

General Principles of EU Law and European Private Law

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CHAPTER 15

From Regulation 17/62 to Article 52 of the Charter of Fundamental Rights

Ian S. Forrester*

§15.01 INTRODUCTION

This article will review some features of the procedural history of European competition law to consider whether the current regime is acceptable in the light of the Charter of Fundamental Rights¹ which now forms an integral part of the EU legal framework.

In the early days, the Commission was the policy-maker, and it was obviously an administration with cautious habits. It was the Commission which drafted the block exemptions, which set its enforcement priorities, which chose which law to make via its rare flagship decisions, which imposed penalties, and which spoke up for the principle of competition within the deliberations of the European institutions. Its quite rare decisions were often selected to advance the law rather than to resolve a particular conflict.

The Commission's decision-making processes were adopted in 1962 and have not fundamentally changed since then. Although they have been improved, they

* Queen's Counsel at the Scots Bar; Honorary Professor, University of Glasgow; White & Case, Brussels. I thank Marika Harjula, Solicitor of the Bar of England and Wales, and Emilie Eriksson, *jur.kand.* (Sweden), for ideas and insights. I have written more fully about the themes covered in this paper in a number of articles, including: *A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'*, European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases, Oxford and Portland Oregon (2011); *Due Process in EC competition cases: a distinguished institution with flawed procedures* (2009) 34 E.L. Rev. 817; *A Challenge for Europe's Judges: The Review of Fines in Competition Cases* (2011) 36 E.L.Rev. 185.

1. The Charter of Fundamental Rights of the European Union, 2010 OJ C 83/389, which has the same legal value as the Treaties, according to Article 6(1) of the Treaty of the European Union. The Charter is binding on the EU institutions, according to Article 51(1) of the Charter.

remain administrative, not prosecutorial. I respectfully suggest that in light of the Commission's current role, and its policies and fining practices, these procedures are now inadequate. It would be foolish to say that they always condemn innocent companies. Indeed, the system yields 'acquittals' in the sense that allegations in the statement of objections may be abandoned or narrowed in the final decision. Officials are careful to respect the interests of the defence within the framework ascribed to them. Nor do I assert that those who engage in cartel activity should be generously treated. I simply add my voice to the groundswell of opinion in favour of procedures that are worthy of the distinguished institution and appropriate for the important role it discharges.

§15.02 THE EARLY DAYS

Since *BRT SABAM*,² it has been known that the competition rules³ had direct effect and could be invoked in national courts. However, there was an unreality which muddled the process of the analysis of whether a problem existed. The prohibition of Article 85(1)⁴ was deemed to have a broad, extensive scope. It caught (according to the Commission's conservative choice of enforcement priorities in the early 1960s) both basically good agreements which had restrictive features but achieved and pursued a pro-competitive goal, and basically bad agreements which could not be redeemed. The reach was therefore vast: tens of thousands of agreements signed each year containing exclusivity provisions were in theory caught by Article 85(1), rendered null by Article 85(2)⁵ and were theoretically liable to fines. If they did not fit the narrow confines of the available block exemptions, the theoretically indispensable remedy against unenforceability and fines was the filing of a notification seeking an exemption. In theory, exemptions would be granted on their merits. In reality, exemptions were almost never granted in specific cases. Specific exemption decisions were reserved for interesting and important cases where the Commission wished to make new law (or soft targets, like trade fairs, which could be good for the statistics).⁶

The Commission was the only entity which could grant exemptions. Courts could not do so. As a result, much legal and procedural creativity was deployed: national courts preferred to find that Article 85(1) was inapplicable, to avoid ceding jurisdiction to the Commission.

This history is still relevant today. There is a link between procedural and substantive law. National courts will seek to escape the constitutional consequences of

2. Case 127/73, *BRT v. SABAM* [1974] ECR 313. See e.g. Ian Forrester, *Jurisdiction of National and Community bodies in competition matters after SABAM*, *Common Market Law Review* (1974).

3. Former Articles 85 and 86 of the Treaty of Rome.

4. Now Article 101(1).

5. Now Article 101(2).

6. Among the trade fair and bourse cases were decisions on office equipment (*VIFKA*, 1986 OJ L 291/46); freight futures (*Baltic Freight Futures Exchange Limited (BIFFEX)*, 1987 OJ L 222/24); dentistry equipment (*International Dentschau*, 1987 OJ L 293/48 and *British Dental Trade Association*, 1988 OJ L 233/15); and machine tools (*CECIO/EMO*, 1989 OJ L 37/11).

European competition law if the consequences of strictly applying it seem unpalatable. If courts feel that the procedures strictly applicable can lead to unjust results, the substantive law will be adapted. It is not a coincidence that in the United States, while dire procedural entanglements await those credibly accused in the civil courts of anti-trust infringements, the courts are conservative, indeed reluctant, in recognizing new categories of anti-trust infringement. Intellectual creativity by plaintiffs and enforcers is more welcome in Brussels.

Because of the primary role of the Commission, great (maybe excessive) weight was in the past attached to any indication of its opinion on the merits, and the Commission was correspondingly exceedingly cautious in expressing any view to assist the courts in applying EC law in national litigation. It developed the ‘comfort letter’, which was less than an exemption but more than a silence in response to a notification. The comfort letter was a source of some reassurance in the sense that it confirmed the Commission had no fundamental concerns; but it was a source of discomfort in that it gave no exemption even where Article 85(1) applied (and therefore nullity was a theoretical consequence).

There arose cases of tension between the determinations of national judges and European proceedings. The handling of national litigations unfolds according to quite well-established procedures, according to a predictable timetable. Commission proceedings were far from predictable. Decisions were few and rare, sometimes as few as ten per year, reserved for flagship cases where the Commission wanted to advance the law. Indeed, this unpredictability made judges reluctant to cede responsibility to a public authority which was notably slow. Although the issues at stake were not as serious as today, and although there was more acceptance of the Commission’s role as defender of the faith, it was evident that a Commission decision was more of an accusatory than a judicial document. And since in many cases there was likely not to be a decision, an excessive amount of energy was devoted to arguing propositions such as ‘If the Commission were to decide, it would find in my client’s favour’. And when they did emerge, decisions would often lack the judicious review of both sides of the argument which a court would normally deploy. The law developed, a rather small number of decisions was taken, and a number of judgments handed down, the shadow of which, especially in dominance cases, still influences today’s law and practice.

§15.03 THE FIRST ROUND OF REFORM

The next phase of competition law history can be marked from the adoption of the EU’s first Merger Regulation 4064/89 on 21 December 1989. It came into force on 21 September 1990.⁷ Now, a merger control regime had been proposed by the Commission as early as 1973. Member States had differing opinions on whether and how mergers should be controlled at Community level. There were doubts as to whether the Commission, which in its antitrust function was slow, perfectionist and reluctant to say

7. Regulation 4064/1989 was amended by Regulation 1310/97 and repealed and replaced in 2004 by the current Merger Regulation, Regulation 139/2004.

‘no’ (and even more reluctant to say ‘yes’), would be capable of taking decisions in a prompt and timely fashion. However, to the surprise of many, including myself, the Commission was able to produce high quality business-like decisions addressing the key points of a contemplated merger.

During 1991, the first full year of operation for the Merger Regulation,⁸ the Merger Task Force received sixty-three notifications and disposed of sixty. It found in five cases that the transaction did not fall within the Regulation (either too small or not a concentration). It blessed fifty transactions under Article 6(1)(b) as raising no serious doubts. In six cases, serious doubts were raised and the procedure of thorough investigation began. In four cases, the transaction was declared compatible with the Common Market, subject (in three of the four cases) to the giving of certain undertakings. A fifth case had not been disposed of at the end of 1991. In the most celebrated case, *Aerospatiale-Alenia/de Havilland*,⁹ there was a declaration of incompatibility. The Commission’s first condemnation of a notified merger aroused fierce political debate, aligned largely along national lines. The responsible Commissioner, Sir Leon Brittan, was subject to extravagant criticisms in a debate before the European Parliament, and there was extensive governmental lobbying. However, the decision was made and was procedurally respected. No political crisis was created, a confirmation of the maturity of EC competition policy.

Since the adoption of the Merger Regulation the Commission has cleared more than 4,600 transactions and blocked twenty-two.¹⁰ Experience did not confirm early fears of slow, bureaucratic or overly burdensome application of the Regulation. The demands for information have been less extravagant than is routine in the US. Small teams of officials have been able to make a thorough and realistic assessment of each pending transaction, and to do so conclusively, in most cases, within a fixed (though frequently elastic in the sense of being liable to postponement) period. Thus the legal certainty of a specific transaction was delivered routinely by the Merger Task Force. Its decisions were clear, untheoretical, and straightforward. Of course, they were often controversial. Thus the Commission had shown its capacity to reach practical, workmanlike decisions inside a quite short time. The process of getting a merger blessed is intensely confrontational and involves the balancing of contrasting predictions of future events. While its decisions on mergers were occasionally challenged, its rare judicial reverses have enhanced the Commission’s credibility.

The story is different with respect to antitrust, notably the repression of cartels, which was transformed by the adoption of the European leniency programme. The earlier adoption by the US authorities of a successful regime offered important advantages in exchange for being the first to confess and to implicate. Despite initial reluctance, the Commission adopted a regime which offered powerful incentives to the first participant in cartels to confess with full details incriminating other participants.

8. Regulation 4064/89, 1989 OJ L 395/1.

9. Commission Decision 91/619/EEC, Case IV/M05, *Aerospatiale-Alenia/de Havilland*, 1991 OJ L 334/42.

10. Commissioner Almunia speech: http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm.

One procedural consequence of the success of the leniency programme has been that delations of supposed co-conspirators have increased. The classic chain of events is that a business with a guilty conscience approaches the Commission to report that it has discovered its sales managers have been participating in secret, imprudent and illegal meetings with competitors, and that each of several named people (nearly always men) had participated in these meetings for years. As a condition of not being fined, the confessing company implicates its fellow competitors. There is an interest in accusing them widely of grave economic wrong-doing or plain criminality, and an evident risk of error, embellishment or exaggeration. Such circumstances call for rigorous checking of facts and identities.

Article 16 of Regulation 1/2003 provides that a national court ruling on anti-competitive practices which are already the subject of a Commission decision 'cannot take decisions running counter to the decision adopted by the Commission'. The green shoots (or black ones, depending on one's viewpoint) of follow-on damages actions by aggrieved competitors and customers are appearing in national courts in several Member States (especially England), encouraged by the Commission and the promise of riches on an American litigation scale.

Criminal liability can flow in some Member States for individuals inculpated by Commission findings. I believe that as of the writing of this article, no citizen is in prison in Europe for cartel offences (though several have been tried), but the day will soon come when that will no longer be the case. Dozens of Europeans are in American prisons for cartel offences. These potential consequences in national law are a further reason to demand rigour in Brussels.

§15.04 DECENTRALIZATION AND WIDER ENFORCEMENT

On 1 May 2004, Regulation 17 of 1962 was replaced by Regulation 1/2003 which brought major changes to the Commission's enforcement powers.¹¹ The Commission surrendered its Article 85(3) monopoly powers, both the abolition of the notification system ('do nothing without seeking Commission blessing'), and the abolition of its monopoly over exemptions ('only the Commission can be trusted to interpret Article 85(3)'). It shared enforcement, thus bringing into being a decentralization of power towards national authorities. This was matched by a surge in cooperation between national competition agencies and a rise in private enforcement.

Competition law is increasingly important around the world, and the European Commission is probably its most influential public enforcer, because it is usually more radical than its US counterparts and is subject to lighter judicial review. This brings us to how Commission decisions are taken, a topic which is familiar, but which is also troubling.

11. Ian Forrester, *Sector-Specific Price Regulation or Antitrust Regulation – A Plague on Both Your Houses?*, European Competition Law Annual 2007: A Reformed Approach to Article 82 EC, Hart Publishing (2008).

§15.05 HOW COMMISSION DECISIONS ARE TAKEN

If we work backwards from the decision itself, we may note the circumstances in which the decision is taken. A College of twenty-seven Commissioners (soon to be twenty-eight when Croatia arrives) sits round a table (usually on a Wednesday) with the Secretary General of the Commission, and adopts a number of decisions on important matters falling within its remit. The Commission is an international organization, so its role and functioning is different to that of a national cabinet of ministers, but there are similarities in that each Member of the Commission is (like a minister in a national government) responsible for a different portfolio, that there is collective responsibility, and that deals between Commissioners are hammered out politically with give-and-take reflecting the portfolios, nationalities and political persuasions of the Commissioners.

It is therefore possible that the disposition of a particular competition case may be the subject of political lobbying to any Commissioner, or to the Commissioner specifically responsible for competition matters. Most competition law practitioners in Brussels can cite several examples. In the modern convention, the Competition Commissioner endeavours to limit the number of communications of a lobbying nature which are made to him or her directly; and if one side is received by the Commissioner, all sides will likely be received. Other Commissioners are certainly in the habit of receiving representations from governments, companies and trade associations relevant to pending competition cases. I know of at least one celebrated case (in the 1990s) where the decision was adopted as part of the unblocking of a number of stalled dossiers. Thus the imposition of anti-dumping duty on bicycle parts, the protection of the herring population, and the taking of a controversial competition decision could be traded-off the one against the other. It is of, course, welcome that in modern practice the Competition Commissioner and his cabinet try to limit the opportunity for political lobbying by governments, compatriots, interested parties or others. However, it cannot be justified that a political body staffed by political figures takes decisions on guilt or innocence or imposes penalties of criminal severity.

Administrations can regulate, legislate, investigate and reach conclusions with perfect propriety. They can, in certain cases, impose penalties, as do tax authorities, refuse collectors, and parking administrators. A cabinet of ministers cannot vote on the guilt or innocence of a company accused of an economic crime. It is unimaginable that a new Member State would be allowed to adopt a competition law regime under which the Prime Minister and cabinet of the country decided on guilt, innocence and penalty in a competition matter. The Commissioner is neither in person nor in function a judge. And the College of Commissioners is assuredly not a court. It is a political body, and political bodies in a democracy cannot well decide matters of guilt or innocence.

Additional thoughts in the same direction are that the Commissioner, although briefed by expert staff, has not attended the hearing of the accused company and will not have heard in a comprehensive way from the accused company about the case. The Commissioner may have been given copies of key documents and will certainly have discussed matters with his staff; and in very large cases, he will often have received

delegations from interested parties. These commendable steps are not enough to make the process lawful.

[A] The Hearing

Article 6(1) of the ECHR contemplates a public hearing for a criminal proceeding, unless there are exceptional circumstances which justify dispensing with such a hearing.¹² The purpose of this right¹³ is to protect litigants from ‘the administration of justice in secret with no public scrutiny’,¹⁴ to maintain public confidence in the courts and the administration of justice.¹⁵ According to the ECtHR case law the right to be present and to participate effectively is fundamental to the fairness of the proceedings, and it includes not only physical presence, but also the ability to hear and follow the proceedings,¹⁶ to understand the evidence and arguments, to instruct the lawyers, and to give evidence.¹⁷ According to the ECtHR this is particularly important where the proceedings are adversarial in nature.¹⁸

The oral hearing provided for in Article 27(1) of Regulation 1/2003, which takes place at a very advanced stage of a competition law case, is not a trial. Indeed, it barely corresponds to a hearing as the term is understood by most lawyers accustomed to civil or criminal advocacy. (An adequate hearing would be presided over by a decision-maker charged with deciding a factual or legal controversy.) Its purpose is to give the parties the opportunity to supplement their written defence by making oral presentations to the Commission. They will typically bring along lawyers and other experts, such as economists or scientists, and give a presentation to elaborate on specific points considered. There is no obligation on the Commission to respond to points or questions. The hearing is held in a large conference room, with the opposing parties facing one another across long rows of tables, the Member States round the edge of the room, with the Hearing Officer and members of the Commission Legal Service looking on from another long table. The curious physical layout is a metaphor for the obscure role of the hearing. The hearing is not a trial. There is only a limited opportunity for the accused company to challenge the evidence against it, including the witnesses upon whose testimony the Commission relies. Functionally, it is an opportunity for the case team to conclude that despite four years of effort it may have been mistaken all along. It should be an opportunity for a trier of fact to decide whether Mr Smith or Ms. Dupont is more believable in describing who attended the meeting on 13 January 2007.

The danger of a lack of rigour in handling the evidence is particularly relevant with respect to the evidence provided by companies with interests hostile to those of the company under attack. Take, for example, leniency applicants. There is no denying that leniency is a valuable tool in uncovering secret cartels. Cartels can be broken by

12. *Jacobsson v. Sweden* (No. 2) (1998) R.J.D. 1998-I, para. 46.

13. See, *Schuler-Zraggen v. Switzerland* (1993) 16 E.H.R.R. 405, para. 58.

14. *Pretto v. Italy* (1983) 6 E.H.R.R. 182, para. 21.

15. *Diennet v. France* (1995) 21 E.H.R.R. 554, para. 33.

16. *Stanford v. United Kingdom* (1994) Series A, No. 282-A

17. *T and V v. United Kingdom* (2000) 30 E.H.R.R. 121.

18. *Hulki Gunes v. Turkey*, App. No. 28489/95, Judgment of 19 June 2003.

the risk of confessions implicating others in exchange for immunity from fines. Leniency applicants have a clear interest in showing serious wrong-doing by their competitors. The juicier the information they provide, the more chance they have of being deemed to have provided 'significant added value' and obtaining a reduction in their fine, or total immunity; and, in the process, they will have created big trouble for their competitors. The same concern arises, *mutatis mutandis*, in the case of complainants, who assert that the factual realities of the marketplace reveal the existence of an infringement and a need for Commission intervention. It is very common for the facts to be the subject of diametrically opposite views. So while it is certain that disputed points of evidence will be considered, that evidence will not be sifted, balanced and analysed at a hearing by a neutral decision-maker who has heard both parties.

The hearing takes place in the absence of the final decision-makers. The Commission's case team and other officials (such as representatives of the Commission's Legal Service) will be present, and will listen with courteous care to the arguments made by the accused company (in most cases those arguments will have been heard before).

The Member States, in the form of the Advisory Committee, look on and put questions and, in due course, may vote on the wisdom of the proposed decision. The Advisory Committee is naturally deferential to the authority which has spent years preparing the case. So far as I am aware, the Advisory Committee has not in thirty years voted against the adoption of a Commission Decision. To the extent there are imperfections of procedure within the Commission, they are not remedied by the Advisory Committee.

We have come a long way since the early days of EU competition law, when cases were carefully picked, decisions were few and penalties were modest. In 1962, fines were not confiscatory though they could, in theory, be painful. At a time when the institution was young and the real and theoretical extent of its powers remained uncertain, the shaping of the procedures for the enforcement of EC competition law was affected by the enormous contributions of a number of individual officials. Their personal scholarship and their dedication to the shaping of sound law meant that they were reluctant to endorse decisions where there was factual or legal doubt and a risk of defeat in Court. In those days, the criticisms concerned more the choice of cases than the fairness of the process. I recollect that in the 1970s, hearings were conducted by the Director in charge of the case team. The Director, in a sense, was there to hear his staff and the accused company battle out their differences. He was evidently not neutral, but he was presiding over one stage in a continuing administrative process. The file was not very thick, and the contested facts might not be very many. Procedural reforms occurred to respond to particular problems in specific cases, such as the Commission's decision in 1981 to appoint an independent Hearing Officer to preside over the hearing.¹⁹ When the hearing was chaired by the Director of the Directorate leading the investigation, this heightened a perception that the Commission, when reaching its decision, might be minded institutionally not to have an openness to alternative ideas.

19. Commission of the European Communities, *11th Report on Competition Policy* (1981), point 26.

This development followed a celebrated controversy. In the *IBM* Article 102 EC case,²⁰ relations between the company and the Commission's staff were tense; press comments suggested the Commission had made up its mind, and the hearing promised undignified fireworks. The decision was made to bring in an outsider, a retired DG IV Director, to preside over the hearing. That official was charming, and firm, and the hearing was a dignified event at which neither side convinced the other but where arguments were rigorously exchanged. Subsequently, the post of Hearing Officer was institutionalized. Each Hearing Officer (I recollect eight) has had long experience and enjoys a high reputation.

The Commission recognized the problem in its 11th Report on Competition Policy:

Although the Commission has no reason to believe that they [the oral hearings] are not conducted fairly at present, it intends to emphasize the objectivity of the hearing. With this in mind it envisages appointing hearing officers, duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible Member of the Commission. This would provide an even better guarantee that the Commission, when stating its views on an individual case as a decision-making authority, would be fully informed of all features of the case whether favourable or unfavourable to the undertakings.²¹

The Commission also referred to the possibility of introducing administrative law judges to investigate and decide competition cases, similar to the Administrative Law Judges who work within the US Federal Trade Commission. The Commission dismissed this suggestion, because it had not proved fully satisfactory in the competition field in the United States because such an authority 'does not seem compatible with the institutional scheme of the Treaty'. Indeed, a hearing by accusers is structurally not likely to be thought to show 'objectivity', regardless of the scrupulousness of the accusers.

Thus the original reason for the naming of a Hearing Officer was that of seemliness—the notion that no one should decide his own case, *nemo iudex in causa sua*, that it was undesirable to imply that the prosecuting service was in charge of concluding the case and organizing the hearing of the company's defence. At that stage, it could have been decided to alter the decision-making process itself, creating a hearing before the decision-maker, or before a person charged with clarifying factual issues. But the reform was, in reality, very modest. If successive Hearing Officers played a role in convincing the Commission that the case was on the wrong track, this was not by rendering a formal favourable ruling but by a quiet word with colleagues.

The Hearing Officer's role was initially limited to chairmanship, the organization and conduct of the hearing. It has, over time, widened to cover other procedural

20. The Commission's decision of 19 December 1980 to open an investigation and to issue a statement of objections regarding infringements of Article 86 (now 102) EC was unsuccessfully challenged before the ECJ (Case 60/81, *IBM v. Commission* [1981] ECR 2639). The case was eventually settled (European Commission's 14th Report on Competition Policy (1984), point 94); see also, Ian Forrester and Christopher Norall, *Yearbook of European Law*, Clarendon Press, Oxford (1985), 395.

21. Commission of the European Communities, 11th Report on Competition Policy (1981), point 26.

questions, in particular safeguarding the confidentiality of documents and business secrets, and access to the Commission's file. The Hearing Officer must report to the Commission on the procedure, and may report on the substance (those reports are not available to the parties). The Commissioner will also receive advice from the Legal Service, and commonly from other services, and will have ready access to all shades of opinion with the Competition Directorate-General.

This matches the pattern that emerged in the 1980s and 1990s of a growing awareness by the Commission of the need to be more procedurally scrupulous in taking competition decisions, while not fundamentally changing how decisions were taken. Access to the file was not addressed in the original Regulation 17²² or any implementing legislation. In a line of judgments, the Courts restricted the Commission's ability to use documents which have not been disclosed to the defendant company, and confirmed the right of defendant companies and their advisors to examine documents which may be useful for their defence.²³ Following *Soda Ash*,²⁴ the Commission in 1997 issued a Notice setting out how the obligation to give parties access to the file would be discharged in practice. The rules were fine-tuned in light of experience by a 2005 Notice.²⁵

The person who presides over the hearing, although a very distinguished civil servant of long experience, has no function to decide on the substance. The Hearing Officer's function is to ensure that the hearing proceeds correctly and that the established procedural rights of the accused company are respected. Those rights amount essentially to being able to make representations in knowledge of the case against it. The Hearing Officer determines such matters as confidentiality of documents, access to the file, the date and duration of the hearing, and the extent to which rights of defence have been respected. These are significant matters and it is good that they are competently and neutrally decided, but the officer's powers are manifestly not sufficient to satisfy modern standards for determining guilt or innocence. The hearing does not constitute what is called for by Article 6 of the ECHR. A hearing at which the decision-maker is absent and the decision-drafters, although present and politely attentive are deeply sceptical (although their minds may not formally already be made up), is not a 'public hearing by an independent and impartial tribunal'.

[B] Fusion of the Investigation and Decision-Making Functions

In a prosecutorial context, the same officials should not both investigate and decide. Police can gather evidence and accuse a suspect, but we do not allow them to decide

22. Regulation No.17: First Regulation implementing Articles 85 and 86 of the Treaty, 1962 OJ 13, pp. 204–211.

23. For instance, Cases 100-103/80, *Musique Diffusion Française v. Commission* [1983] ECR 1825; Case C-62/86, *AKZO Chemie BV v. Commission* [1991] ECR I-3359; and Case T-30/91, *Solvay et Cie v. Commission* ('Soda Ash') [1995] ECR II-1775.

24. Case T-30/91, *Solvay et Cie v. Commission* [1995] ECR II-1775.

25. Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Regulation 139/2004, 2005 OJ C 325/7.

on guilt. A certain ‘prosecutorial bias’ can flow from the entrusting to a single set of persons the functions of investigation, prosecution and adjudication.²⁶ The existence of such bias is not in itself a criticism of individual officials, but is a reflection of the investigative structure itself once proceedings have been commenced and investigative resources have been deployed. These general psychological factors can affect the most talented and ethical professionals. Wouter Wils, a considerable scholar and well-experienced Commission official, distinguishes between confirmation bias, hindsight bias and policy bias.

Confirmation bias arises from the natural tendency for a case investigator to favour evidence that supports his belief that a competition infringement has been committed.²⁷ Police look for their suspect’s fingerprints or footprints: that is perfectly normal. *Hindsight bias* flows from the natural desire to justify one’s past efforts, in particular to hierarchical supervisors and outsiders. It has been argued that 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.²⁸

As a result, case teams may be reluctant to adjust previously held views (honestly and legitimately held) in light of information coming to light later in the investigation.²⁹ In such circumstances, the official can be minded to continue to work towards an infringement decision, ignoring or diminishing the information adverse to the case, so as to justify and confirm the earlier decision to continue the investigation.

The third category of bias, *policy bias*, arises from the desire of officials and authorities to show a high level of enforcement activity. On this theory, promotions flow from taking decisions, and not from not taking decisions. The importance attached to the fines is exemplified by the statistics published by DG Competition on its website³⁰ and by the speeches of successive Competition Commissioners justifying decisions imposing fines and the high level of these fines. As Mr Wils notes, this entails:

a potential risk of abuse, in that dubious cases might be pursued or fines might be inflated in order to keep up the statistics.³¹

I repeat yet again that these difficulties or weaknesses do not in any way impugn the skill or honour of the concerned officials. There is, however, a real danger of the kinds of institutional bias mentioned.

26. Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, 27 World Competition: Law and Economic Review (2004), 202.

27. Wils, *ibid.*, at 215.

28. Frank Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17*, (1996) 8 E.C.L.R 428, 430.

29. Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, (2004) 27 World Competition: Law and Economic Review 202, 216.

30. See: <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf> (accessed 13 March 2013).

31. Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, (2004) 27 World Competition: Law and Economic Review 202, 217.

The fusion of investigative and decision-making functions is not easy to reconcile with the notion of ‘an independent and impartial tribunal established by law’ enshrined in Article 6 of the ECHR. In *Dubus v. France*,³² the lack of an ‘organic separation’ within the French *Commission Bancaire* between those sections which prosecuted and sanctioned Mr Dubus entitled the company to have reasonable doubts as to the independence and impartiality of the *Commission Bancaire*, such that there had been a breach of Article 6(1) of the ECHR. The features of the *Commission Bancaire*’s procedures which caused concern to the ECtHR will sound very familiar to readers in Brussels: there was no clear distinction between the functions of prosecution, investigation and adjudication in the exercise of the *Commission Bancaire*’s judicial power.³³ While the combination of investigative and judicial functions was not, in itself, incompatible with the need for impartiality, there should be no ‘prejudgment’ or the appearance thereof on the part of the *Commission Bancaire*.³⁴ The Strasbourg Court noted that the applicant company might reasonably have had the impression that it had been prosecuted and tried by the same people. The *Commission Bancaire*, in its various capacities, had brought disciplinary proceedings, notified the offences and pronounced the penalty.

Consistent rigour in verifying what happened, why it happened and who suffered as a result, is necessary from the first consideration of the problem, to the formal opening of the case, to the Commission decision, and on to the later stage of the European Courts’ review. Factual rigour is especially desirable in light of the unique – and imperfect – procedures by which competition decisions are taken by the European Commission. These procedural imperfections mean that factual determinations by the Commission services are never publicly tested rigorously, certainly not with the rigour of a criminal trial.

An administration in such circumstances may well reach the right answer, and no doubt it does reach the right result in most cases. But an administrative body cannot readily conduct a trial. It can prosecute, and vigorously. It can regulate and administer, and shape policy goals. It may sometimes impose penalties. But there are risks in doing that, unless the penalties are modest reactions to modest errors or infringements. Administrative penalties can be imposed for parking too long, insanitary restaurant kitchens, environmental nuisances and similar infringements. Grave economic crimes require different treatment.

§15.06 JUDICIAL REVIEW: NEED FOR RIGOUR

Rigorous judicial oversight in turn encourages rigour within the decision-making authority. Under the Convention, a tribunal must have full jurisdiction, to examine all questions of fact and law relevant to the dispute before it.³⁵ Furthermore it must determine matters within its competence on the basis of rules of law, and its decisions

32. *Dubus S.A. v. France*, No. 5242/04, 11 June 2009.

33. *Ibid.*, para. 56.

34. *Ibid.*, paras 57-58.

35. See *Terra Woningen v. Netherlands* (1996) 24 E.H.R.R. 456 (para. 52).

must be legally binding.³⁶ It also has to be impartial and independent of the executive, and of the legislature.³⁷ It is not the case that enhanced procedures weaken the prosecutor. To the contrary: previous negative rulings of the European Courts have given the Commission the impetus to sharpen its own internal decision-making processes. It was the annulment of Commission merger control decisions such as *Tetra Laval*³⁸ and *Airtours*³⁹ that led to the establishment of peer review within the Commission, a process which surely enhances the quality of today's Commission decisions. There is no inconsistency between being opposed to wrong-doing while favouring effective protections for those accused. We learn from the 'war on terror' in my own and others' countries that errors and injustices can occur due to weak forensic procedures, over-enthusiastic prosecutors and over-tolerant juries.

§15.07 DEFERENCE

Whether a contested element in a Commission decision is deemed to be a question of 'fact' or a 'complex ... appraisal', will affect how the Court exercises its power of review,⁴⁰ making only a limited check of 'legality', often called 'light review' or 'marginal review'. It is not a review of the correctness or well-foundedness of the act in question. In the case of merger control, the Court of First Instance has indicated that the EC Merger Regulation confers discretion on the Commission to carry out an economic assessment of the likely effects of a merger. But at the same time the Court has been very interventionist in examining the Commission's decisions.⁴¹ By contrast, in antitrust cases as to breaches of Articles 101 or 102, the Courts have sometimes been quite deferential to the Commission and at other times quite interventionist.⁴² It is not always easy to see a clear dividing line to separate cases of rigorous factual review (as in *Woodpulp*⁴³) from cases of deference to Commission discretion (as in *Wieland-Werke*⁴⁴ or *Microsoft*⁴⁵). I suggest that it cannot be the case that all economic appraisals are 'complex'. Just because an economic assessment is difficult, for example, should not mean it is deemed to be 'complex'.

36. See *Belilos v. Switzerland* (1998) 10 E.H.R.R. 466 (para 64).

37. *Beamartin v. France* (1994) E.H.R.R. 485 at 503 (para. 38), *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165 (para. 78).

38. Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR-I 987.

39. Case T-342/99, *Airtours plc v. Commission* [2002] ECR II-2585.

40. Judge Vesterdorf has recently written that the exercise of unlimited jurisdiction is in practice the very rare exception: *The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?*, Global Competition Policy, Release 2 (2009).

41. See Case T-342/99, *Airtours* [2002] ECR II-2585, para. 64.

42. There is a remarkable contrast between *Woodpulp* and *Microsoft*. See Ian Forrester, *A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'*, European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases, Oxford and Portland Oregon (2011).

43. Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A Ahlström Osakeyhtiö and Others v. Commission* [1993] ECR I-1307.

44. Case T-116/04, *Wielandwerke v. Commission* [2009] ECR II-1087.

45. Case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601.

The language of deference has been cited so frequently that it may have become a sort of judicial mantra. The words have appeared in at least fifty competition cases since 1984. There have been many more cases where the Courts have favoured deference than cases where they have exercised their unlimited jurisdiction. I am doubtful if the appraisals of evidence by the Commission deserved judicial deference in every case where the familiar words have been pronounced.

The boundaries of ‘*complex economic assessments*’ have expanded over the years. The Courts’ exercise of unlimited jurisdiction may, in parallel, have been shrinking. Curiously, as the consequences of being found to be in the wrong have become more dire, the judicial control of such findings has, at least in appearance, become more deferential.

The doctrine of judicial deference to the Commission’s assessments was first enunciated in a famous judgment, *Consten and Grundig*,⁴⁶ in which the ECJ in effect conceded that the Commission could choose its enforcement priorities. The doctrine was further elaborated in *Remia/Nutricia*.⁴⁷ In those days, the Commission defined the prohibition on ‘restricting’ competition contained in Article 85(1) very broadly, referring parties whose conduct was caught in this wide net to the possibility of obtaining an exemption under Article 85(3). Even if the end result – the conclusion that a given agreement or conduct was acceptable and even desirable from the point of view of competition policy – was clear, the Commission consistently considered it was to be reached, as a theoretical matter, by first condemning it under Article 85(1) and then redeeming it under Article 85(3). Agreements which were caught by Article 85(1) and unexempted were void and unenforceable. Voidness could be cured only by an exemption, only the Commission could issue exemptions, and it did so very rarely. Thus the question in *Remia/Nutricia* was whether a clause to regulate competition could be blessed under Article 85(1).

[A] *Remia/Nutricia: Deference as a Lightning of Article 101(1)*

Nutricia notified agreements under which it successively sold two subsidiaries, Remia specializing in the manufacture of sauces (to an individual in the Netherlands), and Luycks, a manufacturer of pickles and condiments as well as a few sauces (to a subsidiary in the Netherlands of the Campbell group). The ‘Sauce Agreement’, required Nutricia not to engage in the production or sale of sauces in the Netherlands for ten years; Nutricia was required to ensure that Luycks also complied with this clause. Remia received a two-year non-exclusive licence for the ‘Luycks’ trademark for sale of sauces to the hotel and catering trade. The ‘Pickles Agreement’ prohibited Nutricia from engaging in the sale or production of pickles in ‘European countries’ for five years, with an exception for certain bulk sales. The buyer also accepted the restriction on making and selling sauces imposed on Luycks, by virtue of the Sauce Agreement.

46. Joined Cases 56 and 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

47. Case 42/84, *Remia BV v. Commission* [1985] ECR 2545.

According to the Commission's theory, post-sale non-compete clauses, which in a narrow sense constitute clear and explicit restrictions of competition, were held not to be caught by Article 85(1) at all. This solution was achieved by an exercise in definitions.

The restriction was 'inherent' in the sale of business and thus was not a restriction. The question then became how much such restriction was 'inherent': for how many years could the seller be obliged not to compete? Now, was the restrictive period pro-competitive, or irretrievably bad, or was it overlong but curable by shortening? The Commission found the periods of non-competition were excessively long. But it did concede that where the sale of a business covered goodwill and clientele as well as material assets, a non-competition obligation imposed on the seller may be necessary to ensure transfer of '*the full commercial value of the business*'. Applying these criteria, the Commission found that four years rather than ten would have been appropriate for the Sauce Agreement; for the Pickles Agreement, it found that two years would be appropriate, and that the geographical scope of the clause should be appropriately limited.⁴⁸

The Commission's approach made good sense to the business community but was legally controversial. Sales of businesses would be impossible without non-compete clauses. Thus they reinforce competition by increasing the number of enterprises on the market. But by arguing that a particular 'restriction' is pro-competitive and therefore not caught by Article 85(1), arguments normally reserved for Article 85(3) crept into the analysis under Article 81(1).

Advocate General Lenz spelled out the problem:

There can be no doubt that a total ban on competition, that is to say an undertaking not to act directly or indirectly on a certain market for a specified period, must be seen as an agreement which has as its object or effect a restriction of competition...⁴⁹

I now turn to the question whether it is possible for the prohibition in Article 85(1) not to be applied to agreements in restraint of competition which in theory fall within its scope without adopting the exemption procedure under Article 85(3). If the answer to that question is positive it will then remain to be examined what rules of law must apply in the case of such a 'non-application' of Article 85(1) of the EEC Treaty...⁵⁰

Although the non-application of Article 85(1) finds no immediate support in the Treaty its permissibility is accepted in academic writings, in particular in the case of agreements for the transfer of undertakings...⁵¹

In academic writings on Community law it is argued that, taken in the abstract, restrictions on competition agreed in the context of agreements for the transfer of undertakings may in principle be regarded as satisfying the factual criteria contained in Article 85(1) of the EEC Treaty...⁵²

48. See Commission Decision 83/670, Case Nos IV 130.389 and IV/30.408, *Nutricia/de Rooij and Nutricia/Zuid-Hollandse Conservenfabriek* [1983] OJ L 376/22.

49. Case 42/84 *Remia v. Commission* [1985] ECR 2545, at 2556.

50. *Ibid.*, at 2558.

51. *Ibid.*, at 2558.

52. *Ibid.*, at 2558.

I, too, agree that an exception, to the extent described above, to the prohibition of restrictive agreements laid down in Article 85(1) of the EEC Treaty is both conceivable and practicable...⁵³

So the Advocate General was endorsing the Commission's approach as sound in principle, even though he noted that academic writing was not unanimous: one of the dissenters was the formidable Norbert Koch of the Commission Legal Service. The Advocate General then produced another reason to support the Commission:

If this is right..., a further consequence will follow regarding the scope for judicial review of the Commission's decision. Since the conditions for an exemption are outlined only in a general manner, the Commission enjoys a wide discretion even in the case of a straightforward application of Article 85(3). The Court of Justice has recognized that Article 85(3) necessarily implies complex assessments of economic matters. Similarly, where such assessments are made in the case of prohibitions of competition agreed in connection with transfers of undertakings, the judicial review must take that fact into account and therefore confine itself to determining the correctness of the facts on which the assessments are based and the applicability to those facts of the relevant legal principles. As the Court of Justice has stated, judicial review must in the first place be carried out in respect of the reasons given for the Commission's decision, which must set out the facts and considerations on which the said assessments are based.

This was a big legal step in terms of the substantive law (which was recognized with relief by commentators, including myself), and it was a deeply important constitutional initiative (less noticed at the time by commentators).

The Court followed the Advocate General. The Commission was in a sense intelligently finding a middle way to reconcile opposing concerns; navigating between the Scylla and Charybdis of stubborn prohibition and lax toleration. At this moment, the notion of ancillary restraints had not been adopted in EC law. The approach of the Commission was commendably practical (even if the precise number of years could be debated: indeed, whether the correct period should be three, four or five years was a matter of appraisal where reasonable men could reasonably differ). As regards the duration of the non-compete clause, the Court endorsed the Commission's findings that the ten years agreed by the parties was too much, and that four years was sufficient.

In upholding the Commission's decision, the Court of Justice noted, echoing Advocate General Lenz, that:

although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking, the Commission has to appraise complex economic matters.

Consequently:

53. Case 42/84, *Remia v. Commission* [1985] ECR 2545, at 2559.

the Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.⁵⁴

Nutricia fertilized the small plant of judicial deference in competition matters. The bush subsequently burgeoned, being cited in dozens of subsequent competition judgments.⁵⁵ But the original seed was intended to commend the Commission's creativity in pragmatically solving a problem of principle. It was not meant, I submit, to be a shifting of primacy in the balance between the administration/prosecution and the judiciary.

[B] **The *Microsoft* Case: Deference to Technical and Economic Assessments**

The *Microsoft* case involved numerous hotly-debated factual matters concerning the design of computer operating systems, how software functions, the role of directories in networks of servers, and other topics. While these matters were assuredly technical and complex, the issues at stake were set forth with limpid clarity in the admirably accurate Report for the Hearing. The judges of the Court of First Instance were evidently able to decide on the merits of the case, as they had accurately identified the issues in dispute. However, in the judgment in 2007,⁵⁶ the formulation of light judicial review was extended to technical matters, not merely complex economic assessments:

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 ... [citations omitted]⁵⁷

Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's (see, as regards a

54. Case 42/84, *Remia v. Commission* [1985] ECR 2545, at 2575.

55. See e.g., Joined Cases 142 and 156/84, *BAT and Reynolds v. Commission* [1987] ECR 4487, para. 62; Case T-44/90, *La Cinq SA v. Commission* [1992] ECR II-1, para. 85; Joined Cases T-39/92 and T-40/92, *Groupement des Cartes Bancaires 'CB' and Europay International SA v. Commission* [1994] ECR II-49, para. 109; Case T-17/93, *Matra Hachette SA v. Commission* [1994] ECR II-595, para. 104; Case T-471/93, *Tiercé Ladbroke SA v. Commission* [1995] ECR II-2537, para. 55.

56. Case T-201/04 *Microsoft Corp. v. Commission* [2007] ECR II-3601. For a rich review by a number of the participants in the case (as well as others), see Luca Rubini (Editor) *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case*, New Horizons in Competition Law and Economics (Edward Elgar 2010).

57. *Ibid.*, para. 87.

decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C-459/00 P(R) *Commission v. Trenker* [2001] ECR I-2823, paragraphs 82 and 83 ... [citations omitted]⁵⁸

These paragraphs expanded the Courts' deference to complex technical appraisals as well as to complex economic ones. The familiar standard was set forth accurately in paragraph 87 referring to 'complex economic appraisals' where the Court's task is 'necessarily limited to checking whether the relevant rules ... have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of appraisal.' The Court's enunciation of a different standard of review in paragraph 88 is striking. The Court's reference to cases 'in the medico-pharmacological sphere' to present this new standard applicable to 'complex technical appraisals' seems unfortunate. In any competition case, the Commission is not assisted by a special agency entrusted with elucidating scientific controversies and making recommendations for action.

I suggest that while the EU Courts recognize that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The EU Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, *Tetra Laval*).⁵⁹

Thus the doctrine of deference has expanded considerably from where it stood in 1965 at the time of *Consten and Grundig*. It has moved from the refusing of an exemption in light of overriding concerns relating to Community policy to reach very specific cases on very specific findings relevant to whether Article 101 or 102 were infringed. The deference shown to 'complex economic assessments' has spread, and has been referred to in scores of judgments, including some which I submit did not involve a complex regulatory exercise. If the *Microsoft* ruling is followed in future, deference (by which I mean either reciting the language of deference or genuinely according actual deference) now encompasses 'complex technical appraisals' as well as economic ones, and does not distinguish between where the Commission is advised by technical regulatory experts and where the Commission decides a competition case itself with no such expert guidance. Among the 'technical matters' could be a range of factual disputes, the determination of which connotes guilt or innocence of a competition law offence.

58. *Microsoft, ibid.*, para. 88.

59. Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR I-987, para. 39.

[C] Judicial Deference Spreads to Fines

The phenomenon of deference spread to appeals about the level of fines, in that the Courts sometimes reviewed in a ‘deferential’ manner how the Commission exercised its fining discretion:

It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is there indicated (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313).⁶⁰

If any part of a Commission decision should not be subject to deference, it is the setting of the fine, which is explicitly subject to the unlimited jurisdiction of the European Courts. I question whether such an approach is consistent with a proper exercise of the Courts’ unlimited jurisdiction.

[D] *Chalkor* and *KME*: Criticism of Deference in Fining Cases

On 8 December 2011, in its judgments in *Chalkor*⁶¹ and *KME*,⁶² the European Court of Justice pronounced on the level of judicial review which the General Court must carry out when reviewing Commission decisions in competition cases. The appellants did prevail as to their arguments of principle, but lost as to their appellate challenge to the judgment below. Although the ECJ rejected the appeals, it implicitly criticized previous cases where the EU Courts had exercised a deferential standard of review, and in contrast prescribed a rigorous standard of judicial review.

The ECJ held that in competition cases the EU Courts must make a full review of the law and the facts. This implies the power of the reviewing court to assess the evidence, annul the contested decision and alter the amount of the fine. The ECJ rejected the notion of limited judicial review. It stated that, although the Commission has a margin of discretion, the CFI (by then the General Court) cannot use that margin of discretion as a basis for dispensing with an in-depth review of the law and the facts or for refraining from reviewing the Commission’s interpretation of information of an economic nature. The General Court should examine whether the evidence relied on is factually accurate, reliable and consistent, whether the evidence contains all the information which must be taken into account in order to assess a complex situation, and whether the evidence is capable of substantiating the conclusions drawn from it.

60. Case T-116/04, *Wieland-Werke v. Commission* [2009] ECR II-1087, para.30.

61. Case C-386/10P, *Chalkor v. Commission* [2011] ECR I-0000.

62. Case C-272/09P, *KME v. Commission* [2011] ECR I-0000.

The General Court has repeatedly recited that its competence was merely to verify that the Commission had acted within the scope of its own Guidelines, not to consider whether the fines were fair and proportionate. However, the ECJ's formulation indicates that such an approach would no longer be appropriate in light of the Charter of Fundamental Rights:

The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.⁶³

The *Chalkor* case thus offers good news and bad news. On the one hand, for the general interest, the ECJ criticizes the practice of deferentially reviewing fines; on the other hand, for Chalkor's interest, it found that although the Court of First Instance had used the offending language, the CFI had in fact actually performed a non-deferential review. Thus Chalkor lost its appeal.

§15.08 INTERNATIONAL STANDARDS

The Lisbon Treaty in 2009 gave to the EU Charter of Fundamental Rights status equivalent to the EU Treaties and made the Charter binding on all EU institutions (including the EU Courts).⁶⁴ The Charter requires that EU law affords at least the same protection for fundamental rights as that prescribed in the ECHR. Article 6(1) ECHR, or the corresponding Article 47 of the Charter, have been much studied by scholars and practitioners.⁶⁵

Sadly, the tepid enthusiasm of the EU institutions for external interference may be inferred from the fact that *years* after the conclusion and entry into force of the Lisbon Treaty, which itself was no overnight development, there is no early prospect that the Union will expose itself to the scrutiny of the Strasbourg Court.

Article 6 of the ECHR and Article 47 of the Charter set out the requirement of a fair and public hearing and due process:

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...
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:

63. Case C-386/10P, *Chalkor v. Commission* [2011] ECR I-0000.

64. Articles 6(1) of the Treaty of the European Union and Article 51(1) of the Charter.

65. Article 52(3) of the Charter stipulates that insofar as the Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR, which does not prevent the Union law from providing more extensive protection.

- (b) to have adequate time and the facilities for the preparation of his defence;
- (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.

These principles reflect the fundamental principle of favouring the rule of law,⁶⁶ which underpins the whole Convention system.^{67,68}

Conduct subject to criminal sanctions deserves procedures which satisfy criminal standards of rigour, thoroughness and due process. The determination of a ‘criminal charge’ (as opposed to the determination of ‘civil rights and obligations’) requires additional safeguards. A defendant in such a case has the right to be informed promptly and in detail of the nature and cause of the accusation; to adequate time and the facilities to prepare a defence; to defend himself in person or through legal assistance of his own choosing (with free legal assistance if necessary); and 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.

[A] The Nature of the EU Competition Rules

Articles 101 and 102 TFEU are general rules applying to all undertakings and are, therefore, general norms of a binding character. A primary purpose of the competition rules and the Commission’s power to enforce them is the protection of society against damage caused by anti-competitive conduct. The fines imposed on those who breach the rules have a punitive and deterrent character. They are, in relative and absolute terms, very heavy. They threaten a very serious financial sanction both in theoretical maximum and in actual practice. The punitive nature of competition fines is confirmed by the way in which they are announced by the Commissioner. There is plenty of stigma in the announcements of the punishment of the guilty. It is striking that a prosecution for a grave economic crime, susceptible to a penalty of tens or hundreds of millions of Euro, should be ‘administrative’ such that there is no need to grant a ‘fair and public hearing ... by an independent and impartial tribunal’ and that, likewise, the accused need not have the opportunity ‘to examine or have examined witnesses against him’. I repeat that there is no hearing on facts (which may be hotly-contested) by a decision-maker, the decision-makers are high political functionaries, and the same officials investigate, charge, convict and punish. And the judicial review is of legality, not correctness (except as to fines since *Chalkor*). The appellate process is sometimes rigorous and sometimes not. The consistency of such a regime with the ECHR is not manifest: some would put it more forcefully.

66. See e.g. *Salabiaku v. France* (1998) 13 E.H.R.R. 379 (para. 28).

67. See e.g. *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 (para. 55) referring to *Golder v. UK* (1975) 1 E.H.R.R. 524 (para. 34).

68. The rule of law is also expressly referred to in the Preamble to the Convention (see *Klass v. Federal Republic of Germany* (1978) 2 E.H.R.R. 214, para. 55) and in Article 3 of the Statute of the Council of Europe. See *Stran Greek Refineries and Stratis Andreadis v. Greece* (1994) 19 E.H.R.R. 293, para. 46.

It should be a cause for embarrassment that even though accession to the ECHR has been imminent for years, no relevant adaptation of processes has been effected. The relationship between EC/EU law and ECHR law has not been especially edifying. The Luxembourg Courts have consistently noted the terms of the Strasbourg Convention and jurisprudence but have rarely doubted the adequacy of the procedures applied by the institutions in Brussels. Although the advent of the Charter and the Convention can hardly have been a surprise for anyone, the implementation has been embarrassingly slow.

[B] **Categorization of Criminal Matters by the ECtHR**

This brings us to the scope and the meaning of the case law of the ECtHR, difficult topics. In *Engel v. Netherlands*,⁶⁹ the ECtHR established three criteria for determining whether proceedings are ‘criminal’ from the point of view of the ECHR, namely (i) the domestic classification, (ii) the nature of the offence, and (iii) the severity of the potential penalty. Subsequent judgments have also established that the criteria are to be assessed independently and that the third criterion is the most important.⁷⁰ So if the legal sanction imposed for breaching a rule has the principal objective of deterring future violations, 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, a truly ‘criminal’ charge under Article 6 would exist. ECtHR case law on Article 6 can be read as making a distinction between ‘soft’ quasi-criminal matters (withdrawal of an advantage, tax penalties, and administrative penalties) and ‘hard’ criminal matters (stigma, punishment, deterrence). However, the ECtHR has given inconsistent guidance on whether the particular (and procedurally controversial) features of an administrative process make the process incurably inadequate or whether rigorous judicial review can solve the problem.

One case helpful to those who are sceptical about an administrative penal process was *Dubus v. France*,⁷¹ which concerned the disciplinary proceedings of the French *Commission Bancaire*. The ECtHR took the view that in condemning Mr Dubus, the *Commission Bancaire* should be regarded as a ‘tribunal’ for the purpose of Article 6 of the ECHR. After citing the *Engel* criteria,⁷² the Court noted that, while the penalty

69. *Engel v. The Netherlands* (1976) 1 E.H.R.R. 647.

70. *Brown v. United Kingdom* (1998) 28 E.H.R.R. CD 233.

71. *Dubus S.A. v. France*, No. 5242/04, June 11, 2009.

72. That is, the nature of the offence and the nature and severity of the penalty: ‘it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The *very nature of the offence* is a factor of greater import. ... However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the *degree of severity of the penalty* that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the ‘criminal’ sphere deprivations of liberty liable to be imposed as a

which had been imposed was categorized in domestic law as an administrative sanction, the penalty was removal from the register or a fine up to the level of its minimum capital, or both. It considered that such significant financial consequences can be regarded as penal sanctions. The penal nature of a sanction depends on the gravity of the potential sanction, and not on the gravity of the sanction in fact imposed. The sanction in this case was such as to affect the credit of the company, entailing undeniable consequences on the company's capital. The ECtHR not only took the view that the *Commission Bancaire*, when it imposed the fine, should be considered to be a 'tribunal' for the purpose of Article 6(1) of the ECHR, but also that, in the circumstances, the sanction had a '*coloration pénale*' and was a criminal charge for the purpose of that Article. There had been a breach of Article 6.

At first, *Dubus* seemed to imply that if a procedure had a *coloration pénale*, then an administrative forum in which the accusers were the deciders was unsatisfactory under Article 6 ECHR. The implications for the EU's competition law regime seemed obvious. Other decisions, however, have clouded the matter.

In *Jussila*,⁷³ the ECtHR was asked to assess whether imposing a tax surcharge was to be seen as a criminal matter under Article 6, even though it was deemed to be administrative under the Finnish system. The Court first discussed at length whether the *Engel* criteria should be used:⁷⁴

[it] is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere. The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character.

To justify the application of the *Engel* criteria, the Court referred to the assessment in *Janosevic*⁷⁵ saying that:

No established or authoritative basis has ... emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6.⁷⁶

The Court was not persuaded that the nature of tax surcharge proceedings was such that they should fall outside the protection of Article 6. Arguments to that effect had also failed in the context of prison disciplinary and minor traffic offences:⁷⁷

While there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the

punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so'.

73. *Jussila v. Finland* (2007) 45 E.H.R.R. 39.

74. *Ibid.*, para. 30.

75. *Janosevic v. Sweden* (2004) 38 E.H.R.R. 473.

76. *Jussila v. Finland* (2007) 45 E.H.R.R. 39, para. 35.

77. *Ibid.*, para. 36.

imposition of punitive penalties in that 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.⁷⁸

In its assessment, the Court then noted that ‘that the surcharges were imposed by a rule whose purpose was deterrent and punitive’.⁷⁹ It considered that this established the criminal nature of the offence and that the minor nature of the penalty rendered the case different from previous case law but that this did not remove the matter from the scope of Article 6 and that Article 6 applied ‘notwithstanding the minor nature of the tax surcharge’.⁸⁰

Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma.

...

Tax surcharges differ from the hard core of criminal law; consequently, the criminal-law guarantees will not necessarily apply with their full stringency...⁸¹

The ECtHR’s assessment of Finland’s compliance with Article 6 and the right to a hearing is relevant to competition cases and how to categorize them. After having established that ‘the obligation to hold a hearing is not absolute’,⁸² and that ‘national authorities may have regard to the demands of efficiency and economy’⁸³ and dispense with one, the Court distinguished ‘criminal cases which do not carry any significant degree of stigma.’⁸⁴ It thus confirmed that there were clearly ‘criminal charges’ of differing weight and that the autonomous interpretation adopted by the ECHR institutions of the notion of a ‘criminal charge’ by applying the *Engel* criteria had labelled as criminal cases not strictly belonging to the traditional categories of the criminal law, such as administrative penalties, prison disciplinary proceedings, customs law, competition law, and penalties imposed by a tax court.

[C] The *Menarini* Judgment: Turning Point or Cross-Road?

In *Menarini*,⁸⁵ the ECtHR examined a fine imposed by the Italian competition authority.⁸⁶ As usual, the Court noted that it was not determinative that the infringement had been labelled ‘administrative’. It held that the imposed fine was based on legislation with a penal and deterrent aim, and noted that the application of competition rules by a competition authority affecting the general interests of society had already been held to be criminal for the purpose Article 6 and that the imposed fine sought first and

78. *Ibid.*, para. 36.

79. *Ibid.*, para. 38.

80. *Ibid.*, para. 38.

81. *Ibid.*, para. 43.

82. *Ibid.*, para. 41.

83. *Ibid.*, para. 42.

84. *Ibid.*, para. 43.

85. *Menarini Diagnostics S.R.L. v. Italy*, No. 43509/08, September 27, 2011.

86. See also for a discussion of this judgment and its effects on EU competition law procedures the contribution by Helene Andersson in this book, Chapter 16.

foremost to have a punitive effect.⁸⁷ As regards the severity of the penalty, the Court held that the large fine, as well as the resulting deterrent effect, meant that the penalty indeed had a criminal nature.⁸⁸

However, the Court then held that Menarini had been able to challenge the fine before the administrative court and to appeal against that court's decision to the *Consiglio di Stato*. The Italian courts had examined Menarini's various arguments in fact and in law and had in doing so examined the evidence produced by the Italian competition authority. Although the competition authority had discretionary powers, the administrative court's role was not limited to verifying the lawfulness of the competition authority's decision: the court was further able to verify whether the administration had made proper use of its powers.⁸⁹ The courts had been able to examine whether the authority's decisions had been substantiated and proportionate, and even to check its technical findings.⁹⁰ Moreover, both the administrative court and the *Consiglio di Stato* had been able to verify that the penalty was appropriate for the offence and could have changed it where necessary.⁹¹ The *Consiglio di Stato* had gone beyond a 'formal' review ('*un contrôle "externe"*') of the logical coherency of the authority's decision and had made a detailed analysis of the appropriateness, including the proportionality, of the penalty.⁹² The competition authority's decision had thus been reviewed by judicial bodies having full jurisdiction. In this respect, there had been no breach of the Convention. The Court found (with one dissent) that there had been no breach of Article 6 by Italy. There seems an evident tension between *Jussila* and *Menarini*.

§15.09 POSSIBLE REMEDIES

Following *Jussila*, it appeared that matters which fell within the 'hard core of the criminal law' demanded at first instance the procedural protections of Article 6 of the ECHR. This conclusion was strengthened by such cases as *Dubus* and *Primagaz*. There appeared to be an evident inconsistency between the reality of how a European competition case was prosecuted and punished and the requirements of the Convention. That inconsistency was not incurable, however. We can distinguish between what is offensive in a formalistic sense (reflecting a mixing of the political and the judicial at the stage of the formal act of the institution) and what is unacceptable in a practical and common-sense way (reflecting unfairness or potential error in how the facts have been considered). A body of politicians, no matter how eminent, should not decide guilt or innocence and impose penalties in criminal cases or cases analogous to criminal cases. The situation of the European Commission is, I believe, unique on earth. The Commissioner cannot effectively be both chief decision-maker and chief of

87. *Menarini Diagnostics S.R.L. v. Italy*, No. 43509/08, September 27, 2011, para. 40.

88. *Ibid.*, paras 41–42.

89. *Ibid.*, para. 63.

90. *Ibid.*, para. 64.

91. *Ibid.*, para. 65.

92. *Ibid.*, para. 66.

the prosecution service. Both positions are honourable, but they should not be combined. The combination of the two roles is dangerous, though the substantive vice of politicization is, in reality, less acute than it might appear. In actual practice, in the great majority of cases, members of the College of Commissioners do not have a hand in drafting the decision, although they are consulted about it in the final stages.

Thus as a formal matter, the decision is criminal in nature, yet it is taken not by an independent and impartial tribunal but by twenty-seven political figures. And if the matter were ever to arrive competently before the ECtHR, this element would perhaps be the strongest and most obvious imperfection. By contrast, the level of resentment or sense of injustice felt by those who have been through the process arises not so much from the formalities of the final vote as from the perceived unfairness of the intellectual process of reaching a conclusion. When diligent and honest officials investigate a case over a period of time, say four years, and then issue the Statement of Objections once the case is, say, 80% concluded, they are understandably committed to the line chosen. So the hearing, regrettably, serves as a tardy opportunity for the case team and the hierarchy of the case team to be persuaded that, after years of investigation, they are indeed mistaken. It is not the function of the hearing to allow the Hearing Officer, who presides, to reach a decision on guilt or innocence or contested facts. There is no equiparation of the ‘case for the prosecution’ and the ‘case for the defence’.

Matters would improve if there were a hearing by an independent person of the factual and legal merits of the accusations levelled by case teams in DG Competition against the accused company, a true ‘*contradictoire*’ debate between opposing parties in the presence of a person who is neutral and impartial. If the decision-maker is functionally separate to the case team, then the problem of combined inconsistent roles is resolved. The case team would be the investigator-prosecutor, and would have to convince the decision-maker that there was a solid case. The substantive outcomes in particular cases would often not be much different, but their credibility would be greatly enhanced.

If the decision-shaping function were removed from the case team, the investigation could still be carried out, as today, by officials within DG Competition. One step further would be to establish an independent competition agency along the lines of OLAF.⁹³ This would isolate the fact-gathering function under one roof. The staff within such an agency could, for instance, deal with cases up to the statement of objections, and then submit the case to the Hearing Officer or the hearing tribunal.

Thus the system could be greatly improved and made more acceptable if the drafting of the decision were entrusted to an individual or group of individuals who had not been involved in the preparation of the prosecution case. Candidates for the discharge of such a function would be members of the judiciary, independent teachers or practitioners of law, and very senior Commission officials with the rank of deputy

93. For a fuller discussion of a possible independent European competition authority, see the working paper by Andreangeli et al., *Enforcement by the Commission – the decisional and enforcement structure in antitrust cases and the Commission’s fining system*, in Merola & Waelbroeck (Editors), *Towards an optimal enforcement of competition rules in Europe*, Chapter 3, Bruylant, Brussels (2010).

director general or director general. The current Hearing Officers would be ideally suited to such a role. Indeed they already carry out an assessment of the substance of the cases in their interim report, but this report is not made public and has no formal influence on the final decision. If the persons were to sit in a tribunal as a trio, there could be a Commission representative alongside two others. If the 'Hearing Officer' were to be a sole individual, ideally the role should not be filled by a member of DG Competition, but by another person with experience of competition cases, who could be attached to, say, the Commission President or the Secretary General. The problem of independence would not be eliminated, but the problem would be less flagrant. If the person or persons taking the decision were obliged to act in independence, and were truly independent of DG Competition, the problem would be materially eased. The problem of bad procedure would have been palliated. It would not be a perfect solution, but it would be an improvement.

Endowing the Hearing Officers with more important functions would be a step in the right direction. The Hearing Officer could organize a proper hearing to get to the bottom of the facts, and could report in writing. If that report were made available to the parties its conclusions could not readily be ignored. This would call for time, staff, facilities and support far more extensive than is currently the case.

The hearing should take place in front of the person who will determine the facts. Otherwise, it is not really a hearing. Subject to confidentiality concerns, there is no reason why Commission hearings should not be public. The ECtHR has held that '[a]n oral and public hearing constitutes a fundamental principle enshrined in Article 6(1)'.⁹⁴ The presence of outsiders would engender an improvement in quality. It would require more solid standards of evidence, and of precision and moderation, than currently prevail. The hearing should provide for a more formal method of scrutiny, by allowing the defendant company to challenge the evidence against it, including the witnesses upon whose testimony the Commission relies. This would require modification to Regulation 1/2003: the hearing would no longer be optional for the parties. It would be an obligatory part of the procedure. (In a number of cases, accused companies have waived a hearing believing that it would change no minds.) The parties, as well as other natural and legal persons, would be obliged to appear before the decision-maker, to reply to the questions posed, and to tell the truth. A prosecution for dangerous driving should not have manifestly superior processes to determine facts than an important competition law prosecution on whose outcome thousands of jobs or millions of Euros or criminal liability may directly or indirectly depend. Thus reform is not at all inimical to efficient prosecution of important cases.

§15.10 CONCLUSION

In the process of finalizing the text of this chapter, I have tried to make sense of the apparent contradiction between *Jussila* and *Menarini*, and the uncertain augury of

94. *Jussila v. Finland* (2007) 45 E.H.R.R. 39 at [40].

Halcor/Chalkor and KME.⁹⁵ I have been helped by the brave attempt of the EFTA Court in 2011 in *Norge Post*⁹⁶ to reconcile the authorities. Let us recollect where things stood.

The citizen in dispute with the public authority has more procedural rights if the matter is ‘criminal’ than if it is not. The *Engel* criteria mean that if a matter is labelled criminal in domestic parlance, that will guarantee the applicability of Article 6 ECHR; but the domestic categorization of the infringement is no more than a starting point, implying that the authority cannot be sure of avoiding the inconvenience of Article 6 by calling the offence ‘administrative’. Putting it differently, almost no deference or credit is given to how the state defines its regime. After *Engel*, the scope of what was eligible for the protections of Article 6 ECHR was expanded steadily to cover a range of controversies with the state.

It has to be recorded that the discussion about the application of the case law of the ECtHR to ‘administrative’ penalties is confused and confusing. In *Jussila*, the Court considered the imposition of a EUR 300 surcharge by an administrative authority. It made a distinction between what the literature calls hardcore criminal offences and others:

it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly ‘criminal charges’ of differing weight. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendennoun* and *Janosevic*, §46 and §81 respectively, where it was found compatible with Article 6§1 for criminal penalties to be imposed, in the first instance by an administrative or non-judicial body: *a contrario*, *Findlay v. the United Kingdom* ...⁹⁷

Jussila was a decision of a Grand Chamber, therefore highly authoritative, but dissents by Judges Zupančič and Spielmann (now President) made it less authoritative. The Court also said ‘there must be at first instance a tribunal which fully meets the requirements of Article 6’. Following *Jussila*, it seemed to me that the Court had declared unacceptable regimes under which an administrative agency imposed penalties in matters which did involve a ‘significant degree of stigma’.⁹⁸

Now, the public stigma of being condemned for competition infringement is much greater than losing an argument with the tax authorities. Citizens who have to pay tax penalties, or civil penalties for putting out rubbish on the wrong day or for customs irregularities, are not exposed to public disgrace. In tax cases, the facts in dispute are usually narrowly limited and the dispute turns on how to characterize them. The frequency and circumstances under which tax investigations are conducted substantially differ from the way the Commission conducts its competition investigations. Nor does the tax authority encourage private lawsuits against the infringer.

95. See also Helene Andersson’s contribution in this book, Chapter 16, for a discussion of these cases and their effects for EU competition law.

96. Case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority*, Judgment of the Court, 18 April 2012, [0000] EFTA Ct. Rep. 000.

97. *Jussila v. Finland* (2007) E.H.R.R. 39, para. 43.

98. See Ian Forrester, *A Challenge for Europe’s Judges: The Review of Fines in Competition Cases*, 36 E.L. Rev. 185 (2011)

The ECtHR seems to have partially reversed *Jussila* by its judgment in *Menarini*. Perhaps ‘reversed’ is too strong. Maybe ‘departed from’ or ‘elected not to follow’ would be more accurate. In *Menarini*, the Court found that the imposition of a fine by the administrative agency in a competition case was acceptable under Article 6 in that the civil courts had jurisdiction over questions of fact and law on appeal, could review the evidence and could review how the authority had exercised its discretion in imposing the fine. If *Menarini* (not a Grand Chamber decision, and weakened by the dissent of Judge Pinto de Albuquerque) is reliable, then punishment by an administrative agency may be made acceptable by the intensity of the available judicial review.⁹⁹

One way of approaching the matter is to conclude that there is no single test by which the requirements of Article 6 can be assessed. On this reasoning, the totality of what happens at first instance may be relevant to the adequacy of the treatment accorded to the citizen. This involves discarding *Jussila*’s convincing distinction between categories of controversy, with a special status for the ‘hard core’ of offences. This line was taken, not without some head-scratching, by the EFTA Court in *Norge Post*.

In any event, I respectfully suggest that the level of intensity of judicial review in EU competition cases is of uncertain adequacy. Judicial review of ‘legality’ is evidently lesser than judicial review of ‘correctness’. As set forth above, the Courts in Luxembourg have saddled themselves with language which, in some cases, excuses a light check on formal adequacy and rationality, while in other cases they rigorously and sceptically challenge what the administration has done and how it has justified itself. While the judgments in *Chalkor* and *KME* confirm the Courts’ duty to be non-deferential in assessing fines, the Courts’ competence in appeals not involving fines is merely a check of legality. Sometimes the Courts robustly review the facts, and sometimes they do not.

I therefore submit that the case law of the ECtHR in Strasbourg is not clear; that the case law of the European Courts in Luxembourg is inadequate to satisfy the requirements of Article 6 of the Convention in all cases; and that the Commission’s regime for deciding competition cases is deeply inadequate. It is profoundly troubling that scrutiny of these procedures by the ECtHR is being prolonged by the very regrettable slowness to accomplish the accession of the EU to the ECHR. I hope that when next this distinguished gathering occurs in Stockholm, the EU institutions will have either adapted their practices or exposed them to scrutiny in Strasbourg.

99. See further Renato Nazzini, *Administrative Enforcement, Judicial Review and Fundamental rights in EU Competition Law: a Comparative Contextual-Functionalist Perspective*, CMLR 49, 971 (2012).