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This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in

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This article assesses whether the current enforcement system of EU competition law complies with the requirements of Article 47 of the Charter of Fundamental Rights (CFR) and Article 6 European Convention of Human Rights (ECHR). It concludes that this is not the case and puts forward possible ways to remedy this deficiency. It argues that EU competition procedures fail to meet the core due process standards laid down by the ECHR and the CFR because fines are not imposed by an independent tribunal at first instance. In addition, the limited exception to that key principle does not apply as competition law infringement cannot be deemed 'minor offences' and the General Court's review of the Commission decisions remains too limited. Therefore, it is suggested that EU Courts should ideally be granted the power to adopt final infringement decisions at first instance, so as to ensure full compliance with Article 6 ECHR. However, in light of the constitutional and practical difficulties raised by such a change, this article examines three alternatives: (i) creating a new independent competition authority; (ii) broadening the review powers of the EU Courts; and (iii) having an independent adjudicator adopt public findings on the case after a hearing at which the case team acts as prosecutor, after which the Commission would have to decide whether to adopt these findings or to take a different decision. While none of these alternatives would on its own fully comply with the requirements of Article 6 ECHR, it is submitted that the combination of broader judicial review plus having an independent adjudicator adopt public findings on the case could be put in place relatively quickly, would solve a number of the shortcomings of the current system and seems to be the best alternative in the short/medium term pending full reform.

1. INTRODUCTION AND SUMMARY

The title to this article was inspired by the Commission's review of Regulation 1/2003 – a report which did not address the fundamental due process concerns shared by many involved in EU competition law. Instead, the Commission's review of Regulation 1/2003 focused on possible (minor) enhancements of the Commission's powers. The review dismissed due process criticisms, concluding that the functioning of Regulation 1/2003 was globally satisfactory, and did not call for any substantial change in the Commission's enforcement policy. This article looks at the concerns affecting the enforcement of EU Competition law by the Commission (and some NCAs – though there are a number of NCAs with more advanced procedures) and concludes that fundamental change is needed to bring it in compliance with ECHR standards.

Many will say that this is not necessary given the current Commission system works satisfactorily. To convince you to continue reading, we would challenge you as follows:

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would you recommend that any other country adopt it as their (new) competition law? Would you advise that country that it would be appropriate and entirely above suspicion/criticism if competition infringements were to be decided – and hundreds of millions of Euros of punishment to be imposed – by 27 regional politicians, 26 of whom had no knowledge of the evidence and one who will have read a summary of the evidence prepared by the prosecuting officials? Would you recommend to that country that it should empower an administrative body to adopt the final decisions imposing significant punishments solely on the recommendations of the prosecutors, without the case having been tried before a neutral judge in a public and fair hearing? Would you advise that country to allow the administrative body overseen by regional politicians to impose huge penalties while allowing only limited judicial review? We submit that the EU's competition procedures are a model no other country concerned about due process would adopt if it was starting with a clean slate. We would therefore submit that this thought experiment confirms that EU competition procedures need to be urgently reformed.

The current enforcement system is not only one that countries putting in place new competition regimes would be advised not to follow, it is also unlawful because EU competition rules are criminal in nature in the sense of Article 6 of the European Convention of Human Rights (ECHR), which provides that a criminal penalty can only be imposed by an 'independent and impartial tribunal established by law'. More specifically, the case law provides that such criminal penalties must be imposed by an independent tribunal at first instance. There is only a limited exception to this rule in the case of offences that are (a) minor and (b) there is a right of appeal against the decision before an independent and impartial tribunal, which has powers of full jurisdictional review in relation to all aspects of the decision. Neither condition is met in EU competition cases: fines of hundreds of millions of Euros are not minor; and the review by the General Court is too limited. EU competition procedures thus fail to meet the core standards laid down by the ECHR.

Since 1 December 2009, the current system also fails to meet EU's own core standards for the very same reasons. With the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights (CFR) has been given 'the same legal value as the Treaties'.[1] In particular, Article 47 CFR, which provides for the right to 'an effective remedy before … an independent and impartial tribunal previously established by law', mirrors the text of Article 6 ECHR. Thus, the meaning and scope of the rights provided by Article 47 CFR must be at least equivalent to those of Article 6 ECHR. This follows from Article 52(3) CFR, which expressly provides that the protection afforded by the CFR must be at least equivalent to the guarantees provided by the ECHR.[2] All the *acquis* for Article 6 ECHR is thus brought into EU law since there is

[1] Article 6(1) TEU.

[2] Pursuant to Article 52(3) CFR, which states that: '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'.

now an express provision of primary law preventing EU Courts from adopting a lower standard of protection than the European Court of Human Rights (ECtHR).

The last part of the article looks at possible ways to remedy this deficiency. The ideal solution that clearly ensures full compliance with Article 6 ECHR would be to give EU Courts the power to adopt final infringement decisions at first instance. This solution raises significant constitutional questions – it could require a change to the Treaties to implement, as well as significant organisational changes. So this is probably best seen as a long term goal, rather than a solution in the near term. Few associated with the EU would be keen to suggest Treaty changes after the difficulties of securing approval for the Lisbon Treaty – a process which highlighted that changing the Treaty can take many years to achieve and is not a short or even medium term solution. Three other alternatives examined below are: creating a new competition authority independent from the Commission; broadening the review powers of the EU Courts with a view to remedying on appeal the potential shortcomings affecting the decision-making process at first instance (to the extent that this has not already been done by the CFR); and having an independent adjudicator adopt public findings on the case after a hearing at which the case team acts as prosecutor. The Commission would then have to decide whether to adopt these findings or to take a different decision.[3] While the feasibility of these solutions within the current Treaty framework may be less problematic than the alternative of Court-imposed punishments, none of these alternatives would on its own fully comply with the requirement of Article 6 ECHR, namely that cases be adjudicated by an independent tribunal at first instance. However, the combination of broader judicial review plus having an independent adjudicator adopt public findings on the case, could be put in place relatively quickly, would solve a number of the shortcomings of the current system and seems to be the best alternative in the short/medium term pending full reform.

In sum, we believe that Europe should lead the way in fair competition procedures; not set an example that other countries would be reluctant to follow. The Lisbon Treaty, now in force, provides that the CFR has the same legal value as any other article of the Treaty and that the European Union will accede to the ECHR. So now is the time to reform the system in a fundamental way, rather than tinkering with the details of Regulation 1/2003. Europe should have change we can believe in.

2. THE COMMISSION'S REVIEW OF REGULATION 1/2003

The Commission published on 30 April 2009 a report on the functioning of Regulation 1/2003 ('the Report').[4] The Report was a missed opportunity in that the Commission

[3] This system is modelled on the one that applies for pharmaceuticals, where the EMEA makes findings on e.g. whether a pharmaceutical should be taken off the market but it is the Commission that has the formal power to decide to ban the drug. In practice the Commission almost always follows the EMEA's findings.

[4] The Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003, COM(2009)206 final ("Report") is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0206:FIN:EN:PDF. The Commission staff working paper accompanying the Communication from the Commission to the European Parliament and

chose not address the due process shortcomings of the current enforcement system of EU competition law, despite clear calls from the stakeholders who submitted comments during the public consultation preceding the adoption of the report.[5]

In particular, the Commission does not accept that the current enforcement system does not fully comply with Article 6 ECHR and states that 'as far as decisions adopted are subject to independent judicial control, such systems are fully compatible with established case law of both the Community Courts as well as the European Court of Human Rights'.[6] The Commission also broadly interprets the exception to the principle of the right to have an independent court at first instance:

> 'under the case law of the European Court of Human Rights, administrative adjudication even of certain matters qualified 'criminal' within the meaning of Article 6 of the ECHR is not incompatible with the Convention so long as the party concerned can bring any such decision affecting it before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.'[7]

However, as will be explained in more detail below, it is submitted that this does not accurately reflect the ECtHR's case law, which requires that decisions be taken by an impartial and independent tribunal at both first and second instance. Moreover, as will be explored below, it is doubtful that the limited judicial review practised until now[8] by the EU Courts (pure 'review of legality'), would satisfy the ECHR requirements as they are not entitled to engage in a complete reassessment of the facts and of the evidence produced before it ('de novo review').

In the Report, the Commission attempts to legitimise its own internal architecture, which fails to separate the investigating and deciding teams, by stressing that 'most Member States have a system of one administrative authority investigating and deciding cases'.[9] But this does not make the Commission model legal – it may instead simply show that Member State authorities also need to change their procedures. In addition, it is noteworthy that some Member States such as France have actually moved away from the Commission model and have adopted instead a structure which distinguishes between the role of investigator and decision-maker.[10] Since 13 January 2008, there is a clear separation between the French Competition Authority's investigatory function

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Council - Report on the functioning of Regulation 1/2003, COM(2009)206 final, is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0574:FIN:EN:PDF.

5 See, for example, the comments of the International Chamber of Commerce and Business Europe, available at: http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/index.html.

6 Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 55.

7 Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 56.

8 There has, to date, not been a case where the Courts have adopted a wider scope of review based on the CFR – though if the interpretation of the CFR set out below is correct, this may happen in the future.

9 Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 192.

10 See the website of the Autorité de la Concurrence, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167&id_article=1079.

and its sanctioning function. In particular, the Board of the Competition Authority will not be involved in the investigations of cases.[11] Similarly, in Belgium, the Competition Service, incorporated within the Ministry of Economic Affairs, investigates, while the College of Competition Prosecutors (chaired by the Director General for Competition) prosecutes and the Competition Council is an administrative court which decides on the merits of the case.[12] A similar separation of investigatory and decision-making powers can be found in Spain where the Investigations Directorate conducts investigations, but decisions are adopted by the CNC Council.[13] So the Commission system cannot in fact be justified on the basis of Member State practices, since many Member States have a better approach.

It is a pity that instead of using the occasion of the review of Regulation 1/2003 to seek to enhance its procedures and ensure due process, the Commission decided not to engage on the issue and instead called for an increase in its powers. For example, the Commission argued in favour of an increasing recourse to Article 18(3) decisions.[14] It also called for sanctions when misleading or false replies are given to during voluntary interviews under Article 19.[15] Moreover, in paragraph 137 of the Report, the Commission expressed frustration that the 'multi-stage procedure foreseen in Article 24 can prove relatively lengthy and cumbersome' and states that 'room for improvement should be examined' - thus seeking to enhance its powers with regard to alleged non-compliance, while not addressing the procedural due process issues that have caused controversy in recent Article 24 procedures.[16] Hence the comment above that the Report was somewhat of a missed opportunity.

In recent months, in response to the growing criticism regarding its procedure, the Commission issued in January 2010 draft 'Best Practices in proceedings concerning Articles 101 and 102 TFEU' and 'Best Practices on submission of economic evidence' as well as 'Hearing Officers' Guidance Paper'.[17] A consultation took place on the draft texts and the Commission received many comments, with most saying that while the documents are a welcome step in the right direction, they do not go far enough. But there remains time for the Commission to address some of the criticisms of its procedure before it officially adopts these three documents.

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[11] 'An interview with Bruno Lasserre', Global Competition Review, August/September 2008 (Vol 11 Issue 8).

[12] See the Competition Authority's website: http://economie.fgov.be/fr/entreprises/concurrence/Autorite_belge_concurrence_Introduction/index.jsp.

[13] See the Competition Auhority's website : http://www.cncompetencia.es/Inicio/ConocerlaCNC/QueeslaCNC/tabid/77/Default.aspx.

[14] Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 82.

[15] Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 84.

[16] See, for example, Case T-167/08, *Microsoft v Commission*, pending, in relation to the Commission's duty to clarify an obligation prior to imposing a penalty of €899 million for non-compliance with it.

[17] Available online at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html.

3. COMPETITION CHARGES ARE CRIMINAL IN NATURE

Although Community competition law is nearly 50 years old, its genuine nature, whether administrative or criminal, remains debated today. The question is not really the correct classification of Community competition law but rather the practical consequences that would flow from recognising its criminal nature. Article 6 of the European Convention on Human Rights distinguishes between determination of civil rights and determination of criminal charges and subjects criminal proceedings to more stringent procedural guarantees – with which EU competition law does not fully comply.

3.1. The ECtHR's test

The ECtHR, located in Strasbourg, has held that the concept of 'criminal charges' should receive an autonomous definition to avoid that states might be tempted to circumvent the due process protection guaranteed by the ECHR by designating a particular law as non-criminal.

In order to determine whether proceedings are 'criminal' within the meaning of Article 6 ECHR, the ECtHR has indicated in *Engel* that it will rely on (i) the domestic classification of the offence; (ii) the very nature of the offence; and (iii) the (nature and) degree of severity of the penalty.[18] These three criteria are not cumulative.[19] Since the ECtHR assesses the three criteria laid down in *Engel* disjunctively, the Court can conclude to the criminal nature of a proceeding even if only one of the three criteria is met.

- First, an offence will be deemed criminal if it is so labelled in domestic law, irrespective of its nature or the severity of the accompanying penalty. States are in principle free to designate as a criminal offence any act they choose, thus rendering applicable the specific protection of Article 6 ECHR.[20]
- Second, the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.[21] For instance, the ECtHR found in *Öztürk* that German road traffic offences remain criminal even if the maximum fines were low.
- Third, sanctions which come within the criminal sphere due to their nature and severity are sufficient to classify the proceedings as criminal, even if the offence itself could have been legitimately characterised as non-criminal (for instance, disciplinary).[22] For instance, the ECtHR found in *Engel* that disciplinary sanctions aiming at the imposition of serious punishments involving deprivation of liberty

[18] ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 82. All ECtHR judgments are available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

[19] ECtHR, Judgment of 25 August 1987, *Lutz v Germany*, para 55.

[20] ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 81.

[21] ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 54.

[22] ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 85.

were criminal in nature for the purpose of applying Article 6 ECHR, although the Court acknowledged that contraventions of legal rules governing the operation of the Netherlands armed forces could legitimately be labelled disciplinary by domestic law.

The ECtHR will stop its analysis as soon as it has determined that the proceedings in question should be deemed criminal, without necessarily examining all three criteria. The Court will only examine all three criteria if necessary to reach a conclusion on the genuine nature of the proceedings at stake. In such cases, the Court may adopt an overall approach and characterise a proceeding as criminal where a series of factors taken together and cumulatively point towards the concept of criminal charges even if none of these factors would be decisive on its own.[23] For instance, the Court found that the tax surcharges imposed on Mr Bendenoun amounted to 'criminal charges' because of the general scope and punitive aim of the underlying tax legislation as well as the very substantial amount of the tax surcharges. The Court found that the provision in question covered 'all citizens in their capacity as taxpayers, and not a given group with a particular status'. The tax surcharges were intended 'not as pecuniary compensation for damage but essentially as a punishment to deter reoffending', and were imposed 'under a general rule, whose purpose is both deterrent and punitive'. Lastly, the Court took into account the fact that the surcharges were 'very substantial'.

Applying this standard, European competition law as enforced by the Commission and/or the NCAs should be deemed criminal if:

- European law classifies competition law as criminal; or
- Competition law infringements are criminal in nature; or
- Sanctions imposed by the Commission and/or the NCAs belong to the criminal sphere due to their nature and severity; or
- A series of factors point towards classifying competition law proceedings as criminal even if none of these factors would be decisive on its own.

3.2. First *Engel* criterion - the 'domestic classification' of EU competition law

Is European competition law classified as criminal under domestic law? It appears that it is not the case as Article 23(5) of Regulation 1/2003 expressly provides that '[d]ecisions taken pursuant to paragraphs 1 and 2 shall *not be of a criminal law nature*'.[24] Relying on this wording, the General Court has rejected claims that competition law should be considered penal in nature.[25] Therefore, EU competition law fails the first *Engel* criterion. European law classifies neither competition law infringements nor competition law sanctions as criminal.

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[23] ECtHR, Judgment of 24 February 1994, *Bendenoun v France*, para 47.

[24] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 (emphasis added).

[25] See e.g. Case T‑83/91, *Tetra Pak v Commission*, [1994] ECR II‑755, para 235; Case T-64/02, *Dr Hans Heubach v Commission*, [2005] ECR II-5137, para 205.

However, from an ECHR point of view, the domestic classification of proceedings is certainly the least important of the three *Engel* criteria. It only constitutes a 'starting point' for the analysis.[26] The domestic labelling of some proceedings as non-criminal is never determinative but simply obliges the Court to turn to the second and third *Engel* criteria.

In addition, the purpose of Article 23(5) of Regulation 1/2003 (and former Article 15(4) of Regulation 17/62) was not to define the level of procedural guarantees that EU competition proceedings should respect, but rather to avoid the political opposition of Member States to a transfer of sovereignty in the criminal sphere and sidestep any legal debate on the Community's criminal competences.[27] In light of this historical background, the wording of the Regulation does not constitute a valid argument to oppose the application of the stricter procedural safeguards of Article 6 ECHR. Arguably, that reasoning was implicitly acknowledged by the EU Courts themselves: although they consider competition law as administrative, the EU Courts purport to provide parties with a protection equivalent to the guarantees provided by the ECHR. For instance, in *Mannesmannröhren*, the General Court held that:

> 'those principles [the rights of defence and the right to fair legal process, both recognised in Community law] offer, in the specific field of competition law … protection equivalent to that guaranteed by Article 6 of the [ECHR]'.[28]

Despite such a declaration of principle, it is submitted that EU Courts have not yet fully applied the Article 6 ECHR procedural safeguards. Notably they have to date failed to examine the compatibility of the overall enforcement structure of EU competition law by the Commission (and most NCAs) with the ECHR.

3.3. Second *Engel* criterion - the nature of competition law

How does European competition law fare under the second *Engel* criterion? Under this criterion, the ECtHR assesses both the domestic legislation's scope and underlying rationale to determine the genuine nature of proceedings.

First, the offence and sanctions must be imposed by general legal provisions.[29] The offence should come close to a 'general prohibition in the public interest'.[30] Conversely, the offence will not be criminal if it only applies to a limited group with a special status. In that regard, Articles 101 and 102 TFEU are clearly provisions of general nature as

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[26] ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 82.

[27] Joshua, 'Attitudes to antitrust enforcement in the EU and the United States: Dodging the traffic warden or respecting the law?', [1995] *Fordham Corporate Law Institute* 101; Kerse, *EC Antitrust Procedure*, Sweet & Maxwell, 4th edition, London, 1998, p 288 §7.02.

[28] Case T-112/98, *Mannesmanröhren v Commission*, [2001] ECR II-1125, para 77. The notion of 'equivalent' protection may have to be revisited given the wording of Article 52(3) of the CFR, which requires at least the same level of protection.

[29] ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 38.

[30] Karen Reid, *A practitioner's guide to the European Convention of Human Rights*, 2nd Edition, Sweet & Maxwell, London, 2004, p 64.

they apply to all undertakings. Furthermore, the concept of undertaking has itself been broadly interpreted to cover 'every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed',[31] which further confirms the general nature of the two provisions.

Second, the aim of the legal provisions enacting the offence and imposing the sanction is particularly relevant. The ECtHR held in *Jussila* that the mere fact that the sanction was imposed by a rule whose purpose was deterrent and punitive was sufficient to establish the criminal nature of the offence, irrespective of the severity of the sanction itself:[32]

> 'the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a *rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence.* The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but *does not remove the matter from the scope of Article 6*. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge'.

Importantly, the objective nature of the infringement 'does not necessarily deprive an offence of its criminal nature'.[33] It is thus irrelevant that European competition law has not historically dedicated much attention to ascertaining the existence of a subjective criminal intent or negligence, although this is formally required by Article 23 of Regulation 1/2003 and the 2006 Fining Guidelines. Though, interestingly, the recent Guidelines on exclusionary abuses of dominant position do seem to place a fair amount of emphasis on the importance of evidence of exclusionary intent.[34]

Crucially, deterrence and punishment are undeniably the two main aims pursued by Regulation 1/2003. The Commission tirelessly emphasises the importance of ensuring deterrence when justify its fining policy and fines in individual cases.[35] In particular, the express reference to 'general deterrence' in the 2006 Fining Guidelines confirms that the Commission seeks not only to punish and deter infringers, but also to deter

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[31] Case C-41/90, *Höfner and Elser v Macrotron*, [1991] ECR I-1979, para 21.

[32] ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 38 (emphasis added).

[33] ECtHR, Judgment of 23 July 2002, *Janosevic v Sweden*, para. 68.

[34] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings , OJ 2009, C45/7, available at http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf, for example at para 20.

[35] See Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2 (2006 Fining Guidelines), para 4; N Kroes, 'Tackling cartels – A never-ending task', Anti-cartel enforcement: criminal and administrative policy, Brasilia, 8 October 2009; N Kroes, 'Power transformers cartel busted', Opening remarks at press conference, Brussels, 7 October 2009; N Kroes, 'Paraffin wax cartel', Opening remarks at press conference, Brussels, 1 October 2008; N Kroes, 'Settlements in cartel cases', 12th annual competition conference, Fiesole, 19 September 2008.

companies in general from committing competition law infringements.[36] In that regard, EU competition law may be distinguished from a case relating to Russian competition law where the ECtHR found that sanctions were only imposed 'for obstructing the authorities' investigation, and do not serve as punishment for substantive antimonopoly violations'.[37]

A final element pointing towards classifying EU competition law as criminal is that competition law has been criminalised in some Member States. Although comparative law is far from being conclusive, the ECtHR has sometimes taken into account the criminal classification of the behaviour in other states as a further indication confirming its conclusion.[38]

On that basis, European competition law should be considered criminal in nature within the meaning of Article 6 ECHR on the basis of the legislation's scope and underlying rationale.

3.4. Third *Engel* criterion - the nature and severity of competition law sanctions

Do EU competition law penalties belong to the criminal sphere? Under the third Engel criterion, the ECtHR assesses both the nature and severity of the sanctions.

First, as regards the nature of the sanction, criminal sanctions must be intended as a punishment to deter re-offending, not as a pecuniary compensation for the damage caused.[39] As noted above, deterrence is the key concept underpinning the Commission's entire fining policy. While general deterrence was relevant for the second *Engel* criterion, the third *Engel* criterion is concerned with specific deterrence, i.e. punishment of companies having infringed competition law and deterring recidivism. Specific deterrence permeates the entire 2006 Fining Guidelines, as can be illustrated by the following most prominent references to that goal.

- Paragraph 4 of the 2006 Fining Guidelines provides that the, 'Commission must ensure that its action has the necessary deterrent effect. Accordingly, when the Commission discovers that Article 81 or 82 [now, 101 or 102] of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence)'.
- Paragraph 25 provides for adding a so-called 'entry fee' to the basic amount, 'in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements'.
- Paragraphs 30-31 provide for 'a specific increase for deterrence'.

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[36] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2 (2006 Fining Guidelines), para 4.

[37] ECtHR, Decision of 3 June 2004, *OOO Neste St. Petersburg a.o. v Russi*a, p 10.

[38] ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 53.

[39] ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 38 ; ECtHR, Judgment of 24 February 1994, *Bendenoun v France*, para 47.

The non-compensatory nature of the fines imposed by the Commission has been now emphasised by the Commission's active promotion of follow-on damages actions.[40] If any doubt remained, the existence of two distinct legal procedures demonstrates the distinct aims pursued by each of them: the imposition of competition fines aims at punishing past offences and deterring against (re-)offending in future whereas civil damages actions aim at compensating for the damage suffered by victims of the competition law infringement.

Second, as regards the severity of the sanction, the ECtHR looks at both the actual penalty imposed and, above all, the maximum penalty provided for by the relevant legislation.[41] Deprivation of liberty is obviously the archetype of criminal penalty. However, the imposition or the possibility of jail sentence is not necessary for proceedings to be deemed criminal on the basis of the third *Engel* criterion. Fines may be sufficient – the decisive element being not necessarily their amount but their purpose.

As described above, it is clear that the underlying rationale of the fines imposed by the Commission for competition law infringements meets the third Engel criterion. In addition, the very high level of the fines must be taken into account. Both individual fines and the annual total amount of fines have sharply increased in recent years. In 2004, the total of fines imposed in cartel cases amounted to €390 million. In 2008, the total was above €2.2 billion, i.e. an 800% increase for similar infringements. In 2008, the Commission also imposed a record €896 million fine on Saint-Gobain for price-fixing.[42] In 2009, the Commission set a new record and fined Intel €1.06 billion for abuse of a dominant position.[43] No other type of corporate wrongdoings can lead to the application of such high fines, even where the damage caused (e.g. to the environment) is enormous.[44]

It is submitted that fines of hundreds of million Euro reach the level of 'criminal severity'. More importantly, irrespective of the absolute amount of the fines, the imposition or the risk of imposition of a fine of up to 10% of the worldwide turnover of the entire group also reaches the level of criminal severity. Depending on the company's margin, such a fine can represent part, whole or more than the entire annual profit of the infringing company. When combined with the underlying aims of deterrence and punishment, and the accompanying stigma, it becomes difficult to contest that competition law fines imposed by the Commission are not criminal within

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[40] The Commission now systematically include a reference to the possibility of lodging private damages actions at the end of its press releases of cartel decisions. See for instance press release IP/09/1432 (Power transformers), IP/09/1389 (re-adoption of decision in the concrete reinforcing bar cartel), IP/09/1169 (calcium carbide cartel). The Commission's White Paper can also be found at http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html. A directive is under preparation.

[41] ECtHR, Judgment of 9 October 2003(Grand Chamber), *Ezeh and Connors v United Kingdom*, para 120.

[42] Commission decision of 12 November 2008 in case COMP/39.125 – Car glass, OJ 2009, C173/13.

[43] Commission decision of 13 May 2009 in case COMP/37.990 – Intel, OJ 2009, C227/13.

[44] By way of contrast, Total was fined €375,000 for the oil pollution from the Erika.

the meaning of Article 6 ECHR. This analysis was recently confirmed by the ECtHR in *Dubus*:[45]

> '37. The Court notes that the applicant incurred a reprimand, a penalty of administrative nature in domestic law. However, the reading of Article L. 613-21 of the CMF (see paragraph 24 above) shows that the applicant company could have been struck off or been imposed a financial penalty 'no higher than the mandatory minimum capital of the legal entity'. *Such penalties have important financial consequences and, thus, can be characterised as criminal penalties* (mutatis mutandis, *Guisset c. France*, no 33933/96, § 59, CEDH 2000 IX). Indeed, the Court repeats that the criminal characterisation of proceedings is function of the level of gravity of the legal maximum penalty that the person faces (*Engel*, op. cit. para. 82) and not function of the gravity of the penalty eventually imposed. The Court also considers, like the applicant, that the issued reprimand imposed was capable of damaging the company's reputation, with undeniable monetary consequences.'

Lastly, it is important to point out that the fact that the fine cannot be converted into a jail sentence in case of non-payment has not been held decisive by the ECtHR.[46]

On that basis, European competition law should be considered criminal in nature or, at the very least, its underlying aims constitute a strong factor pointing towards a characterisation as criminal proceedings within the meaning of Article 6 ECHR.

3.5. Conclusion on the criminal nature of European competition law

The record high fines recently imposed by the Commission have reignited the debate about the nature of EU competition law. The main elements demonstrating the criminal character of EU competition law have been present since its inception:

- EU competition law fines seek (and have always sought) to punish and deter offenders, as well as deterring others to offend; and
- the legal maximum fine is (and has always been) 10% of the annual worldwide turnover of the group, which represents an extremely significant amount of money for any undertaking.

It must therefore be concluded that European competition law is 'criminal' within the meaning of Article 6 ECHR, despite the wording of Article 23(5) of Regulation 1/2003. Judge Vesterdorf, acting as Advocate General in *Rhône Poulenc*, reached the same conclusion:

> 'In view of the fact - in my view confirmed to some extent by the judgment of the Court of Human Rights in the *Öztürk* case - that the fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), *have a criminal law character*, it is vitally important that the Court should seek to bring about a state of legal affairs not

[45] ECtHR, Judgment of 11 July 2009, *Dubus v France*, para 37 (free translation from the French).

[46] ECtHR, Judgment of 23 July 2002, *Janosevic v Sweden*, para 69.

> susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights'.[47]

Advocate General Léger also concurred in *Baustahlgewebe* where it concluded that the case at stake involved a 'criminal charge' within the meaning of Article 6 ECHR.[48]

Arguing that EU competition law proceedings should not be deemed criminal because decisions are taken by an administrative body and not any court would turn the problem upside down. The question is not whether the requirements of Article 6 ECHR apply to the Commission given that it is an administrative body, but rather whether the fact that competition decisions are adopted by an administrative body is compliant with Article 6 ECHR given that EU competition law proceedings are criminal in nature.

Finally, we wonder whether the characterisation of EU competition proceedings as 'hard core criminal' or even 'criminal' in nature matters any more under EU law in light of Article 47 CFR. The Explanation of the CFR states that some CFR articles have a wider scope than their ECHR equivalent and adds that, 'Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation'.[49] Therefore, it is submitted that the *full* protection of Article 6 ECHR applies to EU competition law proceedings even if, *quod non*, they were merely considered administrative in nature.

4. THE CURRENT ENFORCEMENT SYSTEM DOES NOT COMPLY WITH ECHR STANDARDS

4.1. The shortcomings of the current system

Since EU competition law proceedings should be classified as criminal in nature, they should comply with the standard of Article 6 ECHR and, in particular, with the right to a fair and public hearing before an independent and impartial tribunal at first instance. As the ECtHR held in *Jussila*:

> 'An oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, § 79) and where an applicant has an entitlement to have his case 'heard', with the opportunity inter alia to give

[47] Joined opinion of Judge Vesterdorf acting as Advocate General in Cases T-1-4 & 6-15/89 *Rhöne Poulenc a.o. v Commission*, [1991] ECR II-867, at p 885 (emphasis added).

[48] Opinion of Advocate General Léger in case C-185/95 P, *Baustahlgewebe v Commission*, [1998] ECR I-8417, para 31.

[49] Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, explanation on Article 52.

> evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.'[50]

Since the entry into force of the Lisbon Treaty, these very requirements form an integral part of EU primary law. Pursuant to Article 6(2) TEU, the Charter of Fundamental Rights has 'the same legal value as the Treaties'.[51] Moreover, Article 52(3) CFR provides that:

> '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.'

As this is made clear in the Explanations relating to the Charter of Fundamental Rights, 'the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights'.[52]

It follows that Article 47 CFR, which mirrors the text of Article 6 ECHR, implements in EU law the protection afforded by Article 6 ECHR, as interpreted by the ECtHR, in its entirety and on an ongoing basis. Any future expansion of the ECHR protection decided by the ECtHR will also have to be reflected in EU law. Indeed, 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[53] Conversely, stricter standards may be developed autonomously pursuant to the Charter of Fundamental Rights. The ECHR constitutes a floor, not a ceiling.

However, European competition law does not comply with these requirements of Article 6. Pursuant to Regulation 1/2003, EU competition law charges are determined by the Commission at first instance, not by any independent and impartial tribunal as required by Article 6 ECHR. Instead of a judicial authority independent from the executive branch of the government, decisions are actually taken by the executive branch itself. The ultimate decision power is not even entrusted to a specialised administrative department within the Commission but rather to the College of Commissioners, a body composed of politicians without any particular (indeed, often without any) competition law or judicial expertise. Out of the 27 Commissioners, 26 will most likely have no detailed first-hand knowledge of the relevant evidence at all and will never read any of the documents contained in the case file. The Commissioner for Competition is likely to have a more in-depth knowledge of the case (though the level of knowledge may vary considerably between different cases) but does not attend the 'hearing' organised before the adoption of the infringement decision. In that regard,

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[50] ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 40.

[51] Article 6(1) TEU.

[52] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C303/17, explanation on Article 52.

[53] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C303/17, explanation on Article 52.

the parties' appearance before the Hearing Officer can hardly qualify as the 'public hearing' required by Article 6 ECHR: it is not open to the public and, more fundamentally, it is held in the absence of the final adjudicator. The Hearing Officer has, at best, the power to make some private, non-binding comments to the Commissioner for Competition.[54] While the role of the Hearing Officer may constitute a welcome check and balance in the system, it cannot be equated to the presence of a judge. It is thus difficult to see how such a procedure could give the parties the opportunity to present their defence in a way that is consistent with the ECHR.

Moreover, the Commission cumulates the roles of investigator, prosecutor and judge. The confusion of the three roles within the same body can give rise to 'prosecutorial bias',[55] especially since the same team is entrusted with a case from the very first investigations to the drafting of the final infringement decision. The literature (see, e.g., the articles cited above) tells us that three types of bias come into play.

- As Commission officials act both as investigators and prosecutors, it is only human nature that they will tend to favour evidence and interpretations of evidence that support their own thesis – often pointing towards the guilty status of the investigated companies (confirmation bias).
- Equally, there is likely to be a tendency to pursue the proceedings up until the adoption of an infringement decision so as to justify retroactively the launch and continuation of the investigations (hindsight bias).
- Finally, they will tend to impose fines so as to demonstrate effective enforcement of competition law rules (policy bias).

The risk of prosecutorial bias does not come from the quality of the Commission staff – and let us be clear that we are not suggesting there is any wrongdoing or ill-intention on the part of DG COMP staff – but is a structural phenomenon directly resulting from the Commission's flawed structure. In other words, that risk will subsist as long as the current enforcement structure remains unchanged. Some recent Commission's initiatives,[56] notably to increase peer review, constitute a welcome first step in the right direction. However, more fundamental changes will be necessary to eradicate the risk of prosecutorial bias and meet Article 6 ECHR standards given that it is inadequate for an executive body such as the Commission to adjudicate on criminal offences and impose criminal fines, particularly in the light of their size in recent times.

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[54] Commission Decision No 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ 2001, L162/21 (Hearing Officer Mandate), Article 13(2).

[55] GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 7 ; 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 ?', GCLC Working Paper 04/08, available at http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf; W Wils, 'The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis', (2004) 27 *World Competition* 201.

[56] See, for example, GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 8.

4.2. There is no room for an EU competition law exception

It has sometimes been argued that Article 6 ECHR's requirements that the determination of criminal charges be made by an independent tribunal at first instance and that a public hearing be organised do not apply in the case of EU competition law on the ground that competition law does not constitute 'hard core criminal law'.[57]

It is true that the ECtHR has recognised that there can be criminal charges of differing weight, with the consequence that it has sometimes accepted that criminal penalties can be imposed in the first instance by a non-judicial body.[58] However, this constitutes an exception to a general principle. And in previous cases, the ECtHR has limited the scope of the exception to minor offences[59] and conditioned it on the existence of a full review on appeal by a court that entirely complies with all Article 6 ECHR requirements.[60] These two conditions for the exception to apply to European competition law are not satisfied.

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[57] See, for example, Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights', (2010) 33(1) World Competition 5.

[58] ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 43: 'While it may be noted that the above-mentioned cases in which an oral hearing was not considered necessary concerned proceedings falling under the civil head of Article 6 § 1 and that the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. 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 the criminal head to cases not strictly belonging to the traditional categories of the criminal law*, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the *criminal-head guarantees will not necessarily apply with their full stringency* (see *Bendenoun and Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for *criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body*: a contrario, *Findlay v. the United Kingdom*, cited above)' (emphasis added).

[59] ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 56: 'Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.

[60] ECtHR, Judgment of 23 June 1981, *Le Compte a.o. v Belgium*, para 51: 'In fact, their case was dealt with by three bodies – the Provincial Council, the Appeals Council and the Court of Cassation. The question therefore arises whether those bodies met the requirements of Article 6 par. 1. … 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 and, a fortiori, of judicial 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 'right to a court' (see the above-mentioned *Golder* judgment, p. 18, par. 36) and the right to a judicial determination of the dispute (see the above-mentioned *König* judgment, p. 34, par. 98 in fine) cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the

First, infringements leading to the imposition of fines of hundreds of million Euros cannot easily be qualified as 'minor' offences. In addition to the size of the financial penalties, there is also the stigma that attaches to competition law infringements. Commission's decisions and inspections are extensively covered in both specialised and popular media. The condemnation or even the mere launch of an EU competition law investigation produces negative consequences for the undertakings at stake. Not just in terms of corporate image and damage to brands but also because the company is generally obliged to inform investors and make accounting provisions. These negatively impact the share price, can impact the company's rating and can make it more difficult to access the financial markets. It is thus submitted that competition law infringements are not 'minor offences' on the basis of the severity of the sanction and the accompanying stigma/impact.

Second, even if one were to admit that competition law constitutes a 'minor offence', under the second part of the exception set forth above, since the Commission does not constitute an independent and impartial tribunal within the meaning of Article 6 ECHR, its decisions would have to be 'subject to subsequent control by a *judicial body that has full jurisdiction* and does provide the guarantees of Article 6 para 1'.[61] However, (at least based on the current practice, i.e. that which pre-dates the entry into force of the Lisbon Treaty and the entry into effect of Article 52 of the CFR) it does not seem that the possibility to lodge an action for annulment before the EU Courts would meet the ECHR requirements in this respect.

In order for a court to have 'full jurisdiction' within the meaning of the ECHR, the ECtHR held that the judicial body must have 'the power to quash in all respects, on questions of fact and law, the decision of the body below'.[62] Later, in *Kyprianou*, the ECtHR ruled on whether the review by the Cypriot Supreme Court of a condemnation for criminal contempt could cure the flaws that affected the trial before the lower court. Noting the absence of retrial of the case because the Supreme Court was lacking the competence to deal *de novo* with the case, the ECtHR concluded that the defects were not cured on appeal. The ECtHR held:

> '43. The Court notes that the decision of the Assize Court was subsequently reviewed by the Supreme Court. According to the Court's case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, § 33).
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> 44. However, in the present case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant's

fault (see paragraph 33 above). It follows that Article 6 par. 1 (art. 6-1) was not satisfied unless its requirements were met by the Appeals Council itself.'

61 ECtHR, Judgment of 10 February 1983, *Albert and Le Compte v Belgium*, para 29 (emphasis added).

62 ECtHR, Judgment of 23 October 1995, *Schmautzer v Austria*, para 36.

> complaints which are now before this Court. *There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an ab initio, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant.* Indeed, although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so.
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> 45. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the delivery of the judgment by the Assize Court, i.e. on 14 February 2001. The applicant filed his appeal the next day, on 15 February 2001, whilst he was serving the five-day sentence of imprisonment. The decision on appeal was delivered on 2 April 2001, long after the sentence had been served.
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> 46. In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was cured on appeal by the Supreme Court.'[63]

In a subsequent judgment, the Grand Chamber upheld the judgment of the Chamber. Although the Grand Chamber primarily focused on the Supreme Court's decision not to quash the lower Court's judgment, it did not overrule the conclusions or the reasoning reproduced above.[64]

The review of Commission decisions by the EU Courts has not (until now[65]) met the *Kyprianou* standard. As provided by Article 263 TFEU, the EU Courts' competence is limited to voiding decisions that are illegal, without the possibility to substitute their own decision to that of the Commission. If a decision is annulled, it is then for the Commission to take the necessary measure to implement the General Court judgment.[66]

Furthermore, the competence of EU Courts is limited to review the Commission's legal and manifest errors (review of legality, not *de novo* review). They do not carry out a new and independent determination of the competition law charges contained in the SO. EU Courts also have tended to exercise self-restraint when it comes to 'complex factual

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63 ECtHR, Judgment of 27 January 2004, *Kyprianou v Cyprus*, paras 43-46 (emphasis added).

64 ECtHR, Judgment of 15 December 2005 (Grand Chamber), *Kyprianou v Cyprus*, para 134.

65 We are not yet aware of any case where the EU Courts have expressly applied a higher standard of review pursuant to the CFR.

66 Article 233 EC.

or economic assessments'.[67] Faced with such appraisals of fact, EU Courts have tended to give a significant margin of discretion to the Commission, limiting their control to manifest errors of appreciation. One reason for this previous self-restraint may be the limitations in the General Court's own procedures, which do not make it easy for the General Court to adjudicate complex factual or economic matters where two experts can disagree about the assessment. The EU Courts have not substituted their own assessment of matters of appreciation to that of the Commission.[68]

Even with regard to fines, EU Courts have to date only exercised their power of full jurisdiction to correct fines if they have found an illegality. Moreover, they have only exercised that power of full jurisdiction in a very small number of cases. Generally the Courts' review has been limited to checking whether the Commission has made a manifest error in applying its fining guidelines.[69] The Courts have been reluctant to make use of their power in the absence of any illegality, although they would legally be entitled to do so. Indeed, the ECJ has previously rejected a plea of disproportionality in the absence of any illegality in the General Court decision.[70] Lastly, appeals before the General Court have no suspensive effects.[71] The fine must be paid or a bank guarantee produced – it has only been in very rare circumstances that the EU Courts have been willing to adopt interim measures forego the obligation to pay or provide a guarantee[72] – though this may have to change based on the CFR given the ECtHR's judgment in *Västberga Taxi Aktiebolag & Vulic v. Sweden.*[73] The cost of a bank guarantee for sums over €100 million can in and of itself be sufficiently high as to be penal in nature – not

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[67] Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras 168-169; case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 87-89.

[68] Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 87-89; case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras 168-169.

[69] See, Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?', GCP, June 2009, available at: http://www.globalcompetitionpolicy.org/index.php?&id=2115&action=600

[70] Case C-320/95 P, *Società Finanziaria Siderurgica Finsider v Commission*, [1994] ECR I-5697, paras 45-46; Case C-310/93 P, *BPB Industries and British Gypsum v Commission*, [1995] ECR I-865, para 34.

[71] Article 242 EC.

[72] See for instance Order in Case T-252/03 R, *Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) v Commission*, [2004] ECR II-31, paras 30-31.

[73] ECtHR, Judgment of 23 July 2002, *Västberga Taxi Aktiebolag & Vulic v. Sweden*, where the ECtHR held at para. 120 that: 'in cases where considerable amounts have been the subject of enforcement, reimbursement may not fully compensate the individual taxpayer for his or her losses. A system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is therefore open to criticism and should be subjected to strict scrutiny'. The Court of First Instance held (prior to the entry into force of the Lisbon Treaty) in T-384/06R, *IBP a.o. v Commission*, [2007] ECR II-30 that there was no fundamental rights problem in enforcing the sanction prior to the appeal being heard given that the availability of bank guarantee and the possibility of interim measures. However, the Commission has recently adopted a more restrictive policy and no longer allows all companies which have filed an appeal to the General Court to provide a bank guarantee instead of paying provisionally the fine – and interim measures are only available in 'exceptional circumstances'. These changes, combined with the new legal force of the CFR, most notably Article 52(3), may mean that this precedent may not in the future be decided in the same way.

least given that the costs of the bank guarantee cannot necessarily be recovered if the appeal is successful.[74]

To conclude, it is submitted that the defects that affect the proceedings before the Commission are not be cured (in ECHR terms) by the possibility to appeal the decisions before the General Court. The judicial review of Commission decisions by EU Courts has not historically been broad enough to qualify under the ECtHR as being of 'full jurisdiction'. We use the word 'historically' here because it is submitted that now the CFR is in force the EU Courts should adopt a more rigorous level of review than they have in the past in order to respect the principles set out in the ECtHR caselaw. This would be a welcome step forward in due process terms, but it would not in itself resolve the ECHR problem given that competition law infringements are not 'minor offences'.

5. PUTTING THE ENFORCEMENT SYSTEM BACK IN COMPLIANCE WITH THE ECHR AND THE CFR

After having concluded that the current enforcement system is not compliant with the ECHR or the CFR, the next issue becomes how best to remedy the problem.[75] Below four options are explored, namely: (i) creating an independent competition agency, (ii) granting full jurisdiction to EU Courts, (iii) entrusting the EU Courts with the task of adopting infringement decisions at first instance, and (iv) creating an independent judicial panel within or under the auspices of the Commission. In light of the difficulties recently experienced in having proposed Treaty changes ratified, the discussion of each option will also include some thoughts on whether these solutions could be implemented within the existing constitutional framework.

5.1. The creation of an independent competition agency

Before discussing the possible modalities to implement an independent competition authority or European Cartel Office (ECO), as a previous incarnation of such an idea was labelled, it must be stressed that this solution would only partially solve existing ECHR compliance problems. As argued in previous sections of this article, competition law charges are serious criminal offences and thus require the involvement of a tribunal at first instance. The creation of an independent ECO would remove the threat of political colouring of the final decisions (including the penalties) and provide additional procedural guarantees. However, the administrative nature of such an ECO would continue to be problematic under the ECHR.

The creation of an independent ECO could be implemented in several different ways.[76] Basically, the two main questions are (i) whether the ECO would still be part of the

[74] Case T-113/04, *Atlantic Container Line a.o. v Commission*, [2007] ECR II-171.

[75] See also the analysis carried out by the GCLC: GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system.

[76] For a full analysis, see GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system.

Commission or be a newly created independent authority and (ii) whether the ECO will be entrusted with investigative powers, adjudicative powers or both.

Delegating the Commission's current powers of investigation to a specialised department thereof does not raise any difficult constitutional question and could be built on the model of the European Anti-Fraud Office (OLAF). The College of Commissioners could retain its decisional power while the ECO could be delegated the power to conduct the investigations and, maybe, to issue the SO. Much like the OLAF, some guarantees of independence can be added such as the impossibility to remove its director before the end of his term except for some enumerated exceptional circumstances. Although this solution is the easier to implement, it is also probably the less useful as it does not deal with one of the current criticisms, namely the political nature of the final decision maker.

Delegating the College of Commissioners' power of decision to an independent internal department of the Commission would raise serious constitutional questions. In particular, the ECJ has already refused to accept that the Commission delegates to one of its members the power to adopt a decision finding a competition law infringement.[77] The ECJ has held that only 'clearly defined executive powers' may be delegated by an institution – not discretionary powers.[78]

Allocating the power to find infringements to a newly created independent ECO would improve the procedural guarantees of the defendants. However, this solution is also difficult to implement within the current constitutional framework. Clearly, in the absence of any Treaty change, it would be impossible to create a new autonomous institution on the model of the European Central Bank. As noted in the previous paragraph, the ECJ opposes a delegation of discretionary powers. Furthermore, the ECJ held that the principle of institutional balance, read in conjunction with the principle of attribution of powers laid down in Article 7(1) EC (now, Article 7 TFEU), means that an institution may not unconditionally assign its powers to other institutions or bodies.[79]

In other words, if we consider that the power to enforce Articles 101 and 102 TFEU has been granted to the Commission by Article 105 of the Treaty, it would be difficult to re-allocate it to any other entity. However, some have argued that Article 105 TFEU no longer applies following the implementation of Article 103 TFEU by the Council.[80] If this thesis were followed,[81] it would then become possible for the Council to adopt

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[77] Case C-137/92 P, *Commission* v *BASF and Others*, [1994] ECR I-2555, para 71.

[78] Case C-301/02 P, *Tralli v European Central Bank*, [2005] ECR I-4071, para 43.

[79] Case 9/1956, *Meroni v High Authority*, [1958] ECR 11 (English Special Edition, p 133, at p 152).

[80] GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 32

[81] And the accompanying argument being accepted that the Treaty does not itself allocate enforcement powers to a specific institution, such that the re-allocation of these powers by secondary legislation would not risk violating the respect of the institutional balance.

with the Parliament a new Regulation redefining the powers of the Commission for the enforcement of competition law and allocating most of them to a newly created independent body.

The creation of an independent European Cartel Office thus may raise constitutional difficulties within the current Treaty framework. In any event, this solution would not fully comply with ECHR because a criminal punishment would not be imposed by a court at first instance. It does not seem the best solution in the short or long term.

5.2. Granting full jurisdiction to the EU Courts

Broadening the EU Courts' review power would enhance the protection of defendants. However, if (as we argue above) competition law infringements are not considered minor criminal offences, one could still argue that it would not be sufficient to comply fully with the guarantees provided by the ECHR. Nevertheless, it could contribute to curing the defects of proceedings before the Commission.

Pursuant to Article 263 TFEU, EU Courts normally have only a competence of annulment. According to Article 266 TFEU, it is for the Commission to take the necessary measures to comply with the judgment of the General Court and Court of Justice. The EU Courts do not have the power to substitute their own decision to that of the Commission, except with regard to penalties where expressly granted unlimited jurisdiction by secondary legislation (Article 262 TFEU).

Despite the somewhat expansive language of Article 31 of Regulation 1/2003 which provides that 'the Court of Justice shall have unlimited jurisdiction to review *decisions* whereby the Commission has fixed a fine or periodic penalty payment' (emphasis added), the ECJ is unlikely to accept to exercise unlimited jurisdiction over the entire decision beyond the penalty. With regard to the Office of Harmonisation for the Internal Market (OHIM), where secondary legislation was even more expansive, the Court of Justice held that 'the review of that decision by the Community Courts is confined to a review of the legality of that decision, and is thus not intended to re-examine the facts which were assessed within OHIM'[82] despite the language of Article 63(3) of Regulation 40/94 which provided that, 'The Court of Justice has jurisdiction to annul or to alter the contested decision'.

It has been argued that, with regard to competition law, the Treaty itself provides for a basis to expand the EU Courts' power of review.[83] Indeed, Article 103 TFEU entrusts the Council with the task of adopting secondary legislation notably, 'to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments' and 'to define the respective functions of the Commission and of the Court of Justice of the European Union in

[82] Case C-214/05 P, *Rossi v OHIM*, [2006] ECR I-7057, para 50; see Case T-247/01, *eCopy v OHIM*, [2002] ECR II-5301, para 46.

[83] GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system

applying the provisions laid down in this paragraph'. Thus, some argue that the expanded powers of the Courts could be achieved based on secondary legislation based on the current Treaty – albeit that the Courts did not seem attracted to this line of argument in the *OHIM* case cited above.

A more promising line of argument is that the CFR, which has the same status as Treaty Articles such as Article 263 TFEU, already obliges the EU Courts to adopt a wider level of judicial review in competition cases which are criminal in nature.[84] This is because the EU Courts are now by virtue of the CFR obliged to offer the same standard of protection for criminal cases as is prescribed by Article 6(1) ECHR. This follows from the fact that Article 47 CFR is identical in content to Article 6(1) ECHR and from the statement in Article 52(3) CFR that the EU will offer identical protection under the CFR to that established by the ECHR (if not a higher level of protection). Given the ECtHR case law cited above, and the fact that the EU Courts are bound to respect the CFR like other Treaty articles, we would argue that the EU Courts are already obliged to offer a full judicial review in criminal competition cases.

Thus, even if the EU Courts are not expressly granted the power to remake decisions by secondary legislation, they should expand their control of the Commission in criminal competition cases. Instead of deferring to the Commission for any factual or economic assessment viewed as complex, they should more fully exercise their competence of annulment (which could take the level of review significantly closer to a full review as understood by the ECHR). Indeed, EU Courts are fully entitled to question the Commission's reasoning in detail. Community general principles of law and the CFR are broad enough to give the EU Courts the necessary tools to review critically all aspects of the Commission's decisions.

More effective and broader judicial review would clearly be of great benefit, not just to the accused parties but also potentially to the Commission given that the validity of the latter's position would doubtless be confirmed in many cases. To the extent it can be achieved without a Treaty change, it should be pursued. But given the absence of an independent tribunal at first instance where criminal penalties are being imposed, this second alternative is not the complete solution to the ECHR issues identified above.

5.3. Giving the power to take decisions to EU Courts

Entrusting the power to adopt infringement decisions and impose fines to EU Courts instead of the Commission would constitute a fundamental change. From an ECHR point of view, this solution would provide the highest procedural guarantees to defendants as determinations of guilt would be made by a judicial body at first instance. The Commission would retain the power to investigate and would probably act as a public prosecutor before the Courts, issuing a statement of objections and demanding the imposition of a penalty at the Hearing. Conversely, the Commission would be

[84] If one accepts this argument, the corollary may be that a lower level of judicial review may be appropriate in non-criminal antitrust cases.

stripped of its decisional power. The advantage of the system is that it solves most of the problems at a stroke. Prosecutorial bias is less of an issue since the Commission's role would be limited to prosecuting infringements. There is no confusion between the prosecution and decision phases. The political nature of the College of Commissioners is also less disturbing: after all, public prosecutors are in most jurisdictions somewhat related to the executive branch of the government and the Minister for Justice. It could also enable the Commission to be even more rigorous in pursuit of cases.

The problem is how to reach such a solution. Some have argued that the Treaty itself provides a legal basis to implement such a structure without any need of Treaty amendment.[85] As previously noted, Article 103 TFEU empowers the Council to legislate in order 'to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph'. On that basis, the Council would be entitled to strip the Commission of its decisional power and allocate them to the Courts. In addition, Article 257 TFEU empowers the Council and the Parliament to create judicial panels. The argument thus goes that it would be possible to create a competition law-specific judicial panel which would deal with all competition cases. However, this argument is not universally accepted so Treaty changes may well be needed for this radical solution.

Moreover, there would have to be significant changes in how the EU courts function. In particular, they would have to have a greater budget and increased staff – they would need to have sufficient resources to decide complex and fact-heavy cases. That is not something that could be implemented in the short- or medium-term.

Although this option may require Treaty changes, and a significant shift in how the EU courts function, it is the only one that enables full compliance with Article 6 ECHR. So this should be a long term goal, in that it leads to a system that clearly meets Article 6 ECHR, albeit that it is unlikely that such a system would emerge in the short or even medium term.

5.4. Creating an independent adjudicator within the Commission or under its auspices

The final possibility would be to create an independent panel of adjudicators within the Commission or under its auspices. This could be a system of administrative judges or a much strengthened version of the existing Hearing Officer. In such a system, DG COMP would remain in charge of investigating competition cases. However, the current Oral Hearing before the Hearing Officer would become a genuine administrative trial before an independent adjudicator who would write up his or her findings in a ruling that would be of similar length and detail as a Commission decision today. Thus, DG COMP would act as prosecutor and would present its case, whereas the parties would have the right to defend themselves. It would be for the adjudicator

[85] GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system,

to deliver a ruling on procedural issues and on the merits of the case. However, to avoid the constitutional issues set out above, this ruling would then be formally approved or rejected by the College of Commissioners.

In this way, the Commission would formally remain the final decision-maker while in practice the decision would in effect be taken by the independent adjudicator. There is a precedent for such a system from the field of medicines. When adopting a decision as whether or not to authorise the placing on the market of a medicinal product – including whether to ban a product currently on the market for safety grounds - the Commission places great reliance on the opinion given by the European Medicines Agency (EMEA) as to whether the conditions for granting a marketing authorisation are satisfied.[86] Before giving its opinion, the EMEA conducts an in-depth scientific assessment of the data provided by an applicant,[87] including laboratory and animal studies which assess the chemical, biological and toxicological properties of the compound against the targeted disease and clinical trial data resulting from three phases of clinical trials, i.e. experiments conducted on human beings under very strict ethical and technical rules.[88] As a result, and while the Commission formally retains the power to adopt a final decision which is not in accordance with the opinion of the EMEA,[89] in practice, the Commission will nearly always rubber-stamp the scientific assessment conducted by the EMEA.

There are two advantages of this sort of system. On the one hand, the introduction of a genuinely independent adjudicator at the end of the investigative phase constitutes a clear improvement of the current system. It should remove the inherent prosecutorial bias that currently characterises the procedure before the Commission. The guarantee of having an independent administrative judge delivering the decision would thus enhance the defendants' rights of defence.

On the other hand, by limiting the role of the adjudicator such that he or she does not formally adopt the final decision, no major constitutional reshuffle is needed. Formally, there would be no real delegation of powers as the decision would continue to be approved by the College of Commissioners. This advantage is considerable in light of the difficulties seen in ratifying the Lisbon Treaty.

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[86] See Article 12(1) of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004, L136/1).

[87] Article 6(1) of Regulation 726/2004.

[88] Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, OJ 2001, L121/33; Directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products, OJ 2005, L91/13.

[89] Article 10(1) of Regulation 726/2004 provides that 'where the draft decision is not in accordance with the opinion of the Agency, the Commission shall annex a detailed explanation of the reasons for the differences'.

It is true that under this system final decisions would continue to be adopted by a body composed of politicians who have no knowledge of the details of the case. But the EMEA shows that such a system does work – there is no sense that the Commission seeks to second guess the EMEA when it comes to scientific assessment. The practice that the EMEA's findings are followed is a strong one – and an equally strong practice would we think quickly develop in relation to competition matters. And if the Commission did ever decide to overrule its specialist competition judge, then one would expect such a decision to be very carefully justified.

It is submitted that the EU should strongly consider this fourth approach, which seems to deliver many advantages in due process terms while being relatively easy to implement. Unfortunately, the Commission does not currently seem to be keen on such an approach. The Hearing Officers' Guidance Paper is limited to codifying the current practices and does not suggest improvements to the *status quo*. If the Commission does not wish to use a Best Practices document to initiate such a policy change, then it should publish a Green or White Paper on the subject that would identify several options and follow up by consulting interested stakeholders.

6. CONCLUSION

The Irish referendum and the consequent entry into force of the Lisbon Treaty will prove to be significant events for competition law practitioners. The impact of the CFR, which has the same status as other Treaty articles, is still to be felt – but it seems to make the case-law of the ECtHR on Article 6 ECHR part of EU law since 1 December 2009. In addition, Article 6(2) EU as amended by the Lisbon Treaty provides that the European Union will accede to the ECHR.

Any future Commission cartel decisions will be reviewed against the standards of Article 6 ECHR by the EU Courts (pursuant to Articles 47 and 52(3) of the CFR)[90] and also (post accession to the ECHR) by the ECtHR. The ECtHR is thus becoming the final adjudicator over human rights protection in EU law, with its case-law being binding upon the EU Courts. The ECtHR is likely to be more willing to review the compatibility of the entire enforcement structure. It is submitted that the ECtHR will hold that European competition is indeed of criminal nature and will draw the necessary conclusions. There is accordingly a real chance that future cartel decisions may be set aside for non-compatibility with the ECHR, unless the Commission itself actively anticipates that outcome and embraces change. This article argues that it is time for the Commission to do so – and to come out in favour of reform.

[90] Although the content of the ECHR was already deemed to be part of EU law prior to the entry into force of the Lisbon Treaty as fundamental principles of EU law, the European Courts developed their own interpretation of the ECHR and the ECtHR's body of case-law. The European Courts considered Strasbourg's jurisprudence as persuasive but not binding authority. It is submitted that this situation is changed by the entry into force of the CFR. But any inconsistency would certainly be resolved once the EU accedes to the ECHR and parties can bring cases challenging EU procedures in Strasbourg.

In the long term, the best solution would be the third alternative - if the EU had independent courts imposing competition decisions. But there are a number of hurdles before this solution could become a reality.

A more pragmatic short and medium term solution would be a combination of the second and the fourth alternative: the Commission should create an independent judicial panel within the Commission or under its auspices and the EU Courts should apply a higher standard of judicial review (whether based on the CFR or on secondary legislation). The independent adjudicator would issue public findings which would then be adopted by the Commission as its decision like the EMEA in medical matters. This would give good levels of procedural guarantees and would be quicker to implement. This is favoured by the present authors as an immediate solution until the ideal long-term solution of an independent court can be put into place. In addition, the General Court can and should engage in broader judicial review than it does today.

These changes would ensure that Europe is in future be an example to the rest of the world in terms of due process – not something that we would be hesitant to advise other countries to copy.