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THE COMPATIBILITY OF EU ANTITRUST
ENFORCEMENT WITH FUNDAMENTAL RIGHTS

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Preface

I am extremely grateful to Dr. Sanja Bogojevic whose patience, advice and direction provided both focus and depth to my research and understanding. Without which I would no doubt still be wandering the halls of the library in blinkered confusion.

There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets.

Charles Dickens, The Life and Adventures of Nicholas Nickleby

Summary

Developing market integration is an underlying feature of the Union project with market harmonisation and deeper integration at the heart of the Union's modernisation project. Competition law and antitrust enforcement plays a key role in creating the balance between free trade and regulation, to protect and encourage the growth of European market. Following the introduction of the modernising Regulation (1/2003) the Commission has been afforded wide-ranging powers including the ability to conduct inspections of business premises and private homes with extensive powers to request documents, information and oral statements alongside the authority to impose staggeringly large penalties for non-compliance or for anti competitive behaviour. These powers are arguably the tools of regulation that facilitate behavioural and structural changes to create a truly competitive market within the Union. At the same time it presents a tension, in that by its nature competition law acts as a restriction on the ability of corporations to trade freely, to own and enjoy property and to increase their market share with the inevitable consequence of higher profits. The question becomes one of degree, how far should competition rules stretch to protect the market from harmful practices such as market division, price fixing and the abuse of large market shares? More importantly for the purposes of this paper is the question of the check and balance on the use of competition rules to the detriment of companies. Put another way how is the regulator regulated?

One such method is to afford commercial entities access to basic procedural rights protection as they stem from the Union and other international agreements especially the ECHR. This paper will focus on these questions examining the scope of procedural rights available to companies subject to antitrust investigations and penalties and the extent to which such rights are adequately protected. In doing so challenging the assumption that the Commissions powers are sufficiently balanced with procedural rights protection and question whether the Union approach to the rights of companies is in compliance with the ECHR and the Charter.

Abbreviations

AG	Advocate General
CFI	Court of First Instance
EC	European Community
EU	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEC	European Economic Community
EUCFR	European Union Charter of Fundamental Rights
GC	General Court of the European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
CJEU	Court of Justice of the European Union
MS	Member State
CHARTER	Charter of Fundamental Rights of the European Union

1 Introduction

Competition law in the EU has over the past 50 years of market and economic harmonisation has become almost as central to the Union as any of the other four fundamental freedoms. Many commentators consider the EU antitrust enforcement being at the heart of the successful growth of the common market¹. Despite this assumed success and the many attempts to modernise competition law the Commission continues to fill the central role in competition enforcement. Whilst there is some allowance made for a shared competence with national competition authorities the Commission remains the predominant institution in EU antitrust enforcement. This raises questions about antitrust enforcement and its application and scope. The centralisation of power within the Commission has led many to question the compatibility of the Commission's actions and powers with fundamental rights. Practitioners and academics alike have debated the extent to which fundamental rights are available to companies and binding on the Commission.² The Court of Justice, as van Bael³ points out, has rarely applied EU fundamental rights strictly against the Commission the predominant view being that the Commission should be afforded a wide margin of appreciation. Put another way the law should not form an obstacle to the Commission's duty to crackdown of anticompetitive behaviour⁴.

¹ Not an exhaustive list but for examples see, Stajano, A (2006) Research, Quality,

² See for example, Drabeck (2003) A Fair Hearing before EC Institutions, 4 ERPL, 529, Killick, J., Berghe, P.(2010) This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in', Volume 6 Issue 2 pp 259-285, Andreangeli A (2008) EU Competition Enforcement and Human Rights" Edward Elgar Publishing Limited, Wouter P.J. Wils (2005) Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law, paper presented at the First Lisbon Conference on Competition Law and Economics (Lisbon, 3-4 November 2005) p. 15. Available at <http://ssrn.com/abstract=1319243>, Forrester, I., (2009) Due process in EC competition cases: A distinguished institution with flawed procedures', 34 E.L. REV. 817

³ Van Bael and Ellis (2011) Competition Law of the European Community, Kluwer Law International at pg 976

⁴ This is discussed throughout this thesis and especially in the section on judicial review. See also the views of Vesterdorf, B, Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement', (2005) 1 Global Competition Policy 1

Many of the courts decisions and the actions of the Commission are arguably an impediment to companies wishing to rely on human rights⁵.

In all EU Member State jurisdictions businesses operating as registered companies in one form or another acquire legal personality⁶. With this status comes the question as to whether or not they are protected by the rights and freedoms that are otherwise considered to be reserved for human beings. If as legal persons they are entitled to claim protection under such rights and freedoms the question becomes one of how far this protection should extend. The proposition of affording companies the capacity to raise rights and freedoms is not controversial. The controversy arises with the question of whether companies should be given the same level of judicial protection as a human invoking synonymous rights or whether the scope of these rights should be limited as a result of their ‘non human’ status. In a competition law context, at EU level, the question of extent and scope of rights protection for companies, especially during the early stages of investigation by the Commission into alleged anticompetitive behaviour, is a contested point. Research undertaken by Sakkers and Ysewyn illustrates this⁷. The frequency with which companies are raising a violation of their procedural rights, especially in cartel cases, has readily become a source of litigation⁸. This paper offers an evaluative study on a company’s ability to invoke human rights in competition proceedings and the appropriateness of the level of judicial scrutiny of the Commission’s actions in the Union courts with the Charter viewed comparatively with the ECHR jurisprudence and practices. In doing so this research will contribute to the debate over the extent to which such rights should be afforded to companies and the the assessment of the required level of protection that arises from their being legal as apposed to real persons.

⁵ As this thesis will show.

⁶ In the United Kingdom for example this is through a limited liability company or a public company,

⁷ Sakkers, E., and Ysewyn, J., (2008) *European Cartel Digest*, updated 2011, Kluwer Law International, see table at Appendix 1 for the recurrence of the rights theme raised in litigation and more specifically the frequency of the rights of defence raised.

⁸ See fn 7 above also this will be discussed through this thesis as a point of consideration.

1.1 Purpose & Main Objectives

The purpose of this paper is to examine the polar arguments in favour of greater and lesser rights protection to economic entities in antitrust proceedings. Moreover, the research will contribute to the debate on when during antitrust proceedings companies are able to raise the shield of human rights and particularly procedural rights, whilst simultaneously examining the appropriateness of the application of such rights from an ECHR and Charter perspective. Finally, this investigation will appraise the trends, changes, influencing factors and margins of appreciation between EU institutions and the Union courts. The importance of this research in respect of this is it evaluates at which stage of antitrust proceedings there is optimal rights engagement. This is of importance in that it identifies the high watermark of rights protection for companies and by doing so questions the suitability of the level to provide adequate protection for companies. This will be achieved in proposing an answer to the following research questions. What rights do companies subject to antitrust investigations by the Commission have during the investigatory stages? What is the scope of Union judicial review in holding the Commission to account for rights violations? Do the answer to these questions meet the requisite standard under the Charter and the ECHR?

1.2 Method and Material

This thesis is based on research undertaken through the utilisation of the traditional dogmatic legal method. More specifically the research method is that of deduction as a result of quantitative and at times qualitative analysis of the research texts. Texts included traditional legal sources such as international treaties, preparatory work, relevant jurisprudence and legal commentaries to provide a normative assessment of the law. In particular the data collection design provided sufficient reliable and meaningful data from which conclusions were drawn and supported to define the principle positions and understandings of concepts core to the research.

1.3 Delimitations

Firstly, I have chosen to confine the type of antitrust cases considered to cartel cases under Article 101 TFEU. As a result of the vastness of the case law on the one hand and secondly due to the fact that procedural rights issues are more frequently raised in cartel cases. In doing so I have excluded the European Competition Network, parallel actions and private actions at a Member State level to narrow the evaluation of the research questions to the actions of the Commission only in cartel cases. In conjunction to this it has narrowed the evaluation of case law to the Union courts, by which I mean the CJEU and the General Court. This is due to the focus of this paper being on antitrust procedures at a Union level only. Whilst in relation to rights interpretation I have limited the applicability and focus on ECtHR case law to those rights that are directly raised in this paper. This is due to the limited applicability of the ECHR through Article 6 TEU and the Charter and to narrow the argument to a deeper evaluation of the procedural rights raised in the research.

1.4 Research Plan

Chapter 2 provides an introduction to the main issues raised for discussion in the paper. Looking generally at the availability of human rights to commercial entities and their ability to seek judicial protection of such rights in the event of an infringement. The remaining parts of the chapter provide a contextual discussion of the divergent views and impact of procedural rights within Union antitrust law. This includes discussion on the impact of the general principles of law, the Charter and the ECHR. The chapter aims to provide an analysis of the main points in support of antitrust compliance with fundamental principles and those calling for reform. Providing a cross sectional evaluation of the views on whether antitrust procedure is compliant with procedural rights.

Chapter 3 moves on to evaluate particular aspects of the empowering secondary legislation, Regulation 1/2003. The focus being on the

Commission's powers of requesting information, carrying out physical inspections and the ability to question employees and agents and take statements from them, the application of which is evaluated in light of the Charter and the ECHR. Where appropriate drawing out and illustrating the potential to infringe the rights of companies when exercising these powers. At the same time making use of case law for the Union courts and the ECHR to identify the approach and level of judicial scrutiny that exists. This leads directly in chapter 4 and addresses the question of to what extent, either inherent in the Regulation or the Charter, the rights of defence are protected when powers under the Regulation are being exercised. The chapter concentrates on the rights of defence and specifically the presumption of innocence, the right to be heard and the right to access the file, each are considered in light of the ECHR and evaluating to what extent the approach in the Union is compliant with the jurisprudence stemming for the ECtHR. Chapter 5 concentrates on the approach of the Union courts when exercising judicial review over cartel cases. The chapter evaluates, briefly, the differences inherent in the courts jurisdiction when exercising 'legality review' and 'nullity review'⁹. It offers, in normative terms, a narrative of the level of review that can be reliably deduced from the case law of the Union courts and more prominent academic commentary on the levels of review. Chapter 6 offers a comparative analysis of the levels of review at a Union level with the required levels of review at an ECHR level and evaluates the compatibility of the Union approach with the Convention.

The final chapter, 7, highlights the recent case law, evaluating whether there is a trend in judicial reasoning that better aligns the Union antitrust procedures and review with human rights standards stemming from the Convention. Before offering some concluding thoughts and briefly considering the potential role of the EU Ombudsman in being able to assess the Commission's actions or omissions in light of the principle of good administration and whether this could, in the future, play a more active role in ensuring procedural rights are protected.

⁹ On the distinction between the types of review see generally Gerard, D., (2011) Breaking the EU Antitrust Deadlock: Re-empowering the Courts *E.L. Rev.* 36 (4), pp 457-479

2 EU Competition Law

Competition law generally finds itself in a central position in relation to the development and establishment of the internal market of the Union. It is evident that without the Union possessing competence over anti-competitive behaviour the underpinning principles such as the free movement of services, establishment, capital and persons are likely to be severely inhibited. Put another way, if commercial entities were able to restrict, partition, prevent, dominate or influence markets in an uncontrolled way, the four freedoms could in certain sectors become otiose. Of course to suggest that without EU intervention such entities would have unbridled freedom to potentially affect the markets in this way is to great a generalisation, as at a national level amongst Member States (MS) some form of antitrust legislative measures exist¹⁰. However it is true to say that if left to the MS there would be inconsistencies and a lack of regard for the Union position. As a result it has become evident that together with many of the other freedoms the Commission has become the centralising institution through which Union wide application of fundamental principles are regulated, enforced and implemented. EU competition or antitrust law is no different.

One may well argue that in antitrust matters the Commission has become over empowered to the point that it possesses the authority to set policy, investigate infringements, pass judgment on actions of commercial entities and punish them where they are deemed to have acted in an anti-competitive manner. The role of the Commission has grown exponentially and they are not only concerned with the conventional antitrust violations of market abuses, price fixing and information exchanges but also exercise their jurisdiction to wider areas of market influence, economic, consumer and policy effect of commercial transactions within the Union. This wide

¹⁰ On this see for example the 2004 Ashurst Report which offers a detailed analysis of the antitrust measures in each MS. Available at http://ec.europa.eu/competition/antitrust/.../comparative_report last accessed 12:21 29th March 2012.

jurisdiction of enforcement has been legislatively affirmed. Especially in recent times where secondary legislation has not only concreted the Commission's investigative controls but has noticeably increased the ability to financially punish commercial entities for non-compliance with Union antitrust provisions. This in conjunction with the drive to empower national courts to allow private actions for damages of parties affected by anticompetitive behaviour established by the Commission, the creation of the European Competition Network and the strong obligation on MS to rigorously implement Articles 101 and 102 TFEU means that any commercial entity or transaction not having regard to EU competition policy does so at their own risk and possibly to their own detriment. This paper considers the interplay between the enforcement of competition law at an EU level and the question of rights protection of companies.

2.1 Companies & Human Rights

This paper does not permit a full examination of the question of whether human rights' guarantees flowing directly from the EU or from other international human rights sources, such as the ECHR, are applicable fully or partially to legal persons¹¹. It is however prudent to consider it in outline as a preliminary point. More specifically to outline the extent to which legal, as apposed to natural persons are entitled to rely on the protection of fundamental rights. Undoubtedly international human rights documents were intended for the protection of the human individual. In this respect the ECHR is no different. Despite the underlying protection of individuals the ECHR does not expressly exclude the possibility of legal persons invoking the guarantees. A cursory glance of the Convention makes it apparent that no express intention was made to exclude legal persons from seeking protection. In fact the opposite is capable of being inferred. By not expressly excluding legal persons from the Convention it is implied that legal persons are entitled to invoke the Convention. Article 1 for example requires that all

¹¹ For the sake of clarity, by the term legal person this paper means a duly incorporated company having complied with the legal rules of the state of incorporation, or for that matter as an SE company (see C Tavares Da Costa and A de Meester Bilreiro *The European Company Statute* (Kluwer Hague, 2003))

Contracting Parties secure Convention rights to ‘everyone’ within their jurisdiction, regardless of their status or legal nature. This indicates that so long as a company possess the status of ‘legal person’ or has ‘legal personality’ they are able to rely on the Convention. It goes without saying that there are a number of rights that simple logic dictates cannot apply to a company such as the abolition of slavery or the right to life or the rule against torture, but there are others that have at their core procedural guarantees (Art 6) or are economic in nature (Protocol 1 Article 1) that are easily translatable to legal persons.

There is further argumentation surrounding the applicability of human rights norms to legal persons, these are cogently put forward by Andreangeli, Emberland and to some extent Trainor¹². The argument runs in the following vein. The underpinning of the Convention are the concepts of ‘political democracy’ and ‘personal freedom’ the concept of human rights, a counterbalance to the possibility of arbitrary or disproportionate interference into the private sphere of the individual¹³. The emphasis of the rights is therefore not so much the inalienable right itself but rather the limitation it places on the states ability to interfere with such a right. Evidentially outside of those few so-called absolute rights the vast majority of guarantees, especially within the Convention, are capable of some level of interference from the state. Viewed in this way the Convention is seen as providing legal safeguards evidenced by the embedding of guarantees in the Convention such as the right to be heard, the right to a fair trial and the requirement for a state to justify their actions where such guarantees are engaged. For Andreangeli especially, this illustrates that the emphasis of the guarantees is to ensure foreseeability, clarity and legal certainty and the limitations of state action. These principles are easily translatable to the concept of free

¹² Andreangeli, A., (2010) *Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties’ freedom to contract and to enjoy property*, *The Competition Law Review*, Volume 6 Issue 2 pp 225-257; Emberland, M., (2006) *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford; Trainor (1994-1995) ‘A Comparative Analysis of a Corporation’s Right Against Self Incrimination’, 18 *Fordham Int’l L.J.* 2139.

¹³ Shestack, J.J., (1998) ‘The Philosophic Foundations of Human Rights’ 20 *HRQ* 201

market and economic strategy. Whereby legal persons seek to exercise their rights to free trade, property ownership, ability to access the market without hindrance on their advertising and marketing and the right to trade¹⁴. These all to some extent form the characteristics of a free market economy that subsists with 'political democracy' and 'personal freedom' and therefore they are capable of being read through the procedural guarantees enshrined in human rights.

The ECtHR has seemingly had little difficulty in finding that legal persons have standing under the Convention to bring an action for unfair interference with a Convention guarantee¹⁵. Or put another way, Convention guarantees are capable of being read in the context of economic rights, such as the ability of legal persons to own property or to exercise their freedom of expression through the medium of advertising. In the Niemietz¹⁶ case for example the right to private life was taken to contain business relationships and professional activities¹⁷. The right to freedom of speech in the context of advertising was affirmed to a company in Markt Intern¹⁸. Whilst in Casado Coca¹⁹ a company was given full effect of Article 10 ECHR. It is the view of the author that not all guarantees are capable of being read in a way that economic activity can be seen as inherent in it, take for example the right to life. Therefore the scope of guarantees open to a legal person is naturally limited. As Emberband's²⁰ research demonstrates, legal persons are more inclined to rely on a narrow range of Convention guarantees given the economic nature of companies. These tend to be complaints of violations occurring under Article 6, procedural guarantees, Protocol 1 Article 1, the protection of property and the freedom of expression under

¹⁴ A similar argument is put forward in Ovey & White (2002) European Convention on Human Rights, 3rd Ed, 2002: Oxford University Press, p 302

¹⁵ Sunday Times v UK Series A No 30, (1980) 2 EHRR 245 provides the basis for the ECtHR accepting applications from economic entities, see also Andreangeli A, "EU Competition Enforcement and Human Rights", p 17

¹⁶ Appl.No 13710/88, Niemietz v Germany [1993] 16 EHRR 17

¹⁷ The author acknowledges the criticism that arises with Niemietz, in so far as the political context within which the case was framed as well as the fact that Niemietz was in fact an individual whose 'premises' were also his residence.

¹⁸ Appl. No 10572/83 Markt Intern Verlag GmbH & Klaus Bermann v Germany [1990] 12EHRR 161.

¹⁹ Appl. No 15450/89 Casado Coca v Spain [1994] 18 EHRR 1.

²⁰ Ibid pg 14

Article 10. If then it is taken as priori that legal persons are to a large extent able to rely on Convention guarantees, the central question becomes whether legal persons are entitled to the same level of protection as that afforded to natural persons. This is a particularly thorny question to consider, given that corporate litigation inevitably is aimed at the economic policies of the contracting state. In a competition context it is a natural occurrence that a tension exists between free competition and regulatory constraints necessary to establish and ensure the overall stability and effectiveness of the markets²¹. Broadly speaking this is no different to that of an individual claiming undue interference with a guarantee on the grounds of an administrative action, for example, of the state. However as Emberland²² points out there are subtle differences between individual and corporate human rights application. The case law of the ECtHR (discussed below) seemingly points to a standard of review that lacks the full potency of that associated with individual rights violations. The court itself has seemingly drawn a distinction between individual and corporate litigation in the extension of the margin of appreciation²³ to cases involving economic or fiscal policy. The upshot of which is that it remains easier for the state to surmount the hurdle of demonstrating that the interference is necessary, proportionate and justifiable. The ECtHR has made this position clear in *Markt Intern* where it considered that the determination of the right (freedom of expression) must be considered in light of the complex commercial factors that may see where it considered that judicial scrutiny limited to a simple test of proportionality²⁴. Naturally a simple proportionality test leaves aside the possibility of scrutinising the underlying rationale for the restrictive measure. Clearly then the question of rights entitlement for companies will need to be assessed in the light of the particularities of the economic factors and the underlying market policy.

²¹ The author acknowledges that is a generalisation and there are conflicting economic arguments as to the role of the state in market regulation.

²² *Ibid* pg 16

²³ Application No. 10890/94, *Gropper Radio*, para 48

²⁴ Emberland, *ibid*, n24, p193

That been said it does not detract from the fact that as a starting point those rights that are capable of application to a legal person will seemingly have effect. This paper proceeds on the assumption that legal persons are entitled to rely on the same procedural safeguards that a natural person would be entitled to under both the general principles of law and the Convention especially Article 6 ECHR where applicable. The applicability of rights and guarantees to legal persons in an EU context arguably matches that of the ECtHR at least in so far as they are permitted to raise a violation of a right as a cause of action, especially when challenging the actions of an institution.

For example in *Dutch Electricians Federation*²⁵ AG Kokott whilst reaffirming the non binding nature of the ECHR on the EU took the position that the ECHR would provide guidance as to what constitutes a ‘fair procedure’ before the EU institutions. Furthermore in relation to competition law Regulation 1/2003 (Recital 36) expressly gives effect to the Charter and therefore it must be assumed by default that an infringement by the Commission of the Charter in exercising their powers under it would allow a company to bring an action for annulment. There can be little doubt as to this position under the Charter. Wolfgang Weiss²⁶ points out that in a similar way to the ECHR the Charter makes no reference to exclude legal persons. More than this Article 42 expressly applies to ‘legal persons’ whilst other Articles such as 41 apply to ‘every person’ or as in 47 and 48 to ‘everyone’. The extension of the rights of privacy were recently considered in the case of *Scheke*²⁷ whereby the CJEU had to consider the validity of a Union measure in light of the individual right of privacy and the protection of personal data. The court finding that the particular Union measure was in violation of the right not necessarily under ECHR law but made direct use

²⁵ Case 105/04 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*

²⁶ Weiss, W., (2011) *Human Rights and EU Antitrust Enforcement: News from Lisbon*, E.C.L.R 2011, 32(4), 186-195

²⁷ See *Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR* where at paragraph 53 states that ‘legal persons can claim the protection of Articles 7 and 8 of the Charter in relation to such identification’ (under the legislation at issue in the case).

of the Charter to invalidate the measure. However it must be noted that the right to privacy hinged on the existence of a human being affected by the measure complained of²⁸. It is at least debatable whether the right to privacy would have otherwise attached as strongly as it did²⁹.

This approach, of allowing economic entities to rely on rights, is not, in the opinion of the author, contentious. A simple survey³⁰ of recent cartel case law illustrates that in approximately 54% of cases companies raise procedural irregularities such as a breach of the right to be heard as a cause of action. Which the Union courts are prepared to consider in principle. However as with the ECtHR the real question is just how do the rights go in terms of their applicability.

The position in the EU in relation to competition law is a point of much debate. The application of rights and guarantees to companies, whilst recognised, suffers hugely from the particularly artificial consideration that the power, wealth and fact that companies lack a human form means that they are not afforded the same level of protection that one would associate with humans. Within the debate on this some, such as Wils, consider that the application of these rights cannot apply as strictly to legal persons especially in EU competition proceedings where the companies are large wealthy economic entities.

A view shared by AG Colomer in Volkswagen³¹ who argued that the nature of competition law was not synonymous with a dispute between the

²⁸ Whilst Scheke is illustrative it should also be read in context, that the right to privacy arose as a result of the publication of the details of natural persons, at paragraph 53 the court went on to state that the right arose 'only in so far as the official title of the legal person identifies one or more natural persons'. For fuller evaluation of the case see Bobek, M., (2011) Joined Cases C-92 & 93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgment of the Court of Justice (Grand Chamber) of 9 November 2010, nyr., C.M.L.R., Vol 48 (6), 2005-2022.

²⁹ For a comparative analysis see the recent American case of The Federal Communications Commission v AT&T No. 09-1279 in which the US Supreme Court refused to extend the right to privacy fully to a company.

³⁰ Please see Appendix 1 for the table, Sakkers, E., and Ysewyn, J., (2008) European Cartel Digest, updated 2011, Kluwer Law International

³¹ Opinion of Advocate General Ruiz-Jarabo Colomer Volkswagen v. Commission (I), [2003] ECR I-9189 at paragraph 66.

individual and the state and therefore the procedural guarantees under the Convention (Article 6) could not be '*transferred en bloc*'. He went on to find that the underlying reason, especially in criminal law which competition law was not, for procedural guarantees was to '*compensate for the imbalance of power*'. He continues to find that in competition proceedings the affected party is more likely than not to be '*powerful corporations with significant resources*' therefore no such imbalance of power exists. In fact to '*accord such offenders the same procedural safeguards*' would make a '*mockery*' of the rights of less fortunate. More recent case law also seems to draw the conclusion that the lack of human form means legal persons rights entitlement is not as comprehensive. In Orkem³² the EU courts failed to give effect to the principle of the privilege against self-incrimination, the court stated that the right attached '*only to a natural person*' and not necessarily to a '*legal person in the economic sphere*'³³. More recently the limited application of rights to companies has been affirmed this time in relation to the question of a right to be heard. In Dow³⁴ the court found that whilst the right arose it was not to be so strictly interpreted so as to compel the Commission to enter into unlimited hearings and responses to the evidence, but it need only go so far as required on the evidence upon which the Commission based its decision. This is discussed in more detail later in the paper. The upshot of these examples is that the Union approach is one that whilst providing access to the rights it does not adhere to the strict application of them.³⁵ The importance of this to the research questions is that to assess the compatibility of the levels of review and the standards of rights protection the underlying feature of them relating to legal persons must be taken into consideration.

³² Case 374/87 Orkem v Commission [1989] ECR 3283

³³ Orkem at para 28-30

³⁴ Case 97/87 Dow Chemical Ibérica, SA, and others v Commission

³⁵ Likewise the Commission hold the view that their proceedings fall within the boundaries of legality and the nature of them against corporations provides sufficient procedural safeguards. See for example the recent speech by Alexander Italianer, Studienvereinigung Kartellrecht Conference 14 March 2012, Brussels.

Naturally the flipside to this is that it is seemingly the position that by the sheer fact that the company lacks human attributes makes it less important to protect its interests against rights infringements. Whilst there is some merit to this argument, it is the author's view that it belies the true economic ramifications of an adverse competition decision or the imposition of a large penalty on the human participants within the company. Large fines have the possibility of huge economic ramifications leading to redundancies, withdrawal of social corporate funding and donations amongst others. So to say that the companies are not to be afforded the same level of protection based purely on form seems a naïve approach as it side-lines the ripple effect of the infringement in competition proceedings. More than this it also seemingly fails to take into account the legal vacuum caused by the Union courts failing to strictly hold the Commission to a higher standard³⁶. With such a high margin of discretion afforded to the Commission and such low judicial protection for companies the real question becomes whether or not the EU approach to rights protection in competition proceedings makes a mockery of the very concept of affording rights to legal persons. Recent research by Damien Gerard³⁷ highlights the high margin of discretion afforded to the Commission by the Union courts. In the General Court between 2006-2010 only 13% of cases were fully annulled whilst 28% were subject to a partial annulment. In the CJEU for the same period only 8% of cases received a full or partial annulment whilst a total of 92% of cases were dismissed. With such a high rate of dismissal it would not be unfair to consider the General Court, in reality, to be the court of last instance. The remainder of this paper goes on to consider the level of applicability of rights and the levels of protection given to them when raised by companies.

³⁶ For an interesting evaluation of this point and the question of self incrimination see Aslam, I & Ramsden M, (2008) EC Dawn Raids: A Human Rights Violation?, *The Competition Law Review*, Volume 5, Issue 1, pp 61-87

³⁷ Gerard, D., (2011) Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?, *E.L. Rev.*, 36(4), pp 457-479

2.2 Competition Law and EU Rights

As a starting point it should be noted that the Commission although empowered through the Treaties and secondary legislation does not fall outside the rule of law³⁸. It remains subject to the general principles of law established by the Union courts and the relevant Treaty provisions when applying antitrust procedures. In fact, prior to the implementation of the Charter, it is true to say it was the case law of the Union courts which was instrumental in the development of rights discourse within the Union to which Union institutions and MS were and are subject³⁹. The mere fact that the Commission is exercising antitrust powers in no way exempts it from the application of EU rights. The CJEU has expressly stated in *Wachauf*⁴⁰ that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. From this it is possible to glean two concepts, firstly that fundamental rights are an integral part of the Union and the actions of the institutions are anchored to them and secondly that it is the jurisdiction of the Union courts to ensure such rights are respected by the institutions. This position has been solidified following the introduction of the Charter.

2.2.1 EU Charter of Fundamental Rights

The Charter was originally drafted in 2000⁴¹ although not given permanent or binding legal effect at first. It was however indicative of the trend for the EU to create and respect fundamental rights. Although it was subject to at best a ‘lukewarm’ reception from the Union courts. It was viewed more as a reaffirmation or codifying of the general principles of law rather than a tool of progressive rights jurisprudence⁴². This may explain why in competition law procedure, even though Regulation 1/2003 under Recital 37 binds the Commission to the Charter, little or no meaningful effect or use has been

³⁸ The case law and relevant legislation are discussed later in this thesis.

³⁹ von Bogdandy (2000) *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 CML Rev 1307

⁴⁰ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*
⁴¹ [2000] OJ C364

⁴² See the language of the courts and the use of the Charter as a reaffirming tool in cases such as Case 432/05 *Unibet*, para 37; Case 450/06, *Varec*, paragraph 48.

made of the Charter in challenging Commission actions. It remains the case presently that the Charter has not yet opened up avenues of challenge in antitrust proceedings.

This is somewhat surprising when one considers the Lisbon changes and the bringing into legal effect the Charter. As Steve Peers⁴³ convincingly argues, the entry into force of the Lisbon Treaty presents an opportunity through which the Charter can become a cornerstone of the EU constitutional foundation. The Charter not only reflects the diversity of the constitutional traditions of the MS but also outlines the Unions commitment to fundamental rights by enshrining a number of EU general principles as well as incorporating a number of Convention rights. If the Charter is viewed as nothing more than a codification of the general principles its effect will naturally be stunted. If on the other hand it is viewed as a ‘living instrument’ and is widely applied then there is clearly scope to enhance rights protection within the Union. Also the wider interpretation and purposive approach to the Charter presents an avenue through which the jurisprudence of the ECtHR can be incorporated into the Union. Therefore the application of the Charter raises the question as the applicability of both the ECHR and the jurisprudence flowing from the ECtHR to the Union generally and to antitrust procedures specifically.

2.2.2 Competition Law and ECHR

Following the implementation of the Charter and the coming into force of the revised Article 6 TEU the question as to the scope and application of the ECHR in combination with the jurisprudence of the ECtHR within the Union has been at the centre of much debate. This is especially the case in respect of antitrust enforcement⁴⁴. Particularly when the Commission

⁴³ Peers, S., (2011) *The Rebirth of the EU’s Charter of Fundamental Rights*, ch 12, pp 283-309, 2010-2011, 13, CYELS

⁴⁴ Wouter P.J. Wils (2005) *Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law*, paper presented at the First Lisbon Conference on Competition Law and Economics (Lisbon, 3-4 November 2005) p. 15. Available at

exercises their powers of investigation, enforcement and sanction. At the risk of over simplification, the question really is ‘who should interpret the scope and application of Convention rights, the Union courts or the ECtHR?’ The relevance of which to this research rests on the fact that synonymous rights within the Charter are founded on Convention rights yet the question of the ECtHR case law applicability is not expressly provided for. Although this is considered in greater detail throughout this paper it is beneficial to set out the two contrasting views at this juncture.

The first is that the ECtHR case law cannot be divorced from the Convention itself. The second is that the Convention is primary and the case law secondary, meaning that the ECtHR jurisprudence is relevant only so far as the Union courts give effect to it and even then it remains within the discretion of the Union courts as to how far the interpretation is applicable through the prism of uniqueness that is the Union⁴⁵.

2.2.2.1 Direct Applicability

The first of these positions can be termed as direct applicability of both the ECHR and the jurisprudence interpreting the particular Convention right. Put another way the Convention is not capable of being read and applied without reference and consideration to the relevant body of Strasbourg jurisprudence. Although this may not have been the position prior to the Charter there is case law authority supporting the argument that the jurisprudence of the applicable Convention right is binding. For example in *European Parliament v Council of the European Union*⁴⁶ there is direct reference to the binding nature of the jurisprudence of the ECtHR. The court stated that ‘...the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the

<http://ssrn.com/abstract=1319243>, Forrester, I., (2009) Due process in EC competition cases: A distinguished institution with flawed procedures’, 34 E.L. REV. 817

⁴⁵ See for example Gerard, D ‘Breaking the EU Antitrust Deadlock: Re-empowering the Courts’ E.L. Rev, 36 (4), 2011, pp 457-479 and Trainor, S ‘A Comparative Analysis of a Corporation’s Right Against Self Incrimination’, 1994-5, 18 Fordham Int’L L.J. 2139.

⁴⁶ Case C-540/03

Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... *and of the European Court of Human Rights*'. [Emphasis added]. This would seemingly suggest that Convention rights whether found in the general principles of EU law or in the Charter itself are susceptible, where synonymous with the Convention, to the interpretation of the ECtHR. Moreover the Union courts are often reliant on the jurisprudence of the ECtHR, for example in Schmidberger⁴⁷ the Strasbourg jurisprudence on the scope of Convention Articles 10 & 11 was considered at length. In relation to antitrust procedures the Union courts have found Strasbourg case law necessary where assessing a violation of a Convention right. In Baustahlgewebe⁴⁸ the possibility of a violation of the parties right to have the case decided in good time was expressly decided through the test set out by the Strasbourg court. Evidentially then the Convention rights are unable to be viewed in isolation from the Strasbourg case law as it forms the 'meat on the bones' of the Convention right. More than this by interpreting the Convention outside of the jurisprudence that flows from it there is likely to be divergent views and interpretations between the two courts⁴⁹.

2.2.2.2 Article 6TEU & The Charter

There is certainly additional weight added to the direct applicability argument through the reading of Article 6TEU. Firstly 6(1) gives the Charter the same legal effect as the treaties, meaning the Union courts must give full effect to the Charter provisions. In conjunction to this the Charter must be interpreted with due regard to general provisions in Title VII of the Charter (discussed below). Secondly under 6(3) a section related directly to the Charter, it states that '[f]undamental rights, as guaranteed by the

⁴⁷ Case C-112/00

⁴⁸ Case C- 185/95 Baustahlgewebe GmbH v Commission of the European Communities. At paragraphs, 29, 30, 35, 37 and 41.

⁴⁹ Deeper discussion of the ramifications of this falls outside the scope of the paper, but in summary it is possible that this will have minimum effect on the Union institutions as such but places the MS in a position whereby there is a conflict between their international commitments.

European Convention for the Protection of Human Rights and Fundamental Freedoms ... shall constitute general principles of the Union's law.' This seemingly draws the Convention rights into the Union and places them on a level playing field with general principles of law, meaning that Convention rights are to be treated literally and equally as they flow from the Convention.

Moreover there is a sustainable argument that had the legislator intended that the ECtHR case law was not to be applicable the corresponding Convention rights would not have been incorporated into the Charter as Convention rights per se. Rather when read with 6(2) on the accession of the EU to the ECHR and the approach taken by the Union courts as one of mutual respect and harmony it is arguable that there was a clear intention to bind the Union to the full scope of the ECHR including its jurisprudence⁵⁰.

This would also explain the inclusion of Article 53 into the Charter, setting the minimum standard of protection as being that of the Convention for corresponding rights. This article is capable of supporting the assumption that there was legislative intention to ensure that the interpretation and application of Convention rights at a Union level and at a Strasbourg level are, if not the same, then higher but never in conflict as to the minimum standards required by the ECHR.

2.2.2.3 Limited Applicability

Of course the polar argument to that set out above is that the Convention itself may apply in full but the jurisprudence of the ECtHR is considerably less binding. It falls to the Union courts to decide on the interpretation of the Convention rights. Of course on a literal reading of Article 52(3) it is clear that it is only the Convention that is binding on the Union and not the jurisprudence of the ECtHR. More than this under Article 6 TEU there is an

⁵⁰ S Douglas-Scott, S (2006) A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, 43 Common Market Law Review, 656. For discussion on the underlying reasoning for the Union courts acceptance of the Convention case law and the rationale for following it.

intention to ascend to the ECHR but at present this has not occurred and as a result, at least for present purposes, there is validity in the argument that there is no formal binding of the Union courts to the Convention. Union case law, to some extent, supports this. For example in *Kadi*⁵¹ the ECJ made it clear that international agreements are not universally binding on the Union courts and that fundamental rights are ‘a constitutional guarantee stemming from the Union Treaty as an autonomous legal system’ indicating that the Union courts reserve the right to avoid international agreements of which the Convention is one where it is deemed necessary.

There is to some extent historical Union case law that supports this position that essentially rests on the assumption that the Union courts are not bound to the Convention case law⁵². Whilst it can be said that the Union courts do not willingly or flagrantly disregard the jurisprudence of the Strasbourg court seeking harmony rather than conflict, so to it can be said that they do not find this mutual respect as conditional on the acceptance of Convention jurisprudence unconditionally⁵³. In keeping with the competition law theme of this paper the Union courts approach to Article 8 ECHR⁵⁴ can be seen at times as divergent and at other times contradictory of the Convention interpretation. In the case of *Hoechst*⁵⁵ the question arose as to the extent that Article 8 ECHR applied to businesses and commercial premises. The ECJ interpreted the scope of Article 8 as being limited to individual persons ‘homes’ and a freedom relating to that of the individual rather than extended to all legal persons. The ECtHR took a different stance in the *Niemietz*⁵⁶ case deciding that a lawyer whose offices were searched was able to rely on

⁵¹ Joined Cases C 402/05 P and 415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 316

⁵² On this point generally see for example Jacobs, F. (2007) *The Sovereignty of Law*, Cambridge 2007, 54-55; Callewaert, J. (2009) *The European Convention on Human Rights and European Union law: a long way to harmony*, *European Human Rights Law Review*, 768; White, R. (2008) *The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough*, ch.8, *Continuity and Change in EU Law*, OUP, London, 2008.

⁵³ This to some extent feeds into the argument against accession that ultimately falls outside the scope of this on the point that there cannot be accession as the Strasbourg and Luxembourg courts are ultimately courts of equal standing in the international legal order and therefore there is a conflict of reviewability.

⁵⁴ Article 8 ECHR gives everyone the right to respect for their home.

⁵⁵ Joined Cases 46/87 & 227/88 *Hoechst v Commission* [1989] ECR 2859

⁵⁶ *Niemietz v Germany* (App no 13710/88) (1992) Series A no 251, para 31

Article 8 protection and that ‘home’ was capable of including business and professional premises. This was followed by the later case of *Société Colas Est*⁵⁷ which gave further weight to the position that business premises owned by legal persons were capable of Article 8 protection. Whilst this was eventually remedied by the ECJ in *Roquette Frères*⁵⁸, many commentators such as Tobias Lock⁵⁹, point to the use of the Convention jurisprudence being the remedying factor. Whilst this is in some respects correct, it is respectfully submitted that the reading of paragraph 28 of the judgment does not expressly state that the change of the Union position was reliance on the ECtHR case law. Rather the court expressly states that ‘*regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst*’ [emphasis added] whilst the outcome of the case can be seen as bringing the Union case law in line with the Convention interpretation it was not expressly based on the Convention.

This approach is in line with the long established position of the Union courts in using international agreements as sources of inspiration. Other examples of these divergent views between the EU and the ECHR arose in respect of the right not to incriminate oneself. Again flowing from a competition case, that of *Orkem*⁶⁰. The case surrounded a challenge to the Commission request for certain questions to be answered which if answered would, it was contended, be tantamount to giving incriminating evidence against oneself. The question was framed under Article 6 ECHR and that the legal obligation to comply with the Commission request infringed the companies right under Article 6. Following the ECtHR the Union court found that a right not to give evidence against oneself was not inherent in Article 6. However shortly after this the ECtHR in *Funke* held that a conviction based on a refusal to disclose information containing evidence against the applicant was an infringement of Article 6(1) ECHR. Not

⁵⁷ *Société Colas Est v France* (App no 37971/97) Reports of Judgments and Decisions 2002-III.

⁵⁸ Case C-94/00 *Roquette Frères* [2002] ECR I-9011

⁵⁹ See Lock, T., (2011) EU Accession to the ECHR: Consequences for the European Court of Justice, Paper for EUSA Conference 2011

⁶⁰ Case 374/87 *Orkem v Commission* [1989] ECR 3283

unexpectedly the question resurfaced in the Union courts in Mannesmann⁶¹. The Funke case was not even referred to by the Union court. Whilst it did to some extent recognize the right to non-self incrimination this was not a result of the ECtHR or the Convention. It is debatable whether the courts approach in Mannesmann is in conformity with ECHR law. It is however illustrative that the extent to which the Union is bound by both the Convention and the jurisprudence remains a matter for debate.

For present purposes it would seem that there is validity in the limited applicability argument. A position that continues to find some support from case law such as AC-Treuhand⁶² where the Court held that not all convention rights are available in the Union by stating that *'It should be pointed out, at the outset, that the Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not as such form part of Community law.'*

The court goes on to clarify the position of fundamental rights in the Union as well as the applicability of those rights that do have effect in a Union sense, *'[t]hat said, the fact remains that the Community judicature is called upon to ensure the observance of the fundamental rights which form an integral part of the general principles of law and, for that purpose...the ECHR has special significance, as confirmed by Article 6(2) EU. That has also been reaffirmed in the fifth recital in the preamble to the Charter of Fundamental Rights of the European Union, and Articles 52(3) and 53 thereof.'*

It should not be forgotten that the main responsibility of protecting the rights provided for by the Convention rests with the Signatory States. So even if there is accession to the Convention the current position of limited applicability may well be sustainable. As we see in jurisdictions such as the UK under Section 2 Human Rights Act 1998 which states *'...A court or tribunal determining a question which has arisen in connection with a*

⁶¹ Case T-112/98 Mannesmann v Commission [2001] ECR II-729

⁶² Case T-99/04 AC-Treuhand v Commission

Convention right must take into account [ECHR case law]... where in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.’ Moreover the recently proposed changes to the Convention under the so called Brighton Declaration requires that there be a greater margin of appreciation left to the signatory state to implement, apply and interpret Convention rights. The ECtHR has affirmed that ‘the scope of this margin of appreciation is not identical in each case but will vary according to the context...’ Buckley v United Kingdom⁶³. It therefore follows from the above that the applicability of ECHR is limited to the interpretation by the Signatory States. Although it must be pointed out that at the heart of the argument over the application of Convention rights rests on the applicability of Article 6 ECHR to competition procedures. There has been much criticism levelled at the current Union interpretation of Convention jurisprudence in respect of the susceptibility of the Commission to the full effect of Article 6 ECHR. This will be considered in more detail in the next section.

2.3 Article 6 ECHR – Divergent Opinion

It is apparent that the limited scope of application given to the jurisprudence of the ECtHR and the interpretation of Convention rights in the unique circumstances of competition law has led to the Union approach being synonymous with the limited applicability approach set out above. Those in favour of direct applicability consider the Union approach and application to Article 6 is unsustainable and fundamentally flawed.

It therefore falls to consider the nature of Article 6 before determining the question as to its applicability. Following the Strasbourg approach Article 6(1) ECHR applies where there is a ‘determination’ either of a ‘civil right’ or a ‘criminal charge’. Therefore the applicability of Article 6 is limited depending on the nature of the proceedings in issue. This forms the heart of

⁶³ 25 September 1996, § 74, Reports of Judgments and Decisions 1996-IV

the debate between the opposing views. The Union courts⁶⁴ and the Commission determining that the procedures under which antitrust, and especially cartel cases, are investigated and decided are not criminal in nature as is expressly stated in Article 23(5) Regulation 1/2003. This is countered by a number of commentators who argue that the investigation leading to the imposition of incredibly large penalties on companies must be considered criminal in nature and therefore open to the full scope of Article 6. Much turns on the definition of what amounts to ‘criminal’ for the purposes of Article 6.

Turning to the jurisprudence of the ECtHR they have expressly stated that the definition of an action is not definitive rather it is the actual nature and effect that are the determinants of the nature of the proceeding in question. The leading authority on this issue is the so-called Engel case⁶⁵ where the ECtHR has stated that ‘criminal’ is an independent definition. To decide otherwise would of course permit Contracting States to avoid the scope of Article 6 by definition⁶⁶. As a result Engel provides a test to establish the true nature of the proceeding through a three prong approach (a) the classification of the offence under national law (b) the nature of the offence and (c) the severity of the penalty.⁶⁷ In its own jurisprudence it is evident that the Convention is capable of catching regulatory as well as administrative actions within the scope of Article 6. In *Bendenoun*⁶⁸ French tax surcharges were of criminal nature for the purposes of Article 6(1) ECHR. Much was made of the nature of the penalty, not only in amount but in establishing the underlying purpose for the imposition of the penalty which the court found to be as punishment and as a deterrence for reoffending rather than recovery of damage. It should be noted that the court

⁶⁴ See for example See Joined cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and Others v Commission* [1980] ECR 3125, para 81; Cases 100-103/80 [1983] *Musique Diffusion Francaise v Commission* 3 C.M.L.R. 221, para 7; Case T-11/89 *Shell v Commission* [1992] ECR II-757, para 39

⁶⁵ *Engel v The Netherlands* [1979-80] EHRR 647

⁶⁶ *Engel* at para 81

⁶⁷ *Engel* at para 82

⁶⁸ *Bendenoun v France*. [1994] 18 EHRR 54

expressly stated⁶⁹ that all the Engel criteria taken together made the nature of the ‘charge’ in question a criminal one for the purposes of Article 6(1) ECHR. Whilst there is a lack of direct ECtHR case law in respect of competition proceedings at a Union level the case of M&Co⁷⁰ involving competition proceedings in Germany the ECtHR stated that ‘it can be assumed that the [EU] anti-trust proceedings in question would fall under Article 6 had they been conducted by German and not by European judicial authorities.’ The now defunct European Commission on Human Rights took a similar approach in the Stenuit⁷¹ case, where it stated, at paragraph 61, that French competition law had ‘a criminal aspect...for the purposes of the Convention.’ For a number of commentators such as Lidgard, Forrester and Vesterdorf the application of the Engel criteria firmly brings Union competition procedures and penalties within the scope of Article 6 and therefore the position of the Union that Article 6 does not apply is untenable. Or as Riley puts it ‘the inescapable conclusion is that, for the purposes of ECHR the [EU competition] procedures and penalties are criminal in nature.’⁷²

Comparing the Stenuit case to the current competition regime in the Union Andreangeli contends it to be apparent that many of the characteristics that brought the French system within the ambit of ‘criminal’ are inherent in the Union system. Such as the detection and sanctions of violations of norms of general application adopted in the general interest, namely the protection of free competition and the use of penalties in a manner that is both a deterrent and punitive⁷³. This position has been taken up by a number of Advocate Generals such as Vesterdorf in Hercules Chemical, Leger in Baustahlgewebe, Bot in ThyssenKrupp⁷⁴ Nirosta and Kokott in Dutch

⁶⁹ Bendenoun at para 44

⁷⁰ Application No. 13258/87, M. & Co v the Federal Republic of Germany

⁷¹ Appl.No 11598/85 Stenuit v France, [1992] ECC 401. See paragraphs 56 – 63 where the factors taken into account are very similar in nature to the Engel criteria.

⁷² Riley A, “The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation” [2002] 51 ICLQ, p 55, at 67

⁷³ Andreangeli A, (2008) “EU Competition Enforcement and Human Rights” Edward Elgar Publishing Limited, pgs. 25-27

⁷⁴ Advocate General Bot’s Opinion Case C-352/09 P ThyssenKrupp Nirosta v Commission

Electricians Federation. All of whom have to some extent related the penalties to being of criminal in nature.⁷⁵

More recently it is seemingly the position of both the ECtHR and the Union that the penalties imposed in competition proceedings are in fact criminal in nature. The recent case of *Menarini* decided in the ECtHR involving a question as to the nature of competition penalties in Italy forms the basis of this assumption. In *Menarini* the ECtHR followed previous case law by stating that the classification of the proceedings (in this case the Italians argued that competition law was administrative rather than criminal) was not decisive as to the applicability of Article 6. Rather the court considered that the function of the Italian competition authority involved the best interest of society. A similar rationale to that of criminal law, moreover the function and severity of the fine inflicted was by its nature repressive and preventive. Again following the case law discussed above this is criminal in nature. Unsurprisingly the court established the fines as being criminal in nature. Whilst at a Union level the opinion delivered by AG Sharpston in *KME* seems to be reflective of the acceptance that the penalties are indeed criminal. She stated that there is 'little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market sharing agreements in Article [101(1) TFEU] falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights' (paragraph 64). Despite the fact that there is seemingly consensus that the fines imposed by the Commission are criminal in nature there remains debate over the applicability of Article 6 to the procedure leading up to the imposition of the penalty and the decision.

2.3.1.1 Administrative or Criminal

This has led to the reinterpretation of what is deemed to be 'criminal' for the purposes of Article 6. One such interpretation put forward by Wils⁷⁶ and

⁷⁵ Nazzini R, "Some Reflections on the Dynamics of the Due Process Discourse in EC Competition Law" [2005] 2(1) *Comp. L. Rev.*, p 5, at 6

affirmed by AG Sharpston in KME (paragraph 67) suggest that there are differing levels of ‘criminal’, through which there are differing standards of application of Article 6. The argument rests on the interpretation of *Jussila v Finland*⁷⁷ and in particular paragraphs 41-46 of the judgment. In summary they state that there is a possible distinction to be drawn between ‘hard-core’ criminal law matters and those that fall closer to the ‘civil head of Article 6’.

This has led to a distinction being drawn between ‘hard-core’ criminal law that is susceptible to the full jurisdiction of Article 6 and those proceedings that fall closer to the side of civil procedure and are at best ‘soft-core’ criminal law. The importance of the distinction is the lower standard of application of Article 6 and especially the deferred applicability of Article 6(1) which holds the procedural protections of the fair hearing required under the Convention, the court put it in the following way in respect of a right to a fair hearing *‘...the obligation to hold a hearing is not absolute... There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials...’* the court continues to state that *‘...proceedings falling under the civil head of Article 6 § 1 and that the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings...it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly “criminal charges” of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the Engel criteria have underpinned a gradual broadening of the criminal head to*

⁷⁶ Wils W, (2010) “The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights”, available at <http://ssrn.com/abstract=1492736>

⁷⁷ Application No. 73053/01

cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties...’.

This has led Wils to consider that the full effect of Article 6 will depend largely on whether there is a hard-core or soft-core criminal charge. For Wils it is apparent that the nature of EU antitrust provisions are the latter by nature and therefore the full applicability of Article 6 cannot apply to the Commission’s procedure and investigation. A position taken up by Castillo de la Torre⁷⁸ who like Wils considers that the position of the Commission is that of the soft-criminal law in nature. In rebuttal to the size of the fines imposed they point out these must be viewed in the context of the company fined and whilst the amounts may seem large they are not necessarily disproportionate to the imposition of a surcharge placed on an individual such as in Jussila.

However those in favour of direct applicability consider this interpretation of the ECtHR as being skewed in favour of the Commission. Further suggesting that it is evidence of the difficulty in the Union of the non-binding nature of the ECHR and the jurisprudence as there can be no application brought before the ECtHR to determine the matter. Therefore critics such as Forrester, Lidgard and Andreangeli⁷⁹ consider that the position taken up by the Union is unsustainable and based on an incorrect interpretation of the ECtHR case law. The argument runs that Jussila dealt with tax surcharges and does not expressly condone this split between hard-core and soft-core, moreover there is a lack of authority of its application to competition proceedings.

⁷⁸ Castillo de la Torre, F. (2009), “Evidence, Proof and Judicial Review in Cartel Cases”, World Competition 505

⁷⁹ For critical analysis see also I. Forrester, “Due Process in EC competition cases: a distinguished institution with flawed procedures”, [2009] European Law Review 817; GCLC, Report of Group III, Fifth Annual Conference on the Commission’s review of Regulation 1/2003, Brussels, 11-12 June 2009 (available at http://www.coleurope.eu/template.asp?pagename=gclcfifthannual_docs); Jürgen Schwarze, Rainer Bechtold and Wolfgang Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008 (available at http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf)

Furthermore in *Jussila* whilst the court found much of the tax assessment procedure fell outside of the scope of Article 6 this was primarily due to the nature of a ‘tax assessment’ which was largely an administrative function. The court also felt that the penalty imposed was a ‘*minor sum of money*’ (para 48). Therefore the Commission overstates the full effect of *Jussila* and even if this were not the case the actions of the Commission, unlike tax authorities in *Jussila*, are exercising a different function combined with their wide-ranging powers and should be distinguished from a tax authority. Secondly the fines imposed are not ‘minor sums of money’.

Although the Union case law seems to fall more on the side of the limited applicability and supports the interpretation put forward by the likes of *Wils* and *de la Torre*⁸⁰. There is further authority for the Union position in that the Commission cannot be susceptible to the full effect of the ECtHR as it fails to meet the Convention requirements of being a ‘tribunal’ or ‘court’. Whilst it is accepted that an administrative body is capable of being a ‘tribunal’ or ‘court’ the ECtHR case law accepts that administrative bodies whose ‘function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner’ is acceptable to the ECHR. IN order for an administrative body to fall into the full scope of Article 6(1) it still needs to satisfy the requirements of the Convention in particular the administrative body must be independent of the executive and impartial⁸¹. Clearly the Commission does not meet these criteria as they are neither independent nor impartial.⁸² Along with the interpretation of *Jussila* this seemingly brings the Commission outside the ambit of Article 6(1).

Of course this leads to the anomalous position that by the empowering of a body such as the Commission it is possible to circumvent the applicability

⁸⁰ See for example Case 45/69 *Boehringer Mannheim v Commission*; Case T-11/89 *Shell v Commission*.

⁸¹ App. No 9273/81 *Ettl v Austria* [1988] 10 EHRR 255 paras 38 and 41; App No 19178/91 *Bryan v United Kingdom*, Commission Report [1996] 21 EHRR 342, paras 37-38

⁸² On this point see *Drabeck* (2003) A Fair Hearing before EC Institutions, 4 ERPL, 529 at 533.

of the Convention. However the ECtHR has accepted that in light of the need for efficiency and flexibility⁸³ there is no infringement by empowering a body such as the Commission. However respect for the Convention must be guaranteed in one of two ways. Either the administrative body itself must comply with Article 6 or there must be sufficient judicial scrutiny and control of the administrative body by a competent court or tribunal meeting the requirements of Article 6⁸⁴. It is therefore possible to sustain the argument put forward by Wils that the Union courts, if necessary, remedy the limited applicability of the Convention during the procedure of investigation and decision-making can. Or put another way Article 6 is satisfied if at some point during the procedure either at the commencement of proceedings or at the appeal stage of the penalty and or the decision the case is considered in light of Article 6.

The natural rebuttal to this of course is that it is questionable whether it is just and equitable to subject a company to the unlimited jurisdiction of the Commission during the investigative and decision making stages of the completion rules through which a company is required to cooperate (discussed below) and only permitting them access to Article 6 on appeal to either of the Union courts on completion of the Commission action. This is certainly questionable at a Convention level. Cases such as *Imbroscia*⁸⁵, albeit a criminal case, suggests that simply because there is a determination by a competent court at some point of the proceeding ‘it does not follow that the Article has no application to pre-trial proceedings.’ However pro Commission commentators suggest that there are sufficient safeguards inherent in the empowering Regulation (1/2003) to ensure that the Commission is in effect securing the requisite level of rights protection at the ‘pre trial’ stage.

⁸³ Appl. 6878/75 and 7238/75, *Le Compte, Van Leuven and de Meyere v Belgium* [1982] 4 EHRR 1, para 51

⁸⁴ Appl. Nos 7299/75 and 7496/76, *Albert & Le Compte v Belgium* [1983] 5 EHRR 533, para 29

⁸⁵ A/275 [1993] EHRR 13

This is a view shared by the Union courts who have resisted arguments based on a lack of procedural safeguards during the Commission stages to the detriment of the companies. They have expressly stated that the Commission's functions are purely administrative in nature⁸⁶. Moreover there are inherent safeguards both within the Regulation and the ability of the parties to bring an action before the Union courts⁸⁷ to satisfy the Article 6 requirements.

From an ECHR perspective the recent case of Menarini (discussed above) gives weight to the empowerment of administrative bodies in competition proceedings and has seemingly done away with the need for the Jussila distinction as the judgment implies that competition proceedings are criminal in nature. As such the key question is not whether at a procedural stage there is complete compliance with Article 6 rather it is a question of whether or not there is full judicial control of the administrative body. At paragraph 58 of Menarini the ECtHR states that '*entrusting administrative authorities with the task of **prosecuting** and **punishing** contraventions is not incompatible with the Convention, it must be stressed however that the applicant must be able to take any decision taken against him...[to] a court offering the guarantees of Article 6.*' The court uses language synonymous with criminal proceedings such as 'prosecuting' and 'punishing' which are accepted as legitimate functions of the administrative body so long as there is the overseeing unlimited jurisdiction of judicial review. That been said it is the opinion of the author that this does not mean that the Commission must not respect fundamental rights. As already pointed out at a Union level all institutions are required by Union law to respect fundamental rights.

It is apparent that the Commission, largely relying on the supportive interpretation by the Union courts, continues to consider its procedure as

⁸⁶ See for example Case 100/80, *Musique de Diffusion Francaise v Commission*

⁸⁷ See for example Case T 156/94 *Sideruriga Aristrain Madrid SL v Commission*

being compliant with minimum standards of rights protection⁸⁸. The Commission view is that whilst ‘issues relating to the compatibility of the Community enforcement system with the rights of defence of the parties in competition proceedings were raised in the context of appeals against Commission decisions before the Community Courts⁸⁹, these were rejected by the latter.⁶¹ The Union enforcement system also satisfies the requirements of the European Convention on Human Rights’⁹⁰. Although this report and the position of the Commission reached as a result of the case law analysis undertaken by the Commission is challenged by James Killick & Pascal Berghe who suggest that there is no rights compliance and the system is in need of fundamental reform⁹¹. It is the view of the author that the lack of consideration by the Commission of the growing criticism against the enforcement of antitrust law and especially the limited applicability of rights entitlement of companies demonstrate the ever-powerful position that the Commission holds. The low level of judicial scrutiny and the flagrant disregard of the objections by companies and independent lawyers continue to fuel the fires of criticism. This is not helped by the Commission pushing aside the issues of procedural guarantees by making broad and at times sweeping statements that antitrust enforcement is compatible with human rights standards and especially those of the ECtHR. It is noticeable that during the consultation on Regulation 1/2003 (discussed above) that only two small paragraphs were devoted to the substantial issues of procedural flaws raised by companies and lawyers. Likewise in the 2012 Competition law Forum hosted by the Commission it was noticeable that not a single outside or independent counsel were invited to offer a view on the question of rights and levels of judicial review.

⁸⁸ See for example Commission Staff Working Paper Accompanying The Communication From The Commission To The European Parliament And Council Report On The Functioning Of Regulation 1/2003 {COM(2009)206 Final}.

⁸⁹ The Commission largely relying on Cases 209-215 and 218/78, *Heintz van Landewyck SARL and others v Commission (FEDETAB)*, [1980] ECR 3125, para 81; Cases 100-103/80, *Musique Diffusion Française and others v Commission*, [1983] ECR 1825, para 7; Case T-11/89, *Shell International Chemical Company v Commission*, [1992] ECR II-757, para 39.

⁹⁰ *Ibid* paragraph 56

⁹¹ Killick, J., Berghe, P., (July 2010) ‘This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in’, Volume 6 Issue 2 pp 259-285

The position of the Commission and their ability to ride roughshod over the rights of companies is largely a result of Regulation 1/2003 and the wide powers inherent in it. The following section of this paper offers a critical evaluation of the compatibility of the provisions of regulation 1/2003 with fundamental rights norms.

3 Regulation 1/2003

This section will consider in more depth the assertion by pro Commission commentators and the Union courts that there are sufficient procedural safeguards within Regulation 1/2003. Given the limited space within which to do this only Articles that are viewed as relevant to the discussions of procedural rights will be considered. Specifically those Articles that afford the Commission wide ranging powers, such as those derived under Article 18, the power to request information. In addition Article 20 and 21 and the right of inspection of business and private premises as well as the ability to question and take statements. This interlinks to the research questions by assessing the extent to which these powers are balanced by the ability of companies to raise human rights as a defence to the Commissions exercising of their powers under the Regulation.

3.1.1 Overview

One of the main criticisms of the Regulation is that it affords to the Commission wide discretion in their capacity to investigate undertakings and or particular trade sectors. They are able to do so as of their own initiative⁹² or through an individual complaint procedure⁹³. It is the former that frames the context of the discussion and individual complaints are not considered. Once the Commission takes the decision to investigate a company it has two particular strands to it, the first being the investigation without the opening of formal proceedings and the second being with the opening of formal proceedings.

The decision to pursue an investigation formally or informally is important given that the Regulation restricts the Commission's actions more under the informal investigation as such the rights engaged would largely depend on the provisions of Regulation 1/2003 that the Commission rely on. Either

⁹² Expressly provided for pursuant to Article 7 1/2003

⁹³ The individual complaint procedure is not considered here, under 1/2003 any person with a legitimate interest (Article 7(2) 1/2003 as to application of legitimate interest and the individual procedural requirements see Article 5 (1) Regulation 773/2004).

which way the very nature of ‘investigation’ implies that there will be a process of information gathering. As a result the Commission has wide ranging powers to obtain information from undertakings, associations, third parties, Member States and national competition authorities⁹⁴. In the context of this thesis the relevant consideration is whether the exercising of power by the Commission is sufficiently checked by the provisions of the Regulation and if not whether companies are capable of raising the rights of defence as they occur from the Convention and the Charter.

3.2 Requests for Information

Of course the action of investigation or even the requesting of information is integral to any investigation and by placing burdensome restrictions on the Commission’s ability to request information is likely to impede the very purpose of competition enforcement. As such Article 18, 1/2003 provides that the Commission can request information either by ‘simple request’⁹⁵ or through ‘formal decision’⁹⁶.

The form will dictate the obligations arising on the part of the addressee. In the event of the simple request being used the Commission is in essence asking for a form of voluntary assistance in the provision of what the Commission considers ‘necessary information’⁹⁷. The simple request places no legal obligation on the addressee to provide the Commission with any information, indeed there is not even a requirement for the Commission to be answered in the negative should that be the intention of the addressee. In *Limburgse*⁹⁸ the Court stated in respect of a simple request that ‘*an undertaking is not obliged to reply to a request for information...*’ this is in

⁹⁴ It is questionable as to the jurisdiction of the Commission to address such requests to parties established outside of the EU/EEA even where a subsidiary is based within the EU/EEA where the mother company is ‘foreign’ and the information requested in the latter’s control. This was recently raised in Case T-140/07 *Chi Mei Optoelectronics Europe and Chi Mei Optoelectronics v Commission* although it was struck from the register prior to the court answering the question.

⁹⁵ Article 18(2)

⁹⁶ Article 18 (3)

⁹⁷ Article 18 (1),1/2003.

⁹⁸ C-238/99

line with both the reading of 1/2003 and the inference drawn from Article 18(2), 1/2003 which does not allow for the imposition of a penalty to be imposed on an undertaking for non-compliance.

Although non-compliance has not been met with impartial acceptance by the Commission. A sceptic may well consider that the Commission's tendencies to object to non-compliance with simple requests by way of a complaint of undue interference borders somewhat tenuously on the lines of compelling undertakings to incriminate themselves in the alleged unlawful activities⁹⁹. Whilst on the flip side of this, the very fact that an undertaking has the 'right to silence' or 'non-compliance' suggests that the simple request for information does not unduly impede ones right to non self-incrimination. Although it is questionable what inferences the Commission is likely to draw from a company choosing not to cooperate, of course there is no way to know the answer to this.

Although it is the more draconian in nature sections of Article 18 that are cause for concern. Article 18(3) for example permits a request for information by 'Commission Decision'. There are some fundamental differences with the simple request for information. The 'request by decision' places undertakings under a legal obligation on receipt of such a request to comply and provide to the Commission all 'necessary and relevant information'. As to what amounts to 'necessary information' is something of a misnomer with little or no clarification as to the parameters and boundaries of what the Commission can request.

Blanco¹⁰⁰ suggests that the Commission has a considerable margin of discretion in determining what information is 'necessary' for their investigations. Whilst Faull and Nikpay consider that there are 'no

⁹⁹ It should be noted that where an undertaking does respond to the simple request they are quickly deemed to be bound to the duty of sincere cooperation, see Case 374/84 Orkem v Commission at paragraph 27.

¹⁰⁰ Blanco O., L., et al (ed), (2006) E.C. Competition Procedure, Oxford University Press

restrictions placed on the Commission'¹⁰¹. It is difficult to see how this is can be viewed as reconcilable with the Orkem¹⁰² judgment which acknowledges as one of the general principles of Union law, the right of undertakings not to be compelled by the Commission to admit their participation in an infringement, of course to do so expressly based on the provision of legal advice or other influencing factors is an avenue always open to the undertaking. However to compel an undertaking to release documents that either directly or indirectly incriminate it in the alleged activity is in direct contrast to the principle of non-incrimination. The position under a 'decision request' is that undertakings find themselves under an automatic obligation to comply¹⁰³ with the request. In Mannesmannrohren-Werke¹⁰⁴ the court stated that '...undertakings are required to communicate...all facts of which they are aware...which undertakings have an absolute duty to comply with.' Evidently the compulsion of compliance overrides the right to refuse on the grounds of answers or materials constituting self-incrimination. This in some ways explains the divergent views of interpretation between the Union and the ECtHR on the issue of self-incrimination (discussed above) arguably should the Union adopt the ECtHR approach companies would be able to limit their compliance with the request for information and in essence extinguish any hope of the Commission obtaining relevant evidence from companies.

Therefore the Union case law supports the reading of Article 18 through Article 23(1). The latter prevents the undertaking or addressee to intentionally or negligently supply 'incorrect or misleading' information. Again the Commission is found to be in a favourable position in respect of the interpretation and application of what amounts to 'incorrect or misleading'. According to Kerse and Khan¹⁰⁵ the concept stretches from

¹⁰¹ Faull, J., and Nikpay, A., (2007) *The EC Law of Competition*

¹⁰² Case 374/87 *Orkem v Commission*, paragraphs 28, 38

¹⁰³ As to the so called 'duty of active cooperation' see T-9/99 *HFB and Others v Commission* at paragraph 27

¹⁰⁴ T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* at paragraph 28

¹⁰⁵ Kerse, C., & Khan, N., (2004) *E.C. Antitrust Procedure*, Sweet and Maxwell at page 136.

what is expressly requested by the Commission to the requirement that undertakings should respond in the ‘spirit’ of what the Commission is requesting. Therefore the withholding of information of the grounds of self-incrimination or through innocent misunderstanding¹⁰⁶ will seemingly not be sufficient to excuse the ‘non-compliance’. In *Telos*¹⁰⁷ the Commission interpreted misleading in the following way, ‘any statement is incorrect which gives a distorted picture of the true facts asked for, and which departs significantly from reality on major points. Where a statement is thus false or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information.’ The wide and embracing application of this is that the undertaking runs a risk of breaching the ‘request decision’ if it declines, withholds or inadvertently misrepresents the facts as a result of seeking to avoid self-incrimination. Seemingly the Commission is of the view that so long as the information is related in some way to the investigation, however tenuous such a link is, will be sufficient to bring it inside the scope of the Commission’s request.

Whilst the Commission is susceptible to judicial review¹⁰⁸ (discussed below) it has found support rather than resistance from the courts. The case law whilst acknowledging the tensions between fundamental rights and Commission powers nonetheless has continued to support the Commission in the compelling of information and cooperation from undertakings so long as there is some link between the request and the infringement. As *Korah*¹⁰⁹ points out ‘under the [Union] case law this is a low hurdle to cross’, an assertion that is well supported by the court’s decisions. In *SEP*¹¹⁰ for example the court affirming that ‘it is for the Commission to decide ... whether particular information is necessary to enable it to bring to light an infringement of the competition rules’. In the same way it is for the Commission to assess whether non or limited compliance results in the

¹⁰⁶ On this point see Case IV/31.143 *Peugeot*, O.J. [1986] L 295/19 at para 52

¹⁰⁷ Case IV/29.895 – *Telos*, O.J. [1982] L 58/19, para 21

¹⁰⁸ In particular when making requests for information, see Case 97/87 *Dow Chemical* at para 16-17

¹⁰⁹ *Korah*, V., (ed), (2011) *Competition Law of the European Community*, Vol. 2, 10-35.

¹¹⁰ T-39/90 *Samenwerkende Elektriciteits-produktiebedrijven NV v Commission*

hindrance of the Commission's duty, which can later be used as an aggravating factor to increase sanctions levied by the Commission¹¹¹. In conjunction with this the Commission is empowered to impose a penalty on undertakings for non-compliance under Article 23 (1)¹¹².

Whilst the Commission has been challenged with some success on the imposition of both non-compliance and penalties for infringement of competition law on the basis of *ne bis in idem* as set out in Article 4 of protocol 7 of the ECHR and acknowledged as a general principle of law¹¹³. This has not curtailed the Commission's ability to circumvent the principle through the power to uplift the final penalty rather than impose a second one as a result of the perceived action or inaction of the undertaking, even where it is arguably been as a result of the tension caused between the rights of defence and the Commission's investigative powers¹¹⁴.

The requirement of companies to act dutifully even to their own detriment is difficult to reconcile with the principle of non self incrimination and certainly when threatened with a fine for non-compliance it is difficult to see what procedural safeguard exists to ensure the fundamental right of a company is protected, clearly there is nothing within the Regulation or the Commission Notices or Guidelines. Combined with the weak judicial scrutiny it may well be that the position of the Commission and the courts that sufficient procedural safeguards are inherent in the Regulation is misplaced.

3.2.1 Inspections

One of the most contentious points within the procedure is the empowerment of the Commission to collect information as part of their

¹¹¹ See Commission Guidelines on the application of Article 23 (1), 1/2003, O.J. [2006] C210/02, para 28.

¹¹² See recent case where Czech energy companies Energetický a průmyslový holding and EP Investment Advisors were fined € 2.5 million for obstruction during inspection. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/319&format=HTML&aged=0&language=EN&guiLanguage=en>

¹¹³ See for example the GC in C-122/07 Siemens

¹¹⁴ C-254/99 Limburgse Vinyl Maatschappij and Others v Commission at para 61.

investigation¹¹⁵. In a similar way to requests for information this is achieved via simple authorisation or by Decision. There are a number of similarities in the application of the inspection powers and the requests for information¹¹⁶. For example the simple request for inspection in no way compels the undertaking to comply and they may refuse without fear of repercussion¹¹⁷. Likewise the Commission Decision procedure under Article 20(4) is capable of placing undertakings under a legal obligation to comply with the Commission's Decision. Whilst there is a presumption as to a requirement of certainty in respect of the information and scope of requested information to be inspected by the Commission to ensure that the undertakings rights to defence and non-incrimination are protected¹¹⁸ this has been questioned by the Commission. In the Explanatory Note to an Authorisation to Conduct an Inspection the Commission have stated that inspectors cannot be compelled or required to expand on the scope of the information or the reasons for the need to access particular information. The Commission's powers of inspection have been given wide application by the courts and simple procedural errors are seemingly insufficient to launch a challenge against the legality of the inspection even where the addressee may differ to that of the undertaking trading at the inspection address, so long as there is a reasonable link between the two the Commission is seemingly able to execute their Decision¹¹⁹. In light of these decisions the powers granted under Article 20 (2) the Commissions powers are seemingly only challengeable where the infringement to a right of the undertaking is exceptionally severe. As a result the Commission have ended up through Article 20 (2) (a)-(e) with wide access to all premises and materials however and wherever they are held. The wide-ranging access to documents and materials is supported by the ECJ case law that has the effect of permitting

¹¹⁵ Due to restraint of space the effects of sealing documents, areas and IT information are not considered here.

¹¹⁶ Made under Article 20 (3), 1/2003

¹¹⁷ Although the same arguments made above in relation to hindrance and the uplift of or imposition of a sanction applies. So to does the obligation of sincere cooperation once the undertaking engages with the Commission in permitting the inspection.

¹¹⁸ This has been somewhat accepted by the C.F.I. in T-339/04 France Telecom v. Commission [2007] E.C.R. II-521 at paragraphs 56-60.

¹¹⁹ T-66/99 Minoan lines v Commission [2003] E.C.R. II-5515

complete and wide ranging access but curtailing the power by requiring that the Commission quickly cease to examine irrelevant documentation¹²⁰. Whilst undertakings are afforded the right to legal counsel it is notable that the case law and the application of it is restrictive, undertakings have only a short period to consult counsel, to take advice and make a decision in light of their rights¹²¹.

As discussed earlier in relation to the *Roquette Frères* case there has been reluctance to afford the Convention rights in respect of Article 8 to companies and there is long judicial history of limited applicability of this right. Many commentators find this to be an untenable position as the exercising of this power by the Commission is clearly contrary to ECtHR conclusions that Article 8 ECHR applies equally to business premises as to private businesses (see case discussed above *Niemitz* and *Societe Colas Est*). However the approach of the Regulation and the Union courts seems to draw a distinction between the rights of companies and the rights of individuals under Article 8 ECHR.

3.2.2 Inspections – Private Residence

This is evident in the requirement of a higher burden to be met by the Commission under the Regulation when carrying out inspections at the private residences (Article 21). The Commission must demonstrate the existence of reasonable suspicion that documents are likely to be at the private residence as well as the express limitation placed on the inspectors in conducting the search. Perhaps most notable however is the need for the Commission to gain prior authorisation from the national judicial authority of the Member State concerned. It also places the Commission under the direct scrutiny of the national courts. Prior to granting the authorisation national courts are required to ensure that the request is ‘authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement’.

¹²⁰ Case C-94/00 *Roquette Freres v DGCCRF and Commission* [2002] E.C.R II-9011

¹²¹ Case 46/87 *Hoechst v Commission* [1989] E.C.R. II 2859

Arguably on its face national courts have the authority to act as the guardian over the application of Article 8 in respect of private residences to which the Commission is bound to comply with. The Regulation goes further by permitting national courts to request detailed explanations from the Commission to validate the order. No such procedural safeguards are in place under the inspections at business premises, leading to one possible conclusion, that the Union does not perceive companies as having the same rights as individuals. That been said the remainder of Article 21 withdraws much of the power granted to the national authorities by introducing a contradictory paragraph that ousts the jurisdiction of the national courts to ‘call into question’ the necessity for the inspection. This would turn the above argument on its head and indicates that the granting of permission to the Commission is ‘required’ given that the national court cannot ‘call into question’ the Commissions motivation for the inspection. Viewed in this way it is evident that there is little or no distinction between the two types of inspection. It also remains highly dubious that either are in line with the applicable case law of the ECtHR discussed earlier.

3.2.3 Powers of Questioning

The inspection powers are linked to a further area of procedure that remains highly contentious, that of the Commission’s powers to ask for explanations, under Article 20 (2), 1/2003 the Commission is able to ‘ask any representative or member of staff’ to explain facts or documents regardless of such employee or persons legal empowerment to speak on behalf of the undertaking. Whilst Article 4 of Regulation 773/2004 attempts to balance this by granting to the undertaking a right to a copy of the interview and in limited circumstances a right to reply to the statement¹²² there remain inherent difficulties with this. The first being that there is no availability of an undertaking’s right to cross-examination nor is there any clarification as to the weight on which the Commission will place on such statements this amongst other aspects have provided weight to the

¹²² Under Article 17 (3) 773/2004

incompatibility of the procedure with the fundamental rights to a fair and open hearing.

4 Rights to Defence

The appropriateness of the level of protection of rights to defence during the ‘administrative’ stage has been the subject of much debate. With commentators pointing to the lack of capacity to cross-examine witnesses or be heard by the decision maker at the oral hearing as evidence of the shortcomings in adequate respect for fundamental rights. It in many ways forms the foundation of the criticisms levelled at the powers of the Commission being unbridled.

Inherent in the accepted rights to defence is the ability of the accused company to be presumed innocent until proven otherwise. As well as being able to adequately defend itself against the evidence put forward to establish participation in anticompetitive behaviour. The potential difficulty is highlighted in the recently decided case of *Aragonesas*¹²³, where the Commission was found to have relied on evidence that the court described as unreliable, sporadic and fragmented. Despite the lack of supportive evidence the Commission still reached the decision of *Aragonesas* being complicit in a cartel and imposed a heavy penalty. The ability of the Commission to reach decisions based on the inference drawn from the evidence rather than being subject to any overseeing judicial body at this stage of the proceeding is illustrative of the disregard the Commission is capable of showing for fundamental rights and in many ways undermines the Wils argument of their being sufficient procedural safeguards within the Regulation.

4.1 Presumption of Innocence

One of the main considerations is whether the presumption of innocence is sufficiently respected by the Commission during the early stages of the

¹²³ T-348/08 *Aragonesas Industrias y Energía v Commission*

procedure. Whilst there is merit in the argument that the Regulation¹²⁴ places an evidential burden on the Commission to establish the company had participated in the anticompetitive practice it is apparent from cases such as *Aragonesas* this is not necessarily to the standard that would be compatible with rights standards. In particular Article 6(2) ECHR states ‘[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. Although following recent case law from the ECtHR the presumption only bites where a person is ‘subject to a criminal charge’¹²⁵. If this is accepted then the presumption may be seen as having limited effect given the fact that the procedural stages of antitrust enforcement are categorised as administrative and the Commission has been held to lack the necessary components to be considered a court or tribunal for the purposes of the Convention it is therefore arguable that Article 6(2) ECHR cannot fully apply to the Commission.

If this is the case the question arises as to whether the 2nd paragraph of Article 48¹²⁶ of the Charter that is given full effect through Regulation 1/2003 is sufficiently followed. It requires that ‘[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed.’ Again this rests on the question of charge and reading the Article in full it is more likely than not to apply only in criminal proceedings. Although whether this position is tenable is debatable. Clearly the case of *Menarini* throws doubt on this by drawing analogies of criminal prosecution with the Italian competition authority whose powers are largely based on the Italian obligation to enforce EU competition law.

The distinction remains good law and therefore it is possible to conclude that the presumption of innocence, whilst a live issue, is circumvented from application given the distinction drawn between administrative and criminal by the Union courts. Following the arguments of Wils and others the

¹²⁴ Article 2 Regulation 1/2003

¹²⁵ *X v FRG* No 4483/70

¹²⁶ The assumption drawn that the interpretation of Article 6 and Article 48 must correspond in accordance with Article 52 and 53 of the Charter and the Guiding Principles that state that Article 48 corresponds to Article 6(2) and (3) of the ECHR

presumption will only arise once the case is set before a competent court or tribunal and therefore as in *Aragonesas* the court will need to decide on whether the presumption of innocence has been offended through a lack of or an incorrect interpretation of the adduced evidence.

It does not automatically follow that the company is denied other rights flowing through the principle of rights of defence. Although the seemingly non-application of the presumption of innocence does beggar the question as to the extent a company is able to challenge the evidence and rebut the assumption of guilt on the evidence.

4.2 Right to be Heard

The principle of the right to be heard stems largely from the Anglo-Saxon influence on the CJEU and is based on the common law principles of *nemo iudex in causa sua* and *audi alteram partem*. Full discussion of these principles falls outside the scope of this paper, although in general terms they encompass the right to adequate notice including an opportunity to be heard and the right to an unbiased and impartial decision maker¹²⁷. Strictly speaking under the common law this applies in equal strength to administrative and judicial proceedings¹²⁸. At a Union level this principle has been adopted as a general principle of law, in *Transocean Marine Paint*¹²⁹ AG Warner summed it up as follows, '*[t]here is a rule embedded in the law of some of our countries that an administrative authority, before wielding a statutory power to the detriment of a particular person, must in general hear what that person has to say about the matter, even if the statute does not expressly require it*'. Nehl¹³⁰ contends that the inclusion of these principles into the general principles has a twofold function. Firstly 'it contributes to the accuracy of the substantial outcome of the decision

¹²⁷ Some commentators consider that the Union interpretation is in many ways reflective of Article 6 ECHR and the procedural rights under 6(3). See for example Millett (2002) *The Right to Good Administration in European Law*, PL, Summer 309.

¹²⁸ *Franklin v Minister of Town and Country Planning*, HL, [1948] AC 87

¹²⁹ Case 17/74 *Transocean Marine Paint Association v Commission* [1974] this position was accepted by the court at paragraph 15 of the judgment

¹³⁰ Nehl, H.P., (1999) *Principles of administrative procedure in EC law*, Hart Publishing

making’ and ‘it constitutes a process right designed to protect individual substantive rights and interests’. There can be little doubt as to the relevance of these principles or their authority given their subsequent inclusion into the Charter under the heading of good administration in Article 41. Paragraph 2 of the Article expressly provides for the right to be heard before any individual measure which would have an adversely affect is taken. Additionally there is an individual right to access to the file. More than this the Regulation expressly states that ‘undertakings concerned should be accorded the right to be heard...’¹³¹. The Commission holds the position that the undertaking is entitled to these rights and in any event is subject to a fair and impartial determination that includes the right to defence as well as an oral hearing.

4.2.1 Statement of Objections

The right of response is provided to undertakings by the Commission being required, under Article 27(1), to provide a ‘Statement of Objections’ (SO)¹³² to the affected undertakings for their comment, prior to the Commission taking any formal decision. The correlation between the right to a response and defence and the SO has been recently affirmed by the CJEU. In *Bertelsman*¹³³ the court stated ‘*that the statement of objections is a procedural and preparatory document which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure in question...*’. It remains the case that pursuant to 1/2003 the Commission is unable to adopt a decision before giving an undertaking the opportunity to respond. What is lacking in this regard is the fact that once a response has been made there is no mechanism to compel the Commission

¹³¹ Preamble to Regulation 1/2003, Recital 32

¹³² The procedural aspects as to content and form of the SO also plays a role in respect of the right of defence and the lawfulness of the SO itself, this is not fully considered. This is an issue addressed by the court albeit unsatisfactorily in Case C-189/02 *Dansk Rorindustri v Commission* [2005] ECR I-5425.

¹³³ Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* at paragraph 63

to investigate it further or for the company to know whether any weight was placed on such a reply.

4.2.2 Right to an Oral Hearing

Under Article 27 the Commission is obliged to provide to the parties the opportunity to develop their defence at such a hearing, but only where the party applies to do so in writing. Regulation 773/2004, Article 14 (1) calls for the appointment of a ‘Hearing Officer’ to ensure the hearing is conducted in ‘full independence’. Whether this is achieved or not is debatable and it is evident that the restrictions imposed on the hearing such as the limited access to the file and the limited scope of the right to ask questions or cross exam witnesses makes the oral hearing otiose. As Korah¹³⁴ points out the current format of the oral proceeding is essentially restricted to the parties being able to offer an oral account what they have already informed the Commission of their position.

4.2.3 Access to File

The question of a right to respond lies at the heart of many of the accusations levelled at the procedure being in violation of fundamental rights. The issue being predominantly one of access to the file and the selection of evidential data collected supporting the Commission’s position rather than following the more commonly accepted rules of evidence exchange. It is further suggested, with foundation, that there is little or no way for the undertaking to challenge the probative value of the evidence the Commission relies on. Although the court has accepted that access to the Commission’s file is fundamental to an undertakings ability to effectively exercise the right to be heard in their defence¹³⁵ the issue remains one of contention as to what the Commission includes in the file. Under article 15, 1/2003 the Commission is obliged to provide to parties with access to everything except that which is deemed (a) confidential or business

¹³⁴ Korah, V., (ed), (2011) Competition Law of the European Community, Vol. 2 at 10-68

¹³⁵ T-10/92 Cimenteries CBR SA v Commission [1992] E.C.R. II-2667

secrets¹³⁶ (b) internal documents of the Commission and (c) correspondence with national competition authorities. It is such that the rules of evidence common within most types of ‘prosecutorial’ procedure are not applied to the Commission in any strict sense at all. The case law suggests a particularly lenient approach to non-disclosure by the Commission. The case of SGL Carbon¹³⁷ highlights the somewhat Commission ‘friendly’ approach taken by the courts, whereby undertakings are subject to the reverse burden of demonstrating that (a) the Commission has relied on evidence to support its objection and of the infringement and (b) that the Commission’s position could only be proved by reference to such document. Whilst this is somewhat more relaxed in the event that there has been non-disclosure of exculpatory evidence it still remains the undertakings burden to firstly identify the document not disclosed and secondly to show that the non-disclosure would have had a significant impact on the decision of the Commission¹³⁸. Evidentially this makes it particularly difficult for undertakings to identify the evidence not disclosed but more importantly the reverse burden is overly burdensome and protectionist.

In light of all these factors one may well find support for commentators and critics of the proceedings before the Commission. Whilst on paper there is sufficient opportunity for companies to be heard and to make their case but in practice it is seemingly the case that it is impossible to gain access to a fair and impartial decision maker and the right to be heard is limited to a statement of position rather than a rebuttal of the evidence. Due in the main to the fact that there it is virtually impossible to rebut the evidence relied on by the Commission as it is never known what evidence is expressly relied on by the Commission in coming to a decision.

¹³⁶ There is criticism that it is the Commission who decides as what information is restricted.

¹³⁷ Case C-308/04 SGL Carbon v Commission [2006] E.C.R. I-5977

¹³⁸ Case C-204/00 Aalborg Portland v Commission [2004] E.C.R. I-123

4.3 Imposition of Sanctions

Given that it is on the basis of the above evidence and procedure that activates the Commissions power to impose a penalty on a company for violation of competition rules it is tenuous whether the appropriate standards of procedural rights protection are applied in the previous sections. This is a position taken up fiercely by Forrester. Commentators such as Wils¹³⁹ reject the notion of procedural irregularities and flaws within the competition enforcement procedure and point to the fact that the Commission remains subject to review by the EU Courts¹⁴⁰. This is especially the case when the Commission exercises its authority to impose a penalty for antitrust infringement.

4.3.1 Powers of Imposition

The power to impose penalties stems from Regulation 1/2003, predominantly through Article 23(2). Under which the Commission is able to fine each undertaking and association of undertakings up to 10 % of their total turnover in the preceding business year. Whilst this in itself is relatively certain in terms of economic assessment the extent of the fines becomes more complex. Under 23(3) the Commission is entitled to have regard to the gravity and the duration of the infringement particularly ambiguous legislative wording, although this is subject to the Commission Guidelines that sets out the methodology of calculating the fines and the factors taken into account. A number of rights issues arise from the imposition of penalties, however they largely fall outside the scope of this paper due to space restrictions. In overview there has been concern

¹³⁹ Wouter P.J. Wils, Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law, paper presented at the First Lisbon Conference on Competition Law and Economics (Lisbon, 3-4 November 2005) p. 15. Available at <http://ssrn.com/abstract=1319243>

¹⁴⁰ Although he has been subject of criticism from academics but most notably from competition law specialist see for example Forrester I., 'Due process in EC competition cases: A distinguished institution with flawed procedures', (2009) 34 E.L. REV. 817, Forrester I. 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review', in Claus-Dieter Ehlermann & Mel Maquis (Eds.) European Competition Law Annual (2009), Evaluation of Evidence and its Evaluation in Competition Cases, (Oxford, Hart Publishing 2010).

expressed over the Commissions ability to infer parental liability to holding companies where subsidiaries have become involved in anti-competitive activities. There is much debate surrounding the compatibility of the Commission's treatment of subsidiaries as part of a single economic entity leading to fining the same company twice, the holding company and the subsidiary.

From a rights perspective the single economic doctrine is thought to violate the principle *ne bis in idem* and Article 7(1) ECHR. Principles that have previously been accepted as general principles of law applicable to competition proceedings¹⁴¹. A similar argument is raised in respect of joint liability, in that the joint liability means that company A is responsible for the fine imposed on them but also, in the event of non-payment, liable for the fine imposed on B¹⁴². The court has however routinely rejected the arguments on the premise that the interpretation of a 'single economic entity' is a wide concept and it is at the discretion of the Commission to decide how to structure the penalties. In relation to joint and severable liability the Court at paragraphs 149-152 in Siemens¹⁴³ for example stated 'joint and several liability...is part of the objective of deterrence...pursued...by competition law... and respects the principle of non bis in idem...[and] Article 7 ... of the ECHR...'. This is in many ways difficult to reconcile with the interpretation and application of ECHR case law and particularly with the principles of the rights to defence given that parent companies may not be subject to the initial investigations or having been afforded the appropriate levels of a right to defence prior to the implementation of the penalty by the Commission. It is evident that there are concerns raised throughout the initial stages of the investigation, the interpretation and application of procedural rights are on the above analysis

¹⁴¹ T-45/98 Krupp Thyssen [2001] , paragraph:63

¹⁴² T-77/08 Dow Chemical v Commission and T-76/08 El du Pont de Nemours and Others v Commission. Two recent cases demonstrate the wide approach taken in supporting the Commission,

¹⁴³ Joined Cases T-122/07 to T-124/07 Siemens AG Österreich & Ors. V European Commission see also the recent case of Joined Cases C-201/09 P and C-216/09 P, Arcelor Mittal Luxembourg SA & Ors. V European Commission

more often than not sidelined by the Commission in the main due the fact that their powers are so broad and the appropriate checks and balances remain absent.

However as illustrated earlier at both an EU level and for Convention purposes the empowerment of the Commission in this way under the guise of an administrative body seems to be acceptable. Under the condition that their actions are open to full review of a competent judicial body. The extent to which this is the case within the Union is considered in the next section of this paper.

5 Judicial Review

Within the 'rights era' judicial review has become seen as an essential democratic mechanism, especially with the rise of delegated powers to administrative bodies, politicians and bureaucrats¹⁴⁴. It has become the vehicle through which individuals and companies are able to obtain redress for infringements from those empowered and a way to hold them to account¹⁴⁵. In a competition law context the Union courts are to be seen as the final independent arbiter of the legality of both the scope of the Commissions authority and the legality of the exercise of such authority. Many scholars, such as Forrester¹⁴⁶ and Lidgard,¹⁴⁷ have questioned the extent to which there is sufficient scrutiny by the Union courts of the Commission. In order to assess the effectiveness of review it should be remembered that the Union courts are only permitted to operate within the scope of the jurisdiction afforded to them either through the Treaties or specific legislative measures¹⁴⁸. This has, as will be discussed below, in competition proceedings caused a two-tiered system of review due to Regulation 1/2003 giving partial jurisdiction of review whilst Articles 263 and 261 TFEU providing the rest.

5.1 EU Judicial Review

Firstly Regulation 1/2003 expressly grants jurisdiction to the court, although it is worded in such a way that it is centred on review of the penalties imposed by the Commission rather than the procedure itself. This being the case it remains that the only real avenue through which the courts

¹⁴⁴ Shapiro, M., (1980) 'Appeal', 14, *Law & Society Review*, pp.629-661

¹⁴⁵ The nature and scope of judicial review falls outside the scope of this paper. Rather the generalisations made are to place it in context for further discussion of the Union courts approach in competition proceedings.

¹⁴⁶ Forrester I (2010) 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review', in Claus-Dieter Ehlermann & Mel Maquis (Eds.) *European Competition Law Annual (2009), Evaluation of Evidence and its Evaluation in Competition Cases*, (Oxford, Hart Publishing 2010)

¹⁴⁷ Lidgard, H.H., (2012) *Due Process in European Competition Procedure: a Fundamental Concept or a Mere Formality?* (Unpublished)

¹⁴⁸ See generally Article 19 TFEU for general jurisdiction and Articles 263 and 261 TFEU

jurisdiction can be invoked to challenge a Decision is through the Union judicial review procedure under Article 263 TFEU¹⁴⁹. Under which the Union courts shall review the legality of binding legislative acts intended to produce legal effects. It is such that there is jurisdiction to hear cases on grounds of procedural irregularities. Whilst in principle there is a possibility of the Courts striking down a Commission Decision on the basis of procedural irregularity. It is evident from the case law that the Commission is afforded a very wide ‘margin of appreciation’, which some commentators such as Vesterdorf¹⁵⁰ attribute to the concept ‘institutional balance’. This is especially the case where the review calls for assessment of complex factual and economic factors. This ‘margin of appreciation’ is particularly evident in the GC, for example in *Matra Hachette*¹⁵¹ the court stated that ‘where complex economic facts are involved judicial review of the legal characterization of the facts is limited to the possibility of the Commission having committed a manifest error of assessment...’. As considered throughout this paper the EU Courts have given great support to the Commission especially when asked to review the procedural fairness of competition rules, this seems somewhat anomalous given judgments of the court in cases such as *Roquette Frères v Council* where Article 263 is activated through a procedural irregularity, it seems that the Court has therefore drawn a subtle and at times pedantic distinction between essential procedural step and the question of due process within the procedure, the latter it would seem benefits from the wide application of discretion.

Following the Lisbon reforms it has become a particularly tenuous position in so far as the wording of Article 263 was amended to be more in line with institutional accountability and judicial scrutiny. The amendment is clearly aimed at ensuring that the institutions are subject to full review by the Union

¹⁴⁹ The scope of judicial review and the application of Article 263 remains a hotly debated issue in academic circles, see for example Geradin D. and Petit N., ‘Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment’, available at <http://ssrn.com/abstract=1698342>.

¹⁵⁰ Vesterdorf B., ‘Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement’, (2005) 1 Global Competition Policy 1

¹⁵¹ Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595

Courts in all aspects, including the question as to the procedure infringing a fundamental right. To date the EU Courts have taken the view that the ECHR does not apply strictly to competition proceedings¹⁵² through the particularly tenuous argument that EU courts are not empowered to apply ECHR and that they can only take inspiration from the ECtHR judgments. This in relation to the research questions posed illustrates a difficulty for companies to rely on the rights of defence before Union courts as they arise from the Convention. This in turn limits the overall scope of corporate rights protection to a more limited view by Union courts than might otherwise be available under the ECtHR. This is discussed further in the next section.

5.1.1 Jurisdiction of Review

At its simplest there is a hybrid system of review based on the assumption that the court is viewed as having to fill two functions, on the one hand deciding on the lawfulness of the Commission action and on the other the lawfulness of the penalties imposed. Put another way the courts undertake either ‘legality review’ or ‘annulment review’, the confusion arises given the different legislative instruments empowering the Union courts. This stems largely from the lack of clarification of the legal basis on which the court exercises its jurisdiction in assessing particular issues raised in the case law. Legality review seemingly rests Article 263 TFEU whilst the annulment review rests on the jurisdiction derived from Article 261 TFEU read through Article 31 Regulation 1/2003.

5.1.2 Standards of Review

The exercising of legality review in antitrust proceedings is unclear in that the court has not differentiated between the types of review with any clarity. The apparent overuse of legality review is often seen as an unlawful restriction on the courts jurisdiction to review the Commission’s decisions.

¹⁵² See e.g. Case T-347/94, *Mayr-Melnhof Kartongesellschaft mbH v Commission*, 14 May 1998, [1998] ECR II-1751, paras. 311-312: The Court of First Instance has no jurisdiction to apply the ECHR when reviewing an investigation under competition law, because the ECHR is not itself part of Community law.

This is largely due to the fact that the court itself has limited authority in respect of the remedies available. Whilst they are empowered to ‘annul’ a decision of the Commission they are unable to supplement their own judgment in place of that of the Commissions. This by its nature requires the court to focus more on the actions or omissions pertaining to the *intra or ultra vires* of the Commission action rather than undertaking a fuller evaluation of the evidence to reassess whether the Commission decision meets the required standard and burden of proof (Article 2 Reg. 1/2003).

This style of review often leads to what some consider an overly high level of deference to the Commission. This is given weight by the court considering that where there are complex economic factors deference must be given to the Commission (Case 42/84 Remia and Others v Commission [1985] ECR 2545, para. 34). Even where an annulment is made the decision reverts back to the Commission who may or may not reconsider the evidence and change the decision. The apparent injustice stems from companies successfully challenging a Commission decision in the courts only to have the Commission return with a new SO and continue to pursue the company. In recent cases such as Papierfabrik¹⁵³ and more specifically Wieland-Werke AG¹⁵⁴ the re-engineering of the case after rectifying the procedural defect does not in essence offend Article 7(1) or Article 6(2) ECHR.

5.1.3 Annulment Review

This style of review is a broader review distinguished from illegality given the wide scope of jurisdiction on remedies available to the court. Much of the current argumentation on this is whether this style of review is available to companies to challenge the procedure under Regulation 1/2003 or if it applies solely to the question of the penalties imposed by the Commission. Some commentators have criticised the court for the use of this style of

¹⁵³ Joined Cases C-322/07 P, C-327/07 P and C-338/07 P Papierfabrik August Koehler AG and Others v Commission of the European Communities

¹⁵⁴ Case 116/04 Wieland-Werke AG vs. Commission

review only in the assessment of the fines rather than the procedure, an assumption is drawn through a few case references and academic commentary that this is due to the power of review coming through Article 31 1/2003 in conjunction with article 261 TFEU which bestows on the court directly the unlimited jurisdiction to “cancel, reduce or increase” the amount of fines or penalties, once they have determined that these were inappropriate. This will seemingly marry to the requirement of the ECHR style of review being sufficiently full and without limitation, what arises is the question of to what extent is this style of review available, implemented and successful in Union courts. If the standard of review is insufficient to meet the level of review required by Article 6 ECHR it is arguable that the Union courts are breaching Article 6. The difficulty with such an argument is that there remains no body to hear an appeal of a CJEU decision. It remains to be seen whether accession to the ECHR will permit the ECtHR to rule against the CJEU providing companies with an added layer of protection. The question as to the compatibility of the standards of review with the ECHR is considered in the next section.

6 ECHR Standards of Review

As pointed out in the discussion above the empowerment of a body such as the Commission tasked with the enforcement of competition law is not itself an affront to the ECHR. It is however conditional. This flows from *Menarini* where the ECtHR held that the legitimising factor is the requirement that the decision of the Commission must be controlled by a judicial body with full jurisdiction. This raises the question as to what is meant by full jurisdiction and whether this applies equally to the decision and the penalty or just to the penalty. In this respect the *Menarini* case can be read in two ways, either requiring full review of both the decision and the penalty or alternatively just the penalty. As discussed above the Union application of review rests on two types of review, legality and annulment review. Conceptually there is some support for this approach from the ECtHR, for example in *Zumtobel* the court indicated that a legality review was sufficient to satisfy effective judicial review even where the court did not have the power to impose their own decision¹⁵⁵. Although it is clear that this type of legality review must provide sufficient jurisdiction to the overseeing court to be able to fully review the evidence on which the decision maker has relied on¹⁵⁶. From this it is apparent that on either reading of *Menarini* the scope of ‘full review’ is synonymous with the legality review under Article 263 TFEU in so far as the court is entitled to review the evidence relied on by the Commission to assess the legality of the decision. Returning to *Menarini*, the power of the court over the Italian competition authority was limited in the same way to the legality of the decision. This was compatible with the ECHR.

¹⁵⁵ App No 12235/86 *Zumtobel v Austria* [1994] 17 EHRR 116.

¹⁵⁶ App No 10328/83 *Belilos v Switzerland* [1988] 10 EHRR 466

6.1 Compatibility of Review

On its face it is seemingly the position then that the dual nature of legality and annulment review operated by the Union courts is ECHR compatible. The key question being whether the courts are adequately applying the review to sufficiently hold the Commission to account. This forms the real bone of contention. There seems to be a growing trend of realisation that neither the GC nor the CJEU, although empowered to do so, have held the Commission to account. The recent cases of *Chalkor*¹⁵⁷ and *KME* have offered some further lip service from the Union courts as to the scope of their powers and the minimum standards litigants are entitled to. In *Chalkor* the court stated that ‘...whilst...the Commission has a margin of discretion... that does not mean that the Courts...must refrain from reviewing the Commission’s interpretation of information ...[Union] Courts [must] establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it’¹⁵⁸. This was reiterated *KME*¹⁵⁹ where the court considered the required level of review in a similar way (paragraph 121) but went on to consider that ‘the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission’s margin of discretion... as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.’

Whilst much commentary has arisen since the judgments in *Chalkor* and *KME*, it is the authors view that the lip service of the Union courts is no different to the views that have been expressed by the Union courts before.

¹⁵⁷ Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission*

¹⁵⁸ *Chalkor*, para 64

¹⁵⁹ Case C-389/10 P. *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, at paragraph 129

For example in *Tetra Laval*¹⁶⁰, a judgment delivered in 2005 some 6 years before *Chalkor* or *KME*, the court stated that ‘the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Union Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Union Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.’ Whilst in *Lenzing*¹⁶¹ (a 2007 judgment) the GC interpreted the CJEU case law in the following manner ‘[a]ccording to the case-law of the Court of Justice, not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.’

Indeed even prior to *Lenzing* and *Tetra Laval* the level of review has been similar to that reiterated in *Chalkor* and *KME*. In *Racke*¹⁶² (a 1979 judgment) the court put it in the following way ‘...since the evaluation of a complex economic situation is involved, the commission...enjoy...a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the court must examine whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.’ Finally in *Nölle*¹⁶³ (a 1991 judgment) court reaffirmed the position in the following way ‘the Court has consistently held that in the context of such a review it will verify whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers.’

¹⁶⁰ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, at paragraph 39

¹⁶¹ Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947 at paragraph 57

¹⁶² Case 98/78 *Racke* [1979] ECR 69, paragraph 5

¹⁶³ Case C-16/90 *Nölle* [1991] ECR I-5163, paragraph 12

Although the above cases are not all focussed on antitrust review they all consider the lowest level of review of an EU institution carrying out an administrative function delegated to it. It is therefore evident that the appropriate level of review has long rested in the jurisdiction of the Union courts. But having the power of review and exercising that review appropriately is seemingly the missing link. So whilst judgments such as those discussed above are a welcome judicial expression, the reality of review is somewhat different. A view shared by the recently appointed judge to the General Court Marc van der Woude who remarked that the current levels of review in the GC do not meet the standards required either by Menarini or by the CJEU in Chalkor or KME. He points out that the level of review in a trademark case, a dispute between private individuals, is substantially higher and more intense than that of the GC in cartel cases which are by the nature of the fines imposed, at least financially, likely to have a much greater impact on companies.

If the standard of review is insufficient to meet the level of review required by Article 6 ECHR it is arguable that the Union courts are breaching Article 6 themselves. Under ECHR case law and indeed Union law there must be a right to an effective remedy. To follow the case law of the CJEU in Köbler¹⁶⁴ where they stated that ‘The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance’. Whilst of course directed at MS the question remains as to why in principle the GC or the CJEU should not be held to account in the same way. The difficulty with such an argument is that there remains no body to hear an appeal of an ECJ decision. It remains to be seen whether accession to the ECHR will permit the ECtHR to rule against the ECJ providing companies with an added layer of protection. The importance of this as a point is that if the deference of the Union courts to the Commission is as

¹⁶⁴ Case C-224/01 Gerhard Köbler v Republik Österreich

high as it currently is companies procedural rights are unlikely to be adequately protected. Which leaves hanging the availability of a remedy for the roughshod of the company's rights. It also means that there has been a 'transference' of a breach from the Commission to the courts. This is in line with a reading of Menarini that seemingly suggests that the ability of state to use an administrative body rests on this transference of the burden of rights enforcement being moved to the judicial process.

7 Conclusion

It is apparent that the simple research questions posed at the outset of this research disguise a multitude of complexities that arise for consideration. As a starting point the ability of legal persons to invoke human rights is intertwined with the relationship between the Strasbourg and Luxembourg courts. It is apparent that whilst both courts limit the applicability of rights to legal persons their approaches differ considerably, as does their interpretation of the scope of the applicability of procedural rights. This in turn presents a tension that becomes inherent in the application of the Charter given the symbiotic relationship between Charter Articles to their parent rights taken directly from the Convention. Evidentially the non binding nature of the Convention to the Union permits divergent case law and the Union courts have little difficulty in disregarding the case law of the Convention where deemed to be overly restrictive. More than this one cannot be blind to the role of competition law generally in protecting and encouraging free market growth and stability. This goes to the very heart of the origins of the Union, namely the internal market.

Therefore any criticism and analysis of the affording rights of defence to companies must take into account the necessity to balance procedural protection with economic and stability of the internal market. This could in many ways explain the Union courts reluctance to place too high a restraint on the Commission. Economics, market policy and fiscal considerations are traditionally areas that are marked by high levels of judicial deference. However by companies seeking rights protection the Union courts are being unwittingly dragged into these areas to assess the proportionality and suitability of the Commission's actions. More than this the very nature of the fining policy of the Commission involves economic calculations from worldwide turnovers to the assessment of market damage. Again these are areas that are more synonymous with fields outside the ambit of courts generally, however by the Union courts continue to hide under the high

margin of discretion to the Commission rather than find avenues to remedy the complexities such as the use of expert evidence¹⁶⁵ is unacceptable. Throughout this thesis it has been apparent that at a Union level the courts deference has resulted in not only uncertainty but also dissatisfaction of the approach taken by the courts and there is a desperate need for clarification and adjustments to create a more balanced approach to the rights of companies.

Despite the scepticism voiced and the difficulties of review presented by the sheer economic nature of competition proceedings a higher level of review seems to be the order of the day. Recent case law from Strasbourg and in particular the willingness of the CJEU to hold the Commission to a higher standard of proof indicates that the wide discretion from which the Commission has benefitted for so long may become reduced through more active judicial review. There is a lack of empirical evidence on which to base any conclusions as to why the Union courts are becoming more focussed on the actions of the Commission, although it is possible to hazard an educated guess.

In the authors opinion there are three factors that may well form the undercurrent for the changes. The first is without a doubt the case law from the Strasbourg court and in particular the case of Menarini. The importance of the case, although not binding on the EU, should not be underestimated. The impact of Menarini formed the basis for almost an entire panel discussion at the 2012 Competition Law Forum¹⁶⁶ hosted by the Commission. The CJEU in Reflets N° 1/2012 drew out Menarini as a case of special importance to antitrust proceedings. This in conjunction with the ‘mutual understanding’ and ‘respect’ between Luxembourg and Strasbourg and the impending accession of the EU to the Convention places the jurisprudence from Strasbourg at a higher level. Secondly, the Charter itself,

¹⁶⁵ This suprisingly was the position taken by Union courts in the early case law such as C-129/85 A. Ahlström Osakeyhtiö e.a. (Woodpulp II) [1993] ECR I-1307

¹⁶⁶ Available at http://ec.europa.eu/competition/information/european_competition_forum_2012/index.html see in particular the panel on The European Competition Model

combined with the Union drive to be viewed as ‘democratic’ compliant, which following Lisbon has led to changes in the judicial review procedures generally to ensure redress for violations of individual rights by Union institutions. Buttressed with the Charter and the right to an effective judicial remedy¹⁶⁷ as well as the codifying of the Right to Good Administration that largely holds the rights and protections of Article 6 of the Convention into the Charter arguably now requires the Union courts to have more regard to the decisions of the institutions. Or put another way, the extent to which the Commission can rely on a wide margin of discretion can no longer be viewed as rights compliant. Lastly, the economic crisis and the ever-increasing fines imposed on companies must be seen as having an effect. The reduction in fines imposed by the Commission on the grounds of hardship is becoming an all too frequent argument made to the Union courts to exercise their discretion in reducing or annulling the original fines imposed by the Commission. Certainly when it comes to reviewing the penalties the case law illustrates a flexing of judicial muscle, this can be seen from Table 1 below, however it is questionable whether the same can be said in respect of reviewing the decisions of the Commission. As discussed above even where such review is undertaken and the decision is annulled the Commission’s ability to simply reinstitute proceedings seems to be an undermining of the scope of judicial review within the Union.

7.1 Rights Irrelevant?

Whilst much of the focus of this paper and various other academic texts rest on the premise of rights protection, the case law does not expressly support this position. Rather recent case law, see Table 1 below, indicates a trend to annul Commission actions where the basic procedural rights and in particular the right to be heard is not fully engaged and effective, although the Union courts have avoided the direct questions of rights or procedural irregularities and are seemingly basing annulments on the Commission’s

¹⁶⁷ Although outside the scope of this paper see generally for application of the Charter on this point Case C-457/09 Chartry [2011] ECR I-0000, paragraph 25; and Case C-69/10 Samba Diouf [2011] ECR I-0000, paragraph 49

failure to fulfil the required elements of the ‘offence’ under 101 or 102. In *Air Liquide* the failure of the Commission to state reasons why the company’s rebuttals were not relevant and in *Edison* failure to give sufficient reasons as to why the conditions were satisfied were grounds for annulment¹⁶⁸. In *Elf*¹⁶⁹ the ECJ reversed the General Courts judgment due to the Commission’s reasoning being deficient.

Undertaking	Issue	Decision
Unipetro	Lack of Evidence	Annulled the decision
Elf, Grolsch, Air Liquide and Edison	Insufficient reasoning as to involvement of parent	Full and partial annulments
Solvay	Failure to give access to file/ lost documents	Annulment
Toshiba and Melco	Discrimination on calculation of fine	Full and partial annulments
ThyssenKrupp	Incorrect fine uplift	Decision upheld but Commission required to prove

Table 1

Although the case law does not directly refer to the rights of companies as grounds for annulment it is too narrow an interpretation and unnecessarily side-lines the rights issues that are inherent in the complaints. One of the predominant issues raised by companies in appealing against a Commission Decision is the lack of probative and reliable evidence on which the Commission decision rests. The courts have shown a willingness to annul a decision based on a lack of evidence or of the Commission simply failing to reach the requisite burden of proof. This is demonstrative of the courts reluctance to engage with the issues of rights infringement. Put another way the courts are more readily persuaded to annul a decision on evidential

¹⁶⁸ T-185/06 *Air Liquide*, paras:65–82; Case T-196/06, *Edison*, paras:60–9

¹⁶⁹ C-521/09 P, *Elf Aquitaine*, paras:159–168

grounds i.e. the lack of it rather than on the basis of a failure of a company to be heard for example. The effect of an annulment is such that the action remains live and the Commission can simply return with more or differently applied and interpreted evidence¹⁷⁰. More than this it also protects the Commission from a separate action for breach of a procedural right. Moreover for the Union courts to hold a rights infringement by the Commission would be tantamount to accepting that the system as it currently stands based on Regulation 1/2003 lacks the necessary legal foundation to be rights compliant. This would raise wider issues as to the liability of national competition authorities applying Articles 101 and 102 under the Regulation and the extent of their liability at a national level. Further to this it would call the legality of the European Competition Network into question on the grounds that Regulation 1/2003 was not compliant with the Charter.

Therefore wider policy and political issues and considerations must be taken as having some influence over the actions of the Union courts and their reluctance to knock down decisions on the basis of rights infringement. By basing annulments on the Commission's lack of evidence or failure to adequately meet a required administrative step the courts are able to keep the equilibrium. Therefore, in the opinion of the author, to credit the Union courts with taking progressive steps to holding the Commission to account are both unfounded and premature. The deference to the Commission remains. The courts have simply added an additional layer of administration to the proceedings by utilising Article 263 to annul decisions they are in effect, often at the expense to the company, providing the Commission the opportunity to 'sound out' the case before the court and return to the drawing board to reformulate the case and restart the proceedings.

As pointed out above there is a growing trend to annul the Commissions decisions either in part or in full, although neither parties nor the court grounded these in rights violations and interestingly in *Air Liquide*, *Edison*,

¹⁷⁰ See for example Case 352/09 *ThyssenKrupp Nirosta v Commission*, OJ C 152

Elf and Siemens the EU Charter is not mentioned. However the lack of judicial jurisdiction combined with the reluctance of the courts to hold the Commission to account or to indicate that a particular rights violation could not be remedied by simply rehashing the case strongly suggests that the ‘new trend’ of the courts is nothing more than smoke and mirrors.

What remains more of a mystery is why the Ombudsman¹⁷¹ has not been used to greater effect by the parties as a means of attacking a Commission Decisions. With the coming into force of the Charter and the right to Good Administration combined with the function of the Ombudsman to investigate maladministration of the institutions this presents a possibly effective tool of challenge. Whilst it is accepted that the powers of the Ombudsman are limited under Article 228 TFEU to the receiving, examining and reporting on complaints based on maladministration stemming from most, but not all, of the institutions. The scope of ‘maladministration’¹⁷² is widely interpreted and includes abuses of powers and a number of procedural safeguards including the right to be heard and to make statements. This in many ways is the same as those encapsulated under Article 41 of the Charter. All of which are mirrored in many of the cases brought before the Union courts. What is of interest is that the Ombudsman is arguably better placed to investigate the alleged infringement than the courts are¹⁷³. Being able to compel institutions to provide any information or be granted access to any information he may deem necessary to effectively investigate the complaint.

¹⁷¹ There is not much literature on the impact of the Ombudsman on competition proceedings although see Scordamaglia-Tousis, A (2012) *The Role of the European Ombudsman in Competition Proceedings: A Second Guardian of Procedural Guarantees?*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 1 & Diamandouros, N. (2010) ‘Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman’, Vol 1(5) *Journal of European Competition Law & Practice* 379–99.

¹⁷² On this see *The European Code of Good Administrative Behaviour*,

¹⁷³ In depth analysis of the Ombudsman’s powers is outside the scope of this work but for an informative appraisal see BE Amory and YN Desmedt, ‘The European Ombudsman’s first scrutiny of the EC, Commission in antitrust, matters’ (2009) 30(5) *ECLR*, 205 – 11

It must however be accepted that one of the fundamental flaws of making use of the Ombudsman is the lack of the legally binding nature of the decisions of the Ombudsman. That been said, on a practical level it is difficult to see how a subsequent challenge to the courts, following a decision of the Ombudsman in favour of a company, could be ignored by the courts. A contrary judicial decision may well undermine the decision of the Ombudsman. The underuse of the Ombudsman is telling in that there have only been 35 competition related case brought before him, with the vast majority dismissed for lack of an infringement.

There have been instances as Scordamaglia¹⁷⁴ points out where infringements have been found on various grounds including, inappropriate delay in accessing the file, for the delay in sending its reply to the complainant's as well as the protection of and access to confidential information. This cannot help but leave one wondering whether as an institution the Ombudsman is under utilized and is a far more expedient and cost effective option to challenge the Commission on points of procedure. The use of the Ombudsman in no way limits the company's entitlement to judicial review and is therefore capable of being used in a complimentary manner. Who knows perhaps the more frequent use of the Ombudsman will remedy the courts reluctance to fully and effectively review the evidence the Commission relies on.

As to the final thoughts of this thesis, it is hoped that it has in some way added to the ongoing debate as to the availability of human rights to companies at an EU level during antitrust proceedings. From my research it is evident that whilst some level of rights accessibility exists it is not necessarily sufficient to the standard that would or should be expected nor is it harmonious with the Convention. Whilst the courts have managed to avoid the direct question of the suitability of the level of procedural

¹⁷⁴ Scordamaglia-Tousis, A, The Role of the European Ombudsman in Competition Proceedings: A Second Guardian of Procedural Guarantees?, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 1

protection the case law considered and judicial approaches identified in this research highlight the fact that limitations imposed on companies' ability to rely on human rights is unnecessarily restrictive. The limitations that the courts have self imposed through a limited reading of Articles 263 and 261TFEU in respect of fully reviewing the Decisions of the Commission again highlights the underlying reluctance to accept a fuller applicability of human rights to corporations in antitrust proceedings. There is need for further change and reformation especially of Regulation 1/2003 to either increase the procedural safeguards or to restrict the seemingly excessive powers of the Commission.

Appendix 1

Name and year	Infringement of procedure to adopt Decision	Lack of statement of reasons	Commission's conduct during investigation	Right to be heard	Access to file	Self-incrimination	Admissibility of evidence	Unduly lengthy proceedings	Limitation period	Jurisdiction of Commission	Non-existence of Decision	Discrepancy between the SD and Decision	Distortion of evidence by the Commission	Autonomy of the College of Commissioners
Quinine (1969)	x	x		x	x				x					
Dyestuffs (1969)	x	x		x	x				x	x				
European sugar industry (1973)		x	x	x			x							
ANSEAU (1981)	x													
SSI (1982)		x												
Wood pulp (1984)		cartel		x	x									
Polypropylene (1986)	x	x		x	x		x				x			
Roofing felt (1986)		x												
Flat glass (Italy) (1988)			x		x									
PVC I (1988)	x													
LdPe (1988)	x	x									x			
Welded steel mesh (1989)		x		x	x			x						
Soda ash I — Solvay, CFK (1990)	x													
SPO (1992)											x			
Eurocheque (1992)			x	x										
HOV SVZ/MCN (1994)		x			x									
Steel beams (1994)	x	x		x	x									
Steel beams II (2006)		x		x				x	x					
Cartonboard (1994)	x	x		x	x									
PVC II (1994)	x	x		x	x	x	x	x	x					
Cement (1994)	x		x	x	x	x			x					
Far Eastern Freight Conference (1994)	x	x		x	x									
SCK/PNK (1995)		x		x				x			x			
Alloy surcharge I (1998)	x	x		x	x									
TACA (1998)		x		x	x									
British sugar (1998)								x						
Pre-insulated pipes (1998)	x	x		x	x									
Greek ferries (1999)		x	x											
FEG and TU (1999)					x			x						
Seamless steel tubes (2000)		x	x	x	x	x	x	x						
FET/CSA (2000)		x		x				x	x					
Amino acids (2000)		x	x											
Graphite electrodes (2001)	x				x									
Sodium gluconate (2001)		x		x	x									
Vitamins (2001)				x					x					
Luxembourg brewers (2001)		x												
Belgian brewers (2003)		x		x	x									
Citric acid (2001)		x	x	x	x									
Zinc phosphate (2001)		x												
Carbonless paper (2001)	x		x	x	x									
Austrian banks — 'Lombard Club' (2002)	x	x		x		x								
Methionine (2002)	x													
Industrial and medical gases (2002)		x												
Plasterboard (2002)		x	x	x	x			x						
Specialty graphite (2002)				x										
French beef (2003)		x	x	x										
Sorbates (2003)		x	x		x			x						
Mechanical and Electrical Carbon and Graphite (2003)		x												
Organic peroxides (2003)				x										
Industrial tubes (2003)		x												
Copper plumbing tubes (2004)				x										
Spanish Raw Tobacco (2004)		x			x									
Needles (2004)		x		x										
MCAA (2005)		x			x					x				
Thread (2005)				x		x								
Industrial Bags (2005)		x												
Rubber Chemicals (2005)	x													
Hydrogen Peroxide (2006)		x	x		x									
Methacrylates (2006)		x	x	x										
Copper fittings (2006)					x									
Alloy Surcharge II (2006)					x				x					
GIS (2007)				x	x							x	x	x
Dutch Brewers (2007)		x	x		x			x						
International Removal Services in Belgium (2008)			x		x									
Sodium Chlorate (2008)				x	x									

Source: Sakkers, E., and Ysewyn, J., (2008) European Cartel Digest, updated 2011, Kluwer Law International

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