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Member State judges' EU law mandate of *ex officio* review and the role of Article 47 of the Charter

1 Introduction

I was invited to account in this volume for the Court of Justice's take on *ex officio* application of EU law by national courts. So I set out to look for new cases on the topic and came upon a case that has been somewhat neglected in the scholarship: *Sporting Odds*.[1] Although the case has already received attention, this has been from the perspective of the freedom of movement and not from procedural equity perspectives.[2]

The arsenal of procedural questions posed in that reference went to the heart of the topic I had set out to cover in the present contribution – namely how the principle of effective judicial protection affects national courts' EU law mandate of *ex officio* review. The case was about the allocation of responsibility for providing domestic courts with evidence to justify national restrictions on fundamental freedoms. Presented this way, the stakes of *ex officio* review perhaps look higher than what was in earlier case-law handled as an obscure procedural obstacle to effectiveness in the swamp that is national procedural autonomy. Still, even if the parcel has a different wrapping it ever holds the same content – national courts' powers to take investigative measures necessary to review the compatibility of national acts with EU law.

Before commenting on that case, some context is provided. Section two starts by considering the closest predecessor to the case, namely *Online Games*.[3] Its Opinion – commented in section three – draws heavily on the ECtHR:s case-law relating to prosecutorial presence; yet does not apply the latter court's wider case-law on *ex officio* review outside the auspices of hardcore criminal law, here reviewed in section four. Section five contemplates the relevance for present purposes of the Court of Justice's own case-law on the EU Courts' *ex officio* review of

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[1] *Sporting Odds*, C-3/17, EU:C:2018:130. There are also a couple of new consumer protection cases on *ex officio* review: *Profi Credit Polska II,* C-176/17, EU:C:2018:711; *Bondora,* C-435/18, EU:C:2019:1118*, Lintner,* C-511/17, EU:C:2020:188; *Kancelaria Medius*, C-495/19, EU:C:2019:1141; see J. Werbrouck and E. Dauw, "The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law – The Endgame?", to be published in *European Law Review* 2021.

[2] Simon, Denys: Réglementations nationales des jeux de hasard, Europe : Les revues Lexisnexis, 2018 avril nº 4 p.23–24; Hojnik, Janja: Online Gambling under EU Law: Strolling Between Controlled Expansion and Genuine Diminution of Gambling Opportunities, LeXonomica : revija za pravo in ekonomijo 2018 vol 10 nº 02 p.67–101.

[3] *Online Games*, C-685/15, EU:C:2017:452 has also been commented, but not extensively and not in English: Simon, Denys: Droit à un procès équitable, Europe : Les revues Lexisnexis 2017 Août Comm. nº 290 p.13; Simon, Denys: Indépendance des juges, Europe : Les revues Lexisnexis, 2018 avril nº 4 p.11-12 ; Coutron, Laurent: Cour de justice, 2e ch., 14 juin 2017, Online Games Handels e.a., aff. C-685/15, ECLI:EU:C:2017:452, Jurisprudence de la CJUE 2017, Bruylant, Bruxelles. Décisions et commentaires 2018, p. 211–225.

Commission decisions – constituting enforcement of public law *against* individuals belonging in the category of *de facto* criminal proceedings under Art. 6 ECHR.

This vast case-law of our European courts provides the backdrop for analysing the preliminary ruling in *Sporting Odds*. Section six consolidates the Court's response to the referring court's three procedural questions relating to active investigation by the judiciary, the production of evidence and legal analysis.

In the final section, a procedural perspective and a fundamental rights perspective is offered with respect to the implications of the case-law considered in this contribution.

2 *Online Games* – active investigation can strike both ways

In *Online Games,* Austrian tax authorities had seized equipment and imposed fines on two companies registered in other EU Member States, whose gaming machines in Austria ran contrary to the national monopoly on chance games. At initial hearings before the referring court, the public authorities had put forward legal grounds relating to the justification of Austrian legislation in terms of compliance with EU law. Evidence in support of these grounds absent or lacking, a contested subsidiary obligation in Austrian administrative offence proceedings was triggered for the seized judge to take an 'active role in establishing the truth and according to which it is for that court to remedy the shortcomings and omissions of the prosecution authorities.'[4]

The Austrian court took the view that since the Court of Justice had by the time of the referral already, in *Pfleger*, found the Austrian monopoly to be contrary to EU law,[5] it fell upon the administrative authorities to demonstrate its compatibility with EU law by way of objective justifications. For a national court to support a public authority in making its case against an administrative offender[6] would, according to the referring court, lead to a confusion of 'prosecutorial' roles and therefore run contrary to Art. 47 CFR and Art. 6 ECHR.[7]

The *Pfleger* ruling had in fact dealt not only with the compatibility of the public monopoly with the freedom of movement, but also with a burden of proof of kinds.[8] Based on its prior allocation with 'the Member State',[9] the Court of Justice in *Online Games* placed the responsibility for justifying *prima facie* infringements on the public authorities seeking enforcement against individuals.

> it is the *competent authorities* of the Member State wishing to rely on an objective capable of justifying a restriction of the freedom to provide services which must supply the national court called on to rule on that question with all the evidence of such a kind as to enable the

[4] *Online Games*, C-685/15, EU:C:2017:452, 35.

[5] *Pfleger and Others,* C-390/12, EU:C:2014:281 (Art 56 TFEU).

[6] In this paper I mostly refer to individual litigants in this position as 'offenders' since they are actually appellants before the referring court; yet, calling the public authority 'defendants' would be counter-intuitive considering the context of enforcement of quasi-criminal administrative penalties.

[7] *Online Games*, C-685/15, EU:C:2017:452, 38–39.

[8] See e.g. Simon, Denys: Droit à un procès équitable, Europe : Les revues Lexisnexis 2017 Août Comm. nº 290 p.13.

[9] *Pfleger and Others,* C-390/12, EU:C:2014:281, 50.

> court to be satisfied that the measure does indeed comply with the requirements laid down by the Court of Justice to be able to be regarded as justified.[10]

At least in the ruling's initial recount of earlier case-law, judicial review appeared to be supposed to take the form of *scrutiny* of the justifications for national legislation itself:

> it is for that court to satisfy itself, having regard inter alia to the actual rules for applying the restrictive legislation concerned, that the legislation genuinely meets the concern to reduce opportunities for gambling, to limit activities in that area and to fight gambling-related crime in a consistent and systematic manner. The Court has stated that the national court must carry out a global assessment of the circumstances in which restrictive legislation was adopted and implemented.[11]

Having established that a primary responsibility lay on the enforcing authorities as public litigants, the reference to 'global assessment' in this last sentence was in fact not too far from the originally challenged Austrian rule on active adjudication. Although I expected the Court to argue that this heightened scrutiny was rather intended to work in favour of the offenders, the Court took a different track at the stage of subjecting the circumstances in the national proceedings to the Court of Justice's own concrete requirements. The below quote lays the ground for this path, in reference to independence under Art. 47 CFR, whose link to impartiality

> seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect […] requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly statutory and procedural rules, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[12]

The need for a level playing field meant that if a judge is expected to scrutinise national justifications of his own motion, he must equally be able to scrutinise the merits of the offender's case 'not in order to support the prosecution, but to establish the truth'.[13] In other words, global assessments can strike both ways. Even when they hit the 'wrong litigant' (with respect to the *Pfleger* standard), the requirement of impartiality requires that *ex officio* review be carried out on equal terms: 'the court is required to examine the facts of the case before it within the limits of the case, taking account in the same way of any exonerating and incriminating circumstances.'[14]

Thus far, the Court made a convincing case that *ex officio* review should deal with the players even-handedly, including public parties that – despite representing the government – should be treated like any other opposing litigant.[15] The Austrian rules were however embraced only in principle (and here comes the final twist): *provided that* the court did not 'substitute itself for the competent authorities […] whose task it is to provide the evidence necessary to enable that

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[10] *Online Games*, C-685/15, EU:C:2017:452, 50, here emphasized.

[11] Ibid., 51–52.

[12] Ibid*,* 61–62*.* See also *TDC*, C-222/13, EU:C:2014:2265, 31 and Simon, Denys: Indépendance des juges, Europe : Les revues Lexisnexis, 2018 avril nº 4 p.11–12.

[13] *Online Games*, C-685/15, EU:C:2017:452, 64.

[14] Ibid., 63.

[15] Ibid.

court to determine whether that restriction is justified.'[16] Dare I reformulate: 'go ahead and be active, just don't dig too deep'. The Court of Justice did not explain why it drew this particular limit, and did not provide any other authority than the Advocate General's Opinion.[17]

3 Don't confuse the judiciary with the 'prosecution'!

Advocate General Sharpston, in her Opinion, emphasised that *ex officio* practices are not binary (to review or not to review) but a grey scale. Insofar as the area of procedural autonomy grants Member States substantial leeway, the *Rewe* principles[18] and the European fundamental rights regime represent the outer limit:

> It remains of course the national court's duty to evaluate and rule on the material submitted by the Member State. That is so whether the procedure before that court follows an adversarial or an inquisitorial model. In the latter case, it will (or may) also be under an obligation to undertake *ex officio* investigations of its own and that requirement will continue to apply in any event. The material submitted by the Member State will operate to supplement those investigations; subject to the point I shall make below, it will not replace them.
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> How, precisely, the national court conducts its inquiry must to a very large degree be a matter for that court, provided that the requirements of the ECHR and of EU law, in particular the principles of equivalence and effectiveness and – where applicable – the Charter, are met. The nature of that task will inevitably vary (in some cases considerably) from one case to another and from one jurisdiction to another; it is not the role of this Court to intervene in areas which are purely a matter for national law.[19]

Within these bounds, can courts' investigatory powers then go to practically any lengths? The Advocate General was inclined to respond to this in the negative, describing the Austrian rule as 'potentially Herculean'.[20] Austrian courts, having limited investigative resources at their disposal, were at risk of drifting or even losing their way in investigatory practices.[21] Her reasoning about possible sources for such investigation is compelling and the concrete pitfalls she elucidates are clearly relevant to the problem at hand. For instance, actual investigation will need to rely on public authorities with a potential conflict of interest, while relying on legislative preparatory works poses its own set of limitations and problems:

> the referring court indicates that the regional administrative courts in Austria have no independent experts of their own and that they are required to have recourse primarily to experts belonging to one of the national administrative services (who are likely to be a part of the same institution that is a party to the proceedings before the national court). […] In assessing impartiality, the Strasbourg Court has emphasised that that requirement has both a subjective and an objective element. In my view, there must be at least a risk that experts

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[16] Ibid., 67.

[17] The referred *ruling in Pfleger and Others,* C-390/12, EU:C:2014:281 says nothing about substitution.

[18] The Court in *Rewe v. Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188 and *Comet BV v. Produktschap voor Siergewassen*, 45/76, EU:C:1976:191 required that national procedural rules not render the exercise of rights under EU law virtually impossible or excessively difficult (principle of effectiveness) and that they are formulated and applied in a non-discriminatory manner (principle of equivalence).

[19] Opinion by Advocate General Sharpston in *Online Games*, C-685/15, EU:C:2017:201, 55.

[20] Ibid., 58.

[21] Ibid., 58–59.

> drawn from the national administrative services will fail to satisfy the first of these and almost a certainty that they will not meet the second […].
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> The second issue concerns the reliance which the national court may place on explanatory documents to the domestic legislation that is under challenge and on the records of the parliamentary proceedings that led to the adoption of that legislation. […] Can the national court rely on one (or both) of these sources that are already in the public domain, thereby eliminating the need for the Member State to put forward its justification pursuant to paragraph 50 of the judgment in *Pfleger and Others*? Such a solution appears unduly simplistic. […] those sources cannot by definition be regarded as fully complete or reliable where, as was the case with the Law on games of chance, this Court has given strong indications that the legislation in question may not satisfy the requirements of EU law.[22]

Yet, the Advocate General's considerations in support of her findings on courts' active investigation hinged not on the above considerations, but moved on to the appropriateness in criminal proceedings for the prosecution to be present so that the court need not step into an inquisitorial role and, in so doing, contravene the ECHR. The Opinion here relied on a line of case-law on criminal proceedings from the ECtHR which I henceforward refer to as the 'Russian cases'.[23] The bottom line was indeed in this case-law that the prosecution must actually be in the room.[24] I would at most deduce from this that Union fundamental rights law and in particular Arts 47 and 48 CFR should also require that the prosecution be in the room and, in the present case, share the responsibility for putting forward evidence with the municipal tax authorities in the circumstances leading up to the reference in *Online Games.*

From there, the Opinion made an analogy from complete physical absence in these ECtHR cases to a court's compensation through investigative measures for procedural passivity or omission in *Online Games*:

> because the overriding requirement is that of independence and impartiality, where there is any doubt as to the matter the national court called upon to give a ruling must give priority to ensuring that that requirement is satisfied. Should that mean, in any given case, that the national court must refrain from raising an issue that might benefit the prosecution to the detriment of the accused, then so be it. Let me also emphasise that it cannot in any circumstances be the duty of a court in a position such as that of the referring court to substitute itself for the Member State in setting out the justification which it is the duty of the latter to provide in terms of paragraph 50 of the judgment in *Pfleger and Others*. Should such a justification not be supplied (as will be the case with any other instance where the prosecution, through absence or passivity or otherwise, fails to fulfil a duty incumbent on it), the national court may draw all inferences that are appropriate by reason of such failure.[25]

Even though I agree on principle, this was a bit of a leap. For starters, proceedings in the *physical absence* of an opposing party are *per se* contrary to adversarialism – making the word 'substitute' apposite in the most literal sense insofar that the court steps in for the prosecution. Still, had the Russian cases concerned not the prosecution's absence but its passivity in terms

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[22] Ibid., 59–62.

[23] Ibid., 67.

[24] Although only two of the three were Russian; *Ozerov v. Russia*, EC:ECHR:2010:0518JUD006496201 (criminal proceedings); *Kyprianou v. Cyprus* (summary criminal proceedings); ECtHR judgment of 20 September 2016 in *Karelin v. Russia,* application no. 926/08 (*de facto* summary criminal proceedings). Because I am not convinced that this case-law lends itself to the proposed analogy, I will not explain it in detail.

[25] Opinion by Advocate General Sharpston in *Online Games*, C-685/15, EU:C:2017:201, 68.

of e.g. insufficient production of evidence to meet the burden of proof – the outcome would likely have been as the Advocate General proposed, given the presumption of innocence that is universally recognised in criminal proceedings and, pursuant to European fundamental rights law, extends to *de facto* criminal proceedings.[26]

4 *Ex officio* review according to the ECtHR

I would have wished to see reference in *Online Games* to additional case-law in which the ECtHR engaged more directly with courts' exercise of investigative powers. The present section considers this line of ECtHR case-law relating *inter alia* to adversarialism, due notice, the right to be heard and the ambit of proceedings in connection to the requisite of a 'fair' hearing in Art. 6(1) ECHR.[27] This notion brings with it certain sub-requirements, including the right to participate effectively in the hearing and the right to equality of arms.[28] While the right to participate effectively has been held to follow from the 'very notion of an adversarial procedure'[29] the principle of equality of arms denotes a right to an adversarial procedure as the governing principle for civil, criminal and administrative proceedings.[30] The principle of equality of arms requires that each party 'be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.'[31] As to particular adversarial safeguards, the ECtHR has emphasised the 'opportunity for the parties […] to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the Court's decision.'[32] This includes an obligation for the seized court to draw the existence of such evidence to the attention of all parties.[33]

This principle of due notice, under the umbrella of the right to an adversarial procedure, offers guidance as to appropriate *ex officio* exercise of investigative powers.[34] In a case concerning *ex*

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[26] Art 48 CFR: Presumption of innocence and right of defence – 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. – 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

[27] Parts of the present section consolidate section 3.1.6 in Allison Östlund, Effectiveness versus Procedural Protection (Baden-Baden: Nomos, 2019).

[28] Art 6(1) ECHR: In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

[29] ECtHR judgment in *Stanford v. United Kingdom*, application no. 16757/90, 26.

[30] The limitation of the provision's applicability to 'civil rights and obligations' does not mean that all administrative and public law legal relationships fall outside its scope; ECtHR judgment in *Eskelinen and Others v. Finland*, application no. 63235/00, 69; ECtHR judgment in *Ferrazzini v. Italy*, application no. 44759/98, 27. A dynamic interpretation for the purposes of the scope of the notion 'civil rights and obligations' includes public and administrative litigation to the extent that the 'outcome is decisive for private rights and obligations – the latter including a wide variety of administrative law procedures with primarily economic consequences for individuals.' See further D. Harris, M. O'Boyle, E. Bates, and C. Buckley (2009), 218ff.

[31] ECtHR judgment in *Kress v. France* application no. 39594/98, 72.

[32] Ibid., 33.

[33] ECtHR judgment in *Göç v. Turkey*, application no. 36590/97.

[34] Setting aside the right to due notice equally violates the right to an adversarial procedure irrespective of whether, *in casu,* any prejudice for the injured party can be shown.

officio review, *X & Co. Ltd v. Germany*,[35] the European Commission for Human Rights endorsed its use not only as a facultative tool, but even as an obligation.[36] The Commission was not sympathetic to the argument of the UK claimant company, that the seized German court, in declining to invite oral submissions on the introduced point of law, violated the principle of adversarial procedure. The Commission instead referred to *jura novit curia* as a generally recognised principle of law, rejecting the application as 'manifestly ill-founded':

> the practice of the German courts whereby the parties are not necessarily invited to make oral submissions on all points of law which may appear significant to the courts does not constitute an infringement of the principle of "fair hearing" within the meaning of this provision.[37]

The present case demonstrated that, while vowing to uphold adversarialism as a component of the right to a fair trial, the principle of *juria novit curia* is capable of denying parties to submit observations on the application and interpretation of the law chosen by the seized court; i.e. the parties cannot dispose over the seized court's interpretation or application of the law as such.[38]

In subsequent case-law, seized courts' *ex officio* introduction of aspects of law or fact has not in itself been considered an encroachment on adversarial procedure; however, in so doing, a judge should not take litigants by surprise. The ECtHR has emphasized the opportunity to take into account and submit observations based on any elements introduced into the proceedings by the court,[39] in the same way as the adversarial procedure requires that the counter-party's submissions of evidence or observations be subject to due notice before delivering a judgment in the case.[40] It thus appears that in the case-law of the ECtHR, the practice of *ex officio* review is overall not regarded as a threat to equality of arms or court impartiality, as long as it is exercised with caution and subject to the requirement of due notice.[41]

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[35] Order of the European Commission for Human Righs *X. & Co. Ltd. V. the Federal Republic of Germany*, application no. 3147/67.

[36] See comments in F. A. Mann (1977).

[37] Order of the European Commission for Human Righs *X. & Co. Ltd. V. the Federal Republic of Germany*, application no. 3147/67, under 'The Law'.

[38] See, similarly, the Court of First Instance in *Commission of the European Communities v. Anton Pieter Roodhuijzen*, T-58/80 P, EU:T:2009:385, 36.

[39] ECtHR judgment in *Bulut v. Austria*, application no. 17358/90, 50; ECtHR judgment in *Clinique des Acacias et autres v. France*, applications no. 65399/01, 65406/01, 65405/01 and 65407/01, 39; ECtHR judgment in *Prikyan and Angelova v. Bulgaria*, application no. 44624/98, 42; ECtHR judgment in *Bulut v. Austria*, application no. 17358/90, 50. See also ECtHR judgment in *Avotiņš v. Latvia,* application no. 17502/07, 98, where enforcement of foreign judgments under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), OJ L 012, 16/01/2001, was considered contrary to Art 6(1) ECHR if enforcement was carried out 'without the unsuccessful party having been afforded any opportunity of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed.'

[40] This applies equally when the seized court rules *ex officio* on matters of admissibility, legality of a contested act and, most importantly for present purposes, the substitution of grounds. ECtHR judgment in *Clinique des Acacias et autres v. France*, applications no. 65399/01, 65406/01, 65405/01 and 65407/01, 40–43. See, however, ECtHR judgment in *Andret et autres v. France*, application no. 1956/02.

[41] See further R. Ergec and J. Velu, *Convention européenne des droits de l'homme* (Brussels: Bruylant, 2014), 506, § 474.

Where does all this leave us with respect to *Online Games*? I would have preferred the Opinion to make the classification of quasi-criminal or *de facto* criminal in support of relying on the earlier discussed Russian line of criminal ECtHR case-law. I would also have wished to see a such a distinction in the ruling. The Court of Justice's conclusions were, in *Online Games*, guided by the notion of equality between all litigants, all the while basing itself on an Opinion which was in its turn founded on the contrary premise of criminal proceedings. The Court's findings were in this respect, as is familiar, subject to one qualification. Where the ECtHR had drawn the line at prosecutorial absence and due notice, the Court of Justice demanded that the courts not be required to 'substitute themselves for those authorities'.[42]

To me, this rang a bell from EU competition procedure. Perhaps this is a *faux ami.* The next section will nevertheless follow this path back to a separate line of case-law relating to the EU Courts' standard of review in competition cases, in which the distinction between criminal and non-criminal proceedings also became pivotal with respect to the ECHR fundamental rights protection in enforcement proceedings against individuals.

5 Substituting the Commission in competition cases

In 2011 until 2014, the Court of Justice attended to the compatibility of the standard of review carried out by the EU Courts with the principle of judicial protection as laid down in Art. 47 of the EU Charter. Simplified, the issue at hand concerned fines imposed by the Commission on companies infringing EU competition law, e.g. through price fixing or other practices distorting competition. Such fines may reach substantial amounts, why they should not be regarded as administrative penalties but as fines akin to criminal sanctions.[43] Accordingly, the EU Courts' review – in particular the General Court's – should take the form of full or unlimited review.[44]

Effective judicial protection in the guise of access to court enables 'offenders' in this type of case to have their penalty reviewed in full by a judicial instance, which in practice allows the EU courts to substitute their own appraisal for that of the Commission's with respect to the imposition and amount of the penalty.[45] I.e. at least the General Court can basically change the decision or outcome however it wants.

Unlimited jurisdiction is, however, not the same as unchained *ex officio* review:

> the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the

[42] *Online Games*, C-685/15, EU:C:2017:452, 66.

[43] The rulings were delivered just months after the ECtHR handed down ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics SRL v. Italy,* Application no. 43509/08, in which Italian competition fines, in the specific context of examining the scope of review under national procedural law, were found to be of criminal nature within the meaning of Art 6 ECHR.

[44] Art 31 of Regulation 1/2009: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

[45] *KME Germany AG v. Commission*, C-272/09 P, 103; see also *Limburgse Vinyl and Others,* C-238/99 P, 692.

> applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.[46]

In competition proceedings, *inter partes* characteristics come with a division of responsibilities that falls short of an allocation of roles. On the one hand, as in conventional criminal proceedings, a burden of proof weighs on the accuser:

> in regard to infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.[47]

The intuitive conclusion would then be that only once the Commission had met this task, would the burden of proof shift to opposing party. However, the offender has his own task of adducing evidence in support of the appeal:

> What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.[48]

At face value, such emphasis on the responsibilities for the litigants might be assumed to imply a more passive role for the EU Courts. The Court of Justice's insistence on 'carrying out the full and unrestricted review, in law and fact, required of it',[49] would then appear to refer to the assessment of what the parties have put forward, and not the substitution of grounds or the investigation into evidence not put forward by the parties. In *Deltafina*, the Court of Justice again referred to the wide discretion of the General Court with respect to assessing the need for additional evidence or investigation:

> The General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the substantive inaccuracy of the findings of the General Court is apparent from the documents in the case.[50]

In sum, the Court of Justice rejoined the ECtHR by suggesting that the standard of review in EU competition law corresponds to the full review required in *Menarini* and *Janosevic v. Sweden.*[51] It has however been argued, both before and after the considered jurisprudence, that all too intrusive judicial review must be avoided in order to maintain a uniform and predictable application of implementation guidelines and in order for the EU Courts not to fall into a 'government of judges.'[52] In proceedings that are not only *inter partes,* but also *de facto*

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[46] *KME Germany AG v. Commission*, C-272/09 P, 104.

[47] Ibid., 105

[48] Ibid., 105

[49] Ibid., 109.

[50] Ibid.; case C-578/11 *Deltafina SpA v. Commission,* 67.

[51] ECtHR Judgment of 21 May 2003, *Janosevic v. Sweden*, Application no 34619/97, 57; *A. Menarini Diagnostics SRL v. Italy,* Application no. 43509/08.

[52] Jaeger (2011) p. 139. See also K. Lenaerts *et al.* (2006) *Procedural Law of the European Union,* 2nd edition. London: Sweet & Maxwell, p. 450; Schwarze (2008) pp. 58–59; Wils (2010), p. 19.

criminal, its exact reach becomes all the more controversial when investigative measures might benefit the public litigant.

6 Sporting Odds – the tail side

The present contribution has so far traced a few different lines of European case-law on *ex officio* review. Although the Court of Justice's ruling in *Online Games* was more than ever grounded in traditional theories of procedural law,[53] it did not engage with the case-law considered in the present contribution, save indirectly the Russian line. Even though *Online Games* therefore left a few questions unanswered as to compliance with European fundamental rights law, the preliminary ruling in subsequent *Sporting Odds* was brief in response to the reference's procedural questions, and delivered without an Opinion. So let us jump to that ruling.[54]

A British company had offered online betting in Hungary without a necessary concession or licence. Based on an investigation of the website, Hungarian tax authorities proceeded to impose a fine without giving the British company prior notice. At the heart of the national proceedings in *Sporting Odds* were thus administrative proceedings against offenders of a (sort of) state monopoly. But contrary to the Austrian active court rule in *Online Games*, Hungarian legislation made no provision for national courts' *ex officio* review of the 'proportionality of measures restricting the freedom to provide services' – meaning that the problem was not excessive powers but rather the lack thereof.[55] The referring court, as in *Online Games,* wished to know whether it was to investigate the proportionality of the system of concessions in the context of reviewing the imposed administrative fines, or whether it was to allocate the burden of proof between the parties.[56]

The Court of Justice referred back to the 'global assessment' prescribed in *Online Games*, clarifying the notion of courts 'substituting themselves' for lower instances:

> While those courts may be required, under national procedural rules, to take the necessary measures in order to encourage the production of such evidence, they cannot, in contrast, be required to substitute themselves for those authorities in setting out the justifications which it is the duty of the latter to provide. Should such justifications not be provided through absence or passivity of those authorities, the national courts must be able to draw all inferences which result from such failure.[57]

So, as we had already deduced from *Online Games,* nothing stopped a national court from posing pointed questions as long as they were intended to prompt necessary activity from a

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[53] The Court's reasoning on the 'truth' and the level playing field is familiar from e.g. J.A. Jolowicz (2005), J. Thibaut and L. Walker (1978); N.H. Andrews, Nurturing Civil Justice, in Festschrift für Rolf Sturner, eds Bruns A. et al (Tübingen, Mohr Siebeck, 2013), 1395ff.

[54] Also commented in Simon, Denys: Réglementations nationales des jeux de hasard, Europe : Les revues Lexisnexis, 2018 avril nº 4 p.23-24; Hojnik, Janja: Online Gambling under EU Law: Strolling Between Controlled Expansion and Genuine Diminution of Gambling Opportunities, LeXonomica : revija za pravo in ekonomijo 2018 vol 10 nº 02 p.67–101.

[55] *Sporting Odds*, C-3/17, EU:C:2018:130, 52.

[56] Ibid., C-3/17, 16.

[57] Ibid., 54.

party to the dispute to put forward, qualify or supplement its grounds. It is nonetheless the public authorities' responsibility to cook up justifications for encroachments of EU law that – the Court of Justice in other words appears to be precluding national courts from putting forwards additional justifications not offered by the public parties.

Thus the answer to what *ex officio* review national courts *may* carry out under EU law: *ex officio* investigative measures are permitted as an EU law prerogative (provided no 'substitution').[58] Yet, the fact that *ex officio* review is *allowed* within these bounds, is not the same as it being *obliged* under EU law:

> It follows that EU law does not require that Member States provide for an *ex officio* examination of measures restricting fundamental freedoms and, therefore, does not preclude a national law which puts the burden of proof on the parties.[59]

This formula is familiar – the Court of Justice found already in 1995 in *van Schijndel* that if national courts are precluded exceeding the ambit of proceedings or abandoning their passive role under national law, then they are not obliged to carry out such examination as an EU law prerogative.[60] The specific question as to whether the *absence* of *ex officio* powers was contrary to EU law was in *Sporting Odds* answered in the negative, to the effect that at least the range or depth of the 'global assessment' already prescribed in *Online Games* would be up to the national legislator to define.[61] When regarded through the *van Schijndel* prism, this finding looks uncontroversial enough to e.g. explain why no Opinion was delivered.

However, neither *Rewe/Comet*[62] nor *van Schijndel* formed part of the referring courts query, and the Court likewise responded in reference to Articles 47 and 48 of the EU Charter. Also in response to the query about production of evidence and presentation of legislative analysis, the Court of Justice's response was based on these Charter provisions despite the absence of in-depth fundamental rights analysis in the reasoning. However, as regards the burden of proof and the responsibility to provide legal analysis, the ruling became less deferential than with respect to *ex officio* review: On the one hand, Member States having implemented restrictive legislation bear the burden of providing evidence,[63] but on the other hand, failure to produce necessary legal analysis relating to the effects of a restrictive measure does not amount to a failure to satisfy the requisite burden of proof.[64] In the latter respect, the global assessment

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[58] Ibid., 55.

[59] Ibid., 56.

[60] *van Schijndel,* C-430/93, EU:C:1995:441, 22.

[61] *Sporting Odds*, C-3/17, EU:C:2018:130, 57: 'Having regard to all of the foregoing considerations, the answer to Question 10 is that Article 56 TFEU and Article 4(3) TEU, read in conjunction with Articles 47 and 48 of the Charter, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not provide for the *ex officio* examination of the proportionality of measures restricting the freedom to provide serves within the meaning of Article 56 TFEU and which puts the burden of proof on the parties to the proceedings.'

[62] The Court in *Rewe v. Landwirtschaftskammer für das Saarland*, 33/76, EU:C:1976:188 and *Comet BV v. Produktschap voor Siergewassen*, 45/76, EU:C:1976:191.

[63] *Sporting Odds*, C-3/17, EU:C:2018:130, 58–59 (response to Question 13).

[64] Ibid., 64 (response to Question 14).

reappears in somewhat opaque terms, reinforced even in the *absence* of national courts investigatory powers.

The rulings in *Online Games* and *Sporting Odds* also left some doubt as to the holder of the burden of justification, shifting between the 'Member State' the public authority, and the authority 'implementing' the restrictive legislation. This is from a procedural perspective confusing. Suffice it perhaps to say that in an EU jurisdiction, the Member State policy-maker with respect to state monopolies is likely to be Parliament or perhaps, after delegation, Government legislating through decree. The supervisory authority for breaches against such a monopoly is likely either a supervisory (administrative) authority or law enforcement. In either of the latter cases, justifications will have to be sought by the litigating authority in e.g. preparatory works provided by or under the auspices of the legislative branch. The assumption that that same legislative branch will be a public litigant in individual enforcement proceedings is far-fetched and creates unabordable ambiguities in the Court's reasoning. Thankfully though, the Court in *PI v. Landespolizeidirektion Tirol* clarified that the *Sporting Odds* obligation was incumbent on the public authority *with standing* in the proceedings. The legislature's tangeating role is to provide a procedural framework that bolsters this obligation, through e.g. an obligation to state reasons.[65]

7 Conclusion

I once asked a Swedish judge whether he would be willing to take investigative measures if doing so would mean supporting the case of the public litigant. He responded that – especially in administrative proceedings 'against' individuals – supplementary questions should not be posed to individuals who risked undermining their own case through their response. A colleague of his then objected that adherence to the principle of active adjudication, on the contrary, required rolling the dice: 'You never know how any litigant will react to supplementary questions – the same way as you never know what fruit investigation may bear.'

I find that this discussion illustrates the problem in both *Online Games* and *Sporting Odds.* The Court demonstrated willingness to accept that the Pandora's box of *Materielle Prozessleitung*[66] may be opened, but that the Court of Justice could not in any practical sense instruct national courts to try to censure what might come out.[67] It is also for this practical reason that I was somewhat relieved when the Court in *Sporting Odds* added that in the absence of investigative powers, the *Pfleger* ruling's 'global assessment' did not preclude national systems placing a strict burden of proof on the parties, and did not amount to an obligation, without national

[65] *PI v. Landespolizeidirektion Tirol*, C-230/18, EU:C:2019:383, 82–85.

[66] A. Wallerman, "Procedural Autonomy in Sweden: Is Materielle Prozessleitung the Answer?" in *Procedural Autonomy Across Europe,* B. Krans & A. Nylund (eds.), Cambridge: Intersentia (2020).

[67] *Online Games*, C-685/15, EU:C:2017:452, 63.

legislative mandate, to investigate available justifications for restrictions on fundamental freedoms.[68]

As has already been suggested, this conclusion would have been non-controversial had the Court relied on the traditional line of case-law relating to national courts *ex officio* mandate under EU law,[69] which I might summarise as follows: 'If you allow it, we might prescribe it. But if you don't allow it, we'll leave you well enough alone.'[70] However, even in the area of national procedural autonomy, the fundamental rights context of both considered preliminary references should not allow such a deferential approach, as the Court noted in *Online Games*:

> it is for the domestic legal system of each Member State to regulate the procedural rules governing actions for the protection of the rights which individuals derive from EU law. In the absence of EU legislation, the Member States have the responsibility for ensuring that those rights are effectively protected in each case and, in particular, for ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter.[71]

In this perspective, reliance on ECtHR case-law on adversarialism under Art. 6 ECHR represented an appropriate avenue towards finding that the legislation at issue in both *Online Games* and *Sporting Odds* complied with Arts 47 and 48 CFR.

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[68] Notwithstanding that, at the end of its procedural reasoning, *Sporting Odds* reintroduced an ambiguity as to how to how to evaluate the absence of analysis, reports or studies carried out by the legislator or competent authorities, *Sporting Odds*, C-3/17, EU:C:2018:130, 61–65.

[69] I.e. *van Schijndel,* C-430/93, EU:C:1995:441; *Kraaijeveld and Others,* C-72/95, EU:C:1996:1404; *van der Weerd,* C-222/05, EU:C:2007:318 *et seq*.

[70] *van Schijndel,* C-430/93, EU:C:1995:441, 22.

[71] *Online Games*, C-685/15, EU:C:2017:452, 59.