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# Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?

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## Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?

Donald Slater, Sébastien Thomas and Denis Waelbroeck\*

### Introduction

In light of the EC Commission's recent public consultation on the functioning of Regulation 1/2003,<sup>1</sup> it appears to us an opportune moment to look again at the Commission's enforcement powers and potential need for reform in this regard. This paper considers the current accumulation of investigational, prosecutorial and adjudicative powers within the Commission in competition matters and the negative impact of that accumulation on the quality of decision-making and the problems it raises with respect to the right to a fair trial.

First, as so often stressed –and most recently by the OECD–, "*combining the function of investigation and decision in a single institution*" may have the effect to "*dampen internal critique*" within the institution and raise "*concerns about the absence of checks and balances*".<sup>2</sup> Creating the proper decisional structure is indeed fundamental for the quality of decisions.

Second, from a strictly legal point of view, the combination of all powers within one institution raises the question of the compatibility of competition law proceedings led by the European Commission ("*the Commission*") with the fundamental right to a fair trial as enshrined in Article 6 of the European Convention of Human Rights ("*ECHR*").<sup>3</sup>

Traditionally, the view is taken that, it is sufficient for Commission decisions in antitrust cases to be subject to review by the Community courts and particularly by the Court of First Instance ("*the CFI*"), even if the Commission itself is not an "*independent and impartial tribunal*" under Article 6 ECHR.<sup>4</sup>

However, where fines of close to a billion € are imposed today on companies and where competition law is becoming more and more criminalised, it is questionable whether this view is still valid.

A thorough analysis of the case-law of the European Court of Human Rights ("*the ECtHR*") shows that fundamental procedural rights are broader and apply much more strictly when

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<sup>1</sup> See IP/08/12030.

<sup>2</sup> See OECD country studies –European Commission– Peer Review of Competition Law and Policy – 2005, p. 62.

<sup>3</sup> See notably D. WAELBROECK and D. FOSSELDARD, "Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures", 15 *YEL* (1995), pp. 111-142; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", 27(2) *World Competition* (2004), pp. 201-224; K. LENAERTS and J. VANHAMME, "Procedural Rights of Private Parties in the Community Administrative Process", 34 *CMLR* (1997), pp. 531-569; W. WILS, "La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme", *CDE* (1996), pp. 329-354. D. WAELBROECK and C. SMITS, "*Le droit de la concurrence et les droits fondamentaux*", in "*Les droits de l'homme dans les politiques de l'Union européenne*", Larcier, 2006, p. 135 et seq.; D. WAELBROECK, "*Twelve feet all dangling down and six necks exceeding long. The EU network of competition authorities and the European Convention on Fundamental Rights*", in "*The EU Network of Competition Authorities*", Hart Publishing 2005, p. 465 et seq.

<sup>4</sup> See e.g. judgment of the CFI of 11 July 2007 in case T-351/03, *Schneider Electric 3A v. Commission* at para 183.

"criminal sanctions" are imposed, in contrast with cases in which civil remedies or administrative sanctions are provided.

True, the EU is currently not a party to the ECHR. This does however not mean that –as sometimes stated in the past– the ECJ "does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities".<sup>5</sup> First, the European Court of Justice ("the ECJ") has always indicated its willingness to follow the case-law of the ECtHR.<sup>6</sup> Second, it follows from recent ECtHR's jurisprudence that the provision of the ECHR must also be respected in the EU.<sup>7</sup>

As will be shown hereafter, unless the Community competition procedure is changed, it might sooner or later lead to a formal condemnation of all the Member States collectively<sup>8</sup> or of the EU itself<sup>9</sup> by the ECtHR.

This paper will thus show that, given the rapid "criminalisation" of competition law proceedings, sanctions should in principle be imposed at first instance by an independent and impartial tribunal fulfilling all the conditions of Article 6 ECHR (part I). Or at the very least, these sanctions should be subject to full jurisdictional review by an independent and impartial tribunal in order to comply with Article 6 ECHR and to cure the defects of the administrative procedure (part II). It is doubtful however whether such a full jurisdictional review, as it is understood by the ECtHR, is available at Community-level in antitrust cases.

## I. Sanctions imposed by the Commission in competition proceedings are "criminal charges" within the meaning of Article 6 ECHR

### A. The notion of "criminal charge" under Article 6 ECHR

According to Article 6 ECHR,<sup>10</sup> any "determination" of a civil right or obligation or of any criminal charge, has to be made by an "independent and impartial tribunal" fulfilling the

<sup>5</sup> Joined Opinion of Mr Advocate General Darmon delivered on 18 May 1989 in case 374/87, *Orkem v. Commission* and in case 27/88, *Solvay v. Commission*, [1989] ECR p. 3283.

<sup>6</sup> A formal commitment to abide by fundamental rights as enshrined in the ECHR was even undertaken in Article 6(2) of the Treaty on European Union. The ECJ tends indeed increasingly to refer directly to judgments of the ECtHR in its own rulings. See for example the judgment of the CFI of 8 July 2008 in case T-99/04, *AC-Treuhand AG v. Commission*, not yet reported, at para. 52; judgment of the Court of 1 July 2008 in Joined cases C-341/06 P and C-342/06 P, *Chronopost SA and La Poste v. Union française de l'express (UFEX) and Others*, not yet reported, at para. 46. For a critical comment on this, see notably A.G. TOTh, "The European Union and Human Rights: the Way Forward", 34 *CMLR* (1997), pp. 491 *et seq.*

<sup>7</sup> See the judgments of the ECtHR of 18 February 1999, *Matthews v. United Kingdom*, App. n° 24833/94, and of 30 June 2005, *Bosphorus v. Ireland*, App. n° 45036/98. The latter judgment indicates at para. 156 that any presumption of compliance with the provisions of the ECHR by the EU "can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights."

<sup>8</sup> Such attempts have already been made in the past (see notably the *Senator Lines* case, App. n°56672/00) where the compatibility of the non-suspensory nature of Community proceedings with Article 6 ECHR was questioned. The application was finally declared as "devoid of purpose" by the ECtHR after the CFI decided to set aside the fine imposed by the Commission.

<sup>9</sup> This would be possible in the perspective of accession to the ECHR by the European Union, which is explicitly made possible by the new Reform Treaty (see Article 6 of the future Treaty on the European Union, as approved by the Lisbon intergovernmental conference, which states that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.").

<sup>10</sup> Article 6 ECHR ("Right to a fair trial") reads as follows:

"1. 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 protection of the private life of parties so require, or to the

requirements of Article 6(1) ECHR. In addition, criminal proceedings – by contrast with civil proceedings – also have to comply with additional guarantees spelled out in the second and third paragraphs of that provision. This distinction between civil and criminal proceedings has several implications in terms of procedural rights.<sup>11</sup> In this respect, the ECtHR has always insisted on the specific nature of criminal proceedings as regards the rights of the defence<sup>12</sup> and on ensuring that Article 6 ECHR is not interpreted restrictively so that the rights guaranteed by this provision are not compromised.<sup>13</sup>

Considering the “prominent place held in a democratic society by the right to a fair trial”,<sup>14</sup> the ECtHR, “compelled to look behind the appearances and investigate the realities of the procedure in question”,<sup>15</sup> has been prompted to give an autonomous meaning to the concept of “criminal charge” and “to prefer a ‘substantive’ rather than a ‘formal’ conception of the ‘charge’ contemplated by Article 6 par. 1 (art. 6-1)”.<sup>16</sup> This is notably to avoid that the application of this provision could be circumvented by parties to the Convention, simply by their domestic classification of penalties.<sup>17</sup>

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*extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *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 of the court.”*

Article 47 of the charter of Fundamental Rights of the European Union similarly recognises that “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”.

<sup>11</sup> For a discussion of this distinction in the field of competition law, where merger control proceedings are generally considered as falling under the civil heading of Article 6 ECHR, whereas antitrust cases (i.e. implementing Article 81 and Article 82 EC with the possible use of sanctions by the Commission) are considered as falling under the criminal heading of Article 6 ECHR, see notably D. Waelbroeck and D. Fosselard, cited above, W. Wils, cited above and A. Andreangeli, “Toward an EU Competition Court: “Article-6-Proofing” Antitrust Proceedings before the Commission ?”, *World Competition* 30 (4), pp. 595-622.

<sup>12</sup> See for example the Judgment of 9 March 2004, *Pitkänen v. Finland*, App. n° 30508/96, at para. 59.

<sup>13</sup> See for example the Judgement of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.

<sup>14</sup> Judgement of the ECtHR of 27 February 1980, *Deweert v. Belgium*, A 35, at para. 44.

<sup>15</sup> *Ibidem*

<sup>16</sup> *Ibidem*

<sup>17</sup> Judgement of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22, at para. 81. In this case, the ECtHR stated that “[t]he Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (...). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (...), in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules.

In the landmark *Öztürk* case,<sup>18</sup> the ECtHR applied this reasoning to the situation in which road traffic offences had been classified as mere "regulatory offences" and not as "criminal offences" in Germany and where the German judge had therefore considered that the offender was not entitled to be offered a free interpreter during the so-called "administrative procedure". The ECtHR forcefully argued that "there is in fact nothing to suggest that the criminal offences referred to in the Convention necessarily imply a certain degree of seriousness" and that it would be "contrary to the object and purpose of Article 6 (...), which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the States were allowed to remove from the scope of this Article (...) a whole category of offences merely on the ground of regarding them as petty."<sup>19</sup>

In order to determine objectively whether proceedings involve the determination of a "criminal charge" in the sense of Article 6 ECHR, the ECtHR relies in particular on:

- the classification of the offence under domestic law;
- the nature of the offence; and
- the nature and severity of the penalty (These three criteria are generally referred to as the "Engel criteria").<sup>20</sup>

These criteria are not cumulative and do not all carry the same weight.<sup>21</sup> In particular, the classification under domestic law provides no more than a starting point but carries less weight than the other criteria which are more objective.<sup>22</sup>

In later case-law, the ECtHR clarified and specified its second and third criteria used for the determination of a "criminal charge" as follows:

- whether the norm is only addressed to a specific group or is of a generally binding character.<sup>23</sup> (This criterion is mainly used to distinguish criminal sanctions from mere disciplinary sanctions, which are generally addressed only to a specific group or a specific profession);<sup>24</sup>
- whether the sanctions imposed are not merely compensatory but truly punitive and meant to have a deterrent effect;<sup>25</sup> and
- whether the level of the sanction and the stigma attaching to the offence is important.<sup>26</sup>

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*If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (...) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (...) and even without reference to Articles 17 and 18 (...), to satisfy itself that the disciplinary does not improperly encroach upon the criminal." See also for another example *Société Stenuit v. France*, Decision of the Commission of Human Rights of 27 February 1992, A/232-A.*

<sup>18</sup> Judgement of the ECtHR of 21 February 1984, *Öztürk v. Germany*, A 73, at paras. 47-49.

<sup>19</sup> *Öztürk v. Germany*, cited above, at para. 53.

<sup>20</sup> See in particular the judgments of the ECtHR in *Engel and others v. the Netherlands*, cited above, at para. 82; in *Öztürk v. Germany*, cited above, at para. 50; and of 23 November 2006, *Jussila v. Finland*, App. n° 73053/01, at para. 30.

<sup>21</sup> See the Judgement of the ECtHR of 9 October 2003, *Ezeh and Connors v. United Kingdom*, App. n° 39665/98 and 40086/98, at para. 86.

<sup>22</sup> *Öztürk v. Germany*, cited above, at para. 52.

<sup>23</sup> See for example the Judgement of the ECtHR of 24 February 1994, *Bendenoun v. France*, A 284, at para. 46; and *Jussila v. Finland*, cited above, at para. 38.

<sup>24</sup> Judgement of 22 May 1990, *Weber v. Switzerland*, A 177, at para. 33.

<sup>25</sup> See the Judgement of the ECtHR of 7 July 1989, *Tre Traktörer AB v. Sweden*, A 159, at para. 46; and *Bendenoun v. France*, cited above, at para. 47: "the tax surcharges are intended not as a pecuniary compensation for damage but essentially as a punishment to deter reoffending".

<sup>26</sup> In this regard, imprisonment is considered to be the criminal penalty *par excellence*. However, penalties other than deprivations of liberty have in the past also be considered severe enough to justify the applicability of Article 6. In the *Malige* case, for example (Judgment of 23 September 1998, Reports 1998-VII), concerning a measure of docking points from driving licenses after a conviction for a traffic

Thus, wherever a sanction is imposed (whatever its qualification under domestic law) whose main objective is to "deter" from future violations of the norm it is meant to enforce, where the violation of that norm is generally perceived as inherently "bad" or contrary to the common values shared in a democratic society, and where the norm is generally addressed to an undefined group of persons, this sanction will inevitably be considered as a "criminal charge" under Article 6 ECHR.

Where not all these factors lead towards the same conclusion, a balancing process will have to be carried out in order to assess the possible criminal nature of the sanction imposed. It appears from the case-law of the ECtHR that the deterrent function of the sanction and its severity will have a particular weight in this regard.<sup>27</sup>

*B. Proceedings under EC competition law constitute "criminal charges" within the meaning of Article 6 ECHR<sup>28</sup>*

**1. Application of the Engel criteria to EC competition proceedings**

*(i) Domestic classification*

Much uncertainty as to whether EC competition law proceedings could be considered as involving a "criminal charge" within the meaning of Article 6 ECHR has stemmed from the fact that the EC law's domestic classification of *sanctions* imposed by the Commission for breaches of Articles 81 and 82 EC is explicitly non-criminal. Thus, the text of Article 23(5) of Regulation 1/2003 (and its predecessor Article 15 of Regulation 17/62) provides that the decision by which the Commission imposes a fine on undertakings "shall not be of a criminal nature".

However, it should be stressed that such classification is of little relevance in the present context for a number of reasons:

Firstly, to the extent Article 23(5) of Regulation 1/2003 seeks to classify EC competition law proceedings for the purposes of Article 6 ECHR, it should be recalled that domestic classification is not the conclusive or the most important criterion in determining the criminal nature of proceedings under that provision. It is indeed merely a starting point, and the ECtHR has not in the past hesitated to go against this domestic classification.<sup>29</sup> This is in conformity with the aim "to prefer a 'substantive' rather than a 'formal' conception of the 'charge'

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offence, and where no possible detention as an alternative was involved, the Court found the measure to be of a severity to make it a criminal sanction (see P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> ed.), Intersentia, Antwerpen/Oxford, 2006, pp.548-554). In the *Weber* case (cited above), which concerned proceedings where the fine could amount to 500 Swiss francs and could be converted into a term of imprisonment in certain circumstances, the Court held that "what was at stake was sufficiently important to warrant classifying the offence as a criminal one under the Convention." In the *Schmautzer* case (Judgement of 23 October 1995, A 328-A), the Court held that driving without wearing a seat-belt, an administrative offence under Austrian law, was criminal in nature, due notably to the fact that the fine of 200 Austrian schillings had been accompanied by an order for committal to prison in case of non-payment.

<sup>27</sup> See notably *Bendenoun v. France*, cited above, at para. 47; and *Jussila v. Finland*, cited above.

<sup>28</sup> This section deals with the application of the Engel criteria to EC competition law. In other words, it deals with the criminal nature of EC competition law as appreciated in light of the ECHR. It is noted that this is obviously a different question from whether the Commission is a "tribunal" within the meaning of Article 6 ECHR. As consistently found by the ECJ, and as the Commission's itself agrees, it is not. See e.g. Judgment of the CFI of 15 March 2000 in joined cases T-25/95 and others, *Cimenteries CBR and others* [2000] ECR II-700, at paras. 712-724; and of 14 May 1998 in case T-348/94, *Enso Española v. Commission* [1998] ECR p. II-1875, at para. 56. See also Judgment of the Court of 29 October 1980 in joined cases 209 to 215 and 218/78, *van Landewijck e.a. v. Commission (Fedetab)* [1980] ECR p. 3125, at para. 81; and of 7 June 1983 in joined cases 100 to 103/80, *Musique Diffusion française e.a. v. Commission* [1983] ECR p. 1825, at para. 7.

<sup>29</sup> See above, note 15. See also *Engel & Others*, *supra* note 17, at para 81; *Öztürk*, *supra* note 18, at para 49; *Ezeh & Connors*, *supra* note 21, at paras 83, 100; Judgment of the ECtHR of 16 December 1997, *Tejedor Garcia*, App. n° 142/1996/761/962, ECR 1997-VIII, at para 27.

contemplated by Article 6 par. 1 (art. 6-1)."<sup>30</sup> According to the case-law of the ECtHR, classifications under domestic law as to the criminal nature of the offence have only a "relative value".<sup>31</sup> This is understandable, since the opposite conclusion would result in signatory states being able to unilaterally determine the scope of protection enjoyed by individuals under Article 6 ECHR.

In this regard, when stating first in Article 15 of Regulation 17/62 and then in Article 23(5) of Regulation 1/2003 that fines "shall not be of a criminal nature", it is generally recognised that the main – or at least one key – reason was that Member States wanted to make it clear that in adopting Regulation 17/62 they were not recognising that the Community had any criminal competences.<sup>32</sup>

It is possible also that at the time of adoption of Regulation 17/62, Member States genuinely believed that the sanctions proposed – and perhaps even the proceedings more generally – were not truly of a criminal law nature. After all, for many years the fines imposed for even the most egregious breaches of Article 81 EC were sanctioned with fines running at most to tens of thousands of EUR, as opposed to thousands of times those amounts today, and the rhetoric surrounding enforcement was very different.<sup>33</sup>

When the provision was then taken over word for word in Regulation 1/2003 –and again no discussion at all appears in the initial proposal for Regulation 1/2003<sup>34</sup> in which the text already appeared– it is possible that there was a continued concern about a perceived transfer of competences in the criminal sphere. However, as noted above, this does not of course address the issue of substance in relation to Article 6 ECHR.

One crucial point to note, however, is that – unlike the situation under Regulation 17/62 – in retaining the provision in Regulation 1/2003, it is certain that at least some consideration was also given to Article 6 ECHR. This point was simply too important to be ignored given in particular the developments in the ECtHR case law over the previous decades, which clearly indicated that the fines in similar contexts were criminal in nature (see below (ii)). However, what the intention of Article 23(5) was in relation to this point remains a mystery.

To our knowledge, the only institution to leave an official public trace of its consideration of the criminal nature of sanctions under Regulation 1/2003 is the European Parliament (which, it is recalled had only a consultative role in the legislative process). In its position document, the European Parliament did not request the removal of Article 23(5) of the Regulation, but called for proper judicial review of Commission (and national competition authority) decisions in the field of competition law, noting that:

*"The issue of the compatibility of the Community's competition procedure as a whole with Article 6 of the ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purposes of Article 6."*<sup>35</sup>

<sup>30</sup> *Ibidem*

<sup>31</sup> See the case-law of the ECtHR cited above. See accordingly W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", 27(2) *World Competition* (2004), p. 208; D. WAELBROECK and D. FOSSELDARD, cited above, p. 120; and K. LENAERTS and J. VANHAMME, cited above, p. 557.

<sup>32</sup> See e.g. M. WAELBROECK and A. FRIGNANI, *Commentaire Mégret*, vol. 4, concurrence, Ed. ULB, 1997, p. 419 and references. See also R. Legros, "L'avenir du droit pénal international", *Mélanges offerts à Henri Rolin*, Paris, 1964, P. 194.

<sup>33</sup> These evolutions are considered in detail below.

<sup>34</sup> COM(2000)582, OJ [2000] C 385/284, 19 December 2000.

<sup>35</sup> European Parliament position, 1st reading or single reading, OJ [2002] C 72/236, 21 March 2002. See Amendment 43 proposed by the Parliament. In proposing this amendment the Parliament urged: "the institutions and the Member States to give careful consideration to amending Articles 229 and 230 of the EC Treaty with a view to giving the Court of First Instance the power to conduct judicial review of findings and orders made by the Commission in its competition decisions to PE 296.005 64/65 RR296005EN.doc EN a standard sufficient to satisfy the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; likewise calls on the



In conclusion on this point, it is unclear what the intention behind Article 23(5) of Regulation 1/2003 was in relation to Article 6 ECHR. In any event, as indicated, domestic classification is not decisive for purposes of application of Article 6 ECHR.

Secondly, although fines imposed by the Commission are explicitly classified as non-criminal, this does not necessarily imply that proceedings relating to EC competition law infringements are inherently non-criminal in nature. This is an important point, since Article 6 ECHR requires the respect of certain fundamental rights in the determination of "*criminal charges*" and "*criminal offences*" and does not talk in terms of criminal sanctions (which constitute only one of the *Engel* criteria). In determining this, the nature of the sanctions that are imposed is only one element (one of the *Engel* criteria).<sup>36</sup> Another important consideration is the stigma attaching to the offences. Thus, whilst maintaining that sanctions imposed by it are not criminal, the Commission has pursued an active policy of heavily stigmatizing violations of EC competition law, and indeed the current Competition Commissioner has explicitly equated cartel activity to theft.<sup>37</sup>

Thirdly and finally, Regulation 1/2003 explicitly foresees the formal criminalisation of such proceedings under national law. Thus, Article 5 of Regulation 1/2003 allows the imposition of criminal sanctions under national law for breaches of Articles 81 and 82 EC. Article 12(3) provides that "[...] *information exchanged [between national authorities] cannot be used by the receiving authority to impose custodial sentences*". Regulation 1/2003 therefore explicitly acknowledges the possibility that criminal sanctions could be imposed by Member States for violation of EC competition rules. In practice, this is in fact what has happened in a number of

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*Commission to do whatever is necessary, in cooperation with the national authorities, to ensure that the application of Community competition law by national competition authorities is in all respects clearly in accordance with Article 6 of the European Convention".*

The following justification was given by the Parliament for this:

*"The issue of the compatibility of the Community's competition procedure as a whole with Article 6 of the ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purposes of Article 6. But even if this does not come about, it is already clear that Commission competition decisions determine the 'civil rights and obligations' of companies in very important ways. Therefore companies are entitled under Article 6 to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' in Community competition cases. The European Commission could not be regarded as a 'tribunal', and its procedures are not in public. In addition, it is open to question whether it could be considered 'independent' for this purpose, because essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved. It follows that if Community competition procedures are to comply with the ECHR, they must do so because the Court of First Instance provides the hearing required by Article 6. Insofar as Community fines are concerned, the Court has 'full jurisdiction' and this is certainly all that Article 6 requires. However, all the other findings and orders made by the Commission in its competition decisions are subject only to the considerable but nonetheless limited degree of judicial review on the four grounds set out in Article 230 of the EC Treaty. The Court of First Instance undoubtedly goes a long way to inquire into and reconsider the Commission's findings of fact and economic assessments when it thinks it appropriate to do so. The Court does, however, recall that it defers to the Commission's economic assessments unless they are clearly incorrect or have been reached after procedural errors. It is therefore not completely certain that the Court can, consistently with the terms of Article 230, provide as full a re-hearing as might be thought necessary to fulfil the requirements of Article 6 of the Convention. No doubt the Court of First Instance will do everything it can to make sure that its review does not fall short of the standard required by Article 6. However, to resolve doubts, the possibility of amending Articles 229 and 230 should be considered. Similar issues arise in all of the Member States in which competition law fines, whether for breach of Community law or of national competition law, are imposed by administrative authorities and not by courts. The Commission therefore should do whatever is necessary, in cooperation with the national authorities to ensure that the application of Community competition law by national competition authorities, in accordance with the Commission's proposals for decentralisation, is in all respects clearly in accordance with Article 6 of the ECHR."*

<sup>36</sup> It is, however, noted that whilst certain sanctions may be compatible with the classification of a charge as non-criminal, others – in particular imprisonment – will automatically imply that a charge is criminal (See i.a. *Engel and Others*, supra note 17 at para 82; *Campbell and Fell*, Judgment of 28 June 1984, Series A 80, at para 72.) In other words, in classifying a charge as criminal for the purposes of Article 6 ECHR, the imposition of a certain type of sanction may be sufficient but is not necessary.

<sup>37</sup> See below at point under Section I.B. (iii).

Member States that can impose custodial sentences, individual fines and other sanctions on natural persons for breaches of EC competition law.<sup>38</sup> As a result, as Article 6 ECHR is intended to protect against violations by public authorities of the fundamental right of access to justice, it is clearly appropriate to consider classification in the legal system in which the law is actually enforced by authorities, i.e. classification both under EC law and under national law. And it is arguably difficult to accept that a different classification would apply depending on which authority (EU or national) applies the rules. Otherwise Member States might indeed easily circumvent their obligations under the ECHR by delegating them to a centralised authority.<sup>39</sup>

In conclusion, we therefore do not agree that Article 23(5) of Regulation 1/2003 settles the issue of domestic classification for the purposes of Article 6 ECHR.<sup>40</sup>

(ii) Other Engel criteria

To assess the nature of the offence and nature and seriousness of the penalty, the ECtHR case law requires consideration of the general nature of the offence, the punitive and deterrent nature of the penalty and the stigma attaching to the offence. Applying these criteria to proceedings under Article 81 and 82 EC the following can be noted:

- firstly, Articles 81 and 82 EC are general rules applying to all undertakings;
- secondly, the central justification for EC competition law is protection of society against welfare loss caused by anticompetitive conduct,<sup>41</sup> or as stated by the Commission of Human Rights in the *Stenuit* case: "*the aim pursued by the impugned provisions of the Order of 30 June 1945 was to maintain free competition within the French market. The Order thus affected the general interests of society normally protected by criminal law (...)*;"<sup>42</sup>
- and finally, the fines imposed under Regulation 1/2003 have a clear punitive and deterrent character. This point is explicitly and repeatedly confirmed *inter alia* by the language used in the Commission's fining guidelines.<sup>43</sup>

<sup>38</sup> For a comprehensive study of the situation in Member States, see *inter alia*, "*Concurrence et droit penal*", by various authors in *Concurrences* n° 1-2008, p. 1 et seq.

<sup>39</sup> This is *mutatis mutandis* also the reason why, whilst the EU is not a signatory of the ECHR, it is generally recognised that it is also obliged to comply with the ECHR – because the powers it has have been delegated by the Member States and because the key guarantees of the ECHR could otherwise easily be circumvented.

<sup>40</sup> See accordingly: A. ANDREANGELI, cited above, at p. 605; W. WILS, "The Combination...", cited above, pp. 208-209.

<sup>41</sup> See notably A. Jones and B. Sufrin, *EC Competition Law*, 3rd edition, OUP, 2008, p. 44; R. Whish, *Competition Law*, Fifth edition, OUP, 2005, p. 17; See also the Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08), at para. 33: "*The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources*".

<sup>42</sup> See Decision of the Commission of Human Rights of 27 February 1992, *Société Stenuit v. France*, 1992, A/232-A.

<sup>43</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003, JO C 210, 1 September 2006. In these Guidelines, the Commission states for example that "*fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)*". "*it is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices*"; "*In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements*"; "*C. Specific increase for deterrence: The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates*"; "*Although these Guidelines present the general*

In particular as to the seriousness of the penalty, it is hard to identify any other areas of the law where fines of the magnitude observed in the field of EC competition law are imposed.<sup>44</sup>

In relative terms, the sanctions imposed by the Commission for breach of Articles 81 and 82 EC are in practice hundreds or even thousands of times higher than those in other cases where the ECtHR has classified proceedings as criminal in nature for the purpose of interpreting Article 6 ECHR.<sup>45</sup>

But also in absolute terms, the level of fines for breach of EC competition law are generally economically very significant,<sup>46</sup> and indeed the imposition of fines for violation of EC competition law may (and in many cases does) result in the company that is fined going into liquidation.<sup>47</sup>

In this regard, it should be observed that in line with the punitive and deterrent character of the fines that are imposed, there is no strict relationship between these and the profits derived from or impact of the illegal activity (although the impact of distortions of competition is to some extent taken into account).<sup>48</sup>

And the Community does not refrain from applying typical criminal law concepts such as the notion recidivism, which is treated as an aggravating factor aimed at deterring repeat offending by materially increasing the level of fines imposed. This is an important feature of the Commission's approach to fining as the very presence of the concept in this area and the resulting escalation of penalties point to an intent not only to deter but also to morally condemn the impugned behaviour, to stigmatise it and, ultimately, to treat it as criminal.<sup>49</sup>

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*methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing of a particular case from such methodology or from the limits specified in point 21."* (emphasis added). See also Commissioner Neelie Kroes' declarations in the *Financial Times* of 29 November 2007 about the fines imposed by the Commission in the new flat glass cartel: *"the important thing is that the fine as a whole is sufficiently deterrent, so that none of these companies will be tempted to infringe the rules again."*

<sup>44</sup> It appears for example that fines imposed in the US for tax evasion, which is the most serious federal tax crime, can only reach a maximum amount of 250.000\$, whereas the most serious corporate crime possible would be subject to sanctions raising until 290.000\$. These sanctions are thus far less important than those which may be imposed for serious antitrust violations, and this tendency seems to be even more obvious in Europe, where the maximum penalties that can be imposed for antitrust violations are higher than in the US and Japan. Sources: <http://law.jrank.org/pages/1065/Economic-Crime-Tax-Offenses-role-criminal-sanctions.html>; and [http://www.anu.edu.au/fellows/jbraithwaite/\\_documents/Articles/Penalties\\_White\\_1992.pdf](http://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/Penalties_White_1992.pdf); last visit on 21-08-2008.

<sup>45</sup> See for example the *Stenuit* case, cited above, where the fine imposed was 50.000 FRF. See also *Bendenoun v. France*, cited above, where the tax surcharges which were imposed were considered as "very substantial" by the ECtHR as they amounted to FRF 422,534 (approximately 64.000 €) in respect of Mr Bendenoun personally and FRF 570,398 (approximately 87.000 €) in respect of his company.

<sup>46</sup> Fines imposed are frequently of the order of a thousand times, and occasionally ten thousand times, the average per capita GDP across the 27 Member States. According to the Commission's statistics the per capita GDP in 2007 was 24.800 EUR. Source: [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=1073,46870091&\\_dad=portal&\\_schema=PORTAL&p\\_product\\_code=TEC00001](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1073,46870091&_dad=portal&_schema=PORTAL&p_product_code=TEC00001) (last visit: 21-8-2008)

<sup>47</sup> For instance, in the *District Heating Cartel* case the fines led to liquidation for numbers 2 and 3 on the market, the companies **Løgstør Rør** and Tarco.

<sup>48</sup> Thus –according to the fining guidelines–, in determining the basic account of the fine to be imposed, the Commission will take the value of the undertaking's sales to which the infringement relates into account. The Commission will also take into account the need to increase the fine in order to exceed the amounts of gains improperly made.

<sup>49</sup> "(from latin *recidivus* "recurring", from re- "back" + *cado* "I fall"), is the act of a person repeating an undesirable behavior after they have either experienced negative consequences of that behavior, or have been treated or trained to extinguish that behavior. The term is most frequently used in conjunction with substance abuse and criminal behavior. For example, scientific literature may refer to the *recidivism* of sexual offenders, meaning the frequency with which they are detected or apprehended committing additional sexual crimes after being released from prison for similar crimes." (Source: <http://en.wikipedia.org/wiki/Recidivism>).

Indeed, the word "*recidivism*" itself is by definition associated with compulsive criminal behaviour. Thus, standard dictionary definitions of the term include "*the habit of relapsing into crime*",<sup>50</sup> "*a tendency to relapse into a previous condition or mode of behavior; especially: relapse into criminal behaviour*."<sup>51</sup> The ECtHR has in the past explicitly stated that fining policies designed to deter re-offending are indicative of "*criminal charges*" within the meaning of Article 6 ECHR.<sup>52</sup>

Other aspects such as the introduction of *leniency policies* at EC and Member State level appears relevant in this regard.<sup>53</sup>

Finally, in relation to the stigma attaching to violations of competition law, for the purposes of analysis this question can be looked at from the point of view of presentation (i.e. how such offences are presented to the public by relevant authorities), perception (i.e. the public reaction to such offences) and consequences (i.e. the consequences for businesses and individuals of violations of competition law with which they are associated).

These three elements of presentation, perception and consequence are dynamic and interrelated. However, as a general observation, there has been a very marked tendency over the past decade in particular for violations of competition law to be presented increasingly as an extremely serious form of attack on society, carrying grave consequences, and one to which members of the public should not only be concerned about but also react to.

Thus, a number of Member States have formally criminalised certain types of competition law violations<sup>54</sup> and in certain cases provide for imprisonment,<sup>55</sup> or in any event apply significantly higher fines than in the past.<sup>56</sup> Other types of sanctions also exist, for example in the UK, where individuals involved in violations of EC or national competition law may be temporarily prevented from acting as company director,<sup>57</sup> i.e. a restriction on such individuals' freedom to undertake a certain profession.

Beyond these formal sanctions, there may also be other consequences for individuals involved in violations of EC competition law, in particular, reputational and career consequences. It is not, however, possible to quantify this type of effect since very little information on the fall out of EC competition law violations that affects individuals is reported

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<sup>50</sup> Oxford English Dictionary.

<sup>51</sup> Merriam-Webster's Collegiate Dictionary.

<sup>52</sup> See *Neste St. Petersburg v. Russia*, below at note 68.

<sup>53</sup> See G. Parleani, "*La sanction pénale des pratiques anticoncurrentielles*", *Concurrences* n°1-2008, p. 3, at paras 5-6.

<sup>54</sup> See L. Idot, "*Concurrence et droit pénal*", "*Le droit des Etats membres de l'Union européenne*" in *Concurrences* n° 1-2008, p. 14 et seq.

<sup>55</sup> See footnote 116 *infra*.

<sup>56</sup> Even if several countries have introduced criminal sanctions against individuals engaging in anticompetitive conduct, it seems that no individual in Europe had received a custodial sentence for a competition law offence until 2006, when an Irish court sentenced an individual to a period of six months' imprisonment, suspended for a period of 12 months, in connection with an Irish heating oil cartel that operated in the west of Ireland. The UK is expected to follow by imposing custodial sentences to the businessmen found guilty in the Marine Hose Cartel case after they had already been condemned by the US DoJ to prison sentences ranging from 20 months to two and a half year. It is worth noting however that the maximum penalty in the UK is five years' imprisonment compared with the maximum of 10 years' imprisonment in the US. Source: S. Ince & G. Christian, "United Kingdom: The Marine Hose Cartel: A New Era in International Co-operation", *Competition law insight* of 12 February 2008, available at <http://www.mondaq.com/article.asp?articleid=57462>, last visited on 21-8-2008.

<sup>57</sup> Section 204 of the Enterprise Act 2002 amends the Company Directors Disqualification Act 1986 and provides for disqualification orders against a company director if : "(a) *his conduct contributed to the breach of competition law mentioned in subsection (2); (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it; (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach*" (§6). It is immaterial whether the person knew that the conduct of the undertaking constituted the breach (§7). The maximum period of disqualification is 15 years (§9).

in the press. Nonetheless, there is evidence that implication in such violations often result in individuals losing their positions within their company.<sup>58</sup>

As regards the rhetoric used against persons that violate EC competition law, it is not the purpose of this article to exhaustively analyse the speeches of public officials charged with implementation. However, as a general observation, violations of EC competition law are presented by enforcers as very serious, as an attack on society and as "*comparable with theft*". A number of quotes are set out below to illustrate this point:

*"I do believe that we need to begin changing general perception of the competition rules. [...] It is up to us to show that when we break up cartels, it is to stop money being stolen from customers' pockets."*

Neelie Kroes, EC Commissioner for Competition<sup>59</sup>

*"Cartels involve substantial theft and economic harm"*

John Fingleton, UK OFT Chief Executive<sup>60</sup>

*"cartels are like theft, criminalisation makes the punishment fit what is indeed a crime"*

John Vickers, UK OFT Chairman

*"Cartels are like cancers on the open market economy, which forms the very basis of our Community [...]"*

Mario Monti, ex-Commissioner for Competition

*"[L]et me be very clear: these cartels are the equivalent of theft by well-dressed thieves, and they deserve unequivocal public condemnation."*

Joel Klein, US Assistant Attorney General<sup>61</sup>

In addition to presenting violations of EC competition law as very serious, the above quotes also point to a policy of altering public perception of such offences.<sup>62</sup>

The above observations demonstrate a clear EC policy to stigmatise violations of EC competition law through the way in which the offences are presented to the public and the consequences of their breach.

Actual public reaction to and perception of anticompetitive conduct constitutes another dimension of the stigma attaching to an offence. This is clearly a more difficult aspect to measure.

<sup>58</sup> See, for example, the resignation of two executives of British Airways following the imposition by the European Commission of a 300 million GBP fine for price fixing <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/10/09/bcnba09.xml> (same example: <http://www.irishtimes.com/newspaper/breaking/2008/0807/breaking69.htm>).

<sup>59</sup> International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice', Taking Competition Seriously – Anti-Trust Reform in Europe, Brussels, 10 March 2005.

<sup>60</sup> John Fingleton, Marie-Barbe Girard and Simon Williams, "The fight against cartels: is a 'mixed' approach to enforcement the answer?", Title II, in 2006 Fordham Comp. L. Inst. 10 (B. Hawk ed. 2007).

<sup>61</sup> The war against international cartels: lessons from the battlefield. Speech presented at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy New York, October 14, 1999.

<sup>62</sup> Another significant strand of this policy in recent years, is the active encouragement of private enforcement of EC competition law, which has occurred both at EC and national level, *inter alia* so as to ensure higher deterrence. Notably, the Commission published in April 2008 its White Paper on private enforcement (White Paper on damages actions for breach of the EC antitrust rules, 2 April 2008 Doc COM (2008) 165 final ) which stresses that damage actions ought to produce "*beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules*".

For example, around the time of the overhaul of the national competition rules in the UK, the legislative developments were profiled by the UK government as tackling "*rip-off Britain*" and in some cases the media were prepared to confirm broadly that "*There is no doubt that British consumers have the impression they are regularly being ripped off by international cartels using cynical price-fixing measures to steal the last penny out of their wallets.*"<sup>63</sup>

In conclusion on the above, it follows from consideration of the nature of EC competition law, the nature and severity of the sanctions resulting from and stigma attaching to its violation, that EC competition law proceedings should be treated as "*criminal charges*" within the meaning of Article 6 ECHR, as interpreted using the *Engel* criteria laid down by the ECtHR.

In the words of one Commission official who has published extensively on this subject "*it appears difficult to deny that the application of the criteria set out in the case law of the European Court of Human Rights leads to the conclusion that proceedings based on Regulation No 1/2003, leading to decisions in which the Commission finds violations of Articles 81 or 82 EC, orders their termination and imposes fines relate to 'the determination of a criminal charge' within the meaning of Article 6 ECHR.*"<sup>64</sup>

As we shall see in the following section, this analysis is furthermore confirmed by the ECtHR and the Human Rights Commission's own case-law, as well as the case-law of a number of national supreme courts in the Member States.

## **2. Case law of the ECtHR and European Human Rights Commission supporting the criminal charges classification**

In the *Stenuit* case, concerning proceedings led by the French competition authorities, the Human Rights Commission classified these proceedings as criminal for the purposes of Article 6 ECHR, explicitly rejecting the French government's arguments to the contrary. The Human Rights Commission noted that "*the aim pursued by the impugned provisions of the Order of 30 June 1945 was to maintain free competition within the French market. The Order thus affected the general interests of society normally protected by criminal law (...). The penalties imposed by the Minister were measures directed against firms or corporate bodies which had committed acts constituting 'infractions'. The Commission further points out that the Minister could refer the case to the prosecuting authorities, with a view to their instituting criminal proceedings against the 'contrevenant'.*"<sup>65</sup>

With regard to the nature and the severity of the penalty to which those responsible for infringements made themselves liable, the Human Rights Commission went on to observe that:

*"[i]n the present case the penalty imposed by the Minister was a fine of 50.000 FRF [7.620 € approximately], a sum which, in itself is not negligible. But it is above all the fact that the maximum fine, i.e. the penalty to which those responsible for infringements made themselves liable, was 5% of the annual turnover for a firm and 5.000.000 FRF [762.000 € approximately] for other 'contrevenants' which shows quite clearly that the penalty in question was intended to be deterrent."*<sup>66</sup>

The Human Rights Commission therefore concluded in this case that the Minister's decision to impose a fine constituted, for the purposes of Article 6 ECHR, determination of a "*criminal charge*" and that the fine in question had to be regarded as a criminal penalty. The case was finally not adjudicated by the ECtHR, as the applicant and the French government settled the

<sup>63</sup> [http://news.bbc.co.uk/1/hi/uk\\_politics/661476.stm](http://news.bbc.co.uk/1/hi/uk_politics/661476.stm)

<sup>64</sup> W. WILS, cited above, p. 209. See also C. D. EHLERMANN, "*Developments in Community Competition Law Procedures*", EC Competition Policy Newsletter, Vol. 1, n° 1, p. 2.

<sup>65</sup> HR Commission Report of 30 May 1991 in *Société Stenuit v. France*, cited above, at paras. 62-64.

<sup>66</sup> *Ibidem*.



case. Indeed, the infringements that had been found had largely been remedied after the creation of the French Competition Council (*Conseil de la Concurrence*).<sup>67</sup>

In another case, *Neste St. Petersburg v. Russia*,<sup>68</sup> the ECtHR considered that the antitrust proceedings led by the Russian authorities were not "*criminal*" in nature, but this was due to the fact that Russian competition law only "*empowers the antimonopoly bodies to impose administrative sanctions (...) for obstructing the authorities investigations and do not serve as punishment for substantive antimonopoly violations.*" Furthermore, the ECtHR noted that "*section 6-1 of the Competition Law, under which the applicant companies were charged, does not provide for any specific sanctions as such*" and that the confiscation order to which the applicant companies were subjected "*is intended as pecuniary compensation for damage rather than as a punishment to deter re-offending.*" (emphasis added)

In a more recent case *Jussila v. Finland*,<sup>69</sup> the ECtHR reviewed its previous case-law and confirmed that:

*"the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Öztürk v. Germany), prison disciplinary proceedings (...) competition law (Société Stenuit v. France, ...) and penalties imposed by a court with jurisdiction in financial matters (...)."*

It is thus clear from this review of ECtHR case-law, as well as of decisions of the Human Rights Commission, that competition proceedings, in the course of which the Commission takes a decision imposing fines on undertakings, are to be qualified as "*criminal*" under Article 6 ECHR.

### 3. Case law of national courts supporting the criminal charges classification

The position of the ECtHR referred to above has meanwhile been endorsed by a number of the highest courts in the Member States.

Thus, in the *RioTintoZinc* Case for instance, the House of Lords found that EU competition fines were "*penalties*" and that therefore the principle of non-self-incrimination applied under the Civil Evidence Act.<sup>70</sup> The French Constitutional Court has also stressed the gravity of antitrust fines and therefore that all the principles attaching to the rights of defence apply<sup>71</sup> and the French *Cour de Cassation* went so far as to rule that the participation of the *rapporteur* in the deliberation of the *Conseil de la concurrence*, to the extent he has

<sup>67</sup> Decision of the Human Rights Commission of 27 February 1992 in *Société Stenuit v. France*, cited above. See also the Human Rights Commission decision of 9 February 1990 in *M. & Co. v. Germany*, App. n° 13258/87, where the question arose whether, "*by giving effect to a judgment reached in proceedings that allegedly violated Article 6, the Federal Republic of Germany incurred responsibility under the Convention on account of the fact that these proceedings against a German company were possible only because the Federal Republic has transferred its powers in this sphere to the European Communities*". The Human Rights Commission found in this case that "*for the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 (...) had they be conducted by German and not by European judicial authorities.*" This reasoning seems to be guided only by the fact that the EC was not itself a party to the Convention reasoning which may not be applicable today anymore (see *infra*).

<sup>68</sup> Judgment of 3 June 2004, App. n° 69042, 69050, 69054, 69055, 69056, and 69058/01

<sup>69</sup> Judgment of the ECtHR of 23 November 2006, *Jussila v. Finland*, App. n° 73053/01, emphasis added.

<sup>70</sup> [1978] (ML Rep. 100).

<sup>71</sup> See e.g. decision of 22-23 January 1987, *JORF*, 25 January 1987, p. 924; see also J-C and J-L. FOURGOUX, "*Le Conseil de la concurrence dans la vie économique et juridique de l'Europe*", GP, 26-27 September 1990, p-12,13).

undertaken investigations during the fact-finding process, was contrary to Article 6(1) ECHR.<sup>72</sup>

#### 4. Case law of the ECJ on the criminal charges classification

Whilst there is thus wide support for the proposition that competition proceedings in which fines are imposed are to be qualified as "*criminal*" under Article 6 ECHR, the case-law of the ECJ to date remains unclear in this regard.

In a number of early cases, the ECJ was clearly reluctant to accept the applicability of Article 6 ECHR to such proceedings.<sup>73</sup> The case-law showed however progressively an inclination to accept that this was the case. Thus, in the first series of cases brought before the newborn CFI, Judge Vesterdorf acting as Advocate General argued that:

*"[i]n view of the fact – in my view confirmed to some extent by the judgment of the Court of Human Rights in the Öztürk case – that fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights. At all events, the framework formed by the existing body of rules and the judgements handed down hitherto it must therefore be sought to ensure that legal protection meets the standard otherwise regarded as reasonable in Europe."*<sup>74</sup>

This issue was not further discussed by the CFI in this case, but in further case-law the ECJ was inclined to follow Judge Vesterdorf's appraisal. In *Baustahlgewebe* for example, Advocate General Léger considered that:

*"[i]t cannot be disputed – and the Commission does not dispute – that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'."*<sup>75</sup>

<sup>72</sup> See D. Waelbroeck and M. Griffiths "French Cour de Cassation: TGV Nord et Pont de Normandie, Judgment of 5 October 1999" case-note in 37 CMLR (2000) pp. 1465-1476.

<sup>73</sup> Advocate General Mayras, already found in his Opinion delivered on 29 October 1975 in case 26/75, *General Motors v. Commission* [1975] ECR p. 1367, that "[a]lthough in the strict sense of the term the fines prescribed by regulation n° 17 are not in the nature of criminal-law sanctions, I do not consider it possible, in interpreting the term 'intentionally', to disregard the concepts which are commonly accepted in the penal legislation of the Member States." This view was however not widely shared. Thus, even after the *Öztürk* judgment Advocate General Darmon considered that "it does not seem (...) to be blindingly clear that the *Öztürk* judgment should be seen as being so far-reaching that the concept of 'charged with a criminal offence' within the meaning of the Convention should be taken to extend to undertakings which are the subject of administrative proceedings intended to determine whether or not they have committed an infringement of competition rules." (Opinion of Advocate General Darmon delivered on 18 May 1989 in Case 347/87 *Orkem v. Commission* [1989] ECR p. 3301, at para. 137). In the same case, the ECJ seemed to take at least a more careful approach in its judgement by stating that "[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself." (Judgement of the Court of 18 October 1989 in Case 347/89, *Orkem v. Commission*, cited above, at para. 30 (emphasis added). Note that in the French version (which was the original language of the case), the Court only stated the following: « *En ce qui concerne l'article 6 de la Convention européenne, en admettant qu'il puisse être invoqué par une entreprise objet d'une enquête en matière de droit de la concurrence, il convient de constater qu'il ne résulte ni de son libellé ni de la jurisprudence de la Cour européenne des droits de l'homme que cette disposition reconnaisse un droit de ne pas témoigner contre soi-même.* » (emphasis added)).

<sup>74</sup> Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône Poulenc S.A. v. Commission* [1991] ECR II-867, at p. 885 (emphasis added)

<sup>75</sup> Opinion of Advocate General Léger in Case C-185/95 P, *Baustahlgewebe v. Commission* [1998] ECR I-8422, at para. 31.



At para. 21 of its judgment in that case, the ECJ accordingly concluded that:

*"the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (...), and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law."*<sup>76</sup>

In *Hüls*, the ECJ explicitly stated:

*"[...] it is certainly true that the right to be heard by a tribunal and the right to a fair trial, as they result, in particular from Article 6(1) ECHR, are among the fundamental rights which, according to the Court's consistent case law, also confirmed by the preamble to the Single European Act and by article F(2) of the Treaty of the European Union (now, after modification, article 6(2) EU), are protected in the Community legal order and that, having regard to the nature of the infractions in question as well as the nature and the degree of severity of the sanctions they give rise to, undertakings accused of violations of the competition rules that have been imposed fines must for this reason enjoy the guarantees that are provided for procedures of a penal character."*<sup>77</sup>

However, recent cases have again been less receptive to the idea that antitrust fines were criminal charges. Thus in *Volkswagen*,<sup>78</sup> the ECJ rejected the argument that, in order to establish that an infringement was international in nature, the person having acted improperly should have been identified since under Article 15 (4) of Regulation 17, "decisions imposing [...] a fine are not of a criminal law nature" and "were the appellant's view to be upheld, this would infringe seriously on the effectiveness of Community competition law". On the basis of this relatively unclear statement, the CFI in *Compagnie Maritime Belge*<sup>79</sup> confirmed that antitrust fines were not of a criminal nature as deciding otherwise, this would "infringe seriously on the effectiveness of Community competition law". It is underlined that the effectiveness of the law is not among the Engel criteria affecting criminal classification. Moreover, it is unclear what "effectiveness" should be read to mean in this context. If it is to be understood as meaning that criminalisation may (significantly) reduce the number of (successful) prosecutions, that is of course possible. However, the same might be said of many other undoubtedly criminal areas of the law. Were theft to be treated as non-criminal, for example, and the relevant procedural safeguards dispensed with, there would almost certainly be a sharp increase in the number of prosecutions (particularly if the police were

<sup>76</sup> Judgment of the ECJ of 17 December 1998 in Case C-185/95 P, *Baustahlgewebe v. Commission* [1998] ECR I-8422, at para. 21.

<sup>77</sup> Free translation by the authors from the original French text "[...] il est certes vrai que le droit d'être entendu par un tribunal et le droit à un procès équitable, tels qu'ils résultent notamment de l'article 6, paragraphe 1, de la CEDH, font partie des droits fondamentaux qui, selon la jurisprudence constante de la Cour, par ailleurs réaffirmée par le préambule de l'Acte unique européenne et par l'article F, paragraphe 2, du traité sur l'Union européenne (devenu, après modification, article 6, paragraphe 2, UE), sont protégés dans l'ordre juridique communautaire et que, eu égard à la nature des infractions en cause ainsi qu'à la nature et au degré de sévérité des sanctions qui s'y rattachent, les entreprises accusées de violations des règles de concurrence qui se sont vu infliger des amendes pour ce motif doivent bénéficier des garanties qui sont prévues pour les procédures à caractère pénal." Order of the Court of 16 December 1999 in Case C-137/92 P-DEP, *Hüls v. Commission*, not published, referring to judgment of the Court of 8 July 1999 in Case C-199/92 P, *Hüls v. Commission* [1999] ECR I-4383, at para. 150. See also the Judgment of the CFI of 6 October 2005 in Joined cases T-22/02 and T-23/02, *Sumitomo Chemical v. Commission* [2005] ECR II-4065, at para. 105; the Judgment of the Court of 11 January 2000 in Joined Cases C-174/98 P and C-189/98 P, *van der Wal* [2000] ECR I-1 para. 17; and the recent Opinion of AG Kokott in case 280/06, *Autorità Garante della Concorrenza e del Mercato v. ETI and others*, not yet published, at para 71: "The consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences – in particular fines – is that the area is at least akin to criminal law."

<sup>78</sup> Judgment of the ECJ of 19 September 2003 in Case C-338/00 P, *Volkswagen*, [2003], ECR I-9189, at para 97.

<sup>79</sup> Judgment of the CFI of 1<sup>st</sup> July 2008, in Case T-276/04, *Compagnie Maritime Belge*, not yet published, at para 66.

granted the power to prosecute and judge the cases themselves). This would, however, be to the detriment of the quality and soundness of decisions, and in the medium to long term the credibility of the justice system. It is also noted that there are of course plenty of examples of legal systems that formally criminalise competition law and offer the corresponding safeguards, but without finding that the system collapses or grinds to a halt.

## 5. Arguments against the criminal charges classification

Having considered in detail above the reasons why EC competition law proceedings must be regarded as involving criminal charges within the meaning of Article 6 ECHR, it seems to us that none of the counter-arguments that are or could be invoked against this position are decisive. Article 23(5) of Regulation 1/2003 is most often quoted in this context but as indicated above, the contention that Article 23(5) of Regulation 1/2003 somehow settles the question of classification of EC competition law proceedings is clearly inaccurate.<sup>80</sup> The main other arguments against a classification of competition law proceedings as involving criminal charges are discussed below:

### (i) Competition law is not part of the "core" criminal law

One objection to the conclusion that EC competition law proceedings involve a criminal charge under Article 6 ECHR is that they are not "*traditionally*" looked on as criminal, or do not constitute "*core*" criminal offences.

However, a general appeal to traditional conceptions of what is criminal does not appear particularly rigorous and fails to take into account evolution of society. Fifty years ago the notion of environmental crime basically did not exist. One hundred years ago selling opium was in many countries not regarded as criminal. Two hundred years ago, slavery was in many countries not regarded as criminal. But three hundred years ago anticompetitive conduct was already regarded as criminal in England and similar examples can be cited back to the Roman Empire, where at times certain market distorting behaviour carried the death penalty,<sup>81</sup> which arguably means the "*traditional*" epithet is in fact justified.

Reflecting the dynamic nature of criminal law, the ECHR generally interpreted in a dynamic manner,<sup>82</sup> and the concept of criminal Article 6 ECHR specifically must take into account evolving perceptions (as discussed above, for example, the *Engel* criteria refer among others to "*stigma*", not fifty years ago but today).

Moreover, ECtHR case law explicitly recognises that Article 6 ECHR is not intended to be limited to crimes that have been around for a "*long time*". As the ECtHR observed in the *Jussila* case quoted above: "*the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example [...] competition law (Société Stenuit v. France, ...)*".

True, EC competition law violations are obviously not on a par with horrific crimes such as murder or rape. However, as has been seen above, they are frequently equated with the more traditional and familiar crime of theft.<sup>83</sup>

It follows that appeals to tradition in the classification of offences under the criminal head of Article 6 ECHR is misplaced.

A more balanced variation of this argument is that, although competition law violations may fall under the criminal head of Article 6 ECHR, they are not "*core*" offences or serious enough to warrant the full gamut of protections offered under that provision.

<sup>80</sup> See *supra* Section I.B.1(i).

<sup>81</sup> See Wilberforce, Campbell and Elles (1966) *The Law of Restrictive Practices and Monopolies*.

<sup>82</sup> See the judgment of the ECtHR in *Jussila v. Finland*, cited above fn. 69.

<sup>83</sup> See above at Section I.B.1(ii).

As a preliminary remark, Article 6 ECHR itself distinguishes only between civil and criminal heads, and lays down clear criteria for determining which of these applies. As discussed above, in the case of EC competition law, it is undoubtedly the criminal head that applies. Within the criminal head of Article 6 ECHR, the ECtHR's case law does in fact distinguish between *minor and disciplinary* offences and other offences falling under the criminal head. This distinction is considered in detail below. However, it is worth noting here that, although there is clearly a sliding scale of seriousness of offences, the relative positioning of offences on that scale is – except in extreme cases – highly subjective. It is therefore logical and appropriate that the ECtHR does not seek to make legal distinctions between, for example's sake, a fully fledged "force 10" criminal offence and a mere "force 8.5" criminal offence, with a fixed list of procedural rights attaching to the former and a shorter list of procedural rights attaching to the latter. Such distinctions would, in our view, be arbitrary in the extreme.

- (ii) No prison sentences are imposed by the Commission and moreover sanctions are imposed on companies not individuals<sup>84</sup>

Another argument made to support the theory that EC law is not "*real*" criminal law, is that sanctions are imposed on companies only and that no prison sentences are involved.

However, there are again a number of flaws with this argument, and mainly the fact that fulfilment of the *Engel* criteria does not require the possible imposition of prison sentences. Under the *Engel* criteria the nature and severity of sanctions is considered. Whilst the imposition of prison sentences would be sufficient to classify related offences as criminal within the meaning of Article 6 ECHR, it is certainly not a necessary condition and offences can be considered as criminal where 'only' fines are imposed.<sup>85</sup>

In any event, as discussed above, prison sentences can in fact result from violations of EC competition law, where these are imposed by Member States' courts.

Finally, as is well known, the ECHR does not distinguish between natural and legal persons as regards the rights they enjoy under Article 6 ECHR.<sup>86</sup>

Nothing in this argument therefore puts in doubt the criminal classification of EC competition law proceedings under Article 6 ECHR.

Again, it could be argued that, whilst EC competition law clearly falls under the criminal head of Article 6 ECHR, within that criminal head there are offences of varying degrees of seriousness that merit different levels of procedural rights. However, beyond the basic distinction operated between minor and non-minor offences that is considered in greater detail below, such an argument is, in our opinion, no more valid in this context than in the context of an argument based on "*traditional/core*" and "*non-traditional/non-core*" offences (see above).

- (iii) Procedural safeguards are inferior to those offered in criminal proceedings<sup>87</sup>

<sup>84</sup> "Individuals are not at risk. Nobody goes to prison or gets a criminal record. The Commission may fine only business entities." [http://ec.europa.eu/comm/competition/speeches/text/sp1995\\_044\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1995_044_en.html)

<sup>85</sup> See above, note 31. See also e.g. Wils, "Is Criminalisation of EU competition law the Answer", at point 2.1. "Whereas fines can be either criminal or civil or administrative, imprisonment appears to be essentially a criminal sanction. The possibility of a prison sanction does not seem to be a necessary condition for a prohibited act or for an enforcement procedure to be criminal, but it is certainly a sufficient condition."

<sup>86</sup> See for example the judgment of the ECtHR of 7 July 1989, *Tre Traktörer AB*, Application no. 10873/84, at para. 35. For more on *locus standi* of legal persons under the Convention see P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> ed.), supra note 26, pp.52-55; See also Wils, "Is Criminalisation of EU competition law the Answer?", at point 2.1 "Individual penalties are however neither a necessary nor a sufficient condition for enforcement to be criminal."

<sup>87</sup> See e.g. W. Wils, "Is Criminalisation of EU Competition Law the Answer?", at point 2.6.

The argument that procedural safeguards in antitrust cases are inferior to those offered in criminal proceedings and therefore support the view that such proceedings are not criminal is logically flawed. It would be circular to refer to the very procedures, whose legality is under examination, to assist in determining the standards that they should respect.

Thus, under the ECHR, the classification of an offence as criminal must result in certain procedural safeguards. The reverse, however, is not always true. In other words, the absence of those safeguards might well indicate that an offence is not criminal, but it could equally indicate that the state is simply not offering the safeguards that it should be.

One variation on this argument is that in a "true" criminal context, suspects get a tougher time than they do in EC competition proceedings. Thus, for example, individuals may be cross-examined in court by hostile prosecutors, investigative powers of relevant authorities are more significant, there is trial by jury, the prospect of jail sentences etc.<sup>88</sup> These arguments suffer from similar logical failures to those discussed in the preceding paragraph. Thus, the way procedures are designed results from the process of classification and not *vice versa*.

Moreover, it must be emphasised that being subjected to a Commission competition investigation is hardly a pleasant experience. Vast quantities of documents are demanded by the Commission, initial failure to cooperate with investigations (by, for example, invoking the right to silence or legal privilege) regularly results in threats of criminal sanctions at which point individuals will often submit. This practice was indeed recently condemned by the Court of First Instance in the *Akzo* case<sup>89</sup> in the following terms:

*"With regard to the first step, the applicants submit that the Commission forced them to reveal the contents of the documents in question although they had claimed that they were covered by [legal privilege]. Following disclosure of those documents, long discussions ensued between the applicants' in-house counsel and the Commission as to the procedure to be followed for examining those documents. The Commission informed the applicants that any further delay in the handing over and examination of*

<sup>88</sup> An example of this argument can be found in the following text by ex Commission official Julian Joshua (in *Attitudes to Anti-trust Enforcement in the EU and US, Dodging the Traffic Warden, or Respecting the Law?* See [http://ec.europa.eu/comm/competition/speeches/text/sp1995\\_044\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1995_044_en.html)). The text is extensively quoted here because it is a good example of an attempt to validate a logically flawed argument through repetition (*argumentum via repititio*):

*"Just so we are under no illusion, let us remember how a real criminal enforcement system operates. In the United States the Justice Department always prosecutes suspected price fixers criminally. The primary investigative instrument is the Grand Jury. Targeted individuals are summoned for examination on oath by hostile prosecutors without benefit of judge or counsel. Vast quantities of documents are subpoenaed. Corporations cannot hide behind the Fifth Amendment, and individuals who invoke the constitutional privilege against self-incrimination may find themselves obliged to testify nevertheless under strictly limited court-ordered immunity. Failure to cooperate will mean prosecution for contempt of court, obstruction of justice or perjury. Remember too that the Justice Department now often calls on the FBI to assist: house searches, consensual telephone monitoring, sending turned conspirators "wired up" into cartel meetings - these are commonly employed to gather evidence. And of course a Sherman Act indictment can well be reinforced by prosecutors adding a racketeering or wire fraud count. Grand Juries, it should be said, almost always find a "true bill", i.e. they vote to indict.*

*The criminal trial itself is usually before a Federal jury - that is, if the accused plead not guilty. Almost invariably where the evidence is convincing they will seek a plea bargain on the best terms they can get. The Justice Department on conviction will always press for a prison term as well as fines: under recent amendments it is a felony and the jail sentence can be up to three years.*

*A jury verdict is final as to the facts. One can go to the Circuit Court of Appeals, but while most appeals are on evidentiary questions, they are concerned with narrow questions of admissibility or the adequacy of the judge's directions to the jury. As long as there was some evidence on which to convict, the Appeal Court does not go into the facts."*

<sup>89</sup> Joined cases T-125/03 and T-253/03, *Akzo v. Commission*, ECR [2007], not yet reported, at points 63, 94 and 95.

*the documents would amount to obstruction of the investigation and could constitute a criminal offence under section 65 of the UK Competition Act, which is punishable by a term of imprisonment and a fine. It was only under strong protest that the applicants handed the Set B documents to the Commission for examination. Furthermore, during the investigation the Commission inspectors read and described to each other the contents of the Set A and Set B documents for several minutes at a time.*

[...]

*It is also apparent from the report and the minutes mentioned above that the Commission insisted on taking a cursory look at those documents and that the applicants' representatives only agreed to this after the Commission and the OFT officials informed them that refusal to allow them to do so would be tantamount to obstructing the investigation, an action which would be punishable by administrative and criminal penalties.*

*95. In those circumstances, the Court considers that the Commission forced the applicants to accept the cursory look at the disputed documents, even though, as regards the two copies of the typewritten memorandum in Set A and the handwritten notes in Set B, the applicants' representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed."*

For individuals involved in the investigation, there may also be the possibility that they will be criminally pursued by Member State authorities.

(iv) Application of Article 6 ECHR "would impinge seriously on the effectiveness of Community competition law"

As indicated above, in *Volkswagen*,<sup>90</sup> the ECJ found that if decisions imposing a competition fine were to be regarded as of a criminal law nature, "*this would impinge seriously on the effectiveness of community competition law*".

This argument, which has already been commented on above, is hardly more convincing than the previous one. The more serious the offence, the more necessary it is to comply with procedural safeguards. Arguments of administrative efficiency or convenience are hardly sufficient to warrant infringements of fundamental rights. These arguments cannot affect the finding of the ECtHR *inter alia* in *Jussila* that competition law procedures have to respect the basic requirements of Article 6 ECHR.

It is worrying however to see as a quite general and recent development fundamental rights to be purely set aside, temporarily suspended or simply diminished for the declared purpose of attaining objectives such as the "*good administration of justice*" or the "*effectiveness of the law*". Such attempts have already been fiercely criticized by supreme courts in Europe and in the US in the context of the so-called "*war on terror*".<sup>91</sup> There is no reason therefore to see why this would constitute a more valid argument in the field of EU competition law.

## 6. Conclusion

<sup>90</sup> Judgment of the ECJ of 18 September 2003, in case C-338/00 P, *Volkswagen*, [2003], ECR I-9189, point 97; see also Judgment of the CFI of 1<sup>st</sup> July 2008, in case T-276/04, *Compagnie Maritime Belge*, para.66.

<sup>91</sup> See the US Supreme Court rulings in *Rasul v. Bush* 542 U.S. 466 (2004); *Boumediene v. Bush* 553 U.S. \_\_\_ (2008); *Al Odah v. United States* 542 U.S. 466 (2004); in the EU see the CFI judgments in cases T-229/02, *PKK v. Council*, not yet published; T-256/07, *People's Mojahedin Organization of Iran v. Council*, not yet published; T-327/03, *Al Aqsa v. Council*, not yet published; T-47/03, *Sison v. Council*, not yet published; T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR p. II-4665; see also the Opinion of Advocate General Maduro in case 402/05 P, *Kadi v. Council and Commission*, not yet published.

On the basis of the above, we conclude that EC competition law proceedings leading to fines can only be considered as "*criminal*" within the meaning of Article 6 ECHR. In the next section we will now look at the main consequence of this finding for the conduct of these proceedings.

## **II. Criminal charges must generally be heard at first instance by an independent and impartial tribunal, EC competition law is no exception**

### *A. Introduction*

The right to a fair trial as embodied in Article 6 ECHR requires in the first place that any judgement concerning the determination of civil rights or of any criminal charge be given by an independent and impartial tribunal established by law. This right is often regarded as "*one of the most important guarantees of the whole Convention*".<sup>92</sup>

As indicated above, this right is stricter in criminal – than in civil – cases. One consequence of this is that, whilst the ECtHR generally admits that the right to a fair trial is fully complied with in civil cases when effective access to a court is only exercised on appeal (meaning that the first determination of the right can be made by an administrative body and that the case is being heard on appeal by an impartial and independent tribunal having full jurisdiction), it will in principle not admit such two-tier jurisdictional review with regard to "*criminal cases*". This is due notably to the particular nature of criminal offences, on which the ECtHR has always been reluctant to compromise.<sup>93</sup>

As it is put in the case law of the ECtHR, "*[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (...) and where the applicant has an entitlement to have its case "heard", with the opportunity inter alia to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.*"<sup>94</sup>

The ECtHR has only ever admitted exceptions to this principle of first instance decision by a tribunal in narrow circumstances, essentially where the criminal charges under consideration are either minor or disciplinary in nature.

Notwithstanding, discussions on this point often involve a cursory and general extension of the exception to all areas of criminal law except the "*traditional*" areas of criminal law, in other words, the exception becomes the rule.

A more careful reading of the case law does not, however, allow such conclusions to be drawn. The general principle, as set out in the above quote, is that criminal charges must be heard at first instance by an independent and impartial tribunal and any derogation from this is exceptional and must be justified. In light of their nature and the penalties involved, EC competition law proceedings cannot be considered as falling within such exceptions. The inevitable conclusion is that having such cases heard by the Commission at first instance is incompatible with Article 6 ECHR. These points are considered below.

In the following part of this paper (part C), we will then consider the alternative view, i.e. that the exception can extend to EC competition law, and the consequences this has for the type of judicial review that is then required. And finally we will address a few other issues that may be problematic in the EC system viz Article 6 ECHR (part D).

### *B. The right to a first instance independent and impartial tribunal in criminal cases and the scope of exceptions*

#### **1. Introductory remarks**

<sup>92</sup> See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, at p. 46.

<sup>93</sup> See notably the *De Cubber*, *Bendenoun*, *Öztürk*, and *Jussila* judgments, all cited above.

<sup>94</sup> *Jussila v. Finland*, cited above, at para. 40 (emphasis added).

When considering arguments raised by parties alleging a violation of Article 6 ECHR by the Commission, the ECJ has summarily rejected those by considering that *“the Commission cannot be considered as a ‘tribunal’ within the meaning of Article 6 of the ECHR (...). The applicant’s argument that the decision is unlawful simply because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions is therefore irrelevant.”*<sup>95</sup>

However, EC competition proceedings do not simply escape from Article 6 ECHR because a body that falls outside the notion of *“tribunal”* has been put in charge of them. In other words, the applicability of Article 6 ECHR:

*“depends therefore on the nature of the procedure concerned, rather than on whether it is in practice a ‘tribunal’ or an administrative body that investigates the case in question. In the case of procedures involving the determination of civil rights or any criminal charge, any party should be ‘entitled’ to be heard by an independent and impartial tribunal. Therefore, the mere fact that the Commission is not a ‘tribunal’ within the meaning of Article 6(1) should not mean as such that Article 6(1) is not applicable to the proceedings concerned.”*<sup>96</sup>

How then can Article 6 ECHR be respected? In response to this, it is generally argued that:

*“[a]lthough the Commission combines the investigative and prosecutorial with adjudicative functions, and thus cannot be qualified as an independent and impartial tribunal, this does not as such make the current system incompatible with Article 6 (1) ECHR. Indeed, the European Court of Human Rights has ruled that, for reasons of efficiency, the determination of civil rights and obligations or the prosecution and punishment of offences which are “criminal” within the wider meaning of Article 6 ECHR can be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR.”*<sup>97</sup>

In other words, according to the above, the fact that the Commission does not constitute an independent and impartial tribunal does not result in a violation of Article 6 ECHR, because its decisions are reviewed by the CFI and such a two-tiered procedural approach has been endorsed by the ECtHR.

However, this does not reflect the case law of the ECtHR. Rather, the ECtHR states that *“in the criminal context, [...] generally there must be at first instance a tribunal which fully meets the requirements of Article 6”*<sup>98</sup> and refusal of such access at first instance is therefore the exception. The key question is accordingly whether EC competition law is capable of falling within this exception, such that subsequent judicial review of Commission decisions imposing sanctions for breaches of Articles 81 and 82 EC by the CFI is sufficient to comply with the requirements of Article 6 (1) ECHR. We therefore consider in detail below the case law of the ECtHR on this point and whether EC competition law can be considered as falling within this exception.

## **2. Requirement of an independent and impartial tribunal at first instance and its exceptions: case law of the ECtHR**

In its famous judgment in *Le Compte v. Belgium*, the ECtHR held that *“whilst Article 6 par. 1 (...) embodies the “right to a court” (...), it nevertheless does not oblige the Contracting States to submit “contestations” (disputes) over “civil rights and obligations” to a procedure*

<sup>95</sup> See e.g. the judgments of the ECJ in joined cases 209-15 and 218/78, *Heinz van Landewyck v. Commission (Fedetab)*, [1980] ECR 3125; or in joined cases 100-103/80, *Musique diffusion française v. Commission (Pioneer)*, [1983] ECR 1825.

<sup>96</sup> D. WAELBROECK and D. FOSSELDARD, cited above, p. 115.

<sup>97</sup> W. WILS, cited above, p. 209 (emphasis added). See also K. LENAERTS and J. VANHAMME, cited above, at pp. 555-556.

<sup>98</sup> *Jussila v. Finland*, cited above, at para. 40.

conducted at each of its stages before “tribunals” meeting the Article’s various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect (...).<sup>99</sup>

In a subsequent case concerning disciplinary proceedings against *Le Compte*, a Belgian doctor, the ECtHR further held that “[i]n many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (...) is applicable, conferring powers in this manner does not in itself infringe the Convention (...). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the (administrative) organs themselves comply with the requirements of Article 6 (1) or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide for the guarantees of Article 6 para. 1 (...).”<sup>100</sup>

In the *Öztürk* case, the ECtHR extended this line of case-law to certain criminal proceedings. However, the ECtHR also made very clear that, “[h]aving regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (...).”<sup>101</sup>

Then, in *Bendenoun v. France*, a case concerning tax surcharges, the ECtHR held that “[a]s regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (...), Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 (...) of the Convention so long as the taxpayer can bring any decision affecting him before a court that affords the safeguards of that provision.”<sup>102</sup>

It does however not follow from the *Bendenoun* judgment that the exception allowed for criminal cases in *Öztürk* applies not only to “minor offences” but to all criminal cases in general as soon as there would be a “large number of offences” to punish.<sup>103</sup>

In this regard it should be recalled that the ECtHR has always insisted on the peculiar nature of criminal proceedings with regard to the application of Article 6 ECHR,<sup>104</sup> as well as on the restrictive interpretation to be given to the exceptions developed by case-law.<sup>105</sup> The guarantees provided by Article 6 (3) ECHR apply to all criminal law matters, and not only to

<sup>99</sup> Judgment of the ECtHR of 23 June 1981 in the case of *Le Compte, Van Leuven and De Meyere v. Belgium*, A 54, at para. 51 (emphasis added). On the basis of this *le Compte* case-law, the CFI found in *Schneider* (judgment of 11 July 2007, case T-351/03, at para. 183) that in merger cases, the fact that the decisional power was with the Commission and not a court was no breach of Article 6 ECHR. Merger cases are however not criminal law cases.

<sup>100</sup> Judgment of the ECtHR of 10 February 1983 in the case of *Albert and Le Compte v. Belgium*, series A 58, at para. 29 (emphasis added).

<sup>101</sup> *Öztürk v. Germany*, cited above, at para. 56 (emphasis added).

<sup>102</sup> *Bendenoun v. France*, cited above, at para. 46 (emphasis added).

<sup>103</sup> See for example W. WILS, “La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l’homme”, cited above, at pp. 337-338. In subsequent articles, the author recognises however, that « [t]his alternative means [provided by the *Le Compte* case-law] of satisfying the requirements of Article 6(1) ECHR does not appear to be available in more traditional areas of criminal law or in areas considered criminal under domestic law (...). » (W. WILS, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis”, cited above, at p. 209, fn. 13). The author seems to consider however that only prison sanctions “would require the transfer of the decisional power from the European Commission to the Community Courts.” (*idem*, at p. 224, footnote 57).

<sup>104</sup> See e.g. Judgment of 9 March 2004, *Pitkänen v. Finland*, App. n° 30508/96, at para. 59.

<sup>105</sup> See for example the Judgment of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.



the hard core of criminal law such as imprisonment sanctions, as some authors have argued.<sup>106</sup> It is clear from the Court's case-law that, as a general rule, criminal law proceedings should be heard at first instance by a tribunal respecting all the requirements of that provision. This interpretation is furthermore comforted by the text of Article 6 ECHR, which provides that "[i]n 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."<sup>107</sup>

The *Bendenoun* judgment was furthermore distinguished from "the hard core of criminal law" in the recent Grand Chamber case of *Jussila v. Finland*: "[t]ax surcharges differ from the hard core of criminal law; consequently, the criminal-law guarantees will not necessarily apply with their full stringency (...)." <sup>108</sup> Moreover, the ECtHR stated that "the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in [the fiscal] sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention."<sup>109</sup> The Court also firmly reaffirmed that "[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (...) and where the applicant has an entitlement to have its case "heard", with the opportunity inter alia to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses."<sup>110</sup>

Also, in *Findlay v. United Kingdom*, concerning the trial of a military officer before a martial court, the ECtHR stated unequivocally that "[s]ince the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6 para. 1 (...)." <sup>111</sup>

Thus, it appears that a first instance tribunal is necessary in criminal cases in order to comply with Article 6 ECHR. This is a legal obligation from which it may only be derogated in exceptional circumstances in criminal proceedings, i.e. when "*minor offences*" (such as traffic offences or tax surcharges) are at stake. This exception may be explained by the fact that in particular because in such minor cases, either the judge's review of the case will not be compromised or coloured by the pre-existence of an administration decision or the risk of such compromise is worth taking in light of certain factors (less serious nature of the offence, the great volume of cases, etc.)

In the case of minor offences indeed the procedural defects of the administrative stage are outweighed by the benefits gained from the efficiency of the whole system (e.g. the economy of procedural costs, the expediency of the procedure, the possibility for the administrative authority to concentrate its scarce resources on more serious cases, etc.) combined with the possibility to have these procedural defects redressed on appeal in any case. However, in normal criminal cases, the rights of the defence outweigh these marginal advantages.

As will be shown below, the requirements of independence and impartiality are indeed not purely formalistic but lay at the heart of the principle of due process. For reasons of judicial efficiency or economy, only exceptionally may the requirement that the sanction is imposed by a tribunal be derogated from and only provided that there is a possibility for judicial review against the decision taken.

<sup>106</sup> See footnote 103 above.

<sup>107</sup> Emphasis added. We insist on the language used "*in the determination...*" and not "*in the final determination...*". No need to recall that according to Articles 31 and 32 of the Vienna Convention on the law of treaties, the first method of interpretation is to be based on the text and the wording of the treaty provision to be interpreted.

<sup>108</sup> *Jussila v. Finland*, cited above, at para. 43. (emphasis added)

<sup>109</sup> *Jussila v. Finland*, cited above, at para. 36.

<sup>110</sup> *Jussila v. Finland*, cited above, at para. 40 (emphasis added).

<sup>111</sup> Judgment of 25 February 1997, *Findlay v. United Kingdom*, reports 1997-I, at para. 79.

Or as stated by three members of the Human Rights Commission "*where criminal justice, as is often the case, is administered at two levels – at first instance and on appeal – it is not sufficient that the requirement of impartiality is satisfied at the appeal stage. While various minor procedural deficiencies may well be remedied in appeal proceedings, the requirement of an impartial tribunal is of such a fundamental character that it should be satisfied already during the trial at first instance, this being in general an essential – and perhaps even the most important – part of the criminal proceedings against an accused person, in particular where – as would seem to have been the situation in the present case – the evidence in the case was not heard again by the court of appeal.*"<sup>112</sup>

### **3. Competition law infringements leading to sanctions cannot be regarded anymore as "*minor offences*"**

The distinction drawn by the ECtHR between "*minor offences*" and other violations forming part of the "*core of criminal law*" can be traced back to the *Öztürk* judgment in 1984.<sup>113</sup> However, as shown above, the ECtHR has only applied this line of case-law so far to minor traffic offences and tax surcharges or still to disciplinary offences where criminal sanctions were small. In fact, as the ECtHR explained in *Jussila*, this distinction is linked to the progressive stretching out of the notion of "*criminal sanction*" under the ECHR following the application of the *Engel and others* criteria: it would simply have been very difficult to require Member States to comply with all the requirements of Article 6 in areas such as traffic offences and tax surcharges, where hundreds of thousands of minor violations take place every year.

The same cannot be said about Community antitrust proceedings, not only because they are less numerous, but also because a number of factors indeed indicate that competition law proceedings can no longer qualify under the "*minor offences*" exception allowed under ECtHR case-law.

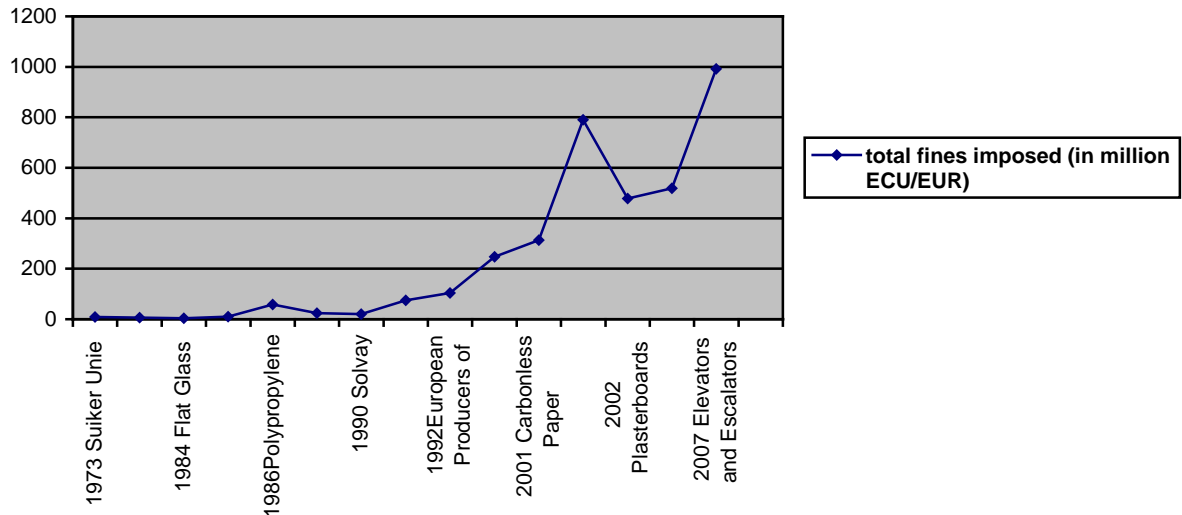
First, the amount of the fines imposed by the Commission for violations of Article 81 or 82 of the EC Treaty has risen dramatically over the last 15 years. For example, whilst fines imposed by the Commission in the late 1970s were of the order of several tens of thousands of EUR, the maximum fine imposed for a cartel infringement in 2007 of 992 million EUR in the *Elevators and Escalators* case.<sup>114</sup> This increase seems even to have accelerated in the last two or three years.<sup>115</sup>

<sup>112</sup> Dissenting Opinion of Mr H. Danelius, Mrs. G. H. Thune and Mr. L. Loucaides in the Report of the Human Rights Commission of 2 March 1995 in case *Thomann v. Switzerland*, App. n° 17602/91. It has to be observed that in this case the majority did not disagree with this finding of the minority but merely held that *in casu*, there was no lack of impartiality at the appeal stage. The mere fact that the accused had first been judged in his absence by the same judges that subsequently judged him on appeal did not reveal any lack of impartiality. The Human Rights Commission recalled however (at para. 65) that impartiality was required already at first instance. A problem might occur for instance "*where a trial judge had previously held in the public prosecutor's department an office whose nature was such that he may have had to deal with the case (...), or exercised the functions of an investigating judge with extensive powers and particularly detailed knowledge of the files (...), or taken pre-trial decisions on the basis of legal provisions requiring a particularly confirmed suspicion (...).*"

<sup>113</sup> Cited above.

<sup>114</sup> Commission Decision of 21<sup>st</sup> February 2007, case COMP/E-1/38.823, no public version yet available.

<sup>115</sup> The latest fine imposed by the Commission has raised the total amount of fines imposed by the Commission in antitrust cases to more than 3 billion EUR in 2007. The total fines of 486 million EUR which were imposed in the recent *Flat Glass* case were imposed for cartel activities lasting less than a year. This makes some lawyers suggest that, on the basis of the Commission's new Fining Guidelines, allowing for amounts of fines reaching the 30% turnover, fines beyond 1 billion EUR could become the new benchmark (in *Financial Times* of 29 November 2007, "*Flat Glass groups are fined 500 million EUR*").



Second, violations of competition law have been criminalised in a growing number of Member States.<sup>116</sup>

Thirdly, as indicated, the stigma attached to violations of competition rules has increased dramatically, cartels being prohibited in stronger terms than ever.<sup>117</sup>

The progressive evolution of the Commission's fining policy with regard to competition law infringements, considered together with the clarification of Article 6 ECHR by the ECtHR, make it obvious today that the current Community system in antitrust proceedings is not in line anymore with the fundamental right to a fair trial. Indeed, while the Commission is "*determining*" at first instance "*the existence of a criminal charge*" (in the sense of Article 6 ECHR), it is not complying with the substantive requirements imposed by this provision.

It can therefore only be concluded that competition law infringements leading to sanctions cannot be regarded anymore as "*minor offences*", and that there is therefore a requirement of an independent and impartial tribunal already at first instance.

#### 4. The conjunction of investigative, prosecutorial and adjudicative powers by the Commission and the problem of prosecutorial bias

The current institutional system before the Commission is not only problematic because it goes against the requirements of the ECtHR. It is also problematic because the accumulation of investigative, prosecutorial and adjudicative powers by the Commission during the whole proceedings in antitrust cases leads naturally to what is called "*prosecutorial bias*", i.e. the fact that a case handler will naturally tend to have a bias in favour of finding a violation once proceedings have been commenced. The case-handler's position is in this regard not different from the position of a defence lawyer who naturally develops a bias in favour of his client. Applied to the Commission in competition proceedings, this however means that the Commission will be naturally more inclined to find the existence of a breach of Articles 81 and 82 EC and to take a decision imposing sanctions than if this decision was taken by an

<sup>116</sup> In accordance with Article 5 of Regulation n° 1/2003, a total of 17 Member States have taken laws imposing criminal sanctions on companies and/or on individuals for breaches of competition law in their jurisdiction (UK, Germany, Denmark, France, Italy, Ireland, Austria, Greece, Spain, Estonia, Slovak Republic, Czech Republic, Finland, Norway, Cyprus, Malta and Slovenia) with sanctions ranging from criminal fines to imprisonment or disqualification of company directors. Not to speak about the possibility for national criminal sanctions in the hypothesis of a refusal to cooperate with the Commission when it is exercising its powers of investigation, including during a dawn raid for example (see notably, with regard to the UK, the Judgment of 17 September 2007 in joined cases T-125/03 and T-253/03, *Akzo and Akcros v. Commission*, not yet published, at para. 63).

<sup>117</sup> See above Section I.B.1(ii).

independent and impartial tribunal which played no role whatsoever during the investigation of the case. In good "*Hegelian dialectics*", a sound system would however require "*thesis*", "*antithesis*" and "*synthesis*" by three different actors. A "*Salomon*" with an open mind should listen to both parties and then decide the case.<sup>118</sup>

The existence of a "*prosecutorial bias*" is generally explained by the following set of factors:<sup>119</sup>

- First, there is a natural tendency for persons investigating on a case to search for evidence which confirms rather than challenges one's beliefs, and to accept more readily the conclusion to a syllogism if it corresponds to one's belief than if it does not, irrespective of its actual logical validity (a so-called "*confirmation bias*"). Such a confirmation bias certainly exists in proceedings relating to the application of Articles 81 and 82 EC, because the Commission will normally only start an investigation if the officials of DG Competition hold the initial belief that an infringement is to be found.
- Secondly, there is what psychologists call *hindsight bias* or the desire to justify past efforts. As one author has put it "*it is understandable in human terms that Commission officials sometimes want to push through what they perceive to be 'their' case. And it explains why arguments put forward by the parties often appear to fall on deaf ears.*"<sup>120</sup> This may be simply explained by the fact that person will naturally refrain from coming to conclusions that put into question the validity of their past conclusions. An official of DG Competition for example will be reluctant, after having pushed a case through and issued a statement of objections, to consider later in its investigations that the case for the finding of an infringement was weaker than he had initially thought. This may be explained not only by internal psychological factors but also by the need to justify past decision to hierarchical superiors or to outside observers.
- Thirdly, there is the *desire to show a high level of enforcement activity*. This aim has also been actively pursued by the Commission in competition matters, as exemplified by the statistics published on its website<sup>121</sup> and by numerous speeches of Competition Commissioners insisting on the number of decisions imposing fines and on the high level of these fines.<sup>122</sup> While this may be a legitimate means to ensure deterrence, there is obviously also "*a potential risk of abuse, in that dubious cases might be pursued or fines might be inflated in order to keep up the statistics.*"<sup>123</sup>

<sup>118</sup> Although the ECtHR has never had to decide on this question with regard to the EC, for obvious reasons of competence, it appears that this absence of formal separation at EC level between prosecutorial and adjudicative functions would very likely be problematic under Article 6 ECHR. Interestingly, at national level, the French *Cour de Cassation* has already decided in a judgment of 5 October 1999, *TGV Nord et Pont de Normandie*, that the participation of the *rapporteur* in the deliberations of the *Conseil de la Concurrence*, to the extent that he has undertaken investigations during the fact-finding process, was contrary to Article 6(1) ECHR. For a more detailed discussion on this judgment, see D. WAELBROECK and M. GRIFFITHS, "French *Cour de Cassation: T.G.V. Nord et Pont de Normandie*, Judgment of 5 October 1999", case note in 37 CMLR (2000), pp. 1465-1476.

<sup>119</sup> We are indebted here to W. WILS and his article on "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, pp. 212-220.

<sup>120</sup> F. MONTAG, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17" [1996] 8 ECLR 428-437, at p. 430.

<sup>121</sup> See the Commission's webpage <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf>.

<sup>122</sup> See notably the Speech of Neelie Kroes of 26 June 2007 (Speech 07/425, available on the Commission's website), where Ms. Kroes stated that "[s]o far this year we have adopted three cartel decisions with fines totalling more than 2 billion euros. And I expect to bring several more investigations to an end later this year."

<sup>123</sup> W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, p. 217. In addition, fines have become an important resource for the Community (with a total budget of 126.5 billion € in 2007, fines totalling more than 2 billion € constitute between 1% and 2% of this total budget).

A prosecutorial bias does however not arise in a system in which the competition enforcement authorities prosecute before an independent court, as it is the case in a large number of countries in the world.<sup>124</sup> Such a system does not only provide for better procedural safeguards against partiality and prosecutorial bias, but enjoys higher legitimacy for those undertakings on which sanctions are imposed, with the result that there is a higher degree of acceptance of the decision and that fewer appeals are being brought before superior courts.<sup>125</sup>

The current "*prosecutorial bias*" is only partly remedied by the recent introduction of "*peer review panels*" composed of experienced officials in order to scrutinise the case team's conclusions with a "*fresh pair of eyes*". Indeed, if the peer review normally takes place before the sending of a statement of objections, in all cases applying Article 82 EC, it only applies to cases applying Article 81 EC "*where appropriate*" and in principle not in cartel cases.<sup>126</sup> Second, this system is by no means equivalent to having an independent administrative law judge taking a decision following a full trial in which both sides of the case are present. Third and in any event, the Commissioners are not "*walled-off*" from discussion of the matter with the staff investigating the case while the case is under adjudication.<sup>127</sup> Fourth, it is also questionable whether such a duplication of tasks simply results in more lengthy and costly proceedings,<sup>128</sup> with the decision-taking phase of the administrative proceedings becoming "*a superfluous anticipation of the work which will be done anyway by the reviewing judge*".<sup>129</sup>

Finally, the most insidious and intractable problem with this accumulation of powers by the administrative authority is that its impact on the outcome of a decision is impossible to measure. As the ECtHR stated in *Tsfayo*, "[o]ne of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts. (...) Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence."<sup>130</sup>

The fact that prosecutorial bias has a definite but immeasurable impact on the outcome of decisions is probably a further reason why decisions in criminal cases should in our view always be taken at first instance by a tribunal respecting all the requirements of Article 6

<sup>124</sup> Such as Korea, Japan, Canada, Australia and Norway for example. In the 27 EU Member States, practice is much more contrasted, with 14 countries (namely Bulgaria, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia and Slovenia) still allowing for sanctions to be taken by the investigating authorities, subject to subsequent judicial review by an independent court, while in the 13 others (namely Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Malta, Spain, Sweden and the United Kingdom) these sanctions – which are often considered as having a criminal character – may only be imposed by an independent body or court (within the meaning of Article 6 ECHR), with the investigating authority playing the role of a prosecutor before it. This classification may be subject to some changes, depending on the definition of a court in every single case and to internal reforms.

<sup>125</sup> In this regard, see F. MONTAG, cited above, at p. 429: "*Undertakings often feel that they are treated unfairly and that their procedural rights are violated in the course of infringement proceedings. (...) [B]ecause undertakings are uncomfortable with the way in which infringement proceedings are carried out and decisions are reached, Commission decisions imposing significant fines lack acceptance.*"

<sup>126</sup> See W. WILS, cited above, at p. 203.

<sup>127</sup> On the contrary, under Commission proceedings, the College of Commissioners (who is taking the final decision on the case by simple majority) only receives a proposal from the Competition Commissioner, who has himself or herself been briefed by the DG Competition officials dealing with the case, including the Chief Competition Economist and the review panel if they have been involved in the case, as well as by the Hearing Officer and possibly other Commission officials. See W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, pp. 203 and 207.

<sup>128</sup> Administrative cost being traditionally the main argument invoked to support the maintenance of the current system in comparison with a system based on prosecution before the Community Courts.

<sup>129</sup> W. WILS, cited above, p. 222.

<sup>130</sup> Judgment of the ECtHR of 14 November 2006, *Tsfayo v. United Kingdom*, App. n° 60860/00, at para. 33.

ECHR. Unlike cases under the civil head of Article 6 (and exceptionally minor criminal offences), the risk that prosecutorial bias will not be corrected by subsequent judicial review is simply unacceptable in criminal cases. This is why the ECtHR excludes as a matter of principle that, except in exceptional cases, criminal sanctions are imposed at first instance by an administrative body.

## 5. The right to a hearing that is public

Oral hearings present companies accused of violating competition law with a last chance to defend themselves before the Commission rules on their case. Such hearings –which are also attended by officials from the EU Member-States– are always held behind close doors largely to shield the companies involved and guard against the release of sensitive business secrets. Even when parties waived their right to a confidential hearing to ensure a full and fair examination of the issues and urged the Commission to hold a public hearing this has been denied. Indeed, the Commission found that in such a case "*presentation from the various parties would play to the gallery rather than throw light on the issues at stake in the case.*"<sup>131</sup> Needless to say, this is a strange argument as public hearings before courts have on the contrary always been regarded as an essential guarantee of the fairness and openness of debate.

According to the ECtHR, "*[a]n oral, and public hearing constitutes a fundamental principle enshrined in Article 6, §1.*"<sup>132</sup>

## 6. The right to an oral hearing before the person deciding the case

A further difficulty with the current proceedings in EU competition cases is that the persons actually adjudicating the cases are not present at the hearing.

According to the ECJ, "*[a]s the purpose of the procedure before the Commission is to apply Article [81] of the Treaty even where it may lead to the imposition of fines, it is an administrative procedure. Within the context of such a procedure there is nothing to prevent the Members of the Commission who are responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission has appointed to conduct it [...]. Thus, the fact that the applicant was not heard personally by the members of the Commission at its hearing cannot amount to a defect in the contested decision.*"<sup>133</sup> Again, one may wonder if such reasoning would still be valid today.

The ECtHR has recently recalled that the right to "*[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (...) and where the applicant has an entitlement to have its case "heard", with the opportunity inter alia to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.*"<sup>134</sup>

"*[A]lthough earlier cases emphasised that a hearing must be held before a court of first and only instance unless there were exceptional circumstances that justifies dispensing one (...),*

<sup>131</sup> See e.g. Microsoft's requests reported in F.T. 14 March 2006.

<sup>132</sup> Judgments of the ECtHR of 23 February 1994, *Fredin* (n° 2), Series A283-A, para. 21; of 26 April 1995, *Fischer*, Series A312, para. 44; *Jussila v. Finland*, supra note 20, at para. 40 (emphasis added). See also the statement of Robert Badinter in *Le Monde* of 27.1.2004 concerning the project of direct settlement procedure in France: "*Le coeur de la procédure pénale, c'est l'audience. C'est le lieu où l'on décide de la valeur des preuves, de la culpabilité, enfin de la peine et de la réparation due à la victime. A l'audience, le procureur n'est pas une partie privilégiée. Le débat est public. Depuis la Révolution, cette publicité est une garantie pour le prévenu et pour le peuple que la justice n'est ni confisquée, ni manipulée.*"

<sup>133</sup> Judgment of the ECJ of 15 July 1970 in Case 45/69, *Boehringer Mannheim v. Commission* [1970] ECR p. 769, at para. 23.

<sup>134</sup> *Jussila v. Finland*, cited above, at para. 40 (emphasis added). See also the judgments of the ECtHR of 23 February 1994, *Fredin* (N° 2), Series A 283 A at para. 21, and of 26 April 1995, *Fischer*, Series A 312, at para. 44.

*the Court has clarified that the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases (...). The overarching principle of fairness embodied in Article 6 is, as always, the key consideration (...).*"<sup>135</sup>

The ECtHR insisted in this regard in particular on the fact that *"the requirements of a fair hearing are the most strict in the sphere of criminal law."*<sup>136</sup> Dispensing with an oral hearing would not be acceptable in areas forming *"the hard core of criminal law"*,<sup>137</sup> and then probably only for minor and/or mere disciplinary offences.

As will be explained in more detail below, proceedings before the Commission in competition cases are led by a team of Commission officials investigating the case. Parties have the right to express their views orally during these proceedings before a Hearing Officer, who will subsequently report to the Competition Commissioner on the content of this hearing. Finally, the Commissioner in charge of competition brings the case before the full College of Commissioners, who –although it did not attend the hearing– takes a final decision.

It should be recalled at this stage that the right to be heard means that no decision may be taken against a person unless that person was previously given an opportunity to state his or her position on the issue.

A proper hearing is not only necessary to ensure greater acceptance of the decision, but allows opposing positions to be directly confronted and challenged, including the possibility for cross-examination and interactive exchanges. Obviously, this requires the presence at oral proceedings of the persons who are ultimately deciding the case.

In this regard, as stated by the OECD, *"[n]o other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission" as indeed "[w]ith 25 members, the Commission is too large to effectively deliberate and decide fact-intensive matters."*<sup>138</sup> In most EU Member States, hearings in competition law proceedings take place before the persons (whether it is an independent judge or an administrative authority) responsible for taking the final decision (see table below). On the contrary, in the EU, *"when the Commission decides a matter, it has typically not heard directly the case against the proposed decision"*, and *"[n]o Commissioner, including even the competition Commissioner, will have attended the hearing."*<sup>139</sup> Indeed, *"[a]ll depends on briefings from staff and there is no ex parte rule or other control on contacts between investigating staff and the Commissioners who decide the matter."*<sup>140</sup>

Member State	Body responsible for taking a decision imposing sanctions for competition law infringements	Right to an oral hearing before the members of this body who are ultimately taking the decision?
Austria	Cartel Court	Yes
Belgium	Competition Council	Yes

<sup>135</sup> *Jussila v. Finland*, cited above, at para. 42 (emphasis added).

<sup>136</sup> *Idem*, at para. 43. Furthermore, in its partly dissenting opinion in the same case, Judge Loucaides, joined by Judges Zupančič and Spielmann, argued that *"[t]he requirement of a public hearing in judicial proceedings has been challenged during the drafting of certain international instruments, but even where this challenge has been successful, as in the case of the American Convention on Human Rights, the guarantee of a public hearing has been retained in respect of criminal proceedings. It appears from the Court's case-law that whenever the Court has found that a hearing could be dispensed with in respect of criminal proceedings at the appeal stage, it was always made clear that a hearing should have taken place at first instance (...)."*

<sup>137</sup> *Ibidem*.

<sup>138</sup> Report quoted above, at p. 63.

<sup>139</sup> *Ibidem*, p. 64.

<sup>140</sup> *Ibidem*.

Bulgaria	Commission for the Protection of Competition	Yes
Cyprus	Commission for the Protection of Competition	Yes
Czech Republic	Office for the Protection of Competition	Yes (if necessary)
Denmark	Criminal Court	Yes
Estonia	Criminal Court	Yes
Finland	Market Court	Yes
France	Competition Council	Yes
Germany	Competition Authority	Yes
Greece	Competition Commission	Yes (but not always before all of them)
Hungary	Competition Council	Yes (but only in important cases)
Ireland	Court	Yes
Italy	Competition Authority	Yes
Latvia	Competition Council	Yes
Lithuania	Competition Council	Yes
Luxembourg	Competition Council	Yes
Malta	Court	Yes
the Netherlands	Director General of the Competition Authority	Yes
Poland	President of the Competition Office	No
Portugal	Competition Council	No
Romania	President of the Competition Council	Yes
Slovakia	Antimonopoly office	Yes
Slovenia	Competition Authority	Yes (but not always)
Spain	Competition Court	Yes (upon request)
Sweden	Court of First Instance	Yes (upon request)
United Kingdom	Office for Fair Trading	No
<b>European Union</b>	<b>European Commission (College of Commissioners)</b>	<b>No</b>

The same is true for the major jurisdictions outside the EU.

<b>Country</b>	<b>Body responsible for taking a decision imposing sanctions for competition law infringements</b>	<b>Right to an oral hearing before the members of this body who are ultimately taking the decision?</b>
Australia	Court	Yes
Canada	Court	Yes
Japan	Court	Yes
South Korea	Court	Yes
Norway	Criminal Court	Yes
United States	Federal District Court	Yes

Thus, even in countries where there is no strict separation between investigatory, prosecutorial and adjudicative powers at the administrative stage (as it is the case in the EU), parties are generally given the opportunity to present their views to those members of the administrative body who will ultimately be taking the decision imposing sanctions. The fact that no such guarantee exists under the Community system constitutes further evidence of the fact, not only that Article 6 ECHR is not complied with,<sup>141</sup> but also that the general requirements of fairness embodied in that provision are not being given enough attention.

<sup>141</sup> See above.



- C. *If criminal sanctions are not imposed at first instance by an independent and impartial tribunal, they should at the very least be subject to fuller judicial review as required under Article 6 ECHR*

### 1. The requirement under Article 6 ECHR for full jurisdictional review

In *Le Compte*,<sup>142</sup> the ECtHR stated that “the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, paragraph 1.” As shown above, this possibility only extends to civil and disciplinary proceedings, but is not allowed in criminal law matters (except for minor offences).<sup>143</sup> Such a system would thus only be acceptable with regard to antitrust cases if it were to be admitted that antitrust violations constitute “minor offences” such as traffic offences or tax surcharges in the light of Article 6 ECHR.<sup>144</sup>

In our view, and as indicated, criminal sanctions such as those imposed by the Commission for antitrust violations are not “minor offences” and can only be imposed at first instance by an independent and impartial tribunal. However, even if it were to be considered that antitrust violations benefit from the “minor offences” exception –*quod certe non*– the question is then whether the current standard of review exercised by the Community courts in antitrust cases does amount to a “full judicial review” as required under Article 6 ECHR.

The main question is therefore what is meant by “full judicial review”. Does it suffice to have a mere control of legality, as currently exercised by the CFI and the ECJ in antitrust matters, or is it necessary to have a complete *de novo* review, implying the possibility for the judge to remake entirely the whole decision?<sup>145</sup>

In this regard, it is clear that a different standard of review applies with regard to civil cases than in criminal cases.<sup>146</sup> With respect to decisions concerning the “determination of civil rights and obligations”, the ECtHR has stated that in specialised areas of an administrative nature, it is sufficient for the court of review to exercise a restricted jurisdiction and to leave the determination of primary facts to the administrative body, “particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (...)”.<sup>147</sup> In these cases “it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body”.<sup>148</sup> However, when the determination of the facts lies at the heart of the judicial proceedings and of the applicants’ contestation, the ECtHR requires that the review Court must have the power to rehear the evidence or to substitute its own views to that of the administrative authority. Otherwise, there would be a risk that “there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute”.<sup>149</sup>

<sup>142</sup> Cited above, at fn.100. The CFI has referred to this judgment to justify the fact that merger decisions are taken by an administrative authority in Case T-351/03, *Schneider Electric SA v. Commission*, 11 July 2007, para. 183. However, merger decisions, contrary to decision imposing fines are clearly not of a “criminal nature”.

<sup>143</sup> See the developments above. See also the judgment of the ECtHR of 26 October 1984, *De Cubber v. Belgium*, cited above, at para. 32.

<sup>144</sup> See notably the *Öztürk* judgment and the developments above.

<sup>145</sup> For a more in-depth analysis of the notion of “tribunal having full jurisdiction”, see D. Waelbroeck and D. Fosseard, cited above, at pp. 127-133.

<sup>146</sup> See also A. Adrengeli, cited above at footnote 11.

<sup>147</sup> Judgment of the ECtHR of 22 November 1995, *Bryan v. United Kingdom*, Series A 335-A, at para. 47. See also the judgments of 18 January 2001, *Chapman v. U.K.*, App. n° 27238/95 and *Jane Smith v. U.K.*, App. n° 25154/94.

<sup>148</sup> Judgment (Grand Chamber) of 28 May 2002, *Kingsley v. U.K.*, App. n° 35605/97, at para. 58. See also the judgment of 31 May 2007, *Bistrovic v. Croatia*, App. n° 25774/05.

<sup>149</sup> Judgment of 14 November 2006, *Tsfayo v. U.K.*, App. n° 60860/00, at para. 48.

In cases concerning the "*determination of a criminal charge*" however, the ECtHR takes a stricter approach, requiring that the appeal jurisdiction does not only verify the correct application of the law by the administrative authority but is also able to engage in a complete reassessment of the facts and of the evidence produced before it ("*de novo review*"). In that regard, the ECtHR has also consistently stated that "*the right to a court and the right to a judicial determination of the dispute cover question of fact as much as questions of law.*"<sup>150</sup>

Thus, in *Schmautzer*, a case concerning an Austrian citizen who was imposed a fine (with twenty-four hours' imprisonment in default of payment) for not wearing his safety belt while driving his car, the ECtHR considered that "*the powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention.*"<sup>151</sup> The ECtHR went on to observe that "*when the compatibility of those powers with Article 6 para. 1 (...) is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below.*"<sup>152</sup> As the Administrative Court lacked that power in this case, the ECtHR considered that it could not be regarded as a "*tribunal*" within the meaning of the Convention and that there had been a violation of Article 6 ECHR.

More clearly still in *Kyprianou*, concerning a contempt of Court before the Cypriot jurisdiction falling under the criminal heading of Article 6 ECHR, the ECtHR held the following:

*"According to the Court's case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 19, § 33). However, in the present case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant's complaints which are now before this Court. There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an ab initio, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant. Indeed, although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the delivery of the judgment by the Assize Court, i.e. on 14 February 2001. (...) In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was cured on appeal by the Supreme Court."*<sup>153</sup>

It follows from the above that the requirements of the ECHR are extremely strict and require effectively a full *de novo* review of the case.

## 2. The standard of review applied by the ECJ and CFI

<sup>150</sup> *Le Compte, Van Leuven and De Meyere v. Belgium*, cited above, at para. 51.

<sup>151</sup> Judgment of 23 October 1995, *Schmautzer v. Austria*, Series A328-A, at para. 36.

<sup>152</sup> *Ibidem*. See also the judgment (Plenary Chamber) of 29 April 1988, *Belilos v. Switzerland*, Series A 132, at paras. 69-70.

<sup>153</sup> Judgment of 27 January 2004, *Kyprianou v. Cyprus*, App. n° 73797/01, at paras. 43-46 (emphasis added). This judgment was subsequently upheld by the Grand Chamber of the ECtHR, who delivered its judgment in the same case on 15 December 2005. See also the judgment of 26 April 1995, *Fischer v. Austria*, Series A 312.

This strict approach has to be contrasted to that of the Community courts which take a fairly conservative approach as to their own competence. For instance, the Community courts generally take the view that "(...) *the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article [81(3)] of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisals or misuse of powers (...)* It is not for the Court of First Instance to substitute its own assessment for that of the Commission."<sup>154</sup>

The same reasoning is also applied in Article 82 cases, in which complex economic assessments are even more often at stake. In the recent *Wanadoo* judgment for example, the CFI held that, "as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion (...). The Court's review must therefore be 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 a misuse of powers."<sup>155</sup>

The same reasoning can be found in most judgments, such as most recently in the *Microsoft* case or in the *Deutsche Telekom* case.<sup>156</sup> In this regard, it should also secondly be recalled that Articles 229 and 230 of the EC treaty only confer unlimited jurisdiction on the Community courts with regard to the determination of pecuniary sanctions.<sup>157</sup> As one of its former members has stated, the CFI is, "essentially, a review court. That is to say its function is not to rehear the case or to substitute its own opinion for that of the Commission, but to review the legality of what the Commission has decided."<sup>158</sup>

### 3. Conclusion

In the light of ECtHR case-law, it is clear that judicial review by the CFI in antitrust cases should not be limited to questions of law and to the determination of the appropriate level of the fine, but should also extend to a full reassessment of the facts and to the expediency of the Commission's decision. The CFI cannot limit its analysis to "manifest errors of appraisals or misuses of power" but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts. The "unlimited jurisdiction" that the Community Courts are entitled to exercise should not be limited to altering the amount of the fines imposed on companies but should also extend to the very determination of the infringement giving rise to these sanctions.<sup>159</sup> Indeed, the progressive change of nature of antitrust proceedings and of the sanctions are imposed in such proceedings now require "full judicial review", as it is understood by the ECtHR, in these cases.

<sup>154</sup> See for example case T-17/93, *Matra Hachette v. Commission*, [1994] ECR II-595-656, at para. 104. (emphasis added). See further case 42/84, *Remia*, [1985] ECR 2545, para. 34, joined cases 142/84 and 156/84, *BAT and Reynolds*, [1987] ECR 4487, at para. 62, case C-194/99 P, *Thyssen Stahl*, [2003] ECR I-10821, at para. 78. See also the case-law cited above.

<sup>155</sup> See the recent CFI Judgment in case T-340/03, *France Télécom v. Commission (Wanadoo)*, at para. 129.

<sup>156</sup> Case T-201/04, *Microsoft v. Commission*, at para. 87: "The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their 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."

<sup>157</sup> See the recent CFI Judgment in Case T-271/03, *Deutsche Telekom v. Commission*, at para. 185 which repeats the same statement. See K. LENAERTS, I. MASELIS and D. ARTS, *Procedural Law of the European Union*, Robert Bray (ed.), Thomson, Sweet and Maxwell, London, 2006, pp. 447-451.

<sup>158</sup> Judge D. BARRINGTON, cited in D. WAELEBROECK and D. FOSSELARD, cited above, at p. 132.

<sup>159</sup> See also D. WAELEBROECK and D. FOSSELARD, cited above, at pp. 127-133.

#### D. Other issues that are problematic in the EC system viz Article 6 ECHR

In this regard, two other features of the current system of judicial review appear problematic in the light of ECtHR case-law.

The first issue is the absence of suspensory effect for proceedings brought before the Community Courts.<sup>160</sup> As shown for instance in the quotation from the *Kyprianou judgment* hereabove, a proper system of full jurisdictional review by an independent tribunal requires automatic suspensory effect. However, under the EU competition system, even if there is the theoretical possibility for companies to request a suspension of the application of the Commission's decision, such a request will almost invariably be rejected in practice, due to the extremely strict conditions that have been developed by the Community courts in their case-law.<sup>161</sup> As a result, companies have no choice but to comply with a Commission decision imposing very important fines before having had the opportunity to a "fair trial" complying with the requirements of Article 6 ECHR. This is illustrated by the *Microsoft* case where Microsoft was forced to divulge under the threat of daily penalty fines valuable know-how before any court had ever heard its case.<sup>162</sup> This practice has also been condemned by the ECtHR in criminal cases.<sup>163</sup>

A second issue is the obligation which is put on national courts not to contradict a Commission decision when they are dealing with a case based on the same facts than those being dealt with by the Commission.<sup>164</sup> Thus, companies could not only be subject to the fines of the Commission, but also possibly to injunctive relief or damage actions in several Member States with authoritative reference to the Commission's decision, before having been offered the chance of being heard in accordance with the requirements of a fair trial embodied in Article 6 ECHR. Under the current case-law, national courts have no obligation to refer questions of validity of Community decisions to the ECJ if they find that there is no reason to consider such acts illegal, nor are they under any obligation to stay proceedings until a judgment is given by the Community courts.

### III. Conclusions – The way forward

There is a growing tendency towards building a more efficient economic justice and a high level of enforcement of antitrust rules by public authorities. This cannot be done however at the cost of disregard for fundamental rights. The intention of some Member States to formally "decriminalise" competition law is unacceptable at a time where the level of the fines and other remedies which are imposed on companies have never been as high.

<sup>160</sup> Article 242 EC. See also K. LENAERTS, I. MASELIS and D. ARTS, cited above, at p. 419, and W. WILS, "The Combination (...)", cited above, at p. 202.

<sup>161</sup> The grant of interim relief is subject to three cumulative conditions, namely (i) that there is a *prima facie* case for the adoption of the requested measures both in fact and in law, (ii) that their adoption is necessary to avoid serious and irreparable damage, and (iii) that the balance of interests favours such an order. The condition of "serious and irreparable damage" is generally interpreted extremely narrowly as meaning that any financial loss will only constitute such an "irreparable damage" if, for example, the very existence of the undertaking would be threatened. (See notably the Order of the President of the Court of 21 March 1997 in case T-41/97 R, *Antillean Rice Mills v. Council* [1997] ECR p. II-447, at para. 47)

<sup>162</sup> See D. Waelbroeck "Microsoft Round 12 – Is the Commission now trying to preempt the judges?", Competition Law Insights 2007.

<sup>163</sup> Judgment of 27 January 2004, *Kyprianou*, cited above, at para. 45. Again, such an absence of suspensory effect would be acceptable in administrative or civil case but not in criminal cases in the light of the Convention.

<sup>164</sup> Judgment of the Court of 14 December 2000 in Case C-344/98, *Masterfoods* [2000] ECR p. I-11369, at paras. 49-60. See also Case T-65/98, *Van den Bergh Foods v. Commission* [2003] ECR p. II-4653, at para. 199. On the precise implications of this jurisprudence, see A. P. KOMNINOS, "Effect of Commission decisions on private antitrust litigation: setting the story straight", 44 *CMLR* (2007), pp. 1387-1428.

The case-law of the ECHR makes very clear that –except for "*minor offences*" sanctions must be imposed at first instance by an independent and impartial tribunal fulfilling all the requirements of Article 6 ECHR. Subsequent judicial review is not sufficient in that regard.

The day has therefore come to start thinking about a profound reform of the current system, both to comply with the ECHR and to make it more efficient and legitimate. Ideally, this should be done by granting the decisional power to the CFI, or to a new competition court.

In this regard, the view has sometimes been expressed that such a reform would require a modification in the treaties themselves, under which it is allegedly the Commission which is responsible for developing competition policy and ensuring compliance with the competition rules, not the ECJ, whose role is only to ensure that "*in the interpretation and application of this Treaty the law is observed*".<sup>165</sup> In the *Italian Flat Glass* case, the Court thus considered that "*although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence. In the light of those factors, the Court considers that it is not for itself, in the circumstances of the present case, to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition.*"<sup>166</sup>

However, in our opinion, this case-law cannot be read as preventing a change in the decisional Structure defined in Regulation n° 1/2003 but only as defining the scope of judicial review when the adjudicative function is vested with the Commission. Thus, when the Commission has decision-making power –as it currently has in Regulation n° 1/2003, the Treaty does not allow full jurisdictional review (except for fines). This does however not mean that the Treaty prohibits a system whereunder antitrust decisions are taken by the Courts and not by the Commission if Regulation n° 1/2003 is modified accordingly. In this regard, EC Article 83 indeed gives to the Council the legislative power, on a proposal from the Commission and after consulting the European Parliament to adopt "*the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82*" and in particular "*to define the respective functions of the Commission and of the Court of Justice*" in applying the competition rules. This leaves thus every possibility open to leave the adjudicating function in antitrust cases to the Courts and in this regard, ideally the role of the Court could be taken over by an EU competition court created as a "*judicial panel*" attached to the CFI, according to Article 225a of the EC Treaty.<sup>167</sup>

It can be recalled here that in areas other than competition, the Court has been entrusted with the power to find infringements (see e.g. ECA p. 226) and there is no reason why the same should not be true in antitrust cases.

<sup>165</sup> Article 220 EC. See A. ANDREANGELI, *cited above*.

<sup>166</sup> Joined cases T-68, 77-78/89, *Società Italiana Vetro SpA and others v. Commission*, [1992] ECR II-1403, at para. 319.

<sup>167</sup> See also OECD Report quoted above, p. 64.



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