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Editorial - Due Process and Innovation in EU Competition Law: At the Gates of Reform?

*Alan Riley**

Undoubtedly the innovation with the greatest impact has been the adoption of the 2002 Leniency Notice and the adoption of the updated Notice in 2006. The EU leniency notice has generated large numbers of cartel cases for DG Competition resulting in dozens of cartels being busted and the Commission imposing over €10 billion fines over the last four years.

This procedural impact of the successful innovation was the centrepiece of the discussion at the first CLaSF workshop to take place in Brussels. In an extremely compelling and closely argued presentation Professor Wouter Wils, now one of the Commission's Hearing Officers, argued that the despite the success of the Commission its current procedures could cope with the procedural impact of a greater number of cases and much larger fines. His well argued presentation sparked a vigorous debate amongst the participants and set the scene for the rest of the presentations.

The core argument in favour of further reform was that the current procedures are essentially based on Council Regulation 17/1962 & Commission Regulation 99/1963, with the only major amendments being the introduction of the Hearing Officer in the 1980s and the updating of Regulation 17 with Regulation 1/2003, which significantly increased the Commission's sanction powers but which did very little to address due process concerns.

These regulations were adopted in the expectation that they would be principally deployed to assess applications for exemptions under Article 101(3). As such placing extensive investigative powers together with the command of the entire procedure, from laying out the Commission's concerns in a statement of objections, to running the procedure and making the final decision-was eminently sensible and efficient. Equally granting the Commission significant financial sanction powers and relying on a turnover calculation to assess the scale of fine to be paid also had merit. Allowing the Commission to levy fines increased the efficiency of the process and a turnover fine provided a rough and ready link between the infringement and its market impact.

The overwhelming majority of speakers at the workshop however took the view that the Commission's procedures were now unsustainable. In the first place this was because DG Competition was now dealing with large numbers of cartel cases rather than one every other year. A system designed for essentially administrative policy focussed cases had great difficulty adjusting to dealing with a significant number of

* City Law School, City University, London.

penal cases. This was compounded by the scaling up of the fines under the 1998 and 2006 Fines Notices, the 'penal rhetoric' used by the Commission and the prospect of parallel personal consequences for culpable employees.

In the second place is that European understanding of procedural law had moved on significantly since 1962. The case law of the European Court of Human Rights has so developed in the last two decades that a series of legitimate questions can now be raised as to the integrity of the Commission's evidence gathering and contentious procedures. These concerns are reinforced by the coming into force of the Lisbon Treaty in December 2009 which requires compliance with the Convention and eventual Union ratification. Andreas Scordamaglia and Jamie Flattery in their papers comprehensively discuss the sustainability of the Commission's procedures in the light of the twin pressures of significant numbers of cartel cases and the potential conflicts with the ECHR case law.

A further question concerns the calculation of fines. A fine calculation based principally on turnover is a rough and ready to calculate a fine on an affected market. When fines are relatively small and not related to price-fixing in most cases this may be an acceptable way to proceed. However, when fines, as a result of the 1998 and 2006 Notices significantly increase in size the procedures are likely to come under a lot more scrutiny. One difficulty for instance with the application turnover calculation in the Fines Notice 2006 is that it is not able to take account of the economic reality that some cartels are much more profitable than others. Many cartels are defensive operations which make little or no money, whereas others are extremely profitable. Imposing a minimum entry fee for price-fixers of between 15-25% of the turnover of the affected market ignores that economic reality.

There is a real danger of creating a market consolidation machine where some members of a weak and defensive cartel either go out of business entirely or merge with competitors in order to cope with the fines imposed. Abayomi Al-Ameen takes these issues into a broader policy setting in his paper *Antitrust Fines-Seeking Justice*. He provides an extensive overview of the major concerns related to the operation of the Fines Notice 2006.

One illuminating paper also addressed the way other EU procedures can catch up and overtake specific competition procedures. Julian Nowag's paper on the application of the European Evidence Warrant to competition cases and the sharp contrast with the procedures under the Network Notice and Regulation 1 provoked an intense debate on parallel EU rules side stepping carefully constructed EU competition structures.

Despite these concerns the overarching discussion of both the workshop and papers are positive for the Commission. A number of papers examine ways of effectively reforming the Commission's procedures. Notably Nicolo Zingales who provided a careful analysis of the development of the role of the Hearing Officer. Consideration was also given by Gurgen Hakopian to the legal and constitutional prospects for a criminal price-fixing regime.

Overall the Commission is facing is these procedural problems created by its success in the cartel field. These 'growing pains' can, with some debate and hard work, be sorted out. If as a result of reform the competition procedures demonstrate a greater fidelity to the ECHR and fining policy that has a better calibration industry should not reckon on being on the receiving end of any great benefit. In truth, once the Commission has a legally unassailable procedure targeted on price-fixers and a re-tooled Fines Notice the numbers of cartels that will be uncovered and the size of the penalties that will be imposed will be very unlikely to shrink.

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Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees

*Andreas Scordamaglia**

The paper assesses the interplay between 'fundamental procedural guarantees' and the need to ensure 'effective cartel enforcement' as reflected on the rules concerning the legal proof of cartel infringements. More specifically, in view of the new provisions of the Lisbon Treaty that accords 'Treaty value' to the Charter and paves the Union's accession to the ECHR, the paper first analyses the legal framework where fundamental rights operate in Europe. After identifying the rights that are pertinent in cartel proceedings, the paper attempts a novel reading of the characterisation of the legal nature of competition proceedings. Against this general background, the article embarks upon a detailed examination of the rules dealing with the legal characterisation, attribution of liability and sanctioning of cartels. It is submitted that the extensive use of presumptions is justified in view of the 'information asymmetry' characterising cartel infringement and no longer constitutes a risk of abuse in view of the increased probative value of evidence obtained through Leniency. Nevertheless, possible inconsistencies with regard to the ECHR standards could arise in the future with regard to the unpredictability of the sanctioning rules and the automatic way parental liability is established. Concluding, it is submitted that the current level of protection does accommodate the issues at stake as to workably reconcile effectiveness and a reasonable protection of defence rights, as well as, the risk of opportunistic use of procedural guarantees. Moreover, speculating on the future inter-play between the Luxemburg and Strasburg courts, it is proposed that the Community enforcement system, benefiting from the *Bosphorus* presumption of legality and the 'manifest deficiency' rebuttability standard, will remain unaffected.

1. INTRODUCTION

1.1 The place of cartel enforcement in the general 'due process' debate

The question of 'due process' in Community competition proceedings has been at the forefront of the future competition reforms debate. Academia, practitioners and even the press[1] have increasingly voiced some criticism with regard to an alleged deficient protection of the undertakings' rights of defence in Community antitrust administrative proceedings. Their recurrent argument is that in light of the noticeable increase in the magnitude of antitrust fines, competition proceedings should no longer be considered

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* EUI, Florence.

1 The Economist, 'Antitrust in the European Union - Unchained watchdog: Businesses think Europe's trustbusters should be kept on a tighter leash', Feb 18th 2010, http://www.economist.com/business-finance/displaystory.cfm?story_id=15546333. ; The Economist, 'Prosecutor, judge and jury: Enforcement of competition law in Europe is unjust and must change', Feb 18th 2010, http://www.economist.com/ opinion/displaystory.cfm?story_id=15545914.

administrative but rather criminal, thereby triggering the higher level of protection guaranteed by the European Convention of Human Rights (hereafter ECHR)[2] and in particular Article 6 ('right to a fair trial').[3] The criticism has not been to no avail as numerous articles have been written, in particular by Commission affiliates,[4] defending the current enforcement structure as sufficient to guarantee the fundamental rights of investigated parties. Moreover, at the political level, in a recent speech[5] the newly appointed Competition Commissioner Almunia sought to tame the criticism on matters of due process by reiterating that the Commission's internal checks and balances do guarantee the fairness and transparency of proceedings, acknowledging that possible improvements could be achieved in the future.[6] Aside this alleged inherent institutional downside of European antitrust enforcement, the debate has become more topical due to the ramifications of the Lisbon Treaty which, not only finally made the Charter of Fundamental Rights (hereafter Charter)[7] legally binding, according it Treaty value, but also streamlined the future accession of the EU to the ECHR.

Against this background, the 'due process' debate calls for a horizontal appraisal of the current level of procedural safeguards that covers the whole spectrum of competition infringements. For, if the revisiting of fundamental rights protection is to be prompted by the increased magnitude of fines, the assessment of public competition enforcement against the rules on 'due process' cannot be conducted in a fragmented manner, distinguishing between different types of Article 101 or 102 TFEU[8] infringements. This is so, because Article 23(2)(a) of Regulation 1/2003[9] makes no distinction between the types of infringement with regard to the magnitude of the imposed fines. Indeed, very severe fines have been imposed in both fields of abuse of dominance, often based on complex economic theories of harm, as well as in cases with obvious anticompetitive

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2 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4.11.1950.

3 See SLATER, D., et al. (2008) 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', GCLC Working Paper 04/08.

4 See articles of members of the Legal Service (in their non-institutional capacity) WILS, W. P. J. (2010) 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', World Competition, Vol.33, p.5–29 ; CASTILLO DE LA TORRE, F. (2009) 'Evidence, Proof and Judicial Review in Cartel Cases', World Competition, Vol.32(4), p.505–578, or the former Secretary General of DG Comp, LOWE, P. (2009) 'Cartels, Fines, and Due Process', Global Competition Policy - Online magazine, June (2) and LOWE, P. (2009) 'Reflections on the past seven years – Competition policy challenges in Europe', 17 November 2009, Kyonote speech, Conrad Hotel, Brussels.

5 ALMUNIA, J. (2010) Speech 10/81, 'Antitrust policy: the road ahead', International Forum on EU Competition Law, 09.03.2010, Brussels, p 5.

6 The Commissioner also recalled the efforts undertaken by DG Comp in the recent 'Best Practices Guidelines' aimed at improving the transparency and predictability of antitrust proceedings. See Commission Press release, IP/10/2, 'Antitrust: improved transparency and predictability of proceedings', 06.01.2010.

7 Charter of Fundamental Rights of the European Union (2000/C 364/01).

8 Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.3.2010.

9 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16.12.2002, OJ 2003, L1/1.

effects, such as cartel infringements. Furthermore, the Charter or ECHR rights involved in competition proceedings are recurrent and associate less to the actual type of anticompetitive conduct and more to the proceedings that surround its investigation. Despite the pluridimensional nature of the debate, the paper focuses on 'due process' aspects that are of specific importance to cartels, and in particular those pertaining to their legal qualification. What justifies such an 'autonomous' analysis of the law, are the specificities that cartel infringements present.

1.2 Specificities of cartel enforcement justifying an autonomous analysis

In the course of the so-called 'war on cartels', waged on both sides of the Atlantic,[10] cartels have been attributed demeaning epithets such as the 'ultimate evil of antitrust',[11] the 'most egregious violation of competition law'[12] or the 'scourges of competition'[13] - a 'most damaging type of anti-competitive practice'[14] calling for a 'zero tolerance policy' as to 'stop money being stolen from customers' pockets'.[15] Yet, it is not their patent deleterious effect on markets that, from an enforcement point of view, distinguishes cartels from any other type of competition infringements. Rather, it is the inaccessibility of incriminating evidence that characterises a cartel. The clandestine character of cartels grants cartel participants a monopoly (over competition enforcers) regarding the possession of such evidence. On top of this, especially in view of today's increasing technological advancements,[16] evidence detection is hardened and cartelists remain in full control over its existence and its elimination. Moreover, irrespective of their clandestine character, cartels are difficult to prove due to their varying and mutating characteristics. Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of

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[10] See in the EU Commissioner Neelie Kroes Speech 07/128, 'Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe', Brussels, 8th March 2007, p 4. See in the US, AG Hammond of the DoJ, 'The detection, prosecution and deterrence of cartel offences remain the highest priority of the Antitrust Division', in HAMMOND, S. D. (2008) 'Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program', 56th Annual Spring Meeting - ABA Section of Antitrust Law, p 1.

[11] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) per U.S. Supreme Court Justice Antonin Scalia.

[12] OECD, Recommendations of the Council concerning Effective Action against Hard Core Cartels - 1998, http://www.oecd.org/dataoecd/39/4/2350130.pdf.

[13] Neelie Kroes, Competition Commissioner, Press Release IP/06/698, 'European Commission Competition: Commission Imposes Fines of €344.5 Million on Producers of Acrylic Glass for Price Fixing' (31 May 2006), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/698&format=HTML

[14] Commissioner Neelie Kroes Speech 05/157, 'Taking Competition Seriously – Anti-Trust Reform in Europe', International Bar Association / European Commission Conference, 10.03.05, p 6.

[15] Ibid.,pp 5,6. An internal study undertaken by the Commission showed that the harm caused by the cartels, fined by the Commission during the period 2005-2007, is estimated around €7.5billion, on the basis of a 10% overcharge assumption - See also LOWE, P. (2009) *supra* fn 4, p 2.

[16] See JALABERT-DOURY, N. (2009) 'Digital evidence searches in competition investigations : best practices for effective fundamental rights: results of an international survey among defense lawyers', Concurrences: revue des droits de la concurrence, No 4, pp 65-73.

each individual undertaking may vary and take different forms. These specificities impose a near unbearable threshold for competition authorities to prove in detail an infringement, let aside to impose an appropriate sanction reflecting the cartelists' real participation.[17]

It is against these specificities of cartels that the whole debate on a potential trade-off between 'effective enforcement' and 'procedural guarantees' is framed; the 'informational asymmetry' justifies a separate analysis despite the fact that often the terms of the debate with regard to public enforcement are of a transversal nature. In other words, from a normative point of view, in order to overcome the informational asymmetry competition authorities should be able to rely on legal rules that do not restrict their capacity to investigate and legally prove the existence of a cartel.

1.3. Structure of the paper

In essence, the paper is based on a conceptually simple premise - undertakings participating in cartels have a strategic advantage compared to competition authorities in that they are in possession and control of all incriminating evidence. This structural imbalance that ultimately hinders detection justifies the adaptation of evidence-related rules that aim at overcoming the informational asymmetry: i) in the investigatory phase, by increasing the investigatory capacity and the application of lenient procedural guarantees and ii) in the post-investigatory phase, by lowering the standard of proof (legal proof) and facilitating rules on liability and sanctioning. The paper focuses only on the latter, and in particular analyses the rules on legal characterisation of cartels, the rules on imputation of liability and those on imposition of fines. The potential loosening of those legal rules needed to promote 'effective enforcement' are therefore analysed against the relevant fundamental rights, especially those pertaining to Articles 6 and 7 ECHR.

Building on this premise the paper is structured in three parts: the first, theoretical, Part 2 lays out the general framework of fundamental right protection in the context of cartel proceedings as to be able to analyse with better foresight, in Part 3, the place of fundamental rights in the legal characterisation, imputation and sanctioning rules. Finally, in Part 4, some general conclusions will be drawn on the necessity of introducing further reforms as to strike a reasonable balance between the two goals of effectiveness and adequate protection in that area of law.

2. THE GENERAL LEGAL FRAMEWORK OF 'COMPETITION' PROCEDURAL GUARANTEES IN THE EU

This part analyses in detail the general legal protection accorded to 'procedural guarantees' in the context of antitrust proceedings. It first sketches the general Community legal framework of human rights protection (2.1) and contextualises the

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17 For a detailed account of the probational difficulties see Joined Cases C-204/00 P, *Aalborg Portland A/S v Commission (Cement)*, [2004] ECR I-123, paras 54-59.

relevant rights of competition proceedings (2.2). It then discusses the contentious issue of the legal nature of Commission proceedings (2.3) that is fundamental with regard to the assessment of the issues of proof discussed thereafter.

2.1 General legal framework of human rights protection in the EU

The protection of procedural guarantees pertaining to evidence should be viewed against the more general background of human rights protection in the EU.[18] While all Member States are parties to the European Convention of Human Rights (ECHR) the same does not apply (yet) for the European Union. From the early days, the principles of supremacy and direct effect of EC law brought some uneasiness in the relationship between Community law and fundamental rights protected in the national order. In a notorious series of cases[19] the Court proclaimed that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'. In guaranteeing the effective protection of those rights the Court drew inspiration from the constitutional traditions common to the Member States and from the international treaties, explicitly stating the special significance of the ECHR.[20] While formally attributed the status of general principles of EC law in Article 6(2) of the Treaty on European Union, the ECHR has never become directly part of the *acquis communautaire* and thus, nor directly applicable as such. This raised questions in particular as to the enforceability of the ECHR *vis-à-vis* the Community institutions. In view of the institutional implications of constitutional significance, a possible accession to the Convention had to be brought, according to the Court, only by way of Treaty amendment.[21]

The Community response to this *legal vacuum* was to enact the 'Charter of Fundamental Rights' in 2000, marking an ambitious effort for the consolidation of fundamental rights that, while modelled on the ECHR, opted for the possibility of a more extensive protection. Its *sui generis* legal value ('solemn proclamation') meant that it served a declaratory purpose[22] that, however, lacked legally binding force on Member States and Community institutions. Despite this ambiguity concerning the legal value of the Charter, the Court referred to the Charter in a series of judgements, thereby reflecting its willingness and commitment to protect fundamental rights.[23] In the field of

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18 See AMEYE, E. M. (2004) 'The Interplay between Human Rights and Competition Law in the EU', European Competition Law Review, 25, 332-341.

19 E.g. Case 11/70, *Internationale Handelsgesellschaft mbH*, 17.12.70, [1970] ECR 1125, para 4.

20 Case 36/75, *Rutili* [1975] ECR 1219, para 32 ; Case C-260/89, *ERT* [1991] ECR I-2925, para 41.

21 Opinion 2/94, *Accession by the Community to the ECHR,* [1996] ECR I-1759, paras 34-36.

22 GRAIG, P. (2006) *EU Administrative law,* OUP, Collected courses of the Academy of European Law; vol. 16/1, p 385, 493-495.

23 BURGORGUE-LARSEN, L. (2006) 'L'apparition de la Charte des droits fondamentaux de l'Union dans la jurisprudence de la CJCE ou les vertus du contrôle de légalité communautaire', L'actualité juridique: droit administratif, No.41, pp 2285-2288; See also Opinion of A.G. Kokott, Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, December 13, 2007, ft 59, 'Admittedly, the Charter of fundamental rights does

competition proceedings, the Court expressly pointed that most of the relevant rights were in substance already protected in Community law prior to the adoption of the Charter[24] as general principles of law. It is therefore to no surprise that Regulation 1/2003 incorporates the Charter's protection by specifying that its provisions should be interpreted and applied with respect to the Charter rights and principles.[25]

The recently ratified Lisbon Treaty[26] seems to bring an end to this legal ambiguity as it attributes to the Charter the 'same value as that of the Treaties'.[27] Furthermore, as of December 1st 2009, it enables the Union to become member to the ECHR. Therefore, it is in light of the ramifications of the Lisbon Treaty, namely the 'constitutionalisation' of two parallel systems of protection of fundamental rights, that the analysis of the procedural guarantees related to evidence should be carried out. Until the Union's accession to the ECHR[28] (in mid-March 2010 the long-lasting accession negotiations started),[29] the Convention's minimum protection standards will officially be safeguarded by the Community Courts by means of the Charter (*by proxy*) as, by virtue of Article 52(3) of the Charter, 'in so far as this Charter contains rights which correspond to rights guaranteed by the ECHR the meaning and scope of those rights shall be the same as those laid down by the Convention'.

2.2. 'Human Rights' in the context of cartel investigations

2.2.1. Is it possible to apply 'human rights' to 'companies'?

Prior to providing an exhaustive outline of the relevant procedural rights, a preliminary question should be posed; can undertakings be beneficiaries of Charter or Convention rights? Whether that is objectionable due to the risk of abusive use of human rights by large corporations falls beyond the scope of analysis of this paper.[30] Nevertheless, it suffices to say that according to some authors the framers of the ECHR have always intended to extend protection to companies, in view of the socio-economic

not yet as such have binding legal effect comparable to that of primary law, but as a source of recognition of law it does shed light on the fundamental rights guaranteed by Community law'.

24 Case T-210/01, *General Electric v Commission*, [2005] ECR II-5575, para 725; See also the Commission's solemn commitment of compliance with the Charter (statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000).

25 Recital 37 of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16.12.2002, OJ 2003, L1/1.

26 Consolidated Treaties on European Union and on the Functioning of the European Union, 2008 OJ, C115/01.

27 Article 6(1) of the Consolidated Treaty on European Union (Note the UK and Polish opt-out protocols).

28 Article 6(2) of the Consolidated Treaty on European Union.

29 See speech of Justice and Fundamental Rights Commissioner, Viviane Reding, of March 18th, 2010, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe', available at www.ec.europa.eu/commission_2010-2014/.../speech_20100318_1_en.pdf.

30 For an extensive analysis of this dilemma see EMBERLAND, M. (2006) *The Human Rights of Companies: Exploring the Structure of ECHR Protection,* Oxford University Press.

implications traditionally taken into account by the European Court of Human Rights (hereafter ECtHR). Generally, it is widely accepted that the Convention was conceived to operate in a socio-economic environment characterized by democracy, the rule of law and free-market economy,[31] the latter justifying the extension of protection of some fundamental rights to corporate entities. Nevertheless, not all rights are transposable to legal entities, especially when the 'human' element of the right makes such transposition impossible (e.g. right to life). Besides, the dividing line between 'human' and 'supra-human' rights is not always clear, as exemplified in the case of the right against 'self-incrimination'.[32] In such situations Courts would either inevitably adapt with regard to the intensity of the protection granted or bar the claim – either way they would have to resort to policy considerations.

2.2.2. An overview of pertinent rights in cartel enforcement

The Strasburg Court has extended some rights and freedoms that by nature can be extended, *mutatis mutandis,* to companies and corporate entities.[33] The legal unenforceability of the ECHR rights before Community Courts has not dissuaded undertakings from invoking ECHR rights in support of their claims. Notably, the range of rights invoked goes far beyond the classical Article 6 guarantees. The most commonly invoked right in cartel appeals is that of right to a fair trial (Article 6(1)). Rather surprisingly, this fundamental article has most frequently been invoked to challenge the capacity of the Commission to conduct impartially and independently antitrust proceedings due to its dual institutional role of judge and prosecutor.[34] Moreover, a great number of cases are brought on the ground of the Commission's failure to deliver a decision within reasonable time.[35] Other claims are made in relation to the way the Commission retrieved or used evidence to find an infringement, usually alleging the use of inadmissible, insufficient or illegal incriminating evidence[36] or of an infringement of the right against self-incrimination.[37] Moreover, numerous are also the claims that allege a breach of the right to a fair hearing,[38] inadequate access to file[39] or

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31 ANDREANGELI, A. (2008) *EU competition enforcement and human rights,* Cheltenham, UK; Northampton, MA: Edward Elgar, p 22; EMBERLAND, M. (2006), *supra fn 30*, p 40.

32 Case 374/87*, Orkem v Commission,* [1989] ECR 3283, paras 28-31, where the ECJ held that the right against self-incrimination is limited natural persons only.

33 See the landmark decision *Pudas v Sweden A 125* (1987); (1988) 10 EHRR 30 which extends protection under the ECHR to legal persons undertaking private commercial activities.

34 See early cases Joined Cases 209-215, 218/78*, Van Landewyck*, [1980] ECR 3125, paras 80-81 and Joined Cases 100-103/80*, SA Musique Diffusion française and others v Commission,* [1983] ECR 1825*,* or more recently Case T-54/03*, Lafarge v Commission,* [2008] E.C.R. II-120, paras 33-39.

35 See first case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, or more recently Case T-58/01*, Solvay v Commission,* [2009], paras 91-96.

36 See Case T-30/91*, Solvay SA v. Commission,* [1995] E.C.R. II-1775, para 31.

37 See Case 374/87, Orkem v Commission, *supra* fn 32 , paras 18-30.

38 See Case T-213/95*, SCK and FNK v Commission,* [1997] ECR II-1739, para 215.

39 See Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P, *Aalborg Portland A/S v Commission (Cement),* [2004] ECR I-123, paras 65-71.

unequal treatment.[40] Finally, Article 6(1) has been also used to challenge the insufficient motivation, evidence presentation before the Court[41] and the lack of predictability or transparency in the manner of imposition of fines.[42]

Apart from Article 6(1) derivative rights, a very common claim is that of the infringement of the presumption of innocence usually by means of an illegal reversal of the burden of proof, or insufficient probative value of evidence infringing the *in dubio pro reo* principle (Article 6(2)).[43] Furthermore, parties have frequently invoked the principle of *nulla poena sine lege* (Article 7)[44] and the right of inviolability of the home (Article 8).[45] Also, a significant number of claims have also alleged breach of the *ne bis in idem* principle[46] of Article 4 of Protocol No.7.[47] Finally, some very specific rights have also made their appearance before Community Courts in the context of cartel litigation, such as the right to information on proper language (Article 6(3)(a)),[48] as well as the right to witness examination (Article 6(3)(d))[49] or some rights that are more remotely linked to cartel enforcement, such as the right to liberty and security (Article 5),[50] the freedom of expression (Article 10)[51] and of assembly and association (Article 11).[52]

Moreover, despite its lack of legally binding force (it became legally binding only as of December 1st 2009) the Charter has also been invoked in cartel cases, but generally in support of the aforementioned Convention rights, i.e. the right to respect for private

40 See Case T-347/94, *Mayr-Melnhof Kartongesellschaft v Commission,* [1998] ECR II 1751, paras 9-11.

41 For instance with regard to the invitation to submit common oral defence: Case C-238/99 P, *Limburgse Vinyl Maatschappij and others (PVC II) v Commission*, [2002] ECR I-8375, para 345; the absence of cross examination of witnesses: Joined Cases C 204/00 P*, Aalborg Portland A/S v Commission (Cement), supra* fn 39, para 200.

42 See infra part 3.2.

43 See Case T-10/89*, Hoechst v Commission,* [1992] ECR II-629, para 252.

44 In chronological order Case T-23/99, *LR AF 1998 v Commission*, [2002] ECR II-1705. Paras 212, 218-219, 233; Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, [2003] ECR II-2597, para 39; Case T-99/04, *AC-Treuhand v Commission,* [2008], paras 85-100

45 See Case 46/87, *Hoechst / Commission*, [1989] ECR 2859, para 18.

46 See Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, LVM etc. v Commission, [1999] ECR II-931, para.54 ; Case T-38/02, *Groupe Danone v. Commission*, [2005] ECR II-4407, para 184 ; Case T-24/07, *ThyssenKrupp Stainless v Commission*, [2009] ECR II-2309, para 178 .

47 Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No.11, Strasbourg, 22.11.1984.

48 Case T-338/94, *Finnboard v Commission,* [1998] ECR II-1617, paras 39; Case T-99/04, *AC-Treuhand v Commission*, [2008] ECR II-1501, paras 23-45.

49 Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 389; Case T-109/02, *Bolloré v Commission*, [2007] ECR II-947, para 86.

50 Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 327; Case C-238/99 P, *Limburgse Vinyl Maatschappij and others (PVC II) v Commission*, [2002] ECR I-8375, para 234.

51 See Case 43/82, *VBVB and VBBB v Commission*, [1984] ECR 19, paras 21-34; Case T-112/98, *Mannesmannröhren-Werke v Commission*, [2001] ECR II-729, paras 56-57.

52 Case C-235/92 P, *Montecatini v Commission*, [1999] ECR I-4539, para 137.

and family life (Article 7), the right of access to documents (Article 42),[53] the right to an effective remedy and a fair trial (Article 47(2)),[54] the presumption of innocence (Article 48(1)),[55] the right of defence (Article 48(2)),[56] the principle of legality and proportionality of criminal offences and penalties (Article 49(1))[57] and *ne bis in idem* (Article 50).[58] Furthermore, the right to property (Article 17)[59] and the right of equality before the law (Article 20)[60] have also been discussed before the Courts. Finally, some unrelated to competition enforcement freedoms have also been raised, such as the freedom of assembly and association (Article 12(1)).[61]

In conclusion, practice shows that undertakings have traditionally linked their claims to Convention rights. Charter rights have rarely been used to ground an autonomous claim but rather to second Convention rights. In view of the 'constitutionalisation' of the Charter, this trend is very likely to change and parties will be more inclined to refer to Charter provisions.

2.3. The legal nature of Commission proceedings

In the famous Dyestuffs case the plaintiffs made the following argument. They argued that 'since the fines authorized by Regulation 17 are not of a criminal law nature, they should be imposed not in order to punish infringements which have already occurred, but in order to prevent their recurrence'.[62] The Court rejected that argument as imposing such a limitation 'would considerably reduce the deterrent effect of fines'. The question posed by plaintiffs goes at the core of the discussion regarding the legal nature of enforcement procedures. If deterrence is the objective, as a matter of principle, it remains unclear why the whole procedure should not be attributed a criminal facet.

Qualification of the legal nature of the cartel procedures is determinant not only with regard to the procedural guarantees of the undertakings concerned but also as to

53 Joined Cases C 204/00 P, *Aalborg Portland A/S,* supra fn 39, para 94.

54 See Case T-112/98*, Mannesmannröhren-Werke v Commission* [2001] ECR II-729, paras 15-16, 76; Case T-99/04*, AC-Treuhand v Commission,* [2008] ECR II-1501, para 77.

55 See Cases T-22/02 and T-23/02*, Sumitomo Chemical v Commission,* [2005] ECR II-4065, para 68, 103; Case T-474/04*, Pergan Hilfsstoffe für industrielle Prozesse v Commission*, [2007] ECR II-4225, paras 46,75.

56 See Case T-99/04*, AC-Treuhand v Commission,* [2008] ECR II-1501, para 23.

57 Case C-76/06 P, *Britannia Alloys & Chemicals v Commission*, [2007] ECR I-4005, para 76; Case T-259/02, *Raiffeisen Zentralbank Österreich v Commission*, [2006] ECR II-5169, para 217; Case T-279/02*, Degussa v Commission*, [2006] ECR II-897, Case T-43/02*, Jungbunzlauer v Commission,* [2006] ECR II-3435, paras 65-68; Case T-99/04*, AC-Treuhand v Commission,* [2008] ECR II-1501, para 83.

58 See infra part 3.3.3.

59 Opinion of A.G. Kokott in Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala,* [2007], para 214.

60 Case T-161/05*, Hoechst GmbH v Commission,* [2009] ECR II-3555, paras 44, 68.

61 Case T-217/03, *FNCBV and others v Commission,* [2006] ECR II-4987, para 95.

62 Case 49/69, *BASF v Commission,* [1972] ECR 713, para 37.

determine the rules on proof, and in particular the evidential standard and burden of proof. Both at the EC level, but also at the national level, the legal qualification of the cartel proceedings determines the applicable substantial and procedural law, which in turn qualify the requisite standard or burden of proof. This in practice can mean that at the level of public enforcement, qualifying the cartel procedure as a criminal procedure would *de jure* suggest that the standard of proof should be set higher compared to a mere administrative law qualification.

2.3.1. The 'administrative' law classification deriving from a 'formal/textual' interpretation of the Community Courts

Article 23(5) of Regulation 1/2003 stipulates that decisions imposing, *inter alia*, sanctions for infringement, 'shall not be of a criminal law nature'. *A contrario*, this textual interpretation suggests that fines imposed are administrative in nature, and therefore the procedure and, in particular, the rules on evidence, are not to be subjected to criminal standards. The non-criminal characterisation of the Commission proceedings has been present from the very beginning of the Commission's activities. For instance, while the initial 1960 Commission proposal of Regulation 17/62 did not include such an explicit characterisation,[63] its explanatory note regarding sanctions the Commission mentioned that 'ces amendes ont le caractère de mesures administratives et non de sanctions pénales'.[64] This was effectively endorsed in the adopted version of Regulation 17 in Article 15(4).

According to this literal interpretation, the Commission was entrusted by the EC Treaty as an administrative body possessing the hybrid powers of 'investigating cases', as well as finding that there have been 'infringements of article 81 and 82', and imposing appropriate 'measures' to bring the infringement to an end. Therefore, as pointed by Wils, it combines the 'investigative and prosecutorial function with the adjudicative or decision-making function'.[65] These particular prerogatives of the Commission in applying competition law have prompted the ECJ to state in numerous occasions[66] that the Commission is not to be regarded as a 'tribunal' within the meaning of Article 6 of the ECHR.[67] This interpretation also reflects the formal current position of the Commission as expressed by its Director General, Philip Lowe.[68]

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[63] See Article 13 of Commission proposal IV/COM(60)158 final, p 46.

[64] «Exposé de motifs», p 19, IV/COM(60)158 final, p 18.

[65] WILS, W. P. J. (2004) 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', World Competition, 27, 201-224; VESTERDORF, B. (2005) 'Judicial review in EC competition law: reflections on the role of the Community courts in the EC system of competition law enforcement', Competition policy international, 1, 3-27.

[66] Joined Cases 209-215, 218/78, *Van Landewyck*, [1980] ECR 3125, para 81 ; Joined Cases 100-103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1825, para 7.

[67] ORTIZ BLANCO, L. (2006) *European Community competition procedure*, Oxford, Oxford University Press, p 159.

[68] LOWE, P. (2009), supra fn 4.

The Court has, also, from its early case law and several times pointed out that the procedure before the Commission is administrative in nature.[69] Therefore the general principles of EU law, as applicable to Community competition law, need not necessarily have the same scope as when they apply to a situation covered by criminal law *stricto sensu.*[70] *Mutati mutandis,* the required standard of proof should be lower compared to the criminal one.

2.3.2. The 'criminal' law classification under the ECHR

2.3.2.1. The ECtHR notion of 'autonomous criminal charge'

Besides this textual interpretation, AG Vesterdorf pointed that competition fines, notwithstanding what is stated in the Regulation, have a 'criminal character',[71] and AG Léger,[72] referring to ECtHR case law, described as an undisputed fact that fines amount to 'criminal charges'. This suggested that along the 'administrative' law qualification in the EU a parallel 'criminal law' qualification existed under the ECtHR approach. The rationale behind this conception of a fine is explained by the ECtHR itself in *Deweer v Belgium,*[73] namely that:

> 'the prominent place held in a democratic society by the right to a fair trial … prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Art.6-1. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question'.[74]

The ECtHR was first confronted with a criminal qualification question in the famous *Engel* case[75] of 1976, where it laid out three criteria for determining whether proceedings in the sphere of military service, which are purportedly disciplinary, encroach on the criminal sphere and thus become subject to Art 6 guarantees. Accordingly, the Court examined: i) whether the provision defining the offence charged belongs to criminal law, according to the legal system of the respondent State, ii) the very nature of the offence; and, iii) the degree of severity of the penalty that the person concerned risks incurring. Under today's established ECtHR's jurisprudence, the criteria ii) and iii) are alternative and not necessarily cumulative,[76] although, 'this does

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[69] See Case 45/69, *Boehringer Mannheim v Commission* [1970] ECR 153, para 23. For recent cases see Case T-99/04*, AC-Treuhand v Commission,* [2008] ECR II-1501, para 113; Joint Cases C 204/00 P, 205/00 P, a.o., *Aalborg Portland A/S v Commission (Cement), supra* fn 39, para 200; Joined Cases T-25,103-104/95, *Cimenteries CBR v. Commission,* [2000] ECR II-491, paras 717-718.

[70] Joined Cases C-189/02 P, a.o., *Dansk Rorindustri A/S v Commission (Pre-insulated Pipes),* [2005] ECR I-5425, paras 215-223.

[71] Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v. Commission,* [1991] ECR II-867, para 885.

[72] Opinion of AG Léger in Case C-185/95 P*, Baustahlgewebe GmbH v EC,* [1998] ECR I-8417, para 31.

[73] *Deweer v Belgium,* A 35, para 44, [1980].

[74] See SLATER, D., supra fn 3, p 5.

[75] Judgment of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22, at para 81.

[76] Judgment of the ECtHR of 9 October 2003, *Ezeh and Connors v. United Kingdom*, App. n° 39665/98 and 40086/98, at para 86.

not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge'.[77] Moreover, the 'autonomous' qualification applies transversally to Article 6, namely, to Article 6(1), to issues on the burden of proof (Article 6(2)) and the concrete rights of Article 6(3)[78] as well as to Article 7.

In *Öztürk v. Germany*[79] the ECtHR crystallized its conception of a fine by clarifying the scope of application of Art 6. *In casu,* a Turkish national lodged a complaint before the European Commission of Human Rights (hereafter HR Commission) on the grounds that the obligation to pay the interpretation costs incurred on the proceedings for a road traffic violation was in breach of Art 6(3)(e) of the ECHR.[80] The German government claimed that the applicant was not charged with a 'criminal offence'.[81] Having regard to the second and third *Engels* criteria, the Court assessed the provisions of the German law. The Court acknowledged that the law provided punishment only in the form of a pecuniary fine, despite the fact that the fine exceeded the economical advantage the offender had obtained as a result of committing the offence. Moreover, if it exceeded the normal legal maximum penalty, the penalty could have been raised even more. More, the imposition of such a fine triggered through a 'point system' the risk for the offender of having his driving license withdrawn by the administrative authorities or his vehicle confiscated. In the Court's view, these measures that were accessory to the fine could have had serious effects on the life of the person concerned.[82] All these factors led the Commission to conclude that the very nature of regulatory fine offences was criminal in character even if in the German legal system they did not belong to criminal law.[83] Recently in *Marttinen v Finland,*[84] the Court reiterated the 'autonomous' meaning of the expression 'charge' as referring to cases where an 'individual's situation' has been 'substantially affected'.[85]

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77 See *Bendenoun v France*, judgment of 24 February 1994, Series A no. 284, p 20, § 47; *Benham v the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p 756, § 56; *Garyfallou AEBE v. Greece,* judgment of 24 September 1997, *Reports* 1997-V, p 1830, § 33; and *Lauko v. Slovakia,* judgment of 2 September 1998, *Reports* 1998-VI, pp 2504-05, § 57).

78 See *Phillips v UK* , Appl. no. 41087/98, [2001], para 35; OVEY, C. (2006) *Jacobs and White : the European Convention on Human Rights*, Oxford University Press, p 193.

79 Judgment of the ECtHR of 21 February 1984*, Öztürk v. Germany,* A 73, paras 47-49.

80 Art.6(3)(e) provides: 'Everyone charged with a criminal offence has the following minimum rights: … to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

81 *Öztürk v. Germany*, supra fn 79, para 25.

82 Ibid.*,* paras 62-63.

83 Ibid.*,* para 65.

84 *Marttinen v. Finalnd*, Appl. no. 19235/03, [2009].

85 *Serves v. France*, 20 October 1997, para 42, Reports of Judgments and Decisions 1997-VI.

2.3.2.2. The application of the ECtHR case-law in competition fines and tax surtaxes

The ECtHR dealt only twice with the legal qualification of competition sanctions. In the first, the often cited *Société Stenuit*[86] decision, the HR Commission was asked to decide whether a French Ministerial decision to impose a fine constituted, for the purpose of the Convention, an imposition of a 'criminal charge' to which Article 6 guarantees accordingly applied (*in casu*, the right to be heard by a tribunal). France claimed that administrative authorities should be capable of imposing penalties provided that the interests of the person concerned are protected by guarantees and that by setting up a 'Competition Commission' France intended to establish a 'fully adversarial' administrative procedure where those guarantees would be provided. France also pointed that proceedings preceding the Competition Commission's involvement were administrative and not judicial acts. The Commission rejected those arguments and found that the administrative fine was effectively a criminal charge. It first pointed that the fine was aimed to promote competition within the French market, thus affecting the general interests of society that are usually protected by criminal law. Moreover, it took account of the considerable level of the fine (5% of the undertaking's annual turnover), proving the dissuasive goal of the sanction.[87] Thus, accordingly, the Commission ruled that the criminal nature of the case 'stems without ambiguity from the range of the examined concordant indications'.[88] The second case, *M.&Co. v Germany,*[89] concerned a Commission competition case also brought before the HR Commission where the applicant requested to hold Germany responsible for failing to examine, before issuing a writ of execution for an ECJ judgement, whether Article 6 had been respected throughout the Commission antitrust proceedings. Despite declaring the application inadmissible, the HR Commission held that 'for the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 had they been conducted by German and not by European judicial authorities'.

Despite the clear HR Commission's proposition that competition fines should be characterized as criminal charges, those decisions are of weak precedential value (3rd importance level according to the ECtHR ranking).[90] The *Société Stenuit* case could have been significant, had the case not been struck out by the ECtHR[91] only on procedural grounds and with no assessment on the merits. In the absence of any other conclusive authority, it appears helpful to draw some inspiration from the tax-surcharges case law

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86 *Société Stenuit v. France, Appl. no. 11598/85, 11/07/1989* of the European Commission of Human Rights (at the time dealing with first instance applications).

87 *Société Stenuit v France*, Appl. No. 11598/85, Report of the Commission, 30 May 1991, para 64.

88 In French "il ressort sans ambigüité du faisceau es indications concordantes relevées ci-avant", *Société Stenuit v France*, supra fn 87, para 64.

89 *M. & Co. v. Germany*, Appl. no. 13258/87, 09/02/1990.

90 'Low importance': Judgments with little legal interest - those applying existing case-law, friendly settlements and striking out judgments. – see http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en

91 *Société Stenuit v France*, Appl. no. 11598/85, [1992].

of the Strasburg Court, where interesting *obiter dicta* had been pronounced also with regard to competition fines.[92]

In the recent case *Jussila v Finland*[93] the ECtHR reiterated the *Engel* criteria[94] in a VAT case. The case provides authority for two significant changes: the enlargement of the scope of 'criminal charge' and the adjustability of the level of protection of Article 6(1). *In casu*, the applicant alleged that he had not received a fair hearing in the proceedings in which a tax surcharge was imposed, as he had not been given the possibility to challenge the reliability and accuracy of the report on the tax inspection (by cross-examining the tax inspector and obtaining supporting testimony by his own expert at an oral hearing). The applicant was found, following errors in his tax returns, liable to pay VAT and an additional ten per cent surcharge – an overall amount of €308.80. The issue arose whether the proceedings were 'criminal' within the autonomous meaning of Article 6 and thus attracted the guarantees of Article 6 under that head. To answer the question, the Court in applied the '*Engel* criteria'.

With regard to the first *Engel* criterion, the ECtHR held that the fact that tax-surcharges were not classified as criminal but as part of the fiscal regime was not decisive.[95] As for the nature of the offence, it observed the general scope of application (to taxpayers in generally) and the fact that tax surcharges, not intended as pecuniary compensation for damages, had a deterrent and punitive purpose that sufficed to establish the criminal nature of the offence. Finally, with regard to the third criterion the Court held that the minor nature of the penalty, which distinguished the case from previous tax-related decisions,[96] does not remove the matter from the scope of Article 6.[97]

Having established the criminal nature of the proceedings, the ECtHR moved on tackling the question whether in the facts of the case the tax surcharge proceedings complied with Article 6. With an obvious intention to clarify the law, it held:

> 'Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of

92 For an extensive analysis see WILS, W. P. J. (2010) *, supra* fn 4, pp 5–29.

93 Judgment of the ECtHR (Grand Chambre) of 3 November 2006, *Jussila v Finland*, Application no.173053/01, [2006].

94 Ibid*.*, paras 30-31.

95 *Jussila v Finland*, Application no. 173053/01, [2006], para 37.

96 *Janosevic v. Sweden*, Appl. no. 34619/97, 23/07/2002 and *Bendenoun*, Appl. no. 12547/86, Série A n°284, [1994].

97 Supra fn 95, para 38, Referring to *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54; also *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, para 55.

> the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties … , prison disciplinary proceedings … , customs law … , competition law … and penalties imposed by a court with jurisdiction in financial matters. … Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'.[98]

Thus, the ECtHR viewed that the gradual broadening of the criminal law characterisation meant that the criminal head guarantees would not apply 'in their full stringency'. On the facts of the case, therefore, tax surcharges differed from hardcore criminal law. The ECtHR carefully examined the precise grounds for requesting an oral hearing, and concluded that, as a matter of fact, no particular issues of credibility arose in the proceedings which required oral presentation of evidence and that issues of fact and law could adequately be addressed and decided on the basis of written submissions.[99] Moreover, the denial of granting an oral hearing was done on good grounds after an assessment of the Administrative Court.

2.4. Concluding remarks

The gradual broadening of the notion of a 'criminal charge' under the ECtHR jurisprudence means that unequivocally competition proceedings receive a double classification: for the Community legal order that of 'administrative law' and for the ECHR legal order that of 'criminal' law.[100] The dual characterization can coexist as, in the words of the ECtHR, the 'classification as non-criminal law at the national level would not be affected by the applying of guarantees of Art.6 to the said proceedings'.[101] Therefore, a 'manichaist' type of approach in favour of either type of classification should be rejected outright.

Nevertheless, in the context of the general matter in question regarding possible future clashes between the two Courts, it appears of outmost importance to compare the approaches of the two Courts in their respective assessments. While the ECJ has consistently rejected a parallelism to criminal law standards in competition proceedings, the ECtHR has engaged into a broadening of the concept of a 'criminal charge' whose effects is, however, watered-down by introducing a differentiated standard of application of procedural guarantees depending on whether they fall in the 'hardcore' or 'non-hardcore' type of offences.

Accordingly, this could essentially end the debate on the applicable standard of protection as these 'diluted' ECtHR standards to a great extent are similar, or in

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98 Supra fn 95, para 43.

99 Ibid., para 47.

100 See also WILS, W. P. J. (2010) 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', World Competition, Vol.33, p 12.

101 *Öztürk v Germany*, supra fn 79, para 66.

Bosphorus parlance,[102] offer 'equivalent' protection to that of the Community administrative standards. It is submitted, however, that the 'non-hardcore' standards applicable by the ECtHR are not applied *in abstracto*, but are always attached to very specific rights (*in casu*, the right to an oral hearing), following a meticulous factual assessment of each appeal, that does not only take into account a '*faisceau d'indices*' that includes the very relevant for competition matters level of the penalty incurred. This contextual analysis essentially means that the same factual elements will be taken into account twice, first at the level of legal qualification, and thereafter, at the level of assessment of infringement of the right. The ECtHR thus indirectly shows its teleological willingness to assess in detail cases of 'administrative colouring' that would have otherwise have failed to pass the first stage of criminal law classification under a restrictive application of the *Engel* test. This approach is not immune to criticism. The dissenting opinions of four judges[103] in *Jussila* shows that some judges oppose this fragmentation of criminal guarantees and propose a theoretically more sound system of stricter criminal law classification (along the *Engel* criteria) and an ensuing uniform application of stringency in the compatibility stage of assessment.

3. CARTEL ENFORCEMENT AND PROCEDURAL GUARANTEES – AN ANALYSIS OF THE RULES OF LEGAL CHARACTERISATION, ATTRIBUTION OF LIABILITY AND SANCTIONING OF CARTELS

Montesquieu, in his seminal work '*De l'esprit des lois'* observed that 'natural equity demands that the degree of proof should be proportionable to the greatness of the accusation'.[104] While the 'greatness of the accusation' in cartel infringements is undisputed – especially in light of the magnitude the incurred sanctions - it appears less clear to what extent this should affect the 'degree of proof' of those infringements, especially having regard to their specificities.

As a matter of fact, with regard to the legal characterisation, cartels are one of the few areas of EC antitrust where the ensuing anticompetitive effects of the alleged offence are rarely disputed. This property of cartels prompted the terminological characterisation use of a '*per se'* infringement or an infringement '*by object'* in EC law parlance. Nevertheless, this *a priori* undisputed legal characterisation does not make cartel prosecution any easier as, for the reasons mentioned above, the probatory difficulty lies not within the substantive rules themselves, but within the facts that support the application of those rule. Reflecting these difficulties, the legal characterization of cartels relies to a great extent on presumptions or on *per se* inconclusive evidence that potentially could clash with the general Article 6(2)

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[102] Judgment of the ECtHR of 30 June 2005, *Bosphorus Airways v. Ireland* (no.45036/98).

[103] Jointly partly dissenting opinion of Judges Costa, Cabral, Barreto and Mularoni, and Caflisch, paras 7-10; See also Dissenting Opinions of Judges Zupani and Spielmann that considered that an infringement of Article 6-1 had occurred.

[104] 'L'équité naturelle demande que le degré de preuve soit proportionné à la grandeur de l'accusation', De l'esprit des Lois, 1748.

guarantees such as the presumption of innocence and the ensuing *in dubio pro reo* principle.

Another increasingly important area that is linked to the probatory standards is that concerning the imputability of a cartel conduct on parent companies. The law as applied today seems to favour a (justified) irrebuttable presumption of liability in the context of full-ownership, and seems to mechanically extend that presumption also in the context of undertakings holding a majority shareholding. The deviation from the general principle of personal responsibility countering the general *presumption of innocence* could constitute a thorny point of contention in the future.

Along the same lines, fines imposed on cartels can also be challenged on the same grounds, yet an additional fundamental rights' dimension, that of the infringement of the principle '*nulla poena sine lege*' of Article 7, is often being invoked as to contest the insufficient predictability of the liability incurred in cartel investigations. Moreover, in the context of international cartel investigations, a significant number of claims have also alleged breach of the double penalization principle of Article 4 of ECHR Protocol No.7.

3.1. The legal characterization of cartels

3.1.1. The expansive interpretation of 'agreements' and 'concerted practices'.

3.1.1.1. The legal definition of 'agreements' and 'concerted practices'

The authors of the EC Treaty, in drafting the original Article 85(1), used the three terms 'agreements', 'decisions' and 'concerted practices', in an effort to capture in its scope of application all types of cooperation arrangements. As argued by AG Vesterdorf,[105] *a priori*, a contextual and historical interpretation of Article 101 TFEU would favour the predisposition of an expansive reading of the terms as to cover all types of arrangements and avoid any *lacuna* in the scope of application. This *ratio legis* has been acknowledged by the Court in its early judgments.[106] The general principle underlying Article 101(1) TFEU and justifying the expansionist approach is that each economic operator must determine independently the policy, which it intends to adopt on the market.[107]

Given the ever-evolving ingenuity of cartelists to form differentiated cartel schemes, it seems inappropriate to adopt the formalistic approach of exhaustively enumerating the forms of cooperation that would constitute a cartel. Suffice here to espouse the Commission's definition:

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105 Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-867. Part D(1)(3)(c).

106 See Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, para 64.

107 Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), point 14. Referring to cases C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para 116; and Joined Cases 40/73 to 48/73 a.o., *Suiker Unie*, [1975] ECR 1663, para 173.

> 'Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors'.[108]

It follows that the term 'cartel' is legally fluid with no precise boundaries. Hence, it would appear more appropriate to attribute to it a purely descriptive function, portraying any form of horizontal cooperation between undertakings that restricts or distorts competition. The Commission (or any NCA) would need to prove three components of the offence to meet the so-called 'requisite legal standard';[109] namely, i) the existence of a prohibited form of cooperation between undertakings, ii) that has as its object or effect the prevention, restriction or distortion of competition and, finally, iii) an effect on intra-community trade. Usually the last two components are more easily met and are often presumed, upon sufficient proof of the first.

Community Courts have responded to the probatory difficulties of cartels through the adoption of a flexible interpretation on the legal characterisation of the notion of collusion, and through an amenable approach regarding the proof of an effect on competition and intra-community trade. This, in the area of cartels, has permitted the effective prosecution of cartels, which under a narrow, literal interpretation of the Treaty would probably have failed.

Recently, in *Bayer v Commission*,[110] the CFI, for the first time ventured to define the term 'agreement' as a concept that 'centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'.[111] It follows that what competition authorities or private parties have to focus on in proving the legal requisites of an agreement is a) the concurrence of wills for a collusive conduct, and b) the faithful expression of the parties' intention. Just like in the case of 'agreements', the notion of concerted practice was also not defined in the Treaty, and for a long time remained 'untested waters'.[112] It took 15 years before the Court delivered its first clarifying judgement in the so-called *Dyestuffs* cases. On appeal,[113] the Court of Justice

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108 Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, OJ, point 1.

109 Equivalent term of 'standard of proof' used by the Court in a series of cases; e.g. Case T-12/89, *Solvay & Cie SA v. Commission*, [1992] ECR II-907, para 70.

110 Case T-41/96*, Bayer v. Commission,* [2000] ECR II-3383.

111 Ibid., para 69.

112 DERINGER, A. (1968) The competition law of the European Economic Community : a commentary on the EEC rules of competition (Articles 85-90), New York: Commerce Clearing House, p 12.

113 Case 48/69*, Imperial Chemical Industries Ltd. v Commission*, para 57 The appeal was brought on the ground, *inter alia*, that the decision was based on the Commission's erroneous understanding of the concept of concerted

(hereafter ECJ) made the following statement of principle holding that the objective of referring to 'concerted practices' in Article 101(1) TFEU was to:

> 'bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants'.

The Court was given a second chance to further elaborate on the concept three years later, in the so-called *Sugar cartel* case.[114] The Court, refined the *ICI* definition as follows:

> The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
>
> Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[115]

In sum, the Court has clarified that 'concerted practices' can take the form of direct or indirect contact, the object or effect of which influences the conduct on the market of an actual or potential competitor. Thus, notwithstanding that the Treaty does not impose an obligation on undertakings to behave in a competitive or rational manner,[116] it does prohibit any contact that could influence the capacity of a company to behave independently.

Despite the welcome clarification of the two definitions, the equivocalness and broadness of the description still make it difficult in practice to pinpoint a concrete distinguishing element between 'agreements' and 'concerted practices'. This

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practice, which, allegedly was used as synonymous to perfectly legal 'conscious parallelism'. Definition taken over also in the recent judgement Case C-8/08, *T-Mobile Netherlands and others,* [2009] ECR I-4529, para 26.

[114] Joined Cases 40-48, 50, 54-56, 111, 113-114/73, *Coöperatieve Vereniging "Suiker Unie" UA v. Commission*, [1975] E.C.R. 1663.

[115] Ibid., paras 173-174.

[116] BRAULT, D. (2006) De la preuve en cas de comportements parallèles mais non coordonnés, Revue Lamy de la Concurrence, 9, 94

corroborates towards concluding that the two notions are in practice tautologous. Such thesis is further supported by decisional practice that shows that the two concepts are complementary to each other and could even be used interchangeably. In the words of the Commission, 'cases may arise where collusion presents some of the elements of both forms of prohibited cooperation'.[117]

This problem of potential definitional overlap has been dealt with pragmatically, having regard to the specificities of cartel offences. Advocate General Reischl was the first to characterise the debate on the conceptual distinction 'an unimportant argument of classification'.[118] The Commission opined in its *Polypropylene* decision, that 'the importance of the concept of a concerted practice does not thus result so much from the distinction between it and an "agreement" as from the distinction between forms of collusion falling under Article 85(1) and mere parallel behaviour with no element of concertation'.[119] This approach was implicitly endorsed by the CFI on appeal in *Poulenc*[120] and further elaborated in *LVM*.[121] The first case introduced the notion of a 'single, overall agreement', while the second one accepted the 'joint unspecified classification' of agreements 'and/or' concerted practices.

Summing up, in the words of Richard Whish the Community Courts, 'seem to have deliberately refrained from construing the expressions "agreement" and "concerted practice" in a legalistic or formalistic manner'. Essentially, the judicial activism of the Court advanced such an expansive and liberal reading of Article 101(1) TFEU that the latter would essentially be applicable to any contact between undertakings aimed at removing uncertainty over the future market behaviour. This came as a response to the conscious practical difficulties faced by competition authorities in meeting the legal test of the infringement.[122] So, while both principles of 'single overall agreement' and of 'single qualification' have been introduced by the Court to facilitate proof, the impact on the legal characterisation is immense, as in practice the Court implicitly modifies the scope of application of Article 101 TFEU to any kind of proven form of collusive action.

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117 Commission Decision IV/31.149, *Polypropylene*, [1986] OJ L 230/1, para.86

118 Opinion of A.G. Reischl, Joined Cases 209-215 and 218/78, *Heintz van Landewyck SARL and others v Commission,* [1980] ECR 3125.

119 Commission Decision IV/31.149*, Polypropylene,* [1986] OJ L 230/1, para 87.

120 Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-867, para 105.

121 Joint Cases T-305-307/94 etc.*, LVM etc. v Commission*, [1999] ECR II-931, paras 696-698.

122 Contrasting this approach, Guerrin holds that in some judgements, the Court deviated from this 'single, overall agreement approach'. For instance he points that in six of the Polypropylene appeal cases the Court reduced the fines following an extensive analysis of each incriminating act individually (ex. price initiatives, participation in meetings) and evaluating the evidence of the firm's participation in this act separately from its global conduct over a long period. As an illustration, he points that in *Shell v Commission* (Case T-11/89, para 190) Shell, that was guilty of participating in a cartel agreement from mid-1977 to September 1983, was acquitted of participating in a January-May 1981 price initiative; *See* GUERRIN, M. and KYRIAZIS, G. (1993) *Cartels: proof and procedural issues,* Fordham Corporate law Institute, p 811.

3.1.1.2. Reliance on 'presumptions' for proving the existence of 'agreements' or 'concerted practices' – 'participation' and 'public distancing'

In qualifying an agreement/concentration, the Court uses a number of presumptions.[123] The first one is that of a presumption of infringement in case of 'cartel participation'. In other words, the existence of the faithfully intended concurrence of wills seems to be an objective test as it is automatically presumed upon evidence of active or passive participation in a meeting with an anti-competitive object.[124] In practice, on the grounds of participation in an agreement, the Commission usually infers the intention, even when the parties themselves argue the opposite.[125] Thus, it has been held that communication of an agreement to the parties and its tacit acceptance suffice to prove the existence of intention, and therefore of an agreement.[126] While, for instance, in *Petrofina*[127] passive participation was disproved based on evidence that the undertaking had, even minimally, contributed to the cartel meetings, in *Hercules Chemicals* the CFI[128] went a step further, ruling that the Commission was right to infer participation of an undertaking that did, 'not publicly distance itself from what was discussed, as this gave the impression to the other participants that it subscribed to the results of the meetings and would act in conformity with them'. Summing up, the passive/active participation distinction practically serves no purpose in the finding of an infringement, although, it might be taken into account in determining the level of the fine imposed.

The aforementioned 'public distancing' requirement pronounced by the CFI in *Hercules Chemicals* was further clarified in *Solvay*, where the Court said that to rebut the presumption an undertaking had 'to adduce evidence to show that its participation in the meetings was without any anti-competitive intention, by showing that it had

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123 See also BRUZZONE, G. and BOCCACCIO, M. (2009) 'Impact-based assessment and use of legal presumptions in EC competition law: the search for the proper mix', World Competition, Vol.32, no.4, pp 465-484.

124 The difference between active or passive participation pertains to the role played by the party in the formation of the cartel policy. However, decisional practice shows that passive participation as a defence is quasi-inexistent, given that the Court will presume active participation whenever a member has been present to a cartel meeting. Case T-348/94, *Enso Española v Commission*, [1998] ECR.II-1875, paras 303-304; see also Joined Cases C 204/00 P*, a.o., Aalborg Portland A/S v Commission (Cement), supra* fn 39, para 81; Case T-120/04, *Peróxidos Orgánicos v Commission,* [2006] ECR II-4441, para 68.

125 As put by Advocate General Slynn, 'the mere presence of the representative of one undertaking at a meeting at which other agree to distort competition does not by itself amount to the participation of the first undertaking in a concerted practice. But the attendance at such a meeting may be taken as evidence that he was aware of the agreements; and in conjunction with other evidence of the conduct of the undertaking it may, in appropriate cases, be taken to indicate the existence of a common intention necessary to constitute a concerted practice' (Opinion of A.G. Slynn in Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1914, p 1930)

126 Case C-277/87, *Sandoz prodotti farmaceutici SpA v Commission*, [1990], ECR I-45, para 11.

127 Case T-2/89, *Petrofina SA v Commission*, [1991] ECR II-1087, paras 92-93.

128 Case T-7/89, *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, para 232; Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 223; Case T-303/02, *Westfalen Gassen Nederland v Commission*, [2006] ECR II-4567.

indicated to its competitors that it was participating in the meetings in a spirit which was different from theirs'.[129] Moreover, even where only one of the participants reveals its intentions, this is not sufficient to exclude the possibility of an agreement or concerted practice.[130] As explained by the Court in *Aalborg* the, 'reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it', and that, 'failure to report to the administrative authorities effectively encourages the continuation of the infringement and compromises its discovery'.[131]

Despite the escape route offered to meeting participants to evade liability through 'public distancing', the CFI indicated that from the, 'existing case law the concept of an undertaking's publically distancing itself, it being a means of avoiding liability, must be interpreted narrowly'.[132] This narrow scope probably explains why the 'public distancing defence' has rarely been successful in practice,[133] thus amounting to a '*probatio diabolica'*.

Using this logic, one of the participants in the *Greek Ferries* case,[134] pleading the public distancing defence claimed that to 'demand evidence that it publicly distanced itself from the aims of the cartel is to ask the impossible' as minutes are rarely taken in cartel meetings. The Court opposed this approach denoting that an undertaking need do 'no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken'.[135] It was immaterial whether the participants took notes of the minutes or not. What had to be proved was that the means chosen by the undertaking for publicly distancing did in fact have the effect of conveying its disagreement to the other undertakings that attended the meeting in a firm and clear manner. Therefore, mere assertions such as alleged telephone calls without documentary evidence were of insufficient probative value to that end. The rationale behind this narrow approach is clear - the Court wants to avoid having situations where undertakings rely on fabricated evidence in order to escape the already hard to find incriminating evidence.[136]

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[129] Case T-12/89, *Solvay & Cie SA v Commission*, [1992] ECR II-907, para 99; Case T-15/89*, Chemie Linz v Commission,* [1992] ECR II-1275, para 135.

[130] Case T-202/98*, Tate & Lyle and others v Commission,* [2001] ECR II-2035, para 54.

[131] Joint Cases C 204/00 P, 205/00 P, *Aalborg Portland, supra* fn 39, paras 82, 84.

[132] Case T-61/99, *Adriatica di Navigazione v Commission (Greek Ferries)*, [2003] ECR II-5349, para 135.

[133] BAILEY, D. (2008) 'Publicly distancing oneself from a cartel', World competition, Vol. 31, no.2, pp 177-203.

[134] Supra fn 132, paras 135-140.

[135] Ibid., para 137.

[136] In the words of AG Mischo 'an undertaking's participation in such meetings must be taken to mean that it intends to participate in the decisions made, and that it would be impossible to prevent infringements of competition law committed by cartels if it were to be accepted that an undertaking may attend such meetings with impunity'. Opinion of AG Mischo in Case C-291/98 P, *Sarrió v Commission*, [2000] ECR 1-9991, para 45.

While the meaning of the 'public distancing defence' is evident, Community and national decisional practice has shown that its applicability is less clear. The defence can be raised for avoiding liability but also in order to attenuate the fine for participating in a cartel. Parties can argue either that they had expressed their public distancing from the very beginning[137] (whereby they would be exempted from any ensuing liability), or that they participated but decided to terminate their involvement.[138] For instance, in *Westfalen* the applicant did not dispute the fact of having participated in the meeting, nor the anti-competitive content of those meetings, but argued that in the light of its behaviour in those meetings it should have been considered to have publicly distanced itself to a sufficient degree. In particular, with regard to price increases it had stated that it 'did not commit to implementing a fixed increase in prices', which the Court interpreted as a 'vague conduct akin to tacit approval', thus, complicitly constituting a passive mode of participation.[139]

Whether the 'public distancing' defence is successful is obviously a matter of fact but also of the quality of the evidence adduced. However, based on existing case-law it can be said that some common cumulative requirements should be satisfied for a successful plea. According to Bailey, those requirements are six,[140] namely: a) the act of 'public distancing must take place without undue delay', b) the objectives of the cartel must be denounced, c) clearly and unequivocally to the other cartel members, d) a firm must avoid discussing its own pricing or marketing strategy, e) the firm must be able to prove that its subsequent conduct on the market was determined independently and, finally f) the company must not attend any further meetings.

The recent 2009 ECJ judgement *Archer Daniels Midland*[141] seems to add an important seventh requirement, shedding some more light on how the Court perceives 'public distancing'. On the fact of the case *ADM* appealed the CFI judgement on the grounds that it had publicly stated its wish to end its participation by leaving before the end of a meeting.[142] On the other hand the Commission claimed that the relevant test of a public dissociation from a cartel is 'whether the members of the cartel understood the conduct of the undertaking as terminating its participation in such an agreement' and that it was for the undertaking to discharge the burden of proving it. According to the Commission the fact that the plaintiff had left did not mean that it ended its participation.[143] The ECJ confirmed the CFI analysis, expressly saying that 'it was for ADM to provide evidence that the members of the cartel considered that ADM was

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[137] For example Case T-303/02*, Westfalen Gassen Nederland v Commission,* [2006] ECR II-4567, paras 60-61.

[138] See UK case *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17, para 1046.

[139] See supra fn 137, para 84.

[140] For extensive analysis on each requirement see BAILEY, D., (2008)*, supra* fn 133, pp 189-203.

[141] Case C-510/06 P, *Archer Daniels Midland v Commission*, [2009] ECR I-1843.

[142] It also claimed that Article 81 EC 'does not allow subjective factors to be used as the basis for identifying a breach of its provisions but merely prohibits overt acts'.

[143] Supra fn 141, paras 116-119.

ending its participation'.[144] In civil law jargon, there is therefore a duty of result (obligation de resultat), that of convincing the other participants, rather than a duty of means (obligation de moyen) that the undertaking had made it explicit.

Interestingly, the Court went on to say that the act of leaving the cartel did not constitute an attenuating circumstance granting fine reduction, 'in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement, as that could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if their conduct were discovered they could expect, by then curtailing the infringement, their fine to be reduced'.[145]

Finally, it is observed that there are situations where the already difficult to rebut presumption of participation becomes irrebuttable. For instance, it seems impossible for a party that has disclosed pricing information to its competitors to use the 'public distancing' defence. The only option for the repentant undertaking would be to 'blow the whistle' in the framework of the leniency notice[146] to a competition authority.

3.1.2. The absence of an 'effects-based' analysis in proving 'agreements' and 'concerted practices'

3.1.2.1. 'Object *or* Effect' analysis and cartels

As explained above, a 'cartel offence' is made up of three components, i) the existence of a prohibited form of cooperation, ii) that has as its object or effect the restriction of competition, and iii) an effect on intra-community trade. This section dwells upon the second component of the restriction, that is often overlooked with regard to cartels, namely, the proof of the 'object/effect' restriction.

The Treaty expressly prohibits agreements that have as their 'object or effect' the restriction of competition. The Court explained in *STM*[147] that the conjunction 'or' shows that the two terms are alternative, which leads to first consider the precise purpose of the agreement (object), and, where an analysis of the clauses of the agreement itself 'does not reveal the effect on competition to be sufficiently deleterious', to consider the consequences (effects) of the agreement.

Competition law adopts a functional approach, namely that the contact has the effect of eliminating, or substantially reducing, uncertainty over the future market conduct.[148]

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144 Ibid., para 120.

145 Ibid., para 149.

146 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, pp 17-22.

147 Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 337, p 249.

148 See Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/08, p 15 referring to Joined Cases T-25/95 etc., *Cimenteries* CBR, [2000] ECR II-491, paras 1849 and 1852; and Joined Cases T-202/98 etc., *British Sugar,* [2001] ECR II-2035, paras 58-60.

As a rule of thumb, anti-competitive agreements are caught when they are likely to have an 'appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation'.[149] Recently the Court pointed that the effects can well be felt on the market where undertakings exercise their commercial activity, or even on the neighbouring and/or emerging markets on which at least one of the participating undertakings is not present, concluding that 'any restriction of competition within the common market may be classed as an "agreement between undertakings" within the meaning of Article 81(1) EC'.[150]

Obviously the concept of a restriction of competition is an economic notion that has been debated at large. As pointed by Joliet it is by 'hypothesis impossible to determine what the "normal" terms of competition would be in the absence of the incriminated behaviour'.[151] In the case of cartels, such an effect is presumed in the presence of 'agreements' with an anti-competitive object, and therefore there is no need to examine the effects on the market. As for 'concerted practices', some contemplation should be given on the distinction between the 'subsequent conduct' and 'restriction of competition', which although different by definition, have at large been equated in practice by the Court.

The Court has in many occasions repeated that for agreements that have as an object the restriction of competition there was no need to take account of the concrete effects of an agreement in the market.[152] In its first cartel decision *Chemifarma* the Court held, *inter alia*, that without ruling out the possibility that the agreement had no effect on competition in the common market, 'such a situation cannot render lawful an agreement the object of which is to restrict competition'.[153] The Commission institutionalised this practice in its Article 81(3) Guidelines.[154] The rule is based on the presumption that because of their deleterious nature, restrictions by object concerning prices, output and market-sharing have a direct negative impact on competition and, thus, would render any further analysis superfluous.

The Article 81(3) Guidelines define restrictions by object as those that 'by their very nature have the potential of restricting competition'[155] and refers to the black-listed restrictions in block exemptions for an illustration.[156] In *Compagnie Royale* the ECJ explained that the restrictions are determined not by the parties' intention, but by the

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149 Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/08, point 16.

150 Case T-99/04*, AC-Treuhand v Commission,* [2008] ECR II-1501, para 122 referring to Case T-328/03*, O2 (Germany) v Commission*, [2006] ECR II-1231, paras 65-73.

151 JOLIET, R. (1974) 'La notion de pratique concertée et l'arrêt ICI dans une perspective comparative', Cahiers de droit européen, p 275.

152 Case 56/64, *Consten and Grundig v Commission EEC*, [1966] ECR 429, para 6.

153 Case 41/69, *ACF Chemiefarma NV v Commission*, [1970] ECR 661, para 127.

154 Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/08, point 20.

155 Ibid., point 21.

156 Ibid., point 23.

aims pursued by the agreement in light of the economic context.[157] This introduces an objective and economic-based assessment. Article 81(3) Guidelines offer some further helpful guidance through the enumeration of a number of factors that should be taken into account in assessing the legality of the object of the contact.[158] Having regard to those guidelines, it appears highly unlikely that a cartel would not be considered to have an anticompetitive object. For instance, evidence showing participation in meetings where parties agree on prices, market shares and output, by definition leads to a misallocation of resources and higher prices. In the presence of such evidence, a cartel constitutes, using a notion of the law of tort, a 'strict liability' offence.[159] Yet, it is important to be able to show that such an object existed, as proof of mere contact would not suffice (although it could trigger a Commission investigation as in the *Carlsberg/Heineken* case).[160]

The Court has made it clear that the criteria for establishing an object/effect characterisation are 'applicable irrespective of whether the case entails an agreement, a decision or a concerted practice'.[161] As mentioned above, for a 'concerted practice' to exist, competing undertakings must have direct or indirect contacts aimed at knowingly removing uncertainty as to the future market behaviour. This definition does not answer the question as to whether the concerted practice should be put in effect (referring to subsequent conduct on the market) or whether it should have produced anti-competitive effects (referring to the 'object or effect' distinction). From a probative point of view the two questions are intertwined as, in order to prove the practice of concertation, a competition authority would often have to adduce evidence of anti-competitive effects.

The question of proof of subsequent conduct on the market in the case of 'concerted practices' has attracted special interest from the early days as reflected in a series of Advocate General opinions[162] and legal doctrine.[163]

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157 Joined Cases 29-30/83, *Compangnie Asturienne des mines and Rheinzink v Commission*, [1984] ECR 1679, para 26.

158 'These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition' (footnotes omitted).

159 The equivalent of a 'responsabilité sans faute' or 'responsabilité objective' under French civil law.

160 See for example Case 37.851 PO/ Carlsberg + Heineken where evidence of a scheduled telephone call of the CEOs of the two competing firms was enough to trigger further investigations; Press release IP/02/1603, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1603&format=HTML&aged=0&language=EN&guiLanguage=en.

161 Case C-8/08, *T-Mobile Netherlands and others,* [2009] ECR I-4529, para 24.

162 Opinion of A.G. Gand in Case 16/65, *Firma G. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1965] ECR 877; Joined opinion of A.G. Mayras in Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619; Opinion of A.G. Reischl in Joined Cases 209-215 and 218/78,

In the *Polypropylene* judgements, the CFI evaded giving a clear answer holding that:

> 'the parties could not have failed to take account directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, (the plaintiff's) competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market'.[164]

This finding equates possession of cartel-deriving information to anticompetitive conduct, based on the presumption that the former will inevitably influence the latter. This position seemed not to be literally followed by the ECJ in the appeal decision of *Hüls*[165] that was controversially greeted by legal scholarship.[166] The ECJ held that the concept of a concerted practice 'implies, besides undertakings concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two'. This, *a priori*, seemed to add a third component to the 'concerted practice' equation, namely, the causal link. Accordingly, on top of proving contact aimed at reducing competition, the Commission was required to establish a 'causal nexus' between the concertation and the actual conduct. This hinted the re-introduction of a significant additional burden for competition authorities. Yet, the Court made sure to alleviate the burden of the causal link by means of a rebuttable presumption against concerting undertakings holding that:

> 'subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market'.[167]

This second statement essentially reintroduced, in a more principled way, the CFI's *Polypropylene* position. The burden of proof for the Commission is significantly low, as essentially the latter is required to prove only concertation to establish the existence of the infringement and of the anti-competitive effects. It follows that, in the words of Guerrin,[168] a, 'concertation with anti-competitive object is presumed to give rise to de facto concerted conduct on the market. It belongs to the incriminated company to

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Heintz van Landewyck SARL and others v Commission, [1980] ECR 3125; Opinion of A.G. Slynn in Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1825.

163 For a review of academic literature on the concept of 'concerted practices' until 1991 see Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v. Commission*, [1991] ECR II-867.

164 Case T-1/89*, Rhône-Poulenc SA v Commission,* [1991] ECR II-II-867, para 123.

165 Case C-199/92 P*, Hüls v Commission,* [1999] ECR I-4287, para 161.

166 See WHISH, R. (2003) *Competition Law,* London, Lexis Nexis, 5th ed, p 107, especially fn 244.

167 Supra fn 165, para 162.

168 GUERRIN, M. and KYRIAZIS, G. (1993)*, supra* fn 122, p 800.

prove either the complete absence of conduct, or that its actual conduct was totally independent from the knowledge it acquired during the concertation'.

The Court in *Hüls* was confronted with a second, subtly different question, namely, whether there was still a necessity to prove the restriction of competition, once an anticompetitive concerted practice is found to exist, irrespective of whether the market conduct has effectively been put into practice or not. The ECJ delivered the following elucidating principle:

> 'a concerted practice as defined above is caught by Article 81(1) EC, even in the absence of anti- competitive effects on the market. First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition'.[169]

In *Anic*, a judgement rendered on the same day, the Court added that requiring an effects-based analysis 'would break down the unity and generality of the prohibited phenomenon and would remove from the ambit of the prohibition, without any reason, certain types of collusion which are no less dangerous than others'.[170]

3.1.2.2. The 'rebuttability' of the 'object/effect' presumption

As acknowledged also by the Court, the fact that an agreement or a concerted practice has an anti-competitive object does not necessarily mean that that conduct will in reality produce a specific effect of restricting or distorting competition.[171] Therefore, as a matter of law, the theoretical possibility of arguing that a firm's subsequent conduct on the market was determined independently of its participation in the cartel is still present, although the so-called '*Anic* presumption' is undoubtedly very difficult to rebut.[172]

Along these lines, the Court confirmed that the fact that an agreement with an anticompetitive object had not been implemented was not sufficient to remove it from the prohibition of Article 101(1) TFEU on the grounds that competition had not been distorted.[173] In *Polypropylene*[174] the appellants challenged this approach, asking the Commission to prove on the basis of objective facts, that there was a sufficient

[169] Supra fn 165, paras 163-165.

[170] Case C-49/92 P, *Commission v ANIC Partecipazioni SpA,* [1999] ECR I-4125, para 108.

[171] Supra fn 165, para 164.

[172] BAILEY, D. (2008), supra fn 133, p 183.

[173] See also Case 86/82, *Hasselblad v Commission*, [1984] ECR 883.

[174] Case T-13/89, *ICI v Commission,* [1992] ECR II-102, paras 273-294.

probability that the object could be achieved. They claimed that their conduct on the market had been determined independently of what had been agreed and that due to the market conditions the outcome of their conduct would anyway have been the same, with or without the concertation. While not rejecting in principle the claimants' argument, in that the market conditions where indeed likely to affect the price, the Court held that the evidence submitted by the Commission was sufficient to demonstrate that the agreement was potentially apt to restrict competition. The fact that an anticompetitive clause had not been implemented did not prove that it has had no effect, as it could create a 'visual and psychological' effect, which contributed to a partitioning of the market.[175] Accordingly, partial compliance[176] or even non-compliance is not sufficient to prove the absence of restriction of competition.[177] It follows that the possibility for incriminated companies to prove by means of a complex economic analysis that an agreement was inapt, even potentially, to restrict competition is still available, although its success would appear extremely difficult in practice.[178]

It is argued that incriminating presumption of negative effects on the market is so strong, that, probably, the only way to rebut it would be to argue that the 'object' could not have affected the market, due to the material impossibility of doing so, for example, by proving that the undertakings have not remained active on the market. Nonetheless, given that in competition law even a potential restriction of competition suffices to establish an infringement, lack of presence on the market might not suffice.[179] Besides, case-law suggests it is immaterial for establishing liability whether a company is active in a different market to the one of the cartel as long as it has contributed to the cartel's aims.[180] The CFI was given the opportunity to clarify this in the recently decided case of *Treuhand*.[181] The case concerned AC-Treuhand AG, a consultancy firm, which had provided three producers of organic peroxides with various services essentially consisting in assisting and contributing to the cartel's objectives as an organiser and guardian of the successful implementation of the anticompetitive agreements. The Commission found the undertaking liable for its anticompetitive conduct and imposed a symbolic fine of EUR 1000. Treuhand appealed, *inter alia*, on the ground that an

[175] Case 19/77, *Miller International Schallplatten GmbH v Commission,* [1978] ECR 131, para 7-8; Case T-77/92*, Parker Pen v Commission,* [1994] ECR II-549, para 55.

[176] Case 246/86, *SC Belasco and others v Commission,* [1989] ECR 2117, paras 21-23.

[177] Case 86/82*, Hasselblad (GB) Limited v Commission*, [1984] ECR 883, para 46; Joints Cases C-89/85, 104/85, 114/85, 116/85, 117/85 & 125/85-129/85*, Ahlström (Wood Pulp),* [1993] ECR I-1307, para 175.

[178] GUERRIN, M. and KYRIAZIS, G. (1993) *supra* fn 122; for an illustration of that difficulty in proving the independency of the pricing decision see the *Toy and games* case before the CAT, BAILEY, D. (2008)*, supra* fn 133, p 201.

[179] For example, in Joined Cases C-189/02 P, 202/02 P, a.o.*, Dansk Rorindustri A/S v Commission (Pre-insulated Pipes),* [2005] ECR I-5425, para 146, the ECJ, the practical impossibility of implementing the agreed boycott could not 'discharge its liability for having participated in that measure, unless it publicly distanced itself from what was agreed at the meeting'.

[180] See Opinion of AG Tizzano in Joined Cases C-189/02 P, 202/02 P, a.o.*, Dansk Rorindustri A/S v Commission (Pre-insulated Pipes),* [2005] ECR I-5425, paras 193-194.

[181] Case T-99/04, *AC-Treuhand v Commission*, [2008] ECR II-1501.

undertaking cannot be held liable for a cartel if it is not active on the market on which the restriction of competition takes place, namely the organic peroxides industry. The Commission submitted that whether an undertaking is active on the market at issue was not relevant for holding it liable for active participation, as it was 'irrelevant whether or not a participant in an infringement derived a profit from it, since Article 81(1) is not based on the criterion of enrichment but on that of jeopardising competition'.[182] The CFI rejected the appeal but following a different reasoning. While it starts its analysis with an invitation for the Community judicature to clarify the scope of the notions 'agreement' and 'undertaking' with regard to the perpetrator of the restriction,[183] it concludes, based on a literal reading of Article 81, that the term 'agreements between undertakings' does not require a restrictive interpretation. Therefore, it purports that there was no need to require that the market of the 'perpetrator' of the restriction be exactly the same as the one on which that restriction is deemed to materialise.[184] The fact that an undertaking is not active on the market on which the restriction of competition materializes, should not exclude its liability for having participated in the implementation of a cartel. In addition to that, the fact that it has participated only in an accessory way is not sufficient to exclude its liability for the entire infringement, although this should be taken into account at the stage of determining the sanction. The judgment highlights the *quasi-automatic* system of liability that ensues from mere cartel participation, and acknowledges the fact that the degree of participation will only be considered and reflected at the sanctioning phase.[185]

3.1.3. Concluding remarks

Both 'agreements' and 'concerted practices' constitute by definition offences whose actual effects do not need to be proven. The implications of this approach are far reaching[186] as they attribute to 'agreements' and 'concerted practices' exactly the same anticompetitive consequences, despite the fact that the intensity of cooperation in the former is stronger than in the latter. Moreover, the limited room for rebutting the 'participation' presumptions through the 'public distancing' defence indicates also the

182 Ibid., para 109 referring to Case C-195/99 P, *Krupp Hoesch Stahl v Commission,* [2003] ECR I-10937, para 85.

183 More precisely to 'that the Community judicature has yet to give an explicit ruling on the question whether the notions of agreement and undertaking as used in Article 81(1) EC are conceived in accordance with a 'unitary' perspective, so as to cover any undertaking which has contributed to the committing of an infringement, irrespective of the economic sector in which that undertaking is normally active or – as the applicant submits – in accordance with a 'bipolar' perspective, so that a distinction is drawn between undertakings which 'perpetrate' an infringement and those whose role is one of 'complicity' in the infringement'.

184 Case T-99/04, *AC-Treuhand v Commission,* [2008] ECR II-1501, paras 122-123.

185 As pointed by Judge Wahl, this is a 'teleological' decision for two reasons; first, in that an accomplice falls also under the scope of the prohibition and second, in that it multiplies the potential leniency applicants. In WAHL, N. (2009) 'Obsession with Justice - Competition law infringements and their perpetrators', in KANNINEN, et al, (2009) *EU competition law in context: essays in honour of Virpi Tiili*, Oxford, Hart Publishing, p 67.

186 ALBORS-LLORENS, A. (2006) 'Horizontal agreements and concerted practices in EC competition law: unlawful and legitimate contacts between competitors', The Antitrust Bulletin, 51, p.848.

predisposition of the Court to favour 'efficiency' over a strict application of the rule of presumption of innocence. Similarly, the *de facto* impossibility of rebutting the 'object' presumption means that from an enforcement point of view, the rule disentangles the Commission from the difficult task of having to prove concrete effects on the market.

This jurisprudence shows that cartels are dealt as a *quasi-automatic* system of liability that ensues from mere cartel participation and acknowledges the fact that the degree of participation will only be considered and reflected at the sanctioning phase. From a ECHR point of view, the use of presumptions in criminal cases is not necessarily contrary to Article 6. As pointed in *Salabiaku v France,*[187] the right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations is not absolute, since, 'presumptions of fact or law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within the reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence'.

Finally, it is submitted that the clear judicial preference of promoting efficiency over Article 6 guarantees, though thorny as they may have been in early case law, is of a weakening importance. The predominant reliance on Leniency ensures that more reliable evidence proving cartel participation is used, attenuating the need to infer cartels from complicated factual evidence.

3.2. Rules of attribution of liability in cartel infringements

Another area of cartel law that has raised a substantial number of questions is that of the manner the Commission imputes liability on undertakings. The pertinent question, from a 'due process' point of view, is the insufficiency in proving the actual involvement of undertakings in a particular conduct, therefore an infringement of the *in dubio pro reo* principle and of Article 6.

3.2.1. The underlying principles of attribution of liability

The predisposition for the Commission and NCAs to impute liability to parent companies is often justified by a series of functional aspects ultimately aimed to lead to extra-deterrence. First, a parent company, even where not directly accountable for the infringement, has a higher turnover than its subsidiaries and therefore will be asked to pay higher fines. Secondly, a side-effect of holding the parent company liable is that of leading to more responsible management over the behaviour of subsidiaries. Besides, in light of that objective, competition authorities may be able to invoke recidivism more often against a parent company than over its subsidiaries.[188] Thirdly, there is a jurisdictional dimension in holding parent companies liable as loose imputability rules

[187] 7 October 1988, § 28, Series A no. 141-A.

[188] WAHL, N. (2009), supra fn 185, p 68.

facilitate the persecution of parent companies located outside the EU that were indirectly involved in European cartels.[189]

The Community rules of imputation of responsibility are therefore conceived against this competition policy background of public enforcement that aims at punishment, deterrence and instauration of a competition culture. EC competition law is based on the 'principle of personal responsibility' of the economic entity that committed the infringement,[190] which essentially means that where an infringement is found to have been committed 'it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it'.[191] While the operation of the principle arose in the context of litigation pertaining to the succession of liability, it is also the underlying principle of its imputation. As explained by the Commission, in the context of undertakings comprising several legal entities, 'the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking'.[192]

Issues of parental company responsibility are more or less simple to deal with when the company itself has committed an infringement. The situation appears less clear when the parent company has not been personally involved in the infringement but its subsidiaries have. The traditional rule of thumb in attributing liability for a cartel infringement within a group of undertakings is to determine whether a subsidiary acted autonomously/independently or whether it merely followed instructions from its parent company.[193] In the former case a subsidiary may be solely liable, while in the latter the subsidiary's anti-competitive conduct may be imputed also to its parent company.[194] While this rule seems to naturally articulate the principle of personal responsibility, that is concordant with the Article 6 requirements, its practical

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[189] See for an illustration Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, 1972] ECR 619, paras 124-146.

[190] Case C-49/92 P, *Commission v ANIC Partecipazioni SpA,* [1999] ECR I-4125, para 78; Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR, para 75.

[191] Case T-6/89, *Enichem Anic v Commission*, [1991] ECR II-1623, para 236; see also Case T-161/05, *Hoechst GmbH v Commission*, [2009] ECR II-3555, para 50. 'According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking'; See also Commission Decision COMP/38.620 - *Hydrogen peroxide*, OJ L 353, 13.12.2006, pp 54-59, para 436, 'the principle of personal liability according to which punishment should be applied only to the offender'.

[192] Commission Decision COMP/38.638 - *Synthetic rubber (BR/ESBR)*, OJ C7, 12.01.2008, para 396.

[193] See Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, where the parent company argued that the conduct is to be imputed to its subsidiaries and not itself, especially due to the separate legal personality. The Court explained that this was not sufficient to exclude the imputability of its conduct to the parent company, especially when the subsidiary 'does not decide independently upon its own conduct on the market, but carries out in all material respects the instructions given to it by the parent company'. See also Cases T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission*, [1993] ECR II-389, para 149; C-65/02 P, *ThyssenKrupp v Commission*, [2005] ECR I-6773, para 66.

[194] Case C-97/08 P, *Akzo Nobel v Commission,* [2009] ECR I-8237, para 58.

application has raised several difficulties, especially with regard to the characterisation of an 'autonomous' behaviour and its appraisal by the Commission.

3.2.2. The parental liability in cases of full-ownership

3.2.2.1. The 'presumption' of liability in cases of full ownership

Early case law suggested that, in order to impute liability on the parent company, the Commission had to prove not only that it was 'able to exercise decisive influence over the policy' but also that it 'in fact used this power'.[195] In *AEG,*[196] however, the Court alleviated the second probatory condition in the case of wholly-owned subsidiaries, explaining that such a check appeared superfluous as 'a whole-owned subsidiary necessarily follows a policy laid down by the same bodies as, under its statutes, determine the parent's policy'. While this seemed to clarify the law, some doubt was cast in *Stora*[197] where the ECJ seemed to suggest that holding all of the shares of a subsidiary in itself did not suffice[198] and that additional evidence of 'decisive influence' had to be adduced.

> 'A 100 per cent shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company. The imputation to the parent company of its subsidiary's conduct is always dependent on a finding that management power was actually exercised'.[199]

In the same judgement, the Court, nevertheless, explained that in such circumstances it was legitimate to 'assume that the parent company in fact exercised decisive influence over its subsidiary's conduct'.[200] The *Stora* rule, however, seemed to be completely disregarded in posterior CFI decisions[201] that quasi-automatically attributed liability

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[195] Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619 para 137.

[196] Case 107/82, *AEG v Commission,* [1983] ECR 3151, para 50; on the facts of the case the parent company did not dispute that it was in a position to exert a decisive influence on its subsidiaries, but argued that it did not make use of this power.

[197] Case C-286/98 P, *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925.

[198] Ibid., para 28. 'Thus, contrary to the appellant's contention, the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous'. However, the ECJ further explained that the CFI had rightly also relied on the fact that the appellant had not disputed that it was in a position to exert decisive influence on its subsidiary's commercial policy. In *Akzo* (C-97/08 P) [2009], para 62 the ECJ explained that the additional criteria mentioned in *Stora* were mentioned by the Court for 'the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company'.

[199] Ibid. para 23; reiterated in Case T-325/01*, DaimlerChrysler v Commission*, [2005] ECR-II-3319, para 218.

[200] Ibid., para 29.

[201] Case T-203/01, *Michelin v Commission,* [2003] ECR II-4071, para 290; Case T-325/01*, DaimlerChrysler v Commission*, [2005], ECR II-3319, para 219; Case T-314/01*, Avebe BA v Commission,* [2006] ECR II-3085, para 136 .

merely on the basis of full shareholding only. Nonetheless, inconsistent statements were still being made by the CFI. In *Bolloré*[202] the CFI unequivocally held that full shareholding was not in itself sufficient to attribute liability and that more than the extent of the shareholding had to be shown in the 'form of indicia' as it 'need not necessarily take the form of evidence of instruction given by the parent company to its subsidiary'.[203] Along the same lines, in *Aristrain*[204] the ECJ itself held that 'the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other'.[205] The legal person in charge has to be identified as the 'head of the group with responsibility for coordinating the group's activities'. This seems to reaffirm the *Stora* case-law, in that while 'decisive influence' is presumed where a company fully owns a subsidiary, such a presumption is also dependent on some kind of managerial influence of that parent company.[206]

Possible persisting doubts dissolved in the recent *Akzo* judgment,[207] where the ECJ explained that in the *Stora* judgment the additional circumstances were mentioned 'for the sole purpose of identifying all the elements on which the CFI had based its reasoning'.[208] The case concerned an appeal brought by a holding company of a group (Akzo Novel NV) against a Commission decision that found that Akzo and several of its wholly owned subsidiaries had committed an infringement by participating in the vitamins cartel. While only four subsidiaries had been found to have directly committed the infringement, the Commission had also fined the holding company on the ground that it exerted decisive influence over the commercial policy of its wholly-owned

[202] Case T-109/02*, Bolloré v Commission,* [2007] ECR II-947, para 132.

[203] Ibid.*,* para 132.

[204] Case C-196/99 P, *Aristrain v Commission,* [2003], ECR I-11005.

[205] Ibid., paras 98-99.

[206] See Case T-309/94*, Koninklijke KNP BT v Commission,* [1998] ECR II-1007, where the CFI ruled that the Commission is entitled to attribute to a parent company, representing a group of companies, responsibility for the unlawful conduct of one of its subsidiaries where there is concrete evidence implicating the parent company in the subsidiary's anti-competitive actions. That is the position where a member of the parent company's management board has participated, as a representative of its subsidiary, in meetings between bodies engaged in discussions with an anti-competitive object, and has even presided over meetings held by the central body of a cartel. The Commission is also entitled to attribute to the parent company responsibility for the conduct of a second subsidiary which has participated in meetings of some of those bodies, since, in involving itself in the participation of one of its subsidiaries in the anti-competitive actions, the parent company is aware, and must also approve of, that subsidiary's participation in the infringement in which the first subsidiary took part.

[207] Although the position was also reiterated by the CFI in Itochu where it was held that, 'where a subsidiary is wholly owned by its parent company, it was unnecessary to ascertain whether the parent had in fact influenced the commercial policy of its subsidiary, as there was a simple presumption that the parent exercised decisive influence over its subsidiary conduct on the market'. Case T-12/03, *Itochu Corp v Commission*, [2009] ECR II-909.

[208] Case T-175/05, *Akzo Nobel and Others v Commission*, [2009] ECR I-8237, para 92.

subsidiaries. Akzo appealed, *inter alia*, on the ground that the Commission was wrong to have imputed a joint liability on the parent merely based on the finding that it had the full shareholding of the subsidiaries, without showing that it had in fact determined the commercial behaviour of the subsidiaries by exercising decisive influence. The ECJ rejected the appeal explicating that where a parent company has the totality of shareholding it is sufficient for the Commission to prove that

> 'the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market'.[209]

3.2.2.2. Rebutting the presumption

According to the *Akzo* ruling, it is for the parent company to put before the Commission any evidence relating to 'the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity'.[210] More concretely, the Commission has explained that to rebut the presumption the parent company must show that

> 'it was not in a position to exert a decisive influence on its wholly-owned subsidiary's commercial policy, or that the subsidiary nonetheless determined autonomously its commercial policy (that is, the parent company, despite its controlling rights, did not actually exercise a decisive influence as regards the basic orientations of the subsidiary's commercial strategy and operations on the market)'.[211]

Be that as it may, the Commission itself acknowledged the scarcity of a successful rebuttal, given that 'a situation in which subsidiaries are controlled by their parent company but nevertheless remain entirely "autonomous" is extremely rare'.[212] Thus, in practice, the burden imposed on parent companies amounts to a '*probatio diabolica*' and it remains questionable whether such a possibility is indeed available. The CFI has identified the following elements in proving liability: whether the parent company was able to influence pricing, production distribution, sales objectives, gross margins, sales

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[209] Ibid., para 61.

[210] Ibid., para 65.

[211] Commission Decision COMP/38.823 - *Elevators and escalators*, OJ C 75, 26.03.2008, para 650.

[212] Commission Decision COMP/38.638 - *Synthetic rubber (BR/ESBR)*, OJ C 7, 12.01.2008, para 397; In that regard AG Kokkot points out that 'presumption rules are by no means unknown in competition law. (59) On the contrary, the characteristics of evidence tendered as proof of infringements of competition rules imply that it must be open to the authority or private party on whom the burden of proof lies to draw certain conclusions from typical sequences of events on the basis of common experience', Opinion of A.G. Kokott in Case C-97/08 P, *Akzo Nobel v Commission,* [2009] ECR I-8237, para 72.

costs, cash flow, stocks and marketing.[213] Thus, it seems logical that parent companies could rely on the same type of evidence to rebut the presumption.

A final issue with regard to the rebuttability is whether a parent company can be held liable where the subsidiary not only acts autonomously but also contrary to the parent's instructions to abide by competition laws. For instance, in the pending case *Amertranseuro International Holdings*[214] the plaintiffs, *inter alia*, argued that they were erroneously held liable as they were 'neither aware, not could have been aware of the subsidiary's involvement in the alleged infringement'. In that regard the CFI has clearly explained that proof of the subsidiary's autonomous behaviour, in the sense of not compliance with the instructions given by the parent company, can exonerate the parent company of its liability.[215] Yet, it is reminded that according to Article 23(2) of Regulation 1/2003, the Commission may impose fines to undertakings where they have intentionally or *negligently* infringed Article 101(1) TFEU. Does the absence of appropriate control over the infringing subsidiary company amount to negligence? Obviously, this depends on the facts of the matter. Arguably, from a deterrence and an enforcement efficiency point of view, holding the parent company liable is more appropriate, as not only it induces responsible management, but also facilitates the proof of competition authorities.[216]

Decisional practice has shown however, that not all full-owners are *ipso facto* held liable. In the *Spanish Raw Tobacco*[217] the Commission abstained to impute responsibility on the parent company of the wholly-owned subsidiary on that grounds that 'apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement',[218] or that 'the 100% shareholding was purely financial'. Yet, this case must be exceptional as, despite the factual and legal similarity, the Commission departed from its finding on the subsequent *Italian Raw Tobacco* decision.[219] Moreover, in other recent decisions the purely financial nature of the shareholding did not exempt the parent company from liability. For instance, in *Schunk*[220] the CFI ruled that the corporate object of the holding, i.e. 'the acquisition, the sale, the administration, in particular the strategic management of industrial

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[213] Case T-112/05*, Akzo Nobel v Commission,* [2007] ECR II-5049, para 64.

[214] Case T-212/08*, Amertranseuro International Holdings v Commission,* action brought on 4 June 2008, OJ C 197, 2.8.2008, p 32.

[215] Supra fn 213, para 62.

[216] Similar arguments put forward with regard to Employer and Employee liability issues. See p 110 and fn 42 in WILS, W. P. J. (2000) 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', European Law Review, 25(2).

[217] Commission Decision COMP/38.238 - *Spanish Raw Tobacco*, OJ L 102, 19.04.2007

[218] Ibid., para 376.

[219] Commission Decision COMP/38.281 - *Italian raw tobacco*, OJ L 353, 13.12.2006 as noted in RIESENKAMPFF, A. and KRAUTHAUSEN, U. (2010) 'Liability of parent companies for antitrust violations of their subsidiaries', European competition law review, Vol.31, issue 1, pp 38-41.

[220] Case T-69/04, *Schunk and Schunk Kohlenstoff-Technik v Commission*, [2008] ECR II-2567.

participations' is broad enough to encompass and permit the management and running of its subsidiaries, despite the fact that it does not exercise any industrial or commercial activity.[221]

The trend of strict applications of the *AKZO* presumption rules has provoked a wave of appeals currently pending before the Community Courts.[222] Their further clarification of the 'rebuttability' of the *AKZO* presumption will be very welcome. Finally, using the aforementioned ECJ's *Aristain*[223] judgment, holding that the share-capital is insufficient in itself to establish an economic unit unless there is an identified influence on the coordination of the group's activities, offers some authority to suggest that the 'management influence' element could remain pertinent in deciding the liability of a parent company in the context of a conglomerate group. In *Hoffman-La Roche,* for instance, the Commission decided to address the decision on the basis of separate management.[224] In such a context the parent company can operate in a completely different market than the one of its subsidiary and apply absolutely no managerial supervision on the decisions of its subsidiary.

3.2.3. The parental liability in cases of non-full ownership

In addition, the situation remains uncertain with regard to groups of companies where the parent company does not possess the totality (or quasi-totality) of the shareholding but merely the majority of it.[225] Early case law acknowledges that a parent company can influence its subsidiary's policy even when holding the majority of the shares[226] or where it *de facto* determines its conduct.[227] While the issue has not come up before the Community Courts, Commission decisional practice can be indicative. In the recent *Carbon carbide*[228] decision neither the Slovak mother-company (HSE – a Slovenian energy company), nor the Slovak mother-company (*Garantovanâ*) had any full control over their respective subsidiaries (TDR Ruse) that were involved in the cartel. The decision could stand for authority that (an allegedly) 70% of the shares held by the parent can suffice to form a presumption of liability, thus further expanding the scope

[221] Ibid*.,* para 61-62.

[222] See *infra* fn 229.

[223] Case C-196/99 P, *Aristrain v Commission,* [2003], *supra* fn 204.

[224] Commission Decision COMP/37.512 - *Vitamins*, OJ L 6, 10.01.2003, pp 1-89, para 643-644 ; 'In the case of Solvay Pharmaceuticals BV, this undertaking directly participated in the infringement and operates as a *functionally separate entity* from its parent Solvay SA. The Commission therefore addresses this Decision to Solvay Pharmaceuticals BV'.

[225] As explained by Wils, 'is it sufficient that the parent company holds all the shares of its subsidiary, or more than half of them, for both companies to constitute a single undertaking?' WILS, W. P. J. (2000) *supra* fn 216, p 103.

[226] Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, para 136.

[227] Commission Decision COMP/38.238 - *Spanish Raw Tobacco*, supra fn 217, p 373.

[228] Commission Decision COMP/39.396 - *Calcium carbide*, 22.07.2009.

of imputability. Two appeals are currently pending before the CFI, which should cast some clarification on the future scope of the presumption.[229]

In such a scenario, a claimant will not be able to benefit from the *AKZO* presumption but the Court seized would have to first analyse whether the group constitutes a 'single economic unit' in the meaning of Article 101 TFEU. In that regard consideration should be given to the economic and legal links between the entities concerned. Accordingly, if the court views that the entities form a 'single economic unit', it can accept a claim against the parent, as, according to the Court, such a legal qualification 'enables the Commission to impose fines to the parent company, without having to establish the personal involvement of the latter in the infringement'.[230] On the other hand, if the Court considers that the two entities do not form an 'undertaking' in the meaning of Article 101 TFEU, the plaintiff should probably adduce proof of 'decisive influence over the commercial conduct of its subsidiary' that will probably relate to the corporate structure of the group.

3.2.4. Concluding remarks

This *AKZO* reasoning shows that the Court prioritises the 'structure of the group' over the 'actual involvement' of a legal entity in a cartel, thus departing from a strict application of the principle of 'personal responsibility'. This trend is reflected in two recent Commission decisions that unequivocally explained that 'the principle of the autonomy of a legal entity and economic autonomy are company law principles that are not relevant once a group of companies is held to form a single undertaking for the purposes of applying Article 81 of the Treaty'.[231] Such an approach clearly differs from the original approach of the Court when first explaining that 'in view of the unity of the group thus formed, the actions of the subsidiaries may in *certain* circumstances be attributed to the parent company'.[232]

Despite the obvious advantages of an easy practical implementation favouring legal certainty, the *AKZO* presumption that so flagrantly departs from a system of personal responsibility sits at odds with the basic procedural requirement of presumption of innocence.[233] Undoubtedly, the fact that the parent company can still rebut the presumption shows *a priori* that the parent's liability is not one of a strict liability regime. This leads to a reversal of the burden of proof that, according to AG Kokkot, is not

[229] Case T-399/09, Case T-399/09, *Holding Slovenske elektrarne (HSE) v Commission*, 06.10.09 (pending); Case T-392/09, *1.Garantovaná v Commission*, 02.10.09 (pending).

[230] Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, para 59.

[231] Commission Decision COMP/38.645 - *Methacrylates,* OJ L 322, 22.11.2006, pp 20-23, para 273; Commission Decision COMP/38.620 - *Hydrogen peroxide*, OJ L 353, 13.12.2006, pp 54-59, para 436.

[232] Emphasis added. *ICI*, op cit, n 226, para 135. For instance in *ICI* the Court considered the fact that the parent held all / the majority of the shares in the subsidiaries, exercised decisive influence over their policy in selling prices (paras 136-138).

[233] Opinion of A.G. Kokott in Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, paras 70-76; See also RIESENKAMPFF, A. and KRAUTHAUSEN, U. (2010) *supra* fn 219, p 41.

incompatible with the presumption of innocence,[234] as only the 'standard of proof' is in fact being affected. Nevertheless, despite such rhetorics, a crystallization of a quasi-automatic system of attribution of liability on parent companies, especially in cases of mere majority ownership - no matter how well justified it might be in terms of deterrence and responsible management - could constitute a flagrant departure from the initial ECJ's focus on personal responsibility. Moreover, in view of the contextual approach espoused by the ECtHR, one should question whether such practice could survive an Article 6(2) scrutiny in the future.

3.3. The rules on cartel fines in view of the principle of '*legality*' and the rule against '*double penalization*'

3.3.1. The general context of judicial review of fines

The numerical expansion of cartel decisions,[235] and the undisputed escalation in the level of fines,[236] also meant a growing need of judicial review in antitrust matters. The 1991 formation of the CFI signalled an expansion of the number of cartel-related cases dealt with by European Courts. Today's extensive body of case law on cartels extends up to a total of 245 judgements, 99 by the ECJ and 146 by the CFI/EGC.[237] It can be generally submitted that the increase of appeals is closely associated to the aforementioned massive expansion of the level of fines imposed on undertakings. Generally, the case-law has gradually evolved from a very substantive law focus on the elements that constitute a cartel (instructive phase), towards a type of review that examines procedural guarantees (fundamental rights phase), and especially, following the adoption of the Leniency Programme, a phase where the proportionality and appropriateness of fines are being scrutinized (fine-control phase). Today, 'one cartel decision triggers an average of 3 to 4 court cases'.[238] It is submitted that this increase is mainly due to the current uncertainty surrounding the sanctioning rules. Fines are appealed in approximately 90% of the Commission decisions, approximately 60% of which successfully with an average fine reduction of 19%.[239]

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[234] Opinion of A.G. Kokott in Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, para 74.

[235] From the late 60s till now the Commission has produced a total of approximately 130 cartel infringement decisions. Yet, the Commission has produced approximately as many decisions over the last 10 years as it had over the previous 30 years, before the introduction of the first leniency programme.

[236] According to the Commission's statistics, since 1990 the Commission has imposed a total of more than €13.5 bn of fines on companies, €13 bn of which (i.e. approx. 95%) within the 2000-2009 period. Last updated: total of €13,543,887,360, as of 17 December 2009, those figures do not correspond to the figures of the actual fines paid by the companies following the CFI's correction of the fine. See http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

[237] As of Feb 25th, 2011.

[238] Commissioner Neelie Kroes Speech/05/205, 'The First Hundred Days', 40th Anniversary of the Studienvereinigung Kartellrecht 1965- 2005, International Forum on European Competition Law, Brussels, 7th April 2005.

[239] VELJANOVSKI, C. (2007) 'European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis', SSRN, p 5; Veljanvski calculated that from 1998 September 2007, the CFI has decided appeals on fines over

The focal shift on the contestability of cartel decisions on the area of fines meant that the latter were challenged on wide spectrum of legal grounds.[240] The ones hereby analysed are those more pertinent within the general 'efficiency' v 'fundamental rights protection' debate. The first argues that the unpredictability of the current legal framework on fines potentially conflicts with the principle of legality (*nulla poena sine lege*);[241] the second argues that the imposition of fines in international cartels can clash with the rule against double penalization (*ne bis in idem*).[242] Each will, in turn, be analyzed.

3.3.2. The unpredictability of the EC rules on fines and the principle of legality

The general principle of legality stipulates that no one should be convicted or punished except in respect of a breach of a pre-existing rule of law.[243] One of the applications of the principle (besides non-retroactivity) is that 'criminal law' should be clearly defined. This principle is recognised in Article 7 ECHR, granted a general principle of EU law status by the Community Courts[244] and incorporated in Article 49 of the Charter. Moreover, it has traditionally been considered to be a corollary to the principle of legal certainty, also accorded a status of a general principle of EU law.[245] Under ECtHR case law, Article 7 applies in the case of 'criminal offences' where 'penalties' are incurred, and given that the interpretation of both those autonomous notions are consistent with that of the *Engel* criteria of Article 6[246], competition proceedings fall within the scope of its application. Moreover, on the applicability of the principle on rules that take the

€6 billion, or, over 98% of all fines imposed by the Commission. Fines were appealed in 45 out of the 50 cartels (19 still pending) by one or more firms, i.e. in 90% of the cases. Moreover, empirical evidence suggests that 59% of these appeals (16/24) were successful in achieving an average reduction of 19.3% (i.e. from a total of €1,753.4 million to €1,415.5 million).

240 See FREUND, H.-J. (2006) 'Application of general principles of Community law in the review of Commission decisions on fines by the Community Courts', ERA-Forum., 1, 40-52; SCHWARZE, J. R. (2007) 'Les sanctions imposées pour les infractions au droit européen de la concurrence selon l'article 23 du règlement no. 1/2003 CE à la lumière des principes généraux du droit', Revue trimestrielle de droit européen, 1, 1-24.

241 See DEBROUX, M. (2006) 'L' "imprevisibilité transparente": La politique de sanction de la Commission en matière de cartels', Concurrences, 4, 46-55; LÓPEZ, J. J. P. (2006) 'The Aggravating Circumstance of Recidivism and the Principle of Legality in the EC Fining Policy: Nulla Poena Sine Lege?', World Competition, 29, 441-457; WHELAN, P. (2008) 'The Degussa case : the Court of First Instance and the European Court of Justice have taken a clear line on legal certainty and antitrust fines', Competition law insight, Vol. 7, p.13-15.

242 WILS, W. P. J. (2003) 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis', World Competition, 26, 131-148; PAULIS, E. (2005) 'Le règlement n° 1/2003 et le principe du ne bis in idem', Concurrences, 1, 32-40; FREUND, H.-J. (2006), supra fn 240, 40-52.

243 See OVEY, C. (2006) *Jacobs and White: the European Convention on Human Rights*, Oxford University Press, p 209.

244 Case C-63/83, *Kirk*, [1984] ECR 2689, para 22.

245 Case 29/69 *Stauder* [1969] ECR 419, para 7.

246 *Welch v UK,* [1993], Series A, No.307-A, according to which other factors to be taken into account are the nature and purpose of the measure, its characterisation under national law, and the procedures involved in the making and implementation of the measure, and its severity.

form of a non-legally binding norm, such as the Commission Guidelines,[247] the ECJ recalls that they latter form 'rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment'.[248] Thus, in that regard, Guidelines qualify as a legal norm to which Article 7 applies.

The Community transposition of the principle of legality of Article 7 commands that Community legislation must be 'unequivocal and its application must be predictable for those subject to it'.[249] Furthermore, these certainty and predictability requirements must be observed more strictly in cases of rules liable to entail financial consequences.[250] On top of that, in cases where a provision empowers the Commission to act (e.g. to impose fines) the Council must 'clearly specify the bounds of the power conferred'.[251] All these requirements regarding the quality and predictability of Community rules have led a significant number of undertakings to appeal on the grounds of the vagueness and unpredictability of Community rules on the imposition of fines.

3.3.2.1. The evolution of the fining rules and 'predictability'

The lack of sufficient transparency with regard to the Commission's discretion to impose fines has been a constant source of criticism under the old Regulation 17 general provisions and it persisted despite the adoption of the first '1998 Guidelines'[252] or the present-day '2006 Guidelines'.[253] In view of the increased level of fines and the success of the Leniency programme, the Commission issued the '1998 Fining Guidelines' as a means to ensure further 'transparency and impartiality'.[254] This signalled the departure from the unwritten but long-lasting decisional practice towards a more formalized set of rules that were meant to offer further transparency. While the analysis of the fining mechanism goes beyond the scope of this paper, suffice to say that, according to Community Courts,[255] the 1998 Guidelines (and by analogy the current 2006 Guidelines) did not introduce a new method of calculation, given that fines continue to be calculated according to the two (old) Regulation 17 criteria, namely the gravity of the infringement and its duration. As a consequence, claims pertaining to

247 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, pp 2-5 replacing the 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 C 9, 14.1.1998, p 3.

248 Case C-167/04 *P, JCB Service v Commission,* [2006] ECR I-8935, para 207.

249 See for example Case 70/83*, Kloppenburg,* [1984] ECR 1075, para 11.

250 Case 326/85, *Netherlands v Commission*, [1987] ECR 5091, para 24.

251 See Case 291/86, *Central-Import Münster*, [1988] ECR 3679, para 13.

252 1998 Guidelines, supra fn 247.

253 2006 Guidelines, supra fn 247.

254 See para 3 of 1998 Guidelines, supra fn 247.

255 Case T-23/99*, LR AF 1998 v Commission,* [2002] ECR II-1705, paras 231-232.

the principle of non-retroactivity were doomed to fail,[256] not least due to the CFI's acknowledgement that the Commission could at 'any time adjust the level of fines to the needs of that (competition) policy'.[257]

3.3.2.2. The ECHR (loose) interpretation of the principle of legality

ECtHR rulings suggest that a provision of law must clearly define crimes and the relevant penalties, a requirement that is met when 'the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation, what acts and omissions will make him criminally liable'.[258] The ECtHR has traditionally accepted loosely defined laws to be compatible with Article 7 based on, *inter alia*, the need to avoid 'excessive rigidity and to keep pace with changing circumstances'.[259] It follows that Article 7 does not require legal provisions to be so precise that the potential consequence of an infringement of those provisions 'should be foreseeable with absolute certainty'.[260] Along these lines, in *Margareta v. Sweden* the ECtHR held that

> 'the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference'.[261]

3.3.2.3. The Community Courts application of the ECtHR case-law in competition cases

Community Courts, confronted with Article 7 claims, drew inspiration from the ECtHR interpretation of the principle, expressly acknowledging that 'there is nothing that would justify the Court giving a different interpretation of the principle of legality (of the ECtHR)'.[262] In light of the aforementioned loose standards of foreseeability under the ECHR, the Community Courts have rejected the totality of the claims, on a series of different grounds.

First, the Court took the view that the ceiling fine of 10% of the undertaking's turnover is reasonable having regard to the interested defended by the Commission.[263] Secondly,

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[256] See for example Joined Cases C-189/02 P, etc., *Dansk Rorindustri A/S v Commission (Pre-insulated Pipes)*, [2005] ECR I-5425; Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, [2003] ECR II-2597, paras 39-61.

[257] Joined Cases 100-103/80, *SA Musique Diffusion française v Commission*, [1983], para 109, Case T-12/89, *Solvay & Cie SA v. Commission*, [1992] ECR II-907, para 309.

[258] *Coëmev. Belgium*, 22 June 2000, 2000-VII, p 1, para 145.

[259] See for instance *Kokkinakis v. Greece,* Series A, No.260-A [1994], paras 40-52.

[260] Case T-43/02*, Jungbunzlauer v Commission*, [2006] ECR II-3435, para 79.

[261] *Margareta & Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A, no. 226-A, para 75.

[262] Case T-43/02, *Jungbunzlauer v Commission*, supra fn 260, para 81.

[263] Ibid., para 86.

the principles of proportionality and equal treatment, together with the existing accessible decision-making practice form a reasonably well predictable system of imposition of fines.[264] Thirdly, the existing Guidelines offer the relevant information that enables to 'foresee to the requisite legal standard the methods and order of magnitude of the fines incurred for any given conduct'.[265] Along these lines, the undisputed fact that undertakings are not in a position to 'know in advance the exact level of the fines' is, according to the Court, not such as to establish a violation of the principle of legality,[266] especially given that the Decision must 'show the Commission's reasoning clearly and unequivocally'.[267]

Apart from those legal grounds, the CFI in *Jungbunzlauer* also employs a 'competition policy' argument that appears significant in the context of the 'efficiency' debate. As a matter of fact the Court held that:

> 'to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted. A fine subject to sufficiently circumscribed variation between the minimum and the maximum amounts which may be imposed for a given offence may therefore render the penalty more effective both from the viewpoint of its application and its deterrent effect'.[268]

The same position, but with an even more explicit wording, was reiterated by the Court in *Degussa*[269] where the CFI held that:

> 'due to the gravity of the infringements which the Commission is required to penalise, the objectives of punishment and deterrence justify preventing undertakings from being in a position to assess the benefits which they would derive from their participation in an infringement by taking account, in advance, of the amount of the fine which would be imposed on them on account of that unlawful conduct'.[270]

The Court's approach is fully concordant with the Commission's official policy according to which 'a greater degree of foreseeability and reliability in the calculation of fines would be inconsistent with the principle that the fine must, first, take account of the particular circumstances of the case and, second, have a deterrent effect sufficient to ensure compliance by undertakings with the competition rules'.[271]

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[264] Ibid*.*, paras 87-88.

[265] Ibid*.*, para 90.

[266] Ibid*.*, para 90.

[267] Ibid*.*, para 91.

[268] Ibid*.*, para 84

[269] Case T-279/02*, Degussa v Commission*, [2006] ECR II-897.

[270] Ibid*.*, para 83.

[271] Case T-43/02, *Jungbunzlauer v Commission*, supra fn 260, para 56.

According to this approach shared both by the Community Courts and by the Commission, a reasonable level of unpredictability impacts on the enforcement efficiency. Using the words of former Commissioner Kroes, it is unclear how 'allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance'.[272] In a way, the increased transparency brought into the system by the Guidelines does not imply an increased predictability, and purposefully so. As pointed by the Court itself, 'the objective of the Guidelines is … transparency and impartiality, and not the foreseeability of the level of the fines'.[273] This fear of internalization of possible fines in the cost/benefit analysis of the undertaking's choice in engaging in cartel activity is justified, especially, in view of the secret characteristics of cartels. The counter-argument, however, points to the direction that rules on fines should provide full awareness of the possible consequences of a criminal act as to ensure deterrence, just like in any traditional type of criminal offence. The argument is *a priori* valid, although, partly flawed since the maximum penalty, that of 10% of the undertaking's turnover, does provide a certain fine benchmark which should be able to act as a deterrent to cartel conduct. Nevertheless, it remains undisputed that from a legitimacy point of view, clearly defined rules offer fewer possibilities for contesting a fine and reduce the undertaking's propensity to sue following the delivery of the Commission's decision.

3.3.3. The application of the *ne bis in idem* principle in the case of international cartels

The principle against double penalisation (double jeopardy) is enshrined in Article 4 of Protocol No.7 to the ECHR,[274] accorded the status of a general principle of EU law[275] and encoded in Article 50 of the Charter. The principle essentially prescribes that a person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. The principle, in competition matters, 'precludes an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision'.[276] As first pointed by the ECJ in *Aalborg,* the application of the principle is conditional upon three cumulative requirements: the identity of the facts, the unity of the offender and the unity the legal interest protected.[277]

It is not surprising that due to the international operation of cartels, some undertakings involved in global cartels face the risk of sanctions for the same cartel in different

[272] Commissioner Neelie Kroes Speech/05/205, *supra* fn 238, p 6.

[273] Case T-15/02*, BASF v Commission,* [2006] ECR II-497, para 250.

[274] Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No.11, Strasbourg, 22.11.1984

[275] Case C-289/04 P*, Showa Denko v Commission,* [2006] ECR I-5859, para 50.

[276] Case T-24/07, *ThyssenKrupp Stainless v Commission*, [2009] ECR II-1501, para 178; for an early application see Case 7/72, *Boehringer Mannheim* v *Commission* [1972] ECR 1281, para 3.

[277] Joined Cases C-204/00 *P, Aalborg Portland A/S, supra* fn 39, para 338.

jurisdictions. In Europe, a significant number of undertakings involved in similar worldwide cartels have argued before the Community Courts that being imposed a sanction for the same conduct in two different jurisdictions amounts to an illegal double penalisation that should be taken into account by the Commission when imposing fines. Of course, this presupposes that the fine imposed in one jurisdiction also takes account of the effects of the cartel on the market in the other jurisdiction (ex. fine on the total turnover of the undertaking) as to meet the requirement of identity of facts. As pointed by the Court in *Archer Midlands Daniels,* 'where the sanction imposed in a non-member country covers only the applications or effects of the cartel on the market of that State and the Community sanction covers only the applications or effects of the cartel on the Community market, the facts are not identical'[278] and, thereby, the first condition for the applicability of the principle is absent.

There are two distinct situations to be assessed in that regard; firstly, where the concurrent fines are imposed by a National Competition Authority (NCA) and the Commission (both belonging to the European Competition Network); and, secondly, where the concurrent fines are imposed by a European competition authority and a competition authority of a non-Member State. As explained by the Court, 'the principle *ne bis in idem* does not apply to situations in which the legal systems and competition authorities of non-Member States intervene within their own jurisdiction'.[279] The distinction is key and the rationale is explained in detail *SGL Carbon.*[280]

Having established this fundamental rule, the Court proceeded with its substantiation. In that respect, it ruled that the inapplicability of the *ne bis in idem* is absolute, in the sense that in a non-Member State scenario European competition authorities are not asked to 'set off' a penalty imposed by a non-member State, even where the three *Aalborg* conditions are met. This follows from the Court's ruling that 'there is no other principle of law obliging the Commission to take account of proceedings and penalties to which the appellant has been subject in non-member States'[281] – both at the public international law level, as well as having regard to the positive committee principles found in EU-US bilateral agreements.

While the application of this rule might, *a priori*, strike as contrary to a feeling of 'natural justice', it constitutes another illustration of judicial activism in interpreting a fundamental right in a contextual manner that favours 'efficiency'.

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[278] Case C-397/03 P, *Archer Daniels Midland v Commission*, [2006] ECR I-4429, para 69.

[279] Case C-289/04 P*, Showa Denko v Commission,* [2006] ECR I-5859, para 56 and Case C-308/04 P*, SGL Carbon v Commission,* [2006] ECR I-5977, para 32.

[280] Case C-308/04 P, *SGL Carbon v Commission*, ibid, para 28-32 ; 'the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States' legal systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules'.

[281] Case C-289/04 P*, Showa Denko v Commission*, [2006] ECR I-5859, para 57.

3.3.4. Concluding remarks

The Community Court interpretation of the Community rules on sanctioning in view of the principle of legality and *ne bis in idem* unambiguously favour efficiency over a strict application of fundamental guarantees. Following the adoption of the 2006 Guidelines, that aim at bringing even further transparency (but not necessarily predictability) in the sanctioning mechanisms, future actions contesting the legality of the fines are likely to fizzle out. Moreover, one should not underestimate the future use of the Cartel Settlement procedure,[282] which substantially limits the unpredictability of the potential fine incurred. Under this new procedure, undertakings are asked to settle on the basis of an estimation of a 'range of fines', thereby getting exposed with a predictable amount at an early stage of the proceedings, which is likely to further limit any successful appeal on the ground of 'unpredictability'.[283] Finally, the risk of 'double-penalization' in the context of international cartels remains topical, not least following to the intensification of international cooperation in this field, although successful challenges on such grounds still remain implausible.

4. GENERAL CONCLUSION

The debate on the 'upgrading' of fundamental rights protection in competition law enforcement, while at the forefront of the reforms discourse, is not novel. It is reminded that as early as in 1991, AG Vesterdorf, citing *Öztürk*,[284] pointed that, notwithstanding the explicit administrative qualification, competition proceedings have a 'criminal law character'[285] and therefore 'it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the ECHR' ensuring that 'legal protection within the Community meets the standard otherwise regarded as reasonable in Europe'.[286] In the wake of the Lisbon Treaty, the debate is revived due to the constitutionalisation of the Charter, and the EU prospective of becoming member to the ECHR. In analysing the legal nature of antitrust proceedings, that indicates the minimum threshold of protection, we infer that no 'black or white' qualification exists, in the sense that proceedings are either exclusively administrative or criminal. Rather the legal nature is portrayed by 'shades of grey', a parallel and non-mutually exclusive qualification that corresponds to the contextual analysis undertaken by the ECtHR, in applying criminal standards where it sees fit.

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[282] See Article 10a-2d in Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, pp 3-5.

[283] For an exhaustive analysis of the settlement procedure for cartels see SCORDAMAGLIA, A. (2009) 'The new Commission settlement procedure for cartels: a critical assessment', Global Antitrust Review, Issue 2, pp 61-91.

[284] *Öztürk v. Germany*, supra fn 79, paras 47-49.

[285] Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v. Commission*, [1991] ECR II-867, para 885.

[286] Ibid., para 885.

In examining the concrete impact of procedural guarantees on the rules governing the legal characterisation, attribution and sanctioning of cartels, it is extrapolated that Community Courts have not only applied Community legislation in a teleological manner that favours the efficiency of cartel enforcement, but have often done so following a contextual and instrumentalist interpretation of ECHR rights. Rules on the legal characterisation of cartels are less prone to be challenged on fundamental right grounds in the future, due to the quasi-exclusive reliance on sound concertation evidence acquired through Leniency. Along the same lines, rules on fines, although still unpredictable due to the persisting discretion enjoyed by the Commission under the 2006 Guidelines, are also less likely to be challenged on grounds of legality. This also depends on the success of the new cartel settlement procedure that effectively reduces the level of unpredictability. However, the same cannot be said with regard to the *ne bis in idem*, as, having regard to the intensified international cooperation of competition authorities, concurrent sanctions are likely to be imposed. Finally, it is submitted that some questions remain open in the area of law on the attribution of liability, especially in the cases of majority shareholding, that would soon need to be further clarified by the Community Courts given that the departure from the 'personal responsibility' focus appears discordant from a 'presumption of innocence' point of view.

Finally, when speculating on the future possibility of a 'double' ECJ/ECtHR scrutiny (following EU's accession to the ECHR) one should take into account that the ECtHR, in *Bosphorus,*[287] following a meticulous examination of the current state of fundamental rights protection in the EU, came to the conclusion that Community affords sufficient protection to the fundamental rights and therefore benefits from a presumption of legality.[288] This presumption is rebuttable if, in the circumstances of a particular case, it is considered that the protection of Convention rights is 'manifestly deficient'.[289] It is hard to detect such a 'manifestly deficient' protection in the field of competition enforcement, especially in light of the ECJ judicial review of cases. However, this does not exclude the possibility that undertakings challenge Commission competition decisions in the future. Yet, under the exhaustion of all domestic remedies rule (Article 35 ECHR), undertakings would be able to challenge the compatibility of a Commission decision only after having exhausted the legal means of appeal before the Community Courts. Moreover, the ECtHR would not rule on the validity of the decision itself, which belongs to the exclusive jurisdiction of the Community Courts, but only with respect to its compatibility with the Convention. A finding of a Convention violation would therefore not necessarily, nor automatically translate into a finding of a Community law violation.[290] Despite these drawbacks, the theoretical possibility of effective judicial supervision of the Community Courts by the Strasburg court should,

[287] Judgment of the ECtHR of 30 June 2005, *Bosphorus Airways v. Ireland* (no.45036/98).

[288] Ibid., para 165.

[289] Ibid., para 156.

[290] It would of course, *de facto*, belong to the Community legal order to rectify the legal situation of the concerned undertaking, and to interpret *ex nunc* the contentious provision in light of the Strasburg Court's interpretation.

in theory, ensure the absolute equivalence in terms of judicial protection of those rights. In that regard it is suggested that the Community Courts, in the context of their contextual approach, have shown the required flexibility in interpreting procedural guarantees in a manner not detached from the competition enforcement needs and priorities. In that regard, excessive, abusive or opportunistic use of procedural guarantees, ultimately aimed at obstructing proceedings and stagnating procedural efficiency, is unlikely to succeed before Community Courts, and most probably before the Strasburg Court.[291]

[291] As argued by Emberland, 'the Court's handling of corporate claims normally concern situations where the applicant in question seeks Convention shelter against the exercise of regulatory authority that impinges on the companies' activities and interest. Corporate applicants squarely use the Convention as a means to restrain regulatory authority in the economic sphere', EMBERLAND, M. (2006), supra fn 30, p 17.

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Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing

Jaime Flattery[*]

This article analyzes the existence of the 'right to be heard' in EU Competition law and queries whether firstly, it is properly adhered to in Commission proceedings and secondly, whether the current system is in compliance with Article 6 of the European Convention of Human Rights (ECHR). It demonstrates that although this fundamental right is deeply rooted in EU case law and has been enshrined in EU legislation such as Regulation 1/2003, the Best Practice Guidelines and the Charter of Fundamental Rights, the extent of the safeguards fall short of EU human rights standards. It discusses the right in the context of administrative law and highlights the importance of taking an objective rather than a formalistic approach to 'fairness'. In Part II there is a practical examination of the extent of the right to be heard within the current framework. Emphasis is put on the important role, but also on the limitations of the Hearing Officer's powers. The article then examines the rights of the complainant and the limited rights of other interested parties to participate. It also highlights through case analysis, deficiencies in both the written and oral components of the hearing and suggests that the oral hearing in particular needs urgent reform. This leads to a consideration in Part III, of the impact of Article 6 ECHR. Here the article addresses the reluctance of EU Courts to accept the changing nature of competition proceedings from 'administrative' to 'criminal', despite support for the contention from the Advocate Generals and the ECtHR. The article applies the ECtHR criteria in order to conclude they are penal in nature. Amongst the recommendations, it suggests that a more adversarial process should be adopted; with a public oral hearing and cross-examination of witnesses. Thus the paper assesses the conflict between efficiency and justice in the enforcement system but recognises the first as desirable; the second as vital.

INTRODUCTION

In its quest for effective enforcement of EU competition policies, one of the primary concerns of the Commission is to apply its procedures in order to 'strike the right balance between efficient enforcement and adequate protection of the rights of the defence'.[1] Mindful of these sensitive and potentially conflicting goals, the EU Courts have taken a prominent role in legitimising a strong enforcement of Articles 101 & 102 TFEU by ensuring that the rights of defence, and in particular the right to a fair hearing, are upheld as fundamental requirements of the administrative process.

Some issues for discussion in this article include the origins and development of the right to a fair hearing (Part I) and critically, the impact that it has had on EU Competition proceedings. In this respect, this paper will discuss the existing procedural

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[*] B. Corp (International), LLB, LLM Université de Luxembourg; Trainee solicitor at Matheson Ormsby Prentice, Dublin. The opinions expressed in this article are entirely personal.

[1] Wouter PJ. Wils, *Efficiency and Justice in European Antitrust Enforcement*, 2008, Hart Publishing, foreword.

protections and the contribution of the Commission's recent *Best Practice Guidelines* and the *Guidance on Hearing Officers*. Particular emphasis will be put on the rights of parties other than the accused undertakings. (Part II).

In assessing the effectiveness of the safeguards, the article will draw attention to the Commissions own 'monopolist' role over proceedings arising from its sole concentration at first instance of the functions of investigator, prosecutor and decision maker. It will then move to consider the conformity of the enforcement system with Article 6 ECHR and the impact of the European Court of Human Rights case law on EU competition rules. Given the heightened debate surrounding the classification of competition law, the author will inquire whether the time is now ripe to accept that phenomenally high fines imposed by the Commission may be synonymous to the leveraging of a 'criminal charge' within the meaning of Article 6 ECHR. (Part III).

Thus the primary aim of this paper is to delve into the law to assess whether the current system, despite its recent improvements, may still unjustly prioritise efficiency and effectiveness over fairness. In this event the article will consider some reforms that may be introduced to avoid infringement of the right to a fair hearing as recognised in EU law and under the ECHR.

PART I. THE SOURCES OF PROCEDURAL PRINCIPLES IN COMPETITION LAW - THE RIGHT TO A FAIR HEARING AS A HIGHER PRINCIPLE OF EU LAW

'Audi Alteram Partum' as a general principle of EU law

The right to a fair hearing, has long been 'deeply entrenched' in the EU legal system as a general principle of law common to the member states.[2] This fact is firmly reflected in the now legally binding Charter of Fundamental Rights of the European Union.[3] Article 41 of the Charter states that every citizen has the 'right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. Most importantly this includes 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. In this sense the rule has developed into an objective standard of good administration as it not only serves the individual interest, but also the common interest by its observance of procedural requirements in the administrative process.[4]

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2 See generally Giannakopoulous, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-Subsidies proceedings*, 2004, Kluwer Law. See also A Andreangeli, *EU Competition Enforcement and Human Rights,* 2008, Edward Elgar, who discusses the rise of the principle as a result of the influence of the common law rules of natural justice in proceedings.

3 Protocol No 1 attaches the Charter of Fundamental Rights (hereinafter the 'Charter'), to the Treaty of Lisbon (TFEU) and accords it the same status as the Treaty, OJ 2000 C 364, p 1. Also Article 6(2) TFEU asserts that the Union protects fundamental rights as enshrined in the Charter, the ECHR and the constitutions of the Member States.

4 Nehl, *Principles of Administrative Procedure in EC Competition Law*, 1999, Hart, p 96.

The principle was first 'constitutionalised' in EU competition proceedings by the *Transocean Marine Paint* case where the ECJ accepted that 'there is a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known'.[5] The practical significance of this principle entitled the undertaking to be informed in good time of the Commission's exemption conditions and to have the opportunity to submit its observations. Thus the right to be heard was, like most general principles, developed by the courts in the absence of express legislative protection and in pursuance of its duty to uphold the rule of law in the Community legal order. The Court emphasized the importance of the right in situations where 'the obligations have far reaching effects'.[6]

The principle was soon confirmed in *Hoffmann la Roche* although the Court used more restrictive terminology in referring to 'the right to be heard before a sanction or penalty' is inflicted.[7] This formalistic interpretation, repeated in *Hoechst I*,[8] was soon abandoned and the courts began to adopt a more liberal position whereby a measure only had to 'adversely' affect or even 'significantly' affect a person's interests. This expansion ensures that the right to be heard can also be invoked by complainants and other interested parties in the infringement proceedings.[9]

The scope of protection offered by the right to a fair hearing in the Charter of Fundamental Rights

i) A result of convergence between the principle of good administration and other EU principles associated with fair treatment

The Court's attempts to define and expand the scope of the right to a fair hearing have also been borne out of the development of overlapping principles, such as the 'principle of care' and the 'principle of good administration'.[10] These different

[5] Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, which concerned an action for annulment of an exemption renewal decision under Article 81(3) on the basis that a particular provision had not been mentioned in the statement of objections nor raised at the hearing.

[6] *Transocean*, *ibid*, para 15. It is submitted that this statement was included to highlight the greater importance the right would have in cases involving fines. See also Case 121/76 *Moli v Commission* [1977] ECR I- 1971, para 20, which concerns the right to be heard before the administration adopts a 'measure liable to gravely prejudice the interests of an individual'.

[7] Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 9; See also, *Lenaerts & Vanhamme* where the term 'sanction' is expansively interpreted as meaning 'any Community measure which inflicts a loss on a private party (fines, periodic payments, surcharges) or at least imposes a *restitutio* on such a party'.

[8] Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, at 15; see also Case 322/81 *Nederlandsche-Industrie-Michelin* [1983] ECR 3461, at 7.

[9] The necessity for third parties to have a 'sufficient interest' in order to participate will be discussed in the next section.

[10] Nehl, 1999, op cit, fn 4, p 27, notes that the link between the two principles was not always readily accepted by the Courts. In the past, pleas based on a breach of the principle of good administration were rejected and rather the problem was dealt with under the heading of other principles. See for example Case C-32/95P

permutations of essentially a right to be treated fairly in proceedings denote the gradual expansion of the concept. Nehl submits that both principles govern the question as to what extent the administration is obliged to take into account submissions made by individual parties under the exercise of their right to be heard.[11] Where the Union's institutions have a power of appraisal for instance, respect for the guarantees in administrative procedures is even more fundamental.[12]

Therefore the explicit inclusion of Article 41 as a 'free-standing' right in the Charter (violation of which could lead to annulment) gives applicants a clear fall back position in order to ensure their right to a fair hearing is respected, notwithstanding the level of protection offered by the legislature.[13] It is submitted that Article 41 will help to develop a benchmark, a minimum set of guarantees, while at the same time recall that 'the concept of a fair hearing remains open and dynamic; it may be used to generate other doctrines, or it may be seen as a general standard for judging whether a certain hearing process is fair all things considered'.[14] Through its comprehensive 'umbrella' provisions, it can be seen as tantamount to an EU 'due process' clause.[15] In keeping with one of the key aims of this article - to assess whether preference is given to efficiency over justice in competition procedures, this concept of objective 'fairness' will remain at the core of the analysis. Essentially this concerns the extent to which the procedural guarantees both fulfil their function in EU Competition law and respect the ECHR standards.[16]

ii) Convergence between standards in the EU and the ECHR

In addition to the merging of principles towards a common concept of 'fairness', the convergence of fundamental rights standards in the EU with those of the ECHR is

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Commission v Lisrestal [1996] ECR I-5373 and Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, where the Court annulled the decision due to a breach of the principle of care instead. See also failed attempts to introduce a right to be heard for third parties in state aid proceedings based on the 'principle of good administration' Case C-198/91, *William Cook plc v Commission*; andCase C-225/91 *Matra SA v Commission* where the plea was withdrawn.

[11] Nehl, *ibid,* p 99.

[12] Such guarantees include the duty of the competent institutions to examine carefully and impartially all the relevant aspects of the individual case. Case C-269/90 *Technische Universität München* [1991] ECR I-5469, para 14; Case T-44/90 *La Cinq v Commission* [1992] ECR II-1, para 86; and Joined Cases T 528/93, T 542/93, T 543/93 and T 546/93 *Métropole télévision and Others v Commission* [1996] ECR II 649, para 93).

[13] This article deals firstly with Article 41 as opposed to Article 47 ECHR (the right to an effective remedy) in order to demonstrate that even if the proceedings are merely 'administrative', the entitlement to a 'fair hearing' is still present. What is fair in the circumstances will depend on the ultimate classification of the proceedings as either, administrative or criminal.

[14] Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford, 1996, p 220.

[15] Kanska Klara, 'Towards Administrative Human Rights in the EU-Impact of the Charter of Fundamental Rights', (2004) 10(3) European Law Journal 296-326.

[16] See Joshua, 'The Right to be Heard in EEC Competition Proceedings', (1991) 15 *FILJ* 16, para 33, 'As the courts in England and the United States have repeatedly stressed—fairness is a flexible concept and its observance does not necessarily lie in adherence to a set of mechanical rules'.

important for the assurance of defence rights in competition cases.[17] Under Article 52(3) of the Charter - where there are rights that are common to both the Charter and the ECHR, the latter's interpretation must be recognised as a minimum standard of protection.[18] Article 52(3) of the CFR provides that, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention. This shall not prevent Union Law from providing more extensive protection'. Thus the scope of the right to a fair hearing in circumstances similar to factual scenarios in the European Court of Human Rights (ECtHR) case law, should ensure the granting of an equivalent 'hearing' in competition proceddings. However such an objective is juxtaposed against the strained 'administrative' label that the Commission and the Courts have traditionally seemed reluctant to abandon. As the final part of this article will examine, whether this entails classifying the proceedings as criminal, quasi-criminal[19] or otherwise, a substantive rather than a formalistic approach is necessary. Despite the current situation[20] and the absence of binding effect of the ECHR in this jurisdiction, by following the interpretive obligations in Article 52(3) of the Charter, the determination of the right to a fair hearing should be such as to ensure equivalent standards of protection as Article 6(1) ECHR.

Furthermore, if the line of arguments classifying the imposition of fines by the Commission as criminal in nature is accepted, then this obligation becomes even more pressing.[21] The significance is that criminal law requires the observance of the full rights of defence without exception. This means granting a hearing by an independent, impartial tribunal and also permitting applicants to have recourse to the additional procedural safeguards in Article 6(2), 6(3) ECHR and in Articles 47-49 of the Charter.[22] It may also mean reassessing the Commission's amalgamation of functions as given the

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[17] Note the increased reliance of the ECJ on the ECHR eg. *Metock v Minister for Justice, Equality and Law Reform* (Case C-127/08) [2008] ECR I-6241 (Article 8 ECHR); and Case T-99/04 *AC Treuhund*, [2008] ECR II-1501, paras 45-48, which held that the right of access to the file is not an end to itself or absolute; see also Opinion of Advocate General Mischo in Cases C-244/99 P and C-251/99 P, points 331 and 125 respectively (Joined Cases C-238, 244, 245, 247, 250-252, and 254/99 P *LVM and Others v Commission* [2002] ECR I-8375), Case 235/92 *Montecatini SpA* [1999] ECR I-4539, para 176.

[18] Article 52(3) of the CFR provides that, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention. This shall not prevent Union Law from providing more extensive protection'. See also Arnull, 'From the Charter to Constitution and beyond; fundamental rights in the new European Union'; [2003] PL 774.

[19] Schwarze, Bechtold, Bosch, 'Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change', Gleiss Lutz Rechtsanwälte, September 2008, fn 160 – 'the fines imposed by the Commission are of a criminal or at least quasi-criminal nature'.

[20] The Union's likely accession to the ECHR is however imminent. Article 6(3) of the Charter provides the legal basis and the institutions have begun the first steps in the process. See Commission proposal on negotiation of accession Directive, 17.03.2010 and the European Parliament's Committee on Constitutional Affairs Draft Report 2.2.2010.

[21] This issue will be examined more extensively in Part III.

[22] These include most notably the possibility of a public trial, the opportunity to cross-examine witnesses who have submitted evidence against them and full lawyer client protections. For a more detailed description of the traits of a full criminal adversarial trial see Joshua, op cit, fn 16, p 39.

current lack of a *de nova* or full review by the EU Courts in competition cases – a stricter separation of the powers 'at first instance' may be required.[23] The recent Opinion of Advocate General Bot sums up the dangers:[24]

> 'In giving precedence to the efficiency of the administrative procedure, the Court of First Instance's stance causes me to have certain reservations. It amounts to calling into question the fundamental nature of the principle of observance of the rights of the defence in what might be described as 'quasi-criminal' proceedings in which the Commission enjoys a very broad discretion and where judicial review is restricted.'

Lastly, the consequences in national law of a Commission infringement decision can lead to separate criminal penalties and/or indemnity claims under national rules, which serves as a further reason to demand rigorous compliance with the procedural safeguards.[25]

PART II. NOT WITHOUT RECOGNITION - SECTOR SPECIFIC LEGISLATION AND THE COMMISSION'S EFFORTS TO GUARANTEE THE RIGHT TO BE HEARD

The Commission has since filled the legislative lacuna which existed in relation to the respect for the right to a fair hearing with specific regulatory measures. Article 27(1) of Regulation No 1/2003[26] asserts that the undertakings concerned must be afforded the opportunity to be heard on the allegation of anti-competitive conduct raised by the Commission against them. The latter's Implementing Regulation 773/2004[27] and the Notice on Access to File[28] help to define the extent of this right. The Commission Decisions which established and defined the role of the Hearing Officer[29] have also

[23] D Slater,S Thomas,D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5(1) Euro CJ 22.

[24] Opinion of Advocate General Bot in Joined Cases C-322/07 P, *Papierfabrik August Koehler AG*, Case C-327/07 P *Bolloré SA*, Case C-338/07 P *Distribuidora Vizcaína de Papeles, SL v Commission,* [2009] ECR I-7191.

[25] Case C-344/98, *Masterfoods* [2000] ECR I-11369, at paras 49-60. See also Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II-4653, at para 199. See the arguments of Wils, *Efficiency and Justice in EU Anti-trust Enforcement*, Chapter 1, p 15; Christopher Harding- 'Effectiveness of Enforcement and Legal Protection', p 664 in Ehlermann & Atanasiu (eds), *European Competition Law Annual 2006, Enforcement of Prohibition of Cartels*, 2007, Hart.

[26] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p 1. See also its preamble, recital 37 which says that it respects fundamental rights in particular as set out in the Charter of Fundamental Rights and its provisions will be interpreted and applied with respect to those rights.

[27] See Articles 10 to 12 and 15 which set out the way in which the parties can exercise their right to be heard, Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (*Implementing Regulation*), OJ L 123, 27.4.2004, p 18.

[28] Notice on the rules for access to the Commission file in cases pursuant to Arts 81 and 82 of the EC Treaty, Arts 53, 54 and 57 of the EEA Agreement and Regulation 139/2004 [2005] OJ C325/.

[29] Commission Decision of 23.05.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.06.2001, p 21, replacing the earlier Terms of reference in Decision 94/810/ECSC, EC.

gone some way towards adapting Commission procedures in response to strong criticism from applicants, lawyers, politicians, academics and even judges.[30] These developments follow the 'pattern that emerged in the 1980s and 1990s of a growing awareness by the Commission of the need to be more procedurally scrupulous while not fundamentally changing how decisions were taken'.[31] The new Guidelines on the procedures of the Hearing officer and those on Best Practice in competition proceedings[32] were introduced to improve transparency and predictability – again likely in response to a perceived lack of objectivity and fairness in EU competition proceedings. So in light of these recent attempts at due process, despite their early stages of implementation, we shall consider if there is propensity for change in relation to the existing guarantees of fair procedure.

The Hearing Officer as the overall supervisor and guardian of the right to be heard - increased emphasis on his independence

According to the preamble of the 2001 Decision, the Hearing Officer (HO) is an independent and experienced person with 'the necessary integrity' to be entrusted with the conduct of the administrative proceedings. They are essentially the 'guardians of fair proceedings' before the Commission. Although clearly addressing some of the principal concerns of undertakings, the new Guidelines do not change the mandate or status of the HO. He is not the equivalent of an administrative judge[33] nor is the hearing before him tantamount to a trial. What they do achieve is an increased emphasis on their independence in stating that they are 'entirely independent' and 'carries out his functions on an *individual* basis'.[34] Moreover, as opposed to formally saying he 'has direct access to the Competition commissioner', the Guidelines now highlight that he 'is attached to the competent member of the commissioner for administrative purposes'.[35] However, the HO is still regarded as a Commission official, is remunerated by and has his office in the same buildings as DG Competition. Therefore, regardless of the personal integrity of his character, the position does not even remotely attract the same degree of impartiality in the eyes of the parties as a neutral judge would

30 See House of Lords Select Committee on the European Union, XIX Report: 'Strengthening the Role of the Hearing Officer', sess 1999/2000; B Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What does it mean in practice?', GCP, June 2009.

31 Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures', (2009) 34 EL Rev 817, notes the position of Hearing Officer first created in 1982 - largely due to the controversy surrounding the *IBM* case where the defendant company was on bad terms with the Director of the investigation and alleged prejudice.

32 DG Competition Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU; DG Competition, 'Best Practices in proceedings concerning Articles 101 and 102 TFEU', Released on 6 January 2010. Note also 'Best Practices on submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in Merger cases'.

33 As is the position in competition law enforcement in the USA.

34 Guidance para 1 & 9.

35 Ibid*,* Recital 6.

possess. Despite an increased role in recent years, he does not possess judicial powers to hear and decide on the case before him. His powers essentially relate to the physical conduct of the hearing, deciding disputes as to access to the file, maintaining confidentiality and reporting to the Competition Commissioner on the extent to which the rights of the defence have been respected. So although he may organise, decide disputes and conduct the proceedings with the utmost skill and impartiality, his power to influence the draft decision is limited as it is not his function to decide on the substance of the case[36] and, unsurprisingly, this has proven to be a serious source of concern to parties.[37]

To sum up, his task is to safeguard the right to be heard throughout the whole procedure and 'to contribute to the objectivity, transparency and efficiency of those proceedings'.[38] This includes both the written and oral exchanges between the parties.[39] Article 10(3) of the implementing Regulation[40] states that this right should be exercised for the large part in writing for reasons of administrative or procedural 'economy'. Therefore, the Hearing Officer also has a role to play in the delicate balancing exercise between efficiency and justice and in the case of a dispute, he ultimately decides who will be heard during the procedure.

Procedural rights and the Hearing Officer's main powers

The starting point from which the procedural rights of the parties become operative is from receipt of the statement of objections (SO) from the Commission. Notably it is rare that the HO will be called upon to intervene during the investigative stage[41] because the undertaking has not been formally accused of infringing the competition rules until the SO has been communicated to it. This reflects the two stage structure of the procedure - investigative and then an *inters partes* stage. However in light of recent case law[42] and the new Best Practice initiatives, it is submitted that there is no reason why the HO should not have a greater role in the pre-*inter partes* stage if a dispute arises regarding, for example, dawn raids and the confidentiality of documents.[43] Alternatively the introduction of the 'State-of-Play' meetings[44] is welcomed as it will facilitate an earlier appraisal of the allegations against the company, and an opportunity for it to

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36 This is left to the case team but with input from the Hearing Officer, Commission legal service, and Advisory Committee which is then transferred to the collegiate body of 27 Commissioners to adopt the final decision.

37 Case T-56/09 *Saint Gobain Carglass Fr v Commission*, pending.

38 Commission Decision of 2001, op cit, fn 29, recital 5.

39 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, para 132,

40 Regulation 773/2004, op cit, fn 27.

41 Case 136/79 *National Panasonic* [1980] ECR 2033, Case T-99/04 *AC Treuhund*, [2008] ECR II-1501, para 56 - only the right to be informed of the purpose and subject matter of the investigation.

42 Case T-99/04 *AC Treuhund*, [2008] ECR II-1501, para 40.

43 Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, para 59 and 110.

44 Informal meetings (similar to those in merger proceedings) between parties and Senior Commission officials involved in the case, para 38 Guidelines.

understand DG Competition's preliminary views on the status of the case after its investigation.

i) Responsibility to ensure the SO meets minimum requirements

One of the Hearing Officers main responsibilities in ensuring the effective right to be heard is to ensure that the SO meets the minimum requirements of informing the undertaking of the allegations against it and secondly, that it is consistent with the grounds relied on by the Commission in its final decision. The underlying rationale is that the undertaking must be fully informed so as to be able to properly prepare its defence to refute the evidence against it before a final decision is taken. According to the case law, the statement of objections provides an essential procedural safeguard,[45] thus it must set out clearly all the essential factors upon which the Commission is relying.[46] Those factors include the facts alleged against the undertaking, the classification of those facts, the legal arguments and evidence on which the Commission relies,[47] and the factors it will take into consideration when setting the fine such as the duration of the infringement.[48] Moreover, since *ARBED* and recently *Bolloré* have confirmed, the Court has held that the statement of objections 'must specify unequivocally the legal person on whom fines may be imposed'.[49]

ii) Ensuring the Consistency of the SO with the Draft Decision

In relation to the Hearing Officer's second role, he must supervise the consistency of the final decision with the Statement of Objections. Despite the fact that the SO is not an act that can be challenged before the Courts, being merely 'provisional',[50] if new facts or evidence arise and there is a fresh investigation, this will necessitate a new SO.[51] The Best Practices Guidelines extend this obligation to situations where 'the intrinsic nature of the infringement' is modified. In this case a State-of-Play meeting followed by

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45 See Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, para 10 and 14.

46 Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769, para 9.

47 Including any inferences which can be drawn from the evidence which have probative value otherwise this would amount to a denial of the right to be heard; See Case 136/79 *Atlantic Container Line* [1980] ECR 2033, para 172-173.

48 See Cases C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 29; Case T-48/00 *Corus UK v Commission* [2004] ECR II-2325, para 144,146; Case C-328/05 P *SGL Carbon*, not yet reported; T-109/02 *Bolloré* [2007] ECR II-947, para 67, and Case T-340/03, *France Télécom v Commission*, [2007] ECR II-107; Case C-202/07 P, [2009] ECR I-2369.

49 See Joined Cases C-322/07 P *Koehler & Bolloré*, [2009] ECR I-7191, para 38; T-276/04 *Compagnie Maritime Belge Transports and Others v Commission*, para 143,146; Case 1 76/99 P *Arbed* SA *v Commission* [2003] ECR I-10687, para 21.

50 Case 60/81 *IBM v Commission* [1981] ECR 2639, para 10, see also Joined Cases 142/84 and 156/84 *BAT and Reynolds Industries v Commission* [1987] ECR 4487, para 70.

51 See Case T-39/92, *Groupement des cartes bancaires 'CB' and Europay International v Commission* [1994] ECR II-49.

a supplementary SO will be issued.[52] However, because it is assumed that the Commission will adapt its position in light of developments, this information may be given summarily as the decision does not necessarily have to be a 'replica' of the Statement of Objections.[53] Conversely, the Commission cannot rely on facts on which the target parties have not had an opportunity to make their views known.

The Court's insistence on ensuring an effective right to be heard in this regard can be seen in the *Bolloré* appeal case. Here the Commission decision imposing a fine of €22.68m was annulled by the ECJ which overturned the General Court as it had not properly appreciated the consequences of the inconsistency between the evidence supporting the decision and that in the SO. Despite the fact that Bolloré had personally participated in the cartel, it could not also be held 'individually and directly responsible' for the actions of its subsidiary unless it had the opportunity to make its views known on certain documentary evidence which had been excluded from the SO. In this instance, the decision merited annulment not purely as a result of the procedural error, but due to the possibility that it may have amounted to a restriction on the defendant's 'rights of defence'.[54] Consequently the Hearing Officer has an important role in drawing up his final report to consider whether the draft decision of the case team deals only with objections in respect of which the parties have been afforded the opportunity of making their views known.[55]

iii) Right of Access to File

In turning to the party's right to access the Commission's file, we note it is enshrined in the relevant legislation,[56] the case law[57] and the Charter of Fundamental Rights.[58] It is a 'procedural safeguard intended to protect the rights of the defence'[59] and more precisely 'an essential precondition of the effective exercise of the right to be heard'[60] which allows the undertakings to present their views on the conclusions reached by the Commission in its SO. Since the *Soda Ash* case, the Courts have ensured this protection with its principle of 'equality of arms'. This grants the target undertaking the right to

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[52] Best Practice Guidelines paras 96, 97. Note that if the new evidence merely corroborates the Commission's position, issuing a simple letter of facts will suffice.

[53] Opinion of Advocate General Bot in Case C-327/07 P, *Bolloré,* [2009] ECR I-7191, para 93.

[54] On the different consequences arising from excluding 'inculpatory' versus 'exculpatory' evidence, see K Lenaerts & I Maselis, 'Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty', in BE Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute. International Antitrust Law & Policy*, New York, Juris Publishing Inc., 2001, 279-311.

[55] See Article 15 of Commission Decision of 2001, op cit, fn 29.

[56] See Commission Notice on access to file 2005, Regulation No 1/2003, Article 27 (2) and Articles 15 and 16 of the Implementing Regulation.

[57] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359; Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 & 104/95 *Cimenteries CBR and Others* [2000] ECR II-491.

[58] Under Article 41

[59] Case T-161/05, *Hoechst GmbH v Commission* [2009] ECR II-3555, para 160.

[60] Galligan, op cit, fn 14, p 545.

request access to the whole of the file, as it is not for the Commission to decide which documents are relevant to the investigated undertaking's rights of defence.[61] However concerns for fairness in the proceedings are emphasized by the fact that disputes regarding 'access to file' are always balanced against the legitimate interests of undertakings to protect their business secrets and to maintain the confidentiality of internal documents.[62] While 'access to file' issues in relation to target parties are generally concerned with the completeness of the SO,[63] in the context of multi-party proceedings they are also highly relevant. An example is where the Hearing Officer determines disputes relating to disclosure of information by the Commission to third parties or in relation to the publishing by the Commission on its website of the main facts and the fines imposed in its Decisions.[64]

iv) Contribution of the Best Practice Guidelines

The BP Guidelines attempt to enhance transparency by stating that parties (possibly including complainants and third parties) may have earlier access during the investigation[65] and that they may request access to a non-confidential version of other parties' written replies to the SO and submit their comments thereon.[66] This is indeed in 'the interests of fair and effective enforcement'; however, it does not grant an unconditional right. It is submitted that the Hearing Officer's powers in deciding access issues are both a strength and a weakness in the system; positive because they help to ensure a fair balancing of the rights of all parties, but problematic in that the Commission's refusal to grant access to file to a target party can only be challenged *ex-post* in the course of annulment proceedings of the final decision.[67] However, this deficiency is countered by the fact that the Hearing Officer's decisions on disclosure of

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[61] *Solvay SA v Commission* (Soda Ash) (T-30/91) [1995] ECR II-1775 para 81; Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, para 125.

[62] Commission Decision of 2001, op cit, fn 29, Article 8.

[63] E.g. consideration of whether the documents comprise both inculpatory and exculpatory evidence and the possibility for annulment only if 'the outcome could have been more advantageous for the person concerned or if, precisely because of the procedural defect, it is impossible to ascertain whether the decision would have been different' per Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Joined Cases (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *P Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission* [2004] ECR I-123, para 32.

[64] See *Austrian Banks Club-Lombard* cases; Joined Cases T-259/02 to 264/02 and T-271/02, *Raiffeisen Zentralbank Österreich and Others v. Commission* [2006] ECR II-5169, para 12 - the right to receive the SO cannot be restricted on basis of mere suspicion that the document may be misused.

[65] Best Practice Guidelines, para 65

[66] Note written documents submitted in connection to State of Play meetings will form part of the 'file' and non-confidential copies may be sent to third parties. See paras 39-40 BP Guidelines.

[67] See for example the failure to allow access to documents in Case *Aalborg Portland*, op cit, n 63, which ultimately led to the annulment of the Commission decision.

allegedly 'confidential' information, can be brought directly before the GC during the course of proceedings.[68]

v) Deadlines to reply to the statement of objections

Time limits can also affect the fairness of the procedures as a very tight deadline may not allow an undertaking to effectively participate. However, Article 10 of the 2001 Decision provides that the parties may submit reasoned requests to the Hearing Officer for an extension of the time limit (usually of 2 months) imposed by the Commission. When deciding the Hearing Officer will balance the urgency of the case with its complexity.[69] It should be noted that deadlines will normally start running when access to the main documents in the file has been granted. However in the interests of legal certainty and efficiency, the fact that access to the entire file has not, in the addressee's view, been granted does not automatically mean that a deadline set by DG Competition has not started running.[70] One of the new initiatives which may serve to ease the pressure of the time limits relates to the flexibility introduced by State-of-Play and triangular meetings. In addition to their flexible participant composition, they find a balance between efficiency and flexibility as they provide an option for parties to make use of the facility on a needs basis rather than according to a strict timeframe.[71]

Rights of the Complainant and Other Interested Parties

In addition to the target parties, the Hearing Officer must ensure that the right of complainants and other interested parties to effectively make their views known is maintained by the Commission. Over the years, their position has significantly improved[72] and applications from concerned parties to participate in the proceedings are generally given fair consideration. This helps to counter the criticism that 'the Community Courts have so far not been able or willing to set a reliable yardstick against which, the need for both procedural and judicial protection of third parties can be measured'.[73]

i) Applications to be Heard

Firstly in turning to the complainant, the Regulation provides that they must receive a non-confidential version of the statement of objections and a date by which they can

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[68] Article 9 procedure a.k.a the *AKZO* procedure.

[69] See Case T-44/00 *Mannesmannröhren-Werken AG* [2004] ECR II-2223, para 65.

[70] Ibid.

[71] They may take place shortly after the opening of proceedings; still during the investigative phase, after replies to SO, after the oral hearing, or pursuant to commitment proceedings. See para 64.

[72] See Nehl, op cit, fn 4, p 104. Previously 'the principle of care' was a stop gap for the shortcomings in the administrative process associated with other principles such as *audi alteram partem* in the degree of procedural protection offered to complainants.

[73] Nehl, op cit, fn 4, p 95.

make their views known in writing.[74] This correctly acknowledges that the interests of a complainant, such as a close competitor, may equally be as affected by the outcome of proceedings as the undertaking under investigation (who is potentially guilty of having infringed competition rules) and thus they deserve a right to effectively participate in the proceedings.[75] In practice, complainants are admitted to the proceedings by DG Competition on the basis of a formal complaint pursuant to Art 5 of Regulation 773/2004. The importance of defining these participatory rights is vital both for the protection of individual rights and for legal certainty in proceedings. It is also conducive to ensuring fairness and objectivity with respect to the Commissions wide discretion concerning; (1) who has the right to be heard and (2) as to which form the hearing will take.

The Hearing Officer responds to these needs, as he is responsible for admitting natural or legal persons with a 'sufficient interest' to proceedings before the Commission.[76] There is however no automatic right to be heard and applications for admission must be reasoned and must clearly explain the applicant's interest in the outcome of the proceedings.[77] In assessing a request for third party status, the Hearing Officer will take into consideration the contribution the party has made or is likely to make to establish 'the truth and relevance of the facts and circumstances' pertinent to the proceedings, as opposed to an exclusively private interest, or which would normally not be considered as 'sufficient'.[78] The HO may request further information from the party to this effect.

The Guidance further sets out other elements that will be considered; such as, the object of the association, whether the case raises questions of principle likely to affect the association and whether its mission is sufficiently closely connected to the subject matter of the case.[79] This is commendable as it recognises that a third party association may be affected by the proceedings and indeed deserve the right to be heard. However, the case-team retains considerable influence over participation applications as the

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[74] Art 27 (1), Regulation No 1/2003 – 'complainants shall be associated closely with the proceedings', para 17 & 18 of Guidance on Hearing Officer.

[75] Case 5/85 *AKZO Chemie* [1986] ECR 2585; A Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing, 2008, p 40 citing CS Kerse and N Khan, *EC Antitrust Procedure* (5th edn, 2005). This represents a fair balance between the need to ensure a 'meaningful participation' and 'the legitimate interests of the investigated parties' insofar as it still allows them to make their views known.

[76] Regulation 1/2003, Article 27 (3): 'If the Commission considers it necessary' compared to the Guidance (para 32) and its *positive* wording – 'has the responsibility to'. This contrasts with what Nehl regards as the 'unhelpful' and 'purely negative definition constantly repeated by the courts, according to which third parties do not enjoy the same degree of procedural protection as applicants or target parties', op cit, fn 4, p 97.

[77] See paras 32 & 33 of the Guidance. Note applications will be accepted throughout the administrative proceedings.

[78] 'Sufficient interest' i.e. 'an economic or legal interest which is or may be detrimentally affected by the infringement of the Commission's decision', T-528/93 *Metropole*, [1996] ECR II-649, para 61.

[79] Guidance para 34.

Hearing Officer will only decide on applications after having requested comments from DG Competition.[80]

The Hearing Officer's final report in the *De Beers*[81] competition case is a good example of how the rules can succeed in upholding the right to be heard. Here Alorosa, a third party to the proceedings, was exceptionally allowed to be heard on the basis that given its former plans to merge with the De Beers, it was 'directly and individually' affected by the commitments De Beers had offered to the Commission.[82]

Furthermore, the upside of protecting the rights of third parties may have significance for the outcome of the final decision. This is especially so in the context of cartels where the Commission has applied the Leniency Notice, as the parties who submit information can greatly impact on the condemnation of other cartel members. This aspect of the Best Practice Guidelines has been disappointing as third parties are still not informed of the substance of a leniency application filed by another party until the SO is issued.

ii) Forms of Participation for Third Parties

The Commission has considerable discretion as to the manner by which it facilitates third party rights so long as it respects the principle of good administration.[83] Normally third parties have the right to information in writing of the nature of the subject matter and to receive a date before which they may submit their views. Third party rights are significantly lesser than those of the target undertakings or complainants. Although they have the right to be informed of the 'nature and subject matter of the proceedings', they have no right to receive even a non-confidential copy of the SO.[84] Third parties may request an oral hearing but their rights cannot be exercised in a manner which would conflict with the rights of the defendant undertaking to be heard.[85] Presumably this is another manifestation of the Commission's attempt to

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80 Guidance para 35.

81 Opinion of Advocate General Kokott delivered on 17 September 2009 in Case C-441/07 P *Alrosa/De Beers*, judgment of 29 June 2010.

82 See also T-528/93 *Metropole Television and others*, [1996] ECR II-649, recital 1 of summary.

83 Nehl, op cit, fn 4, p 141, adds that the Commission's wide discretion is counterbalanced by the procedural device of the concept of care. But see the peculiarity regarding para 8 of the 2010 Guidance on Hearing Officers as it curiously states that 'the Hearing Officer does not ensure the principle of "sound" administration' and defers to the Commissions Code of Good Behaviour (p 5). Despite this, where a party to the proceedings believes this 'principle' is not being respected (e.g. submissions not taken into account or lack of opportunity to be heard in an effective manner due to a tight deadline/insufficient access to the file) then the Hearing Officer is the first port of call for the enforcement of this perceived lack of good administration. Moreover, the Hearing Officer's website authoritatively sets Article 41 - the right to good administration - as the guiding principle of his whole mission.

84 See Case T-17/*93 Matra Hachette SA* [1994] ECR 595, paras 16-18, HO Guidance paras 16-18.

85 Ibid, e.g. their presence at the oral hearing may mean the defendant undertaking cannot not express its views effectively due to confidentiality concerns. One possible solution is to allow third parties to submit written observations but not attend the oral hearing. See also Jellema, 'The redheaded stepchild of Community competition law: the third party and its right to be heard in competition proceedings', (2002) 20 Boston UILJ 211, p 272.

ensure fairness in the procedure by limiting opportunism, for example, from undertakings who try to take advantage of participation in order to uncover the commercial policies of their competitors. Giannakopoulos suggests that opening the proceedings to all and sundry would lead to numerous applications being heard which would then spur intense allegations regarding the confidentiality of the SO and its responses, leading to 'protraction and delay of the procedure'.[86]

iii) Obstacles and Further Challenges for Third Parties

The concern for efficiency must always be balanced with respect to the rights of defence as the Courts have repeatedly emphasised: observance of the rights of defence is a fundamental principle of Union law.[87] The conflict is exemplified by the ruling in the *Lisrestal* case.[88] Here the ECJ upheld the judgment of the CFI and rejected the Commission's pleas in holding that practical grounds are not sufficient to justify the infringement of a fundamental principle such as the observance of the rights of defence. The position was subsequently strengthened in *Air Inter* where the Court restated that the right to a fair hearing should not be weakened as a result of a legislative gap or where legislation exists but fails to take proper account of the principle.[89]

Moreover, there is a significant procedural obstacle for a third party who is denied a right to be heard to challenge this decision. The party must be able to show that in not hearing the third party the Commission 'unduly restricted the inquiry'.[90] The Guidance has chosen to phrase this more positively in stating that the Hearing Officer's decisions must have due regard to 'the interest in efficient proceedings'.[91]

Andreangeli submits that 'the rather limited possibility to access the oral hearing constitutes a factor of some concern' as the requirement to show that an outright denial to join proceedings has 'unduly restricted' the investigation is a 'rather high threshold' which can 'discourage third parties from exercising their hearing rights'.[92] Certainly the

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[86] Giannakopoulos, op cit, fn 2.

[87] Opinion of AG Bot in *Bollore*, op cit, fn 49, para 88; Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, para 68; in particular the right to a fair hearing in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries* and *Nippon Steel v Commission* [2007] ECR I-729, paragraph 151; also citing, Case C-44/06 *Gerlach* [2007] ECR I-2071, para 38; Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria v Commission* [2007] ECR I-7141, para 36.

[88] Case C-32/95P *Commission v Lisrestal* [1996] ECR I-5373 dealing with the administration of the European Social Fund and the Commission's refusal to directly consult individuals due to an 'excessive administrative burden' paras 35-37; Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, recital 32; Giannakopolous, op cit, fn 2, p 408.

[89] See also *Air Inter*, op cit, fn 10, and Giannakopolous, op cit, fn 2, p 408.

[90] A Andreangeli, op cit, fn 75, p 41.

[91] BP Guidance, para 34.

[92] Andreangeli, op cit, fn 75, p 41; see also Case 209-215 & 218/78 *Heintz van Landewyk v Commission* (FEDETAB) [1980] ECR 3125.

admission of third parties to the procedure, especially concerning the oral procedure, can help to clarify the facts and issues and thus give a better overall view[93] but it can also cause inefficiency and possibly lead to long and protracted procedures. However, it is submitted that the lack of cases in point[94] suggests that in practice third party rights are not 'unduly restricted' especially given the wide-ranging factors that the HO will consider for each application to be heard.[95]

The Oral Hearing

One of the primary ways to ensure fairness in proceedings liable to adversely affect a person is to abide by the old adage that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[96] Therefore a real opportunity for an accused undertaking to clarify, elaborate and emphasize its arguments before a neutral party who then decides as to guilt or innocence on the basis of the facts and evidence before it, would go a long way towards realising effective justice in competition law. The article will now consider to what extent the oral hearing in the 'administrative sphere' can succeed in fulfilling these objectives.

Article 12 of the Implementing Regulation 773/20047 provides that the Commission shall give the parties to whom it has addressed a SO the opportunity to develop their arguments at an oral hearing which is organised and conducted by the Hearing Officer.[97] He is responsible for ensuring its objectivity and that due account is taken of all the relevant facts, whether favourable or unfavourable to the parties, including the factual elements related to the gravity of any infringement. He then draws up an interim report on the extent to which the right to be heard has been respected in the whole of the proceedings and this is submitted to the Director General of Competition and the Competition Commissioner.[98] The most notable benefits of a hearing are summed up by the current Hearing Officer[99] where he concludes that the hearing would give:

> 'the parties a chance to react to any allegations by other parties on the spot, to present their cases to a wider audience … and to raise issues in the presence of many of those who are consulted before a final decision is reached'.

John Temple Lang, a former Hearing Officer, opines that the oral hearing has in recent years assumed more importance as companies take advantage of the fact that Member

93 No 18064/91, *Ortenberg v Austria*, [1995] 19 EHRR 524, para.26

94 Despite the fact that the third party has the right to challenge the Commission decision refusing to allow it to participate in the proceedings before the General Court.

95 See para 34 Guidance on Hearing Officers; Article 6 Commission Decision of 2001, op cit, fn 29.

96 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 per Hewart LCJ.

97 Note for both the target and third parties, the right to an oral hearing is not automatic and must be requested. See Article 5, Commission Decision of 2001, op cit, fn 29.

98 Article 13, ibid.

99 Final report of the Hearing Officer in Case COMP/37.766 - *Dutch Beer market* OJ 2009, C133/6.

State representatives on the Advisory Committee are present and use this as a lobbying platform to try to influence them.[100]

In the *CD-Contact Data GmbH* case[101] the applicant considered that its right to an oral hearing was 'particularly important'. It submitted that because there was no hearing, the Commission acted in breach of the principle of sound administration and the rights of the defence by exercising 'undue influence' on it to waive its right to a hearing. The Court was ready to consider the importance of the hearing as otherwise the applicant would be deprived of any opportunity to submit its observations during a formal hearing with third parties present but, on the facts it was unsuccessful in proving such undue influence. Similarly in *CISAC*, concerning an 'authors collecting society' with 27 members subject to competition proceedings, the importance of the oral hearing was implicit in the Hearing Officer's report. Following the oral hearing, the Hearing Officer required a new 'Letter of Facts' to be issued to substantiate the SO and for a new round of access to documents and submissions to be opened in favour of *CISAC*. As a result of this hearing, he reported that the Commission actually decided to drop the conclusions in respect of *CISAC*.[102] However, it appears that this case is more of an exception as the majority of the Hearing Officer's reports do not attest significant flaws in the Commission's procedures.[103] A final possible importance of the Hearing Officer's role is that failure to address him in a dispute, for example, in 'access to file' issues, can later be used against a party.[104]

At this point it is worth considering the Best Practice Guidelines and their initiatives with respect to allowing the undertakings to express themselves orally. Firstly the State-of-Play meetings provide an informal setting at the Commission's premises,[105] where the parties concerned have 'ample opportunity for open and frank discussions and to make their points of view known throughout the procedure'. They can be instigated upon the request of the parties but unlike oral hearings, can also result from the initiative of DG Competition. One of the advantages of this novelty is that it gives the undertakings an extra opportunity to clarify information and to influence the case team

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[100] See Giannakopoulos, op cit, fn 2, p 185. See also Michael Albers, Karen Williams 'Oral Hearings - Neither a Trial nor a State of Play Meeting', Mar 16, 2010, at www.competitionpolicyinternational.com, who note, 'Oral hearings are requested in around 75 percent of all cases for which a statement of objections (SO) has been issued'.

[101] Case T 18/03 *CD-Contact Data GmbH v Commission*, [2009] ECR II-1021, para 88.

[102] Case COMP/C-2/38.698, OJ 2008, C323/10. Presumably because the probative value of their evidence was insufficient to meet these additional procedural requirements.

[103] See the website at http://ec.europa.eu/competition/hearing_officers/reports.html.

[104] See Case T-44/00 *Mannesmanröhren-Werken AG* [2004] ECR II-2223; See also *AC Treuhund* [2008] ECR II-1501, para 51, where the Court's decision relied on the minutes of the oral hearing which revealed the applicant had actually admitted that the lack of prior information from the Commission would not have influenced its final decision.

[105] Or alternatively, if appropriate, by telephone or videoconference. See Best Practice Guidelines, paras 54-56

in their decision, if indeed the promise that Senior DG Competition management will chair the meeting is kept.[106]

The Guidelines expressly mention that the parties subject to Commission proceedings have the opportunity to discuss the case either with the Director-General of DG Competition[107] or, when appropriate, with the Commissioner responsible for Competition.[108] However this seems to be more a reflection of practice rather than an enforceable right for the undertakings. The Best Practice guidelines do seem to recognise the importance of the oral hearing in the overall scheme of fair enforcement. They state:

> 'In view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management (Director/Deputy DG*)* in oral hearings, together with the case team of Commission officials responsible for the investigation'.[109]

On one hand, it seems that the Best Practice initiatives go some way towards remedying the current deficit whereby there is an absence at any point in the procedure of a hearing before the person who decides the case. They help to counter the fact that the Hearing Officer has in practice little input into matters relating to the substance of the case; or, at least, little visible input[110] as his interim views are not available to the parties due to their classification as internal reports. Despite the fact that the Hearing Officer's final report is made available to the parties and is now published on its website,[111] in the *Hoechst Gmbh* case the Court maintained that:

> 'it should be noted at the outset that the hearing officer's report constitutes a purely internal Commission document, which is not intended to supplement or correct the undertakings' arguments and which therefore does not constitute a decisive factor which the Community judicature must take into account when exercising its power of review'.[112]

This reflects the fact that the Hearing Officer's role, despite being 'independent', is still merely a component of the Commission's decision making process. Undoubtedly he contributes to the objectiveness and fairness of the proceedings but, it is the case-team and then ultimately the entire College of Commissioners (27 political representatives)

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[106] See para 56.

[107] Or the Deputy Director General. See para 64.

[108] See para 64.

[109] See para 94.

[110] Despite the fact that the HO must be kept informed of all developments in the case and that he may also make further observations on any matter pertaining to the procedure or substance of the case.

[111] Commission Decision of 2001, op cit, fn 29, Article 16.

[112] See Case T-161/05 *Hoechst GmbH v Commission of the European Communities*, [2009] not yet reported, (CFI Sept. 30, 2009), para 176; Case T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, para 375.

who are responsible for deciding whether to adopt the draft decision relating to the infringement.

Finally, despite the Best Practices and the Hearing Officers efforts to renew objectiveness and fairness in the proceedings; the guidelines are no substitute for a broader and more fundamental reform of Regulation 1/2003, which remains necessary to ensure both procedural fairness and possibly compliance with the ECHR.[113]

Deficiencies of the Oral Hearing

Ultimately from a party's point of view, the most it can hope for (or deserves) is to properly be able to present its arguments to the Commission and for them to be adequately taken into account. However the nature of the oral hearing and indeed the procedure as a whole, has led to critics identifying some serious and inherent problems that may violate the right to a fair hearing as protected under Article 6 ECHR.[114]

The first of these defects is that there is no hearing on the full facts, with the full guarantees of a criminal trial, before the person who will ultimately decide the case. The second related flaw to be analysed is more subtle, but nonetheless powerful. It relates to a perceived lack of independent and impartial decision making leading to the infringement decision. As a result of the fact that the same case team both investigates and draws up the draft infringement decision there is a certain perception that the whole proceedings may be subject to a degree of prosecutorial bias. Wils submits that this is due to psychological factors associated with the fact that a case can sometimes take years to complete so that a Commission official who actively pursues an investigation for the duration may find it hard to effectively take contradicting evidence into account. This reflects the Commission's investigative structure itself and the huge investment of resources once the investigation has been opened.[115] Thus parties are often frustrated by the perceived unfairness of the intellectual process of reaching a conclusion. The last problem concerns the lack of any possibility for the undertakings to cross-examine the evidence submitted against them or to hold a public hearing which will be considered here in due course.

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[113] See for instance ICC Commission on Competition, 'Due process in EU antitrust proceedings', Document No. 225/667 – 8 March 2010; Ulrich Soltész, 'What (Not) to Expect From the Oral Hearing', The CPI Antitrust Journal March 2010 (1) and Modrall &Patel, 'Oral Hearings and the Best Practices Guidelines', Mar 16, 2010 at www.competitionpolicyinternational.com.

[114] Waelbroek and Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? - The Impact of the ECHR on EC Antitrust Procedures', (1994) 14 YEL pp 111-142.

[115] Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function' (2004) 27 World Competition: Law and Economic Review 202.

PART III. THE IMPACT OF THE ECHR ON EU COMPETITION LAW

Reluctance to apply ECHR case law – a recent softening in judicial attitudes?

i) No jurisdiction to Apply ECHR

Traditionally both the EU Courts and the Commission have typically held that EU competition law proceedings are not directly subject to the ECHR and secondly, that the proceedings are not criminal in nature and thus undeserving of the full protection of Article 6 ECHR guarantees.[116] In relation to this first contention, the usual objections include a lack of jurisdiction to apply the ECHR supported by the premise that 'the Commission is not a tribunal' within the meaning of Article 6(1) ECHR. In the *Mannesmannröhren-Werke AG v Commission* case the Court held:

> 'It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law.'[117]

Despite the General Court having recently restated this position in *AC Treuhund*, it also showed a greater deference to the possibility of an ECHR influence. Hence the lack of 'jurisdiction' claim was immediately compensated with a recognition that in situations where 'penalties, especially fines or penalty payments, may be imposed' that the rights of the defence are 'fundamental rights forming an integral part of the general principles of law',[118] whose observance the Union judicature ensures; the Court citing the *Aalborg Portland*[119] and *Groupe Danone*[120] cases to this effect. Moreover in reiterating the 'special significance' of the ECHR and then noting the interpretative obligation in Article 52(3) of the Charter (as discussed in Part I) it seems the Court showed a willingness to apply the ECHR but fell foul of the jurisdictional limitations.[121]

It is submitted that now, given that the binding legal force of the Charter has since been realised by the Treaty of Lisbon - this interpretative obligation is unavoidable. Notably where the EU rights correlate to those under the ECHR, such as the presumption of innocence under Article 6(2) ECHR, the Court has showed a greater

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[116] Article 6 ECHR.

[117] Case T-112/98, [2001] ECR II-729 paras 59, 60; see also Case T-374/94, *Mayr-Melnhof v Commission* [1998] ECR II-1751, para 311.

[118] Case T-99/04 *AC Treuhund*, [2008] ECR II-1501, para 46.

[119] *Aalborg Portland*, op cit, fn 63, para 23.

[120] Case C-3/06P, [2007] ECR I-1331, para 68.

[121] *AC Treuhund*, op cit, fn 17, para 45; note also the careful wording in Case 347/87 *Orkem v Commission* [1989] ECR 3301, at para 30 – '[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself'.

willingness to take the Convention into account.[122] Thus the applicant in *AC Treuhund* may well have found the scope of his rights interpreted more restrictively than a future Court may decide in a similar scenario.

ii) Commission is not a 'Tribunal'

In addition, the argument of non-applicability was bolstered by the assertion that the Commission is not a tribunal. The General Court in *Shell*[123] held that the fact that certain officials acted in administrative proceedings as investigators and 'rapporteurs' did not make it unlawful. Similarly in the *Bolloré* case the Court considered the application of Article 6(3) ECHR to competition proceedings where it restated that 'it is clear from settled case-law that the Commission cannot be described as a "tribunal" within the meaning of Article 6 of the ECHR'.[124] This position was later confirmed in *Cimenteries*.[125]

iii) Administrative versus Criminal

As regards the second contention, this brings into question the classification of competition enforcement as 'administrative' despite the fact that it exhibits clearly punitive and deterrent characteristics. This criminalisation of competition law sanctions has arguably become evident in recent years in light of the huge fines the Commission may legally impose, in some cases surpassing the billion Euro mark.[126] Despite the Opinions of the Advocate Generals that the fines are 'sanctionative'[127] and 'do in fact have a criminal law character',[128] the Court has not yet renounced its views on the non-criminal nature of the fines. Most recently the GC repeated its careful literal interpretation in *Compagnie Maritime Belge*:[129]

> 'It follows from the wording of Article 19(4) of Regulation No 4056/86 (now Article 23 (5) of Regulation 1/2003) that even the fines imposed under that

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[122] See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 178, Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, para 149.

[123] Case T-11/89 *Shellv Commission*, [1992] ECR II-757 para 39, also Cases 209-215 & 218/78 *Heintz van Landewyk v Commission (FEDETAB)* [1980] ECR 3125, para 79-81; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others v Commission* [1983] ECR 1825 (Pioneer) para 7-9.

[124] *Bolloré,* op cit, fn 49, para 86.

[125] *Cimenteries*, op cit, fn 57.

[126] See the fine of EUR 1.06 billion imposed on Intel for Article 102 TFEU infringement (COMP/C-3 /37.990 - *Intel*)

[127] See Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Case 217/00 *Buzzi Unicem Spa*, op cit, fn 63, para 29.

[128] See Opinion of Advocate General Vesterdorf in Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, para I.3

[129] *Compagnie Maritime Belge,* op cit, fn 49, para 65; Case T-83/91 *Tetra Pak v Commission* [1994] ECR II 755, para 235.

> provision are not of a criminal law nature.[130] Furthermore, it has been held that the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of the criminal law were accepted'.[131]

However it is respectfully submitted that arguments in favour of procedural efficiency need to be more openly balanced in light of human rights obligations. The Court has itself held in the past in *Lisrestal*[132] that administrative or practical efficiency cannot justify the infringement of a fundamental principle such as the observance of the rights of defence.[133] Indeed, as Advocate General Bot highlighted, observing such rights is all the more critical 'in what might be described as quasi-criminal proceedings and where the Commission enjoys a very broad discretion and judicial review is restricted'.[134]

In order to mitigate this conflict the Courts have recourse to the general principles of law with respect to the right to a fair hearing and apply standards that it considers to be fair in the circumstances. In the *Bolloré* judgment the GC stated that the Commission is not under an obligation to call witnesses to give evidence at the hearing, either for or against the company if it does not see it as necessary, but nor is it entitled to call witnesses to testify against the undertaking concerned without their agreement.[135] In looking to the facts at hand the GC considered it important that the applicant could not show that it had requested the Commission to provide details of the names of the third parties who submitted evidence or that it had asked for them to be questioned at the hearing and it held that Regulation No 17 had not been violated.[136]

This methodology of using the general principles of law to deduce an overall appreciation of what is fair in the circumstances is a reasonable approach and is to be commended. However, objectively speaking, that consideration of fairness is obviously limited by the pigeon holing of the proceedings into an 'administrative' classification and thereby excluding the full application of Article 6(2) or Article 6(3) ECHR.[137]

It is also interesting for the purposes of this article to note the Commission's own arguments as to the applicability of Article 6(3) in the *AC Treuhund* case. It is submitted that failure to respect the guarantees under Article 6(3)(a) ECHR at the investigation stage must seriously compromise the fair nature of the proceedings; when account is

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[130] See para 86 and the cases cited - Joined Cases 209, 215 & 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, para 81, and Joined Cases 100-103/80 *Pioneer*, op cit, fn 123, para 7.

[131] See to that effect, Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, para 97.

[132] Op cit, fn 88.

[133] However see the contrasting Opinion of AG Bot at para 84 in the subsequent appeal to the ECJ, see discussion at fn 24, 53, 87, where giving precedence to the efficiency of the administrative procedure, caused him to have 'certain reservations'.

[134] Op cit, fn 24.

[135] *Bolloré*, op cit, fn 49 para 87, citing Case T-9/99 *HFB and Others v Commission* [2002] ECR II 1487, para 392.

[136] Para 88.

[137] See generally Lenaerts & Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 CML Rev 531, p 556.

taken of the implementation of the procedure as a whole.[138] Accordingly the questions that need answering at this juncture are to what extent is a higher level of procedural guarantee required to ensure this view of objective fairness? Indeed, if competition proceedings do fall under the criminal classification, to what extent do the protections need to be increased in order to match those of the Convention?

Determination of a 'criminal charge' in the sense of Article 6 ECHR

In order to guarantee optimal procedural rights to individuals, the ECtHR has not limited itself to a formalistic definition of 'criminal charge' but has developed an autonomous interpretation of the notion of a 'criminal charge'.[139] The criteria established in the seminal *Engel*[140]case and later expanded in the *Bendenoun* judgment,[141] have underpinned a gradual broadening of the criminal head to cases not strictly belonging to criminal law in the traditional sense. These include administrative penalties,[142] customs law,[143] penalties imposed by a commercial court and tax surcharges.[144] Indeed in *Société Stenuit v France*,[145] the now defunct European Commission of Human Rights concluded that the French competition law proceedings in light of the nature of the offence possessed 'a criminal aspect … for the purposes of the Convention'.

Thus, in applying the criteria established in the above mentioned jurisprudence, in order to determine the substantive nature of a 'charge', the ECtHR will examine; the classification in domestic law, the nature of the offence and the nature and severity of the penalty.[146] It will also consider whether the rules have a specific or general sense[147] and whether they are punitive or deterrent in nature. The latter criteria seem to have particular relevance and since the *Dubus* case[148] has recently confirmed, the level of the sanction itself will also be determinative. The *Dubus* judgment concerned a French financial company subject to procedures of the national Banking Commission. The applicant challenged the fact that the same people were both investigating his 'misconduct' and then deciding as to his guilt. The ECtHR held that as the Banking Commission had imposed a sanction with a 'penal coloration', that it had in fact

[138] *AC Treuhund*, op cit, fn 17, para 40, the Commission invokes ECtHR caselaw to this effect in *Imbroscia v Switzerland* Eur. Court H. R. judgment of 24 November 1993, Series A no. 275, § 36.

[139] *Le Compte, Van Leuven and de Meyere v Belgium*, ser A No 43, [1982] 4 EHRR 1, para 45.

[140] Judgment of the ECtHR of 8 June 1976, *Engel and others v the Netherlands*.

[141] Judgment of the ECtHR of 24 February 1994, *Bendenoun v France*, A 284.

[142] *Öztürk v Germany* judgment of the ECtHR of 21 February 1984 - Case 8544/79.

[143] *Salabiaku v France*, judgment of the ECtHR of 7 October 1988, Series A no 141-A.

[144] *Guisset v. France*, no. 33933/96, ECHR 2000-IX.

[145] Judgment of the ECtHR of 27 February 1992, Series A no. 232-A.

[146] Note the criteria are neither cumulative nor equal, the first being less indicative.

[147] *Bendenoun*, para 46.

[148] Judgement of the ECtHR of 11 June 2009, *Dubus SA v France, Application* no. (5242/04).

fulfilled the same function as a 'tribunal' within the meaning of Article 6 ECHR[149] and therefore was necessarily subject to the same obligations of impartiality and independence. In light of this qualification, the Court held that the essence of Article 6 is respected if the defendant can establish the existence of a 'separation organique' between the different functions which would ensure a fair hearing without 'un prejugement'; that is prejudgment or bias.[150]

However, based on the above judgements, the ECtHR carved an exception for certain procedures in order to guarantee the effectiveness of the administration. It drew a distinction between the hard core of criminal law and other minor offences[151] holding that the criminal guarantees will not necessarily apply with their full stringency in some cases. For example, in *Bendenoun* which related to the imposition of tax surcharges, it was found that imposing criminal penalties in the first instance by an administrative or non-judicial body was compatible with Article 6(1), so long as there was a subsequent possibility for judicial review by a proper court.[152] As the *Engel*[153] judgement stated:

> 'the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, paragraph 1'.

Therefore the EU competition enforcement mechanism, and the limited option to bring judicial review proceedings before the GC, must be assessed in light of the ECtHR judgments and its established criteria.

i) Significance of the two tier administrative plus judicial system

In EU competition law the traditional view[154] is that the two phase judicial system satisfies the protections of Article 6 ECHR. It sees the GC as a trial court capable of curing any injustices of the administrative procedure by annulling in whole or in part the contested Commission decision. However, despite recent trends of more in-depth review in cases such as *Schneider Electric*,[155] critics often deplore the less than full 'review

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[149] *Dubus* para 38 - « La Cour est d'avis que la Commission bancaire, lorsqu'elle a infligé à la requérante la sanction du blâme, devait être regardée comme un « tribunal » au sens de l'article 6 § 1 de la Convention (voir en ce sens l'arrêt Sramek c. Autriche, 22 octobre 1984, § 36, série A no 84, où la sanction dans les circonstances de l'espèce, avait une « coloration pénale ». Ainsi, la Commission bancaire a statué en tant que « tribunal » et sur le « bien-fondé d'une accusation en matière pénale au sens de l'article 6 § 1 de la Convention. »

[150] See the arguments submitted by the French government in *Dubus*.

[151] *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, para 33 and 35.

[152] *Bendenoun* op cit, fn 141, para 46; *Janosevic v Sweden* (No. 34619/97, *ECHR* 2002-VII), para 81.

[153] *Engel and others v the Netherlands*, op cit, fn 140.

[154] See notes from the Fordham Competition Law Institute's, 'Annual Conference on International Antitrust Law and Policy', 2001 in Lenaerts and Vanhame, op cit, fn 137.

[155] Case T-351/03*, Schneider Electric 3A v. Commission* [2007] ECR II-2237, para 183.

on the merits' available to the parties. Although it has full jurisdiction to review fines, the GC does not reassess all the factual elements of the case and rather limits its review to determining whether the Commissions analysis 'was vitiated by a manifest error of assessment or a misuse of powers'.[156]

This approach may well be justified by the fact that competition decisions involve complex economic appraisals.[157] The rationale is that the Treaty attributed the Commission this enforcement power under Articles 101 & 102 and thus charged it with a duty to implement its 'overall policy objectives'. Moreover as Joshua submits, it reflects the viewpoint that the administration 'must not only have the authority to administer in the more traditional sense, but also to decide disputes arising out of its administration'. Indeed he deems that the 'effective administration of schemes of regulation presupposes a concentration of functions wholly foreign to the judicial process'.[158] However, the penultimate question pertains to whether this concentration of important powers in a single body is such as to render a lower standard of justice or fairness than would otherwise apply in judicial proceedings?

Application of Article 6 ECHR to EU Competition proceedings imposing fines

i) Applying the 'criminal charge' criteria to EU Competition procedures

Taking into account the ECtHR substantive approach to the nature of proceedings, it is clear that the provision in Art 23(5) of Regulation 1/2003, which expressly states that the fines are not of a criminal law nature, is not determinative. The extent to which this is true is evident if one takes an analytical approach and applies the Engel criteria (as restated in *Dubus*) to EU competition law proceedings. Firstly, competition rules are measures of general application as Articles 101 and 102 TFEU apply to all undertakings. Secondly, the rules attach penalties for non-compliance and they certainly aim to have a deterrent effect. Moreover, by taking a brief look at the gravity of the penalties in the form of fines one could certainly suggest that the fines are high enough to be classified as criminal.

ii) Consequences of falling within the notion of a 'criminal charge'

The crucial consequence is that greater standards of procedural guarantees are necessitated by 'criminal charges' as opposed to mere administrative sanctions. This boils down to the reality that as the stakes get higher, so too does the necessity to ensure fairness in the way a decision is arrived at - namely by guaranteeing the right to be heard. As Marshall correctly submits, the individual's interest in having an opportunity to convince the decision maker of his position is part of the 'instrumental

[156] Case 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para 62, Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.

[157] Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, para 34.

[158] Joshua, op cit, fn 16, p 39.

conception of due process'.[159] Examination of this 'instrumental value' highlights that it cannot be furthered without the participation of an adjudicator who is truly independent from the government or administrator involved in the case.

The argument accepting that an accumulation of functions is in compliance with the ECHR where the matter concerns certain administrative, minor or disciplinary offences,[160] cannot be accepted with respect to competition law. Its procedures are essentially criminal and they therefore deserve to have an independent and impartial tribunal to 'determine the charge' at first instance after a public hearing on all the facts and legal arguments. According to Forrester,[161] this 'formal legal vice' is easily identified and should the matter ever arrive competently before the ECtHR, 'this element would perhaps be the strongest and most obvious imperfection'.

Another concern relates to the Article 6(3) ECHR guarantees and the fact that neither in the proceedings before the Commission, nor before the EU Courts, do the undertakings have the possibility of examining witnesses. This is particularly significant with regard to statements made in leniency applications as the undertakings charged in such statements do not have the possibility of examining the witnesses who made these potentially incriminating statements. In fact the Leniency Notice creates an incentive to confess as much as possible in order to implicate other undertakings. In addition, neither the Commission nor the EU courts are obliged to hear the witnesses.[162] Therefore, whether the statements are true or false may not be examined at all. This constitutes a serious infringement of Art 6(3)(d) of the ECHR.[163] If the right to cross examine the persons who have submitted evidence against it was granted to the accused undertakings, it would also assist the Commission to assess whether it could indeed rely on the evidence in, for example, a subsequent court procedure.[164] Unfortunately as we have seen, the new Best Practice Guidelines failed to deliver on this point and did not introduce such a right. It is nevertheless submitted that this right should not extend to examining the Commission officials themselves given that they are not witnesses to the facts.[165]

As regards the requirement for the hearing to take place in public (Article 6(3) ECHR), in practice this is of less concern in practice given that parties usually seek protection of their business secrets. However, in order to fully respond to the Article 6 obligations

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[159] See Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process', 95 Yale LJ 455, at p 477.

[160] *Öztürk v Germany*, ECtHR of 21 February 1984, Case 8544/79, para 56; *Kadubec v Slovakia*, ECtHR of 2 September 1998, Case 5/1998/908/1120, para 57.

[161] Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures', (2009) ELRev 841.

[162] See comments on *Bolloré* at fn 24 and 49.

[163] *Haas v Germany*, ECtHR Case 73047/01 (November 17, 2005).

[164] See Ulrich Soltész, 'What (Not) to Expect From the Oral Hearing', The CPI Antitrust Journal March 2010 (1) p 5.

[165] Joshua, op cit, fn 16, p 65.

and to guarantee fairness and transparency of debate it is submitted that it should at least be an available option. Moreover in the *Jussila* case the ECtHR held that 'an oral and public hearing constitutes a fundamental principle enshrined in Article 6(1)'.[166]

Notably in the *Microsoft* case, the request for the oral hearing to be held in public was rejected. The HO maintained that he could not depart from a tradition that was in operation for more than forty years nor did he consider it would be in the interests of the parties or the 'serenity' of the case. In the author's opinion, similarly to the arguments based on procedural efficiency, these are not sufficient justifications where fundamental rights are concerned. Consideration of higher principles than tradition or serenity is required, as is a consideration of human rights issues in competition law not as 'a burden but rather as part of a compliance strategy'.[167]

Currently, the possibility of a negative ruling from the ECtHR is not entirely excluded should an appropriate case arise. In essence it would mean that all the Member States of the EU would be held jointly responsible for the failures of the EU institutions insofar as their transfer of competences to the EU (in the area of competition law enforcement) has resulted in a failure to fulfil their 'positive obligation' to uphold the Convention under Article 1 ECHR. Overall, if the proceedings were to be classified as criminal, it would imply greater obligations at 'first instance' to ensure the effectiveness of the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law as required under Article 6 ECHR.

RECOMMENDATIONS

Although the Commission's good motives in seeking to implement competition policies for the common good are not questioned, it is submitted that its procedures lack the requisite qualities to appropriately fulfil its mandate in a fair and objective manner. In order to avoid the complete overhaul of institutional reform which could require Treaty amendment, the Commission could temporarily afford more powers to the Hearing Officer. This could be done by allowing the HO earlier intervention in the investigation process, by reinforcing his right to submit comments on the substance of the case and by giving greater weight to his comments where they are invoked in a subsequent judicial procedure. With regards to the protection of third parties, which has substantially improved, the Hearing Officer should be able to determine himself, on the basis of a third party application, whether the third party can be admitted without first having to consult with the Director of the case study. All of the above suggestions are naturally linked to further increasing the impartiality of his position vis-à-vis the case team and the other Commission personnel.

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[166] *Jussila v Finland* (73053/01) [2009] S.T.C. 29 (ECHR (Grand Chamber), para 40.

[167] Thomas Perroud, 'The impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom', http://www.icc.qmul.ac.uk/GAR/GAR2008/Perroud.pdf.

Some more radical reforms include creating a Competition Court with full 'jurisdiction on the merits'[168] however this would undeniably require Treaty amendment. Alternatively, arguments such as granting the Hearing Officer a role similar to that of an Administrative Court Judge in the United States have often been debated and cast aside. According to the House of Lords Select Committee this is due to concerns to the effect that 'making the Hearing Officer more like a judge would only blur the picture, possibly to the detriment of the effective application of the Union's competition policy'.[169]

That is not to say that the current process could not embrace a more adversarial process which could include a public oral hearing and the possibility to cross examine witnesses.[170] On the one hand, a public hearing would have to be accompanied by the prior preparation of a non-confidential version of each document to be used at the hearing so as not to infringe confidentiality safeguards. On the other hand, given the extensive disclosure requirements that are already in place, this may not prove to be such an additional burden for the parties.

Perhaps this classification or division of evidence suggestion, if considered in light of an interdepartmental reorganisation, could prove crucial to improving the system. For example it could envisage a physical division between the investigative evidence being dealt with by the investigative team from the evidence upon which the decision will be based, the latter being dealt with by another DG. This separation could notably cure or at least offset the current concerns regarding bias. The system could also clarify 'access to file' rights as all the evidence sent to the second DG would be freely available to all parties given its non-confidential nature. This could help to reduce time spent in relation to disputes on the disclosure of information.[171] However this suggestion necessitates a more long term view of what constitutes efficiency/effectiveness as it would, of course, require an initial injection of extra resources, from all sides, in order to implement it.

CONCLUSION

As the first part of this article has suggested, there has been increasing convergence between EU administrative law principles. In this author's view these developments are positive and may help to ensure a greater overall objectiveness and fairness in proceedings, arguably the most important criteria of any process. On the other hand, while EU human rights and the ECHR are often considered as parallel jurisdictions, ultimate convergence is now more likely as a result of the Treaty of Lisbon changes.

[168] Andreangeli, op cit, fn 75, chapter 7, p 225.

[169] House of Lords XIX Select Report on Strengthening the Role of the Hearing Officer 2001.

[170] In 13 EU countries the infringement decisions can only be applied by an organically separate court, e.g. Ireland, England, Finland, Estonia, Malta etc see Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5(1) Euro CJ 22.

[171] For support of this position see CD Ehlermann, 'The European Administration and the Public Administration of Member States with Regard to Competition Law', [1995] ECLR 454, p 456.

The implication is that there is now more scope for interplay between them; creating an opportunity to develop a more coherent set of standards relating to the fundamental right to a fair hearing. In the meantime, there is a strong interpretative obligation on the EU Courts to read the ECHR rights as 'a minimum' in the case of corresponding rights such as Article 41 and Articles 47-49 of the Charter with Article 6 of the ECHR. Thus the imposition of the highest procedural standards of protection is required in EU competition law; not because of any inherent desire to protect the infringers or to lend solidarity to the third parties, but more fundamentally, because it consists of a repressive system of enforcement that is concentrated in a body possessing *à la fois* powers of investigation, prosecution and adjudication.[172] In such situations, the need to guarantee all the elements of procedural fairness becomes paramount as these pertain to the crucial right to a fair hearing. In this light it is submitted that a closer reading of the ECtHR case law such as *Dubus* and *Jussila* when considering competition law enforcement is vital. In so doing, it will be difficult to escape the classification of competition law as anything other than criminal in nature. Moreover, this should not be such a major adjustment as many Member States already provide for criminalisation of certain competition law infringements and others at least have separate courts to impose the penalties.

On a final note, ensuring human rights obligations in an increasingly criminalised area of law may be the most appropriate means of achieving the delicate balance between efficiency and justice and at the same time may provide the necessary impetus for positive change.

[172] See C. Harding, 'Effectiveness of Enforcement and Legal Protection', in *Enforcement of Cartels in EC Competition Law*, EUI-RSCAS/EU Competition, Proceedings 2006, p664

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Antitrust Fines – Seeking Justice

*Abayomi Al-Ameen**

In this paper, I propose that the methodology for assessing fines provided in the 2006 European Commission's fining guidelines should be amended. This is because the methodology is not fair. The grounds for alleging unfairness are as follows: (i) the variable mark-up is arbitrary; (ii) the guidelines fail to treat different violations differently as object and effect-based infringements are assessed through the same methodology; (iii) the methodology itself is not methodical in the sense that it fails to separate the disgorgement/compensation goal from retribution and deterrence. Hence there is a call for fairer guidelines. The fairness that is herein proposed requires that the guidelines be better formalised. This naturally comes with the attendant effect of ensuring legal clarity. It is also likely to contain the Commission's discretion. In addition to these typical advantages, I advocate fair fining guidelines on two grounds. The first reason is that such fair guidelines could aid in attaining optimality. I make this argument by linking fairness to legitimacy and legitimacy to constitutional economics which is then expressed in the light of Pareto. Even if I am wrong on the first ground, my second argument is that the fair guidelines should be applied because justice (as fairness) is a value worth seeking in itself. Aside from its intrinsic value, it does have a distinct benefit of bolstering a 'more economic approach' in antitrust fining policy. Moreover, in this specific context, the advantages of the fair guidelines far outweighs the rather (likely minimal if at all) negative welfare effect.

INTRODUCTION

The imposition of fines remains a key tool to antitrust enforcers in their quest to attain their objectives. Thus, as a result of its importance, the European Commission continues to surpass itself by increasing the amount of antitrust fines at an exponential rate.[1] In principle, these fines are meant to suppress illegal activities and to prevent recidivism.[2] However, antitrust enforcers should not limit their concerns to these goals as they have to be concerned about legal issues as well. Thus, claims that have continuously plagued the Commission's practice relate to justice and fairness concerns.

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* Ph.D. candidate, Swansea University, UK. I thank Professor Jukka Snell and Ms Venessa Eddy for their comments. The usual disclaimer applies.

[1] Increases are acceptable as can be inferred from the case of *Mustique Diffusion Francaise v Commission* [1983] ECR 1825, para 15. Since the mid 1990's the average fine has been on the increase see Iwan Bos and Marten Schinkel, 'On the Scope for the European Commission's 2006 Fining Guidelines under the Legal Fine Maximum' *Amsterdam Center for Law & Economics Working Paper No. 2006-13* pg 2.

[2] See *Zinc Phosphate* Case C-76/06 *P Britannia Alloys v Commission* [2007] ECR 1-4405, para 22; *Graphite electrodes* Case C-289/04 P *Showa Denko v Commission* [2006] ECR 1-5859, para 16. See also Damien Geradin and David Henry, 'The EC Fining Policy for Violation of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgements' *03/05 Global Competition Law Centre Working Paper Series*, College of Europe, pg 1.

While most of such concerns have been on procedural justice[3] and proportionality, I herein focus on form-based justice issues arising from the 2006 guidelines. My claim thus is that the guidelines could be fairer than they presently are, therefore there is a need for 'fair guidelines'.

To substantiate this claim, it is imperative to ascertain the fairness issues arising from the 2006 guidelines and to distinguish the claim herein made from other fairness notions such as proportional justice. The present guidelines are not as fair because, regarding the methodology for ascertaining the basic fine, the limit of the variable mark-up is arbitrary. Also, it fails to treat different violations differently[4] as fines for object and effect-based infringements are computed through the same methodology. Finally, the methodology itself is not methodical in the sense that it fails to separate the disgorgement/compensation goal from retribution and deterrence. The fairness concerns arising from these problems are thus largely formal and, as such, different from proportional justice claims.

Issues on the proportionality of antitrust fines are primary centred on the volume of fine. Thus where fines are very high, genuine questions could be asked.[5] The fairness argument made here however is not directly linked to the proportionality argument because while the latter is a product of the retributive theory of justice[6] the former has no link with either of the retributive, deterrence or efficiency theories. Also, while the proportionality of fines is assessed in the light of the total fine imposed, the fairness or unfairness assessed herein is about the form of the guidelines rather than the fines themselves.

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[3] See e.g. Adrianna Andreangeli, *EU Competition Enforcement and Human Rights* (Cheltenham, Edward Elgar Publishing, 2008). Donald Slater, Sébastien Thomas and Denis Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?', *Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08*, accessible at http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf ('GCLC Working Paper'), also (2009) 5 *European Competition Journal* 97, and A Andreangeli, O Brouwer, D De Feydeau, Ian Forrester, Damien Geradin, Assimakis Komninos, Karl Hofstetter, Yannis Katsoulacos, Christophe Lemaire, Mathew O'Regan, Luis Ortiz Blanco, Donald Slater Sébastien Thomas, David Ulph, Dennis Waelbroeck and Ute Zinsmeister, 'Enforcement by the Commission – The decisional and enforcement structure in antitrust cases and the Commission's fining system', draft report presented at the Fifth Annual Conference of the Global Competition Law Centre, 11-12 June 2009, http://www.coleurope.eu/template.asp?pagename=gclcfifthannual ('GCLC Report'); see also International Chamber of Commerce, 'The fining policy of the European Commission in competition cases', ICC Document No. 225/659 of 2 July 2009. Karl Hofstetter, 'EU Cartel Fining Law and Policies in Urgent Need of Reform' (2009) *2 The Antitrust Chronicle*. Contra Wouter Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention of Human Rights' (2010) *33 World Competition* pgs 5-29.

[4] See joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* [2001] ECR II-3765 para 237.

[5] See John Rawls, 'Two Concepts of Rules' (1955) *64 Philosophical Review* pg 3 at 4-5. This is the more so important considering the provision of Article 49(3) of the Charter of Fundamental Rights of the European Union which requires that the severity of penalty must not be disproportionate to the offence.

[6] See Wouter Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford and Portland, Hart Publishing, 2008) pg 64.

The fair guidelines provide details on how the fines should be computed – there should be the point at which the calculated fine is strictly a question of the impact of the anti-competitive practice. Where there is no such impact it should clearly state the method for assessing fine. It should then show the point at which the Commission exercises its discretion in other to punish and deter present or future violators. This formalism has a great advantage of ensuring clarity while it will also contain the ambit of Commission's discretionary powers.

Aside from the hitherto mentioned advantages, the fairness that emanates from the proposed guidelines has two values. First, fairness boosts legitimacy which could consequently help in achieving optimality. Second, fairness as a virtue in itself has the advantage of encouraging a 'more economic approach' to the fining policy. In general, the proposal herein made does not impinge on the primary goals of fine and does not create significant obstacles to welfare.

In order to expound on my proposal, I divide this paper into five parts. In part 1, I identify some problems in the past and present guidelines then give a brief overview of how the problems could be corrected. In part 2, I substantiate my claim that fairness has the value of enhancing legitimacy while the legitimacy of the fair guidelines could serve as a key towards optimality of fines. In part 3, I establish the value of fairness in itself and also show the benefit of 'a more economic approach' which even though is not related to the notion of fairness, should be welcome as it accords with the Commission's presents effort at promoting economic analysis. In part 4, I give more details on how the fair guidelines are to operate while in part 5, I conclude accordingly.

1. ADVANCING THE FINING GUIDELINES – THE PAST, PRESENT AND FUTURE

So far, the problems of the fining guidelines have been stated clearly. The nature of the recommendation however requires that we are more specific. It is also important to show how the fair guidelines will make the fining regime better. These tasks will be easier once a brief historical account of these related problems are identified.

1.1. The Past

Fines imposed by the Commission in the primordial days of antitrust enforcement were ferociously challenged on grounds of justice.[7] The Commission thus had to review its practice and, as a result, came up with the 1998 guidelines which substantially addressed earlier concerns. The improvements notwithstanding, there were still vivid flaws in the methodology of computing fines and the effect of such fines. For instance, the guidelines was criticised for failing to relate the methodology to economics[8] as neither the individual assessment nor the proxy employed were 'explicitly linked to a

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[7] In the earlier times, arguments were that fines were decided arbitrarily which made it a standard practice for undertakings to challenge the Commission on the fine imposed. Also, there was no precise methodology which rendered the system abysmally unclear.

[8] See Geradin and Henry, above n 2, pp 13-15.

quantitative measure of the effect of the infringement'.[9] In *District Heating Pipes*[10] the court stated that the guidelines operated like a tariff-based system. Commentators were unequivocal about their disapproval and very uncompromising in their complaints. Joshua and Camesasca for instance stated that:

> 'Companies charged with antitrust violations in the EC are kept guessing up until the moment when the Commission issues its final decision, and while it is usually (but not always) easy enough to follow the steps in the Commission's calculation, the crucial initial figure chosen as the starting point for the whole exercise is largely discretionary'.[11]

It has been shown that part of the reasons why the 1998 guidelines was changed was because it did not relate the infringement to the methodology and the starting point was arbitrary.

1.2. The Present

In the implementation of its duty to pursue a general policy and to steer the conduct of undertakings in the light of such policy,[12] the Commission through its 2006 guidelines was of the opinion that its objectives are best achieved where the total fine it imposes is a combination of the basic fine, the necessary multiplier depending on: years of violation; the gravity of the violation and; the need for deterrence.[13] Aside it deterrence drive, the Commission is also interested in ensuring that the guidelines are less arbitrary/discretionary and more methodical and reasoned. It sought to achieve this by providing a two-step methodology for assessing fines. First, the Commission ascertains the basic fine. Second, it may adjust the sum of the basic fine upward or downward.[14]

The basic fine is determined with reference to the value of sales of goods and services.[15] This requires two tasks first of which is to calculates the value of sales to which the infringement directly or indirectly relates[16] while the second task requires that the Commission determines the basic amount of the fine with regard to a proportion of

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[9] Enrico Camilli, 'Optimal Fines in Cartel Cases and the Actual EC Fining Policy' (2006) *29 World Competition* 592-593. Also Ingeborg Simmonsson, *Legitimacy in EU Cartel Control* (Oxford and Portland, Hart Publishing, 2010) pg 296.

[10] Joined Cases C-189/02 P, C-205/02 P to C-208/02 P and C-213/*02 P Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para 225.

[11] See Julian Joshua and Peter Camesasca, 'EC Fining Policy against Cartels after the Lysine Rulings: The Subtle Secrets of X' (2004) *5 Global Competition.*

[12] European Commission's Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) para 4 (hereinafter referred to as '2006 guidelines'). The Commission referred to the case of *P Dansk Rørindustri & ors v Commission* above 10 para 170.

[13] As distinct from the 1998 guidelines which was primarily retributive.

[14] The fairness issue addressed in this paper lies in the assessment of the basic fine thus, the second methodology will not be discussed any further.

[15] 2006 guidelines para 5.

[16] Ibid para 13-18.

the value of sale, depending on the gravity of the infringement,[17] multiplied by the number of years of infringement.

Further on the second task, the proxy for assessing the fine will be set at a level of up to 30 percent of the value of sales.[18] Whether the proxy in a particular case will be at the upper or lower end of the variable mark-up depends on various factors such as: the nature of the infringement; the combined market share of all the undertakings concerned; the geographical scope of the infringement; and whether or not the infringement has been implemented.[19] The sum arrived at here is then to be multiplied by the number of years of violation. Depending on the nature of violation, the sum could, either as a matter of fact[20] or at the discretion of the Commission,[21] be increased by the sum between 15 percent and 25 percent of the value of sales.

Similar to some of the problems identified under the 1998 guidelines, the starting point (the variable mark up) for assessing fines under the 2006 guidelines is rather arbitrary. There is a fundamental absence of reasoned underpinning as the Commission gave no justification (be it theoretical or empirical) for the mark-up. Also, it fails to segment discretion from legal requirement. For instance, if the primary requirement of the variable mark-up is to either disgorge the infringers of their illegal profit or compensate the society for the loss, it is not clear why factors such as the nature of the infringement and whether or not the infringement has been implemented should be considered in determining the proxy in specific cases. Further, the guidelines fail to treat different infringements differently. Under these guidelines, both object-based and effect-based infringements are treated alike when in fact fairness may require that the infringements (even if merely formally)[22] should be treated differently. This is contrary to the decision in *Alloy Surcharge* wherein the General Court stated that:

> 'the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable

[17] This is to be determined on a cases-by-case basis taking into account the relevant factors of the case. Ibid, para 20.

[18] Hereinafter referred to as 'variable mark-up'.

[19] 2006 guidelines above n 12 para 22.

[20] In cartel cases, it is commonly called 'entry fee'.

[21] Application of the gravity mark-up to other infringement other than cartel is at the discretion of the Commission.

[22] Argument could be made that the exact proxy to be applied in any particular case could reflect the different. For instance, one of the factors that the Commission considers in order to ascertain whether the proxy should be at the higher end or lower end of the mark-up is to see if the infringement has been implemented. As convincing as this may sound, the fact that it comes as a discretion rather than a legal requirement could raise fairness concerns in individual cases. Moreover, the Commission clearly disclaims that the guidelines should not be regarded as the basis for an automatic and arithmetical calculation method. The procedure should be formally different even if the Commission is to add so much more for deterrence purpose.

situations are treated differently or different situations are treated in the same way'.[23]

1.3. The Future

It is argued that the aforementioned concerns emanating from the 2006 guidelines could lead to unfairness. Thus, even though these concerns result from an oversight rather than a calculated attempt, the unfairness is still worth correcting. Hence, the fair guidelines of the future could, for instance, entail a three-step methodology whereby the basic fine will be strictly geared towards linking the violation to the methodology.[24] This second step could contain factors that will determine the multiplier for deterrence purpose[25] - this multiplier could be further increased based on the gravity of the infringement.[26] The third step could contain the provisions in the present guidelines regarding the adjustment of basic fine.[27]

The primary task here is centred on the basic fine. In order to correct the problems identified in the 2006 guidelines, the first task is to develop a separate methodology for assessing object and effect-based infringement with particular regards to the basic fine. Then within each methodology, the Commission should attempt to, as practically as possible, link the infringement to the methodology. A brief analysis of how it should work is given below.

1.3.1. Economic Reasoning for Infringement by Effect

With regard to infringements by anti-competitive effect, it is imperative to forge a link with economics. This could be by assessing effects either through the loss to society or the gain to the violator. Whichever route we decide to follow, a proper economic assessment would entail the 'but for' test. In *Zinc Phosphate*, it was stated that the 'but for' test requires us to 'take as a reference the competition that would normally exist if there were no infringement'.[28] This test, as shown in *Methionine*,[29] will be applicable only where all objective conditions on the relevant market are taken into account, including the economic context and legislative background.

Admittedly, we might not be able to arrive at a perfect representation of what the position would be but for the infringement. This is because a hindsight consideration of the slope of the demand curve is almost impossible and in any case disputable. Thus, *practical fairness* demands that the linkage need not be perfect as some margin for error

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[23] Above n 4 para 237.

[24] Either through effect (loss or gain) or where there is no effect, an assessment scale.

[25] i.e. the factors considered in 2006 guidelines above n 12 para 22.

[26] i.e. the 15-25 percent 'entry fee'.

[27] See 2006 Guidelines above n 12 para 27-35.

[28] Above n 2.

[29] *Methionine*, Commission decision of 2 July 2002, 2003/674/EC, OJ L/255, 8/10/2003 1-32.

and estimations could be allowed. Moreover, there is support from the jurisprudence of the General Court in *FETTCA*[30] where it stated that assessment need not be precise.

There are two imperfect but generally acceptable economic methods that can be applied in ascertaining the alternative prices and quantities which invariably link the methodology to the infringement. First is by assessing the market power exercised by the undertakings, or second, by measuring through a comparison of the difference between the price currently met and the alternative price that would come up in the equilibrium if the competitive process was free to operate.[31]

The first method requires the use of statistical model in ascertaining the 'but for' price through information obtained from the affected undertakings such as the cost, price and quantity information before and during the time of the infringement. These information are then processed so as to estimate the demand elasticity and the marginal cost and consequently the 'but-for' price. The second method merely requires the use of benchmark in determining the alternative price. This approach gives consideration to certain exogenous elements such as price of products in similar sectors in other countries, historical prices or cost.[32] It must be stated that though neither of these two options is not without its challenges, preference has been shown towards the benchmarking approach because its reference to exogenous elements could furnish a more realistic view of a real competitive price.[33]

For infringements by effect, the mark-up under the fining guideline would commence on the right ground if, for example, it follows the benchmark method for assessing the alternative price.[34]

1.3.2. Economic Reasoning for Infringement by Object

The need for a separate methodology for assessing object-based infringement cases is primarily because of the clarity and lucidity it affords the regime. This proposal should however not be seen as suggesting that undertakings' implicated under this head should be treated lightly. Such proposition should be disregarded considering the ills of antitrust violations. Moreover, such statement will be out of line with the spirit in Europe as the General Court rightly stated in *Balloré and ors v Commission* that 'the fact

[30] Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, para 342. It made reference to the Commission's Twenty First Report on Competition Policy.

[31] See Camilli, above n 9, pg 11.

[32] Nonthika Wehmhöner, 'Optimal Fining Policies' Paper presented at the Amsterdam Center for Law and Economics Conference Remedies and Sanctions in Competition Policy, Amsterdam, 17-18 February 2005. [http://www.kernbureau.uva.nl/acle/object.cfm/objectid=F07DE744-C1D1-4F2E-876EEB31F7FA5B9F] pg 18 see also Camilli, ibid, pg 11.

[33] Camilli ibid pg 12.

[34] It would also have meant that some of the factors that determine the upward or downward movement within the mark-up cannot be applied.

that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect.'[35]

There is however a good base upon which to establish a separate methodology for assessing anti-competitive object infringements. The Court in *Steel Beams*,[36] said that factors relating to the intentional aspect of an infringement may be more significant than those relating to the effect, particularly where they are infringements which are intrinsically serious, such as price fixing and market sharing. Though the mentioned case is an example of where an undertaking's behaviour is implicated both by object and effect,[37] it still lends itself to possibility of an object-based assessment. Thus, where an undertaking or group of undertakings have not yet put their cynical act into fruition thereby causing no anti-competitive effect, the guidelines may provide for ratios/percentages which should be applied in graduated steps depending on the nature of the violation.

2. THE LEGITIMACY CUM OPTIMALITY VIRTUE

I have shown why the 2006 guidelines may be unfair and how it can be cured by the fair guidelines. However, there is more to the fair guidelines that has been stated in the previous part. The aim in this part is to establish how the fair guidelines could help to reach optimal fines. This is done by drawing on the legitimacy[38] (that derives from fairness)[39] as a component of Pareto. If subjective considerations are part of the metric of welfare, then the fair guidelines are better than the 2006 guidelines because while the former is likely to meet the legitimacy criterion under Pareto, the latter is unlikely to meet the requirement because of the potential illegitimacy that may result from the relatively unfair guidelines.[40]

In order to make this claim, it is pertinent to state the dominant theories on optimal fines. Thereafter, I consider legitimacy as a component of optimality.

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[35] Joined Cases T-109/02, etc *Balloré and others v Commission* [2007] ECR II-947.

[36] *Steel Beams*, Case C-194/99 *P Thyssen Stahl v Commission* [2003] ECR I-10821, para 118.

[37] How the assessment should be done in such instance is discussed in part 4.

[38] Legitimacy is defined for the purpose of this exercise as the perceived legality of the system in the eye of the public. In relation to fines, legitimacy refers to both input and output legitimacy. It relates to the questions surrounding the adequacy of data necessary for the computation of an infringement which reflects the violation (input) and the consequence of such fines (output). See Simmonson above n 9 pgs 294-295.

[39] See generally Tom Tyler, *Why People Obey the Law* (New Haven, Yale University Press, 1990).

[40] The 1998 guidelines was criticised for failing on account of both input and output legitimacy because of its retributive stance. The output illegitimacy emanated from the absence of connection between raised fines and the economic value of the market concerned see Simmonson above n 9 pg 297, while the output legitimacy was doubtful based on the vagueness of the terms in the guidelines Geradin and Henry above n 2 pg 12 and the arbitrariness of the proxy see Joshua and Camesasca above n 11. As could be observed from the argument so far, some of the issues that rendered the 1988 guidelines illegitimate are still present in the 2006 guidelines.

2.1. The prominent ideas on optimality of fines

Notwithstanding the fairness concerns hitherto mentioned, antitrust enforcers are still to be assessed on the basis of the optimality of their practice. There are two prominent approaches to determining the optimality of fines - the deterrence approach and the internalisation approach. For the former, a fine will be optimal if it sends across the moral message about the seriousness of the violation.[41] The manner through which this effect is achieved is not as relevant so long as the message is achieved.[42] On the other hand, the internalisation approach, based on the Chicago school, regard an optimal fine as an efficient one. Efficiency thus requires that fine be determined through the harm caused.[43]

2.1.1. Deterrence approach

Under the deterrence approach, an enforcement mechanism is optimal where it creates a credible threat of penalty which weighs sufficiently in the balance of expected costs and benefits to deter calculating undertakings from committing antitrust violations. In relation to fines, such measure will be optimal:

> 'if and only if, from the perspective of the company contemplating whether or not to commit a violation the expected fine exceeds the expected gain from the violation'.[44]

The value of the expected fine within this approach is the total fine divided by the probability of detection. Because the probability of detection is unlikely to be one, it is acceptable to factor in the probability of detection into the total sum especially where the harm from the infringement exceeds the illegal gain obtained by offender. The optimal sanctioning system thus require that penalties have to maximise deterrence without incurring inefficiency cost.[45]

2.1.2. Internalisation approach

Under the internalisation approach, the premise for assessing optimal fines should be the net loss to persons other than the offender. After the multiplier has been applied to reach the optimal fine, the offender internalises all the costs and benefits of the violation, thus leading the offender to commit an 'efficient breach' where the total

[41] Wils, above n 6 pgs 49-75.

[42] Clear examples are *Ballore* above n 35 and *Steal Beam* above n 36.

[43] See Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169; William Landes, 'Optimal sanctions for Antitrust Violations' (1983) 50 University of Chicago Law Review 652. As the 2006 guideline is based on the deterrence approach, reference to the internalisation approach will be merely theoretical.

[44] Wils above n 6 pg 56.

[45] Nadia Calvino, 'Deterrent Effect and Proportionality of Fines', in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition law Annual: Enforcement of Prohibition of Cartels* (Oxford and Portland Oregon, Hart Publishing, 2007) pg 320.

benefits exceed the total cost. On the other hand, such fines will deter 'inefficient breaches' if the total costs exceed the total benefits.[46]

In effect, a fine is optimal where it is proportional to the harm and as such does not induce undertakings to forego behaviour that increases surplus. In order to attain the balance required, Posner states that:

> 'The penalty for an antitrust violation should be calculated to impose on the violator a cost, whether in pecuniary or non-pecuniary terms, equal to the cost that his violation imposed on the society. This criterion is not derived from notions of symmetry or from the biblical notion of an eye for an eye. It is a criterion of efficiency.'[47]

Thus they argue that the harm-based approach is optimal because, rather than deterring efficient breaches, it only deters inefficient breaches.

2.2. Legitimacy and optimality

In principle, the fair guidelines are not meant to impair the tasks of antitrust enforcers who are motivated by either of the two dominant approaches. In fact, the fair guidelines could complement these approaches. For instance, Wils states that the calculation of fines should commence with an amount equal to the violator's expected gain.[48] This sounds fair even within the proposed guidelines particularly in relation to assessment of effect-based infringements. More importantly, the fair guidelines are unlikely to impede the dominant approaches because they are largely formal. It merely proposed that the guidelines should have a three-step methodology whereby we only specify the contents of the first step (basic fine). As such, there is still the latitude for the Commission to strengthen the latter two steps in order to achieve its enforcement goals.[49]

Regardless of the possible synergies and complementarities, it is very possible that the fair guidelines may be at variance with what may be considered to be the optimal fine under either of the approaches.[50] On the other hand, the dominant approaches might not adequately reflect the optimality of their fines if fairness (legitimacy) is supposed to be a component of their optimality assessment. Accordingly, these approaches appear to portend a major problem since optimality is a constant end-state enforcers seek. I argue for legitimacy as a criterion of Pareto. From this premise, since the fair guidelines do not disparage the deterrence objective while the deterrence-propelled 2006 guidelines fail on fairness grounds, the former should be preferred because it represents a better measure of optimality.

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[46] Becker, above n 43; Landes, above n 43.

[47] Richard Posner, *Antitrust law* (Chicago, University of Chicago Press, 2001) pg 267.

[48] Wils above n 6.

[49] Under both the object based and the effect-based aspects.

[50] For instance, where cost savings and administrative convenience are lost.

In Europe, the legitimate guidelines could attain the status of a Pareto criterion either because people value fairness enough that they subjectively assess it as welfare-enhancing (aesthetics) or because of the possible consequence it could have on the Internal Market as a whole.

In order to establish this claim, first, I show that Pareto, the primary vessel for assessing optimality, is a broad enough theory.[51] Afterwards, I establish how legitimacy may fit into Pareto. Here I argue that the legitimacy of antitrust fines may be sought either for aesthetical purposes or for the positive consequence that derives from it. I however show the weakness of this argument through the Kaldor-Hicks theory.

2.2.1. Broadness of Optimality Criterion

With regards to fines, the interactions between efficiency theorist, deterrent theorist and legitimacy view are somewhat paradoxical - they are intertwined yet polarised. Efficiency and deterrence are intertwined in that they can fashion a role for deterrence but polarised in that they understand optimality in different ways. Efficiency and legitimacy are intertwined in that they both appreciate a harm-based method of assessing the basic fine but polarised in the sense that efficiency denies the need for notions such as legitimacy and fairness as an integral part of optimality. The deterrence and legitimacy view herein proposed are intertwined in the sense that the fair guidelines still consider deterrence to be primary and the deterrence theorists should have no arguments against the fair guidelines as long as the deterrence objective is achieved. They are however polarised in the sense that though deterrence theorists could possibly appreciate the logic behind differentiating object-based from effect-based ones, they might not be persuaded to alter the regime merely for fairness sake. Also, regarding effect-based infringements, though they might recognise the linking of the methodology for assessing the basic fine to the infringement as ideal in a perfect regulatory world, nonetheless, they do not consider it an important optimality criterion.

The notion of Pareto optimality means that laws and policies would be optimal where they make the society better off while making nobody worse off. In recent times, the most prominent underlying theories about optimality are that of the efficiency theorists who effectively link Pareto strictly to efficiency. The genesis is the celebrated work of Posner wherein he severed the connection between the economic analysis of the law and utilitarianism as the latter could not give an adequate metric of social welfare.

Posner's theoretical breakthrough shifted the metric for assessing optimality of social welfare. Thus, instead of ascertaining the utility of individuals' by seeking their consent (an impossible task indeed), he proposes that the metric should be the 'value' of people's preferences with their willingness to pay to have them satisfied. Thus '[u]nlike the utility of satisfying preferences which will remain imponderable forever, the value of satisfying them has the notable advantage of being measurable in money. Wealth

[51] This requires elucidation of the efficiency theory. The reference to the theory is merely to show the broadness of Pareto. The conclusion is however vital to my claim that optimality sought by the deterrence approach could include factors other than the need to send a moral message to dissuade antitrust violators.

(the total value of satisfied preferences) thus replaces utility for Posner as the quantity that actions, policies and laws must maximize.'[52] Wealth maximisation is thus the theory that addresses Pareto strictly in the light of Coase[53] because to recognise any other will render the system unintelligible.

In order to show that Pareto has a broader ambit, Fletcher's criticism of the efficiency theory is instructive. He argued that the theory is wrong for regarding value as the sole metric for optimality. This claim was substantiated through an insightful analogy of the smoker and non-smoker[54] as against Coase's farmer and rancher analogy.

Fletcher commenced from the definition of rationality. He asserted that under both Coase and Pareto, to act rationally is to maximise individual utility.[55] However, Fletcher argued that the definition of rationality under Pareto standards are not necessarily defined through the Coasian theory which views rationality in terms of individuals' preference for profit maximisation, cost savings, welfare surplus etc. Acknowledging Fletcher's argument, Coleman states that there is nothing in or emanating from the Coasian theory that limits the farmer and the rancher's willingness to bid to their interest in maximising profit. This means that it is possible that the farmer could as well be willing to pay more than the market cost of the expected corn damage just to avoid any other 'ugly' cow in the neighbourhood.[56] In such instance, 'his utility will be a function both of his desire to profit and to live in an aesthetically pleasing

[52] James MacDonald and Caryn Beck-Dudley, 'Are Deontology and Teleology Mutually Exclusive?' (1994) *13 Journal of Business Ethics* 615.

[53] Coase argued that the problem with entitlement does not lie in the cost implication of the infringers action on another party. Rather, it is the conflict in demand for the use of resources. This conflict, he argues, should be resolved by reference to which of the two conflicting uses has the greater social value. Expounding on this through the rancher-farmer analogy, Coase argued that if a rancher and farmer have different interest in a particular land – the rancher wants the land to allow the cattle to stray while the farmer wants it free from the cattle so that the crop can grow. This problem is not to be solved by reference to who had pre-existing rights but by ascertaining which of the two uses has greater value. See Ronald Coase, 'The Problem of Social Cost' (1960) *3 Journal of Law and Economics* pg 1. Applied to the issue at hand, the interest of antitrust enforcers and that of violating undertakings can be understood as conflicting uses of the market. This can be solved by a bargain between the two parties on the basis of efficiency. Based on Coase and subsequently Posner's theory of wealth maximisation, an equilibrium bargain (Pareto efficient) for the use of the market should not be solely dictated by the antitrust enforcers' intent (either to deter, punish or for fairness sake) but by striving at efficiency regardless of who internalises the cost. This explains the institutionalisation approach as against the deterrence approach. The task here however is to show that Pareto is not limited either to efficiency or pre-existing institutional interest (i.e. deterrence) but includes normative interests such as legitimacy.

[54] Fletcher showed that the requirement for optimality may include normative interests through his insightful smoker and non-smoker analogy. He argues that while in the rancher-farmer case, both parties bid against each other on the basis of price, the bargain between a smoker and non-smoker is based on individual preferences which equally expresses the general principle that to act rationally is to maximise individual utility. See Jules Coleman, *Market Morals and the Law* (New York, Oxford University Press, 2003) pg 73.

[55] Ibid. This could also explain the rationality of deterrence as an objective.

[56] Ibid.

environment.'[57] In effect, the efficiencies deriving from Coase are but a subset of definition of rationality in the Paretian sense.

The gap identified above seems a credible inroad to argue that considerations that either go beyond or exclude institutional efficiency could be required in ascertaining the optimality of policies. It can also be the base upon which legitimacy and fairness can be brought into the deterrence approach. Thus, if we say that rational agents aiming at optimal deterrence impose fines because they believe it helps in avoiding the negative impact of antitrust violation, they could be equally interested in measuring the fairness of their practice as a component of welfare either because they value fairness in itself (aesthetics) or because they feel that fairness helps to avoid tangible welfare losses that may arise from unfair guidelines. In such instance, the question of optimality cannot be answered solely through deterrence but must also include fairness/legitimacy considerations.

2.2.2. Legitimacy as Components of Optimal Antitrust Fines

To establish a broad scope for the optimality of antitrust fines, we have to proceed on the understanding that in assessing whether such fines are optimal, we takes into account issues beyond the confines of competition law. This argument, if made through constitutional economics, will have a strong theoretical grounding through the ordoliberal ideology which has great influence in Europe.[58] It is however not enough to identify the wholesomeness of the Union's goals. It need be shown how fairness factors in with Pareto.

The common agreement theory in Buchanan's constitutional economics provides that the network of rules constituting an institution are justified because they are freely consented to and that particular institutional events, in the form of actions policies and decisions, are justified because they are required by rules that are consented to. It is believed within this theory that policies, market transactions or political decisions etc can be given content or meaning only within an institutional framework.[59] In the justificatory exercise, one should not address a rule in isolation. Rather, the network of rules should be considered since it is what 'gives it life and substance'.[60] Even though desirable end-states such as utility and welfare have a role to play in this consent theory, there are merely derivative of the main measure which is the level of acceptance that the set of rules enjoy within a given community. As such, welfare or utility will only be relevant to the extent that they figure in the evaluation of institutions.

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[57] Ibid.

[58] Although it has been used mostly in the context of substantive antitrust, collectiveness of will and fairness has always been argued to be an integral part of competition law. See e.g. Commission Report on Competition Policy 1979, paras 9, 10; Commission Report on Competition Policy 1985 para 11.

[59] Coleman, above n 54, pg 135.

[60] Ibid.

Interpreting Buchanan's thesis, one could start from the premise that an efficient policy is that which achieves optimal welfare. Thus since rational individuals expect to promote their welfare, their consent to a policy presupposes that they have done so on the basis that it will promote their expected welfare.[61] Hence, '[i]f everyone agrees to abide by a rule, then each person believes that adhering to that rule will be to his advantage. Where everyone is better off by a rule, it is efficient.'[62]

From the foregoing, it does appear that under the constitutional economic, Pareto optimality is determined strictly by the level of consent given by individuals as this consent implies that the policy makes them better off. If this were to be the case, a prima facie conclusion would be that where anyone or a group dissent due to perceived illegality or injustice emanating from a particular measure, the agreement (the sole source of optimality) breaks down hence the enforcement regime becomes sub-optimal. Applied to the present context, though there is a common agreement for antitrust enforcement on the basis of deterrence, an illegitimate fining regime will render the enforcement sub-optimal. This will mean that legitimacy takes a prime position in Pareto analysis so that every component is measured by reference to it. It is however imperative that the argument is not understood in this way as it will be at best too simplistic and unrealistic and we will end up committing 'the fallacy of building efficiency into consent'.[63] This observation nonetheless, the theory of institutedness[64] implies that fairness as a non-consequentialist ideal could together with deterrence be the required components of optimality.

Conceiving fairness in consequentialist terms, the relationship between consent and optimality can be broadened so that it relates to Europe's economic goals. Thus, even though the issue of antitrust fines is a matter of competition policy, we should not access its optimality strictly through competition law as it is just one out of numerous other policies that are required for an effective functioning of the Internal Market.[65]

Moving on with the justificatory exercise, it could be said that it is the link between welfare and justice that makes individuals either consent or question the legitimacy of

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[61] As a premise, it need be stated that the antitrust enforcement regime as a whole is a product of common agreement between European citizens. An easy assumption that could be drawn from such agreement is that individuals' would only have consented because they expect to be better off with it while leaving no one worse off.

[62] Coleman above n 54 pg 135.

[63] Ibid.

[64] The sociological theory of institutedness was formulated by Polanyi. He stated that '[t]he human economy ... is embedded and enmeshed in institutions, economic and noneconomic. The inclusion of the noneconomic is vital. For religion or government may be as important for the structure and functioning of the economy as monetary institutions or the availability of tools and machines themselves that lighten the toil of labor' see Karl Polanyi, Conrad Arensberg, and Harry Pearson (eds), *Trade and Market in the Early Empires; Economies in History and Theory* (New York, Free Press, 1957) pg 34.

[65] Moreover, the intentional omission of competition goal from the Lisbon Treaty further buttresses the claim that we have to look more broadly. This premise finds teeth in the constitutional economic theory which requires that we consider a network of rules and not a rule in isolation.

antitrust policies. As such, it is not inconceivable that an overzealous drive to achieve antitrust goals either in substance or in enforcement might itself be counter-productive to the proper functioning of the Internal Market. For instance, negative welfare effects could arise from antitrust enforcers' failure to comply with the rule of law or fundamental rights in formulating or implementing its guidelines.

In the specific context of this paper, owing to law and psychology theories which argue that people support measures taken by legal authorities only where such measures produce positive outcome for them,[66] it can be said that a perception of welfare loss (through, for example, an undertaking's decision to 'pack up shop' from Europe) arising as a result of unfair guidelines could raise real legitimacy concerns. The perception of loss is even rifer in Europe as there is the risk that mere psychological feeling of unfairness may make less and less people believe in Europe as an entity.

It would not take much to ignite the machinery of doubts into the European framework considering the fact that the legitimacy of the institution and its practice as a whole remain contested to date. This is more reason why the relevant authorities should not only avoid complicity but must also be seen to exercise extra care because of the sensitive nature of their duties. This however does not mean that the Commission should avoid all possible dissatisfactions as this would suggest that they are to be measured on the threshold of infallibility.

With regards to the standard of care placed on the Commission, it is contended that it might (perhaps inadvertently so) give room to a well grounded, deep seated suspicion which invariably could have a knock-on effect on the optimality of its fines.[67] In any case, the most indicative will be a suspicion that the Commission's 'mind' is coloured in dogma, incompetence or bias - the Commission's failure to provide a theoretically nourished base for its guidelines and its evasiveness in this regard together with some other 'slow burners' may engender a climate of dissatisfaction towards it and consequently competition law in general. For example, (no matter how far-fetched it may sound) it could be a ground for arguing that the Commission, rather than striving for robustness and detail in its fining practice, is more preoccupied with generating revenue for the Union. If this is the case, violators (or even the public) are entitled to suspect that they might not be getting fair treatment after all and thus regard such fines to be sub-optimal.

2.2.3. The Kaldor-Hicks Debacle

Even though an attempt has been made to fit fairness/justice and the resulting legitimacy question within the Pareto ranks, it will be unwise to ignore the likelihood that a Kaldor-Hicks efficiency claim may weaken the argument so far made.

[66] Tyler, above n 39 pgs 72-73.

[67] Both in the amount of fine and the methodology. It is even possible that subconsciously most people will disagree with the amount of the fine because they do not appreciate the method. As such, though the amount of fine is not the point of discus here, it is likely that claims against the fine could succeed merely by casting substantial doubt on the Commission's discretion.

A typical criticism of Pareto is that it is impossible to formulate a policy that makes everyone better off without making anyone worse off. It is even the more unlikely where it affects a large and diverse population in complicated ways. This is because the ordering of relationships provided by the Pareto criterion is such that numerous states could be Pareto efficient. This criticism means that it cannot be conclusively stated that the legitimacy deriving from the common agreement in the fair guidelines is a component of Pareto.

An argument could thus be made that even if other criteria aside from welfare are to be considered, and even if the common agreement is required, individuals could still favour the present guidelines as against the fair guidelines even though some people are worse off. It can be argued, applying the Kaldor-Hicks efficiency, that despite the fairness trade-off, the deterrence effect and the legitimacy (absent of fairness) of the present guidelines could still attain an optimal status.

Kaldor criterion provides that a measure which has a net effect of making everyone better off but makes some people worse off will still be efficient where the 'winners' from the change would compensate the 'losers' and still be better off. Further, Hicks criterion provides that optimality will be attained where the 'losers' could not afford to bribe the 'winners' to prevent/effect the change.

Applied to the present context, it means that fairness and legitimacy are not synonymous. Thus even if legitimacy forms a component of optimal fines, the fair guidelines can be traded-off where the winners (perhaps the consumers and larger populace) perceive the 2006 guidelines as ideal despite the fact that there are losers (i.e. affected undertakings). The requirement that the populace will have to compensate the undertakings is absolutely theoretical. A further requirement is that the undertakings should be unable to influence the populace that such change is required.[68]

There is thus an obvious possibility to reach optimality in constitutional economics outside of fairness. This possibility to some extent undermines the consequentialist value of the fair guidelines. Nevertheless, the possible aesthetic and welfare effect of such fairness is still likely.

3. THE FAIR GUIDELINES - DEONTOLOGICAL JUSTIFICATION

It is argued that antitrust fines should be fair and that fairness should be sought in its own right. To show that the proposed guidelines will be preferred to the present guidelines on the ground of fairness, much weight is placed on the seminal work of Rawls[69] where he employed a hypothetical model of a situation in which people are to choose the fundamental principles by which basic institutions of their society are to be evaluated and organised. For the purpose of my argument, the important aspect of Rawls postulation is the fact that a fair measure is that which will be chosen by persons

[68] If they could, perhaps through threats that they will take away their business then legitimacy and fairness will be synonyms hence the Kaldor-Hicks counter-argument would not stand.

[69] John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972).

who are in an hypothetical Original Position.[70] Of course, if we do not know the position we hold in a society (antitrust enforcer, consumers, violating undertaking, competitor etc) and we have to make a choice between the present guidelines and the fair guidelines, we would prefer to choose the fair fining guidelines.[71]

Moreover, even without the veil of ignorance, there are credible and practical arguments that contrary to this conventional approach to law and economics, people give a broader scope to their bounded self-interest so that even where they will be not be affected by a measure, many still care about both giving and receiving fair treatment in a range of settings.[72]

Addressing the fairness in the proposed guidelines in its own terms is perhaps a better way to justify this proposition as it affords the independence and practicality lacking in the optimality arguments made in the preceding part.[73] The fair guidelines adopted for the sake of fairness comes with a simultaneous (but not constitutive) benefit which is that it encourages a more economic approach in the assessment - the methodical nature of the guidelines, the distinctions and detail required coupled with the flexibility it affords gives a practical example of the economic embeddedness required of the Commission.[74]

This above advantage notwithstanding, one has to be concerned about consequentialist criticism since antitrust enforcement is primary assessed through its effect[75] which is

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[70] Such person decides fairly because he is covered by the veil of ignorance.

[71] Note however that Rawls' justice as fairness theory has been characterised as consequentialist rather than deontological. See Andrew Halpin, *Rights and Law: Analysis & Theory* (Oxford, Hart Publishing, 1997); Norman Daniels, *Reading Rawls* (Oxford, Blackwell, 1975).

[72] Mathew Rabin, 'Incorporating Fairness into Game Theory and Economics' (1993) *83 American Economic Review*, pgs 1281-1302; Christine Jolls, 'Behavioural Law and Economics' Yale Law School, Public Law Working Paper No. 130, Yale Law & Economics Research Paper No. 342 Pg 17.

[73] For instance, the arguments made as to the optimality of fines under the deterrence/efficiency theories on the one hand and constitutional economics/legitimacy arguments on the other hand can be faulted because of their holistic assumptions on the motivation of law and its subjects. This credible criticism further waters down the justification of the fair guidelines on the basis of optimality. As such, while the former can be faulted for its belief that '[a]ctors … behave or decide as atoms outside a social context', see Mark Granovetter, 'Economic action and social structure: The problem of embeddedness' (1985) *91 American Journal of Sociology*, pg 481-510 at 487. See also Cass Sunstein David Schkade, Daniel Kahneman, 'Do People Want Optimal Deterrence?' (2000) *29 Journal of Legal Studies* pgs 237-53. The latter could be equally faulted on the ground that it assumes that humans are exhaustively deterministic in building preferences when in fact it has been shown that where their decisions are influenced by end state such as welfare, they are rather stochastic. They do not choose from a preference menu. See Cass Sunstein, 'Introduction', in Cass Sunstein (ed) *Behavioural Law and Economics* (Cambridge, Cambridge University Press, 2000).

[74] For work on embeddedness in competition law see David Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Josef Drexl, Laurence Idot and Jöel Monéger, *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009) pgs 20-44.

[75] Competition Authorities normally assess their performance through the effect. E.g. the Commission provides a report on competition policy on a yearly basis in which it emphasises the its effort in the previous year aimed at making the necessary impact. We however have to take account of the fact that the role of fines in achieving the deterrence effect has been downplayed by the UK Office of Fair Trading (OFT) in its 2007discussion paper titled, 'The deterrent effect of competition enforcement by the OFT', OFT 963.

welfare related. I argue however that fair guidelines are more advantageous as they need not negatively impact on the Commission's deterrence drive. Even if it will require any more cost and/or administrative work, they cannot be significant enough to warrant a trade-off. This conclusion thus has to adequately address the contention that any notion of fairness will lead to a choice that makes everyone worse off.

Kaplow and Shavell[76] argue that granting importance to any notion of fairness entails a conflict with Pareto as it implies that we are prepared to adopt a legal rule that reduces the well-being of every person in society. To them, the assessment of legal rules based on a notion of fairness will sometimes result in the choice of a legal rule that makes everyone worse off because it influences the selection of legal rules differently from those that would have been chosen if one were exclusively concerned with individuals' well-being. This claim was substantiated by differentiating the effect of fairness in identical and non-identical cases. In the identical cases, they assert that if everyone in society is identically affected by a rule, the consequence would be either that it makes everyone better off or worse off. To them, the position of a welfarist is quite straightforward in the sense that when faced with the two possible effects, he would surely endorse whichever rule that makes everyone better off. As such, a fair measure which diverges from the welfare measure (based on inferential logic) would make everyone worse off. The strength of this argument notwithstanding, the lingering uncertainty on the deterrence effect of antitrust fines[77] means that the fair guidelines cannot be effectively trounced on the 'identical cases' argument.

Stronger argument could be made against the fair guidelines through Kaplow and Shavell's non-identical cases. The position is that whenever a rule produces winners and losers, such rule cannot be evaluated without at least implicitly balancing the gains and losses that derive from it. This balancing will involve standard welfare economics which, for the purpose of their argument is left unspecified.[78] Thus, suppose we choose to align to fair guidelines, it will be difficult for anyone to criticise the fine emanating from the guidelines if it sufficiently deters. Its deterrence effect notwithstanding, let us suppose that the fair guidelines and the present guidelines are equally imperfect. Regardless of their imperfections, the 2006 guidelines could be said to make people better off while the fair guidelines will make people worse off simply because the latter is more costly and inconvenient. In such instance, according to Kaplow and Shavell, a person strongly disposed to fairness might prefer to stick to the fair guidelines despite the net welfare effect of the other guidelines. The trade-off under this postulation implies that a fairness proponent would be disposed to choosing rules that makes everyone worse off.

Moreover, welfare is still a value worth seeking even if individuals are motivated by other factors such as justice and fairness.

[76] See generally Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Massachusetts, Harvard University Press, 2002).

[77] Theoretically it extremely unlikely that we can assess the optimality of fines see Wils above n 6 pg 73.

[78] For instance, it could be based on Kaldor-Hicks efficiency or wealth maximisation etc.

Here lie two effects of a deontological application of fairness – a more economic approach versus cost/inconvenience. On the negative effect, it is argued that the time and cost commitment that is required in computing fines under the fair guidelines need not be enormous.[79] For example, benchmarking could still be applied under the fair guidelines in the effect-based aspect as there is no need for insisting on perfect input data. The convenience that follows from the object-based assessment is even more obvious as the basic fine is to be determined through a scale. Moreover, the advantage of a 'more economic approach' (a phrase increasingly dominant in Commission's vocabulary) appears to outweigh the likely cost increase.

4. THE FAIR GUIDELINES – MORE DETAILS

Assessment of the basic fines under the fair guidelines is highly instance specific – we have object based assessment and effect based assessment. The specific nature of these assessment means that first, we need to be clear on how each aspect should work and second, how to address complicated cases, for example, where object and effect are implicated in a single case and an effect-based assessment will generate far less total fine than an object based assessment and vice-versa.

4.1. Object-based Assessment

The basic fine here is geared towards either punishment or deterrence. In order to ensure its effectiveness, it is better if the mark-up is not fixed as it might be necessary that the methodology reflects the level of severity of the anti-competitive object. Thus, for this purpose, a point-based system may be adopted. If the anti-competitive intent has been in play for a tangible duration, a multiplier reflecting such duration could be included. Some of the factors that could be considered in ascertaining the proxy are the market power of the infringing undertaking, the nature of the infringement, and a rough econometric forecast of the possible effect had the violation been implemented. This analysis could also take the undertakings' plans into account.

4.2. Effect-based Assessment

Where an infringement has anti-competitive effect, the basic fine must link the infringement to the effect. There are two broad options that could be adopted here. First is to determine the basic fine through an assessment of the illegal gains. Second is to ascertain such basic fine through loss incurred by society as a result of the practice. With regards to gain-based assessment, the basic fine could be structured to disgorge all the illegal gains[80] through a historic econometric analysis of the undertaking's activities. Because of the difficulty that may attend such analysis, an empirical study could be embarked upon in order to ascertain the average gain made from different types of infringements. This thus allows for the use of benchmarks. However, the use of ratios

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[79] Details provided on the workings of the fair guidelines below shows that the computation need not be unduly elaborate.

[80] Wils above n 6 pg 55.

and proxies is not enough to suggest that the fining regime takes seriously the need for linkage as even though benchmarking is used in the 2006 guidelines the link is not evident.

With regards to the harm-based approach, benchmark could also be applied. Assessment could either be based on overcharge or deadweight loss.[81] Deadweight loss is a net loss to social welfare that results because the benefit generated by an action differs from the forgone opportunity cost. It includes a form of inefficiency associated with reduced output[82] which occurs where equilibrium for goods and services are not Pareto optimal. Usually, it contains both the lost consumer surplus and the lost producer surplus. With regards to the consumers, the deadweight loss is the opposite of what obtains in a perfectly competitive market where the marginal consumer purchases the last unit of a commodity at price equivalent to the marginal cost of producing that unit. Thus, the loss incurred is as a result of market inefficiencies that prevents consumers who would have more marginal benefits than marginal cost from purchasing the unit or empowering consumers who would have more marginal cost than marginal benefits to purchase the unit.

As observed by Leslie, regardless of what one believes to be the goal of competition policy, there seems to be unanimity in the assertion that deadweight loss should be avoided. However, despite the recognition of its importance, the concept has not been adequately theorised let alone meaningfully incorporated into antitrust doctrine.[83] As a result, the economic and legal principles inherent in it are far from established.[84]

Such deadweight loss analysis of effect-based infringement could be an ideal exercise for the Commission.[85] Enforcers should be guided by the understanding that a

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[81] Deadweight loss analysis should be preferred because it will cover for the practical difficulty that attends such claims in private actions. Thus even though the Court of Justice had stated in *Manfredi* that private parties can recover both actual loss (*damnum emergens*) and loss of an increase in those assets which would have occurred if the harmful act had not taken place (*lucrum cessans*), (as definition by Advocate General Capotorti in *Ireks-Arkady*), the fact is that the institution of deadweight loss claims by private parties remains an ideal with no parallel in reality. As such, by making violating undertakings pay for the effect caused where if left to private parties, may remain unknown, the system is able to maintain that link whilst also taking the opportunity to show the violating undertakings the evil of their ways.

[82] Christopher Leslie, 'Antitrust Damages and Deadweight Loss' in Kevin Marshall (ed) *The Economics of Antitrust Injury and Firm Specific Damages* (Arizona, Lawyers & Judges Publishing Company, 2008) pg 4.

[83] Ibid, Leslie pg 54.

[84] William Tye and Stephen Kalos, 'Antitrust Damages and Lost Opportunities' in Kevin Marshall (ed) ibid pg 137.

[85] It is however noteworthy that it has downsides. It could for instance be criticised on the ground that it might lower the deterrence level of fines especially in the light of assertions that deadweight losses caused by anti-competitive practices are small. Even if this were true, it is not enough reason to jettison the idea as multipliers could be included to achieve deterrence. Another potential concern is that deadweight loss analysis are impractical and almost impossible to ascertain. The response is that even with the attendant difficulties, such analysis are well possible since complete accuracy is not a requirement. When faced with this problem, the authorities can find support in the decision of the General Court in *Citric Acid* when addressing the 'but for' that 'consideration of the impact of a cartel on the market necessarily involves recourse to

deadweight loss analysis does not require an accurate result as long as it is reasonable.[86] As shown by experts, a reasonable assessment of deadweight loss is not an impossible task.[87] In the analysis, Leslie suggests elements that should be considered. They are: the market value of the violation (QM); the amount of the overcharge; what the market output would have been but for the violation (QC); the price that would have been charged but for the violation; and, the shape of the demand between QM and QC.

Referring to Landes' statement that optimal penalty should equal the net harm to persons other than the offender, Leslie states further that:

> '[the] list [of elements to be considered in calculating deadweight loss] excludes one obvious factor: the shape of the supply curve. It is not necessary to know the shape of the supply curve between QM and QC because the defendant should not be responsible for paying antitrust damages based on the lower part of the deadweight loss triangle. The deadweight loss triangle is composed of lost consumer surplus and foregone producer surplus. The shape of the bottom part of the triangle need not be defined at all because deadweight loss should not include lost producer surplus. The [undertaking] has already paid for this by not collecting the profits on the sales it decided to forgo.'[88]

He argues further that, by not including the producer surplus, the estimation process is easier as the calculation is done as though marginal cost curve were horizontal.

4.3. Complicated Cases

Having separate guidelines could be exploited by undertakings especially where, for example, the assessment of fine for an infringing undertaking under the object-based methodology will be less than that under the effect-based methodology and vice versa. As an illustration, an undertaking could be implicated by both anti-competitive object and effect. It could happen that such undertaking might be required to pay a relatively lower fine if assessed under effect-based methodology simply because the societal loss or illegal gains which determine the mark-up are rather negligible. Problems arise however where such an undertaking would incur a more substantial amount of fine if the object-based methodology is applied, perhaps because of the seriousness of the

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assumption' which inevitable means that the Commission could rely on 'reasonable probability', which is not precisely quantifiable.

[86] Leslie, above n 82, pg 55.

[87] Jerry Hausman and Whitney Newey, 'Nonparametric Estimation of Exact Consumer Surplus and Deadweight Loss' *MIT-CEEPR 93-014WP* (September 1993) [http://dspace.mit.edu/bitstream/handle/1721.1/50211/35721008.pdf?sequence=1]. Also it has been stated that once profit deriving from the infringement has been estimated, the deadweight loss is easy enough to determine if price, quantity and cost under the infringement and under the alternative competitive condition are known and a straight-demand curve is assumed as well as constant cost. Even where the information is not given, it is argued that the deadweight loss can be estimated using the rate of return on sales, computed by dividing accounting profit adjusted from the normal rate of return on capital by revenue, an estimate of the elasticity of demand and the revenue under the infringement. See also Wehmörner, above n 32, pg 19.

[88] Leslie, above n 82, pg 56.

violation. Though such an undertaking can be assessed under both, the difference in the total fine would give room for preferences which could undermine the fining regime by encouraging corporate decisional tactics and manoeuvring.[89]

In other to avoid such effect, the guidelines should be clear on cases where both object and effect are implicated. A possible provision could set out indicators that would help ascertain whether the guidelines that derives at the higher or lower total fine should be applicable.

5. CONCLUSION

The 2006 guidelines are not hopelessly bad even in the context of fairness. Considering the fact that they are primarily (and rightly so) aimed at deterrence, an uncompromising critique of the guidelines might be too harsh. However, it has been shown that there is room for improvement. More so, the fair guidelines have clear advantages that they bring to the regime. The proposal is further strengthened by the fact that the fair guidelines need not impinge on the primary goal of antitrust fines.

In general, the fair guidelines afford a clearer regime and in line with the rule of law, it contains the ambit of the Commission's discretion. In addition, fairness could help the fining policy to attain optimality while also engendering a more economic approach to the institution of antitrust enforcement.

Fairness in an object-based assessment is valuable in that it treats different violations differently. Also, the fair guidelines limit the liability of infringing undertaking to the extent of its violation through the point-based system. Third, considerations of fairness might result in easily applicable guidelines. Regarding effect-based assessment, fairness will help to enrich the reasoning of regulators and increase the level of sophistication.

Moreover, it should be applied as the negative welfare implications (if any) are likely to be minimal. The fair guidelines need not be extremely costly and time consuming thus there are greater reasons to accept the recommendations herein made.

[89] On how undertakings could exploit competition rules see Abayomi Al-Ameen, 'Restitutionary Remedies in Competition Law: Bull in a China Shop?' (2009) *32 World Competition* 327 at 341-345.

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Due Process: The Exchange of Information and Risk of Hindering Effective Cross-border Co-operation in Competition Cases

*Julian Nowag**

The paper investigates the different regimes for the exchange of information in cross-border competition cases. It argues that the co-operation and information exchange mechanisms in competition cases established by Regulation 1/2003 have been overtaken by the means provided by the European Evidence Warrant which was developed under the former third Pillar (Co-operation in Criminal Matters). Moreover, the paper argues that both means: those provided by Regulation 1/2003 and those provided by the European Evidence Warrant are in general available to national competition authorities. In the light of the merging of the first pillar and third pillar under the Lisbon Treaty possible solutions are put forward to address the inconsistencies created by the availability of different co-operation mechanisms.

1. INTRODUCTION

The paper considers the EU cross border co-operation among competition authorities in competition cases and in particular in cases involving criminal sanctions for individuals. First, a general hypothesis is set out, followed by an introduction into the means of co-operation provided by Regulation 1/2003 and the European Evidence Warrant (EEW).[1] The paper, then, turns to the question, which means would be available to a national competition authority faced with a cross-border cartel investigation? It is shown that the national competition authority could in general use (i) co-operation within the European Competition Network (ECN), i.e. the means provided by Regulation 1/2003 and (ii) the EEW in order to obtain information.[2] The paper, then, turns to an investigation of the forms of co-operation under Regulation 1/2003 and the EEW, i.e. the scope of application of the two regimes, before the limits of co-operation will be explored. Concerning the limits set by Regulation 1/2003 and the EEW the paper will, in particular, focus on the question of dual criminality[3] as a limitation to the usage or the exchange of information. The following interim conclusions explain that one could argue that the mechanisms developed in the context of the co-operation in criminal cases seem to go further than those in the ECN and that the interaction of Regulation 1/2003 and the EEW might lead to cases where

* St Anne's College - University of Oxford. I would like to thank Nadine Zipperle for comments on earlier versions of this paper. I would also like to thank the CLaSF for supporting this research with a fellowship. All errors remain mine.

1 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008, L350/72.

2 Information in this sense should be understood broadly and covers also classical evidence.

3 Also called double criminality.

limitations are circumvented. The last section suggests possible solutions in order to harmonise the different regimes. Against the background of the merging of the EU pillars under the Lisbon Treaty this harmonisation might lead to more effective cross-border co-operation. The paper is intended to show the divergences in the current legal instruments regarding the exchange of information and should encourage a debate about the appropriate means of co-operation in competition law but equally in law enforcement in general. However, there seems to be a caveat concerning the EEW: the framework decision has not been implemented yet (the deadline for implementation is January 2011) so that the actual implementation in praxis has to be seen.

2. Starting Point/General Hypothesis

The starting point should be a widely accepted hypothesis: the legal protection regarding due process in competition cases involving (criminal) sanctions against individuals[4] is higher than the protection given to undertakings in (classical) competition proceedings. This in turn would mean that one could also formulate a second hypothesis which seems to be fundamental to this paper: the use of information gathered in proceedings against individuals can be used in classical competition proceedings against undertakings. This forms the basis for this analysis which compares the exchange of information in competition cases to cases of exchange of information in criminal cases against individuals. The argument that can be made after this comparison is that the aim to protect the individual in competition cases has lead to a situation where the effectiveness of co-operation in cross-border competition cases in the European Competition Network (ECN) is reduced i.e. is not as effective as it could be. This is so since the protection of the individual in competition cases goes much further than in cases involving sanctions against individuals in general.[5] The paper is, therefore, intended to start a debate about the appropriate balance between the protection of individuals and effective cross-border co-operation.

The analysis starts with a simple practical problem. A national competition authority in a Member State (MS) with criminal sanctions against individuals for the infringement of competition law, for example the OFT, investigates a cartel. This cartel was formed in another MS - that does not have a cartel offence - and is, however, directed and implemented at the UK market. How can the OFT receive or request the information that the competition authority in the other MS holds or could acquire?

In general two ways might be possible: (i) The classical route under Article 22[6] and Article 12[7] of Regulation 1/2003 which covers the exchange of information within the European Competition Network, and (ii) the EEW. Before the paper turns to the

4 In the context of this paper 'criminal sanctions' should be understood as encompassing sanctions which are imposed on an individual, independently from the national characterisation as criminal or administrative sanctions.

5 Such cases encompass sanctions imposed by means of criminal and administrative procedures.

6 Concerning investigation on behalf of another authority.

7 On the exchange of information.

availability and scope of the means in a competition case, it seems useful to recall the general framework of these tools.

3. CO-OPERATION UNDER REGULATION 1/2003

The co-operation within the ECN in its current form was established with the introduction of Regulation 1/2003. The ECN is formed out of the Commission and the National Competition Authorities (NCAs).[8] With regard to the co-operation within the ECN one can distinguish between vertical and horizontal co-operation.[9] While there are special mechanisms established for the vertical exchange of information between the Commission and the National Competition Agency in Article 11 of Regulation 1/2003[10] the horizontal exchange, i.e. the co-operation among the different NCA, is governed by Article 12.[11] Vertical co-operation does not take place on a voluntary base, as Article 11 of Regulation 1/2003 imposes clear rights and obligations regarding the exchange of information. In contrast, horizontal co-operation among NCAs under Article 12 of Regulation 1/2003 does not impose an obligation to exchange information but seems to leave discretion.[12]

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[8] On the development of the ECN in general see DJ Gerber, 'The Evolution of a European Competition Law Network' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004. For an evaluation of functioning of the ECN see: M Kekelekis, 'The European Competition Network (ECN): It Does Actually Work Well' (2009) EIPAScope 35 and with regard to leniency K Dekeyser and M Jaspers, 'A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on Work in the Leniency Field' (2007) 30 *World Competition* 3. The Network seems to be designed with distinct hierarchical structure, on this unusual structure of a network see: F Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' (2009) <http://cadmus.eui.eu/dspace/handle/1814/11067> accessed 29 March 2010. In the US one might equally identify such a Network of Competition Authorities, as the Multistate Antitrust Taskforce within the National Association of Attorneys General is used as an 'ad hoc antitrust enforcement unit' in antitrust cases, B Hawk and J Beyer, 'Lessons to be Drawn from the Infra-National Network of Competition Authorities in the US: The National Association of Attorneys General (NAAG) as a Case Study' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 100.

[9] D Reichelt, 'To What Extent does the Co-operation within the European Competition Network Protect the Rights of Undertakings?' (2005) 42 CMLR 745, 748.

[10] The Commission seems to suggest that the main purpose of the provision is to 'ensure that cases are dealt with by a well placed competition authority … [and that] ... efficient and quick re-allocation of cases [is possible]', Commission Notice on Cooperation within the Network of Competition Authorities, OJ 2004, C101/43, para 16-17. Moreover, the provisions should safeguard the consistent application of Article 101 and 102 throughout the Union, ibid, para 43-57.

[11] SM Lage and H Brokelmann, 'The Possible Consequences of a Relatively Broad Scope for Exchange of Confidential Information on National Procedural Law and Antitrust Sanctions' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 406. Article 12 seems to be the general basis for the exchange of information while Article 11 seems to cover the more specific case of vertical co-operation. On the exchange of information in the US see B. Hawk and J. Beyer, n 8, above, 107–110, or in the Federal system in Germany U Böge, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004.

[12] K Dekeyser and F Polverino, 'The ECN and the Model Leniency Programme' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law: New Challenges*, Alphen aan den Rijn, Kluwer Law International, 2010, 508–509. On the contrary view see J Faull and A Nikpay, *The EC Law of Competition*, 2nd ed, Oxford, Oxford

The European Evidence Warrant, on the other hand, is an instrument which was adopted under the former third pillar of the EU, i.e. co-operation in criminal matters.[13] Within the current system of co-operation in criminal matters one has to differentiate between measures based on the principle of mutual assistance which include the Council of Europe Convention on mutual assistance in criminal matters, the Schengen Agreement and the EU Convention on mutual assistance in criminal matters and its Protocol and those measures that are based on mutual recognition. While the idea of mutual recognition for the area of co-operation in criminal matters was promoted at the European Council meeting in Tampere in 1999.[14] The Commission released a communication on mutual recognition that was followed by Council programme containing 24 measures.[15] The first step to implement the principle of mutual recognition was the framework decision on the European Arrest Warrant[16] which was followed by the framework decision on freezing of assets and evidence,[17] the framework decision on the application of the principle of mutual recognition to financial penalties[18] and most notably the framework decision on the European Evidence Warrant.[19] In general, the difference between the principle of mutual recognition and the instruments based on mutual assistance can be explained by the degree of (legal) bindingness. In the case of mutual recognition the request by one MS to the other will be directly recognised and enforced by the other MS. Therefore, the request becomes an 'order – and not requests like in the case of mutual assistance

University Press, 2007, para 2.164-2.165, arguing that the duty of loyal cooperation (Article 3a TEU) would introduce a duty of co-operation. See also M Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union*, Göttingen, V & R Unipress, 2007, 51ff, with regard to the question why an exchange of evidence might face constitutional problems.

[13] Such co-operation in criminal matters among the EU's MSs was firstly developed outside the EU system within the Council of Europe. This co-operation dates back to 1959 with the Council of Europe Convention on mutual assistance and its subsequent protocols. In terms of co-operation within the EU framework one could mention the Schengen Convention, OJ 2000, L239/19, and the EU Mutual Assistance Convention, OJ 2000, C197/1, which was signed after long negotiations and supplemented the Schengen and Council of Europe rules.

[14] European Council of 15-16 October 1999, Conclusions of the Presidency - SN 200/1/99 REV 1.

[15] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 2001, C12/02.

[16] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L190/1, transposition in Member States' national legislation until 1 January 2004.

[17] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ 2003, L196/45; the aim is to enable judicial authorities of one MS to send an order to another MS to freeze assets in order to obtain evidence or to confiscate the property in the future. This order is executed by the other MS quickly and without further formality. The scope of this instrument is, however, limited to the freezing of evidence located in another MS. The subsequent transfer of the evidence between the MSs would be regulated by mutual assistance instruments or the EEW. This framework decision was supplemented by the framework decision on the application of the principle of mutual recognition to confiscation orders, OJ 2006, L328/59.

[18] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005, L76/16.

[19] See above, n 1.

principle – that will have legal binding force upon the country receiving it. Thus, the requesting country becomes an issuing country and the requested country becomes an executing country.'[20] The mutual assistance instruments do not bind in this direct form[21] and are subject to dual criminality requirements.

In practice this means that in cases of mutual assistance a request is sent from one MS to the other MS. This request shall then, if no relevant ground for refusal is invoked by the receiving MS, be executed as soon as possible and where possible within the deadlines indicated by the issuing authority. In cases of mutual recognition, the ordering state typically issues an order on a standard form that shall be recognised and executed within a fixed deadline. It has to be observed that in these cases the relevant grounds for refusal are limited and the requirement of the dual criminality has been 'watered down' over time dramatically. Ideally there would be no dual criminality requirement at all, where the principle of mutual recognition applies.[22] In this sense the EEW might be seen as the first and most courageous step towards this goal.[23]

4. AVAILABILITY OF INSTRUMENTS

After this brief introduction into the two different instruments, we should return to our example of a cross-border competition case. The OFT would, first of all, need to assess whether both instruments would be available in the given case. As it seems clear that competition authorities can use the means provided for by Article 12 and 22 of Regulation 1/2003, a closer look at the question whether the competition authorities could use the mechanism provided in the framework decision on the EEW seems necessary.

In this respect it has first to be born in mind that the EEW is only available in cases of 'criminal proceedings'. However, Article 5 of the framework decision defines these criminal proceedings not only as classical criminal proceedings but as proceedings in

[20] V Stojanovski, 'The European Evidence Warrant' Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition, Brno, Masaryk University, 2009, 1.2.

[21] The Council of Europe Convention for example is legally not binding, as Article 2 states that the request may be refused on grounds of sovereignty, security, order public and essential interest. However, as every Country is free to define its own essential interest the country is essentially 'free to decide on how to proceed with the request... [and seems to depend] solely on the will of the requesting country', ibid, 1.1. Even though, the protocol from 2001 seems to ease this problem to some extent.

[22] See in this regard for example the Proposal for a Council framework decision on the exchange of information under the principle of availability (Brussels 12.10.2005) COM/2005/490 final.

[23] See in this regard for example recital 16 of the Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters: 'To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, should be limited. In particular, refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) should not be possible' if the request does not require search and seizure. Even in these cases Article 14 contains a long list of offences that are not subject to the dual criminality requirement.

which a legal person is held liable or is punished for the infringement of the rules of law, as it encompasses:

(a) ... criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

(b) ... proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(c) ... proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and

(d) ... proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.[24]

So that the EEW is also available in cases of administrative sanctions[25] which is clarified by Article 5(b) of the framework decision.[26] In this respect it might also be important to note that the framework decision is not limited to sanctions against individuals but applies to sanctions against 'a legal person.'[27] One might, thus, consider that the EEW is also available in classical competition cases, i.e. cases where sanctions against individuals are not at issue. Such an interpretation might equally find some support in the idea that the sanctions against the undertakings in competition cases are criminal in nature, at least in the sense of the ECHR.[28]

With regard to the question whether a competition authority, i.e. the OFT, could issue an EEW, Article 2 of the framework decision explains that an EEW can be issued by:

(i) a judge, a court, an investigating magistrate, a public prosecutor; or

(ii) any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with

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24 Framework decision on the EEW, n 1, above, Article 5.

25 So in cases like § 81 of the (German) GWB which imposes administrative sanctions (Ordnungswidrigkeit) for the breach of competition law.

26 See in this regard also H. Ahlbrecht, 'Der Rahmenbeschluss-Entwurf der Europäischen Beweisanordnung - eine kritische Bestandsaufnahme' (2006) *Neue Zeitschrift für Strafrecht* 70, 71.

27 Framework decision on the EEW, n 1, above, Article 5(d).

28 See in this regard: PJ Wils Wouter, 'La Compatibilité des Procedures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme: Wils, La Compatibilité des Procedures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme, Cahiers de Droit Europeen, (1996) 32 *Cahiers de Droit Europeen* 329; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Edward Elgar, 2008, 29ff.

> competence to order the obtaining of evidence in cross-border cases in accordance with national law.

Thus, a competition authority even though not 'a judge, a court, an investigating magistrate, a public prosecutor' within the meaning of Article 2(c)(i) of the framework decision could issue an EEW. This is so since it is acting in the 'capacity as investigating authority' and 'has the competence to order the obtaining of evidence in cross-border cases in accordance with national law'[29] within the meaning of Article 2(c)(ii) of the framework decision. This finding is, moreover, supported by the fact that the internal organisation of the MS, i.e. whether the MS has put an administrative authority or a court in charge of the investigation, cannot be decisive with regard to the question of whether the EEW is applicable.[30]

Hence, it has been established that the investigating competition authority, in cases where criminal sanctions for individuals exist, has both means available, the means of Regulation 1/2003 and the EEW. One might, moreover, take up the position that this does not only apply in cases involving criminal sanctions against individuals, but equally in classical competition cases without criminal sanctions against individuals.

5. Forms of Co-operation under Regulation 1/2003 and the EEW (Scope of Application)

Another question which a national competition authority would have to face is the question, what kind of information it can obtain under the different regimes and how the procedures would work.

If a national competition authority, like the OFT, would use the means provided by Regulation 1/2003, Article 22 and Article 12 of Regulation 1/2003 would come into play. According to Article 22:

> The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

So that under Regulation 1/2003 the requesting competition authority could ask the competition authority in the other MS to investigate on its behalf. In this investigation the competition authority could use all the powers granted to it in such matters. The exchange of the acquired information would, however, be subject to Article 12 of Regulation 1/2003. Regulation 1/2003 does not cover further procedural questions.

[29] In this respect one has to bear the general competence of the national competition authorities to obtain evidence in cross-border competition cases in mind.

[30] Such a requirement would put pressure on the national procedural autonomy to change the system towards a system with courts in charge of the investigation and might be seen as an intrusion into the national procedural autonomy.

In the case of the EEW, however, one has to point out that the EEW seems not to cover such a broad scope of measures as Article 22 of Regulation 1/2003.[31] Article 4(1) of the framework decision explains that an EEW can be issued to obtain objects, documents or data. However:

> [t]he EEW shall not be issued for the purpose of requiring the executing authority to:
>
> (a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
>
> (b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
>
> (c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
>
> (d) conduct analysis of existing objects, documents or data; and
>
> (e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.[32]

Hence, the scope of application for the EEW seems to be more limited. Yet, this narrow scope is widened again by Article 4(4) as the EEW covers such information if it is was, 'already in the possession of the executing authority before the EEW is issued'.[33] Moreover, it is important to note that the EEW also covers statements made during the execution of the warrant, for example during a search and seizure.[34] From a procedural point of view, the EEW is issued on a standard form and strict deadlines for its execution or refusal of execution apply.[35]

Finally, another difference between the mechanisms provided by Regulation 1/2003 and the EEW regarding the scope of application has to be pointed out. The co-operation under Regulation 1/2003 does only apply among the national competition authorities/national competition authorities and the Commission, while the EEW cannot only be used among competition authorities. The EEW can be directed to every 'authority having competence under the national law which implements this Framework Decision to recognise or execute an EEW in accordance with this Framework Decision.'[36]

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[31] Depending on the particular national arrangements regarding the powers of investigation of the competition authorities.

[32] Framework decision on the EEW, n 1, above, Article 4(3).

[33] Ibid, Article 4(4).

[34] Ibid, Article 4(6).

[35] Ibid, see Article 15 and 16.

[36] Ibid, Article 2(d).

6. LIMITS OF CO-OPERATION

Another important (and perhaps the most important) consideration for the competition authority, e.g. the OFT, are the limits set for the co-operation. In this context first the limits imposed by Regulation 1/2003 should be investigated before the limits of the EEW will be examined.

6.1. Regulation 1/2003

The co-operation might be restricted in three different ways: (i) restrictions with regard to the gathering of information, (ii) restrictions with regard to the exchange of information, and, finally, (iii) restrictions with regard to the use of the exchanged information.[37]

6.1.1. Limits with regard to the gathering of information

With regard to the question of gathering information, the Commission holds the view that these questions are governed by the national law that is applicable to the national authority that is gathering the information.[38] Hence, Regulation 1/2003 upholds the national procedural autonomy and in consequence the national authority 'may inform the receiving authority whether the gathering of the information was contested or could still be contested'.[39]

From a Community perspective this means that the Regulation seems to impose no limitation on the exchange of information that might have been gathered in violation of national procedural law. One might describe this as a form of a country of origin principle comparable to the developments in the four freedoms.[40] This would mean that the question whether the information was required legally would depend solely on the law applicable to the transmitting state. The law of the receiving state would, on the other hand, determine the consequences in the national proceedings if the information had been gathered in an illegal manner in the providing state.[41] It is suggested that this approach, though it might raise questions regarding the rule of law and the protection of the undertaking concerned, is in line with the principle of national procedural autonomy.

6.1.2. Limits with regard to the exchange of information

The exchange of information seems not to be limited by Article 12 of Regulation 1/2003. This seems also supported by the provision governing questions of professional secrecy, Article 28 of Regulation 1/2003. This provision explicitly sets out

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[37] D Reichelt, n 9, above, 750. With regard to the relationship between human rights and the exchange of information under Article 12 in general see: A. Andreangeli, n 28, above, 199–219.

[38] Cooperation Notice, n 10, above, para 27.

[39] Ibid.

[40] For a critical comment on this approach see D Reichelt, n 9, above, 751–752, making an argument based on the rule of law.

[41] *Cf.* Cooperation Notice, n 10, above, para 27.

that the restrictions imposed by this Article are '[w]ithout prejudice to the exchange... of information'.[42]

The interpretation that the exchange of information under Article 12 is not limited has been criticised, as Article 12 would set out the legal basis of the exchange of information while the other provisions (Article 11, 13 and 21) would set out the conditions for the exchange. This is said to be so since the exchange would, otherwise, not be limited at all as the only limitation would stem from the requirement that it must be used for 'the purpose of applying Article [101] or Article [102]' as Article 12(2) sets out.[43]

However, the fundamental difference between Article 11 and 12 is that the former is covering mainly the horizontal while the later is covering mainly vertical matters.[44] Hence, it seems not easily possible to apply limitations that are designed to apply in horizontal cases to vertical cases and vice versa. Moreover, as mentioned above, one should carefully distinguish between the gathering, exchange and usage of information. So that the limitation for 'the purpose of applying Article 81 or Article 82' is not a limitation with regard to the exchange but with regard to the usage of information.[45]

Thus, the Regulation does not limit the exchange of information itself. The only limitation on the exchange might stem from the fact that the Regulation must comply with the general principles of EU law.[46] This, however, could be achieved by national procedural means such as hearings and formal appealable decision before the NCA passes on the information.[47]

Yet, one might question whether such a severe measure as not exchanging information is needed to secure the protection of fundamental rights. It might be better to handle issues regarding the usage, including questions of access to documents of third parties, not at the stage of exchange but, more appropriately, at the level of regulating the usage of the information itself. Finally, one has to bear in mind that an interpretation that would prescribe procedural safeguards would invade the national procedural autonomy. Therefore, it seems that limiting the possible exchange of information provided for by Article 12 of Regulation 1/2003 by means of applying the limitations of Article 11 or

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42 Article 28(2).

43 D Reichelt, n 9, above, 755.

44 The distinguishing element seems to be the hierarchical structure of the network. While there are compulsory elements in the horizontal relationship such elements are not present in the vertical relationship. See in this regard also SM Lage and H Brokelmann, n 11, above, 406.

45 For a contrary view see D Reichelt, n 10, above, 755, who seems to interpret this as a limitation of exchange.

46 SM Lage and H Brokelmann, n 11, above, 412.

47 Ibid, 412–415. Very critical with regard to the question of how information that is considered confidential in one MS can be exchanged with another MS that does not consider this as confidential (client lawyer privilege or the access to files) also D Waelbroeck, "Twelve Feet All Dangling Down and Six Necks Exceeding Long': The EU Network of Competition Authorities and the European Convention on Human Rights and Fundamental Freedoms' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 447–478.

by requiring other procedural safeguards at national level seems difficult. So that the exchange of information is prima facie not limited by Article 12 but left at the discretion of the national authorities.[48] However, this does not mean that the *use* of this information is not limited by Article 12.

6.1.3. Limits with regard to the use of information

With regard to the use of information exchanged Article 12(1) explains that:

> For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

At first glance this seems to be at odds with *Spanish Banks,* since the ECJ held with regard to the exchange of information that a NCA could not rely on information covered by professional secrecy.[49] However, the Courts reason for this interpretation was that the old 'Regulation No 17/62 does not govern proceedings conducted by the competent authorities in the Member States, even where such proceedings are for the implementation of Articles [101(1) and 106 TFEU]'.[50] Thus, the usage outside the Commission proceedings was not allowed, as the old Regulation only allowed the use of information for the purpose for which it was collected.[51] Hence, Article 12 of Regulation 1/2003 might be seen as a reaction to *Spanish Banks,* as it now expressly allows the usage and exchange of information between the Commission and the NCA and among the NCAs.[52] One can, therefore, conclude that except for the cases covered by Article 12(2) and (3), the information exchanged can be used. This, however, means that even evidence that could not have been collected under the national law but has been collected legally in another jurisdiction can be used, effectively leading to a situation where the 'less protective' standard prevails.[53]

However, the Regulation also provides for restrictions of the usage of the information exchanged. Article 12(2) of Regulation 1/2003 restricts the usage to 'the purpose of

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[48] Though one might have to make an exception based on the SEP provisio, established in Case C-36/92 *Samenwerkende Elektriciteits-Produktiebedrijven (SEP) NV* v *Commission* [1994] ECR I-1911, where the NCA is directly or indirectly engaged in economic activity see: D Reichelt, n 9, above, 770–774.

[49] Case C-67/91 *Dirección General de Defensa de la Competencia* v *Asociación Española de Banca Privada and others (Spanish Banks)* [1992] ECR I-4785, para 39 -42.

[50] Ibid, para 33.

[51] Ibid.

[52] *Cf.* M Woude, 'Exchange of Information Within the European Competition Network: Scope and Limits' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 381.

[53] In this regard see also A Andreangeli, '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?' (2005) 2 *Competition Law Review* 32, who describes the exchange and usage of information in the ECN as 'a significant threat to the confidentiality of lawyer-client communications', ibid, 43.

applying Article [101] or Article [102] of the Treaty and *in respect of the subject-matter* for which it was collected by the transmitting authority' (emphasis added). Therefore, Article 12 is more restrictive than the old Article which was not restricted to 'the subject-matter for which it was collected by the transmitting authority.'[54] This restriction, nonetheless, is not applicable if national competition law is applied in parallel and the outcome does not differ.[55]

Hence, the most important restrictions regarding the usage of information exchanged are contained in Article 12(3) of Regulation 1/2003. Article 12(3) limits the use of information as evidence in criminal cases against individuals to cases where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

According to the Commission this provision should ensure that the 'more extensive rights of defence'[56] of individuals are not circumvented by using the information exchanged under Article 12 which was collected from undertakings.[57]

It is important to bear in mind that the third paragraph of Article 12 covers two situations that need to be differentiated. Firstly, cases where both States impose criminal 'sanctions of a similar kind'[58] and, secondly, cases where only one MS imposes criminal sanctions, or where the criminal sanctions are not of similar kind.[59]

With regard to cases where both states impose similar criminal sanctions, the information can be used in the criminal case without any limitations by Article 12. This has been criticized as the procedural safeguards in the different MSs are not necessarily the same.[60] Moreover, one would have to bear in mind that this information might have been collected by the transmitting authority under the administrative procedures for the collection of information and not under the criminal procedures. So that it seems a bold statement that the Commission expressed that Article 12(3):

> precludes sanctions being imposed on individuals on the basis of information

[54] This 'subject matter' restriction seems to implement the *Dow Benelux* case, Case 85/87 *Dow Benelux* [1989] ECR 3137, para 17-20, as the Commission Notice suggests. See: Cooperation Notice, n 10 above, para 28(b).

[55] Article 12(2), second sentence.

[56] Ibid, para 28(a).

[57] Ibid, para 28(c).

[58] Article 12(3), 1. recital.

[59] Ibid, 2. recital.

[60] D Reichelt, n 9, above, 781, and Cleary, Gottlieb, Steen Hamilton, 'Comments on draft European Commission Notices and draft regulation implementing Regulation 1/2003' as citied in Reichelt, 778.

> exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority.[61]

This would be so, since Article 12(3) does not provide for an assessment by the receiving NCA whether the standards are comparable in cases where the exchanging MSs have 'similar kind of sanctions'.[62] Thus, one could conclude that in the case of criminal sanction of a 'similar kind' a principle of the country of origin applies. In this sense the Commission formulates:

> If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind ... information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent.[63]

Altogether, one could describe this as a classical case of dual criminality: one authority assists the other when both have sanctions of a similar kind.

The second recital of Article 12(3), however, softens the dual criminality approach to some extent. In the case that the exchanging MSs do not both provide for sanction of a 'similar kind', Article 12(3) distinguishes between cases of custodial sanctions and other sanctions.[64] Where the transferring MS does not provide for custodial sanctions the use of the exchanged information by the receiving MS to impose such sanctions is prohibited. With regard to proceedings concerning other sanctions, which are not available in the transferring MS, the Regulation requires that the information can only be used if 'the same level of protection of the right to defence' existed in the transferring MS.[65]

Thus, the strict dual criminality requirement has been modified. It is still in place with regard to custodial sanctions, but for cases involving non-custodial sanctions it has been replaced by a system where the level of protection of the right to defence is compared.

If one would transfer these finding to a practical level one can identify 9 different cases:

Case 1: MS C1 with criminal/custodial sanctions for individuals can use the evidence provided by MS C2, which equally has custodial sanctions for individuals.

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[61] Cooperation Notice, n 10, above, para 28(c).

[62] D Reichelt, n 9, above, 781.

[63] In this sense also Cooperation Notice, n 10, above, para 28(c).

[64] See ibid.

[65] A higher standard should not be an obstacle.

Case 2: MS C1 cannot use the evidence provided by MS N2, which has non-custodial sanctions for individuals, for custodial sanctions. C1 can, however, use the information for non-custodial sanctions [66]

Case 3: MS C1 cannot use the evidence provided by MS U2, which does not provide for criminal sanctions for individuals, but only classical fines for undertakings; or the information provided by Commission for custodial sanctions. MS C1 can, however, use the information for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS U2/Commission proceedings is not lower than that in MS C1.

Case 4: MS N1 can use the evidence provided by MS C2 to impose its non-custodial sanctions.[67]

Case 5: MS N1 can use the evidence provided by MS N2, which has equally non-custodial sanctions for individuals.

Case 6: MS N1 can use the evidence provided by MS U2 or the Commission for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS U2 or Commission proceedings is not lower than that in MS N1.

Case 7: MS U1 or the Commission can use the evidence provided by MS C2 without restrictions.

Case 8: MS U1 or the Commission can use the evidence provided by MS N2 without restrictions.

Case 9: MS U1 or the Commission can use the evidence provided by MS U2 without restrictions.

Receiving Member State	**Providing Member State**		
	C2	**N2**	**U2 or the Commission**
C1 cases involving custodial sanctions for individuals	y	n	n
C1 cases involving non- custodial sanctions for individuals	y	y[68]	n

[66] This result is based on the argument that with respect to non-custodial sanctions the MS 'foresees sanctions of a similar kind'. One could, however, equally apply a literal interpretation and argue that the MS do not foresee sanctions of a similar kind. So that MS C1 could use the information for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS N2 is not lower than that in MS C1. This question might be an interesting question for a preliminary ruling.

[67] Provided that one follows the interpretation that the lower level of sanctions (no custodial sanctions on part of MS N1) does not hinder the classification that the MS 'foresees sanctions of a similar kind'. The more restrictive, literal interpretation would in this case equally demand that the protection of the right of defence of the individual in MS C2 is not lower than that in MS N1 to use the evidence for non-custodial sanctions.

[68] Based on the interpretation given in n 66, above.

<table>
<tr><td>C1 cases not involving sanctions for individuals</td><td>y</td><td>y</td><td>y</td></tr>
<tr><td>N1 cases involving non- custodial sanctions for individuals</td><td>y[69]</td><td>y</td><td>n</td></tr>
<tr><td>N1 cases not involving sanctions for individuals</td><td>y</td><td>y</td><td>y</td></tr>
<tr><td>U1 cases not involving sanctions for individuals</td><td>y</td><td>y</td><td>y</td></tr>
<tr><td colspan="4">Usage allowed: y
Usage not allowed: n
Usage only allowed, if level of protection of the rights of defence of natural persons in the providing MS is not lower as in the receiving MS: y/n</td></tr>
</table>

On the whole it has to be concluded that Regulation 1/2003 does not limit the gathering of information, the gathering is only limited by national procedural rules. In this respect a principle of country of origin seems to be established: the receiving MS is not empowered to use its national procedural law to review the legality of the gathering of the information at the transmitting MS.[70] However, in turn, this does not necessarily mean that the receiving MS would need to accept that the information cannot be used because it was gathered illegally in the country of origin. Instead it is for the national law of the receiving MS to determine the consequences of illegal gathering of information. Thus, the usage of this illegal gathered information might not be admissible in the providing MS but might be admissible in the receiving MS.[71]

With regard to the exchange of the information it has been explained that Regulation 1/2003 does not provide any limits on the exchange of information but leaves this at the discretion of the national authorities.

The only limits that the Regulation imposes are limits on the usage of the information provided. Here, the Regulation seems to impose a modified dual criminality requirement. In cases where both MSs have criminal sanctions of similar kind the usage is allowed, even if the standards with regard to procedural safeguards are not the same. One could describe this as a principle of country of origin with regard to national procedural law. The dual criminality requirement is, however, softened. This is so since, the use of the exchanged information is possible in cases involving sanctions that are not of similar kind when the protection of the right to defence in both MSs is equal.

[69] Based on the interpretation given in n 67, above.

[70] See also D Reichelt, n 9, above, 779.

[71] See to the contrary M Woude, n 52, above, 383–384, who argues that the highest standard would always prevail. That is to say, where information may not be used in the providing state it may not be used in the receiving state; on the other hand information usable in the providing MS would not be usable in the receiving state if the national procedural law of the receiving state would prevent the usage.

Though this does not extend to cases concerning custodial sanctions, as in these cases the strict dual criminality requirement applies.

As the competition authorities are, however, not required to provide information they might decline to do so. For example they might decline to provide information because this information, even though gathered illegally in the transmitting MS, might be admissible in the courts of the receiving MS. The authority of MS U1 might equally decline to provide the information because it suspects that this information might help the receiving MS C2 to prosecute a citizen of MS U1. This is so because even though the information might not be directly usable in the criminal proceedings due to Article 12(2), (3) of Regulation 1/2003 it can be of indirect help: the authorities of MS C2 could find evidence that could not have been found without the exchanged information. Or put differently: the receiving national 'authorities are unlikely to forget the information received under Article 12'.[72]

6.2. EEW

In contrast to the discretionary system with restrictions on the usage of information under Regulation 1/2003, the EEW sets up a mandatory system and, in the light of the effectiveness of judicial cooperation in criminal matters, very limited grounds for non-recognition.[73]

However, an important limit to the co-operation under the EEW is linked to the question of the dual criminality requirement as ground for refusal. In this regard it has to be differentiated between search or seizure and other measures.

While the co-operation within the ECN does not require dual criminality in cases of search and seizure, as the investigation takes place 'on behalf and for the account of the competition authority of another Member State', Article 22 of Regulation 1/2003.[74] The dual criminality requirement comes, however, into play as soon as sanctions against individuals are concerned. In such cases Article 12(3) of Regulation 1/2003 imposes a strict dual criminality requirement with regard to the usage of information exchanged in cases involving sanctions against individuals.

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72 Ibid, 381.

73 Enumerated in Article 13 refusal is possible for example when the EEW would: infringe the ne bis in idem principle, it would be impossible to execute the EEW by the measures available to the executing authority, if immunity or other privileges under the law of the executing MS would make the execution impossible, the EEW for a search or seizure has not been validated by a judge, a court, an investigating magistrate or a public prosecutor (see Article 11(4)), on territorial grounds, the execution would 'harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities', or the EEW standard form is 'incomplete or manifestly incorrect'.

74 This may be explained by the reason that the co-operation within the ECN is not primarily seen as co-operation in criminal matters but in competition law cases. However, if one would argue that the sanctions in competition cases are to be considered as criminal in nature (which would also be the conclusion that might be reached when applying the definitions contained in the framework decision on the EEW, see text to n 26 – n 29, above, then it could be said that in this regard dual criminality exists, as behaviour contrary Article 101 and 102 TFEU is forbidden in all MS.

In contrast to Regulation 1/2003 the co-operation within the framework of the EEW distinguishes between the gathering of information and gathering in form of search and seizure. Article 14(1) of the framework decision sets out that, with regard to the exchange and gathering of information, no dual criminality requirement applies, where no search and seizure is involved. Therefore, all information that is gathered without search and seizure[75] can be exchanged under the EEW and used within the boundaries set by the national procedural law of the MS issuing the EEW.[76]

Only in cases where the execution of the EEW involves search and seizure a (softened) dual criminality requirement comes into play pursuant Article 14(2)(3) of the framework decision.[77] In this context it has to be born in mind that the criminality as understood by the framework decision does not mean that the conduct must be a criminal offence in the classical sense; as it has been shown[78] that administrative sanctions can also be considered as criminal in the sense of the framework decision. Hence, the dual criminality requirement would be fulfilled in cases where one MS imposed a criminal sanction and other administrative sanctions on individuals.[79]

With regard to EEW in competition cases this would mean:

a) Search and seizure measures may be subject to dual criminality, i.e. the search and seizure *could*[80] be refused in the executing MS if it does not foresee *any* kind of sanctions against individuals in competition cases.

b) The exchange and usage of information gathered without search and seizure measures or which are already in possession of the executing authority[81] is not restricted.

If one would apply the same matrix as established above for the co-operation under Article 12 of Regulation one would have the following result.

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[75] In this context it is also important to bear the scope of the EEW in mind, see text to n 31 – n 34, above.

[76] In this regard see Article 7 of the framework decision on the EEW, n 1, above, 76.

[77] Article 12(2) sets out that the dual criminality applies for all other offences than those listed in Article 14(2) of the framework decision on the EEW. However, it is important to note that Germany has pushed for an option (a Declaration) under which it can 'make execution [of the EEW for search and seizure] subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling' unless the issuing MS makes a statement that the offence in question meets certain criteria.

[78] See text to n 25, above.

[79] One might in this context think of co-operation between the UK (criminal sanction against individuals) and Germany (administrative sanctions against individuals).

[80] Not would *have to*. This element of discretion might be compared to the discretion which applies to all cases under Article 12 of Regulation 1/2003.

[81] So also information gathered by means of search and seizure before the EEW was issued.

Issuing Member State	Executing Member States					
	C2		N2		U2	
	No Search or Seizure	Search or Seizure	No Search or Seizure	Search or Seizure	No Search or Seizure	Search or Seizure
C1 cases involving custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
C1 cases involving non-custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
C1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
N1 cases involving non-custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
N1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
U1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
Exchange and Usage allowed: y Exchange and Usage not allowed: n Exchange (i.e. execution) might be made subject to dual criminality, gives discretion[82] = y/n						

This table shows, in comparison to the table on the usage of the information exchanged pursuant Article 12 of Regulation 1/2003, that the regime for the co-operation in criminal cases is not as strict as the regime developed in the context of ECN. While the regime of Article 12 of Regulation 1/2003 shows four cases where the information exchanged cannot be used in criminal cases against individuals, the table on the EEW shows not a single absolute case.[83] Instead it introduces discretion, however, only for cases involving search or seizure.[84] With regard to the distinction between search or seizure measures and other measures it is important that the EEW introduces another limitation. Even though a competition authority could issue an EEW, according to Article 2 (c)(ii), the executing authority in the other MS may refuse the execution of the EEW in cases of search or seizure 'if the issuing authority is not a

[82] This discretion is given to the MS who have to implement the framework decision. The MS, however, might equally decide to give discretion to the executing authority. *Cf* the case of Article 12 of Regulation 1/2003 which seems to give discretion to the competition authority concerned.

[83] Like the cases in Regulation 1/2003 where the usage is absolutely prohibited.

[84] In this context it might also be important to recall that the exchange of information under Article 12 in general is subject to a discretion on part of the authority which receives the request of information exchange.

judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities'.[85]

7. INTERIM CONCLUSION

In conclusion, it seems that a competition authority might be able to receive co-operation under the EEW that goes further than under Regulation 1/2003. This is so, because:

a) execution of the EEW is mandatory as compared to the discretionary regime under Article 12 of Regulation 1/2003,

b) as the information received under the EEW can always be used in criminal proceedings against individuals,[86]

c) strict time limits apply.

This result that co-operation in terms of the EEW seems to go further than the co-operation under Regulation 1/2003 might be caused by the fact that the system established under Regulation 1/2003 seems (still) to be built on the principle of mutual assistance rather than mutual recognition as the EEW.[87] In line with the Commission's Green Paper on obtaining evidence in criminal matters from one MS to another and securing its admissibility, one could argue that the availability of these different regimes:

> makes the application of the rules burdensome and may cause confusion among practitioners. This can also result in situations where practitioners do not use the most appropriate instrument for the evidence sought. Ultimately, these factors may therefore hinder effective cross-border cooperation. Furthermore, instruments based on mutual assistance, may be regarded as slow and inefficient given the fact that they do not impose any standard forms to be used when issuing a request for obtaining evidence located in another Member State or any fixed deadlines for executing the request.[88]

The fact that the co-operation in the area of criminal law seems closer and more efficient than in competition law is particularly intriguing, since co-operation in competition cases takes place in an area of law which has a much higher degree of

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[85] Article 11(4) of the framework decision on the EEW, n 1, above, 77.

[86] At least in terms of EU law. Limitation that might arise from national procedural law should not be considered in this context.

[87] Very critical of the principle of mutual recognition in the area of criminal law: S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?' (2004) 41 CMLR 5, arguing that this principle should not lead to the abolition of the dual criminality requirement. Also critical M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CMLR 405, comparing mutual recognition in the internal market with the application of this principle in the area of criminal law.

[88] Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility (Brussels 11.11.2009) COM(2009) 624 final 4.

harmonisation[89] than criminal law.[90] Moreover, this intriguing result leads to the grotesque situation where the co-operation in an area mainly designed for the prosecuting of individuals sets lower standards regarding the exchange of information than the co-operation in cases where undertakings are involved.[91]

However, this development might also lead to cases where the interaction between the co-operation within the ECN and the EEW results in cases where the safeguards of either one are circumvented. Here, three hypothetical and potentially critical cases regarding the interaction between the co-operation within the ECN and the EEW might easily be identified.

The first case would be a case where the receiving authority in the other MS does reject the request to share the information under Article 12 of Regulation 1/2003.[92] It seems that the requesting competition authority could then use the EEW to become an issuing authority and compel the reluctant authority to pass on the information, as long as the grounds for refusal pursuant Article 13 of the framework decision do not exist.

The second case would involve a request by one competition authority under Article 22 of Regulation 1/2003 involving the search of premises and seizure of documents. The requesting authority could then use the EEW to obtain the documents seized as material already in the possession of the executing authority. It would, thereby, effectively circumvent the requirement of having the EEW issued by a judge, court, investigating magistrate or public prosecutor to be recognised and would also circumvent the dual criminality in cases of search and seizure set out in Article 14(3) of the framework decision on the EEW. Moreover, such a procedure could also be used to circumvent the limits of the framework decision set out in Article 4 regarding live evidence, as it might be possible for the receiving competition authority to obtain this information in proceedings under Article 22 of Regulation 1/2003. Finally, the use of the EEW in these cases would circumvent the restriction regarding the use of information contained in Article 12(3) of Regulation 1/2003.

In the third case the co-operation between the competition authorities under Article 12 of Regulation 1/2003 has lead to the case that information has been exchanged but

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[89] Perhaps this area of law might even be described as the area of law with the highest degree of harmonisation, as in all MSs conduct prohibited by Article 101 and 102 TFEU is also illegal under national law.

[90] Where harmonisation only starts to take place gradually. With regard to the harmonisation in criminal law see for example: S Peers, 'The European Union and Substantive Criminal Law: Reinventing the Wheel?' (2002) 33 *Netherlands Yearbook of International Law* 47; EJ Husabø, *Harmonization of Criminal Law in Europe*, Antwerpen, Intersentia, 2005; B Hecker *Europäisches Strafrecht*, 2nd aktualisierte und erw. Aufl, Berlin, Springer, 2007, 309–443; V Mitsilegas, *EU Criminal Law*, Oxford, Hart, 2009, 59–110.

[91] A reason that might explain this situation could be that while the primary goal of the EEW is to regulate the exchange of information between the MS authorities, this is not the primary goal of Regulation 1/2003. Regulation 1/2003 seems to regulate the co-operation more en passant, as a by-product of the decentralisation and the detailed regulation of powers of the Commission vis a vie national authorities.

[92] Though it has been argued that a rejection would never happen in practice due to the dynamics of a network, see in this regard F Cengiz, n 8, above, 12.

cannot be used in the case against an individual. Could the requesting competition authority request the information again, now by means of EEW, in order to use the information in the case against the individual? If so, one would need to ask why the competition authority should not be allowed to use the information in the first place. This is so, since otherwise one might face a situation where the information is sent back to the providing authority[93] in order to regain it by means of the EEW to use it in the case against the individual.

8. POSSIBLE SOLUTIONS

It has been seen that mechanisms for co-operation differ notably. This difference seems to be linked to their different origin: the Regulation 1/2003 as a (former) first pillar instrument and the EEW as co-operation instrument of the (former) third pillar. Taking into account that the Lisbon Treaty merges these two pillars, one might ask if the different regimes for the exchange of information should still apply in cases concerning competition and criminal proceedings, especially as one would expect that a finding made in criminal cases can be used in competition cases.[94]

Against this background and assuming that closer co-operation is the way forward[95] it seems that the principle of mutual recognition will replace mutual assistance with regard to co-operation and exchange of information in competition cases in the long term. Three solutions seem possible, two external, i.e. outside the current framework of Regulation 1/2003, and an internal, i.e. by reforming Regulation 1/2003.

The most ambitious, and perhaps the most effective solution, would be an external one. The different legal regimes for co-operation and information exchange are replaced by a single instrument based on the principle of mutual recognition. This regime would be governing the co-operation and exchange of information between all law enforcement agencies in the Union. This would mean that the Union level would equally be encompassed, i.e. the Commission.[96] It would closely resemble to the principle of availability,[97] where information held by one law enforcement agency is made available to another law enforcement agency if needed. Arguably, such a system would provoke an intense debate and is not likely to succeed.

A smaller but equally ambitious version of this external solution would be the adoption of this framework without including the Union's enforcement authority, i.e. Commission. Such a solution would probably create the same debate and would

[93] Perhaps because it is evidence, which exists only once or cannot be reproduced.

[94] See in this regard section 2. Starting Point/General Hypothesis, above.

[95] This is not to say that this is the optimal way forward. The paper shows potential ways forward, so that an informed discussion about the optimal way is possible. Note S Peers, n 87, above, and M Möstl, n 87, above, which are both critical of the developments regarding mutual recognition in criminal law.

[96] The co-operation between the Commission and the national competition authorities is still only governed by Regulation 1/2003 as the EEW only governs the relationship between law enforcement agencies of the MSs.

[97] See in this context for example: Proposal for a Council framework decision on the exchange of information under the principle of availability (Brussels 12.10.2005) COM(2005) 490 final.

furthermore have the disadvantage that 'most effective co-operation' between the Commission and the national competition authorities would not be guaranteed.

The least ambitious and therefore feasible solution would be an internal solution, i.e. a reform of the co-operation mechanisms provided under Regulation 1/2003 and in particular Article 12. The reform would replace mutual assistance with a system of mutual recognition in order to bring Regulation 1/2003 in line with the co-operation mechanisms in criminal matters and especially the EEW. The most important element of such a reform would be the removal of the discretionary element in Article 12(1) of Regulation 1/2003. Instead narrow grounds for refusal would be implemented. This could, perhaps, be along the lines of the proposed council framework decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.[98] So refusal would only be allowed in order:

- to avoid jeopardising the success of an on-going investigation;
- to protect a source of information or the physical integrity of a natural person;
- to protect the confidentiality of information at any stage of processing; or,
- to protect the fundamental rights and freedoms of persons.

Moreover, the restriction on the use of the information exchanged contained in Article 12(3) would be abolished. The complete abolition of the dual criminality requirement seems to be the general way forward pushed for by the Commission. Even though a complete abolition might seem to be a bold proposal, it is in line with the current trend of reducing the dual criminality requirements and the Commission's approach.[99] This would mean that the question how the information gathered in proceedings against undertakings can be used in proceedings against individuals would be left to the national level. One might argue this would not create serious problems, as the MSs, in European competition cases, are also bound by the Charter of Fundamental Rights, the ECHR and even by national fundamental rights. Hence, the 'risk created' for fundamental rights protection, by leaving this matter to the MSs, seems not too high. Moreover, one might ask: 'why should the Union be in a better position to protect fundamental rights than the MSs and in particular national courts?' To counter problems that might arise out of the different standards of human rights protection in the MSs, one could also include[100] a section like Article 7 of the framework decision on the EEW that sets out, that:

> Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have

[98] Ibid.

[99] See for example the Green Paper, n 88, above.

[100] Though this seems to substantially lessen the idea and impact of mutual recognition. It would, however, address the criticism expressed in the context of Regulation 1/2003 and a possible trading down effect with regard to standard of fundamental rights protection. In this line for example: A Andreangeli, n 53, above.

been met:

(a) obtaining the objects, documents or data sought is necessary and proportionate for the purpose of proceedings referred to in Article 5;

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

Finally, it is important that the Commission would be included in this new exchange regime. This would ensure the highest possible degree of efficiency with regard to co-operation and might furthermore help to overcome the current hierarchical structure of the ECN.[101]

9. CONCLUSION

It has been shown that the co-operation and information exchange mechanisms in competition cases established by Regulation 1/2003 have been overtaken by the means provided by the EEW. This result is surprising as competition law is an area of law with a much higher degree of harmonisation than criminal law. However, the fact that the co-operation in terms of EEW is more effective than the one under the ECN might be explained as a consequence of models and times when the instruments were developed. While the system established under Regulation 1/2003 seems to be assembled having the systems of mutual assistance in mind, the EEW is built on the newer principle of mutual assistance and goes further than any other previous instrument in this area. The paper has also explained that, in general, national competition authorities have both means available: (i) the classical ECN route provided by Regulation 1/2003 and (ii) the EEW. The inconsistencies that might be produced by the current system of different instruments have been explained and in the light of the merging of the (former) first pillar and (former) third pillar under the Lisbon Treaty three possible reforms have been put forward. These suggested reform proposals and the inconsistencies explained should form the basis for an interesting (and controversial) debate on the right balance between effective law enforcement in cross-border competition cases and the protection of fundamental rights.

[101] With regard to the current atypical structure of the ECN see: F Cengiz, n 8, above.

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The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?

*Nicolo Zingales**

This article will discuss, in light of the expected accession of the European Union (EU) to the European Convention of Human Rights (ECHR), whether the current enforcement structure of competition law in the EU is consistent with the right to fair trial enshrined in Art 6 ECHR. After a brief introduction summarizing the terms of the debate on the 'fair trial' in EU competition law, the focus will shift to the role of the Hearing Officer and its evolution to illustrate the combination in its role of two different functions: on the one hand, ensuring respect of the right to be heard; on the other, improving the quality of the decision and minimizing the risk of annulment through judicial review. To emphasize the fundamental importance of giving priority to the former if EU competition law proceedings are to avoid potential condemnations for breach of Article 6 ECHR, a paragraph will describe the intensity of the judicial control operated by the EU adjudicature over violations of due process. Following a critical analysis of procedural guarantees available in competition proceedings and the associated powers and responsibilities of the Hearing Officer, the article will conclude with two suggestions for a potentially improved respect of the right to be heard under the current mandate, and a word of optimism for a revision of the mandate and an indication of what should be the main priority of such reform.

1. THE LEGAL ISSUE: FRICTION BETWEEN EU COMPETITION LAW AND THE ECHR

Various commentators and a number of court cases[1] have questioned whether the system for the enforcement of competition law in Europe, where the Commission

* PhD candidate in International Law and Economics, Bocconi University. I wish to thank the Academy of European Law and the participants of the Annual Conference on European Antitrust Law 2010, as well as Michael Albers, Mark English and the staff of the Hearing Officer for the constructive inputs. All errors and responsibilities remain my own.

[1] D Slater, S Thomas and D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) European Competition Journal Vol 5, Issue 1, p 97; D Waelbroeck and D Fosselard, 'Should the Decision-making power in EC Antitrust Procedures be Left to an Independent Judge? The impact of the European Convention of Human Rights on EC Antitrust Procedures' (1994) 64 Yearbook of European Law 111_42; J Schwarze, R Bechtold and W Bosch, 'Deficiencies in European Competition Law: Critical Analysis and proposals for change', GleissLutz Rechtsanalte, Stuttgart, 2008; I Forrester, 'Due process in Competition Cases: a distinguished institution with flawed procedures', (2009) European Law Review, 34(6), p 817; A Andreangeli, 'The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings', (2006) European Law Review vol 31 issue 3 pp 342-363; A Andreangeli, O Brouwer, D de Feydeau, I Forrester, D Geradin, A Komninos, K Hofstetter, Y Katsoulacos, C Lemaire, M O'Regan, L Ortiz Blanco, D Slater, S Thomas, D Ulph, D Waelbroeck, U Zinmeister, 'Enforcement by the Commission: The decisional and enforcement structure in antitrust cases and the Commission's fining system', (2009) Brussels, European Union OPC. For the case-law of the EU, see *inter alia* Cases 45/69, *Boehringer Mannheim v Commission* [1970] ECR 153; Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825, p 1920; Case T-11/89, *Shell v Commission* [1992] ECR II-757,

carries out both a prosecutorial and an adjudicative function, might not lead to a violation of Article 6 of the European Convention of Human Rights (ECHR).

Most arguments have been grounded on the first paragraph of Article 6, which provides that, 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The usual allegations are that competition decisions involve the determination of civil rights and obligations, and that because of the combination of its functions, the Commission is not an 'independent and impartial tribunal' as the ECHR would require. The argument goes that, although the Commission does not fall within the meaning of 'independent and impartial tribunal',[2] it is de facto a tribunal since its decisions are immediately binding even if challenged before the General Court (except for those exceptional cases where interim measures are granted).[3] Alternatively, a more moderate view holds that, since a considerable amount of time lapses before one can exercise his right to be heard before the General Court, competition proceedings may in specific cases fail the test of the 'reasonable time' requirement of Art 6(1) ECHR.[4]

Opponents of these views contend pointing to the absolute necessity to have in place such an enforcement structure for efficiency reasons,[5] and place emphasis for that purpose on a *caveat* that the ECHR jurisprudence has established with respect to the scope of application of Article 6 ECHR: starting from the *La Compte* case,[6] the

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para 39; Case T-348/94, *Enso Espanola v Commission* [1998] ECR II-1875; Case T–112/98, *Mannesmannröhren-Werke AG v Commission*, [2001] ECR II-729, para 60. As to the ECHR jurisprudence, see the decision of the European Commission of Human Rights, *M & Co v Federal Republic of Germany*, Appl. 13258/87, 64 D & R 138 (1990), where the applicants were not allowed to launch a procedure against Germany on the basis of Article 6 of the Strasbourg Convention for action required of Germany by EU law to enforce a competition fine imposed by the European Commission, given that Germany had transferred its powers to the EU and the EU was not incompatible with its membership of the Strasbourg Convention given that fundamental rights received an equivalent protection under EU law; see also, more recently, the application lodged and pending before the CFI in the Case T-56/09, *Saint Gobain Glass France and Others v. Commission.*

[2] Case 218/78 R, *Heintz van Landewyck SARL v Commission*, [1980] ECR 3125, para 81; Cases 100-103/80, *Musique de Diffusion Française v Commission,* [1983] 3 CMLR 221 para 7; Joined Cases T-109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bollorè and others v Commission*, [2007] ECR II-947, para 86; Case T-54/03, *Lafarge SA v Commission,* [2008] ECR II-120, at 47.

[3] See below, Section 2.2.

[4] The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities: see Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, para 29, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, para 187

[5] See *inter alia* W. Wils, 'The combination of the Investigative and Prosecutorial Functions and the Adjudicative Function in Antitrust Enforcement: A Legal and Economic Analysis' (2004) World Competition 27 No. 2, 201-224.

[6] *La Compte, Van Leuven and De Meyere v Belgium*, Appl. no. 6878/75 and 7238/75, A/43 para 51. On the same line of reasoning, see *Albert and Le Compte v Belgium*, Appl. No. *7299/75* and *7496/76,* A/58 para 29; *Ozturk v Germany*, A/73 (1984) 6 EHRR 409, para 46; *Bendenoun v France*, A/284 para 56.

European Court of Human Rights (ECtHR) has repeatedly held that the determination of civil rights and obligations or the prosecution and punishment of offences which are 'criminal' within the meaning of Article 6 *can* be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decisions made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR. Similarly, the ECtHR has stated that, in specialized areas of administrative nature, it is sufficient for the court to exercise a restricted jurisdiction and leave the determination of facts to an adminitrative body, 'particularly where the facts have already been established in the course of a quasi-judicial proedure governed by many of the safeguards required by Art 6(1)'.[7] However, when the determination of facts lies at the heart of the judicial proceedings and of the applicant's contestation (as it is often the case for competition law proceedings), the ECtHR requires that the review Court have the power to rehear the evidence or to substitute its own views to that of the administrative authority, for otherwise there would be a risk 'that there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute'.[8] It is clear, then, that it is crucial for the validity of both exceptions to have in place a robust system of judicial review.

Two additional arguments are often underestimated by this type of discussions: first, as recently recalled by one of the critics of the current enforcement system,[9] the ECtHR has not ruled so far in favour of the applicability of this 'efficiency' justification to competition law proceedings. This has an important bearing on the prospects for future pronouncements by the court on these issues, as it implies that in order to hold the EU accountable for violation of 'due process' under Art 6(1) ECHR there would be no need for the ECtHR to overrule established jurisprudence. Based on previous case-law, however, it is reasonable to assume that the ECtHR will not provide a definite and general answer to whether such justification can be used in the competition enforcement domain: it will rather look at the specific context, and may accept the justification only to the extent that (1) specific violations of due process can be corrected in the following phase of the proceedings; and (2) such violations are not irremediable or decisive for the further continuation of the proceedings.[10]

Secondly, and along the same line of reasoning, a distinction should be made in this regard between charges that fall under the meaning of criminal established by the Convention and charges classified as 'criminal' under both domestic and convention law: for the latter hypothesis, in which criminal charges are more serious, the case-law

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[7] *Jane Smith v. The United Kingdom*, Appl. No. 25154/94; *Bryan v United Kingdom* Appl. No. 19178/91, 21 EHRR 342, [1995] Series A No 335-A; *Chapman v. United Kingdom*, Application No. 27238/95, 33 E.H.R.R. 399 [2001] 10 BHRC 48; *Grecu v Romania* , Appl. no. 56326/00

[8] *Tsfayo v UK,* App. No 60860/00, All ER (D) 177 (Nov), para 48. See also D Slater, S Thomas and D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) European Competition Journal, Vol.5, Issue 1, p 97.

[9] I Forrester, op cit, n 1, p 821.

[10] Decision of the European Commission of Human Rights, Case *H v UK*, App. no. 100000/82, D.R., vol. 33 p 265.

of the ECHR has clarified that the 'efficiency' justification cannot find application.[11] Now, even if the categorization as criminal of any fine imposed pursuant to Regulation 1/2003 is explicitly ruled out,[12] and even if the same regulation excludes its application to national laws which impose criminal sanctions on natural persons, nonetheless, an exception remains with respect to those cases in which 'such sanctions are the means whereby competition rules applying to undertakings are enforced'.[13] In such cases, it seems difficult to argue against the qualification of 'criminal' under both domestic and convention law, for this is in line with the three criteria identified by the ECHR jurisprudence for the autonomous definition of 'criminal charge' under the Convention: the classification of the offence under national law, the nature and severity of the charge and the purpose of the fine (namely, whether it was both punitive and deterrent).[14] Without going into the details of each of the three criteria, it can be maintained that, where national law establishes a threat of imprisonment for resistance to inspections,[15] the proceedings can be deemed criminal in the Convention's sense as at least two out of the three (non-cumulative) criteria militate in favour of such qualification.[16] An argument can be advanced, therefore, that given the increasing trend toward criminalization of anti-cartel laws in Europe and the reliance of the European Commission on the procedures established by national law for the execution of dawn raids where an investigated company refuses to surrender to the Commission's inspection,[17] the two-tiered system described above could be found to fall foul of the requirements of a fair trial ex Article 6 ECHR. This seems to be an inevitable conclusion for those cartels in which decisive evidence is gathered through dawn raid inspections, at least with regard to those countries that have in place anti-cartel

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[11] *De Cubber v Belgium*, Series A no. 86 para 31-32 and *Findlay v Ukm* 25/2/97, reports 1997-I, para 79.

[12] Article 24 (5) Regulation 1/2003.

[13] Recital n. 8, Regulation 1/2003.

[14] *Engel v Netherlands,* series A No. 22[1979-80] 1 EHRR 647.

[15] Note that this can be either a result of the national competition law, or even a more general national legislation that makes hindering an official proceeding a criminal offence, as it the case for Sweden: see in this regard J. Coyet and M.P. Giolito, 'Putting your Hands in Someone Else's Drawers – Some Thoughts on the Use of Coercive Measures When Conducting Dawn Raids in the Homes of Directors, Managers and Other Staff Memebers', in M Johanson, K Almestad, J Azizi and M Baldi, *Liber amicorum in honour of Sven Norberg: A European for All Seasons*, Bruylant 2007, p 153.

[16] A similar finding was reached unanimously by the European Commission of Human Right following an application (subsequently withdrawn) by a French company against France concerning the violation of Art 6(1) ECHR pursuant to the enforcement of its competition law. The Commission concluded that, despite the domestic classification as 'administrative', competition law was criminal in the Convention sense because of the nature of the law in itself (seeks to protect the general interest of the public, akin to criminal law) and the severity of the fine (up to 5% of the annual turnover to ensure deterrence). See Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, Decision of the Commission of Human Rights of 27 February 1992, A/232-A. 18. More recently, the ECtHR held in *Jussila* that 'competition law' cases are part of the 'gradual broadening of the criminal head [of Article 6] to cases not strictly belonging to the traditional categories of criminal law'. See *Jussila v Finland* (2007) 45 EHRR 39, at para 43.

[17] Article 20 (6) Regulation 1/2003.

legislation that applies criminal sanctions for resistance to inspections ordered by the Commission.[18]

The debate about the applicability of Article 6 ECHR to competition proceedings has been refreshed recently by the entering into force of the Lisbon Treaty, which contains one important novelty in this respect: the Charter of Fundamental Rights acquires the same legal value as the Treaties.[19] As a result, the EU will be obliged to give full respect to the fundamental rights enshrined therein, including the right to a fair hearing referred to in Article 41,[20] and the EU courts will have to tackle the question of whether competition proceedings comply with the requirements of Art 6(1) ECHR,[21] which is explicitly incorporated in Article 41 of the Charter. Conceivably, this will trigger a stricter scrutiny over the respect by the community procedures of fundamental rights than the one carried out by the ECtHR, which has so far limited itself to presuming the compatibility with the Convention of acts adopted by States in fulfillment of obligations imposed by the EU, save the possibility of rebutting such presumption in a particular case if it considered that the protection of fundamental rights was *manifestly* deficient.[22]

2. THE POSSIBLE SOLUTIONS: JUDICIAL REVIEW AND THE HEARING OFFICER

Against this backdrop, it is important to understand the role played by the General Court and the Hearing Officer in competition proceedings. These are, as a matter of fact, the forces that impose some real constraint on the Commission's decision-making power. This is not to minimize the role of the Legal Service and the Chief Competition Economist, both performing an important work in ensuring the legality of the decision and its consistency with sound economic principles. But their role remains one of internal control, which is unlikely to be as effective as that of someone whose objective is not aligned with that of the institution that is subject to such control (in particular, enforcing the competition rules). By contrast, it will be illustrated throughout the article

[18] The problem lies in the fact that the Commission's decision is not a warrant, as would be required under the ECHR case-law, because it is not granted judicial authorization: see I Aslam and M Ramsden, 'EC Dawn Raids: A Human Rights Violation?', (2008) 5(1) CompLRev 70, and A Riley, 'The ECHR Implications of the Investigations Provisions of the Draft Competition Regulation' (2002) 51(1) ICLQ 55.

[19] Article 6 TEU.

[20] Right to a good administration, which implies also a 'right of every person to be heard before any individual measure which would affect him or her adversely is taken'. The standard of protection of such right must also not be inferior to that of the ECHR in light of article 52.2 of the Charter, according which, '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'.

[21] See, for instance, Case T-99/04, *AC-Treuhand* AG *v Commission* [2008] ECR II-1501, where it held, '[T]he Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not form part of Community law'.

[22] Judgment of the ECtHR (Grand Chambre) of 30 June 2005, *Bosphorus Hava Yollari Tuizm Ve Ticaret Anonim Şirketi v Ireland*, Appl no 45036/98, para 156.

that, even though the Hearing Officer is part of the Commission and thus formally constitutes an 'internal check', its progressive empowerment with quasi-judicial prerogatives and the increased focus of its role on the protection of the right to be heard may contribute to moving it away from such categorization, towards one of a *de facto* external check provided with some 'teeth' to the enforcement of its mandate. Another feature that is frequently cited amongst the 'checks and balances' of the current enforcement system is the role of the Advisory Committee on Restrictive Practices and Dominant Positions, as detailed by Article 14 of Reg 1/2003. However, it is submitted here, as it has been recognised elsewhere,[23] that such Committee cannot be the solution to the problem of due process. Its approach is naturally deferential to the authority who has been working for a considerable amount of time on the case and has seen the whole body of evidence. As a matter of fact the Advisory Committee has never voted against the adoption of a Commission Decision. Hence, no further reference will be made for the present purposes to such committee and the focus will remain on what are considered the two truly significant 'checks' to assess whether they are able to ensure compliance with Article 6 ECHR. The aim of this article is to enable us to answer, in line with the ECHR case-law cited above, the following question:

> 'Is the two-tiered enforcement system adopted by the Commission capable of ensuring that (i) violations of due process occurring in one phase of the proceedings can be corrected in the following one (i.e., either by the Hearing Officer or by the Court of First Instance), and (ii) such violations are not irremediable or decisive for the further continuation of the proceedings?'

2.1. Judicial review: an imperfect remedy for due process violations

As every community based on the rule of law, the EU provides a means by which the individuals or entities affected can lodge an application for judicial review of a decision taken by the public authority, including to lament a violation of due process. Under Article 263 TFEU, the Court of Justice of the EU has jurisdiction to review the legality of any act or Regulation adopted by a European institution by which they are 'directly and individually concerned'.[24] This allows natural or legal persons, the interests of which have not been adequately represented or protected by the institution in the formation of the act, to request the General Court to review the original reasoning leading to the formation of the act, and determine with a fresh mind whether the institution concerned had the competence, misused its powers or violated an essential procedural requirement, the Treaties or any rule of law relating to their application.[25] However, when compared to a situation in which the process of formation of the act duly takes into account in the first place all the interests concerned, the effectiveness of this *ex-post* control can only be limited, as it suffers from two main disadvantages.

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[23] I Forrester, op cit, p 834.

[24] Article 263(4) TFEU.

[25] Article 263(2) TFEU.

The first, obvious disadvantage is a timing issue: on average, letting aside the special categories of staff cases, intellectual property and appeals from the Civil Service Tribunal, the General Court delivers its judgments in 33 months[26] from the date in which the application was submitted. During this period, undertakings and individuals will *de facto* have to live with the consequences of the contested act without having access, in the short-term, to an effective legal remedy. To minimize the likelihood that such situation might give rise to substantiated claims of 'denial of justice',[27] Article 104 of the Rules of Procedure of the General of the Court affords the applicant the opportunity to apply in cases of urgency for *interim measures* which have a suspensory effect on the enforcement of a decision of any measure adopted by an institution. However, the case-law has demonstrated that the conditions for such type of requests to be granted, based upon the showing of *fumus boni iuris* (i.e., a *prima facie* case) and *periculum* (i.e., a serious and irreparable harm) *in mora*, are extremely stringent. A well known example is the rejection in 2008 of the application for interim measures in the *Microsoft* case, where the applicant argued that the disclosure of the information relating to the interoperability of a product with competitors' products that had been ordered by the Commission would have altered the market conditions in such a way that that Microsoft would not only lose market share but also would no longer be able to regain the market share lost. On that occasion, the Court made clear that it is for the undertaking concerned to adduce any factual evidence to support its argument, in that particular case by demonstrating that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy.[28]

More recently, in the *Intel* case,[29] the Court rejected an application submitted by Intel to avoid the consequences of a final decision which would be taken on the conclusion of a Commission's procedure in breach of its rights, stressing that the occurrence of the harm alleged depended on a future and hypothetical event, namely the adoption by the Commission of a final decision unfavourable to the applicant.[30]

The second disadvantage of actions for annulment *vis a vis* full participation to the proceedings leading to the adoption of the act is the limited scope of the protection

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[26] Statistics referred to the year 2009, available at http://curia.europa.eu/jcms/jcms/Jo2_7000/

[27] This term has been interpreted in international law as referring to extreme situations having at object an improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures and unjust decisions. See AO Adede, 'A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law' 14, Can YB Int'l L 72 (1976). As to the circumstances that might give rise to it, there is little doubt that an unjustified and protracted delay in adjudicating would be sufficient for a potentially successful claim, particularly when the consequences of the delay are likely to be irreparable at a later stage of the proceedings. For the leading contribution on this subject, see J Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2005 Cambridge, UK.

[28] Order of the President of the CFI, Case 201/04, *Microsoft v Commission*, para 319.

[29] Order of the President of the CFI, Case 457/08*, Intel v Commission*, para 85.

[30] Unfavourable decision which, for the record, materialized approximately 100 days after the order of the Court.

that this legal tool can afford. In that regard, one should keep in mind that judicial control is simply a legality control, by which the Court cannot really substitute its reasoning to that of the institution[31] but simply controls that this is not illegal under one of the grounds of annulment listed in Article 263 TFEU. Notwithstanding the fact that the General Court has shown an increasing willingness to engage in the examination of the Commission's assessments,[32] the bar for contesting the Commission's reasoning remains high: the Court will limit its analysis to 'manifest errors of appraisals or misuses of power'. As emphasized by a growing strand of literature,[33] the outcome of an increasing number of court cases in competition law is being determined by reference to 'complex economic assessments', leading to a deferential approach to judicial review. This is particularly problematic where the application for annulment is lodged by an individual who is adversely affected by the contested act; i.e. an individual who is entitled not simply to a right of participation, but to the stricter panoply of safeguards that attaches to the right to be heard.

Moreover, judicial review might also be unable to render justice to the aggrieved parties who simply allege the violation of essential procedural requirements, which ideally represent the 'typical' ground of appeal to challenge a procedural deficiency such as the violation of the right to be heard, and entitle the Court to raise the issue of its own motion.[34] The problem with such ground of appeal is that the Court has adopted a rather restrictive approach to qualifying a procedural rule as essential to ground on it the annulment of a Commission's decision: it requires the undertaking concerned to bear the burden of proving that the contested act would have been different if the procedure had been respected.[35] Fortunately, the General Court has distinguished this line of case-law from another one concerning the more serious violations of procedural requirements that protect fundamental principles of EU law, such as the right to be heard: in those circumstances, the aggrieved party can lament violation of an essential procedural requirement simply by showing that the breach of the procedural rule has

[31] In competition law proceedings, the usual assertion is that the Court cannot substitute its assessment with the legal and economic appraisal of the Commission: see Case 74/74, *CNTA SA v Commission* [1975] ECR, paras 21-22; Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595; Case T–155/04 *SELEX Sistemi integrati Spa v Commission* [2006] ECR II-4797, para 28.

[32] A tendency that has been more apparent in the merger review context: see for example Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585; Case T-310/01, *Schneider Electric SA v Commission* [2002] ECR II-4071; Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381; Case T-464/04, *Impala v Commission* [2006] ECR II-2289.

[33] I Forrester, 'A Blush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review"', paper presented at the 14th Annual Competition Law and Policy Workshop of the European University Institute, June 19-20, 2009, to be published in 2009 Competition Law Annual (Hart Publishing); V. Rose, '*Margins of Appreciation:* Changing Contours in Community and Domestic Case Law', (2009) Competition Policy International Vol. 5 No. 1; Andreangeli, and others, op cit, n 1.

[34] Case C-304/89, *Oliveira v Commission,* [1991] ECR I- 2283, para 18.

[35] Joint Cases 209, 215 & 218/78,*Van Landewyck c Commission*, [1980] ECR 3125, para 47; Case 150/84, *Bernardi c Parlement*, [1986] ECR 1375, para 28; Case 30/78, *Distillers Company c Commission*, [1980] ECR 2229, para 27; Case T-7/90, *Kobor v Commission*, [1990] ECR II-721, para 30; Case T-7/89, *Hercules c Commission*, [1991] ECR II-1711, para 56.

played a role in the contested decision, that is, if it concerns the gathering of evidence which the Commission has used to reach the decision.[36] This means that an applicant for annulment will be relieved from having to prove the 'but-for' outcome where the violation has tainted a piece of evidence relied upon by the Commission in its decision.[37] However, it will not prevent the Court from annulling merely a part of the decision if the remainder can stand on its own. Moreover, it is not clear whether such rule, which resembles the unforgiving exclusionary rule generally applied in criminal cases, could be invoked for the exclusion of the *assessment* of evidence legitimately collected (where the assessment was carried out in violation of the right for the parties to have their submissions duly considered) or of evidence that has been gathered violating procedural rules that are not meant to protect a fundamental right such as the right to be heard.

In light of the above, it is understandable why the availability of an action for annulment ex Article 263 of the Treaty should only be considered as a safeguard, designed to operate when for some particular reasons the affected parties have not been able to exercise their participatory rights throughout the first phase, i.e. the process that led to the adoption of the final act. Judicial review cannot be taken as a panacea for the violation of rights of defence, nor as a systematic fix for the problems of competition law proceedings. Even the CFI (now General Court) has acknowledged, in this respect, that judicial control cannot be a substitute for a thorough investigation of the case in the course of the administrative procedure.[38]

2.2. The creation of the Hearing Officer

The figure of the Hearing Officer was introduced in European competition policy in September 1982[39] in order to ensure that a potential addressee of the SO has the opportunity to be heard from a Commission official who is experienced in competition but independent from the directorate, and thus not involved in the case.[40] Specifically, the Mandate contains a list of rules that confer to this figure the power of scrutiny over a variety of Commission's acts, and thereby indirectly create a right for parties to a Commission's proceedings to avail themselves of his power.

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[36] E.g., Case T-54/03, *Larfage SA v Commission,* [2008] ECR II-120, para 70; Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP et T-61/02 OP, *Dresdner Bank e.a.v Commission*, [2006] ECR II-3567, para 158.

[37] This brings the EU case-law in line with the holdings of the ECtHR concerning failure of the public authority to disclose exculpatory evidence to the accused: according to the ECtHR, it is not necessary to show specific prejudice from the failure to disclose. See *Bulut* (1996) 24 EHRR 84; *Kress v France*, judgment of 7 June 2001 (GC) para 74; *Martinie v France* (2007) 45 EHRR 15 (GC) paras 45-50.

[38] Case T-36/91, *Solvay v Commission*, [1995] ECR II-1833, para 108: 'any infringement of the rights of defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure'.

[39] Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21), hereinafter 'the Mandate'.

[40] Until 1982, hearings took place within DG IV, and were chaired by the Director General.

From a fairness perspective, the initiative by the Commission to create this new post was laudable, as it amounted to spontaneously imposing a self-restraint on its own powers. Realistically, the rationale underlying such innovation was the growing criticism for the lack of transparency and impartiality of the proceedings.[41] In addition, one can claim that this represented a strategic move towards a more effective enforcement, since it has been recognized both historically[42] and by general theory of law[43] that fairness of procedures has a direct bearing on the rate of compliance and law-abidingness within a particular legal system.

It is also important to note that entrusting a third party with ensuring fairness and transparency on the DG Competition's operations has proved to be a double-edged sword: first of all, because this is a perfect mechanism for undertakings to slow down proceedings, submitting to the Hearing Officer a variety of requests that are of dubious purpose, and may reveal to be simply well engineered dilatory tactics. This inevitably affects the efficiency of the DG Competition's enforcement machine, and given its policy of using as the value of 10% of the turnover of a company in the previous business year as a cap for the maximum fine that can be imposed,[44] it may have an adverse impact on the ability of the enforcer to impose truly dissuasive sanctions. In this respect it can be noted that the possibility of 'gaming' the calculation of the maximum threshold has been considerably narrowed by the European Court of Justice (ECJ), holding in a recent judgment that the turnover must be reflective of the normal economic activity and thus it is justified for the Commission to refer in exceptional circumstances to business years different from the previous one.[45] However, it should also be remembered that this ruling was in response to an extreme case and does not take away the fact that the Hearing Officer can be used for dilatory tactics.

Secondly, the progressive delegation of powers to the Hearing Officer has created the paradox that if an undertaking fails to bring a dispute which has arisen with DG Competition before the Hearing Officer, for which it has decision-making power, this can be taken as acceptance of the position expressed by DG Competition and weigh against the party before the European Courts, if it were to raise this procedural matter.[46] In fact, such a situation seems paradoxical to the extent that this sign of

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[41] To be precise, it is common belief that the creation of the Hearing Officer's post followed the publication by the House of Lords of a Report on the European Union in June 1982, which criticized the lack of impartiality of the hearings before the Director General and thus the inability of the parties to a Commission's proceedings to be heard effectively. Nevertheless, this does not put in discussion the merits of the Commission in having finally implemented such initiative.

[42] A famous quotation from the common law is, 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done': *The King v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, 2259 (Hewart, CJ)

[43] Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

[44] Regulation 1/2003, Article 23(2).

[45] Case C-76/06, *Britannia Alloys v Commission*, [2007] ECR I-4405, paras 40-44. For a more detailed explanation, see the Opinion of the Advocate General Bot in the same case, paras 38-77.

[46] Case T-44/00, *Manneslannrhren-Werke v Commission* [2004] ECR II-223, para 51 et seq. A confirmation of this approach can be found in the Opinion of the Advocate General Geelhoed in Case C-308/04 P, *SGL Carbon*

greater importance of the role of the Hearing Officer is not accompanied by the attribution of more fully-fledged judicial prerogatives; such as the power to issue subpoenas to compel attendance and to mandate compliance with its decisions, both outside and within the Hearing context.

These side-effects certainly did not materialize under the 1982 mandate, for the powers of the Hearing Officer were really of limited remit, and the scope for misuse by the defendants of such powers almost non-existent. At the outset, the Hearing Officer's scrutiny over a case regarded only the phase of decision, which was identified as the oral hearing and any decision taken subsequently, and did not culminate in the adoption of a final document explaining to the Commission the overall conduct of DG Competition during the proceedings. The report that was submitted by the Hearing Officer was what would be nowadays called the 'interim report',[47] which concerned the developments at the hearing and his observations, but could also contain observations on substantive issues, relating *inter alia* to the need for further information, the withdrawal of certain objections or the formulation of further objections. This report was given exclusively to the Director General and the Director responsible, hence there was nothing written that could be relied upon by the alleged infringer of competition law as conclusive evidence[48] of bad administration in case of annulment proceedings before the courts.[49]

In 1994, with the first revision of the Mandate, this aspect was modified introducing the so called 'final report', essentially corresponding to the old report but which could in exceptional cases be disclosed outside DG Competition. Such report was indeed in principle merely for internal purposes, and could be attached to the draft decision submitted to the Commission *only if* the Commissioner deemed it appropriate, 'in order to ensure that when [the Commission] reaches a decision on an individual case it is fully apprised of all relevant information'.[50] From the very wording of this provision, and the discretion that was left to the Commissioner to decide whether to make this report public, one can see that the role of the Hearing Officer had been conceived originally more as one of strengthening the Commission's case, rather than conferring rights on individuals. However, this initial picture of the Hearing Officer has with time become less accurate, starting from the introduction by the 1994 Mandate of decision-making powers concerning the participation in the hearing of third parties, the authorization of the persons to be heard orally, the possible extension of time limits for replies, and

AG, [2006] ECR I-5977, para 101, and the judgment of the Court in that same Case (which follows the Opinion), para 96.

[47] See below, Section 3.4.

[48] There were, of course, the minutes of the oral hearing, but these were simply the presentation of contrasting views represented at the hearing, and did not in any way include conclusions drawn by the chair of that hearing.

[49] On the impossibility of using the Report in court, see Case T–15/89, *Chemie Linz c Commission* [1992] ECR 1275.

[50] 94/810 ESC, EC Commission Decision of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (i.e., the 'enlarged Mandate'), Article 10.

most importantly the resolution of disputes on access to file issues. From that moment onwards, the array of functions of the hearing officer made it progressively move away from the sort of peer-review focus for which it had been initially conceived, growing into a form of external control that increasingly resembles that of a judicial (or quasi-judicial) body.

A great obstacle to this transformation was the central issue of the publicity of the report: what is the material benefit from the Hearing Officer's oversight, if the people who eventually decide the case (i.e., the college of Commissioners) can remain completely unaware of its findings? On this matter, the revision of the Mandate in 2001 presented a significant improvement, establishing that a final report on the right to be heard, including procedural issues such as disclosure of documents and access to file, time limits for replying to the Statement of objections (SO) and the proper conduct of the oral hearing, must be attached to the decision, sent to the parties with the decision, and published in the Official Journal.[51] However, the reform was not so radical as to have the Hearing Officer completely abandon its 'peer-reviewing' role: the new Mandate, as the previous one, preserved the so called 'interim report' and its merely internal purpose. From an efficiency viewpoint, the usefulness of this exercise is even more questionable now that DG Competition has introduced 'peer review panels'[52] for virtually every case involving procedural or technical complexities.

Finally, one further important step was taken to depart from the traditional model: the post of the Hearing Officer was detached from DG Competition, and attached only for administrative purposes to the Cabinet of the Commissioner for competition. Here too, the move represented a significant improvement from the system previously in place, but not a net separation from the sort of 'restrained oversight' that follows as a natural consequence of the fact that the controller (the hearing officer) is controlled by the hierarchical superior (the Commissioner) of the controlled (DG Competition). Through this residual attachment, in fact, the Commissioner for Competition is able to have a significant influence on future developments of the Hearing Officer: he has the authority to decide, for example, the amount of resources to be devoted to the fulfilment of the Hearing Officer's objectives, as opposed to the traditional (and arguably more 'populist') objective of fining undertakings for breaches of the competition rules. And while nothing prevents him from preserving the only remaining bit of internal reviewing function of the Hearing Officer, i.e. the 'interim report', recent public statements[53] suggest that there may be some margin of manoeuvre to accomplish

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[51] Article 15 of the enlarged Mandate.

[52] There is apparently no official public notice of a commitment to use peer review panels systematically, but a first mention of this intention was done in October 2003 by the Commissioner: see Commissioner Monti, 'EU competition policy after May 1994', Speech delivered at the 30th Annual Fordham Conference on International Law and Policy (New York, 24 October 2003).

[53] See J Almunia, 'EU Antitrust policy: the road ahead', Speech at the International Forum of Competition Law, 9 March 2010, Brussels. Available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/81&format=HTML&aged=0&language=FR&guiLanguage=en: 'there is always the need to consider possible improvements [...] while I believe that our administrative system is sound, I am

the final, missing reforms for the creation of an independent quasi-judicial body. As a first step in that direction, it is suggested here that the hearing officer be completely separated not only from DG Competition, but also from the Cabinet of the Commissioner for Competition, and attached for administrative purposes to the Secretary General.

3. WHAT DOES THE HEARING OFFICER PROTECT? IN-BUILT PROCEDURAL GUARANTEES

Already as early as in the eighties and nineties, the ECJ down-played allegations of lack of a 'fair trial' stating that the mere availability of an action for annulment before the CFI under Art 230 EC[54] and the observance of procedural guarantees laid down by the regulations governing the enforcement of competition law allow the Community's competition enforcement system to meet the requirements of a fair trial for the undertakings concerned. Much emphasis by the Court was placed on the fact that notwithstanding the fact that DG Competition cannot be qualified a Tribunal within the meaning of Article 6(1) of the European Convention of Human Rights,[55] it must observe the procedural guarantees laid down by EU law.[56]

What did the ECJ exactly mean, in *Heintz van Landewyck SARL*,[57] when referring to the 'procedural guarantees' laid down by EU law? The following (non-exhaustive) list, representing the guarantees that the Court found to have been respected by the Commission may serve as an illustration of the broader concept: i) the obligation to schedule a hearing within a reasonable time, if requested by the investigated parties; ii) the obligation to grant application to be heard to any natural and legal person that shows a sufficient interest,[58] and if so, afford them the opportunity of making known their views in writing within such time-limit as the Commission may fix;[59] iii) the obligation to grant access to file pursuant to the applicable regulations; iv) the right for undertakings or associations of undertakings against which proceedings are commenced to propose that the Commission hear persons who may corroborate 'the facts set out in their written observation on the objections raised against them';[60] v) the right for

always open to listen to constructive criticism with a view to ensure that our procedures are conducted in an objective and impartial manner'. See also J Almunia, 'Los nuevos retos de la política de competencia de la UE', Speech delivered at the Comisión Nacional de la Competencia Lunes 15 de marzo de 2010, Madrid: 'Siempre estaré dispuesto a escuchar críticas constructivas y a mejorar nuestras reglas de funcionamiento para aumentar su transparencia'.

[54] Case T-156/94, *Siderurgica Aeristrain Madrid SL v Commission*, [1999] ECR II-645, paras 102 & 109. See also, more recently, Case T-348/94, *Enso Espanola*, *v Commission* [1998] ECR II-1875, holding that the Commission is subject to 'effective' judicial review by an independent and impartial judge.

[55] See above n 2.

[56] Joined Cases 209-215, 218/78 R, *Heintz van Landewyck SARL v Commission* [1980] ECR 3125.

[57] Ibid.

[58] Article 19.2, Reg 17/69.

[59] Article 5, Reg 99/63.

[60] Article 3.3, Reg 99/63.

undertakings against which the proceedings are commenced to request the Commission to hear third parties;[61] and, vi) the obligation to consult with the Advisory Committee.

In short, the ECJ understands procedural guarantees to constitute rights of the parties to a Commission's proceeding (and in some limited circumstances of third parties)[62] to which correspond, in most occasions, Commission's obligations (an exception being made for those cases where the Commission enjoys a broad discretion on the conferral of the privilege). On the other hand, while some obligations impinge on the Commission by default, i.e. without the need for any impulse by the parties, certain others only arise upon submission and approval of a request in that sense. *Heintz van Landewyck* may not entirely reflect the current situation, particularly as the decision-making power in some matters has moved from DG Competition to the Hearing Officer. Nonetheless, it is worth noting that the combination of Regulations 17/69 and 99/63 already contained an extensive list of guarantees for the undertakings party to a Commission proceeding. The rationale and purpose of those guarantees was essentially the same as their 'modernized' version in Regulation 1/2003 and 773/2004: ensuring respect for the 'right to be heard' and 'right of access to evidence'. One might even claim that the whole system has always been in fact designed around one concept, as the latter is rather instrumental to the exercise of the former.[63] Yet this classification may be too narrow, and overlook that the right of access to evidence has a critical importance in itself for allowing a party to ascertain whether the conclusions reached by DG Competition are supported by adequate evidence. This is arguably based on a different rationale than the mere 'participation' in the decision of the entities directly affected by it: the objective is to make sure that the administration of justice is transparent,[64] and thus to impose a 'check' on DG Competition even for cases where the parties do not intend to lodge an application for annulment. It becomes clear then the analogy of this twofold objective with the function of the hearing, which the acting Hearing Officers have recently portrayed as 'check' and 'balance' depending on the circumstances.[65] The rationale of procedural guarantees, and as a consequence the role played by the Hearing officer, may then turn to be different from context to context.

Some clarification in respect of the hierarchy and the coexistence of these two objectives can be seeked in the Guidance paper ('Guidance') recently published by the

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[61] Within the meaning of Article 5 of Reg 99/63.

[62] See Case T-198/01, *Technische Glaswerke v Commission*, [2004] ECR II-2717, para 194. See also K Laenarts and J Vanhamme, 'Procedural rights of private parties in the Community administrative process', (1997) 34 CMLRev 531-569.

[63] S Wernicke, 'In Defense of the Rights of Defence: Competition law procedure and the changing role of the Hearing officer', Concurrences No. 3- 2009, para 22: 'A corollary of the right to be heard is the right to have access to file'.

[64] This is also recognized by official publications of the Commission: see H Johannes and J Gilchrist, 'Role and Powers of the Hearing Officers under the enlarged mandate', EC Competition Policy Newsletter vol 1 No 4 Spring 1995, p 12.

[65] M Albers and K Williams, 'Oral Hearings – Neither a Trial Nor a State of Play Meeting', CPI Journal March 2010 (1), pp 4-5.

Hearing Officer in conjunction with the Best Practices on the submission of economic evidence and the Best Practices on the conduct of proceedings concerning Article 101 & 102 TFEU (altogether 'Best Practices').[66] In this document, the Hearing Officer does not make plain a distinction between procedural guarantees depending on whether they ensure the respect of the *contradictoire* or the right of access to evidence. It rather proposes a more basic classification:

> (1) Rights of defence, which 'mainly relate to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support a claim that there has been an infringement of competition law'.[67]
>
> (2) Procedural rights of complainants and all other parties to a Commission procedure.

The existence of two different kinds of procedural guarantees is thus recognized by the Guidance. However, it is a somewhat broader classification than the one suggested above, as both the right to be heard and the right of access to the file would seem to fall within the category of 'rights of defence'. The fact that the definition of rights of defence starts with the word 'mainly' hints at the fact that the Hearing Officer does not intend these as constituting simply an explication of the principle of *contradictoire*, but rather prefers to leave the concept open.[68] This definition is closely aligned with recent case-law, which has qualified the right to a fair trial as 'a fundamental principle of Community law and … *part* of the rights of defence' (emphasis added).[69]

Whatever the notion of 'rights of defence' refers to, it shall be kept in mind that they have been *all* identified as fundamental rights forming an integral part of the general principles of law, whose observance the Court ensures;[70] accordingly, given the supremacy of principles over rules, it follows that more weight ought to be attached to rights of defence than to those procedural guarantees belonging to the category of 'procedural rights'. Does this mean that the latter category should be subject to a balancing with the effectiveness of competition enforcement? One may well argue that the answer ought to be in the affirmative.[71] But the guidance does not give a definite

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[66] Both documents are available on DG Competition's website, at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html.

[67] Guidance, para 4, citing in support the following case-law: Joined Cases C-238, 244, 245, 247, 250, and 254/99 P, *Limburgse Vinyl Maatschappij and others v Commission* [2002] ECR I-8375, para 91; Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, para 11.

[68] Other procedural rights pertaining to this category are the right to have a lawyer, the privilege against self-incrimination and, as mentioned above, the right of access to the file.

[69] Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Commission*, [2008] ECR I-4951, para 61.

[70] Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland v Commission,* [2004] ECR I-123, para 19.

[71] Alternatively, the consequence of the different value of these rights may be simply that alleged victims of violations of procedural rights will not be able to benefit from the facilitation on the burden of proof that the case-law seems to have established in favour of rights of defence: see supra, para 2.1 and case-law in n 35 and 36.

response to the consequences of such qualification, rather focusing on outlining the different breadth of those rights.

Specifically, it does so by exploring the different phases of the Commission's procedure: (a) the investigative phase, (b) procedures potentially leading to a prohibition decision, (c) the oral hearing, and (d) the post-oral hearing.

A description of the main issues related to each of these phases is sketched throughout the following paragraphs, in the attempt to give a clearer picture concerning potential deficiencies of the system with regard to the right to be heard. It should be noted, however, that the following list of attributions and potential deficiencies of the Hearing Officer's powers cannot be exhaustive, for the simple reason that the Guidance only refers to proceedings for the enforcement of Articles 101 and 102 TFEU, and not to the merger control area.

Two separate sections are dedicated by the Guidance to the admission to the procedure of third parties and to the so called 'other procedures'. While the latter contains some important remarks on the role of the Hearing Officer in commitment decisions that will be briefly discussed after the description of the four phases mentioned above, this article will not specifically address the former section in light of the fact that third parties other than complainants, if admitted, have a somewhat different status and enjoy only limited procedural rights. In essence, their right to be informed of the nature and subject of the proceedings is constrained by the discretion of DG Competition to determine the means by which they will be informed, and the scope of the right to make known their view is by consequence dependant on whether the information provided by DG Competition enables them to do so.[72] For the present purposes, it suffices to say that while at first blush, one may find regrettable that there is currently no legislative provision allowing the Hearing Officer to ensure that DG Competition delivers all the information necessary and relevant for these third parties to make known their view, it is not to be underestimated the capacity of the Hearing Officer to operate 'behind the curtains' in the particular case, to convince DG Competition that a broader array of information should be conveyed.

3.1. The investigative phase

The recognition of defence rights during the course of the investigative phase has been a critical issue, surely not one meant to be covered when the Commission 'launched' the Hearing Officer enterprise. Moreover, the fact that defence rights, and in particular the right to be heard, have no application in the investigative phase has found support from the jurisprudence of the ECtHR in the *Saunders* case.[73]

Rather, the expansion of the rights of defence to this area is the result of some relatively recent judgments where the Luxembourg's jurisprudence, perhaps warned by

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[72] Guidance, para 17.

[73] Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313, para 68.

prior developments in Strasbourg,[74] rebuffed the Commission for failing to give adequate protection to the right to be heard.[75] It is also thanks to these judgments that the 'Hearing Officer enterprise' passed the stage of being merely a reviewing and strengthening of the internal case, and developed into a more effective external check on the DG Competition's operation.

As a result of that case-law, the investigated can now count on: the right to be informed of the purpose and the subject-matter of the investigation, except for cartel cases;[76] the right not to self-incriminate; the right to be represented by a lawyer; and, the right to raise confidentiality issues with the Hearing Officer. It should be noted, however, that notwithstanding the critical importance of this expansion of the rights of defence, the Hearing Officer recognizes his limited role in this phase of the proceedings: like the ECJ stated in *Dalmine,*[77] an undertaking subject to investigatory measures can only rely in full on its rights of defence once a SO has been notified to it. It is for this reason that it will look into the confidentiality issues only upon request of the investigated undertakings, and will address them 'if raised in the reply to a Statement of Objections'.[78] This stimulates questions regarding the disposability of rights of defence: is it really acceptable for the European legal system that a public figure known as the 'guardian of fair proceedings'[79] lacks the power to stop a violation of the rights of defence from materializing even when he is aware of it? Especially in light the fact that rights of defence are fundamental rights, shouldn't they enjoy more powers to secure their respect?

3.2. Procedures potentially leading to a prohibition decision

Most of the work of the Hearing Officer is carried out following the notification of the Statement of Objections, which marks the entry into the territory of the procedures potentially leading to a prohibition decision. The procedural rights for the addressee in this phase include getting proper access to file,[80] applying to the Hearing Officer for

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[74] See, in particular, two lines of cases brought by the European Commission of Human Rights: The first follows the decision of 4 July 1983, *H v UK*, Req. no. 100000/82, *supra* n 10. The other one is based on the decision of 13 December 1982 no. 9453/81, D.R. vol. 31 and 13 July 1983 no. 9022/80, D.R. vol. 33, p 21, establishing that the due process guarantees are applicable to the investigative phase in criminal matters, notably in a legal system where the collection of evidence is essentially carried out at this stage.

[75] Joint Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland v Commission*, [2004] ECR I-123, para 63 (Cases 46/87 et 227/88, *Hoechst v Commission*, [1989] ECR 2859, para 15); Case T-99/04, *AC- Treuhand*, [2008] ECR II-1501, paras 51-56 (Case C-105/04, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, [2006] ECR I-8725, paras 47-50).

[76] Best practices on the conduct of antitrust proceedings concerning Arts 101 & 102 TFEU, paras 14 and 23.

[77] Case C-407/04 P, *Dalmine v Commission* [2007] ECR I-829, para 59. See also Case T-99/04, *AC-Treuhand* AG *v Commission* [2008] ECR II-1501, paras 76 et seq.

[78] Guidance, para 11.

[79] Guidance, para 3.

[80] According to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005, C325/7.

any dispute concerning the disclosure by the Commission of confidential information which might be necessary to exercise the right to be heard, and requesting an extension of the time-limit to reply to the SO.

An important feature of the decision of the Hearing Officer in case of disputes on the disclosure of confidential information, which involves a balancing test between the third party's interest to confidentiality and the addressee's right to be heard, is that they can be immediately challenged to the General Court (and more specifically, only by the party who has provided the information in question). This is, once again, a procedural right that originates from the case-law of the Court of Justice,[81] which also established the procedure that the Commission must follow were it to consider the disclosure of information for which confidentiality is claimed (the famous 'AKZO procedure').[82]

By contrast, it seems remarkable that no legal recourse is provided to immediately challenge the Hearing Officer's decisions concerning access to file[83] and extensions of deadlines. Recently, the Court ruled in the *Intel* case against the possibility of appealing decisions refusing the extension of deadlines and access to certain documents necessary to ensure rights of defence, stressing that 'the decisions refusing to grant access to those documents and, subsequently, to extend the deadline for service of the reply to the SSO, even though they may constitute an infringement of the rights of the defence, are merely preparatory measures whose negative effects will be felt only in the event of any final decision finding that there has been an infringement'.[84] While the accuracy of this statement is irrefutable, it is submitted here that the fact that the negative effect will only materialize at a later stage of the proceedings does not mean that, as the reasoning of the Court implied,[85] those acts are not capable of immediately and irreversibly affecting the interests of an investigated party. Because of the wide discretion enjoyed by the Commission in 'complex economic assessments', and the consequent inability of an appellant to engage the Court in a discussion on the merits of its economic arguments, it seems at least questionable to assume that an investigated party will be able to obtain after the adoption of the final decision a valid remedy for any injustice that might be caused through interlocutory acts. The conclusion logically follows then that such acts ought to be amenable to judicial review according to Article 263 of the EC Treaty.[86] In absence of spontaneous legislative action in this regard, we will

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[81] Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*, [1986] ECR 1965, para 29.

[82] Such decision has to be notified to the company concerned, which has to be given the opportunity to bring an action before the Court of First Instance with a view to having the Commission's assessments reviewed. The information may then not be disclosed before one week after the decision has been notified.

[83] Such possibility was explicitly ruled out in Joined Cases T–10, 11, 12 & 15/92, *Cimenteries CBR v Commission* [1992] ECR II-2667. The approach was also endorsed by Advocate General Léger in his opinion in Case C-310/93P, *BPB Industries and British Gypsum v. Commission* [1995] ECR I-865, at footnote 101 and para 122.

[84] Order of the President of the CFI, Case T-457/08 R*, Intel v Commission*, [2009] ECR II-12, para 56.

[85] Ibid, paras 52-53.

[86] Of this opinion M Lewitt, 'Commission Hearings and the Role of the Hearing Officer: Suggestions for Reform', [1998] ECLR 406, quoting for comparison, Case 60/81, *IBM v Commission* [1981] ECR 2639; Case T-64/89, *Automec v Commission* [1990] ECR II-367; Case T–186/94, *Guerin Automobiles v Commission* [1995]

probably just have to wait, as for *AKZO*, for a court case to establish the possibility of lodging direct appeal against those measures, thus officially recognizing the otherwise lack of effective access to justice.

3.3. The oral hearing

Ensuring the objectivity of the oral hearing was the very purpose for the creation of the Hearing Officer's post, and initially its main focus. This is the reason why the powers of the hearing officer for the preparation and chairing of the hearing were well developed already in the first Mandate. Still, it is surprising that throughout the two revisions of the Mandate the need has never been felt to expand the scope of these provisions so as to confer participants to the hearing with some of the procedural guarantees that are considered ordinary in a trial-like situation. The absence of specific rules may lead on certain occasion to adverse effects on the dialectic process of the hearing: for example, since there are no specific rules regarding the standard to be met by third parties called on to testify as experts, it is not unimaginable that in response to the intervention of these 'experts', participants exhaust the limited time which is allotted to them in attacks to the reliability of such experts, instead of focusing on more important elements of the case. One may wonder then why the Hearing Officer has not adopted some Rules of procedure akin to those that are used by the General Court, though obviously reduced in length and scope, to minimize such problems.

Concerning the preparation of the hearing, the Mandate provides that the Hearing Officer establishes the date, duration, location and the attendants. The timing however will be usually a result of a compromise of the parties' availability with that of the other participants. In this respect, some criticism has been expressed stressing that the date should be fixed primarily in the interests of the addressees of the SO, whereas the current Mandate does not contain any criteria and the discretion enjoyed by the Hearing Officer in that regard is too broad.[87]

Another criticism can be raised in connection with the contacts that the Hearing Officer may make with the undertakings concerned. To facilitate the focus of the hearing on the critical issues, he may let them know in advance the issues on which he would like to hear their point of view. He may also invite them to a prior meeting with him, and if necessary with the relevant Commission's department; and ask for prior submission of the main content of the statements of the persons to be heard at the hearing.[88] While this sort of 'anticipation' of the hearing is no doubt useful to speed up the procedure and thus increase the efficiency of the hearing, a doubt may arise as to whether other participants to the hearing, and especially the addressees, would not be entitled to benefit from the anticipation made *vis a vis* any participant to the hearing: it

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ECR II-1753. Orders of the CFI of, Case T–134/95, *Dysan Magnetics and Review Magnetics v Commission* [1996] ECR II-81; Case T–9/97, *Elf Atochem v Commission* [1997] ECR II-909. In a similar fashion, see the Opinion of the Advocate General in *BPB Industries and British Gypsum v. Commission* [1995] ECR I-865, footnote 101.

[87] S Kinsella, 'Is it a Hearing if Nobody is Listening?', CPI Antitrust Journal, 2010 (1) p 4.

[88] Art 11 of the Mandate.

seems feasible, for example, and certainly fair that they obtain from the Hearing Officer non-confidential information about the object of the discussion to which an undertaking has been invited, as well as the material submitted in advance by the undertakings on behalf of the persons to be heard at the hearing. Along the same lines of preparing the ground for the operation of the *contradictoire*, a potential improvement in the preparation of the hearing would be the establishment of a rule (possibly, included in the Rules of Procedure the convenience of which was emphasised above) according to which the Commission must disclose in advance the exact content of its presentation, and allow the Hearing Office to send it to the parties concerned so as to enable them fully to exercise their right to be heard.

Concerning the chairing and the organisation of the hearing, it should be remembered that currently the hearing is an entirely voluntary process: both as to attendance, which cannot be compelled by the Hearing Officer, and as to the participation of its attendees, which do not have either the duty to respond to every chief accusation nor the right to receive specific answers from the Commission. But the most criticised issue regards the absence of a process of cross-examination of witnesses; in particular, leniency applicants. More often than not, investigations in cartel cases are driven by information submitted by fellow cartel members who have applied for the Leniency Programme. Given the fundamental importance of the right to be heard in the European legal system, it should naturally follow that the undertakings accused have the opportunity to confront with the accuser and contest the evidence provided, as would be required for criminal charges by Article 6(3) of the ECHR. However, due mainly to issues of confidentiality and fear of retaliation, it is hardly plausible that a leniency applicant will attend the hearing.[89] This is often recognized as one of the major failures of EU competition enforcement in securing protection of fundamental rights, which implies that until the system does not find a fix for such problem, it cannot be affirmed that the Hearing Officer ensures full respect for the right to be heard. Unfortunately, the Hearing Officer's inability lies within the very nature of the hearing, which has been conceived as an entirely voluntary process. As a result, it has no power to summon witnesses, nor have the participants to the hearing an obligation to answer questions or tell the truth. Even if some recent developments appear to show, as noted above,[90] that the delegation of decision-making powers to the Hearing Officer has turned failures to submit applications to him into evidence that could be used against an aggrieved party in further legal proceedings, this is clearly not the case for applications for oral hearing, since the hearing officer lacks any decisional powers as to the subject matter of the controversy.

We can thus only imagine how the hearing officer could manage cross-examination of leniency applicants, if it had the powers to issue subpoenas. Arguably, the problem of

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[89] For this reason it has been proposed the establishment of a direct relationship between the amount of leniency and the effective participation to the hearing: see J Modrall and R Patell, 'Oral Hearings and the best practices guidelines', CPI Antitrust Journal, 2010 (1), p 4.

[90] See n 46.

confidentiality could be to a large extent dealt with by making use of Article 12(3) of the Mandate, which allows the Hearing Officer to establish 'whether the persons concerned should be heard separately or in the presence of other persons attending the hearing'. By holding *in camera* sessions where only the accused, the leniency applicant and their lawyers are present, the Hearing Officer would be able to preserve confidentiality *vis a vis* third parties - shielding both the accused and the accuser from private enforcement actions, for example - while ensuring respect for the right to be heard.

3.4. The Post-oral hearing

The post-oral hearing phase is the phase during which the Hearing Officer submits, as indicated above, an 'interim report' to the Commissioner. Such report, which addresses all procedural issues relating to the fairness of the procedure, may also contain observations on specific issues brought to the attention of the Hearing Officer by any part during the procedure, as well as on the substance of the case. Yet no right is vested on any party to the proceedings concerning such report. This can be attached under two different points of view: first, the existence of such provision seems to contrast with the objective of ensuring respect for the right to be heard, to the extent that the very exercise of such right is not fed into the subsequent decision of the Commissioner (except in cases where he spontaneously decides to react to the Hearing Officer's comments). Secondly, as stressed above, the convenience of a provision as such is even more questionable after the establishment of 'peer review panels': a sceptical eye may well perceive this as an unnecessary duplication.

In addition to the submission of the report, the Hearing Officer may have a responsibility as a follow-up of the hearing. In particular, such responsibility arises only if he deems it appropriate, after consulting the director responsible, in view of the need to ensure respect for the right to be heard.[91] It consists in affording persons, undertakings and associations of persons or undertakings the opportunity to submit further written comments after the oral hearing, within a fixed date that is determined by the Hearing Officer. This is no doubt a valuable addition for the purpose of respecting the principle of *contradictoire*, which may sometimes require the extension of the dialectic process beyond the time allotted by the Hearing Officer. Therefore, this provision provides the opportunity to repair some potential deficiencies of the hearing, and in line with well-settled ECtHR case-law, it may affect the fairness of the entire proceedings.[92] From the right to be heard viewpoint, the protection afforded by this

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[91] Art 12(4) of the Mandate

[92] As reminded by the ECtHR in *Le Compte*, *supra* note 6, para 5: 'Whilst Article 6 par 1 (Art 6-1) embodies the "right to a court" … , it nevertheless does not oblige the Contracting States to submit "contestations" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies … which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system'. The ECHR jurisprudence has also consistently assessed the existence of a violation of article 6 looking at the proceedings in their entirety,

provision could be seen as defective to the extent that it remains discretionary on the Hearing Officer to authorize such submissions. Conceivably, this is just a theoretical issue since it seems unlikely that the Hearing Officer, given their specific competencies and expertise, will let the need for an extension of the *contradictoire* beyond the hearing go unnoticed. Nonetheless, it can be argued that, precisely for the same reason as for the interlocutory acts referred to in section 3.1 above, decisions by the Hearing Officer regarding such matters should be amenable to judicial review.

Finally, a further task of the Hearing Officer during this phase is to address the issues raised by the parties in relation to a Supplementary SO or a Letter of Facts (i.e, a letter stating that the Commission intends to rely on new evidence that corroborates the objections already made). Importantly, the Best Practices recognize that, 'the procedural rights which are triggered by the sending of the initial Statement of Objections apply *mutatis mutandis* in case a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing'.[93] It follows that in case of a new SO, the Hearing Officer will essentially fulfil the same functions as those described in sections 3.2 and 3.3. By contrast, the implementation of the right to be heard may suffer some limitations in this phase with respect to the contestation of new factual elements (as opposed to new grounds for violations of competition rules) adduced as evidence: after receiving a letter of facts, the undertaking will only be granted the possibility to express its position within a fixed deadline and the position will only be expressed in writing. This appears to be in contrast with the practice of the majority of EU Member States and the major jurisdictions outside the EU, where as noted by the Organization for Economic Cooperation and Development (OECD), there must be an oral hearing before the members of the decision-making body that will ultimately take the decision.[94]

3.5. Other Procedures

The Guidance concludes the analysis of the different context of operations with a final section which concerns two types of procedural rights that are by their nature very different from the ones listed so far. The first regards complainants: according to the distinction made by the Hearing Officer above, complainants do not enjoy rights of defence but are entitled to the respect of some procedural rights. Concretely, however, these rights are functional to allow the exercise of the right to be heard and thus very similar (although with a different objective and narrower in scope) to those enjoyed by undertakings that are addressees or potential addressees of the SO. In particular, once complainants are informed by the Commission that it considers that there are insufficient grounds for pursuing a complaint, and that it gives them a definite time-

rather than at a single stage of the proceedings : see for example, on the 'reasonable time' requirement, the judgment of the ECtHR of 24 November 1993 in *Imbroscia v Switzerland*, série A n° 275, para. 36, and the case-law cited therein.

93 Best practices on the conduct of antitrust proceedings concerning Articles 101 & 102 TFEU, para 98.

94 OECD country studies – European Commission – Peer Review of Competition Law and Policy – 2005, p 63, available at http://www.oecd.org/dataoecd/7/41/35908641.pdf.

period to submit observations in writing, they are entitled to: 1) submit a reasoned request to the Hearing Officer for an extension of the deadline; 2) request the Commission to access the documents in its possession upon which it has based its preliminary assessment; and, 3) submit a reasoned request to the Hearing Officer for disclosure of documents in possession of the Commission to which access was not given. Additionally, complainants enjoy procedural rights where their complaint is being pursued by DG Competition: namely, they are entitled to receive a non-confidential version of the SO and make their views known within a time limit set by DG competition. But the list of entitlements stops here, notably cutting short of the right to request a hearing. They have, of course, the right to be admitted by DG Competition to any hearing that might be scheduled within the procedure related to the case for which they have submitted a complaint. They have also the opportunity to request to be heard orally following the letter through which the Commission has notified them of the intention to reject the complaint. Only the addressees of the SO, however, have the right to request a hearing.

The existence of such different scope of protection for procedural right is important and well-founded, for the entitlement of complainants to such requests would place a substantial administrative burden on the Commission and would be, logically, not required by international human rights standards. The ECHR, for example, akin to other international human rights treaties, limits the right to a fair trial to situations involving 'the determination of [one's] civil rights and obligations or of any criminal charge against [oneself]'. The decision of a case for which one has complained clearly does not give rise to claims concerning his civil rights of obligations: even if it may affect him indirectly through the impact of competition in the market, his civil rights and obligations will remain untouched. However, it is interesting to note that the formulation of the notion of 'beneficiaries' of the right to be heard in the Charter of Fundamental Rights is broader in this respect, referring to the 'right of every person to be heard before any individual measure which would affect him or her adversely is taken'. The argument could be made thus: that strict adherence to the Charter of Fundamental Rights requires interpreting such article to confer complainants with the right to request a hearing. A less demanding interpretation would be, of course, to consider the provision as merely imposing the obligation to make known one's own view (for example, though the possibility to present observations in writing). Still, one could easily imagine cases in which the ability of the complainant to request a hearing serves to repair violations of due process occurred in a pathological situation. This option of conferring complainants with the right to request a hearing perhaps limited to some specific circumstances, like the absence of a request in that sense by the addressees or the emergence of new elements of fact following the hearing requested by the addressees, deserves at least some consideration after the entry into force of the Lisbon Treaty.

Finally, the Hearing Officer is entitled to 'where appropriate ... assess the competition impact of commitments proposed in relation to any proceedings initiated by the

Commission ... in particular the selection of respondents and the methodology used'.[95] The Guidance paper goes even beyond that, specifying that a final report will be prepared in cases of commitment Decisions 'taking into account that the undertaking concerned has been put in a position to propose adequate commitments, or to modify them following a market test'.[96] The problem in this context is one of complexity: while it can be expected that the Hearing Officer will capably perform the task of checking the appropriateness of the respondents selected and the methodology deployed, it seems unlikely that - given the limited time and resources - he will be able to properly assess whether the undertaking was in the position to offer 'adequate commitments'. Grasping the notion of 'adequate' in complex cases arguably requires more than a skimming through some thousands of pages. Conceivably, this inadequacy could be at least minimized by allowing the Hearing Officer to sit in at the actual negotiations between DG Competition and the proposing party, so as to allow him to gain first-hand knowledge about how the different interests at stake have played out in the negotiation.

Those who defend the current institutional system could contend that such an arrangement would not be required under any of the current due process standards: undertakings are free to engage into a negotiation to propose commitments and are free to leave at any time. Moreover, commitment decisions do not establish any violation of competition law, nor do they impose any fine. Accordingly, it would seem hard to square these procedures into the notions of 'individual measure which would affect [one] adversely' and 'determination of rights and obligations' referred to by Article 41(2) of the Charter and Article 6(1) ECHR. Nonetheless, such a solution should be considered so as to avoid the risk that the Commission uses such negotiated procedures, and the alternative of a fine as a threat, to *de facto* impose solutions at its will and circumvent the procedural guarantees that the competition enforcement system otherwise provides.[97] In those circumstances, it would not seem to be an overstretch if the ECtHR were to hold that the protection of Convention rights (in particular, those enshrined in Article 6 ECHR) afforded by the EU legal system is 'manifestly deficient', so as to rebut the 'presumption of equivalence' and find a violation of Article 6(1) ECHR.[98] A similar finding was made, indeed, in a case concerning settlement of criminal matters in Belgium, where the ECtHR found a violation of Article 6(1) ECHR. Recognizing that '[t]he "right to a court", which is a constituent element of the right to a fair trial, is … subject to implied limitations' and that 'in the Contracting States'

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[95] Article 14 of the Mandate.

[96] Guidance, para 68.

[97] See D Walebroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?', Global Competition Law Centre Working Paper 01/08, p 3: 'Le risque est […] que la Commission utilise ces procedures pour le cas échéant forcer des engagements et des transactions de la part des enterprises et pour developper ainsi une politique parallele de concurrence qui échappe entièrement au contrôle du juge et aux garanties minimales auxquelles notre Etat de droit reste attaché'.

[98] Judgment of the ECtHR (Grand Chambre) of 30 Juine 2005, *Bosphorus Hava Yollari Tuizm Ve Ticaret Anonim Şirketi v Ireland*, Appl. no. 45036/98, para 156.

domestic legal systems a waiver of this kind is frequently encountered both in civil matters … and in criminal matters' for its 'undeniable advantages for the individual concerned as well as for the administration of justice',[99] the Court went on to argue that '[a]bsence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law' and that as 'the applicant waived the guarantees of Article 6 par 1 (Art 6-1) only "under the threat of [the] serious prejudice"',[100] there had been a violation of the Convention.

4. CONCLUSIONS

The preceding paragraphs have analysed the role of judicial review and of the Hearing Officer in competition proceedings in the attempt to appraise the compatibility of the current Commission's procedures with the right to a fair trial.

As a preliminary remark, it must be said that the Hearing Officer and the courts play in parallel, since they both operate, for purposes of our analysis, to identify and correct potential violations of the law which occur in DG Competition's proceedings. The main difference is that the law which the Hearing Officer aims to ensure the respect of is procedural, and thus his activity has only a limited field of application when compared to the courts (even though, at the internal level, the Hearing Officer may in fact exercise a control that resembles - at least for its scope - that operated by the Court). Another difference is that the scrutiny of the Hearing Officer, in cases of disputes for which its decision is requested, goes into the merit of the matter in question, substituting its reasoning with that of DG Competition; by contrast, the courts adopt a much more deferential stance, using criteria such as misuse of powers or manifest error, often associated with the notion of 'complex economic assessments'.

What conclusion have we reached, in terms of the question posed at the outset? The short answer would be that the doubts about the compatibility of such two-tiered system with Article 6(1) seem to be not unfounded. Not because of the two-tiered structure in itself, but rather because the system in place fails to give sufficient guarantees that any violation of the right to a fair trial suffered in DG Competition's proceedings will be corrected elsewhere. More specifically, judicial control seems generally inadequate to fulfil this task, with the exception of gross violations (i.e., violations of rights of defence that have played a role in the formation of the decision): for those violations, the standard of protection developed seems compatible with the test used by the Strasbourg Court. These are arguably by and large correspondent to the violations described in the second limb of the *H v UK* test, i.e. those irremediable or decisive for the further continuation of the proceedings, which cannot tolerate ex-post corrections. For all the other violations of the right of fair trial, then, it would be required for EU antitrust enforcement that the Hearing Officer meets the challenge in order not to fall foul of the first limb of the test. Unfortunately, we have ascertained

[99] Judgement of the ECtHR of 27 February 1980, *Deweer v Belgium*, Appl. No. 6903/75, para 49.

[100] Ibid, paras 49-50.

from a survey of his functions that he is not equipped to do so, and that some amendments to its Mandate would be most needed in this respect.

This has given us the opportunity to review the history of the Hearing Officer and the evolution of its (limited) powers. Without doubts, the intrinsic value of the Commission's initiative in establishing this post has to be recognized and recollected with admiration. Nonetheless, it is arguable that had the post not been created, Member States would have been much more likely to be condemned by the Strasbourg Court for breach of the right to fair trial,[101] and as a consequence would have pushed to implement some changes in the European system for competition enforcement in order to avoid further liability under Article 6 ECHR. It is therefore not clear whether the alternative to the *status quo* would have been better. What is in any event appreciable is that the Luxembourg courts have in several occasions given their contribution towards the shaping up of a system of procedural guarantees that circumscribes competition proceeding in order to avoid the friction with the right to a fair trial under Article 6 ECHR.

The figure of the Hearing Officer, which represents the guardian of these procedural guarantees, is a figure that affords the Commission the opportunity to reconcile the objective of effective enforcement of competition with the value that those guarantees are meant to protect. Notwithstanding the Hearing Officer's commitment to the respect of those guarantees, the analysis above has shown that there are several occasions where it is simply not able to ensure its observance, even where it is apparent that the fundamental importance of those guarantees ought to prevail over the objective of effective enforcement. One explanation for that may be that the Mandate was drafted by members of DG Competition, who while regulating some specific grey areas of tension between rights of defence and effective enforcement of competition have understandably preferred to tilt the balance in favour of the latter. Regardless of what the driver was, the fact that the existing legal framework still tends to privilege the former objective is clear. This imbalance prevents the rectification by the Hearing Officer of certain violations of due process which might, in specific cases, lead to a finding of violation of both the Charter of Fundamental Rights and the ECHR. It is for this reason that, whereas the Hearing Officer's stated mission is to ensure that the hearing is properly conducted and contribute to the objectivity of the hearing itself and any decision taken subsequently, it is submitted here that its role may actually be broader. As a matter of fact, his functions are not limited to ensure the respect of the procedural rights contained in the antitrust regulation: he also overviews the case in its entirety, checking for the Commission's compliance with a variety of rules and principles. Notably, the word 'principles' needs to be emphasised here, for it militates in

[101] This would occur, in fact, where the procedures of EU competition law were found to be manifestly deficient for the protection of the right to be heard and Member States would continue to cooperate in the EU framework for the enforcement of the competition rules. Such a scenario would be in line with the ruling of the ECtHR in *Soering,* according to which Contracting States are obliged to refuse their co-operation (i.e., the execution of a criminal conviction) if it emerges that the conviction is the result of a flagrant denial of justice: see *Soering v the United Kingdom* ECtHR judgment of 7 July 1989, Series A no.161, p. 45, para 113.

favour of the assertion that the scrutiny of the Hearing Officer on a case should not be merely confined to those issues for which the Mandate confers upon him a specific power. By contrast, as recognized by Article 3.1 of the Mandate, 'the hearing officer shall take account of ... *principles laid down by the Court of Justice and the [General Court] of the European Communities*' (emphasis added). As a result, the Hearing Officer can act 'in defence of the rights of defence'[102] also when such rights are not explicitly provided by a specific regulation: this would be consistent not only with the higher hierarchical value of 'principles' over 'laws', but also with well settled case-law.[103] It would also, incidentally, send a strong signal regarding his emancipation from DG Competition and reinforce the rhetoric of effective separation from DG Competition.

Another occasion for the Hearing Officer to demonstrate a proactive approach towards the evolution of its role would be, as suggested above, the creation of a set of Rules of procedure applicable for the organisation and the conduct of hearings. This would make the process more rigorous and transparent, and could also represent a first step towards the consideration of the hearing as an obligatory participation. Such organisational measure would also benefit the exercise of the rights of defence, allowing streamlining of the process of confrontation and honouring the principle of *contradictoire*. Moreover, it would have a direct impact on the pursuit of the objectivity of the hearing, given the increased ability for its participants to organize efficiently their agenda.

This is, however, as far as the Hearing Officer can push the quest for due process with the current Mandate. He is constrained, unfortunately, not only by the lack of resources but also by a set of rules that are too basic, and for which an update would be more than desirable. Everything depends, in the next few years, on what the priorities of the Commissioner will be. There is some reason, however, to be optimistic: the issue of 'due process' is in the eyes of everyone. The fact that it has been the object in the last year of 7 public speeches, including one of the former Commissioner,[104] two of the former Director General,[105] one of the new US Attorney General for Antitrust,[106] one

[102] S Wernicke, '"In Defence of the Rights of Defence": Competition law procedure and the changing role of the Hearing officer', Concurrences No. 3- 2009.

[103] See e.g. C-48 & 66/90, *Netherlands v Commission*, [1992] ECR I-565, para 44; Case C-32/95 P *Commission v Lisrestal and Others*, [1996] ECR I-5373, para 21; Case C-288/96, *Germany v Commission*, [2000] ECR I-8237, para 99; Case C-287/02, *Spain v Commission*, [2005] ECR I-5093, para 37; and 13 September 2007, Joined Cases C-439 & 454/05 P *Land Oberösterreich v Commission*, [2007] ECR I-7141, para 36; Case T-260/94, *Air Inter v Commission*, [1997] ECR II-997, para 60.

[104] N Kroes, 'The Lessons Learned', Speech at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University, New York, 24 September 2009.

[105] P Lowe, 'Reflections on the past seven years – "Competition policy challenges in Europe"', Speech at GCR 2009 Competition Law Review, Brussels, 17 November 2009; 'Due process in antitrust', Keynote address at the CRA Conference on Economic Developments in Competition Law , Brussels, 9 December 2009.

[106] Christine Varney, Keynote address at the 13th Annual Competition Conference of the International Bar Association, 11-12 September 2009, Fiesole.

of the new Director General[107] and two of the new Commissioner,[108] is a strong signal that this is the right moment to advance our proposals.

After the series of comments and suggestions made above with regard to possible issues in the current system, this article would not be complete without a final remark to stress what is the most important, substantial but at the same time simple and concrete reform that the Commissioner could bring about with respect to the hearing process: make the so called 'interim report' available to the public, or at least to the alleged infringer(s). Such an innovation would really come a long way towards greater respect for the right to be heard, would enhance transparency and trustworthiness in the Commission's enforcement machine and would significantly increase the importance of the Hearing Officer's role. As argued by a Commission official in the early nineties, the diametrically different approach of the EU and the US (where all decisions and tentative decisions of the hearing examiner are made part of the record and are served on the parties so that they may take exceptions or submit their observations)[109] could be justified by the role played by the Hearing Officer in the decision-making process, which was far more limited (and indeed almost insignificant) in the EU.[110] However, given the direct connection of the Hearing Officer to the final decision-maker, its progressive empowerment and the specific attribution of the duty to report to the Commissioner, a serious doubt can be cast on whether such enormous difference is still justifiable.

[107] A Italiener, 'Challenges for European Competition Policy', Speech at the International Forum Competition Law of the Studienvereinigung Kartellrecht, Brussels, 9 March 2010.

[108] See above n 53.

[109] See the Administrative Procedure Act, 5 U.S.C. Para 557 (c) 1988.

[110] J Joshua, 'The right to be heard in EEC Competition Procedures', 15 Fordham International Law Journal 16 (1991-1992), p 80.

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Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?

*Gurgen Hakopian**

The EU's competence to criminalise competition law enforcement has been and will continue to be a subject of debate. Before the entry into force of the Treaty of Lisbon opinions were divided on the question whether the Community had the power to introduce criminal law sanctions at the level of the EU institutions and the Member States. It can however be said that the old Treaty did not preclude the adoption of such measures, in theory at least, based on the wording of Art 83 EC and the Community's criminal law competence. The new TFEU has introduced a specific legal basis for the adoption of substantive criminal law measures in Art 83 TFEU, thus changing the dynamics in this area. Examination of the new system of EU criminal law reveals that criminalisation of competition law at the level of the EU institutions would no longer be possible without a Treaty amendment. Subject to the conditions mentioned in Art 83(2) TFEU, the Union does have the competence to criminalise competition law enforcement at the level of the Member States through harmonisation. The European Public Prosecutor, who would have the power to prosecute certain crimes before the national courts, could play a role in this respect, as it was originally intended to include bid-rigging in his competence ratione materiae. Even though the adoption of criminal law measures is technically 'easier' after the entry into force of the Treaty of Lisbon, broad consensus will still be required. Any developments in criminal competition law enforcement will depend on the political will in the Union.

1. INTRODUCTION

The effectiveness of EU competition law enforcement has been an issue of concern for some time. It has been openly questioned whether the current system, based on administrative fines, is sufficiently deterrent to assure compliance with the legal rules. Since there is increasing awareness in the EU and its Member States that this might not be the case, alternative methods of enforcement are being considered. One such approach is the institution of criminal sanctions for individuals and corporations. The current system allows Member States the choice between administrative, civil and criminal measures in the enforcement of national and EU competition rules. In the last decade certain Member States have used this possibility to criminalise their national enforcement systems. The United Kingdom and Ireland respectively introduced and expanded criminal competences in competition law in 2002. In the Netherlands, a proposal will be tabled by the legislator for the (re-)introduction of criminal law sanctions for both individuals and undertakings in the near future.[1] While it is clear that

* PhD candidate, Radboud University Nijmegen. The author would like to thank Prof Johan van de Gronden and Dr Henri de Waele for their useful comments and insights.

Member States have the authority to criminalise competition law enforcement, the question whether the EU has the same competence is open for discussion.[2]

This paper will investigate whether the new system of EU criminal law provides for an adequate framework for the EU legislator to introduce a criminal enforcement system of competition law in the European Union both at the level of the EU institutions and at the level of the Member States, by means of full or partial harmonisation, and how this compares to the system before the entry into force of the Treaty of Lisbon.[3] Particular attention will be paid to any effects the abolishment of the Pillar structure may have on the abovementioned issue.

The paper will start with a brief summary of the discussion concerning the possibilities of criminalising EU competition law enforcement under the old Pillar system. The analysis will focus on the interplay between a number of proposed legal bases and the debate on the Community's criminal law competence. Arguments from both sides of the spectrum will be considered. Subsequently, attention will be paid to the new substantive provisions of European criminal law, particularly Art 83 TFEU. This provision provides for a specific legal basis for the adoption of substantive criminal law measures in the EU. The debate on the extent of the Union's competence over criminal law is not settled however, as a number of questions arise from the wording of the Treaty. The conditions for the application of both paragraphs of Art 83 TFEU will be analysed in detail. The relationship between this Article and Art 103 TFEU will also be considered, followed by a critical analysis of the new system of EU criminal law in the context of criminalising competition law enforcement. Finally, it will be examined what role the institution of a European Public Prosecutor's Office could play in a possible scenario of criminal competition law enforcement. At the end of the paper, a number of conclusions will be drawn. It will be shown that possibilities for the criminalisation of EU competition law continue to exist, albeit in a modified manner. However, it will be argued that despite the substantial changes in EU criminal law, the most important issue remains the political will of the EU and its Member States to criminalise competition law enforcement.

2. VIEWS ON CRIMINALISATION UNDER THE PILLAR SYSTEM

The old Art 83 EC gave the Community the competence to adopt legislation (both regulations and directives) to give effect to the prohibitions laid down in Art 81(1) EC, but stated in paragraph (2)(a) that this would be done 'by making provision for fines

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[1] For a more detailed discussion of the proposal see R de Bree, 'Mededingingsrecht en strafrecht: hernieuwde kennismaking' (2006) 7 *Markt en Mededinging* 205. Due to the recent (February 2010) collapse of the Dutch government however, tabling it may take more time than originally anticipated.

[2] It is perhaps important to note that while Member States have a broader competence to criminalise the enforcement of EU competition law at the national level, this paper will approach the subject from the viewpoint of criminalising cartel offences in particular.

[3] To clarify: criminalisation at the level of the EU institutions means making serious breaches of competition law European crimes, prosecuted by a European authority at the EU courts.

and periodic penalty payments'. It has therefore been argued that the EC lacked the power to adopt criminal sanctions in competition law, for instance by the German government before the ECJ.[4] It is evident that the authors of the EC Treaty intended to introduce a system of competition law enforcement based on (administrative) fines, not criminal sanctions. However, the question whether it would have been possible in theory is a different one. While it is true that the EC Treaty did not give the Community the explicit power to introduce criminal law sanctions in competition law matters, it must be kept in mind that the 'fines and periodic penalty payments' mentioned in Art 83(2)(a) EC were[5] merely examples and did not in any way constitute an exhaustive list of measures.[6]

The Community's criminal law competence was expanded by the ECJ in its famous *Environmental Crimes* judgment,[7] where a framework decision adopted under the Third Pillar was annulled on the grounds that it encroached upon the Community's competence to adopt the measure using First Pillar legislation. The Court pointed out that according to Art 47 EU, 'nothing in the Treaty on the European Union is to affect the EC Treaty', a principle that is also found in Art 29 EU.[8] It went on to state that:

> 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence […] However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'[9]

The ECJ repeated this point of view in another case concerning environmental protection, with the important addition that 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.'[10] Despite the fact that these cases were concerned specifically with

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[4] Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-05383, paras. 16-17.

[5] Note that Art 103(2)(a) TFEU is unchanged from its predecessor Art 83(2)(a) EC. This provision will be discussed in more detail below.

[6] As pointed out by M Zuleeg in 'Criminal Sanctions – Panel Discussion', in: C D Ehlermann, I Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003) 389.

[7] Case C-176/03, *Commission of the European Communities v. Council of the European Union (Environmental Crimes)* [2005] ECR I-07879.

[8] *Id*, para 38.

[9] *Id*, paras 47-78.

[10] Case C-440/05, *Commission of the European Communities v. Council of the European Union (Ship-Source Pollution)* [2007] ECR I-09097, para 70. For a more detailed discussion of both judgments see S Peers, 'The European Community's criminal law competence: The plot thickens' (2008) 33 *European Law Review* 399.

environmental protection, it has been argued that the reasoning followed by the ECJ applies to other areas of Community law as well, including competition law.[11]

Consequently, several scholars have expressed the opinion that the introduction of criminal competition law enforcement in the EU would indeed have been possible both at the level of the EU institutions and at the national level through full harmonisation.[12] Interestingly enough, the Commission itself has seemed open to the possibility of the application of criminal sanctions in the past:

> 'Deterring undertakings and individuals from entering or re-entering cartel arrangements is one of our main objectives. We [the Commission, GH] therefore welcome all sanctions, including criminal sanctions, which contribute to the deterrent effect on cartels'.[13]

Wils has argued that in the event that Art 83 EC would not be considered to be a sufficient legal basis for introducing criminal law sanctions, 'the solution would be to use Art 308 EC'.[14] The purpose of this provision was to provide a necessary power, when none is available elsewhere in the EC Treaty, to attain any Community objective.[15] Any proposal based on Art 308 EC had to be 'in the course of the operation of the common market', but over the years its scope has been expanded to include much that is not primarily concerned with the operation of the economic community.[16]

While it is clear that different opinions existed on the Community's criminal law competence in general and its competence in competition law matter in particular, it can be said that the old system did not exclude, in theory at least, the possibility of introducing criminal law sanctions for competition law enforcement both at the level of the EU institutions and at the level of the Member States. The answer to the question whether this could have been achieved by using Art 83 EC, Arts 29 and 47 EU, Art 308 EC, or a combination of these provisions, will now almost certainly remain in the realm of guesswork and speculation.

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[11] R de Bree, 'Mededingingsrecht in het strafrecht: 'Law in the making?' (2008) 9 *Actualiteiten Mededingingsrecht* 212-213; R Barents, 'De denationalisering van het strafrecht' (2006) 10 *Sociaal-Economische Wetgeving* 371; A Dawes & O Lynskey, 'The ever-longer arm of EC law: the extension of community competence into the field of criminal law' (2008) 45 *Common Market Law Review* 140-151.

[12] Barents, *supra* note 11; W Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer, 2002) 232-237; Zuleeg, *supra* note 6, 389-391.

[13] O Guersent, 'The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges', in: C D Ehlermann and I Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007)

[14] W Wils, 'Is criminalization of EU competition law the answer?', in: K J Cseres, M P Schinkel and F O W Vogelaar (eds.), *Criminalization of Competition Law Enforcement – Economic and Legal Implications for the EU Member States* (Elgar, 2006) 95.

[15] Its successor, Article 352 TFEU, will be considered in more detail below.

[16] House of Commons, European Scrutiny Committee, 'Article 308 of the EC Treaty', 29th Report, Session 2006-07 (The Stationery Office Limited, 2007)

3. The TFEU and the New System of EU Criminal Law

The first and most important thing to note about the new system of EU criminal law is that mutual recognition is (still) the leading principle.[17] In fact, the Union's competence to adopt measures in the field of criminal procedure is subordinate to the principle of mutual recognition.[18] This must be kept in mind when analysing the Union's criminal law competence in the TFEU.

With the abolishment of the Pillar structure, a new provision for the institution of substantive criminal law measures in the European Union was introduced: Art 83 TFEU. The provision reads:

> 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.
>
> These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
>
> On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.
>
> 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.
>
> 3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

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[17] Art 82(1) TFEU states: 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.'

[18] See Art 82(2) TFEU as well as V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) 156-158.

> Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Art 83(1) and Art 83(2) TFEU both confer the competence to adopt substantive criminal law measures, but the legislative procedure that has to be followed is different. For the first paragraph, the ordinary legislative procedure[19] applies. The second paragraph states that the measures shall be adopted by using the same procedure as was followed for prior harmonisation measures.[20] Art 83(1) TFEU lays down certain 'areas of (particularly serious) crime (with a cross-border dimension)', some of which have been deliberately drafted in a broad way as to leave a wider margin to the EU legislator,[21] while Art 83(2) TFEU is not limited in subject matter. The Council may extend the list of crimes in Art 83(1) TFEU if it considers it necessary to do so. What does this mean for the relationship between the two? The logical conclusion would be that the Council cannot extend the areas of crime mentioned in the first paragraph to cover offences falling under the second paragraph, and that Art 83(2) TFEU cannot be utilised to adopt measures concerning the areas of crime mentioned in Art 83(1) TFEU.[22] Keeping this in mind, it is now time to consider whether this Article constitutes a sufficient legal basis for the introduction of criminal law sanctions in competition law matters at the level of the EU institutions and/or at the level of the Member States.

A first important remark to be made is that both paragraphs of Art 83 TFEU exclusively provide for the use of directives in adopting substantive criminal law measures. As directives are obviously still only binding upon the Member States,[23] it must be concluded that the wording of Art 83 TFEU excludes the possibility of instituting a criminal system of competition law enforcement at the level of the EU institutions.[24] Therefore, any discussion of the possibilities that this Article provides for

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19 Art 294 TFEU (ex Art 251 EC).

20 As Art 83(2) can only be used in an area which is already subject to harmonisation. We shall return to this point later.

21 C Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon – A New Dimension for the Community Method' (2008) 4 *European Constitutional Law Review* 34-36.

22 See also S Peers, 'EC Criminal Law and the Treaty of Lisbon' (2008) 33 *European Law Review* 516-517. He considers each paragraph to be a lex specialis as regards the other.

23 Art 288 TFEU.

24 Wils (*supra* note 14, 97) reached the same conclusion when discussing Article III-271(1) of the now defunct Constitutional Treaty, the predecessor of Art 83(1) TFEU: 'the fact that this Article only allows the use of European framework laws [the CT equivalent of directives, GH] […] appears to close the door to criminalization of EU antitrust enforcement at the level of the EU institutions.'

criminalising EU competition law enforcement must be confined to the scenario of harmonisation at the level of the Member States.

As stated before Art 83(1) TFEU is exclusively concerned with 'particularly serious crime with a cross-border dimension' and provides an exhaustive list of 'areas of crime' that conform to this standard of seriousness. Competition law offences, and more specifically cartel offences, are not included in the list. However, it is too simplistic to dismiss this provision's usefulness for the matter at hand based on this fact alone. An interesting point of view is that cartel offences could theoretically be seen as a species of corruption.[25] While there is no definition of corruption to be found in the TFEU (or, indeed, any of the other areas of crime listed in Art 83(1) TFEU), the Commission has in the past expressed its thoughts on the issue:

> 'There is no single uniform definition of all the constituent elements of corruption. […] Whereas one of the rather traditional definitions, followed by the World Bank and the non-governmental organisation Transparency International, views corruption as "the use of one's public position for illegitimate private gains", it appears more appropriate to use a broader definition such as the one of the Global Programme against Corruption run by the United Nations, i.e. "abuse of power for private gain" and including thereby both the entire public and private sector'.[26]

Though the EU has adopted the UN's broader definition to include the private sector, it is too much of a stretch to throw competition law offences in the corruption bin. An argument can be made that an overlap between the two exists, but corruption is only a part of competition law offences such as bid-rigging and market sharing. A tying of the two categories would therefore lack the necessary legal basis and credibility. Another hypothetical scenario would be to include serious breaches of competition law in the definition of 'organised crime'. In Art 1 of Joint action 98/733/JHA, a criminal organisation was defined as 'a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.'[27] A cartel could probably be described as such a 'structured association', leaving the issue of the minimum penalty required. For an offence to be qualified as part of organised crime, there must be a maximum sentence of at least four years imprisonment in place. The seriousness of cartel offences is recognised by a number of Member States. In the UK and Ireland, a conviction

[25] Peers, *supra* note 22, 522.

[26] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'On a Comprehensive EU Policy Against Corruption' (28 May 2003) Brussels COM/2003/0317 final.

[27] Joint action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 1-3.

under that offence carries a maximum prison sentence of five years.[28] In Estonia however, individuals can only be punished for competition offences by means of up to three years imprisonment.[29] Then there are of course the Member States who have not criminalised competition law enforcement at all. In the absence of clear consensus on the matter, it seems premature to include cartel offences in the organised crime category.[30] Thus it must be concluded that Art 83(1) TFEU is not a very convincing legal basis for the criminalisation of EU competition law at this point in time. That being said, its application could of course be extended by a unanimous decision of the Council (after consulting the Parliament), should it be considered necessary to include competition law offences in the current list of areas of crime.

Art 83(2) TFEU gives the Union the power to adopt substantive criminal law measures in areas other than those mentioned in Art 83(1) TFEU, subject to a number of conditions: the measures in question must be essential to ensure the effective implementation of a Union policy, in an area already subject to harmonisation, and must be adopted by the same decision-making process as in the main harmonisation policy. It is interesting to note that the provision refers to approximation of criminal laws and regulations of the Member States, a phrase not found in Art 83(1) TFEU. Prima facie this seems to imply a limited degree of integration. Then again, Art 83(2) TFEU does not require the crime in question to be 'sufficiently serious' with a 'cross-border' dimension. Yet it would be premature to conclude that this provision is unlimited in its legislative mandate, considering the fact that any necessity to legislate at the European level automatically implies some kind of 'Union dimension'.[31] So how should the conditions for the application of Art 83(2) TFEU apply? The requirement that criminal law measures be 'essential' already existed under the Community's criminal law competence and so far there is no reason to assume that it must be applied differently under the TFEU. The precise meaning of this condition has always been somewhat unclear:

> 'It is thus clear that the questions whether criminal measures are in a particular case 'essential' for combating serious offences or 'necessary' in order to ensure that rules are 'fully effective' call, not only for 'objective' consideration of the substantive legal basis or policy area in question, but also for a degree of judgment. From that perspective, it was no accident that the Court referred to criminal law measures

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[28] Section 190(1)(b) Enterprise Act 2002 (UK); Section 8(1)(b)(ii) Competition Act 2002 (Ireland).

[29] Articles 399-402 of the Estonian Penal Code. See also A Proos, 'Competition policy in Estonia', in: K J Cseres, M P Schinkel and F O W Vogelaar (eds.), *Criminalization of Competition Law Enforcement – Economic and Legal Implications for the EU Member States* (Elgar, 2006) 307-311.

[30] An example from the Netherlands is perhaps illustrative of the difficulties concerning the overlap between the two concepts. In 2008 a number of window cleaners were prosecuted for taking part in a criminal organisation. The court in question however ruled that their actions factually constituted cartel behaviour, which is not a criminal offence in the Netherlands, and dismissed the case. See De Bree, *supra* note 11, 215-216.

[31] E Herlin-Karnell, 'The Lisbon Treaty and the Area of Criminal Law and Justice' (2008) 3 *Sieps European Policy Analysis* (2008) 5-6, available at http://www.sieps.se/epa/2008/EPA_nr3_2008.pdf.

> which the Community legislature 'considers necessary' and established that 'the Council took the view that criminal penalties were essential'. […] It appears to me problematic, in particular, that the conditions for the adoption of measures relating to criminal law under the Community pillar, notably the legislative procedure, depend on the area of Community action concerned, and vary accordingly'.[32]

It is to be expected that it will continue to be difficult to assess whether this condition is satisfied in practice. Another issue that is unclear at this point in time is what institution will have to prove that criminal law measures are in fact essential. It seems logical that the case law of the Court will be taken into consideration (for example, it should now be clear that environmental protection is an essential Union policy), but one can imagine a situation where there is a disagreement between the Council on the one hand and Commission and Parliament on the other, and the suggestion that both issues are 'highly likely to be the subject of ECJ litigation' does not seem to be far off.[33]

The requirement that the area concerned must have already been subject to harmonisation measures also existed under the old system, albeit implicitly.[34] A number of questions arise from this condition. First of all, it must be determined to what extent the Union can adopt criminal law measures. The wording of the TFEU makes it clear that the measures can be adopted to the extent that the area in question has been harmonised, but there is no reason to conclude that full harmonisation is a requisite for the adoption of measures under this provision. In short, the Union can only adopt criminal law measures in the area of competition law to the extent that it has harmonised competition law. Next, it should be noted that criminal law measures adopted under Art 83(2) TFEU must not precede the harmonisation measures in question.[35] If harmonisation measures are not in place, the adoption of criminal law measures cannot logically prove to be 'essential to ensure the effective implementation of a Union policy', since such a policy would not exist. There is however no indication to be found of a minimum waiting period, which means that in theory criminal law measures could be adopted immediately after the adoption of the harmonisation measures. Finally, does the precondition of prior harmonisation imply that criminal law measures adopted on the basis of Art 83(2) TFEU must be separate from the original legislation at issue? Certainly, the Treaty imposes no obligation to do so. However, the requirement that the same legislative procedure must be followed strongly points towards the conclusion that it was indeed the intention of the Treaty drafters that separate measures be used. There is also the matter of the British, Irish and Danish opt-outs from policing and criminal law and the emergency brake procedure of Art 83(3)

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[32] Opinion of A G Mazák, Case C-440/05, *Commission of the European Communities v. Council of the European Union* [2007] ECR I-09097, paras 119, 121.

[33] Mitsilegas, *supra* note 18, 108.

[34] *Supra* note 10, para 66.

[35] The Article states: 'in an area which *has been subject to harmonisation measures* [...] adopted by the same ordinary or special legislative procedure *as was followed for the adoption of the harmonisation measures in question*' [emphasis added, GH].

TFEU. In the case of simple amendment of existing legislation, Member States could have the power to invoke their opt-outs and the emergency brake in the areas already subject to harmonisation, thus perhaps extending the influence of Art 83 TFEU to non-criminal matters.[36] It can therefore be assumed that the use of separate measures was intended to avoid such complication in the future. In short, it can be said that Art 83(2) TFEU could definitely constitute a sufficient legal basis to criminalise the enforcement of EU competition law enforcement through harmonisation at the level of the Member States. Competition law is of course an area that has been subject to harmonisation measures, but it would still have to be proven that criminal law measures are essential to ensure the effective implementation of the Union's competition law policy. Who will get the final word on the precise definition of these criteria is however still unclear.

Before drawing further conclusions, it is important to examine the relationship between Art 83 TFEU and Art 103 TFEU, the provision that deals specifically with the adoption of competition law measures and the successor of Art 83 EC. As noted in the second paragraph of this paper, it has been argued that 'fines and periodic penalty payments' were mentioned in Art 83(2)(a) EC as examples, and criminal competition law measures could have been adopted in theory by using this Article as a legal basis. If we assume that the same reasoning applies to the new Article (and indeed there is no reason why it should not), does that mean that the existence of a specific legal basis for the adoption of substantive criminal law measures, Art 83 TFEU, precludes the adoption of criminal law measures on the basis of Art 103 TFEU? This issue is of the utmost importance, since Art 103 TFEU, like its predecessor, allows for the use of both regulations and directives, and thus could perhaps be seen as providing the possibility to criminalise competition law enforcement at the level of the EU institutions. The Article also contains its own legislative procedure (decision of the Council, on a proposal from the Commission and after consulting the European Parliament, known as the 'consultation procedure').[37] Taking this into account, another question would be whether all competition law measures should be adopted on the basis of Art 103 TFEU. According to a leading commentator, there would be some friction between the two provisions:

> 'If it were desired to adopt criminal law measures concerning EU competition law, these would have to be carefully distinguished from the competence in para.1 [Art 83(1)] concerning the adoption of measures concerning (private) corruption. This point is relevant since the decision-making rules would be different (consultation of the EP for competition law measures, as distinct from the ordinary legislative procedure for measures concerning corruption)'.[38]

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[36] Peers, *supra* note 22, 520-521.

[37] Note that the phrase 'acting by a qualified majority' that appeared in Art 83(1) EC is gone from Art 103(1) TFEU.

[38] Peers, *supra* note 22, 522.

As for the first question, it must be concluded that substantive criminal law measures cannot be adopted on the basis of Art 103 TFEU alone. The reason for this is simple: there is a specific legal base to be found in the Treaty for the adoption of such measures. In the absence of other provisions that explicitly confer the competence to adopt substantive criminal law, Art 83 TFEU has to be seen as the correct legal basis in this area. Since Art 103(2)(a), like its predecessor, only mentions 'fines and periodic penalty payments', it must be concluded that this Article does not confer the competence to adopt criminal law measures in the area of competition law. This reasoning also applies to another legal base mentioned under the old system, Art 352 TFEU (ex Art 308 EC). With the entry into force of Art 83 TFEU, the argument that the Treaties do not provide the necessary power to adopt criminal law measures is no longer valid. The ECJ's case-law on the Community's criminal law competence is also no longer relevant in this regard. It is clear that it will not be possible to adopt 'Community criminal law' on this basis, not only because the Community has ceased to exist but because of the introduction of a specific legal base for the adoption of substantive criminal law measures. Art 83 TFEU was created with the intent to end the confusion in this field, as evidenced by the fact that the criteria of 'essentiality' and 'effectiveness' have been transposed from the ECJ's case-law into the second paragraph of this provision. An interesting question is whether the ECJ's 'centre of gravity'-theory could play a role in determining the correct legal base for the adoption of criminal competition law measures:

> 'in the context of the organisation of the powers of the Community the choice of a legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure […] If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component […] Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases'.[39]

Could one then argue that in the criminalisation of competition law enforcement, competition policy is the 'predominant purpose or component', thereby ignoring Art 83 TFEU entirely as a legal basis and basing any measures in this field solely on Art 103 TFEU? If the answer to this question is in the affirmative, it would mean that Art 103 TFEU could be used to criminalise competition law enforcement at the level of the EU institutions. Such reasoning does not seem entirely convincing however. First of all, it would be hard to argue that criminal law as the purpose of the proposed legislation is completely subordinate to competition policy. Second, the fact that there is a specific

[39] Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002] ECR I-11453, paras 93-94.

legal basis for the adoption of criminal law measures that did not exist for the Community means that Art 83 TFEU cannot be ignored on the basis of this doctrine alone, especially considering the fact that criminal law measures are not mentioned in Art 103 TFEU. Nevertheless, it remains an interesting point and the last word has definitely not been said on the matter.

Finally, we must consider what consequences the legislative procedure laid down in Art 103 TFEU may have for any Union competence to criminalise competition law on the basis of Art 83 TFEU. The answer to this question is twofold. In the case of Art 83(2) TFEU, there do not seem to be too many problems. Any measure adopted on the basis of this provision would have to follow the same legislative procedure that was used for prior harmonisation of competition law (Art 103 TFEU/Art 83 EC). The issue is with Art 83(1) TFEU, which, as correctly noted by Peers, imposes the use of the ordinary legislative procedure and can therefore be in conflict with Art 103 TFEU. It is highly unlikely that Art 83(1) TFEU can be used to criminalise the enforcement of EU competition law at this point in time. However, should the Council unanimously decide to extend the list of areas of crime mentioned in this provision to include competition law offences, there is no theoretical objection why it cannot constitute a valid legal base for the adoption of criminal competition law measures. In that case a specific basis for the adoption of such measures would exist, separate from the competence laid down in Art 103 TFEU. Whether one would consider separating the Union's competence to adopt criminal competition law measures from its general legislative competence in competition law is another question entirely.

4. THE EUROPEAN PUBLIC PROSECUTOR

The idea for a European Public prosecutor was developed as early as 1997 by a study group funded by the Commission.[40] Now, more than a decade later, we find a specific legal basis for the creation of such an office, Art 86 TFEU:

> 1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.
>
> In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

[40] See the two main publications of this group: M Delmas-Marty (ed.), Corpus Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union (Editions Economica,1997) and M Delmas-Marty and J A E Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States, Penal Provisions for the Protection of European Finances*, (Intersentia, 2000-2001).

> Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.
>
> 2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
>
> 3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.
>
> 4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

An initial important remark to be made is that there is no obligation to create a European Public Prosecutor, this Article merely provides the possibility to do so. It is not unthinkable that the EPP will never come into existence.[41] The initiative to create the EPP must be taken by the Council in a unanimous decision or a group of at least nine Member States. The Prosecutor will be concerned with crimes against the Union's financial interests, though its powers may be extended by the Council to include 'serious crime having a cross-border dimension'. The Prosecutor's competence would extend to the entire territory of the Union, which would constitute a single legal area for this purpose.[42] He will only be able to bring cases before national courts, which means that a vertical structure will be introduced in cooperation in criminal matters. If coercive measures need to be taken, the Prosecutor can apply for a warrant at the competent national judicial authority. The Member States themselves will identify

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[41] And if it does it has been suggested that its institution 'will not be for tomorrow'. Ladenburger, *supra* note 21, 39.

[42] Corpus Juris 2000, Art 18, available at http://www.law.uu.nl/wiarda/corpus/index1.htm.

which authority is competent. Once the warrant is obtained, the Prosecutor will have the power to take direct action and enforce it throughout the whole territory of the Union.[43] The EPP will be independent of the EU institutions and the Member States, composed of a Chief Prosecutor in Brussels and Deputy Prosecutors in each of the national capitals. The Chief would be appointed by the Council for a non-renewable term of six years, the Deputies would be appointed by the Chief from a pool of national public prosecutors. As of now it is unclear whether these prosecutors would remain national prosecutors or acquire a separate 'European' status.

If it was decided to criminalise the enforcement of EU competition law, could the EPP prosecute these crimes before the national courts? The answer to this question cannot be found in the Treaty, but clues can be found in the Corpus Juris proposals and the Commission's Green Paper relating to this issue.[44] The most important question that needs answering is what crimes exactly the EPP will be able to prosecute, as the term 'crimes against the financial interests of the Union' is rather vague. One remark that can be made is that these crimes do not have to be committed in the Union itself, but merely against it.[45] The Corpus Juris 2000 contains a list of crimes for which the EPP would be competent. These are: fraud affecting the financial interests of the European Communities and assimilated offences; market-rigging; money laundering and receiving; conspiracy; corruption; misappropriation of funds; abuse of office; disclosure of secrets pertaining to one's office. All these offences are also found in the Commission's Green Paper. Of particular interest for this paper is of course the reference to market-rigging. In the Corpus Juris 2000, the crime is defined as follows:

> 'It is a criminal offence for a person, in the context of an adjudication process governed by Community law, to make a tender on the basis of an agreement calculated to restrict competition and intended to cause the relevant authority to accept a particular offer.'[46]

The Green Paper has the following to say on the matter:

> 'Getting, or trying to get, a specific bid accepted by any contract-awarding authority whatever, using means that violate Community rules on public procurement, such as an illegal agreement, might therefore be made a common criminal offence if there is actual or potential damage to the Community's financial interests.'[47]

Essentially, this is a description of the competition law offence known more commonly as bid-rigging. It must however be kept in mind that none of these documents are as

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43 *Id*, Article 24.

44 Commission of the European Communities, 'Green Paper on criminal-law protection of the Financial interest of the Community and the establishment of a European Prosecutor' (11 December 2001) Brussels COM/2001/715 final.

45 C van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in: N Walker (ed.), *Europe's Area of Freedom, Security and Justice* (OUP, 2004) 219.

46 *Supra* note 42, Article 2.

47 *Supra* note 44, section 5.2.2.1, 37.

yet part of European law.[48] Therefore it cannot be stated with certainty that these very same definitions will be used to define the crime of market-rigging, or indeed that market-rigging will even be one of the crimes affecting the financial interests of the Union that the EPP will be competent to prosecute. It is not determined what crimes will be included in the regulations that need to be adopted in order to create the Prosecutor. These crimes will together constitute a mini-EU criminal code. If market-rigging is included in the list, this will have two major consequences. The first is that the EPP will be able to bring criminal proceedings before the national courts for this particular breach of competition law. The second is that market-rigging will constitute a European crime and this part of competition law will be criminalised by means of an EU regulation. Considering that other competition law offences are not mentioned in the Corpus Juris and the Green Paper, we have to assume that it was not originally intended to give the EPP the power to act in these matters. Then again, it remains to be seen what crimes will be included in the Prosecutor's competence. Should it be considered desirable to give the EPP full competence in competition law matters, an alternative route is available via Art 86(4). In a procedure similar to Art 83(1), the Council can unanimously extend the EPP's competence to include 'serious crime having a cross-border dimension' after obtaining the consent of the Parliament and consulting the Commission. It must however be kept in mind that even if the whole of EU competition law was to be criminalised in the regulation(s) creating the EPP, criminal enforcement at the level of the EU institutions would still not be possible, as the Prosecutor can only bring cases before the national courts. An interesting question, largely beyond the scope of this paper, is whether it would be wise in the first place to confer this responsibility on the EPP. Considering the fact that the EPP system will provide for centralised investigation and decentralised trials, it is doubtful whether this will be the most effective way of criminal competition law enforcement in the EU. These doubts include concerns about the differences in the Member States in the protection of defendants' rights in criminal proceedings.[49]

5. CONCLUSION

When one considers the possibility of criminalising the enforcement of EU competition law, the following two scenarios come to mind:

1. The institution of a criminal law framework at the level of the EU institutions, with the Commission or another entity acting as the prosecutor before the European courts. Such a system would most probably have to be reinforced by some kind of European criminal code.

2. The harmonisation of criminal competition law enforcement in all the Member States. Member States will be obliged to impose criminal sanctions for certain

[48] Mitsilegas, *supra* note 18, 230-231.

[49] S Peers, *EU Justice and Home Affairs Law* (OUP, 2006) 490-491.

competition law offences, but the enforcement will be carried out by national authorities before the national courts.

While both scenarios would most probably have been possible in theory under the Pillar system, we have seen that matters are slightly different under the new TFEU. The first scenario appears to be closed off for the time being, considering the fact that Art 83 TFEU only allows for the use of directives and that there is no specific legal base to be found for the criminalisation of competition law elsewhere in the Treaty. Should there be a desire to criminalise competition law enforcement at the level of the EU institutions, a Treaty amendment would be necessary. This could be achieved in a number of different ways: an amendment of Art 83 TFEU, providing for the use of regulations to adopt substantive criminal law measures; an amendment of Art 103(2)(a) TFEU, adding the words 'criminal law sanctions' to the list of 'fines and periodic penalty payments' (this would create an explicit legal base for the adoption of criminal law sanctions in competition law, meaning that there would no longer be an obligation to use Art 83 TFEU); or the creation of an entirely new provision conferring the competence to criminalise competition law enforcement. The second scenario remains a definite possibility. Art 83(2) TFEU, provided that its conditions are fulfilled, could undoubtedly be used for the harmonisation of criminal competition law enforcement in the Member States. A dual legal basis with Art 103 TFEU would most likely be needed. Whether Art 83(1) TFEU provides this competence as well is unlikely. Competition law offences are not included in the areas of crime mentioned in this provision, and it is hard to make a convincing argument that they fit into one of the existing categories. In the absence of an explicit reference to competition law, it must be assumed that Art 83(2) TFEU is the correct legal basis for the time being. The European Public Prosecutor could potentially play a role here, prosecuting competition law offences before the national courts. However, it is unclear what crimes will be included in the EPP's competence in the future. Market-rigging was originally intended to be one of them, but whether that intention will become reality remains to be seen. Even so, market-rigging is only one specific breach of competition law and for the EPP to be effective in this regard his competence will have to be extended to cover a much wider range of offences.

The debate on the Union's criminal law competence after the entry into force of the Lisbon Treaty and the TFEU is certainly not settled yet. However, the most crucial element for the introduction of criminal law sanctions in the EU in general and the criminalisation of competition law enforcement in particular remains the political will of the EU and its Member States. Even though criminal law has been moved into the domain of what used to be 'Community' decision-making, large support will still be required across the Union to adopt substantial measures. The emergency brake procedure contained in Art 83(3) TFEU is evidence of that fact. This provision allows any Member State to object to a measure based on Art 83(1) or (2) on the grounds that

it 'would affect fundamental aspects of its criminal justice system'.[50] There is also the matter of the unanimity requirements concerning the extension of the Union's criminal law competence in Art 83(1) TFEU and the European Public Prosecutor's competence in Art 86(4) TFEU. Finally, the British, Irish and Danish opt-outs could also potentially play a role here, though the complexity of the rules in this field leaves a large amount of uncertainty for the future. When there is consensus across the Union that criminalisation of EU competition law is desirable, the necessary steps will undoubtedly be taken. At this moment such consensus is lacking, though it can perhaps be said that there is agreement throughout the Union that bid-rigging can be qualified as a criminal offence. The TFEU provides for the possibility of criminalisation in the Member States through harmonisation. If it were decided to criminalise competition law enforcement at the level of the EU institutions, a Treaty amendment would most likely be needed. Once again the outcome depends on the political will in the Union.

[50] Though a Member State would have to convincingly argue that this is the case. For a more detailed discussion of the emergency brake procedure, see Peers, *supra* note 22, 522-529.