

# A Few Remarks on the Scope of Judicial Review Performed by the Union Judge

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This article<sup>1</sup> presents some general aspects of the scope of judicial review applied by the Court of Justice of the European Union as well as its particularities in competition (the research comprises cases concerning agreements restricting competition and the abuse of a dominant position) and civil service cases. As legal texts of the European Union do not provide the precise scope of judicial control, the jurisprudence<sup>2</sup> of the Court of Justice of the European Union is one of the main sources giving clarifications on this issue. This article focuses accordingly on the presentation of the relevant jurisprudence, which analyzes the subject matter in general and reflects the evolution of this Court's approach in the said competition and civil service cases.

**Keywords:** European Union law, European Union judicature, judicial review, competition law, civil service.

## Kelios pastabos dėl Sąjungos teisėjo atliekamos teisminės kontrolės apimties

Straipsnyje apžvelgiami kai kurie Europos Sąjungos Teisingumo Teismo atliekamos teisminės kontrolės apimties aspektai ir jos ypatumai konkurencijos (tyrimas apima bylas, susijusias su konkurenciją ribojančiais susitarimais ir piktnaudžiumu dominuojančia padėtimi) bei viešosios tarnybos bylose. Kadangi Europos Sąjungos teisės aktai tiksliai neapibrėžia teisminės kontrolės apimties, Europos Sąjungos Teisingumo Teismo (ESTT) jurisprudencija yra vienas iš pagrindinių informacijos šaltinių šiuo klausimu. Atsižvelgiant į tai, straipsnyje pristatoma aktuali analizuojama tema ESTT praktika ir atspindima teismo požiūrio raida minėtose konkurencijos ir viešosios tarnybos bylose.

**Pagrindiniai žodžiai:** Europos Sąjungos teisė, Europos Sąjungos teismai, teisminė kontrolė, konkurencijos teisė, viešoji tarnyba.

## Introduction

The issue of the scope of judicial review is a typical problem of public law. Prior to the judgment of an administrative court, there is usually the decision of a public authority. In contrast to that, civil or criminal cases begin without a state-run decision, as the behavior of private persons is examined.

<sup>1</sup> This article is based on the presentation “The Scope of the Administrative Judge’s Control: The Practice of the Judge of the Union” delivered on November 2018 in Kiev, Ukraine for judges, lawyers, and professors of law. The article was drafted with the assistance of law clerk Ms. Ieva Jasinauskaitė. The article in no way reflects the view of the Court of Justice of the European Union or its judges.

<sup>2</sup> Although in English, in the given context, the term “case-law” is more common, in this article the term “jurisprudence” is used in order to stress the terminology used by the CJEU.

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Summarized in a simple formula, one can say that civil and criminal courts decide, while administrative and constitutional courts control.<sup>3</sup>

The Court of Justice of the European Union (hereinafter referred to as the CJEU)<sup>4</sup> in general and the General Court in particular can be treated as the European Union's (hereinafter referred to as the EU or the Union) administrative court when exercising the function of reviewing the decisions of EU institutions and bodies. The intensity of judicial review in the EU is a broad and complex category of law that raises many questions, the answers to which are rarely obvious. Although there are some general rules provided in the EU legal acts and the CJEU jurisprudence, the judicial review also differs according to the type of cases.

The object of this article is the concept of the scope of judicial review of the CJEU as such in the light of competition (concerning agreements restricting competition as well as the abuse of a dominant position) and civil service cases, which serve as illustrative examples of the wide scope of CJEU reviews, depending on the nature of the dispute. The article aims to present and analyze the key aspects of the scope of judicial review performed by the CJEU and the evolution of its jurisprudence regarding the said competition and public service matters. Therefore, the research is focused on the analysis of the CJEU jurisprudence and on relevant EU legal acts.

Although the topic of the article is not new in foreign legal literature, it retains its novelty because of the constantly evaluating jurisprudence. It should also be mentioned that most authors discuss this topic fragmentally, in the context of a particular case, and do not provide a more comprehensive or systemic analysis based on the development of the CJEU jurisprudence. The present article is original in that it analyzes both the general aspects of the scope of judicial review as well as its particularities in the abovementioned two types of cases, and that its analysis is based both on some previous and current jurisprudence. As regards the Lithuanian legal doctrine, no comprehensive researches including the mentioned elements on this matter (and especially disputes in the EU civil service area) have been done to date.

Multiple methods of research are used in order to analyze the relevant sources and to achieve the abovementioned aims. First, the EU legal acts and CJEU jurisprudence are studied by using linguistic, logical and systemic methods. Second, the evolution of the CJEU jurisprudence is realized by performing a comparative research as well as invoking the historical method. Third, the statistical method was necessary for the treatment and presentation of relevant statistical data on the CJEU activities.

## 1. General Aspects of the Scope of Judicial Review Performed by the CJEU

The Treaty on the Functioning of the European Union (hereinafter referred as the TFEU)<sup>5</sup> has established, by Articles 263 and 277 on the one hand and Article 267 on the other, a complete system of legal remedies and procedures designed to ensure a judicial review of the legality of EU acts, and has entrusted such a review to the EU courts.<sup>6</sup> That is to say, a means for reviewing the legality of EU acts

<sup>3</sup> See, for example, OSTER, J. S. The Scope of Judicial Review in the German and U.S. Administrative Legal System. *German Law Journal*, 2008, Volume 9, No 10, p. 1267–1297. Available at: <[https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b859789f72662e5f8e6096/1454922104901/GLJ\\_Vol\\_09\\_No\\_10\\_Oster.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b859789f72662e5f8e6096/1454922104901/GLJ_Vol_09_No_10_Oster.pdf)>.

<sup>4</sup> The Court of Justice of the European Union (CJEU) consists of the Court of Justice and the General Court. While talking about two jurisdictions, the terms “Court of Justice” and “General Court” will be used. The term “Court of Justice of the European Union” (CJEU) will be used to reflect both EU judicial bodies.

<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 326, 2012, p. 0001–0390.

<sup>6</sup> Court of Justice of the European Union. Judgment of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, case C-72/15, ECLI:EU:C:2017:236, paragraph 66.

consists of actions for annulment and requests for a preliminary ruling. The type of procedure depends in general on its initiation. National courts of EU Member States may address a preliminary request on the validity of EU law applicable in a particular case and thus question the validity of EU legal acts through the preliminary ruling procedure. Other subjects – EU Member States, EU institutions, natural or legal persons – may, under certain conditions, bring an action for annulment before the CJEU (the Court of Justice or General Court, depending on the nature of the contested act as well as on the initiator of the proceedings).

Typically, how intensely the EU Courts examine the legality of a contested decision is indicated by the applicable standard of review. In brief, there are two standards of scrutiny to choose: full review and marginal review. In principle, a full review is the prevailing threshold of judicial control with respect to questions of law and fact and represents the strictest level of scrutiny that EU Courts may exercise. By contrast, a marginal review is engaged where a decision touches upon policy matters or entails complex economic assessments and is thought to connote a more relaxed standard of control, under which judicial intervention is confined to instances of “manifest errors of assessment” etc.<sup>7</sup>

Although the scope of a judicial review highly depends on the nature of a dispute, some general guidelines may be treated as universal. A basic principle applied in the CJEU jurisprudence implies that the discretion enjoyed by an institution or a body of the Union affects the intensity of the judicial review. If this discretion is broad, the review exercised over the assessments made by an institution or a body concerned must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct, and there is no serious or manifest error of assessment or misuse of powers.<sup>8</sup> And, on the contrary, a reduced discretion results in a stricter judicial review.

One of the clearest examples of the cases when an EU institution or a body enjoys a broad discretion is that having the element of political choice. In one of such cases,<sup>9</sup> the Court of Justice has considered that the European Parliament has made its political choice by conferring on the European Commission (hereinafter referred to as the Commission) the power to adopt an implementing act pursuant to Article 291 TFEU, and not a delegated act on the basis of Article 290 TFEU.<sup>10</sup> The Court of Justice has noted that the EU legislature enjoys discretion when it decides to confer a delegated or implementing power on the Commission. Therefore, the Court of Justice limited its review only to the assessment of manifest errors, and as manifest errors of this type had not been identified, the action had to be dismissed.

<sup>7</sup> See, for example, TÜRK, A. H. Oversight of Administrative Rulemaking: Judicial Review. *European Law Journal*, 2013, Volume 19, No. 1, 2013, p. 126–142. Available at: <[http://www.osservatorioair.it/wp-content/uploads/2013/04/Turk\\_ELJ\\_1\\_2013.pdf](http://www.osservatorioair.it/wp-content/uploads/2013/04/Turk_ELJ_1_2013.pdf)>; KALINTIRI, A. What’s in a name? The marginal standard of review of ‘complex economic evaluations’ in EU competition enforcement. *Common Market Law Review*, 2016, Volume 53, Issue 5, p. 1283–1316. Available at: <[http://eprints.lse.ac.uk/67727/1/KALINTIRI\\_The%20marginal%20standard%20.pdf](http://eprints.lse.ac.uk/67727/1/KALINTIRI_The%20marginal%20standard%20.pdf)>.

<sup>8</sup> General Court of the European Union. Judgment of 1 February 2018, *European Dynamics Luxembourg SA and Others v European Chemicals Agency*, case T-477/15, ECLI:EU: T:2018:52, paragraph 47.

<sup>9</sup> Court of Justice of the European Union. Judgment of 18 March 2014, *European Commission v European Parliament and Council of the European Union*, case C-427/12, ECLI:EU:C:2014:170.

<sup>10</sup> To be precise about the circumstances of the latter case, the Commission sought the annulment of Article 80(1) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (*OJL* 167, 2012, p. 1), in so far as Article 80(1) provided for the adoption of measures setting the fees payable to the European Chemicals Agency by an act based on Article 291(2) TFEU (hereinafter referred to as the “implementing act”), and not by an act adopted under Article 290(1) TFEU (hereinafter referred to as the “delegated act”). The Court of Justice has stated that when the EU legislature confers, in a legislative act, a delegated power on the Commission pursuant to Article 290(1) TFEU, the Commission is called on to adopt rules which supplement or amend certain non-essential elements of that act. By contrast, when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States (paragraphs 38–39).

The judgment in *Digital Rights Ireland*<sup>11</sup> may be presented as a different example of the interpretation of the scope of judicial review when the discretion of an institution was treated as not broad. The Court of Justice had to examine the validity of the Data Retention Directive No 2006/24/EC<sup>12</sup> in light of fundamental rights under the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter<sup>13</sup>). The Court of Justice observed that, in view of the important role played by the protection of personal data in light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by the directive, the EU legislature's discretion was reduced, with the result that review of that discretion should be strict.<sup>14</sup> The Court of Justice found in the latter case that the EU legislature had exceeded the limits imposed by compliance with the principle of proportionality in light of the Charter's articles guaranteeing the respect for private and family life and the protection of personal data. Therefore, the Court of Justice has decided that the Data Retention Directive No 2006/24/EC was invalid.<sup>15</sup>

In brief, the discretion that is entitled to the author of a contested act is of high importance. The abovementioned analysis may be summarized in the following formula: *the broader the discretion – the narrower the scope of judicial review*. This also means that the CJEU shall stay away from issues related to political choice. The latter formula could serve as a guideline for judiciaries of the EU Member States as well.

## 2. Competition Cases (Articles 101 and 102 TFEU)

The Commission decisions issued under Article 101 (prohibition of agreements restricting competition) and Article 102 (prohibition of abuse of a dominant position) TFEU are reviewed by the CJEU. Under Article 263 TFEU, there are four grounds on which the CJEU has jurisdiction to provide its review: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the Treaties or of any rule of law relating to their application; (iv) misuse of powers. Such a review shall be described as “review of legality” or “annulment jurisdiction.” Where the CJEU finds the decision of the Commission to be illegal it may only annul it and remand to the Commission. The CJEU has no power to issue a new decision that would replace the one issued by the Commission.

Article 261 TFEU also foresees the possibility to give the CJEU unlimited jurisdiction with regard to penalties. Such a possibility was implemented in the competition area, and the mentioned legality review is supplemented by a review with unlimited jurisdiction envisaged in regard to the penalties. Under Article 31 of the Regulation 1/2003,<sup>16</sup> the CJEU shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment – it may cancel, reduce, or increase<sup>17</sup> the fine or periodic penalty payment imposed. Thus, as regards the appropriateness of

<sup>11</sup> Court of Justice of the European Union. Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

<sup>12</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ L* 105, 2006, p. 54–63.

<sup>13</sup> Charter of Fundamental Rights of the European Union, *OJ C* 326, 2012, p. 391–407.

<sup>14</sup> *Digital Rights Ireland* (C-293/12 and C-594/12), paragraph 48.

<sup>15</sup> *Idem*, paragraphs 69, 71.

<sup>16</sup> 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, *OJ L* 1, 2003, p. 1–25.

<sup>17</sup> By the way, the possibility to increase a fine causes a problem for many administrative judges within EU Member States, since most national administrative judges do not enjoy such power.

the amounts of fines imposed the CJEU exercises (or at least could exercise), a *de novo* review: it can re-make the Commission's decision, assessing the different factors taken into account when calculating the amount of a fine.<sup>18</sup>

The main area where problematic issues come to the front is the standard of review of the Commission decisions, namely the intensity of the scrutiny exercised by the CJEU over the legality of the Commission decision subject to review.<sup>19</sup> One could easily recognize that for the last decades, the CJEU had the tendency to refer to the broad discretion of the Commission in competition cases and thus justify a limited judicial control over complex technical and economic assessments.<sup>20</sup>

When talking about the evaluation of the intensity of judicial review in competition matters, many would start from the judgment in *Consten*<sup>21</sup> of 1966 that shows the standpoint of the Court of Justice in its early days. It was quite clear from this judgment that the Court of Justice perceived its role in competition matters as one of a mere review of legality and not (except as regards the imposition of fines) one of unlimited jurisdiction or review of the merits.<sup>22</sup>

Later, the Court of Justice gave some general insights on the scope of its review regarding technical questions in *Technische Universität München*<sup>23</sup> (the judgment was delivered under a preliminary reference procedure, as a German court referred a question on the validity of a Commission decision related with customs matters). It was stated that a large power of appraisal shall be given to the Commission, especially in case of complex technical issues. The scope of control of an EU judge was considered by the Court of Justice to be limited to the verification of whether the Commission had taken its disputed decision in accordance to the general principles of EU legal order in administrative procedures.<sup>24</sup>

In *Aalborg Portland and Others*,<sup>25</sup> as regards the scope of judicial review, the Court of Justice noted that examination by the judicature of 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.<sup>26</sup>

<sup>18</sup> Here we absolutely agree with a doctrine. See, for instance, BERNATT, M. *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights*. Institute for Consumer Antitrust Studies Working Papers, Loyola University Chicago, 2012, p. 6. Available at SSRN: <<https://ssrn.com/abstract=2447884>> or <<http://dx.doi.org/10.2139/ssrn.2447884>>.

<sup>19</sup> *Idem*, p. 7.

<sup>20</sup> See, for example, JAEGER, M. L'intensité du contrôle du Tribunal dans les affaires de concurrence soulevant des questions d'appréciation économique complexe. *Revue européenne de droit public*, 2012, Volume 24, No 3 (85), p. 975–996; BAILEY, D. Standard of proof in EC merger proceedings: a Common Law perspective. *Common market law review*, 2003, Volume 40, Issue 4, p. 861.

<sup>21</sup> Court of Justice of the European Union. Judgment of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, joined cases 56 and 58-64, ECLI:EU:C:1966:41.

<sup>22</sup> DA CRUZ VILAÇA, J. L. The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU. *Journal of Antitrust Enforcement*, 2018, Volume 6, Issue 2, pages 173–188. Available at: <<https://doi.org/10.1093/jaenfo/jny003>>.

<sup>23</sup> Court of Justice of the European Union. Judgment of 21 November 1990, *Technische Universität München v Hauptzollamt München-Mitte*, case C-269/90, ECLI:EU:C:1991:438.

<sup>24</sup> *Idem*, paragraphs 13–15.

<sup>25</sup> Court of Justice of the European Union. Judgment of 7 January 2004, *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission of the European Communities*, 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, ECLI:EU:C:2004:6.

<sup>26</sup> *Idem*, paragraph 279.

One might say that this approach, demonstrated in the abovementioned cases, began to significantly change after the adoption of the Charter in 2000, and even more after the Lisbon Treaty<sup>27</sup> came into force in 2009 and gave the Charter the same legal value as the Treaties. Recent jurisprudence shows that the CJEU has been explaining and interpreting the scope of its judicial review by paying attention to ensure its full conformity with the requirements of the principle of effective judicial protection contained in Article 47 of the Charter. Thus, recent judgments seem to promote a less deferential judicial review: when talking about complex assessments, they refer to an increasing number of elements that should be verified (this is seen from the cases cited below). It should, however, be stressed that the CJEU has never suggested that this review should be completely unlimited or denied a certain level of discretion of the Commission in economic matters.

*Microsoft*<sup>28</sup> shall be mentioned in this context. Although the General Court had still referred to previous CJEU jurisprudence and the notions of “limited review” and “manifest error” regarding complex economic or technical assessments, it listed more elements than before falling under this review.<sup>29</sup> The General Court stated that “while the Community Courts recognize that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission’s interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.”<sup>30</sup>

*Chalkor* and *KME*<sup>31</sup> can also serve as good examples of the changing CJEU approach because of their clear argumentation, full analysis of the issue, and produced summary of the relevant jurisprudence. In those judgments, the Court of Justice stressed that the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter. It also added that the judicial review of the decisions of the institutions was arranged by the founding Treaties.

The Court of Justice has emphasized that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU courts must refrain from reviewing how the Commission interprets 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 that must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.<sup>32</sup> By the way, in *Chalkor*, the Court of Justice

<sup>27</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306, 2007, p. 1–271.

<sup>28</sup> General Court of the European Union. Judgment of 17 September 2007, *Microsoft Corp. v Commission of the European Communities*, case T-201/04, ECLI:EU:T:2007:289.

<sup>29</sup> There are authors who interpret the *Microsoft* judgment in a way that the General Court seemed to have gone beyond a mere check if there was a “manifest” error, and seemed rather to have conducted an exhaustive review to exclude the existence of any error whatsoever in the Commission’s assessments. For example, see the review provided in SETARI, A. *The Standard of Judicial Review in EU Competition Cases: The Possibility of Introducing a System of More Intense or Full Judicial Review by the EU Courts: Doctoral Dissertation*. Milan: The University of Milan, 2011, p. 122. Available at: <[https://air.unimi.it/retrieve/handle/2434/232402/300225/phd\\_unimi\\_R09230.pdf](https://air.unimi.it/retrieve/handle/2434/232402/300225/phd_unimi_R09230.pdf)>.

<sup>30</sup> *Microsoft* (T-201/04), paragraph 89.

<sup>31</sup> Court of Justice of the European Union. Judgments of 8 December 2011, *Chalkor AE Epexergasias Metallon v European Commission*, case C-386/10, ECLI:EU:C:2011:815; *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, case C-389/10 P, ECLI:EU:C:2011:816, and *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, case C-272/09 P, ECLI:EU:C:2011:810.

<sup>32</sup> *Chalkor* (C-386/10), paragraphs 52–54; *KME* (C-389/10 P), paragraphs 119–121; *KME* (C-272/09 P), paragraphs 92–94.

has also stressed that the EU court should in no case be obliged to make a new investigation of the file: the failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection.<sup>33</sup>

Discussing the subject matter, we cannot leave aside *Intel*.<sup>34</sup> The Court of Justice upheld Intel's appeal on the General Court's failure to assess Intel's rebates in light of all the relevant circumstances. The Court of Justice noted that the General Court confirmed the Commission's line of argument that loyalty rebates granted by an undertaking in a dominant position were, by their very nature, capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an as efficient competitor test (hereinafter referred to as the "AEC test") were not necessary. The Court of Justice has observed that, while the Commission emphasized that the rebates at issue were by their very nature capable of restricting competition, it nevertheless carried out an in-depth examination of the circumstances of the case in its decision, and the AEC test played an important role in the Commission's assessment. The Court of Justice therefore held that the General Court was required to examine all of Intel's arguments concerning that test (such as, *inter alia*, the errors allegedly committed by the Commission as regards that test), which the General Court failed to do.<sup>35</sup> The Court of Justice therefore set aside the judgment of the General Court. The message of the Court of Justice was quite clear – the General Court has not made a full analysis of factual and economic evidence in this case in order to properly check the legality of the Commission's decision and there was no reason to use the Commission's "margin of appreciation" as an excuse for not conducting an in-depth review.

Finally, it should be stressed that the burden of proof for reversing a Commission decision always lies on the applicant. This rule should be followed even in the case of unlimited judicial review (regarding the fines imposed), and this has been recently reminded in *Infineon Technologies*.<sup>36</sup> It was stated in the latter judgment that the exercise of unlimited jurisdiction does not amount to a review of the court's own motion, and proceedings still are *inter partes*. Therefore, it is always for the applicant to raise pleas in law against the decision at issue and to adduce evidence in support of those pleas.<sup>37</sup>

To sum up, the Union judge exercises a comprehensive review as regards the law and facts of the decisions on competition matters that are subject to its judicial control. However, with the exception of unlimited jurisdiction as far as fines imposed are concerned, the assessment provided in a contested act may not be substituted by the one of the Union judge. The scope of judicial control is also limited in cases of complex technical or economic issues. This often presents a challenge for the court to find the balance between proper legality verification and the necessity to respect the discretion of the author of the questioned act.

### 3. Civil Service Cases

According to Article 270 TFEU, the CJEU has been given jurisdiction in disputes between the EU and its staff. The TFEU, however, does not give any indications about the scope of the CJEU jurisdiction

<sup>33</sup> *Chalkor* (C-386/10), paragraph 66.

<sup>34</sup> Court of Justice of the European Union. Judgment of 6 September 2017, *Intel Corp. v European Commission*, case C-413/14 P, ECLI:EU:C:2017:632.

<sup>35</sup> *Idem*, paragraphs 142–146.

<sup>36</sup> Court of Justice of the European Union. Judgment of 26 September 2018, *Infineon Technologies AG v European Commission*, case C-99/17 P, ECLI:EU:C:2018:773.

<sup>37</sup> *Idem*, paragraph 194.

in this matter. The details regarding this issue are laid down in the EU Staff Regulations<sup>38</sup> and in the CJEU jurisprudence.

According to Article 91 of the EU Staff Regulations, the unlimited jurisdiction is given to the CJEU in case of “disputes of a financial character” between the EU and its civil servants. The CJEU has always given a very broad interpretation of when its jurisdiction should be unlimited in civil service cases as well as of the notion of “disputes of a financial character.” This approach has been applied from its early jurisprudence and even before the EU Staff Regulations (with the abovementioned provisions concerning the scope of jurisdiction) have been adopted.

Let us start from some landmark judgments. In *Von Lachmüller*<sup>39</sup> of 1960, the Court of Justice considered that it had to verify not only whether the acts which were disputed were lawful, but also if the conduct they revealed was a breach that could give rise to compensation for the officials concerned. It has thus granted such a compensation to unlawfully dismissed officials, although some of them claimed compensation only in the alternative: in order to assess the amount of the damage, account must be taken of the fact that although the applicants have either been reinstated in to their former posts or have found new employment, they have suffered direct, non-material damage by reason of the anxieties which the precarious position arising from the default of the Commission caused them.

*Oberthur*<sup>40</sup> of 1980 is known as another landmark judgment. The Court of Justice has considered itself as having unlimited jurisdiction, although the applicant has sought only annulment of the promotion procedure and the decision rejecting his claim. The Court of Justice found that albeit the promotion procedure was irregular as regards the applicant, it could not justify the annulment of this procedure, as a large number of other public servants have already been promoted. Therefore, the Court of Justice awarded the applicant on its own motion the compensation for the non-material damage suffered because of the irregularity committed.<sup>41</sup> Thus, the unlimited jurisdiction of the Court of Justice was interpreted as meaning *inter alia* its power to award the applicant the compensation for the non-material damage on its own motion as well as to assess the damage suffered and to decide on its own as regards the amount of that compensation.

Some other CJEU judgments providing an interpretation of the notion “dispute of a financial character” are also good examples for illustrating the scope of the judicial review of contested decisions that the Court of Justice implements in civil service cases.

First of all, according to the jurisprudence, the notion of “dispute of a financial character” denotes all disputes related to any compensations and payments or their components. These are, for example, a dispute concerning a rent allowance<sup>42</sup> or disputes related with decisions having direct consequences for these payments: a dispute concerning a case of dismissal<sup>43</sup> or a contract termination,<sup>44</sup> a dispute

<sup>38</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045, 1962, p. 1385.

<sup>39</sup> Court of Justice of the European Union. Judgment of 15 July 1960, *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v Commission of the European Economic Community*, joined cases 43/59, 45/59 and 48/59, ECLI:EU:C:1960:37.

<sup>40</sup> Court of Justice of the European Union. Judgment of 5 June 1980, *Dominique Oberthur v European Commission*, case C-24/79, ECLI:EU:C:1980:145.

<sup>41</sup> *Ibid.*, paragraphs 11–15.

<sup>42</sup> Court of Justice of the European Union. Judgment of 27 October 1987, *Arlette Houyoux and Marie-Catherine Guery v Commission of the European Communities*, joined cases 176/86, 177/86, paragraph 16, ECLI:EU:C:1987:461.

<sup>43</sup> General Court of the European Union. Judgment of 8 September 2009, *European Training Foundation (ETF) v Pia Landgren*, case T-404/06 P, ECLI:EU:T:2009:313, paragraphs 232 and 233.

<sup>44</sup> The European Union Civil Service Tribunal. Judgment of 2 July 2014, *Aristidis Psarras v European Union Agency for Network and Information Security (ENISA)*, case F-63/13, paragraphs 46–48, ECLI:EU:F:2014:177.



concerning the withdrawal of decisions of appointment and establishment because of the false declarations of pre-hiring medical examinations,<sup>45</sup> etc.

Second, some judgments are worth to be presented in detail as regards the application of unlimited jurisdiction as well as the interpretation of disputes of a financial character.

For instance, in *Weißenfels*,<sup>46</sup> the Court of Justice has stressed that the sole purpose of the applicant's claims was obviously to obtain payment of the sums that the Parliament, wrongly in its submission, deducted from the applicant's remuneration pursuant to the rule against overlapping, plus interest at the statutory rate. The Court of Justice has stated that the notion of "disputes of a financial character" includes not only actions brought by staff members seeking to have an institution held liable, but also all those seeking payment by an institution to a staff member of a sum that, according to them, should be transferred under the Staff Regulations or other measure governing their working relations. The Court of Justice has also stressed that unlimited jurisdiction entrusts it with the task of providing a complete solution to the disputes brought before it – that is to say, to rule on all the rights and obligations of the staff member, save for leaving to the institution in question, under the control of the court, the implementation of such part of the judgment and under such precise conditions as the court shall determine.<sup>47</sup>

The definition of the notion of disputes of a financial character provided in *Weißenfels* was reiterated and developed in other judgments of the EU courts. As such, *Gogos*<sup>48</sup> is worth mentioning. The dispute in this case concerned a Commission decision classifying an EU official on a certain grade and step as well as a decision rejecting the complaint he had lodged with the appointing authority against the classification decision. The General Court has dismissed the action. Although having found some irregularities in the competition proceedings as regards the applicant, the General Court has however stressed that the applicant did not put an application for financial compensation for that loss before the court. The applicant appealed to the Court of Justice. In his appeal, the appellant claimed *inter alia* that the General Court failed to exercise the unlimited jurisdiction it has in disputes of a financial character to grant him compensation of its own motion.

The Court of Justice has reminded, according to its jurisprudence, that an action by which an official seeks annulment of a decision affecting his position under the EU Staff Regulations may also give rise to a dispute of a financial character. Moreover, an action by which an official seeks a judicial review of his classification likewise gives rise to a dispute of a financial character. Thus, the action brought at first instance by the applicant was considered as being of a financial character within the meaning of Article 91(1) of the Staff Regulations, and, consequently, the General Court therefore had unlimited jurisdiction in this case. The Court of Justice has stressed that unlimited jurisdiction gives EU Courts, even in cases where they do not annul the decision at issue, the power, if necessary, of their own motion to order the defendant to pay compensation for the damage caused by the defendant's wrongful act in the performance of public duties.

In the latter case, the Court of Justice however found that the disadvantages suffered by the applicant in connection with his remuneration and his career have been caused not by the classification decision or the decision on the complaint but by the errors of law committed by the Commission in the course

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<sup>45</sup> General Court of the European Union. Judgment of 23 March 2000, *Charlotte Rudolph v Commission of the European Communities*, case T-197/98, ECLI:EU:T:2000:86, paragraph 32.

<sup>46</sup> Court of Justice of the European Union. Judgment of 18 December 2007, *Roderich Weißenfels v European Parliament*, case C-135/06 P, ECLI:EU:C:2007:812.

<sup>47</sup> *Idem*, paragraphs 62, 65–67.

<sup>48</sup> Court of Justice of the European Union. Judgment of 20 May 2010, *Christos Gogos v European Commission*, case C-583/08 P, ECLI:EU:C:2010:287.

of the competition, errors which Mr. Gogos did not plea in the present proceedings. Therefore, the General Court was found to have been right not to exercise its unlimited jurisdiction.<sup>49</sup>

Thus, the EU courts enjoy unlimited jurisdiction in disputes between the EU and its staff that are of a financial character. According to the jurisprudence, the notion of “dispute of a financial character” is treated broadly and concerns, in essence, all disputes that have a connection to the financial interests of an EU civil servant. The unlimited jurisdiction entrusts both EU Courts with the task to provide a complete solution to the disputes brought before it, i.e., to rule on all the rights and obligations of the staff member. According to the jurisprudence, this includes the possibility to award of court’s own motion compensation for the damage suffered as well as to assess that damage *ex aequo et bono*. Although the CJEU often refers to the notion of “compensation” in general, it is seen from the factual circumstances of the cases that until now, EU courts used to award the compensation for non-material damages.

## Final Remarks

1. The analysis of the CJEU jurisprudence leads to a difficulty of setting a strict formula for the scope of judicial review performed by the CJEU when assessing the legality of public administration decisions. It highly depends not only on the category of cases but also on a particular dispute. However, some remarks – this term is more suitable than “conclusions” or “rules” – might be formulated, which could serve as guidelines when talking about the issue.
2. First, the discretion that is entitled to the author of a contested act is of high importance. The less discretion is given for an institution or a body of the European Union, the more intensive the judicial review shall be, and *vice versa*. This also means that the Court of Justice of the European Union shall stay away from issues related to political choice.
3. Second, as regards competition cases, the Courts of the European Union exercise a comprehensive review but, with the exception of unlimited jurisdiction concerning the fines, the assessment performed in a contested act may not be substituted by one of a judge of the European Union. The scope of judicial control is also limited regarding complex technical and economic issues. This often presents a challenge for the Court to find a balance between proper legality verification and the necessary respect for the discretion of the author of the questioned act.
4. Third, the Court of Justice of the European Union enjoys unlimited jurisdiction in disputes between the EU and its staff that are of a financial character. According to the jurisprudence, the notion of “dispute of a financial character” is applied broadly and concerns, in essence, all disputes that have a connection to the financial interests of an EU civil servant.

## References

### EU Legal Acts

1. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C* 306, 2007, p. 1–271.
2. Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 326, 2012, p. 0001–0390.
3. Charter of Fundamental Rights of the European Union, *OJ C* 326, 2012, p. 391–407.
4. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ L* 105, 2006, p. 54–63.

<sup>49</sup> *Idem*, paragraphs 8–15, 38–39, 46–48, 51–53.

5. Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ P* 045, 1962, p. 1385.
6. 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, *OJ L* 1, 2003, p. 1–25.
7. Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, *OJ L* 167, 2012, p. 1.

### Special Legal Literature

8. BAILEY, D. Standard of proof in EC merger proceedings: a Common Law perspective. *Common market law review*, 2003, Volume 40, Issue 4, p. 861.
9. BERNATT, M. *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights*. Institute for Consumer Antitrust Studies Working Papers, Loyola University Chicago, 2012, p. 6. Available at SSRN: <<https://ssrn.com/abstract=2447884>> or <<http://dx.doi.org/10.2139/ssrn.2447884>>.
10. DA CRUZ VILAÇA, J. L. The intensity of judicial review in complex economic matters – recent competition law judgments of the Court of Justice of the EU. *Journal of Antitrust Enforcement*, 2018, Volume 6, Issue 2, p. 173–188. Available at: <<https://doi.org/10.1093/jaenfo/jny003>>.
11. JAEGER, M. L'intensité du contrôle du Tribunal dans les affaires de concurrence soulevant des questions d'appréciation économique complexe. *Revue européenne de droit public*, 2012, Volume 24, No 3 (85), p. 975–996.
12. KALINTIRI, A. What's in a name? The marginal standard of review of 'complex economic evaluations' in EU competition enforcement. *Common Market Law Review*, 2016, Volume 53, Issue 5, p. 1283–1316. Available at: <[http://eprints.lse.ac.uk/67727/1/KALINTIRI\\_The%20marginal%20standard%20.pdf](http://eprints.lse.ac.uk/67727/1/KALINTIRI_The%20marginal%20standard%20.pdf)>, <<https://doi.org/10.5040/9781509919697>>.
13. OSTER, J. S. The Scope of Judicial Review in the German and U.S. Administrative Legal System. *German Law Journal*, 2008, Volume 9, No 10, p. 1267–1297. Available at: <[https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b859789f72662e5f8e6096/1454922104901/GLJ\\_Vol\\_09\\_No\\_10\\_Oster.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b859789f72662e5f8e6096/1454922104901/GLJ_Vol_09_No_10_Oster.pdf)>.
14. SETARI, A. *The Standard of Judicial Review in EU Competition Cases: the Possibility of Introducing a System of More Intense or Full Judicial Review by the EU Courts*. Doctoral Dissertation. Milan: The University of Milan, Milan, 2011, p. 122. Available at: <[https://air.unimi.it/retrieve/handle/2434/232402/300225/phd\\_unimi\\_R09230.pdf](https://air.unimi.it/retrieve/handle/2434/232402/300225/phd_unimi_R09230.pdf)>.
15. TÜRK, A. H. Oversight of Administrative Rulemaking: Judicial Review. *European Law Journal*, 2013, Volume 19, No. 1, 2013, p. 126–142. Available at: <[http://www.osservatorioair.it/wp-content/uploads/2013/04/Turk\\_ELJ\\_1\\_2013.pdf](http://www.osservatorioair.it/wp-content/uploads/2013/04/Turk_ELJ_1_2013.pdf)>, <<https://doi.org/10.1111/eulj.12017>>.

### Jurisprudence

#### *Judgments of the Court of Justice of the European Union*

16. Court of Justice of the European Union. Judgment of 15 July 1960, *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v Commission of the European Economic Community*, joined cases 43/59, 45/59 and 48/59, ECLI:EU:C:1960:37.
17. Court of Justice of the European Union. Judgment of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, joined cases 56 and 58-64, ECLI:EU:C:1966:41.
18. Court of Justice of the European Union. Judgment of 5 June 1980, *Dominique Oberthür v European Commission*, case C-24/79, ECLI:EU:C:1980:145.
19. Court of Justice of the European Union. Judgment of 27 October 1987, *Arlette Houyoux and Marie-Catherine Guery v Commission of the European Communities*, joined cases 176/86, 177/86, ECLI:EU:C:1987:461.
20. Court of Justice of the European Union. Judgment of 21 November 1990, *Technische Universität München prieš Hauptzollamt München-Mitte*, case C-269/90, ECLI:EU:C:1991:438.
21. Court of Justice of the European Union. Judgment of 7 January 2004, *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del*

- Tirreno SpA v Commission of the European Communities*, 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, ECLI:EU:C:2004:6.
22. Court of Justice of the European Union. Judgment of 20 May 2010, *Christos Gogos v European Commission*, case C-583/08 P, ECLI:EU:C:2010:287.
  23. Court of Justice of the European Union. Judgment of 8 December 2011, *Chalkor AE Epexergasias Metallon v European Commission*, case C-386/10, ECLI:EU:C:2011:815.
  24. Court of Justice of the European Union. Judgment of 8 December 2011, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, case C-389/10 P, ECLI:EU:C:2011:816.
  25. Court of Justice of the European Union. Judgment of 8 December 2011, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, case C-272/09 P, ECLI:EU:C:2011:810.
  26. Court of Justice of the European Union. Judgment of 18 March 2014, *European Commission v European Parliament and Council of the European Union*, case C-427/12, ECLI:EU:C:2014:170.
  27. Court of Justice of the European Union. Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.
  28. Court of Justice of the European Union. Judgment of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, case C-72/15, ECLI:EU:C:2017:236.
  29. Court of Justice of the European Union. Judgment of 6 September 2017, *Intel Corp. v European Commission*, case C-413/14 P, ECLI:EU:C:2017:632.
  30. Court of Justice of the European Union. Judgment of 26 September 2018, *Infineon Technologies AG v European Commission*, case C-99/17 P, ECLI:EU:C:2018:773.
  31. Court of Justice of the European Union. Judgment of 18 December 2007, *Roderich Weißenfels v European Parliament*, case C-135/06 P, ECLI:EU:C:2007:812.

#### ***Judgments of the General Court of the European Union***

32. General Court of the European Union. Judgment of 23 March 2000, *Charlotte Rudolph v Commission of the European Communities*, case T-197/98, ECLI:EU:T:2000:86.
33. General Court of the European Union. Judgment of 17 September 2007, *Microsoft Corp. v Commission of the European Communities*, case T-201/04, ECLI:EU:T:2007:289.
34. General Court of the European Union. Judgment of 8 September 2009, *European Training Foundation (ETF) v Pia Landgren*, case T-404/06 P, ECLI:EU:T:2009:313.
35. General Court of the European Union. Judgment of 1 February 2018, *European Dynamics Luxembourg SA and Others v European Chemicals Agency*, case T-477/15, ECLI:EU:T:2018:52.

#### ***Judgments of the European Union Civil Service Tribunal***

36. The European Union Civil Service Tribunal. Judgment of 2 July 2014, *Aristidis Psarras v European Union Agency for Network and Information Security (ENISA)*, case F-63/13, ECLI:EU:F:2014:177.

## **A Few Remarks on the Scope of Judicial Review Performed by the Union Judge**

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S u m m a r y

This article presents some general aspects of the scope of judicial review implemented by the Court of Justice of the European Union as well as its particularities in competition (the research comprises cases concerning agreements restricting competition as well as abuse of a dominant position) and civil service cases. As legal texts of the European Union do not give precise details about the scope of judicial control, the jurisprudence of the Court of Justice of the European Union is one of the main sources giving answers to this question. The article focuses accordingly on the presentation of the relevant jurisprudence that analyzes the subject matter in general and reflects the evolution of this Court's approach in the said competition and civil service cases.

The analysis provided in the article allows to make several concluding remarks. First, the discretion that is entitled to the author of a contested act is of high importance. The less discretion is given for an institution or a body of the European Union, the more intensive the judicial review shall be, and *vice versa*. This also means that the Court of Justice of the European Union shall stay away from issues related to political choice. Second, as regards competition cases, the Courts of the European Union exercise a comprehensive review but, with the exception of unlimited jurisdiction concerning the fines, the assessment performed in a contested act may not be substituted by one of a judge of the European Union. The scope of judicial control is also limited regarding complex technical and economic issues. This often presents a challenge for the Court to find a balance between proper legality verification and the necessary respect for the discretion of the author of the questioned act. Third, the Court of Justice of the European Union enjoys unlimited jurisdiction in disputes between the EU and its staff that are of a financial character. According to the jurisprudence, the notion of “dispute of a financial character” is applied broadly and concerns in essence all the disputes that have a connection to the financial interests of an EU civil servant.

## **Kelios pastabos dėl Sąjungos teisėjo atliekamos teisminės kontrolės apimties**

**Virgilijus Valančius**

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S a n t r a u k a

Straipsnyje apžvelgiama keletas bendrųjų Europos Sąjungos Teisingumo Teismo atliekamos teisminės kontrolės apimties aspektų ir šios kontrolės ypatumai konkurencijos bylose (tyrimas apima bylas, susijusias su konkurenciją ribojančiais susitarimais ir piktnaudžiavimu dominuojančia padėtimi) ir viešosios tarnybos bylose. Kadangi Europos Sąjungos teisės aktai tiksliai neapibrėžia teisminės kontrolės apimties, Europos Sąjungos Teisingumo Teismo jurisprudencija yra vienas iš pagrindinių informacijos šaltinių šiuo klausimu. Atsižvelgiant į tai, straipsnyje pristatoma susijusi Europos Sąjungos Teisingumo Teismo praktika, kurioje analizuojami straipsnio objekto bendrieji aspektai ir atspindima Europos Sąjungos Teisingumo Teismo požiūrio raida minėtose konkurencijos ir viešosios tarnybos bylose.

Straipsnyje atlikta analizė leidžia padaryti keletą apibendrinančių išvadų. Pirmą, itin svarbi yra ginčijamą teisės aktą priėmusio subjekto diskrecijos apimtis. Kuo mažiau Europos Sąjungos institucijai ar įstaigai yra suteikta diskrecijos laisvės, tuo intensyvesnė teisminė kontrolė bus vykdoma, ir atvirkščiai. Tai taip pat reiškia, kad Europos Sąjungos Teisingumo Teismas turėtų atsiriboti nuo su politiniu pasirinkimu susijusių klausimų sprendimo. Antra, konkurencijos bylose Europos Sąjungos teismai atlieka išsamią ginčijamų aktų teisėtumo kontrolę, tačiau, išskyrus neribotą jurisdikciją dėl baudų vertinimo, Europos Sąjungos teismo teisėjas negali ginčijamų aktų pakeisti savo iš naujo atliktu vertinimu. Teisminės kontrolės apimtis taip pat ribojama ir sudėtingų ekonominių ar techninių klausimų atvejais. Tai dažnai lemia, kad teismai susiduria su iššūkiu rasti tinkamo teisėtumo kontrolės atlikimo ir būtinybės nepažeisti ginčijamą aktą priėmusio subjekto diskrecijos pusiausvyrą. Trečia, Europos Sąjungos Teisingumo Teismui yra suteikta neribota jurisdikcija finansinio pobūdžio ginčuose tarp Europos Sąjungos ir jos tarnautojų. Atsižvelgiant į jurisprudenciją, sąvoka „finansinio pobūdžio ginčai“ yra taikoma plačiai ir apima iš esmės visus ginčus, kurie yra susiję su Europos Sąjungos tarnautojų finansiniais interesais.