THE COMPETITION LAW REVIEW

Volume 2 Issue 1 ISSN 1745-638X

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ISSN 1745-638X (Online)

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Volume 2 Issue 1 **August 2005**

Editorial
Developing Due Process in EC Competition Law

Alan Riley[*]

It was not so long ago that mention of due process and competition in the same breadth would see most competition specialists' eyes glaze over. Competition law was about substantial issues of law and economics - due process was a marginal subject, focussing on access to the Commission's file and the role of the Hearing Officer. It would have been inconceivable to have a wide-ranging group of scholars, practitioners and regulators from across the Union spending eight hours discussing due process issues. However, at the Vth CLaSF workshop in April we were able to have an informative and broad discussion concerning a host of due process issues which would have stunned some of the early specialists in the competition field. We were able to extensively discuss a number of procedural issues as varied as self-incrimination, through privilege, to double jeopardy, fining policy and recidivism.

There are three reasons for this development of procedural competition law. Firstly, the increase in the number of cartel cases dealt with by the Commission since the mid-1990s. Prior to that date the Commission investigated very few cartel cases. Without cartel cases the development of procedural competition law tended to be a lot slower, as the overwhelming majority of the Commission's workload was made up of regulatory cases where there was no major law-enforcement objective, any penal sanction would be minimal and the Commission's major objective was often to just develop regulatory principles. However, following the adoption of the 1996 Leniency Notice, the number of cartel cases dealt with by the Commission accelerated. This acceleration was given a major boost by the adoption of the US style 2002 Leniency Notice, as result of which the Commission is now dealing with approximately 50 cartel cases; that is more cartel cases than the entire period from 1958 to 2002.

Cartel cases matter for the development of procedural competition law because it is largely in such cases that questions such as the extent of the right of the Commission to ask questions under Article 18 of Regulation 1, the scope of any legal professional privilege when the Commission undertakes an on the spot inspection under Articles 20 and 21 of Regulation 1, or the question of the Commission's recidivist policy are likely to arise. Due to the secretive nature of cartel activity and the need to apply significant investigative powers against such practices, together with the heavy sanctions that such serious anti-competitive behaviour attracts, the more cartel cases there are the greater

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likelihood that due process issues will be aired both in Oral Hearings and then before the CFI.

The second factor is the development over the last two decades of a substantial and largely consistent European Court of Human Rights (ECtHR) case law which is likely to provides a substantial degree of legal support for counsel to defendant undertakings to argue that the existing guarantees that such undertakings already enjoy in proceedings before the Commission and the CFI should be extended and developed.

The third factor is the modernisation programme and in particular the development of a network of competition authorities. The development of the network, in which cases can be re-allocated amongst the Commission and the national authorities and where little or no procedural harmonisation has taken place, raises truly difficult and challenging due process issues.

Together the impact of a stronger enforcement practice against cartels; the development of the ECtHR case law and the modernisation programme are raising a wide range of complex procedural issues which have remained hitherto unexplored.

Dr Renato Nazzini in his article 'Some Reflections on the Dynamics of Due Process Discourse in EC Competition Law' reflects this broader impact that the due process debate is having on procedural competition law. Dr Nazzini fleshes out the very interesting point that procedural competition law at both EC and national level is undergoing a process of transplantation of legal concepts from national to international, to EC and then back down to national systems. On his broader canvass he examines the *ne bis in indem* rule, self-incrimination, legal professional privilege, and the rights of third party in competition procedures. What Dr Nazzini observes is two types of interaction in the due process debate which are likely to impact upon the development of procedural standards in competition law. The first: a vertical interaction between the Community and the Member States, and; the second, a horizontal action between the Member States. As he says,

> 'This on-going process shifts the focus from national law requirements to transnational concepts and principles'.

Dr Nazzini goes on to suggest that the result may be the convergence of procedural standards not so much by binding rules but by a process of learning, best practice and adaptation which could be described as 'spontaneous harmonization' and that this may be more appropriate in this field because of technical and context specific nature of procedural law.

Ms Arianna Andreangeli in her paper 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back?' highlights the impact of the operation of case allocation rules in light of the already controversial issue at Community level, the application of legal professional privilege. As Ms Andreangeli, makes very clear the lack of common procedural rules between the Member States and the Member States and the Commission raises some very serious questions for the effective protection of the rights of the defence. It has to be open to question how it can be acceptable in a

case involving allegations of price-fixing, the most serious competition infringement, potentially resulting in very heavy fines, subsequent damages actions and potential significant reputational damage that the network of European competition authorities can contemplate a situation in which information that is privileged in one jurisdiction can be seized in another Member State where privilege is narrower and sent to that first jurisdiction where it can be used in evidence against a defendant undertaking. As Ms Andreangeli says:

> 'the lack of harmonisation of procedural and evidential rules, and especially of a uniform notion of legal professional privilege is likely to play havoc with legal certainty and to undermine the effectiveness of the right of investigated undertakings to be subjected to a fair procedure both at Community and national level'.

Ms Kristina Nordlander's article 'Recidivism: Legal Certainty for Repeat Offenders', raises some very interesting and as yet largely unexplored issues surrounding the Commission policy to recidivism in cartel cases. Given that the Commission's own limitation period for competition infringements is 5 years can it be acceptable that there is no limitation period in respect of recidivist activity? There have even have been cases where the Commission has taken into account in calculating a fine recidivist behaviour from 40 years ago. Clearly as more and more leniency applications are turned into cartel prohibition decisions, the disparity between the Commission's limitation period and the lack of a limitation period for recidivism to be taken into account is likely to result in defendant undertakings raising this issue as a matter raising questions of legal certainty and under Article 6 ECHR.

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Some Reflections on the Dynamics of the Due Process Discourse in EC Competition Law

Renato Nazzini[*]

This article discusses 'due process' requirements in the application and enforcement of EC competition law. It proposes an analytical model whereby 'due process' requirements are categorized as elements of sub-systems interacting with each other. These sub-systems include international law, Community law, national laws, and aspirations of the users of the system. The article tests the application of the model by looking at the principle of *ne bis in idem* (double jeopardy), the privilege against self-incrimination, legal professional privilege, and the role of complainants and third parties in national proceedings. It concludes that the dynamic process of adoption and definition of standards of procedural fairness facilitates both vertical interaction between the Community legal order and the legal systems of the Member States and horizontal interaction between the legal systems of the Member States. This on-going process shifts the focus from national law requirements to the transnational dimension, which becomes the common ground for policy discussion, enforcement practice, and decision-making. This dynamism is conducive to 'spontaneous harmonization', a process of convergence which is more suited to the highly technical and context-specific nature of certain procedural requirements than harmonization through binding measures.

1. INTRODUCTION

The theme of 'due process' in competition law proceedings is not new but is now more topical than it was before. This is the result of the combined effect of several factors.

First, the reforms of competition law enforcement known as 'modernization' have introduced a new set of procedural rules at European level. They have decentralized the application of EC competition law. However, the procedures applied by the Commission and the national competition authorities of the EU Member States differ from each other. This is seen in some quarters as creating uncertainty. Thus, the 'due process' discourse is often used to point to the perceived shortcomings of competition enforcement in the 'brave new world'.

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Second, there is increased enforcement activity of the EC and national competition law prohibitions in the EU by a plurality of authorities. The Commission and the national competition authorities have been given new powers and are using existing powers more frequently and proactively. Publicity of enforcement activity and the rhetoric deployed by public authorities in relation to cartels and other serious infringements of competition law raise the profile of public and private enforcement. Inevitably, issues relating to the process of enforcement become more important, both in theory and in practice.

Third, 'due process' requirements have seen their scope of application expand at international and national levels. At international level, the European Court of Human Rights interpreted the concept of 'criminal charge' under Article 6 of the European Convention of Human Rights autonomously and broadly. This made it possible to import 'due process' requirements thus far confined to the field of criminal law into the realm of administrative law. In the UK, the requirements of Article 6 of the European Human Rights Convention were 'brought home' by the Human Rights Act 1998. UK courts are now required to apply Article 6 and to construe and give effect to primary and subordinate legislation in a way which is compatible with the Convention rights[1]. On the other hand, administrative law itself has expanded into new areas of economic regulation where prohibitions enforced by way of pecuniary or other sanctions have become more and more frequent.

This article is an attempt to sketch out a methodology to analyse 'due process' issues at national level. It focuses on competition law but makes suggestions that may be of wider application. The structure of the analysis is as follows. First, the article will address the question of the implications of the 'due process' discourse for the development of English law and Community law. Second, it will propose an analytical model whereby 'due process' requirements can be categorized as elements of sub-systems, including, for instance, public international law, Community law, and national laws, interacting with each other. Third, it will look at instances in which the proposed methodology can help clarify and understand the legal process of adoption and application of procedural requirements. It will focus on the following areas: a) *ne bis in idem* (double jeopardy); b) privilege against self-incrimination; c) legal professional privilege; d) the role of complainants and third parties in national proceedings. The final section of the article summarizes its principal conclusions.

2. DUE PROCESS, ENGLISH LAW AND EUROPEAN CONVERGENCE

The term 'due process' in competition proceedings, and indeed in any civil, criminal, and administrative proceedings, does not have a clearly defined meaning. In the field of administrative law, the very term 'due process' sounds unfamiliar and novel. In English law, traditionally the questions raised under the heading of 'due process' would be better understood in terms of 'natural justice' or 'fairness'.

[1] Human Rights Act 1998, s 3(1).

In *Re Pergamon Press Ltd*, Lord Denning MR described the powers and function of inspectors appointed by the Board of Trade under the Companies Act 1948.[2] He stated that the inspectors did not make a decision: their task was to investigate and report. However, their report could have serious repercussions:[3]

> They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up […].

He went on to say:[4]

> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative […]. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.

The courts have widely explored the requirement for quasi-judicial and even administrative bodies to be fair. And fairness means fairness to all. Not only to those that a tribunal or administrative body intends to sanction or criticize but to all persons whose rights, interests and legitimate expectations are affected by a decision which the tribunal or administrative body intends to make.[5] So, what does the concept of 'due process' add to the requirements of fairness and natural justice?

Focusing the analysis on UK competition law, including the powers to apply and enforce Articles 81 and 82 EC under national law, I would argue that the debate on 'due process' requirements has two distinct consequences.

The first is that in English law, the current debate on 'due process' shifts the focus from the method of the common law to the analysis of procedural rights. Traditionally, the courts have exercised jurisdiction over tribunals and administrative bodies requiring them to act fairly. The case law developed general principles but the application of the principles was specific to the sector affected, for instance licensing, employment, and the treatment of aliens. More importantly, under this approach procedural rights are determined according to the method of the common law: the court will rule after hearing argument based on the relevant authorities taking account of a wide variety of factors, including the nature of the person's interest, the type of decision being given, and the type of subject-matter. To put it another way, the court will embark upon a balancing exercise in which it weighs up three types of factors, described by Paul Craig as being 'the individual interest at issue; the benefits to be derived from added

2 *Re Pergamon Press Ltd* [1971] 1 Ch 388.

3 Ibid, 399.

4 Ibid, 399 – 400.

5 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 168 – 170.

procedural safeguards; and the costs to the administration, both direct and indirect, of complying with these procedural safeguards'.[6]

The concept of 'due process' and the current debate on 'procedural rights' implies the adoption of pre-determined standards of fairness which the decision-maker, be it a court or an administrative body, must apply by virtue of their legal force or their status in the value system of the society. The analysis whereby 'due process' requirements are adopted and applied is no longer a balancing test but an exercise in the hermeneutics of rights. The right may not be absolute. Limitations imposed on it may be justified and the analysis of the justification may require a balancing exercise not different from that carried out at common law. However, under a rights-based approach, the balancing test applies after a relevant procedural safeguard has been identified and described in its substance and scope. At common law, the balancing test applies in order to determine whether a 'procedural right' ought to be recognized to the applicant in the first place.

The second consequence relates to the European and international dimensions. Here, the novel concept of 'due process' shifts the focus of the legal analysis from principles and rules of national administrative law to transnational and international standards of justice. This becomes, both in theory and in practice, an instrument of convergence at European level. Based on a commonly understood, albeit at times vague and imprecise, concept of 'due process', it is possible to establish a productive process of comparison and cross-fertilization in the EU both vertically and horizontally: vertically between the national legal systems and the Community legal order and horizontally between the legal systems of the Member States. Comparison and cross-fertilization may be the basis for convergence occurring without the need for formal harmonization measures but rather through a self-governed process of adoption and adaptation of procedural models.

3. THE ANALYTICAL MODEL

The concept of 'due process' is indeterminate both in Community and in national laws. The Community courts have applied requirements of procedural fairness on a case-by-case basis. National legal systems recognize principles and rules of procedural fairness under different approaches and in different ways.

In the definition of the concept of 'due process', a useful starting point may be to identify the legal basis of the requirement under consideration. The concept of 'due process' is polyhedral. This is even more important from the viewpoint of a national competition authority, which applies a multiplicity of standards originating in legal instruments or rules of different provenance, status, and force. Within the broad definition of 'due process' requirements, it may be helpful to identify six sub-systems. They are the following:

- International standards not effective under national law (in the UK, this was the case of Article 6 of the European Human Rights Convention before the Human Rights Act 1998 came into force);

[6] P Craig, *Administrative Law,* 5th edn, London, Sweet & Maxwell, 2003, 425.

- International standards effective under national law (this is now the case of Convention Rights under the Human Rights Act 1998 in the UK);
- Community law (with varying degrees of intensity: fundamental rights, general principles, EC Treaty provisions, rules adopted under the EC Treaty);
- National constitutional standards ('rigid' or 'flexible', enshrined in written constitutions or emerging from the case law);
- National law (here also with different degrees of intensity/generality: general principles and specific provisions, primary/secondary legislation and common law);
- Aspirations of the users of the system voiced by their legal advisers, lobbying groups, and politicians ('legitimate expectations'[7] of the users of the system in the 'modern democratic society'[8]).

It may be interesting to focus on some of the features of the proposed model that will be applied and developed throughout this paper. I would like to focus on the following elements. First, the nature of the model as a system and a process. Second, its static and dynamic dimensions.

The sub-systems identified above, taken together, are a system and a process.

They are a system because they interact with each other. General principles of Community law may be based on, and often derive from, the legal systems of the Member States. International standards of justice influence the development of Community law and may be binding under national law. National constitutional standards interact with Community law and inform the interpretation of national law. Aspirations of the users of the legal system find their way in all the sub-systems identified above through the judicial system or through lobbying or political pressure.

The sub-systems identified above are also a process because they can be understood as a temporal sequence. 'Due process' requirements under national law may be later recognized as general principles of Community law by the Community courts or may be adopted in Community legislation. Procedural rights under Community law may be adopted under national law. Lobbying and political pressure or cases brought in the courts by the users of the system may result in new procedural rights being recognized at national, European, or international level.

The proposed model is both static and dynamic.

The model is static when 'due process' requirements are analysed within the sub-system where they belong. This makes it possible to identify their origin, legal force, and the consequences of their violation. More importantly, the model is also dynamic because it

[7] This meaning of 'legitimate expectation' should not be confused with the technical concept of legitimate expectations in administrative law or in Community law.

[8] The idea of a 'modern democratic society' is neutral in terms of the analysis of the sociological, economic, and political structure of current Western democracies. In this context, the concept simply assumes that the users of the system will have expectations as to how the system should work based on a set of historically accepted and socially/politically shared values and principles.

makes it possible to analyse the transposition of procedural rights from one sub-system to the other. Fairness requirements may be subject to a legal transplant from one sub-system to another. This dynamic process may change the nature and function of legal norms depending on the degree to which they are context-specific or self-standing. A context-specific norm is one that requires, for its construction and application, a set of further technical concepts and rules that are specific to the sub-system where the norm originates. An example is the principle of double jeopardy or *ne bis in idem*. A self-standing norm consists in an analytical framework or logical structure which does not require, for its construction and application, a set of further technical concepts and rules that are specific to the sub-system where the norm originates. An example may be the principle of proportionality.

The proposed model may be used to describe and explain the process of adoption, definition and application of procedural rights. The following analysis will focus on some of the procedural guarantees relevant in EC and domestic competition proceedings.

4. APPLICATION OF THE MODEL

4.1. *Ne Bis In Idem* (Double Jeopardy)

(a) The problem

The enforcement of competition law by competition authorities and courts raises the question as to whether it is possible to apply administrative, civil, and criminal sanctions in respect of an agreement or practice which has already been subject to previous proceedings. The problem only arises if multiple sanctions are imposed on the same person. The principle that could prevent concurrent or subsequent proceedings in these circumstances is the principle of *ne bis in idem* or double jeopardy. There is enshrined in international conventions and in Community law a wide concept of the double jeopardy rule. This broader principle tends to be applied to proceedings that are criminal in nature albeit not criminal under national law. Furthermore, this principle may have a transnational application, i.e. may be applied to proceedings taking place in different states. While proceedings against individuals are not barred by proceedings against companies and civil remedies are not barred by proceedings of a criminal nature, the question must be asked as to whether investigations of a criminal nature against undertakings may be barred because the same, or substantially the same, infringement has already been investigated by the same or a different authority in the same or even in a different State.

(b) The nature of the principle of *ne bis in idem*

The double jeopardy rule originates in the criminal law systems of the states. Its application is generally limited to proceedings that are criminal under national law. Its effect is to bar a second prosecution when the defendant has been already validly acquitted or convicted for the same offence or, in certain circumstances, for an offence based on the same or substantially the same facts. In English criminal law a plea of autrefois aquit or autrefois convict bars a second prosecution if the defendant has been previously acquitted or convicted of the same offence as that of which he is charged in

the second prosecution.[9] Furthermore, under the doctrine of abuse of process, the court is required to stay proceedings if the defendant has previously been acquitted or convicted on the same or substantially the same facts (albeit of a different offence), unless there are exceptional circumstances.[10] Similar rules exist in most legal systems.

The double jeopardy rule originating in the national criminal law systems is now recognized in international conventions. Focusing the analysis on the European dimension, Article 4 of Protocol No 7 to the European Human Rights Convention states:[11]

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, of if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

International and transnational sub-systems interact with each other. Thus, even if Protocol 7 has not been ratified by the United Kingdom, since the rights protected by the Convention may be regarded as fundamental rights in Community law, Article 4 of Protocol No 7 may indirectly affect the legal position in the UK in the enforcement of EC competition law through the jurisprudence of the Court of Justice.[12] It should also be noted that in the transposition of the principle in Article 4 of Protocol 7 into Community law, the scope of the rule changes. While Article 4 only applies to proceedings within the same jurisdiction and does not provide for a principle of transnational *ne bis in idem*, Article 50 of the European Charter of Fundamental Rights[13] departs from the traditional view that the double jeopardy rule only applies to criminal

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9 *Connelly v DPP* [1964] AC 1254, 1339 – 1340, HL, *per* Lord Devlin.

10 Ibid.

11 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950), Protocol No 7, Art 4.

12 European Human Rights Convention, Protocol No 7, Art 4 was referred to by the Court of Justice as reflecting a 'fundamental principle of Community law' in Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P, C-251/99P, C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij NV (LVM) v Commission of the European Communities (PVC No 2)* [2002] ECR I-8375, para 59; see also WPJ Wils, 'The Principle of *Ne Nis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' [2003] World Competition 131, 133. For a general overview of the problems arising from the application of the European Human Rights Convention to administrative proceedings by the Commission, see A Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' [2002] ICLQ 55 – 89 and R Wainwright, 'Human Rights: What Have They to Do with Competition Law?' M Andenas, M Hutchings, Ph Marsden (eds), *Current Competition Law* Vol III, London, British Institute of Intl and Comparative Law, 2005, 473 - 480.

13 Charter of Fundamental Rights of the European Union, OJ 2000, C364/1 (the European Charter of Fundamental Rights).

proceedings within the same jurisdiction and adopts a principle of Community-wide *ne bis in idem*. Article 50 states:

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The Charter is not legally binding in itself.[14] It is addressed to the Member States only insofar as they apply Community law.[15] However, it is a highly influential statement of the fundamental rights protected by Community law. Furthermore, its binding effect may follow from its being expression of 'general principles of Community law' under Articles 6(2) and 46(d) of the EU Treaty.

A Framework Decision concerning the application of the 'ne bis in idem' principle to be adopted under Article 34(2)(b) of the Treaty on European Union[16] is currently under negotiation.[17] If a Framework Decision is adopted, it is likely to have implications for criminal prosecutions of individuals and corporate bodies for competition law related crimes arising from the same or substantially the same facts in different Member States. It is, however, not clear whether any Framework Decision that may be adopted will apply to infringements that are not criminal under national law and to proceedings that take place without the involvement of a court exercising criminal jurisdiction under national law.[18]

(c) Multiple administrative proceedings

Under the current system, the problem arises because administrative proceedings by the Commission or the Office of Fair Trading may be criminal for the purposes of the European Human Rights Convention[19] and, it would appear, for the purposes of the interpretation of the Charter.[20] Protocol 7 to the European Human Rights Convention

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[14] The Preamble of the European Charter of Fundamental Rights states: 'This Charter reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […]'.

[15] European Charter of Fundamental Rights, Art 15(1).

[16] Treaty on European Union (consolidated text), OJ 2002, C325/5.

[17] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle, OJ 2003, C100/24.

[18] As the Framework Decision is currently under negotiation and it is difficult to speculate as to what form it will take if adopted, this article focuses on the analysis of the law as presently in force.

[19] The European Court of Human Rights adopted a substantive test for the definition of the autonomous meaning of 'criminal charge' under Article 6 of the Convention in *Engel v Netherlands* (1979/80) 1 EHRR 647. Administrative proceedings under Community law may be considered criminal for the purposes of Article 6 of the European Human Rights Convention: Case C-235/92P *Montecatini Spa v Commission of the European Communities* [1999] ECR I-4539, paras 175-176. The same applies to proceedings under the Competition Act 1998: *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (Napp No 3)* [2001] Comp AR 33, [2002] ECC 3, paras 68 – 76; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (Napp No 4)* [2002] ECC 13, paras 98 – 103.

[20] European Charter of Fundamental Rights, Art 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

and the Article 50 of the European Charter provide for the right not to be tried twice for the same offence. This would appear to be a general principle of Community law and, arguably, binding on Member States insofar as they apply Community law. However, its extent and application in competition law proceedings is not entirely clear. Yet, some guidance may be found the case law of the Court of Justice.

The Court of Justice rejected a broad interpretation of the *ne bis in idem* principle in competition matters. It held in the *PVC (No 2)* case[21]:

> The application of that principle […] presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. Thus, the principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second.

In the light of this judgment, in EC competition law the relevant test for the application of the principle of *ne bis in idem* seems to be whether the infringement or the non-infringement has been established in a decision not subject to (further) appeal or judicial review application.

The *PVC (No 2)* case was concerned with subsequent proceedings brought by the same authority. The problem is further complicated because the same agreement or conduct may give rise to liability under different legal systems. Community law and national law may both apply to the same anti-competitive agreement or conduct. Legal systems of states outside the Community may also impose sanctions for the same agreement or conduct that may be subject to an infringement decision for breach of Community competition law. The principle of double jeopardy comes into play where the same undertaking is subject to fines for the same or substantially the same facts albeit under different legal provisions in different legal systems.

The Court of Justice has taken a pragmatic approach to the problem of multiple fining decisions under different legal systems. It held in *Walt Wilhelm v Bundeskartellamt* that parallel proceedings under Community and national competition laws are permissible insofar any later fining decision takes into account any fines already imposed on the same person in previous decisions.[22]

In *Boehringer Mannheim GmbH v Commission*, the Court of Justice considered whether the fines imposed by the Commission should take into account any penalties imposed by State authorities outside the European Community. The Court held, on the facts, that the agreements that were the subject matter of the criminal prosecution in the US were

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[21] *(PVC No 2)* case (op cit n 12), paras 61 - 62.

[22] Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, para 11. This rule against double jeopardy in fining decisions follows from a principle of 'natural justice' (ibid).

different in 'their object and their geographical emphasis' to the cartel investigated by the Commission.[23] As a consequence, no issue of *ne bis in idem* arose.[24]

The EC position in relation to multiple fining decisions has been adopted under UK law. Section 38(9) of the Competition Act 1998 provides that in setting the amount of a penalty under Part I of the Act, the Office of Fair Trading, the Competition Appeal Tribunal and any court to which an appeal lies as to the amount of the penalty, must take into account any penalty or fine imposed by the Commission, or by a court or other body in another Member State in respect of the same agreement or conduct. Therefore, penalties and fines imposed by authorities and courts of third states, i.e. states that are not Members of the EU, are not taken into account.

A related question is whether a subsequent investigation may be barred by a decision accepting commitments under Article 5 of Regulation 1/2003.[25] The Court of Justice gave some guidance on the issue of *ne bis in idem* with regard to settlements in *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*.[26] In that case, the Court gave a preliminary ruling on two references raising the same issue on the interpretation of the Convention Implementing the Schengen Agreement, which, in Chapter 3 of Title III, provides for the application of the *ne bis in idem* principle.

Criminal proceedings against Mr Gözütok in the Netherlands had been discontinued following acceptance by Mr Gözütok to pay a sum of money determined by the prosecution. The German authorities wanted to prosecute Mr Gözütok for the same offence. Proceedings against Mr Brügge raised the same question. The Court held that where the prosecution is discontinued by decision of the prosecuting authority and on condition that the accused performs obligations determined by the prosecution, further proceedings are precluded. However, the Court clarified that a relevant fact in reaching this conclusion was that under national law a further prosecution was definitively barred.[27] Therefore, the consequences of discontinuing proceedings under national law were material to the decision as to whether the discontinuance was a final disposal of the case. The Court also stated that what matters is not the procedure *per se*, e.g. whether the discontinuance of proceedings is embodied in a formal judicial decision, but the effect of discontinuing proceedings.

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[23] Case 7/72 *Boehringer Mannheim GmbH v Commission of the European Communities* [1972] ECR 1281, para 4.

[24] Ibid, paras 5 – 8.

[25] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 (Regulation 1/2003), Art 5 states: 'The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: — requiring that an infringement be brought to an end, — ordering interim measures, — accepting commitments, — imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

[26] Joined cases C-187/01 and C-385/01 *Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01)* [2003] ECR I-1345.

[27] Ibid, para 30.

(d) Neighbouring principles: legal certainty and legitimate expectations

Finally, the principles of legal certainty and legitimate expectations might also at times prevent a public authority from acting in a manner which reneges on previous decisions. However, the application of these principles to enforcement proceedings beyond the application of the *ne bis in idem* rule is probably very limited. If an investigation does not terminate with a final infringement or non-infringement decision that bars further proceedings, there is no reason why launching such further proceedings would offend against the principle of legal certainty or the parties' legitimate expectations.

In *Klöckner-Werke AG v High Authority* the Court of Justice said:[28]

> […] The administrative authority is not always bound by its previous actions in its public activities by virtue of a rule which, in relations between the same parties, forbids them to venire contra factum proprium.

In the *Perfumes* cases, the Court of Justice considered the legal effect of letters by Commission officials stating that in view of the small market share of the companies concerned and the competitive structure of the relevant market there was no need for the Commission to take action on the basis of the facts in its possession and, therefore, the file was closed.[29] The Court noted that the letters in question were pure case closure letters based upon the facts in the Commission's possession. They were not binding on national courts.[30] It followed that such case closure letters did not have legal effects and were not binding on the Commission. However, they gave rise to legitimate expectations for the undertakings concerned that their agreement was compatible with Article 81 EC. Therefore, unless there was a material change of circumstances or the case closure or comfort letter was adopted on the basis of incorrect or incomplete information, the Commission was prevented from reopening the investigation.[31]

(e) The application of the principle of *ne bis in idem* to national competition proceedings

There is currently no case law on whether and how the principle of *ne bis in idem* might apply to proceedings brought by national competition authorities for the application and enforcement of Articles 81 and 82 EC. However, the analytical model proposed in this paper leads to some tentative conclusions:

a) the principle of *ne bis in idem* has been transplanted from national law to international conventions and then adopted by Community law based both on the national legal systems of the EU Member States and on public international law standards. Currently, the principle is been re-imported into the national legal systems of the Member States

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[28] Joined Cases 17/61 and 20/61 *Klöckner-Werke AG v High Authority of the European Coal and Steel Community* [1962] ECR 615.

[29] Joined Cases 253/78 and 1-3/79 *Procureur de la Republique v Bruno Giry and Guerlain SA* [1980] ECR 2327; Case 31/80 *NV L'Oréal v PVBA "De Nieuwe AMCK"* [1980] ECR 3775, 3805.

[30] Ibid.

[31] AG Reischl in his Opinion in the *L'Oréal* case [1980] ECR 3775, 3805; PM Roth (ed), *C Bellamy and G Child: European Community Law of Competition,* 5th edn, London, Sweet & Maxwell, 2001, 874 – 875.

after having been transformed by the dynamic process of transplant from national law into public international law and into Community law;

b) the difficulty in the process results from the context-specific and not self-standing nature of the principle. The concept of *ne bis in idem* has been transposed from the national criminal law systems into a transnational/international context where autonomous concepts of 'criminal charge' and 'criminal proceedings' were adopted. The same principle, together with the autonomous concepts of 'criminal charge' and 'criminal proceedings', is now been transposed into national law again not in the field of criminal law, where it originated, but in the field of administrative law;

c) this further transposition requires adapting the tests adopted by the Community courts to the national legal systems under the framework of Regulation 1/2003. Therefore, because of the very nature of the process of adoption of the standard, it is not possible to provide solutions that are the same in all Member States and in all circumstances;

d) because of the context-specific and not self-standing nature of the concept of *ne bis in idem*, an acute problem arises with regard to decisions by national competition authorities or the Commission that are based on lack of evidence of the infringement after a full investigation has been conducted with the involvement of the parties to the alleged infringement. In criminal proceedings, lack of evidence leads to an acquittal, i.e. a decision barring further proceedings. In civil proceedings the same fundamental principle applies: a party failing to prove his case fails on the merits. If the claimant fails to establish any element of the cause of action the court will give judgment for the defendant. This judgment is a final decision on the merits that bars further proceedings under the doctrine of *res judicata*. However, the same principles may not apply to administrative authorities even where the administrative proceedings are criminal in nature for the purposes of the application of international standards. Transposing an international standard created with the aim of ensuring the fairness of criminal trials into national administrative law systems based on discretionary powers of investigation may be problematic;

e) it is possible to predict that parties to administrative investigations and their legal advisers will rely on the principle of *ne bis in idem* and national and Community courts will further clarify its scope in relation to the system of concurrent powers under Regulation 1/2003. The process is on-going and while guidance may be found in the current case law, the substance and scope of the principle may have to be redefined in the new context. Furthermore, its substance and scope will be, at least in part, dependent on the features of the national administrative law systems in which the principle is applied.

4.2. Privilege against Self-Incrimination

(a) The privilege and the exercise of powers of compulsion

In criminal proceedings in England, the privilege against self-incrimination includes the right not to answer any question which could, directly or indirectly, incriminate the defendant under examination. It extends to pre-trial procedures to prevent compulsory

disclosure. It also includes the right not to be compelled to give any answers when questioned by the police under caution. Beyond the scope of criminal law, in relation to administrative enquiries and procedures, financial services legislation progressively enabled administrative authorities to exercise powers of compelling answers in the investigation of corporate fraud.[32] Investigators exercising powers of compulsion are under obligation to give a person whom they propose to criticize a fair opportunity to answer such criticisms as are levelled against them[33] and must base their findings on material having probative value.[34] Significantly, though, these statutes, in their original form, made it possible for prosecuting authorities to use the answers given under compulsory questioning in subsequent criminal proceedings. Evidence obtained under compulsion by administrative authorities other than the Serious Fraud Office was not subject to statutory limitations on admissibility at the trial of any criminal offences until the law came under scrutiny by the European Court of Human Rights in the *Saunders* case.

In *Saunders v The United Kingdom,*[35] the European Court of Human Rights addressed two important issues. The first was that compulsion to answer questions in the context of administrative proceedings is not a breach of Article 6 of the Convention *per se*.[36] The second was that answers compulsorily obtained in a non-judicial investigation may not be used to incriminate the accused in criminal proceedings.[37] It is clear from *Saunders* that oral evidence obtained under compulsion in administrative proceedings must be inadmissible as evidence-in-chief in criminal proceedings under Article 6 of the European Human Rights Convention. It is also clear that evidence which has an existence independent of the will of the suspect may be obtained under compulsion.[38]

The Court in *Saunders* accepted that the privilege does not apply in the compulsion to disclose certain types of non-testimonial evidence. In this respect, *Saunders* might appear to be at odds with *Funke v France*[39] and *JB v Switzerland*[40], where the Court found that the privilege had been infringed because of the compulsion to produce documents. In the *Funke* case, the Court found that the applicant's Article 6(1) right to a fair trial had been violated simply on the grounds of that he had been compelled under threat of penal sanctions to disclose self-incriminating documents. This view was reiterated in the case of *JB v Switzerland*, in which the decision of the Swiss tax authorities to

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32 Companies Act 1985, s 434; Insolvency Act 1986, ss 236 and 433; Insurance Companies Act 1982, s 43A; Company Directors Disqualification Act 1986, s 20; Building Societies Act 1986, s 57; Financial Services Act 1986, ss 105 and 177; Banking Act 1987, ss 39 and 41 - 42; Companies Act 1989, s 83; and Friendly Societies Act 1992, s 67.

33 *Re Pergamon Press Ltd* (op cit n 2).

34 *Mahon v Air New Zealand* [1984] AC 808, 820.

35 *Saunders v United Kingdom* (1997) 23 EHRR 313, ECtHR. The case concerned the admissibility in criminal proceedings of transcripts of compulsory interviews held under sections 434 and 436 of the Companies Act 1985.

36 Ibid, para 67

37 Ibid, para 74

38 Ibid, para 69.

39 *Funke v France* (1993) 16 EHRR 297, ECtHR.

40 *JB v Switzerland* [2001] Crim LR 748, ECtHR.

prosecute and fine the applicant upon his refusal to supply them with information they had requested was found to have violated his Article 6(1) rights to a fair trial.

However, the cases of *Funke* and *JB* are of a more limited application. The Court in *Funke* emphasized the fact that the French prosecuting authority simply *believed* that the relevant documents existed; they were not certain of their existence.[41] The notion of the 'fishing expedition' was precisely the sort of procedural abuse that fair trial provisions were intended to inhibit. Similarly, the sustainability of the *JB* case depends on the particular type of evidentiary material concerned. The Swiss tax authorities sought documentary evidence that the Court considered not to have an existence independent of the will of the applicant, the feature that the Court itself used to distinguish *JB* from *Saunders*.[42]

The rule under Article 6 of the European Human Rights Convention, therefore, appears to be that powers of compulsion may not be used to compel the testimony of a person charged with a criminal offence for the purpose of using the compelled testimony to incriminate the defendant at the criminal trial. The use of compulsion is, however, legitimate where that evidential material already exists.[43] Compelled production of documents is an infringement of the privilege only if the order for production is of the nature of a 'fishing expedition'[44] or requires the addressee to generate the documentary evidence to be produced.[45]

Adverse inferences may be drawn from the defendant's silence without violating Article 6 of the European Human Rights Convention.[46] In the light of *Saunders*, it was not entirely clear whether testimonial evidence obtained under powers of compulsion could be used to attack credibility or under the doctrine of previous inconsistent statements. The European Court of Human Rights in *Saunders* levelled criticism at the use of the evidence obtained under compulsion 'to contradict or cast doubt upon other statements of the accused' and at the impact that the extensive use of previous statements might have had on the jury.[47] However, in the *Saunders* case the transcripts of the compulsory interviews were used as evidence-in-chief. The question of whether compelled statements could be used to attack credibility or under the doctrine of

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41 *Funke v France* (op cit n 39), para 44. For the application of the Fifth Amendment privilege to production of pre-existing documents, see: *Fisher v United States* 425 US 391 (1976) and *United States v Hubbell* 120 S Ct 2037 (2000).

42 *JB v Switzerland* (op cit n 40), para 68.

43 *A-G's Reference (No 7 2000)* [2001] 1 WLR 1979, CA Crim Div. For a fine judicial criticism of the distinction between pre-existing evidence and new evidence see *Brown v Stott* [2001] 2 WLR 817, 837, PC, *per* Lord Bingham.

44 *Funke v France* (op cit n 39).

45 *JB v Switzerland* (op cit n 40).

46 *John Murray v United Kingdom* (1996) 22 EHRR 29, ECtHR. Arguably, the mode of trial by judge alone played a role in the judgment of the European Court of Human Rights (ibid, at 51) and in the Report of the European Commission of Human Rights (*John Murray v the United Kingdom* App 18739/91 (1994) 18 EHRR 1, 59, Eur Commission of Human Rights). This point was central to the partly concurring, partly dissenting opinion of N Bratza QC (*John Murray v the United Kingdom*, Partly concurring, partly dissenting opinion of Mr N Bratza, para 1).

47 *Saunders v United Kingdom* (op cit n 35), paras 71 and 72.

previous inconsistent statements was addressed in the case of *Shannon v United Kingdom*. In that case, the European Court of Human Rights held that the permissible use of statements obtained under compulsion against the defendant 'if he had relied on evidence inconsistent with it' did constitute a violation of Article 6(1) of the European Human Rights Convention because 'such use would have deprived the applicant of the right to determine what evidence he wished to put before the trial court, and could have amounted to 'resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'.[48]

Prior to the *Saunders* case, in the UK statements obtained by the Serious Fraud Office using powers of compulsion were already inadmissible at trial under section 2(8) of the Criminal Justice Act 1987. However, *Saunders* made it clear that use at trial of statements obtained under compulsion in procedures other than criminal investigations and proceedings may be an infringement of Article 6 of the Convention. In the light of *Saunders*, the reforms in Youth Justice and Criminal Evidence Act 1999 neutralized most of the differences between the safeguards applicable to Serious Fraud Office's investigations and other administrative investigations. As a result of these reforms, the current rule on admissibility of statements obtained under compulsion is that they cannot be used against the maker of the statement in subsequent criminal proceedings other than for offences equivalent to perjury or otherwise making false testimony in court or providing false or misleading information to the investigating authority unless two cumulative conditions are fulfilled: a) the defendant makes a statement inconsistent with the previous statement; b) evidence relating to the previous statement is adduced, or a question relating to it is asked, in the proceedings by or on behalf of the maker of the statement.[49] As the analysis in this section has shown, the better view is that this rule on admissibility is consistent with Article 6 of the European Human Rights Convention. The position would not appear to have changed as a result of *Shannon v the United Kingdom*[50] as this case concerned the procedural protection afforded to the defendant prior to the amendments introduced by the Youth Justice and Criminal Evidence Act 1999.

(b) The scope of the privilege in criminal investigations under national law

While the *Saunders* case required strengthening the protection of the privilege against self-incrimination especially in the context of concurrent proceedings, at the national level the privilege was been eroded in two ways. Firstly, the Criminal Justice and Public Order Act 1994 had already allowed the court or jury to draw 'such inferences as appear proper' from the defendant's failure to give evidence in court;[51] failure to mention when questioned by police a fact which he could reasonably have been expected to mention and on which he later relies;[52] failure to explain to police his

[48] *Shannon v the United Kingdom* (Application No 6563/03), ECtHR, 4 October 2005.

[49] Youth Justice and Criminal Evidence Act 1999, s 59 and Sch 3, amending a number of statutory provisions, including section 2 of the Criminal Justice Act 1987.

[50] *Shannon v the United Kingdom* (op cit n 48).

[51] Criminal Justice and Public Order Act 1994, s 35

[52] Ibid, s 34

possession of, or proximity to any object, substance or mark;[53] and failure to explain to police his presence at a particular place.[54] These provisions had been supplemented by provisions of the Criminal Procedure and Investigations Act 1996, section 11 of which entitled the court to draw adverse inferences from the simple fact of the failure of a defendant to disclose a defence statement in accordance with section 5, or from the fact that disclosure of the defence statement was late. Section 11 of the Criminal Procedure and Investigations Act 1996 in its original form has been substituted by section 39 of the Criminal Justice Act 2003, which extends the pre-existing section 11 to include new instances of failure of the defence to comply with disclosure obligations. Failure to comply with disclosure obligations by the defence may attract adverse comment by any parties, in some circumstances with leave, or by the judge, and adverse inferences may be drawn against the defendant.

The second way in which the privilege against self-incrimination has been eroded in English law in the context of criminal proceedings is by entrusting the investigating authorities with powers to compel production of documents and answers to questions. The precursor provision is section 2 of the Criminal Justice Act 1987 and the trend has since been confirmed.

The new provisions of the Enterprise Act 2002 on the investigation of hard core cartels mirror the provisions of the Criminal Justice Act 1987, as amended as a result of the *Saunders* case. Section 192(1) of the Enterprise Act mirrors section 2(2) of the Criminal Justice Act 1987, whilst powers in relation to documents are conferred by subsections (2) – (4). Section 196 restricts the use of statements in response to a requirement imposed by virtue of section 192 or 193 in the same way as restrictions on admissibility are set by section 2 of the Criminal Justice Act as amended by the Youth Justice and Criminal Evidence Act 1999. Sections 30A, 65B, and 65K of the Competition Act 1998 introduce limitations on admissibility of statements obtained in response of requirements under the civil provisions of the Act in criminal prosecutions against the maker of the statement.

Thus, in the context of competition law criminal investigations, the privilege against self-incrimination has been overridden by statute. However, the interaction between the European Human Rights Convention and the UK legal system required a strengthening of the protection of the privilege which is now reflected in the relevant provisions of the Enterprise Act 2002 and the Competition Act 1998. Statements obtained under compulsion are inadmissible in evidence unless the maker of the statement gives evidence inconsistent with it and "evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution". The widening of the scope of protection was triggered by the application of a user of the system to the European Court of Human Rights and led to statutory amendments in national law. It is also important to note that while at the time when *Saunders* was decided and the Youth Justice and Criminal Evidence Act 1999 received the royal assent the European Human Rights Convention was not applicable

[53] Ibid, s 36

[54] Ibid, s 37

in the UK, the Human Rights Act 1998 has since given effect to the Convention in domestic law. The Act requires the courts to 'take into account' any decision, judgment or declaration of the European Court of Human Rights and any opinion or decision of the European Commission on Human Rights, insofar as it is relevant to do so.[55] Primary legislation must be read in a way that is compatible with the Convention.[56] It is unlawful for courts, as public bodies, to act in a way that is incompatible with Convention rights.[57]

(c) The scope of the privilege in proceedings by the EC Commission

A second area for consideration is the scope of the privilege in administrative proceedings that may be criminal in nature for the purpose of Article 6 of the European Human Rights Convention. In England, there is no settled case law on the scope of the privilege in these circumstances.

The Community courts have, however, addressed the issue on several occasions. The fundamental assumption is that in proceedings before the Commission for infringements of Articles 81 and 82 EC undertakings under investigation do not have an unqualified privilege against self-incrimination. Before formal proceedings are instituted,[58] the objective of assuring compliance with Community competition law led the Council to give the Commission wide powers of investigation. There is, therefore, a strong policy reason for the limitations on the rights of the undertakings in that preliminary phase.[59]

In the *Orkem* case, the Court of Justice asked itself the question as to whether general principles of Community law, which include fundamental rights recognized by the legal systems of the Member States, warranted Orkem's claim that the Commission had no power to compel an undertaking under investigation to disclose information that might provide evidence of an infringement of competition law. The Court of Justice rejected this argument mainly on the grounds that the 'laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings.'[60] The Court also held that an unqualified right to silence was neither embodied in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms nor in Article 14 of the International Covenant on Civil and Political Rights.[61] However, the Court granted the undertaking under investigation a minimal protection to the extent that it was held to be an infringement of the rights of defence to compel an undertaking to make statements

55 Human Rights Act 1998, s 2.

56 Ibid, s 3.

57 Ibid, s 6

58 Formal proceedings are opened when the Commission notifies the parties to the alleged infringement of its intention to proceed to a decision and no later than the service of the statement of objections.

59 Case 374/87 *Orkem v Commission of the European Communities* [1989] ECR 3283, para 19.

60 Ibid, para 29.

61 Ibid, paras 30 - 31. The Court's reasoning in relation to Article 6 of the ECHR is now to be read in the light of the subsequent case law of the Court in Strasbourg: see WPJ Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' [2003] World Competition 567, 574 – 578.

'which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove.'[62] Therefore, directly and indirectly incriminating questions may not be asked of an undertaking under investigation. The rights of defence upheld by the Court of Justice in the *Orkem* case are a fundamental principle of Community law. They are a limitation on the powers of investigation under Articles 18 and 20(2)(e) of Regulation 1/2003.

In the light of the *Orkem* case, it is useful to define directly incriminating questions as questions requiring the undertaking to confess guilt. Indirectly incriminating questions, on the other hand, are questions asked in such a way so 'as to compel the applicant to acknowledge its participation' in activities prohibited by EC competition law.[63]

Orkem is a development of the jurisprudence of the Court of Justice on the rights of defence in competition law proceedings. In *Hoechst v Commission*, the Court had already stated, relying on *Michelin v Commission*,[64] that the rights of defence are a fundamental principle of Community law.[65] In the *Hoechst* case, the Court drew a distinction between rights that have to be respected only in formal proceedings that follow the service of the statement of objections,[66] and rights that 'must be respected as from the preliminary-inquiry stage.'[67] The right not to be compelled to answer directly or indirectly incriminating questions falls within the latter category.

In *Societé Generale v Commission*, the Court of First Instance rejected a complaint that the Commission had compelled the undertaking under investigation to give self-incriminating answers thus infringing its rights of defence. The Court said that the Commission may not compel an undertaking 'to provide answers which might involve an admission on its part of the existence of an infringement which is incumbent on the Commission to prove.'[68] The Court considered that the answers requested were 'purely factual and cannot be regarded as capable of requiring the applicant to admit the existence of an infringement of the rules on competition.'[69]

The principles laid down in *Orkem* and *Societé Generale* have been considered again by the Court of First Instance in *Mannesmann v Commission*.[70] The judgment correctly applies the test laid down in *Orkem* to the questions asked of the applicant by the

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62 *Orkem* case (op cit n 59), para 35.

63 Ibid, paras 38 - 39.

64 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, para 7.

65 Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859, para 14.

66 Example of such rights is the right to be heard. The right to a hearing only arises in the administrative procedure and is not upheld at the investigative stage.

67 *Hoechst v Commission* (op cit n 65), para 16. Examples of such rights are the right to legal professional privilege and the right to legal representation: see Case 155/79 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 1575.

68 Case T-34/93 *Société Générale v Commission of the European Communities* [1995] ECR II-545, para 74.

69 Ibid, para 75.

70 Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II–729, paras 60 – 67.

Commission. However, the Court of First Instance in *Mannesmann* went on to say that requests of purely factual questions and production of documents already in existence are compatible with the rights of defence and the right to a fair legal process as recognised by the Community legal order in the same fashion as they are by Article 6 of the European Human Rights Convention.

It is not clear whether the test of 'purely factual questions and production of documents already in existence' and the test in *Orkem* are exactly coextensive. The Court of Justice in *Orkem* drew a distinction between questions aiming at extracting factual information and questions relating to the purpose and objective of certain alleged behaviour.[71] In *Orkem*, however, the test of the factual or evaluative-incriminating nature of the question relates to the answers to the question rather than to the questions themselves. It is not the way in which the question if formulated but rather the nature of the admission sought of the undertaking that determines whether or not the rights of defence have been infringed. There is nothing to suggest that the Court of First Instance in *Mannesmann* was narrowing the scope of the rule in *Orkem*. It is more likely that the test of 'purely factual questions' in *Mannesmann* relates to the type of information the Commission requires of the undertaking. The Court of First Instance in *Mannesmann* clearly understood the answers given and the documents produced as disclosing pure facts to which different interpretations could be attached, these interpretations being the subject matter of the second phase of the procedure.[72] In this respect, the language used by the Court of First Instance in *Societé Generale*, which refers to 'purely factual answers' rather than 'purely factual questions', is clearer and, therefore, should be adopted instead of the more ambiguous formula in *Mannesmann*.

In conclusion, in proceedings before the Commission the Community courts have upheld claims to privilege against self-incrimination with respect to questions aiming at extracting an admission of guilt from the undertaking under investigation. This applies to questions asking whether or not the infringement has been committed (directly incriminating questions) and questions asking for the reason and rationale of certain behaviours (indirectly incriminating questions). Questions asking for purely factual information do not fall within this category although they may be used to 'incriminate' the undertaking in question.

(d) The scope of the privilege in national administrative proceedings

Turning now to the problem of the privilege against self-incrimination in national administrative proceedings, it is noteworthy that there is no settled case law on the substance and scope of the privilege. However, the application of the proposed analytical model yields the following conclusions:

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[71] *Orkem* case (op cit n 59), para 38.

[72] *Mannesmannröhren-Werke v Commission* (op cit n 70), 78: 'There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising its rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission'.

a) the privilege against self-incrimination in administrative proceedings may be a Convention right and is a fundamental principle of Community law;

b) technically, and insofar as it is held that the privilege is a binding Community law principle that Member States have to respect when applying Community law, the privilege as understood in Community law takes precedence over the Article 6 of the European Human Rights Convention under UK law;

c) in the dynamic process of definition and application of the standard, arguments are generally drawn both from the case law of the Community courts and the jurisprudence of the European Court of Human Rights;

d) national courts are likely to apply both set of precedents in an integrated way, reconciling any possible conflicts;

e) the precise scope of the privilege under national law is yet to be defined but the current administrative practice seems to follow closely the case law of the Community courts.

4.3. Legal professional privilege

This section deals with legal professional privilege (or 'confidentiality' under Scots law). The public policy justifying the protection of confidential communications between a lawyer and its client is stated by Lord Scott in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*:[73]

> […] it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else […]

Lord Scott's judgment draws upon a consistent line of authorities recognizing the nature of the privilege as a fundamental element of any system based on the rule of law.[74] The same policy reasons led the Community courts to rule that the legal professional privilege is a fundamental principle within the meaning of 'law' in Article 220 EC. In his Opinion in *AM & S Europe Ltd v Commission*, Advocate General Slynn said:[75]

> [The privilege] essentially springs from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

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[73] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, 649 – 650.

[74] See, for instance, *R v Special Comr of Income Tax, ex p Morgan Grenfell & Co Ltd* [2003] 1 AC 563.

[75] Opinion of AG Slynn in Case 155/79 *AM & S Europe Ltd v Commission* [1983] QB 878, 913.

The Court of Justice in the *AM & S* case broadly recognized that the laws of the Member States protect the confidentiality of communications between lawyer and client as it 'serves the requirements […] that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it'.[76] However, the Court limited the legal professional privilege in three ways. First, the communication must be 'made for the purposes and in the interests of the client's rights of defence'.[77] Second, it must take place between the client and an independent lawyer, excluding lawyers that are employees of the client.[78] Third, the lawyer must be 'entitled to practice' or, as the French text states, 'inscrit au barreau', in a Member State.[79]

The dynamics of adoption and definition of Community law standards of 'due process' can be further illustrated by *Akzo Nobel Chemicals Ltd v Commission* (application to the President of the CFI for interim measures).[80] In that case, the applicants argued that communications between in-house counsel and the management of the company should be covered by the Community legal professional privilege. Here, the aspiration of the users of the system to be granted a procedural right is based on the protection afforded under national law. The President of the CFI noted the Commission's argument that not all Member States recognized a legal professional privilege in relation to communications with in-house counsel.[81] On the other hand, he went on to say that the judgment of the Court of Justice in the *AM & S* case was based on the interpretation of principles common to the Member States in 1982.[82] Since then, several Member States adopted rules that extend the scope of legal professional privilege to cover communications with in-house counsel. Furthermore, there are many instances in which lawyers employed by a firm are subject to the same set of deontological rules as independent lawyers are.[83] Therefore, in the legal systems of the Member States and possibly, as a consequence, in Community law, it is less and less plausible to presume that the fact that a lawyer is employed by his client is such as to exclude the requirement of independence of the lawyer as an officer of the court.[84]

The reasoning of the President of the CFI is consistent with precedent. The protection of communications between independent lawyers and their clients in the legal systems

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[76] *AM & S Europe Ltd v Commission* (op cit n 67), para 18.

[77] Ibid, para 21.

[78] Ibid.

[79] Ibid, paras 25 – 26.

[80] Joined Cases T-125/03R and T-253/03R *Akzo Nobel Chemicals Ltd v Commission*, (30 October 2003, unreported), para 121. The order of the President of the Court of First Instance granting interim measures was annulled on appeal to the President of the Court of Justice on the grounds that it was not established that the order was necessary to prevent serious and irreparable harm to the applicant: Case C-7/04P(R) *Commission v Akzo Nobel Chemicals Ltd* (27 September 2004, unreported). However, the President of the Court of Justice did not comment on the analysis relating to whether or not legal professional privilege should extend to communications with in-house counsel.

[81] Joined Cases T-125/03R and T-253/03R *Akzo Nobel Chemicals Ltd v Commission* (op cit n 80).

[82] Ibid, para 122.

[83] Ibid, para 124.

[84] Ibid, para 125.

of the Member States was material to the judgment of the ECJ in *AM & S v Commission*, where the Court referred to 'the legal traditions common to the Member States'.[85] Furthermore, the policy justifications for the privilege recognized by the Court of Justice in the *AM & S* case are not necessarily excluded by the fact that the lawyer is employed by the client insofar the lawyer is asked to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs.[86]

The *AM & S* and *AKZO* cases on legal professional privilege in Community law can be understood as a quite straightforward application of the proposed model. Firms and their legal advisers as users of the system have an aspiration, or a 'legitimate expectation', that legal professional privilege should be upheld in Community law. In this respect, it is interesting to note that in both cases professional associations of lawyers intervened in the proceedings. The introduction of, or the attempt to broaden the scope of, the 'due process' requirement in Community law in thus triggered by the users of the system and argued on the basis of the law of the Member States that already recognize the requirement.

4.4. Position of complainants and other third parties in investigations under the Competition Act 1998

The impact of Community law on national standards of procedural fairness may go beyond the sphere of the national application of Community law. In *Pernod Ricard SA v Office of Fair Trading*, the appellants argued that the OFT should have disclosed a non-confidential version of the notice under rule 14 of the OFT's rules (the equivalent of the statement of objections) to them and consulted them before closing an investigation into an alleged abuse of dominant position by Bacardi-Martini Ltd. The notice in question had been served on the undertaking alleged to have abused its dominant position but not on the complainant. The proceedings had been conducted under the Competition Act 1998 and at the relevant time the OFT did not have the power to apply Articles 81 and 82 EC. The appellants had complained to the OFT about exclusionary practices by Bacardi and, in the words of the Competition Appeal Tribunal, its 'interests were directly and closely affected by the outcome of the OFT's investigation'.[87]

The Tribunal ruled against the OFT on two alternative grounds: 1) section 60 of the Competition Act 1998; 2) the administrative law duty to act fairly. The reasoning of the Tribunal in relation to both grounds demonstrates that the requirements of 'due process' under Community law have played a significant role in the judgment.

As regards the ground based on section 60 of the Competition Act 1998, the decisive role of Community law for the Tribunal's conclusion is clear. Section 60 of the Act requires the OFT, the concurrent regulators, and any UK court or tribunal to ensure that questions arising under Part I of the Competition Act 1998 in relation to

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[85] *AM & S Europe Ltd v Commission* (op cit n 67), para 66.

[86] Ibid, para 24.

[87] *Pernod Ricard SA v Office of Fair Trading* [2004] CAT 10, para 236.

competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the Community. This duty only arises so far as it is practicable having regard to any material difference between the provisions in question. The Tribunal held that the OFT should have given the appellants the same opportunities to be heard as they would have been given under Community law. Whether or not this is the correct legal position under UK law, it is important to note that the consequence of the Tribunal's ruling was that the OFT was bound by the rules applicable in Commission proceedings. Section 60 of the Competition act 1998 was thus construed so as to ensure consistency between Community law and national law not only in the application of the substantive provisions but also in the area of 'due process'.

As regards the ground based on the duty of fairness under English law, the Tribunal held that it had been unfair, in the circumstances of the case, not to disclose a non-confidential version of the notice under rule 14 of the OFT's rules to the appellants. It went on to say:

> Moreover, whatever the strict interpretation of section 60, in deciding what would be a fair and reasonable exercise of the OFT's discretion, we think we are entitled to take into account how the EC Commission would proceed in similar circumstances.

This case demonstrates that Community law requirements of 'due process' influence English law in two ways. The first may be through section 60 of the Competition Act 1998 if the Tribunal was correct to hold that issues of procedure are 'questions […] in relation to competition within the United Kingdom' and insofar as there are no relevant differences between the provisions concerned. The second is through a 'softer' process of convergence of national law towards Community law based on the interpretation of national law taking into account how the question would be determined under Community law.

The *Pernod* case bears witness to the complexity of the process of adoption and application of 'due process' requirements. In the *AM & S* and *AKZO* cases, national law standards interact with Community law, through the concept of 'legal traditions common to the Member States', to give rise to new fairness requirements at Community level. In the *Pernod* case, Community law interacts with national law, through a national law provision aimed to ensure consistency between Community law and national law or through a process of converging interpretation of national law, to reshape and clarify national fairness requirements in a way which is consistent with Community law.

E. CONCLUSION

This paper argued that the term 'due process' is not a defined legal concept in itself. The term, however, is important because it contributes to the discourse on procedural fairness in two ways. At national level, it shifts the focus from the common law approach to the hermeneutics of rights. While at common law the requirement of procedural fairness is the result of a balancing exercise, a rights-based approach generally means that the substance and scope of the 'right' must be identified before

carrying out any balancing exercise relating to the extent to which the right can be limited or interfered with. At European level, the concept of 'due process' provides a shared platform for vertical and horizontal convergence.

In legal terms, the concept of 'due process' is better described as a set of procedural requirements belonging in legal sub-systems, which include international law, Community law, national law, and aspirations of the users of the system. This model is a system and a process. It is a system because the constituent sub-systems interact with each other. It is a process because procedural requirements may be transplanted from one sub-system to the other in a temporal sequence. The model has a static and a dynamic dimension. The static dimension relates to the basis of the requirement, its origin, and the remedies for its infringement. The dynamic dimension relates to the process of transplant of 'due process' requirements from one sub-system into another. The transplant process is more complex if the requirement in question is context-specific and not self-standing while the less context-specific the requirement is, the more straightforward the transplant. This paper applies the proposed model to the principle of *ne bis in idem*, the privilege against self-incrimination, the legal professional privilege, and the determination of the rights of complainants and other third parties in national competition proceedings.

Starting with the *ne bis in idem* principle, there is currently no case law on how this principle might apply to the types of decision that may be adopted by national competition authorities. The application of the analytical model proposed in this paper leads to the following conclusions: a) the principle of *ne bis in idem* has been transplanted from national law to international conventions. It was then adopted by Community law based both on the national legal systems of the EU Member States and on public international law standards. Currently, the principle is been re-imported into the national legal systems of the Member States after having been transformed by the dynamic process of transplant from national law into public international law and Community law; b) the difficulty in the process results from the context-specific and not self-standing nature of the principle of *ne bis in idem*. It has been transposed from the national criminal law systems into a transnational/international context where autonomous concepts of 'criminal charge' and 'criminal proceedings' were adopted. The same principle, together with the autonomous concepts of 'criminal charge' and 'criminal proceedings', is now been transposed back into national law not in the field of national criminal law, where it originated, but in the field of administrative law; c) this further transposition requires adapting the tests adopted by the Community courts to the national legal systems under the framework of Regulation 1/2003. Therefore, because of the very nature of the process of adoption of the standard, it is not possible to provide solutions that are the same in all Member States and in all circumstances, the reason being the context-specific and not self-standing nature of the standard; d) an acute problem arises with regard to decisions by national competition authorities or the Commission that are based on lack of evidence of the infringement after a full investigation has been conducted with the involvement of the parties to the alleged infringement. In criminal proceedings lack of evidence leads to an acquittal, i.e. a decision barring further proceedings. In civil proceedings the same fundamental principle applies: a party failing to prove his case fails on the merits. If the claimant fails

to establish any element of the cause of action the court will give judgment for the defendant. This judgment is a final decision on the merits that bars further proceedings under the doctrine of *res judicata*. However, the same principles may not apply to administrative authorities even where the administrative proceedings are criminal in nature for the purposes of the application of international standards. Transposing an international standard created with the aim of ensuring the fairness of criminal trials into national administrative law systems based on discretionary powers of investigation may be problematic; e) it is possible to predict that parties to administrative investigations and their legal advisers will rely on the principle of *ne bis in idem* more often than in the past because of the system of concurrent enforcement of competition law under Regulation 1/2003. The process is on-going and while guidance may be found in the current case law, the substance and scope of the principle may have to be redefined in the new context in a way which is, at least in part, dependent on the features of the national administrative law systems in which the principle is applied.

The substance and scope of the privilege against self-incrimination in criminal law have been shaped in centuries of judicial interpretation and statutory interventions. However, even this highly developed area of national law was not immune from the influence of the European Human Rights Convention. The widening of the scope of protection under national law was triggered by the application of a user of the system to the European Court of Human Rights and led to statutory amendments in national law. The current provisions on use of statements obtained under compulsion contained in the Enterprise Act 2002 and the Competition Act 1998 are the result of this process.

Insofar as administrative proceedings are concerned, the privilege against self-incrimination has the dual nature of a Convention right and a fundamental principle of Community law. While technically, under UK law the Community law privilege takes precedence over the Article 6 of the European Human Rights Convention, arguments based on the privilege are generally drawn both from Community law and the jurisprudence of the European Court of Human Rights, without distinctions. National courts are likely to apply both set of precedents in an integrated way, reconciling any possible conflicts. The precise scope of the privilege under national law is yet to be defined but the current administrative practice seems to follow closely the case law of the Community courts.

The current topics of legal professional privilege in Community law and complainants' and other third parties' rights in UK law can also be more easily explained under the proposed model. The issue of legal professional privilege in EC law may depend, to a significant extent, on the position under the national laws of the Member States. On the other hand, complainants' and other third parties' rights under UK law are a question of national administrative law where Community law may have a significant role to play.

In conclusion, the 'due process' discourse and the dynamic process of adoption and definition of standards of procedural fairness facilitate two types of interaction: a) vertical interaction between the Community legal order and the legal systems of the Member States; b) horizontal interaction between the legal systems of the Member

States.[88] This on-going process shifts the focus from national law requirements to transnational concepts and principles. Such concepts and principles serve two functions. The first is analytical. They form the common ground for the discussion on policy, enforcement practice, and decision-making, including the legislative process. The second is instrumental. The adoption of shared concepts and principles makes it possible to compare models adopted under national law, to share experiences and best practices and, if appropriate, to change national law or practice in the framework of an osmotic process. The result may be convergence through 'spontaneous harmonization' rather than binding measures. It would appear that 'spontaneous harmonization' may be more appropriate in the field of 'due process' because of the highly technical and context-specific nature of certain procedural requirements.

[88] While the vertical interaction lies at the heart of the application of Community law, the horizontal interaction in the field of procedural law is still embryonic. However, the horizontal interaction is as important as the vertical interaction in the process of spontaneous harmonization of the legal systems of the EU Member States.

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 2 Issue 1 **August 2005**

The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?

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This article discusses the current degree of protection afforded to legal professional privilege in the context of the framework for the enforcement of Articles 81 and 82 EC Treaty resulting from the 'Modernisation Regulation' No 1/2003. After examining the notion of lawyer-client confidentiality existing under both English law and the European Convention on Human Rights, it will assess the concept of privilege enshrined in Community law, according to the case law of the ECJ. Thereafter, the article will analyse the impact of Article 12 of Council Regulation No 1/2003, which allows for the exchange and use in evidence of information collected by the Commission and the National Competition Authorities on the present standards of protection of legal professional privilege. Finally, it will address the issue of whether these standards can be redefined in a manner which takes into account, on the one hand, the effective protection of privilege in the 'decentralised' enforcement framework established by Regulation 1/2003 and, on the other, the need for the application of binding ethical rules on legal advisers in the interest of the proper administration of justice.

1. INTRODUCTION

This paper aims to examine the current standards of protection of legal professional privilege (LPP) in Competition enforcement proceedings and, in particular, the impact of the provisions of Regulation No 1/2003 allowing for the exchange of information among the Commission and the National Competition Authorities (NCAs) on the treatment of privileged communications in the jurisdiction of the receiving authority.

The first part will examine the existing degree of protection afforded to Legal Professional Privilege by the European Convention of Human Rights (ECHR) and by English law, and will analyse its role as an essential component of the right to a "fair trial" and to a "fair procedure" enshrined in Article 6(1) of the Convention. The second

[*] The School of Law, the University of Birmingham. Heartfelt thanks are owed to Dr Eleanor Spaventa for her comments and suggestions on an earlier draft of this paper. An earlier version of this paper was presented to the 5th CLaSF Workshop on *Due Process in European Antitrust Law*, organised by the Competition Law Scholars Forum and held in Glasgow, Graduate School of Law on April 7th 2005. The author is very grateful to the Workshop's Chair, Prof. Barry Rodger, and to all the participants to the Workshop for their invaluable feedback. She is the sole responsible for the views expressed and for any errors or shortcomings contained in this paper.

section will then assess the present state of play as regards the safeguard of the privilege in EC law: particular attention will be paid to the *AKZO Nobel and Ackros Chemicals* interim order of the Court of First Instance, and to its implications for a future reformulation of the notion laid down by *AM & S v Commission*, which should encompass also communications between the undertakings concerned and their employed legal advisers.

The third part will be concerned with the provisions contained in Article 12 of Council Regulation No 1/2003, allowing for the exchange of information between the Commission and the National Competition Authorities, and among the NCAs themselves. In particular, their impact on the level of protection afforded to lawyer-client confidentiality by EC law and by the laws of the single Member States, especially of the United Kingdom, will be considered. In this respect, it will be argued that the cooperation between enforcement agencies could jeopardise the protection of LPP, since communications enjoying that safeguard in accordance with the law of the receiving authority could nevertheless be disclosed on the ground that they were not privileged in the jurisdiction in which they were originally collected.

It will be suggested that the application of Article 12 of Council Regulation No 1/2003 calls for the adoption of a new Community definition of legal professional privilege, applicable in the context of proceedings for the application of Articles 81 and 82 EC Treaty by both the Commission and the NCAs. This new Community principle should extend to communications emanating to all in-house counsel. The proposed change would avoid that, due to the inconsistent degree of protection granted to it by the various Member States, the protection of lawyer-client confidentiality could be "watered down". To this end, the position of the Office of Fair Trading will be considered in detail.

Thereafter, possible alternatives to the *AM & S* concept of privilege will be examined: in particular the "functional" approach laid down by the US Delaware District Court in its *Renfield v Remy Martin* judgment and the solution suggested by the President of Court of First Instance in *AKZO Nobel* will be discussed. Consequently, it will be considered whether, on the one hand, the concerns for an effective protection of privilege in the context of the functioning of the European Competition Network and, on the other, the need to enforce binding ethical standards on legal advisers can be reconciled.

2. LEGAL PROFESSIONAL PRIVILEGE AS AN ESSENTIAL CHARACTERISTIC OF A "FAIR PROCEDURE"

2.1. Lawyer-client confidentiality as an element of the right to a "fair trial"

The confidentiality of communications between a lawyer and his or her client has been granted legal recognition both at international and at domestic level.[1] Its effective safeguard was considered to be an "auxiliary principle serving to buttress the cardinal

[1] *Inter alia*, Passmore, 'The future of legal professional privilege', (1999) 3 *International Journal of Evidence and Proof* 71 at 72.

principles of unimpeded access to the courts and to legal advice".[2] By affecting "the ability of the one to seek and the other to give legal advice in confidence",[3] legal professional privilege has been regarded as "much more than an ordinary rule of evidence",[4] and rather as "a fundamental condition on which the administration of justice as a whole rests".[5]

The application of Articles 6, 8 and, to a more limited extent, 10 of the European Convention on Human Rights has guaranteed a high level of protection to the privilege. In this respect, the European Court of Human Rights regarded "an accused's right to communicate with his advocate out of hearing of a third person" [6] as "part of the basic requirements of a fair trial in a democratic society".[7] It was confirmed in *Campbell v United Kingdom*[8] that,

> "it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer—client relationship is, in principle, privileged".[9]

The Strasbourg Court was therefore concerned with ensuring that an individual could obtain effective legal advice in order to seek access to a court. Consequently, it held in *Golder*[10] that the refusal of the Home Secretary to grant leave to consult a solicitor with a view to considering the institution of civil proceedings for libel irremediably hindered the applicant's right to access to a Court,[11] which "constitutes an element … inherent in the right stated by Article 6(1)."[12]

Similarly, the House of Lords recognised that in an adversarial judicial system the confidentiality of lawyer client communications constitutes a "necessary corollary of the right to any person to obtain skilled legal advice about the law".[13] According to Lord Hoffmann, that "advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."[14] With respect to its scope, privilege can be claimed, and as a result

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2 *R (Daly) v Secretary of State for the Home Department*, House of Lords, 24 April, 23 May 2001, [2001] 2 AC 532, per Lord Bingham of Cornhill at para 10.

3 *R v Derby Magistrates Court ex parte B*, [1996] 1 AC 487, per Lord Taylor CJ at p 507.

4 *Ibid.*

5 *Ibid.* See Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W Res J Int'l L* 145 at 168.

6 Appl. 12629/87, *S v Switzerland*, judgment of 28 November 1991, [1992] 14 EHRR 670 at para 48.

7 *Ibid.* See also *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26.

8 Appl. 13590/88, Ser. A-No 223, [1993] EHRR 137.

9 *Id.*, para 46.

10 *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524.

11 *Id.*, para 26.

12 *Id.*, para 36.

13 *R (on the application of Morgan Greenfell & Co Ltd) v Special Commissioner of Income Tax*, [2002] HRLR 42 at para. 7.

14 *Ibid.* Cf., *inter alia*, appl. No 21497/93, *Mantovanelli v France*, judgment of 17 March 1997 (HUDOC Ref. No. 8/1996/627/810), [1997] 24 EHRR 370 at para 33.

the disclosure withheld, with respect to "communications between [the] party and his legal advisers in which legal advice is sought and given".[15]

The privileged nature of the correspondence aimed at providing legal advice was upheld by the European Court of Human Rights also in relation to measures of surveillance imposed on a lawyer by public authorities. In *Kopp v Switzerland*,[16] the Court took the view that the interception of telephone conversations aimed at monitoring a legal adviser constituted an interference with the applicant's right to respect for "private and family life, home and correspondence", enshrined by Article 8 of the ECHR. Nevertheless, the interference at issue in the particular case did not comply with the requirements of the second paragraph of that provision, i.e. being "prescribed by law" and "necessary in a democratic society" for the achievement of a legitimate aim, as listed by the Convention.[17]

In the opinion of the Court, the insufficient clarity and precision of the national law allowing for phone-tapping meant that the applicant "as a lawyer did not enjoy the minimum degree of protection required by the rule of law in a democratic society".[18] Accordingly, the measure in question violated Article 8, in as much as the Authorities failed to safeguard "the special status of lawyers"[19] and their "central position in the administration of justice as intermediaries between the public and the Courts". [20]

However, it is submitted that the protection of that "special status" does not appear to be dependent on the condition that the legal adviser be a member of the local Bar or Law Society. In *AB v Netherlands* the search and seizure by the prison authorities from a prisoner's cell of correspondence between the applicant and his representative—a former inmate—in proceedings before the Strasbourg organs was incompatible with Article 8. [21] The Court emphasised that "neither the Convention nor the Rules of Procedure of the European Commission of Human Rights at the material time required the representatives of applicants to be practising lawyers."[22]

On occasions, Article 10 ECHR has successfully been invoked to protect the lawyer's right to free speech in the context of judicial proceedings. Cases in which a defence counsel had been the target of libel actions for comments and other statements made before the courts were of particular concern. Nevertheless, the European Court of Human Rights clearly affirmed that the "restriction of defence counsel's freedom of expression can be accepted as necessary in a democratic society"[23] only in exceptional circumstances.[24] In addition, the fact that the applicant was not a member of the local

15 Passmore, 'The future of legal professional privilege', (1999) 3 *International Journal of Evidence and Proof* 71 at 72.

16 Appl. No 23224/94, [1999] 27 EHRR 91.

17 *Id*, para 75.

18 *Ibid.*

19 Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

20 *Ibid.*

21 Appl. No 37328/97, *AB v Netherlands*, [2003] 37 EHRR 48 at para 82-83.

22 *Id*, para 86.

23 *Id*, para 55.

24 *Ibid.*

"Bar" or "law Society" was not considered decisive by the Court for the purpose of granting her the protection enshrined in Article 10(2) of the Convention.[25]

The European Convention of Human Rights therefore affords to legal advisers a high level of protection in order to ensure that they can effectively exercise their function of providing legal advice to the best of their ability.[26] To this end the requirement that communications with their clients be kept secret is considered essential to allow adequate legal representation and assistance and thereby full and effective access to the courts. [27] Legal professional privilege therefore contributes to the efficient administration of justice in a system inspired to rules of adversarial litigation and consistent with Article 6 ECHR.

2.2. Legal professional privilege in the corporate context: are Human Rights standards applicable to undertakings?

The position of both the English courts and the Strasbourg organs indicates that the confidentiality of communications between lawyer and client constitutes an essential element of a "fair trial" within the meaning of Article 6 ECHR. The protection of that confidentiality was also linked to the more general concept of secrecy of correspondence enshrined in Article 8 of the Convention and was regarded as an expression of the "special status" enjoyed by lawyers in a democratic society as intermediaries between the public and the Courts. However, a more general question should perhaps be addressed, namely, to what extent these principles are applicable when the client is not a natural person, but a corporate entity.

In general, the European Court of Human Rights has already recognised that the safeguards provided by the ECHR are applicable to individuals and legal persons alike, that operate in the commercial contexts, in order to protect their rights and freedoms in the exercise of business activities. In the *Niemitz* case[28] the Court took the view that the notion of "private life" could not be restricted "to an 'inner circle' in which the individual may live his own personal life as he chooses",[29] and should also encompass his or her "right to establish and develop relationships with other human beings".

Consequently, it was held:

> "there appears…to be no reason in principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."[30]

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[25] *Id*, para 53.

[26] Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W. Res. J. Int'l L.* 145 at 171.

[27] *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26.

[28] Appl. No 13710/88, *Niemitz v Germany*, Ser. A No 251-B, [1993] 16 EHRR 17.

[29] *Id*, para 29.

[30] *Ibid.*

Similarly, the Court constructed the concept of "home" as comprising also the applicant's business premises, namely his legal office. In its view, to take any more restrictive view of the scope of the notions of "private life" and "home" would hinder the function of Article 8, which is to protect individuals against the arbitrary interference of the public authorities.[31]

Furthermore, the Convention's safeguards have also been sought in the context of the protection of freedom of commercial speech and expression, including advertising. In *Markt Intern*[32] the Court held that information of a commercial nature could not be excluded from the scope of Article 10, since the latter "does not apply solely to certain types of information or ideas or forms of expression."[33] On the contrary, an active specialised press was regarded as an essential factor in a market economy, in as much as, by ensuring a degree of scrutiny of the [undertaking's] practices by its competitors",[34] it would foster "the openness of business activities".[35] In the later *Casado Coca* judgment,[36] the Strasbourg Court reiterated that Article 10 protected the freedom to impart information of whatever nature, and hence even "information of a commercial nature…and even light music and commercials transmitted by cable".[37]

The Court has therefore adopted a purposive approach in the interpretation of the Convention to ensure that the function of its provisions is not defeated in its essence. Consequently, in judgments such as *Niemitz* and *Markt Intern* it extended the safeguards provided by Article 10 of the ECHR to individuals and legal persons engaged in economic activities, namely to undertakings. However, it should be noted that the authorities of the Contracting States have been allowed a wider margin of appreciation as regards the adoption of restrictive measures on commercial speech, as opposed to the stricter scrutiny to which "interferences" with "political" speech are subjected by the court in Strasbourg.[38]

With respect to legal professional privilege, no ruling has been handed down to date as regards communications between lawyer and a corporate client. However, it is worth noting that the (now defunct) European Commission on Human Rights declared admissible a complaint brought by a Swedish company and concerning the seizure of documents exchanged between the applicant and its lawyers and stored in the office of the law firm.[39] Although the case was settled out of court,[40] the Commission's report

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[31] *Id*, para 31.

[32] *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989,Ser. A No 165, [1990] 12 EHRR 161.

[33] *Id*, para. 26.

[34] *Id*, para 35.

[35] *Ibid.*

[36] Appl. No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1.

[37] *Ibid.*

[38] Cf. *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989,Ser. A No 165, [1990] 12 EHRR 161 at para 33, 35 and 37 with *Lingens v Austria*, judgment of 8 July 1986, Ser. A No 103, [1986] 8 EHRR 103 at para 41-42.

[39] Appl. No 14369/88, *Noviflora Sweden AB v Sweden*, Commission Decision, [1993] 15 EHRR CD6; para 2(b) and 4.

constitutes a clear indication that the protection of the confidentiality of lawyer-client correspondence enshrined, *inter alia*, in Article 8 ECHR also extends to cases where the client is not a natural person.[41]

It is submitted that this conclusion is compatible with the goal and function of legal professional privilege as it has been protected under the Convention. The public interest clearly requires that undertakings are also guaranteed the right to seek legal advice in order to obtain full and effective access to the courts for the protection of their interests, in accordance with Article 6.[42] Also, the notion of "correspondence" contained in Article 8 is not made subject to any qualification: accordingly, the protection of its secrecy cannot be excluded on the basis of the professional nature of the communications between a legal adviser and his client.[43]

The demands of an efficient administration of justice the "special status" enjoyed by lawyers in a democratic society[44] therefore support the view that lawyer-client confidentiality should be secured regardless of the nature of the "client"—namely, regardless of whether the latter is a natural or legal person—and of the nature of the dispute, i.e. whether the latter is of a criminal, civil or commercial nature.

3. THE PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE IN EC LAW

3.1. The present state of play: 'AM & S v Commission': lawyer-client confidentiality as a "general principle of Community law"

After having considered the notion of legal professional privilege in the context of the protection of human rights both in the context of the European Convention of Human Rights and in that of English law, it is necessary to assess the current standards of protection in the Community legal system. In the well-known *AM & S Europe v Commission* case, the ECJ recognised that, in the absence of an express provision protecting the privilege, the general exception of confidentiality, enshrined, *inter alia*, in Article 287 of the Treaty, could be invoked by the undertakings affected by a competition investigation in order to prevent disclosure of written communications between a lawyer and his client for the purpose of legal assistance. [45]

The Court was mindful of the importance of legal professional privilege as a means to ensuring a fair procedure, by enabling "any person … without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it" .[46] At the same time, however, the Community concept of privilege had to take into account the variance of its scope and of the criteria governing it in each of the

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40 Report of the Commission adopted on 8 July 1993; para 13-16 of the report.

41 *Inter alia*, Riley, 'The ECHR implications of the investigation provisions of the Draft Competition Regulation', (2002) 51 (1) 55 at 68.

42 *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26. *Supra*, para 1.1.

43 *Inter alia*, appl No 13710/88, *Niemitz v Germany*, Ser. A No 251-B, [1993] 16 EHRR 17 at para 32.

44 *Inter alia*, appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

45 Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 para 18.

46 *Ibid.*

Member States, [47] and especially of the differing conceptions of the legal profession itself.[48]

Accordingly the ECJ took the view that the exception of confidentiality could prevent disclosure only of those communications which are made for the purpose of protecting the client's rights of the defence, and emanate from independent counsel, namely, counsel who are not employed by the client, and who are entitled to practice the legal profession in one of the Member States. [49] Despite recognising legal professional privilege in Community law, *AM&S* leaves open several issues as regards its scope. First, the ECJ expressly refers to communications between lawyer and client,[50] and not also to communications with third parties, including expert reports made for the main purpose of litigation.[51] Hence, litigation privilege would not seem to be protected.

Nonetheless, the conditions governing the privilege appear more problematic. The independence of the legal adviser was justified by the Court on the basis of the very nature of the legal profession, and of the role of the counsel as auxiliary to the Courts in the administration of justice, who are "required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs".[52] In order to fulfil that function, it is necessary that the lawyer be bound by binding rules of professional ethics, whose enforcement is entrusted with institutions endowed with the necessary powers in the general interest.[53] By contrast, in some Member States in-house legal advisers, by reason of their relationship of employment with their "client", are considered as having waived their ethical autonomy, [54] which is considered as a precondition to the privilege. [55]

However, the *AM & S* test, due to its general character, withholds privilege to communications originating from employed counsel who are allowed to be members of the legal profession under the law of Member State where they are authorised to exercise their profession, and are accordingly both subject to the same ethical rules and entitled to the same legal protection as independent counsel. [56] This outcome contrasts also with the Opinion of AG Slynn in *AM & S*, according to which, "provided he is

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[47] *Id*, para 19.

[48] *Id*, para 20.

[49] *Id*, para 21.

[50] *Ibid.*

[51] Pattenden, 'Litigation privilege and expert opinion evidence', (2000) 4 *Int'l J of Ev and Proof* 213.

[52] *Id*, para 24.

[53] *Ibid.*

[54] Daly, 'The cultural ethical and legal challenges in lawyering for a global organization: the role of the general counsel', (1997) 46 *Emory J* 1057 at 1102.

[55] Fennelly, 'Lawyers and employed lawyers: the application of legal professional privilege', (1998) 1 *Irish Bus* 2 at 7.

[56] *Inter alia*, Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 142.

subject to rules of professional ethics, the salaried lawyer should … be treated in the same way as the lawyer in private practice",[57] *inter alia*, for privilege purposes.

In addition, the role of in-house lawyers has received increasing recognition, in as much as it is believed that, from their "privileged" position within the company, they are "best placed to encourage compliance with the law". [58] Denying the protection of confidentiality to communications emanating from employed counsel is therefore likely to jeopardise that function. It would also appear to hinder the achievement of one of the goals of Regulation No 1/2003, namely to increase the self-compliance with Community competition rules, and especially of Article 81 EC Treaty in a framework where the "safe harbour" of exemptions and, to a more limited extent, of negative clearances is no longer available. [59]

The *AM & S* concept of privilege could also be detrimental to the smooth running of international commercial transactions, and to the overall competitiveness of the business environment within the EU, in as much as it compels undertakings established in non Member States where in-house counsel's communications are privileged, as in the United States of America, to employ an independent local counsel through which advice can be channelled only in order to protect it from disclosure. [60] Accordingly, it could be disputed whether *AM & S* constitutes an adequate response both to the needs of the reformed structure for the application of EC competition law, resulting from the "Modernization" Regulation No 1/2003 and to the changing role of in-house counsel in the present business environment.[61]

2.2. The 'AKZO Nobel' interim order: towards a reformulation of legal professional privilege?

The current position of the ECJ as regards legal professional privilege, by withholding protection to the confidentiality of communications emanating from employed counsel, could hinder the effectiveness of the rights of the defence of the undertakings concerned. It is submitted that this danger would appear well-founded given the increasing importance of in-house counsel in the modern reality of business. Moreover, the features of the globalised economy have called for closer cooperation between the Commission and the US Department of Justice.[62] However, the CFI could tackle these concerns by providing a more extensive definition of LPP.

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[57] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575, per AG Slynn at p 1611.

[58] Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 140.

[59] Power, 'Representing clients after the Modernisation of EC Competition law', (2003) 14 *ICCLR* 335 at 336.

[60] Daly, 'The cultural ethical and legal challenges in lawyering for a global organization: the role of the general counsel', (1997) 46 *Emory L J* 1057 at 1108.

[61] *Id*, p 1058.

[62] *Inter alia*, Lambert, 'Parallel Antitrust investigations: the long arm of the DOJ from the perspective of an EU defense counsel', (2002) 14 *Loy Consumer L Rev* 509 at 514-515.

Relying on the rationale of *AM & S,* according to which the scope of legal professional privilege is linked to the lawyers' obedience to binding rules of professional ethics[63] aimed at ensuring that they "provide independent legal advice"[64] in the interest of the administration of justice, the President of the CFI considered in the recent *AKZO Nobel and Ackros Chemicals*[65] interim application whether written communications between the second applicant and a member of the legal department of the first applicant could be covered by legal professional privilege, the adviser being

> "a member of the Netherlands Bar, subject to professional obligations as regards independence and respect for the rules of the Bar comparable to those of an external lawyer".[66]

The applicants had pointed to the "numerous changes in the professional rules of the Member States … tending … to extend the cover of professional privilege to the activities of certain in-house lawyers".[67] The President noted that, on the basis of the evidence before the Court,

> "there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts, if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status.".[68]

Accordingly, it was concluded that the pleas presented by the applicants and the interveners were:

> "not wholly unfounded and … apt to justify raising again the complex question of the circumstances in which written communications with a lawyer employed by an undertaking on a permanent basis may possibly be protected by professional privilege, provided that the lawyer is subject to rules of professional conduct equivalent to those imposed on an independent lawyer."[69]

Although the order in *AKZO Nobel* may be seen as merely a "modest procedural victory for the applicants",[70] it demonstrates the existence of significant momentum for a future redefinition of LPP. The reasoning of President Vesterdorf suggests that the scope of professional privilege should be defined solely on the basis of the allegiance on the part of the lawyer to binding rules of ethics. The approach envisaged by the

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63 Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 142.

64 *Ibid.*

65 Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission* [2003] ECR II-4771.

66 *Id*, para 80.

67 *Ibid.*

68 *Id*, para 126.

69 *Id*, para 127.

70 Murphy, 'CFI signals possible extension of professional privilege to in-house lawyers', (2004) 25 *ECLR* 447 at 453.

order could bring evident benefits, first of all, in terms of effective compliance with competition law. In fact, it would prevent disclosure of communications provided by employed counsel in the course of the legal self-assessment of practices giving rise to *prima facie* anti-competitive concerns.

Furthermore, the suggested definition would improve legal certainty across the EU, in as much as it would ensure that communications will not be disclosed if they originate from counsel bound by rules of ethics in the country in which he or she is authorised to practice, regardless of the existence of a link of employment with the client.[71] As a result, the in-house counsel could effectively exercise his or her function as a "facilitator" in achieving autonomous compliance with the law.

The fact that the ECJ annulled the CFI interim order[72] should not be interpreted as too much of a blow on the expectations for a reformulation of the privilege: the Court, far from addressing the substantive issues of the protection of lawyer-client confidentiality,[73] quashed the order on the ground that it did not satisfy the condition of urgency,[74] thus leaving open the substantive question as to the definition of privilege.

It could be queried whether additional support for a reformulation of the privilege could be gathered from the case law of the European Court of Human Rights.[75] Its recent judgments in fact seem to focus on the pivotal role of the legal adviser as an intermediary between the public and the courts[76] and on the need to ensure a practical and effective right to a "fair trial".[77] It is thus suggested that allegiance to the national Bar or Law Society does not seem to be considered by the Strasbourg court as an essential condition for the protection of the "special status" conferred to the lawyer in a democratic society.[78]

However, the Strasbourg court appears to have adopted a view of the legal profession as exercising auxiliary function to the administration of justice exercised before the courts, which therefore requires the existence and the enforcement of rules of professional conduct by independent bodies in the public interest. It was held in *Casado Coca v Spain* that, "such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils."[79]

Indeed, later developments seem to have relaxed this position, at least to some degree. The Court held in *Nikula v Finland* that the primary duty of counsel should be "to

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71 *Id*, p 454.

72 Case C-7/04 P (R), *Commission v AKZO Nobel and Ackros Chemicals*, order of 27 September 2004, [2004] 5 CMLR 24.

73 *Id*, para 29.

74 *Id*, para 44.

75 *Supra*, para 1.

76 *Inter alia,* appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

77 *Inter alia*, appl 12629/87, *S v Switzerland*, judgment of 28 November 1991, [1992] 14 EHRR 670 at para 48.

78 Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 55.

79 Appl No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1 at para 54.

defend their clients' interests zealously".[80] Accordingly, their "special status" and particularly their freedom of expression in the court room, should be protected in any case, regardless of the circumstance that they are not members of the local Bar or Law society.[81]

In reaching those conclusions, the Strasbourg court regarded as relevant the fact that, although the applicant was not subject to the disciplinary powers of the Bar Council, she was nevertheless subject to the supervision of the trial court.[82] The *Nikula* judgment seems therefore to suggest that, although allegiance to the national Bar or Law Society is not considered as an essential condition for the protection of his or her "special status", a certain degree of control should nonetheless be exercised on the lawyer to ensure the integrity of his or her function as auxiliary to the proper administration of justice.[83]

Having regard to the position of employed legal advisers, it could be argued that, since they are not subject to supervisory bodies in all the Member States, that requirement of control supposedly envisaged by the European Court of Human Rights is not met. At the same time, however, the role of in-house counsel has received, as the *AKZO Nobel*[84] interim order itself demonstrates, increasing recognition which has gained them admission to the local Bar in some of the EU states. As it was held by the President of the CFI, the current developments of the national laws of the Member States support the view that a link of employment may not always exclude the independence required for the function of counsel to be fulfilled.[85]

Accordingly, it cannot be excluded that the "special status" of lawyers in a democratic society, so strongly advocated by the European Court of Human Rights, cannot attach to an employed legal adviser, provided that, as it was suggested by the CFI order, the latter is "subject to strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status."[86]

It is submitted that in *Nikula* the European Court on Human Rights appears to have taken the view that an individual will enjoy the protections enshrined in the "special status" of lawyer, including LPP, provided that he or she is acing as an "advocate" in defence of the accused and is subject to the supervision of a court.

It may therefore be concluded that the case law of the Strasbourg organs could be read as to suggest that the *AM & S* test should perhaps be replaced with a more flexible set of conditions allowing for a consideration of whether, in the particular circumstances of the case, the lawyer, notwithstanding his or her relation of employment with the client, is subject to binding rules which preserve his integrity and independence.

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[80] Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 54.

[81] *Id*, para 55.

[82] *Id*, para 53.

[83] *Id*, para 45.

[84] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771.

[85] *Id*, para 80.

[86] *Id*, para 126.

4. THE EUROPEAN COMPETITION NETWORK: WHAT FUTURE FOR THE PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE?

4.1. Preliminary remarks

The argument in support of the reformulation of a wider notion of legal professional privilege in Community law becomes extremely compelling in the context of the decentralised enforcement of EC competition law introduced by Regulation 1/2003.[87] The abolition of the notification procedure has forced the undertakings to rely increasingly on self-assessment of their practices and therefore has called for a more proactive role of the legal advisers than in the past.[88] It is therefore submitted that those communications should be adequately shielded from disclosure to both the Commission and the national competition authorities[89] (hereinafter referred to as NCAs).

However, a significant threat to the confidentiality of lawyer-client communications is posed by the creation of the European Competition Network and in particular from the provision for the exchange of information between the Commission and the NCAs and among the national authorities themselves, due to, first of all, the lack of a common definition of privilege across the EU, and, second, to the absence in Regulation 1/2003 of any rule governing the use in evidence of the information obtained as a result of that exchange. Accordingly, after having examined the scope of Article 12 of the Modernization Regulation, the impact of that provision on the protection of transferred privileged communications will be assessed with reference especially to the position of the Office of Fair Trading.

4.2. Article 12 of Regulation 1/2003: the use in evidence of information exchanged between the Commission and the National Competition Authorities

The exchange of information within the European Competition Network was regarded by the Council as an essential factor to ensure that the Commission and the NCAs apply "the Community competition rules in close cooperation".[90] In this respect, the Commission viewed the "power of all the competition authorities to exchange and use information…collected by them for the purpose of applying Article 81 or Article 82" as a "precondition for efficient and effective allocation and handling of cases."[91]

Accordingly, Article 12(1) of Regulation 1 authorises, "the Commission and the competition authorities of the Member States … to provide one another with and use in evidence any matter of facts or of law, including confidential information" in proceedings enforcing Articles 81 and 82 EC Treaty. Paragraph 2 further establishes that evidence so obtained can be deployed as evidence only "for the purpose of

87 Para 12.

88 Power, 'Representing clients after the Modernisation of EC Competition law', (2003) 14 *ICCLR* 335 at 336.

89 *Id*, p 337. Also, *infra*, para 4.1.

90 Recital XV of the Preamble to Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

91 Para 26 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43.

applying Article 81 or Article 82 of the Treaty and in respect of the subject matter for which it was collected by the transmitting authority". An exception to that rule is provided by paragraph 3, according to which exchanged information may be used by the receiving Authority in order to enforce national competition law when the latter is applied in parallel with the Community rules and does not "lead to a different outcome."

Article 12, even though it "creates a legal basis for the exchange of any information within the network",[92] does not provide any rule governing the use of the evidence so obtained. In particular, it is not clear whether the receiving NCA could use in evidence information obtained as a result of the application of Article 12 which it could not have collected itself, because that information was protected from disclosure during the competition investigations. On the point, the Commission stated in its "Network Notice"[93] that "the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority."[94]

The position of the Commission seems therefore to support the view that, once the information has been lawfully gathered by the transmitting authority, and constituted admissible evidence in its jurisdiction, then the receiving authority should be empowered to deploy it in the course of its own proceedings, although the rules applicable in the latter's jurisdiction may differ, and especially may be more protective as regards the question of the admissibility of that information as evidence.

This interpretation of Article 12 was justified by the Commission on the basis of the "equivalent protection"[95] granted by the Member States to the rights of defence of the undertakings and of the safeguards contained in Regulation 1/2003, and in particular of the rule preventing that evidence from being relied upon to impose custodial sanctions on individuals.[96] Nevertheless it could be argued that the suggested approach may result in exposing the undertakings concerned to a considerable amount of uncertainty as to the use of evidence collected in competition investigations against them, given the differing standards for the protection of confidentiality applicable across the Union.[97]

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92 Van der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford, Hart Publishing, 2003, 369 at 378. Cf. Case C-67/91, *Direccion General de la Defensa de la Competencia v Asociacion Espanola de Banca Privada and others*, [1992] ECR I-4785 at para 41; for commentary, *inter alia*, Willis, 'Transfer of information between authorities in the modernised network', (2004) 2(4) *Competition Law Journal* 310 at 319.

93 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43.

94 Para 26.

95 Recital XVI of the Preamble to the Council Regulation 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

96 Wils, 'The EU Network of Competition Authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU', in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford, Hart Publishing, 2003, 433 at 457-458.

97 Van Der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu, op cit (n 92), p 369 at 384.

In this respect, the limits provided by Article 12 would not seem sufficient to redress the balance between the NCAs and the investigated undertakings, in as much as the latter would still be exposed to proceedings and the consequent threat of fines in a different jurisdiction. It is therefore submitted that the "criminal nature" of some of the essential features of competition proceedings and the deterrent character of the financial penalties threatened for infringements of Articles 81 and 82 EC Treaty,[98] can justify "higher standards" for the protection of confidentiality. In particular, it should be avoided that the exchange of information allowed under Regulation 1/2003 be "used as a tool to circumvent procedural safeguards"[99] available under national law.

4.3. Exchange of information and the protection of legal professional privilege

The issues arising from the varying procedural standards and rules governing the exclusion of evidence in the various Member States become all the more relevant with respect to the protection of confidentiality of lawyer-client communications, the boundaries of which may vary significantly across the Member States.

On the point, the President of the CFI observed extra-judicially that Article 12 appears to have been intended by the Council as allowing information to be deployed against the investigated undertakings "even if it has been collected under rules which are less protective than those of the Commission or the receiving NCA", [100] subject only to the limits established by Article 12(3) for the protection of individuals. Therefore, it could have unpleasant consequences for undertakings, since it would permit national competition authorities, or indeed the Commission itself, to use evidence "collected … under a specific standard of LPP"[101] although the law applicable in their jurisdiction grants higher protection to it.

The application of Article 12 to confidential communications containing legal advice is likely to lead to worrying results particularly with respect to correspondence exchanged between an undertaking and its in-house counsel, whose secrecy is protected only in some Member States. According to the updated Report produced by the Council of the Bars and Law Societies of the European Union (hereinafter referred to as the "CCBE Report"),[102] communications emanating from in-house counsel are protected against disclosure only in England and Wales[103]—although the question is still disputed in

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[98] Appl No 11598/85, *Stenuit v France*, Commission Report, [1992] ECC 401 at para 57. Cf. also, *mutatis mutandis*, appl No 37971/97, *Stes Colas Est and others v France*, judgment of 16 April 2002 (HUDOC Ref. No 00003563), [2002]-III Reports of Judgments and Decisions; [2004] 39 EHRR 17.

[99] Van Der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu, op cit (n 92), p 369 at 385.

[100] Vesterdorf, 'Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues', (2004) Fordham Corporate Law Institute, *XXXI Annual Conference on International Antitrust Law and Policy,* p 19.

[101] *Id*, p 20.

[102] CCBE, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions* — John Fish (February 2004), available at: http://www.ccbe.org/en/comites/in_house_en.htm

[103] *Id*, p 48.

Scotland[104] and is subject to the verification on the part of the court of an adequate professional qualification by the courts of Northern Ireland[105]—and in Ireland.[106]

Other countries, such as the Netherlands,[107] Portugal[108] and Spain,[109] allow salaried legal professionals to become members of the national Bar, sometimes subject to an undertaking given by both the lawyer and its employer that the independence of the former will be maintained. As a result of their admission to the Bar, they are therefore treated as "regulated legal professionals" for the purpose of privilege. However, in Germany[110] privilege has not been acknowledged to communications emanating from a salaried legal professional, when the latter acts for his employer in the context of the employment relationship, although the issue is still widely debated.[111]

This superficial overview demonstrates that the protection of confidentiality of lawyer-client communication remains uneven across the European Union.[112] As a result, there exists a real danger that Article 12 could be deployed by the National Competition Authorities, or indeed by the Commission itself to defeat higher standards of legal professional privilege in their own jurisdiction. The position of the Office of Fair Trading supports that conclusion. According to the OFT *Guidelines governing powers of investigation*,[113]

> "Whilst UK privilege rules would apply to cases being investigated in the UK by the OFT on its own behalf under national and EC law, the OFT could be sent the communications of in-house lawyers by a NCA from another Member State where the communication of in-house lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation."[114]

Consequently, if the Commission, or a NCA in whose jurisdiction that material is not shielded against disclosure, were to transmit communications between an investigated undertakings and its in-house counsel to the OFT, the latter would still be able to deploy that evidence in the proceedings, regardless of the higher degree of protection afforded in its jurisdiction to lawyer-client confidentiality.

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[104] *Id*, p 51.

[105] *Id,* pp 52-53.

[106] *Id*, pp 33-34.

[107] *Id.* p 39.

[108] *Id*, p 42.

[109] *Id*, p 44.

[110] *Id*, p 28.

[111] *Id* p 29.

[112] *Inter alia,* Burnside and Crossley, '*AM & S, AKZO* and beyond: legal professional privilege in the wake of Modernisation', paper presented at the 2005 IBA Conference: "Antitrust Reform in Europe: a year in practice" (5th roundtable: 'Due process in the face of divergent national procedures and sanctions'), held in Brussels, March 9-11. Available at: http://www.ibanet.org/images/downloads/A04824516v1.IBA_burnside_crossley.pdf.

[113] Office of Fair Trading, *Powers of Investigation,* Draft competition law guidelines for consultation, April 2004, OFT 404a.

[114] Para 6.3.

The *Guidelines* of the Office of Fair Trading, despite appearing justified by the need to ensure the "useful effect" of the provisions of Regulation 1/2003,[115] raise significant concerns as to the effectiveness of the right to a "fair trial" and to a "fair procedure" of the undertakings concerned in proceedings for the application of Articles 81 and 82 of the EC Treaty.

On that point, it was argued that in the context of the decentralised enforcement of EC competition rules, the NCAs "will be obliged to respect at least the Community law standard, pursuant to the *Wachauf* case law", [116] according to which the standards laid down by the general principles of EC law as regards the protection of fundamental rights are binding on Member States when implementing rules of Community law.[117] The consequences arising from the application of Article 12 in the manner envisaged by the OFT to in-house counsel's communications would however appear to remain within the boundaries of the existing case law of the ECJ as regards Privilege. [118]

In addition, the position expressed by both the Commission in the "Network Notice" and the Office of Fair Trading in its *Guidelines* could be justified on the grounds that, once undertakings are aware of the fact that communications with their in-house counsel are not protected in the jurisdiction where they have been or are likely to be collected, they should not be entitled to expect that, in the event of documents being transmitted to another NCA, the higher standards for the protection of privilege available in the receiving authority's jurisdiction would apply.

However, it is submitted that this argument seems misconceived, since it appears to disregard the circumstance that to allow that use of the exchanged evidence would place the undertakings concerned at a significant disadvantage vis-à-vis other firms affected by competition proceedings before the receiving NCA the evidence against which was not located outside the authority's jurisdiction. Whereas the latter could successfully claim privilege on communications with their legal adviser, the former would not be able to do so, although proceedings are carried out in the same jurisdiction and by the same NCA, and therefore the position of the two groups of undertakings can be considered comparable. [119] Accordingly, it could be argued that this hypothetical scenario would constitute a violation of the right against discrimination in the enjoyment of fundamental rights to privacy and fair procedure as enshrined, *inter alia*, in, respectively, Articles 6, 8 and 14 of the ECHR.[120]

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115 Bloom, 'Exchange of confidential information among members of the EU network of competition authorities', in Ehlermann and Atanasiu, op cit (n 92), 389 at 399.

116 Lage and Brokelmann, 'The possible consequences of a relatively broad scope for exchange of confidential information on national procedural law and Antitrust sanctions', in Ehlermann and Atanasiu, op cit (n 92), 405 at 416.

117 Case 5//88, *Wachauf v Bundesamt fur Ernahrung und Fortwirtschaft*, [1989] ECR 2609 at para 19.

118 Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 21.

119 Cf., *inter alia*, *Fredin v Sweden*, judgment of 18 February 1991, Ser. A-No 192, [1991] 13 EHRR 784.

120 *Inter alia* (*mutatis mutandis*), *Belgian Linguistics Case*, judgment of 23 July 1968, Ser. A-No 6, [1979-80] 1 EHRR 252, sect. I B, para 9.

It is submitted that it is open to question whether reasons of expediency in the conduct of investigations could constitute a "legitimate aim" capable of justifying the differential treatment of the communications between the lawyer and the client-undertaking as it would result from the application of Article 12 of Regulation 1/2003.[121] Also, it is disputable whether the restriction of the protection of the privileged nature of that correspondence would be proportionate to the aim pursued—if any such aim can indeed be found—in as much as the restriction would in effect result in thwarting the protection of the legal professional privilege as guaranteed by the national law of the receiving jurisdiction.[122]

The provision for the exchange and the use in evidence of information among the members of the European Competition Network therefore appears to raise serious questions as regards its conformity with general principles of Community law, and especially with the right to non-discrimination on grounds of nationality enjoyed by the undertakings established in any of the Member States. In addition, withholding the higher standards of protection of legal professional privilege provided by the domestic laws of some Member States could hinder the attainment of the self-compliance with competition law by undertakings, in as much as it could jeopardise the role of the legal adviser in assessing the legality of their market practices.[123]

However, it could be wondered whether, were the case to come before the Court today, *AM & S* would have been decided in the same way. As *AKZO Nobel* suggests, the laws of some Member States have shown increasing consideration for the role and purpose of the in-house counsel, and accordingly have accepted that legal professional privilege could attach to communications emanating from employed lawyers who are allowed to become members of the local Bar. [124]

It is respectfully suggested that, although no decision has been adopted on the point, additional support for a construction of privilege capable of embracing communications with employed counsel could be gathered from the principles laid down by the European Court of Human Rights as regards the protection of the "special status of lawyers"[125] in the interest of both the sound administration of justice and the right of individuals and undertakings to receive legal advice and assistance, in accordance with Article 6 of the Convention.

The position adopted by the Strasbourg Court would appear to suggest that the allegiance of the legal advisers to their national "Bar" is not an essential precondition for the protection of that "special status" and, therefore, of the secrecy of their

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[121] Cf., *mutatis mutandis*, *id*, para 10.

[122] Cf., *mutatis mutandis*, *inter alia*, *Lithgow and others v United Kingdom*, judgment of 8 July 1986, Ser. A-No 291-B, [1994] EHRR 329 at para 177.

[123] *Supra*, para 2.1. *Inter alia*, Faull, "In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 140.

[124] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 80.

[125] Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

communications with clients.[126] Henceforth, it is submitted that the interpretation of Article 12 of Regulation 1/2003 envisaged by the Office of Fair Trading, despite appearing consistent with that suggested by the Commission in its Network Notice[127] would not secure a degree of protection of privilege equivalent to that required by the "special status" conferred to lawyers by the European Court of Human Rights. [128]

5. MODERNIZATION AND LAWYER-CLIENT CONFIDENTIALITY: IN SEARCH OF A COMMON SOLUTION?

5.1. An alternative solution to 'AM & S': proposals from overseas

It is submitted that the analysis of the impact of Article 12 of the Modernization Regulation on the circulation and use in evidence of information covered by lawyer-client confidentiality raises serious issues as to the fairness of the proceedings before the receiving NCA, and highlights a clear risk that the protection of legal professional privilege may be "watered down", to the detriment of the right of the undertaking concerned to receive effective legal assistance. The root cause of that risk seems to lie in the lack of a harmonized notion of privilege across the Member States.

The forthcoming judgment in the *AKZO Nobel* case therefore constitutes an invaluable "window of opportunity" for the reformulation of a EU notion of privilege which would take account of the developments of the laws of the Member States on the issue, and which could become applicable to all proceedings for the application of Articles 81-82 EC Treaty, before both the Commission and the NCAs, in accordance with the *Wachauf* principle.[129] What is not clear is which solution will be adopted by the CFI. A test similar to that of *AM & S*, based on a "common notion" of privilege drawn from the relevant national rules in force across the Member States, and suggested also by the wording of the interim order is by no means the only option available, as the US legal experience suggests.

In *Renfield v Remy Martin*,[130] the Delaware District Court had to decide "whether the privilege is available to protect the secrecy of communications emanating from a French "in-house counsel".[131] The plaintiff had relied on the fact that in France, unlike the United States, no such communication would be protected, since an employed lawyer could not be a member of the legal profession.[132] However, the Court took the different view that, since "the organization of the French legal profession is unlike that in the United States",[133] the criterion of "membership in a "bar"[134] was not decisive.

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126 Appl No 37328/97, *AB v Netherlands*, [2003] 37 EHRR 48 at para 86.

127 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43 at para 26.

128 Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

129 Case 5//88, *Wachauf v Bundesamt fur Ernahrung und Fortwirtschaft*, [1989] ECR 2609 at para 19. *Supra*, para 3.3.

130 *Renfield Corp and Renfield Importers, Ltd v E. Remy Martin & Co, SA, Remy Martin Amerique Inc, Glenmore Distilleries Co and Foreign Vintages Inc*, US District Court, D. Delaware, (1982) 98 FRD 442.

131 *Id*, para 2.

132 *Ibid.*

133 *Ibid.*

Consequently, it was stated that "the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by the law to do so",[135] and concluded that the communications in question should be privileged:

> "French 'in-house counsel' certainly meet this test; like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation." [136]

The test laid down in *Renfield*, by resting on the question "whether the individual is competent to render legal advice and is permitted by law to do so",[137] represents a reasonable and balanced alternative to the *AM & S* test. In its context, the admission to a "bar", far from being the decisive element of the test, as implied in *AM & S*, constitutes "just one of the elements to be weighed up in deciding whether the communication involves legal advice"[138] for privilege purposes. It would therefore have the advantage of not requiring total convergence of the legal systems of the various Member States as regards the admission of in-house counsel to the legal profession, and would take into account the circumstance that in the reality of business, "a link of employment may not always exclude independence".[139]

Accordingly, it is submitted that a uniform approach to the definition of Legal Professional Privilege similar to that adopted by the Delaware District Court could constitute an adequate response to the characteristics of the framework for the enforcement of Articles 81 and 82 EC Treaty. As a result of the mutual recognition brought about by the Directives on the free movement of legal professionals,[140] a lawyer qualified to provide legal services in one Member State would not have difficulty in meeting the conditions laid down by the judgment of the Delaware District Court, i.e. that counsel be skilled to provide legal advice and be authorised by the law to do so. [141]

Those requirements would also appear to be sufficiently flexible to protect the confidentiality of lawyer-client communications in the context of the decentralised application of EC competition law. Particularly, in the event of documents being

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[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 40.

[138] *Ibid.*

[139] *Id*, p 41.

[140] Council Directive 77/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ 1977, L78/17; Directive 98/5 of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998, L77/36. Cf. Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 26. For commentary, *inter alia*, Fennelly, 'Lawyers and employed lawyers: the Application of Legal Professional privilege', (1998) 1 *Irish Bus L* 2.

[141] *Renfield Corp and Renfield Importers, Ltd v E. Remy Martin & Co, SA, Remy Martin Amerique Inc, Glenmore Distilleries Co and Foreign Vintages Inc*, US District Court, D. Delaware, (1982) 98 FRD 442 at para 2.

exchanged in accordance with Article 12 of Regulation 1/2003, the legal adviser would be able to resist successfully the disclosure of his or her communications with the client in proceedings before the receiving NCA. In addition, the concerned undertaking could foresee the consequences of the transmission of information in the context of the network and to benefit from the more extensive level of protection available under national law of the collecting authority. [142]

Nevertheless, it may be argued that the application of a "functional" test could give rise to legal uncertainty as regards the boundaries of privilege. Admittedly, one of the positive features of *AM & S* is that its outcome is fairly predictable: legal professional privilege will not be recognised of the documents relate to legal advice emanating from employed counsel. It was suggested that, due to his role within the corporate structure of the undertaking, it could sometimes be difficult to distinguish between legal and business advice given by an employed lawyer. [143]

On that point, it is respectfully objected that drawing that distinction would appear to be already required by the *A M & S* judgment. In fact, in order to determine whether lawyer-client communications should be privileged, it is necessary to assess whether they have been "made for the purposes and in the interests of the client's rights of defence". [144] Business advice would not therefore appear to fulfil that condition.

However, it is submitted that the actual crux of the *Renfield* set of conditions lies in its failure to address the issue of how to protect the ethical integrity and the independence of counsel, which ensure that legal advice and assistance can be given in the interest of the proper administration of justice. In particular, the test, by not regarding allegiance to the local Bar as a decisive condition for the protection of the privilege, does not solve the problem of how to ensure that appropriate ethical standards are enforced on the employed legal adviser in the public interest, especially so as to avoid that lawyer-client confidentiality may be used as a "shield" to withhold disclosure of evidence of episodes of corporate malpractice.

The issue emerged prominently in the United States of America as a result of the ENRON scandal, and prompted the adoption by Congress of the Sarbanes-Oxley Act.[145] Section 307 of the Act imposes on corporate lawyers the duty to report evidence of certain forms of corporate misconduct committed by directors to "the chief legal counsellor" or the chief executive officer of the company, and, if no appropriate

[142] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 41. Cf. Vesterdorf, 'Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues', (2004) Fordham Corporate Law Institute, *XXXI Annual Conference on International Antitrust Law and Policy,* p 20.

[143] Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 317.

[144] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 21.

[145] For commentary, *inter alia*, 'Developments in the Law—Corporations and Society: IV. Lawyer conduct and corporate misconduct', (2004) 117 *Harvard Law Review* 2227.

measures are taken on the basis of that evidence, to the audit committee of the board of directors of the company.[146]

Although it could be queried whether a similar obligation should be imposed on European in-house counsel, once they are granted the benefit of Legal Professional Privilege, it is submitted that the introduction of a rule similar to section 307 in the EU context would not be viable or indeed necessary to reinforce the counsel's observance of appropriate rules of professional conduct. In fact, privilege will not attach to advice aimed at aiding the commission of criminal acts.[147] Therefore, the general crime-fraud exception, inherent to the essence and function of the privilege, could allow for the disclosure of those communication and ultimately for the reporting of evidence of episodes of corporate misfeasance.[148]

It was argued that as a result of the Sarbanes Oxley Act, US in-house lawyers are now required to assume the role of "corporate gatekeepers"[149] in order to avoid the commission of serious forms of corporate fraud by public companies' managers. Commentators defined Section 307 as "clear and necessary legislative authority … that corporate lawyers are not to act as facilitators and legalistic justifiers of managerial schemes that violate legal or fiduciary duties."[150] However, the peculiar characteristics of the role of employed counsel, and especially his economic dependence on the single client threaten the efficacy of the reporting duty as a means to secure his allegiance to rules of professional conduct. As Cohen put it,

> "ultimately the lawyer will weigh his own ethics against possibilities of being fired or professionally black-listed. The deterrent on both sides is the loss of livelihood. While we hope lawyers will choose ethics over the possibilities being caught, the likelihood of this result is slim at best."[151]

In substance, the effectiveness of the obligation introduced by Section 307 can be seriously questioned first, because the adoption of any measure aimed at investigating the evidence and, if the allegations are well-founded, at pursuing those responsible for the instance of malpractice would always be dependent on the action of officers of the corporation; and second, because the inherent economic dependence of the counsel on his client-employer may act as a deterrent to reporting, due to perceived risk of the possible loss of employment.

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146 Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 308-309.

147 *Inter alia*, Maher, 'Professional privilege — Without prejudice letters and statutory inroads on the common law', (1990) 35(3) *Journal of the Law Society of Scotland* 108 at 110.

148 Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W Res J of Int'l L* 145 at 191.

149 *Id,* p 308.

150 Konstant, 'Sarbanes-Oxley and changing the norms of corporate lawyering', (2004) *Michigan State Law Review* 541 at 558.

151 Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 318.

5.2. Predicting the outcome of 'AKZO Nobel': tentative conclusions

The implementation of the Modernization Regulation on Competition enforcement raises pressing procedural issues which cannot be overlooked. The lack of harmonization of procedural and evidential rules, and especially of a uniform notion of legal professional privilege, is likely to play havoc with legal certainty and to undermine the effectiveness of the right of the investigated undertakings to be subjected to a "fair procedure" both at Community and at national level. That problem is made even more difficult to ignore by the incorporation of the EU Charter of Fundamental Rights in the Constitutional Treaty, especially in as much as, according to Article 52(3), the European Convention on Human Rights will become the "minimum standard" of protection of those rights which are common to both instruments. [152]

The forthcoming developments of the case law of the CFI therefore offer a tremendous opportunity to meet the concerns arising from the provisions on the exchange of confidential information within the European Competition Network: the *AKZO Nobel* order, suggests that perhaps momentum exists for a reformulation of the Community concept of legal professional privilege as to include communications with employed counsel. In this respect, it could be argued that a "functional test" akin to the one laid down in *Renfield*, would constitute a solution capable of meeting the concerns raised by the application of the Modernization Regulation, in as much as it would allow for the extension of privilege to communications emanating from employed counsel in most cases, regardless of the absence of a common ground on the issue across the Member States. [153]

However, and as the CFI interim order indeed suggests, before the protection of the confidentiality can be granted to documents originated from employed legal advisers, it is necessary to ensure that the latter are subject to a degree of control as to their ethical integrity, by means of the enforcement of binding professional rules in the public interest. [154] Accordingly, it appears likely that in-house counsel will benefit from privilege subject to the condition that they be allowed membership to their local professional bodies competent for the application of those ethical rules. [155]

The adoption of a similar approach would have far-reaching consequences, in as much as it would then be for the Member States to decide whether or not to allow in-house counsel to be admitted to the national Bar or Law Society. Nevertheless, it is submitted that, given the resistance with which similar proposals have been met with in some Member States, the solution envisaged in the interim order could perhaps increase the

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[152] Lemmens, 'The relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights — substantive aspects', (2001) 8 *Maastricht J of Eur and Comp L* 49 at 51.

[153] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 41.

[154] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 127.

[155] *Inter alia*, appl No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1 at para 54.

fragmentation in the protection of privilege, at least until such time as more convergence is reached on the issue.

In substance, although moving away from the "independence" requirement established in *A M & S* could be a positive development, since by doing so the CFI would recognise that for the purpose of LPP, a link of employment between lawyer and client does not in principle exclude the lawyer's autonomy,[156] the condition that in-house counsel be subject to binding rules of ethics, enforced in the public interest by supervisory bodies, could lead to an—at least temporary—uneven safeguard of lawyer-client confidentiality. Accordingly, it is not clear whether *AKZO Nobel* is likely to mark an actual progress towards the effective protection of lawyer-client confidentiality, especially in consideration of the challenges posed by the "Modernised" framework for the enforcement of Community competition law established by Regulation 1/2003.

[156] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 126.

ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 2 Issue 1 **August 2005**

The Commission's Policy on Recidivism: legal certainty for repeat offenders?

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This paper discusses the application by the European Commission of recidivism as an aggravating circumstance in competition law cases. It considers the largely unexplored questions of the legal basis for recidivism; the application of recidivism as an aggravating factor in the calculation of a fine and, in particular, whether the Commission should be able to treat recidivism as a perpetual aggravating circumstance without regard to the time limit that elapses between the relevant infringements. It concludes that the Commission's current policy, which does not recognise any period of limitation for recidivism, may not respect the basic principles of proportionality and legal certainty.

1. INTRODUCTION

This paper discusses the application by the European Commission of recidivism as an aggravating circumstance in competition law cases. It concludes that the Commission's current policy, which does not recognize any period of limitation for recidivism, may not respect the basic principles of proportionality and legal certainty.

The Commission's practice is to increase the amount of the fine imposed on an undertaking following an infringement of the competition rules in the EC Treaty if that undertaking had previously breached those rules. The legal basis for this practice is Regulation 17/62[1] (now Regulation 1/2003,[2] together the 'Regulations') and the Commission's 1998 Fining Guidelines[3] (the 'Guidelines'). The Guidelines thus create an equivalent of a criminal (competition) record for companies that are caught infringing Articles 81 or 82 EC.

The Commission (rightly) views recidivism as a very serious aggravating circumstance and imposes a substantial fine increase on repeat offenders. In recent cases, however, the Commission extended this principle in order to increase the basic amount of the

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[1] Regulation No 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962, P 013.

[2] Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ 2003, L1/1.

[3] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ 1998, C009.

fine by 50% based on infringements that occurred more than 20 years prior to the current infringement.

Recidivism has three particular characteristics that are relevant to the discussion here. First, recidivism is typically seen as a subjective status of the person committing the infringement, and not as an objective characteristic of the infringement itself. The rationale for recidivism, which exists in the legal systems of all the Member States, is that a repeat offender is more apt to commit crimes and therefore needs more severe punishment to be deterred from such behaviour in the future.

Second, recidivism is made up of two objective components forming an indivisible whole. Generally, the first component must be a conviction by a court or competition authority which has final effect. The second component is a further offence.

Third, because recidivism constitutes a second penalty based on the existence of a past infringement that has already been the subject of a penalty, it constitutes an exception to the principle of *non bis in idem*.

In almost all Member States, the punishment of repeat offences derives from specific, statutory provisions and safeguards that generally include a definition of recidivism, a definition of the type of infringement to which it applies, and a limitation period.

None of the important issues of principle raised by recidivism are addressed explicitly by European law. Moreover, the Commission's approach to recidivism raises a number of important questions and problems. In particular whether:

(1) there is a sufficient legal basis for recidivism,

(2) the application of recidivism as an aggravating factor in cases where the first infringement which forms the basis for recidivism took place before the adoption of the Guidelines may breach the principle of legal certainty and non-retroactive application of unfavourable law, and

(3) the Commission can treat recidivism as a perpetual aggravating circumstance, without regard for the time that has elapsed between the relevant infringements.

The application of EC competition law by national competition authorities and courts increases the uncertainty for potential recidivist companies because fines may be increased for previous infringements committed and sanctioned in other jurisdictions.

These questions are discussed below. Section 2 sets out the relevant legal framework, including EC and Member State rules on recidivism. Section 3 discusses whether there is a sufficient legal basis for recidivism in EC law. Section 4 argues in particular that the Commission's failure to apply a limitation period for recidivism infringes the principles of proportionality and legal certainty. Section 5 offers some conclusions.

2. RECIDIVISM RULES

2.1. EC Legal Framework

The Regulations and Guidelines

Regulations 17/62 and 1/2003 both state that "[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement."

Prior to the publication of the 1998 Fining Guidelines, the Commission was criticized for the vague criteria it used in determining fines,[4] and there was no explicit basis for punishing repeat offenders.

In announcing the Guidelines, the Commission noted that:

> 'The publication of these guidelines pursues the aim of transparency both with respect to companies and with respect to the [CFI] and to the ECJ. Their application should make it possible to strengthen the coherence of the policy of the Commission as regards fines while maintaining the deterrent character of the sanctions.'[5]

The Guidelines explicitly provide for the possibility to increase fines for repeat offenders. The Guidelines list in section 2 a 'repeat infringement of the same type by the same undertaking(s)' as an aggravating circumstance leading to an increase in the basic amount of the fine.

The Community Courts have accepted that the Commission enjoys a wide margin of discretion in deciding how to calculate fines as long as it bases its decision on the two criteria in the Regulations, namely the gravity of the infringement and its duration, and stays within the 10% of annual turnover limit established by the Regulations.[6] For example, the Commission is not bound to consider turnover in deciding the basic amount of the fine although it may have done so previously. Furthermore, the fact that in the past the Commission imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in the Regulations if that is necessary to ensure the implementation of Community competition policy.[7] The Commission has the necessary discretion to 'direct the conduct of undertakings towards compliance with the competition rules'.[8]

It is furthermore established case law that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of

4 See, for example, I Van Bael, 'The lottery of EU Competition Law', (1995) 4 ECLR 237.

5 Karel van Miert submits to the Commission clear guidelines on the method for the setting of fines in the context of European "anti-trust" legislation, IP/97/1075, 3 December 1997.

6 See, *e.g.*, Case T-23/99 *LR AF v Commission*, judgment of March 20, 2002, [2002] ECR II 1705, para 231.

7 *Id*, para 237 with further references.

8 *Id,* para 236 with further references.

the case, its context, and the dissuasive effect of fines and that no binding or exhaustive list of the criteria which must be applied has been drawn up.[9]

Limited to person and similar offence

The Guidelines state that the repeated infringement must be 'of the same type' and 'by the same undertaking(s)'.

The Commission considers infringements based on similar conduct on different geographic markets and in different sectors as of the 'same type' for recidivism purposes.[10]

In *Michelin*, the Commission rejected the argument that because the previous abuse was on a different geographic market it could not constitute a repetition of the same infringement stating that:

> 'when a dominant undertaking has been censured by the Commission it has a responsibility not only to put an end to the abusive practices on the relevant market but also to ensure that its commercial policy throughout the Community conforms to the individual decision notified to it.'[11]

In a decision against BASF which concerned the vitamins and animal feedstuff sector, the Commission increased the fine for recidivism despite the fact that the earlier decisions were concerned with entirely different sectors. The 1969 Decision concerned dyestuffs (Matières Colorantes)[12] and the 1994 Decision concerned bulk thermoplastic PVC.[13]

Likewise, in the Belgian Beer cartel case, the Commission imposed an increased fine based on the existence of concerted practices by a different affiliate (which had been sold) in the glass sector.

The concept of 'same undertaking' includes any legal entity within the same economic unit. In *Michelin*, the CFI confirmed that the Commission could apply recidivism to a company which had not previously been found guilty of any offence, but which was 99% owned by the same parent company that also held 99% of a company that had committed a previous offence. The CFI concluded that the subsidiaries in question did not determine independently their own conduct on the market and that therefore they formed part of the same economic unit for purposes of Community competition law.

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9 *Id,* para 236.

10 However, in the French Beer Case – *Brasseries Kronenburg, Brasseries Heineken*, Decision of 29 September 2004, the Commission found that a previous decision from 1974 mainly involved price agreements which were of a different type from the armistice agreement at issue, and therefore refrained from taking the 1974 decision as evidence of a repeated infringement (see footnote 93). Summary of decision: OJ 2005, L184/57, also published on the Commission website: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37750/en.pdf

11 *Michelin*, Commission Decision of June 20, 2001, OJ 2002, L143/1, para 362.

12 Case IV/26.267 – *Matières colorantes*, Commission Decision of 24 July 1969, OJ 1969, L195/11.

13 Case IV/31.865 – *PVC*, Commission Decision of 27 July 1994, OJ 1994, L239/14.

The Court noted that the Commission could have imposed the fine on the same parent company in both decisions.[14]

2.2. Member State Laws

Where there is no clear Community rule, the Community Courts will look to national laws for principles common to the legal systems of the Member States to establish the applicable EC law. For example, in determining the scope of the protection of legal professional privilege under EC law, the Court of Justice referred to the substance of national laws.[15] Principles common to the Member State laws are therefore very important in determining the appropriate EC rule.

In the Member States, recidivism is normally considered as an aggravating factor in criminal sentencing. Member State courts and competition authorities also take repeated offences into account in increasing fines imposed on undertakings for breaches of competition law. However, because recidivism implies an increase of criminal or administrative responsibility, national laws make recidivism subject to a number of conditions and safeguards.

In the criminal context, the legal basis for recidivism is generally a legally binding norm, which explicitly provides for the possibility of applying recidivism as an aggravating circumstance.[16] In some cases, the legal basis for recidivism, because it affects the fundamental rights of the individual,[17] ranks higher than regular norms.[18] Where the legal basis for recidivism is not a legally binding norm, for example in Ireland, a statutory provision explicitly acknowledging this possibility is recommended.[19]

In several Member States, including France, Italy, Spain, Portugal, Sweden, the Czech Republic, and Slovakia, the national competition law provides explicitly for the possibility to increase fines for repeat infringements.[20] Where that is not the case, for example in the United Kingdom, Belgium, and the Netherlands, published guidelines provide for recidivism as an aggravating factor to increase fines.

The criminal legislation of the Member States in most cases introduces some time limit on the consideration of previous infringements even for the most serious crimes (with

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[14] Case T-203/01 *Michelin v Commission*, judgment of 30 September 2003, [2003] ECR II 4071, para 290.

[15] Case 155/79 *AM&S v Commission*, judgment of 18 May 1982, [1982] ECR 1575.

[16] See for instance Articles 132-8 to 132-11 of the French Criminal Code, Article 99 of the Italian Criminal Code, Section 46 of the German Criminal Code, Articles 22 and 136 of the Spanish Criminal Code, Article 75 and followings of the Portuguese Criminal Code, Section 143(2) of the British Criminal Justice Act 2003, Articles 54 to 57 of the Belgian Criminal Code, Article 421 of the Dutch Criminal Code, Articles 69 and 70 of the Check Criminal Code, Articles 69 and 70 of the Slovak Criminal Code.

[17] See Article 81 of the Spanish Constitution, which requires a "*ley orgánica*", passed by absolute majority when a provision affects fundamental rights of the individual.

[18] See for instance, the example of Spain, Código penal approved by Ley Orgánica 10/95, 23 November 1995.

[19] Consultation Paper on Sentencing (LRC C-P 6 1993), Report on Sentencing (LRC 53-1996).

[20] See, *e.g.*, Section 28a(3) of the Swedish Competition Act (SFS 1993:20) which provides that a fine may be set at a higher amount if the undertaking has previously infringed the prohibitions under the Act, Article 10.2(f) Ley de Defensa de la Competencia (Spanish Competition Act 16/1989 of 17th July, Official State Gazette Nº. 170, of 18th July 1989), Article L. 464-2 of the French Commercial Code.

the exception of crimes against humanity).[21] National legislations consider the time elapsed since the first conviction.[22] The general trend is to determine a maximum period of time between the first and the second conviction, beyond which the first conviction cannot be taken into account for the purposes of recidivism. In general, this period of time varies depending on the seriousness of the offence committed. In some countries, such as Spain, Portugal, the Netherlands, the Czech Republic and Slovakia, recidivism is always temporary, meaning that after a maximum of 10 years following the first conviction, the Courts cannot take the first infraction into account in order to aggravate the penalty for the second one based on recidivism. In some other countries, such as France, Germany and Belgium, recidivism can in some cases be perpetual (while obviously not extending beyond the life of the natural person concerned), but only for the most serious criminal offences.

Several Member States have specific provisions imposing a limitation period for recidivism in competition law cases. For example, in Italy the first offence cannot constitute an aggravating factor after five years[23] and in Germany the limitation period is three or five years depending on the fine.[24] In cases where there is no specific provision, it seems unlikely that national judges would accept a limitation period in excess of the period that applies to the consideration of a previous offence as an aggravating factor under the applicable criminal law.

There is very limited national case law applying recidivism as an aggravating circumstance to increase fines for competition law infringements. In abuse of dominance cases concerning Telefónica, the Spanish competition authority in a decision dated March 8, 2000,[25] took into account a previous infringement which was subject to a decision 19 years earlier.[26] However, in a decision dated April 1, 2004 also concerning abuse of dominance by Telefónica,[27] the authority considered only previous decisions rendered in 2001 and 1999.

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21 The criminal laws of several Member States restrict the consideration of offences which were committed in excess of five to ten years prior to the offence currently being sentenced. These include, for example, Belgium, the Czech Republic, France, Germany, the Netherlands, the Slovak Republic, Spain, Portugal, and the UK. More specifically, national administrative laws of Member States also limit consideration of previous infringements when imposing a fine for a new infringement. These include, for example, Italy or Germany where a five year limitation period applies.

22 See for instance, Section 143(2) of the Criminal Justice Act 2003 in the United Kingdom.

23 Article 8 bis of the Law on Administrative Sanctions (to which the Competition Act, Law No. 287 of 1990, refers).

24 In Germany a repeated competition law infringement can only be considered an aggravating factor if it has not been deleted in the Gewerbezentralregister. Pursuant to Section 153 of the Gewebeordnung (Industrial Code), the extinction period is 3 years for fines not exceeding €300 and 5 years for fines exceeding €300. The period begins when the fining decision becomes final.

25 Decision No. 456/99 *Retevisión/Telefónica.*

26 Decision No. 167/80 of 26 March 1981.

27 Decision No. 557/03.

The French Competition Authority (Conseil de la Concurrence) has increased fines based on repeated infringements in a number of cases.[28]

3. IS THERE A SUFFICIENT LEGAL BASIS FOR RECIDIVISM?

3.1. Fundamental Rights and Principles Common to the Member States – No Punishment without Law and No Retroactive Application of Unfavourable Law

The Community Courts have consistently held that legal principles and fundamental rights common to the legal systems of the Member States, as well as rights recognized by the European Convention on Human Rights (the "Convention", to which all Member States are signatories) and the case law of the Court of Human Rights, constitute fundamental principles of EC law which the Courts must respect and enforce.

In *LRAF*, the Court of First Instance ("CFI") held that:

> 'It is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature … For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect … '.[29]

The Treaty on European Union also provides that the Union shall respect fundamental rights, as guaranteed by the Convention, and the EU Charter of Fundamental Rights makes reference to the Convention and to the case law of the European Court of Human Rights.

Nulla Poena Sine Lege: Article 7 of the European Convention on Human Rights.

Article 7 of the Convention provides:

> 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

This Article reflects the generally recognized fundamental principle of *nullum crimen, nulla poena sine lege, i.e.* only the law can define a crime and prescribe a penalty.

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[28] See Decisions N 02-D-42 of 28 June 2002 (fines were increased based on a decision in 1980 relating to conduct at the end of the 70s), N 02-D-62 of 27 September 2002 (similar infringements took place in 1992, 1993, 1995 and 1997, but the competition council referred only to the decision taken in 1992 as a basis for recidivism), N 01-D-41 of 11 July 2001 (an opinion rendered in 1980 was the basis for increasing fines), and 01-D-67 of 19 October 2001 (1989 and 1998 decisions were referred to as a basis for recidivism).

[29] Op cit n 6, para 217.

Non-retroactive application of unfavourable law.

A related fundamental principle enshrined in Article 7 of the Convention and recognized by the Community Courts is the non-retroactive application of unfavourable law.

The concept of 'criminal' offence in the Convention has an autonomous meaning,[30] which arguably encompasses a breach of Articles 81 and 82 EC. Although the Regulations both state that 'decisions [imposing fines for competition law infringements] shall not be of a criminal law nature', the fact that such fines have a deterrent and punitive character and that the Article 81 and 82 EC prohibitions apply generally to all undertakings likely takes these provisions within the scope of application of Article 7 in the Convention.[31]

In any case, the Court of Justice has recognized that a penalty, even of a non-criminal nature, cannot be imposed unless it is based on a 'clear and unambiguous' legal basis.[32]

The CFI stated in *LRAF* that:

> 'The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the Convention as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Community judicature. Although [the Regulations provide] that Commission decisions imposing fines for infringement of competition law are not of a criminal nature, the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition.'[33]

In *LRAF*, the CFI further stated with specific reference to Article 7 of the Convention that

> '[s]uch observance requires that the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed.'

3.2. EC Legal Basis

Commission practice

The Commission has applied recidivism as an aggravating circumstance based on Regulation 17/62 in 15 cases to date. In the six decisions taken since the adoption of

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30 *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22; *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, paragraph 81.

31 *Société Stenuit v. France*, Commission's report of 30 May 1991,no. 11598/85; Third Section Decision as to admissibility, *Neste and others against Russia*, June 3, 2004.

32 Case C-172/89, *Vandermoortele v Commission*, judgment of December 12, 1990, [1990] ECR I-4677.

33 Op cit, n 6, paras 219-220.

the Guidelines in 1998, the Commission applied a 50% fine increase for recidivism.[34] In all of those decisions (dating from 2001, 2003, and 2004), the Commission based recidivism on previous infringements which occurred prior to the adoption of the Guidelines.

The Regulations

It is not clear that applying recidivism as an aggravating factor follows from the obligation in the Regulations to consider the "gravity" and "duration" of the infringement.

First, neither the EC Treaty nor the Regulations contain an explicit reference to the possibility of increasing fines based on recidivism.

Second, recidivism is based on a characteristic of the recidivist, *i.e.*, the legal person which infringed the competition rules, and has nothing to do with the nature of the infringement, its duration or gravity. Member States laws recognize recidivism as an aggravating circumstance which refers to the person who committed the offence, not to the gravity or to the duration of the infringement itself.

Arguably, therefore, the Regulations do not provide the necessary clear and unambiguous legal basis for recidivism.

The Guidelines

The Commission itself seems to consider that only the Regulations and not the Guidelines are a legal basis for imposing fines or increasing fines:

> 'Les lignes directrices ne constitueraient pas, en elles-même, une base juridique, ni pour des sanctions, ni pour leur renforcement.'[35]

It is questionable whether the Guidelines could constitute a sufficient legal basis for recidivism. Guidelines are not formally legally binding. The Guidelines may bind the Commission because they create legitimate expectations among undertakings that the Commission will calculate fines in a certain way. However, the Guidelines are primarily a policy and guidance instrument of the Commission, which can be set aside by the Community Courts. The Guidelines serve only to explain in more detail the Commission's practical implementation of the framework for imposing fines provided by the Regulations and the EC Treaty. If the Regulations do not provide a legal basis for recidivism, then arguably the Guidelines go beyond the scope of the Commission's discretion pursuant to the Regulations and are invalid on this point.

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[34] *Michelin*, Commission Decision of 20 June 2001, OJ 2002 L143/1, *Belgian Beer*, Commission Decision of 5 December 2001, OJ 2003, L200/1, *Organic Peroxides*, Commission Decision of 10 December 2003, published at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37857/en.pdf, *Sorbates*, Commission Decision of 1 October 2003, Summary of Decision: OJ 2005, L182/20, published at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37370/en.pdf, *Industrial Tubes*, Commission Decision of 16 December 2003, Summary of Decision: OJ 2004, L125/50, published at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/38240/en.pdf, *French Beer*, Commission Decision of 29 September 2004, Summary of Decision: OJ 2005, L184/57, published at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37750/en.pdf

[35] Case T-9/99 *HFB Holding and Others v Commission*, judgment of 20 March 2002, [2002] ECR II 1487, para 485.

The Guidelines have withstood a number of legal challenges before the Community Courts, but none of those cases concerned directly the legal basis for recidivism.

In *Michelin*,[36] the CFI dismissed the applicant's arguments that the first and second infringements were not of a similar nature and could therefore not be the basis for recidivism, that the applicant was not the legal entity that had committed the first infringement, and that the Commission had breached the principles of fairness and equal treatment in increasing the fine by 50%.

In *HFB*,[37] the applicant argued that the Commission had exceeded its discretion under Regulation 17/62 when it adopted the Guidelines because it had not provided that fines should be calculated taking into account the turnover of the undertaking in question. Furthermore, the applicant argued that the Guidelines introduced a new aggravating circumstance in providing for the need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement. However, the applicant did not make any argument based on the lack of legal basis for recidivism (recidivism was not applied to the applicant). In holding that the Commission had not exceeded its discretionary powers in adopting the Guidelines, the CFI concluded that although the basic amount is calculated without reference to turnover, the framework for calculating fines in the Guidelines respected the 10% of annual turnover limit in Regulation 17/62. The CFI also found that the Commission's assessment was based on the 'gravity' and 'duration' criteria in Regulation 17/62.

The CFI noted in Michelin that:

> '[t]he Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in [the Regulations] and in the Guidelines.'[38]

Conclusion

In conclusion, the Regulations and the Guidelines may provide an insufficient basis for the Commission's application of recidivism as an aggravating circumstance to increase fines on undertakings that infringe the competition rules of the EC Treaty.

3.3. At what Point in Time Should the Legal Basis be Assessed?

Interesting questions arise if the Guidelines were to be considered the legal basis for recidivism (given that the Regulations make no explicit reference to the possibility to increase fines based on repeat offences), or at least as providing the necessary legal certainty. The legal basis and legal certainty must be assessed at the time of the infringement. But is it the date of the first infringement or the second infringement that is relevant in this regard?

It can be argued that the relevant point in time is the date of the second infringement since an undertaking which commits an offence at that point in time, and which knows

[36] Op cit, n 14.

[37] Op cit, n 35.

[38] Op cit, n 14, para 254.

that it has committed a previous similar offence, can determine that it will be liable for higher fines due to recidivism based on the status of the law at the time of the second infringement. However, recidivism is also in a sense a punishment for the first offence. The undertaking will be at risk of incurring higher fines for a subsequent infringement following the first infringement. The first infringement is thus a necessary basis for recidivism, and it is arguably essential that a potential culprit be fully aware of all the consequences of its behaviour.

A recent judgment on recidivism from the European Court of Human Rights suggests that the relevant legal basis must be assessed at the time of the first infringement because the first and second offences, which constitute the basis for recidivism, must be seen as 'forming an indivisible whole'.[39]

If that is the case, and if the Guidelines provide the legal basis for recidivism, then the Commission cannot increase fines based on first infringements that occurred prior to 1998.

In *Achour v France*,[40] the European Court of Human Rights held that a French law that extended the period during which a person could be subject to a heavier penalty as a recidivist could not be applied to a person who had committed the first offence before the entry into force of the new (unfavourable) law. The Court noted that 'new, more severe legislation cannot be applied to an ongoing situation that arose before it came into force'. In rejecting France's argument (confirmed by the French Court of Cassation) that it was sufficient that the new law was in force before the date of the second offence, the Court held that:

> 'It would be pointless to set up an opposition between the two components of recidivism, … and to take only one into account or minimize the significance of one in relation to the other.'

The Court noted that there was no overlap between (i) the period when the person in question was subject to the 'old' 5-year recidivism rule, and (ii) the period when the 'new' ten-year recidivism rule applied, *i.e.*, the application of the new legislation restored a legal situation that had ceased to have effect after the expiration of the 5-year limitation period following the first offence.

Conclusion

Even if the Guidelines were to provide the necessary legal basis for the Commission's application of recidivism as an aggravating circumstance to increase fines, then fines can only be increased on this basis for first infringements committed after the adoption of the Guidelines in 1998. All of the Commission's decisions to date are based on first infringements committed prior to that date.

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[39] *Anchour v France*, Application no. 67335/01, judgment of 10 November 2004, para 36.

[40] *Anchour v France*, Application no. 67335/01, judgment of 10 November 2004.

4. CAN RECIDIVISM BE PERPETUAL IN NATURE?

4.1. Proportionality and Legal Certainty

Principle of proportionality

It is a fundamental principle of EC law that the means used by the Community must be in proportion to their purpose. Article 5 EC provides that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'. The principle of proportionality is particularly important in cases which involve the imposition of penalties or sanctions.[41]

Legal certainty

All legal systems are based on the principle that the application of the law to a specific situation must be predictable. The principle of non-retroactivity discussed above aims to ensure legal certainty. Time limits and periods of limitation also serve to guarantee legal certainty. In the *Dyestuffs Cases*, the Court of Justice invoked a limitation period as a general principle of law:

> ' … the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines'.[42]

4.2. The Commission's Recent Practice

As opposed to the five-year limitation period that applies to the investigation of the actual infringement under the Regulations,[43] the Commission's recent practice shows that it does not recognize any period of limitation for recidivism. In other words, the Commission applies recidivism without regard for the time that has elapsed since the previous infringement.

In its 29 September 2004 decision *Brasseries Kronenbourg and Heineken*, the Commission said that:

> '[T]he concept of repeated infringement or recidivism is not subject to any period of limitation. The guidelines do not set any time limit between the previous infringement and the current one. … Furthermore, since a repeated infringement demonstrates that the penalty previously imposed was not a sufficient deterrent, increasing the fine to take account of a repeated infringement is not disproportionate, even if the earlier decision dates from twenty years previously.'

A review of the case law and Commission decisions shows that the Commission has increased fines based on previous infringements that occurred several decades prior to the second offence. In December 2004, the Commission imposed a 50% fine increase

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41 See HG Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Sixth Edition, Kluwer Law, 2001), para 181.

42 Case 48/69 *Imperial Chemical Industries v. Commission*, judgment of July 14, 1972, [1972] ECR 619, para. 49.

43 Regulation 2988/74 and Article 25 of Regulation 1/2003.

on BASF because it had already been fined for cartel activities between 1964 and 1967 and between 1980 and 1984, *i.e.*, conduct committed almost forty years previously.[44]

The basic principles of proportionality and legal certainty arguably require the application by the Commission of a limitation period after which an infringement can no longer lead to the imposition of a fine (or an aggravated fine).[45]

This would be in line with Member State laws described above.

Legal certainty requires that the Commission must act within a reasonable time in adopting decisions.[46] It should therefore also require some limitation on the Commission's consideration of previous infringements when calculating fines.

Although the conditions for applying recidivism do not arise until the time of the second infringement (and therefore arguably the time limit for the Commission to act would only start to run following the second infringement), the fact that companies have a perpetual life while their managers and owners change, and that recidivism can apply based on previous infringements in other geographic markets which may have concerned different products sold by the same undertaking, makes it very difficult for companies to understand the implications of their illegal behaviour with any certainty if recidivism applies perpetually. An infringement of the EC competition rules at any point back in time, anywhere in the world, with respect to any product market, by any entity within the same economic unit could potentially lead to an increased fine.

Arguably, there is even less legal certainty now that competition authorities and courts in 25 Member States have parallel competence to enforce the competition rules of the EC Treaty, including increasing fines for repeat offenders based on recidivism. Member State authorities and courts may decide to respect the limitation periods applicable under national law also when imposing fines based on Articles 81 and 82 EC, but then the argument could be made that they are not giving full effect to EC law. It is clear that at least some authorities contemplate applying recidivism as an aggravated circumstance is cases where the previous infringement was sanctioned by another authority in a different Member State. For example, in Sweden, there is a pending proposal to change the Competition Act to provide that fines can be increased under

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[44] Case No. COMP/E-2/37.533 – *Choline Chloride*, Commission Decision of 9 December 2004, Summary of Decision: OJ 2005, L190/22, published at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37533/en.pdf and Case IV/26.267 – *Matières colorantes*, op cit, n 12 (article 1); Case IV/31.865 – *PVC*, op cit, n 13, para. 54. BASF brought an action against the decision (see OJ 2005, C115/28) submitting among other things that the 50% increase of the fine for recidivism based on infringements that happened almost 40 and 20 years ago is contrary to the principle of legal certainty and the principle of proportionality.

[45] Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, OJ 1974, L319/1 and Article 25 of Regulation 1/2003. See also *Ford Agricultural* OJ 1993, L20/1, ¶22 where the Commission did not impose fines because a period of six years had elapsed since the infringement: 'The Commission takes into account that the greater bulk of the infringements that have been established relate to a period six or more years ago', and for this and other reasons no fine was imposed.

[46] Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission*, judgment of 22 October 1997 [1997] ECR II-1739, 'It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy.'

the Act not only based on previous infringements of the Act but also based on previous infringements of Articles 81 and 82 EC. The rationale for this proposed change is that infringements sanctioned in other EU jurisdictions should also be taken into account for recidivism purposes.[47]

The perpetual nature of recidivism seems clearly disproportional when compared to even the most serious crimes under national law which are typically subject to a limitation period for repeat offences and which moreover concern natural persons who do not – as opposed to undertakings – have a perpetual life. The longer the limitation period, the harsher the penalty for "recidivism". A recidivism policy which equates EC competition law infringements with the most serious crimes cannot be proportional.

The absence of any limitation period for recidivism in competition law cases moreover results in an absurdity. Because of the existence of a five-year limitation period for imposing fines,[48] a company cannot be fined for an infringement committed more than five years ago. However, a company's fine can be and has been increased because of an infringement committed almost 50 years ago.

5. CONCLUSIONS

Under the Commission's recidivism policy, any company or group of companies which have ever infringed Articles 81 or 82 EC are regarded as guilty of a 'repeated infringement' for an infinite number of years irrespective of the sector or geographic market where the infringement took place. It is questionable whether this policy has a sufficient legal basis in the Regulations and whether it complies with the principles of proportionality and legal certainty.

The fundamental principles of *nulla poena sine lege* and legal certainty may require a clear and unambiguous legal basis for recidivism at the time of the first offence and the imposition of a period of limitation between the first and second offence. This is confirmed by the fact that Member State laws respect these principles by providing for such clear legal basis and limitation periods.

The recent modernization and decentralization of EC competition law raises additional issues and requires a clear legal basis and practice for applying recidivism. Not only the Commission but also national competition authorities and courts are imposing fines based on infringements of Articles 81 and 82 EC. It is not completely clear, for example, in what circumstances and to what extent the Commission or the authorities of a Member State would consider a fine imposed in another Member State for recidivism purposes.

[47] SOU 2004:10, at 11.1, p 159.

[48] Regulation 2988/74 and Article 25 of Regulation 1/2003.