



FACULTY OF LAW  
Lund University

Justin Pierce

# Is There Sufficient Judicial Review in Assessing Economic Evidence in Article 102 TFEU Cases?

JAEM03 Master Thesis

European Business Law  
30 higher education credits

Supervisor: Dr. Sanja Bogojevic

Term: Spring

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# Preface

I am extremely thankful to Dr. Sanja Bogojevic whose patience, advice and direction provided both focus and depth to my research and understanding of the area. Without her suggestions and encouragement, I would have headed unwittingly and obliviously into an unprecedented disaster.

*“Discovery is to be disowned...gather around and haggle, for hard cash we will lie and deceive,  
even our masters don't know the webs we weave”  
(Pink Floyd, The Dogs of War)*

*Met al my liefde vir Milton en Amelia*

# 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 OVERVIEW

The purpose of this paper is to contribute to the on-going debate over the applicability of rights to companies that are subject to Article 102 TFEU (102) investigations.<sup>1</sup> In the European Union (EU), the function of 102 is to control monopolies as well as regulate market power held by dominant companies.<sup>2</sup> Unlike Article 101 TFEU (101) it does not centre nor rest upon the need for an agreement between undertakings.<sup>3</sup> It is therefore, more focused on the constraining of market power of undertakings that hold high market shares in specific markets and where there are insufficient constraints on such a market to prevent a distortion of the market.<sup>4</sup> In this sense, 102 serves as the artificial market restraint against undertakings with large market shares to prevent abuse and harm to the market. One of the underlying concerns of the EU, in respect of dominant companies is the potential for them to operate in a way that restricts outputs, increases prices, dilutes research and development and creates a barrier to market entry for new competitors in the market. The Commission and the Union courts have taken a policy driven and purposive or a 'teleological' approach to the application, interpretation and scope of 102.<sup>5</sup> It is fair to say that it is now an established principle of 102 that it catches both exploitative and

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<sup>1</sup> See for example, Szyszczak, E., 'Controlling Dominance in European Markets', (2011) Fordham International Law Journal, Vol. 33, Issue 6, Article 4, 1738-1775.

<sup>2</sup> See paragraph 5 of the Commission Enforcement Guidance (Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), OJ C 45, 24.2.2009, p. 7–20).

<sup>3</sup> Although according to the text of 102 that states 'one or more undertakings' this has been found to include independent undertakings which together hold a 'collective dominant position' on the market. For case law interpretations see Case T-68, 77, *Società Italiano Vetro SpA v Commission* [1992] ECR II-1403, paras. 357–8; Case C-395, *Compagnie Maritime Belge Transports SA v. Commission*, [2000] ECR I-1365; Case T-191/98, *Atlantic Container Line & Ors v. Commission* [2003] ECR II-3275.

<sup>4</sup> See the opinion of AG Kokott in Case C-95/04 *British Airways v Commission* [2000] ECR I-1365 at para 68-69, where she states '*The starting-point here must be the protective purpose of Article 82 EC. The provision forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared. The conduct of a dominant undertaking is not, therefore, to be regarded as abusive within the meaning of Article 82 EC only once it has concrete effects on individual market participants, be they competitors or consumers. Rather, a line of conduct of a dominant undertaking is abusive as soon as it runs counter to the purpose of protecting competition in the internal market from distortions (Article 3(1)(g) EC). That is because, as already mentioned, a dominant undertaking bears a particular responsibility to ensure that effective and undistorted competition in the common market is not undermined by its conduct.*'

<sup>5</sup> See for example Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, and Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461

exclusionary behaviour.<sup>6</sup> Although there have been considerable attempts to reform and clarify the use, application and goals of 102, especially by the Commission,<sup>7</sup> it is still subject to criticism. One of the main drivers of this criticism is intertwined with the Commission attempting to introduce a more economic approach to the evidence, justification and evaluation of potential or actual effect on the market.<sup>8</sup> This has led to an indifferent application and guidance on just how the Commission establishes a causal link between an abuse, and the harm caused. This is especially the case in 102 given that the evidence is much more likely to rest on an economic evaluation rather than direct proof of wrongdoing,<sup>9</sup> as may be the case in 101. Certainly following the Leniency Notice<sup>10</sup> cartel investigations have become heavily reliant on one company turning over on other cartel members. So it is fair to say that 102 and economic evidence is far more entangled than 101 cases. For some, the use of economics is beneficial as it draws the Commission closer to the 'effect' test, meaning that the Commission will have to show the effect on the market rather than draw hypothetical possibilities. As it will be discussed in later chapters of this piece, this approach has been advocated by the Commission<sup>11</sup> but has been

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<sup>6</sup> Whilst exploitative abuses may be gleaned from a literal reading of 102 and therefore, uncontroversial in the sense that they are covered by 102, exclusionary abuse is a judicial creature.

<sup>7</sup> Commission's Guidance on Enforcement Priorities 2009, OJ C45/7. See for discussion Geradin, D., Chapter 2: *Is the Guidance Paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?* <http://www.intertic.org/BookPapers/Geradin.pdf>; Renda, Andrea, *Treatment of Exclusionary Abuses under Article 82 of the EC Treaty: Comments on the European Commission's Guidance Paper*. Final Report on a CEPS Task Force, 10 September 2009; Witt, A. (n.d). *The Commission's Guidance Paper on Abusive Exclusionary Conduct- More radical than it appears?* *European Law Review*, 35(2), 214-235.

<sup>8</sup> See later sections of this paper in which it is evident that the Commission and the Union courts have different approaches to the establishment of abuse. However, the Courts have also stated that there is not necessarily a distinction to be made with effect. See Case T-155/06 *Tomra Systems ASA and Others v European Commission* [2010], ECR II-04361 at para 289 that states 'It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.'

<sup>9</sup> See for example B. Baker Jonathan, F. Bresnahan Timothy, "Economic Evidence in Antitrust: Defining Markets and Measuring Market Power", in Paolo Buccirossi, eds., *Handbook of Antitrust Economics*, 2008, Cambridge Massachusetts, MIT Press.

<sup>10</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17-22. For commentary see Kayhko A. *European Commission's 2006 Leniency Notice - For Better or for Worse*, *The Competition Law International*, 2008: (2):42.; Stephan A. *An Empirical Assessment of the European Leniency Notice*. *Journal Of Competition Law And Economics*, September 2009; 5(3):537-561; Levy N, O'Donoghue R. *The EU Leniency Programme Comes of Age*, *World Competition: Law & Economics Review*, March 2004; 27(1):75-99; Riley A. *Beyond Leniency: Enhancing Enforcement in EC Antitrust Law*, *World Competition: Law & Economics Review*, September 2005; 28 (3):377-400; Andreas S. *The Direct Settlement of EC Cartel Cases*, *International & Comparative Law Quarterly*, July 2009; 58(3):627-654; Veljanovski C. *Cartel Fines in Europe: Law, Practice and Deterrence*, *World Competition: Law and Economics Review*, March 2007; 30(1):65-86.

<sup>11</sup> This is also inherent in the Commission 2005 discussion paper, EUROPEAN COMMISSION "DG Competition discussion paper on the application of Article 82 EC to exclusionary abuses" (December 2005), available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

applied in a sporadic manner and without institutional consistency. Sufrin and Jones<sup>12</sup> are highly critical of the way the Commission, and the Union courts have approached and dealt with 102 according to them in a haphazard and case-by-case basis has resulted in uncertainty and incomprehensible legal standards that undertakings are expected to deal with. This beggars the question as to whether companies should be entitled to a higher level of rights protection where 102 is applied. In 102 cases, undertakings are unable to avail themselves of the exemptions under 101(3) or, in the main, the block exemption regime under the same Article. Moreover, it is particularly difficult for companies to rebut the Commission evaluation. This has become markedly evident in circumstances where the Courts or Commission finds that a dominant undertaking has a special responsibility to the market or is a super dominant company. These concepts are judicial by creation and have led to the continued criticisms by large companies of the application of 102 in so far as it lacks the clear boundaries that should be associated with a legal rule. More recently we have seen in the *Microsoft*<sup>13</sup> case and in the on-going *Google*<sup>14</sup> case, that position of special responsibility or super dominance may result in trade secrets, intellectual property rights and other corporate tools from being prevented from being used in a way that would otherwise solidify a dominant position or exclude competitors. Super-dominance' was defined by Advocate General Fennelly as a '*position of such overwhelming dominance verging on monopoly*' that it would give rise to '*particularly onerous special obligations.*' The implication seems to be that the super-dominant undertaking will have to steer away from competing as vigorously as an undertaking that is 'merely' dominant. That been said and at first glance one may well consider that by virtue of dominance, an abuse is already proven, but at least in theory this is not the case. Again, the question comes down to whether companies are provided the sufficient forum at the appropriate standard to challenge a potential Commission decision.

Both the concept of dominance and the concept of abuse require some level of proof by the Commission. This is, in fact, needed under Article 2 of Regulation 1/2003 that places the burden of proof on the Commission to bring any further action. However, one of the main difficulties with 102 is that the nature of the Article requires that there be an assessment of position a company possesses on a particular market and the effect or potential effect of their anticipated or actual behaviour on the said market. The crux here then is the establishment of the 'market' or relevant market. It is not my intention to enter the long-standing debate as to how this is achieved, except in outline. The first analysis that is required involves the question of dominance and what the threshold for dominance is. In *United Brands*, the Court of Justice defined the concept of dominance as [A] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it

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<sup>12</sup> Jones, A., Sufrin, B. E., & Jones, A. *EU competition law: text, cases, and materials*, Oxford: Oxford University Press, 2011, chapter 4.

<sup>13</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601

<sup>14</sup> Case COMP/M.6381- *Google/Motorola Mobility*

the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Whereas the General Court in *British Airways* considered that ‘Article [102] applies both to undertakings whose possible dominant position is established, as in this case, in relation to their suppliers and to those which are capable of being in the same position in relation to their customers. This clearly expanded the concept and removed the element of consumers as the focus and included suppliers and competitors as well. However, key to all the establishment of this according to the ECJ is the establishment of the market share of the company. We have already seen that a high market share can lead the anomalous application of special responsibility or super dominance. Therefore, the market share becomes a key factor. High market shares according to the ECJ can be evidence of dominance. The factor to start the analysis is then, relevant market. It is likely that undertakings will argue for the broadest possible geographic market so to reduce their market share, and by extension argue that they are not in a dominant position. In *Wood Pulp*, the court accepted the geographical market as being global whilst in *United Brands*, a more restrictive approach was taken whereby the court stated that the geographic market ‘should comprise only areas where the conditions of competition are homogenous’, this approach was affirmed in *Michelin I* where, the geographical market was restricted to Netherlands. The cost and feasibility of transportation or other factors such as the use of the product or service are also used as indicative of what the market is. Following which the share the undertaking possesses on the market becomes the second step to be taken in accordance with establishing whether they have dominance. The question of abuse arises after this.

As already highlighted the valuation of markets and market shares is likely to be the subject of debate and argumentation. Following *United Brands* clearly this can be further broken down into subsections, namely ‘*the product market*’ and ‘*the geographic market*’. A narrow interpretation of the product market is seemingly in line with the Commission and Union courts approach. The Commission has released two important Notices, 97/C 372/03 & 2009/C 45/02, to assist in the evaluation of establishing the product market. One of the questions for consideration is the question to which there can be product substitution or cross elasticity of supply and demand. Although this is traditionally narrowly interpreted, in *Hilti* the court refused to accept that the market for nail guns and handheld drills were the same. Likewise, in *United Brands*, the court upheld the Commission decision finding bananas were a distinct market from the more general fruit market. This will require an analysis of the product price, characteristics, use and raw materials.<sup>15</sup> One of the key questions is whether the consumer would be prepared to substitute one product for another. This will need to be proven by econometric and statistic test results confirming the position.

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<sup>15</sup> See for example C-22/78 – *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1978] ECR 1869

This general introduction only aims to put the 102 evaluation into context by drawing out that a finding of dominance is a key factor to the operation of the Article and the analysis of whether this has been achieved is not necessarily a legal test. It is for all intents and purposes more economic than legal. As it will be seen later in this paper this resting of evaluations and evidence primarily on economic evidence presents particular difficulties when companies wish to raise a defence against the economic evaluation. The approach from the courts is considered in chapter 5 with an evaluation of whether economic evidence is sufficiently tested by the reviewing courts to counteract any potential injustice been caused by wrongful evaluation. Before this and to follow *Faull and Nikpay*<sup>16</sup> Article 102 cannot be considered in isolation, and one must have consideration for the wider context of within which 102 operates, specifically as affirmed in *Continental Can*, 102 must be viewed with reference to the internal market and the objectives of the EU institutions in achieving this and sustaining it. As such it is necessary too briefly put competition law in perspective having account of the aims and goals of the Union to understand the position of rights in relation to competition proceedings.

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<sup>16</sup> Faull, J., and Nikpay, A. (2007) *The EC Law of Competition*, Kerse, C., & Khan, N. (2004) *E.C. Antitrust Procedure*, Sweet and Maxwell

## 2 RESEARCH APPROACH

The thesis aims to examine three points: (1) The scope of rights of defence of companies in competition proceedings under 102; (2) The assessment of economic evidence in 102 TFEU; (3) what protection, if any, companies should be entitled to under the Union system.

### 2.1 Research Questions

In order to meet the research aims and objectives, there are three questions to be asked:

- (1) When and to what extent are rights available to companies in competition cases?
- (2) What is the effect or outcome from the use of economic evidence in 102 cases?
- (3) Is there uniformity in the approach taken by the Commission and the Courts?

### 2.2 Research Methodology Considerations

As with the majority of legal research this falls under the umbrella of legal doctrinal research. A broad definition and understanding of this means it is an internal investigation of what the law is. Whilst the area of study, competition law, does by its very nature find itself intertwined with Union history, national identities and other disciplines, including politics, sociology and economics, the predominant focus of this research is the law and it, therefore, investigates the law without advancing any positions as to the effect on these and other disciplines. The approach, legal dogmatics, relies on the researcher collecting and analysing a body of law, including case-law and significant primary legal sources with supporting data collected through a review of significant and reliable journal articles and other written commentaries. The research motivation seeks to identify and describe the relevant law and to examine how it is applied. This approach engages the first research question, concerning the scope and extent of application of rights to companies. It is an objective research question at the epistemic level of knowledge providing a descriptive account of the substantive data. It is concerned with determining *what the law is*. It involves tracing normative texts and final legal instruments as well as reviewing literature by scholars and knowledge opinions in the area.

Although it is accepted that by engaging with the European Union, it is impossible strictly to confine the research to the traditional sources associated with doctrinal research. By its very nature EU law presents a model requiring the researcher combine the conventional sources with a more robust and dynamic research framework placing the law in a wider context and takes into account not only the objective of the law but also to evaluate how it is influenced, premised on,

intersects with the EU freedoms, economic goals and the effect on national autonomy and national law. In doing so doctrinal research is only capable of forming a starting point for the research rather serving as a complete research approach. Moreover, according to Hutchinson<sup>17</sup> this highlights lawyer's reluctance to move beyond the traditional doctrinal approach and engage with other social science methodologies. This disguises shallowness in the research. The basis for which is that doctrinal research is underpinned by the criterion of 'objectiveness'. Put more simply, doctrinal research presupposes that any lawyer undertaking the research is likely to arrive at the same or at least a very similar answer to the question '*what is the law*'? This occurs as a result of the view that the approach is founded on the objectiveness of the researcher to identify the relevant texts and describe the results in a way to answer the question of 'what is the law?'

Such an approach in relation to the triangulation of research questions means that the traditional paradigm of legal doctrinal research will not provide a sufficiently robust research framework to engage with the research questions posed. For example, in the area of competition law difficulties arise in that it has a triangular interdisciplinary intersection. It invokes policy; the European economic constitutional provisions. Finally, it is premised on economic theory which some argue now encompasses contemporary economic thought. Although it is not intended to engage in a critical review of the underlying economic theory, the research approach to the economics in the law will entail a reversal of the research method of economics and the law. Under this approach, economists undertake economic research by looking through the law, in so doing, their approach is one literally of the law as it stands, not as it is interpreted. Put simply the economists take a traditionalist approach to the law. I shall do the same to the economic theory. I shall identify the commonly accepted economic view whilst drawing attention to potentially competing theories from the field. The limitation being that it is not the intention of this research to investigate the validity of the applied economic theory. It is only my task to demonstrate that the common theory is, in fact, the majority accepted common theory.

The second research question is involved more with how the law is interpreted and what effect the application of this interpretation is likely to have on dominant companies. The question focuses on the legal or juridical effects of competition law. The research seeks to establish the consequences that result from the application of competition laws. That is, the actual effect under the law. In approaching this question it is necessary to utilise a research tool that is effective when evaluating and identifying trends. As such I shall employ a case-law analysis model, through which I will examine the case law of the Court of Justice, the General Court and the European Court of Human Rights. In so doing, I shall use key identifying words to select the case-law before examining the judgment of the Courts through a term search. The predominant terms will be based upon the definitions identified throughout this chapter following adequate research to identify the term and its definition. In order to achieve this, I shall use a piece of

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<sup>17</sup> T. Hutchinson, *Researching and Writing in the Law* (2<sup>nd</sup> edn) (Pymont, NSW: Lawbook Co., 2006).

software, Filemaker Pro, through which I shall develop a data capture sheet with enough data fields to provide and test the results for reliability and validity. It is also suitably flexible in order to retrieve particular data from all the fields or a combination of fields to answer particular questions asked by the research.

The third question provides a more general and theoretical appraisal of the standard of judicial review that is appropriate in cases of abuse of a dominant position. It is abstract because it needs to engage with the objective that underlies the current legal provisions and to what extent the judicial decision-making is influenced by the objective of the law. Therefore, what matters in engaging with this question to understand the law it is necessary to evaluate how judges and decision makers such as the Commission do and/or should decide cases, and whether through their decision making history the objectives of the Union legislation have been met. This remains a legal question but engages the wider debate of how the law should be interpreted to achieve a non-legal goal. In doing so and to turn the question on its head it is really engaging with Dworkin by asking which values should judges take into account and how should they be valued or balanced against one another. In addition to which the approach of the American realists will be outlined and applied and applied to both the Union courts and the Commission to evaluate the acceptability of their decisions within the spectrum of possible, plausible and acceptable legal responses given the individual circumstances to the case.

## **2.3 Project Structure**

The structure of this research is as follows; chapter 1 will introduce the study. Chapter 2 follows with the research purpose and introduces the research tasks, research theory and methodology. In chapter 3, discusses the contemporary issues surrounding the scope and application of rights to corporations, this is within the framework of the EU competition law. Therefore, it provides a brief comparative narrative of the EU and the ECHR approaches by examining the relevant case law and scholarly debate on the subject. Chapter 4 moves on to consider the role of the Commission and the use of economic evidence in 102 cases. Chapter 5 identifies cases of the European Courts and assesses the judgments to identify what level of review the Courts undertake when complex economic assessments are necessary. Chapter 6 provides a brief concluding thoughts and remarks

## **2.4 Research Data**

The data necessary to support the research will be collected from conventional sources, including the Treaties of the Union, secondary Union legislation and Commission Notices, Guidelines and Reports. For the purposes of legal interpretation and application, case law from the General Court, the CJEU and the DG Competition Commission will be used. In so doing, a database of relevant cases will be established. These will be selected based on relevance to the research questions assisting in establishing an accurate description of the state of the law. The evaluation

of the data in the third research question will be used to deduce and identify with a sufficient degree of certainty actual, perceived or potential difficulties within the Union legal framework.

## **2.5 Research Limitations**

The vast amount of literature, inter disciplinary consideration and views of the topic generally make it impossible to produce a comprehensive study in a single thesis. Therefore, I propose to limit the scope of the research by restricting the study to a Union view and not considering the position from a Member States level, except in so far as is necessary for context. This will be more in relation to the third question rather than the first two. The scope will be further limited to cases where Union competition rules are engaged in cases under 102. Finally, the use of a strategic case law analysis will identify the case law most relevant for the research that will limit and focus the research to the issues raised by the questions. The suggested limitations are aimed at preventing the project from becoming overly general and at the same time provide sufficient data from which reliable conclusions can be drawn and supported.

### 3 RIGHTS AND CORPORATIONS

In the past academics and practitioners have criticised<sup>18</sup> the lack of research and consideration of due process<sup>19</sup> in competition investigations and penalties.<sup>20</sup> Although, in recent years much has been written on the nature of competition law procedure,<sup>21</sup> particularly questioning whether it falls within the area of criminal or administrative decision-making.<sup>22</sup> Likewise, there has been a rise in the analysis of procedural rights, standards of evidence and burdens of proof. More

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<sup>18</sup> See European Competition Law Annual: 2009, *'The Evaluation Of Evidence And Its Judicial Review In Competition Cases*, Oxford and Portland Oregon, 2011, p. xviii and Heike Schweitzer, *'The European Competition Law Enforcement System and the Evolution of Judicial Review'*, European University Institute Robert Schuman Centre for Advanced Studies, 2009 EU Competition Law and Policy Workshop/Proceedings, p.1. This seems to be an overly broad statement. The question of rights protection in administrative proceedings such as competition law has been a point of discussion for some time [see Lenaerts and Vanhamme, *Procedural Rights of the Private Parties in the Community Administrative Process*, (1997) 34 CMLRev, 531; Joshua, *The Right to be Heard in EEC Competition Procedures* (1991-1992) 15 Fordham Int'l L. J. 16], it has also been debated in the United States [see Macdonald, *Judicial Review and Procedural Fairness in Administrative Law*, (1979) 25 McGill LJ 520].

<sup>19</sup> This term is discussed in more detail later in this paper, in the current context it is taken to incorporate fairness in procedure a balance of procedure that includes fair treatment through the normal judicial system, entitlement to notice of a charge and a hearing before an impartial judge through a formal legal procedure that ensures the protection of life and property within the limits of lawfulness. This is a long established principle see for example the Magna Carta of England and the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the US constitution.

<sup>20</sup> This apparent lack of concern for due process and the extended question of rights protection in the early years of the Community [Union] can be explained by the fact that rights protection was not a focus for the Community and nor were there provisions at a treaty level for the protection of rights. Some commentators such as Douglas-Scott suggest that this is due to economic nature of the originating treaty [see Douglas-Scott, *The Constitutional law of the European Union* (2002), Logman, p.432]. Following judicial establishment of the primacy of Community law there was a renewed emphasis on the need for rights protection to counter balance an otherwise omnipotent power [see Dausés, *The Protection of Fundamental Rights in the Community Legal Order*, (1985) 10 ELRev, 398 at 400], this was followed by judicial recognition of rights, early case law such as Case 4/73, *Nold v Commission*, [1974] ECR 491 are illustrative of this. In more recent times there has been an introduction of the Charter of Fundamental Rights of the European Union as well as Article 6 Treaty on European Union making provisions for the Union to ascend to the European Convention on Human Rights. It is safe to say that rights and their protection now underpin the Union in both action and judicial consideration.

<sup>21</sup> See examples: 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.

<sup>22</sup> Whilst this is an interesting area of debate it does not form the focus of this research paper except where it is expressly raised in the text further discussion of this point will fall outside the scope of the paper, for further commentary on the point see for example Bronckers, M., & Vallery, A. *Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini'*. *European Competition Journal*, (2012) 8(2), 283-299

recently levels of judicial review have formed a research focus.<sup>23</sup> Whilst this explosion of research into these important issues is welcome and necessary to stimulate discussion, debate and potential reform, the focus in the writing is often on Article 101 TFEU and is further narrowed to cases that result from the cartel busting powers of the Commission.<sup>24</sup> Within this literature, we find the core of the debate relates to standards of proof,<sup>25</sup> procedural rights<sup>26</sup> and levels of judicial review<sup>27</sup> within the EU system. There is a gap in the research when it comes to the question of rights in 102<sup>28</sup> investigations, decisions and levels of judicial scrutiny.<sup>29</sup> This may be explained in that there are fewer cases under this Article. Nonetheless, it is still deserving of

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<sup>23</sup> Heike Schweitzer, p. 1. This is discussed throughout this paper 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

<sup>24</sup> This is unsurprising given the Commission's focus on cartel busting and the high publicity that follows with the investigations that are more often than not followed by eye watering fines [see for example 2012 TV and computer monitor tubes €1 470 515 000; 2008 Car glass €1 354 896 000, 2007 Elevators and escalators €32 422 250, 2010 Airfreight €79 445 000; 2001 Vitamins €790 515 000; 2008 Candle waxes €676 011 400; 2007/2012 Gas insulated switchgear €675 445 000; 2010 LCD €648 925 000; 2009 Gas €640 000 000; 2010 Bathroom fittings €622 250 782] see also Joaquín Almunia, *A Spotlight on Cartel Prosecution*, Berlin, 14 April 2011, available at [http://europa.eu/rapid/press-release\\_SPEECH-11-268\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-11-268_en.htm?locale=en). See also the Directorate General for Competition Management Plan 2013 at 4.2.1. it states that 'The fight against cartels remains a top priority for DG COMP'.

<sup>25</sup> See for example Castillo de la Torre, F. (2009), "Evidence, Proof and Judicial Review in Cartel Cases", World Competition 505

<sup>26</sup> By way of example Forrester, I., (2009) *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 E.L. REV. 817; 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](http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf))

<sup>27</sup> See for example 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=131924>; Gerard, D, *Breaking the EU Antitrust Deadlock: Re-empowering the Courts* E.L. Rev, 36 (4), 2011, pp 457-479

<sup>28</sup> There is however substantial literature on the issues surrounding the application and establishing abusive behavior in 102 cases on a number of issues, see for example Hovenkamp H. "Signposts of Anticompetitive Exclusion: Restraints on Innovation and Economies of Scale" (2007) in Barry Hawk (ed.) 2006 Fordham Competition Law Institute (Juris Publishing) Chapter 18; Werden G, "The 'No Economic Sense' Test for Exclusionary Conduct", (2006) 31 Journal of Corporation Law 293; Elhauge E. "Defining Better Monopolization Standards" (2003) 56 Stanford Law Review 253; Melamed D, "Exclusive Dealing Arrangements and Other Exclusionary Conduct – Are There Unifying Principles" (2006) Antitrust law Journal, Vol. 73, 375;

<sup>29</sup> That is not to say that Article 102 cases are ignored, rather the focus is more on the level and extent of the fines and it tends to be on the larger cases, such as Solvay (Moore, S. *Solvay v. Commission/ICI v. Commission/ICI v. Commission* (1996) *Common Market Law Review*, 33(2), 355), Microsoft (Baker, J "Microsoft's \$731 million fine could have been higher." (2013) Cio (13284045) 32. Business Source Complete, EBSCOhost (accessed July 16, 2013) and Intel Banasevic, N., & Hellström, P. *When the Chips are Down: Some Reflections on the European Commission's Intel Decision*, (2010) Journal Of European Competition Law & Practice, 1(4), 301. Further see Dethmers, F.,and Engelen, H., *Fines under art.102 of the Treaty on the Functioning of the European Union* [2011] E.C.L.R., Issue 2

consideration, especially given the differences between the two Articles.<sup>30</sup> It is Article 102 that forms a sectional focus of this research.

Within the literature on both Articles, there is an assumptive starting point that companies are entitled to rights protection. As this is an opening supposition, it seems appropriate to begin the substance of this chapter assessing whether rights are available and applicable to legal persons.<sup>31</sup> Overall, this chapter aims to assess, briefly, the applicability of rights to corporations, examining the approach under the Convention and in the Union. As a result of this comparative approach, the interrelationship between the Convention, Strasbourg jurisprudence and the EU is examined.

### 3.1 Rights of Companies

The question posed is whether rights are applicable fully, partially or at all to legal persons?<sup>32</sup> Although it is not the aim of this paper to provide a detailed analysis of the scope of

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<sup>30</sup> There are a number of differences between the two Articles, the most important being that for 102 to be engaged there must be a dominant undertaking on the market. In addition 102 can be applied to a single entity or a group of dominant undertakings holding collective dominance. Thirdly there are no exemptions as under 101 (3) this also precludes the block exemption regime under the same Article. Whilst there is to some degree a level of certainty within 101 the same cannot be said for 102. This has become especially clear in circumstances where the Courts or Commission find that a dominant undertaking has a special responsibility to the market (this 'special responsibility' is essentially the idea that dominant undertakings may be prevented from engaging in conduct which is otherwise permissible when engaged in by non-dominant undertakings. This was originally established in Case 322/81 *Michelin v Commission* [1983] ECR 3461) or is a super dominant company. These concepts are judicially created and have led to the continued criticisms by large companies of the application of 102 in so far as it lacks the clear boundaries that should be associated with a legal rule. More recently we have seen in the Microsoft case (Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601) and in the on-going Google case (See [http://europa.eu/rapid/press-release\\_IP-13-371\\_en.htm](http://europa.eu/rapid/press-release_IP-13-371_en.htm), note also that the FTC in their investigation found that the business practices of Google did not have an anti-competitive effect in the USA whereas the preliminary view expressed by the Commission seems to be contrary to this) that position of special responsibility or super dominance may result in trade secrets, intellectual property rights and other corporate tools from being prevented in being used in a way that would otherwise solidify a dominant position or exclude competitors. Super-dominance' was defined by Advocate General Fennelly (Opinion of Advocate General Fennelly in T 24/93 *Compagnie Maritime Belge Transports and Others v. Commission* [1993] ECR II-543 para. 137) as a 'position of such overwhelming dominance verging on monopoly' that it would give rise to 'particularly onerous special obligations'. The implication seems to be that the super-dominant undertaking will have to steer away from competing as vigorously as an undertaking that is 'merely' dominant<sup>30</sup>. That been said and at first glance one may well consider that by virtue of dominance an abuse is already proven, but at least in theory this is not the case.

<sup>31</sup> Juristic person is taken to include an entity, such as a company or corporation that is recognised as having legal personality, and is subject to legal obligations and entitled to legal protection. I shall use the term juristic person interchangeably with companies, corporations and undertakings to prevent over repetition, the reader should give these the same meaning unless the context suggests otherwise.

<sup>32</sup> For the sake of clarity, by the term juristic 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 Bireiro *The European Company Statute* (Kluwer Hague, 2003).

rights available to them. It is prudent to consider an appropriate answer in outline as a preliminary point. More specifically to sketch the extent to which juristic, in contrast to natural persons are entitled to rely upon the protection of rights. Undoubtedly international human rights documents were intended for the protection of the natural person not the juristic one, but as time has moved and business grown in influence so has the realisation that legal persons have some rights entitlement.<sup>33</sup> In this respect, the ECHR<sup>34</sup> is a valuable starting point to evaluate this evolution of rights attaching to legal persons, as it is applicable to all Member States and has a close link to the EU.<sup>35</sup>

Despite the underlying purpose being the protection of individuals, the Convention does not expressly exclude the possibility of legal persons invoking the guarantees. It is apparent from a cursory glance of the Convention 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 it is implied that legal persons are entitled to invoke the Convention. Article 1, for example, requires that all Contracting Parties secure Convention rights to ‘everyone’ within their jurisdiction, suggesting its application regardless of their status or *legal nature*. This indicates that so long as a company possesses the status of ‘juristic person’ or has ‘juristic personality’ they could fall into the *legal nature* and as such able to rely on the Convention.

It goes without saying that there are a number of rights which simple logic dictates cannot apply to a company, such as the abolition of slavery<sup>36</sup> or the right to life<sup>37</sup> or the rule against torture,<sup>38</sup> but others that have at their core procedural guarantees (Art 6) or are economic in nature (Protocol 1 Article 1)<sup>39</sup> are easily translatable to legal persons. 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

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<sup>33</sup> Indeed some commentators within the competition field have questioned the consistency of the applicability of human rights instruments such as the Convention to legal persons, the argument as Andreangeli puts it is that it could be argued that a literal reading of the Convention is not consistent with the assumption that legal persons are covered under it. Pointing out that the originating purpose of the Convention for example is the protection of the individual and the upholding of democracy, the rule of law and the diminishment of arbitrariness at a state level Andreangeli A, “*EU Competition Enforcement and Human Rights*”, (2008), MPG Books, London, p 17

<sup>34</sup> When referring to the Convention or the ECHR I mean the European Convention for Human Rights. I use the terms interchangeably to avoid over repetition.

<sup>35</sup> Whilst the early case law of the Union courts acknowledged the Convention as a ‘source of inspiration’ Case 4/73, *Nold v Commission*, [1974] ECR 491, the applicability of the Convention has been strengthened following the coming into force of the Charter. Even prior to this the ECJ held that the principal aim of the Charter [Nice on 7 December 2000], is to reaffirm ‘rights as they result, in particular, from...the ... international obligations common to the Member States, ... the [ECHR], ... and the case-law of the ... European Court of Human Rights’ Case 540/03, *European Parliament v Council*, [2006] ECR I-5769.

<sup>36</sup> Article 4 Prohibition of slavery and forced labour.

<sup>37</sup> Article 2 The right to life.

<sup>38</sup> Article 3 The rule against torture.

<sup>39</sup> Every natural or juristic person is entitled to the peaceful enjoyment of his possessions.

inherent in it, take, for example, the right to life. Therefore, the scope of guarantees open to a juristic person is naturally limited. As Emberland's<sup>40</sup> 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 Article 10.

There is further argumentation surrounding the applicability of rights to legal persons, these are cogently put forward by Andreangeli, Emberland and to some extent, Trainor.<sup>41</sup> The argument runs in the following vein. The underpinning objectives of the Convention are the concepts of 'political democracy' and 'personal freedom' the concept of human rights is therefore, a counterbalance to arbitrary or disproportionate state interference into the private sphere of the individual.<sup>42</sup> The emphasis of the rights is therefore, not the inalienable right itself but rather the limitation it places on the state's ability to interfere with the private autonomy of the individual.<sup>43</sup> Evidentially outside of those few so-called absolute rights the vast majority of guarantees, especially within the Convention, permit 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<sup>44</sup>, the right to a fair trial<sup>45</sup> 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.<sup>46</sup> These principles are easily translatable to the concept of legal persons and the right to operate a business freely with

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<sup>40</sup> Emberland, M., (2006) *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford, pg 14

<sup>41</sup> 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.

<sup>42</sup> Shestack, JJ., (1998) 'The Philosophic Foundations of Human Rights' 20HRQ201

<sup>43</sup> The issue of private autonomy and the impact the competition rules have on it falls outside this paper, for further commentary and analysis on the issues surrounding private autonomy in the EU see Leczykiewicz, Dorota, 'Where Angels Fear to Tread': *The EU Law of Remedies and Codification of European Private Law* (February 12, 2012). European Review of Contract Law, Vol. 8, pp. 47-81, 2012; Oxford Legal Studies Research Paper No. 18/2012; Leczykiewicz, Dorota, *Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?* (April 15, 2013). U Bernitz & X Groussot (eds), *General Principles of EU Law and Private Law* (Kluwer 2014), Forthcoming; Leczykiewicz, Dorota and Weatherill, Stephen, *Private Law Relationships and EU Law* (March 1, 2013). in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford 2013).

<sup>44</sup> Article 6 Convention

<sup>45</sup> *ibid*

<sup>46</sup> A similar argument is put forward in Ovey & White (2002) *European Convention on Human Rights*, 3rd Ed, 2002: Oxford University Press, p 302

minimum state intervention or control except as is necessary and justifiable. The freedom to conduct a business has long been recognised under the Convention<sup>47</sup> so too has it been accepted as a general principle of EU law,<sup>48</sup> now reflected in the Charter<sup>49</sup> and protected in a number of the Member States<sup>50</sup> in one form or another. The ECtHR has had little difficulty in finding that legal persons have standing under the Convention to bring an action for unfair interference with a Convention guarantee.<sup>51</sup> Additionally, 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 *Niemietz*,<sup>52</sup> the right to private life was interpreted to include business relationships and professional activities<sup>53</sup>. The right to freedom of speech in the context of advertising was attributed to a company in *Markt Intern*.<sup>54</sup> Whilst in *Casado Coca*,<sup>55</sup> a company could invoke Article 10 ECHR.<sup>56</sup> 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, especially when challenging the actions or decisions of an institution. For example, in *Dutch Electricians Federation*<sup>57</sup> AG Kokott whilst reaffirming the non-binding nature of the ECHR on the EU took the position that the Convention would provide guidance as to what constitutes a ‘fair procedure’ before the EU institutions.<sup>58</sup> 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

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<sup>47</sup> The ECtHR have decided that, apart from private assets and substantive values, article 1(1) of the First Protocol also protects the right to conduct a business and the commercial goodwill and clientèle built up by a person’s work, see *Van Marle v the Netherlands*, 26. 6. 1986, nos 8543/79, 8674/79.

<sup>48</sup> Opinion of Advocate General Cruz Villalón, delivered on 19 February 2013, C-426/11, *Mark Alemo-Herron and Ors v Parkwood Leisure Ltd* [2013] para. 48 and C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 73

<sup>49</sup> Article 16 of the Charter

<sup>50</sup> For example Spain (Article 38 of the Spanish Constitution), Portugal (Article 61(1) of the Portuguese Constitution) and Italy (Article 41(1) of the Italian Constitution).

<sup>51</sup> *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

<sup>52</sup> Appl.No 13710/88, *Niemietz v Germany* [1993] 16 EHRR 17

<sup>53</sup> 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.

<sup>54</sup> Appl. No 10572/83 *Markt Intern Verlag GmbH & Klaus Bermann v Germany* [1990] 12EHRR 161.

<sup>55</sup> Appl. No 15450/89 *Casado Coca v Spain* [1994] 18 EHRR 1.

<sup>56</sup> Everyone has the right to freedom of expression.

<sup>57</sup> Case 105/04 *Nederlandse Federatieve Vereniging voor de Goothandel op Elektrotechnisch Gebied v Commission*

<sup>58</sup> However compare this with the judgment in Case 540/03, *European Parliament v Council*, [2006] ECR I-5769, this is a Grand Chamber judgment that acknowledges the Convention and the ECtHR jurisprudence, so the limited application of Convention case law seems at odds with this. Although a possibility could be to reconsider the fact that the court in 105/04 make it clear that they are addressing competition matters. However, if this line of reasoning is to be followed we are then left in the position that the Convention will have different applications across different areas of law which will be contentious when cases cross over such branches

Charter. Wolfgang Weiss<sup>59</sup> 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 ECJ in *DEB*<sup>60</sup> found the application of Article 47 Charter could reach legal persons. In the operative paragraph at point 1 it states “*The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer*”. Although this was a response to a preliminary ruling question the fact that the ECJ linked Article 47 to the right of a juristic person demonstrates that the Charter can be directly applicable. Even outside of the Charter the ECJ has been willing to extend rights in commercial contests. For example, the right of privacy was considered in the case of *Scheke*<sup>61</sup> whereby the ECJ 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 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 of.<sup>62</sup> It is at least debatable whether the right to privacy would have otherwise attached as strongly as it did.<sup>63</sup> More specifically there has been recognition of other rights<sup>64</sup> such as the right to professional legal privilege,<sup>65</sup> protection against self-incrimination,<sup>66</sup> access to file<sup>67</sup> and investigatory objectivity and fairness.<sup>68</sup> If, then it is taken as *priori* that legal persons are to a large extent able to rely on Convention guarantees and EU

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<sup>59</sup> Weiss, W., (2011) *Human Rights and EU Antitrust Enforcement: News from Lisbon*, E.C.L.R 2011, 32(4), 186-195

<sup>60</sup> Case 279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I- 13849, interestingly in this case is that the Court may use of the Convention including Articles 6 and 13 to reinforce and interpret Article 47 of the Charter.

<sup>61</sup> 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).

<sup>62</sup> 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 juristic 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.

<sup>63</sup> 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.

<sup>64</sup> This is by no means a closed list and is merely an illustration of the fact that rights are recognised by the Union courts

<sup>65</sup> Case 155-79 *AM &S Europe v Commission*, [1982] ECR I-1575

<sup>66</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283

<sup>67</sup> T-58/01 *Solvay v Commission* [2009] ECR II-4781

<sup>68</sup> Enshrined in the Charter and the Right to Good Administration, Article 41.

rights, whether occurring under the Charter or the general principles of the EU, the central question becomes whether legal persons are entitled to the same level of protection as that afforded to natural persons?

## 3.2 Level of Rights Protection to Legal persons

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 markets.<sup>69</sup> 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, by an institution of the state. This section begins by considering the approach of the ECtHR in assessing the scope of rights protection for legal persons. The reason for doing so is due to the ongoing debate within competition circles that the level of review conducted by the Union courts is insufficient to satisfy the Convention.<sup>70</sup> It is impossible due to space and time constraints to evaluate all the case law under the Convention as it may be applicable to the debate. I will highlight, in my opinion, the most prominent and informative cases.<sup>71</sup> Before doing so it is necessary briefly to set the scene by identifying relevant key concepts that underpin the decision making of the ECtHR.

These concepts are often held within the Convention Articles texts. For example, Articles 8 and 10 are both conditional Articles, in so far as it is permitted to interfere with them for limited and

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<sup>69</sup> The author acknowledges that is a generalisation and there are conflicting economic arguments as to the role of the state in market regulation. This is primarily an economic discussion as to the most effective policy or approach to market regulation, see Buchanan, A. E., *Ethics, Efficiency, and the Market*, 1985, Towota, NJ: Rowman & Allanheld for a summary of the main arguments. Amongst these debates there has been one ongoing on property rights attributing them to self-ownership and basing them on the mixing of one's labor with material things, Nozick, R., *Anarchy, State, And Utopia*, (1974), New York: Basic Books, this falls outside the scope of this piece but ties into the earlier argument relating to private autonomy and protections related to legal persons, see fn 21.

<sup>70</sup> See for example T Cowen, 'Justice Delayed is Justice Denied': *The Rule of Law, Economic Development and the Future of the European Community Courts*, 4.1 European Competition Journal 1 (2008); OECD, *European Commission – Peer Review of Competition Law and Policy* (OECD: Paris, 2005); D Lawsky, 'Information Please: Opening Antitrust to the Public - Why More European Union Court and Commission Documents and Hearings Should No Longer Be Secret', in P Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Cheltenham: Edward Elgar, 2006).

<sup>71</sup> For the sake of clarity I will not, at this juncture focus on the application of Article 6 ECHR as it is probably uncontroversial to suggest that there is little difference in the rights of companies to that of individuals when and if Article 6 is engaged. Of course there is a debate in the Union in this regard which touched on in the later sections of this paper see for example a contrary view Opinion of Advocate General Ruiz-Jarabo Colomer *Volkswagen v. Commission* (I), [2003] ECR I-9189 at paragraph 66; 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.

specific reasons.<sup>72</sup> Article 8, for example, allows state authorities to interfere in the right so long as it is in accordance to the law and is *necessary* in a democratic society, in the interests of national security, public safety, the economic well-being of the country or for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. Whereas, Article 10 is similar, it states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary* in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The keyword in both these derogation paragraphs is the word *necessary*. Marius Emberland<sup>73</sup> offers a detailed analysis of the levels of review in commercial litigation in the ECtHR by stressing the importance of the application of the *necessary* element. He draws out that in cases involving individual litigation, the scope of *necessary* is narrow; certainly, the burden rests on the contracting state to demonstrate that a measure interfering with a right is *necessary*. This is self-evident and the ECtHR has made this clear, in the case of *Silver*<sup>74</sup> where they stated that the phrase ‘*necessary in a democratic society*’ means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a ‘*pressing social need*’ and be ‘*proportionate to the legitimate aim pursued*’ ...; and ‘*...those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted...*’. *Silver* sets the standard for individual enforcement. However, the standard has not been directly transposed to legal persons. This is evident from the so-called *Markt Intern* standard this is derived from the case of the same name. The facts from the case are that *Markt Intern*, a publishing company, was subject to an injunction from German authorities preventing the release of statements concerning a large undertaking. The German competition

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<sup>72</sup> The second paragraphs of both articles, it should also be pointed out that in relation to Article 8, the right to privacy, one of the grounds for derogation is the economic well-being of the country. This raises questions especially in a competition context which often has as its objective the protection of economic wellbeing, whether rights such as Articles 8 and 10 will ever be applied in a commercial context to the same extent that they are in individual matters. This is ultimately a question of the extent that the ECtHR is willing to extend the margin of appreciation and move away from the *Silver* position of interpreting the derogations narrowly, on the question of margin of appreciation see J McBride ‘Proportionality and the European Convention on Human Rights’ in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Oxford, 1999); M Oreja ‘Souveraineté des Etats et respect des droits de l’homme’ in F Matscher and H Petzold (eds) *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Heymann Cologne, 1988); H Petzold ‘The Convention and the Principle of Subsidiarity’ in R St John Macdonald F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Dordrecht, 1993); Y Arai-Takahashi *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia Antwerp, 2002)

<sup>73</sup> See Emberland, chapter 4. This section of the paper draws heavily from Emberland’s analysis of the Convention interpretation.

<sup>74</sup> *Silver and Others v UK* Series A No 61, (1984) 5 EHRR 347

authorities found the statements would breach German competition rules (Unfair Competition Act of 7 June 1909). The German courts upheld the injunction, as a result *Markt Intern* appealed to the Strasbourg court to invalidate the injunction on the grounds of a breach of Article 10 of the Convention. Whilst the Court acknowledged the fact that the freedom of speech was capable of attaching itself to a commercial context, the ‘*necessity*’ element of whether the interference, in this case the injunction was found to be necessary was not dealt with in the same way as it would have been had the *Silver* criterion been applied. Rather the Court makes reference to the fact that the Convention approach in spheres such as competition, in which the situation is constantly changing in accordance with developments in the market, requires a higher margin of appreciation. The Court put it in this way ‘*a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the [Court] would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.*’ This ‘*essential margin of appreciation*’ points to a lower standard of review than would have been expected under the individual enforcement. It is further interesting that the Court is shying away from undertaking re-examination of the facts and the circumstances of each case.<sup>75</sup> Whilst there was much disagreement in the Court in this case, a split of 9 to 9 judges with the President having the deciding vote. Nonetheless, the *Markt Intern* standard has been subsequently affirmed and followed in the *Krone Verlag* case.<sup>76</sup> The facts about the case are that at the behest of an Austrian media company the Austrian authorities issued a preliminary injunction preventing the publication of an advertisement that compared prices of competing newspapers under the Unfair Competition Act. The Court expressly relying on *Markt Intern* affirmed the ‘*essential margin of appreciation*’.<sup>77</sup> In another contested case that has the question of competition at its heart, *Casado Coca*<sup>78</sup> again sees the ECtHR follow a much lower standard of review than would be

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<sup>75</sup> This point will be returned to later in this paper in an EU competition law context in that the Union courts have been criticised in their approach to the reviewing of the Commission decisions in that the court often permits to wide a discretion to the Commission

<sup>76</sup> This should not be mixed up with Application no. 34315/96 *Krone Verlag GmbH & Co KG v Austria*, this case does not hold the same authority of affirming the *Markt Intern* standard. *Krone* involved the reporting of financial details of a politician and the injunction issued by the Austrian authorities was said to be justified by the authorities on grounds of the politician being outside the sphere of public interest in the case and therefore necessary to protect his individual rights. The ECtHR affirmed this approach but found that the politician was in the scope of public domain and therefore the injunction was not ‘*necessary*’. This is, in my opinion, a markedly different case to *Markt Intern* and does not fall as neatly into the scope of the ‘*commercial*’. Whereas Application no. 39069/97 *Krone Verlag GmbH & Co KG v Austria (No.3)* does, as is discussed in the main body of this text.

<sup>77</sup> Para 30 the Court states “*Such a margin of appreciation is particularly essential in the complex and fluctuating area of unfair competition. The same applies to advertising. The Court’s task is therefore confined to ascertaining whether the measures taken at national level are justifiable in principle and proportionate*”.

<sup>78</sup> Application no. 15450/89 *Casado Coca v Spain*

expected, reiterating the stance taken in *Intern Markt*.<sup>79</sup> What is important to note here is that there is clearly a difference in the level of review of certain Convention rights under the *Markt Intern* doctrine, although the rights falling under this standard are not what I term *equally applicable rights*.<sup>80</sup> Nor does it seem that the ECtHR has transposed the *Markt Intern* standard across the Convention wholesale in cases that involve *equally applicable rights*.

### 3.3 Equally Applicable Rights

The distinction is of importance in that it is necessary to formulate what standard of review relates to what cases. The difficulty that this presents is that in some instances, the actions of state interference will enjoy the *Markt Intern* standard and in others, the full *Silver* review with the narrow margin appreciation is likely to apply. The simple fact that there is a commercial or a competition element in the case does not result in an otherwise *equally applicable right* becoming a limited right under the more lenient standard of review. What does have to exist is the exercise of a state action that is capable of engaging Article 6 for example, this is what I would consider to be an *equally applicable right*. The case of *Fayed*<sup>81</sup> is illustrative of my point. The facts are that the Secretary of State appointed inspectors to investigate the takeover of Harrods and the complicated commercial structures leading up to it. It was argued that throughout the investigation and in the exercise of their responsibility of regulating the conduct of the affairs of public companies, the national authorities exceeded their margin of appreciation by limiting the access to the courts under Article 6(1). However, the Court rejected this on the basis that the inspectors were limited in their powers to being investigative only, and they lacked the authority to make any legal determination on the case as a result Article 6(1) did not apply. Here we see that the *equally applicable right* did not bite and as such the Silver level of review fell away. Although the case law of the ECtHR is not always consistent which raises some

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<sup>79</sup> For further examples and discussion of the approach of the ECtHR see: Application no. 53440/99 *Hertel v Switzerland*; Application no. 24699/94 *VGT Verein gegen Tierfabriken v Switzerland*; on the distinction between home and commercial premises see Application no. 37971/97 *Colas Est SA and Others v France compare with Funke, Crémieux, and Mialhe*

<sup>80</sup> By equally applicable rights I mean rights that would not be subject to a different level of review within the Convention system. Some of the procedural safeguards under Article 6 would fit into this, such as the right to court. There are questions as to whether the application of Article 6 is different in matters dealing with commercial parties, as this section demonstrates the answer to this is unclear and it is impossible to provide a definitive position on the matter given the enhanced complexity resulting from the peculiarities of the national systems in each case and the differences in the laws. For example competition enforcement in some jurisdictions may be predominantly administrative and governed by national civil law whilst other jurisdictions may provide for criminal sanctions (see for example the Estonian Penal Code Article 400(2) or a mixture of the two such as the English Enterprise Act 2003. Section (188) and the remainder of Part 6 of the Act, therefore the question arises as to whether there are differing approaches and applications of Article 6 in criminal and civil matters in the ECtHR, for consideration of this point see for example Vitkauskas, D. and Dikov, G. 'Protecting the Right to a Fair Trial Under the European Convention of Human Rights', 2012, Council of Europe Human Rights Handbooks.

<sup>81</sup> Application no.17101/90 *Fayed v United Kingdom*

difficulties. In *Zlinsat Spol. S.R.O.*<sup>82</sup> the Court found that a Czech company who lost their rights to property acquired under a privatization contract that was subsequently cancelled and they were evicted by a decision of the state prosecutor, against whose decision there was no appeal were entitled to Article 6 protection. However, in *S.a.r.l. du Parc d'Activites de Blotzheim and SCI Haselaecker*,<sup>83</sup> a number of companies challenged a French presidential decree that potentially affected their property rights through an enlargement of the Basel-Mulhouse airport. However, the Court were unwilling to extend the meaning of 'civil right' under Article 6 to include the possible effect upon the properties on the basis that there was no challenge to any actual planning, exploratory decision or other action from which an actual effect could be ascertained or that the parties had been unable to challenge. It was only the intent stated in the decree. Article 6 was not engaged. In *Arma*,<sup>84</sup> the court was willing to find that the French prohibition on a sole shareholder of a company who was acting as the company director from challenging a liquidation order was a violation of Article 6. The Court also found an Article 6 violation in *Marpa Zeeland B.V and Metal Welding B.V.*,<sup>85</sup> where a state official had issued assurances to the company that by withdrawing an appeal against a sentence the original penalty would be reduced. This turned out not to be the case, and the company had lost the right of appeal. Article 6 applied as the company were denied the rights inherent in the Article. Whilst the above brief analysis of the ECtHR approach to the application of Article 6 is by no means exhaustive, it is indicative of when Article 6 is likely to be engaged. Of course, this further depends on the extent to which the case in particular falls within the civil<sup>86</sup> or criminal limb of Article 6. However, it seems to be the case that public policy grounds do play a more far reaching role in commercial matters than the Court may be willing to publicly accept, this throws doubt onto Article 6 being an equally applicable right. However, this may well be an overly narrow reading of the considered case law. Generally, the case law of the ECtHR points to a standard of review that lacks the full potency of that associated with individual rights violations. The court itself has drawn a distinction between individual and corporate litigation in the extension of the margin of appreciation<sup>87</sup> to cases involving economic or fiscal policy in limited rights outside of equally applicable rights as we have seen in the discussion of the case law so far. The ECtHR has made this position clear in *Markt Intern* where it considered that the determination of the right must be considered in light of the complex commercial factors, the

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<sup>82</sup> *Zlinsat Spol. S.R.O. v Bulgaria* (2006)

<sup>83</sup> Application no. 48897/99 *S.a.r.l. du Parc d'Activites de Blotzheim and SCI Haselaecker v France* (2003)

<sup>84</sup> Application No: 23241/04 *Arma v France* (2007)

<sup>85</sup> AppNr, 46300/99 *Marpa Zeeland B.V and Metal Welding B.V v Netherlands* (2004),

<sup>86</sup> It is true to say that there is a different approach by the Court in matters of civil or criminal under Article 6, although this difference should not be taken so broadly so as to suggest that there is a spillover from the *Markt Intern* standard into Article 6 where the matter is one that is purely commercial in nature. Rather the distinction will apply equally to natural and legal persons in the context of the case. By way of example see the approach to property rights and the right to contest state action taken by the Court in Application no 2614/65 *Ringelsen v Austria*

<sup>87</sup> Application No. 10890/94, *Groppera Radio*, para 48

Court went on to find that judicial scrutiny is limited to a simple test of proportionality.<sup>88</sup> Naturally a simple proportionality test leaves aside the possibility of scrutinising the underlying rationale for the restrictive measure.<sup>89</sup> 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. This does not necessarily follow in the consideration or application of Article 6 of the Convention. Although what does become clear from the case law considered is that for Article 6 to be engaged there must be the real prospect of the complainant being adversely affected by the action complained of, this is clear, especially from *Fayed, S.a.r.l. du Parc d'Activites de Blotzheim and SCI Haselaecker and Zlinsat Spol. S.R.O.* Therefore it is not sufficient to cry foul without being able to substantiate the claim. This indicates that the burden of proof falls onto the complainant to raise the assumption of the injustice before reversing the burden to the state to rebut such.

### 3.4 Union Law and the ECHR: The Relationship

To what end then is this discussion on the Convention and the approach of the ECtHR relevant to this paper? The answer is quite simple, but the discussion more complex. The simple answer is that there is a strong movement and belief that the rights and the jurisprudence resulting from Strasbourg should be directly applicable to the EU. More specifically they should be applied to competition law. As already pointed out the EU does in fact respect, guarantee and protect a

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<sup>88</sup> Emberland, p193

<sup>89</sup> The danger of this is it could lead to an overly formalistic interpretation of the law, this would run counter to the position of the ECtHR which has consistently held that convention rights should be interpreted in the light of the present-day conditions, while taking account the prevalent economic and social conditions meaning that the Convention is to be treated as a living instrument (for example Application No. 6833/74 *Marckx v Belgium*, 13 June 1979; Letsas, G *A Theory of Interpretation of the European Convention on Human Rights* (2007) Oxford, Oxford University Press). The dangers of formalism are apparent. Comparatively formalism is 'discredited', especially in the US, with a rise in intellectual movement that treated social sciences including law as empirical studies not rooted in some form of abstract formalism (for a brief overview see Freeman, M. A. *Lloyd's Introduction to Jurisprudence*, (2008) London, Sweet & Maxwell). The realist movement led by Oliver Wendell Holmes Jr (*The Path of the Law*), Karl Llewellyn (*Some Realism about Realism*) and to a lesser extent Jerome Frank (*Law and the Modern Mind*) called for a greater consideration of the social, political and policy influences that 'persuaded' judges to reach an available decision based on legal and factual indeterminacy that did not stretch the law outside of what was an acceptable degree of legal indeterminacy. Although this movement has moved on into the Post Realism and Legal Process movement approach to law for an overview of this see especially the commentary of Neil Duxbury (Duxbury, N. *The Reinvention of American Legal Realism, Legal Studies*, (1992) (12), 137–77; Duxbury, N., *Faith in Reason: The Process Tradition in American Jurisprudence*, *Cardozo Law Review*, (1993) (15), 601–705; Duxbury, N. *Patterns of American Jurisprudence* (1995) Oxford: Oxford University Press. Nonetheless this approach is in line with the ECtHR in treating the Convention as a living document and taking into account policy and social factors: see for example the prison rights case law such as Application No 39665/98 *Ezeh and Connors v the United Kingdom*, 9 October 2003, para. 104-106

number of synonymous<sup>90</sup> if not identical rights. However, the criticisms against the Union rests not so much on the limited or the *Markt Intern* line of rights and the lower level of review but rather that the Union is using the same level of low review to *equally applicable rights*, especially the rights of defence or procedural rights.<sup>91</sup> This in turn finds that the EU is left lagging behind the Strasbourg standard that applies to Article 6 of the Convention. This is the simple answer. As for the discussion, there is a substantial body of literature on the debate on the Convention, ECtHR jurisprudence and the Union<sup>92</sup> relationship. This has been intensified 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 enforcement.<sup>93</sup> 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.<sup>94</sup> For some there must be direct

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<sup>90</sup> 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.

<sup>91</sup> On this point see for example: Soltesz, U. 2012, “Due process and judicial review - mixed signals from Luxembourg in cartel cases”, European Competition Law Review, vol. 33, no. 5, pp. 241; Anonymous & OECD 2009, “Prosecuting Cartels without Direct Evidence of Agreement”, OECD Journal of Competition Law and Policy, vol. 9, no. 3, pp. 49-105.; McGowan, L. 2010, *Anti-Trust Revolution in Europe: The European Commission’s Cartel Policy*, Edward Elgar; Forrester, I. 2000, “the modernization of EC competition law.(European Community)”, Fordham International Law Journal, vol. 23, no. 4, pp. 1028; Forrester, I. 2009, “Due process in EC competition cases: A distinguished institution with flawed procedures”, European Law Review, vol. 34, no. 6, pp. 817-843; Wils, W.P.J. 2008, *Efficiency and justice in European antitrust enforcement*, Hart, Oxford; Wils, W. 2003, “Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis”, World Competition, , pp. 567-588.

<sup>92</sup> See for example: Pech, Laurent and Groussot, Xavier, *Fundamental Rights Protection in the EU Post Lisbon Treaty* (June 14, 2010); Besselink, Leonard F. M., *The EU and the European Convention of Human Rights after Lisbon: From ‘Bosphorus’ Sovereign Immunity to Full Scrutiny?* (13 January 2008); McCrudden, Christopher, *The Future of the EU Charter of Fundamental Rights*, Available at SSRN: <http://ssrn.com/abstract=299639> or <http://dx.doi.org/10.2139/ssrn.299639>; Mathisen, Karoline L., *The Impact of the Lisbon Treaty, in Particular Article 6 TEU, on Member States’ Obligations with Respect to the Protection of Fundamental Rights* (July 29, 2010). University of Luxembourg Law Working Paper No. 2010-01. Available at SSRN: <http://ssrn.com/abstract=1650544> or <http://dx.doi.org/10.2139/ssrn.1650544>

<sup>93</sup> 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

<sup>94</sup> Although there is case law from the EU that suggests that the Convention jurisprudence has a role to play in the Union application of convention rights, although the Union is unwilling to adopt it wholesale, it must rather be reflective of the peculiarities of the EU system, by way of example see the Union interpretation of the principle of ne bis in idem in Case 17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2008] ECR I-9641 where the Grand Chamber makes no direct reference to the Convention, although the AG opinion is grounded

applicability of both the Convention 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*<sup>95</sup> 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 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 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 *Schmidberger*<sup>96</sup> 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 *Baustahlgewebe*<sup>97</sup> 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. Evidently 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 Strasbourg jurisprudence there is likely to be divergent views and interpretations between the two courts.<sup>98</sup> There is certainly additional weight added to the direct applicability argument through the reading of Article 6 TEU. 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. Secondly under 6(3) a section related directly to the Charter, it states that ‘*[fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... shall constitute general principles of the Union's law.]*’ This draws the

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in it and the Commission representative, albeit expressing his personal view, Wouter Wils draws direct reference to the Convention see Wils, Wouter P. J., *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis* (February 11, 2003). World Competition: Law and Economics Review, Vol. 26, No. 2, 2003. Available at SSRN: <http://ssrn.com/abstract=1319252>

<sup>95</sup> Case C-540/03

<sup>96</sup> Case C-112/00

<sup>97</sup> Case C- 185/95 *Baustahlgewebe GmbH v Commission of the European Communities*. At paragraphs, 29, 30, 35, 37 and 41.

<sup>98</sup> 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.

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 jurisprudence.<sup>99</sup> 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.

The polar argument to that set out above is that the Convention itself may apply to corresponding rights but the jurisprudence of the ECtHR is considerably less binding.<sup>100</sup> 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 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*<sup>101</sup> the ECJ made it clear that international agreements are not universally binding on the Union courts and that fundamental

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<sup>99</sup> 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.

<sup>100</sup> If one is to consider the application of the Convention amongst signatory states it becomes clear that the so called transplantation of ECtHR jurisprudence has differing degrees. In (book here) the different approaches to the Convention is apparent. Perhaps one of the more balanced mechanisms between national sovereignty and respect for the Convention is found in the Human Rights Act 1998. Under section 2 of the Act, *Interpretation of Convention Rights*, national courts must take into account Strasbourg jurisprudence but only where in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. It is not overly controversial to transplant this directly to the Union courts approach which draws inspiration from the Convention. Following Lisbon there is no reason for this to change, so long as the Union courts consider the jurisprudence and motivate their decision within the realms of the legal answers as to whether the case law is applicable or not. In short this is easily transposed into the doctrine of harmonious interpretation, something the Union courts have advocated to national courts, this seems to be inherent in the Charter, take Article 52 (4) as an example that requires that insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. Clearly harmonious interpretation. Moreover, recent case law suggests that the same is expected of Member States see for example C-617-/10 *Åkerberg Fransson* [2013] nyr.

<sup>101</sup> Joined Cases C 402/05 P and 415/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 316

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 some 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 law.<sup>102</sup> 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 unconditionally.<sup>103</sup> In keeping with the competition law theme of this paper the Union courts approach to Article 8 ECHR<sup>104</sup> can be seen at times as divergent and at other times contradictory of the Convention interpretation. In the case of *Hoechst*<sup>105</sup> 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*<sup>106</sup> case deciding that a lawyer whose offices were searched was able to rely on 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*<sup>107</sup> 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*<sup>108</sup>, many commentators such as Tobias Lock,<sup>109</sup> 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 could be more easily explained if one is to apply the *Markt Intern* standard of review to the cases. Clearly it is

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<sup>102</sup> 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.

<sup>103</sup> 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.

<sup>104</sup> Article 8 ECHR gives everyone the right to respect for their home.

<sup>105</sup> Joined Cases 46/87 & 227/88 *Hoechst v Commission* [1989] ECR 2859

<sup>106</sup> *Niemietz v Germany* (App no 13710/88) (1992) Series A no 251, para 31

<sup>107</sup> *Société Colas Est v France* (App no 37971/97) Reports of Judgments and Decisions 2002-III.

<sup>108</sup> Case C-94/00 *Roquette Frères* [2002] ECR I-9011

<sup>109</sup> See Lock, T., (2011) *EU Accession to the ECHR: Consequences for the European Court of Justice*, Paper for EUSA Conference 2011

up to the deciding court, in this case the Union courts, to decide the scope of the application of rights that are not equally applicable. This would be the situation in an Article 8 consideration. It would also point to the position that the Union courts, were in fact applying the principles of review developed by the ECtHR when evaluating interference with a limited right. This approach is in line with the long established position of the Union courts in using international agreements as sources of inspiration. It remains the case that there are other examples of divergent views between the EU and the ECHR such as the right not to incriminate oneself. Again flowing from a competition case, that of *Orkem*.<sup>110</sup> 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 unexpectedly the question resurfaced in the Union courts in *Mannesmann*.<sup>111</sup> The *Funke* case was not even referred to by the Union court. Whilst it did to some extent recognise 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-Treuhand*<sup>112</sup> 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.*' Although one should bear in mind this was prior to the Lisbon reforms and the coming into force,<sup>113</sup> moreover it does not suggest that simply because the Convention was not applicable that the standard of review by the Union courts fell below that expected under the Convention.

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<sup>110</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283

<sup>111</sup> Case T-112/98 *Mannesmann v Commission* [2001] ECR II-729

<sup>112</sup> Case T-99/04 *AC-Treuhand v Commission*

<sup>113</sup> Judgment delivered on the 8<sup>th</sup> July 2008, although the Charter was drafted in 2000 as part of the failed Draft Constitutional Treaty it was rarely invoked by parties in competition proceedings and even more rarely by the Courts, see *Pierce, J., (2012) Corporate Rights and EU Antitrust Law: A Compatible Incompatibility? LSEU/CP 2, pp 58-80* the Lund Student EU Law Review, Fundamental Rights and Competition Law, (eds) Forrester, I., Lidgard, HH, 2012, available online at [http://www.jur.lu.se/Quickplace/eu\\_law\\_review/Main.nsf/h\\_Toc/5A9BAC27557CACDCC1257A6F00492088/?OpenDocument](http://www.jur.lu.se/Quickplace/eu_law_review/Main.nsf/h_Toc/5A9BAC27557CACDCC1257A6F00492088/?OpenDocument)

### 3.5 EU Commission and Equally Applicable Rights

As explained above the differentiation in application of limited rights between the Union and the ECtHR is prima facie acceptable in so far as they are proportionate to a legitimate aim. It follows from the Convention case law such as *Markt Intern* and *Casado Coca* that in the field of competition matters a high level of deference is granted to the state or in this case the Union. However, the pressing questions are whether (a) equally applicable rights apply to the initial investigatory and decision making processes carried out by the Commission and if so, (b) what standard of protection should the Commission be adhering to and where they fail to do so (c) what is the role of the Union courts in remedying the lower standard application? Inherent in the equally applicable rights is the foundation of the accused company being 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. So the related question is whether these and other procedural guarantees enjoy protection by the Commission? The question belies what is a complex assessment of the extent that administrative bodies such as the Commission are required or expected to deliver the same level of rights protection that one would expect from a judicial body. This is in many ways naïve and the fact that many have attacked the Commission for its failure to have more regard for rights within the systems and approaches in dealing with competition matters demonstrates a clear lack of considering the institutional constraints of the Commission. As a starting point the Commission is not universally unique, the modern day state administration is carried out by state appointed administrative bodies. To follow Edward Rubin's observations,<sup>114</sup> the reality is that we all live in an administrative state driven by explicitly shaped policies that are implemented by administrative agencies and as such courts have been side-lined as the primary means of regulation.<sup>115</sup> This leads into the particular question posed at the beginning of this section, namely whether equally applicable rights apply to the Commission when exercising their investigatory and decision

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<sup>114</sup> Rubin, E., 'Law and Legislation in the Administrative State' Columbia Law Review, 89 ,3, 369-426

<sup>115</sup> For commentary on the role of the administrative state Morstein Marx, F, *The Administrative State : An Introduction To Bureaucracy / By Fritz Morstein Marx*, n.p.: Chicago : Chicago U.P., 1957; Epstein, R, *The Perilous Position of The Rule of Law and the Administrative State*, *Harvard Journal Of Law & Public Policy*, 2013, 36, 1, pp. 5-19; Krause, GA, *Representative democracy and policy-making in the administrative state: Is agency policy-making necessarily better?*, *Journal Of Public Policy*, 2013, 33, 2, p. 111-135; *Deweyan Democracy and the Administrative State* 2011, *Harvard Law Review*, 125, 2, pp. 580-601; Carolan, E, *Institutional Legitimacy And The Administrative State*, n.p.: Oxford University Press, Oxford Scholarship Online, 2009; Ansell, C, & Gingrich, J 2003, *Reforming The Administrative State*, n.p.: Oxford University Press, Oxford Scholarship Online, EBSCO host, viewed 25 July 2013; Camp, BT, *The failure of adversarial process in the administrative state*, *Indiana Law Journal*, 2009, 84, 1, p. 57-134; Stivers, C, *The significance of the administrative state*, *Public Administration Review*, 2008, 68, 1, p. 53-56; Morag-Levine, N, *Common Law, Civil Law, And The Administrative State: From Coke To Lochner*, *Constitutional Commentary*, 2007, 24, 3, pp. 601-661; Kathi, P, & Cooper, T, *Democratizing the Administrative State: Connecting Neighborhood Councils and City Agencies*, *Public Administration Review*, 2005, 65, 5, pp. 559-567; Caiden, GE, *The Challenge To The Administrative State*, *Policy Studies Journal*, 1981, 9, 8, pp. 1142-1152.

making powers.<sup>116</sup> Turning again to the ECtHR to assess the scope and reach of Article 6 in matters that are by their nature administrative it becomes clear that there has been a wide scope. In *Ringeisen*<sup>117</sup> Article 6 applied to the granting of an official permit before a disposition of land could take place. In *Albert and Le Compte*<sup>118</sup> the Article applied when making a decision regulating the right to practice a profession. Whilst in *Bentham*<sup>119</sup> the decision to grant a licence in pursuance of a trade in a particular field, the sale of alcohol engaged Article 6. Other examples include decisions on the right to social benefit<sup>120</sup> and public sector pensions.<sup>121</sup> There is a common factor in all of these cases, namely that an administrative body has been made the *primary decision maker* in the area. One of the potential difficulties of *primary decision makers* is that by their nature they are prima facie not bound to apply equally applicable rights such as Article 6. This is driven by the fact that Article 6 only bites in particular legal proceedings that have as their object either the “*determination of civil rights and obligations*” or “*a criminal charge*”.<sup>122</sup> The distinction between the two depends on whether the full provisions of Article 6 apply especially 6(2)<sup>123</sup> and (3)<sup>124</sup> or whether it is limited to 6(1)<sup>125</sup>. Even if one of the two

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<sup>116</sup> From a common law perspective this is not a new question, since as early as 1915 there has developed a long line of case law starting with *Local Government Board v Aldrige* (1915) AC 120 that suggests that administrative decision making is susceptible, to differing extents, to natural justice and fairness. Arguably these same principles were adopted into Article 6 of the Convention given the heavy influence of the UK in the drafting of the Convention

<sup>117</sup> Application no 2614/65 *Ringeisen v Austria*

<sup>118</sup> *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; see also *De Moor v Belgium* (1994) 18 EHRR 372

<sup>119</sup> *Bentham v Netherlands* (1986) 8 EHRR 425

<sup>120</sup> *Feldbrugge v Netherlands* (1986) 8 EHRR 425

<sup>121</sup> *Massa v Italy* (1993) 18 EHRR 266

<sup>122</sup> In many cases the distinction is clear to see between civil and criminal. Although in EU competition debates it is argued that the application of Articles 101 and 102 TFEU are clearly criminal and as such should be fully susceptible to the full application of Article 6. It is not the intention of this paper to engage with this discussion, see the reference material noted in fn 9 above, see especially the commentary from Wils and the much criticised use of the case law of the ECtHR especially the case of *Jussila v Finland* (2006) (Appl. No. 73053/01, 23 November 2006), see also the Opinion of AG Sharpston, Case C-272/09 P, *KME v. Commission*, 10 February 2001 where she states 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).

<sup>123</sup> Under 6(2) it states that ‘*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*’

<sup>124</sup> Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.

<sup>125</sup> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the

categories are in issue the application of Article 6 depends on whether the *primary decision maker* fulfils the criteria required to satisfy the definition of ‘*independent and impartial court or tribunal*’. Considering the composition and structure of the Commission it would be at best tenuous to suggest that it could meet the Convention criteria. The Commission is not part of the judiciary<sup>126</sup> of the Union nor does it possess independence from the Union executive<sup>127</sup> or have independence in decision making,<sup>128</sup> it would be difficult to attribute to the Commission the traits required for it to be a *independent and impartial court or tribunal*.<sup>129</sup> In cases such as *Ringeisen*, *Albert and Le Compte* and *Bentham* it is possible to argue that the need for Article 6 application was as a result of the ‘finality’ of the decisions from these bodies. Put another way, Article 6 had to apply as there was no possibility of further review, for example in *Albert and Le Compte* and *Bentham* the Belgian medical disciplinary body decision was not, in the *cour de cassation* subject to a review of the merits of the case. Naturally if the administrative bodies could simply avoid the obligations of Article 6 as a result of their composition this would render the Convention useless in a number of situations. Whilst the ECtHR has accepted that there is nothing incompatible with the appointment of administrative bodies as *primary decision makers* the respect for Article 6 must either be guaranteed by the administrative body itself or their decisions must be susceptible to review from a higher authority, usually judicial in nature.<sup>130</sup> In *Albert and Le Compte* and *Bentham* the Court stated, “*the Convention calls at least for one of the following two systems: either the jurisdictional organs themselves comply with...Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full*

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protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

<sup>126</sup> Note the treaty distinction in institutions the Commission is empowered under Article 17 and the Courts of the Union under Article 19 TEU. The fact that the judges are appointed and the Court governed by the treaties does not detract from the judicial independence, this has been excepted by the ECtHR in *Clarke v United Kingdom* (dec.)(2005) (Appl. No. 23695/02, 25 August 2005) and *Campbell and Fell v United Kingdom* (1984) (Appl. Nos. 7819/77 and 7878/77, 28 June 1984)

<sup>127</sup> Article 17 TEU tasks the Commission with promoting the general interests of the Union and take appropriate initiatives to that end. It cannot therefore follow that the Commission acts independently of the Union when it has been established as the vehicle through which Union policies and objectives are transplanted and pursued.

<sup>128</sup> It is evident from Article 17 (6) TEU and Article 1 of the Commission Rules of Procedure requires that decision-making in the Commission be based on the principle of collegiality. Meaning that Commission decisions must be taken collectively by all Commissioners and all Commissioners are collectively responsible for those decisions. The rules of decision making applies directly to the field of competition, for example finding and ordering the termination of an infringement (Article 7); decisions ordering and renewing interim measures (Article 8(1)(2)); decisions making commitments binding (Article 9(1)), decisions finding the inapplicability of Articles 101 or 102 TFEU (Article 10), decisions imposing fines for breaches of procedural or substantive law (Article 23(1)(2)). Decisions relating to granting immunity or reduction of fines or rejecting immunity and leniency applications, for a more detailed description of the application of the Commission Rules of Procedure to competition proceedings see Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012, available at [http://ec.europa.eu/competition/antitrust/information\\_en.html](http://ec.europa.eu/competition/antitrust/information_en.html).

<sup>129</sup> Whilst there are a number of case law examples stemming from the Convention that indicate that bodies that are not ‘true’ courts or tribunals have been held to be susceptible to Article 6, see for example

<sup>130</sup> See for example the case of *Zander v Sweden* (1993) 18 EHRR 175

*jurisdiction and does provide the guarantees of Article 6(1).”*<sup>131</sup> It follows that the application of the Convention is not on every step in the case but rather the entire process taken as a whole to assess whether when taken together the rights under Article 6 are sufficiently protected. More recently the ECtHR has affirmed that the same principle is directly applicable to the Italian competition authority, paragraph 58 of *Menarini*<sup>132</sup> 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.*’ This has been taken by many to mean that there is a requirement that the reviewing court must carry out a full and meaningful review of the case.<sup>133</sup> This has caused considerable disagreement in competition circles, see footnote 119 for some commentary, on the meaning of full review for the purposes of Article 6 protection. There has been criticism levelled at the Union courts. Some commentators such as Philip Marsden<sup>134</sup> asks the question of the Union system in this way; ‘... *do Europeans and others really understand the limited nature of the CFI's (now General Court) review of the Commission's decisions? The CFI is only looking at the adequacy of the decision. Judgments are reported as if they were full appeals; as if a hearing was held of all the issues, witnesses examined, arguments heard in full, in a public forum. The reality of course is quite different. There may be the judges' questions – which are starting to grow in significance – but there is no in-depth questioning of officials, witnesses, complainants, and the majority of the work has been done in unavailable written pleadings which are protected from public scrutiny. More could be opened up, and thereby provide greater oversight. How much more credibility*

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<sup>131</sup> *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at para 29.

<sup>132</sup> *Affaire A. Menarini Diagnostics S.R.L. V. Italie*, Requête no 43509/08

<sup>133</sup> For further commentary see Bronckers M, Vallery A. *Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?*. *European Competition Journal* [serial online]. August 2012;8(2):283-299. Available from: EconLit, Ipswich, MA. Accessed July 25, 2013; Wesseling R, van der Woude M. The Lawfulness and Acceptability of Enforcement of European Cartel Law. *World Competition: Law And Economics Review* [serial online]. December 2012;35(4):573-598; Katsoulacos Y, Ulph D. *Optimal Enforcement Structures For Competition Policy: Implications of Judicial Reviews And Of Internal Error Correction Mechanisms*. *European Competition Journal* [serial online]. April 2011; 7(1):71-88; Cengiz F. *Judicial Review and The Rule of Law in the EU Competition Law Regime After Alrosa*. *European Competition Journal* [serial online]. April 2011; 7(1):127-153; Nazzini R. *Administrative Enforcement, Judicial Review and Fundamental Rights In EU Competition Law:A Comparative Contextual-Functionalist Perspective*. *Common Market Law Review* [serial online]. June 2012; 49(3):971-1005; Van Cleynenbreugel P. *Constitutionalizing Comprehensively Tailored Judicial Review In EU Competition Law*. *Columbia Journal Of European Law*, Summer 2012;18(3):519; Lang J. *Judicial Review of Competition Decisions under the European Convention on Human Rights and the Importance of the EFTA Court: The Norway Post Judgment*, *European Law Review* [serial online]. n.d.; 37(4):464-480; Castillo de la Torre F. *Evidence, Proof and Judicial Review in Cartel Cases*, *World Competition: Law and Economics Review* [serial online]. December 2009; 32(4):505-578; Forrester I. *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*. *European Law Review* [serial online]. n.d.; 36(2):185-207; Bailey D. *Scope of Judicial Review Under Article 81 EC*. *Common Market Law Review* [serial online]. October 2004; 41(5):1327-1360.

<sup>134</sup> Marsden, P., ‘*Checks and Balances: EU Competition Law and the Rule of Law*’, (2009) 5(1) *Competition Law International* 24.

would the process have if reporters could genuinely write “today the Court upheld the Commission's decision”, rather than what should be: “today the Court found that the Commission was not manifestly wrong”?” This rather strong statement is reflective of the general view<sup>135</sup> expressed by those outside of the Commission. Is it true that the Union courts are providing an insufficient level of review, or is it more a matter that commentators are pushing for what they perceive to be the ‘proper standard of review’.

### 3.6 Judicial Approach to Full Jurisdiction

Following on from the questions raised above it is necessary to ask what the role of the Union courts is in these matters. As pointed out their approach has been subject to vehement criticism. Before delving into this debate, it is prudent to consider what is wrapped up in the ECtHR term ‘full jurisdiction’. At the heart of this question is whether or not the jurisdiction exercised by the reviewing court is sufficiently extensive to remedy any shortcomings of *primary decision makers* that arise under Article 6. Inherent in this is the question of whether ‘full jurisdiction’ means that the reviewing court must have full jurisdiction to review and decide all questions of law, fact and scope of margin of appreciation. If the answer to this is in the affirmative, then the discussion of the Union levels of review would end here, with the conclusion being it is not ‘full jurisdiction’. In the same way if this were applied wholesale to Member States a number would also fail the test.<sup>136</sup> As already pointed out the question of ‘full jurisdiction’ must be read in light of the

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<sup>135</sup> It is often the case that commentators suggest that it is reflected in the Union case law and it is self evident that the Union courts have a ‘stand-off’ approach when it comes to the aims and objectives of the Union competition rules, we see the courts’ reluctance to question the policy aims of the Union as set out by the Commission. It is this element that has caused many to question the appropriateness of the courts review of competition decisions. The argument runs that the Commission is able to reach conclusions with minimal levels of evidence and argue policy grounds to validate them. This is especially the case in cartels and evidence of wrongful behaviour. As Nazzini points out the underlying concepts that are unique to competition law may in themselves have differing meanings depending on factors such as ‘political environment, prevailing market conditions or economic theories’ (Nazzini, R., *The foundations of European Union Competition Law: The Objective and Principles of Article 102* (2011) Oxford, Oxford University Press, see chap 4). It is not that these concepts are judicially altered; it is rather that there is a degree of legal indeterminacy inherent in the concepts. According to Karl Llewellyn, this means that there is more than one acceptable conclusion to be drawn from the law. Therefore, in taking into consideration the particular facts of a case and the overarching political goals it is acceptable that judicial decisions will evolve in accordance with these types of ‘realisms indeterminate facts’. This is exemplified in Case C-162/09 *Secretary of State for Work and Pensions v Lassal*, ECR-I 09217, para. 49 the Court states that ‘*in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part*’.

<sup>136</sup> Take for example judicial review in the UK, where courts are limited to hearing specific grounds permitting standing in judicial review cases, as well as restrictive time limits. Moreover, the UK administrative courts and tribunals have self imposed limits on the reviewing of evidence and remedies. (see for example Jones, G (2010) *Remedies in Judicial Review Proceedings for Breaches of EU Law*; Allan, ‘*Constitutional Dialogue and the Justification of Judicial Review*’ (2003) 23 OJLS 563; Bailey and Elliott, ‘*Taking Local Government Seriously: Democracy, Autonomy and the Constitution*’ [2009] CLJ 436; Craig, ‘*The Common Law, Shared Power and Judicial Review*’ (2004) 24 OJLS 237) The system of the UK has however undergone significant change following

ECtHR jurisprudence, which allows for the reviewing court to evaluate the overall process. In *Bryan*,<sup>137</sup> for example, the Court stated<sup>138</sup> that in assessing the sufficiency of the review available it was necessary to have regard to matters such as the subject-matter of the decision appealed against, the way the decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. The reviewing court should have regard as to the nature of the type of proceedings, including whether the *primary decision maker* has acted in a quasi-judicial character and the procedural safeguards in place during that procedure.<sup>139</sup> The Court acknowledged that although the English High Court could not have substituted its own findings of fact for those of the *primary decision maker*, it would have had the power to satisfy itself that the *primary decision maker's* findings of fact or the inferences based on them were neither perverse nor irrational. Following this it indicates that the notion of 'full jurisdiction' does not necessarily require the reviewing court to reassess the evidence except in so far as it is necessary to consider whether the decision reached by the *primary decision maker* is rational and reasonable. This suggests that the examination of the evidence is only to go far as to establish whether it is sufficient, rather than a deeper review of the probative and reliability of the evidence.<sup>140</sup> Furthermore, for the dispute to attract the judicial protection of Article 6(1), it must be '*genuine and serious*' that is in '*actual existence*'.<sup>141</sup> Moreover, we have seen that there is a high margin of appreciation where the action is based on a key policy that is seemingly enhanced in economic wellbeing objectives. In the context of Union, competition law has become almost as central to the Union as any of the fundamental freedoms.<sup>142</sup> Many commentators consider the

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the introduction of the Human Rights Act 1998 to ensure compatibility with the Convention see for example *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53; [2007] 2 W.L.R. 1 at paras 3 and 32). The need for disclosure is likely to be greater in cases involving claims that action taken by a public authority infringes a Convention right and is not justified because it is disproportionate. The courts may need to see the main documentation upon which the decision of the public authority concerned was based in order to assess the merits of such a claim and the courts are likely to show a "somewhat greater readiness than hitherto" to order disclosure of the main documents in such cases. Note the use of the term main documents in the proceeding, this is simply to be illustrative of the primary decision makers motivation for reaching the decision rather than assessing the actual admissibility of the evidence (for further discussion see: Hugh Tomlinson QC (2010) *The Human Rights Act: The Ugly, The Bad and the Good* (<http://www.adminlaw.org.uk/library/publications.php>); Jeff King, '*The Justiciability of Resource Allocation*' (2007) 70 *Modern Law Review* 197-224; Jeff King, '*The Pervasiveness of Polycentricity*' [2008] *Public Law* 101-124; Richard Clayton, '*The Human Rights Act six years on: where are we now?*' (2007) *EHRLR* 10; Keith Ewing and Joo-Cheong Tham, '*The Continuing Futility of the Human Rights Act*' [2008] *Public Law* 668-693; Aileen Kavanagh, '*The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998*' (2004) 24 *Oxford Journal of Legal Studies* 259-285

<sup>137</sup> *Bryan v United Kingdom* (1995) 21 EHRR 342

<sup>138</sup> At paragraph 45

<sup>139</sup> At paragraph 48

<sup>140</sup> It is accepted that the case analysis and the following assumption drawn from it do not relate to Article 6(2) and (3) it is based primarily on the scope of review of to comply with Article 6 (1).

<sup>141</sup> *Bentham v Netherlands* (1986) 8 EHRR 425

<sup>142</sup> See example commentary on this point, Rickford J. *Protectionism, Capital Freedom, and the Internal Market* [e-book]. Oxford University Press; 2010; Bonefeld W. *Freedom and the Strong State: On German Ordoliberalism, New Political Economy* [serial online]. November 2012; 17(5):633-656. Available from: EconLit, Ipswich, MA.;

EU antitrust enforcement being at the heart of the successful growth of the internal market.<sup>143</sup> For some such as Josef Drexel competition law serves a function that is more than simply regulating the internal market for fair competition. It carries with it a higher degree of importance almost synonymous with constitutional law. This is not an unsubstantiated position to view competition law from. The specific nature of the EU means that the function of European competition law cannot be accurately assessed through a comparative study nor can it be viewed as a standard legal provision. We see prior to Lisbon that the goal of competition law was to achieve fairness on the market and following the Lisbon reforms the competition provisions are now tied directly to the achievement of ‘market integration’. The free movement of goods, along with the other freedoms,<sup>144</sup> remain a central feature of achieving an effective and competitive internal market within the EU. The centrality of the free movement of goods to this integration is reflected in the Treaties, Articles 28-30 of the Treaty on the Functioning of the European Union (TFEU) prohibit the imposition of custom’s duties on imports and exports and those charges having equivalent effect. Article 110 TFEU prohibits discriminatory internal taxation on imported goods, whilst Articles 34 and 35 restrict the imposition of quantitative restrictions on imports and exports. The TFEU has two chapters<sup>145</sup> dedicated to the free movement of goods, at their core all of these provisions share a common goal, the achievement of an internal European market free from trade barriers and restrictions.<sup>146</sup> Damage or compromising the internal market

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Stucke M. *Reconsidering Antitrust's Goals*. *Boston College Law Review* [serial online]. March 2012; 53(2):551-629; NICOLAIDES P. Competition and Advantage under Internal Market and State Aid Rules: Is There a Gap in the Law?. *Legal Issues of Economic Integration* [serial online]. August 2013; 40(3):271-290; Basedow J. Freedom of Contract in the European Union. *European Review Of Private Law* [serial online]. December 2008; 16(6):901-923; Oliver P, Roth W. *The Internal Market and The Four Freedoms*, *Common Market Law Review* [serial online], April 2004;41(2):407-441. Available from: Political Science Complete, Ipswich, MA. Accessed July 29, 2013. See also the case of Case 171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein (2012) NYR* a case that decided under Article 28 EC but could just as easily have been decided under the guise of Article 101 TFEU.

<sup>143</sup> Not an exhaustive list but for examples see, Stajano, A (2006) *Research, Quality, Competitiveness: European Union Technology Policy for the Information Society*, Springer, pp 437-440, chp 13 and 14; Pelkmans, J., (2003) *Better Internal Market Regulation*, Intereconomics, April, 66-69, Whish, (2012) *Competition Law*, 6th Ed, OUP, Faull, J., and Nikpay, A. (2007) *The EC Law of Competition*, Kerse, C., & Khan, N. (2004) *E.C. Antitrust Procedure*, Sweet and Maxwell

<sup>144</sup> The four fundamental freedoms, free movement of goods and people, unrestricted provision of services and liberalization of capital movements The details of these are found in Articles 34-5 TFEU; Article 45 TFEU; Article 56-7 TFEU and Article 63 TFEU

<sup>145</sup> Chapter 2-Customs Cooperation and Chapter 3-Prohibition of Quantitative Restrictions between Member States.

<sup>146</sup> For more discussion on the economic nature of the Union system and especially the question on economic constitutionalism see Laurent E, Le Cacheux J. *Integrity and Efficiency in the EU: The Case Against the European Economic Constitution*, CES Working Paper, no. 130, 2006; De Cecco F. *State Aid And The European Economic Constitution / Francesco De Cecco* [e-book]. Oxford : Hart, 2013; 2013. Accessed July 29, 2013; Collins H. *The European Economic Constitution and the Constitutional Dimension of Private Law*, *European Review of Contract Law* [serial online]. May 2009;5(2):71-94; Hilson C. *The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on National and European Identity*, *European Law Journal* [serial online]. March 2008; 14(2):186-202; Semmelmann C. *The European Union's Economic Constitution under the Lisbon Treaty:*

arises from three relationships (a) directly by Member States (b) from the private sector (c) from a mixture of (a) and (b). The simple table below is illustrative of the interrelationship between the legislative regimes and the space that is filled by competition law. We see that the legislative schematic of the Union provisions is to ensure that the actions at both a public and a private level are caught so as neither can adversely affect the internal market. Moreover, the notion of private autonomy makes it more difficult if not impossible to place the burdens of categories A-D to undertakings.<sup>147</sup> Therefore if E were removed from the schematic undertakings would be unrestricted by the Union and could adversely affect the internal market, through what is currently deemed to be anti-competitive behaviour.<sup>148</sup> The legislative strategy to capture all types of activities, whether private, public or a combination which might be the case in state aid, for example, affirms that free competition in an open-market economy with undistorted competition on the internal market are essential to the operation of the EU. Furthermore, the competition law provisions underpin and drive these economic aims and objectives.<sup>149</sup> We have previously seen how the use of competition law has resulted in further Union competence and economic integration. By way of example, the use of 102 in the *Continental Can*<sup>150</sup> case to regulate concentrations on the European market contributed to the now Merger Regulation, Regulation 139/2004. More recently 102 has been used in the area of intellectual property rights where essential patents are misused in a standardisation context<sup>151</sup>. As such competition law operates as a further fundamental tool of the European economic integration program. It follows that EU competition law cannot therefore be viewed narrowly or in isolation without having due regard for the wider purpose that the provisions serve.

| Category | Article | Addressee | Provision |
|----------|---------|-----------|-----------|
|----------|---------|-----------|-----------|

*Soul-Searching Shifts the Focus to Procedure*, European Law Review [serial online]. n.d.; 35(4):516-541; Morijn J. Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution. *European Law Journal* [serial online]. January 2006;12(1):15-40; Rutgers J. *The European Economic Constitution, Freedom of Contract and the DCFR*. *European Review of Contract Law* [serial online]. May 2009;5(2):95-108; Semmelmann C. *The European Union's economic constitution under the Lisbon treaty: Soul-searching shifts the focus to procedure*. *European Law Review* [serial online]. August 1, 2010; 35(4):516-541.

<sup>147</sup> On the application of private autonomy see above discussion on private autonomy.

<sup>148</sup> Although competition law outside of state aid focuses on the relationship between the Union and private entities Member States remain under a positive obligation, enshrined in Article 4(3) TEU, see Case 94/04 *Federico Cipolla v Roasaria Fazari* [2006] ECR I-1142, paras 46-53.

<sup>149</sup> See post Lisbon Article 3(1) (b) TEU that ties competition to the internal market.

<sup>150</sup> Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215

<sup>151</sup> This is discussed in more detail later in this paper, offering a short evaluation of the standardisation issue in the context of essential patents and their use or misuse amounts to an abuse of a dominant position.

|   |                       |                                |                           |
|---|-----------------------|--------------------------------|---------------------------|
| A | Articles 28 -29 TFEU  | Member States                  | Free Movement of Goods    |
| B | Articles 30-32 TFEU   | Member States                  | Customs Union             |
| C | Articles 34-37 TFEU   | Member States                  | Quantitative Restrictions |
| D | Articles 110-113 TFEU | Member States                  | Tax Provisions            |
| E | Articles 101-102 TFEU | Undertakings                   | Competition Provisions    |
| F | Articles 107-109 TFEU | Member States and Undertakings | State Aid                 |

As already pointed out courts, when deciding on the level of review and the margin of appreciation<sup>152</sup> afforded to *primary decision makers*, they are expected to take into account the importance of the policy within the state (in this case the Union).<sup>153</sup> Given the centrality of the Union competition provisions the approach by the Union courts becomes more legitimate and understandable than some, such as Marsden consider. The Union courts place a high focus on the complainant showing that there has been a breach of their procedural guarantees that is ‘*genuine and serious*’ and is in ‘*actual existence*’. In the Union, the review mechanism is predominantly under the judicial review procedure in Article 263 TFEU.<sup>154</sup> Whilst it is apparent, especially in cartel investigations that the Commission enjoys a wide range of acceptable responses so long as the inferences and conclusions drawn are *prima facie* causally linked to the evidence. This ‘margin of appreciation’ is particularly evident in *Matra Hachette*<sup>155</sup> 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...*’. In *Roquette Frères v Council* the judgment could be read as affirming the principle discussed in

<sup>152</sup> Vesterdorf explains this not in the same terms as I have here based on the level of review having the flexibility to facilitate the protection and margin of discretion to the Commission, rather for him it is a matter of institutional competences and respect. See 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

<sup>153</sup> In respect of the importance of competition provisions in relation to policy, see Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 42 where the Court stated that ‘The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union’

<sup>154</sup> 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>. The review of fines is set out in Article 21 of Regulation 1/2003 that has its treaty base in Article 261 TFEU. Note that this Article that provides jurisdiction to the Union courts does not extend to decisions, these fall squarely under 263TFEU.

<sup>155</sup> Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595

light of the ECtHR case of *Bryan* that the potential breach would need to end in the complainant being adversely affected. However, this margin of appreciation is not without limits and the courts and especially the General Court in recent times has set the parameters of its application. For example, in *Kone Oyj*<sup>156</sup> the General Court stated that where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission (emphasis added) and therefore, could have had an influence, in any way at all, on the assessments made by the Commission in the decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine.<sup>157</sup> This accords with the view of the ECtHR that Article 6(1) is engaged where the *primary decision maker* has acted unfairly or in a way that makes their decision illogical or resulted in the drawing of inferences that the evidence does not support. To put this in a more theoretical context and applying the underlying supposition of legal realism to it, as long as the decision that has been reached by the *primary decision maker* is rationally determinate and is motivated by reference and use of proper justificatory grounds. The nature of competition law itself means that there is always likely to be more than one substantiated decision. Put another way, there is not necessarily a right or wrong answer. There exist a range of decisions that would fall within the realms of legality. By way of illustration Llewellyn<sup>158</sup> argued that it is equally legitimate for a court to treat precedent “strictly” or “loosely.” In applying the stricter rule a judge could come to the decision that his ‘hands are tied’ as he is required to follow slavishly the strict rule. If, however, he chose to apply the looser rule, he could find legitimate tools of interpretation that

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<sup>156</sup> Case T-151/07, *Kone v the Commission*.

<sup>157</sup> Paragraph 38

<sup>158</sup> For more discussion on the question of indeterminacy in law and judicial decision making see Cook, W. W. *The logical and legal bases of the conflict of laws*. Yale Law Journal, (1924), (33), 457–88.; Frank, J. *Law and the Modern Mind*, (1930) New York: Brentano's; Frank, J. Are judges human? Parts I & II. University of Pennsylvania Law Review, (1931) (80), 17–53, 233–67; Holmes, Jr, O. W. *The path of the law*. (1897) Harvard Law Review, (10), 457–78; Hutcheson, Jr, J. *The judgment intuitive: the function of the “hunch” in judicial decision* (1929) Cornell Law Quarterly, (14), 274–88; Llewellyn, K. *The Bramble Bush*, New York: Oceana; Llewellyn, K. *Some realism about realism - responding to Dean Pound*, Harvard Law Review, (1931) (44), 1,222–64; Llewellyn, K. *Remarks on the theory of appellate decision and the rules and canons about how statutes are to be construed* (1950) Vanderbilt Law Review, (3), 395–406. I appreciate that the realist movement to which I have made reference centred around the discussion of appeals cases in the USA. However, it is no less applicable to the competition procedure at an EU law in understanding how the courts acting as review courts will consider the viability and reliability of a Commission decision. This would broadly be the same function as that of a US appeal court, therefore, the same principles are directly translatable to the EU system.

would allow him to deviate from the ‘strict’ rule.<sup>159</sup> The latter is likely to include policy aims, social and economic considerations and fairness.<sup>160</sup> Both decisions are equally legitimate within the law. Therefore, the question is whether or not the decision that is reached is sufficient to be determined applying the facts and the legal rules. If we turn this to the decision-making powers of the Commission, the principal function of the review of the Union courts is to establish whether the Commission has reached a decision that falls within the range of acceptable responses, having account of the relevant facts and evidence. Whilst most Commission decisions are likely to arrive at the Union courts via Article 263, which tends to be activated through a procedural irregularity, the question of due process within the procedure, and the validity of the Commission decision seems rightly to rest upon the question of whether the decision falls within the spectrum of reasonable responses of the Commission. Of course if the decision has been reached in violation of a basic due process right that is ‘genuine and serious’ and will cause ‘actual substantial harm’ to the company, then the decision reached by the Commission would not fit inside the box of reasonable decisions provided for by law. In *Aalborg Portland and*

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<sup>159</sup> This for Llewellyn was what made the law evolutionary in nature, whilst he accepted that there was always likely to be a lag in law to catch up to the social, political and economic norms and policies the laws failure to at least move in that direction would cause the law to stagnate and lose touch, it is now common place for policy arguments to form at least a limb of an advocates case ((see fn 144 for reference). In a Union context policy is often what constitutes the dictat from the Member States to the Union institutions it does therefore seem perverse to ignore the underlying policy aims to decide on the application of the law. In many ways this ties back to the argument put forward by Vesterdorf (fn 139) on institutional balance and recognition.

<sup>160</sup> For the legal realist this is acceptable especially where the law is seen to be rationally indeterminate meaning that the accepted class of reasons is insufficient to justify a unique outcome that the decision maker sees as being the ‘legitimate decision’ given the circumstances, the basis that each case comes before the court or decision maker as a unique set of facts and circumstances means that judges or decision makers could legitimately characterise the facts in a way that justifies the reaching of a decision. Even where a decision is not supported on a formalistic reading of the law, the decision is still legitimate so long as it does not offend the basic legal catchalls such as rights and due process. (for more on this point see Moore, U. and Sussman, G ‘*Legal and institutional methods applied to the debiting of direct discounts - I. Legal method: banker's set-off; II. Institutional method; VI. The decisions, the institutions, and the degree of deviation.* (1931) *Yale Law Journal*, (40), 381–400, 555–75, 1,219–50; Moore, U. and Callahan, C. ‘*Law and learning theory: a study in legal control*’, *Yale Law Journal*, (1943) (53), 1–136. Dworkin developed this by proposing that much indeterminacy in law dissipates when the definition of ‘law’ is expanded to include moral and political principles as legitimate sources of decision making (this point is examined by Leiter in: Leiter, Brian, ‘*Objectivity, morality, and adjudication.* In B. Leiter (ed.), *Objectivity in Law and Morals*’ (2001) Cambridge, UK, Cambridge University Press, 66–98; Leiter, Brian, ‘*Naturalism in legal philosophy*’ (2002) In E. Zalta (ed.). Outside of the area of competition law there are numerous examples of the ECJ having done just this, take for example the landmark Union cases examples such as Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Where a provision of EC law is directly effective it creates rights and duties which are directly enforceable by individuals before the national courts); Case 6/64 *Costa v ENEL* [1964] E.C.R. 585 (The transfer by Member States from their domestic legal systems to the EC system of rights and duties carries with it a permanent limitation of their sovereign rights, against which a later, unilateral act incompatible with EC law cannot prevail); Case 106/77 *Italian Minister of Finance v Simmenthal* [1978] E.C.R. 629 (An Italian law introduced after joining the EEC required veterinary inspections of beef and veal. The law was challenged before the Italian courts as contrary to Art.28 (ex 30) (prohibiting quantitative restrictions on imports and measures having equivalent effect). See also Case 213/89, *R. v Secretary of State for Transport Ex p. Factortame*, [1990] E.C.R. 1-2433.

*Others*<sup>161</sup> the Court stated that respect for the rights of the defence requires that the person concerned must have been afforded the opportunity, during the administrative procedure, to make known his views on the truth and relevance of the facts and circumstances alleged, and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty. Failure to do so can remove the Commission decision from being a valid legal response. In *Fuji*<sup>162</sup> the Court affirmed that its role under Article 263 is to assess whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement. Where there is doubt, the benefit of that doubt must be given to the parties to whom the decision is addressed, and consequently, the court cannot conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains doubts on that point. The meeting of the required 'legal standard' can therefore be translated to the realist approach in considering it as the benchmark as to whether the Commission decision is, in fact, a valid response that can be reasonably determined on the facts and evidence.<sup>163</sup>

As discussed above, full review within the context of judicial review does not entail consideration for the validity, suitability, probative value or accuracy of the evidence that the Commission relies on. It is rather the Court having account of the facts, the decision and reference to the evidence used to arrive at the decision they can find a legitimate and rational link from which the decision reached can be considered legally permitted. So what then is the role of companies' rights? Quite simply an infringement of a company right that meets the criteria as set out in the ECtHR jurisprudence, i.e. being actual and serious will take a decision outside the bounds of a legitimate rational legal decision. If, then we are to read the case law of the Union in light of this realist approach to interpretation, the Union system finds itself aligned with the ECtHR jurisprudence and providing an accepted standard of protection. Take, for example, the opinion of AG Colomer in *Volkswagen*<sup>164</sup> who argued that the nature of competition law, was not synonymous with a dispute between the individual and the state and therefore, the procedural

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<sup>161</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I123, paragraph 66.

<sup>162</sup> Case T-132/07, *Fuji Electric Co. Ltd v Commission* (2011) para 89

<sup>163</sup> The notion here of reasonableness is a common legal principle especially in more modern times coinciding with the growth of the administrative state, on the notion of reasonableness especially in judicial review context see for example Bilchitz, D 2008, *Judicial Review In Practice: The Reasonableness Approach And Its Shortcomings*, n.p.: Oxford University Press, Oxford Scholarship Online; Arancibia, J 2011, *Judicial Review Of Commercial Regulation*, n.p.: Oxford University Press, Oxford Scholarship Online; Syrett, KK 2008, Nice and judicial review: Enforcing 'accountability for reasonableness' through the courts?, *Medical Law Review*, 16, 1, p. 127-140; ZARING, D 2011, RULE BY REASONABLENESS, *Administrative Law Review*, 63, 3, pp. 525-560, Business Source Complete; Pillay, AA 2011, *Reinventing reasonableness: the adjudication of social and economic rights in South Africa, India and the United Kingdom*, British Library EThOS; Wharam, A 1973, *Judicial Control of Delegated Legislation: The Test of Reasonableness*, *The Modern Law Review*, 6, p. 611, JSTOR Arts & Sciences IV.

<sup>164</sup> Opinion of Advocate General Ruiz-Jarabo Colomer *Volkswagen v Commission* (I), [2003] ECR I-9189 at paragraph 66.

guarantees under the Convention (Article 6) could not be ‘*transferred en bloc*’.<sup>165</sup> More recent case law indicates that the economic nature of competition law and its centrality to Union objectives means that due process, and other rights cannot be drawn too narrowly so to undermine the Union objectives.<sup>166</sup> In *Orkem*<sup>167</sup> the EU courts failed to give effect to the principle of the privilege against self-incrimination,<sup>168</sup> the court stated that the right attached ‘*only to a natural person*’ and not necessarily to a ‘*juristic person in the economic sphere*’<sup>169</sup>. 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 *Dow*<sup>170</sup> 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 to go so far as required on the evidence upon which the Commission based its decision. 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 narrow application of them.<sup>171</sup> Nonetheless this approach still aligns the Union system with the ECHR if one is to accept the *Markt Intern* standard, although, this proposition of compatibility is not without criticism. Others offer a contrary view to this believing that such a wide margin of discretion afforded to the Commission, and such low judicial protection makes a mockery of the very concept of affording rights to legal persons. Recent research by Damien Gerard<sup>172</sup> highlights the high margin of discretion afforded to the Commission by the Union courts. In the General Court between 2006-2010 at most 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 potential difficulty is highlighted in the case of *Aragonesas*,<sup>173</sup> 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

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<sup>165</sup> This is in many ways a simple application of the *Markt Intern* standard of review. Whatever may be argued the position remains that firms, especially in antitrust matters cannot be equated to individuals who face a fetter being placed on their liberty.

<sup>166</sup> Given the economic nature of competition law and the potential negative impact that anti competitive behaviour is likely to have on the internal market and consumers, it is hardly surprising that the views of AG Colomer in *VW* have been largely followed, even if not expressly.

<sup>167</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283

<sup>168</sup> 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

<sup>169</sup> *Orkem* at para 28-30

<sup>170</sup> Case 97/87 *Dow Chemical Ibérica, SA, and others v Commission*

<sup>171</sup> 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 speech by Alexander Italianer, Studienvereinigung Kartellrecht Conference 14 March 2012, Brussels.

<sup>172</sup> Gerard, D., (2011) *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?*, *E.L. Rev*, 36(4), pp 457-479

<sup>173</sup> T-348/08 *Aragonesas Industrias y Energía v Commission*

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. Although such a one-sided approach denies the fact that the General Court has shown itself willing to limit the Commission's actions. As Hoseinian<sup>174</sup> points out the contribution of the General Court to holding the Commission to account is not insignificant. He highlights that the access to file,<sup>175</sup> the burden of proof<sup>176</sup> and the courts willingness to deal with complex cases<sup>177</sup> are all proof of the General Court fulfilling the role designated to it. However, both Gerard and Hoseinian draw no real distinction between 101 or 102. As previously stated, one of the less addressed questions in the literature is whether due to the nature of 102 firms should be entitled to a higher rights protection? The question posed largely comes about as a result of the transformation and reform of the approach to 102 by the Commission and the on-going debate as to the best approach to establishing an abuse of a dominant company. It is not the purpose of this paper to trace the reformation of EU competition law, although for context for the following chapters, it is helpful to set out the main objectives of the 102 reform.<sup>178</sup> Historically, competition law has been influenced by economics and the trends from the US, for example, the Chicago School of economics<sup>179</sup> is commonly accepted as being the basis for competition enforcement. Although over a quarter of a century later, economic thought has progressed and so too has the enforcement of EU competition law. However, the transformation of Union competition law has

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<sup>174</sup> Hoseinian, F.M.F., *The Forthcoming reform of the General Court of the European Union-Potential Specialisation within the General Court*, in Hawk, B. E. (2013). *International antitrust law & policy / editor Barry E. Hawk*. Yonkers, N.Y. : Juris, 2013 at chapter 6

<sup>175</sup> T-58/01 *Solvay v Commission* [2009] ECR II-4781

<sup>176</sup> T-10/92 *Cimenteries CBR SA v Commission*, ECR [1993] I-05105

<sup>177</sup> Although a merger case see T-310/01 *Schneider Electric v Commission* [1993] ECR II-407, here the GC dealt with the appeal that raised a number of complexities within 10 months from date of appeal.

<sup>178</sup> Kroes, "Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82", in: Hawk (ed.), "Fordham Corporate Law Institute, International Antitrust Law & Policy 2005", 381, 383 (2006).

<sup>179</sup> There remains debate as to the applicability of the Chicago school and the following Harvard school. More recently the debate has moved on to resurrect the Schumpeterian competition debate (see for example; Schumpeter JA, *Theory of economic development*, 1934, Harvard University Press, Cambridge; Schumpeter JA, *Capitalism, socialism, and democracy*, 3rd edition, 1950, Harper and Row and Hicks JR, *Value and capital*, 1939, Clarendon, Oxford; Hicks JR, *Capital and time*, 1973, Clarendon, Oxford, New York) that the stimulation of technological innovation encouragement of innovative opportunities. This so called dynamic competition approach has gained a much more prominent role in competition enforcement and is specifically seen as an aim of the Union. On the debate on economics see for example, Fourcade M, Khurana R. *From social control to financial economics: the linked ecologies of economics and business in twentieth century America*, *Theory & Society*, March 2013;42 (2):121-159; Rothbard M. *Competition and the Economists*, *Quarterly Journal Of Austrian Economics*, Winter2012 2012; 15(4):396-409; Kobayashi B, Muris T. *Chicago, Post-Chicago, And Beyond: Time To Let Go Of The 20th Century*, *Antitrust Law Journal*, January 2012;78(1):147-172; Giocoli N. *When low is no good: Predatory pricing and U.S. antitrust law (1950–1980)*. *European Journal of The History of Economic Thought* [serial online]. December 2011; 18(5):777-806; *School on Economic Methodology and Monopolistic Competition*, *American Journal Of Economics & Sociology*, April 1963;22(2):235-250.

not always matched the modernisation of economic thought underlying the enforcement of competition law. From the first introduction of Article 85 and 86 EEC in the Treaty of Rome to Regulation 17 in 1962 that remained largely in force for four decades until the introduction of Regulation 1/2003 there has not been a propensity to reform competition law at a Union level. The question and ensuing debate of a more economic approach to the appraisal of 102 cases by the Commission was fuelled and has grown in momentum since July 2005 which saw the Commission Discussion Paper (Discussion Paper), ‘An Economic Approach to [Article 102 TFEU]’<sup>180</sup> being released.<sup>181</sup> Under the Discussion Paper between paragraphs 58-84 it outlines the general test and approach to assessing the conduct of companies to determine whether a breach of 102 has occurred. This can conveniently be broken down into a three stage test. Firstly, it has to be shown that the conduct in question is capable, by its nature, to foreclose competitors from the market. Secondly, the conduct is also likely to have a distorting effect on the specific market. Finally, it cannot be excused by virtue of “objective necessity” “meeting competition” and the “efficiency” defence.

Within this consultation, the Economic Advisory Group for Competition Policy (EAGCP) responded and cast doubt on the effectiveness of the traditional approach that the Commission had taken to 102 cases. The essence of the criticism is that the categorisation of types of behavior that are likely to be viewed as abusive<sup>182</sup> does not correlate neatly with the second limb of 102, namely whether an abuse has occurred. The underlying premise is that distinct markets operate in different ways and the types of behavior that may be a cause for concern on one market is not necessarily transposable to another. Whilst the EAGCP advocates a more effects based approach the Commission did not adopt this wholesale. In its 2008 publication, ‘Guidance on the Commission’s enforcement priorities in applying [Article 102] to abusive exclusionary conduct by dominant undertakings’<sup>183</sup> the Commission sets out its approach to the enforcement of 102 and the enforcement priorities of the Commission. The document was met with much criticism for being short, vague, descriptive and lacking sufficient detail to be of any substantial use to

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<sup>180</sup> Available at [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf)

<sup>181</sup> Prior to which and to some extent still ongoing there has been criticism of the approach of the union institutions to the enforcement of 102 see for example Kallaugher And Sher, “*Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82*”, (2004) 25 E.C.L.R. 263, 268; Eilmansberger, “*How to Distinguish Good from Bad Competition Under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses*”, (2005) 42 C.M.L.Rev 129.; Waelbroeck, “*Michelin II: A Per Se Rule Against Rebates by Dominant Companies?*”, (2005) 1 JCLE 149 Competition Law Forum’s Article 82 Review Group, “*The Reform of Article 82: EAGCP-REPORT, “An Economic Approach to 82*”, (2006) 1 Competition Policy International. Although for contrary views see Christiansen/Kerber, “*Competition Policy With Optimally Differentiated Rules Instead Economic Approach to Article 82 EC and the Legal Process*”, (2006) ZWeR 259, 270, Boy, “*Abuse of Market Power: Controlling Dominance or Protecting Competition*”, in: Ullrich (ed.), “*The Evolution of European Competition Law: Whose Regulation, Which Competition*”, 201, (2006).

<sup>182</sup> Such as predatory pricing, selective price cuts, margin squeeze as examples of the ‘textbook’ categorisation of abusive behaviour.

<sup>183</sup> OJ C 45, 24.2.2009, p. 7–20

companies and their advisors. Short the document may be, but the remaining criticisms are not necessarily warranted. On closer inspection, clearly a number of the EAGCP recommendations have found their way into the Guidance Paper whilst this may not always be clear on a close inspection of it they are there. A prime and important example being the language of the Commission and the introduction into 102 cases the concept of efficiency. One of the main distinctions in the drafting of 101 and 102 is the clear lack of available justifications under 102. The Guidance paper could withstand a reading that the Commission favours an ‘effects based’ analysis and in doing so introducing the possibility of efficiency gains being a justification to exempt otherwise ‘unlawful’ behavior.<sup>184</sup> Regardless of this it is generally proposed that the Discussion Paper did not go far enough to support the more economics based approach that many have been calling for. For some, it lacked clarification of the applicable economic approaches, tools and evaluations that companies and lawyers had been calling for. However, criticism of the Commission seems to be the ‘trendy’ move in these matters and seems to ignore the difficulty of the Commission delivering what is being asked for. With the modernisation program moving away from the shackles of the Chicago school and even from the ‘post Chicago’ line of economics there exist various models of economics and especially within the area of dynamic competition, there is debate and confusion as to a single method of economic analysis. Too strong a reliance on strict economic models brings with it the danger of reducing the assessment of competition policy to the question of changes in price and quantity of given products. To do so is to limit the Commission and the Union in protecting dynamic competition and is likely to exclude a number of cases from the ambit of 102 investigations, especially the growing trend of cases and potential abuses involving intellectual property rights. In such cases, a pure economic approach is unlikely to bring the necessary market balance. What follows is a tracing of the approach taken by the Commission in reaching decisions contrasted with those of the Union courts to evaluate whether there is consistency and answer the question of whether firms are given adequate rights protection.

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<sup>184</sup> Although detailed consideration of this point falls outside the scope of this research except where reference is made for contextual purposes.

# 4 ARTICLE 102 COMMISSION DECISIONS

As already pointed out 102 prohibits not the acquiring of dominance but rather the abuse of a dominant position in so far as it affects trade between Member States. The objective of 102 is not explicitly stated in the treaties, and this is resulted in a significant debate<sup>185</sup> as to the objective that it serves. Although the Union courts have clearly linked it to the internal market, this is clear from the recent *TeliaSonera*<sup>186</sup> case. The Court starts by linking competition law, through Article 3(3)TEU and Protocol No 27, to the internal market and the development of a system that ensures that competition is not distorted. This is supported through the use of Article 3(1)(b) TFEU which identifies Article 102 as one of the essential rules in achieving a competitive internal market. However, the Court does not stop here and goes further to combine the purpose of 102 to the prevention of detriment of public interest, individual undertakings and consumers. Accordingly then dominance on the EU market is equated with a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers<sup>187</sup>, these being reasonable and legitimate objectives to associate 102 with.

## 4.1 Effects Based Model

Traditionally, the approach of the European courts in establishing an abuse of a dominant position has been based on a legal formalistic model. As such they avoid the potentially thorny area of looking into the ‘actual’ impact of the alleged anticompetitive conduct on the market.<sup>188</sup> This epitomises the ECJ’s judgment in *Hoffman-La Roche*<sup>189</sup> holding that for ‘the purposes of Article [102], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in

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<sup>185</sup> On this point see for example: Nazzini R. *The Foundations Of European Union Competition Law: The Objective And Principles of Article 102*, Oxford: Oxford University Press, cop. 2011; Ahlborn, C., & Ysewyn, J. *European Union: Reform of dominance rules - not too late, but definitely too little*, 2007, International Financial Law Review, 2610-11; Rousseva E, Marquis M. *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU*. Journal Of European Competition Law & Practice, 2013, 4(1):32

<sup>186</sup> Case C-52/09 - *Konkurrensverket v TeliaSonera Sverige AB*, judgment of 17 February 2011, nyr.

<sup>187</sup> Daniela Chirita A. *Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU*. World Competition: Law And Economics Review (2010) 33(3):417-436

<sup>188</sup> See for example cases such as *British Airways* and *Microsoft*, discussed in the introduction to this paper.

<sup>189</sup> Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461

other words, that the conduct in question is capable of having or likely to have such an effect'.<sup>190</sup> Nonetheless reform is seemingly going ahead unabated and the Commission is clearly leaning to a more economic assessment to 102 cases. Take for example, the Best practices for the submission of economic evidence released by the Commission in 2010<sup>191</sup> that moves economic evidence into a more central role and aims to clarify the use and interpretation of this sort of evidence in 102 cases. Accordingly there seems to be a trend<sup>192</sup> that places economic analysis in a central position and according to the Commission “economic reasoning is employed in competition cases notably in order to develop in a consistent manner or, conversely, to rebut because of its inconsistency, the economic evidence and arguments in a given case.”<sup>193</sup>

### **COMP/E-1/38.113 Prokent/Tomra**

Tomra group was active in the market for the supply of so-called reverse vending machines, and related products and services. These machines are used in supermarkets for the collection of disposable or non-refillable containers were developed. Depending on their specifications, these machines identify the incoming container according to particular parameters such as shape and/or bar code and calculate the deposit that is to be reimbursed to the customer. Following a complaint from a competitor the Commission investigated whether Tomra had abused their dominant position. The Commission found that through the business practices of Tomra that included exclusivity agreements, quantity commitments and loyalty systems, an abuse of a dominant position had occurred. In its defence Tomra had put forward a substantial amount of economic evidence to support their position that their business practices were not exclusionary in nature and therefore, no anti-competitive behavior had occurred. Regardless of the fact that the Commission undertook a thorough evaluation of the economic evidence and placed an emphasis on the ‘effect’ on the market their conclusion was to find an abuse of a dominant position.

### **T-155/06 Tomra Systems v Commission [2011] 4 CMLR 7**

Tomra brought an action for annulment to the General Court on a number of grounds, on of being that the Commission made a manifest error of law in not including in its legal assessment the market context in which the agreements that the Commission had found exclusionary operated (paragraph 199). The Court in assessing the complaint found that the Commission was not required to analyse the ‘actual effect’. Interestingly the Court acknowledges that the Commission went further in the originating decision and evaluated the ‘actual’ effects on the

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<sup>190</sup> *ibid* para.

<sup>191</sup> DG Competition best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases. Available at: [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/](http://ec.europa.eu/competition/consultations/2010_best_practices/)

<sup>192</sup> B. Baker Jonathan, F. Bresnahan Timothy, “*Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*”, in Paolo Buccirossi, eds., *Handbook of Antitrust Economics*, Cambridge Massachusetts London England: the MIT Press 2008.

<sup>193</sup> *Ibid* para 9.

market.

It is interesting that the contrast of the approaches is so stark in the Tomra case.<sup>194</sup> Whilst the Union courts are clearly able, through their case law, to provide the minimum of what level of analysis the Commission is expected to undertake for the purposes of judicial review of their decisions, this does not prevent the Commission from imposing a higher burden on itself in the originating decision. What remains to be seen is whether (a) the Commission will continue to evaluate the ‘efficiency’ and the ‘effect’ in 102 cases. Although, the trend does seem to suggest that this is likely to be the case. The use of ‘effect’ is also seen in the more controversial Intel decision<sup>195</sup> where the Commission based part of their decision on the ‘effects-based’ model of scrutiny. However, there were as upheld by the European Ombudsman,<sup>196</sup> other concerns surrounding the Commission’s behaviour and the quality of the evidence<sup>197</sup>. Nonetheless for the purposes of this discussion the point remains that the ‘effects-based’ approach was again introduced into the Commission’s decision making.

### **T-340/03 France Télécom SA v Commission [2007] ECR II-107**

The case came about as a result of a sectorial investigation by the Commission into the high-speed internet market. The Commission found that the prices charged by Wanadoo Interactive SA (part of the France Télécom group, 99.9% of its capital being held by Wanadoo SA). The Commission took the view that Wanadoo infringed Article 102 by charging for its eXtense and Wanadoo ADSL services predatory prices that did not enable it to cover its variable costs until August 2001 or to cover its full costs from August 2001 onwards, as part of a plan to pre-empt the market in high-speed internet access during a key phase in its development. Wanadoo brought an action to the General Court for the annulment of the Commission’s decision arguing that the Commission had made serious errors of law and assessment, in their methodology and factors used to find that Wanadoo had embarked on a strategy of predatory pricing. However, the Court (paras 195-197) found that the conditions for the application of Article 102 and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect. Thus, with regard to the practices concerning prices, the Court of

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<sup>194</sup> See also T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] ECR II-2631; T-301/04 *Clearstream v Commission* [2009] ECR II-3155

<sup>195</sup> *Intel Corporation COMP/C-3/37.990* [2009] OJ C227/07, see paragraph 926 as an example where the Commission states ‘*although this is not indispensable according to the case-law... the Commission will show that the conditional rebate schemes prevented or made it more difficult for each of those OEMs to source x86 CPUs from AMD.*’

<sup>196</sup> Available at <http://www.ombudsman.europa.eu/press/release.faces/en/4403/html.bookmark>

<sup>197</sup> See the second plea to the General Court in the application for annulment in case T-286/09 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:220:0041:0042:EN:PDF>

Justice held in *AKZO v Commission*, that prices below average variable costs applied by an undertaking in a dominant position are regarded as abusive in themselves because the only interest which the undertaking may have in applying such prices is that of eliminating competitors, and that prices below average total costs but above average variable costs are abusive if they are determined as part of a plan for eliminating a competitor. In that case, the Court did not require any demonstration of the actual effects of the practices in question. Furthermore, it should be added that, where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 102. It is clear therefore that, in the case of predatory pricing, the first element of the abuse applied by the dominant undertaking comprises non-recovery of costs. In the case of non-recovery of variable costs, the second element, that is, predatory intent, is presumed, whereas, in relation to prices below average full costs, the existence of a plan to eliminate competition must be proved.

Once again the Court draws out that the need to show an actual effect on the market is unnecessary. Drawing on the previous case law of the ECJ the Court affirms the strict formalistic approach rather than opting for a more effects based approach. Had the Court moved into the realms of 'effect' it would have aligned itself more the United States<sup>198</sup> approach to the assessment of establishing predation. This would have required an assessment of the actual effects of the practice including answering the question of recoupment.

### **T-219/99 British Airways v Commission [2003] ECR II-5917**

The case involved British Airways (BA) and resulted from a complaint lodged with the Commission by Virgin Atlantic, a competitor on the market, complaining that a range of incentive agreements between BA and travel agents amounted to an abuse under Article 102. BA operated two incentive systems. The first system of incentives established by BA consisted of marketing agreements, which enabled certain IATA travel agents established in the United Kingdom to receive payments in addition to their basic commission, namely: a performance reward, plus certain special bonuses, based on the volume of sectors flown on BA; a performance reward, plus certain special bonuses, based on the volume of sectors flown on BA; cash sums from a fund for travel agents to use for staff training; cash sums from a fund for travel agents to use for staff training; cash sums from a business development fund established by BA with a view to increasing its revenue and the resources of which were to be used by each agent for financing promotional projects in favour of BA. Cash sums from a business development fund established by BA with a view to increasing its revenue and the resources of which were to be used by each agent for financing promotional projects in favour of BA. The marketing agreements also required the United Kingdom travel agents not to accord less favourable

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<sup>198</sup> Not discussed here but see US examples and approaches in *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 940 (1993); *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co Inc* 127 S Ct 1069 (2007).

treatment to BA than that which they accorded to any other airline, particularly in relation to the display of their fares, products, brochures and timetables. Those marketing agreements, concluded for one year at a time, were in principle reserved for United Kingdom IATA travel agents with more than GBP 500 000 annual sales of BA tickets (flown revenue). Travel agents with annual flown revenue exceeding GBP 500 000 but below GBP 10 million were offered a standard marketing agreement. Those with a flown revenue exceeding GBP 10 million entered into a marketing agreement individually negotiated with BA. The performance reward was calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets. In addition to the general performance reward, certain routes qualified for a special performance bonus. Payment of the performance reward or the special bonus was subject to travel agents increasing their sales of BA tickets from one year to the next. Although, as a general rule, neither of those two bonuses was paid in respect of sectors flown on BA domestic services within the United Kingdom, those sectors were counted in determining whether sales objectives were achieved, since those objectives were calculated in terms of global flown revenue, including longhaul, shorthaul and domestic flights. In addition to the marketing agreements, BA concluded a second type of incentive agreement (global agreements) with three IATA travel agents. For the 1992/1993 winter season, BA set up global incentive programmes with three travel agents, entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales. The Commission found these practices amounted to an abuse under Article 102 on the basis that it encouraged discrimination against competitors and produced an exclusionary effect. BA brought an action to the General Court for the annulment of the Commission's decision arguing that no such abuse had occurred.

In assessing the arguments of BA the Court refused to be moved away from the formalistic approach that pervades the case law<sup>199</sup>. At paragraph 293 the Court states that BA could not accuse the Commission of failing to demonstrate that its practices produced an exclusionary effect. In the first place, for the purposes of establishing an infringement of Article 102, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.

Again the approach of the Court is seen to steer clear of the assessment of the question of market effect. Even though this was clearly found by the Commission to exist in their decision against BA the Court did not engage with the evidence or assumption on which the Commission had reached such a conclusion.

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<sup>199</sup> Whereas the Commission decision in the case at paras 103; 111-113 seems to find an effect on the market., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0074:EN:NOT>. Although the Court makes reference to this it does not form the basis of their evaluation of the case.

### **T-201/04 Microsoft Corp v Commission [2007] ECR II-3601**

Microsoft brought an action for annulment against the Commission decision finding that they had abused their dominant position twice over. Firstly, by refusing to supply interoperability information to its competitors. Secondly by tying Windows Media Player to its operating system. Microsoft raised a number of concerns as to the Commission decision, but for the purposes of this analysis paragraph 664 of the Courts judgment states that, it must be borne in mind that it is settled case-law that Article 102 covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market. This is a particularly startling statement as it would seem that holding of super dominance could itself amount to an abuse, but for the immediate discussion again it is clear that the ‘effect’ on the market was unnecessary.

### **C-468/06 Sot Lélou kai Sia EE and others v GlaxoSmithKline AVEE [2008] ECR I-7139**

The case originated by way of a preliminary ruling from a Greek court and involved GSK AVEE a Greek subsidiary of GlaxoSmithKline plc. GSK AVEE imported, warehoused and distributed pharmaceutical products in Greece for the medicinal products Imigran, Lamictal and Serevent for the treatment, respectively, of migraines, epilepsy and asthma (‘the medicinal products in dispute’), which are available in Greece only on prescription. Towards the end of October 2000, GSK AVEE altered its system of distribution on the Greek market, citing a shortage, for which it denied responsibility, of those medicines. From 6 November 2000 it stopped meeting the orders of the appellants in the main proceedings for the medicinal products in dispute and began itself to distribute those products to Greek hospitals and pharmacies through the company Farmacenter AE (‘Farmacenter’). In December 2000 GSK AVEE applied to the Epitropi Antagonismou (Competition Commission) for negative clearance in the form of a declaration that its new policy of selling the medicines directly to Greek hospitals and pharmacies did not infringe Article 2 of Law 703/1977.

Amongst the questions referred by the national court it asked whether a refusal by a dominant undertaking to meet orders sent to it by pharmaceutical wholesalers, on account that those wholesalers are involved in parallel imports of those products to other Member States, constitutes a per se abuse?

In reply the ECJ stated that ensuring that competition in the internal market is not distorted, there can be no escape from the prohibition laid down in Article 102 for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of effective competition in terms of the supply and the prices that those exports would obtain for final consumers in the other Member States. Again the arguments of the

parties was rejected as to the actual market effect and despite the fact that GSK AVEVE had begun to resume supply to the distributors this was not seen as a significant element for consideration.

### **C-549/10P Tomra Systems and Others v Commission [2012] NYR**

To return to Tomra, which is discussed above, the case was appealed from the General Court to the ECJ. One of the grounds of the appeal was that the General Court had erred in finding that the foreclosure effects of the system of rebates Tomra had engaged in would not have had an effect on the market as there was no restriction or exclusion of competitors from the market. Rather competitors could easily have competed against the agreements in question. However the ECJ affirmed the General Courts earlier statement that the Commission was not required to demonstrate an actual effect on the market. The ECJ stated that the General Court was correct to hold that the determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying 102 and, secondly, in the light of the findings made in paragraph 243 of the judgment under appeal, it was, in any event, in the present case, proved to the requisite legal standard that the market had been closed to competition by the practices at issue. Not to flog the point, but this is again difficult to reconcile with the Commission's approach to the 'effect' on the market in their earlier decision in the case.

The formalistic approach of the European courts does not seem to take into account the more effects based approach that is been advocated for by the Commission and from other outside sources. The trend in 102 cases for the judicial proceedings remains in line with the early case law discussed above. This raises the all-important question as to whether or not the European courts are failing to apply the correct level of scrutiny to a Commission decision in 102 cases?

The argument runs that if the 'effects based approach' were to be adopted by the courts they would, then need to enter into a deeper evaluation and consideration of the economic evidence put forward by the company and that of the Commission and evaluate, which is more persuading. A number of commentators contend that the courts are required to do this whether they wish to or not. The protection of the rights of defence of companies, procedural fairness and natural justice demands it. Although many speak of this as though companies are automatically entitled to be protected in this manner, as pointed out earlier the level of review in 'full review' does not necessarily entail a full reassessment of the evidence. It is rather the case that the *Markt Intern* standard be applied. Although it is arguable that in order to assess a fine or decision the evidence should be reassessed by the courts to ascertain whether the originating decision is safe. Or to turn the argument on its head, regardless of whether there is a distinction about review of the fine or annulment of the decision the fact remains that the evidence needs to be reassessed. In reviewing the penalty, the court cannot assess its reasonableness and lawfulness unless it evaluates the evidence to decide the extent to which the company has acted in an aggravating or mitigating manner. This is a general requirement of fairness in administrative law. The second scenario is

such that if the Commission chooses to base part of its decision on ‘effects based approach’ then the court is obliged to ascertain whether the Commission has proven to the required standard not simply the possibility of an anti-competitive behavior action was likely to occur, but whether there is sufficient evidence to establish such effect has actually occurred. This raises an all-important question as to how the courts have approached the question of evidence. More importantly how have they approached economic evidence and how should, in 102 cases, the weight of the evidence be more thoroughly tested given the uncertain nature of the evidence and the fact that this will be at the heart of the Commission decision to impose large financial penalties.

## 5 UNION COURTS 102 DECISIONS

The remaining question here is to what extent the Union courts should review the evidence, especially economic evidence that the Commission relies on. As discussed above there are doubts that the type and level of review carried out in the Union courts is insufficient to meet the minimum rights requirements that firms may legitimately expect. The remainder of this chapter evaluates a small number of cases from the Union courts to ascertain their approach to evaluating cases in this area. This is followed by a conclusion finding that the level and type of review in the Union is, contrary to the view of many, in line with the basic levels that are associated with the ECHR.

### **Deutsche Telekom v Commission**<sup>200</sup>

The facts of the case surround an abuse of dominance in the German telecom market in which Deutsche Telekom was guilty of margin squeeze, the ECJ on appeal from the GC the ECJ upheld the GC at paragraph 143 by stating that the General Court was right to reject Deutsche Telekom complaint that the Commission had calculated the margin squeeze on the basis of the charges and costs of a vertically integrated dominant undertaking, disregarding the particular situation of competitors on the market. The General Court pointed out in paragraph 185 of its judgment that its review of complex economic appraisals made by the Commission is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers. Whilst this has approach is one that it is significantly criticised, with commentators calling for a more definitive test of whether an actual effect has been established on the evidence it carries with it a misunderstanding of the required level of ‘full review’. To return to the statement of the ECtHR that put it in this way *‘a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition*. Put in context, if the Union courts were to adopt a pure effects based approach they would be holding the Commission to a higher than permitted burden of proof and would require a full evaluation of the evidence from both sides. This would remove the function of the Court from review to trial. For this, there is no jurisdiction.

### **Spain v Commission**<sup>201</sup>

This case stemmed from an infringement action arising from an abuse of dominance by margin squeeze again by a former state monopoly *Telefonica*. The second plea of the case was that the Commission had made a manifest error in assessment in reaching the conclusion of abuse. The GC replied by stating that so far as the Commission’s decision is the result of complex technical

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<sup>200</sup> T 271/03 *Deutsche Telekom v Commission* [2008] ECR II 1477

<sup>201</sup> Case T-398/07, *Kingdom of Spain v Commission*, [2012] ECR II-000

appraisals, those appraisals are, in principle, subject to only limited judicial review, which means that the courts of the European Union cannot substitute their own assessment of matters of fact for the Commission's. Although the Court does go on in paragraph 62 to say that whilst the Commission has this margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The courts of the European Union must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. However it then goes on in paragraph 63 to return to the test of manifest error in its evaluation of the Commission decision.

The statements of the Court in paragraph 62 of the judgment must be read as affirming the judicial position as the gatekeeper protecting the rights of firms. Clearly the Commission does not have free roam to reach a decision and to return to the argument put forward above that the decision of the Commission is permissible so long as it falls within the range of acceptable responses from the facts would make it legally legitimate.

### **Astra Zeneca v Commission**<sup>202</sup>

A highly contested and criticised judgment, the case involved the question of whether Astra had abused its dominant position through misleading national patent offices and deregistration in a number of Member States of Losec capsules this led to the Commission assessing the relevant product market extremely narrowly. The General Court in an extensive judgment considered that in respect of economic evidence. It follows from settled case-law that, although as a general rule the Community judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's.

However, while the Community judicature recognises that the Commission has a margin of assessment in economic or technical matters that does not mean that it must decline to review the Commission's interpretation of economic or technical data. In order to take due account of the parties' arguments, the Community judicature must not only establish whether the evidence put

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<sup>202</sup> T 321/05 *AstraZeneca v Commission* [2010] ECR II-2805

forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. In the Court's judgment it comes to the conclusion that since quantification of cost-effectiveness is likely to be particularly complex and uncertain, it cannot be considered that the Commission committed a manifest error of assessment in taking into account the price of the medicines for an identical period of treatment.

Whilst this case has become highly topical, it is in my opinion misguided. The legislative framework that gave rise to this case has subsequently been repealed and it is unlikely that this would reoccur now. Nonetheless and even if this were not the case it does not detract from the application of the realism argument to the Commission decision.

### **Clearstream Banking AG v Commission**<sup>203</sup>

This is similar to the Astra case in that it presented another challenge against the relevant product market assessment where the GC repeated the mantra that, it should be noted, at the outset, that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Community judicature. However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and is capable of substantiating the conclusions drawn from it. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's. This judgment is indicative of the attitude of the Union Court's around 2004. The relevance of which is that it coincides with the new approach under the modernization Regulation (1/2003). This high margin of discretion is possibly attributable to the Court's not wishing to run counter to the Commission's goals and objectives. It was discussed earlier that the function of competition law cannot be viewed in isolation nor can the case law of the Courts.

### **Microsoft v Commission**<sup>204</sup>

This case involved a number of issues from failure to licence to tying and bundling. The question of the relevant market was again in issue especially so on the server market. The interest in this case also stems from the direct attack of Microsoft on the Commission's approach to complex

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<sup>203</sup> T-301/04 *Clearstream Banking AG v Commission* [2009] ECR II-315

<sup>204</sup> T-201/04 *Microsoft v Commission* [2007] ECR II-3601

assessments and the judicial standing off to facilitate the Commission decisions. In paragraph 89 of the judgment the Court accepts that it is obligated to review the evidence from which the Commission decision stems, it should do so not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. Although in the final analysis of the case at paragraph 389 the Court reverts back to an earlier statement in paragraph 87 it must be emphasised that the Commission's analysis of that question in the contested decision is based on complex economic assessments and that, accordingly, it is subject to only limited review by the Court. The two steps forward one step backwards approach by the Court in Microsoft now forms the 'standard' or 'precedent' for the state of review in Article 102 cases. This would be the case if the court were acting as the 'trial' court but as already shown in competition matters this is not the case and the approach by the Union courts is perfectly legitimate.

### **Solvay v Commission**<sup>205</sup>

The paragraph 87 of the Microsoft case at paragraph 250 is used to in this case to substantiate the position that the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.

### **Kish Glass v Commission**<sup>206</sup>

Interestingly in Kish Glass, at paragraph 64 the Court states that according to consistent case-law, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. By now, the trend is clear to see through the consistent use of language what the approach of the Courts is.

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<sup>205</sup> T-58/01 *Solvay v Commission* [2009] ECR II-4781

<sup>206</sup> C-65/96 *Kish Glass v Commission* [ 2000] ECR II-1885

### **Compagnie Générale Maritime and others v Commission**<sup>207</sup>

In this case at paragraph 339 makes reference to the limited right of review. However, the interesting aspect here is that the limited review is in the context of an action for annulment where the Court considered that the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the power of discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules of procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. This indicates a different type of review, that of purely ultra vires review, this is not a substantial form of review. It is also noticeable that the Court makes no mention of ensuring that the Commission was entitled to reach the conclusions that they did although by not finding a legality breach we can safely infer that the Commission response fell within the spectrum of reasonable and acceptable legal responses.

### **Atlantic Container Line and Others v Commission**<sup>208</sup>

The line of reasoning in the previous cases was followed here, in that the Courts jurisdiction is limited as a result of the review been brought under the annulment procedure. Turning to the earlier 1995 judgment of the Court in the ICI<sup>209</sup> case it is clear that the Commission was not able to rely on a high level of non-interference from the Courts. Here the Court held at paragraph 91, that where, as in the present case, difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. This seems to be a much higher burden on the Commission if not to the Court, then certainly to the party affected. In doing so it is clear that the Commission cannot simply dismiss out of hand concerns raised by the undertaking thereby heightening the burden of proof on the Commission.

### **La Cinq v Commission**<sup>210</sup>

Although this case is capable of being read so as to affirm the generally accepted ‘Microsoft’ position, paragraph 86 provides an interesting brake to the powers of the Commission where the Court stated that where the institutions of the Community have a power of appraisal in order to be able to fulfil their tasks, respect of the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in

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<sup>207</sup> T-86/95, *Compagnie Générale Maritime and others v Commission* [2002] ECR II- 1011

<sup>208</sup> T-395/94 *Atlantic. Container Line and Others v Commission* [1995] ECR II-595

<sup>209</sup> Case 48/69 *ICI v Commission* [1972] ECR 619

<sup>210</sup> T-44/90 *La Cinq v Commission* [1992] ECR II-1

particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case.

The case law considered in this chapter is illustrative of the fact that the question of full review by the courts of the administrative decision making by the Commission is not necessarily limited. Many consider this proposition to be untenable in practice. Most abuse of dominance cases will turn on the question of economic evidence and its interpretation. By allowing the Commission to dictate the evidence collection, decide its validity and counter it with their own interpretation has raised questions as to its compatibility with fundamental rights and rights of procedure. This requires one to question the suitability of economic data as evidence for the proving of an abuse of dominance where contrary economic evidence exists and is easily manipulated by the manner in which evidence is collected, the demographic surveyed or the sales points considered, geographically speaking. Nonetheless, and so as not to repeat my earlier arguments the realist approach combined with the jurisprudence of the ECtHR suggest otherwise. The level of review by the Union courts is perfectly in tune even where complex economic material is at issue. Moreover, it is not for the Courts to substitute their decisions for those of the Commission rather it is to ensure having regard for the rights of companies that the Commission decision falls within the parameters of lawful.

## 6 CONCLUDING REMARKS

To return to the questions posed at the beginning of this paper. Firstly, to what extent are rights available to companies in competition cases? The answer rests on the conclusions that are drawn from the case law analysis of the ECtHR and the Union. Namely that in economic areas such as competition a higher margin of appreciation to administrative decision makers than would otherwise be available to private individuals means that rights are available to companies in a limited way. The concept of ‘full review’ has an autonomous meaning outside the scope of that associated with private persons and in my view the debate on the criminality of the sanctions does not erode the underlying rationale for different standards. Secondly, what is the effect or outcome from the use of economic evidence in 102 cases? Clearly, there are divergent approaches by the Commission and the Union courts. However, one should not lose sight of the institutional roles that they play. It is not for the Union courts to assess the evidence in order for the Court to reach a decision. Rather it is for them to test that there is sufficient probative evidence that brings the Commission decision within the scope of the legally permissible decisions on a functionalist reading. This brings us to the final question of whether there is uniformity in the approach taken by the Commission and the Courts? The answer is not always. However, this does not mean that there is a problem. Rather that the institutional balance discussed in relation to the second question is in good operation. If the Union courts were to take a truly strict approach to the evidence and require an effect be shown it would limit considerably the scope of Article 102. This in turn would paralyse the Commission from being able to rely on 102 to achieve other policy goals associated with protecting competition on the market.

To provide an example, the Commission’s approach to company’s use of intellectual property rights in a standards setting environment is a growing trend in the Commission investigations. The Commission's pro standardisation position is evident in the growth of their interest in standards, from the reinvention of Directive 98/34,<sup>211</sup> the introduction of the 2012 European Standardisation Regulation 1025<sup>212</sup> to its Horizon 2020 commitment to standards, it remains firmly driven to prevent abuses of the standards process. A company owning standard essential patents (SEP) and acting in a way that is contrary to the reasonable expectations of a responsible SEP owner in a standard context will likely attract the attention of the Commission. The concern of the Commission over SEP is illustrated in the *Google/Motorola* merger decision in which it aired apprehensions over Google acquiring the Motorola patent portfolio, and the extent that Google would be bound to the Motorola commitments. There are hardly an abundance of case law examples on this topic, but the few there are illustrates the antitrust twist will continue to subsist where the failure of the standard is likely to cause a distortion of the market through the

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<sup>211</sup> See my paper presented at EURAS 2013, *The Role of the Union courts in Preventing Technical Barriers to Trade Within the Internal Market*

<sup>212</sup> See my earlier piece, *The European Standardisation Regulation*, SRC Memo Series, No.5, March, 2013.

application of 102. If the Commission were put to proof by the Union courts to prove an actual affect of the behaviour they may well be hard pressed to do so. The cases in which the Commission has been successful such as in *Rambus*, where the accusation of withholding information on patents relevant to the standard engaged the Commission. No actual market effect, rather a standard effect. Likewise, in *Qualcomm*, an alleged breach of an agreement to licence on fair, reasonable and non-discriminatory terms (FRAND) was sufficient to justify a Commission investigation. In *Nokia, ICom* who acquired patents was accused of not conforming to the commitments made by the foregoing owner of the SEP. Whilst in *Samsung*, the accusation arose as a result of their actions, an application for an injunction, to prevent a competitor, *Apple*, from acquiring a licence on standard agreed FRAND terms. In a similar vein, we have the *Google-Motorola* case in which *Google* is accused of not strictly adhering to the FRAND commitments of the past patent owners by seeking injunctions against *Microsoft* and *Apple*. It is difficult to say with certainty what the likely judicial outcome of any of these cases could or would be, especially since to date none of them have come before a Union court.<sup>213</sup>

What we do know is that the Commission is prepared to open investigations into companies who do not strictly act in ‘good faith’ or those who do not entirely follow their commitments made to the standard setting community. However, it is questionable whether this would be something that the Commission could do under 102 if it were strictly an effects based approach. So whilst the Commission should and does, as is clear from the foregoing discussion, try where possible to highlight the effect it is not a prerequisite for judicial control of the Commission or for the protection of the rights of companies.

Due to the constraints of space a matter that has not been discussed in any depth is the growing case law on intellectual property rights and the Charter and the application of 102 to these cases. The rights of property are expressly protected in Article 17 of the Charter, included at paragraph 2 is intellectual property.<sup>214</sup> This should be read in conjunction with Article 16, which is the freedom to conduct a business. It is Article 16 that is particularly under litigated. The application of any Union law, including 102 must comply with the Charter and in this context Article 16. The recent line of cases on this Article suggests that, by reason of the freedom to conduct a business, companies should be able to assert their interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes to its future economic activity. If this is the case, then one must ask whether a dominant company refusing to licence intellectual property or withdrawing their property rights from the market is entitled to do so. Will this lead to the Union courts having to carry out a proportionality assessment on the Commission decision and if so will this require that the courts re-evaluate the evidence more thoroughly in order to

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<sup>213</sup> Although this may be about to change, with a reference been made from the Dusseldorf Regional Court via Article 263 TFEU, (docket No. 4b O 104/12). The Dusseldorf court wants to clarify under what circumstances an infringement court has to consider a compulsory license defense in a patent dispute concerning a SEP.

<sup>214</sup> This is raised but not discussed further due to space restraints.

effectively carry out the proportionality test? These are questions that will no doubt be raised in the future as lawyers seek new avenues to check the Commission's decisions.

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