August 20, 2015

Transatlantic Perspective on Judicial Deference in Administrative Law

Maciej Bernatt, University of Warsaw

Available at: https://works.bepress.com/maciej_bernatt/1/
Transatlantic Perspective on Judicial Deference in Administrative Law

by

Maciej Bernatt*

The U.S. concept of judicial deference in administrative law limits the scope of judicial review of administrative agencies’ actions in the light of agencies’ superior expertise and separation of powers arguments. It may serve as an interesting point of reference for the European discussion about adequate institutional balance between administration and courts.

The paper analyzes whether there are grounds for the validity of the concept of judicial deference in Continental Europe and in what areas (law, facts or both). As a starting point it is observed that it remains generally accepted in Europe that it is a role of courts (and not administrative agencies) to interpret the law. Against this background, standards stemming from Article 6 of the European Convention on Human Rights (the ECHR) are analyzed in order to answer the question whether deferential standard of review is permissible under the ECHR principle of full judicial review. The analysis of the jurisprudence of the European Court of Human Rights (the ECtHR) leads to the conclusion that there is a space for U.S.-like judicial deference under European fundamental rights framework when it comes to the question of facts. On the other hand the ECtHR jurisprudence does not offer much guidance as to whether any deference can be accorded to administration’s statutory interpretation.

Further study on European Union courts’ review of the decisions of the European Commission in the sphere of competition law shows that judicial deference is accorded in Europe in practice. Importantly, the EU Courts declare deference to the Commission’s complex economic assessment and defer to the Commission’s interpretation of its own soft law. When it comes to facts, standard of review seems to correspond with the U.S. substantial evidence test. On the other hand, legal questions concerning the Commission’s own soft law are reviewed in a way similar to the Skidmore standard. Further similarities between Europe and the U.S. are observed in the U.S. courts of appeal practice of reviewing the Federal Trade Commission’s decisions in the field of antitrust. The actual intensity of review exercised by the U.S. courts remains close to the EU Courts’ review of the EU Commission’s decisions.

The paper shows that differences between the U.S. and Europe—especially if one takes into account U.S. courts often non-application of Chevron—are not so significant as one would intuitively think. In the conclusion, the paper proposes three variables that may be identified in both the U.S. and European approaches to decide whether judicial deference to administrative agency decisions should be accorded or not.

* Dr Maciej Bernatt, Assistant Professor in the Department of European Economic Law (Jean Monnet Chair), Faculty of Management, University of Warsaw and Scientific Secretary of the Centre for Antitrust and Regulatory Studies at the University of Warsaw. This paper presents the author’s research on judicial deference in the United States and in Europe started in the Institute for Consumer Antitrust Studies of the Loyola University Chicago School of Law in academic year 2013/14 and continued at the University of Warsaw after his return. The author is grateful to Spencer Waller for creating a great environment for conducting this research in the U.S. The author would like to thank Christine Chabot, Paul Craig, Eleanor Fox, David Gerber, Julie Grant, Michael Jacobs, Barry Sullivan and Spencer Waller for all suggestions concerning this research. The author’s research would not be possible without the generous support of Polish-U.S. Fulbright Commission. All omissions remain mine. Comments are welcome at mbernatt@wz.uw.edu.pl.
TABLE OF CONTENTS

Introduction ........................................................................................................................................... 3
I. Judicial deference: delimiting the concept ..................................................................................... 6
II United States: deference to administrative agency as a rule? ....................................................... 10
   A. Interpretation of law: *Chevron* deference ............................................................................... 10
   B. Interpretation of law: *Skidmore* deference .............................................................................. 16
   C. Review of facts: substantial evidence test .................................................................................. 19
III Europe: any place for judicial deference in the ECHR system? .................................................. 22
   A. Standard of review in administrative cases classified as civil .................................................... 23
   B. Standard of review in administrative cases classified as criminal ............................................ 28
      1. Review of law and facts ............................................................................................................. 32
      2. Review of fines .......................................................................................................................... 36
IV. Judicial deference in practice: a case of competition law ............................................................. 38
   A. Review of facts in EU competition law ....................................................................................... 39
   B. Review of complex economic assessment in EU competition law ............................................ 43
   C. Review of fines in EU competition law ....................................................................................... 50
   D. Review of statutory interpretations in EU competition law ...................................................... 54
   E. Point of comparison: review of the U.S. Federal Trade Commission’s decisions ..................... 60
      1. *Chevron* as a rule? .................................................................................................................... 61
      2. Non-deferential standard of review in practice ........................................................................ 62
V. Trans-Atlantic worlds are not far apart: principal findings .......................................................... 68
   A. Europe’s fundamental rights system v. the U.S. standards ......................................................... 68
      1. Classic administrative cases ...................................................................................................... 68
      2. Administrative cases involving fines .......................................................................................... 70
   B. Example of similarity: antitrust ..................................................................................................... 71
      1. Complex economic assessment .................................................................................................. 72
      2. Other factual determinations ..................................................................................................... 73
      3. Legal questions .......................................................................................................................... 73
      4. Fines ............................................................................................................................................ 74
Conclusion ............................................................................................................................................ 74
Introduction

In order to develop, modern democracies must be efficient; specifically, they must respond in a timely manner to changing societal and economic challenges. A large role in this respect is played by specialized administrative agencies equipped in adequate skills and expert knowledge. Still, in a democracy, the actions of such agencies need to be controlled by courts. Otherwise, there is a risk of abuse of power and a violation of fundamental rights. The challenge is thus how to build a model of judicial review to guarantee effective judicial control of administration, while concurrently preserving the characteristics of the expert-administrative agencies that aid in the efficient functioning of the democratic state. The aforementioned problem is addressed in this paper by discussing the concept of judicial deference from the trans-Atlantic perspective.

The concept of judicial deference has been developed in the U.S. to indicate the required intensity of judicial review of administrative agencies’ actions in the light of the agencies’ superior expertise and separation of powers arguments. The focus of the discussion in the U.S. has been on how the judicial review of an administrative agency’s interpretations of the applicable federal statute should operate.\(^1\) However, judicial deference is a useful concept when discussing the review of facts as well.\(^2\)

\(^1\) The current legal standard was established in 1984 in a seminal ruling of Supreme Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*: the Court, when reviewing an administrative agency's construction of statute which it administers, should defer to agency interpretation of the statute unless the interpretation is unreasonable; 467 U.S. 837 (1984). See more infra Part II.A.-B.

\(^2\) When dealing with the administrative agencies’ factual findings the courts in U.S. shall hold unlawful and set aside agency action only if it is found to be unsupported by substantial evidence; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). See more infra Part II.C.
In Continental Europe more limited attention has been dedicated to the concept of judicial deference as a platform for delimitating powers of administration and courts. This seems to have its grounds in the perception of courts in Europe—it is undisputed that it is a primary role of the courts to interpret the law and to check the legality of administrative action. Importantly for the European Union law, in the light of Article 19(1) of the Treaty on European Union the EU Courts bear primary responsibility for the interpretation of the EU Treaties.

This paper compares the U.S. standards of judicial review of administrative action with the standards that most universally govern judicial review of administrative action in Europe—supranational standards stemming from Article 6 of the European Convention on Human Rights (ECHR). The analysis aims to answer the question if there is a place in the ECHR legal system for judicial deference that is similar to that applied in the U.S., and if so, in what areas. Thus, this paper explores whether the U.S. standards are reflected abroad, specifically in Continental Europe. To verify whether deference is accorded in the European practice of judicial review, the paper provides a study of EU Courts’ review of the decisions of the European Commission in the sphere where the Commission acts in a similar manner to U.S.

---

3 Only recently Eduardo Jordao and Susan Rose-Ackerman covered Italy and France in its analysis on judicial review of executive policy making; see Eduardo Jordao, Susan Rose-Ackerman, Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, 66 Admin. L. Rev. 1 (2014). However, they did not discuss the relevance of judicial deference for European supranational legal orders—ECHR and EU law.

4 Susan Rose-Ackerman, Peter L. Lindseth, Comparative Administrative Law: Outlining a Field of Study, 28 Windsor Yearbook of Access to Justice 435, 445 (2010); see also Paul Craig, EU Administrative Law 405 (2012).

5 For example Article 7 of the Constitution of the Republic of Poland provides that state authorities shall act on the basis of law and in frame of the boundaries of law (principle of legalism). Administrative courts main task is to check whether administrative agencies pass their decisions in conform with this principle.

administrative agencies and where economic expertise is required: the sphere of competition law. The analysis of the standard of review in EU competition law when it comes to the EU Commission’s factual determinations, complex economic assessment, fines and statutory interpretations is aimed at answering the questions of whether and when the EU Courts are ready to accord judicial deference to the Commission’s determinations. In this respect it is analyzed whether the EU Courts approach in the competition law field corresponds with the U.S. courts of appeal practice of reviewing Federal Trade Commission’s decisions in the field of antitrust. In the conclusion, the paper proposes three variables that may be identified both in U.S. and European approaches to decide whether the judicial dereference to administrative agency decisions should be accorded or not. The proposal is aimed at preserving the positive sides of judicial deference while providing sufficient procedural safeguards.

The paper has the following structure. Part I defines the concept of judicial deference and discusses its principal rationales. In order to provide the basis for comparative analysis, the U.S. approach to judicial deference is examined in Part II. Both the areas of statutory and factual determinations are covered. Part III aims at answering the question whether under the ECHR principle of full judicial review there is a space for judicial deference to administrative agencies’ determinations. The jurisprudence of European Court of Human Rights (the ECtHR) concerning both administrative cases of civil and criminal character (in a meaning of Article 6 ECHR) is closely analyzed. Part IV answers the question whether in the judicial practice of European courts it is possible to identify deferential approaches corresponding to U.S. standards. EU Courts’ jurisprudence in competition law field is analyzed in this respect.

7 Because of relevance for the analysis in the field of competition law the paper is focused only on the review of factual determinations issued through formal adjudication—hence the substantial evidence standard. The paper does not address arbitrary and capricious standard of review for factual determinations made through rulemaking or other procedures not involving formal adjudication.
Comparison with the judicial review of the FTC’s decisions is provided. Part V presents the principal findings. The paper is closed with Conclusions.

I. Judicial deference: delimiting the concept

Judicial deference concerns the accurate division of judicial and administrative powers. The intensity of judicial review of administrative action lies in the heart of this problem. One can imagine two extremes of court-administrative agency relation. One is a court issuing new decisions without any consideration of administrative agency findings. The other is a court fully bound by the determinations of administrative agency. Neither of these two situations may be really described as review—“they represent conclusions that the matter at issue is the unique business of the agency or of the courts, rather than a shared concern to be allocated between them”. Thus judicial review is concerned with the question about the weight of administrative agencies’ determinations in the judicial review process, or in other words, the scope of deference accorded by the court to these determinations. The scope of deference will normally depend on the standard of review applied by the court when assessing the decision of the initial administrative decision-maker. For example when it comes to review of

---

8 Peter L. Strauss, Todd D. Rakoff, Cynthia R. Farina, Gillian E. Metzger, Administrative Law, 926 (2011). See also Paul Craig, supra note 4, at 433 ( “it is not for the reviewing court to decide whether of it had been the primary decision-maker, it would have concluded that such probability existed”). It is underlined that one of the goals of judicial review is to promote efficient resource allocation between administrative agencies and the courts, Cass R. Sunstein, On the Costs and Benefits of Aggressive Judicial Review of Agency Action, 1989 Duke L.J. 522, 523-524 (1989); in this respect see also Louis L. Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev., 865 (1963).

facts “standard of review tells us how far the reviewing court should reassess findings of fact made by the primary decision-maker to decide whether the standard of proof for the initial decision has been attained or not”.10

Deference is understood in general English as a yielding of judgment or preference out of respect for the position, wish, or known opinion of another.11 In a legal context it may be associated with respect to decision-making by other authority. Jurisprudence in the U.S. and Canada suggest that the courts may defer to administrative agencies’ determinations if they are reasonable12 and that such deference has its grounds in respect for administrative agency decision-making.13 In legal literature deference is associated with such expressions as “reasonableness review” or “careful respect”.14 According to the Supreme Court of Canada “the concept of deference as respect requires of the courts not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”.15 However, as Justice Scalia pointed out the word deference does not necessarily have to mean

10 Paul Craig, supra note 4, at 433.


12 See Chevron, 467 U.S., discussed in detail infra Part II.

13 The Supreme Court of Canada observed: “Defence is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision-makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.” Dunsmuir v New Brunswick, (2008) 291 D.L.R. (4th) 577, 602.

14 Gary Lawson, Stephen Kam, supra note 9, at 11-12. They underline however that the meaning of deference may be truly established only in the context of each judicial opinion.

for courts “anything more than considering those views (views of Executive or Congress—M.B.) with attentiveness and profound respect” before they reject them.\textsuperscript{16}

Several rationales for judicial deference have been given in the legal literature. The first one is expertise.\textsuperscript{17} The argument is that “the courts should be slow to intervene where a decision has been made by a body entrusted by the legislature with the exercise of a function because of the particular skill and knowledge possessed by it”.\textsuperscript{18} Furthermore, specialist administrative bodies “which possess experience and expertise in a given area may be in a better position than the court to decide issues in a manner consistent with, and in furtherance of, the policy underlying enabling legislation”.\textsuperscript{19} In other words administrative agencies are in a better position to “exercise the policymaking discretion inherent in the administration of most modern statutes”.\textsuperscript{20} The second is separation of powers rationale.\textsuperscript{21} The courts defer to the decisions made by administrative agencies because of institutional competence of the executive branch to make decisions that involve policy judgments: “policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive”.\textsuperscript{22} The third one is democratic legitimacy. Administrative agencies are seen in this context as bodies that execute the law enacted by the


\textsuperscript{17} \textit{Id.}, at 514. See more: Ronald J. Krotoszynski, Jr., \textit{Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore}, 54 Admin. L. Rev. 735, 737, 739-739 (2002).


\textsuperscript{19} Hilary Biehler, \textit{supra} note 18, at 31.

\textsuperscript{20} Margaret H. Lemos, \textit{The Other Delegate: Judicially Administered Statutes and the Non Delegation Doctrine}, 81 S. Cal. L. Rev. 405, 445 (2008).

\textsuperscript{21} Antonin Scalia, \textit{supra} note 16, at 515.

\textsuperscript{22} \textit{Id.}
legislature that has—different to courts—a democratic mandate. In such view agencies are “delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals”. Fourth, judicial deference to administrative statutory interpretations relies on the theory of implied Congressional intent. When Congress passes a vague statute and gives an agency ability to enforce its provisions with the force of law, it implicitly delegates primary interpretive authority to the agency. Other arguments for deference regard the administrative agencies greater than courts political accountability for the decision taken. In this sense the courts, by deferring to agency policy judgements, “enhance the political responsibility of the agencies for the decisions they make”. It is also

23 William N. Eskridge, Jr. & Lauren E. Baer, supra note 18, at 1086-1087.


25 See Elizabeth Garrett, Legislating Chevron, 101 Mich. L. Rev. 2637, 2642-43 (2003); Cass R. Sunstein, Beyond Marbury: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2589 (2006). The theory of implied Congressional intent is an answer to the doubts that Chevron (see more infra Part II.A.) is in conflict with section 706 of the Administrative Procedure Act (mandating judicial review of questions of law) and more broadly constitutional task of courts to say what the law is. On the other hand it is argued that Chevron has basis in Article III doctrine of implicit judicial restraint, see Mark Seidenfeld, Chevron's Foundation, 86 Notre Dame L. Rev. 273, 275 (2013) (“It is a self-imposed constraint meant to create barriers against a court reading a statute to effectuate what its judges believe (either explicitly or implicitly) to be the best policy available when an appropriate alternative institution also bears responsibility for interpreting the statute”).

26 Evan J. Criddle, Chevron Consensus, 88 B.U. L. Rev.1271, 1288-1290 (2008); Lisa Schultz Bressman, Deference and Democracy, 75 Geo. Wash. L. Rev. 761, 762 (2007) notes that “scholars have widely endorsed Chevron and especially the principle of political accountability on which it rests”.

27 Eduardo Jordao, Susan Rose-Ackerman, supra note 3, at 8.
argued that administrative agencies are more likely to respond quickly to changing circumstances as well guarantee greater uniformity of the decisions across the nation.

II United States: deference to administrative agency as a rule?

Judicial deference is a concept developed in the U.S. by both courts and academics. This section of the paper presents the major developments in this area as they have evolved in the U.S. The rules governing the review of administrative agencies’ statutory interpretations and factual findings are discussed. The analysis serves as a point of reference for further study on judicial deference in Europe.

A. Interpretation of law: Chevron deference

In U.S. the question of judicial deference to administrative agency determinations has been extensively discussed for many years. This debate has been focused on the scope of deference to agencies’ legal interpretations. Before 1984 one could observe two conflicting lines in jurisprudence. Judge Henry Friendly in 1976 stated: “We think it is time to recognize (...) that there are two lines of Supreme Court decisions (...). Leading cases support (...) the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis. (...) However, there is an impressive body of law sanctioning free substitution of judicial for

28 According to Peter H. Schuck’s judicial deference to administrative agencies’ decisions may vitalize agencies by “infusing them with energy direction, mobility, and the capacity for change”, Peter H. Schuck, Foundations of Administrative Law, 175 (2004).

administrative judgment when the question involves the meaning of a statutory term.”  

The seminal ruling of the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council* confirmed the correctness of the former approach. The Court established a two-step test for determining when the court reviewing the administrative agency should defer to the legal interpretation of the statute the agency administers. At the first step the court determines whether the Congress has directly spoken to the precise question at issue. In cases where the court establishes that the statutory term was left ambiguous by Congress (it is not clear) the court determines at the second step whether the agency’s interpretation of the ambiguous term is reasonable. Thus the court when reviewing an administrative agency's construction of statute which it administers defers to agency interpretation of this statute unless the interpretation is unreasonable. It is not entitled to substitute the agency’s interpretation with its own even if other reasonable interpretations are possible.

*Chevron* rests on all deference rationales discussed above. It acknowledges directly that interpretation of legal terms that were left ambiguous by Congress involve policy-making decisions that require balancing of conflicting interests and exercise of discretion. Indeed,

---


31 See *Chevron*, 467 U.S.

32 Id. at 842-43.

33 Id. (“When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”).

34 Margaret H. Lemos, *supra* note 20, at 428-429 (“Critical to the Court’s decision was its recognition that an agency’s resolution of statutory ambiguity inevitably will involve an exercise of discretion”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 880-881 (2001) (“The central insight of Chevron is that any question of statutory interpretation where the answer is not compelled by traditional tools of
policy-making is for expert-agencies and not for the courts to be done and so the courts should defer to agencies’ policy choices. The Supreme Court explained that “(t)he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” It is entirely appropriate for the agencies “to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities”. This confirms that *Chevron* is based also on the theory of implied Congressional intent. The Court also sees agency expert character indispensable in technical and complex areas as an argument for deference. The same holds true with greater political accountability of agencies’ than of federal judges’. Separation of interpretation entails the exercise of discretionary policy.”). See also Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2228 (1997); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2087 (1990).

---


36 *Chevron*, 467 U.S. at 865-66. The Court noted also that: “Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments”.

37 See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (noting that *Chevron* “is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps”).

38 *Chevron*, 467 U.S. at 865-66 (“In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. (...) Judges are not experts in the field”).

39 *Id.* (“While agencies are not directly accountable to the people, the Chief Executive is”).
powers/democratic legitimacy argument is also present in Justice Stevens’ opinion. The need for agency responsiveness to changing circumstances seems to underline the ruling as well.

*Chevron* is the most often cited administrative law case in the U.S. It has both its defenders and critics. Recent empirical studies show that the Supreme Court often does not apply *Chevron* deference when dealing with administrative agency decisions. Such studies find confirmation in the recent Supreme Court decision in *King v. Burwell* where the Court found *Chevron* inapplicable to resolve statutory ambiguity when dealing with the extraordinary question of “deep economic and political significance”. It also happens that the courts reserve their traditional power to “say what the law is” under *Chevron*’s first step.

---

40 Id. ("Judges (…) are not part of either political branch of the Government").

41 Id. ("It is entirely appropriate for this political branch of the Government to make such policy choices (…) which Congress (…) left to be resolved by the agency charged with the administration of the statute in light of everyday realities").


45 See William N. Eskridge, Jr., Lauren E. Baer, *supra* note 18.

46 *King v. Burwell*, No. 14-114, 2015 WL 2473448, at *2 (U.S. June 25, 2015). *King v. Burwell* suggest also that a delegation of power to administrative agency to interpret ambiguous term should in “extraordinary cases” be explicit rather than only implicit, at *8.

47 The courts in U.S. have been traditionally perceived to be entrusted in duty to eventually say what the law is, see Antonin Scalia, *supra* note 16, at 514. In this respect see also Nathaniel Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 Vand. L. Rev. 470 (1950); Louis L. Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239 (1955). It is pointed that the courts’ traditional understanding of judicial role may overwhelm doctrinal initiatives to place some part of this responsibility in other hands, see Barry
when deciding whether the statutory term in question is clear or not and thus whether it is silent or ambiguous with respect to the agency’s policy decision.\textsuperscript{48} Such a state of affairs reflects opinions about the limited practical operationality of \textit{Chevron}.\textsuperscript{49} Nevertheless, \textit{Chevron} remains a starting point for the discussion about the intensity of judicial review of administrative action in the U.S. It is also of importance that the criticism against \textit{Chevron} formulated in the literature usually does not involve the rejection of the concept of judicial deference as such. What is pointed out is the need for clearer standards determining when the courts should defer to administrative agencies. Some scholars argue for example that \textit{Chevron} could be reduced only to its second step.\textsuperscript{50}

The discussion in the U.S. concerns especially the question when \textit{Chevron} is applicable. It is exactly the area where the dispute about the scope of judicial deference to the Federal Trade Commission’s interpretations arises (see infra Part IV.E.). Under the so called \textit{Chevron} step

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{48} Christine Kexel Chabot, \textit{Selling Chevron}, Admin. L. Rev., forthcoming (2015), available at SSRN, at 4. In \textit{King v. Burwell} the Supreme Court held that the decision whether given term is clear or not often requires contextual analysis (“If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words “in their context and with a view to their place in the overall statutory scheme.” \textit{FDA v. Brown \\& Williamson Tobacco Corp.}, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121”) \textit{King v. Burwell}, No. 14-114, 2015 WL 2473448 at *2.
\item \textsuperscript{49} \textit{Chevron} first step—whether Congress spoke precisely to the question at issue—is especially open for divergent assessment as the judges depending on their values may have a different views what ‘clear’ means. See \textit{A Pragmatic Approach to Chevron}, 112 Harv. L. Rev. 1723, 1723-24 (1999). It is observed that judges who are in favor of textualism tend to be less deferential as they do not look into the broader context of the interpreted term, see Bradford C. Mank, \textit{Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies}, 86 Ky. L. J. 575 (1997-98).
\end{itemize}
\end{footnotesize}
zero, the courts analyze whether the Congress intended to have courts defer to agency interpretation of the statute.\textsuperscript{51} The alternative is a more limited type of deference (\textit{Skidmore} framework) or the court’s \textit{de novo} review.\textsuperscript{52}

Two main operating principles deriving from the Supreme Court’s opinion in the \textit{Mead} case\textsuperscript{53} are taken into account when deciding about applicability of \textit{Chevron}. The first one “concerns the type of power Congress must bestow upon an agency in order impliedly to delegate interpretational authority to it”.\textsuperscript{54} The \textit{Chevron} deference is applicable only if Congress gave the agency the power to implement the statute either through the promulgation of legislative rules (rulemaking) or the rendering of binding adjudications.\textsuperscript{55} The second operating principle dictates that only interpretations delivered by means of formal rulemaking or binding adjudication are entitled to receive \textit{Chevron} deference.\textsuperscript{56} It is argued that “when


\textsuperscript{52} Thomas W. Merrill & Kristen E. Hickman, \textit{supra} note 34, at 836. However, such approach is rejected by Justice Scalia dissenting in \textit{United States v. Mead Corp.}, 533 U.S. 218 (2001). Scalia advocates that \textit{Chevron} deference should be accorded to any interpretations by agency of the statute with administers (with the exception of pure litigation positions), see the dissenting opinion, at 239-261.

\textsuperscript{53} See \textit{Mead}, 533 U.S.

\textsuperscript{54} Thomas W. Merrill & Kristen E. Hickman, \textit{supra} note 34, at 836-837.

\textsuperscript{55} \textit{Mead}, 533 U.S. at 227-227, the Supreme Court held that “(a)dministrative implementation of a particular statutory provision qualifies for \textit{Chevron} deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. Such delegation may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent”. The fact that the FTC has no practice of formal rulemaking in the field of unfair methods of competition is used as an argument against application of \textit{Chevron} to FTC’s legal interpretations. See in this respect \textit{infra} note 251.

\textsuperscript{56} Thomas W. Merrill & Kristen E. Hickman, \textit{supra} note 34, at 837.
agencies act through legislative rulemaking or binding adjudication, members of the public ordinarily will be afforded an opportunity to be heard before an interpretation is adopted.”

The presence of procedural guarantees supports the argument for the admissibility of broader deference: in such cases the procedures in place provide adequate surrounding for the statutory interpretation. It is argued that “extending Chevron deference to less formal interpretations would permit evasion of these procedural guarantees”. Thus Mead instructs that the broader procedural guarantees, the more restraint judicial review may be.

B. Interpretation of law: Skidmore deference

When the courts reject the application of Chevron deference, an administrative agency’s interpretations may still be accorded deference under Skidmore framework.

---

57 Id. See also Lisa Schultz Bressman, Chevron’s Mistake, 58 Duke L.J. 549, 556 (2009) (“courts would not allow agencies to assert interpretive authority when Congress has not authorized proper procedures.”)

58 Procedural formality conditions the scope of deference, see Elizabeth Magill, Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1035 (2011).

59 Lisa Schultz Bressman, supra note 57, at 556, argues that “procedural formality tends to ensure that agency action is rational and fair.”

60 Thomas W. Merrill & Kristen E. Hickman, supra note 34, at 837. For this reason one could expect greater deference to be accorded to the FTC. See supra Part IV.E.2.

61 Evan J. Criddle, supra note 26, at 1272 (“where agency decisionmaking processes satisfy all of the leading rationales for deference, the Court applies Chevron. Conversely, where any of the leading rationales for deference remains unsatisfied, the Court evaluates agency statutory interpretations under the residual Skidmore test”). See also Ronald M. Levin, Mead and the Prospective Exercise of Discretion, 54 Admin. L. Rev. 771, 772 (2002). Justice Scalia expressed view that Chevron test should an exclusive one, see Mead, 533 U.S. at 238, Scalia, J. dissenting.
judicial observation that the agency has proven its expertise in the question at issue. Under Skidmore deference agency views expressed in non-binding instruments (such as amicus briefs, opinion letters, policy statements, enforcement guidelines and agency manuals) are given whatever respectful consideration their reasoning deserves. Such informal interpretations according to Skidmore ruling “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”. Thus Skidmore calls upon reviewing

---

62 Gary Lawson, Stephen Kam, supra note 9, at 12-13, call this kind of deference an epistemological one. The courts defer because they think that the agency’s decision is “good evidence of the right answer”; they conclude that the agency is better situated to resolve a problem at stake. Differently Chevron deference may be called a legal one. Here the questions is about the extent to which courts are obliged to give a certain degree of deference to agency legal decisions simply because they are the legal decisions of agencies. In other words agency’s interpretation under Chevron has a “power to control”. Instead interpretation under Skidmore has a “power to persuade” (only), see Ronald M. Levin, supra note 61, at 772.

63 Skidmore v. Swift & Co., 323 U.S. 134 (1944); after years of doubts of Skidmore standard practical relevance it was brought back to life in consequence of Supreme Court rulings in Christensen v. Harris County, 529 U.S. 576, 587 (2000) and Mead, 533 U.S. at 230-33. It is underlined that in this two cases “the Court clarified that Chevron's scope is not limitless and that Skidmore governs a wide range of administrative interpretations that do not carry congressionally authorized legal force”, Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern Skidmore Standard, 107 Colum. L. Rev. 1235, 1237 (2007).

64 Gary Lawson, Stephen Kam, supra note 9, at 13.

65 Skidmore, 323 U.S. at 140.
courts to assess multiple factors to decide on a case-by-case basis what deference, if any, to afford agency’s legal interpretations.\textsuperscript{66}

Importance of Skidmore standard was confirmed in the Supreme Court’s Mead opinion. In Mead the Court held Customs Service “ruling letters” are not entitled to Chevron deference because they lack the force of law (they do not bind third parties—persons other than those who requested the Customs Service to issue them) and may be issued by multiple units of Customs Service. The Court crucially noted that in jurisprudence “the fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position”.\textsuperscript{67} Thus under Mead even if the agency’s interpretation lacks the force of law (it has not been adopted in formal rulemaking or formal adjudication process)\textsuperscript{68} it may still be accorded deference by the reviewing courts on the basis of an agency’s expertise and experience.

Hearst deference is the other type of deference alternative (and previous) to Chevron deference. In N.L.R.B. v. Hearst Publications the Supreme Court held that when the question of statutory interpretation (of the term “employee” in this case) is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.\textsuperscript{69} It is enough that agency

\begin{itemize}
  \item \textsuperscript{66} Kristin E. Hickman & Matthew D. Krueger, supra note 63, at 1236-1237.
  \item \textsuperscript{67} Mead, 533 U.S. at 228.
  \item \textsuperscript{68} Ronald M. Levin, supra note 61, at 776.
  \item \textsuperscript{69} N.L.R.B. v. Hearst Publications, 322 U.S. 111, 130-131 (1944) (“Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. (…) But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. (…) the
determination “has ‘warrant in the record’ and a reasonable basis in law”.

Courts must give “appropriate weight to the judgment of those whose special duty is to administer the questioned statute”. Application of *Hearst* by the courts means that they should defer in reviewing agency application of law to fact. It is underlined that in *Hearst* establishing the statutory meanings of “employee” involved the inductive, fact-specific, law application question for which agency should receive a lot of reasonable-style deference. Statutory interpretation by the FTC of the term of “unfair methods of competition” could be expected to be treated similarly in this respect.

**C. Review of facts: substantial evidence test**

The standards governing judicial review of administrative agencies’ factual determinations are less disputed than those of legal character. Review of facts established by the administrative agency is governed by the substantial evidence test. It has its sources both in written law (Section 706(2)(E) of Administrative Procedure Act, 5 U.S. Code § 706) and in jurisprudence (see most notably *Universal Camera Corp. v. NLRB*). According to this standard the court shall hold unlawful and set aside agency action found to be unsupported by substantial evidence. Conversely, the court must accept the agency’s findings of fact if they are supported by substantial evidence: “such relevant evidence as a reasonable mind might

---

70 *Id.* at 131

71 *Id.* at 130-131.


73 Gary Lawson, Stephen Kam, *supra* note 9, at 27.

74 For actual, different practice see *infra* Part IV.E.2.

75 See *Universal Camera*, 340 U.S.
accept as adequate to support a conclusion". The substantial evidence test governs also the judicial review of civil fines imposed by administrative agencies via formal adjudication. The substantial evidence standard is deferential. The agency’s “findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both”. The court must take into account all evidence collected, including the body of evidence opposed to the agency’s view. However, the Supreme Court acknowledged that the expertness of the agency also plays a role. It noticed that National Labor Relations Board (the agency in *Universal Camera* case) is “one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect”. Furthermore, even as to matters not requiring expertise, a court should not “displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo”. Also when it comes to the review of civil penalties imposed by administrative agencies the U.S. courts accord agencies a broad scope of deference what stems from the belief that

76 *Id.*, at 477.


78 *Universal Camera*, 340 U.S. at 490.

79 *Id.*, at 488.

80 *Id.*

81 *Id.*
administrative agencies are considered to enjoy discretion and to possess expertise in this field.\footnote{Butz, 411 U.S. at 185-86. See more Max Minzner, Why Agencies Punish, 53 Wm. & Mary L. Rev. 853, 911 (2012).}

In judicial practice the substantial evidence test may find application to a mixed question of fact and law, especially application of law to facts.\footnote{O'Leary v. Brown-Pac.-Maxon, 340 U.S. 504, 507-508 (1951) (“The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of ‘fact.’ Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term ‘fact.’ Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as ‘questions of law.’ (…) We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness. It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment”).} Determination of the meaning of “unfair method of competition” or “unfair labor practice” in the context of a particular fact situation may be an example here. In such a case the court determines whether the reasonable person could reach on the basis of facts of the case a conclusion that the agency reached.\footnote{William F. Funk, Richard H. Seamon, Administrative Law, 299 (2012) discussing “unfair labor practice”.
}

The difference between the standards governing the review of factual, legal and mixed question may be unclear in judicial practice. One could for example see the question of the definition of employee in \textit{Hearst} as a mixed question of fact and law where the facts of the case play a role in establishing whether the independently contracted “newsboys” may be understood as employees. The Labor Board determinations in \textit{Hearst} were upheld by the
court because it was reasonable and had a basis in law. The *Hearst* standard, even if classified often as governing a judicial review of legal questions, in fact corresponds to a substantive review test.\(^{85}\)

### III Europe: any place for judicial deference in the ECHR system?

Judicial deference to administrative agencies’ determinations as a distinctive legal concept is alien to European civil law tradition. In continental Europe, civil law countries’ courts are seen primarily responsible for the interpretation of law.\(^{86}\) Undoubtedly, the courts in European civil law countries are not obliged to defer to administrative agency’s reasonable interpretation of statutory provision that was left ambiguous by legislators. However, this in itself does not exclude a possibility that in practice—if certain conditions are met—the courts do not defer to expert administrative agencies’ determinations. The area of facts seems to be especially opened for courts’ respect to expert administrative conclusions. Such a hypothesis is tested in the light of the supranational standards that govern universally judicial review of administrative action in the Council of Europe countries\(^ {87}\)—standards stemming from Article 6 of the European Convention on Human Rights (ECHR).\(^ {88}\)

\(^{85}\) Gary Lawson, Stephen Kam, *supra* note 9, at 25.

\(^{86}\) Susan Rose-Ackerman, Peter L. Lindseth, *supra* note 4, at 445; Paul Craig, *supra* note 4, at 436. In particular, there is no counterpart of the theory of implied Congressional intent. See *supra* Part I.

\(^{87}\) Council of Europe consists of 47 Member States (all European countries except from Belarus are the members thereof). All Member States of Council of Europe are the ECHR contracting parties.

\(^{88}\) Article 6 ECHR plays nowadays a role of fundamental guiding principle both for Member States of Council of Europe (including 28 EU Member States) and EU institutions on how to build legal procedures so as everyone’s right to fair trial is guaranteed. The obligation to build the system of enforcement of EU law in accordance with Article 6 ECHR derives from Article 6(3) of the Treaty on European Union. Under this provision “fundamental
A. Standard of review in administrative cases classified as civil

The European Court of Human Rights (ECtHR) repetitively acknowledged that a right to judicial review is in the administrative decision-making context an important requirement of a right to fair trial provided in Article 6 ECHR. Decisions taken by administrative authorities that themselves do not satisfy the requirements of Article 6(1) ECHR must be subject to subsequent control by a "judicial body that has full jurisdiction" over questions of facts and law (full judicial review). 89

Full judicial review—as a principle—does not exclude per se the permissibility of limitation of the scope of judicial review of administrative authorities’ decisions. Right to a fair trial, rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” The Member States of Council of Europe (ECHR Contracting Parties) are bound directly by ECHR provisions and their interpretations stemming from ECtHR case law.

89 See the ECtHR judgment of 10 February 1983 in case Albert and Le Compte v. Belgium, no. 7299/75, 7496/76, paragraph 29 (“In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 is applicable, conferring powers in this manner does not in itself infringe the Convention (…). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1”, emphasis added) and paragraph 36 (“The public character of the cassation proceedings does not suffice to remedy the defect found to exist at the stage of the disciplinary proceedings. The Court of Cassation does not take cognisance of the merits of the case, which means that many aspects of "contestations" (disputes) concerning "civil rights and obligations", including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction"). The standard established in Albert and Le Compte is applicable in cases concerning the judicial review of administrative authorities’ decisions; see the ECtHR judgement of 22 November 1995 in case Bryan v United Kingdom, no. 19178/91, paragraph 40 and of 23 October 1995 in case Schmautzer v Austria, no. 15523/89, paragraph 34.
unlike some other rights protected by the ECHR (such as right to life and prohibition of inhuman or degrading treatment), is not absolute and may be limited. The ECtHR is ready to find the limitations of the scope of judicial review to be permissible in these administrative law cases that are classified by the ECtHR under the civil head of Article 6(1) ECHR: administrative cases that influence an applicant’s civil rights or obligations.\textsuperscript{90} For example, competition merger proceedings are classified as such.\textsuperscript{91}

The 1995 ECtHR judgment in \textit{Bryan} has established the rules governing limited judicial review in administrative cases classified as civil in a sense of Article 6 ECHR. The case concerned the sufficiency of judicial review of UK courts of the administrative decision concerning a breach of planning rules that governed the erection of new buildings in the green belt area. The ECtHR observed that in the case under complaint judicial review related to "points of law" only, was not capable of embracing all aspects of the administrative decision; that there was no rehearing of the original complaints submitted to the administrative body; that the UK court could not substitute its own decision on the merits for that of the administrative body; and that its jurisdiction over the facts was limited.\textsuperscript{92} Despite that, the ECtHR was satisfied with the judicial review provided by the UK court. It observed that apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the administrative decision could have been quashed by the court if it had been made by reference to irrelevant factors or without regard to relevant factors; if the evidence relied on by the inspector was not capable of


\textsuperscript{92} \textit{Bryan}, supra note 89, at paragraph 44.
supporting a finding of fact; if the decision was based on an inference from facts which was perverse or irrational.\textsuperscript{93} Speaking about the assessment of sufficiency of the review, the ECtHR observed that “it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal”.\textsuperscript{94} Also according to the ECtHR, respect should be given by the court to decisions taken by administrative authorities on grounds of ‘expediency’.\textsuperscript{95}

The required intensity of review depends in the light of Bryan similarly to U.S. Mead standard on the presence of procedural safeguards during administrative phase of the proceedings and institutional guarantees of independence and impartiality of the administrative decision-maker.\textsuperscript{96} The greater the level of procedural guarantees and the more quasi-judicial the proceedings are, the more limited the scope of judicial review may be. In any case, procedural shortcomings alleged by the party should be subject to review by the court.\textsuperscript{97} The ECtHR does not expect de novo review of evidence by the court.\textsuperscript{98} It is sufficient that the reviewing court

\textsuperscript{93} Id.

\textsuperscript{94} Id., at paragraph 45.

\textsuperscript{95} Id., at paragraph 47.

\textsuperscript{96} Id., at paragraph 46 (“In this connection the Court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality”).

\textsuperscript{97} Id., at paragraph 46.

\textsuperscript{98} Id., at paragraph 47 (“while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector’s findings of fact or the inferences based on them were neither perverse nor irrational”). However in Bryan there was no dispute as to the primary facts before the High Court (Id.)
has a power to assess whether “the findings of fact or the inferences based on them were neither perverse nor irrational”. Such standard seems to be even more deferential than U.S. substantial evidence test. However, it remains applicable only in cases which review factual findings that concern “policy matters” in “the specialized area of law” and where the subject-matter of the contested administrative decision is an example of “exercise of discretionary judgment in the regulation of citizens’ conduct”.

If these elements are lacking and the procedural guarantees during the administrative phase are limited, the ECtHR requires a more thorough review of administrative factual findings. Still, required judicial scrutiny does not seem to be greater from U.S. substantial evidence test requirements as to matters not requiring expertise. In Tsfayo, the case concerning the administration’s refusal to pay backdated housing benefits to an Ethiopian national living in the UK, the ECtHR observed that in Bryan “the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims”. In contrast, in Tsfayo “no specialist expertise was required to determine pure factual issue at stake” (the question whether there was “good cause” for the applicant's

99 *Id.*, at paragraph 47. See also the ECtHR judgment of 18 January 2001 in case *Jane Smith v UK*, no. 25154/94, paragraph 133.

100 *Id.*, at paragraph 47 (“These submissions, as the Commission noted, went essentially to questions involving “a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a conservation area”).

101 *Id.*, at paragraph 47 (“Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1. It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens’ conduct in the sphere of town and country planning.”, emphasis added).
delay in making a claim).\textsuperscript{102} As opposed to \textit{Bryan} the factual findings could not have been said “to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take”.\textsuperscript{103} Additionally, the administrative agency that decided the case was not impartial (it was directly connected to one of the parties to the dispute) and the procedural safeguards were not adequate to overcome this.\textsuperscript{104} For these reasons the ECtHR found the judicial review not to be sufficient in the instant case.\textsuperscript{105} It seems that similar conclusion could have been reached under U.S. substantial evidence test.

The approach taken by the ECtHR in \textit{Bryan} and confirmed in a different factual and procedural context in \textit{Tsfayo} established a standard used by the ECtHR when assessing whether the judicial review of administrative law cases classified under the civil head of Article 6 ECHR is “sufficient”. In 2011 in \textit{Sigma Radio Television}, a case concerning the breach of rules governing broadcasting the materials for children by a television broadcaster, the ECtHR applied the \textit{Bryan/Tsfayo} rationale and concluded that the judicial review provided by the Cyprus Supreme Court was sufficient.\textsuperscript{106} The ECtHR used also the instant case to

\textsuperscript{102} The ECtHR judgment of 14 November 2006 in case \textit{Tsfayo v UK}, no. 60860/00, at paragraph 46.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at paragraph 47.

\textsuperscript{105} \textit{Id.} at paragraph 48.

\textsuperscript{106} The review was found to be sufficient despite the fact that the Supreme Court could not substitute its own decision for that of the national broadcasting authority and its jurisdiction over the facts was limited. The ECtHR observed that the subject matter of the administrative decision in question was a classic exercise of administrative discretion in the specialised area of law and that a number of procedural guarantees were available to the applicant in the administrative proceedings and that the applicant’s allegations as to shortcomings in this proceedings, including those concerning objective partiality and the breach of the principles of natural justice, were subject to review by the Supreme Court. The ECtHR observed also that the Supreme Court analyzed in detail all points raised in the recourse. Differently than in \textit{Tsfayo} the applicant’s case did not
repeat that the level of expertise needed to decide the case, the presence of procedural guarantees and the extent to which the administrative discretion is involved influences the required intensity of judicial review. Additionally, according to the ECtHR the court must always be empowered to determine the central issue in dispute and to remand the case to the administrative agency. The ECtHR was consistent in applying this U.S.-like Bryan rationale in other cases classified as civil in a sense of Article 6 ECHR.

B. Standard of review in administrative cases classified as criminal

The ECHR does not distinguish administrative cases as such. They are classified as either civil or criminal in a sense of Article 6 ECHR. The administrative law cases that involve heavy fines (such as competition law cases) are classified in the ECtHR jurisprudence as
centre on a fundamental question of fact which the Supreme Court did not have jurisdiction to revisit (the ECtHR judgment of 21 July 2011 in case Sigma Radio Television v Cyprus, no. 32181/04 and 35122/05, paragraphs 159-166).

107 Sigma, supra note 106, at paragraph 154 (“(i)n assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialized issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal”)

108 Id. See also the judgment of 27 October 2009 in case Crompton v UK, no. 42509/05, paragraphs 78-80.

109 The ECtHR judgment of 7 November 2000 in case Kingsley v UK, no. 35605/97, paragraphs 58-59

Still, they fall out of the scope of the “hard core of criminal law” and so fully blown criminal procedural safeguards do not have to be provided. The factual and legal determination as well as the imposition of fines may be delegated at first instance to administrative agency that does not meet the requirements of tribunal (court) in a sense of Article 6 ECHR, most importantly it is not fully independent and impartial. However, in

111 See the judgement of 24 February 1994 in case Bendenoun v France, no. 12547/86, paragraph 52 and of 23 July 2002 in case Janosevic v Sweden, no. 34619/97, paragraph 90 for tax law cases. For financial law cases see ECtHR decision of 27 August 2002 in case Didier v France, no. 58188/00 and a judgment of 11 June 2009 in Dubus v. France, no. 5242/04, paragraph 36. For such classification of competition law cases see the detailed analysis in ECtHR judgement of 27 September 2011 in case Menarini v Italy, no. 43509/08, paragraphs 38-45; compare also the opinion of AG Sharpston of 10 February 2011 in case C-272/09 P KME Germany AG, paragraph 64 and opinion of AG Léger of 3 February 1988 in case C-185/95 P Baustahlgewebe v Commission, paragraph 31. The application of Article 6 ECHR under its criminal head is the result of the applicability of Engel conditions: although practices restricting competition are classified as administrative and not criminal, the general and abstract character of the prohibition as well the deterrent, repressive, severe and stigmatising character of fines (not compensatory one) decides about criminal character of the proceedings concerning these practices. For Engel criteria see the ECtHR judgement of 8 June 1976 in case Engel and others v the Netherlands, no. 5100/71, paragraph 82 and the ECtHR judgement of 21 February 1984 in case Öztürk v Germany, no. 8544/79, paragraph 50.

112 In criminal cases sensu stricto the first instance decision must be delivered by the court (see infra note 115). Thus in such situation the question about the judicial review of administrative action does not appear at all. Similarly in the U.S. Chevron does not apply to criminal law decisions. Agencies do not have a power to independently impose criminal sanctions with the force of law, they must litigate and convince a court to impose criminal liability.

113 The ECtHR judgment of 23 November 2006 in case Jussila v. Finland [GC], no. 73053/01, paragraph 43.

114 The ECtHR judgment in Öztürk, supra note 111, at paragraph 58 and more recently in Jussila, supra note 113, at paragraph 43; Menarini, supra note 111, at paragraph 59 and the ECtHR judgment of 4 March 2014 in case Grande Stevens and Others v Italy, no. 18640/10, at paragraphs 138-139.
such situations the question is whether deferential standard of review will pass the test of Article 6 ECHR. In other words, we may ask whether the standard established in Bryan and confirmed among others in Tsfayo and Sigma, all of which were classified by the ECtHR as civil cases\textsuperscript{116}, may govern the review of administrative authorities’ decisions in which fines are imposed.

In Sigma the ECtHR the Court did not find necessary to determine whether the criminal limb of Article 6(1) ECHR was applicable in that case. It stated only that paragraph 1 of Article 6, violation of which was alleged by the applicant, applies in civil matters as well as in the criminal sphere.\textsuperscript{117} By doing so the ECtHR did not explain whether there is any difference as

\textsuperscript{115}Bendenoun, supra note 111, at paragraph 46 and Janosevic, supra note 111, at paragraph 81; Jussila, supra note 113, at paragraph 43; in Findlay, a criminal case sensu stricto the ECtHR held that such case must be heard already at first instance by tribunal that fully meets the requirements of Article 6 (judgment of 25 February 1997 in case Findlay v. the United Kingdom, no. 22107/93, paragraph 79). A "tribunal" is characterized in the ECtHR’s jurisprudence in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner; it must also satisfy a series of further requirements—Independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure, see the judgment of 29 April 1988 in case Belilos v Switzerland, no. 10328/83, paragraph 64.

\textsuperscript{116}See also other cases supra note 110.

\textsuperscript{117}Sigma, supra note 106, at paragraph 126; compare also Albert and Le Compte, supra note 89, at paragraph 30 (“the Court does not believe that the two aspects, civil and criminal, of Article 6 para. 1 are necessarily mutually exclusive”) and more recently in Volkov, supra note 110, at paragraph 92. The applicant in Sigma argued, that the fines imposed by national broadcasting authority were in fact of a criminal nature and that therefore the complaint could also be examined under the criminal head of Article 6(1) ECHR and relied on the findings of the ECtHR in Jussila. The ECtHR denied dealing with the sufficiency of review of fines by the Cyprus Supreme Court because these issues were not raised by the applicant before that court in the legal points on which its recourses were based (Sigma, supra note 106, at paragraph 167). The ECtHR was also persuaded by the Government position that a number of Supreme Court judgments in judicial review proceedings indicate that the
to the required scope of procedural safeguards under Article 6(1) ECHR\textsuperscript{118} between cases classified as civil and those criminal cases that in \emph{Jussila} words fall out of the scope of hard core of criminal law. Some scholars indirectly suggest that \textit{Sigma} test determining the notion of sufficiency of judicial review could find application in cases classified as criminal in a sense of Article 6 ECHR.\textsuperscript{119} However, the ECtHR jurisprudence does not confirm this.\textsuperscript{120}

Supreme Court has the competence to examine the necessity and proportionality of the fines in its judicial review role (\textit{Id.}, at paragraph 168).

\textsuperscript{118} Paragraphs 2 and 3 of Article 6 ECHR may find application only in criminal cases (see the wording of these provisions).

\textsuperscript{119} Renato Nazzini, \textit{Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective}, 49 Common Market Law Review 971, 989 (2012) (“The distinction between the determination of a “criminal charge” and the determination of “civil rights and obligations” is relevant but only as a contextual element of the functionalist analysis that specifies the intensity of the protection in each individual case. There is no obstacle in principle, therefore, to extending the jurisprudence of the Court in cases concerning civil rights and obligations to the determination of criminal charges, particularly in the light of the overbroad definition of “criminal charge” under Article 6(1)”). For a different opinion see Editorial Comments, \textit{Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights}, 48 Common Market Law Review 1405, 1411 (2011). Nicholas Khan and Wouter Wils also refers to \textit{Sigma} in the analysis of judicial review of EU Commission decisions; see Nicholas Khan, \textit{Kerse & Khan on EU Antitrust Procedure} 564 (2012) and Wouter Wils, \textit{The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker}, 37 World Competition (2014), available at SSRN, at 8. See also Andreas Scordamaglia-Tousis, \textit{EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights} 149 (2013).

\textsuperscript{120} In the judgment of 17 April 2012 in case \textit{Steininger v Austria}, no. 21539/07 the ECtHR after discussing the standards of assessing sufficiency in civil cases stemming from \textit{Bryan} noted that “(i)n the present case, however, the criminal head of Article 6 § 1 applies to the proceedings at issue and in its case-law the Court followed a different approach as regards the scope of review of criminal sanctions imposed by administrative authorities” (paragraph 52).
Rather when discussing the required scope of judicial review of administrative decisions imposing fines (“non-hard core” criminal cases) the ECtHR uses different language and does not rely on Bryan, Tsfayo, Sigma and its other “civil” cases. Nevertheless, in some administrative cases classified as criminal in a meaning of Article 6 ECHR the ECtHR accepts a review that is formally limited to legal questions if in fact it goes further so as the evidentiary issues are also reviewed. What is more the presence of institutional and procedural due process safeguards during the administrative phase of the proceedings seem to play an indirect role in satisfying the ECtHR with the intensity of judicial review provided by the national courts. The cases such as Menarini and Grande Stevens substantiate in particular these views.\textsuperscript{121}

1. Review of law and facts

In two cases against Austria decided in 1995: Umlauff and Schmautzer the ECtHR described what “full jurisdiction” means in cases concerning criminal charge in a sense or Article 6 ECHR where the first instance adjudicative body does not meet the requirement of Article 6 ECHR. Both cases involved fines imposed for violation of road law. The ECtHR laconically defined characteristics of a "judicial body that has full jurisdiction". Such body should have a power to quash in all respects, on questions of fact and law, the decision of the body below\textsuperscript{122} as well as examine all the relevant facts.\textsuperscript{123}

This standard was invoked in 2002 in Janosevic, a case concerning the imposition of tax surcharges qualified as criminal sanctions within the autonomous meaning of Article 6(1)

\textsuperscript{121} See Menarini, supra note 111 and Grande Stevens, supra note 114. See also infra Part V.A.2.

\textsuperscript{122} Schmautzer, supra note 89, paragraph 36; judgement of 23 October 1995 in case Umlauff v Austria, no. 15527/89, paragraph 39

\textsuperscript{123} Schmautzer, supra note 89, at paragraph 35; Umlauff, supra note 122, paragraph 38.
ECHR. The ECtHR held that the system where tax authorities are entitled to impose sanctions like tax surcharges is not incompatible with Article 6(1) ECHR so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including (in Umlauft words) the power to quash in all respects, on questions of fact and law, the challenged decision. Such situation was found to exist in Janosevic. The ECtHR observed that the Swedish administrative court had jurisdiction to examine all aspects of the matters before them and was not restricted to points of law but could also extend to factual issues, including the assessment of evidence. If it disagreed with the findings of the Tax Authority, it had the power to quash the decisions appealed against it. Insufficient review was instead found to be provided in Steininger in 2012. The ECtHR, after consciously rejecting the possibility of relying on Bryan standard on the basis of Umlauft/Schmautzer and Janosevic, found that the Austrian administrative court’s decision merely related to questions of law by simply referring to a previous decision on a similar matter and contained no answer to the applicant company’s complaint relating to the facts. For this reason such

124 Janosevic, supra note 111, at paragraph 81; compare also the judgement of 23 July 2002 in case Västberga Taxi Aktiebolag and Vulic v. Sweden, no. 36985/97.

125 Janosevic, supra note 111, at paragraph 81. The ECtHR relied on Umlauft, supra note 122. See also the ECtHR judgment of 13 February 2003 in case Chevrol v France, no. 49636/99, paragraph 77.

126 Janosevic, supra note 111, at paragraph 82.

127 Id.

128 Steininger, supra note 120, at paragraph 52. See also the ECtHR judgement of 23 October 1995 in case Gradinger v. Austria, no. 15963/90, paragraph 44.

129 Steininger, supra note 120, at paragraph 57.
review was not qualified “as adequate ‘full review’ of the applicant company’s criminal conviction passed by an administrative authority”\textsuperscript{130}

The Umlauft/Schmautzer standard was also invoked by the ECtHR in 2004 in Silvester’s Horeca Service\textsuperscript{131}, in 2011 in Menarini\textsuperscript{132}, in 2012 in Segame\textsuperscript{133} and in 2014 in Grande Stevens\textsuperscript{134}. Out of these four cases, Menarini is the most often commented on in the literature. This case is particularly famous in competition law circles as it is seen to confirm the accordance of the EU competition law enforcement system in view of its similarity to the Italian system with respect to Article 6 ECHR requirements.\textsuperscript{135} The ECtHR repeated that in

\textsuperscript{130} Id., at paragraph 57. The same conclusion was reached by the ECtHR in view of the similarities of the facts in the judgement of 4 April 2013 in case Julius Kloiber Schlachthof and Others v Austria, no. 21565/07, paragraphs 28-34.

\textsuperscript{131} The ECtHR judgement of 4 March 2004 in case Silvester’s Horeca Service v Belgium, no. 47650/99, paragraph 26.

\textsuperscript{132} Menarini, supra note 111, at paragraph 59.

\textsuperscript{133} The ECtHR judgement of 7 June 2012 in case Segame v France, no. 4837/06, paragraph 55.

\textsuperscript{134} Grande Stevens, supra note 114, at paragraph 139.

\textsuperscript{135} Alexander Italianer, the Director General of DG Competition observed in October 2011 that the judgement in Menarini confirms “the legitimacy of administrative systems, a model followed by many competition agencies. It also corroborates the case law of the European Court of Justice which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial”, see Alexander Italianer, Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf, at 3. See also Wouter Wils, supra note 119, at 7. Many authors have criticized EU system in this respect, see for example Donald Slater, Sebastian Thomas and Denis Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?, 8 The Global Competition Law Centre Working Papers Series – GCLC Working Paper 7 (2004); James Killick, Pascal Berge, This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in, 6(2)
criminal cases falling out of the scope of the hard core of criminal law\textsuperscript{136} it is permissible that administrative agency delivers the first-instance decision and imposes fines as long as this decision is reviewed by the judicial body that has full jurisdiction.\textsuperscript{137} Subsequently, the ECtHR provided the analysis of sufficiency of judicial review of Italian courts. It found that their review of the Italian competition agency’s decision imposing fine on company for its participation in cartel was indeed in accordance with Article 6 ECHR.\textsuperscript{138} The ECtHR observed that judicial review was not limited to the questions of legality only. The Italian courts (Lazio administrative court and subsequently Council of State) could determine whether, in relation to the particular circumstances of the case, the competition authority had made proper use of its powers. They were able to examine the validity and proportionality of the administrative decision and even check technical assessments. In the instant case, various allegations of fact and law were also analyzed and so the evidence collected was assessed. The ECtHR was satisfied with the judicial review in this particular case and so did not answer in a complex way the question what is the required scope of judicial review of the

\textsuperscript{136} The ECtHR did not use exactly the Jussila language but in fact confirmed it by stating that the nature of an administrative procedure may differ in several respects form the nature of criminal proceedings in the strict sense of the term, see Menarini, supra note 111, at paragraph 62.

\textsuperscript{137} Id., at paragraph 59.

\textsuperscript{138} Id., at paragraphs 63-67. However, see the strong dissent by Judge Pinto de Albuquerque. Menarini questioned that the legality review exercised by Italian courts (under which the courts were checking the qualification of facts to law) did not cover factual determinations that were a central issue in the case (Menarini, paragraphs 13-17). For a comment see for example Marco Bronckers, Anne Vallery, Fair and Effective Competition Policy in the EU: which Role for Authorities and which Role for the Courts After Menarini, 8 European Competition Journal 283, 285-289 (2012).
administration’s discretionary powers, and whether any deference to competition agency’s determination is permissible in a view that this is a specialized area of law that requires expert knowledge and involves the use of discretion. Still, the ECtHR did not expect from the Italian courts reviewing the competition agency decision to have a power to substitute its own view for this of the agency or to fully rehear the evidence. What was necessary was the review of facts—a requirement in line with the U.S. substantial evidence test.

2. Review of fines

The Silvester's Horeca Service, Menarini, Segame and Grande Stevens cases show that under the ECHR principle of full review the courts reviewing administrative agency’s decision imposing fines should have a power both to lower and to annul it. Nothing suggests that the ECtHR may be ready to accept a deferential standard of review in this respect.

In Silvester's Horeca Service the Court of Appeal of Brussels was only called upon to examine the reality of offenses of VAT and review the legality of tax penalties claimed, without being competent to assess whether or grant a full or partial waiver thereof. It could “relieve the debtor of the obligations are legally imposed by the authorities, only for reasons of expediency or fairness”.

Such review was found by the ECtHR not to be satisfactory from an Article 6 ECHR point of view.

---

139 The ECtHR was simply satisfied with the Council of State opinion that the Italian courts may control whether the administration has made proper use of its discretionary powers (even if they may not substitute its opinion for this of administration), see Menarini, supra note 111, at paragraphs 53 and 63.

140 Silvester's Horeca Service, supra note 131, at paragraph 28.

141 Id., at paragraphs 28, 30. See also the ECtHR judgement of 26 September 1995 in Diennet v. France, no. 18160/91, paragraph 34 (“Conseil d'Etat (…) cannot be regarded as a "judicial body that has full jurisdiction", in particular because it does not have the power to assess whether the penalty was proportionate to the misconduct.”)
Conversely, the ECtHR found the review of fines to be sufficient in *Segame*\textsuperscript{142}, *Menarini*\textsuperscript{143} and *Grande Stevens*.\textsuperscript{144} In *Segame* the ECtHR observed that the applicant company was able to lodge an application with the administrative court to be exempted from paying the additional tax and fines.\textsuperscript{145} The administrative court had broad powers and full jurisdiction to assess all the elements of fact and law and could not only quash or uphold an administrative decision, but also change it or replace it with its own decision and rule on the rights of the interested party.\textsuperscript{146} It could exempt the taxpayer from the disputed taxes and penalties or modify the amount thereof within the limits prescribed by law, and where penalties were concerned, it could lower the rate within the limits of the applicable legal provisions.\textsuperscript{147} The applicant could also discuss before the court the base used to calculate the tax in order to persuade the administrative court to reduce it.\textsuperscript{148} However, the ECtHR accepted the system where the fiscal fine is expressed as a percentage of the unpaid tax.\textsuperscript{149} In the opinion of the

\textsuperscript{142} *Segame*, supra note 133, at paragraphs 56-59.

\textsuperscript{143} *Menarini*, supra note 111, at paragraphs 65-66.

\textsuperscript{144} *Grande Stevens*, supra note 114, at 149 (The Court of Appeal “was also called upon to assess the proportionality of sanctions in relation to the seriousness of the alleged conduct. In fact, it has also reduced the amount of fines and the duration of the ban imposed for certain applicants (...) and examined their various allegations of legal or factual.”)

\textsuperscript{145} *Segame*, supra note 133, at paragraphs 56.

\textsuperscript{146} Id.

\textsuperscript{147} Id.

\textsuperscript{148} Id., at paragraph 57.

\textsuperscript{149} The applicant was complaining that in such a system the administrative courts did not have the power to vary the fiscal fine in the absence of any legal provision to that effect (Id. at paragraph 58) The ECtHR answered “that the law itself, to a certain degree, makes the fine proportionate to the seriousness of the taxpayer’s conduct, by expressing it as a percentage of the unpaid tax, the calculation of which the applicant company had ample opportunity to discuss in this case” (Id. at paragraph 59).
ECtHR such a system is needed for fiscal measures to be sufficiently effective to preserve the interests of the State.\textsuperscript{150} It is also permissible on the grounds that “such cases differ from the hard core of criminal law for the purposes of the Convention”.\textsuperscript{151}

In \textit{Menarini} the ECtHR relied also on \textit{Silvester's Horeca Service} and found that—correctly—Italian courts had full jurisdiction over the penalty imposed as they could verify its appropriateness and if needed change it. The ECtHR observed that indeed the courts engaged in a detailed analysis of the proportionality of the sanction itself. Similar situation appeared in \textit{Grande Stevens}. The ECtHR observed that the reviewing court was called upon to assess the proportionality of sanctions in relation to the seriousness of the alleged conduct and confirmatively noted that it has also reduced the amount of fines and the duration of the ban imposed for certain applicants.\textsuperscript{152}

\section*{IV. Judicial deference in practice: a case of competition law}

The study of the ECtHR jurisprudence reveals that U.S.-like judicial deference may—at least when it comes to facts—be found permissible in the light of the European standard’s most important fundamental rights framework. However, the question remains whether in the judicial practice of European courts one can identify approaches corresponding to U.S.

\begin{flushright}\footnotesize\textsuperscript{150} Id. at paragraph 59.\end{flushright}

\begin{flushright}\footnotesize\textsuperscript{151} Id.\end{flushright}

\begin{flushright}\footnotesize\textsuperscript{152} Grande Stevens, supra note 114, at 149. In \textit{Sigma} (case decided under Article 6 civil head) the ECtHR was not assessing the compatibility of the review of fines with the requirements of Article 6 ECHR. However, it was content to observe that the Cyprus Supreme Court has the competence to examine the necessity and proportionality of the fines (\textit{Sigma}, supra note 106, at 168).
judicial deference. The following analysis of EU Courts jurisprudence\textsuperscript{153} is aimed to reveal whether the EU Courts: the General Court (GC) and the Court of Justice (CJEU) accord deference to the European Commission’s legal and factual determinations. The focus is on the Commission’s decisions in the competition law field (antitrust). In this field the Commission acts similar to U.S. federal administrative agencies: it is responsible for the competition policy, has a power to issue individually addressed decisions against firms involved in anti-competitive behavior (to issue cease and desist orders and impose civil fines) and has significant expertise (also of economic character). Thus it may serve as a relevant point of reference for comparative studies on judicial deference. In order to fully address the question of judicial deference in the competition law field, this part of the paper offers comparative analysis of the intensity of judicial review of the U.S. Federal Trade Commission’s decisions—U.S. administrative agency that follows administrative process similar to the EU one.

A. Review of facts in EU competition law

The EU Commission decisions issued under Article 101 (prohibition of agreements restricting competition) and Article 102 (prohibition of abuse of dominant position) of the Treaty on the Functioning of the European Union\textsuperscript{154} (TFEU) and under EU Merger Regulation\textsuperscript{155} are reviewed by the EU Courts under Article 263(4) TFEU.\textsuperscript{156} Review provided in Article 263

\textsuperscript{153} For a study of judicial review of administrative action in France and Italy see Eduardo Jordao, Susan Rose-Ackerman, \textit{supra note 3, at 23-39.}

\textsuperscript{154} Official Journal C 83, 30.3.2010., p. 47.


\textsuperscript{156} Article 263(4) TFEU provides that any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them. On this basis the undertaking
TFEU is described by the EU Courts as “review of legality”. Where the EU Courts find the decision of the Commission to be illegal (in violation of Article 263(2) TFEU) they annul it and remand to the Commission. Most often this annulment takes place on an evidentiary basis because of insufficient proof supporting the Commission conclusion that Article 101 or 102 TFEU was violated or because of infringement of an essential procedural requirement that might have affected the outcome of the decision.

found by the Commission in violation of EU competition rules or other entity affected by the EU Commission’s decision (such as competitor) may bring an action for annulment of the Commission decision to the General Court and next on points of law to the Court of Justice. In such situation on the basis of Article 263(2) of the TFEU the EU Courts have jurisdiction on grounds of (1) lack of competence of the Commission, (2) infringement of an essential procedural requirement by the Commission, (3) infringement of the EU Treaties (in the competition context especially Article 101 or 102 of TFEU) or of any rule of law relating to its application (such as the regulation on implementation of Article 101-102) by the Commission and (4) misuse of powers by the Commission.


158 This may be considered either a violation of Article 263(2) TFEU third annulment ground or the violation of Article 263(2) TFEU second ground. However, it is underlined that the modern trend is to discard the formal grounds of Article 263 TFEU and plead simply that the Commission has not proven the infringement, see Nicholas Khan, supra note 119, at 575. The GC’s approach is to assess whether the evidence was sufficient to establish infringement, cases T-305/94, etc. Limburgse Vinyl Maatschaapij v Commission [1999] ECR II-931.

159 This happened, for example, where the Commission relied on the interpretation of a number of documents upon which parties had no chance to comment on (see T-30/91 Solvay v Comission, [1995] ECR II-1775, paragraph 81), where the Commission failed to properly explain charges contained in a statement of objections (case 17/74 Transocean v Comission, [1974] ECR 01063, para. 13-20; case T-191/98 Atlantic Container Line AB and others v. Comission, [2003] ECR II-3275, paragraph 113, 162) and where its decision lacked proper justification (case T-101/03 Suproco NV v. Comission, [2005] ECR II-3839, paragraph 20). See also Nicholas Khan, supra note 119, at 590-591. More recently, the CJEU set aside the General Court judgment to the extent that it rejected Ballast Nedam’s plea in law about the infringement of its rights of the defense (ambiguity in the
The analysis of EU Courts’ jurisprudence show that an ordinary standard of review of facts corresponds to the U.S. substantial evidence test. The EU Courts undertake a comprehensive (exhaustive) review of the examination carried out by the Commission. This review concerns “both the Commission's substantive findings of facts and its legal appraisal of these facts”. Thus the Commission’s decision is subject to judicial control from the point of view of the correctness and importance of the facts established by the Commission. The EU Courts check whether the Commission produced “sufficiently precise and consistent evidence” to support the firm conviction that the alleged infringement took place.

At the same time the EU Courts, similar to U.S. courts reviewing the factual determinations of administrative agencies, do not exercise de novo review: they do not consider possible alternative outcomes of the case as they simply check whether the evidence collected supports the Commission’s conclusion. Scholars argue that such shape of judicial review has its wording of the statement of objections), see C-612/12 P Ballast Nedam v Commission, not yet published, judgment of 27 March 2014, paragraphs 22-31.


161 Cimenteries CBR, supra note 160, at paragraph 719.

162 Case T-156/94 Siderugica Aristrain Madrid SL v. Comission, [1999] ECR II-645, paragraph 115; See also Arianna Andreangeli, supra note 91 at 152.

163 Nicholas Khan, supra note 119, at 576.

164 Damien Gerard, Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts? 36 European Law Review 457, 469 (2011) (The EU Courts “do not carry out anew a balance of probabilities between the different interpretations of the evidence as put forward by the Commission on the one hand, and the applicant(s) on the other. Rather, they check the internal consistency of the ratio deciden di of the Commission’s decision”). See also Jose Carlos Laguna de Paz, Understanding the limits of judicial review in European Competition Law,
grounds in the division of tasks between the Commission and the EU Courts (it is for the Commission, not for the EU Courts to conduct competition policy\textsuperscript{165}) and a presumption that the Commission is better placed to choose between conflicting interests.\textsuperscript{166} Corresponding to the rationales on which both \textit{Chevron} and the U.S. substantial evidence test is based on, it is argued that “if there is a choice between two approaches on which reasonable people may disagree, then the Courts may be expected to leave the Commission’s assessment alone”.\textsuperscript{167} Reflection of such view may be found in jurisprudence where the EU Courts points at the need of preservation of the “inter-institutional balance” within the EU\textsuperscript{168} what prohibits them to encroach on the discretion enjoyed by the Commission.\textsuperscript{169}

\textsuperscript{165} Bo Vesterdorf, \textit{Judicial review in EC competition law: Reflections on the role of the Community courts in the EC system of competition law enforcement}, 1 Competition Policy International 3, 10 (2005) (“(t)he system envisages a sort of institutional balance. The Commission and the Courts should focus on their respective primary functions: competition policy and enforcement on the one hand, judicial review on the other”).


\textsuperscript{167} Renato Nazzini, \textit{supra} note 119, at 996 invoking the opinion of Bo Vesterdorf. For a more general discussion of institutional balance in the EU see Alexander Fritzsche, \textit{Discretion, Scope of Judicial Review and Institutional Balance in European Law}, 47 CML Rev. 361, 390-392 (2010).

\textsuperscript{168} Joined cases T-68, 77-78/89, \textit{Societa Italiana Vetro and Others v Commission}, [1992] ECR II-1403, paragraphs 319-320 (“Accordingly, the Court considers that, although a Community court may, as part of the
B. Review of complex economic assessment in EU competition law

A nominally lighter standard of judicial review (manifest error of assessment standard) is applicable by the EU Courts when it comes to Commission’s complex economic and technical assessment. The EU Courts recognize that the Commission has in this field “a margin of appreciation”. In line with the acceptance of deference under the U.S. substantial evidence test, such standard of review finds its grounds in the EU Commission’s greater expertise.

The EU Courts recognize that the Commission has in this field “a margin of appreciation”. In line with the acceptance of deference under the U.S. substantial evidence test, such standard of review finds its grounds in the EU Commission’s greater expertise.

judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence”).

Case C-441/07 P Commission v Alrosa, [2010] ECR I-05949, paragraph 67. See also opinion of A.G. Tizzano in Tetra Laval, paragraph 89 (“The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly – as I have just said – to enter into the merits of the Commission’s complex economic assessments or to substitute its own point of view for that of the institution”).

See for instance Joined Cases C-501, 513, 515 & 519/06 P, GlaxoSmithKline Services Limited v. Commission, [2010] ECR 11-2969, paragraphs 85 and 146. Originally the EU Courts were using only the complex economic assessment formula. In Microsoft the General Court expanded the formula also to complex technical assessment by making a reference to cases concerning “medico-pharmacological sphere”, see case T-201/04 Microsoft v Commission [2007] ECR II-3601, paragraphs 88-89.

EU courts use also (interchangeably) the term “margin of discretion”. Such approach may differ from this applicable in national laws of EU Member States where discretion is often considered to have foundations in statutory provisions conferring discretionary powers upon authorized institution and is not associated with factual latitude inherent in the application of laws. See more Alexander Fritzsche, supra note 167, at 363-364.

It is observed that the EU Courts apply a deferential standard in case of some of evidentiary issues “probably because of the implied belief that the evaluation of evidence is better carried out by the first instance decision-maker rather than by a court of review”, Renato Nazzini, supra note 119, at 994.
responsibility for policy-making\(^{173}\) and practical observation that the competition cases are so complicated that it is impossible for judges to look into every detail of the case.\(^{174}\) Separation of powers arguments also underline the limits imposed on judicial review related to complex assessments.\(^{175}\)

In Aalborg the CJEU summarized its previous jurisprudence\(^{176}\) and described the applicable standard of review of the Commission’s complex economic assessment in the following way:

\[^{173}\text{It is observed that in the appraisal of facts there is sometimes no right or wrong answer (there is margin of choice) and so it is for the authority responsible for competition policy (the Commission not the EU Courts) to take the decision, see Jose Carlos Laguna de Paz, supra note 164, at 16. It is also argued that ‘complexity’ should not be understood as ‘difficult to understand’ but rather be associated with “situations where the Commission makes economic policy choices”, Marc Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review? 2 Journal of European Competition Law & Practice 295, 309-310 (2011).}\]

\[^{174}\text{See the opinion of Bo Vesterdorf as reported by Henry Vane, The house always wins, Global Competition Review, October 2014, available at http://globalcompetitionreview.com/features/article/36947/house-always-wins/.}\]

\[^{175}\text{Jose Carlos Laguna de Paz, supra note 164, at 15 (“when courts refer to the limits of judicial review related to complex assessments, ultimately, they are accepting the limits resulting from the principle of separation of powers, which put a margin of appraisal in the hands of the Commission to ascertain whether we are or not in presence of legal assumptions.”).}\]

\[^{176}\text{See Remia, supra note 160, at paragraph 34, and Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62. However, it is observed that already in seminal Consten/Grundig case the deferential approach to Commission’s economic determinations has been taken and played a significant role in shaping the EC competition policy where the ECJ was deferring to the goals of competitions law set by the Commission (such as market integration), see Ian S. Forrester, A Bush in need of pruning: The luxuriant growth of ‘Light Judicial Review’, in Ehlermann and Marquis (Eds.), European Competition Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases (2011), available at http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf, at 19-20. Compare case C-56/64 Consten and Grundig v Commission [1966] ECR 429, at page 347 (“Furthermore, the}\]
“(e)xamination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers”.177 However, according to the newer line of judgments concerning—in the same manner—cartels, abuse of dominant position and mergers, the Commission’s complex economic assessment is under more thorough judicial scrutiny. The EU Courts underline that the fact that the Commission has a margin of appreciation with regard to economic or technical matters “does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it”.178 The famous trio of the Commission’s lost

177 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland A/S and Others v Commission, [2004] ECR I-123, paragraph 279.

178 KME, supra note 157, at paragraph 94 and case C-386/10 P Chalkor v Commission, [2011] ECR I-13085, paragraph 54 (cartels); Microsoft v Commission, supra note 170, at paragraphs 87-89 (abuse of dominant position) and case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, paragraph 39 (mergers). More recently such formula was confirmed in the CJEU judgment (Grand Chamber) of 6 November 2012 in case C-199/11 Europese Gemeenschap v Otis and Others, not yet reported, paragraph 59. According to Paul Craig the General Court in Tetra Laval failed to establish a clear test of assessment when the evidence is convincing for the Court and was very close to substituting its judgment for this of the Commission (what he believes is
merger cases (Airtours, Schneider Electric and Tetra Laval)\textsuperscript{179} shows that actual review may be intense and the Commission’s decision may be annulled when the Commission commits an error of assessment of factors that are economic in their nature.\textsuperscript{180} In fact it is suggested that in Airtours, Schneider Electric and Tetra Laval the EU Courts went too far and behaved as if they were primary decision-makers establishing economic facts and not as bodies responsible for reviewing the Commission’s assessment.\textsuperscript{181}

It seems that the Tetra Laval formula may bring the GC to substitution of its own view for that of the Commission\textsuperscript{182} what could be seen as a violation of the rules under which judicial review of facts rests on both in U.S. and in Europe. Importantly, the CJEU ruling in the Alrosa commitment decision case confirms that the General Court is precluded from impermissible). He concludes that it is unclear how much real margin of appreciation is accorded to the Commission in relation to complex economic matters, see Paul Craig, supra note 4, at 434-436.

\textsuperscript{179} Case T-342/99 Airtours v Commission [2002] ECR II-2585; case T-310/01 Schneider Electric v. Commission [2002] ECR II-4071 and Tetra Laval, supra note 178. In these three cases the General Court overturned the Commission’s decisions because the analysis of the effects of a proposed mergers were insufficient.

\textsuperscript{180} In Airtours (supra note 179, at paragraph 294) the GC concluded that the Commission’s decision “far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market”.

\textsuperscript{181} Paul Craig, supra note 4, at 434-436.

\textsuperscript{182} Paul Craig argues that the GC obligation to establish whether the evidence relied on by the Commission is factually accurate, reliable and consistent requires evaluative judgement of economic and factual matters; Id., at 436. Taking into account a complex character of such evaluation the EU Courts may be inclined to draw different conclusions from such evaluation and so substitute its own view for this of the Commission (what is prohibited).
substituting its own view for this of the Commission.\textsuperscript{183} In this case the General Court, when reviewing the Commission’s decision, expressed according to the CJEU its “own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding (…) that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case”.\textsuperscript{184} The CJEU concluded that “(b)y so doing, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment”.\textsuperscript{185} More recently, in an infringement case—\textit{Groupement des Cartes Bancaires}, the CJEU relied on its previous jurisprudence to repeat that “the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments”.\textsuperscript{186}

\textsuperscript{183} This statement is accepted in the literature even by those who criticize the CJEU for failing to establish sufficient safeguards against the abuse of powers by the EU Commission in the course of imposing commitments on undertakings, see Firat Cengiz, \textit{Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa}, 7 European Competition Journal 127, 150-151 (2011). As far as the prohibition of substitution by the GC of its own view for this of the Commission is concerned \textit{Alrosa} seems to establish a valid standard, see especially following judgment of 24 October 2013 in C-510/11 P Kone v Commission, [2013] ECR I-0000, paragraph 27. Importance of \textit{Alrosa} ruling in this respect was noticed in EFTA Court judgment of 18 April 2012 in case E-15/10 Posten Norge v EFTA Surveillance Authority, where the EFTA Court noted in paragraph 98 that the competition authority is precluded from substituting its own more preferable view for this of the authority if it finds the authority conclusion to be supported by evidence.

\textsuperscript{184} \textit{Alrosa, supra} note 169, paragraph 66. The CJEU was reviewing the GC judgment in case T-170/06, \textit{Alrosa v Commission}, [2007] ECR II-2601.

\textsuperscript{185} \textit{Alrosa, supra} note 169, paragraph 67.

\textsuperscript{186} Case C-67/13 P \textit{Groupement des cartes bancaires v Commission}, not yet reported, the judgment of 11 September 2014, paragraph 46 relying on case C-413/06 P, \textit{Bertelsmann and Sony Corporation of America v
Some believe that judicial scrutiny in EU competition law is in practice insufficient when it comes to complex economic issues in non-merger cases: especially in the abuse of dominance field (despite formal application of the exactly the same standard of judicial review as in merger decisions).\textsuperscript{187} However, it is difficult to give a clear-cut, abstract answer as to the sufficiency of judicial review in Article 101-102 TFEU cases.\textsuperscript{188} Opinion on that may be influenced by commentator’s view on accuracy of the Commission’s decisions and subsequent GC judgments. For instance, the recently most famous GC judgement in the \textit{Intel} case\textsuperscript{189} raised a lot of criticism in general and so commentators were unsatisfied with the intensity of judicial review provided by the GC as well.\textsuperscript{190}

However, the \textit{Intel} judgement could also be used to claim that the GC—at least at the level of declaration—agreed to more intense judicial review: in \textit{Intel} the “margin of appreciation” formula (present in previous Article 102 TFEU “big” cases such as \textit{Microsoft}) was not used by the GC at all. A comprehensive standard of review of facts found application.\textsuperscript{191} Time will

\begin{flushleft}
\textit{Impala}, paragraph 145 and case C-73/11 \textit{P Fracona Košice v Commission}, paragraph 89. Similarly, in \textit{Kone} the CJEU held that the European Union judicature should not encroach upon the discretion available to the Commission in the administrative proceedings by substituting its own assessment of complex economic circumstances for that of the Commission. Its role is, where relevant, to demonstrate that the way in which the Commission reached its conclusions was not justified in law; see \textit{Kone}, supra note 183, at paragraphs 26-27.
\end{flushleft}

\begin{flushleft}
\textsuperscript{187} See for instance Damien Gerard, \textit{supra} note 164, at 465.
\end{flushleft}

\begin{flushleft}
\textsuperscript{188} When it comes to cartels Andreas Scordamaglia-Tousis observes that manifest error of assessment standard has rarely limited the GC in reviewing exhaustively the Commission infringement decisions, see Andreas Scordamaglia-Tousis, \textit{supra} note 119, at 134 and 592.
\end{flushleft}

\begin{flushleft}
\textsuperscript{189} Case T-286/09 \textit{Intel v Commission}, not yet reported, judgment of 12 June 2014.
\end{flushleft}

\begin{flushleft}
\textsuperscript{190} For a collection of opinions in this respect see Henry Vane, \textit{supra} note 174.
\end{flushleft}

\begin{flushleft}
\textsuperscript{191} It is argued that “on the basis of a comprehensive review of the contested facts, the General Court found
tell whether the “margin of appreciation” formula will be abandoned in subsequent EU Courts judgments. This may not necessarily happen: already after Intel the CJEU repeated in 
Telefonica and in Groupement des Cartes Bancaires that the Commission enjoys a margin of 
appreciation in its complex economic assessment. 192

In any case, the CJEU, when assessing the sufficiency of GC’s judicial review of the 
Commission’s decisions, is not focused on the language used in the GC judgement but on the 
actual sufficiency of the review. In Chalkor (Article 101 TFEU case) the CJEU rejected the 
parties’ arguments and underlined that the fact that the GC repeatedly referred to the 
‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission did not prevent 
it from exercising the full and unrestricted review, in law and in fact, required of it. 193 On the 
other hand, in Groupement des cartes bancaires the CJEU held that the GC failed to offer 
effective judicial protection despite the fact that the CJEU indicated that the Commission 
enjoys “a margin of assessment with regard to economic matters, in particular in the context 
of complex economic assessments” 194. According to the CJEU this margin does not mean that 
the GC must refrain from reviewing the Commission’s legal classification of information of 
an economic nature. 195

that the rebates granted to Dell, HP, NEC and Lenovo were exclusivity rebates and so upheld the Commission’s 
decision, Wouter P. J. Wils, The Judgment of the EU General Court in Intel and the So-Called 'More Economic 

192 C-295/12 Telefonica v Commission, not yet reported, judgement of 10 July 2014, paragraph 54; Groupement 
des Cartes Bancaires, supra note 186, at paragraph 46.

193 Chalkor, supra note 178, paragraph 82.

194 Groupement des cartes bancaires, supra note 186, paragraph 46.

195 Id.
It may be argued that the standard of review of complex economic and technical assessment (unless the Tetra Laval formula is interpreted too broadly) corresponds with the deferential approaches of the U.S. substantive evidence test and more generally with Chevron rationales. The Commission is an expert agency responsible for competition policy that has greater knowledge of economics than EU Courts and so a deference left to the determinations in this field after EU Courts check out whether the evidence collected support the Commission’s conclusion meets the requirements of substantial evidence standard as established in Universal Camera.

C. Review of fines in EU competition law

The EU Courts jurisprudence shows that the EU judiciary happens to be deferential also in areas falling out of the scope of complex economic and technical assessment. For instance, in Archer Daniels Midland the EU Courts found the Commission to be better placed to carry out the task of the evaluation of evidence concerning the leader’s role of Archer Daniels Midland in the cartel. Crucially however, the Commission is also accorded some judicial deference when it comes to its fining policy in particular when it comes to calculation of fines.

---

196 A shift to much closer judicial scrutiny in the EU—called for example by Damien Gerard, supra note 164—would move away the EU model of judicial review from U.S. one. Paul Craig observes—contrary to Damien Gerard’s opinion—that the judicial review of facts under manifest error of assessment standard has become more intense. He points at the risks for the credibility of the EU judiciary if it fails to fulfill its own-imposed obligation of intensive factual review of the Commission’s decisions; see Paul Craig, supra note 4, at 438.


198 See supra Part II.C.


200 Jose Carlos Laguna de Paz, supra note 164, at 18.
It is observed that the Commission benefits from a considerable margin of appreciation with regard to the individualization of the fine, in particular when it decides whether or not to take into account mitigating or aggravating circumstances.\(^{201}\) This happens, somewhat surprisingly\(^{202}\) despite the General Court’s unlimited jurisdictions in the field of fines\(^{203}\) and seem to stem from the perception that fining policy is the area of the Commission’s discretion. The GC underlines that fines “constitute an instrument of the Commission's competition policy” and so “it must be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules”.\(^{204}\) The Commission has a margin of appreciation when fixing fines and “a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances


\(^{202}\) See Editorial Comments, supra note 119, at 1412.

\(^{203}\) An unlimited review of fines is laid down by Article 31 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003). Under this provision the fine imposed by the Commission may be cancelled, reduced or increased by the court (however, the GC cannot impose a different fine but to rule on existing fines set by decisions of the Commission). Thus when it comes to the appropriateness of the amounts of fine the EU Courts are empowered to exercise de novo review: they can re-make the Commission’s decision assessing differently factors taken into account when calculating the amount of fine namely the gravity and duration of infringement (see Article 23 of the Regulation 1/2003).


51
of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account”.

Importantly, the Commission is granted deference as to the decision about the level of fines necessary to achieve the objective of the EU Treaties. For this reason judicial review is often concentrated on the correctness of the application of the Commission’s 2006 Fining Guidelines when determining the amount of fine imposed what in fact may amount to deference to the Commission’s interpretation of the legal terms contained therein. In addition, the GC is not entitled to decide upon such questions of fining which the Commission is not entitled to decide itself.

---


208 Such approach makes the process of the imposition of fines more transparent, see KME, supra note 157, at paragraph 99.

209 See more infra Part IV.D.

210 Case C-231/11 P Commission v Siemens Österreich and Others, judgment of 10 April 2014, not yet reported, paragraph 74 (“Furthermore, since, as is apparent from this judgment, the power to impose penalties available to the Commission under Article 23(2) of Regulation No 1/2003 does not include the power to determine how the fine imposed is to be allocated as between those held jointly and severally liable from the perspective of their internal relationship, once the fine has been paid in full and the Commission subsequently has no further interest in the matter, so the General Court does not have any such power of allocation when exercising the unlimited jurisdiction conferred on it by Article 31 of that regulation to cancel, reduce or increase such a fine”).
The EU Courts’ deference to the Commission’s determinations concerning fines does not mean that this area remains in practice out of judicial control\(^\text{211}\) and that the EU Courts cannot overturn the Commission’s decision as to the amount of fine imposed. This happened, for example, where the Commission committed an error concerning the duration of the infringement\(^\text{212}\); used a different, discriminatory method of calculation of fine for the participation in the same cartel;\(^\text{213}\) or erred in calculating the fine by taking into account the anticompetitive practice in which the fined undertaking was in fact not involved.\(^\text{214}\) The GC cannot use the Commission's margin of discretion—either in regard to the choice of factors taken into account in the application of the criteria mentioned in the Commission’s Fining Guidelines or in regard to the assessment of those factors—“as a basis for dispensing with the conduct of an in-depth review of the law and of the facts”.\(^\text{215}\) Still, judicial deference in the field of fines is present and is considered to reflect the inter-institutional balance in EU competition law.\(^\text{216}\) Telefonica case demonstrates that the CJEU—contrary to the AG

\(^{211}\) Even in the area where EU courts often accord deference to the Commission—calculation of fine—the GC is not bound by such calculation. It must carry out its own assessment, taking all the circumstances of the case into account, judgment of 14 September 2004 in case T-156/94 Aristrain v Commission, not published in the ECR, paragraph 43; restated in case T-147/09 Trelleborg v Commission, not yet published, judgment of 17 May 2013 paragraph 114.

\(^{212}\) Case T-370/09 GDF Suez v Commission, Curia, paragraphs 458-466.


\(^{215}\) See Chalkor, supra note 178, at paragraph 62.

\(^{216}\) Jose Carlos Laguna de la Paz, supra note 164, at 22.
Wathelet opinion—does not seem to see a need for a change in the GC’s intensity of review of fines.\textsuperscript{217}

**D. Review of statutory interpretations in EU competition law**

The main difference in the discussion about the scope of deference to administrative agency determinations between the U.S. and the EU concerns the area of statutory interpretations. The debate about the scope of judicial review and a permissible scope of deference is concentrated in the EU competition law on factual issues. Differently than in the U.S., there has been by now no discussion about the division of tasks as to legal interpretation. According to law in books legal interpretation remains in the hands of EU Courts. The principal reason for the difference between the EU and the U.S. as to the legal standards in force is that EU competition law is regulated on the constitutional (primary) level in the Treaty on the Functioning of the European Union. It is undisputed that in the light of Article 19(1) of the Treaty on the European Union the CJEU bears primary responsibility for the interpretation of the EU Treaties\textsuperscript{218} and so also Articles 101-102 TFEU. It is observed in the literature that the EU Commission is left with no discretion as to the interpretation of Article 101-102 TFEU and that the EU Courts play a crucial role in giving exact meaning to these

\textsuperscript{217} AG Wathelet in the opinion of 26 September 2013 in C-295/12 P Telefonica, paragraph 109-118 expressed the view that the unlimited jurisdiction enjoyed by the GC requires it to make its own assessment of fine and that the GC “must exercise its unlimited jurisdiction \textit{fully} when assessing the proportionality of the amount of the fine” and in the view of GC failure in this respect proposed that the CJEU should set aside the judgment of the GC in Telefonica. The CJEU did not follow such proposal, did not find the GC review of fines to be unsatisfactorily and dismissed the appeal against the GC judgement; see Telefonica, supra note 204, at paragraph 214.

\textsuperscript{218} Article 19(1) of the TEU provides that the CJEU “shall ensure that in the interpretation and application of the Treaties the law is observed”. Additionally Article 267 TFEU provides that the CJEU has a jurisdiction to give preliminary rulings concerning the interpretation of the Treaties as well as the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.
provisions. In other words the EU Courts have a final say on legal categories and legal issues: the Courts can substitute the Commission’s judgment on questions of law. Under the EU competition law enforcement system there is no margin of appreciation left to the Commission as to what legal criteria to apply. Direct applicability of Articles 101-102 TFEU presupposes the absence of policy discretion in their interpretation and application: “directly applicable norms are generally fully within the sphere of law, and therefore fully judiciable”. These opinions also find confirmation in the GC judgment in Treuhand, where the GC observed that “the interpretation of the undefined legal concept of ‘agreements between undertakings’ ultimately falls to be determined by the Community judicature”. In addition, the EU Courts should not refrain from reviewing the Commission’s legal classification of information of an economic nature. Also, only the interpretation of EU law by the EU Courts are bounding on the EU Member States. The EU Commission’s interpretation does not have such character.

---


220 There is no counterpart of U.S. theory of implied Congressional intent, see supra Part I.

221 Paul Craig, supra note 4, at 405. See also Alexandr Fritzsche, supra note 167, at 394.

222 Andreas Scordamaglia-Tousis, supra note 119, at 117 invoking the opinion of Judge Bo Vesterdorf.

223 Heike Schweitzer, supra note 219, at 102.


225 Groupement des cartes bancaires, supra note 186, at 68.

226 See the opinion of AG Kokott of 21 May 2015 in case C-23/14 Post Danmark II, paragraph 60.
interpretation of law reflects the approach that is common in European civil law countries and in the UK.227

In this light, it is clear that there is no counterpart of the *Chevron* doctrine on the EU level: the EU Courts are not legally bound to give any deference to the Commission’s interpretations of Article 101-102 TFEU. However, this does not necessarily have to mean that the EU Courts in practice do not defer to these interpretations of EU competition law that they find convincing and reasonable and that in practice do not follow an internal reasoning similar to the *Skidmore* framework. European antitrust scholars observe it is impossible to deny that the Commission’s decisional practice is of instructive value for the EU Courts228 and that the Commission may be successful in convincing the EU Courts to adopt the interpretation which it advocates.229 Some of them are even of the opinion that the EU Courts confirm all important theories put forward by the Commission.230

227 Susan Rose-Ackerman, Peter L. Lindseth, *supra* note 4, at 445; see also Paul Craig, *supra* note 4, at 406.

228 Andreas Scordamaglia-Tousis, *supra* note 119, at 117.

229 Wouter Wils, *supra* note 219, at 15.

230 Damien Gerard, *supra* note 164, at 470-471. The author assess such phenomenon negatively. He points at the EU courts approach to the effects of collusive practices (it is sufficient for the Commission to prove the implementation of the agreement; there is no obligation to assess actual impact of these agreements, see Joined cases C-125/07 P et *Erste Group Bank*, [2009] ECR I-8681, paragraph 118), agreement with the Commission as to broad scope of the notion of the participation infringement (it is sufficient for the Commission to show that the firm participated in meetings during which agreements of an anti-competitive nature were concluded, without manifestly opposing them, see Case C-510/06 P *Archer Daniels Midland* [2009] ECR I-1843, paragraph 119), broad parent company liability for anticompetitive practices of its subsidiaries (it is sufficient for the Commission prove that the subsidiary is wholly owned by the parent company in order to assume that the parent exercises a decisive influence over the commercial policy of the subsidiary, Case C-90/09 P *General Química v Commission*, [2011] I-00001, paragraphs 37-43), lack of obligation to prove a possibility of recoupment of losses by the dominant firm allegedly involved in predatory pricing (Case T-340/03 *France Télécom v Commission*
Such a state of affairs seems to stem from the EU Courts belief that the EU Commission enjoys certain level of discretion in the field of competition policy it is responsible for under Article 105 TFEU and that the role of the Commission is to give substance to the principles enshrined in Article 101-102 TFEU. In words similar to those underlying the *Chevron* rationales about administrative agencies responsibilities for policies left to them by the U.S. Congress, the EU Courts explain why the Commission enjoys a policy discretion with regard to its own enforcement priorities in the area of Article 101 and 102 TFEU. In *Masterfoods*, the CJEU held that “the Commission, entrusted by [Article 105(1) TFEU] with the task of ensuring application of the principles laid down in [Articles 101 and 102 TFEU], is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance [now: the GC] and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations”. The EU Courts seem to see the Commission as

---

231 Article 105 TFEU provides that the Commission shall ensure the application of the principles laid down in Articles 101 and 102 TFEU. Article 105 TFEU corresponds with Article 17 TFEU under which the Commission (and not the EU Courts) bears responsibility in ensuring the application of the EU Treaties.

232 Case C-344/98 *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, paragraph 46. For this reason the Commission is entitled to give differing degrees of priority to the complaints brought before it and generally set its enforcement priorities, see Wouter Wils, *supra* note 219, at 7-10.
an expert-agency that in a persuasive way conducts a competition policy (in public interest) entrusted to it by the legislator (EU Member States that signed the EU Treaties).\textsuperscript{233} Such approach does not seem to alter in principle despite variable intensity of judicial scrutiny over the Commission’s evidentiary assessment of complex economic issues.

The EU Courts deference when it comes to legal questions may be closely noticed in the EU Courts’ review of the Commission’s interpretation of its own soft law that was adopted by the Commission in order to conduct effective competition policy. The Commission’s Fining Guidelines\textsuperscript{234} and the Commission’s Leniency Notice\textsuperscript{235} are examples. In the EU literature the deference accorded in these two areas was analyzed more as an evidentiary issue where the question is how thoroughly the EU Courts should review evidentiary findings as to the amount of fine imposed by the Commission or the scope of leniency applicant cooperation with the Commission. However, it is also possible to see the current judicial approach as a deference to the Commission’s interpretation of its own soft rules. Thus we may talk about the deference that in the U.S. would fall under the \textit{Skidmore} standard (deference given to the interpretation of non-binding instruments that are given whatever respectful consideration their reasoning deserves). Where the GC leaves the Commission with the determination as to what the starting amount for a calculation of a fine should be in the given case\textsuperscript{236} it is in fact

\textsuperscript{233} For a comment see Heike Schweitzer, \textit{supra} note 219, at 18 and Fernando Castillo de la Torre, \textit{Evidence, Proof and Judicial Review in Cartel Cases}, 32 World Competition, 505, 567 (2009).

\textsuperscript{234} See \textit{supra} note 207.

\textsuperscript{235} Commission Notice on Immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 08/12/2006, p. 0017 – 0022.

\textsuperscript{236} The GC in \textit{KME} noted that “in the exercise of its unlimited jurisdiction and in the light of the foregoing considerations (…) there is no cause to call into question the starting amount of the fine imposed on the applicants” (case T-25/05 \textit{KME Germany and others v Commission} [2010] II-00091, paragraph 92). See also \textit{Coats Holdings, supra} note 204, paragraph 190.
deferring to the Commission legal interpretation of the term “basic amount of fine” used in the Commission Fining Guidelines. The same holds true with the interpretation of such a notion as gravity of the infringement. Similarly, where the GC finds that it is for the Commission to assess whether the leniency applicant deserves full reduction of the fine because of the scope of its cooperation, the Commission is in fact given deference when it comes to the interpretation of the notion of cooperation under point 12(a) of Leniency Notice. The same observation is valid when it comes to the term “significant added value” of the information provided by the leniency applicant.

237 See the Commission’s 2006 Fining Guidelines, supra note 207, at paragraphs 12-26.

238 Id., at paragraphs 19-20.

239 Case C-328/05 P SGL Carbon v Commission [2007] ECR I-3921, paragraph 88 (“As regards, finally, SGL Carbon’s claim that the cooperation provided by it was undervalued by comparison with that of the other members of the cartel, it should be noted, as the Court of First Instance rightly pointed out at paragraph 371 of the judgment under appeal, that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.”). See also the same statement in the subsequent case (issued already after the CJEU KME judgment) T-214/06 Imperial Chemical Industries v Commission [2012] ECR II-000, paragraph 181. See also T-456/10 – Timab Industries and Cie financière et de participations Roulier v. Commission, not yet reported, judgement of 20 May 2015, paragraphs 177 and 195.

240 Point 12(a) of Commission Leniency Notice, supra note 235, provides that for the undertaking to qualify for immunity the following condition (among others listed in the Notice) must be met: “The undertaking cooperates genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission’s administrative procedure”.

241 The Commission Leniency Notice, supra note 235, at points 24-25.

242 Joined Cases T-122-124/07, Siemens Österreich and Others v. Commission, [2011] ECR II-00793, paragraph 221 (“Within the limits laid down by the Leniency Notice, the Commission has a broad discretion in assessing whether the evidence provided by an undertaking represents added value within the meaning of point 22 of that
E. Point of comparison: review of the U.S. Federal Trade Commission’s decisions

This part analyzes whether the EU Commission counterpart—U.S. Federal Trade Commission (FTC) is accorded Chevron deference when it comes to legal determinations (such approach would be divergent from the one in Europe) and how intensively the courts review their factual determinations. To answer that question, this section of the paper analyzes the judicial review of the FTC cease and desists orders issued under sec. 5 FTC Act—decisions adopted in formal adjudication process subject to review by U.S. federal courts of appeal.

The relevance of the undertaken study is reinforced by the fact that administrative way of enforcing sec. 5 FTC Act resembles the enforcement of EU competition law: the FTC’s decisions are adopted in administrative proceedings and are subject to judicial review both notice and, on that basis, whether it is appropriate to grant a reduction to an undertaking under that notice (…). That assessment is the subject of limited review by the Court”.

243 The analysis provided in the paper is limited only to the FTC. The paper does not address another U.S. federal agency responsible for antitrust—the Department of Justice Antitrust Division as it enforces the antitrust laws (Sherman Act and Clayton Act) only by bringing either civil or criminal cases to courts. Thus it acts only as a litigant and not as an administrative first instance decision-maker. See Daniel A. Crane, A Neo-Chicago Perspective on Antitrust Institutions, 78 Antitrust L.J. 43, 63 (2012).

244 The FTC was established by Congress in 1914 as an expert-agency responsible for administering the Federal Trade Commission Act and most importantly its sec. 5 that prohibits openly-ended formulated “unfair methods of competition” (15 U.S.C.A. § 45). Congress believed that unfair competition could best be prevented “through the action of an administrative body of practical men (…) who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.”, Report of the Conference Committee, H.R.Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914). For the analysis of the origins of the FTC see Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control and Competition, 71 Antitrust L. J. 1 (2003).
when it comes to law and facts.\textsuperscript{245} In addition, the administrative proceedings before the FTC offer many institutional and procedural guarantees satisfying ECHR Bryan standards and so could be seen as an argument for deferential review. The proceedings before the FTC guarantees the division of investigatory/prosecutorial and decision-making function\textsuperscript{246}, contradictory nature of the administrative process, parties’ broad access to file and evidence contained therein and their right to cross-examine witnesses as well as direct contact with the decision-maker at oral hearing.

1. \textit{Chevron as a rule?}

In \textit{E.I. du Pont de Nemours} the Court of Appeal for 2nd Cir. analysis of the FTC Act’s legislative history led it to the conclusion that Congress’ use of the vague general term “unfair methods of competition” in sec. 5 FTC Act without defining what is “unfair” was deliberate and that Congress sought to provide broad and flexible authority to the FTC as an administrative body with broad business and economic expertise.\textsuperscript{247} Such observation is

\begin{itemize}
  \item \textsuperscript{245} The addressees of cease-and-desist orders issued by the FTC under sec. 5 FTC Act may obtain a review of such orders in the court of appeals of the United States. Court of appeal has a right to affirm, modify or set aside the order of the FTC (15 U.S.C.A. § 45 c).
  \item \textsuperscript{246} At the first stage the proceedings are run before the impartial Administrative Law Judge and it is for the FTC counsel to prove that the sec. 5 FTC Act was violated. At the second stage of the proceedings the decisions are taken by the Commission’s full board. The institutional structure of the FTC guarantees impartiality to a significant extent—different persons are responsible for investigation (members of FTC Bureau of Competition) and different for decision-making (FTC Commissioners and ALJs). The FTC’s decision in \textit{McWane} proves also that the FTC Full Board is ready to dismiss a majority of its claims raised preliminary against the respondent in the original complaint (see the FTC opinion of 6 February 2014 in the Matter of McWane, Inc., and Star Pipe Products, Ltd., \url{http://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter}).
\end{itemize}
reflected also in the Supreme Court’s previous opinion in *Atlantic Refining* where the Court observed that development of the term ‘unfair’ was intentionally left by Congress to the FTC.\(^{248}\) On this basis, one familiar with the general rules governing judicial review in U.S. (in particular with the presumption that courts should not be burdened with the policy questions) could intuitively think that the FTC’s statutory interpretation contained in the FTC’s decisions issued under sec. 5 FTC Act are entitled to *Chevron* deference.\(^{249}\) The term “unfair methods of competition” is clearly ambiguous and Congress explicitly intended the FTC—an expert agency—to give meaning to it. Thus one could expect that the courts reviewing the FTC decisions should defer to the FTC interpretations of sec. 5 FTC Act as long as they are reasonable.

2. Non-deferential standard of review in practice

A closer study of the U.S. courts of appeals jurisprudence shows a rather different picture. There is not a single judicial opinion in which the courts would suggest that the FTC is entitled to *Chevron* deference when it comes to the way its statutory interpretations are reviewed\(^{250}\) even if there are many arguments for the FTC to receive it.\(^{251}\) Rather, important


\(^{250}\) Such problem appeared only once in *California Dental Association* where the FTC raised the question whether its interpretation of the term “profit” (and so the FTC's jurisdiction over non-profit associations) is entitled to *Chevron* deference. According to the FTC the text of the FTC Act did not support a construction
cases suggest that the FTC is not entitled to deference to the interpretation of the term ‘unfair methods of competition’ contained in sec. 5 FTC Act. When it comes to factual exempting all nonprofit (or professional) associations. The Supreme Court held that it was unnecessary to address whether Chevron deference should be accorded to the FTC's interpretation of its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses, since its interpretation was “clearly the better reading of the statute under ordinary principles of construction”, see California Dental Ass'n v. F.T.C., 526 U.S. 756, 766 (1999).

Legislative history, the fact that sec. 5 FTC Act cease and desist orders are adopted in formal adjudication process, the fact that the FTC is the only agency administering FTC Act, no risk of over-deterrence (the FTC does not impose civil penalties), presence of due process safeguards, separation of investigatory and decision-making functions, the FTC expertise and greater than courts accountability all support the arguments that there are grounds for according to the FTC broader scope of judicial deference. Conversely, there are three main reasons why in case of the FTC scope of deference is more limited than one could expect under principles of administrative law. First, the FTC has no practice of formal rulemaking in the field of unfair methods of competition. Second, the U.S. courts are not persuaded that the FTC Act covers areas reaching beyond common-law-style Sherman Act (the statute interpreted by the courts in private action cases ever since). Third, the FTC is not a single U.S. agency responsible for the area of antitrust (the prohibition on restraints of trade is subject also to public enforcement by the Antitrust Division of the Department of Justice). See also supra Part II.A.

See Boise Cascade Corp. v. F.T.C., 637 F.2d 573 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2nd Cir. 1980); E.I. du Pont de Nemours, 729 F.2d. For example in E.I. du Pont de Nemours the 2nd Cir. rejected the FTC's right to choose between different reasonable interpretations of ambiguous term ‘unfair’. The court noted that this term is an elusive one but find itself in the position to define it (“In our view, before business conduct in an oligopolistic industry may be labelled “unfair” within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct”) see E.I. du Pont de Nemours, 729 F.2d. at 139. The 2nd Cir. considered that its ultimate role is to “determine the scope of the statute upon which the Commission's jurisdiction depends” (at 136). In more recent case D.C. Cir. found that FTC's interpretation of antitrust law cannot be accorded deference, see Rambus Inc. v. F.T.C., 522 F.3d 456, 462 (D.C. Cir. 2008) (“In this case under
determinations, the FTC success rate in court is mixed. Despite the application of the substantial evidence test\(^{253}\) and judicial acknowledgement of the FTC expertise\(^{254}\) its decisions under sec. 5 FTC Act happen to be overturned by the reviewing courts quite often. The standard of review of the FTC’s legal determinations under sec. 5 of FTC Act was established by the Supreme Court in *Indiana Federation of Dentists*.\(^ {255}\) Unusually for general administrative law standards, *de novo* standard of review with some *Skidmore*-like elements is applicable: “the legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are (...) for the courts to resolve”.\(^ {256}\) However, “even in considering such issues the courts are to give some deference to the Commission’s

\(\text{§ 5 of the FTC Act, the Commission expressly limited its theory of liability to Rambus’s unlawful monopolization of four markets in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. (…) Therefore, we apply principles of antitrust law developed under the Sherman Act, and we review the Commission’s construction and application of the antitrust laws de novo.”). It is underlined that Rambus illustrates “how a court of appeals can rein in the FTC without any obligation of deference”, Diana De Leon, *The Judicial Contraction of Section 2 Doctrine*, 45 Loy. L.A. L. Rev. 1105, 1169 (2012).

\(^{253}\) The FTC Act provides that the findings of the FTC as to the facts, if supported by evidence, shall be conclusive (15 U.S.C.A. § 45(c)). Thus in case of facts the substantial evidence test is applied by courts. The statute forbids a court to “make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.” (*FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73, 54 S.Ct. 315, 318, 78 L.Ed. 655, 1934). The substantive evidence standard applies regardless whether the FTC’s full board agrees in its decision with the initial Administrative Law Judge’s (the ALJ) decision. The court may, however, examine the FTC’s findings more closely where they differ from those of the ALJ. See *Schering-Plough Corporation v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005).

\(^{254}\) See for example *E.I. du Pont de Nemours*, 729 F.2d at 136.


\(^{256}\) *Id.*
informed judgment that a particular commercial practice is to be condemned as ‘unfair’”.

*Indiana Federation of Dentists* suggests that the FTC’s legal determinations may in practice be accorded—more limited in comparison with the *Chevron* standard—*Skidmore*-like deference.

In practice, the disputes before the courts of appeal as to accuracy of the FTC’s conclusions have not been framed as pure questions of law. Instead, courts of appeals review the objections against the FTC decisions usually as the questions of facts. Thus the approach taken is similar to the way EU Courts review the EU Commission’s decisions in the field of competition law. For example in the recent *McWane* opinion the Court of Appeals for the 11th Cir. after repeating the *Indiana Federation of Dentists* formula consciously framed three disputed FTC determinations (market definition, possession of monopoly power as well as harm to competition and existence of procompetitive benefits) as factual or economic conclusions and reviewed them under the substantial evidence test.

Similar approach may be observed in previous opinions of U.S. courts of appeal. However, differently than in *McWane*, courts often overturned the FTC’s decisions as not supported by substantial evidence. In *Boise Cascade* the 9th Circuit denied the enforcement of the FTC order finding that southern plywood manufacturers violated the FTC Act by adopting and maintaining a system of delivered pricing which utilized computation of rail freight charges

---

257 *Id.* See also *FTC v. Cement Institute*, 333 U.S. 683, 692-93 (1948) and *Atlantic Refining*, 381 U.S. at 367-68, where the Supreme Court noted: “(w)hile the final word is left to the courts, necessarily ‘we give great weight to the Commission's conclusion . . . ’” as to what is an “unfair method of competition” within the meaning of sec. 5 FTC Act. *Indiana Federation of Dentists* formula has consistently been repeated by the courts of appeals. See *Schering-Plough*, 402 F.3d at 1062; *Polygram Holding v. FTC* 416 F.3d29, 33 (D.C. Cir., 2004); *North Texas Specialty Physicians v. FTC* 528 F.3d 346, 354 (5th Circuit, 2008); *McWane, Inc. v. F.T.C.* , 783 F.3d 814, 825 (11th Cir. 2015).

258 *McWane*, 783 F.3d at 825.
from Pacific Northwest in determining the price of southern plywood.\textsuperscript{259} The Court found that the FTC’s order is not supported by substantial evidence. In another early 1980s case, the 2\textsuperscript{nd} Circuit reversed the FTC’s decision in \textit{E.I. du Pont de Nemours}.\textsuperscript{260} The Court did not find “substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition”.\textsuperscript{261} In \textit{Rambus}, a much more recent case, the FTC failed to prove a “dangerous probability” that Rambus would monopolize the market in a sense of sec. 2 of the Sherman Act.\textsuperscript{262} Along similar lines, in \textit{Schering} the 11\textsuperscript{th} Cir. held that evidence did not support a finding that settlement agreements unreasonably restrained competition beyond exclusionary effects of patent.\textsuperscript{263}

In other cases the courts accorded “some deference” to the FTC's determinations of factual character. In 2011, in \textit{Realcomp II} the 6\textsuperscript{th} Cir. concluded on this basis that the FTC properly rejected Realcomp's procompetitive justifications as not legitimate, plausible, substantial and reasonable.\textsuperscript{264} In this respect the Court relied on \textit{Detroit Auto Dealers Association}, a former

\textsuperscript{259} See \textit{Boise Cascade}, 637 F.2d.

\textsuperscript{260} See \textit{E.I. du Pont de Nemours}, 729 F.2d.

\textsuperscript{261} \textit{E.I. du Pont de Nemours}, 729 F.2d at 141. The case concerned manufacturers of lead antiknock gasoline additives who adopted parallel business practices consisting of giving advanced notice of price increases to their customers and promising their customers to sell the additives at the price not lower than in case of other customers. According to the FTC these practices led to the adoption of uniform pricing in this industry and harmed competition.

\textsuperscript{262} See \textit{Rambus} 522 F.3d.

\textsuperscript{263} \textit{Schering-Plough}, 402 F.3d at 1062.

\textsuperscript{264} \textit{Realcomp II, Ltd. v. F.T.C.}, 635 F.3d 815, 834 (6th Cir. 2011) (“Realcomp might still prevail, despite evidence of actual or likely anticompetitive effects, by demonstrating “some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.” Ind. Fed’n, 476 U.S. at 459, 106 S.Ct. 2009. Giving “some deference” to the Commission’s conclusion, In re
case litigated by the FTC before the 6th Circuit.\textsuperscript{265} In this case, the Court deferred to some extent to one of the FTC’s finding: “(w)e perceive some difference between withholding of relevant cost information and restricting showroom hours, but in deference to the Commission, we are not prepared to hold the analogy to be erroneous”.\textsuperscript{266} Courts of appeal occasionally defer to the FTC’s purely evidentiary findings. \textit{Chicago Bridge & Iron} is an example.\textsuperscript{267}

\textsuperscript{265} \textit{In re Detroit Auto Dealers Ass'n, Inc.}, 955 F.2d 457, 469-70 (6th Cir. 1992) (“Giving the Commission's conclusion some deference, we, nevertheless, examine its conclusion in light of its findings, as supported by this record, to determine whether petitioners' justifications for their conduct are legitimate, plausible, substantial and reasonable. In this regard, we examine the evidence of the power of petitioners in the relevant market”).

\textsuperscript{266} \textit{In re Detroit Auto Dealers}, 955 F.2d at 471-72. Still, according to concurring and dissenting judge Ryan the majority opinion did not satisfactorily adhere to identified standards for review and failed to offer any valid reasons for rejecting the FTC’s factual findings and legal conclusions (at 473). In this case 6th Cir. was scrutinizing whether the agreement between car dealers to limit showroom hours is an unlawful restraint of trade in violation of sec. 5 FTC Act.

\textsuperscript{267} \textit{Chicago Bridge & Iron Co. N.V. v. F.T.C.}, 534 F.3d 410, 437 (5th Cir. 2008): “(w)e will, therefore, consider CB&I's potential entry argument in concert with evidence regarding the barriers to entry. CB&I contends the Commission's conclusion that CB&I failed to rebut the three main barriers to entry offered in the Government's \textit{prima facie} case, (1) reputation/experience, (2) regulatory and technical expertise, and (3) access to local labor and trained supervisors, is not based on substantial evidence. Based on the substantial evidence standard, as long as the Commission derives a “reasonable inference” from the evidence that CB&I failed to rebut the \textit{prima facie} case, we defer to the Commission's findings”; in this case 5th Cir. relied on \textit{Gibson v. F. T. C.}, 682 F.2d 554, 568-69 (5th Cir. 1982): “The findings of the Commission must be accepted if there is substantial evidence on the
V. Trans-Atlantic worlds are not far apart: principal findings

The analysis of fundamental rights standards governing the judicial review in Europe and the analysis of EU Courts’ practice in the field of competition law show that judicial deference may not only be a U.S. but also a European phenomenon. The most striking difference is that in Europe, under the principles of the ECHR and EU law, a doctrine similar to *Chevron* has not been declared: the courts are not legally bound by the statutory interpretations put forward by the administrative agencies. However, the criticism against *Chevron* in the U.S. and the U.S. federal courts’ practice of not applying *Chevron* (also when dealing with the FTC’s antitrust decisions) as well as the respect the EU Commission enjoys in the proceedings before the EU Courts in competition cases suggest that in practice the differences between Europe and the U.S. are not necessarily that considerable. Even closer similarities between Europe and the U.S. may be observed in the judicial review of agencies’ factual determinations.

A. Europe’s fundamental rights system v. the U.S. standards

The analysis presented in *supra* Part III shows that question about permissibility of deferential review in the light of requirements of Article 6 ECHR is complex. Slightly different conclusions stem from the ECtHR’s jurisprudence in administrative cases classified as civil and from administrative cases classified as criminal. In any case discussion about the required intensity of judicial review concerns first and foremost factual and not legal issues.

1. Classic administrative cases

In administrative cases classified as civil deferential standard of review is permissible in particular if (1) the subject matter of the decision involves a specialized issue requiring record considered as a whole to support them (…) Where there is the possibility of drawing two inconsistent inferences from the evidence, the Commission may make the choice”.

68
professional knowledge or experience and the exercise of administrative discretion or concern policy matters in the specialized area of law; (2) administrative proceedings offer many of Article 6 ECHR safeguards and the decision is delivered by the authority that is impartial and independent. The more of these elements are present (for example the more quasi-judicial the process before the administrative agency is), the more likely it is that the ECtHR will be satisfied with the limited standard of review. The ECtHR might even accept the review where the courts check only whether the administrative agency’s factual finding or the inferences based on them were neither perverse nor irrational. In any case, however, the court must be empowered to determine the central issue in dispute and have a power to remand the case to the administrative agency. Such a test does not go beyond what is expected from courts under the U.S. substantial evidence test. In both cases, the administrative agency’s expertise is an argument for greater judicial deference. Also the presence of procedural guarantees during the administrative phase of the proceedings is, for the ECtHR, an argument—in line with Mead rationale—for a lighter judicial review.

On the other hand, ECtHR jurisprudence in civil cases does not offer many hints supporting the argument that a deferential standard of review would be acceptable when it comes to pure legal questions—such issues were not directly disputed before the ECtHR as the national courts were always empowered to fully review legal issues. Still, the fact that deference to the determinations involving the exercise of administrative discretion or policy matters in the specialized area of law may be accorded might suggest that the administrative authorities’ statutory interpretation could be reviewed in a deferential way. This would depend on whether such legal issues were framed as a question concerning administrative discretion or in terms of decision-making on policy matters. In any case, the unlikely introduction of pure Chevron-like doctrine in one of Council of Europe states might be controversial from the point of view.
of Article 6 ECHR’s full judicial review requirement. It would violate Article 6 ECHR if light judicial review also concerned facts.

2. Administrative cases involving fines

Less space for U.S.-framed deference may be found in administrative cases classified by the ECtHR as criminal in a sense of Article 6 ECHR: administrative cases that involve fines. The ECtHR never directly suggested that the limitations in the standard of review may be justified in the view of subject matter of the decision (professional knowledge or exercise of administrative discretion) or because of the specialized area of law being involved. Instead, the ECtHR on many occasions held that the decision of an administrative agency that does not fulfill the conditions of Article 6 ECHR itself must be subject to subsequent control by a court that has full jurisdiction: a court that has a power to quash in all respects, in fact or in law, a decision rendered by the administrative agency. Such court must in particular have jurisdiction to address all issues of fact and law relevant to the case before it as well as actually assess not only legal issues but also factual ones. Additionally, full review of penalty is required, including the court power to assess its proportionality and power to modify its amount (within the limits prescribed by law) or to annul it. Such a test differs from U.S. deferential standard of review of civil penalties imposed by administrative agencies.

In practice however, the ECtHR accepts quite a limited standard of review of administrative decisions in criminal cases. It does not expect full rehearing of the evidence and does not require the courts to have a power to substitute its own view for that of the administrative agency. It rather takes a case by case approach and sees its task mainly as a control over the sufficiency of the judicial review in the case under complaint. Thus in some instances (for example in Menarini), it accepts a review that is formally limited to legal questions if in fact it goes further so as the evidentiary issues are also reviewed.
It is doubtful whether in criminal cases the ECtHR will start using a more U.S.-like Bryan/Tsfayo test so as to agree for the limitations of judicial review on the basis of the subject-matter of the decision appealed against. However, it is not impossible to reject a possibility that such factors will indirectly play a role in ECtHR’s acceptance of a more lenient standard of review in actual case before the ECtHR. On the other hand, it is well-justified to claim that quite limited standard of review in criminal cases will be seen by the ECtHR to be in accordance with Article 6 ECHR if many of the Article 6 safeguards will be present during the administrative phase of the proceedings. Mead-style rationale could be identified again. In Menarini the fact that Italian competition authority was considered by the ECtHR to be independent might have played a role in the reasoning in this case. More interestingly, a different result would have been reached by the ECtHR in Grande Stevens if the prosecutorial and adjudicative functions had been more separated during the administrative phase of the proceedings or if the applicant had had an access to oral hearing during the administrative phase of proceedings.

B. Example of similarity: antitrust

The analysis provided in supra Part IV shows that judicial deference can be identified in Europe not only on the level of European fundamental rights framework but also in the 

---

268 Probably the ECtHR would have reached the same conclusion as to the sufficiency of judicial review if the Sigma had been classified as criminal in a sense of Article 6 ECHR.

269 Menarini, supra note 111, at paragraph 40.

270 Grande Stevens, supra note 114, at paragraphs 122-123 and 136-137.

271 Id., at paragraphs 122-123. In Grande Stevens lack of access to oral hearing during administrative phase of proceedings or during the proceedings before the court the exercised full jurisdiction over the administrative proceedings combined with the lack of objective impartiality during the administrative proceedings led the ECtHR to the conclusion that Article 6 ECHR was violated in this case.
sophisticated area of EU competition law that requires expertness and economic knowledge of
decision-makers. In line with the findings concerning the ECHR system, the judicial review of
facts, especially those of economic nature, seem to remain in the EU quite deferential (the
applicable standard of review is in a constant state of flux) and it corresponds with standards
of U.S. administrative law that govern the review of facts. Further, judicial review exercised
by the EU Courts (when it comes to EU Commission’s decisions) is surely not more intense
than that of the U.S. courts (when it comes to FTC’s decisions). Deferential approaches
identified in the EU Courts jurisprudence reflect the first two rationales of deference
discussed in supra Part I. The EU Courts seem to believe that the Commission deserves
respect as an expert body responsible for the task of conducting competition policy on the EU
internal market. More specific observations can be made concerning the judicial review of
complex economic assessment, facts, law and fines.

1. Complex economic assessment

Standard of review of the EU Commission’s complex economic determinations is declared by
the EU Courts to be deferential (manifest error of assessment standard is applied). However,
as the GC is under obligation to establish whether the evidence relied on by the Commission
substantiates the conclusions drawn from it, actual intensity of judicial review may vary on a
case by case basis. In the area of mergers, the GC judgments in Airtours, Schneider Electric
and Tetra Laval provide an example of deep judicial scrutiny into the economic substance of
the EU Commission decisions. Similarly, in the U.S., despite declaration of “some deference”
to the FTC’s informed judgment that a particular commercial practice is ‘unfair’ and despite
the application of a deferential substantial evidence test, the FTC’s decisions are often
reviewed intensively by the U.S. courts.
2. Other factual determinations

In areas concerning factual determinations other than complex economic issues, the EU Courts exercise theoretically more intense comprehensive standard of review and check whether the Commission produced sufficient evidence to support the finding of infringement. In any case in all areas concerning the Commission’s factual determinations the EU Courts do not exercise de novo review: they are not entitled to substitute its own view for that of the Commission. Thus the standard of review of facts in EU competition proceedings corresponds with the U.S. substantial evidence test.

3. Legal questions

In the area of judicial review of law, the EU Commission is not given any deference when it comes to its interpretation of Article 101-102 TFEU. Still, the Commission’s record in persuading the EU Courts to the theories it puts forward is significant. In addition, the EU Courts accord deference to the EU Commission’s interpretation of its own soft law in the area of fining policy. In this respect the EU Courts’ approach reflects the Skidmore rationale. Furthermore, a comparison of EU and U.S. judicial review of legal questions in competition law shows that the differences are not very significant in this field as well. The FTC is not accorded Chevron deference and deference accorded by reviewing courts (if any) concerns factual rather than legal determinations. The fact that the FTC is not accorded Chevron deference may have its main reasons in particularities of the U.S. antitrust system (always seen as a common law area reserved ultimately for courts) and reflect more generally limited application of Chevron deference in practice. Still, this fact confirms that the differences between Europe and the U.S. are more limited than one familiar with the principals of U.S. and EU administrative law might think.

272 See supra Part II.A.
4. Fines

Quite controversially from the point of view of ECHR standards governing the judicial review in criminal cases (in a sense of Article 6 ECHR) the EU Commission is accorded deference when fixing the amount of fines and particularly when choosing factors that determine the amount of fines, even if the EU Courts are formally empowered to exercise *de novo* review in this respect. From the U.S. perspective, the fact that the FTC is not entitled to impose civil penalties and so its actions under sec. 5 FTC Act do not pose the risk to be over-deterrent may serve as an argument that the FTC deserves greater judicial deference. However, this does not mean that a certain scope of deference accorded by the EU Courts to the EU Commission in the field of fines would go against the U.S. administrative law standards. To the contrary—the U.S. courts believe that the agencies, when imposing sanctions, act in the scope of their discretion.\textsuperscript{273} Courts see also agencies as experts in the field of sanctions.\textsuperscript{274} For this reason, a very deferential standard of judicial review of civil penalties is accepted by the U.S. Supreme Court.\textsuperscript{275}

Conclusion

In light of the similarities in the judicial review of administrative actions in Europe and in the U.S., it is possible to distinguish three common variables that should influence the scope of judicial deference. If taken into account they can help in building a model of judicial review under which both positive sides of judicial deference are preserved (especially the need for

\textsuperscript{273} Max Minzner, *supra* note 82, at 911.

\textsuperscript{274} Id.

\textsuperscript{275} Butz, 411 U.S. at 185-86.
expertise and flexibility in administrative decision-making) and sufficient safeguards against the abuse of power by administration are provided.

First, the U.S. Mead operating principles and the standards under Article 6 ECHR suggest that the greater the presence of due process guarantees during the administrative phase of proceedings, the more deferential judicial review can be. Conversely, more limited scope of procedural guarantees provided during the administrative phase of the proceedings (for example lack of direct access to an administrative decision-maker at oral hearings) should be seen as an argument for closer judicial scrutiny of administrative action. From this perspective—on a competition law level—extensive procedural guarantees in the proceedings before the FTC may serve as a valid argument for according the FTC greater deference on a judicial level. On the other hand further improvements of administrative process when it comes to the proceedings before the EU Commission can be envisaged as an answer for a call for closer judicial control of the EU Commission’s decisions.\textsuperscript{276}

Second, the ECHR standards suggest that institutionally guaranteed impartiality of administrative decision-makers (division of prosecutorial and investigative functions from decision-making ones) may be seen as a factor influencing the scope of judicial deference. The more adversarial (more judicial-like) the administrative process, the further deference may reach. The U.S. experience with formal adjudication processes being adversarial rather than inquisitorial (which is much more common in Continental Europe) may confirm such hypothesis. Against this background, the separation of decision-makers from the persons responsible for investigating and arguing the case inside the FTC structure should be seen as factors influencing the intensity of judicial review of the FTC’s cease and desist orders. On the other hand, lack of clear separation of these functions in the proceedings before the EU Commission may be used as an argument against more lenient judicial review.

\textsuperscript{276} For such call see Damien Gerard, \textit{supra} note 164, at 475; Ian S. Forrester, \textit{supra} note 206, at 207.
Third, the rationales upon which judicial deference is founded, the ECHR standards, and the U.S. standards reflected in *Chevron* and *Skidmore* deference as well as in substantive evidence test all indicate that administrative agencies should possess an established expertise in the field at stake before claiming deference before the court. From this perspective it is of importance that both the EU Commission and the FTC are experienced enforcers of competition rules staffed not only with lawyers but also economists. On the other hand, in many countries in economic and democratic transition, closer judicial insight into administrative decision-making may be natural. Only after the administrative agency acquires sufficient expertise and experience (proven for example by the quality of its decisions) may it claim deference before the court.

277 For example it is underlined that the strength of FTC economic analysis stems from the large number of economists employed out of which around 70 are the PhD economists, see Harry First, Eleanor M. Fox, Daniel E. Hemli, *Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System*, 303 *New York University Law and Economics Working Papers*, 8-9 (2012), available at [http://lsr.nellco.org/nyu_lewp/303](http://lsr.nellco.org/nyu_lewp/303) at 43-44.