt the actual relevance of the exchanged information for the process of competition on the market if the undertakings themselves have already affirmed that there was a violation of the competition rules by way of their application?

As a consequence, there is a risk that harmless discussions about more or less generally expressed expectations for future market developments will be designated as hardcore restrictions. This risk also affects institutionalized systems for exchanging market information. In respect of such systems, it is not certain on the basis of general empirical rules that they will always (or ‘per se’) have the effect of restricting competition, but it is certain that they will remove some degree of uncertainty regarding the conduct of competitors. Although their effect on competition is not certain, such exchanges of information can thus be classified under European law as practices whose object is to restrict competition. This is because the case law does not focus on the issue of the restriction of competition but on the reduction of uncertainty. Under this case law, the provision or discussion of a competitor’s corporate information removes, by definition, the uncertainty that is inherent to the process under competition law, regardless of whether that information is correct, relevant from the perspective of the recipient and/or actually used. In EU jurisprudence removing uncertainty is equivalent to concerted action, even though the effects of such concerted action on competition cannot be assumed to exist ‘per se’.

Formalistic application of the T-Mobile criterion therefore implies the risk of leading to what is known as ‘false positives’: practices are classified as cartel infringements even though it is not certain that they can have restricted competition. The commendable attempts of the European Commission to nevertheless make a clearer distinction in the ‘Horizontal Guidelines’ between forms of exchanging information that are always wrong on the one hand and forms of information exchange that must be assessed on the basis of their effects on the other, were doomed to fail because the European Commission is also bound by the overly broadly formulated T-Mobile criterion.  

The lack of the distinctive character in the legal concept of ‘object restrictions’ also affects the concept of a single complex and continuous infringement (hereinafter ‘SCCI’ for ease of reference). The Commission interprets this concept broadly and tends to systematically treat all contacts between competitors over long periods of time as part of one SCCI. After all, in the Commission’s opinion, those contacts always have the same purpose: the restriction of competition. The General Court imposed a limit on this practice when it held that bringing together various practices as a SCCI solely on the basis that the various practices intended to restrict competition was artificial since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a constitutive element of any conduct covered by Article 101.\textsuperscript{30} The argument that all established practices intended to restrict competition and thus collectively formed a SCCI therefore had no distinctive character. Even though the Commission now refers in its decision-making practice to a series of more specific factors to demonstrate the existence of a SCCI, there is as yet no certainty as to when taking part in a meeting amounts to participating in a SCCI.

As said, the answer to the question whether an undertaking participated in a SCCI or not is of crucial importance for the outcome of the proceedings given that the fining guidelines, decision-making practice and case law offer little scope for differentiation when calculating the fine between undertakings that participate in all aspects of the SCCI and undertakings whose participation is limited to one or a few aspects. Although the case law assumes that the degree of participation is a factor that must be taken into account when determining the gravity of the infringement committed by the undertaking,\textsuperscript{31} the old and new guidelines are based on a system that barely allows for this. The gravity of the infringement usually refers to seriousness of the entire infringement for which the participants are all deemed responsible. Differentiation only takes place on the grounds of a classification based on turnover or market share figures (old system) or on the relevant turnover achieved by the participants (new system). Likewise, the degree of involvement cannot be regarded as a circumstance for reducing the fine as that circumstance relates to how the undertaking behaves in the cartel but not to the size of the parts of the cartel for which it is deemed liable.

Moreover, a recent Opinion by Advocate General Kokott suggests that there are only up sides for the Commission in qualifying conduct as a SCCI. According to her, the General Court can still impose a (lower) fine, if it is established on appeal that there was insufficient proof for the undertaking’s participation in


\textsuperscript{31} Commission v. AEC, cited n. 21 above, para. 90; see also judgment of the General Court of Nov. 16, 2011, Case T-79/06, Sachs GmbH v. Commission, not yet published in ECR, paras. 135–137.
the SCCI. If the General Court considers the behaviour to be a violation of the competition rules, albeit a different infringement than the SCCI against which the undertaking defended itself in the Commission’s administrative process, it may impose another fine. This fine would still be based, however, on the parameters underlying the initial fine which the Commission set for the undertaking’s involvement in the SCCI.\textsuperscript{32}

More generally, the broad definition of the cartel ban leads to a large group of infringements being ‘tossed onto one heap’ even though there are significant differences in the degree of blame and impact of those practices in competition law. Participating in a number of discussions with competitors and in which— for instance, at the request of customers and in their presence— individual expectations and envisaged price trends are discussed is not tantamount to a long term institutionalized system of secret consultations in which competitors fix prices, divide customers and effectively monitor their collective wrong-doing. While the latter is naturally more serious than the former the current fining guidelines treat both of these infringements as ‘cartels’, which normally speaking would lead to comparable fines being imposed on different infringements. This practice is all the more alarming given that the competition authorities, as mentioned above, are shifting the focus of their enforcement activity to practices based on exchanges of commercial information and market forecasts. For that reason, it has been argued that a further distinction should be made within the category of ‘cartels’ between ‘type A’ cartels and ‘type B’ cartels (and, if needs be, ‘type C’ cartels), depending on the actual seriousness of the cartel infringements.\textsuperscript{33}

In this way it would be possible to customize the fines for very divergent forms of cartel behaviour within the Commission general methodology for setting fines.

Last, we arrive at another bone of contention that continues to form the subject of countless appeals before the General Court and the Court of Justice: the application of the legal presumptions concerning parent company liability.\textsuperscript{34} In theory, it is possible for a parent company that holds 100%, or almost 100%, of the shares of the subsidiary to rebut the presumption that it had a decisive influence over the conduct of the subsidiary company. The Commission decisional practice and the case law of the Luxembourg courts do not explain, however, which arguments and evidence are deemed to rebut the presumptions. This is all the more frustrating in cases involving evidence that the shareholding parent company did not do something (i.e., did not exercise any decisive influence), given that

\textsuperscript{32} Opinion of Advocate General Kokott of May 24, 2012, Case C-441/11 P, Commissions u. Verhuizingen Cropama, not yet published in ECR, see in particular para. 69 ff.

\textsuperscript{33} R. Wesseling, De Kartelrel (Vossius Pers, 2011).

proving that something did not happen is practically impossible. It is hoped that
the many pending appeal proceedings will finally shed light on the nature of the
evidence that must be adduced. The first tentative indications can already be
deducted from the case law.\textsuperscript{35} For the time being, however, the uncertainty that has
lasted for years continues and undertakings are usually told that the evidence they
have adduced was not sufficient to rebut the presumption of influence, without
being given any specifics as to which evidence could have negated the legal
presumptions. As such, the party ends up in a situation in which it is deemed to
prove its innocence without being told what must be done for that purpose.
Questions have meanwhile been raised about the compatibility of such a liability
document with the presumptions of innocence guaranteed by the ECHR.\textsuperscript{36}

The above illustrates the danger of a formalistic application of broad concepts
and legal presumptions that are virtually not rebuttable in practice. From the
parties' (subjective) point of view, conducting proceedings amounts to a battle
against an unfair system rather than a procedure aimed at the proportional
punishment of infringements of the cartel ban. From a normative perspective, one
fails to see why a meeting between competitors during which commercially
sensitive information also comes up for discussion (and where there is thus an
infringement) should be punished as heavily as explicit price-fixing agreements.

To be clear, we are not suggesting that the Commission is abusing its powers
or otherwise acting improperly. Our point is simply that the body of legal
definitions that it has at its disposal is based on a series of assumptions and
presumptions that do not necessarily tally with economic reality in each individual
case and that their use does not automatically lead to the best possible
proportionate outcome.

3.4 FINING GUIDELINES

Our concerns about the risk that cartel law is threatening to become formalized
are not limited to the conditions for applying Article 101 TFEU but also extend to
how the fines for cartel infringements are determined.

The fine to be imposed is determined on the basis of the fining guidelines.
According to the current version of these fining guidelines, the fine is determined
on the basis of a percentage of the turnover that the undertaking in question made

\textsuperscript{35} Judgments of the General Court of June 16, 2011, Case T-185/06, Air Liquide v Commission, not yet
published in ECR, and in Joined Cases T-208/08 and T-209/08, Gasolin Grup and Stichting
Administratiebureurs Portefeuille v Commission, not yet published in ECR; see also judgment of the Court
of Justice of Sept. 29, 2011, Case C-521/09 P, Elf Aquitaine v Commission, not yet published in ECR.

\textsuperscript{36} See M. Brenkens & A. Vullers, No Longer Presumed Guilty? The Impact of Fundamental Rights on
by selling the products covered by the cartel in the last year of the infringement.  
Depending on the seriousness of the infringement and market conditions, this fine can run up to 30% of those sales. This basic amount is then multiplied by the number of years that the infringement lasted. In practice, and regardless of how long the infringement lasted, a further basic amount is added to that amount again as a (further) deterrent factor. Yet more is added for larger undertakings with a high turnover on products other than the cartel products. The fine is then lastly adjusted, normally upwards, to take account of factors such as recidivism and the role played by the undertaking concerned in the infringement.

The application of the fining guidelines leads to amounts which may be justified to sanction genuine cartels. We doubt, however, that such amounts still bear any relationship to the damage actually caused to the economy in other situations, particularly in case of information exchange. As far as cartels are concerned, the guidelines — and the case law — do not require that the actual effect of the infringement is investigated. In those cases in which undertakings endeavour to show on the basis of economic studies that practices — even if they qualify as ‘hardcore restrictions’ — have not had any, or only very limited, adverse effects, the Commission does not deem itself obliged to take the effects of cartel infringement into consideration. As far as individual participation is concerned, we refer to our comments above regarding the lack of differentiation based on the extent of participation in a SCCI.

More generally, one could say that the fining guidelines are applied quite mechanically. The Commission can neatly tick the boxes of the guidelines without having to consider once again whether the final amount is still compatible with the need for an effective enforcement of the ban on cartels and is thus proportionate to the repression and prevention of the infringement actually committed by the undertaking. The Commission only seems to be concerned about the market impact of a cartel when the fine turns out to be lower than the unlawful profit made on account of the infringement, in cases where the Commission is able and willing to make an estimate of this. All in all the question of whether or not an infringement has had an economic effect serves as a fine-increasing but not a fine-reducing factor in the mechanics of the fining guidelines.

We wonder what the reasons could be for this formal calculation of the fine, particularly since the Commission advocates a more economic approach to competition law and generally seems to encourage the submission of economically

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38 The studies of J.M. Connor on the average overcharge of 25% in case of cartels relate to effective price-fixing cartels and not the exchange of information.
slanted evidence. Cartel law would not have to be more complicated than merger control, in which an 'economic' or more effects based approach has come about. We also fail to see why the Commission would be in a fundamentally weaker position than national courts, which, in the Commission's view, can determine or estimate the damage caused by a cartel. Lastly, in national case law (for instance in the Netherlands) a differentiation is applied in the determination of fines depending on the estimated impact of the infringement on the competition law process. If Member State authorities can assess the effects in the context of determining sanctions, the Commission should be able to do this too. And if the Commission can do so, one can expect that it must do so. As we have already stated above, the post-Menarini case law requires customization and customization assumes that measurements are actually taken.

3.5 Preliminary Conclusion

As we concluded at the end of the previous section, the lawfulness of an administrative enforcement system depends on the answer to the question whether this system is able to guarantee that the underlying facts of the infringement are thoroughly assessed and that the appropriateness of the sanction is determined in light of the correct and relevant facts. The fact that the Commission and the General Court can guarantee such a result in the abstract, does not mean that this result is also achieved in every case. As we have argued above, there is a risk that the current interpretation of some important concepts and the existing fining methods will transform cartel enforcement into a formalistic activity that sanctions undertakings severely for practices that, according to economic literature and experience, do not always actually damage market forces.

In our view, an administrative enforcement system is only compatible with the requirements of Article 6 ECHR and Article 47 of the Charter if it incorporates checks and balances that exclude such formalism. This brings us to the procedural

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41. See the final decision of the CBB of Aug. 12, 2010 in Case T-Mobile and Others v Netherlands Competition Authority (LJN B 3895): ‘The grievance of the Netherlands Competition Authority raise the question as to whether significance can be attached, when fixing the fine on the basis of the gravity of the infringement, to the consequences of the infringement, even if those consequences do not need to be examined when determining the infringement because the conduct has as its object to restrict competition. Contrary to what the Netherlands Competition Authority submits, the Tribunal holds the view that the fact that the consequences of an infringement do not have to be taken into account when determining the infringement, does not also mean that the intended consequences may not be considered when determining the gravity of the infringement.’
issues concerning the role of the three actors in the European enforcement system, namely the Commission, the General Court and the Court of Justice.

4 SUGGESTIONS FOR AVOIDING FORMALISM IN THE APPLICATION OF CONCEPTS

4.1 THE PROCEEDINGS BEFORE THE COMMISSION

Ever since the system came into effect at the start of the 1960s, there has been criticism of the incompatibility the Commission's prosecutorial and sanctioning powers. These complaints have increased during the past few years. The Commission is accused of selectively gathering (or at least focusing on) incriminating evidence. The entire proceedings are said to favour prosecution rather than objective legal findings. The more recent manifestations of this criticism are directly related to the level of the fines that the Commission imposes. Both the high-profile report of Professors Schwarze and Bechtold and the comprehensive report of the working group chaired by Professor Waelbroeck commence with graphs and tables illustrating the increase in the level of fines. We understand that these high fines are typically agonizing for European business and that they lead to increased attention for the lawfulness of the enforcement system. The level of the fines also explains why competition law sanctions fall within the scope of Article 6 ECHR. Even so, the lawfulness of the enforcement system is not directly affected by the increased level of the fine; the system has not suddenly become unlawful only because the fines that are imposed increase.

Moreover, when assessing the European enforcement system, it should not be forgotten that high fines may be justified to guarantee the proper functioning of the European internal market. It would not benefit the internal market if the efficiency of European competition policy were to be sacrificed on the altar of pious legal principles. As is the case with every repression-orientated enforcement system, a balance must be found somewhere between efficiency and lawfulness. And, as in all discussions on finding the correct balance, those on each side of the litigating table will obviously adopt divergent positions.

The Commission is furthermore making specific efforts to improve the acceptability of its procedures. The decision to enhance the role of the Hearing
Officer is an example of this intention.\textsuperscript{16} His role now extends to the investigative phase, which precedes the notification of the statement of objections. The Hearing Officer may, for instance, intervene in disputes concerning the nature of the questions that are posed, the period for answering those questions and he is entrusted with the practical application of the procedure for legal professional privilege, as was outlined in the Akzo case. A further marked improvement for litigants is that they can already gain insight, during the administrative phase, into the specific criteria that the Commission is considering to take into account when fixing the fine.

However welcome these improvements may be, they cannot alter the inquisitorial nature of the proceedings instituted under Council Regulation (EC) No 1/2003. It is and remains the task of the Commission to detect and fine infringements. The Decision on the terms of reference of the Hearing Officer stipulates, for instance, that the Commission has to conduct its competition proceedings fairly, impartially and objectively and that it must ensure respect of the procedural rights of the parties concerned. However, the Decision does not state that the Commission must aim to objectively establish the truth and that it must, to that end, look for both incriminating and exculpatory evidence. The Decision (reflecting the current process itself) is still geared towards the efficiency of the fight against infringements. In fact, according to the last sentence of the third recital, the Decision aims to contribute 'to the objectivity, transparency and efficiency of these proceedings'.

The focus on efficiency of the administrative procedure runs the inherent risk that the importance of the Commission's prosecutorial duties will outweigh its duties flowing from the task to establish the (full) truth objectively. In that respect, it is regrettable that the recent reforms of the administrative proceedings have not addressed the Commission's obligation to collect and examine both incriminating and exculpatory evidence in the cases that are brought before it in the same way as an investigating judge is obliged to do in the Belgian or French criminal law system. In our opinion, an obligation for fulfilling this two-sided investigating task can be inferred from the principles of proper administration. We are thinking here, in particular, of the duty of care the Commission must observe, especially in cases requiring the assessment of factually complex situations. This duty implies that the Commission must carefully and impartially examine all the relevant aspects of the individual case.\textsuperscript{17}

\textsuperscript{16} Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ C275/29.
As regards the concrete details of this obligation, we believe - within the current Treaty framework - that the Commission could organize its services differently. Following the example of the Dutch competition authority, it could introduce a clear division between the departments that bring the charges and those that prepare the decision. This division would change the dynamic of the oral hearings, in the sense that a real debate could arise between the department that brings the charges, on the one hand, and the undertakings that are charged, on the other hand, in the presence of the department that must still prepare a decision. In order to guarantee the impartiality of the 'decision department' entrusted with the preparation of the draft decision for the College of Commissioners, one could consider separating it physically from the 'prosecuting department'.

We have already argued above that the Commission should review its fining practice so that the fines are actually in line with the actual damage caused by the cartel infringements as well as the need to guarantee a proper repression and prevention of those infringements.

4.2 THE REVIEW BY THE GENERAL COURT AND COURT OF JUSTICE

In relation to the review by the General Court and the Court of Justice, we believe that it is clear, after the Court of Justice’s judgments in *Chalkor* and *KME*, that the General Court can no longer afford to limit its review to checking the elements summarized in the fining guidelines. However, it is also clear that applicants have an important role to play. They must adduce the evidence that must enable the General Court to assess the proportionality and appropriateness of the sanction imposed by the Commission. As is evident from the *Chalkor* case, if the applicant fails to do so, the General Court cannot be blamed.

Accordingly, the Court of Justice’s judgments in the *Chalkor* and *KME* cases offer new perspectives to take account of the economic substantiation of the fine from a perspective of repression and prevention of the infringement, as effectively committed by each undertaking. The fact that the current guidelines do not oblige the Commission to measure the effects of an infringement does not release the General Court from the obligation to investigate such effects, if a party expressly adduces convincing evidence for this purpose. Applying jurisdiction in the manner as we understand the *Chalkor* and *KME* judgments would enable fines to be more
in line with the public damage caused by the cartels. This would also force the Commission in turn to ‘deformalise’ the application of the guidelines and, in so doing, increase the acceptability of its fining policy.

This improvement in the enforcement system only relates to one part of the formalism from which the system suffers. It does not provide any protection against an abstract use of the legal concepts by the Commission, General Court and Court of Justice in applying the cartel ban. As the Court that must oversee the uniformity of EU law, it is up to the Court of Justice to ensure that the five concepts we have discussed above are applied in situations that are comparable with the body of facts in the cases in which those concepts were originally developed. Not every infringement of Article 101 TFEU is necessarily a hardcore cartel and not every meeting of competitors necessarily leads to a hardcore restriction. It is also important that the Court of Justice provides clarity regarding the circumstances under which a parent company can prove that it cannot be held liable for its subsidiaries. It seems to us that a presumption of guilt without a real possibility of rebuttal is hard to reconcile with the Strasbourg requirements, as these arise from Article 6 ECHR, among others.

We consider it important for the General Court and Court of Justice to take stricter action in relation to alterations in the fining policy. We believe that the Commission must be free to alter its policy but that such freedom may not lead to arbitrariness. We point here specifically to Article 16 of Council Regulation (EC) No 1/2003 that attaches a significant precedent value to the Commission’s decisions, which are binding on national authorities and judicial bodies. If the Commission alters its fining policy for a specific case, it must properly motivate the change in policy in relation to the earlier policy. We see a clear indication of the existence of such an obligation to provide reasons in the KME and Chalkor cases, in which the Court of Justice emphasizes its importance.

5 CONCLUSION

The judgments in the Menarini, KME and Chalkor cases demonstrate that the current administrative enforcement system for European competition law is not incompatible as such with Article 6 ECHR and Article 47 of the Charter. However, an important condition is attached to the approval of the system by the Courts. The Commission may only base its decisions on concrete facts and the General Court must ensure that the Commission does this correctly, even if this involves technical assessments or complex factual circumstances. The General Court may not limit itself in any case to a review of legality of the Commission’s actions. Within the context of the pleas and arguments put forward by
undertakings, the General Court must form its own opinion of the appropriateness of the sanction to be imposed.

Although these judgments do not compel the European legislature to adapt the system provided for in Council Regulation (EC) No 1/2003, the different players in this system will have to review their conduct. The checks and balances within the system must be tightened to prevent sanctions from being imposed that are not justified by the gravity of the committed infringement. This means that even more attention must be paid to determine the specific facts of the case. There should be no place for a formalistic and mechanical application of presumptions and suppositions. In our opinion, this calls for a review of how the conditions for applying Article 101 TFEU are actually used. The concepts that have been developed as part of combating highly institutionalized cartels may only be used if the facts unambiguously point to the existence of such a cartel. For example, the 'label' cartel cannot be stuck on every agreement or meeting.

We are further of the opinion that the Commission and General Court must pay heed to the consequences that an infringement has had on society when they are fixing and assessing fines. Fines should be proportionate to that which is necessary to punish the infringement and prevent it from being repeated. It should not be the outcome of a mechanical application of general fining guidelines. Determining the correct punishment is essentially customization and does not lend itself to being dictated to by abstract policy rules.

A policy turnaround is not required to bring about a more factually orientated application of competition law. The current system is flexible enough to guarantee this result, on the understanding that all players in this system make an effort towards achieving this purpose. In the case of the Commission, we believe that this means that it must adopt internal measures to ensure that both inculpatory and exculpatory evidence are collected and investigated. The General Court will have to ask itself more than before what its unlimited jurisdiction actually means. The Court of Justice will finally have to oversee the final result.

Lastly, it seems to us that a more factually orientated approach to European competition law is not only a legal question for a relatively small group of specialists. Competition law serves the proper functioning of the European internal market and, in so doing, is the foundation of European cooperation. It is with this in mind that we have made several suggestions above for enhancing the lawfulness and acceptability of how European competition law is applied.

For an example in which the General Court traced the application of a concept back to the specific situation in which that concept was formulated, see the judgment of June 16, 2011, Joined Cases T-208/08 and T-209/08, Coppens and Portefeu v Commission, not yet published in ECR, paras. 157-159.