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Procedural Aspects of EC Competition Law

- A comparison with ECHR and the US
Antitrust system

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Preface

Finally this long journey has come to an end. With the finishing of this thesis, my time at the university is completed. I do it with a feeling of anticipation for the future and hope for the adventures to come, but of course it is not without a feeling of melancholy as well. It has been some great years with laughter, knowledge and friendship. When there have been clouds on the ever-blue sky I have had my friends and family to thank, for making the work worth while. I hereby want to make a special thank you to my parents who always believed in me and whom I hope to fill with pride and joy in the future as well. Also a thought to my brothers and sister, I sincerely hope that I have encouraged you to continue with your studies even though you have many years to come before you can choose to. I would also wish to send a gratitude to my dear grandparents, whom I try to acquire knowledge from, in order to get the larger perspectives of life. As already mentioned, thank you to all of my friends, this time none mentioned, none forgotten. Last but not least, my ever shining ray of sun, Michelle. Thank you for being there when support was needed and for making every day a never ending adventure.

Lund the 21st of May, 2004.

With joy,

Tobias Linder

Per aspera ad astra – nulla fimbriae subsumesse

Abbreviations

AD	Antitrust Division
ALJ	Administrative Law Judge
CFR	Charter of Fundamental Rights of the European Union
DOJ	Department of Justice
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECohR	European Commission of Human Rights
ECJ	European Court of Justice
ECT	Treaty establishing the European Community
EU	European Union
FTC	Federal Trade Commission
MS	Member State
TEU	Treaty on the European Union
US	United States

1 Introduction

“I answer, Each Transgression may be *punished* to that *degree*, and with so much *Severity* as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie (!) others from doing the like.”

John Locke, Two treatises of government

The quote derives from the 18th century and, as is visible, there were already then discussions about the appropriate character and graveness of a punishment. Today there also exists a wide discourse about deterrents and their character. How should one decide which is the appropriate punishment for a violation of a provision? In every legal system there are rules and practices answering this question, even in the area of Community law.

This thesis ventures into the area of punishment for infringements of Community Competition law. Throughout the years, both in the Commission and in the European Court of Justice (ECJ), there have been interesting developments in the case-law, with a tendency of enhancing the fines for violations as the evolution has passed on.

The latest fine of a considerable amount that was decided by the Commission was the Microsoft decision, where the company was fined the breathtaking 497.2 million Euro.¹ I question whether it is solely the company that suffers from a fine of such an amount. Single investors and whole economies might soon be victims if the escalation of the fines do not stop. The company that has been punished might also be forced, in such a situation, to raise their prices in order prevent bankruptcy. Thereby the consumers are the ones who, at the end, have to bear the costs. The rules that are created in order to protect the consumers might thus also have negative effects contrary to their purpose.

Due to the high amounts of the fines, it can be questioned whether their character has changed over time. The hypothesis is that Competition law sanctions already today have such a strong penal character that the penalties can no longer be said to be of a purely administrative kind. The

¹ Commission decision 24 March 2004, IP/04/384, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/382|0|RAPID&lg=EN&display=, 040416.

consequences for a breach are so grave that the structure of the system has to be questioned. Therefore it can be discussed whether the procedural safeguards that exists today within Competition law are comparable to procedural safeguards within criminal law procedures. If the Community Competition holds a lower standard than can be required, quite many problems can emerge. An adherence to stronger procedural safeguards would not only mean stronger protection for the individuals but it would also enhance the credibility of the Commission.

The basis of the analysis is made in the European Convention for Human Rights and Fundamental Freedoms (ECHR). Every Member State (MS) must apply this Convention in their national legal systems, it is one of the prerequisites for applying for EU membership. The European Union (EU) and its Institutions are however not bound by it, although the ECJ has in a number of cases held that the fundamental principles of Human Rights are to be regarded as part of Community law. The Court derives these principles from both the constitutions of the MS and from the Charter of Fundamental Rights of the European Union (CFR). These will not be considered and analysed in this thesis. To examine the principles derived from the MS constitutions would be a massive examination which clearly falls outside the scope of this thesis. Likewise I find it unsuitable to base the analysis on the principles in CFR, because they are created by the same system which I am set out to critically examine. Therefore I find it more appropriate to use an independent standard as the ECHR to compare the procedure in Community Competition with.

In different legal systems there are different ways of deterring against infringements of the Competition rules. Usually there is some kind of economic penalty if a company has been in breach of the rules. In some countries there are also threats of criminal sanctions for the persons responsible or the manager of the company. Even now, in some Member States there is such a possibility, for instance in the United Kingdom. I have however chosen to examine the system in the United States (US) where parts of the Competition law are criminalized and compare that procedural system to the European Community (EC) Competition law system. The reason to choose the US is its evolution of the Competition law, which can be said to be the most prominent one in the world. I acknowledge that the US Antitrust system might not be the sole system providing interesting experiences of value for the discourse, but due to the limited scope of the thesis there is no possibility to examine other systems.

The thesis is primarily written for European lawyers with an interest of comparing the rules. I have however also tried to insert some background information in order to give a reader without any larger knowledge of the EC Competition law system a possibility to understand the analysis.

1.1 Purpose

The purpose of the thesis is to examine whether the proceeding in front of the European Commission in the area of Competition law is in accordance with procedural safeguards applied in criminal law procedures and if not so, try to find possible solutions. In order to investigate this I will compare the procedure of the Commission to the procedural safeguards as regulated in Article 6 of the European Convention of Human Rights. I will also examine the Antitrust system and the procedure applied in the United States and compare this to the Community system. This is done in order to try to find solutions to the issues that arise in the EC system.

1.2 Method and material

In the thesis I have used the traditional legal method of legal dogmatics and examined, described and interpreted legislation, cases, legal principles and legal doctrine. I have also used the comparative method and systematically compared the Community system with the rules in ECHR and the US Antitrust system. The basis for the analysis is that an investigation and comparison between different legal systems gives a wider and more nuanced picture of problematic issues and possible solutions within a specific area.

Throughout the thesis, the analysis and my own thoughts are brought forward simultaneously as the descriptive theory. This is done in order to have a coherent line of reasoning and facilitate the discussion and conclusion in the final chapter. When I have discussed certain issues I have however clearly indicated that it is my thoughts that are brought forward.

When examining the European Union material I have mainly used the English version of the texts. I acknowledge that I thereby might not discover discrepancies between the different language versions of the texts. A complete examination of all the versions does however fall outside the material scope of a thesis of this character.

1.3 Delimitations

The thesis does not touch upon the procedure in front of the ECJ, but only the procedure before the Commission. The Competition procedure applied in the Member States will not be examined, even though it is an important issue, especially when regarding regulation 1/2003 and its delegation of powers to the national Competition authorities. I will only examine the procedures before the Commission, which are still of great importance. I will look upon both the procedure by the Directorate General Competition (DG IV) and the procedure in the Commission as such.

The main focus in the thesis will be on breaches of Articles 81 and 82 of the Treaty establishing the European Community (ECT) and decisions concerning the infringement and the setting of fines. Thereby I will not examine the proceedings in cases concerning Mergers or State aid. I will scrutinize the Commission procedure for penalties when infringement of Article 81 or 82 have occurred and not penalties for infringements of the procedural rules in such a procedure. I will not scrutinize the procedure concerning declaratory orders on negative clearances or individual exceptions. I do acknowledge that even decisions and orders may have negative consequences on the economy of an undertaking but in this thesis these concerns will not be elaborated.

The safeguarding principles that I will concentrate on will be the ones enshrined in the right to a fair trial, which is regulated in Article 6 of the ECHR. As mentioned I will not venture into national laws to consider the principles applied there, but only investigate within the sphere of the ECHR. It is important to stress that the principles discussed are not an exhaustive enumeration of relevant principles. There are many other principles that shall be applied in proceedings, for instance the principle of proportionality and the principle of legitimate expectations. These principles are however so solid in their status that they have not been included in the detailed examination.

I have limited the scope of the investigation of the US system to federal law. I will thus only look at interstate trade, due to its closer resemblance with the EC system. I have also limited the examination to the proceedings by the Antitrust Division (AD) of the Department of Justice (DOJ) and the proceeding in front of the Federal Trade Commission (FTC). However, due to the extremely extensive nature of the US system I have been forced to delimit the thesis to only examine the wider scope of the proceeding and the most interesting parts of it, thus I will not scrutinize every aspect of the procedure. In the US chapter I will not examine the detailed compliance of different rights that are applied in the proceedings. The main purpose is to more generally describe and examine the structure of the US system. This is done in order to get a model which is possible to compare with the EC system.

This thesis is not set out to be a theoretical discussion to determine whether the competition rules are to be criminalized or not. Of course the analysis can be used in such a discourse but I will not elaborate on this question.

1.4 Definitions

It is important to stress that I will use the word Commission in several senses. It will be used both for referring to the board of the Commissioners as such and for the Commission as the institution. It will also however be used for description of the more abstract mass of civil servants working

within the Commission. I do however believe that the context where the word is placed will be sufficient for understanding in what sense it is used.

To facilitate the wording of the thesis I have often used the words undertaking, cooperation and company in a singular form. When mentioning the words they should be understood as also meaning several undertakings, this will however be clear from the context where they are used.

1.5 Disposition

I would first like to mention that the thesis can be seen to have a division into two main parts. The first part examines the nature of the EC Competition law procedure and thereby also the safeguards applied in it. The second part contains a comparison with the United States, where I try to draw experiences from their Antitrust proceedings in order to examine whether elements of the system can be applied in the EC system.

In the second chapter I will examine the European Court of Human Rights' (ECtHR) determination of the nature of a sanction. This is done in order to clarify why it is important to examine the questions of the thesis. In the end of the chapter I will touch upon the competence of the European Union according to the pillar structure, which is interesting if one regards the true nature of the EC competition fines and the question of legitimacy.

The third chapter deals with basic principles of criminal procedures. I will discuss Article 6 of the ECHR, which deals with the right to a fair trial, and its application by the ECtHR. I will review the primary principles that are enshrined in the notion of a fair trial.

The fourth chapter scrutinizes the EC Competition proceedings and the structure of the Commission. I will examine the procedure and the decision taking process and compare it to the procedural safeguards elaborated with in the previous chapter.

In the fifth chapter I will examine the US Antitrust system and the proceedings in both a criminal antitrust procedure and an administrative antitrust procedure. The system and procedure will be compared to the EC Competition system after each specific subject that is of interest. I have tried to have the same structure in the EC and the US chapters. However, due to the structural differences of the two systems I have been forced to slightly change the structure of chapter 5, in order to make it more easily accessible for the reader.

I would like to stress that the analysis is ongoing in the thesis in order to facilitate the overview. There are many different details concerning the issues discussed which would be too hard to cope with in a pure analysis chapter. As mentioned in the method chapter I will clearly indicate when I forward my own personal views.

My discussion and conclusion are in the sixth chapter of the thesis. In the discussion I will develop my thoughts and try to find reasonable solutions to the issues that have arisen in the previous chapters. Finally I will conclude with my proposals.

In the very end I will have a brief summary of the thesis.

2 The character of EC Competition law

As mentioned in the introduction, the hypothesis for this thesis is that Competition law sanctions already today have such a strong penal character that the penalties no longer can be said to be of a purely administrative kind. The purpose of this chapter is to explain this position.

2.1 The concept of penalty

The word “penalty” is used in the context of Regulation 1. Generally speaking penalty indicates punishment. Black’s Law Dictionary defines penalty as:

“Punishment imposed on a wrongdoer, esp. in the form of imprisonment or fine. Though usu. for crimes, penalties are also sometimes imposed for civil wrongs.”²

Moreover, most Member States’ national systems define penalty in a similar way. In Denmark, a penalty is defined as a judicial reaction that implies a suffering of personal or economic character, which is imposed upon a person, who has committed an unlawful act, in so far as the intensity of the punishment is dependant upon the gravity of the unlawful act.³ In Sweden, the definition is set out in a similar way, with the additional qualification that the judicial action should be carried out, by someone – for instance the state – in an authoritative position, in an impartial way, motivated by justice and not by individual biases.⁴

The ECtHR has provided an analytical model through their case law that can be used in order to determine whether the penalty can be regarded as administrative or criminal. The model builds upon the principle that a sanction can be regarded as administrative as long as it does not fulfil any of the criteria enumerated by the ECtHR.

2.2 The ECtHR’s determination of the nature of a sanction

Regulation 1 states that decisions on fines taken by the Commission “shall not be of a criminal law nature”.⁵ The ECtHR has however held in a number of cases that the meaning of the word criminal shall have an autonomous

² Blacks Law Dictionary, 7th edition 1999.

³ Vagn Greve, *Straffene*, (Jurist- og Økonomforbundets Forlag, 2002), p. 13.

⁴ Nils Jareborg, *Straffrättens gärningslära*, (Norstedts Juridik, 2000), p. 14.

⁵ Regulation 1/2003, Article 23, paragraph 5.

interpretation within the scope of ECHR.⁶ This requires one to look beyond the wording of the law to the substance and implications of the law.

One of the first and most important cases within this area was the *Engel* Case.⁷ It concerned a complaint against various disciplinary penalties and measures imposed upon the applicants while carrying out their compulsory military service. The ECtHR stressed that if the contracting states were able, at their discretion, to classify an offence as disciplinary or criminal then the application of Article 6 ECHR would be subordinate to the states' will. That in turn might lead to results incompatible with the purpose and object of the Convention. The ECtHR therefore regarded itself to have the jurisdiction to determine whether the nature of the sanction is criminal.⁸

The ECtHR confirmed this reasoning in the *Öztürk* case. The Court stated that the ECHR is not opposed to states creating or maintaining a distinction between different categories of offences in their national legal systems. It does however not follow that the classification is decisive for the purposes of the ECHR.⁹

The conclusion from these examples can be said to be that the Court takes rather a substantive, and not merely a formalistic view of what can be regarded as criminal.¹⁰

In order to classify a sanction as criminal, the Court refers to the test it set out in its *Engel* decision, the “Engels criteria”.¹¹ These criteria are to be separated into three parts. The first criterion looks at whether the provision defining the offence charged is within the scope of the criminal law of the state in question. Community law explicitly states that competition violations are not of a criminal nature. However, this is only a starting point, and has only a formal and relative value.

The second criterion concerns the very nature of the offence. This is considered to be a factor of great importance and takes into consideration aspects such as the gravity of the crime, the object of protection, and the classification in other convention states. All of these components are important within the scope of Competition law. The gravity of the competition violation is very important in determining the fine. In the 1998 Guidelines on the method of setting fines it is stated that the Commission can consider both attenuating and aggravating circumstances in applying the fines, but the objectives set out in the Guidelines require that the fines imposed are consistent with the “objectives pursued in penalising

⁶ Ian Forrester, *Modernization of EC competition law*, 2000, 23 Fordham Int'l L.J. 1028, p. 1073.

⁷ *Engel and others v. the Netherlands*, ECtHR, Ser. A, No. 22, 1976.

⁸ Id. paragraph 81.

⁹ *Öztürk v FRG*, ECtHR, Ser A, No. 73, 1984, paragraph 49.

¹⁰ Petter Asp, *EG:s sanktionsrätt – ett straffrättsligt perspektiv*, (Iustus Förlag AB, 1998), p. 319.

¹¹ *Engel and others v. the Netherlands*, supra note 7, paragraph 82.

infringements of competition rules.”¹² The object of protection for the competition rules is the general interest of society. This is an interest which is normally protected by criminal law. Finally, the classification of Competition law violations also affects the evaluation. Competition law has become criminalized in some Member States, for instance in the United Kingdom, which is a circumstance that could have some significance in a proceeding.

According to the third and final criterion, consideration shall be taken to the degree of severity of the penalty. The ECtHR undoubtedly puts the largest weight upon this element. The Court does not make a distinction between whether the penalty concerns a negative sanction or the forfeiture of a privilege.¹³ Generally it can be said that if the sanction contains any form of imprisonment then there is a presumption that the penalty is of a criminal nature, however the issue becomes more difficult when only fines are in question.¹⁴

The criteria are regarded to be alternate and not cumulative to each other. Thereby you only need to fulfil one of the criteria in order for the sanction to be considered criminal.¹⁵

When considering the imposition of fines as a criminal sanction, the *Stenuit* case is of specific interest and importance.¹⁶ The case concerned a breach of French Competition rules where an administrative fine of 50 000 FF was imposed on *Stenuit*.¹⁷ The ECoHR considered the Engels Criteria and came to the conclusion that the fine was to be regarded as a criminal sanction. When considering the second criterion, the object of protection of the French provisions which was to maintain free competition within the French market, they found that it affected the general interests of society normally protected by criminal law.¹⁸ The ECoHR also held that a penalty can usually be considered criminal when the penalty consists of punitive and deterrent factors.¹⁹ The ECoHR reasoned that the large sum of the fine and the possibility to impose up to 5% of the annual turnover showed quite clearly that the penalty in question was intended to be a deterrent.²⁰

The reasoning of this case also applies when regarding the system of EC Competition. It is especially striking when taking into account the

¹² 1998 Guidelines on the method of setting fines – preamble.

¹³ Petter Asp, *supra* note 10, p. 329.

¹⁴ *Id.* p. 328 et. seq.

¹⁵ *Id.* p. 333.

¹⁶ *Société Stenuit v France*, ECtHR, Ser. A, No. 232-A, 1992. The ECtHR discontinued the case due to an agreement between the parties. It is instead the opinion of the European Commission of Human Rights (ECoHR) that raises interest.

¹⁷ *Id.* paragraph 5.

¹⁸ *Id.* Opinion of the European Commission on Human Rights, paragraph 62.

¹⁹ *Id.* paragraph 63. This has also been mentioned in *Öztürk v FRG*, *supra* note 9, paragraph 53.

²⁰ *Société Stenuit v France*, *supra* note 16, Opinion of the European Commission on Human Rights, paragraph 64.

possibility of imposing a fine up to 10% of the annual turnover in EC Competition proceedings. These circumstances and the previous argumentation quite clearly shows that there are many circumstances indicating that it is questionable whether the Community Competition system can be said to be of a purely administrative nature. Thereby we also receive a clear motive of why it is important to examine the procedure before the Commission in the Competition proceedings.

2.3 Community competence

With regard to the previous discussion, there is a need for a theoretical background to the rule making power of the Community. I find it relevant to briefly discuss the pillar structure of the European Union and the competence of the Community in order to show that the issue in question might have certain implications even outside the pure rights perspective.

The European Union is often said to have the shape of a three part pillar structure. The first pillar, the Community pillar, consists of the Treaty of the European Community and the Euroatom Treaty. The second and the third pillars are within the intergovernmental sphere and consists of the Common Foreign and Security Policy, respectively co-operation in the field of Justice and Home Affairs. The institutional structure of the two last mentioned pillars can however be said to go somewhat further than being purely a classic intergovernmental decision making model. The Commission has some authority in these areas and there is also a very limited possibility for some matters to be decided by qualified majority rather than unanimity. The European Community forms a legally independent organisation within this pillar structure with their own autonomy and own legal personality.²¹

The competence to legislate in criminal matters is thus found in the third pillar. In Article 29 in the Treaty on the European Union (TEU) it is stated that the Union shall provide the citizens with a high level of safety in the area of freedom security and justice by developing “[...]common action among the Member States in the fields of police and judicial cooperation in criminal matters[...]”. In the second paragraph of the article there is an enumeration of the crimes that specifically should be prevented and the means of preventing them. This list is however not exhaustive and all kinds of other offences could also be tackled within the third pillar.²²

Some of these powers can be transferred to the Community through the process stated in Article 42 TEU. This however only concerns the area under title IV of the EC Treaty: Visas, Asylum, Immigration and other policies related to the free movement of persons. Thus the possibility of

²¹ P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the law of the European Communities*, (Kluwer Law, 1998), p. 46 et. seq.

²² G.J.M Corstens, *Criminal law in the first pillar*, *European Journal of Crime, Criminal law and Criminal Justice*, Volume 11/1, 2003, p. 134.

transferring criminal competence to the first pillar can not be said to be possible and thereby there is no explicit competence within the criminal law area in the European Community. This poses a legitimacy problem when taking into account the conclusion in the previous subchapter. If there is no competence to create or uphold such rules they must be regarded as null and void.

However there are some scholars that believe that there is a possibility for a criminal competence within the first pillar. P.J. Wils reasons that there is no sign in the ECT that criminal law should be excluded from the scope of the first pillar. He draws this conclusion from Article 5 ECT which provides the principle of conferred powers. Through this article he finds that the principle does not preclude the adoption of criminal law measures under the ECT, as long as the requirements of a legal basis are fulfilled. He acknowledges that it is a political reality that the Member States have opposed such criminal law initiatives within the first pillar but reasons that there exists no “*domaine reserve*” of the Member States and no inalienable attributes of sovereignty.²³

The question about competence is also interesting if one discusses the scenario if the new Treaty establishing a Constitution for Europe is adopted. In Article 6 of the Constitutional Treaty it is laid down that the EU shall have a legal personality. When doing so the EU merges its legal personality with that of the Community. This would in turn pave the way for merging the Treaties into a single text which would simplify the system of the legal rules. By this it would also be appropriate to get rid of the “pillar-structure” of the European Union, in order to simplify the Union’s architecture.²⁴ This merging of the pillars does not follow automatically but a continuation of the pillar model is seen as obsolete. By this re-constructing of the current system the European Union and thus the Community receives competence within the area of Justice and Home affairs and will thereby have the competence to create Criminal legislation, which will solve the legitimacy problem.

2.4 Concluding remarks

Even though Regulation 1 holds that the Community Competition fines are of an administrative nature it is highly questionable if this nature has not changed over the course of time. The ECHR and its application by the ECtHR can be said to provide the most reasonable standard of determining the issue and as has been shown, the result is quite different compared to the opinion put forward in the regulation. The reasoning could pose a theoretical problem of the legitimacy of the fines when taking into account

²³ Wouter P.J. Wils, *The optimal enforcement of EC Antitrust law*, (Kluwer law international, 2002), p. 233.

²⁴ Final Report of Working Group III on Legal Personality, WG III 16, CONV 305/02, p. 5 and 15.

the proposed lack of competence within the criminal law area for the Community. There are also opinions put forward that the competence already lies within the realm of the Community. However, if the Constitutional Treaty would be adopted the legitimacy problem would be solved due to the merging of the treaties.

In this context one can ask what the actual impact would be if the ECHR was to be applied to the European system. To be able to answer this question, we first need to examine what rights shall be applied in criminal proceedings according to the ECHR, before scrutinizing whether they are followed in EC Competition proceedings.

3 Basic principles of criminal procedures

3.1 The concept of right

One can begin with asking; what is a right? The concept of rights is unclear and contains numerous interpretations. Often a right means moral claims to freedom of action. Rights are protective devices intended to protect the rights holder from external intrusion. There is also another dimension to rights; one person's rights always entail other persons' obligations. When we recognize a right we always at the same time recognize others' duties to respect those rights.²⁵

There can also be a division between different forms of rights; negative, positive and political. The negative rights represents rights of actions for individuals without interference from the state or the authorities; for instance the right of a secure life, the right of a fair trial, the right of beliefs and the right to the peaceful enjoyment of possessions. The expression positive rights, means rights that put an obligation for a certain performance on the state. This category of rights can also be called social rights because their purpose is usually to help weaker groups in a society. Finally there are the political rights which involve the right of being a citizen and thereby having a possibility of participating in the political decision making process.²⁶

It can also be discussed why there are procedural safeguards. I find that the answer is quite logical; to protect the citizens against the arbitrary will of the state in proceedings. The citizens have given the executive power of justice to the state therefore there must be protective measures so that the justice system neither becomes biased nor distorted. The procedural safeguards restrains the competence of the state organs so that there is a limit to their powers.

It can be stressed that rights do not solely apply to natural persons. Article 6 has been found to be applicable on judicial persons as well as natural persons. This is not explicitly regulated in the article but is derived from the case law of the ECtHR. Other articles may also be applicable to judicial persons. The determining factor is whether the article in question de facto can be applied to a judicial person. Other articles that can be applied on companies are for instance Article 10; the right of free speech, Article 1 of

²⁵ Tara Smith, *Moral Rights and Political Freedom*, (Rowman & Littlefield Publishers Inc. 1995), p. 23 et. seq.

²⁶ Sällskapet för politisk filosofi (red.), *Politisk filosofi – Rättigheter*, (Symposium bokförlag, 1988), p. 9 et. seq.

the first protocol; the right to property and probably also Article 7; the principle of legality.²⁷

3.2 The right to a fair trial

The right to a fair trial is regulated in Article 6 of the ECHR, which states the right to a hearing by a court and contains the general procedural safeguards applicable on court proceedings. The first sentence of its first paragraph reads:

“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.”

In paragraph two and three of the article more specific safeguards that shall be applied in criminal procedures are stated, for instance the presumption of innocence, the right to be informed about the proceedings, the right of defence and the right to hear witnesses. Important to mention is that the enumeration in paragraph three is not exhaustive but only exemplifies applicable safeguards.²⁸

The article is applicable to cases relating to “civil rights and obligations” and “criminal charges”. As has been discussed in the previous chapter, the concepts are autonomous and ECtHR determines whether a proceeding can be considered to fall under one or the other category. Regarding criminal charges it is the Engels criteria that are used in the determination.

Concerning civil rights and obligations the determination whether the proceeding in question falls under Article 6 is quite wide. The locution covers all proceedings where the result is decisive for private rights and obligations, irrespective of the jurisdiction and nature of the decision making authority.²⁹ The concept of civil rights and obligations covers the area of administrative law if the authorities decision is decisive for the relations in civil law.³⁰ In other words, if an agreement is affected by the decision this would mean that Article 6 would be applicable. In my opinion this quite clearly indicates that the article shall apply also in Competition law proceedings even if it is not, by some reason, regarded as criminal. In the continuing discussions I do however presume that EC Competition law shall be regarded as having a criminal nature.

3.2.1 The right against self-incrimination

This principle is not expressively stated in the Convention text but follows from Article 6(1), the right to a fair trial and the *Funke* decision from the

²⁷ Petter Asp, supra note 10, p. 338.

²⁸ Carl-Henrik Ehrenkrona, *Karnov – Kommentar till Lag 1994:1219*, (Fakta Info Direkt, 2004), note 42.

²⁹ Id. note 35.

³⁰ *Ringeisen v. Austria*, ECtHR, Ser. A, No. 13, 1971, paragraph 94.

ECtHR.³¹ The case concerned a German national, Mr Funke, who refused to produce bank statements from his foreign accounts to the customs authorities, in the investigating of a possible custom offence. The national courts imposed a fine and a penalty payment until he produced the bank statements. ECtHR noted that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist. The ECtHR continued by holding that the special features of customs law could not justify such an infringement of the right of anyone "charged with a criminal offence", to remain silent and not to contribute to incriminating himself. Thereby they found that there had been a breach of Article 6.³²

This case has subsequently been confirmed by the Court in *Murray v. United Kingdom* and *Saunders v. United Kingdom*.³³ The former case concerned Mr Murray who was arrested in Northern Ireland in accordance with the Prevention of Terrorism Act. He did not account for his presence in the house where he was arrested and refused to say anything both in the police hearings and in the court procedure. The court held this as evidence against him and drew very strong inferences from it when determining the case. The ECtHR reasoned that there could not be any doubt that

"[...] the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure [...]"³⁴

The Court did however hold that this right was not to be regarded as absolute, but it could have negative consequences for the accused. But a judgement could not only be based on the silence of an accused. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 was to be determined in the light of the specific circumstances in a case.³⁵

The latter case mentioned, *Saunders*, concerned the director and chief executive of the company Guinness, who, during a campaign to take over a competing company, had misled the stock market and conducted illegal share dealings in order to make their bid the most attractive one. The applicant was during the investigations interviewed by inspectors from the Department of Trade and Industry at several occasions, both before and after he was charged for the crime. The interviews were compulsory and formed a significant part of the evidence in the case. The ECtHR held, due to that the accused had been under a legal compulsion with a risk of being fined or imprisoned for contempt of court if not answering the questions, that there had been a breach of Article 6 and the principle against self-incrimination. The material obtained during the interviews had been used to a wide extent in the proceedings by the prosecutor and had an immense

³¹ *Funke v. France*, ECtHR, Ser. A, No. 256, 1993.

³² Id. paragraph 44.

³³ *John Murray v. United Kingdom*, ECtHR, Reports 1996-I, respectively *Saunders v. United Kingdom*, ECtHR, Reports 1996-VI.

³⁴ *John Murray v. United Kingdom*, Id. paragraph 45.

³⁵ Id. Paragraph 47.

impact on the outcome.³⁶ The Court did not accept the government's argument that the complexity of corporate fraud and the vital public interest of investigating such crimes, could justify a departure from the principle of a fair trial. It further stated that Article 6 applies to all criminal proceedings without distinction from the most simple to the most complex of crimes.³⁷

3.2.2 The right to an independent and impartial tribunal

This right constitutes the right to a court and can be said to have three elements. The first is that there must be a "tribunal" established by law and meeting the requirements of independence and impartiality. The second element concerns the tribunal's jurisdiction, which must be sufficiently broad to determine all aspects of the dispute or charge. The third and final element deals with the issue that the individual concerned must have access to the tribunal.³⁸

3.2.2.1 Independent and impartial tribunal

The Court has characterised the notion "tribunal", in the substantive sense of the term, as a body with judicial function, namely determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed matter. The tribunal must satisfy requirements such as independence from the executive, impartiality and a certain duration of its members terms of office.³⁹ It is necessary to stress the importance of the body's independence from both the executive power and the parties in a proceeding. This can be divided into a subjective and objective element. The subjective element concerns whether the judgement has been dictated by, for instance, a prejudice by the judge or if he, by any reason, is biased. The objective requirement implies that every impartial viewer's reasonable doubt about the impartiality of the judge must be eliminated. Justice must not only be done, it must also be seen to be done.⁴⁰ The Court has for instance held that there was insufficient objective impartiality when a judge sitting in a criminal case had been the head of the section of the public prosecutor's department which had been responsible for the prosecution of the accused.⁴¹

3.2.2.2 Jurisdiction

The tribunal must have full jurisdiction to deal with all aspects of the case. This includes jurisdiction to determine all relevant questions of both fact and law.⁴²

³⁶ *Saunders v. United Kingdom*, supra note 33, paragraph 72.

³⁷ Id. Paragraph 74.

³⁸ Andrew Grotrian, *Article 6 of the European Convention of Human Rights – The right to a fair trial*, Human rights files No. 13, (Council of Europe Press, 1994), p. 27.

³⁹ *Belilos v. Switzerland*, ECtHR, Ser. A 132, 1998, paragraph 64.

⁴⁰ Carl-Henrik Ehrenkrona, supra note 28, note 39.

⁴¹ *Piersack v. Belgium*, ECtHR, Ser. A, No. 53, 1982, paragraph 30.

⁴² Id. p. 30.

3.2.2.3 Access to the tribunal

The individual concerned must be able to bring the matter before a court without any improper legal or practical obstacles being placed in his way. The right of access is not absolute but may be subject to limitations. Any limitation to this right must have a legitimate aim and there must be proportionality between the means employed and that aim. One should in this context regard the “rule of law in a democratic society” The limitations applied should not restrict the access in such a way that the very essence of the right is impaired.⁴³

3.2.3 The principle of equality of arms

The concept of a fair trial requires respect for the principle of equality of arms, in other words; the principle of procedural equality between the parties. Both parties shall have the possibility to be present or represented in front of the court in a proceeding. They shall also have the right to review the material evidence used in the case.⁴⁴ There is a possibility of some degree of discrepancy between the parties, as long as it does not affect the fairness of the proceedings as a whole. This depends to some extent on the nature of the case and the issue in question.⁴⁵

A case addressing this principle was the *Borgers* case.⁴⁶ It concerned the position of the Belgian “procureur général” – the prosecutor general, in criminal proceedings and his participation in the courts decision. The ECtHR examined whether the proceedings before the Court of Cassation respected the rights of the defence and the principle of the equality of arms, which were said to be features of the wider concept of a fair trial. The Court held that there was an infringement of Article 6 partly because the prosecutor had a say in the discussions whether the case was to be admitted but also because he participated, in an advisory capacity, in the courts deliberations. The Court found it hard to see how such a participation could be unbiased and only restricted to purely stylistic considerations in drafting the judgements.⁴⁷

The principle of equality of arms also includes the principle of contradiction. The parties must have the possibility to comment on the material used in the proceedings otherwise there will be a breach of Article 6.⁴⁸ The ECtHR has held that each party must be afforded a reasonable opportunity to present one’s case in conditions that do not place him at a disadvantage vis-à-vis his opponent.⁴⁹

⁴³ *Ashingdane v. the United Kingdom*, ECtHR, Ser. A, No. 93, 1985, paragraph 57.

⁴⁴ Carl-Henrik Ehrenkrona, *supra* note 28, note 37.

⁴⁵ Andrew Grotrian, *supra* note 38, p. 41.

⁴⁶ *Borgers v. Belgium*, ECtHR, Ser. A, No. 214-B, 1991.

⁴⁷ *Id.* paragraphs 26 and 28.

⁴⁸ Carl-Henrik Ehrenkrona, *supra* note 28, note 37.

⁴⁹ *Kuopila v. Finland*, ECtHR, Judgement 27th of April 2000, paragraph 37.

When discussing these issues it is also necessary to examine whether there is a right to an adversary process. The ECtHR discussed the issue and came to the conclusion that all evidence must in principle be produced in the presence of the accused at a public hearing with a view to an adversarial argument.⁵⁰ The accused must have a possibility of challenging the different aspects of the case during a confrontation or an examination.⁵¹

In this context it can also be distinguished between the notion of an inquisitorial and an accusatorial criminal proceeding.⁵² Characterising for the former is that the court has the task of both prosecutor and judge. No prosecutor is needed because as soon as the court suspects a crime, it shall commence investigations *ex officio*.⁵³ As has been elaborated with above this is contrary to the principle of impartiality of the court. In the accusatorial system it is instead the prosecutor who starts the criminal proceedings, and the proceedings in the court is characterised by a procedure between the defendant and the prosecutor, while the court only is an impartial viewer. Often there are no pure proceedings of one or the other kind but most often they influence each other. Historically speaking there have been quite a spread use of the two systems, however today the accusatorial process is more commonly used.⁵⁴ At least when examining the pure court proceedings, if looking at the pre-trial investigations the inquisitorial process is more common.⁵⁵

3.3 Concluding remarks

As shown there are numerous safeguarding principles that shall be applied in a criminal proceeding, even though I have not elaborated with the most obvious ones. The principles can be said to be the outer limit of the governments competence, it is therefore crucial that they are applied in a correct and coherent way. One must however keep in mind the somewhat special character of principles. Rules can be followed or broken, while principles can be bent and followed to a lower or a higher extent. Yet, the principles discussed in this chapter ought to be so important in a democratic society that they can not be bent. Thus it becomes interesting to examine if the EC Competition law system can be said to manage this threshold.

⁵⁰ *Barberà, Messegue and Jabardo v. Spain*, ECtHR, Ser. A, No. 146, 1988, paragraph 78.

⁵¹ *Bricmont v. Belgium*, ECtHR, Ser. A, No. 158, 1989, paragraph 81.

⁵² The accusatorial proceeding is also known as an adversary proceeding.

⁵³ Nils Dillén, *Straffprocessrätt*, (P.A. Norstedt & Söners Förlag, 1947), p. 31.

⁵⁴ *Id.* p. 31 et seq.

⁵⁵ John A Andrews, *Human Rights in Criminal Procedure – A comparative study*, (Martinus Nijhoff Publishers, 1982), p. 11 et seq.

4 EC Competition law

4.1 The Competition rules

The European Competition rules have their primary basis in Article 3(1)(g) ECT. It states that the activities of the Community shall include “a system ensuring that competition in the internal market is not distorted”. This is made possible through the primary legislation beneath Title VI of the ECT and the multitude of secondary legislation that exists. The Competition system has its basis in the notion of a liberal market rather than a centrally planned market. The purpose behind the rules can be seen as two-fold; it shall ensure the effect of the internal market by controlling the behaviour of the companies and it shall vitalize commercial activities.⁵⁶

The articles beneath Title VI of importance to this thesis are Articles 81 and 82 ECT. These two articles form the basis for the Community Competition system. Article 81 prohibits agreements, decisions and concerted practices between undertakings which may affect trade and have as their object or effect an influence on the competition in the internal market. In the first paragraph there is also a non-exhaustive enumeration of certain behaviours that are regarded as being prohibited by the article. According to paragraph two, any agreements or decisions declared prohibited shall be automatically void. There are however also exceptions to the application of the article in paragraph three. Article 81 has got quite an advanced but logical construction that has been given an immense power throughout the case law of the ECJ. Article 82 on the other hand regulates the abuse of undertakings with dominant positions. In this article there is also an enumeration over different prohibited behaviour, however neither this list is exhaustive. As can be seen in the article there is no possibility for exceptions. What this exactly means is unclear, the Treaties do not have any preparatory works. It can be questioned whether the authors intended to have any material difference between the two articles. This is however a question that most likely never will have an answer.

Throughout the lapse of time there have also been made a great number of secondary legislation concerning the Competition system. Without a doubt the most important one has been Regulation 17 which now is replaced by Regulation 1. The regulation can be said to be one of the most important tools for the Commission in their application of the Competition rules.

⁵⁶ Hans Henrik Lidgard, *Competition Classics*, (Student material from the Faculty of Law, University of Lund, 2003), p. 14.

4.2 The structure of the Commission

The Commission is the politically independent institution that represents and upholds the interests of the EU as a whole. Its mandate is derived from Article 211 ECT, which states the powers of the Commission. The Commission shall ensure the proper functioning and development of the Common Market by ensuring that the provisions of the Treaty are applied. As of today there are 30 Commissioners, but this will change when the present term runs out on the 31st October 2004, after which there only will be 25. The Commission's staff, which amounts to 24,000 people, is organised into 36 departments; "Directorates-General" (DG) and "Services".⁵⁷ The one working within the Competition area is DG IV. This DG is in turn divided into directorates and subsequently into divisions. Usually when a case comes before DG IV there will be appointed a Case Chairman (chef de file) and a Case Officer (rapporteur), who will be responsible for the continued progress of the case.⁵⁸

The ECJ has stressed that the principle of collegiate shall govern the work of the Commission. This is an important expression for the institutional philosophy of the Community and the Union. The principle implies that the Commissioners are equal in the decision making process and that the decisions and their motivation shall be made jointly. This also means that they are all, on a political level, responsible for the decisions made.⁵⁹

4.3 General characteristics of the procedure

The Commission's conduct of proceedings is governed by the principle of *audi alteram partem* and by the aim of establishing the truth through an inquisitorial procedure. The Commission allows all parties addressed by the decision and third parties with an interest in it, to make submissions and be heard. Thereafter it adopts its decision on the basis of the information received. Because of this, the Commission can not be considered to be a neutral civil authority adopting decisions in proceedings between two parties.⁶⁰

The Commission has because of this often been criticized of being both judge and party to its own proceedings. In this context one can discuss whether the Commission can be regarded as having a tribunal character or not. The ECJ has held that it shall only be regarded as an administrative body and not as a tribunal in the sense of ECHR.⁶¹ The Court has however

⁵⁷ http://www.europa.eu.int/institutions/comm/index_en.htm, 040507.

⁵⁸ C.S. Kerse, *EC Antitrust Procedure*, (Sweet & Maxwell, 1998), p. 219.

⁵⁹ Ulf Bernitz & Anders Källgren, *Europarättens grunder*, (Norstedts Juridik, 1999), p. 59.

⁶⁰ Luis Ortiz Blanco, *EC Competition Procedure*, (Oxford University Press, 1995), p. 43.

⁶¹ Joined Cases C-100-103/80, *SA Musique Diffusion Française and Others v. Commission*, [1983] ECR 1825, paragraph 7.

stated that during the administrative procedure the Commission shall observe “the procedural safeguards provided for by Community law”.⁶²

But, as has been elaborated with above, concepts shall have an autonomous meaning within the scope of ECHR. It can therefore be questioned whether the Commission falls under the definition of a tribunal according to the ECHR, which was drawn up in chapter 3.1.2.1. above. The Commission has a competence to determine matters which falls under its jurisdiction and it does so independent from the executive (which in this case can be said to be the Council and the Parliament). There is also a certain duration of their period of office. They can however be dismissed by the Parliament, which is a circumstance that indicates that they are not a tribunal. The ECJ has also held the non-independency to be the reason for not considering the Commission to be a tribunal.⁶³ Their jurisdiction and independence are however circumstances very strongly addressing the tribunal view, a view that I personally do believe is the correct one. If so, their independence from the parties most certainly can be called in question. When looking at the subjective requirement it can be reasoned that the Commission is not unbiased. The Commissioner responsible for DG IV can be said to be the person outermost responsible for the investigations conducted by the DG and he still takes part of the decision according to the principle of collegiate. The objective requirement must also be considered to be breached; an impartial viewer would most certainly have doubt about the impartiality of the Commission. The situation is strikingly similar to that addressed in the *Piersack* judgement by the ECHR.⁶⁴ These views taken together clearly shows the problematic implications involved in the present Commission procedure when applying the principles of the ECHR to it.

Another issue of importance is the burden of proof in the proceedings before the Commission. According to Article 2 in Regulation 1 the party or the authority alleging the infringement shall have the burden of proof, which also is a quite logical placement of the burden. It is however interesting to discuss to what degree the evidence shall be in order to suffice for an infringement. In the area of criminal law it is the principle of *in dubio pro reo* that is applicable. This means that when in doubt, even the slightest of doubt, the court shall judge in favour of the accused. The proof must be beyond a point of reasonable doubt before a just court may convict someone. Within the Community Competition law the rules of evidence are not so strict. The Commission must however still adequately prove the factual basis for its decision. It is the task of the Commission to produce a sufficient amount of reliable evidence to support its accusations. It is then up to the undertaking concerned to give a plausible explanation for the evidence put against it.⁶⁵

⁶² Id. paragraph 8.

⁶³ Barry Doherty, *Playing poker with the Commission – Rights of access to the Commissions file in Competition cases*, E.C.L.R 1994:1, p 14.

⁶⁴ *Piersack v. Belgium*, supra note 41.

⁶⁵ Luis Ortiz Blanco, supra note 60, p. 44 et seq.

I do find it quite remarkable that there is not a higher burden of proof for the Commission. There is of course no specific probability percentage that shall be fulfilled before a decision can be made, such a number does not even exist within criminal law. I do however believe that it should be a higher evidence threshold than a “more likelier than” standard, which is also known as preponderance of evidence. Especially when regarding the huge amounts of the fines that have been adjudicated during later years. These have an immense impact on the companies and the persons involved and it is rather negligent to their interests not to have a higher level of proof. It can be reasoned in such a discussion that there would be severe problems of getting anyone convicted at all, with regard taken especially to the high difficulties of getting information at all about an infringement. The argument does however fall when taken into account the large interest of legal security that is given to the individual person by safeguarding principles.

In a discussion there can be done a weighing between the different interests that are protected. On the one hand the protection of the competition in the Common Market and on the other the protection of individuals. In this weighing it is rather a question of legal philosophy than a pure question of the specific interest. If one adheres to the Hobbesian philosophy, or even a Utilitarian philosophy, one would most probably choose the option where the Community interest is regarded as being more important. If instead being a Lockean philosopher and firmly holding on to the rights theory one would adhere to the protection of the individual. I personally do believe that the latter answer is the most appropriate one, especially now when individuals are starting to get more affected by the decisions of the Commission.

4.4 The decision taking process

In order to facilitate the overview I have chosen to divide the process into a number of sub parts; Investigative measures, Hearings, Decisions, Fines and Penalty Payments and finally Judicial review.⁶⁶

4.4.1 Investigative powers

When commencing an investigation it is the Commission itself that takes the initiative, or rather the DG IV or the division responsible for the certain area. This is usually done when having received a complaint, either from someone affected by the behaviour in question, for instance an undertaking, a natural or legal person or even a Member State, or being informed by someone who takes part of the unlawful behaviour. The Commission also

⁶⁶ A structural chart of the proceeding is attached in Supplement A. It does however have a somewhat different division but I do find it illustrative of the process.

monitors the Community economy and makes observations and inquiries into sectors of the economy.⁶⁷

The powers of investigation for the Commission is stated in Chapter V of Regulation 1. Article 17 deals with the question of investigations into sectors of the economy and into agreements. The Commission can request the undertakings in a particular sector to supply the Commission with information about all agreements, decisions and concerted practices within that sector.

Article 18 concerns simple requests and decisions for information. This is usually said to be a two-stage process, first the request can be made and if not followed a decision is taken. When making a request or taking a decision, the Commission shall state the legal basis and the purpose of the request, specify the information requested and set a time limit. If the undertaking in question fails to supply the information wanted, the Commission may impose a fine or when it concerns decisions, also a periodic penalty. This is interesting to discuss when taking into account the right against self incrimination that has been discussed before. The ECJ has in the cases *Orkem* and *Solvay* considered the question whether there is a right not to incriminate oneself in competition cases.⁶⁸ The first case concerned a suspected infringement of the Competition rules within the thermoplastics industry. The Court examined the legal traditions of the Member States and held that the company did not have the right not to give evidence against itself, especially not in the economic sphere and in particular not within Competition law. It did however further state that the Commission could not compel an undertaking to provide it with answers which might involve an admission on the undertaking's part of the existence of an infringement, which is the duty of the Commission to prove.⁶⁹ The latter case, *Solvay*, had a very similar question at issue, which made the Court, in principle, literally confirm the *Orkem* case. Other important principles that are derived from the *Orkem* case is firstly that the Commission is empowered with a wide discretion of deciding whether particular information is necessary and thereby requesting it.⁷⁰ There is however one limitation; there must be a relationship between the information requested and the infringement under investigation.⁷¹ Secondly the Commission must regard the principle of right to a defence in the initial phase of an infringement procedure such as during preliminary inquiry procedures.⁷²

The reasoning above is quite interesting when regarding the discussion in chapter 3.1.1. The ECtHR has found a right against self incrimination in a

⁶⁷ Luis Ortiz Blanco, *supra* note 60, p 65.

⁶⁸ C-374/87, *Orkem v. Commission*, [1989] ECR 3283 and C-27/88, *Solvay v. Commission*, [1989] ECR I-3355.

⁶⁹ *Orkem v. Commission*, *Id.* Summary, paragraph 3.

⁷⁰ *Id.* Paragraph 14 et seq.

⁷¹ C.S. Kerse, *supra* note 58, p. 114 et seq.

⁷² *Orkem v. Commission*, *supra* note 68, Summary, paragraph 3.

number of cases and, as been mentioned, the ECtHR held in the *Saunders* case that the right shall apply in all criminal proceedings without a distinction from the most simple to the most complex of crimes. The ECJ however disregarded this right with the motivation that there is no such tradition, especially not in the economic sector and not for legal persons. Still, there was a limit to the investigatory powers of the Commission and they could not compel an undertaking to explicitly admit an infringement.

The question is then to what extent the principle is applicable according to the ECHR. From the cases in chapter 3.1.1 it is quite obvious that there is a very high hurdle of protection for the accused. Thereby it can be questioned whether the ECJ holding is enough. I would say probably not. Nevertheless, I do acknowledge that there are a number of difficulties when regarding that the accused often is a legal person and the insecurity whether the right is applicable or not. It can be reasoned that the fines affects natural persons to a large extent, which might indicate that the principle still could be applicable. There might also be difficulties in determining the persons affected by the principle due to that there has to be action by natural persons inside the legal person.

A possible solution would be to protect the management, because they are most likely the persons to suffer from the fine, for instance they might get fired and personal responsibility might be charged upon them. In any case their lives will most probably be negatively affected in some way. Even if the Competition rules were not to be considered criminal there still might be a possibility for the principle to apply. Mr van Overbeek interprets the judgements by the ECHR to the effect that the principle does actually apply even though the proceeding in question might be administrative.⁷³ Personally I find it reasonable if one would take a coherent view on every proceeding where a fine or some kind of penalty could be adjudicated upon a person, natural or legal and apply the right against self incrimination on every person in such a proceeding. This would be a more logical approach dependant on the element of punishment, or at least negative consequences, in a proceeding.

Another topic regulated under chapter V of regulation 1 is the power of conducting inspections, which is dealt with in Articles 20, 21 and 22. The Commission is authorized to conduct all necessary inspections of undertakings and associations of undertakings. They are also empowered to search other premises for books or other records related to the subject matter of the inspection. If the requested material is not handed over, there is a possibility of fining the undertaking. The ECJ has however held that undertakings are protected from arbitrary and disproportionate measures and that such protection must be recognized as a general principle of

⁷³ Walter B.J. van Overbeek, *The right to remain silent in Competition Investigations: The Funke decision of the Court of Human Rights makes revision of the ECJ's case law necessary*, E.C.L.R. 1994:3, p. 129 et seq.

Community law.⁷⁴ The protection from arbitrariness is also known as the prohibition against “fishing expeditions”.

As a general rule every document found on the premises and in the files of an undertaking shall be regarded as a business record. There is however a possibility of confidentiality for documents stemming from correspondence between lawyer and client if two conditions are fulfilled: firstly the correspondence must have been sent for the purposes and in the interests of the client’s rights of defence; secondly, it must be correspondence with independent lawyers.⁷⁵

4.4.2 Hearings

When the primary investigation has been done, the Commission will issue a statement of objections. The statement of objections serves to inform the undertaking of the objections against its behaviour.⁷⁶ When the undertaking has received the statement of objections it has a voluntary opportunity to reply to the Commission’s statement. The undertaking can first do so in writing and secondly, if necessary, orally.⁷⁷ According to Article 27 of Regulation 1 the Commission is obliged to give the undertaking concerned an opportunity of being heard on the matters to which the Commission has objected. It also states that the Commission shall only base its decision on information which the undertaking has been able to comment. The right to be heard in Commission proceedings includes the right of access to the Commission files, which however has limitations, for instance regarding business secrets of other undertakings that must be protected and confidential internal documents of the Commission. The same limitation is applicable to information enabling complainants to be identified where they wish to remain anonymous.⁷⁸ The access to the file has been interpreted very wide and also includes access to documents which can be used in an exculpatory way by the undertaking, even if they are confidential.⁷⁹

The hearings before the Commission are mainly based on Regulation 773.⁸⁰ It stresses the right to be heard and the access to the file for the undertaking concerned. An especially important implication of the Regulation is that the hearing shall be conducted by a Hearing Officer.⁸¹ The office of the Hearing Officer was created in 1982 in order to make the oral procedure more objective and impartial. Thereby his role is not that of a judge, he does not assess the matters of fact or the arguments put forward, but merely insures

⁷⁴ Joined Cases C-46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859, paragraph 19.

⁷⁵ Luis Ortiz Blanco, *supra* note 60, p. 130 and p. 134.

⁷⁶ *Id.* p. 167.

⁷⁷ C.S. Kerse, *supra* note 58, p. 189.

⁷⁸ T-7/89, *SA Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraphs 53 and 54.

⁷⁹ Luis Ortiz Blanco, *supra* note 60, p. 188 et seq.

⁸⁰ Regulation 773/2004.

⁸¹ *Id.* Article 14.

that the proceedings are done in a proper way.⁸² The Commission adopted a decision in 2001 which further regulates the Hearing Officer and his task.⁸³

According to the preamble of the decision the Hearing Officer shall be:

“[...]an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.”

The hearing officer shall however be attached to the DG responsible for competition matters according to Article 2 of the decision.

This is, at least in my opinion, rather questionable when taking into regard the possibility for him to be impartial, as is the purpose. It is mentioned numerous times in the decision that the procedure is administrative, but as has been discussed there is a certain criminal nature of the decisions, which poses a problem. One could argue that he does not make the decision as such and therefore it should not have any significance. The Hearing Officer does however draw up a general rapport on the hearing and on the conduct of the proceeding. This shall be forwarded to the competent member of the Commission and might thereby be taken into consideration when the Commissioners adopt the decision. The report shall mainly contain how the right to be heard has been followed but the Hearing Officer may also make observations on the need for further information, the withdrawal of certain objections or the formulation of further objections.⁸⁴ C.S. Kerse does however argue that this has been rarely done in the past. Likewise he debates that it is not a decisive factor or a formal opinion which must be taken into account by the Commission before adopting a decision.⁸⁵

Despite this I do find it quite remarkable that there at least *is* such a possibility. I doubt that the Hearing Officer is un-biased, especially with regard to his position, which clearly is strongly connected to the Commission simultaneously as it gives him a possibility of influencing the outcome of the case.

4.4.3 Decisions

After the hearing and the investigation phase the DG IV prepares, with the aid of the Legal Service, a draft decision which is referred to the Advisory Committee on Restrictive Practices and Monopolies. This is regulated in Article 14 of Regulation 1 and shall be done in all cases where the Commission takes a decision about the finding of an infringement of the Competition rules. The Committee shall be composed of representatives of the competition authorities of the Member States. It shall deliver an opinion on the Commissions draft decision, which shall be taken into utmost account when drafting the final decision. The Commission is obliged to

⁸² Luis Ortiz Blanco, *supra* note 60, p. 199.

⁸³ 2001/462/EC, ECSC: Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings.

⁸⁴ *Id.* Article 13.

⁸⁵ C.S. Kerse, *supra* note 58, p. 200 et seq.

inform the Committee of how and to what extent it was taken into account. This procedure gets especially interesting when taking into regard that the opinion by the Committee is not shown to the undertakings concerned. This has been heavily criticised and the argument has been forwarded that the right of defence is not observed by this procedure.⁸⁶ The ECJ has however denied this right for the undertaking in the *Pioneer* case.⁸⁷ The Court held that the opinion was the final stage of the decision process and a right of access would amount to a reopening of the previous stage of the procedure. In the Court's view the undertakings had already had an opportunity to comment on the facts and documents of the case.⁸⁸

In my opinion this procedure is questionable to a high degree. Only the Commission can make their views heard in the meeting with the Committee, which undermines the whole idea behind the right to be heard, especially when the opinion of the Advisory Committee must be taken into serious consideration. The fact that the undertaking has had a possibility of commenting on the facts of the case, does not validate a new proceeding in front of a new body, where only one part can make their voice heard and the other is represented by the documents submitted and transcripts from the hearings. The defendant must also be able to comment on all material used against him in accordance with the principle of contradiction. He shall not be placed in a disadvantage compared to the other party. Otherwise there is a clear violation of Article 6 ECHR and the principle of equality of arms.

After this step in the procedure, DG IV, again with help of the Legal Service, drafts the final decision.⁸⁹ The draft decision will then be sent to the Commissioner of Competition, who will distribute this draft to his colleagues. The *Chefs du cabinet* – the senior assistants to each member – will examine it and only when they have approved it, it can be decided upon in one of the weekly meetings of the Commission.⁹⁰ The decisions taken by the Commission are to be made public. The publication shall state the parties names and the main contents of the decision, which includes the amount of the fines.⁹¹

Commission decisions in competition matters usually contains both declaratory components and enforcing components. The first component deals with the circumstances of the case and the legal basis for the decision, thereby stating the reason for the infringement. The second component contains orders to bring infringements to an end and orders to carry out specific tasks, for instance orders to take specific action on the market or orders to pay penalties.⁹²

⁸⁶ Id. p. 220.

⁸⁷ *SA Musique Diffusion française and others v Commission*, supra note 61.

⁸⁸ Id. paragraphs 34-36.

⁸⁹ Luis Ortiz Blanco, supra note 60, p. 215.

⁹⁰ Valentine Korah, *An Introductory guide to EC Competition Law and Practice*, (Hart Publishing, 2000), p. 174.

⁹¹ Regulation 1/2003, paragraph 30.

⁹² Luis Ortiz Blanco, supra note 60, p. 217 et seq.

As has been shown the Commissioners themselves are not present at the hearing and do not take part of the primary proceedings at all. Still they are the ones who formally takes the decision. The ECJ has however held that this does not deprive the decision of its validity. The *Buchler* case elaborated with this issue.⁹³ The applicant argued that the Commission decision was illegal on the ground that the members of the Commission who were to decide on the fine had not been present at the hearing. The ECJ did however not find this amounting to a defect of the decision, due to that there was nothing preventing this system within the context of an administrative procedure. Further it held that even though the complete file was not sent to each member of the Commission but only information regarding the essential points, they at least had access to the complete file.⁹⁴

I find this last step of the procedure direct contrary to Article 6 ECHR and the right to a fair trial. The “judges”, who are partial, does not take part of the hearing and thereby the undertaking can not put forward his arguments in their presence, but only ventilate his views through transcripts of the hearings. I do not consider this to fulfil the requirements of an adversary procedure, despite the fact that he had the chance to comment on the material before.

4.4.4 Fines and Penalty Payments

The fines are regulated in Article 23 of Regulation 1 and in the Guidelines on the method of setting fines.⁹⁵ The purpose of the fines is two-fold. They shall both punish past acts and have a deterrent effect for the future. The deterrent effect’s objective is not solely for the undertaking in question but also for others who might be tempted to take alike actions.⁹⁶

According to Article 23, the Commission may impose a fine if an undertaking has infringed Article 81 or 82 of the Treaty, if a decision concerning interim measures has been contravened or if an undertaking fails to comply with a commitment made by a binding decision. When fixing the amount of the fine, gravity and duration of the infringement shall be considered. There is however a limit and the Commission can not impose a fine higher than 10% of the annual turnover of an undertaking.

The guidelines have the purpose to ensure the transparency and impartiality of the Commission’s decisions and deals with the question of fines in more detail. As mentioned above the gravity and the duration of the infringement are the decisive factors when determining the fines. The gravity assessment is dependant on the impact on the market, the geographical scope and the

⁹³ C-44/69, *Buchler v. Commission*, [1970] ECR 733.

⁹⁴ Id. Paragraphs 19-23.

⁹⁵ 1998 Guidelines on the method of setting fines, OJ C 9, 14.01.98.

⁹⁶ Luis Ortiz Blanco, *supra* note 60, p. 221.

nature of the infringement.⁹⁷ The result can be referred to one of three different categories; minor, serious and very serious infringements. The scale enables the Commission to apply different amount of fines depending on for instance the involvement of the different undertakings. The duration assessment is also divided into three different categories; short (less than one year), medium (one to five years) and long term (more than five years) infringement.⁹⁸ Normally an amount will be determined for both of the two factors. These two amounts will then be added together, which forms the basic amount. This amount can be adjusted depending on aggravating and attenuating circumstances. Important to mention is that the examples enumerated in the article are not exhaustive.

In Article 24 the periodic penalty payments are governed. Their objective is to force the undertaking to comply with the decision.⁹⁹ The amount decided upon has a limit; it can not exceed 5% of the average daily turnover. The proceeding involves two decisions, one stating the threat of a fine and the other determining the time of infringement and thus the final amount to be paid.

The collection of the fines are administered by the DG XIX, Budgets and DG XX, Financial Control. If the fines are not paid within the time-limit a notice will be sent requiring payment. If the undertaking still refuses to pay, the matter is handed over to the Legal Service who starts a proceeding in the competent Member State. Usually, it is not the legal service themselves who handles the case but it is entrusted to an independent law firm.¹⁰⁰

4.4.5 Judicial review

There are basically three grounds of challenging a Commission decision:

1. Article 229 ECT, unlimited jurisdiction,
2. Article 230 ECT, four grounds for an annulment of a decision,
3. Article 231 ECT, legality on the Commissions failure to act.

The first and second alternative challenges positive acts of the Commission whilst the third challenges the Commissions failure to act.¹⁰¹ In the following I will limit the examination to the two first alternatives.

Article 31 of Regulation 1 also addresses the review by the Court of Justice. According to it, the ECJ has got unlimited jurisdiction to review the decisions by the Commission in competition sanction matters. The Court can cancel, reduce or increase the penalty imposed. The notion of “unlimited jurisdiction” is derived from Article 229 of the ECT. It is originally a French concept drawn from administrative law and authorises the Court to deal fully with the matter between the parties and thus go

⁹⁷ 1998 Guidelines, supra note 95, Article (1) A.

⁹⁸ Id. Article (1) B and C.S. Kerse, supra note 58, p. 312.

⁹⁹ C.S. Kerse, Id. p. 312.

¹⁰⁰ Luis Ortiz Blanco, supra note 60, p. 313.

¹⁰¹ C.S. Kerse, supra note 58, p. 380 and 403.

further than only the annulment of an act. The articles were originating from this distinction but during the lapse of time they have developed differently and they can not be said to be so extensive any longer. An applicant can thus not escape the limits of Article 230 ECT and seek annulment on wider grounds.¹⁰² He must thereby adhere to the enumeration in Article 230 ECT, 2nd paragraph;

“[...]lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law related to its application, or misuse of powers.”

The CFI has touched upon the issue of jurisdiction in the *Italian flat glass* case.¹⁰³ The Court held that the unlimited jurisdiction de facto was limited to the penalties provided for in regulations made by the Council. Therefore the Court were not to consider the entire file but only the parts relevant for a review of the lawfulness of the decision. The Court found that it did not have jurisdiction to remake the contested decision even though it has the capability of partially annulling a Commission decision.¹⁰⁴

There seems to be quite a discussion about the actual jurisdiction of the Community Courts in this matter. Korah criticises that the appeals from the Commission is limited to judicial review and due to this the CFI can not reconsider the merits of the case.¹⁰⁵ C. S. Kerse does however hold that the Court in fact is capable of considering all aspects of the case and all relevant questions of law and fact.¹⁰⁶ This is an opinion which Lidgard adheres to.¹⁰⁷ Blanco, on the other hand, forwards the view that the ECJ limited its reasoning in the *Remia* case to the grounds of invalidity enumerated in Article 230 due to the often very complex economic matters dealt with, whilst the CFI has been more inclined to examine in detail the facts on which the Commission has adopted the decision.¹⁰⁸

The realistic answer seems to be that the CFI has jurisdiction to examine both the facts and the law but in case of complex economic assessments they will limit themselves to only examine the four circumstances in Article 230 ECT.¹⁰⁹ If the judgement is appealed, the ECJ only has the jurisdiction to review the legality of the CFI judgement.¹¹⁰ The ECJ can only examine the evidence if they have been misconstrued in the earlier judgement.¹¹¹

¹⁰² C.S. Kerse, supra note 58, p. 381.

¹⁰³ Joined cases T-68 and 77-78/89, *Societa Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission*, [1992] ECR II-1403.

¹⁰⁴ Id. paragraph 318 et seq.

¹⁰⁵ Valentine Korah, supra note 90, p. 186 et seq.

¹⁰⁶ C.S. Kerse, supra note 58, p. 381.

¹⁰⁷ Hans Henrik Lidgard, supra note 56, p. 445.

¹⁰⁸ Luis Ortiz Blanco, supra note 60, p. 320 et seq and C-42/84, *Remia BV and others v Commission*, [1985] ECR 2545, paragraph 34.

¹⁰⁹ Hans Henrik Lidgard, supra note 56, p. 445.

¹¹⁰ C-219/95, *Ferriere Nord SpA v Commission*, [1997] ECR I-4411, paragraph 31.

¹¹¹ C-7/95, *John Deere Ltd v Commission*, [1998] ECR I-3111, paragraph 22.

My personal view is that there ought to be a possibility for both of the Courts to examine all the circumstances of the case. As the system is today there could be an appeal without any further consideration of the facts of the case, something that I would regard as a factual denial of justice. The reasoning from the *Remia* case is however not that inconceivable. The judges of the Court might not have the relevant competence to examine the complex details of the economic assessment. But still a restriction on the Court's jurisdiction would be contrary to the jurisdiction factor enshrined in the right to an independent and impartial tribunal. The Court in such a case would not have the competence to decide upon all relevant questions of both fact and law. If one would address the ECHR there would thus be a breach of Article 6.

Another important issue in the discourse is the question of persons with the capability of *locus standi*. The question is however very wide and it only lies in the interest of this thesis to examine if an undertaking affected by a Commission decision can seek annulment in the Court. Somewhat simplified the answer is quite concise; Yes. The "direct and individual concern" requirement in Article 230 ECT, 4th paragraph would apply to a fined undertaking. There does thus exist an access to the court in the meaning of the ECHR.

4.5 Concluding remarks

As has been shown, the Community Competition procedure in front of the Commission lacks several important procedural safeguards. The situation is, in my view, very problematic. The undertaking comes into a situation where he can not defend himself against the accusations against him, but has to rely on transcripts and documents, which very well could be interpreted contrary to their factual meaning. There is also some problems involved in the judicial review by Courts. The proceeding can thus not be said to fulfil the demands which the ECHR requires for a procedure of a criminal nature. Due to the inadequacy of the EC system, it is appropriate to examine the US Antitrust system and compare them, in order to find creative solutions for the issues that have arisen.

5 US Anti-Trust law

5.1 Anti-trust legislation

The most important legislation for Antitrust in the US is the Sherman Act and the Clayton Act, which both will be dealt with below. There is however also another Act which might raise interest; the Robinson-Patman Act. This act mainly concerns price discrimination and was once used to a high extent. Its importance has however decreased and few government actions are brought under it today.¹¹² Due to this I will not further examine this act.

5.1.1 The Sherman Act

The Sherman act was passed already in the year 1890 by the US Congress. The rules were given the name “anti-trust” because their specific target was the increasing use of trusts to set prices and divide up markets.¹¹³ When passing it, the legislators also worried about excessive private power and expressed a clear preference for free enterprise and unrestricted competition.¹¹⁴

The most important provisions of the 7 Sections in the act is Section 1 and Section 2.¹¹⁵ The first section focuses on restrictive agreements while the second deals with the enlargement or misuse of monopoly power. It is stated in Section 1 that “every contract [...] in restraint of trade or commerce [...] is declared to be illegal”. The person responsible for the contract or acting under it shall be deemed guilty of a felony and can be punished by a fine. A company can be punished up to 10 000 000 dollars while “any other person”, i.e. a natural person, can be fined up to 350 000 dollars or imprisoned up to 3 years. Section 2 regulates, as mentioned, the question of monopolies. It prohibits both attempts, combinations and conspiracies to monopolize. The same possibilities of punishment is used in this provision as in Section 1.

The cornerstones of the Sherman Act are the Rule of Reason and the *Per se* rule. The Rule of Reason in Antitrust law derives from the famous case *Standard Oil Co.*¹¹⁶ Before this case the courts had a very conservative and firm view on the expression “every contract”. The case changed this. The Court held that the standard of reason had been used before by the courts and should therefore also be used when basing a judgement on the Sherman

¹¹² Ernest Gellhorn, *Antitrust Law and Economics*, (Nutshell Series – West Publishing Company, 1990), p. 404 et seq.

¹¹³ Giuliano Amato, *Antitrust and the Bounds of Power – The dilemma of liberal democracy in the history of the market*, (Hart Publishing, 1997), p. 7 et seq.

¹¹⁴ Ernest Gellhorn, *supra* note 112, p. 21.

¹¹⁵ Section 1 and 2 are enclosed in Supplement B.

¹¹⁶ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

Act. The Rule of Reason was thereby held to be the measure used for determining whether an act did fall under the prohibitions in the Act.¹¹⁷ The principle has thereafter been involved in innumerable cases, amongst others in the case *National Society of professional engineers*.¹¹⁸ The Court discussed the principle and found it “[...]to give the Act both flexibility and definition”.¹¹⁹ The inquiry mandated by the principle was whether the agreement in question was one that promoted competition or one that suppressed competition.¹²⁰

The *Per se* rule evolved through experience, in the interest of judicial economy and originated in the case *Trenton Potteries*.¹²¹ It has the consequence that some categories of practices have been adjudged to be unreasonable as a matter of law and thus illegal *per se*. When such a behaviour is before the court it is enough to only find the existence of such a prohibited practice to conclude that a violation of the Sherman Act has occurred.¹²²

The interrelation between the two rules is worth mentioning in order to clarify the situation and avoid misunderstandings further on; the rule of reason can be applied to restrictions, which the court has found not constituting a *per se* infringement of the Antitrust rules.¹²³

5.1.2 The Clayton Act

The US Congress passed the Clayton Act in 1914 in order to clarify some issues in the Sherman Act and strengthen its enforcement. It did however not try to replace it, but only supplement it.¹²⁴

There are specifically four sections of interest; Sections 2, 3, 7 and 8.¹²⁵ Section 2 concerns the issue of price discrimination and states that it shall be illegal to discriminate in price between different purchases of a similar “grade and quality”. The next Section of interest, number 3, deals with tying and exclusive dealing contracts. In Section 7 mergers are regulated. It forbids the acquiring of stocks or other share capital of an undertaking if such a purchase would substantially lessen competition. Finally, Section 8 concerns interlocking directorates. According to this rule no person is allowed to serve as director or officer in two corporations that are competitors.

¹¹⁷ Id. p. 60.

¹¹⁸ *National Society of professional engineers v. United States*, 435 U.S. 679 (1978).

¹¹⁹ Id. p. 688.

¹²⁰ Id. p. 691.

¹²¹ *US v. Trenton Potteries Co.*, 273 US 392 (1927).

¹²² Walter Treumann, Martin Peltzer and Angelika M. Kuehn, *US Business Law*, (Verlag Dr. Otto Schmidt KG, 1990), p. 297.

¹²³ Jens Fejø, *Monopoly Law and Market*, (Kluwer Law and Taxation Publishers, 1990), p. 89.

¹²⁴ Id. p. 23 et. seq.

¹²⁵ The relevant parts of the Sections are enclosed in Supplement C.

In my opinion, the two Acts above seem from a *prima facie* view to have much in common with the EC System. There are however also differences. There is no clear *per se* rule within EC Competition law, even though the treatment of “hard-core” violations does not differ in a larger extent from the way *per se* violations are treated.¹²⁶

5.2 Enforcement Agencies

When discussing the issue of Antitrust in the US it is important to have in mind that there are quite different ways of enforcement of the rules. Three governmental bodies are authorized to enforce the federal antitrust laws; the Department of Justice, the FTC and the state attorneys general.¹²⁷ Due to the delimitation to Federal law, only the two first mentioned will be elaborated with in the following examination. The two enforcement agencies have more overlapping responsibilities than exclusive, except for certain provisions. Some argue that the system promotes “competition” between the agencies and thereby promotes efficiency, while others are critical to the system and considers it to create unnecessary workload and inconsistency.¹²⁸

According to the Clayton Act there is however also a possibility for private parties to enforce the rules; injured parties can take action for treble damages and lawyers fees.¹²⁹ The private party must prove injuries to his business which reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. A mere demonstration that the injury is casually linked to the illegal presence at the market is not enough.¹³⁰

It follows from Article 5 of the Sherman Act that a favourable verdict in a government antitrust action is regarded as a *prima facie* evidence in a subsequent private antitrust action. This means that the plaintiff only needs to show damage and standing, which usually forces the defendant to reach a settlement before a trial is commenced.¹³¹

¹²⁶ Jens Fejø, *supra* note 123, p. 365.

¹²⁷ Diane P Wood, *User-Friendly Competition Law in the United States* in Piet Jan Slot and Alison McDonell (ed.), *Procedure and Enforcement in E.C. and U.S. Competition Law*, (Sweet and Maxwell, 1993), p. 8.

¹²⁸ Barry E Hawk and James D. Veltrop, *Dual Antitrust enforcement in the United States: positive or negative lessons for the European Community* in Piet Jan Slot and Alison McDonell (ed.), *Id.* p. 21 et seq.

¹²⁹ 15 U.S.C.A. § 15.

¹³⁰ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), 477 et seq.

¹³¹ Spencer Weber Waller, *The incoherence of punishment in Antitrust*, 78 Chi. –Kent L. Rev. 207, p. 218.

5.2.1 Department of Justice - Antitrust Division

The Antitrust Division (AD) within the Department of Justice (DOJ) has the responsibility for the Antitrust enforcement and is governed by the Assistant Attorney General. The AD is separated into five areas which in turn are divided into sections and offices. Each of the different areas are governed by a Deputy Assistant Attorney General, who reports directly to the Assistant Attorney General.¹³²

The AD has the exclusive authority to enforce the criminal provisions of the Sherman Act. It has this responsibility primarily because of its role as the nation's principal law enforcement body.¹³³ The primary target of such proceedings is usually *per se* prohibitions, such as price fixing, bid rigging and schemes for market allocation.¹³⁴ The AD does however also have jurisdiction to bring civil actions, which are more likely when the legal standards are more difficult to discern.¹³⁵ The civil actions mostly end up in a so called Consent Decree, which is a settlement that is filed to the court and incorporated in a judicial order. The possibility of making such a settlement exists throughout the entire proceeding; before, during and after the trial.¹³⁶ In the forthcoming description I will only examine the criminal procedure in front of the AD.

5.2.2 The Federal Trade Commission

The FTC Act was passed simultaneously as the Clayton Act in 1914. Through the Act an impartial and specialized administrative unity was formed.¹³⁷

The 1st Section of the FTC Act creates the Commission and states that it shall be composed of five Commissioners, who will be appointed for a seven year term.¹³⁸ Not more than three of them can be members of the same political party. There is also a prohibition for the Commissioners to engage in any other business, vocation or employment. They must thus be totally independent. Important to notice is that a Commissioner can be removed by the President for inefficiency, neglect of duty or malfeasance in office.

¹³² Antitrust Division Organizational Chart, <http://www.usdoj.gov/atr/org.htm>, 040514.

¹³³ Barry E Hawk and James D. Veltrop, *supra* note 128, p.22.

¹³⁴ Gary R. Spratling, *Fines in Criminal Antitrust cases*, in Piet Jan Slot and Alison McDonnell (ed.), *supra* note 127, p. 76.

¹³⁵ Phillip Areeda and Louis Kaplow, *Antitrust Analysis*, (Aspen Law and Business, 1997), p. 55.

¹³⁶ *Id.* p. 63.

¹³⁷ The Act is quite extensive and detailed in its Sections, which unfortunately means that it cannot be enclosed as a supplement.

¹³⁸ 15 U.S.C.A. § 41.

Section 5 in the FTC Act is the acts sole substantive Antitrust provision and provides:

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”¹³⁹

According to the 2nd paragraph of the Section the Commission is empowered and directed to prevent the use of unfair methods of competition that affects commerce. The FTC has direct competence to enforce the FTC Act and the Clayton Act.¹⁴⁰ The paragraph has been interpreted as giving the Commission jurisdiction also in matters of violation of the Sherman Act.¹⁴¹ The FTC does however not have the competence to impose fines or award compensatory damage to private parties. They are regarded as an administrative agency and their powers are thus limited to issuing cease and desist orders.¹⁴²

The FTC’s work is divided into three different Bureaus; Consumer Protection, Competition and Economics. The work is aided by the Office of General Counsel and seven regional offices. The Bureau of Competition is responsible for the issues concerning Mergers and Antitrust violations, but also has the task of being a source of information and expertise to the economy. This involves developing guidelines and giving the business community information about the policies in order to facilitate compliance with the rules.¹⁴³

5.3 General characteristics of the procedure

Important to stress is that the proceeding brought by the AD is a regular criminal proceeding and thus of an adversary nature and conducted in a court. The AD does not have the authority to make rules and enforce them in an administrative manner, but it must instead apply to the courts for a finding of illegality and imposition of sanctions. The AD does however effect the political dimension of antitrust by issuing different guidelines forwarding different areas where enforcement will be concentrated.¹⁴⁴

The proceedings in front of the FTC are on the other hand of an administrative nature. The FTC is authorized to issue its own rules on interpretation of statues which it enforces. It also has the power to adjudicate a violation of those rules. As has been mentioned above, it has however not the possibility of issuing criminal or civil penalties,

¹³⁹ 15 U.S.C.A. § 45.

¹⁴⁰ Phillip Areeda and Louis Kaplow, *supra* note 135, p. 68 et seq.

¹⁴¹ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), p. 694 et seq.

¹⁴² Diane P Wood, *supra* note 127, p. 9.

¹⁴³ Guide to the Federal Trade Commission, <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.htm>, 040514.

¹⁴⁴ Walter Treumann, Martin Peltzer and Angelika M. Kuehn, *supra* note 122, p. 289.

nevertheless it does have the competence to issue cease and desist orders. Subsequent breaches of these orders can result in heavy penalties.¹⁴⁵

The structure of the US federal court system can be briefly mentioned. The criminal antitrust cases are first tried in one of the 94 Districts, then the case can be appealed to one of the 12 Circuit Courts of Appeals and finally the Supreme Court can hear an appeal if it believes that an important legal issue is at stake. The FTC administrative proceedings can in turn only be tried in the two last mentioned instances.¹⁴⁶

It is already quite visible that the differences between the EC and the US systems are extensive. The European Commission can be said to have influences from both of the two organs in the US system. It has a striking resemblance with the FTC concerning both the structure of the Commission as such, and its framework of tasks. The significant difference is that the FTC can not adjudicate fines, which is dependant on its nature of being an administrative body. The AD does however more work as a prosecutor even if it has the capability to also bring civil suits. The likenesses here are however a little more farfetched. The only certain thing is the competence to handle the criminal cases. Due to these facts I find it necessary to show the procedural aspects both in the AD proceedings and in the FTC proceedings. This in order to examine the differences, but also likenesses between the US and the EU system and thereby find satisfactory comparable parameters.

5.4 The decision taking process

The process is divided as far as possible according to the division in chapter 4.4 in order to facilitate the overview. The outline has however been somewhat altered due to the specific circumstances of the US system.¹⁴⁷

5.4.1 Investigative procedure and pre-trial hearings

5.4.1.1 Criminal Proceedings

A criminal procedure generally begins after a complaint by some source, for instance a competitor, employee or customer. The AD examines the probability for the infringement and if it is found plausible, a grand jury investigation will be commenced. The grand jury consists of 16-23 individuals who are there to safeguard against abusive prosecution. This was at least the purpose of the system, today the grand jury is more of an evidence collector for the government.¹⁴⁸ Federal investigations often use

¹⁴⁵ Id. p. 291.

¹⁴⁶ Donald I Baker, *Investigation and Proof of an Antitrust Violation in the United States – a Comparative look* in Piet Jan Slot and Alison McDonell (ed.), supra note 127, p. 145.

¹⁴⁷ A structural chart of the Decision-taking process is enclosed in Supplement D.

¹⁴⁸ Donald I Baker, supra note 146, p. 149 et seq.

this procedure in addition to the police investigations but the grand jury has several advantages:

1. subpoena authority
2. lay participation
3. closed proceedings
4. immunity grants
5. grand jury secrecy
6. prosecutor leads the investigation

The prosecutor serves as the primary legal advisor and decides which witnesses to be called, he questions them and has the power over the granting of immunity. The subpoenas are the most important tool to build a case. Usually they are used in two steps, first for accessing documents, secondly for compelling testimony.¹⁴⁹ However an individual can not be forced to give information which might incriminate him or her, according to the Fifth Amendment to the US Constitution. Because of this, the grand jury usually calls low-level employees and gives them immunity from prosecution and thereby they can not refuse to give information. Important to notice is that the right against self incrimination only applies to natural persons and hence does not apply to legal entities.¹⁵⁰

Worthy of mentioning is that the witnesses before the grand jury does not have the right to have a council present.¹⁵¹ This is derived from the *Mandujano* case, where it was held that the witness does have the right to a counsel but the counsel may not be inside the grand jury room and thus not present in the hearings.¹⁵² There were however two dissents in the judgement that contended that there was a right to counsel because the questioning “inextricably involved” his privilege against self incrimination.¹⁵³

5.4.1.2 Administrative Proceedings

The FTC starts a procedure after receiving information from consumers or businesses but even from Congressional inquiries and newspapers. Generally the proceedings are non-public in order to protect both the investigation and the companies involved.¹⁵⁴ The Commission has the power to gather and file information about certain businesses. They can also issue general or special orders for reports or answers in writing to specific questions from businesses.¹⁵⁵ The FTC has the possibility to issue administrative subpoenas¹⁵⁶ but the administrative subpoena is also, like the grand jury subpoena subject to certain restrictions, for instance the right against self incrimination.¹⁵⁷ But as has been mentioned, the right against

¹⁴⁹ Ellen S. Podger and Jerold H. Israel, *White Collar Crime – In a Nutshell*, (West Publishing Co., 1997), p. 243-246.

¹⁵⁰ *U.S. v. White*, 322 U.S. 694 (1944), p. 698 et seq.

¹⁵¹ Donald I Baker, *supra* note 146, p. 150.

¹⁵² *U.S. v. Mandujano*, 425 U.S. 564 (1976), p. 581.

¹⁵³ *Id.* p. 602-609.

¹⁵⁴ Guide to the Federal Trade Commission, *supra* note 143.

¹⁵⁵ 15 U.S.C.A. § 46.

¹⁵⁶ Donald I Baker, *supra* note 146, p. 154.

¹⁵⁷ Ellen S. Podger and Jerold H. Israel, *supra* note 149, p. 283.

self incrimination does not apply to companies. Nevertheless it does apply to natural persons who are forced to deliver documents *if* the documents in question could provide the Government with a link in the chain of evidence needed to prosecute him or her personally for a crime.¹⁵⁸

Once an investigation has been completed the FTC will generally afford the parties a possibility to settle under a Consent Order, roughly similar to the Consent Decree used in civil actions by the AD. The FTC notifies the parties about the terms of the cease and desist order. The parties can then agree to those terms without admitting a violation of the law. In situations where the Consent Order is not made available by the FTC or in situations where the negotiations fail, formal proceedings are initiated and tried at a hearing by an Administrative Law Judge (ALJ).¹⁵⁹ The FTC also has the possibility in a failing negotiation situation to seek injunctive relief in the federal courts.¹⁶⁰

What is remarkable to notice from the above is that the right against self-incrimination is applied both in the criminal *and* the administrative proceeding, if there is a possibility that the material might be used against a natural person. There is however no such right for a company, which is quite similar to the European system.

5.4.2 Decisions, fines and penalties

5.4.2.1 Criminal Proceedings

In the AD proceedings the usual criminal procedure before a court is used. In the proceeding the AD will primarily rely on documents subpoenaed from the defendants and on trial testimony from witnesses who earlier have been given immunity in the grand jury hearings. The testimony in the grand jury is not admissible in the proceeding but can be used to show inconsistency or to refresh recollection.¹⁶¹

As has been touched upon there is a possibility for fining both the corporation and the management of it with criminal sanctions. The development towards a corporate criminal liability begun with strict liability cases which did not require *mens rea*.¹⁶² This doctrine was extended to also cover crimes with an intent element in the case *New York Central*.¹⁶³ The personal liability for the employees has evolved over time and has its basis in the idea that even if an agent is acting on behalf of a corporation, it does not release the agent from being held criminally accountable.¹⁶⁴ The

¹⁵⁸ Id. p. 306 et seq.

¹⁵⁹ Phillip Areeda and Louis Kaplow, supra note 135, p. 69 et seq.

¹⁶⁰ Guide to the Federal Trade Commission, supra note 143.

¹⁶¹ Donald I Baker, supra note 146, p. 151.

¹⁶² Ellen S. Podger and Jerold H. Israel, supra note 149, p. 16.

¹⁶³ *New York Central & Hudson River Railroad Co. v. U.S.*, 212 U.S. 481 (1909) p. 494 et seq.

¹⁶⁴ Ellen S. Podger and Jerold H. Israel, supra note 149, p. 30 et seq.

responsible corporate officers (i.e. the management) have been held liable by a statute of a “knowing” element, even if they had no factual knowledge of the circumstances.¹⁶⁵ The mere fact that one is in such a position does however not constitute knowledge,¹⁶⁶ but where knowledge is an element of the offence it can often be inferred from circumstantial evidence.¹⁶⁷

Due to that the usual criminal procedure is used there are quite many safeguards that are applied, for instance the right to assistance of a counsel, the right to a jury trial and the right to an impartial judge and jury.¹⁶⁸ Still, the possibility for a jury trial does not mean that everyone demands it, many litigants recognize that a jury might not be suitable for determining the complex questions in an antitrust case. If the defendant would have a weak case he would however probably demand a jury trial and hope to gain from their ignorance.¹⁶⁹

I find the use of a jury in the trial interesting when considering the often very advanced economic reasoning present in antitrust cases. Especially when regarding the EU system where there are very competent judicial scholars examining the questions and still sometimes find them too advanced. It is however a right for the defendant to vindicate and thereby he can decide when to apply it, hence he will not involuntarily be negatively affected by their ignorance.

An important element in the criminal antitrust proceeding is the intent of the defendant which must be established by evidence and inferences drawn from those. This wrongful intent can not be drawn from the mere fact that there has been an effect on prices.¹⁷⁰ When taking into account that the burden of proof is of a “beyond a reasonable doubt” standard in the proceedings, due to their regular criminal nature, it can be relatively difficult to prove a violation of the antitrust provisions.

When adjudicating the fines in the cases the courts must be within the range set by the U.S. Sentencing Commission’s Sentencing Guidelines. The Congress created this independent Commission in 1984 in order to get similar sentences for similar crimes. The Sentencing Guidelines have significantly reduced the judge’s discretion by setting up specific ranges for both fines and imprisonment.¹⁷¹

¹⁶⁵ *Id.* and *U.S. v. Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984), p. 670.

¹⁶⁶ *U.S. v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), p. 51-54.

¹⁶⁷ Ellen S. Podger and Jerold H. Israel, *supra* note 149, p. 33.

¹⁶⁸ These rights are all derived from the Sixth Amendment to the US Constitution. For a more detailed examination of these rights see Jerold H. Israel and Wayne R. LaFave, *Criminal Procedure in a Nutshell – Constitutional Limitations*, (West Publishing Co. 1988), chapter 7 et seq.

¹⁶⁹ Phillip Areeda and Louis Kaplow, *supra* note 135, p. 93.

¹⁷⁰ *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), p. 435.

¹⁷¹ Gary R. Spratling, *supra* note 134, p. 76.

As have been said before there are limits in the Sherman Act for the amount of fines that can be adjudicated. The ceiling for the corporate criminal fines has however been raised by the US Congress in 1998 from 10 million dollars to 100 million dollars per offence.¹⁷² Still, this limit is only for each separate violation, which means that the fines can increase when there are convictions on multiple accounts.¹⁷³ The determination of each fine is very complex and is done by calculating the fine range for the violation, which is based on the offence and the offender. This is then adjusted with aggravating factors, such as prior history and violation of an order, and mitigating factors, for instance self-reporting, cooperation and acceptance of responsibility.¹⁷⁴ In the late 1990s the AD investigated and prosecuted one of the largest cartels known; the cartel of vitamin manufacturers, where the total amount of the fines of all seven defendants approximately was 1 billion dollars.¹⁷⁵

The Guidelines also point out that prison terms should be more common and somewhat longer than were the practice before the guidelines. There is a requirement that, absent adjustments, six months or longer should be adjudicated in the great majority of cases that are prosecuted and the courts are given the mandate to impose “considerably longer sentences” within the guideline ranges.¹⁷⁶ Between the years 1999 and 2003 more than thirty individual antitrust offenders received jail sentences for one year or more, with an average sentence of more than eighteen months.¹⁷⁷

5.4.2.2 Administrative Proceedings

As mentioned before, there is a possibility to an administrative trial before an ALJ in a FTC proceeding. This is also known as a “Part III” proceeding. The ALJ is a special employee of the FTC, which is “independent” from both the Commission and the Bureau of Competition. The proceedings are quite similar to those in an ordinary US district court without a jury.¹⁷⁸ The FTC is represented by a “complaint counsel” from FTC’s Bureau of Competition in the proceedings. Each side issues requests for documents and witnesses and then, ultimately, they have a full trial in front of the ALJ. The ALJ tries both the facts and the law in the proceedings and eventually issues an “Initial Decision”. This decision can be appealed to the full Commission on both facts and law by either of the parties to the case. When the Commission examines the case they have the possibility to do a new review of the facts and law including receiving briefs and hearing oral

¹⁷² João Pearce Azevedo, *Crime and Punishment in the fight against cartels: the Gathering Storm*, E.C.L.R. 2003:8 p. 405.

¹⁷³ United States Sentencing Guidelines Manual § 2.R.1.1, <http://guidelinelaw.com/fsglaw/>, 040516.

¹⁷⁴ Gary R. Spratling, supra note 134, p. 78-79 and 83 et seq.

¹⁷⁵ Spencer Weber Waller, supra note 131, p. 221 et seq.

¹⁷⁶ United States Sentencing Guidelines Manual § 2.R.1.1, supra note 173.

¹⁷⁷ Lawrence K Gustafson, Brian M. Collins and Brian McKay, *Criminal consequences of Anticompetitive Conduct*, 45 S. Tex. L. Rev. 89 (2003), p. 94.

¹⁷⁸ Donald I Baker, supra note 146, p. 156.

arguments. They can thus be said to function as both a trial and an appellate court.¹⁷⁹

Another subject of interest is the burden of proof in the administrative proceedings. The FTC staff bears the burden of proof under a “preponderance of evidence” standard. This means that there is a lower threshold than in criminal proceedings. The evidence does only have to be “more convincing” or “more probable than not”.¹⁸⁰

When examining this procedure one is struck by the close resemblance to the proceedings in front of the European Commission. The hearings in front of the ALJ is similar to those in front of the Hearing Officer, who also issues a report to the Commission. Due to their close resemblance they can also be said to have the same disadvantage; the ALJ is supposed to be impartial but he is still working in the FTC. The possibility for the FTC Commissioners to do a re-examination of the case and even hear oral arguments is however a better system than that applied in the EC, due to the adversary nature of such a proceeding. It can also be mentioned that the persons in the FTC Commission are very skilled in the subject of Antitrust law, which is different to the European Commissioners who does not have this as a pre-requisite for being appointed.

There is an important difference between the systems; the FTC does not have the competence to adjudicate fines, a power which the European Commission possesses. The FTC instead has the possibility of applying to a court for enforcement of the orders. If the order becomes final then every day of disobedience can incur a civil penalty of up to 5000 dollars.¹⁸¹

Another issue that is interesting in this context is that the FTC administrative litigation is well-known to be a forum for expert adjudication of antitrust issues.¹⁸² Put in an European discussion this is similar to the proceedings in front of the DG IV, which without a doubt is of a very high level of expertise. This is quite contrary to the US criminal proceeding where there can be laymen deciding the case. One could thus ask which is to prefer, a trial where laymen are involved when adjudicating the fines or a proceeding where the persons deciding the case are very high skilled in the subject. I believe that a mixture of the two would be to prefer, thus a court with very high level of knowledge.

¹⁷⁹ D. Bruce Hoffman and M. Sean Royall, *Administrative Litigation at the FTC: Past, Present and Future*, (2003) 71 Antitrust L.J. 319, p. 322.

¹⁸⁰ Donald I Baker, *supra* note 146, p. 157.

¹⁸¹ Phillip Areeda and Louis Kaplow, *supra* note 135, p. 70.

¹⁸² D. Bruce Hoffman and M. Sean Royall, *supra* note 179, 327.

5.4.3 Judicial review

5.4.3.1 Criminal Proceedings

The judgements in criminal Antitrust proceedings are subject to judicial review by the US Court of Appeals, where the appeals are handled in the ordinary way.¹⁸³ The jury's verdict is essentially final to the facts. The Court of Appeals does not review the evidence as long as there were some evidence in the previous trial supporting the verdict. Most appeals instead concern legal questions about jury instructions and evidentiary questions, for instance questions of failure to exclude certain evidence.¹⁸⁴

When discussing appeals in the US it is essential to be aware of the Double Jeopardy clause in the Fifth Amendment to the US Constitution. This prevents the defendant of being tried again for a crime when he has been found innocent by the first jury. Jeopardy attaches in jury trials when the jury is "empaneled and sworn".¹⁸⁵ Once the trial has reached the point of jeopardy there are thus constitutional difficulties of retrial on the same charge. The prohibition is however not absolute and there are possibilities for retrial for instance in the case of a mistrial.¹⁸⁶ The same applies in cases where the jury is unable to reach an unanimous verdict. But if the Government loses that is essentially the end of the case.¹⁸⁷

5.4.3.2 Administrative Proceedings

FTC decisions are also reviewable by the Federal Courts of Appeals. The courts have jurisdiction to review and affirm, modify or vacate FTC orders.¹⁸⁸ The FTC's decisions are however subject to a more deferential review than that applied to district court judgements.¹⁸⁹ The findings of fact are reviewed under the "substantial evidence" standard which only examines whether there is evidence in the record that "a reasonable mind might accept as adequate". The court's task is instead to resolve the legal issues presented, i.e. the identification of legal standards and their application to the facts found. Nevertheless the court must, according to administrative law, consider the same legal rationale as the FTC and can not consider other reasons why the practice might be deemed unfair.¹⁹⁰

The scope of the judicial review by the courts is however not entirely uniform. When taking into regard that the FTC enforces the Sherman Act and the Clayton Act concurrently with the DOJ there might be little room

¹⁸³ Phillip Areeda and Louis Kaplow, supra note 135, p. 95.

¹⁸⁴ Donald I Baker, supra note 146, p. 152.

¹⁸⁵ Crist v. Bretz, 437 U.S. 28 (1978), p. 38.

¹⁸⁶ Jerold H. Israel and Wayne R LaFave, supra note 168, p. 450.

¹⁸⁷ Donald I Baker, supra note 146, p. 152.

¹⁸⁸ Phillip Areeda and Louis Kaplow, supra note 135, p. 70.

¹⁸⁹ D. Bruce Hoffman and M. Sean Royall, supra note 179, p. 324.

¹⁹⁰ FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), p. 454.

for different standards and an appellate court might review a FTC decision in almost the same way as a trial judgement.¹⁹¹

The appeals system can thus be said to have some of the same issues that arose when examining the European System. The courts are somewhat limited in their re-examination which can be considered contrary to the right to a fair trial. I personally find it important to stress the need for a complete re-assessment of both fact and law in the cases. I do however acknowledge the difficulties of this especially when regarding the lack of expertise in the courts and the higher costs the extended proceedings would cause.

5.5 Concluding remarks

The US system is a very complex apparatus which is divided into two different procedures on the federal level. When adjudicating fines the conduct is done in a criminal proceeding, which ensures the procedural safeguards for the defendant and ensures him a fair trial. On the other hand when deciding cease and desist orders, it is a purely administrative proceeding which surely can be said to give the DOJ and AD wider frames to work within.

From a *prima facie* view there does not seem to be many problems of the kind found when examining the EC system. This is mostly due to the dual structures of the system. There is some criticism to the system but it is not of the same altitude as the one put forward against the EC system. There might thus be some implications of the US Antitrust system that could be taken into account when discussing the EC Competition system and the issues that have arisen.

¹⁹¹ Phillip Areeda and Louis Kaplow, *supra* note 135, p. 71.

6 Discussion

It has been shown in the thesis that the proceedings in front of the European Commission in Community Competition cases lack a number of important procedural safeguards. For instance, the lack of an impartial judge and the problem of it being an inquisitorial procedure. How can one solve these problems inherent in the proceedings? Could conclusions be drawn from the US system? The US system also lacks some safeguards, especially the narrow interpretation in the appeals courts, but I have not found the problems to be as extensive as they are in the EC system.

To ensure the adherence to the safeguards in the EC system I have found some parallels that could be drawn from the US system and be used in the EC system. As of today there are different proceedings before the European Commission depending on whether the case involves fines or if it is, for instance, a decision on negative clearance. There are some proceedings that can be said to be of a truly administrative nature but, as is visible, these proceedings have not been elaborated with in the thesis. The conclusions I have drawn from the US system might however also effect these proceedings in some aspects; the “administrative” procedure elaborated on below could probably also be applied in such cases, however I have chosen not to elaborate further with these issues.

My proposal is to divide the present fine setting procedure in front of the Commission into two different proceedings of which one concerns “lighter” violations which I will refer to as “administrative” cases, i.e. cease and desist orders. The other category, the “criminal” cases, involve hard-core violations. The word “criminal” is used in the context below to facilitate the reasoning, and simply means a proceeding where there is a possibility of adjudicating a fine.

The dividing line between the two different kinds of proceedings could be similar to that of the US. If the breach is a *per se* breach, or as it can be called in the EC; hard-core, then it could be considered to be of a “criminal” nature and the case would be handled according to that procedure. If it is a rule of reason case it could in turn be limited to cease and desist orders and therefore handled according to the “administrative” proceeding. The division is done in order to facilitate the handling of the cases and to reduce the workload that could arise concerning pure fine setting matters.

Concerning the administrative proceedings there could however be a problem with the deterring effect. One could in such a situation, apply the US model and make both the fulfilment of the orders dependant on high fines (which is to some extent done in the EC system as well) and create a possibility for injured companies to commence proceedings against the infringer. The companies affected by the unlawful behaviour could be given a right to commence proceedings in front of CFI in order to obtain damages.

I do not believe that the possibility to receive treble damages is appropriate for the European system, but some kind of deterrent damage standard could be used. The evidence criterion used in the US could be a good standard in these cases, thus the company would have to prove injuries connected to the anticompetitive effect of the defendants behaviour. The proceedings in such cases ought to be of a class-action nature in order not to overwhelm the CFI with cases. A cease and desist decision by the Commission could in such a proceeding serve as indicative evidence for the plaintiffs.

Naturally there would probably be cases where the suitable proceeding type is unclear and perhaps a case would need to change category. If one adheres to similar investigation procedures then the dividing line between the categories could be just before the hearing would commence. To avoid problems that might arise, there could be some kind of expert board determining the suitable proceeding for each specific case. That would also guarantee a coherent line of reasoning for division of the categories.

The first of these proceedings, the administrative, could concern cases of violations where there is no clear proof of the infringement or where the violation has been minor. One could discuss that the proceedings in front of the Commission today would be appropriate in such cases. I do however find that there needs to be some adjustments, because even if no fine is adjudicated, a cease and desist decision still impacts the defendant in a very negative manner.

One issue of special interest is that the Commissioners do not take part of the primary proceedings. One possibility would be to give the Hearing Officer a more independent position from the Commission, or at least from DG IV and entrust him with the competence to decide the cases. This would be an application of the ALJ proceedings to the EU system. An advantage with such a construction would be that the Commissioners who do not take part of the proceedings would not take part in the decision-process. In such a situation the proceedings would be purely administrative but still of an adversary nature which would, in my view, suffice for fulfilment of the safeguards. Because even if the proceedings could be called administrative, I do believe that an adversary nature is crucial, partly because there are some indications that Article 6 applies to such proceedings as well, but especially for enhancing the Commission's credibility from the perspective of the market actors.

It can also be discussed whether the Advisory Committee opinion should be used. I personally do not think so, but I acknowledge the special issues that arise when regarding the importance for the MS to be a part of the Competition development in the EU. There would probably be a strong opposition from the Member States about changing the system which certainly would pose problems. Still, there ought to be a better forum for the MS to influence EC Competition.

The second category of the proceedings, the “criminal” proceeding, would be quite different to the present system. The civil servant handling the case would act as a prosecutor, and if a plausible breach of the hard-core violations was found, he would commence proceedings in front of the CFI. Thereby there would be an adversary nature of the proceedings which up till this point has been missing. In this way the decision would be taken by a court and not a political organ that has not heard the case directly. This would to a large extent decrease the problems existing today.

One could in this context reason for having the same procedure for the criminal cases as in the administrative proceeding discussed above. I do not believe that more independence for the Hearing Officer would be enough for fulfilment of the safeguards of a criminal proceeding, but there must be a very strong independence for the decision-taking body. One would, in principle, be forced to create a new entity that is completely independent. This would in my view be unnecessary due to the fact that there is already today an entity which can take this role. One could also reason the other way around and argue for bringing all cases, even the administrative ones, before the CFI. This could be motivated by the negative consequences that even a decision results in for an undertaking. There could however be problems when considering the practical applicability of such a system, due to the workload of the Courts which already today is excessive.

I would also like to stress that the burden of proof and especially the degree of evidence for proving an infringement, should be higher in the “criminal” cases, due to the strong impact of the fines even on natural persons. I do think it is reasonable to use the usual criminal standard of *in dubio pro reo* in order to safeguard the interest of the defendant. I acknowledge that the adjustment of the degree of evidence might cause fewer judgements against the infringer but in comparison with adjudicating fines upon innocent undertakings I believe that the price is acceptable. In the administrative proceedings such a standard would be a too high a threshold and the regular preponderance of evidence standard could perhaps suffice. It could however also be argued that the negative consequences of a decision would motivate a higher standard of evidence, if not to the *in dubio pro reo* standard, at least higher than the pure preponderance of evidence level.

A very problematic issue in this context is the question about self-incrimination. There are some boundaries to the Commission’s investigative powers and it can be discussed whether these limits should be more extensive. I personally find that some kind of affect-doctrine would be suitable. The one who might be affected negatively by the information, for instance the management or the agent in the company responsible for the violation, should not be forced to give information. Thereby every proceeding where a fine or some kind of penalty may be adjudicated, should apply the right against self incrimination on every person, natural or legal, directly affected in such a proceeding.

In both types of proceedings it is crucial for the Community Courts to be able to do a complete examination of the case concerning both facts and law aspects. With consideration taken to their previous problems of lack of knowledge in the relevant areas, they would probably need to recruit competent personnel. This would however be in line with the increase in cases that probably would be the outcome of both the “criminal” proceedings before the Court and the possibility for private parties to commence damage proceedings. I acknowledge the great difficulties for such an expansion of the court, when regarding the workload that exists today. The procedural safeguards must however be taken into account in the proceedings and hence the judicial appeal should have a wider scope than it does today. Still, if needed, guidelines could be created, which would limit the ECJ’s caseload by restricting the appeals to cases involving important judicial questions.

The large advantage of the thoughts addressed here is that there does not need to be any larger change in the structure of the system. The solution is not dependant on an adoption of the Constitutional Treaty, even if the rules then could be considered to be more legitimate. Nor is it dependant on an explicit criminalization of the EC Competition rules. The system could be realized through creating guidelines, forcing the Commission and the civil servants to follow different proceedings depending on the facts in the cases.

One could ask the question if my proposal of changes is possible at all. Could the Courts really endure a larger burden than today and would the MS accept changes to their disadvantage? I admit that the practical possibilities might not be easy, but I do believe that something has to be done to the present procedural system. In the end it will be a question of how high the procedural safeguards are evaluated in comparison to the costs for their application and the high priority put on the practical possibilities of fining infringers, which is highly valued in order to make the European Market the most competitive in the world.

6.1 Conclusion

The descriptive parts and the analysis throughout the thesis have shown several features of the present EC Commission procedural system that can be criticized. The examination of the United States’ Antitrust system has however given some possible solutions to these issues.

My proposal is to divide the present decision taking process into two different procedures. One that would be a pure administrative proceeding where different kinds of orders could be adjudicated. The proceeding would take place in front of a Hearing Officer with more independence than today and with the mandate to take a primary decision.

The other procedure would be applied in cases involving fines. The case-handler would in such a proceeding have the position of a prosecutor with

the possibility of starting a procedure for infringement and fines in front of the CFI. The Court would thus be the only competent entity for taking decisions on fines.

Summary

This thesis examines whether the proceeding in front of the European Commission in the area of EC Competition law is in accordance with procedural safeguards applied in criminal law procedures. The basis for the investigation is Article 6 ECHR and the safeguarding principles regulated therein. The US Antitrust procedure is also examined in order to try to find solutions to the possible issues.

The hypothesis is that EC Competition law sanctions already today have such a strong penal character that they can not be said to be of a purely administrative nature. When applying the Engels criteria, as set forward by the ECtHR, one comes to the conclusion that the Competition sanctions should be regarded as having a criminal nature. This is foremost due to the severity of the penalties imposed, but also due to their object of protection.

The right to a fair trial as regulated in Article 6 ECHR has several consequences for a procedure. No one can for instance be forced to give information which could be used in an incriminating way against himself. Other important implications of the article are the right to an independent and impartial tribunal, and procedural equality between the parties. This is crucial in order to have an unbiased and just court system.

The proceeding in EC Competition cases lacks several of these safeguarding features. Problems arise especially regarding the impartiality of the Commission and the un-adversary nature of the proceedings. The defendant is put in a situation where he neither has the possibility to comment on material that forms the basis for a decision, nor can he make his views heard orally in front of the decision-taking entity. The proceeding can thus not be said to fulfil the demands which the ECHR requires for a procedure of a criminal nature.

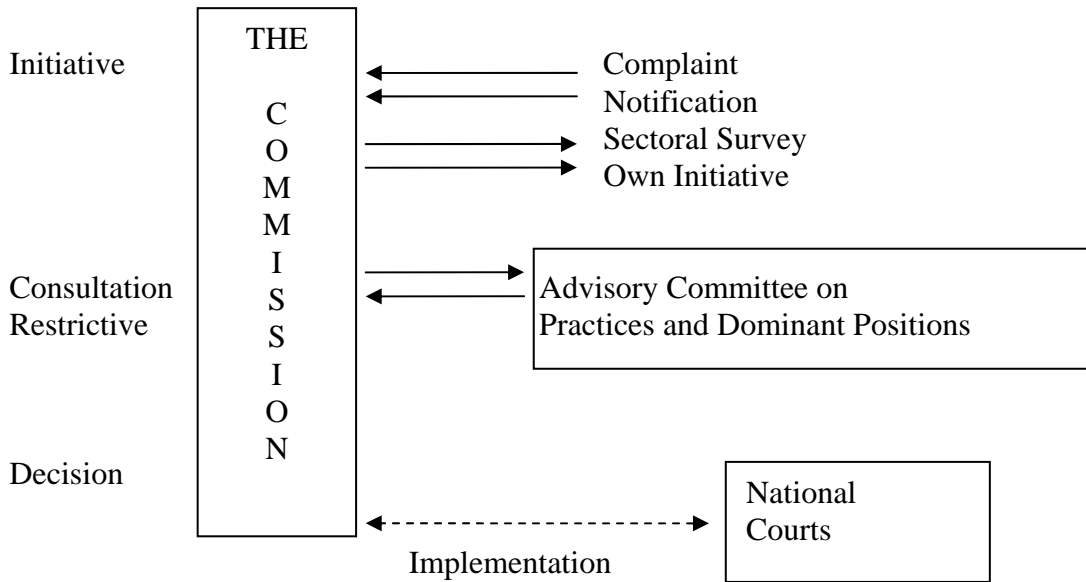
The Antitrust system of the United States is quite complex with a multitude of possibilities to enforce the Antitrust provisions. The Antitrust Division of the Department of Justice has sole responsibility for handling the criminal antitrust cases, and does so as a prosecutor, but can also commence civil proceedings. The Federal Trade Commission handles administrative cases and can in such proceedings take cease and desist orders but not adjudicate fines. Due to this division of the cases problems concerning safeguards are not to the same extent as in the EC system.

My proposal to solve the issues in the EC system is to divide the present procedure into two different proceedings dependant on the nature of the case. In proceedings concerning orders, the present proceeding could be adjusted as to make the Hearing Officer more independent and give him the competence to take primary decisions. In fine setting matters the case-

handler would function more as a prosecutor with the possibility of commencing proceedings in front of the CFI.

I acknowledge the difficulties of changing the structure of the system, but in my opinion the safeguards have to be given priority above other interests.

Supplement A



The structure of the Decision-taking process in the European Commission.¹⁹²

¹⁹² Andrew Haslam-Jones, *A comparative analysis of the Decision-taking Process in Competition Matters in Member States of the European Union, the European Commission and the United States*, [1995] 3 ECLR, p.162, Figure 5.

Supplement B

Sherman Act
15 U.S.C.A. §§ 1-2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supplement C

Clayton Act
15 U.S.C.A. §§ 12-27

§ 2
15 U.S.C.A. § 13
a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered [...]

§ 3.
15 U.S.C.A. § 14
Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 7.

15 U.S.C.A. § 18

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.[...]

§ 8.

15 U.S.C.A. § 19

Interlocking directorates and officers

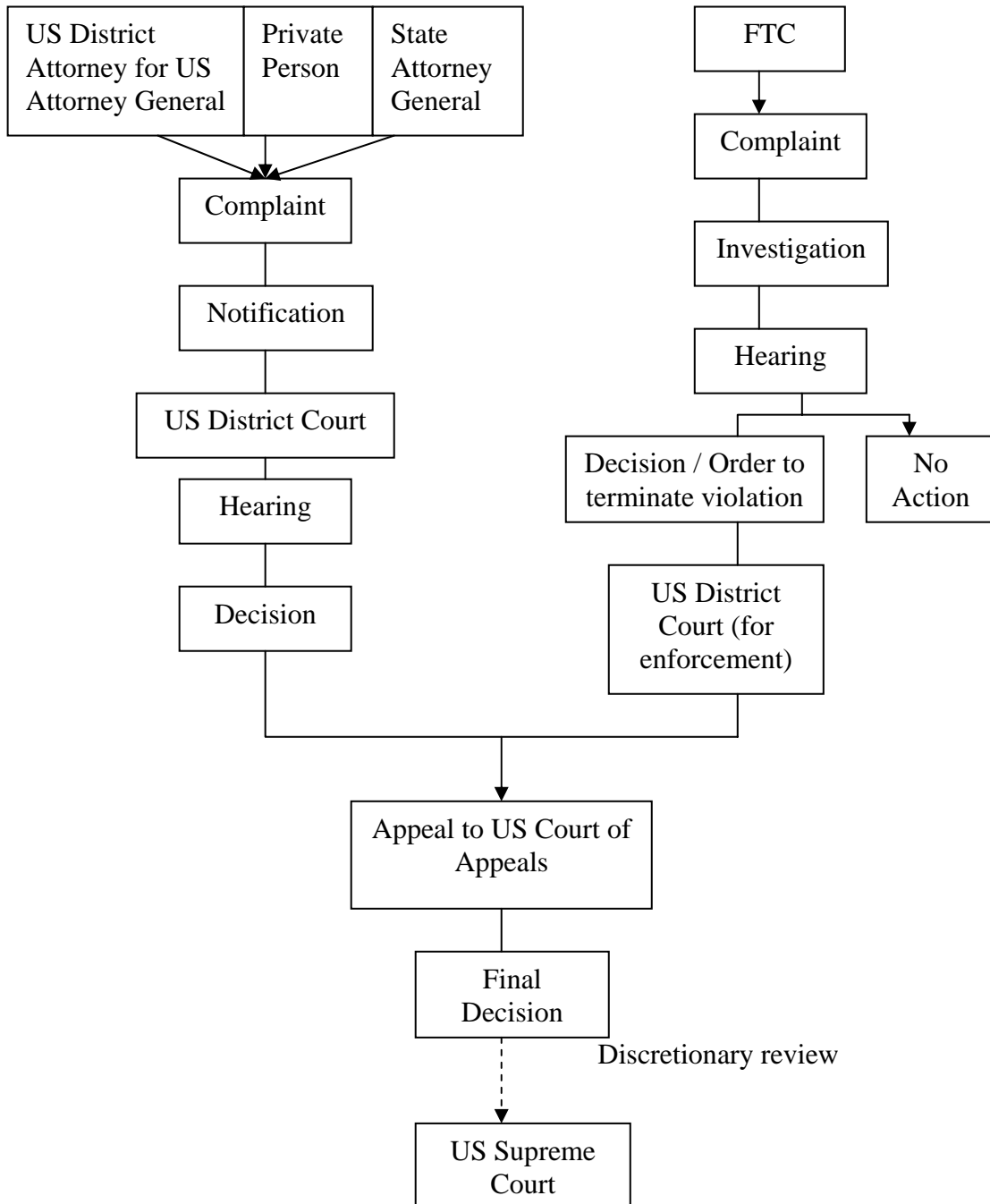
(a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are--

(A) engaged in whole or in part in commerce; and

(B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;

if each of the corporations has capital, surplus, and undivided profits aggregating more than \$10,000,000 as adjusted pursuant to paragraph (5) of this subsection.[...]

Supplement D



The Structure of the Decision-taking process in US Anti-trust Cases.¹⁹³

¹⁹³ Andrew Haslam-Jones, *supra* note 192, p. 179, Figure 16.

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