

# THE COMPETITION LAW REVIEW

Volume 6 Issue 2

ISSN 1745-638X



## EDITORIAL BOARD

Prof Steve Anderman  
Prof Cosmo Graham  
Mr Angus MacCulloch  
Ms Kirsty Middleton  
Prof Anthony Ogus  
Prof Tony Prosser

Dr Alan Riley  
Prof Barry Rodger  
Prof Brenda Sufrin  
Prof Phillipa Watson  
Prof Richard Whish

## EDITORIAL COMMITTEE

Dr Alan Riley, Joint Editor  
Prof Barry Rodger, Joint Editor  
Mr Angus MacCulloch, Production Editor

## STUDENT EDITORS

Mark Wilcox, Lancaster University  
Emma Green, Lancaster University  
Craig Allan, University of Strathclyde  
Alan Roughead, University of Strathclyde  
Elizabeth Muir, University of Strathclyde

© 2010 Competition Law Scholars Forum and Contributors.

## INFORMATION FOR CONTRIBUTORS

Contributions to the Review and all correspondence should be sent to the Editors. Contributions should be sent as email attachments to <editor@clasf.org>. Articles should be accompanied by an abstract of no more than 300 words. Articles should not normally exceed 12,000 words (excluding footnotes).

## CONTENTS

### EDITORIAL

Reforming EU Competition Law Andreas Stephan .....	139
---	-----

### ARTICLES

The impact of Regulation 1/2003 in the new Member States KJ Cseres .....	145
A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003? Francisco Marcos & Albert Sánchez Graells .....	183
Counting Down Regulation 1400/2002 – Questioning the Logic of Sector-Specific Rules for the European Car Industry Sandra Marco Colino.....	203
Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties freedom to contract and to enjoy property Arianna Andreangeli .....	225
This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in James Killick & Pascal Berghe .....	259

### BOOK REVIEW

Christopher Townley, <i>Article 81 EC and Public Policy</i> Arianna Andreangeli .....	287
--	-----

---

**THE COMPETITION LAW REVIEW**

---

**Volume 6 Issue 2 pp 145-182****July 2010****The Impact of Regulation 1/2003 in the New Member States***KJ Cseres\**

---

Regulation 1/2003 entered into force on 1 May 2004 introducing a fundamental change in the enforcement of Articles 101 and 102 TFEU. 1 May 2004 also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. The modernization of EC competition law enforcement has in fact taken place against the background of enlargement. Enlargement and the modernization of law enforcement had been closely connected to one and other not only in the field of competition law. This paper discusses the impact of Regulation 1/2003 in the ten new Member States situated in Central and Eastern Europe that joined the EU in 2004 and 2007. What makes these Central and Eastern European countries (CEECs) special is transition from command and control economy and totalitarian rule to market economy and to compliance with the rule of law. What makes implementation of EU rules in CEECs' legislation special is the conditionality and the fact that Europeanization of these countries' laws have been interacting with market, constitutional and institutional reforms. The paper discusses both the direct and indirect impact of Regulation 1/2003 in the legislation, enforcement models and institutional designs in these countries. The experience of the CEECs indicate that EU leverage has been the most noticeable and direct on the statutory enactments of substantive competition law, however, it has in an indirect way also influenced enforcement methods and institutional choices. The exceptional influence of the EU on the CEECs' competition rules can be demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to. However, in the less visible parts of the law such as procedural rules divergence can be substantial with important consequences for overall enforcement outcomes. Moreover, in the CEECs there is a significant difference between the black letter of the law and its active enforcement.

---

**1. INTRODUCTION**

Regulation 1/2003 entered into force on 1 May 2004 introducing a fundamental change in the enforcement of Articles 101 and 102 TFEU. 1 May 2004 also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. The modernization of EC competition law enforcement has in fact taken place against the background of enlargement. Enlargement and the modernization of law enforcement have been closely connected to one another. This paper will discuss the impact of Regulation 1/2003 in the ten new Member States situated in Central and Eastern Europe that joined the EU in 2004 and 2007. What makes these Central and Eastern European countries (CEECs) special is their transition from command and control economy and totalitarian rule to market economy and to compliance with the rule of law. What makes the implementation of EU rules in CEECs' legislation special is conditionality and the fact that the Europeanization of

---

\* Associate Professor of Law, University of Amsterdam, Amsterdam Center for Law & Economics, Amsterdam Centre for European Law & Governance, Universiteit van Amsterdam, k.j.cseres@uva.nl

these countries' laws has been interacting with market, constitutional and institutional reforms. Moreover, from studying the case of the CEECs general lessons can be drawn for Europeanization strategies, for other areas of law and for the balance between public and private governance.

The paper will discuss both the direct and indirect impact of Regulation 1/2003 in the legislation, enforcement models and institutional designs in these countries. The impact of Regulation 1/2003 can be clearly followed in the substantive competition rules, however the Regulation and the Commission's policy was less outspoken with regard to the development of procedural rules, enforcement methods and the institutional framework to be chosen by the Member States. The experience of the CEECs indicate that EU leverage has been the most noticeable and direct on the statutory enactments of substantive competition law, however, it has in an indirect way also influenced enforcement methods and institutional choices. The exceptional influence of the EU on the CEECs' competition rules can be demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to. However, in the less visible parts of the law, such as procedural rules, divergence can be substantial with important consequences for overall enforcement outcomes. Moreover, in the CEECs there is a significant difference between the black letter of the law and its active enforcement. Therefore, it is key to investigate why and how the CEECs reconcile their legal obligations with specific market failures of the transition economies and with the need to develop enforcement methods and institutional structure suitable for their local socio-economic circumstances. The true character of the investigated legal systems is believed to be untangled once active enforcement is studied.

Accordingly, the paper will provide a comprehensive overview of the modes implementation of EC rules as laid down in Regulation 1/2003 and other soft-law legislation adopted within the framework of modernization. The first part of the paper discusses the role of Regulation 1/2003 in the CEECs and the characteristics of the Europeanization of national laws. The second part studies the legislative implementation of EC rules both with regard to substantive and procedural rules as well as the judicial implementation by national courts. The third part is about the active enforcement of these rules by the NCAs and by the national courts including both judicial review procedure and private enforcement. The fourth part elaborates on the institutions in the enforcement framework and the paper is closed by concluding remarks and discusses the reasons for available enforcement methods and the types of sanctions.

## **2. THE DOUBLE ROLE OF REGULATION 1/2003 IN THE NEW MEMBER STATES**

### **2.1. Accession and modernization of EU competition law**

The role of Regulation 1/2003 in the new Member States needs to be examined in the double perspective of enlargement and the modernization of European competition law enforcement. The process of enlargement and the reform of EC competition law

were closely interrelated and mutually impacting on each other. On the one hand, enlargement has opened the discourse on enforcement and it made the relevance of enforcement for the effective working of Community rules manifest. While previously issues of enforcement and institutional structures were regarded to rest in the exclusive competence of the Member States, according to the Community principles of procedural autonomy and institutional neutrality, enlargement has pushed crucial questions of enforcement and institutional choice to the forefront of the EU agenda. This change was visible in the modernization of EC competition law, which was launched by the 1999 White Paper.<sup>1</sup> The reform was aimed at finding more effective enforcement methods in order to prevent outright violations of competition law and substantial economic harm to society.<sup>2</sup> A number of initiatives have been taken in order to achieve this objective. The adoption of Regulation 1/2003 decentralized the enforcement of EC competition law establishing the European Competition Network, DG Competition reorganized its cartel busting work, the 1996 and then later the 2002 leniency programs have been revised,<sup>3</sup> a discussion on how to facilitate private damages cases was launched<sup>4</sup> and the method of setting fines have been revised.<sup>5</sup> In fact, Regulation 1/2003 not only introduced a new procedural framework for the application of Articles 101 and 102 and thus directly intervened in domestic enforcement of competition law, but it has formed inherent part of the broader EU development discussing enforcement methods.

Regulation 1/2003 formed part of the legal requirements of the candidate countries' accession to the EU.<sup>6</sup> The legal obligations of accession acted as considerable political

---

<sup>1</sup> White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, 28.04.1999.

<sup>2</sup> White Paper, 1999, paras 8,41,42, 75

<sup>3</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002, C45/03.

<sup>4</sup> Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para 26.

<sup>5</sup> The Commission has since then introduced new and amended measures mainly to further improve enforcement of Articles 101 and 102. Commission notice on immunity from fines and reduction of fines in cartel case, OJ C 298/17, 8.12.2006, White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008, Discussion paper on the on the application of Article 82 to exclusionary abuses, 2005, Guidance on its enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7; Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ 2008, L171/3, pp 3–5, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008, C167/1.

<sup>6</sup> The legal, economic and political conditions have been first laid down in the so-called Copenhagen criteria of the 1993 Copenhagen European Council and later in more detail in the 1995 White Paper, which was drafted in order to assist the candidate countries in their preparations to meet the requirements of the internal market. The conditions that pre-accession candidates have to fulfil are specified in a Commission report entitled 'Europe and the challenge of enlargement'. They were made formal by the Member States at the Copenhagen European Council in June 1993, and then expanded upon by the Commission in a Communication called 'Agenda 2000', dated 16 July 1997. Agenda 2000 is an action program adopted by the Commission on 15 July 1997.

and economic pressure and exercised the most significant influence on the way competition laws have been shaped in the CEECs. An in-depth analysis of this extraordinary law transfer and the way EC law still influences the competition laws in these countries is missing. The available research covers the legal academic discussion, which has mainly focused on the constitutional law and public administration aspects of EU enlargement. Economic law and specifically competition law has so far received limited attention. The discussion on the impact of European competition law on national competition law concentrated on the question how far the NMS managed to align their legislation with that of the EU and how effectively and accurately the new Member States implemented the *acquis communautaire*.<sup>7</sup> This top down approach was concerned about the ability of these countries to meet the requirements of accession and later membership. This approach was based on controlling compliance with conditions set by the EU. Such an approach is merely appropriate to identify whether adequate rule transfer has taken place and to spot legislative gaps in this top down perspective, but it is not an appropriate method to ask whether formal rule transposition has been effectuated by effective enforcement and placed in an adequate institutional set up. Moreover, and even more importantly, this approach does not take account of the broader domestic developments such as the interaction with market, constitutional and institutional reforms and the fact that the rapid adoption of the economic regulation in the post-communist CEECs has coincided with the revival of private law and the revision of the civil law codifications. Such codifications were also vastly important for the establishment of the appropriate legal framework to facilitate private transactions on the market. The relationship between the two processes from an institutional perspective has largely been underinvestigated. The revival of classical private law and the role of private law courts in this process, however, deserves special attention also when investigating the impact of the EU competition law regulation on the law on the books and the law in action in CEECs, and, in particular, the role of the institutions involved in adopting and enforcing the EU regulation in these countries.

## 2.2. Europeanization of competition laws in the New Member States

In the CEECs the adoption of an identifiable body of competition law and the continuous alignment of these laws with legislative and policy developments in EC competition law has been a clear example of Europeanization. Moreover, this process of Europeanization has been strengthened by Regulation 1/2003 as the decentralization of EC competition law enforcement established a system of close cooperation between the European Commission and the national authorities and delegated an active role for local/national actors. The new enforcement system inherently involved a process of increased Europeanization of competition law in all Member States. It has, also, opened

---

<sup>7</sup> Ojala, M, *The competition law of Central and Eastern Europe* (Sweet & Maxwell, 1999); D Geradin, D Henry, 'Competition Law in the New Member States - Where Do We Come From? Where Do We Go?', in: D Geradin, D Henry (eds.) *Modernisation and enlargement: two major challenges for EC Competition law* (Intersentia, 2005); J Fingleton, M Fritsch, H Hansen, (eds.), *Rules of competition and East-West integration* (Boston: Kluwer Academic Publishers, 1997).

the way for private enforcement of competition law and encouraged private actors to enforce competition rules before their own domestic courts.

Europeanization is understood as ‘the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance’.<sup>8</sup> The concept of Europeanization also has a dynamic dimension. It is a ‘gradual process that begins before, and continues after, the admission of new members to the organization’. Moreover, it demands ‘horizontal institutionalization’, that is widening of the group of actors whose actions and relations are normatively structured.<sup>9</sup> Europeanization is a concept referring to five phenomena within vertical, horizontal and diagonal Europeanization: (1) transposition of the *acquis communautaire*; (2) influence on national institutional frameworks (institutional design); (3) compliance with transposed *acquis communautaire*; (4) spillover effects and emulation of EC law; and (5) horizontal Europeanization: borrowing Member States’ law (legal transplants).<sup>10</sup> These aspects will be discussed below following a different categorization built on the various modes of implementation.

The degree of Europeanization can be determined by studying two dimensions. First, whether there is continuity or discontinuity of pre-existing competition laws and, second, whether an identifiable body of law had existed before alignment with EU law was sought. The degree of continuity or discontinuity of pre-existing competition laws is a relevant indicator of the degree of Europeanization that has taken place in the investigated groups of countries.

Competition was actually non-existent in the socialist area of the investigated countries. Administratively planned market activities and the central allocation of resources took the place of free competition and trade. The CEECs had to build competition laws from scratch and more importantly create a competition culture. In the process of transition competition law played a significant role. Competition law and policy were of

---

<sup>8</sup> I Bache and A Jordan, ‘Europeanization and Domestic Change’ in I Bache and A Jordan (eds) *The Europeanization of British Politics* (Palgrave Macmillan, Basingstoke 2006), 30. H Wallace, ‘Europeanization and Globalization: Complementary or Contradictory Trends?’ (2000) 5 *New Political Economy* 369, J Caporaso, T Risse, M Green Cowles and T Risse-Kappen (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, Ithaca 2001), K Featherstone and C Radaelli (eds) *The Politics of Europeanization* (Oxford University Press, Oxford 2003), M Vink, ‘What is Europeanization?’ (2003) 3 *European Political Science* 63, S Bulmer and C Radaelli, ‘The Europeanisation of National Policy’ in S Bulmer and C Lesquesne (eds) *The Member States of the European Union* (Oxford University Press, Oxford 2005); S Bulmer ‘Theorizing Europeanization’ in P Graziano and M Vink (eds) *Europeanization: New Research Agendas* (Palgrave Macmillan, Basingstoke 2007).

<sup>9</sup> F Schimmelfennig and U Sedelmeier, ‘Theorizing EU enlargement: research focus, hypotheses, and the state of research’ (2002) 9 *Journal of European Public Policy* 500, 503. According to them ‘[i]nstitutionalization means the process by which the actions and interactions of social actors come to be normatively patterned [whereas] [h]orizontal institutionalization takes place when institutions spread beyond the incumbent actors, that is, when the group of actors whose actions and relations are governed by the organization’s norms becomes larger.’

<sup>10</sup> On vertical and diagonal interactions see Ch Schmid, ‘Vertical and Diagonal Conflicts in the Europeanization Process’ in Ch Joerges and O Gerstenberg (eds) *Private Governance, Democratic Constitutionalism and Supranationalism* (European Communities 1998).

great importance in creating a functioning market economy in the former socialist countries. It supported and stimulated the economic changes and it had a demonstrative role as well. The introduction of competition law proclaimed these countries commitment to market economy and competition advocacy as well as proclaimed the principles of correct economic activity and fair market practices. In the light of these countries' wish to join the EU, the EU Treaty rules seemed to be an obvious reference point. From 1990 on all the CEECs adopted new competition acts and they gradually aligned their legislation to the EU rules.

The adoption of an identifiable body of competition law has been a clear example of Europeanization in the NMS: clear and comprehensive set of rules developed in the shadow of accession. The true character of the Europeanization process can be better understood and evaluated through a closer examination of the various dimensions of implementing EU law in the CEECs. The next section will analyze three complementary layers of transferring European law into the CEECs. The next section examines legislative implementation, then the third section elaborates on the enforcement of the implemented rules and then the institutions enforcing the implemented rules will be discussed.

### **3. MODES OF IMPLEMENTATION OF EUROPEAN LAW**

Implementation of EU law had been stamp marked by external governance and EU conditionality. This unusual process of rule transfer exhibited an exceptional influence of the EU on the competition rules of the NMS demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to do. The principles that governed the transfer and the design of economic law are largely underinvestigated. In the CEECs there seems to be a significant difference between the black letter of the law and its active enforcement. Therefore, the modes of implementation need to be studied by taking account of factors influencing the actual invocation of rules such as the interaction with market, constitutional and institutional reforms. The examination of the formal and informal constraints on law enforcement is key to capture the true impact of EU law on law enforcement and institution building. Such research can better answer questions why and how the CEECs reconcile their legal obligations with the need to address specific market failures of their transition economies and with the need to develop enforcement methods and institutional structure suitable for their local socio-economic circumstances. First, the implementation and harmonization of substantive and procedural competition rules will be reviewed. Then judicial implementation of the European case-law will be briefly discussed.

#### **3.1. Legislative implementation**

##### **3.1.1. Harmonization of substantive rules**

Throughout the whole accession process it has not been made clear what institutional and substantive solutions the candidate countries were to implement in their respective



legal system beyond the obligation to bring their competition rules in conformity with EU law. The candidate countries were never presented the exact parameters of their obligation to harmonize their competition laws. Therefore it can be argued that harmonization in their respective legislative system was required as far as it was indispensable. This is also in line with the general principle of subsidiarity as enshrined in Article 5 TEU. In other words the new Member States, just like the old Member States had a considerable latitude for deciding what kind of substantive and institutional regime they would opt for.

This freedom is, however, not unlimited. Article 4(3) TEU requires the Member States to take all appropriate measures to ensure fulfillment of the obligations arising out of the EU Treaty and facilitate the achievement of the Community's tasks. Moreover, they should, 'abstain from any measure which could jeopardize the attainment of the objectives of this Treaty'. On the basis of this Community loyalty principle the European Court of Justice has also developed the so-called useful effect doctrine within the realm of competition law. According to this doctrine the Member States may not introduce legislation or take decisions, which would deprive the competition rules of their useful effect.<sup>11</sup>

#### 3.1.1.2. Obligations flowing from Regulation 1/2003

Beyond these general obligations the Member States had to meet a number of more specific requirements that the new procedural framework has laid down. Regulation 1/2003 introduced a new procedural framework of the application of Articles 101 and 102 TFEU, where the notification system had been abolished and Article 101 became directly applicable in its entirety, thus including Article 101(3). Agreements that fulfill these requirements of Article 101 are deemed legal without the need for notification and a prior administrative decision. The new procedural framework of EU competition law forms a system of decentralized enforcement and parallel competences, where the European Commission shares its competence with the national authorities. The NCAs and the Commission form a network of public authorities co-operating closely together. This so-called European Competition Network (hereinafter ECN) provides a focus for regular contact and consultation on enforcement policy and the Commission has a central role in the network in order to ensure to consistent application of the rules.

The most important legal obligations that stemmed from Regulation 1/2003 for all the Member States were laid down in Article 3, namely the obligation for national competition authorities and national courts to apply Articles 101 and 102 as well as the convergence rule for Article 101, and in Article 35 in conjunction with Article 5, the obligation to empower national competition authorities. Article 3 of Regulation 1/2003

---

<sup>11</sup> This doctrine has no explicit legal basis in the EC Treaty used to be founded on Article 3(1)(g) (now implemented in a Protocol No. 27 on the internal market and competition) read in conjunction with Article 10 (now Article 4 (3) TEU) and Articles 81 and 82 EC (now Articles 101 and 102 TFEU). Case 267/86 *Van Eycke v. ASPA* [1988] ECR 4769, para 16.

has directly influence the substance of national competition rules. Article 3(1) defines the principle of simultaneous application of national law and competition law with the limitation posed in Article 3(2): Member States may not adopt and apply on their territory stricter national competition laws which prohibit agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1), or which fulfill the conditions of Article 101(3) or which are covered by a Regulation for the application of Article 101(3). However, this principle of convergence does not apply with regard to prohibiting and imposing sanctions on unilateral conduct engaged in by undertakings.<sup>12</sup> Article 3(3) further excludes from the principle of convergence national merger laws and laws having a different objective than the protection of competition.<sup>13</sup>

Still, leeways for national law exist even under Article 3(2) such as inherent restrictions, national group exemptions and national statutory *de minimis* rules. The block exemptions in the CEECs largely follow the European Commission's BERs; however, some CEECs have specific exemptions from the competition rules for agricultural products such as in Estonia and Czech Republic and special provisions for dominant position in the retail trade like in the Latvian competition law. One remarkable exception from the convergence rule is the application of stricter national rules for unilateral conduct. Recital 8 of Regulation 1/2003 explicitly mentions provisions regulating cases of abuse of superior bargaining power or economic dependence. The assessment of unequal bargaining power is currently subject to vigorous discussion in competition law and one of the questions being discussed is whether competition law or private law or other specific legislation should regulate this issue and if regulation exists, whether competition authorities or civil courts should enforce it. Both the EU Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003<sup>14</sup> and a recent survey of the International Competition Network<sup>15</sup> discussed the controversial topic of abuse of superior bargaining power (ASBP).<sup>16</sup>

Some jurisdictions, for example Germany, employ specific provision in their competition law prohibiting abuse of superior buying power, others employ them in

---

<sup>12</sup> Recital 8 of Regulation 1/2003.

<sup>13</sup> Recital 9 of Regulation 1/2003.

<sup>14</sup> Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final, 29.4.2009, paras 160-169, 180-181.

<sup>15</sup> ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position. [http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/ASBP\\_1.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/ASBP_1.pdf); see also F Jenny, 'The "Coming Out" of Abuse of Superior Bargaining Power in the Antitrust World', [http://www.unctad.org/sections/ditc\\_ccpb/docs/ditc\\_ccpb0008\\_en.pdf](http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf)

<sup>16</sup> Abuse of superior bargaining power typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power. ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position, p 3.

other specific contexts such as tort liability under commercial code like France, again in other jurisdictions a private civil remedy exists (Italy) or separate administrative regulation of retail chains. A separate administrative act is often the legislative model opted for by the CEECs, like in Hungary<sup>17</sup>, Slovak Republic<sup>18</sup> and a draft law in the Czech Republic.<sup>19</sup> However, in Latvia the provision is part of the competition law.<sup>20</sup> The enforcement of these rules rest with the respective NCAs except in the Slovak Republic where the Slovak Antimonopoly Office refused to be the controlling body; the fear is that present act just like its predecessor in 2003 is likely to fail due to the same weakness that is, the lack of an experienced body responsible for controlling its fulfillment and enforcement.

Table I provides an overview of the legislative implementation of Articles 10 and 102 TFEU into national competition laws.

---

<sup>17</sup> Act on Trade of 2005 lists abuses of ‘significant market power’, created basically for supermarket practices against retailers. It introduced specific rules on undertakings of significant market power and empowered the GVH (NCA) to apply the procedural rules on abuse of dominance in cases of infringements of the prohibitions enumerated by the Act on Trade.

<sup>18</sup> Act on Unfair Conditions in Business Relationships (AUC) on April 11 2008.

<sup>19</sup> There have been several attempts to introduce the prohibition of the abuse of economic dependency into national law. A proposal currently being discussed in parliament suggests that such a position on the relevant market, which enables an undertaking to establish substantially more favourable business conditions with an economically dependent undertaking than it could without such a position, shall be considered an abuse of economic dependency and shall be prohibited. It seems that at least concerning food, the described regulations will be introduced. D Bicková, A Braun, *The European Antitrust Review 2010 Section 4: Country Chapters, Czech Republic*. ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position, p 6; Commission Staff Working Paper, paras 160-169.

<sup>20</sup> Section 13(2) of the Competition Law provides that a dominant position in the retail sector is held by such market participant or several market participants, which, taking into consideration its purchasing power for a sufficient length of time and dependency of suppliers in the relevant market, has the capacity to directly or indirectly apply or impose unfair and unjustified conditions, provisions and payments on the suppliers and has the capacity to significantly hinder, restrict or distort competition in any relevant market in the territory of Latvia. Any market participant that holds the dominant position in the retail sector is prohibited from abusing such dominant position in the territory of Latvia. The relevant section then provides an exhaustive list of abuses of a dominant position in the retail sector. Act

TABLE I. Legislative implementation

Equivalent to Article 101 TFEU			Equivalent to Article 102 TFEU	
Notification procedure		Block Exemptions		Abuse of superior bargaining power
YES	NO			
Slovakia (informal guidance) Latvia	Bulgaria, Poland, Hungary, Czech Republic, Romania, Lithuania, Slovenia	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia (EU rules apply - no national ones)	Poland, Romania (more ex. of abuse), Czech Republic (presumption of dominance from ECJ case law), Slovakia Slovenia	Slovakia (Act on retail chains in force from January 2009 that focuses on the problem of supermarkets and their suppliers), Czech Republic, Hungary (buyer power), Latvia (retail trade)

Beyond these legislative alignments the CEECs also experienced some ‘unpleasant U-turns’ in the process of drafting competition rules. For example, in Hungary the Competition Act of 1990 only prohibited horizontal agreements and resale price maintenance.<sup>21</sup> The attempt to avoid introducing the prohibition of vertical agreements in 1996 was not successful due to EU pressure. In 1996 a general prohibition of vertical agreements was introduced in Hungary complemented by group exemptions for exclusive distribution, exclusive and franchise agreements.<sup>22</sup> In 2002 a new group exemption was implemented, similar to Regulation 2790/1999, which contained a safe harbour regulation for all vertical agreements with less than 30 % market share.<sup>23</sup> These changes revived the previous Hungarian approach that was more open to economic analysis and less formalistic and completely in harmony with the 1999 EC rules.<sup>24</sup>

<sup>21</sup> The Hungarian legislation at that time seemed to precede the later EC reform of vertical agreements. An often cited argument to this reform was formulated by the then head of the Hungarian competition authority, Ferenc Vissi : ‘does it make sense to condemn all vertical restraints and then (block) exempt 90% *à la* Brussels, or to accept 90% and condemn only 10% (*à la* Budapest)?’. Cited in B E Hawk, ‘System failure: vertical restraints and EC competition law’, (1995) 32(4) CMLR, 973-990, 980.

<sup>22</sup> Government Regulation 53/1997 (III.26) on exclusive distribution agreements, Government Regulation 54/1997 (III.26.) on exclusive purchase agreements, Government Regulation 246/1997 (XII.20.) on franchise agreements.

<sup>23</sup> Government Regulation 55/2002 (III.26.) on the exemption from the prohibition of the restriction of competition for certain groups of vertical agreements.

<sup>24</sup> OECD, Background report on the role of competition policy in the regulatory reform, Hungary, (2000) 10-11, <http://www.oecd.org/dataoecd/27/16/34768045.pdf> accessed 14 October 2007.

Similarly, in Lithuania the Competition Act of 1992 did not prohibit vertical agreements unless one of the parties was a dominant undertaking.<sup>25</sup>

### 3.1.2. Harmonization of procedural rules

Regulation 1/2003 also contains procedural rules with regard to the powers of the national competition authorities. Article 5 lists the powers of the NCAs when they apply Articles 101 and 102, in fact it is a list of decisions, such finding an infringement, ordering interim measures, accepting commitments and imposing fines which the NCAs can take. The Staff Commission Working Paper accompanying the Report on Regulation 1/2003 admitted that Article 5 is a very basic provision and does not formally regulate or harmonize the procedural rules followed by the NCAs or the ECN beyond Article 5.<sup>26</sup> This means that the NCAs apply the same substantive rules but in divergent procedural frameworks and they may impose different sanctions as well. These procedural differences had been to some extent addressed in Articles 11 and 12 of Regulation 1/2003 with regard to the cooperation within the ECN. Despite this fact, the Member States have voluntarily converged their procedural rules to the EU provisions applicable to the Commission and these procedures apply both for the enforcement of the Treaty provisions as well as national competition rules. Table II. below shows that the same voluntary convergence has taken place in the CEECs. However, in relation to the total number of the Member States the CEECs more often diverge or partially diverge from the provisions of Regulation 1/2003.<sup>27</sup> Moreover, despite the convergence of these procedural rules in the CEECs, in fact, the NCAs sometimes could not or did not actually enforce these rules due to other factors. This is for example, the case with regard to the power to investigate private premises in the Czech Republic, Estonia, Hungary, Romania, Slovenia and the Slovak Republic.<sup>28</sup> Similar experience has been found with regard to leniency programs. It should also be noted that the fact that most of the CEECs have introduced criminal sanctions, either for the most severe violations of cartel rules or for specific cartel cases such as bid-rigging, adds additional rules to or replaces the administrative rules on how investigations are initiated, investigation powers and rights of defence are legislated, what kind of information can be used or transmitted in the ECN, and has relevant limitations with regard to both national and as EU leniency applications. These issues of actual enforcement will be discussed further below in section 4.1.1.

---

<sup>25</sup> Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2008)57, p 5.

<sup>26</sup> Staff Commission Working Paper accompanying the Report on Regulation 1/2003, para 200.

<sup>27</sup> For comparison see ECN Working Group on Cooperation Issues, Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003 (14 April 2008), [http://ec.europa.eu/competition/ecn/ecn\\_convergencequest\\_April2008.pdf](http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf)

<sup>28</sup> Staff Commission Working Paper accompanying the Report on Regulation 1/2003 para 202.

TABLE II. Powers of NCAs: legislative implementation after Regulation 1/2003

<b>Convergence of national competition laws with Regulation 1/2003</b>	<b>YES</b>	<b>NO</b>	<b>Partial implementation</b>
<b>Power to impose structural remedies</b>	Czech Republic, Slovakia	Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia	Bulgaria, Romania
<b>Power to order interim measures</b>	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia, Slovenia	Estonia	Bulgaria
<b>Power to adopt commitments</b>	Bulgaria, Romania, Lithuania, Hungary, Slovenia, Czech Republic, Poland	Estonia, Slovakia	Bulgaria, Latvia,
<b>Power to seal business premises, books</b>	Lithuania, Hungary, Slovakia, Czech Republic, Poland	Slovenia	Bulgaria, Latvia, Romania
<b>Power to inspect private premises</b>	Estonia, Hungary, Poland, Czech republic, Slovakia, Slovenia, Romania	Bulgaria	Lithuania
<b>Calculation of fine Max. 10% of undertaking's turnover</b>	Czech Republic, Slovenia, Slovakia, Latvia, Romania, Lithuania, Bulgaria, Hungary, Poland	Estonia (fixed),	
<b>Fines on association of undertakings</b>	Hungary, Latvia, Lithuania	Estonia, Slovakia, Slovenia, Poland, Romania	Czech Republic, Bulgaria
<b>Informal guidance</b>	Latvia, Poland, Romania, Slovenia	Czech Republic, Hungary, Estonia	Lithuania, Slovakia, Bulgaria,
<b>Leniency</b>	Czech Republic, Slovakia, Hungary, Poland, Latvia, Lithuania, Romania, Bulgaria, Estonia <sup>29</sup>		Slovenia <sup>30</sup>

<sup>29</sup> There is no clearly defined leniency policy with regard to information provided by participants of cartels. However, Estonian Code of Criminal contains provisions allowing the Prosecutor's Office, the Public Prosecutor's Office or the court (at the application of the Prosecutor's Office) to terminate the criminal

**Table II Source:** Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003; International Comparative Legal Guide, Enforcement of Competition Law 2009, Global Legal Group, Cartels & Leniency 2009, Country Reports, 2009

Table II follows the overview provided on the Commission's website in the course of the review of Regulation 1/2003. The Staff commission Working Paper acknowledges that there are further differences in national procedural rules of competition law enforcement but provides neither data nor an overview of these divergences. Such a divergence can be clearly seen with regard to handling of complaints.

Table III shows on the one hand the existence of complaints in the national competition laws, and on the other, which procedural rights complainants have during the NCAs' investigation.

TABLE III. Powers of NCAs: handling complaints

<b>Convergence of national competition laws with Regulation 1/2003 and other enforcement tools</b>	<b>YES</b>	<b>NO</b>	<b>Partial implementation</b>
<b>Complaints</b>	Romania, Lithuania, Latvia, Bulgaria, Hungary, Romania	Czech Republic, <sup>31</sup> Slovakia, <sup>32</sup> Poland, <sup>33</sup> Slovenia <sup>34</sup>	Estonia <sup>35</sup>

proceedings initiated against the suspect. Global legal group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, p 62.

<sup>30</sup> A true leniency program does not exist. However, according to article 76 of the Competition Act the fine applicable to an undertaking in a cartel may be waived by the Office if the certain conditions are fulfilled. Global Legal Group, Z. Zoric, N. Pipan Nahtigal, Cartels & Leniency 2009, Chapter 37, Slovenia, p 219.

<sup>31</sup> Article 21 of the Competition Act declares that competition law proceedings shall be initiated *ex officio*.

<sup>32</sup> According to Article 25 of Slovak Competition Act proceedings in the case of an agreement restricting competition shall always commence on the Authority's own initiative. The Authority may initiate the proceedings on its own initiative and on the basis of a written petition by an individual or a legal entity that is not an undertaking pursuant to this Act. On the basis of a request submitted by an individual or a legal entity filing a written petition, the Authority shall inform them in writing of further procedure regarding the matter within two months following the date of receipt of the request. Anti-cartel Template, Slovakia, ICN Cartels Working group, Subgroup: Enforcement techniques, p.5A, 2009.

<sup>33</sup> The Act of 16 February 2007 abolished the institution of proceedings launched on request. The antimonopoly proceedings in the cases of competition restricting practices are now initiated on *ex officio* basis. Motions lodged do not bind the OCCP President and constitute only a source of information. Anti-cartel Template, Poland, ICN Cartels Working group, Subgroup: Enforcement techniques, p 5A, 2009.

<sup>34</sup> The Office initiates procedure *ex officio* but the basis for the initiation of the procedure is information which the Office gathers from complaints and leniency. Anti-cartel Template, Slovenia, ICN Cartels Working group, Subgroup: Enforcement techniques, p 5A, 2009.

<sup>35</sup> The rights of complainants depend on the type of proceedings. In administrative proceedings complainants can provide their opinion and objections in writing or orally and they have access to non-confidential documents during the whole proceedings. In misdemeanour proceedings the law sets no specific rights for

<b>Legitimate interest of complainants</b>	Bulgaria, Latvia,	Lithuania, <sup>36</sup> Hungary, Romania	
<b>Access to non-confidential version of statement of objections</b>	Bulgaria, Lithuania, Latvia, Hungary		Romania <sup>37</sup>
<b>Express its opinion during investigation,</b>	Bulgaria, Lithuania, Latvia,	Hungary	Romania
<b>Reasoned rejection of complaint</b>	Bulgaria, Lithuania, Latvia, Hungary, Romania		
<b>Appeal decision of NCA</b>	Latvia, Bulgaria, Hungary	Lithuania	

With regard to procedural rules on complaints and the rights of complainants during investigation the CEECs largely diverge from one and other. While some countries provide extensive rights for complainants more or less on similar conditions as the European Commission<sup>38</sup> in a number of countries the NCAs initiate proceedings exclusively on their own initiative and use complaints merely as a source of information. Differences, however, still exist among those countries that grant certain procedural rights to complainants. Lithuania grants similar rights to complainants as the undertakings investigated except for the possibility to appeal illegal actions of investigators. Moreover, the right to request the start of investigation by the NCA is limited to undertakings whose interests have been violated due to restrictive practices, entities of public administration and associations or unions representing the interests of undertakings and consumers. In addition, complainants also have a right to request the

---

complainants, however they have the right to a reasoned decision should their complaint not be followed by investigation. The same rules apply in criminal proceedings. Global legal Group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, pp 56-57.

<sup>36</sup> On the basis of Article 24 of the Lithuanian Competition Act the right to request the start of investigation by the NCA is limited to undertakings whose interests have been violated due to restrictive practices; entities of public administration and associations or unions representing the interests of undertakings and consumers.

<sup>37</sup> Access to the file, participation in hearings and the right to be heard depends on the discretion of the Romanian NCA.

<sup>38</sup> The legal framework for handling of complaints has been laid down by Regulation 1/2003, Regulation 773/2004 and the Notice on handling of complaints in 2004. In short, Article 7 of Regulation 1/2003 has taken over from Regulation 17 the possibility for persons who are able to show a legitimate interest to be (formal) complainants that enjoy certain procedural rights. The procedural rights are set out in Article 6 of Regulation 773/2004 which notably foresees that the complainant shall be provided with a copy of the non-confidential version of the statement of objections and they have the opportunity of can expressing their views at the oral hearing of the parties to which a statement of objections has been addressed. Moreover, the Commission has to provide reasoned opinion if it does not pursue a complaint and this decision of the Commission is subject to appeal to the Courts.



protection of their commercial secrets at any stage of the proceedings.<sup>39</sup> In Latvia persons whose rights and lawful interests have been or may have been infringed due to the violation can file a complaint. They have access to the non-confidential version of the file and statement of objections and they also have the right to submit evidence and express opinion during the entire investigation.<sup>40</sup> In Bulgaria the new competition law envisages stronger guarantees for protecting the rights of interested third parties in the proceedings. The application can be lodged by the persons, whose interests have been affected or threatened by an infringement of the Competition Act, which means that for a formal application a legitimate interest is necessary to be shown. An interested party, affected by the claimed violation has the right to receive statements of objections, to submit a response as well as supporting evidence in the course of the proceedings. The complainant has the right to appeal the various acts of the NCA.<sup>41</sup>

Since 2005 the Hungarian Competition Act distinguishes between informal and formal complaints. The NCA (GVH) argued that because the proceedings of the GVH are started *ex officio*, the complainant and the person making an informal complaint do not become parties, not even when the GVH initiates its proceeding based on the document which they submitted. Formal complaints are made by way of using a complaint form and supplying a statement of relevant facts of the alleged competition law infringements and the main details of the complainant and the undertaking concerned. If a submission does not include all this information, the GVH will treat it as an informal complaint and the rights of the complainant are much reduced. In particular, an informal complainant has no right of access to the file, and no right to appeal if the complaint is rejected.<sup>42</sup>

Poland, Slovakia, Slovenia and the Czech Republic handle complaints as mere sources of information without granting procedural rights to the complainants. These differences in the various ways of handling complaints have relevant implications for the enforcement of both national and EU rules. First, complaints are not only significant sources of market information for NCAs, but complainants' participation in the competition law proceedings forms relevant procedural safeguards of good administration. On the one hand, while the rights of complainants are not 'as far reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation' and their limits 'are reached where they begin to interfere with those companies' right to a fair hearing',<sup>43</sup> both too broadly and too narrowly defined rights of complainants can lead to problems of administrative accountability *vis-*

---

<sup>39</sup> Global Legal Group, Gumbis, J K.Kačerauskas, Enforcement of Competition Law 2009, Chapter 16, Lithuania, p 102.

<sup>40</sup> Global Legal Group, Gumbis, J K.Kačerauskas, Enforcement of Competition Law 2009, Chapter 15, Latvia, p 94.

<sup>41</sup> Bulgaria, Annual Report CPC, 2008, p.12; Global Legal Group, P. Petrov, Enforcement of Competition Law 2009, Chapter 7, Bulgaria, p 41.

<sup>42</sup> See Hungarian Competition Act Article 43 G-I.

<sup>43</sup> *Joined Cases 142 and 156/84, BAT and Reynolds v Commission [1987]*, para. 20

*à-vis* the undertakings concerned. On the other, granting certain procedural rights for those persons and organizations, in particular end-consumers whose economic rights have been adversely and directly affected by anti-competitive practices,<sup>44</sup> also serves the purpose of sufficiently accounting for the representation of these interests in the procedure of the NCAs. NCAs are administrative authorities that must act in the public interest, not a judicial authority the function of which is to safeguard individual rights. Moreover, denying participation rights to complainants and structuring the procedure exclusively around the rights of the defence of the undertakings targeted is inconsistent with the overall aim of the procedure: effective enforcement/application of competition rules. It is also incongruous with the ultimate aim of these rules: ensuring consumer welfare. These arguments are also relevant in the light of the decentralized enforcement of Articles 101 and 102 by the NCAs as the varying degrees of participation rights in the national procedures can jeopardize the uniform application of Community law.

The interplay between handling of complaints, participation rights and private enforcement of competition law as alternative ways of enforcement should be addressed. At Community level the present legislative framework is based on a two fundamental enforcement principles established by the CFI in its judgment in *Automec II*.<sup>45</sup> First, the CFI said that the Commission is entitled to apply different degrees of priority in dealing with complaints submitted to it and justify it on the basis of the Community interest.<sup>46</sup> In this connection the CFI stated that unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations *inter se*, an administrative authority must act in the public interest. Accordingly, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied in the various cases brought to its notice. Second, the Court stated that reasons pertaining to procedural economy and the sound administration of justice militate in favour of the case being considered by the courts to which related questions had already been referred.<sup>47</sup> Thus, in fact the Commission has a wide discretion on setting its enforcement priorities in order to discipline complaints and providing complainants with a credible alternative avenue is conceptually a correlate, or even a precondition for NCAs' discretion for priority setting and case selection. The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of

---

<sup>44</sup> The CFI in *BEMIM* ruled that an association of undertakings could claim a legitimate interest in making an application within the meaning of Article 3 of Regulation 17 even if it was not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided, however, that among other things the conduct complained of is liable adversely to affect the interests of its members. Joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* para 112; T-114/92 *BEMIM v Commission* [1995] ECR II-147, paragraph 28.

<sup>45</sup> Case T-24/90 *Automec Srl* [1992] ECR II-02223.

<sup>46</sup> Case T-24/90 *Automec Srl* [1992] paras 83-84.

<sup>47</sup> Case T-24/90 *Automec Srl* [1992] para 87.

his rights before the national courts.<sup>48</sup> In view of that, the substitution between participation rights for complainants in NCAs' administrative procedures and private enforcement of competition law as credible alternative of law enforcement merits further consideration.<sup>49</sup>

### 3.1.3. Interim conclusions on legislative implementation

In sum, two conclusions can be formed about the legislative implementation of Regulation 1/2003 in the CEECs. The rules of Regulation 1/2003 were mostly targeted at uniformity and consistency in the decentralized enforcement system of EU competition law. These rules effected the way national authorities have to enforce EU competition rules, but have not imposed further reaching obligations on the new Member States. While it could be concluded that Regulation 1/2003 has not stood in the way of the CEECs to adopt competition rules different from the EU Treaty (except no stricter rules in the case of Article 101 TFEU), it has definitely formed a further incentive for these countries to converge or even copy the EC rules in their own competition legislation. It has clearly been the idea that implementing similar or identical rules on national level will ease the parallel application of national and EU competition law and help to achieve a uniform and consistent enforcement system. However, there is a part of national competition rules which are visible and mostly converge with EU rules such as the powers of NCA summarized in Table II and there is a substantial part of national procedural rules which are less visible and where substantial differences exist. These invisible procedural rules, however, can considerably influence the way EU and national competition rules are enforced and may eventually lead to different outcomes.

The implementation of Regulation 1/2003 in the CEECs has taken place as part of an extraordinary law transfer. The CEECs had to create a functioning market economy and a competitive business environment within a short period of time. The

---

<sup>48</sup> Case T-24/90 *Automec v Commission* (Automec II)[1992] ECR II-2223 paras 91-94, Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ 1993, C39/6.

<sup>49</sup> Since the CFI's judgment in *Automec II* the Commission has maintained a policy on handling of complaints grounded on the potential complainants' access to private law actions before national courts as an alternative or even more efficient avenue of law enforcement, thus justifying the Commission' leeway to reject complaints. The question, however, arises whether national courts can indeed adequately secure potential complainants' rights and more specifically whether consumers have the legal and economic infrastructure to file private actions before national courts. The efficiency of the current model where consumers' participation rights in competition law proceedings are restricted, among other reasons, by relying on the argument that they can effectively enforce their rights before the national courts can be criticized by on the basis of the various limitations on consumers' capacity and motivation to file private law action but also because of the limited competence and in certain jurisdictions the limited readiness of civil courts to rule on business behaviour. There is an overall unresolved problem of available low cost collective actions for consumers to claim damages for competition law violations in Europe. In fact, there are two principal reasons why the efficiency of the present EU model can be questioned. On the one hand, it does not seem to correspond to the ultimately declared goal of EU competition law, i.e. consumer welfare. On the other, it does not seem to correspond to the ultimate actual goal of EU competition law, i.e. effective and efficient application of Articles 101 and 102 TFEU.

implementation and enforcement of competition law had a notable role in the transition from planned economy to market economy. Neither the Copenhagen criteria, nor the Europe Agreements, nor the White Paper for the preparation for accession contained an explicit legal obligation to copy the relevant Treaty provisions. The candidate countries' economic integration into the Community was conditioned upon the legal obligation to bring national law into general harmony with EU law, but there was no direct and clear obligation to adopt identical substantive rules with the EU model. Due to the lack of an identifiable body of competition law<sup>50</sup> these countries had to build competition laws and more importantly create a competition culture from the scratch. Faithful adoption of EC rules has been in line with the new Member States desire of rapid accession and their joint interest with the EU to demonstrate fast and visible results. The process of competition law transfer has been governed by the clear determinacy of the accession agenda by EU conditionality.<sup>51</sup>

One explanation for the above mentioned 'informal harmonization' process of substantive and procedural rules could lie in the spill-over effects of the high convergence of substantive rules and the influential role of the European Competition Network. With the introduction of the decentralized enforcement of European competition law the public enforcement output of national competition authorities shifted to the focus of attention at EU level. Through the ECN there is regular discussion and cooperation among the NCAs with regard to the enforcement of European competition law but also national rules such as leniency programs and sanctions, which are discussed in the working groups of the ECN. While the NCAs are being held accountable and they are evaluated by national control and audit mechanisms such as annual reports submitted to the parliaments, there seems to be a mechanism of 'peer accountability' present within established international networks such as the ECN, where the annual reports of all NCAs are published in English on the website of the Commission's DG Competition.<sup>52</sup> Even though the ECN was in the first place created in order to guard uniform and consistent enforcement of Articles 81 and 82 EC, it has proved to be a notable forum for discussing enforcement methods, for mutual learning and even informally converging enforcement policies as the examples of the Leniency Model and the Article 82 review and guidelines show. The ECN is a significant channel of Europeanization and harmonization in a bottom-up perspective. The ECN and other informal cooperation networks such as the ICN and the OECD evaluation and control put increasing pressure on the agencies to quantify their enforcement and advocacy work.<sup>53</sup> This process is further generated by reputation

---

<sup>50</sup> The competition legislation that existed in the CEECs before World War II was set aside and became invalid after 1945.

<sup>51</sup> F Schimmelfennig and U Sedelmeier 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) *Journal of European Public Policy* 661-679

<sup>52</sup> [http://ec.europa.eu/comm/competition/ecn/annual\\_reports.html](http://ec.europa.eu/comm/competition/ecn/annual_reports.html) accessed on 8th October 2007.

<sup>53</sup> However, it has to be admitted that quantification of the enforcement work of national competition authorities lacks clearly defined and commonly agreed benchmarks. I Maher, *The Rule of Law and Agency: The Case of Competition Policy*, IEP WORKING PAPER 06/01 (March 2006) 4, see also W E Kovacic,

mechanisms such as the OECD country reports, the International Competition Network or even the Global Competition Review rankings.<sup>54</sup> These mechanisms make actual enforcement modalities more visible and may even induce competition among the agencies. Even though enforcement methods legislated in soft law instruments on EU level does not oblige Member States to follow those guidelines, there is certainly some pressure both from the Commission as well as within the ECN to adopt similar instruments in national legislations. A prime example is the leniency program, which has been adopted in 24 out of the 27 Member States and in 8 out of the ten CEECs being investigated in this paper.

### 3.2. Judicial implementation of the European competition case-law

Implementation of EU competition law by the judiciary can be investigated in two kinds of situations. National courts apply European competition law when they review administrative decisions of NCAs, whose decisions are subject to judicial review by the national courts. Moreover, the national courts have the competence to enforce competition law in private law claims, especially in damages claims based on national tort law. In both cases courts may make references to EU case-law, which can provide a proxy about the level of judicial implementation<sup>55</sup> Table IV represents an overview of the judicial implementation of EU competition law by national courts in the CEECs.

TABLE IV. Judicial implementation

Application of Articles 101 and 102 TFEU by national courts	Judicial review	Private enforcement Legal basis in competition law
Hungary (modifying NCA decision ) Lithuania (Public procurement for the assignment of concessions in the sector of waste collection)	Hungary (national courts highly converge with NCA) Slovakia Czech Republic Bulgaria Lithuania Romania Latvia Slovenia Poland	Bulgaria Estonia Latvia Lithuania Romania Hungary Slovenia Lithuania (successful case)

There are several difficulties with studying judicial implementation in the CEECs. While in some countries it was considered that the reference by the NCA to European competition

Using evaluation to improve the performance of competition policy authorities, background Note, OECD, Evaluation of the actions and resources of competition authorities, DAF/COMP(2005)30.

<sup>54</sup> I Maher, 'The Rule of Law and Agency: The Case of Competition Policy', IEP Working Paper 06/01 (March 2006) 4.

<sup>55</sup> Cseres, K.J. J. Langer, Judicial review in Hungarian competition law –*Tetra Laval* à la Hongroise in: Lavrijssen, S. A. Ottow, *Judicial review in competition law and economic regulation*, Europa Law Publishing, 2008 forthcoming

law jurisprudence improved and supported effective law enforcement,<sup>56</sup> the national courts in general seem to be reluctant to apply EU competition law. The degree of application of Articles 101 and 102 by national courts is much lower than by administrative agencies.<sup>57</sup> Moreover, national courts do not properly notify the Commission about cases where Articles 101 and 102 are applied and this is striking in the case of the CEECs. On the Commission website, where national judgments are registered there are two single cases from the CEECs, one from Lithuania on public procurement for the assignment of concessions in the sector of waste collection and the other case from Hungary.<sup>58</sup> The role of national courts in implementing European law cannot be underestimated in the effective enforcement of competition law. The role national courts play in the effective enforcement of competition law will be further discussed in the next section on judicial enforcement. In the next section the active invocation of the competition rules are investigated with regard to the NCA first and then with regard to the judicial power.

#### **4. ENFORCEMENT: ACTIVE INVOCATION OF THE IMPLEMENTED RULES**

The actual impact of EU law in the investigated legal systems is believed to be confirmed once active enforcement is studied. The new enforcement models of the European Commission have a strong influence in all the Member States, however, actual application of the models is where the CEECs show a different picture. In the CEECs there are significant socio-economic factors both formal and informal constraints that have a decisive impact on whether and how the implemented rules are actively invoked. These socio-economic factors are related to the transition of the economy, to the lack of previously existing market mechanisms and experience with free markets and market regulation interaction with market, constitutional and institutional changes, and the revival of private law and private law courts in all the investigated countries.

The influence of economic institutions on economic performance is fundamental in measuring successful law enforcement and in understanding why a certain legal rule proves to be successful or fails in different institutional contexts. This theory of the relevance of institutions is an imperative insight when analyzing law and enforcement in the CEECs. Institutions consist of formal and informal rules that determine the behavior of individuals and organizations. Formal rules such as laws and regulations and informal rules such as constraints on behavior derived from culture, tradition, custom and attitudes. Formal rules and informal constraints are interdependent and in constant interaction. Similar measures will lead to different outcomes because of diverging informal rules and informal constraints in different economies. Institutional

---

<sup>56</sup> OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 5, ICC, EC Regulation 1/2003: views on its functioning, prepared by the Commission on Competition, Document no.225/653, 2008, p 17.

<sup>57</sup> Staff Commission Working Paper accompanying the Report on Regulation 1/2003, para 270.

<sup>58</sup> Hungary: Gazdasági Versenyhivatal / Magyar Államvasutak ZRT 7 K 34364/2006/16; Lithuania: Tėv Baltija / Kauno m. savivaldybės administracijos direktorius (Director of administration of the municipality of the city of Kaunas) Vivil case 2- 1068- 52/ 05.

change is a process that is subject to path dependency. Institutional path dependency is the downstream institutional choices inherent in any institutional framework and which makes it difficult to alter the direction of economy once it is in a certain institutional path. Formal rules can be changed overnight, but informal constraints change slowly.<sup>59</sup> These insights from institutional economics<sup>60</sup> proved helpful in explaining the experience of the transition process from central planning to a market economy in the CEECs. The failure to take institutions into account when designing reform policies has generated serious difficulties and challenges.<sup>61</sup>

Neither the CEECs nor the undertakings in these countries were granted any transitional periods for the implementation of the new, decentralized system of EU competition law.<sup>62</sup> Regulation 1/2003 delegated an active role to local actors and established a system of close cooperation between the EU and the national authorities. In the new framework national competition legislations operate in parallel with EC competition law and the national competition authorities and/or courts apply both national and European competition rules. Concerning the enforcement of the EU competition rules full cooperation between the Commission and the national authorities of the Member States is necessitated by the fact that the European competition rules became directly applicable in the whole Union.<sup>63</sup> The new enforcement system inherently involved a process of increased Europeanization/convergence of competition law in all Member States. The parallel application of national and EU rules as well as the close institutional cooperation between national authorities and the Commission form significant channels of the convergence process. The next two sections will disentangle further this Europeanization process and its constraints by looking at the administrative and judicial enforcement of competition rules.

#### 4.1. Administrative enforcement by the NCAs

The obligation for the NCAs to apply Articles 101 and 102 parallel to national competition law is laid down in Article 3(1) of Regulation 1/2003. The enforcement

---

<sup>59</sup> D C North (1997), 'The Contribution of the New Institutional Economics to an Understanding of the Transition Problem', *WIDER Annual Lectures*, Helsinki, March 1997, 13.

<sup>60</sup> The relevance of institutions has been already emphasized by Stiglitz, who argued that stages of development indicates how far an economy has advanced to generate institutions necessary for well-functioning market economy and the capability of economy's institutional apparatus to generate wealth for its citizens. J Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm', in: *Review of Development Economics*, (Vol. 6, 2, June, 2002), Special Issue on Democracy, Participation and Development, 163-182, 164.

<sup>61</sup> OECD, OECD Global Forum on Competition, Small economies and competition policy: background paper, CCNM/GF/COMP(2003)4 , 9-10.

<sup>62</sup> The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. J Känkänen, 'Accession negotiations brought to successful conclusion', *Competition Policy Newsletter* (2003/1) 26.

<sup>63</sup> The interaction between the European Commission and the national competition authorities is required by Article 11 of Regulation 1/2003.

rate of the NCAs has been discussed in the Staff Commission Paper accompanying the Report on Regulation 1/2003. The only remark the Staff Working Paper makes to the enforcement record of the CEECs is that the rate of application of Articles 101 and 102 is influenced by the period of applicability of these rules.<sup>64</sup> Between 2004 and 2009 the number of decisions that the NCAs of the CEECs took by applying Articles 101 and 102 varies between 3 (Estonia, Latvia, Bulgaria 4, Lithuania 5, Czech Republic 6) and 9 (Slovak Republic, Poland, Slovenia 8). Hungary has brought 17 cases to the stage of a decision and Romania has initiated 6 cases but reached in no cases a decision.<sup>65</sup> It is on several points highly debatable how and to what degree the number of cases brought by NCAs indicates the effectiveness of their enforcement. It can however, be observed that these numbers do not significantly deviate from the average of the number of decisions in the other Member States, where a few countries like Italy (40), Spain (27), France (56), Germany (45), the Netherlands (31) and Denmark (27) has decided a large number of cases but the other Member States demonstrate a similar average as the CEECs.

Looking further into national practice of competition law enforcement some post-transition characteristics are still present, however, the competition agencies seem to operate with fairly similar output as their colleagues in the old Member States. Most of the CEECs had difficulties with enforcing the substantive competition rules in their initial startup as an agency. Enforcement powers were often insufficient to conduct investigations, reach decisions and impose persuasive fines.<sup>66</sup> Being charged with several market regulatory tasks, many NCAs devoted much time and resources to these wider activities such as unfair competition or consumer protection. Moreover, they often lacked priority setting or strategic planning and were obliged to follow on all complaints.<sup>67</sup> For example, Poland had no possibility to dismiss meritless complaints by private parties or the Czech Republic required firms that had a dominant position according to a legislative presumption of a fixed market share (30%) had to notify and register with the NCA.<sup>68</sup> This seems to be the case still in Bulgaria. This phenomenon could be well understood by looking at the inherent nature of the transition economies,

---

<sup>64</sup> Staff Commission Working Paper accompanying the Report on Regulation 1/2003 paras 148-149.

<sup>65</sup> <http://ec.europa.eu/competition/ecn/statistics.html>, 2.

<sup>66</sup> OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 3; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Poland, DAF/COMP/GF/WD(2009)76, p 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Bulgaria, DAF/COMP/GF/WD(2009)56, p 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, p 6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, p 3.

<sup>67</sup> OECD, Global Forum on Competition, Challenges faced by young competition authorities, Note by the Secretariat, DAF/COMP/GF (2009)3/REV1, pp 4-5, 13-14.

<sup>68</sup> OECD, Global Forum on Competition, Challenges faced by young competition authorities, Note by the Secretariat, DAF/COMP/GF (2009)3/REV1, p 18.



namely the fact that they first had to build markets and just after an initial period could begin with market surveillance in the classical sense. The creation of a level playing field required fair trading rules. Competition authorities were often used for the correction of a wide range of market failures as a substitute for other market regulatory tools. For example, consumer protection as such was either non-existent or it was in its infancy at the beginning of the 1990s. There was neither a firm legislative nor an institutional basis for it. Although protection of consumers was not the main goal of either competition legislation or competition authorities, some of the CEECs adopted competition acts including rules on unfair trade practices. This integrated approach was also reflected in the competences of the agencies enforcing these laws. Moreover, market failures in the field of specific sectors, like telecommunications or electricity had been addressed by competition law tools in the absence of sector specific regulation. Thus besides the 'classical' competition rules the CEECs have often adopted competition legislation covering other relevant fields of market law such as unfair competition, advertising, unfair trade practices or even sector regulatory issues.

When the privatization process had been completed and sector regulatory agencies were formed the NCAs could turn to more traditional competition law enforcement, however, many of them still have wider regulatory tasks assigned to them. These inefficiencies have also been dealt with, for example, by following the enforcement tools as the Commission in the course of the modernization. However, even the strengthened enforcement tools have not always delivered the expected results in actual enforcement. One example is leniency programmes which are often praised as the model for procedural convergence and a clear result of the cooperation mechanism within the ECN. All the CEECs have a clearly defined leniency program, except Slovenia. However, even this jurisdiction applies some other provisions that make termination of proceedings or fine reduction possible. Despite the fact that the majority of the CEECs have a leniency program, their application has been limited so far. The first adopted programmes proved to be unproductive due to insufficient transparency or uncertainty about eligibility. Many programmes have therefore been revised and slowly the programmes began to operate with a few number of cases in each country. The Czech Office for the Protection of Competition applied its leniency program for the first time in 2004 with regard to a cartel agreement in the energy drinks market. Poland had its first leniency case in a cartel agreement in 2006 but majorly revised its 2004 leniency programme in 2009 due to several shortcomings in the previous model.<sup>69</sup> In the Czech Republic, Hungary and in Slovakia a marker system exists as well.<sup>70</sup> However, in the Czech Republic the decision to grant a 'marker' lies fully at the

---

<sup>69</sup> Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines,

<sup>70</sup> Global Legal Group, Zahradnik, M. H. Madárová., *Cartels & Leniency 2009*, Chapter 36, Slovakia, p 214; Global Legal Group, Braun, A. Bicková D., *Cartels & Leniency 2009*, Chapter 10, Czech Republic, p 54; Global Legal Group, Bacher, G. J. Budai *Cartels & Leniency 2009*, Chapter 18, Hungary, p 102.

discretion of the Antimonopoly Office.<sup>71</sup> In Hungary leniency was applied for in a few cartel cases, but only one of these cases was already closed by the decision of the Competition Council in 2007.<sup>72</sup> However, Hungary has had a leniency programme for provisions on the prohibition of unfair and restrictive market practices since 2009.<sup>73</sup> In the next section the implications criminal law enforcement of competition law may have for the administrative enforcement will be discussed.

#### 4.1.1. The interplay with criminal enforcement

As has been mentioned above there are also some recent reforms in the CEECs that go beyond the present EU enforcement rules and may influence the administrative enforcement of national and EU competition rules. As Table VII shows, most of the CEECs have introduced criminal sanctions either for the most severe violations of cartel rules or for specific cartel cases such as bid-rigging. In Estonia competition offences became criminal offences on 1 September 2002,<sup>74</sup> Hungary<sup>75</sup> have introduced criminal sanctions in 2005 and many other countries followed the trend the last four years, recent examples being the Czech Republic, Latvia and Slovakia. Actual invocation of criminal sanctions and procedures has only taken place in Estonia.

TABLE VII. Administrative and criminal sanctions in the competition law enforcement

<b>Administrative law sanctions</b>	Estonia, Bulgaria, Latvia, Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia,	Slovenia	
<b>Criminal law sanctions</b>	Czech Republic, Estonia, Romania, Slovenia, Slovakia, Latvia Active invocation: Estonia	Bulgaria	Hungary (bid-rigging), Poland (bid-rigging),

<sup>71</sup> Global Legal Group, Braun, A. Bicková D., *Cartels & Leniency 2009*, Chapter 10, Czech Republic, p 54.

<sup>72</sup> The Competition Council found the leniency notice of the GVH to be applicable to a vertical agreement case. The Competition Council made it clear that despite the fact that according to international and Hungarian legal practice leniency policy is applied to horizontal agreements, it regarded leniency policy to be applicable and to be applied in the case at hand. Vj-81/2006.

<sup>73</sup> Leniency policy related provisions of Act No LVII of 1996 on the prohibition of unfair and restrictive market practices (2009).

<sup>74</sup> Penal Code was amended to allow for legal persons to be held criminally liable for competition offences (Art 399 - 402) with a penalty payment of up to 250 million EEK (16 million EUR). Physical persons can be punished by means of a fine (up to 25 000 EEK, or 1600 EUR, calculated by minimum income) or up to three years imprisonment. The ECB investigates criminal cases together with public prosecutors. Liability is imposed by way of court judgment. A Proos, *Competition Policy in Estonia* in K J Cseres, M P Schinkel, F O W Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham 2006).

<sup>75</sup> Section 14 of the Act XCI of 2005 amending the Hungarian Criminal Code, Act IV of 1978 and other acts

The legislative implementation of criminal sanctions for the enforcement of competition law in the CEECs was mentioned above. All the countries except Bulgaria have introduced criminal sanctions for at least certain severe cases of cartel formation. However, practical experience exists only in Estonia. The first criminal judgment was enforced in the field of prohibited agreements. The Estonian experience shows that criminal proceedings are complicated and time-consuming but sometimes the only instrument to establish and stop a violation. Close cooperation between the NCA and the Public Prosecutor's Office and the Police Board seemed indispensable and delivered valuable practical experience.<sup>76</sup> The Estonian procedural rules related to competition law enforcement are rather complicated as three types (administrative, misdemeanor and criminal) of proceedings are possible. This has caused problems in practice and in number of occasions the ECA's decisions made rendered in misdemeanor proceedings have been overruled due to procedural infringements. The choice of the type of proceedings and hence, the applicable measures and sanctions, is to a great extent in the ECA's discretion, as there is no case law setting out clear principles in the respect. Furthermore, in some instances, it is theoretically possible that the same case could be investigated simultaneously in different proceedings. Therefore, it is often difficult to predict possible consequences of competition law violations.<sup>77</sup> The effectiveness of criminal sanctions and the consequences of this type of enforcement methods will have to be checked in the future development of those countries' practices.

The Estonian practice illustrates some of the major problems with regard to introducing criminal law enforcement besides administrative law enforcement. One of the main problems is the division of competences between the NCAs as the administrative enforcer of competition law, and the public prosecutors as the enforcers of criminal law. The NCAs are competent to investigate alleged infringements of competition law, including the enforcement of administrative offences and the imposition of administrative fines on both individuals and undertakings. However, where the competition law infringement is a criminal offence the competence for the criminal prosecution of the individual, for example, switches to the public prosecutor, while the competence for the prosecution of the undertaking remains with the NCA. Another relevant concern is related to leniency applications. Leniency programs often do not cover criminal sanctions. Accordingly, the undertakings may be prevented from fines or get a reduction of the applicable fine but the individuals cannot escape criminal sanctions. This means that the interests of the undertaking and its employees may diverge and hamper leniency application altogether as, on the one hand, it delays the application and on the other, hinders the efficient collection of information from individual employees for which an undertaking must rely on in order to file a successful

---

<sup>76</sup> Annual Report, 2004, Estonian Competition Board, p.3

<sup>77</sup> Global Legal Group, Tamm. E., K.Paas., Enforcement of competition law 2009, Chapter 9, Estonia p.214

leniency application.<sup>78</sup> An NCA's promise of immunity from fines or not to bring a case does not automatically bind a criminal prosecutor. This is even less so in countries where prosecutors have no discretion as to whether they prosecute a case if there is sufficient evidence. Such a discretionary power does by definition exist after a leniency application but not in countries where it is mandatory to prosecute criminal offences. Thus the concern is that the diverging interests of undertakings and individuals increases when competition law infringements trigger criminal liability and therefore criminal prosecution decreases the likelihood of leniency applications and therefore can negatively affect administrative enforcement. It is generally accepted that a criminal offence must be accompanied by leniency rules for automatic immunity, otherwise the leniency programme loses its attractiveness and the detection probability be significantly reduced.<sup>79</sup> One way to overcome this problem is represented by the Estonian legislation which extends the effects of a leniency grant to criminal prosecution.<sup>80</sup>

Furthermore, the differences between national criminal and competition laws present significant challenges to the successful investigation and enforcement of EU competition rules within the ECN. For example, Article 12 (3) of Regulation 1/2003 only permits the exchange of information between NCAs where national law imposes sanctions of similar kind.<sup>81</sup> Those Member States that impose criminal sanctions for the violations of Articles 101 and 102 could be restricted from fully benefiting from the exchange of information within the ECN and at the same time this would jeopardize the effective, proportionate and dissuasive application of EU competition law.<sup>82</sup>

If one accepts that the impact of Regulation 1/2003 was also meant to improve the enforcement of both EU and national competition rules then introducing harsh criminal sanctions can be considered on the one hand, as an attempt of the CEECs to live up to this goal while, on the other hand, representing a potential conflict between two enforcement tools with the same goal.

---

<sup>78</sup> D.Schroeder, S.Heinz, Requests for leniency in the EU: experience and legal puzzles in: K J Cseres, M P Schinkel, F O W Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham 2006) pp 161-163.

<sup>79</sup> Wagner-von Papp, Florian, Criminal Antitrust Law Enforcement in Germany: 'The Whole Point is Lost If You Keep it a Secret! Why Didn't You Tell the World, Eh?' (April 5, 2010). Criminalising Cartels: Critical studies of an interdisciplinary regulatory movement, C. Beaton-Wells, A. Ezrachi, eds., Hart Publishing, Forthcoming . Available at SSRN: <http://ssrn.com/abstract=1584887>

<sup>80</sup> There is no clearly defined leniency policy with regard to information provided by participants of cartels. However, Estonian Code of Criminal contains provisions allowing the Prosecutor's Office, the Public Prosecutor's Office or the court (at the application of the Prosecutor's Office) to terminate the criminal proceedings initiated against the suspect. Global legal group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, p 62

<sup>81</sup> See also Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, point 28 c,

<sup>82</sup> A Dawes, O Lynksy, 'The ever-longer arm of EC law: the extension of Community competence into the field of criminal law', (2008) 45 CMLR 131.

#### 4.1.2. Interim conclusions on administrative enforcement

In the absence of a Community blueprint or a clear methodology for effective enforcement methods and optimal institutional design all the Member States were left a considerable leeway to adapt the *acquis* to their own institutional preferences and legal system. Despite this freedom the NMS are ambitiously adopting the latest developments in the Commission's competition law enforcement practice. The CEECs have tried to improve detection methods by strengthening investigation powers, establishing special cartel units, increasing corporate fines, introducing criminal sanctions, and professional disqualification and leniency programmes. Direct settlement exists in the Czech Republic since 2008 in the form of so called alternative solution of certain competition cases and was first applied in the summer of 2008.<sup>83</sup> A chief economist has been appointed in Hungary in 2006 and in the Czech Republic in 2009.<sup>84</sup>

There is a need to systemize the available enforcement methods in the national competition rules, but also to investigate what the formal or informal constraints are to actively invoking these enforcement schemes in specific country settings. The discrepancy between law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules often lacks active enforcement. The example of generally adopted but scarcely applied leniency programmes is noteworthy. Another example is private enforcement, where legislative steps have been taken but outsourcing enforcement to the private sector has gained little ground. The relevance of private enforcement of competition rules for the development of European private law is fundamental, and will be further discussed in section 4.2.3. The enforcement of competition rules by the national courts is an essential though rather limitedly examined area of the enforcement of competition law. The next section will address both judicial review procedures and private enforcement.

### 4.2. Judicial enforcement by national courts

#### 4.2.1. Judicial appeal

The Staff Commission Working Paper remarks that:

'[J]udgments in the Member States that joined the EU in 2004 and 2007 involving the application of Article 101(3) are still relatively infrequent which can to a certain extent be attributed to the fact that EC competition law became applicable as of the date of accession only, with the effect that judicial proceedings under Article 101 are naturally less numerous and/or may not have reached the state of judgment yet.'<sup>85</sup>

<sup>83</sup> First, in February 2008, the Office issued its rules on so called alternative solution of certain competition cases. Notice on the alternative solution of certain competition issues, Experience with Direct Settlement in Cartel Cases, [http://www.compet.cz/fileadmin/user\\_upload/Sekce\\_HS/Direct\\_Settlement.pdf](http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Direct_Settlement.pdf)

<sup>84</sup> Gergely Csorba, (*Chief Economist*, Hungary, GVH); Milan Brouček, Chief Economist of the Czech competition authority.

<sup>85</sup> Point 40 of the Staff Commission working Paper

However, the Working Paper also admits that there is overall scarcity of judgments.<sup>86</sup> While application of EU competition law by national courts is weak there is also a problem of lack of data on such national judgments as the Commission has not worked out a specific system for transmitting judgements to the Commission.<sup>87</sup>

Judicial review of the administrative decisions of NCAs plays a crucial role in the overall enforcement of competition law. Judicial review serves as the ultimate control of the legality of the administrative authorities' decisions. The intensity of the standard of judicial review depends on the specific judicial system. The standard of judicial review is presently subject to an extensive debate: whether this review should be intense or restrained especially when it comes to the assessment of the NCAs' economic analysis of cases.<sup>88</sup> It is presently argued that more intensive judicial control is one way to address the emergence of independent national competition and other regulatory authorities with often wide-ranging discretionary powers in order to counterbalance the lack of political and also administrative accountability.<sup>89</sup> While it can be argued that the cooperation mechanisms within the ECN and with the Commission represent a certain degree of administrative accountability control, national judicial review is indispensable with its complementary function of judicial accountability. Accordingly, whether the national courts are inclined or reluctant to review the decisions of the NCAs with more rigour is decisive in an effective enforcement framework.

In its landmark ruling *Tetra Laval*<sup>90</sup> the ECJ had defined a moderate standard of judicial review of competition decisions taken by the European Commission<sup>91</sup> Accordingly, the appraisal of complex economic issues should be reviewed in a marginal way. Under this limited test, courts should check whether the procedural requirements are satisfied, the reasons for the decision taken are properly stated, the facts are accurately stated and whether there has been no manifest error of assessment or a misuse of powers.

---

<sup>86</sup> Point 41 of the Staff Commission working Paper states that, '[O]verall, the relative scarcity of judgments involving Article 81(3) EC seems in the first place to stem from what appears to be a relatively low level of enforcement of EC competition law in general by national courts in the EU. This corresponds to the criticism made by some stakeholders that not all national courts have sufficient experience and/or expertise to apply Articles 81 and 82 EC'.

<sup>87</sup> Staff Commission Working Paper, point 291.

<sup>88</sup> O Essens, A Gerbrandy, S Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Europa Law Publishing 2009; Cseres, K.J. J. Langer, *Tetra Laval á la Hongroise* in: *National Courts and the Standard of Review in Competition Law and Economic Regulation*, O Essens, A Gerbrandy, S Lavrijssen (eds.) Europa Law Publishing 2009, pp 127-144.

<sup>89</sup> S.A.C.M. Lavrijssen & M. de Visser, *Independent Administrative Authorities and the Standard of Judicial Review*, *Utrecht Law Review* 2006, no. 1, pp 111-135.

<sup>90</sup> ECJ, Case C-12/03P *Commission v. Tetra Laval BV* [2005] ECR I-987.

<sup>91</sup> The ECJ considered that Community courts must not perform a new investigation and substitute the Commission's analysis with their own assessment. Nonetheless, the Commission's assessment must not be left unchecked. The courts must fully verify whether the evidence put forward is accurate, reliable, consistent, exhaustive and capable of substantiating the conclusions drawn from it. Case C-42/84, *Remia BV and others v Commission* [1985] ECR 2545 and Case C-68/94, *Kali und Salz* [1998] ECR I-1375. CFI, Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, paras 87-89.

It is beyond the scope of this paper to provide a comprehensive analysis and evaluation of judicial review in the CEECs. Moreover, it seems rather difficult to form a judgment how judicial review functions in the CEECs. This is due to a number of factors. First, there is little data available on judicial appeal cases, most of it concerns the short English summary of statistics of upholding or overturning NCA decisions and no access to the content of the cases. There is even less known about the way national courts apply EU or national competition law and the rate of references they make to EU jurisprudence. The available data on appeal cases in many countries demonstrates a high rate of success of the NCAs.<sup>92</sup> At the same time, agencies express certain skepticism with regard to the expertise of national judges to assess competition law issues. Moreover, the standard of judicial review may differ per country and the way courts apply this standard requires case specific in-depth research.

Certain agencies even consider judicial review to be an important impediment to the efficient and effective enforcement of the competition law. They argue that judges are unfamiliar with the principles of competition law analysis and find it difficult to come to grips with competition law. The competition agency may find itself losing an unacceptable number of its cases in court. Moreover, judicial process may take too long and thus frustrates effective law enforcement.<sup>93</sup> Experience showed that those countries where specialized courts existed faced fewer problems than where general courts dealt with competition cases. Table VIII provides an overview of the court system dealing with competition cases.

TABLE VIII. Specialization of national courts and standard of judicial review

	YES	NO
<b>Specialized national courts for dealing with competition issues in the context of civil proceedings?</b>	Slovakia, Czech Republic	Bulgaria, Estonia, Hungary Latvia, Lithuania, Poland Romania, Slovenia

<sup>92</sup> OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2009)57, p 7; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Poland, DAF/COMP/GF/WD(2009)76, p 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Hungary, DAF/COMP/GF/WD(2009)47, p 13;

<sup>93</sup> OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, pp 5-6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, pp 10-11

<b>Standard of judicial review Restrained <i>à la</i> Tetra Laval</b>	Bulgaria, Hungary, Estonia, Latvia, Romania, Slovenia	Lithuania, Poland, Romania, Slovakia, Czech Republic

**Source:** Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No 1/2003

With regard to the specialization of courts dealing with competition cases the Czech Republic had experience with both generalist court enforcement until 2003 and specialized courts. It argued that even though some specialization might be necessary due to the complexity and low frequency of competition cases, at the same time there might be a risk of the dominance of a single approach.

#### 4.2.2. Illustrative examples of judicial review

As to the impediments judicial review raises in competition law enforcement some country specific experience is illustrative. Slovakia reported serious shortcomings of its judicial review system.<sup>94</sup> First, until 2008, the appeal to the decision of Regional Court in Bratislava was only possible for the unsuccessful petitioner when the court dismissed his action and for the NCA in cases where the decision was changed, for example the imposed fine was decreased. However, in the proceedings which ended in annulment of the decision of the Council of the Competition Office and in the most of the cases also of first instance decision, the Office had power to appeal only under certain conditions stipulated in the Civil Code of Procedure which was almost never the case in reality. Therefore, the Office felt sometimes paralyzed, as it was not able to intervene effectively in the market for the benefits of consumer and competition. Since 15 October 2008, the legislative amendment to the Civil Code of Procedure gave the Office the right to appeal against any decision of the Regional Court in Bratislava which annuls the decision of the Council of the Office. In important cases the national court annuls the decisions of the Council of the Office, whilst most of the decisions lack a concrete identification of the failures of the Office during the proceedings and a particular legal opinion of the court. The other negative fact is unfounded and disproportionate decrease of the imposed sanctions. Slovakia argued that the lack of experience of judges in competition law, and hence the following outputs, disable the effective enforcement of competition rules.<sup>95</sup>

A 2007 case in the Czech Republic is illustrative where, a Czech review court overruled the national competition authority's decisions in two cases on the ground that the

<sup>94</sup> DAF/COMP/GF/WD(2009)62, pp 5-6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, pp 10-11

<sup>95</sup> DAF/COMP/GF/WD(2009)62, pp 5-6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, p 6



application of EC and national competition law regarding the same infringement in the same decision would violate the principle of *ne bis in idem*. The Czech Supreme Administrative Court later overturned the lower court's judgment and held that that court had misinterpreted the principle.<sup>96</sup>

As to the standard of judicial review an available study of the Hungarian practice can be mentioned. While the Hungarian legislation provides wide competence for the Hungarian courts to review decisions of administrative authorities, the case-law of the courts shows that the courts are cautious in the extent they review the assessment of the Hungarian NCA (GVH) and well-aware of the borderlines of their powers.<sup>97</sup> Even though the courts are allowed to change the decision of the administrative agency and replace it by their own decision, they do not engage in reestablishing the facts of the case or intervene with the appraisal of the GVH.

The Hungarian courts seem to have been able to find a reserved position in the floating zone between restrained and intense judicial review when it comes to the review of the (economic) appraisal of national authorities. The identification of the exact borderline between marginal and intense judicial review of the administrative authorities' decisions could be further discussed perhaps by a cross-country comparison.

Still, the question remains why the Hungarian courts do not make reference and rely on European law more often. There is presently a high degree of convergence between national and thus Hungarian substantive competition rules and the European competition law provisions. Accordingly, it could be reasonably expected that the enforcement of these closely aligned national rules follow the guidelines provided by the European Courts. This is, however, not the case. An extensive answer to what the underlying reasons for this discrepancy might be is beyond the scope of this contribution. Still, one possible explanation could be that unlike the national competition authorities who actively participate in the European Competition Network, national courts are still more embedded in their national legal system and focus more on national legal rules and jurisprudence.

With regard to judicial review standards and actual enforcement there is a striking lack of research and data, especially in the CEECs but to some extent also in the old Member States. However, as stated above the role of judicial review in the overall

---

<sup>96</sup> Case No. 62 Ca 8/2007-171, RWE Transgas, Decision of the Regional Court Brno, 22 October 2007; Case No. 62 Ca 4/2007-115, Tupperware, Decision of the Regional Court Brno, 1 November 2007. Case 5 Afs 8/2008 – 328, RWE Transgas, Decision of the Supreme Administrative Court, 31 October 2008; Case 7 Afs 7/2008-200, Tupperware, Decision of the Supreme Administrative Court, 3 December 2008.

<sup>97</sup> The general statutory standard of review can be found in Section 339/B Act III of 1952 on the Code of Civil Procedures consists of four elements: accurate establishment of the facts, compliance with relevant procedural rules, the assessment of the facts is clear and the characterization of the evidence in law is reasonable. When this standard is compared with the *Tetra Laval* standard as laid down in paragraph 39 of the judgment and further elaborated on by the Court of First Instance in *Microsoft, Alrosa* and *Impala*, the Hungarian legislator seems to follow the Community standard. See also Vj-27/2005, MOL excessive pricing case GVH, Annual Report GVH (2006); Kf. II. 39. 048/2002/13. Legfelsőbb Bíróság. (Supreme Court); *Népszabadság Rt. by B.V. Tabora*. Legf. Bír. 7.K.33364/2003/10. (Supreme Court)

competition law enforcement is fundamental: it is to provide a rigorous control of the administrative decisions and assessment of NCAs where often administrative accountability is absent. The fact that there seems to be a reluctance of courts to engage in such complex and perhaps unfamiliar legal exercises and the fact there is an overall lack of data what the national courts are doing and how is a problem beyond effective competition law enforcement. It is a problem of accountability and transparency both at EU and at national level.

#### 4.2.3. Private enforcement of competition rules before national courts

Private enforcement of competition law in the CEECs merits separate attention in the research on the CEECs' competition laws. First, private enforcement of competition law is a prime example of Europeanization of national law and influencing national competition and private law rules. Second, while the obstacles to introduce private damages claims are numerous and involve complex legal and economic issues in all Member States<sup>98</sup> the CEECs face particular challenges. Third, it offers a distinctive case study to investigate how informal constraints prevent actual enforcement of formal rules. Fourth, it accentuates the role of institutions such as competition authorities, national courts and private individuals and the interplay between them in the enforcement of competition rules.

While some of the CEECs have implemented private enforcement of national competition rules, none of them except Lithuania has practical experience with private enforcement. There have been no final cases of private enforcement and therefore merely theoretical assumptions can be made about their future 'success'. While some of the challenges are equally valid for the old Member States, the CEECs face some particular problems. Both private individuals and national authorities face the problems of assessing complex legal and economic issues of competition law. While most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues the same cannot be said about the national courts. National courts face a double barrier: on the one hand, they lack a basic knowledge of European law and on the other, they are unfamiliar with competition law issues. The new system of European competition law substantially raised the level of economic analysis in competition cases, which will most probably create problems. The main difficulties to be expected are among others how NCAs deal with cases that spill over much beyond their narrow competition mandate,<sup>99</sup> how national courts as well as private undertakings will assess the application of the legal exception under Article 101(3).<sup>100</sup>

---

<sup>98</sup> The Green Paper has identified a number of general obstacles to introduce this enforcement method such as access to evidence, passing on defense, standing for indirect purchasers and quantification of damages. Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final

<sup>99</sup> The NCAs' limited resources and procedural limitations might result in dealing with a limited number of cases.

<sup>100</sup> The application of Article 101(3) to non-economic objectives can prove to be an especially dangerous exercise when national courts apply that provision, unlikely fit to assess whether the restriction of competition within the internal market can be justified by non-economic objectives of other Community

National judges need trainings and assistance in order to be able to manage expert witnesses and economic evidence that will be inherent and frequent parts of competition cases.

Further obstacles of private enforcement are inherent in the fact that transition in these countries is not yet complete. The relatively recent shift of these countries to a market economy and to a democratic judicial system still has its limitations. While economic changes have been fast moving legislative steps were often lagging behind. The legislative and institutional framework to guarantee swift law enforcement is not yet at place.

Moreover, private actors' readiness to bring damages actions to courts is further hindered by the low degree of awareness of competition rules, the weak and fragmented civil society, weak part autonomy and the often lacking recognition of involving private actors in law making and enforcement. Besides the lack of confidence in the judiciary the significant time, costs and complexity litigation means. These last three issues are especially a problem for consumers. The legal position of consumers and consumer organizations is often more restricted in these countries than in the old Member States. Access to justice of consumers and consumer organizations within and outside of the court system is often problematic or despite of existing legal rules practical difficulties hinder them to make effective use of those substantive rights. Collective consumer actions are rare either because of the lack of legal basis or other practical financial problems.<sup>101</sup> These inefficiencies for consumers' access to justice has to be considered also in light of the Community argument that selecting priorities for NCAs and wide discretion on assessing complaints has its relevant justification in the fact that private individuals can also turn to national courts. Presently this argument does not hold with regard to consumers' access to national courts.

The specific problems of the CEECs call for tailor made solutions and necessitates a more proactive approach. Such tailor made solutions aim at, for example, making use of the advantages earned during public enforcement. Such a useful element of the public enforcement is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases.<sup>102</sup> Another recent example is a legal presumption of 10% overcharge when calculating damages for hard-core cartels in Hungary.<sup>103</sup> In Bulgaria a more flexible procedural rules has been

---

policies. National authorities might justify anti-competitive practices on the basis of national policies. Therefore, as the Commission argues, a pure economic approach is more appropriate in the decentralized enforcement. NCAs will have to invest both in financial and humans resources in order to increase their capacity for economic analysis.

<sup>101</sup> See the National reports of Czech Republic, 20, Lithuania 17, Latvia 17 Estonia, 21-22, Slovenia, 21-22, Hungary, 16 in Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, (2004).

<sup>102</sup> Article 15 Regulation 1/2003.

<sup>103</sup> In case of a horizontal hardcore cartels, except horizontal hardcore purchase cartels, it is presumed that the competition law violation caused a 10% increase in the market price. The new rule will apply to both EC and Hungarian competition law violations. The presumption is rebuttable.

implemented for damages claims for competition law violations. The Competition Act provides that all legal and natural persons, to whom damages have been caused, are entitled to compensation even where the infringement has not been aimed directly against them. This special rule allows the compensation of damages suffered by persons or entities (e.g. final customers and consumers) which have not been a direct counterparty of the infringer/s but the results of the infringement were passed on to them by the intermediate commercial operators.<sup>104</sup>

Studying tailor made solutions can provide insights into the specific legal, economic and social barriers of private enforcement in the CEECs and perhaps formulate some ideas what the optimal incentives could be to make private enforcement work also in the other European jurisdictions.

The last section will address further characteristics of the institutional framework set up in the CEECs for enforcing competition rules.

## 5. INSTITUTIONS ENFORCING COMPETITION RULES

While the transfer of substantive rules could rely on well-defined EU rules a clear guidebook for enforcement questions was not provided by the EU. Accordingly, establishing effective enforcement and institutional design have formed the most serious challenge in the post-communist transformation of the legal and economic system and even after 2004. Crucial questions of enforcement and institutional choice were left unanswered except for some very general rules in Regulation 1/2003.

Under Article 35 Regulation 1/2003 each Member State had a clear obligation to draw up national competition law and designate a competition authority responsible for the application of Articles 101 and 102 before 1 May 2004,<sup>105</sup> however, the details have been left to the Member States themselves. These authorities could be administrative or judicial. The only requirement imposed by Article 35 was that the authorities have to be designated in order to guarantee that the provisions of Regulation 1/2003 are effectively complied with.<sup>106</sup> The accession process merely required an adequate administrative capacity through well-functioning competition authorities and thus the new Member States had a great level of freedom in designing the institutional framework of competition law enforcement. Beyond Article 35 of Regulation 1/2003 neither further requirements nor formal rules have been formulated on the powers and

---

<sup>104</sup> *International Comparative Legal Guide, Enforcement of competition laws*, Petrov P. Bulgaria, 2009, p 44

<sup>105</sup> Article 35(1) Regulation 1/2003: ‘The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts’.

<sup>106</sup> Point 2 of the Notice on cooperation within the Network of Competition Authorities provides that, ‘Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law’. See also, Case C-176/03, *Commission of the European Communities v Council of the European Union*, Judgment of 13 September 2005 ECR I-7879, paras 46-55.

procedures of these competition authorities.<sup>107</sup> The competences of the national authorities were very roughly set out in Articles 5 and 6 of Regulation 1/2003.

The Report on the functioning of Regulation 1/2003<sup>108</sup> has acknowledged this institutional deficit. In the absence of a Community blueprint or a clear methodology institutional choices were guided by a learning process characterized by improvisation and experimentation. In the CEECs it resulted in several reorganizations and shifting legislative powers between regulatory agencies. Prime examples are Poland and a recent institutional change took place in Estonia. The Estonian NCA became an integrated authority, which merged with previously separate communications, the energy market and railway regulators at the beginning of 2008. Further to the merger, the ECA consists of three divisions - competition division, railway and energy regulatory division and communications regulatory. Hence, the different divisions of the ECA regulate also specific sectors.

### 5.1. Variations for institutional design

There is presently a wide diversity of institutional design among competition authorities across the EU, which is based on a large variety of country-specific institutional traditions and legacies. Traditionally the CEECs heavily relied on public agencies to enforce regulations and therefore without specific advice and assistance from the EU on institutions they resorted broad market regulatory tasks to these agencies, sometimes with overlapping competences. One striking characteristic in the CEECs is the fact that NCAs have enforcement powers in several fields of market regulation, notably in unfair trade practices. They seem to take up (quasi-)regulatory roles as well. Competition authorities are in comparison with other public agencies, for example consumer authorities are still relatively independent, reasonably well funded and have acquired substantial legal and economic expertise in market regulatory issues. These features are probably the reason that the NCAs resources and expertise are used for certain 'spillovers' in other fields of market regulation such as consumer protection and regulating network industries.<sup>109</sup> Table IX provides an overview of the NCAs' competences.

---

<sup>107</sup> Although national procedural rules had to provide for admission of the Commission as *amicus curiae* in national procedures, NCAs will have to be empowered to conduct examinations in accordance with the Regulation, and Member States will have to fulfil obligations to report to the Commission. The Commission retains broad supervisory powers that allows him to intervene in proceedings before the national authorities and to of the Commission discretionary powers 'primus inter pares'. See Article 11(6).

<sup>108</sup> Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009 points 190 and 200)

<sup>109</sup> For example in Slovakia and the Czech Republic the NCAs have a disciplining role in the regulation of network industries. Article 11 of the Czech Competition Act, Article 8 of the Slovak Competition Act.

TABLE IX. Competences of the NCAs

<b>Scope of competition law includes unfair competition or consumer protection</b>	<b>Competence of competition agency includes other than competition law</b>	<b>Shift in the institutional balance</b>
Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia	Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia, Czech Republic	Poland, Bulgaria, Lithuania, Latvia, Estonia

As to the national courts it should be admitted that in fact, we know little about what they are doing. This lack of data is evident in the recent Report on the on the functioning of Regulation 1/2003 and its accompanying Staff Commission Paper.<sup>110</sup> Moreover, there is an overall lack of reported case-law on the Commission website for national judgments applying Articles 101 and 102.<sup>111</sup> However, the role of the national courts in reviewing decisions of the NCAs and adjudicating private actions is crucial in the overall effective enforcement of competition law.

The interplay between competition authorities and national courts became more visible and national legislations show that in the CEECs cooperation between these two enforcement institutions is intensive and sometimes in the form of a legislative obligation. Such an element of the public enforcement is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases. While in Estonia the NCA must be consulted by national civil courts in antitrust cases, in Latvia the NCA may be consulted by national civil courts. In Romania, whenever a party claims a breach of Articles 101 and 102, the judge may decide that the absence of a preliminary decision issued by the Romanian Competition Council represents grounds for inadmissibility for the claim. This rationale is based on the exclusive jurisdiction of the Romanian Competition Council for all cases relating to anti-competitive behavior, and on the view that this preliminary administrative procedure has to be observed. In addition, the Competition Council's practice seems to base its decisions on Romanian legislation and not on EU legislation. Its decisions will rely on EU legislation only as a subsidiary argument.<sup>112</sup>

In Hungary, on the basis of Article 88/B of the Competition Act, a court shall immediately notify the Competition Office if the application of the competition law rules on cartels or abuse of dominant position arises in a civil action before the court.

<sup>110</sup>Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 (COM(2009) 206 final, 29.4.2009; Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009).

<sup>111</sup>Out of the ten new Member States two countries (Hungary, Lithuania) have each one judgment published on this website. <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>

<sup>112</sup>See Decision 12/2008 (where the Competition Council refers to Article 81(1) only as a subsidiary argument in the rationale, stressing that the national correspondent provision covers the issue in a sufficient manner), Decision 19/2008 and Decision 15/2008. EC Regulation 1/2003: views on its functioning, Prepared by the Commission on Competition, ICC, 2008, p 5.

The Competition Office may submit observations or set forth its standpoint orally before the closing of the hearings. Upon a request of the court, the Competition Office shall inform the court about its legal standpoint concerning the application of the competition law rules in the given case. Thus, the Competition Office acts as an ‘amicus curiae’ to the courts. Furthermore, if the Competition Office decides to initiate proceedings in a matter that is pending before the court, then the court shall stay its own proceeding until the Competition Office issues its final and legally binding decision, and the court is also bound by the final and legally binding decision of the Office concerning the finding of breach of the competition law rules or the lack thereof.

The present institutional balance between NCAs and national courts will probably change in the future. The role of national courts is fundamental both in competition law enforcement as well as in unraveling and adjudicating cases on the ‘borderlines’ of competition law, such as the above mentioned abuse of a superior bargaining power<sup>113</sup> or unfair trade practices or even unfair contract terms. For the time being it is essential to study the interplay and the changing institutional balance between competition authorities, national courts, other regulatory agencies and private individuals in order to spot barriers of effective enforcement frameworks and to design workable remedies.

## 6. CONCLUSIONS

This paper assessed the impact of Regulation 1/2003 in the CEECs that joined the EU in 2004 and 2007. The assessment has been conducted by looking at the legislative and judicial implementation of substantive and procedural competition rules, the active invocation of these rules by the NCAs and by the national courts and the way institutional design has been given shape. These three different dimensions allowed to depart from traditional top-down approaches to study the effect of EU law in national legislations and to try to address less visible parts of the enforcement framework that actually raise fundamental questions of both good competition law enforcement and good administration.

With regard to the legislative implementation this paper demonstrated that even though there is a high convergence of substantive competition rules relevant differences exist for example with relation to unilateral conduct. The emergence of these rules does pose regulatory and enforcement questions and have implications not only for the NCAs but also for the national courts who need to differentiate among competition law and non-competition law issues and decide, for example, whether contract or competition law

---

<sup>113</sup>Behind provisions regulating economic dependence and superior bargaining power lies a regulatory dilemma: whether contract law or competition law should regulate unequal bargaining power and when such provisions should trigger enforcement. It has been submitted that the main distinctive feature is whether the aim of the provision is limited to regulating a contractual relationship with a view to protecting a weaker party against a stronger party or whether competition on the market is taken into account either in the elaboration of the rule or its application. De Smijter E. and Kjoelbye, L. ‘The Enforcement system under Regulation 1/2003’, in Faull & Nikpay: The EC law of competition, part 2.59. Staff Commission Working Paper accompanying the Report on Regulation 1/2003 paras 180-181

should deal with the given situation. Similarly to the old Member States, the CEECs voluntarily converge with the Commission in respect of procedural rules, however, considerable differences remain in the less visible parts of procedural law. For example, the differences how these countries regulate the rights of complainants are imperative both for public enforcement and for the safeguarding of sound administration as well as for private enforcement. Diverging procedural rules demonstrate that national procedural autonomy is still a powerful influencing device on the ultimate outcome of enforcement of EU rules. The role of the ECN in this process as a transmitting mechanism among the NCAs and the European Commission as a learning laboratory is noteworthy.

With regard to the active enforcement of competition rules the CEECs still exhibit legacies of their past. The discrepancy between law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules sometimes lacks active enforcement. The increasing role and influence of criminal law enforcement raises another challenge for the enforcement of both national and EU law. Distinguishing between the enforcement by NCAs and by the national courts in this paper allowed to point out the low levels of active enforcement by the courts and the overall lack of data on court cases. The function of the courts has been considered both in judicial appeal cases and in private enforcement. Together with the last section on institutions the paper points to a picture where further research and analysis of national procedural rules and their implications for the overall enforcement framework is needed and where the institutions and the institutional interplay and balance between them as well as their relationship with civil society merits further analysis. This paper showed that NCAs have passed the initial stage of young competition authorities and became mature law enforcers of competition law, even though they face certain drawbacks of their legislative or institutional environment. Conversely, the national courts are struggling with their enforcement tasks in competition law. The competence of national judges to assess competition law cases and their private law cross-roads as well as their private law consequences need to receive more attention in the future academic as well as public policy work.

While there is a high convergence of substantive competition laws among Member States, the divergences of procedural laws but even more importantly the different institutional variations that eventually influence and determine how the rules are enforced is a factor that cannot be overlooked. Moreover, they need to be looked at in a broader context of sound administration by considering accountability, transparency, participation issues and institutional interactions in the new governance structure of EU and national competition law enforcement.



---

**THE COMPETITION LAW REVIEW**

---

Volume 6 Issue 2 pp 183-201

July 2010

## A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?

*Francisco Marcos & Albert Sánchez Graells\**

---

Block exemption regulations (BER) survived the modernisation of EU competition law. According to the Commission, they play a major role in the system instituted by Regulation 1/2003. Some authors consider that BER are conceptually hard to nest within the new system, but that they provide legal certainty. Others adopt a more critical approach and propose their axing. This paper adopts the latter approach. In view of the mixed messages that the Commission has been sending in the review of existing general and industry specific BER, this paper revisits the institution of BER, its justification and need in the decentralised system brought forward by Regulation 1/2003 and the more economic approach to EU competition law. After stating the initial justification for BER under the prior enforcement system, the paper stresses the difficulties for their fitness within the new paradigm, focusing on the distortions that they may generate for an effective and consistent enforcement of EU competition law. In order to complete the modernisation of EU competition law in a second wave (that is, as a consequence of the current revision of Regulation 1/2003), the paper recommends a clear-cut policy to abrogate all BER and to issue substitutive guidelines in exchange.

---

**1. INTRODUCTION**

The practical impact and effective consequences of the modernisation package of EU competition law remain subject to discussion. There is wide disagreement amongst authors as to the extent of the change of conceptual and systemic paradigm under Regulation 1/2003.<sup>1</sup> The disagreement seems particularly acute as regards the link between procedural and substantive aspects of the reform. In this paper, amongst the substantive aspects of the reform, we focus on block exemption regulations (hereinafter, BER).

Although the Commission has recently noted, in its review on the functioning of Regulation 1/2003,<sup>2</sup> that ‘Regulation 1/2003 did not change the instrument of block exemption regulations’;<sup>3</sup> in our view, such an assessment is highly debatable. The

---

\* Professor of Law, IE Law School (francisco.marcos@ie.edu) & Lecturer in Commercial Law, Pontifical University Comillas – ICADE (asanchezgraells@der.upcomillas.es). Comments received from Professor DJ Gerber, by the participants at the 14th CLaSF Workshop: “Reforming EC Competition Law” (City University London, 10 Sept. 2009) and by one anonymous reviewer are gratefully acknowledged and appreciated. The usual disclaimer applies. Opinions and mistakes remain the authors’ own.

<sup>1</sup> Council Regulation (EC) No 1/2003, of 16 December 2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 (hereinafter, Regulation 1/2003).

<sup>2</sup> Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final.

<sup>3</sup> Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, SEC(2009) 574 final (¶25). See also recital 10 of Regulation 1/2003; moreover, according to the Commission

Commission's position that all BER are aligned and consistent with the general philosophy underlying the modernisation or decentralisation of enforcement of Article 101(3) TFEU - i.e. with the 'shift from giving comfort to individual agreements to a system in which emphasis is on general guidance that can be helpful to numerous undertakings and other enforcers'<sup>4</sup> - overlooks that the change in approach envisioned by Regulation 1/2003 should have left behind instruments not of an actual universal character and which impose specific behaviour rather than offering general guidance (i.e. instruments that *de iure* or *de facto* are binding for the undertakings and authorities concerned).<sup>5</sup> From this perspective, the Commission's position that BER can coexist with other enforcement instruments in the modernised paradigm is hard to share in the case of general BER. In our opinion, that conclusion is even more difficult to reach for industry specific BER.<sup>6</sup>

From a different perspective, the parallel developments regarding the revision of industry specific BER (e.g. liner shipping companies,<sup>7</sup> maritime transportation,<sup>8</sup> insurance,<sup>9</sup> and motor vehicles sector)<sup>10</sup> are conducted on fragile grounds and their

---

Notice, Guidelines on the Application of Article 81(3) of the Treaty, OJ 2004, C101/97 (¶2): 'Regulation 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 does not affect the validity and legal nature of block exemption regulations. All existing block exemption regulations remain in force and agreements covered by block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1). Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority. Block exempted agreements cannot be held invalid by national courts in the context of private litigation' (footnotes omitted).

<sup>4</sup> Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final (¶9) and Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, SEC(2009) 574 final (¶43).

<sup>5</sup> Indeed, '[t]he direct effect of article 81(3) will, of course, leave no place for individual exemption decisions or for block exemption regulations in the traditional sense', Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37(3) CMLRev 537, 566.

<sup>6</sup> By referring to 'general BER' and 'industry specific BER', we distinguish between those regulations that exempt general practices or conduct no matter the sector in which they occur (e.g., vertical agreements, transfer technology agreements) and those that only cover a specific industry or economic sector (ad.ex. insurance, motor vehicle distribution).

<sup>7</sup> Recently the Commission has complied with the Council's mandate to draft a new BER; see Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ 2009, L256/31.

<sup>8</sup> Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services, OJ 2008, C245/2.

<sup>9</sup> See Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Commission Regulation (EC) No 358/2003 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, COM(2009) 138, and Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 358/2003, SEC(2009) 364. See also Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2010, L83/1; and Explanatory Communication from the Commission

outcome sends mixed messages. It is to be expected that future revisions of other industry specific BER may cause further lack of system consistency. For several reasons, the Commission's work in this area raises questions about the need and function of industry specific BER. Firstly, they cannot be reconciled or synthesized with a consistent trend of competition policy-making. Secondly, some of them have been repealed and substituted with guidelines (maritime transportation and, partially, motor vehicles),<sup>11</sup> others are to be renewed (liner shipping companies or *consortia*), and still others have only been renewed partially (insurance). A possible reading of the situation hints towards a general strategy of the Commission to *substantially dismantle the system of sector-specific BER* and substitute it with (more general) guidelines on the application of Article 101(3) TFEU in those sectors—unless there are good reasons to keep sector-specific BER.<sup>12</sup> Therefore, the Commission seems to consider industry specific BER as lying somewhere in between 'specific comfort' to the sector concerned and 'general guidance' of relevance to a 'broader audience' of undertakings and enforcers—indeed, they are; and seems to be willing to minimise (if not abandon) the scope and coverage of industry specific BER. However, this trend does not affect its position as regards general BER—where there is no indication of a similar strategy of substituting them with general guidelines.

In our opinion it can be argued that, contrary to the position of the Commission in its Report on Regulation 1/2003,<sup>13</sup> the role of BER in the antitrust field has changed after the modernization of EU competition law by means of Regulation 1/2003.<sup>14</sup> Even further, this change is not limited to sector-specific rules but, most notably, affects the essence of the BER instrument and should apply equally to general BER. In broad terms, there are reasons to support the view that the system has moved from a scenario of BER primarily conceived as instruments aimed at ensuring the *administrability* of a system where the Commission held the monopoly in the application of Article 101(3)

---

on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2010, C82/2.

<sup>10</sup> Communication from the Commission—The Future Competition Law Framework Applicable to the Motor Vehicle Sector, COM(2009) 388 final. See also Marco Colino, 'Counting Down Regulation 1400/2002 EC – Questioning the Logic of Sector-Specific Rules for the European Car industry', (Paper presented at 14th CLaSF Workshop, 'Reforming EU competition law', London, 10 Sept. 2009, *mimeo*) 1. The Commission has finally approved a new BER for the car industry; see Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2010, L129/52.

<sup>11</sup> See Commission Notice, Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ 2010, C138/16.

<sup>12</sup> An approach consistent with the initial proposals of the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (*infra* §2).

<sup>13</sup> Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final.

<sup>14</sup> The situation in the antitrust field should be distinguished from the State aid arena, where the development of the exemption policy follows a separate path and is still justified by the enforcement monopoly granted to the Commission.

TFEU (if attainable), towards a new scenario where *consistency and uniformity* in the decentralized application of Article 101(3) TFEU is achieved primarily through guidelines—in order to guarantee i) proper self-assessment by undertakings, and ii) effective enforcement by the ‘decentralised’ authorities.<sup>15</sup> Under the new paradigm, BER can hardly find a place of their own.

For that reason, rather than adopting a piecemeal approach to the revision and probable repeal of existing sector-specific BER, it would be desirable to design an all-encompassing strategy for the development of proper rules and guidance under the new paradigm of Regulation 1/2003—which, in our opinion, should entail the complete abrogation of general and sector-specific BER. Such an approach would also benefit the review process of non-sector-specific BER and guidelines; for instance in relation to the Horizontal Guidelines<sup>16</sup> and the recently completed review of the vertical restraints BER.<sup>17</sup> Hence, in order to complete the modernisation of EU competition law, we would recommend that the Commission should adopt a clear-cut policy to abrogate *all* BER (both general and industry specific) and to issue the corresponding substitutive general guidelines (*infra* §5).

For that purpose, in this paper we advance a general conceptual framework for the analysis of the BER policy post-modernization in light of the abolition of the Commission’s monopoly for the enforcement of Article 101(3) TFEU (and the ensuing bureaucratic limitations), with particular focus on the function that these instruments are called upon to serve in a paradigm of self-assessment and decentralized enforcement (functional approach) (*infra* §2). Furthermore, we submit that the ‘more economic’ or ‘effects approach’ promoted by the Commission in the enforcement of antitrust prohibitions is ontologically opposed to the maintenance of BER (*infra* §3). We then proceed to highlight the unfitness and/or systemic incompatibility of BER (both industry specific and general) with the new approach under Regulation 1/2003: they are instruments of the past and some of their features distort enforcement and

---

<sup>15</sup> In similar terms, see Goyder, *EC Competition Law*, 4th ed, Oxford, Oxford University Press, 2003 47-51; and G Monti, ‘New Directions in EC Competition Law’ in Tridimas & Nebbia (eds) *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Hart Publishing, Oxford, 2004, 186-187, who stressed that ‘as the administrative burden of an ex ante notification [vanishes], the original *raison d’être* for block exemptions disappears’ and stressed that the issuance of guidelines eliminated the need for BER. Apart from guidelines, specific Commission interventions taking over Member States’ competence to decide in those instances in which their proceedings might lead to an inconsistent application of article 101(3) TFEU or BER is envisaged [see art. 11(6) of Regulation 1/2003]. On the exceptional circumstances under which the Commission might resort to such power, see Gilliams, ‘Modernisation: From Policy to Practice’ (2003) 28(4) *Eur L Rev* 451, 467.

<sup>16</sup> Commission Notice, Guidelines on the Applicability of Article 81 of the Treaty to Horizontal Co-operation Agreements, OJ 2001, C3/2. The Commission has recently published a Draft Communication-Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements SEC 2010 (528), 5.5.2010, Brussels, [http://ec.europa.eu/competition/consultations/2010\\_horizontals/guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf)

<sup>17</sup> See the very recent Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L142/1.

may generate legal uncertainty under the new paradigm (*infra* §4). As briefly mentioned, we conclude with some general recommendations for the completion of the reform of this aspect of EU competition law, with the aim of streamlining the application of Article 101 TFEU by means of a complete substitution of all existing BER with interpretative guidelines (*infra* §5).

## 2. THE CHANGE OF PROCEDURAL PARADIGM BROUGHT FORWARD BY REGULATION 1/2003

In order to properly appraise the fitness of BER in the paradigm created by Regulation 1/2003, it is important to understand the origins of this regulatory device—which are clearly rooted in the prior model for the enforcement of EU competition law and, more specifically, are the result of a *shortcoming* in that system.

BER were born as a tool to free the Commission of part of the administrative burden generated by the notification procedure envisaged in Regulation 17/62<sup>18</sup> for the application of Article 101(3) TFEU under an individual exemption regime—and, hence, they were primarily conceived as an *administrative device*<sup>19</sup> aimed at releasing some of its resources to allow the Commission to become more active in the pursuit of serious competition infringements.<sup>20</sup> BER were an effective complement to the Commission's individual authorizations—and were adopted once the Commission had achieved a

<sup>18</sup> Council Regulation No. 17 implementing Articles 85 and 86 of the Treaty, OJ 1962, 13/204 (hereinafter, Regulation 17/62). The economic logic, functionality and limits of this system are examined in Wils, 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24(2) Eur L Rev 139, and compared with the new one after (the then proposed) Regulation 1/2003 in *ibid*, 'The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation n. 17' (2001) 24 Fordham Int'l L J 1655.

<sup>19</sup> On potentially different conceptualisations of BER, see Greaves, *EC Block Exemption Regulations*, London, Chancery Law Publishing, 1994, 3-4.

<sup>20</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶5 & ¶¶14-15). The need for a significant reform of the institutional structure (systemic issues) of EU competition law had been stressed and anticipated by Gerber, 'The Transformation of European Community Competition Law?' (1994) 35(1) Harvard Int'l L J 97, 98-100 & 124-134. In this regard, specifically taking into account the re-orientation of the Commission's resources aimed at the approval of Regulation 1/2003, the modernisation strategy has been rather successful, since it 'has substantially reduced the Commission's workload in terms of case-work. More significantly, the nature of the cases is now radically different, as the flow of notifications has ceased and all new cases concern by definition alleged or suspected infringements' of EU competition rules; see Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003—Institutional Report' in Koeck & Karollus (eds) *The Modernisation of European Competition Law—Initial Experiences with Regulation 1/2003*, 2 FIDE XXIII Congress Linz 2008, Wien, Nomos - Facultas.wuv, 2008, 379-382. A situation that should not be surprising and that was anticipated by Di Federico & Manzini, 'A Law and Economics Approach to the New European Antitrust Enforcing Rules' (2004) 1(2) Erasmus L & Econ Rev 143, 153, who generally concluded 'that the reform will prove to be more efficient than the system set up by Regulation No. 17/62, although the passage from an ex ante to an ex post regime might entail some additional costs both for the undertakings under investigation and for the public authorities responsible for the correct and uniform implementation of EC antitrust law' (*ibid*, 143). See also Wesseling, 'The Draft Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26(4) Eur L Rev 357.

consistent and solid knowledge of the innocuousness for competition in the market of certain practices and agreements under certain conditions,<sup>21</sup> especially when small and medium size firms were involved.<sup>22</sup>

Even if the adoption of BER initially contributed to improving the actual enforcement of EU competition law, the individual notification and authorization technique soon proved insufficient to effectively unburden the system - which was substantially ineffective and unable to absorb the excessive workload of the Commission and an increasing backlog in the issuance of exemption decisions, both to the detriment of the Commission (as enforcer) and European business (as addressees of the EU competition rules).

Therefore, after forty years of continued enforcement of Article 101(3) TFEU through the individual exemption regime established by Regulation 17/62, the modernisation of EU competition law conducted by means of Regulation 1/2003 dismantled the system and opted for a new model of legal exemption based on the self-assessment conducted by undertakings. The burden of the enforcement system partially shifted to the affected undertakings themselves.

Indeed, the main aim of Regulation 1/2003 was to abolish the enforcement monopoly that the Commission held over Article 101(3) TFEU and to design a more efficient decentralised system for the enforcement of EU competition law.<sup>23</sup> Specifically, the

---

<sup>21</sup> In this regard, it should be acknowledged that BER had a secondary or implied guiding role, given that they synthesised the stock of knowledge of the Commission in a given area of economic activity. Nonetheless, particularly in the case of sector specific BER, they served a limited guidance function due to their structural limitations and the rigidity of their content; which made the analogical application of their content in other areas of economic activity rather difficult.

<sup>22</sup> See, European Commission, *VII Report on Competition Policy for 1977* (1978) 28, expressly conceiving BERs to alleviate the Commission's workload by lifting the notification requirement. The cause-effect relationship between BER and less notifications is expressly acknowledged, see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶33).

<sup>23</sup> See White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1 (¶¶19-21 & ¶28); Ehlermann, *The Modernization of EC Antitrust Policy*, op cit, n 5, 557-563; Tesouro 'Modernisation and Decentralisation of EC Competition Law' in Rivas & Horspool (eds) *Modernisation and Decentralisation of EC Competition Law*, The Hague, Kluwer Law International, 2000, 9 and ibid, 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy' in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 261; M Monti, 'La Nueva Política Europea de la Competencia', in Beneyto & Maillo (eds) *El Nuevo Derecho Comunitario y Español de la Competencia. Descentralización, Análisis Económico y Cooperación Internacional*, Barcelona, Bosch, 2002, 22; Gauer et al, 'Regulation 1/2003: A Modernised Application of EC Competition Rules' (2003) 1 Competition Pol'y Newslet 3; Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40(3) CMLR 545, 553-559; and Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) Governance 431, 434-436. This justification is put into question by Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You!—Part 1: Regulation 1 and the Notification Burden' (2003) 24(11) ECLR 604, 613-615, on the basis that significant self-assessment was already being carried on by undertakings and their legal advisors pre-modernisation—so that the abandonment of the notification system 'made the modernisation programme look a lot more radical than it actually was' (ibid, 615).

reform had as its *leit-motif* the reduction of compliance and enforcement costs of Article 101 TFEU by allocating full responsibility for the assessment of the possible anticompetitive character of their contracts and practices to undertakings.<sup>24</sup> Legal certainty was improved through direct enforceability of business agreements and decisions initially caught by Article 101(1) TFEU that, however, did not require individual authorisation in order to fulfil the conditions of Article 101(3) TFEU.<sup>25</sup>

However, this change of paradigm did not include the repeal of BER—which, given its very close links with the notification system and the ensuing administrative burden, should have been the logical consequence of the change of paradigm. The Commission clearly indicated its intention to adopt a new approach to BER (at least in relation with vertical and horizontal agreements<sup>26</sup> and, with more limited effects, *i.e.* merely procedural, in special sectors such as agriculture and transport<sup>27</sup>)—but the option for a complete suppression of BER did not receive serious attention during the modernisation process. BER survive as a result of inertia, strengthened in the case of industry specific BER by industry and business pressure for their maintenance,

<sup>24</sup> On the huge compliance costs the prior system carried, especially for small and medium sized firms, see Müller, ‘The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition’ (2004) 5(6) German L J 721, 725. In exchange for the lightening of the administrative burden of the individual notification that previously weighted on undertakings, they were assigned the additional responsibility of assessing the legality of their actions according to Article 101(3) TFEU, something for which they were allegedly better-placed.

<sup>25</sup> Müller, ‘The New Council Regulation (EC) No. 1/2003’, *op cit*, n 24, 729. There were, however, concerns about the diminished level of legal certainty in the new system. Notwithstanding, the legal certainty afforded by Regulation 17/62 should not be exaggerated, see Montag & Rosenfeld, ‘A Solution to the Problems? Regulation 1/2003 and the Modernization of Competition Procedure’ (2003) 2 ZWeR 107, 112, 114-117 & 133-134.

<sup>26</sup> Indeed, the Commission indicated that its new approach to vertical and horizontal restraints should simplify the law in these fields, which would result ‘from the Commission’s intention to adopt a new type of block exemption regulation that will no longer be based on an approach that restricts exemption to certain specific agreements and clauses identified in the regulation. The new type of exemption will provide general exemption for all agreements and all clauses in a given category, subject only to a list of prohibited restrictions (‘blacklisted clauses’) and specific conditions of application, on the one hand, and a restriction of the benefit of general exemption through a market-share threshold criterion, on the other. [...] Notices will also be issued to clarify the conditions governing the application of Article [101] to cases not covered by the block exemption regulations’; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶27). Furthermore, in order to promote legal certainty, the Commission intended to reinforce the binding character of BER vis-à-vis decentralised competition authorities; (*ibid*, 31). On this, see Bishop, ‘Modernisation of the Rules Implementing Articles 81 and 82’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 59-61; and Schaub, ‘The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 256-257. As we shall see in further detail (*infra* §4), this approach (even if preferable to the prior and more formalistic BER policy) is still too-closely pegged to principles of the previous system and does not sit well with the new paradigm of Regulation 1/2003.

<sup>27</sup> In fact, mention of sector-specific BER was only made in passing in the White Paper and, other than adjusting relatively far-reaching procedural aspects of industry specific regulation to adapt it to decentralised enforcement, no substantive changes were proposed; see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶43-45).

although they lack any substantial grounding.<sup>28</sup> Bureaucratic simplification (through the abolition of the individual notification system) should have been followed by legislative simplification (through the axing of BER), and that would not necessarily mean less legal certainty for businesses.<sup>29</sup>

In our opinion, the permanence of BER after the modernisation of EU competition law constitutes a *conceptual oddity*<sup>30</sup> that could be seen as a *fossilized* administrative device - the existence of which is hard to square within the profiles of the new system.<sup>31</sup> If this is the case, the relevance of the issue should not be restricted to the undue permanence of an inadequate procedural device (*i.e.* as merely an inappropriate administrative tool) but, in our view, should rather be derived from the substantive negative effects that the maintenance of BER can generate under the new paradigm.<sup>32</sup> In order to better appraise whether this is the case (*infra* §4),<sup>33</sup> it might be useful to briefly explore the contours of the new enforcement paradigm created by Regulation 1/2003.

---

<sup>28</sup> See Farrell & Klemperer, 'Coordination and Lock-in: Competition with Switching Costs and Network Effects' in Armstrong & Porter (eds) *Handbook of Industrial Organization*, Amsterdam, Elsevier, 2007, 2015; and Liebowitz & Margolis, 'Path Dependence' in Bouckaert & De Geest (eds) *Encyclopedia of Law and Economics*, vol. 1, Cheltenham, Edward Elgar, 2000, 982 & 995.

<sup>29</sup> See the convincing call for legal simplicity by Epstein, *Simple Rules for a Complex World*, Cambridge, Harvard University Press, 1995, 21-46.

<sup>30</sup> Along the same lines, see Wißeman, Decentralised Enforcement of EU competition law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999, (2000) 23(2) *World Comp* 123, 142; and Riley, EC Antitrust Modernisation (Part 1), *op cit*, n 23, 605 ('A conceptually curious part of Regulation 1 is that the existing block exemption system is retained [... which] is at first sight undoubtedly conceptually odd'). It was, indeed, hard to fit conceptually within the new framework; see Whish & Sufrin, 'Community Competition Law: Notification and Individual Exemption: Goodbye to All That' in Hayton (ed) *Law's Future(s)*, Oxford, Hart Publishing, 2000, 138 fn 17, which sought an impossible balance with the view that 'since a constitutive act will no longer be necessary under Article 81(3) [in the Regulation 1/2003 system, BER] will be block 'clearances' rather than block 'exemptions' (without digging any deeper on the meaning, need and implications of such 'block clearances').

<sup>31</sup> However, some commentators considered that there were sound practical reasons to keep BER under the system established by Regulation 1/2003 as a means to generate legal certainty. As Riley pointed out, 'This access to legal security is even more important given that there is likely to be a period of legal uncertainty following the coming into force of Regulation 1', see Riley, *op cit*, n 23. On similar terms, Pijetlovic, 'Reform of EC Antitrust Enforcement: Criticism of the New System is Highly Exaggerated' (2004) 25(6) *ECLR* 356, 358-359. However, such justification might have lost relevance over time, both as a result of the practice in applying Article 101(3) TFEU during the intermediate years and, maybe more remarkably, due to the legal uncertainty and enforcement shadow that BER generate (see *infra* this Section).

<sup>32</sup> The need to link procedural and substantive aspects of the modernisation process is stressed by Gerber, 'Two Forms of Modernisation in European Competition Law' (2008) 31(5) *Fordham Int'l L J* 1235, 1255-1258; and G Monti, 'New Directions in EC Competition Law', *op cit*, n 15.

<sup>33</sup> *Contra*, see Wils, 'Regulation 1/2003: A Reminder of the Main Issues' in Geradin (ed) *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp, Intersentia, 2004, 35-36, who considers that the continued use of BER under the new paradigm 'does not appear to pose any particular problems' and that BER continue to be a useful and efficient mechanism of EU competition law as a result of the enforcement savings and reduction of *ex post* litigation that they generate—also in a decentralised paradigm of self-assessment. Similarly, Fiebig, 'Modernization of European Competition Law as a Form of Convergence' (2005) 19 *Temple Int'l & Comp L J* 63, 67-68, considers BER 'ancillary to the modernization program' and, although he praises the self-assessment process under Article 101(3) TFEU, he concludes that 'revised block



On the other hand, regardless of the issue of the decentralization of enforcement (which does not significantly affect the analyses conducted in this paper), Regulation 1/2003 brought forward a new methodology for the appraisal of seemingly anti-competitive conduct. Undertakings and enforcers need to appraise the relevant conduct in a two-step approach. It has become commonplace to understand that, first, they have to determine whether it runs against the prohibition of Article 101(1) TFEU and, if that is the case, they need to check whether the conditions for exemption set in Article 101(3) TFEU apply.<sup>34</sup> At first sight, this does not seem to substantially depart from the enforcement mechanics under the previous regime. However, it is important to stress that the new paradigm implies the ability of undertakings and enforcers to balance pro- and anti-competitive effects (or anti-competitive effects and economic efficiencies) *unconditionally and without limits*. The *prima facie* most restrictive agreement or concerted practice can be *fully exempted* if sufficient pro-competitive effects or efficiencies are generated and meet the additional requirements of Article 101(3) TFEU. This is the logical result of the *economic or effects-based approach* adopted simultaneously with the modernisation of EU competition law (*infra* §3). Hence, under this new paradigm, any instrument that limits or conditions the way or extent in which undertakings can seek to benefit from the exemption of Article 101(3) TFEU—and in which enforcers can appraise whether that is the case or not—risks generating either over-inclusion or under-inclusion, and is at odds with the abovementioned principles of unconditional and unlimited (self)assessment.<sup>35</sup> This is the point of departure of our rejection of BER under the new paradigm (*infra* §4).

### 3. THE DIFFICULTIES OF CONCILIATING BER WITH THE ‘EFFECTS APPROACH’ TO EU COMPETITION LAW

The modernization of EU competition law enforcement runs parallel to a relevant change in the understanding and interpretation of articles 101 and 102 TFEU (and also of merger review).<sup>36</sup> In the last few years, the Commission has advocated a change in its approach regarding the enforcement of competition prohibitions. A decentralized system has been established whereby the Commission shares enforcement powers with National Competition Authorities and Courts, contemplating an increasing role for private judicial claims by victims of anti-competitive practices.<sup>37</sup>

---

exemptions will be important to the success of the modernization efforts’. See also Carlin & Pautke, ‘The Last of its Kind: The Review of the Transfer Technology Block Exemption Regulation’ (2004) 24 Nw J Int’l L & Bus 601, 603), ‘companies are likely to increasingly rely on the block exemption safe harbours as a guarantee of legal certainty’.

<sup>34</sup> For another view of this balancing process, see Nicolaidis, ‘The Balancing Myth: The Economics of Article 81(1) & (3)’ (2005) 32(2) Leg Iss Econ Integration 123.

<sup>35</sup> Regarding vertical restraints, see G Monti, *EC Competition Law*, Cambridge, Cambridge University Press, 2007, 358-359.

<sup>36</sup> See Gerber, ‘Two Forms of Modernisation in European Competition Law’, *op cit*, n 32.

<sup>37</sup> It might be argued that this decentralisation or change in the enforcement structure could justify the continued existence of BER as a tool of harmonisation in the enforcement of Article 101 TFEU, at least until

Moreover, enforcement of competition rules has moved from a rather formalistic position - in which the prohibitions were applied whenever the conditions set out in the rule were met by certain business practices (regardless of their effects) - to a more functional position<sup>38</sup> - in which the application of the prohibition looks at the actual consequences of those presumably anticompetitive business practices.<sup>39</sup> This can be considered an unavoidable consequence of the institutional embeddedness of economics in competition law.<sup>40</sup>

In contrast with the traditional view of EU competition law as a set of rules declaring the illegality of certain conduct prescribed in them (*per se*), in the last decade the Commission has followed and suggested a more functional understanding of the prohibitions under which the economic effects resulting from the apparent anticompetitive actions are crucial for the final decision.<sup>41</sup> Indeed, the structure and wording of the Article 101(1) TFEU prohibition are amenable to such economic

---

modernisation matures in practice (for example in the application of Article 101(3) TFEU at the national level). However, in our view, such a plausible goal should be pursued through alternative devices (particularly through collaboration of all authorities within the European Competition Network). Keeping BER with that aim seems inappropriate, equivalent to the use of a sledgehammer to crack a nut.

<sup>38</sup> See this seminal idea already in the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶56- 78), further commented in Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust: Unspoken Consequences and Incomplete Treatment of Alternative Options' (1999) 20(10) ECLR 420, 422-423.

<sup>39</sup> Of course, this issue is debatable, particularly as regards Article 101(3) TFEU—where an option or preference for policy goals other than economic efficiency (at least in certain circumstances) can be identified—see Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51 Antitrust Bull 915, 952-67; Whish, *Competition Law*, 6th ed, Oxford, Oxford University Press, 2009, 153-155; Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford, Oxford University Press, 2006, 159/174; Craig and De Búrca, *EU Law: Texts, Cases and Materials*, 4th ed, Oxford, Oxford University Press, 2007, 981-982; and Townley, *Article 81 EC and Public Policy*, Oxford, Hart Publishing, 2009, *in totum*. Then, if it were true that there is a relatively big gap between the economic rationale underpinning the Commission's guidelines on Article 101(3) TFEU and the policy grounds upon which the exception has been granted in practice (environment, employment etc), this could be a justification for the continued existence of BER. However, in our view, there is very limited scope to take non-economic considerations into account in the enforcement of Article 101(3) TFEU and, in any case, BER do not seem to be in a better position to provide legal certainty as to the applicable (non-economic) criteria than guidelines (equally based on non-economic criteria).

<sup>40</sup> See Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Drexler (ed) *Economic Theory and Competition Law*, Cheltenham, Edward-Elgar - ASCOLA, 2009. In similar and more detailed terms, Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32(2) Cambridge J Econ 295; Budzinski, 'Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits' (University of Southern Denmark, Department of Environmental and Business Economics, IME Working Paper 93/09, June 2009) available at [http://www.sdu.dk/~media/Files/Om\\_SDU/Institut/Miljo/ime/wp/budzinski93.ashx](http://www.sdu.dk/~media/Files/Om_SDU/Institut/Miljo/ime/wp/budzinski93.ashx); and Muris, 'Improving the Economic Foundations of Competition Policy' (2003) 12(1) Geo Mason L Rev 1.

<sup>41</sup> This does not necessarily mean that decisions have increasingly been more discretionary as the economics ('effects-based') influence may be incorporated in the drafting or content of the rules or eventually in the notices and guidelines that might be issued, minimizing costs and mistakes; see Christiansen & Kerber, 'Competition Policy with Optimally Differentiated Rules instead of "Per Se Rules vs. Rule of Reason"' (2006) 2(2) J Comp L & Econ 215.

analysis of effects, although greater controversy has come from its use within the framework of conduct proscribed under Article 102 TFEU.<sup>42</sup>

The subsistence of several BER that exempt certain categories of agreements, universally or in specific sectors, from the prohibition of Article 101(1) TFEU runs against the dictates of the effects-based approach. The analysis that has to be pursued following such an approach is curtailed by the rigid conditions and the strict requirements imposed by each BER.<sup>43</sup>

There is no reason to keep BER when individual notifications have been abolished, because the same degree of legal certainty can be assured by self-assessment<sup>44</sup>—which may be assisted by suitable and reasonable guidelines. Of course, it can be argued that there are two levels of legal certainty: a rather abstract one, where certainty reaches all agents and derives from the clarity and predictability of the system (*i.e.* certainty of textual language, methodological consistency, and predictability in the decision-making of the relevant authority), and a more particular one, where certainty is specific to a given agent that benefits from the exemption provided by a individual authorization decision (in the prior paradigm, from the Commission itself) - that is, where certainty derives from a binding and specific legal document. Once the second level of legal certainty is unavailable to undertakings (because individual exemption decisions have been abrogated by Regulation 1/2003); under the new paradigm legal certainty must stem from the clarity and predictability of the rules exclusively. In this regard, BER do not add to legal certainty - as they do not have any ontological advantage over more general guidance (or any other type of regulatory document, for this matter) on certainty or clarity of the textual language of the competition rules. On the contrary, and from the standpoint of methodological consistency, BER perform an inappropriate and misleading guiding role, since they interfere with the more general guidance functions in the new system and limit the consistency and effectiveness of the more economic approach to EU competition law. Moreover, they can diminish enforcement

<sup>42</sup> See Röeller & Stehmann, 'The Year 2005 at DG Competition: The Trend Towards a More Effects-Based Approach' (2006) 29 *Rev Ind Org* 281; Etro, 'Competition Policy: Towards a New Approach' (2006) 2(1) *Eur Comp J* 29; and Geradin, 'Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?' (Working Paper, 2010) available at <http://ssrn.com/abstract=1569502>.

<sup>43</sup> See Case T-51/ *Tetra Pak v Commission* [1990] ECR II-309 ¶29: '[I]t is true that regulations granting block exemption, like individual exemption decisions, apply only to agreements which, in principle, satisfy the conditions set out in Article 85(3). But unlike individual exemptions, block exemptions are, by definition, not dependent on a case-by-case examination to establish that the conditions for exemption laid down in the Treaty are in fact satisfied. In order to qualify for a block exemption, an agreement has only to satisfy the criteria laid down in the relevant block-exemption regulation. The agreement itself is not subject to any positive assessment with regard to the conditions set out in Article 85(3)'. Along these lines, see e.g. regarding the 2004 revision of the technology transfer BER, Patterson, 'Revision of the New Technology Transfer Block Exemption Regulation: Convergence or Capitulation?' in Ullrich (ed) *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, Cheltenham, Edward-Elgar - ASCOLA, 2006, 65-70.

<sup>44</sup> The same reasoning which inspired the choice of the Commission regarding the notification regime—see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶12-13)—should mark the policy to be followed regarding BER.

and negatively impact upon the consistency and predictability of the decision-making by competition authorities (both the Commission and National Competition Authorities - particularly in the case of industry specific BER, given the shadows they cast on the affected economic sectors). In general, hence, BER seem to have rather negative potential effects on legal certainty, broadly understood.

Besides, soft law instruments (such as non-binding general guidelines) are essentially better suited to explain or give interpretation to rules of an economic nature.<sup>45</sup> Retaining the BER (or revising the existing BER) may interfere with business practices as firms may be led to strictly follow BER requirements (for example, when drafting the terms of contract) - thereby thwarting a crucial element in the competitive process.<sup>46</sup>

#### 4. WHAT ROLE FOR BER UNDER THE NEW ENFORCEMENT DYNAMICS?

In light of the logical consequences that we extract from the modernisation of EU competition law (*supra* §2), coupled with the twin shift towards a *more economic approach* (*supra* §3), it seems necessary to appraise whether BER can be made to fit within the (constitutional) boundaries of the new system (§4.1), and to consider the frictions and distortions that its retention within the new paradigm may generate (§4.2). Even further, industry specific BER pose additional problems and difficulties on their own (§4.3).

##### 4.1. Lacking an Administrative Justification, BER become (Quasi-)Legislative Instruments with Difficult Insertion and Justification in the EU Constitutional System

BER were approved as a kind of ‘aggregate’ exercise of the administrative discretion (or administrative discretion *en masse*) that the Commission enjoyed exclusively for the application of Article 101(3) TFEU.<sup>47</sup> Indeed, the approval of BER has been termed an ‘administrative fix’ for the unmanageable workload generated by the system of individual notifications and exemptions.<sup>48</sup> For that reason, once the enforcement monopoly has disappeared by virtue of Regulation 1/2003, it is doubtful whether the general delegation/authorisation issued by the Council to the Commission for the

---

<sup>45</sup> Bishop, ‘Modernisation of the Rules Implementing Articles 81 and 82’, op cit, n 26, 61 and Pijetlovic, ‘Reform of EC Antitrust Enforcement’, op cit, n 31, 310.

<sup>46</sup> See Korah & Horspool, ‘Competition’, (1992) 37 Antitrust Bull 337, 356-357; and Wesseling, *The Modernisation of EC Antitrust Law*, Oxford, Hart Publishing, 2000, 101 & 107. According to Weibrecht, ‘From Freiburg to Chicago and Beyond – The First 50 Years of European Competition Law’ (2008) 29(2) ECLR 81, 86 they ‘had begun to act as straightjacket for the development of contractual practice’.

<sup>47</sup> The ‘special’ nature of the ‘legislative’ powers granted to the Commission for the approval of BER is described by Gerber, ‘The Transformation of European Community Competition Law?’, op cit, n 32, 107 & 133, who stressed that DG COMP is the only Directorate General within the Commission to hold this particular competence.

<sup>48</sup> See Riley, EC Antitrust Modernisation (Part 1), op cit, n 23, 605; and Budzinski, *The Governance of Global Competition. Competence Allocation in International Competition Policy*, Cheltenham, Edward Elgar, 2008, 128.

approval of BER is still justified—or, on the contrary, it has acquired a different nature (being a more purely delegated ‘legislative’ power that, at least, deserves careful reconsideration under the new circumstances).

Moreover, in the system set by Regulation 1/2003, the adoption and enforcement of BER has entered a new dimension. Whereas in a centralized paradigm BER could be seen as an ‘*exercise of self-restraint*’ by the Commission - which decided not to intervene in specific cases as long as certain conditions were fulfilled (in a clear trade-off between accuracy and administrability of the system of EU competition law enforcement) - in a decentralized system the adoption of BER by the Commission becomes an instance of ‘imposed limitation or restriction’ of National Competition Authorities’ enforcement discretion and Courts’ adjudication powers.<sup>49</sup> Whereas such limitation is probably within the bounds of the attribution of (shared) competences in competition law issues between EU and national authorities,<sup>50</sup> its legitimacy might raise doubts.<sup>51</sup> Finally, doubt might be cast on the conceptual compatibility of the *universal* legal exemption contained in Article 101(3) TFEU and the *specific* exemptions contained in general BER (or the ‘*super-specific*’ exemption of industry BER) - particularly when the conditions for the application of the latter could distort the application and effectiveness of the former.<sup>52</sup>

<sup>49</sup> Hence, it could be seen as one amongst the various elements that have led commentators to consider that, regardless of the apparent or institutional decentralisation, the modernisation process has centralised EU competition law (at least from a substantive standpoint) far beyond the prior system of Regulation 17/62; see Riley, *EC Antitrust Modernisation (Part 1)* op cit, n 23, 604 & Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1’ (2003) 24(12) ECLR 657; and, Wilks, ‘Agency Escape’, op cit, n 23, 438-439.

<sup>50</sup> See Mavroidis & Neven, ‘From the White Paper to the Proposal for a Council Regulation: How to Treat the New Kids on the Block’ (2001) 28(2) Leg Iss Econ Integration 151, 159-166. See also Budzinski, *The Governance of Global Competition* (2008) 126-127; and Budzinski & Christiansen, ‘Competence Allocation in the EU Competition Policy System as an Interest-Driven Process’ (2005) 25(3) J Public Pol’y 313, who strongly criticise the system of competence allocation.

<sup>51</sup> The legitimacy concern is similar to the concern associated with substantial shifts in the interpretation and enforcement adopted unilaterally by the Commission; see Gerber, ‘Two Forms of Modernisation in European Competition Law’, op cit, n 32, 1261. However, this needs to be weighed against the role of the Commission as the guardian of the Treaties—which is reinforced by the key position that the modernisation package has granted the Commission in setting competition policy and ensuring consistent interpretation and application of Articles 101 and 102 TFEU throughout the single market (thereby granting it ‘pre-eminence’); see Gerber & Cassinis, ‘The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement’ (2006) 27(1) ECLR 10 & (2006) 27(2) ECLR 51, 14-15 & 57; and Forrester, ‘Modernisation: An Extension of the Powers of the Commission?’ in Geradin (ed) *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp, Intersentia, 2004, 86-89.

<sup>52</sup> In similar terms, doubt was cast on the possibility that the Commission could continue to adopt BER in a legal exemption paradigm, on the basis of a contradiction between the general legal exemption in Article 101(3) TFEU (post-modernisation) and specific constitutive determinations of exemption in BER; see Deringer, ‘Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Arts. 85 und 86 EG-Vertrag (Arts. 81 und 82 EG)’ (2000) 1 EZW 5, 7 & 8) (*apud* Marengo, ‘Does a Legal Exception System Require an Amendment of the Treaty?’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 173). However, it has also been argued that those concerns do not seem to pose significant impediment

In our opinion, it is justifiable to consider that the empowerment of the Commission to adopt the BER has become a significant *anomaly* within the constitutional system of the EU and that, in light of its very low level of democratic legitimacy - and in the absence any practical need - should be abolished. In any case, this position is supported not only by constitutional reasons and, hence, we will not discuss this issue in further detail.

#### **4.2. BER Generate Significant Risks of Inconsistency and Effectiveness of Enforcement of EU Competition Law in the Markets Concerned (Particularly in the Case of Industry Specific BER) and, hence, Can be Self-Defeating**

From a different perspective (and assuming that the previous considerations were not enough to justify the repeal of BER), the need and desirability of the BER mechanism within the paradigm of Regulation 1/2003 merit further scrutiny. Given that the main concerns guiding the reform undertaken by Regulation 1/2003 were i) increasing the *effectiveness* in the enforcement of EU competition rules, while ii) ensuring *consistency*<sup>53</sup> - these seem the relevant parameters to conduct such (re)assessment.

BER can run against the '*more economic approach*' associated with the modernisation of EU competition law,<sup>54</sup> and their repeal could contribute to the development of better and more precise competition enforcement.<sup>55</sup> BER can also run against the analysis of Article 101 TFEU as a whole by requiring a two-step process (*supra* §2)—particularly by imposing mandatory rules (such as the exclusion of exemption for *blacklisted clauses*) that

---

to the adoption of BER under the paradigm of Regulation 1/2003, see Marengo (*ibid*, 173). Therefore, the issue is still unresolved.

<sup>53</sup> The key role of consistency for the success of the modernisation project is stressed by Gerber & Cassinis, *The "Modernisation" of European Community Competition Law*, *op cit*, n 51.

<sup>54</sup> G Monti, *New Directions in EC Competition*, *op cit*, n 15, 186, who advocated for the abolition of block exemptions, given that they are based on oversimplified economic analysis 'and are at once over and under inclusive'.

<sup>55</sup> G Monti, 'New Directions in EC Competition', *ibid*, 187-188, and Monti, *EC Competition Law*, *op cit*, n 35, 399-400, indicated that there are several benefits derived from the axing of block exemptions, such as the equal treatment of all agreements (overcoming the 'straightjacket' effect of BER), the elimination of overly-restrictive clauses included in BER, promotion of a more economic-oriented analysis of agreements, and greater significance granted to the *de minimis* rule. Interestingly, the superiority of the *de minimis* rule over BER was stressed by Bishop, 'Modernisation of the Rules Implementing Articles 81 and 82', *op cit*, n 26, 56. It is noteworthy to stress that the Commission intended to achieve some of these goals through the adoption of a revised BER policy that went hand-in-hand with modernisation; 'the Commission intends to adopt block exemption regulations with a wider scope of application. The use of market share thresholds will allow the Commission to eliminate the straight-jacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium-sized undertakings. The Commission will adopt guidelines and individual decisions to clarify the scope of application of Articles [101](1) and [101](3) outside the block exemptions', White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶30). However, as anticipated, any shift in BER policy that falls short of repeal might be insufficient to (completely) achieve the desired results.

could contravene the holistic analysis required for the proper application of Article 101 TFEU post-modernisation.<sup>56</sup>

Therefore, BER seem to distort the proper understanding of the rules contained in Article 101 TFEU and their application and, in general terms, can distort the enforcement of EU competition law. Additionally, this effect might have been buttressed by the fact that some member States adopted EU BER and applied them to exempt conduct under their domestic competition laws.<sup>57</sup>

Moreover, BER also cause a relatively unnoticed distortion of EU competition law enforcement. Inadvertently, BER may generate limits on monitoring and enforcement (as they create an *aura* or *shadow* that blurs surveillance activities in the sectors concerned).<sup>58</sup> If that is true, the mere existence of BER (and with particular intensity in sector-specific BER) may create a false impression of a blanket exemption for undertakings, as well as perverse (diminished) incentives for enforcers to control actual compliance with the conditions set out in the BER. In other words, BER increase the *uncertainty* that affects both the decisions of undertakings and the monitoring and enforcement efforts of authorities and, ultimately might significantly reduce the effectiveness of EU competition law in the concerned industries. In this regard, it is quite telling that, according to the national reports presented in the XXIII FIDE Congress (2008), no decision to withdraw the BER benefit had been adopted by the national competition authorities of member States—either on the basis of Article 29(2) of Regulation 1/2003 or the equivalent domestic provisions.<sup>59</sup> This also reflects the

<sup>56</sup> In similar terms, it has been stressed that the Commission has traditionally used BER to impose (quasi)mandatory rules; see Wesseling, *The Modernisation of EC Antitrust Law*, op cit, n 20, 84; and Forrester, ‘Modernisation: An Extension of the Powers of the Commission?’ op cit, n 51, 87 (‘Block exemptions [...] might not in theory set compulsory rules [...] but in actual practice they became quasi-mandatory codes of conduct’). See also Gerber, ‘The Transformation of European Community Competition Law?’, op cit, n 32, 134-135 (who further stressed that ‘the case of block exemptions illustrates that legislation tends to broaden the existing prohibitions beyond levels established by the [European Court of Justice]’). Also, in case of sector-specific BER that co-exist with general BER on a same type of conduct (as it happens with vertical agreements on the motor-vehicle sector,) the question is ‘why are car distribution contracts unable to benefit from this general exemption for similar contracts for the distribution of other consumer goods?’, Marco Colino, ‘On the Road to Perdition? The Future of the European Car Industry and its implications for EC Competition Policy?’ (2007) 28(1) *Nw J Int’l L & Bus* 35, 74.

<sup>57</sup> Such is the case in Spain, where Article 1(4) of the Competition Act (Ley 15/2007, de 3 de Julio, de Defensa de la Competencia. BOE 159, 04.07.2007, 28.848-28.872) establishes that ‘The prohibition in Section 1 [equivalent to article 101(1) TFEU] shall not apply to agreements, collective decisions or recommendations, or concerted or consciously parallel practices that comply with the provisions set out in the Community Regulations on the application of Article 81(3) of the EC Treaty for certain categories of agreements, decisions by associations of undertakings and concerted practices, including when the corresponding conduct may not affect trade between EU Member States’ (emphasis added).

<sup>58</sup> An idea that we have advanced in relation to the insurance BER; Marcos & Sanchez Graells, ‘Some Preliminary Views on the Revision of the Insurance Block Exemption Regulation’ (2009) 30(10) *ECLR* 745.

<sup>59</sup> See the reports included in Koeck & Karollus (eds) *The Modernisation of European Competition Law—Initial Experiences with Regulation 1/2003*, 2 FIDE XXIII Congress Linz 2008, Wien, Nomos - Facultas.wuv, 2008, according to which the first four years of enforcement of Regulation 1/2003 had generated scant results in this area—not to say an absolute lack of results. Most countries report no decisions on this issue (Croatia,

practice of the Commission as regards the enforcement of BER through withdrawal of their benefits.<sup>60</sup>

In general, then, from the perspective of increasing the effectiveness of EU competition law, the BER mechanism - at least under the new paradigm brought forward by Regulation 1/2003 - tends to raise more obstacles than to make a positive net contribution. As we shall see immediately, the situation is similar from the perspective of ensuring the consistency of enforcement of EU competition law.

Indeed, contrary to what could appear, BER have a *relatively limited power to ensure the consistent interpretation* and application of EU competition law. First, because they are highly dependent on market definition in order to determine whether the firms concerned are covered by the *safe harbours* contained therein (which, as a result of the new BER strategy adopted by the Commission post-modernisation, are less formal and more centrally grounded on economic criteria; and, particularly, on market share thresholds).<sup>61</sup> The difficulties involved in the definition of markets in certain industries may blur the analysis and assessment of conduct by firms whose market shares may be near the thresholds frequently used by BER, with the ensuing uncertainty that this may provoke.<sup>62</sup> Moreover, the assessment of practices and conduct by firms in an industry covered by an industry specific BER is further complicated when they are placed slightly out of the safe harbour provided by the BER (due to the market share condition, or for not being the type of practice or conduct expressly mentioned in the BER). Second, because they can give rise to divergent interpretations as regards the application of the *de minimis* rule.<sup>63</sup> Finally, because they offer no guidance whatsoever

---

Czech Rep., Denmark, Estonia, Finland, Hungary, Ireland, Luxembourg, Netherlands, Portugal, Slovenia, Spain and Sweden). Only in France has there been a complaint requesting the withdrawal of BER benefit (which was rejected) and, in Greece, there was a case pending decision in which withdrawal had been proposed. There was no information available for other member States (Poland and the United Kingdom—where, reportedly, there has been an instance of withdrawal—provided no data in their reports, and the rest of the countries were not included in the 2008 FIDE Report).

<sup>60</sup> See e.g. Jones & Sufrin, *EC Competition Law. Text, Cases and Materials*, 3rd ed, Oxford, Oxford University Press, 2008, 288-289; and, specifically, in relation with vertical (distribution) agreements, Whish, *Competition Law*, op cit, n 39, 659-660.

<sup>61</sup> See Carlin & Pautke, 'The Review of the Transfer Technology Block Exemption Regulation', op cit, n 33, 608; Rodger, 'The Commission White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty' (1999) 24(6) Eur L Rev 653, 663. Of course, it must be acknowledged that market definition is well rehearsed in both Article 102 TFEU and the practice related to merger control by the Commission. Moreover, with complicated areas of law (for example vertical restraints where the same practice can be harmful in some markets and beneficial in others), market power is the most straightforward way of regulating potentially harmful practices. Nonetheless, in our view, the strong dependence of current BER on market definition severely limits their ability to generate a 'net contribution' to legal certainty in the affected industries.

<sup>62</sup> See Bishop, 'Modernisation of the Rules Implementing Articles 81 and 82', op cit, n 26, 60 & 64; and Waelbroeck, 'Vertical Agreements: 4 Years of Liberalisation by Regulation N. 2790/99 after 40 Years of Legal (Block) Regulation' in Ullrich (ed) *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, Cheltenham, Edward-Elgar - ASCOLA, 2006, 87-88.

<sup>63</sup> Indeed, the practice of the Commission to extend certain requirements of BER to the analysis of *de minimis* agreements—such as the inexistence of *black clauses*, see Notice on Agreements of Minor Importance Which



as to the criteria to be applied in cases not covered by the BER—and generate uncertainty as to the possible application of Article 101(3) TFEU according to general criteria if the specific criteria set out in the BER do not exempt a given agreement (due, for instance, to the inclusion of a *black clause* that triggered automatic exclusion of the BER).

For all these reasons, BER seem to lie ‘in the middle of nowhere’ as regards guidance to undertakings and enforcement authorities and in most, if not all instances, need to be complemented with more general guidance. Broadly considered, then, BER do not seem to effectively contribute to enhance consistency (or, at least, they seem insufficient to guarantee it). Hence, the shift to a model of ‘pure’ guidance seems preferable to the current mixed model of BER *plus* guidance,<sup>64</sup> since it would at least exclude the need to conduct a preliminary assessment under the rules of the BER and, failing that, a second assessment under the more general criteria contained in the guidelines (particularly in those cases in which inconsistencies could be reached between the content of the BER concerned and the assessment according to the alternative guidelines).

### 4.3. Specific Questions and Problems Posed by Industry Specific BER

The issues posed by BER, in general, are exacerbated in case of some industry specific BER, for two reasons. First, the exemption of the application of EU competition law prohibitions to anticompetitive practices and conduct in certain industries may run contrary to the goals and principles on competition law as not being grounded in any public interest, and for diminishing consumer welfare.<sup>65</sup> In many cases, industry specific exemptions contained in BER may be no more (and no less) than a form of *economic protectionism*, providing shelter to inefficient industries and firms and running against market efficiency. Occasionally, industry specific BER may be the result of lobbying

---

Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001, C368/13 (¶11) and G Monti, ‘New Directions in EC Competition’, op cit n 15, 187 - is highly debatable and it would not be surprising that national competition authorities could opt for a different approach, exempting *de minimis* agreements regardless of their content (as we understand that it should be done under the more economic and holistic approach outlined *supra* §3).

<sup>64</sup> The Commission itself acknowledged the benefits of notices and guidelines, which ‘are particularly well suited to the interpretation of rules of an economic nature, because they make it easier to take account of the range of criteria that are relevant to an examination under the competition rules. They might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out’; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶31).

<sup>65</sup> See Adams, ‘Business Exemptions from the Antitrust Laws: Their Extent and Rationale’ in Phillips (ed) *Perspectives on Antitrust Policy*, Princeton, Princeton University Press, 1965; Tollison, ‘Public Choice and Antitrust’ (1985) 4(3) *Cato J* 905, 911; and De Alessi, ‘The Public Choice Model of Antitrust Enforcement’ in McChesney & Shuggart (eds) *The Causes and Consequences of Antitrust. The Public Choice Perspective*, Chicago University of Chicago Press, 1995, 200.

efforts by concerned business without any credible economic basis<sup>66</sup>—*i.e.* may result in regulatory capture of the Commission.

Second, differently from those BER of general scope and application, sector-specific BER tend to become instruments of (an almost purely) regulatory character. As they attempt to face the theoretical singularities of markets and competition in certain industries, they change the focus and use of the exemption device rather as a channel through which solutions are given to their endogenous market failures and competition problems that might exist—hence, giving rise to an instance of undercover regulation or *regulatory tunnelling*. Therefore, in so doing, the Commission transforms its powers related to enforcing competition prohibitions contained in EU law into an industrial policy tool to engineer the marketplace, thereby sacrificing competition law goals.<sup>67</sup> Moreover, from a regulatory technique perspective, the fact that the Commission may be using disparate instruments within the same sector simultaneously (*i.e.* BER and pure regulatory tools run in parallel) may distort its objectives, introducing conditions or requirements that may be redundant or unnecessary.

## 5. COMPLETING THE MODERNISATION PROCESS: STRATEGY AND RECOMMENDATIONS FOR A MORE CONSISTENT EXEMPTION POLICY

As we have tried to show in this paper, BER are *relics* from the past. Under the new paradigm brought forward by Regulation 1/2003, they have (inadvertently) *mutated* from administrative devices or fixes into *pseudo* or *quasi*-legislative instruments and, as a consequence, their justification and legitimacy should be reassessed under a new light—which shows the pitfalls embedded in the retention of this institution in the context of a decentralised system. Moreover, BER run counter to the main goals of the modernisation process, as they generate obstacles for an effective enforcement of EU competition law and shade and blur the consistent enforcement of Article 101 TFEU *as a whole*. Therefore, overall, there seems to be no (proper) role for BER in the realm of Regulation 1/2003.

As a consequence of this analysis, and in order to complete the modernisation of EU competition law in a *second wave* (*i.e.* as a consequence of the process of revision of Regulation 1/2003 currently underway), we would recommend that the Commission

---

<sup>66</sup> In general terms, Adams & Brock, 'The Political Economy of Antitrust Exemptions' (1990) 29 Washburn L.J. 215, 216; American Bar Association, *Federal Statutory Exemptions from Antitrust Law*, Chicago, ABA Section of Antitrust Law, 2007, 330-332; Bush, 'Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries' (2006) 3 Utah L. Rev. 613, 635; and Khemani, 'Application of Competition Law: Exemptions and Exceptions' 11 & 32 (UN Conference on Trade and Development, UNCTAD/DITC/CLP/Misc.25, 2002) available at [http://www.unctad.org/EN/docs/ditclpmisc25\\_en.pdf](http://www.unctad.org/EN/docs/ditclpmisc25_en.pdf).

<sup>67</sup> See Wesseling, *The Modernisation of EC Antitrust Law*, op. cit., n. 20, 40. Besides, as a learning from other jurisdictions, block exemptions might blur the enforcement of antitrust rules in regulated and deregulated areas as the intermingling of antitrust and regulatory instruments may lead to unwanted outcomes, see the U.S. experience analysed by Bush, 'Antitrust Exemptions and Immunities as Applied to Deregulated Industries', *ibid.*

adopt a clear-cut policy to abrogate *all* BER (both general and industry specific) and to issue corresponding substitutive general guidelines—which could even absorb some or most of the content of current BER, but presenting it with a real informative and non-binding character. The effects of such a policy would most likely be to increase flexibility in the enforcement of Article 101 TFEU (in line with the *more economic approach* and the requirements of a decentralised system) that would not significantly impair either the effectiveness or consistency of the enforcement of EU competition law (which, as we have seen, are not significantly advanced by BER). This policy should be especially beneficial in markets covered by industry specific BER, where the negative consequences resulting from BER seem to be greater.



---

**THE COMPETITION LAW REVIEW**

---

Volume 6 Issue 2 pp 203-224

July 2010

Recent Changes in the Regulation of Motor Vehicle Distribution in Europe –  
Questioning the Logic of Sector-Specific Rules for the Car Industry*Sandra Marco Colino\**

---

A new block exemption regulation for motor vehicle distribution agreements was adopted in May 2010. Regulation 461/2010 extends the application of Regulation 1400/2002 – the first ‘new style’ block exemption for the car sector – for three years regarding the distribution of new motor vehicles. After that period, the sector will finally fall within the scope of the general block exemption for vertical agreements - Regulation 330/2010. At the same time, Regulation 461/2010 contains a list of hardcore restrictions applicable to the car aftermarket. It is accompanied by a set of sector-specific supplementary guidelines. As Regulation 1400/2002 is progressively replaced, the momentum calls for an assessment of its achievements and the merits of the changes envisaged. The Commission appears to finally acknowledge that the maintenance of specific rules for the car sector is of questionable necessity, and opts to gradually include the sector in the general block exemption regulation for vertical agreements. Such a welcome change should doubtlessly bring coherence to an exemption system divided by the existence of a specific car industry regime for the past fifteen years. Unfortunately, a closer look at the modifications rapidly mitigates the initial enthusiasm, particularly since the Commission has opted to maintain specific rules for the aftermarket, and has delayed the inclusion of the sector in the general regime for vertical agreements. Whilst it is too early to assess the merits of the forthcoming amendments, this paper questions the practical effectiveness of the Commission’s most recent reform, and argues that a precious opportunity to unify the curious divide between distribution agreements in the car sector and all other industries may have – yet again – been squandered.

---

**INTRODUCTION**

Only seven years after the entry into force of Regulation 1400/2002,<sup>1</sup> the first ‘new-style’ block exemption for the distribution of motor vehicles, a new reform of the sector specific rules has just been completed. Regulation 461/2010 has been introduced,<sup>2</sup> along with a set of Supplementary Guidelines on Vertical Restraints in Agreements for the Sale and Repair of Motor Vehicles and for the Distribution of

---

\* Research Assistant Professor, The Chinese University of Hong Kong. PhD, European University Institute, Florence. LLM, Universidad Carlos III, Madrid. The author would like to thank all the participants of the Fourteenth Competition Law Scholars Forum Workshop (London, 10 September 2009) for their helpful comments. All errors are mine alone.

<sup>1</sup> Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30-41.

<sup>2</sup> Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L129/52-57.

Spare Parts for Motor Vehicles (hereinafter the ‘Supplementary Guidelines’)<sup>3</sup> The new Regulation contains a list of hardcore restrictions applicable to the motor vehicle aftermarket – repair, maintenance and the sale of spare parts – which came into force on 1 June 2010. It also extends the application of the provisions of Regulation 1400/2002 relating to distribution agreements and concerted practices of new motor vehicles until June 2013. After that date, the exemption of such contracts will be regulated by the general regime for vertical agreements, the newly adopted Regulation 330/2010.<sup>4</sup>

These sector-specific rules lay down the conditions to be met by vertical agreements in the car industry in order to be block exempted from the prohibition of Article 101(1) TFEU by virtue of Article 101(3) TFEU.<sup>5</sup> Back in 2002, the introduction of Regulation 1400/2002 was the result of a long-awaited reform that brought the specific rules for the sector in line with the general regime for vertical agreements, which had itself been reformed two years earlier with Regulation 2790/99.<sup>6</sup> At the time, the abolition of the previous rigid system raised great expectations among academics and stakeholders. The changes were principally aimed, on the one hand, at balancing the relationship between manufacturers and dealers, and on the other, they attempted to introduce a methodological economic assessment to determine the validity of agreements. To achieve the former, among other novelties, Internet operators and supermarket sales were given ground to flourish with the removal of the obligation on dealers to offer repair and aftersales services. In addition, to further enhance the bargaining power of dealers, Articles 3(3), 3(5) and 3(6) of Regulation 1400/2002 focused on the duration and termination of dealerships. As regards the latter, and very much in line with the general regime for vertical agreements, economic analysis was introduced in the shape of market share thresholds below which agreements were exempted, provided no hardcore restrictions are present.

Regulation 1400/2002 and Regulation 2790/99 expired on 31 May 2010. As new rules come into force, the momentum calls for an assessment of the merits of the regime that has just been replaced in order to assess the adequacy of the latest reforms. The purpose of this paper is to determine whether the practical shortcomings of the existing block exemption have been adequately addressed. Importantly, the Commission has finally opted for extending the application of the general rules for vertical agreements to the industry. Such a welcome change would doubtlessly bring coherence to an exemption system divided by the existence of a specific regime for the car industry for

---

<sup>3</sup> Commission Notice, Supplementary Guidelines on Vertical Restraints in Agreements for the Sale and Repair of Motor Vehicles and for the Distribution of Spare Parts for Motor Vehicles [2010] OJ C138/16-27.

<sup>4</sup> Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices [2010] OJ L102/1-7.

<sup>5</sup> When agreements do not qualify for an exemption under Regulation 461/2010 or 1400/2002, they may still be exempted when they meet the conditions laid down in Article 101(3) TFEU.

<sup>6</sup> Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article [101](3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, [1999] OJ L336/29.

fifteen years.<sup>7</sup> Unfortunately, a closer look at the new rules somewhat mitigates the initial enthusiasm; the Commission has maintained specific rules alongside the general regime in the shape of guidelines and a new block exemption with specific hardcore restrictions for the car aftermarket. Furthermore, the inclusion of the sector in the general regime for vertical agreements is delayed, as the life of parts of Regulation 1400/2002 is to be extended for three years. This study also places the changes in context, as they come at a time of financial instability and coincide with a profound crisis in the automobile industry. In addition, the ‘umbrella’ block exemption for vertical agreements in all other sectors of the economy has also been reformed. Regulation 330/2010 was announced in July 2009, along with new Guidelines on Vertical Restraints. Given that in three years the primary car market will be governed by these general rules, the amendments need to be scrutinised in order to determine how they will affect the car sector.

While it is too early to assess the merits of the changes, it is argued that they are somewhat timid, and thus a golden opportunity to introduce vital reforms may be squandered. An analysis of the previous rules reveals that two issues would have required particular attention. Firstly, economic analysis as envisaged in Regulation 1400/2002 may be excessively rigid. Unfortunately, the new rules seem to overlook this aspect; moreover, the new regulation for vertical agreements proposes to take into consideration the market share of the buyer, which would lead to enhanced inflexibility. Secondly, the puzzling obligation to introduce certain contractual clauses as a condition for exemption is to survive for at least another three years as the lifespan of the current rules has been prolonged. Furthermore, the need of these special provisions for the car aftermarket may be questioned, since the peculiarities of the sector can hardly serve to justify a differentiated regime. It is necessary to establish whether the problems identified by the Commission are truly exclusive to the car industry. If this is not the case, it seems absurd to disrupt the coherence and unity of the system. Underlying this proposition is a query as to the logic of establishing an excessively detailed exemption system. While Article 101(3) TFEU requires complex economic analysis, and block exemptions attempt to provide legal certainty for firms, it would appear that the problems may be derived from an overuse of this Treaty provision in the first place. In this sense, limiting the excessively broad scope of the prohibition contained in Article 101(1) TFEU would reduce the need to resort to the exemption system and lead to a more straightforward regime.

In order to adequately analyse these issues, this study is structured in four parts. Part One describes the context of the present reform by examining the crisis of the European car industry, its origins and its consequences. Part Two explains the competition law implications of distribution agreements in the car sector in an attempt to understand why a sound regulation is of crucial importance. Part Three carries out

---

<sup>7</sup> In her Ph.D., the author questioned the rationale behind the specific rules. See S Marco Colino, ‘Towards a Sound Economic Analysis in EC Competition Law? The New Regulatory Framework for Motor Vehicle Distribution Agreements in the EU’ (2007) PhD thesis, European University Institute, Florence

an assessment of Regulation 1400/2002, and Part Four analyses the lines of the most recent reform and attempts to make suggestions for change.

## 1. THE CHALLENGES FOR COMPETITION LAW OF AN INDUSTRY IN CRISIS

If your time to you is worth savin'  
Then you better start swimmin'  
Or you'll sink like a stone,  
For the times they are a-changin'<sup>8</sup>

As the reform of the car distribution rules is implemented, and borrowing Bob Dylan's words, the car industry appears to be sinking like a stone as it is immersed in what experts have referred to as its most acute crisis to date. Car sales in some countries may have rocketed in recent months, but these isolated rises in demand are consequential to government stimuli to purchase new motor vehicles. Germany, the US and the UK are some of the nations that have experienced such increases. Car sales in Germany rose by 27 per cent in the early months of 2009 as a result of an incentive to encourage consumers to upgrade their vehicles.<sup>9</sup> In the US, a similar scheme known as the Car Allowance Rebate System (CARS) had a similar impact in August 2009. Sales of Ford vehicles amounted to 181,826 (an 11 per cent increase on the previous month and 17.2 per cent on the previous year), while GM sold 246,479 cars and trucks (30 per cent more than the previous month, but still less than in August 2008).<sup>10</sup> As for the UK, in October 2009 new car sales experienced a 31 per cent growth on the previous year as a result of the British government's scrappage campaign, which has been in place since May 2009 and which awards £2,000 to owners of motor vehicles over 10 years old for trading their old car for a new one.<sup>11</sup>

Looking beyond these initiatives, the broader picture reflects a very different reality. For several years, the big European and American manufacturers have been experiencing a significant and increasing drop in sales. By way of example, in October 2008 new car sales in Europe fell by 14.5 per cent.<sup>12</sup> The industry's troubles are principally the consequence of long-running overcapacity. As early as 2000, statistics reflected that European carmakers were producing about 6 million more cars than

---

<sup>8</sup> An extract from Bob Dylan's classic song "The Times They are a'Changin'" (1964), from the album that bears the same name.

<sup>9</sup> However, when the entire year is considered German manufacturers still experienced an overall drop in sales and exports in 2009. See J Kollewe, 'German Car Scrappage Scheme Extended to Meet Demand' (7 April 2009) *The Guardian*, at <http://www.guardian.co.uk/business/2009/apr/07/automotive-industry-germany-scrappage>.

<sup>10</sup> See A Frear, 'US Car Sales Soar During Cash for Dunkers' (1 September 2009), *The Times Online*, at [http://business.timesonline.co.uk/tol/business/markets/united\\_states/article6817689.ece](http://business.timesonline.co.uk/tol/business/markets/united_states/article6817689.ece).

<sup>11</sup> See J Kollewe, 'Scrappage Scheme Boost Continues as New Car Sales Up 31% on Last Year' (5 November 2009), *The Guardian*, at <http://www.guardian.co.uk/business/2009/nov/05/uk-car-sales-30-percent-up-october>.

<sup>12</sup> 'EU Warns Against Car Subsidy Race', *BBC News* (London, 21 November 2008), at <http://news.bbc.co.uk/1/hi/business/7742407.stm>.



could be sold.<sup>13</sup> The figures should have set off alarm bells among producers, who ought to have been enticed to outrun their competitors by seeking ways in which to increase efficiency. However, the facts reflect a very different reaction. There has been a clamour for decades among experts that the European industry's productivity and capacity to innovate are considerably below that of competitors. Consumer preferences have evolved over the years in favour of smaller, environmentally friendly cars, yet manufacturers in Europe and the US seem to remain loyal to their classic products. Furthermore, a new generation of carmakers, mainly from China and India, is exerting fierce competition. The newcomers are expected to be the main beneficiaries of the anticipated growth in demand for automobiles as a consequence of the motorisation of the 'Asian dragons'.<sup>14</sup> As a result, the ghost of overcapacity still haunts Europe's manufacturers.

In this context, the recent global economic crisis could not have come at a worst moment for the industry, and the downturn may well claim some casualties among the most affected manufacturers. National governments have rushed to the rescue of this crucial sector of the economy to avoid the catastrophic consequences of the collapse of the industry. In the United States, Detroit's 'Big Three' – General Motors, Ford and Chrysler – have seen regular decreases in profits for years, and in November 2008 GM announced annual losses of four billion dollars.<sup>15</sup> The sector turned to the government for help, and president Barack Obama promised subsidies<sup>16</sup> and incentives for purchasing vehicles.<sup>17</sup> The aid however is subject to strict conditions in an attempt to force manufacturers to finally adopt a long-term regeneration plan.<sup>18</sup> Europe's manufacturers are in a similar position, although there have been mixed feelings about subsidies to the industry. Former Commissioner Kroes insisted that a 'subsidy race' must be avoided, as financial aid will not solve the industry's woes unless the funds are adequately managed.<sup>19</sup> Jaguar Land Rover<sup>20</sup> said in December 2008 that the crisis of the

---

<sup>13</sup> 'Analysis: Europe's Car Industry' *BBC News* (London, 12 May 2000) at <http://news.bbc.co.uk/1/hi/business/746306.stm>.

<sup>14</sup> 'Extinction of the Predator', *The Economist* (London, 10 September 2005) p. 63.

<sup>15</sup> TL Friedman, 'While Detroit Slept' (9 December 2008) *New York Times*, at <http://www.nytimes.com/2008/12/10/opinion/10friedman.html>.

<sup>16</sup> W Johnson, 'Obama Backs £33bn Loans for Car Industry' (12 November 2008), *The Independent*, at <http://www.independent.co.uk/news/world/americas/obama-backs-pound33bn-loans-for-car-industry-1014893.html>.

<sup>17</sup> Such as the Car Allowance Rebate System (CARS), which has had very positive results. See A Frear, 'US Car Sales Soar During Cash for Dunkers' (1 September 2009), *The Times Online*, at [http://business.timesonline.co.uk/tol/business/markets/united\\_states/article6817689.ece](http://business.timesonline.co.uk/tol/business/markets/united_states/article6817689.ece).

<sup>18</sup> 'Obama Vows Aid for Car Industry' (7 December 2008) *BBC News*, at [http://news.bbc.co.uk/1/hi/world/americas/us\\_elections\\_2008/7770129.stm](http://news.bbc.co.uk/1/hi/world/americas/us_elections_2008/7770129.stm).

<sup>19</sup> 'EU Warns Against Car Subsidy Race', *BBC News* (London, 21 November 2008), at <http://news.bbc.co.uk/1/hi/business/7742407.stm>.

<sup>20</sup> The Midlands company was purchased in June 2008 by the Indian manufacturer Tata.

sector in the UK is a 'national emergency',<sup>21</sup> and as a result the British government has promised an investment of 70 million pounds. German manufacturers are also affected, yet the German government has adopted a more sceptical attitude towards subsidies. Very much in line with former Commissioner Kroes, Chancellor Merkel has stated that '[t]he future of the auto industry cannot, in the long run, rely on a state subsidy',<sup>22</sup> while the Finance Minister justified this position arguing that the government could not account for the mistakes of manufacturers.<sup>23</sup> Instead of direct subsidies, the government opted to offer an incentive scheme to compel consumers to purchase new fuel-efficient cars this year, which proved to be very successful and is bound to serve as an example to follow in other countries.<sup>24</sup>

The caution exercised by governments when subsidising the industry can be better understood by examining the questionable decision-making of the sector in the past. In the last decades, consumers' preferences have evolved, and yet car manufacturers in the EU and the US have not reacted adequately and timely to the new reality. Statistics reflect a growth in the preference for compact vehicles. They are not only less expensive, but also better suited for contemporary lifestyle. The proliferation of big cities progressively transformed the purpose given to this utility. Cars are no longer simply a means to travel or to transport goods; they are also used for moving within urban areas where distances are shorter and parking is at a premium. Small passenger cars are more appropriate for such commutes. In addition, the volatility of the price of crude oil has led to alarming price swings – in the summer of 2008, the price of a barrel was almost \$150, and only a few months later it dropped to below \$40.<sup>25</sup> This unpredictability, coupled with growing concerns for the environmental problems derived from carbon dioxide emissions, has driven consumers towards vehicles powered by other fuels. As a consequence, hybrid cars have become increasingly popular. In such an evolving environment, it would seem wise for manufacturers to adapt to the new circumstances. While Japanese manufacturers would appear to have reacted to the changing times, carmakers in Europe and the US chose to avoid thorough reforms. Instead, they opted for short-term solutions that would prove unsustainable in the long run. In particular, alliances and mergers between brands

---

<sup>21</sup> G Ruddick, 'Jaguar Land Rover Claims Car Industry Crisis is 'National Emergency' for UK', (18 December 2008) *The Telegraph*.

<sup>22</sup> See 'Merkel Warns on US Auto Subsidies' (20 January 2009), *Reuters*, at <http://www.reuters.com/article/GCA-autos/idUSTRE50J2M920090120>.

<sup>23</sup> 'German Finance Minister Rules Out Auto Industry Bail (16 November 2008) *APF*, at [http://www.google.com/hostednews/afp/article/ALeqM5ji8I\\_Lbl4p-Oifa3mNqDbINNTGQ](http://www.google.com/hostednews/afp/article/ALeqM5ji8I_Lbl4p-Oifa3mNqDbINNTGQ).

<sup>24</sup> J Kollwe, 'German Car Scrappage Scheme Extended to Meet Demand' (7 April 2009) *The Guardian*, at <http://www.guardian.co.uk/business/2009/apr/07/automotive-industry-germany-scrappage>.

<sup>25</sup> A Wolker, 'Crude Oil's Rollercoaster Prices' (7 August 2009), *BBC News*, online at <http://news.bbc.co.uk/1/hi/business/8144533.stm>.

proliferated as a way out of the crisis.<sup>26</sup> However, time has shown that such quick fix solutions were hasty remedies that could not endure the test of time.<sup>27</sup>

As a result, it is obvious that the overwhelming responsibility for the industry's crisis rests upon the manufacturers themselves. European companies, threatened by the competition posed by Asian and American carmakers, have opted for superfluous solutions with immediate survival effects without confronting more complex and costly – yet essential – reforms.<sup>28</sup> Consequently, the reaction of European manufacturers to the threat posed by competitors has had a snowball effect, and despite masking immediate problems, in the long run it has only served to aggravate the serious operational issues of a stagnant industry. As a way out of the nadir, manufacturers now look towards national governments in yet another attempt to squander vital refurbishment. Governments are understandably cautious about subsidising inefficient industries; such a policy could lead to a distortion of competition. However, it is clear that the industry is an essential pillar of the economy for the Old Continent, and that in order to have the strength to swim for the shore manufacturers may need governments to provide them with a buoy to cling to. It is for this reason that, in comparison with other industries, Member States tend to be more willing to intervene and prevent the collapse of car manufacturers.

In such a context, it is essential that governments carefully consider the most adequate means to provide the necessary aid. While direct subsidies to the industry may raise certain competition concerns, incentive schemes that encourage consumers to purchase new motor vehicles on the one hand while putting pressure on manufacturers to innovate and adopt environmentally-friendly technologies on the other, doubtlessly seems like the most reasonable option. The measures adopted in Germany and the US are designed very much along these lines and are worthy of praise. It is nonetheless regrettable that sometimes the subsidies given to car purchasers are based upon the condition that they trade an old car for a new one, as is the case in the UK. Although the benefits of removing old cars from circulation are obvious, such an incentive does not benefit those who do not own a car (nor those who have a motor vehicle that is less than 10 years old). Furthermore, it is unfortunate that the aid is not linked to the purchase of ecologically friendly cars. There is no encouragement for customers to replace old gas-guzzlers for cars that use alternative fuels, nor is the industry

---

<sup>26</sup> 'Extinction of the Predator', *The Economist* (London, 10 September 2005) 71-73.

<sup>27</sup> *Ibid.* By way of example, the alliance formed in 1998 when Chrysler was purchased by Daimler-Benz proved unsuccessful, and disappeared only nine years later when the investment fund Cerberus Capital Management purchased 80 per cent of Chrysler. See A Clark, 'Chrysler - How a Great Car Firm Crashed', *The Guardian* (1 May 2009), online at <http://www.guardian.co.uk/business/2009/may/01/chrysler-bankruptcy-car-industry-us>. The author has previously studied the consequences of mergers and alliances in the car industry. See S Marco Colino, 'On the Road to Perdition? The Future of the European Car Industry and its Implications for EC Competition Policy' (2007) 28 *Northwestern Journal of International Law & Business* 1, 35-88.

<sup>28</sup> Kenworthy, Macaulay and Rogers have noted that such behaviour is typical of firms who face strong competition and are forced to focus on immediate concerns in order to survive. See L Kenworthy, S Macaulay and J Rogers "The More Things Change...": Business Litigation and Governance in the American Automobile Industry' (1996) 21 *Law and Social Inquiry* 3, 631-678, at 633.

encouraged to engage in the production of hybrids and other eco-friendly vehicles. The persistence of overcapacity almost inevitably implies that not all the current brands will survive the crisis. Measures that relieve those manufacturers who demonstrate greater efficiency and capability to adapt to new demands should not threaten the competitive process, but rather ought to provide essential means to overcome an unprecedented crisis without interfering with competition. It is therefore obvious that the role of government is to provide the support to find a way out of a difficult situation, and encouraging the necessary reforms remains decisive.

## 2. THE IMPACT OF CAR DISTRIBUTION AGREEMENTS ON COMPETITION

In addition to the problems of the industry, manufacturers have had to cope with the added pressure of complying with costly and complex European rules. A raft of secondary legislation harmonising product standards is in place, and EU competition law rules place further obligations on the sector. Non-compliance with the Treaty's antitrust provisions has often led to the imposition of fines on some of Europe's leading manufacturers. Some examples are the fine of almost €50 million imposed on Peugeot in 2005 for obstructing exports,<sup>29</sup> and the investigation of the practices of BMW and General Motors for breach of the rules imposed by Regulation 1400/2002 that culminated with reforms of the distribution contracts under scrutiny.<sup>30</sup> It is clear that under no circumstances should competition policy should be influenced by the interests of the sector; this mistake of the past has led to important inconsistencies in the regulation of the industry.<sup>31</sup> Nonetheless, at times it would appear that disproportionate concerns for market integration and sectoral interests may have sometimes had a negative impact on the European rules, and led to the imposition of strict and unnecessary conditions on the industry that do not always purport clear benefits for the competitive process.<sup>32</sup> Assessing the appropriateness of pursuing integration through competition has been the object of lengthy discussions and is beyond the scope of this paper; this section merely outlines the concerns for competition raised by distribution agreements in the car sector and how the Commission and the European Courts addressed these issues before Regulation 1400/2002.

### 2.1. Franchises and market segmentation

Franchise agreements are the preferred distribution method for brand new motor vehicles. Through these franchises, manufacturers appoint specialised dealers in each

---

<sup>29</sup> Commission Decision of 5 October 2005, *Automobiles Peugeot SA and Peugeot Nederland NV*, OJ 2005, L173/20.

<sup>30</sup> See the following press releases: 'Competition: Commission Welcomes Changes to General Motors' Distribution and Servicing Agreements', IP/06/303, and 'Competition: Commission Welcomes Changes to BMW's Distribution and Servicing Agreements', IP/06.302 (13 March 2006)

<sup>31</sup> By way of example, the previous block exemption, Regulation 1475/95, introduced exemption requirements of questionable effects on competition. See section 2.2 below.

<sup>32</sup> See, *inter alia*, R Wesseling, *The Modernization of EC Antitrust Law* (Oxford and Portland, Hart, 2000).

territory, and the result is a network of selected retailers who represent the manufacturer and take care of sales in the specific area assigned to them. This would seem an efficient and legitimate manner of channelling motor vehicle distributions across Europe. Industry representatives have long claimed that there are multiple reasons that justify the use of franchising in the distribution of cars. Through a franchise contract, for instance, the manufacturer can exert considerable control over the process of distribution. Moreover, a limited number of dealers is usually the most efficient means of entering a market and servicing the product. Franchised dealers have the capacity to build and maintain a strong retail organisation. According to manufacturers, the nature of the relationship is of mutual dependence, as each party has substantial interest in the other's conduct.<sup>33</sup> It is also argued that there are important benefits for consumers, since efficient delivery should translate into lower prices and qualified dealers ought to provide a better customer service.

Despite these benefits, some of the restrictions that can be imposed in franchise agreements have led to competition concerns for the European legislator. This is particularly so when the agreements establish selective and exclusive distribution (SED) systems, which are frequent in Europe.<sup>34</sup> SED systems may lead to market segmentation, as each territory is allotted to one or a select few distributors, becoming impenetrable not only for those outside the distribution system, but also to authorised dealers from other regions. Exclusive rights may have the effect of dividing the EU along national lines again – thus fragmenting the single market. This would also serve to allow price discrimination between the different allotted territories. The Commission has led a vehement fight against car price differentials – in its view, a clear sign of a lack of market integration – and therefore looks towards territorial protection with mistrust.<sup>35</sup> To add to these woes, franchises have been criticised for their one-sidedness. They have often been defined as contracts of adhesion enacted overwhelmingly in favour of manufacturers.<sup>36</sup> Carmakers have used franchising as a means to gain maximum control over the management of the dealers' business, which has affected the Commission's tolerance towards this common distribution technique.

## 2.2. The concerns for EU competition law – the early days

As a consequence of the possible problems of exclusive and selective distribution for the single market and competition, the Commission carefully monitors agreements

---

<sup>33</sup> P Davis, 'Retrieving Corporate Policy: Managing Minority Dissent' (2005) 5 *Corporate Governance* 64.

<sup>34</sup> For a thorough analysis of each of these types of distribution systems, see M Mendelsohn and S Rose, *Guide to EC Block Exemption of Vertical Agreements* (The Hague, Kluwer Law International 2002) 115.

<sup>35</sup> For a critical view of the Commission's position on car price differentials, see S Marco Colino, 'On the Road to Perdition? The Future of the European Car Industry and its Implications for EC Competition Policy' (2007) 28 *Northwestern Journal of International Law & Business* 1, 35-88.

<sup>36</sup> For a criticism of this abusive character of franchises, see C Joerges, 'Relational Contract Theory in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles in the Assessment of Contract Relations Between Automobile Manufacturers and their Dealers in Germany' (1985) *Wisconsin Law Review* 3

between dealers and manufacturers. The car sector is no exception. Already in the 1970s, franchise agreements for the distribution of motor vehicles were expressly declared to fall within the prohibition of Article 101(1). In *BMW*,<sup>37</sup> the CJEU emphasised the problems derived from the cumulative effects of such agreements. Essentially, if distribution in the entire industry operates following SED schemes, this will lead to market compartmentalisation.<sup>38</sup> The inclusion of these agreements in the realms of Article 101(1) TFEU did not go down well with producers, who defend their distribution systems invoking the free-rider argument. They allege that the technological complexity inherent to motor vehicles requires appointing dealers with a high degree of expertise. These skilled dealers must somehow be protected from the competition posed by less qualified traders who may be able to sell at lower prices, as they do not necessarily comply with the same obligations and expenditure in, *inter alia*, pre- and aftersales services, promotion and brand image protection.

The Commission and the European Courts have acknowledged the potential benefits of these distribution techniques, and as such these agreements were often able to avoid the nullity sanction on the basis of 101(3) TFEU – mainly on consumer protection grounds.<sup>39</sup> In order to avoid the burden of notification imposed by the now defunct Regulation 17/62,<sup>40</sup> the Commission adopted Regulation 123/85, a specific block exemption regulation for distribution agreements of new motor vehicles.<sup>41</sup> As with all block exemptions, when the conditions laid down in the regulation were met, contracts were automatically exempted and the parties did not need to notify the Commission. These rules were reformed in 1995 following pressure from car manufacturers and their representatives to increase their freedom to establish selective and exclusive distribution schemes. The reforms came in the shape of Regulation 1475/95, which virtually imposed SED systems for the distribution of motor vehicles. Only these kinds of distribution were exempted by this sector-specific Regulation.<sup>42</sup> The amendments introduced received harsh criticisms for being overwhelmingly protective of manufacturers. Experts also claimed that the rules led to higher prices and restrictions in consumer choices. In addition, dealers were inexplicably obliged to carry out repair

---

<sup>37</sup> *BMW Belgium NC and Belgian BMW Dealers* [1978] OJ L46/33. This case is in line with the *Pronuptia* ruling on franchising, case 161/84, [1986] ECR 353, [1986]. See also a later *BMW* case, *BMW AG v. ALD Autoleasing D GmbH* [1955] ECR I-3439.

<sup>38</sup> A Tongue, 'Understanding 1400/02 – What It Is and What It Means' (2003) Research Report 01/03, International Car Distribution Programme Ltd., 8.

<sup>39</sup> *BMW* OJ 1975, L29/1. In fact, the first ever BER was drawn along the lines set out in the Commission BMW exemption decision. Also, *SABA* OJ 1976, L28/19 (for electronic devices) and *Campari* OJ 1978, L70/69.

<sup>40</sup> Council Regulation (EEC) No. 17 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty OJ 1962, L3/204/62.

<sup>41</sup> Commission Regulation (EEC) No. 123/85 of 12 December 1984 on the Application of Article 85(3) of the EEC Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, OJ 1985, L15/16.

<sup>42</sup> Commission Regulation (EC) No. 1475/95 of 28 June 1995 on the Application of Article 85(3) to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, OJ 1995, L145/25.

and maintenance services to enter into the manufacturers' network, and wholesalers outside the approved distribution system could be prevented from accessing original spare parts. Such overwhelmingly detailed provisions de facto greatly limited competition in these secondary markets.<sup>43</sup> Such detrimental rules could hardly be justified in the context of the protection of competition afforded by Article 101 TFEU – the legal basis for their adoption.<sup>44</sup>

### 3. A LOOK BACK AT THE LIFE OF REGULATION 1400/2002

In an attempt to heed the concerns of Regulation 1475/95 and coinciding with a new trend of reform of EU competition law addressed mainly at enhancing economic analysis, Regulation 1400/2002 entered into force on 1 October 2002. The exemption applied to all levels of motor vehicle trade,<sup>45</sup> service-only agreements and even goods which are not specific to motor vehicles when 'it is reasonably certain that they are destined for installation in or upon a motor vehicle'.<sup>46</sup> The regulation allowed any kind of distribution system and not just SED models, thus opening the door to innovation in distribution. As a result, most kinds of vertical agreements in the car sector could qualify for an exemption, provided that three conditions were met: first of all, the stipulated market shares could not be exceeded; secondly, they should not contain any hardcore restrictions; and thirdly, they ought to comply with the contractual requirements imposed by the Regulation. Each of these conditions deserves particular attention.

#### 3.1. Market share thresholds and economic analysis

Regulation 1400/2002 followed the example set by Regulation 2790/99 – and virtually all the new-style block exemptions<sup>47</sup> – by establishing market share thresholds as parameters for economic assessment. Contracts could benefit from the block exemption provided that the market share of the supplier did not exceed 30 per cent. Exceptionally, in exclusive supply agreements it was the buyer's market share that was considered, given that access to supplies may be limited. The threshold was identical to that established in the general block exemption for vertical agreements with two exceptions. Firstly, selective distribution that utilised quantitative criteria enjoyed a

---

<sup>43</sup> Global Antitrust Weekly, NERA Consulting Economists, National Economic Research Associates, Inc., 30 November-6 December 2001.

<sup>44</sup> For a more detailed analysis of the previous sector-specific regulations, see S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 112-115.

<sup>45</sup> Article 2 (1) of Regulation 1400/2002.

<sup>46</sup> A Kmiecik, 'Analysis of Regulation 1400/2002: The New Block Exemption for the Motor Vehicle Sector' (2002) IBC Conference Proceedings, *Advanced Course on Competition Law*, Informa, Brussels.

<sup>47</sup> A similar stance is followed in other recent block exemptions, such as Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements, OJ 2000, L304/3, or Commission Regulation 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, OJ 2000, L304/7.

higher threshold of 40 per cent. Secondly, purely qualitative selective distribution could be exempted irrespective of the market share of the parties.

The market share threshold system introduced an economic analysis which was inexistent in the previous block exemptions. However, as the author has previously argued it would appear that the establishment of these thresholds results in an excessively rigid method of determining the validity of agreements.<sup>48</sup> In addition, the determination of the percentage of market share held by a manufacturer is dependant upon the complex definition of the relevant (product and geographic) market; this process allows scope for interpretation and is thus embedded in ambiguity. Defining the relevant market is a task not only for the Commission, but also for national authorities and courts. As a result, the homogeneity of interpretation and the effectiveness of the economic analysis may be endangered given the practical difficulties to confidently determine market shares. Despite these criticisms, no better criterion has been suggested in order to measure the economic impact of distribution agreements. As long as the interpretation of the scope of the prohibition of 101(1) TFEU remains broad, market share caps will play a significant role. Until a better solution is found, it would seem wise to stretch the scope of the exemption to all distribution agreements in the car sector provided that the pertinent market shares do not exceed 40 per cent. Such a modification would not solve all the problems related to the *modus operandi* of market share thresholds. It would nonetheless imply that all distribution systems would be subject to the same cap, which would grant greater coherence to the procedure. Furthermore, while the car market is currently not highly concentrated, if – as predicted – there are indeed casualties following the current crisis, the resulting market structure may be different. The surviving producers could have increased market shares in the different segments of the market for motor vehicles. Given that distribution agreements have been proven to purport overwhelmingly beneficial effects, the sensible option would seem to be a lenient market share threshold. This would allow a larger number of agreements to benefit from the scope of the block exemption.

### **3.2. Prohibited restrictions of competition**

In addition to the market share thresholds, Articles 4 and 5 contained a list of restrictions that were forbidden regardless of market shares. The constraints described in Article 4 would prevent the application of the block exemption to the whole accord they are contained in, while those in Article 5 would not be exemptible in themselves but will not preclude the validity of the remainder of the contract. Accordingly, these provisions are respectively referred to as the black and grey lists of Regulation 1400/2002.

Article 4 was divided into three parts: ‘hardcore restrictions concerning the sale of new motor vehicles, repair and maintenance services or spare parts’, ‘hardcore restrictions

---

<sup>48</sup> S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 100-104.



only concerning the sale of new motor vehicles' and 'hardcore restrictions only concerning the sale of repair and maintenance services and of spare parts'. The first kind of provisions were virtually identical to those contained in Regulation 2790/99. Article 4(1)(a) forbids minimum resale price maintenance, which will therefore only be exemptible using Article 101(3) TFEU. Other price restraints such as maximum resale price maintenance or price recommendations are not considered to be hardcore restrictions, and will not prevent the application of the block exemption. Some kinds of territorial restrictions however receive a harsher treatment. Article 4(1)(b) precludes manufacturers from imposing resale restrictions on dealers regarding the territory in which or the customers to whom they sell. There are some exceptions to this general rule. For instance, in an attempt to protect dealers from free riders it is possible to forbid active sales in selective distribution systems.<sup>49</sup>

The second kind of hardcore restrictions – those relating specifically to the primary car market – encompassed some important changes. For the exemption to apply, dealers had to be able to subcontract repair and maintenance work to authorised workshops.<sup>50</sup> Such a provision not only broke the link between sales and aftersales for once and for all; it also opened up new possibilities of independent repairers, whose access to technical information, diagnostics and other equipment and tools was further facilitated with the list of hardcore restrictions that refer to the repair services and the sale of spare parts – the third type of black clauses. Among these was also a requirement that independent spare parts manufacturers be able to supply any resellers of their choice, including authorised distributors.<sup>51</sup> They could also display their brand logo on the parts supplied by them. These last two types of hardcore restraints were peculiar to the specific block exemption. Regulation 2790/99 would in theory have allowed restricting the sale of spare parts produced by independent manufacturers within an authorised distribution network, and therefore this restriction was one of the peculiarities of the specific regime.

The grey list contained in Article 5 covered non-compete obligations and location clauses.<sup>52</sup> As regards non-compete obligations, it is worth noting that the definition given in the sector-specific block exemption differed from that of Regulation 2790/99. Article 1(b) of Regulation 1400/2002 defined these as an 'obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any [...] obligation on the buyer to purchase from the supplier [...] more than 30 % of the buyer's total purchases of the contract goods'. However, under the former general block exemption for vertical agreements the

---

<sup>49</sup> Article 4(1)(b)(i) of Regulation 1400/2002. Such sales are only exemptible when they are not to end users and they are not imposed on sub-dealers appointed by the authorised dealer. See Article 4(1)(d) of Regulation 1400/2002.

<sup>50</sup> Article 4(1)(g) of Regulation 1400/2002.

<sup>51</sup> Article 4(1)(j) of Regulation 1400/2002.

<sup>52</sup> A Kmiecik, 'Analysis of Regulation 1400/2002: The New Block Exemption for the Motor Vehicle Sector' (2002) IBC Conference Proceedings, *Advanced Course on Competition Law*, Informa, 59, fn 108.

percentage of goods that must be purchased from the supplier for a non-compete obligation to exist is as high as 80 per cent. As a consequence, under Regulation 2790/99 requirements to purchase less than 80 per cent of the buyer's stock from the supplier could be imposed without time limitations, as they were not considered non-compete obligations. Importantly, Regulation 1400/2002 expressly referred to non-compete obligations not only in the primary market, but also in the repair and maintenance and spare parts markets. Such impositions were prohibited when they surpassed the 30 per cent cap.<sup>53</sup> The explanation for the exceptionally low percentage and hence the limited tolerance towards these kinds of obligations in this sector is somewhat unclear, and this particularly harsh treatment appears difficult to justify. The other kind of clauses included in this grey list were location clauses. Article 5(2)(b) prohibited obligations on dealers of a selective distribution system not to open sales or delivery outlets anywhere in the internal market where selective distribution was employed. The rationale of prohibiting such limitations was undeniably linked to the protection of parallel imports in an attempt to diminish price differentials across the EU.<sup>54</sup>

### **3.3. Balancing the dealer-manufacturer relationship**

It is widely recognised that Regulation 1475/95 afforded an excessive consideration of the interests of manufacturers, which further deteriorated the position of dealers in the vertical relationship. Regulation 1400/2002 attempted to correct this imbalance in several ways. To begin with, as explained above, dealers could no longer be required to perform aftersales and repair services.<sup>55</sup> In addition to the rupture of the tie between sales and aftersales, the rules introduced a clear attempt to promote multibranding – the possibility of dealers to sell more than one brand of motor vehicles – which was inexplicably restricted in earlier block exemptions. The recognition of multibranding has had limited practical consequences, and the overwhelming majority of concessionaries still deal exclusively with one brand. The reason for the restricted influence of Regulation 1400/2002 in this respect is that it is still possible to require dealers to have separate showrooms for the different brands. This would require large, costly premises which hamper the flourishing of multibrand dealers.

There are other ways in which the former Regulation demonstrated concerns for the disadvantaged situation of dealers. Articles 3(3) to 3(6) introduced certain contractual requirements for the application of the block exemption. Firstly, according to Article 3(3) dealers should be allowed to assign their agreements to other authorised distributors or repairers. Secondly, Article 3(4) imposed restrictions on the right of suppliers to terminate dealership contracts. Thirdly, Article 3(5) established a minimum duration of five years for agreements in order to fall within the scope of the exemption,

---

<sup>53</sup> This includes the obligation of the dealer to sell or repair the manufacturer's brand only (Article 5(1)(c)), even after the expiration of the agreement (Article 5(1)(d)).

<sup>54</sup> On parallel imports, see M Lutz, 'Pricing in Segmented Markets, Arbitrage Barriers, and the Law of One Price: Evidence from the European Car Market' (2004) 12 *Review of International Economics* 3, 456-475.

<sup>55</sup> See section 3.2 above.

as well as a 6 months' notification period for non-renewal. This period was increased to two years if the agreement was indefinite.<sup>56</sup> Fourthly, Article 3(6) implied a u-turn with respect to the previous block exemption, under which arbitration was disallowed. This provision imposed an obligation to include contractual clauses contemplating the right to resort to arbitration as a means of dispute resolution, and included a non-exhaustive list of disagreements that may be decided via arbitration.

This attempt to protect dealers through competition law was rather unique and of questionable legitimacy from the point of view of Article 101 TFEU. The above clauses appeared to introduce requirements that are more characteristic of contract law than competition law regimes. However, and despite various harmonising initiatives with limited success, contract law is still principally a matter reserved for national legislators. After reading the Treaty's competition law provisions, which act as the necessary legal basis for all secondary antitrust legislation, it is unclear that the Commission has been granted the competence to legislate on such issues. Therefore, as the author has previously argued, the inclusion of these requirements in Regulation 1400/2002 appeared to be incoherent and unjustified from the point of view of the pursuit of the protection of competition, which is the objective of Articles 101 to 109 of the TFEU. As a result, there may have been an extralimitation of the Commission's legislative powers,<sup>57</sup> as well as an unjustified defiance of the boundaries between competition and regulation.<sup>58</sup>

#### 4. IS A SPECIFIC REGIME FOR THE CAR SECTOR NECESSARY? PRIORITIES OF THE CURRENT RULES AND FUTURE OUTLOOK

Last year, the Commission deliberated upon the influence of Regulation 1400/2002 on motor vehicle distribution. The reflection, somewhat forced by the imminent expiration of Regulation 1400/2002, led to the adoption of a Communication and an Impact Assessment Report in July 2009.<sup>59</sup> In its findings, the Commission admitted that no major problems exist in the primary car market for the sale of new vehicles. This was the first time that the Commission acknowledged that there is no longer a reason for the maintenance of a specific regime. However, some special rules for secondary markets (aftersales, repair and spare parts) are still deemed necessary given the

---

<sup>56</sup> Exceptionally, a one-year notice is allowed when either the supplier 'is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement' or 'the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.'

<sup>57</sup> S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford, Hart 2009).

<sup>58</sup> On the distinction between competition and regulation, see M Motta, *Competition Law: Theory and Practice* (Cambridge, Cambridge University Press 2004) xviii-xix.

<sup>59</sup> Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector (22 July 2009) Brussels COM(2009) 388 final; and Commission Staff Working Document Accompanying the Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector: Impact Assessment (22 July 2009) SEC(2009) 1052.

perseverance of problems. The merits of the new legislation (both Regulation 461/2010 and the Supplementary Guidelines) are studied in the present section.

Alongside the reform of the specific rules for the car industry, the Commission recently undertook a review of the general rules for distribution agreements, which culminated in the adoption of Regulation 330/2010.<sup>60</sup> The institution expressed its conviction that the rules laid down in the general block exemption for vertical agreements are working adequately, and accordingly only introduced minor reforms in its new block exemption and guidelines on vertical restraints. In June 2013, when the rules for the car industry are harmonised with those for other distribution contracts, agreements in the motor vehicle sector will fall within the scope of the new Regulation for vertical agreements. Consequently, these changes too require closer attention.

#### **4.1. Regulation 461/2010 and the Supplementary Guidelines: a disguised *status quo*?**

Unfortunately, one cannot help but feel that the reforms to the specific rules for the exemption of car distribution agreements have squandered a valuable opportunity to tackle the existing regulatory inconsistencies. In fact, a close look at the reform shows that in practice very little will change in the short term. Yes, the Commission does show some awareness of the problems of the previous block exemptions. It has noted that the new rules ought not to ‘impose regulatory constraints which might increase distribution costs and are not justified by the objective of protecting competition on the market’;<sup>61</sup> it has even admitted that the previous rules were ‘clearly overly complicated and restrictive and have had the indirect effect of driving up distribution costs’.<sup>62</sup> This promising acknowledgement however has not filtered into the regulatory adjustments.

In the Impact Assessment Reform published in July 2009 (hereinafter the Report), four different legislative options were considered as possibilities for replacing Regulation 1400/2002. The first two options outlined two opposed radical possibilities: keeping the specific rules (option 1) or doing away with them and extending the application of the general exemption for vertical agreements to the car sector (option 2). By contrast, the other two alternatives were somewhere in between the extremes, and advocated for the removal of the special regulation whilst retaining specific guidelines (option 3) or a new block exemption (option 4). The survival of specificities is, the Commission argued, a tactic to address the problems related to the aftersales and repair market and the reduced competition in the sale of spare parts. The Commission expressed its preference for the third option, but did not reject option 4 - leaving the door open for a new block exemption. This is justified, according to the institution, by the need to

---

<sup>60</sup> Press Release, ‘Antitrust: Commission Launches Public Consultation on Review of Competition Rules for Distribution Sector’ (28<sup>th</sup> July 2009) Brussels IP/09/1197.

<sup>61</sup> Press Release, ‘Antitrust: Commission Proposes Future Competition Law Regime for Motor vehicle Sector’ (22<sup>th</sup> July 2009) IP/09/1168.

<sup>62</sup> Press Release, ‘Antitrust: Commission Adopts Revised Competition Rules for Motor Vehicle Distribution and Repair’ (27<sup>th</sup> May 2010) IP/10/619.

control clauses that may lead to market foreclosure or the imposition of prices by the manufacturer. In addition, territorial protection that may pose a threat to cross-border sales and market integration also needs to be closely monitored. With the disappearance of Regulation 1400/2002, the Commission claimed, specific rules would also be needed to fill the lacuna left by the disappearance of the regulation of independent operators' access to technical information, access to spare parts and access to the network of authorised repairers.<sup>63</sup>

The resulting legislation is a rather complex hybrid of the legislative scenarios outlined in the Report. A block exemption has been adopted (option 4); however, it merely extends the lifespan of Regulation 1400/2002 for another three years in respect of distribution agreements in the primary market for motor vehicles (option 1), when they will finally fall within the ambit of the general block exemption for vertical agreements (option 2). Agreements in secondary markets are governed by Regulation 330/2010 since 1 June 2010, but the block exemption contains a list of additional sector-specific hardcore restrictions. Importantly, Supplementary Guidelines accompany Regulation 461/2010 (option 3); the Commission emphasises their *supplementary* character, as they complement the general Guidelines on Vertical Restraints that apply to all vertical agreements.<sup>64</sup> They play an essential role in the assessment of the application of Article 101 TFEU to contracts in this sector.

The implications of the inclusion of motor vehicle distribution agreements in the scope of the general block exemption in the medium term are discussed in the next subsection. As for the specific exemption rules for agreements in the aftermarket, Article 6 of Regulation 461/2010 contains three specific hardcore restrictions. First of all, selective distributors may not be prevented from selling spare parts to independent repairers that use these in the repair of motor vehicles. Secondly, suppliers of spare parts, repair tools or diagnostic or other equipment ought to be allowed to sell to authorised or independent distributors, as well as to authorised or independent repairers and end users. Finally, the ability of a supplier of components to place its trade mark or logo on its products 'effectively and in an easily visible manner' is protected by the new Regulation. As a result, it appears that the reason for the specific rules is affording additional protection to independent repairers and spare parts suppliers vis-à-vis manufacturers. Their position is further strengthened by the Supplementary Guidelines. Selective distribution, still predominant in the car industry, may be caught by Article 101 TFEU if it limits access to technical information by independent repairers, if they are arbitrarily excluded from legal and/or extended warranties or if they are prevented from entering the distribution network by applying non-qualitative criteria.<sup>65</sup>

---

<sup>63</sup> Commission Staff Working Document Accompanying the Communication from the Commission – The Future Competition Law Framework Applicable to the Motor Vehicle Sector – Impact Assessment Report, (COM(2009) 388 final) 21.

<sup>64</sup> Commission Notice, Guidelines on Vertical Restraints [2010] OJ C130/1.

<sup>65</sup> Supplementary Guidelines, para. 60.

What the Commission fails to explain is how these issues make the car market different from other markets. In fact, a look at other sectors reveals the occurrence of similar problems. Attempts to reduce cross-border sales and parallel imports can be found in pharmaceutical products, cosmetics, electronic goods or even spirits, yet these sectors do not have specific block exemptions.<sup>66</sup> Furthermore, restrictions in the secondary markets, such as the ones the Commission identifies in repair and maintenance services or the sale of spare parts, are not uncommon outside the car sector. By way of example, tying clauses which force buyers to purchase secondary goods in order to obtain supplies of a product are frequent, for instance, in the sale of printers (where the buyer may be forced to purchase ink cartridges from the supplier), nail guns (that can be linked to the purchase of the nails they need) or packaging machines (where the purchase of carton may be imposed).<sup>67</sup> Even the well-known *Microsoft* case addressed, *inter alia*, the legality of the company's tying of its Windows Media Player to its Windows Operating System.<sup>68</sup> Such practices are deemed illegal by Article 102(d) TFEU when the supplier holds a dominant position. In a similar way, when car manufacturers force their dealers to purchase a minimum quantity of spare parts from them, this would be deemed unlawful if market power is involved. Yet car producers' contractual clauses referring to spare parts must additionally comply with the restrictions imposed by the sector-specific rules that remain in place.

The Commission's intention would appear to be increasing legal certainty for the parties. The application of Article 101(3) TFEU requires a complex evaluation of the benefits and disadvantages of specific vertical restraints, and sectoral rules should assist the parties and their legal representatives in understanding the kinds of restrictions that may result in their agreements being considered unlawful. While this is a noble pursuit, enacting rules to address every possible specific scenario in each industry is clearly an impossible task, and any system that attempts to do so will unavoidably be incomprehensive. In this context, the existence of specific rules is even more difficult to justify, as they challenge the unity, coherence and comprehensiveness of the entire exemption system under Article 101(3) TFEU. Rather, it would seem more appropriate to combat uncertainty by reinterpreting Article 101(1) TFEU and limiting the scope of the prohibition, while at the same time aiming for exemption rules that apply to all

---

<sup>66</sup> See for instance the famous Distillers decision condemning a dual pricing system for Johnny Walker whisky. Commission Decision of 20<sup>th</sup> December 1977, *Distillers Company Limited* OJ 1978, L50/16, upheld by the CJEU in case C-30/78 *Distillers Company Limited v. Commission of the European Communities* [1980] ECR 2229. For a criticism of this decision, see V Korah, 'Goodbye, Red Label: Condemnation of Dual Pricing by Distillers' (1978) 2 *European Law Review* 62-71. In this context, the recent CJEU judgement in *GlaxoSmithKline* is of crucial importance, as it finally challenges the presumption that double pricing schemes and export bans are anticompetitive by object under Article 101(1) TFEU. See case C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] nyr.

<sup>67</sup> Two of the leading cases are *Hilti* and *Tetra Pak*, relating respectively to nail guns and packaging machines. See case T- 30/89 *Hilti v Commission* [1991] ECR II-1439, confirmed by case C-53/92 P *Hilti v Commission* [1994] ECR I-667; and case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, confirmed by case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

<sup>68</sup> Case T-201/04, *Microsoft Corp v Commission* [2004] ECR II-4463.

sectors of the economy. As such, the amendment of the rules affecting the distribution contracts in the motor vehicle industry and the simultaneous transformation of the general regime for vertical agreements should have been considered one general process of reform and should have led to a single set of rules. One new reformed block exemption for vertical agreements which also covered the car sector would have been the most desirable outcome; any specificities worthy of particular attention could have been addressed in the set of detailed guidelines for vertical restraints that accompany the regulation.

In this light, the desire to retain specific guidelines or even a block exemption for the lingering problems of the sector seems somewhat disappointing. The changes, at first sight, remove some of the sector-specific rules for motor vehicle distribution agreements. In practice, some of the specific clauses of Articles 4 and 5 of Regulation 1400/2002 have been simply relocated rather than removed. Given that they were virtually the only substantive difference of the exclusive regime, the minimal effects of the alleged 'reform' are evident. Even more disappointingly, a further constraint is placed in the practical outcome of the modifications as the inclusion of the car sector in the general block exemption of vertical agreements is delayed in time. Accordingly, the resulting reform is a series of minor amendments that bear almost exclusively structural consequences, with minimal alterations of substantive rules – some of which will not take place for three years. It is obvious that not enough has changed in the Commission's mindset, and most of the problems pointed at in the previous section are likely to persist.

#### **4.2. Consequences of application of the general block exemption for vertical agreements to the car sector**

In three years' time, when Regulation 330/2010 is applied to motor vehicle distribution, two significant modifications will be introduced – one more desirable than the other. The most welcome change is undoubtedly the abolition of the 'white list' of Articles 3(3) to (6) of Regulation 1400/2002 for once and for all. Already back in 1999, Regulation 2790/99 removed all requirements relating to clauses that must be included in agreements in order to benefit from the application of the block exemption, and new Regulation 330/2010 has maintained this feature. The Commission seems to finally give in to the idea that, although the position of dealers may be strengthened through competition law in a number of ways, tampering with contractual protection clauses is outside the realms of antitrust. Furthermore, the general block exemption for vertical agreements does not contain clauses protecting multibranding – which, as seen above, should not have important practical consequences as dealers do not tend to deal with more than one brand. It may also enable manufacturers to force dealers to offer some repair and maintenance services, as the list of hardcore restrictions is more flexible than that of the specific block exemption.

Importantly, the new Guidelines on Vertical Restraints introduce some – albeit limited – flexibility in the interpretation of the hardcore restrictions of the block exemption. This crucial change may, for the first time, lead to a more tolerant stance towards

minimum resale price maintenance and absolute territorial protection distribution agreements in the motor vehicle industry, previously treated as illegal *per se*. Section 4 provides some examples of situations in which hardcore restrictions may be necessary and therefore not illegal. For instance, vertical price-fixing may be allowed, *inter alia*, for short promotions in ‘a franchise system or similar distribution system applying a uniform distribution format or a coordinated short term low price campaign’ (which does not rule out selective distribution).<sup>69</sup> Another relevant example is the possibility of restricting passive sales outside the allotted territory for up to two years to allow distributors of new products to recover their investments.<sup>70</sup>

Despite this laudable progress, some shortcomings still remain. In 2013, when Regulation 1400/2010 is completely abolished, there will be changes to the market share thresholds established by the previous regulations. Just like Regulation 2790/99, the new block exemption establishes a 30 per cent threshold for all kinds of distribution techniques. The author’s suggestion of increasing the general market share cap to 40 per cent was therefore not taken onboard, and the Commission has expressed its satisfaction that ‘competition authorities [may] investigate a wider number of potentially anti-competitive practices’.<sup>71</sup> Additionally, losing the specific block exemption means that selective distribution will be deprived of the privileged treatment it has under Regulation 1400/2002 – the 40 per cent cap for quantitative selective distribution and the acceptance of qualitative selective distribution regardless of the market share of the supplier. Even more unfortunate is the fact that the new general block exemption imposes a novel obligation to examine the market share of both contracting parties in an attempt to take into consideration the growing power of buyers (mainly consequential to the emergence of new powerful dealers such as superstores and Internet operators). Much against the author’s proposals to simplify economic analysis and to overcome the problems derived from the rigidity of market share thresholds, the resulting system is bound to notoriously reduce the scope of the exemption – precisely at a time when most legal systems are leaning towards increasingly tolerant stances on vertical agreements given their benefits.<sup>72</sup> This may be a major step back in relation to the reforms introduced by Regulations 2790/99 and 1400/2002.

### CONCLUDING REMARKS

In the path towards the reform of the block exemption regime for motor vehicle distribution agreements, the Commission has found itself having to juggle a series of

---

<sup>69</sup> Guidelines on Vertical Restraints, para 225.

<sup>70</sup> Guidelines on Vertical Restraints, paras 60-62.

<sup>71</sup> Commission Staff Working Document Accompanying the Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector: Impact Assessment (22 July 2009) SEC(2009) 1052, para 17. This aspect is discussed by the author in S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 127-8.

<sup>72</sup> In the US, all vertical (price and non-price) restraints are currently analysed under the rule of reason, ever since Leegin declared that minimum resale price maintenance should not be considered *per se* illegal. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 US 2705 (2007).



outstanding priorities and conflicting interests. There is an imminent need to ensure that competition is protected and enhanced and that, at the same time, dealers and consumers are afforded adequate protection. It is also paramount that the law does not impose unnecessary constraints on car manufacturers at a moment when the industry is immersed in an acute crisis; yet the trap of taking specific interests into consideration in the enactment of competition law rules is to be avoided at all costs. The key to the survival of Europe's established manufacturers lies in the hands of the industry and its capacity to introduce the necessary reforms to enhance its competitiveness. The crisis of the sector calls for government intervention, which may in some stances be very useful. Any aid must however be carefully rationalised; direct subsidies could lead to distortions of competition and will not solve any problems if the money is not adequately invested. Instead, incentives given to consumers for purchasing new cars are proving very successful, and are particularly desirable when linked to the purchase of eco-friendly cars, thus forcing the industry to engage in the production of such vehicles. These measures must nonetheless be seen as transitory solutions and ought not to substitute the necessary refurbishment of the sector.

The Commission's modifications to the exemption system constitute an important step towards the instauration of a coherent and unified regime for vertical agreements; however, one cannot help but feel that the result is somewhat deflating. The promising intention to remove the specific rules for the motor vehicle distribution agreements is undermined by the subsequent introduction of a new block exemption and special guidelines to confront the remaining problems in the markets for repair, aftersales and spare parts. The quest for legal certainty thus appears to be leading to the adoption of an excessively detailed exemption regime in order to clarify the application of Article 101(3) TFEU. However, part of the problem lies in that the complex analysis of this provision is applied far too frequently given the excessively broad interpretation of Article 101(1) TFEU. The European Courts – particularly the CJEU – have manifested an awareness of this problem, and an attempt to limit the scope of the prohibition can be perceived in recent judgements. This would appear to be a more desirable solution. In the light of the Commission's disappointing inactivity in this direction, the role of the CJEU in the reinterpretation of Article 101(1) TFEU may prove crucial for future reforms.

Until that happens, the system remains frustratingly fragmented with the persistent division between specific and general rules for exemption. Regulation 1400/2002 is going into 'extra time' for no less than three years and, contrary to what was originally stipulated, will not disappear until 2013. Even then it is the Commission's preference that specific rules remain, questioning the extent to which the changes under discussion go beyond mere appearance. The reasons why the specificities of the car sector could not simply have been addressed in the general guidelines on vertical restraints remain unconvincing. Furthermore, although the eventual extension of the new block exemption regulation for vertical agreements to the car sector should finally lead to the removal of the inconsistencies of the 'white list' approach, as well as a more tolerant stance towards resale price maintenance and absolute territorial protection, the stricter

market share threshold system provided for in the proposed legislation is noticeably disheartening. Until 2013, cynics will be justified in arguing that the 2010 ‘reform’ of the exemption system for vertical agreements could be appropriately labelled ‘much ado about nothing’.

---

**THE COMPETITION LAW REVIEW**

---

Volume 6 Issue 2 pp 225-257

July 2010

Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties' freedom to contract and to enjoy property

*Arianna Andreangeli\**

---

This paper seeks to analyse the issues emerging from the imposition of certain antitrust remedies, such as the obligation to grant intellectual property licenses regarding key inventions covered by patent or copyright and to stipulate contracts with other firms, including competitors, as a means to remedy the consequences of antitrust infringements. It will consider the extent to which Article 7 remedies can be reconciled with other important tenets of the market economy, such as the freedom to contract and the right to peacefully enjoy one's possessions. After briefly examining the rationale for the application of certain human rights' guarantees to competition investigations and decisions, the first part of the paper will consider the questions of whether and to what extent the European Convention on Human Rights protects economic freedom and compare the current position with that adopted by the US Supreme Court. The second part will illustrate the notion of competition remedies and consider whether the principles governing them are compatible with current human rights standards as well as with the concept of the rule of law as a tool to protect 'everyone' from the arbitrary or disproportionate use of public power. The final part of the paper will argue that although antitrust remedies pursue a legitimate objective, i.e. the preservation of economic well-being through competitive markets, they must also comply with basic human rights safeguards, such as the protection of property and of freedom to contract, by striking a "fair balance" between the common good and the legitimate interests of the affected undertakings. It will be concluded that the practice in this area should conform to standards consistent with the principles enshrined in the ECHR and to the substantive concept of 'rule of law', i.e. accuracy, administrability, consistency, objectivity, applicability and transparency.

---

## 1. INTRODUCTION

Fostering genuine competition across the Common Market is at the forefront of the action of the European Commission. To achieve this goal, the 2003 Modernisation Regulation strengthened its powers of investigation and sanction and provided an express legal basis for imposing behavioural or structural obligations on undertakings found to have infringed the competition rules, in order to end the breach. However, the case law concerning Article 102 TFEU demonstrates that antitrust remedies can have a pervasive impact on the right of the concerned firms to enjoy their property and to choose freely their contractual partners. Consequently, a question emerges as to where

---

\* Lecturer in Law, Liverpool Law School, University of Liverpool. This paper was presented at the 14th CLaSF workshop on 'Reforming EC Competition Law', held at City University, London, on 10 September 2009; heartfelt thanks are owed to the organisers and to all participants for their comments. The author wishes to thank Prof D Daniel Sokol, of the University of Florida, and Prof Maurice E Stucke, of the University of Tennessee, for the feedback on an earlier draft of this paper. The usual disclaimer applies.

the boundary should be drawn between enhancing competition through administrative action and safeguarding business freedom.

The first part of this paper will examine the approach adopted by EU competition law in respect to antitrust remedies and will analyse it in the light of the right to peacefully enjoy one's property and freedom of contract, provided by the European Convention on Human Rights (hereinafter referred to as ECHR). Thereafter, the standards of protection of business freedom in the US Constitution will be scrutinised with particular regard for the question of whether antitrust enforcement can constitute a legitimate ground for restraining the ability of commercial actors to freely determine how to conduct their affairs on the market, especially by forcing them to share their inventions with rivals.

The paper will then consider whether the requirements of 'necessity' and 'proportionality' governing antitrust remedies in EU law are compatible with the human rights standards enshrined in Article 1, Protocol I to the ECHR. It will be argued that although antitrust remedies pursue a legitimate objective, i.e. the preservation of competition to encourage economic progress, they should be compatible with the protection of property and the freedom to stipulate contracts and with the rule of law and especially its requirement that a 'fair balance' be struck between the common good and the legitimate interests of the concerned parties.

For this reason, the paper will suggest that the existing criteria governing antitrust remedies in refusal to deal cases should be inspired by a more restrained attitude as regards the extent to which the Commission can impose on dominant undertaking an obligation to 'share' the outcome of their investment with others. It will be argued that the pre-existing rules enshrined in the ECJ's *IMS Health* judgment could constitute a useful blueprint to develop these new standards.

## **2. ANTITRUST REMEDIES AS A MEANS TO 'BRING THE INFRINGEMENT TO AN END' IN EU COMPETITION ENFORCEMENT**

Council Regulation No 1/2003's Article 7 empowers the Commission to 'impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'. However, antitrust remedies had already been imposed by the Commission under Council Regulation No 17/62<sup>1</sup> on the basis of its Article 3(1), according to which the Commission could 'by decision require the undertakings or the associations of undertakings concerned to' terminate their infringement.<sup>2</sup>

Thus, the ECJ held in its *Commercial Solvents* judgment<sup>3</sup> that this provision should be applied to each individual case having regard to the features of the breach established

---

<sup>1</sup> See e.g. WHISH, *Competition Law*, 5<sup>th</sup> Ed, 2005: OUP, pp 254-55.

<sup>2</sup> See, *inter alia*, Case T-170/06, *Alrosa v Commission*, [2007] ECR II-2601, para 102-103.

<sup>3</sup> Case 6 and 7/73, *Commercial Solvents and ICI v Commission*, [1974] ECR 223.

by the decision<sup>4</sup> and should be read as allowing the Commission not only to oblige the parties to cease anti-competitive behaviour but also ‘to do certain acts and provide certain advantages which have been wrongfully withheld’ to restore competition on the relevant market.<sup>5</sup> The Court rejected the applicants’ arguments that by ordering them to provide ‘specific supplies’ to a former customer<sup>6</sup> had acted outside the remit of its powers and upheld the obligation imposed on Commercial Solvents to continue supplying an existing customer with a view to avoiding the latter being excluded from the relevant, downstream market.<sup>7</sup>

The same principles were later applied in the *Magill* case, concerning instead the question of whether a refusal to grant an intellectual property licence on the part of a dominant undertaking infringed Article 102 TFEU. Both the General Court and the Court of Justice confirmed the decision finding an infringement of the prohibition contained in Article 102 TFEU and the legality of the remedy imposed on the applicants.<sup>8</sup> Thus, the Commission could impose obligations ‘to take or to refrain from taking certain actions’ to bring the infringement to an end and if required:<sup>9</sup> forcing the applicants to license the use of copyrighted information to third parties had accordingly been necessary and proportionate to restore antitrust compliance.<sup>10</sup>

Today, Article 7 of Regulation No 1/2003 not only provides a firm and express legal basis for the imposition of remedies, but also reiterates the applicability of the same criteria of ‘necessity’ and ‘proportionality’ in their design, whose observance appears directly related to the application of the substantive rules that are relevant to ascertain whether the EU competition rules have been infringed.

A detailed examination of the case law and of the issues arising from the application of Article 102 TFEU to refusals to deal and to license intellectual property rights goes beyond the remit of this paper. It is however beyond doubt that the principles governing the finding of an infringement of Article 102 in cases of refusals to deal have undergone significant change. If in its older case law the Court of Justice had taken the view that refusals to deal and especially to license intellectual property rights would infringe the EU competition rules only exceptionally,<sup>11</sup> in later judgments it seemed to somehow ‘mellow down’ its approach.

---

<sup>4</sup> *Id.*, para 45.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.*, para 44.

<sup>7</sup> *Id.*, para 46.

<sup>8</sup> Case T-69/89, *RTE v Commission*, [1991] ECR II-485, especially paras 70-73; Case C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, especially paras 91, 93-94.

<sup>9</sup> Case T-69/89, *RTE v Commission*, [1991] ECR II-485, para 97.

<sup>10</sup> C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, para 93.

<sup>11</sup> See e.g. case 238/87, *Volvo v Veng*, [1988] ECR 6211, para 8-9. For commentary, see Evans & Padilla, *The Law and Economics of Article 82 EC Treaty*, 2006, Oxford/Portland OR: Hart Publishing, pp 409-410, 424.

The Court held in the *IMS Health* preliminary ruling that a refusal to grant an intellectual property license would breach Article 102 TFEU only if the ‘input’ covered by the license was ‘indispensable’ to operate on a distinct market, in the sense of not being duplicable.<sup>12</sup> The complainant would also have to establish that, after the access to the protected input, it would be able to offer a ‘new product’, i.e. output that is genuinely novel and not a duplicate of existing goods or services, and that the refusal was not objectively justified.<sup>13</sup> This test was read as providing a framework to counterbalance the preservation of effective competition, especially in markets where innovation is a key factor for the rivalry between undertakings, and the concern for encouraging the drive to invest and furthering technical development.<sup>14</sup>

Later decisions,<sup>15</sup> together with the Guidance document published by the Commission in 2009 on the application of Article 102 TFEU to exclusionary abuses (hereinafter referred to as 2009 Guidance)<sup>16</sup> seem to have distanced themselves from this ‘finely balanced’ approach.<sup>17</sup> It is argued that perhaps influenced by its victory in the *Microsoft* case,<sup>18</sup> the Commission adopted a more generous stance in respect to the conditions enumerated in the *IMS Health* test that had hitherto served the purpose of striking a balance between safeguarding the ‘process’ of competition and encouraging future investment by providing appropriate financial rewards.<sup>19</sup>

According to the Commission’s 2009 Guidance,<sup>20</sup> refusing to deal with a competitor and to license an input regarded as ‘indispensable’ to compete effectively on a given

---

<sup>12</sup> Case C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, para 48; see also Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, para 28.

<sup>13</sup> Case C-418/01, cit. (fn. 12), para 48-49; see also Opinion of AG Tizzano, para 62.

<sup>14</sup> *Id.*, per AG Tizzano, para 62; see also para 48 of the judgment. For commentary, see, *inter alia*, Hatzopoulos, ‘Refusal to Deal: the EC essential facilities doctrine’, in Amato & Ehlermann (Eds.), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, p 354.

<sup>15</sup> E.g. Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601 (hereinafter referred to as *Microsoft* 2007 judgment), see especially para 331, 434-435; see also Commission Decision of 24 May 2004, *Microsoft*, C(2004) 900 (hereinafter referred to as *Microsoft* 2004 Decision), especially para 669, 684-685; see also, Commission Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at: <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (hereinafter referred to as 2005 Discussion Paper), para 235. For commentary, see *inter alia* Pardolesi & Renda, ‘The European Commission’s case against Microsoft: Kill Bill?’, (2004) 27(4) *W Comp* 513 at pp 537-541.

<sup>16</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, C(2009) 864C (final), 9 February 2009, available at: [http://ec.europa.eu/competition/antitrust/art82/guidance\\_en.pdf](http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf) (hereinafter referred to as 2009 Guidance).

<sup>17</sup> See e.g. Rousseva, ‘Abuse of dominant position defences: objective justification and Article 82 in the era of Modernisation’, in Amato & Ehlermann (Eds.), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, pp 394-395.

<sup>18</sup> Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601 (hereinafter referred to as 2007 *Microsoft* judgment).

<sup>19</sup> Case C-7/97, *Bronner GmbH v Mediaprint*, [1998] ECR I-7791, paras 41, 43-44. See 2009 Guidance, paras 81, 86; also 2005 Discussion Paper, para 228. For commentary, see, *inter alia*, Kitch, ‘The nature and function of the patent system’, (1977) 20 *J Law & Econ* 265 at 278-279.

<sup>20</sup> See 2009 Guidance, paras 81, 86-89.

market would result in (or be likely to lead to) consumer harm not only if the refusal prevented rivals from supplying a ‘novel’ product, but also if it jeopardised their ability to engage in ‘follow-on’ innovation.<sup>21</sup> However, it may legitimately be questioned whether the new approach is capable of continuing to fulfil the ‘balancing function’ played by the *IMS* test and especially to reconcile the interests of rivals in the short term with the objective of boosting long term investment by powerful firms.<sup>22</sup>

It is concluded that the current approach raises a serious question as to whether the interpretation of Article 102 TFEU in refusals to license cases constitutes a proportionate response to the concurring needs to reconcile the integrity of intellectual property for the purpose of fostering technical development and to maintain effective competition.<sup>23</sup> After addressing some general issues relating to their applicability to corporate actors, the next sections will consider whether the reading of Article 102 TFEU adopted by the Commission and the EU Courts can be reconciled with the rules protecting property rights and freedom of contract provided by the European Convention on Human Rights.

### 3. ANTITRUST REMEDIES AND HUMAN RIGHTS’ PROTECTION: BALANCING EFFECTIVE COMPETITION AGAINST THE ECHR ‘ECONOMIC RIGHTS’

#### 3.1. Human rights, corporate actors and competition enforcement: introductory remarks

The limited purvey of this paper does not allow a detailed examination of the question of whether the human rights’ guarantees enshrined in the ECHR are applicable to ‘corporate actors’ as well as the issue of the relevance of the Convention rules for the overall ‘fairness’ of competition proceedings before the Commission or the NCAs, the latter when they enforce the Treaty antitrust rules. Suffice to say that, despite having been originally envisaged to protect individuals’ rights, the Convention provides in Article 1 for a duty on the Contracting Parties to secure the rights it contains to ‘everyone’ within their jurisdiction, regardless of their status or legal nature.<sup>24</sup>

Having regard specifically to business freedom, it was suggested that the Convention’s founding values and especially its commitment to personal liberty, favour the

<sup>21</sup> *Id.*, para 87; cf. Case C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, para 43. For commentary, *inter alia*, Andreangeli, ‘Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?’, (2009) 34(4) *ELRev* 584 at 608.

<sup>22</sup> 2009 Guidance, para. 89. For commentary, see, *inter alia*, Larouche, ‘The European *Microsoft* case at the crossroads of competition policy and innovation’, TILEC Discussion Paper, May 2008, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1140165#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#), pp 12-13.

<sup>23</sup> E.g. Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, paras 28, 41-44; for commentary, *inter alia*, Hatzopoulos, ‘Refusal to Deal: the EC essential facilities doctrine’, in Amato & Ehlermann (Eds), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, p 354 *et seq.*; also Andreangeli, ‘Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?’, (2009) 34(4) *ELRev* 584 at 608-610.

<sup>24</sup> See, e.g., Emberland, *The human rights of companies*, (2005) Oxford University Press, pp 33-34.

protection of a number of rights having an ‘economic substance’, such as the right to peacefully enjoy property and in that context, freedom of covenant.<sup>25</sup>

Commentators argued that the protection of property rights is fully consistent with the essence of the rule of law: by confining the exercise of discretionary powers only to cases in which governmental intervention is strictly necessary to promote the ‘most productive’ use of resources, this principle protects the incentive to invest in new technical advancements,<sup>26</sup> ensures that any adverse effects of these forms of public intervention on individual rights are offset by imposing certain procedural requirements and therefore establishes a duty to grant compensation to those affected by it,<sup>27</sup> consistently with principles of ‘fairness’, foreseeability and proportionality.<sup>28</sup>

It is suggested that the ECHR is consistent with these principles, being inspired by political democracy and personal freedom, the latter intended as the ‘absence of (arbitrary) public encroachment of the private sphere’,<sup>29</sup> and providing safeguards such as the right to a fair trial and the protection of individual rights against arbitrary or disproportionate interferences on the part of State authorities, as provided by, *inter alia*, Articles 8(2) and 10(2) of the Convention.<sup>30</sup> The emphasis placed on the requirements of clarity and foreseeability of the law governing these interferences conforms to the conditions of legal certainty enshrined in the rule of law.<sup>31</sup>

In this context, freedom of enterprise is consistent with the protection of individual freedom and of the right to peacefully enjoy property.<sup>32</sup> However, it is clear that these entitlements are not unlimited but can be subjected to constraints in the public interest.<sup>33</sup> Consequently, whereas the rule of law does not prevent States from providing ‘regulatory structures’ for the economy, how can it be ensured that these

---

<sup>25</sup> See e.g. Ovey and White, *European Convention on Human Rights*, 3<sup>rd</sup> Ed, 2002: Oxford University Press, p 302; also Emberland, *ibid*, pp 48-49; Andreangeli, *EU Competition enforcement and Human Rights*, 2008: Cheltenham, E Elgar, pp 16-17. See e.g. World Bank, World Development Report 2002: Building Institutions For Markets 105 (2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>, p 133.

<sup>26</sup> See e.g. Cass, ‘Property rights systems and the rule of law’, Boston University School of Law, Working Paper Series—Public Law and Legal Theory, #03=-6, available at: [http://ssrn.com/abstract\\_id=392783](http://ssrn.com/abstract_id=392783), pp 4-5; see also p 7.

<sup>27</sup> *Id.*, pp 16-20; see also Lord Bingham, ‘The Rule of Law’, 6<sup>th</sup> Sir David Williams Lecture, 16 November 2006, House of Lords, transcript available at: [www.cpl.law.cam.ac.uk/past\\_activities/the\\_rule\\_of\\_law\\_text\\_transcript\\_php](http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript_php), pp 2, 5-6; see also p 9.

<sup>28</sup> Hayek, *The Road to Serfdom*, 1944 (reprinted in 2008), Abingdon/New York: Routledge, p 84.

<sup>29</sup> Emberland, *op cit*, n 24, pp 40-41, 43, 47.

<sup>30</sup> See e.g. *Handyside v United Kingdom*, [1979-1980] 1 EHRR 737, para 48. See also appl. No 5947/72, *Silver v United Kingdom*, [1983] 5 EHRR 347, para 97.

<sup>31</sup> Hayek, *op cit*, n 28, pp 37-38; see also Emberland, *op cit*, n 24, pp 37, 43.

<sup>32</sup> See e.g. Ovey & White, *European Convention on Human Rights*, 3<sup>rd</sup> Ed, 2002: Oxford University Press, p 302; also Emberland, *op cit*, n 24, pp 48-49; Andreangeli, *EU Competition enforcement and Human Rights*, 2008: Cheltenham, E Elgar, pp 16-17.

<sup>33</sup> See e.g. Trainor, ‘A comparative analysis of a corporation’s right against self-incrimination’, (1994-95) 18 *Fordham Int’l L.J.*, p 239; see especially pp 2165-2166.



frameworks are shaped in a manner that respects and does not unduly hinder the enjoyment of these rights?<sup>34</sup>

It is argued that these considerations are all the more relevant for competition enforcement structures. Although commentators have suggested that free competition provides a ‘better way of guiding individual efforts than any other’ and have therefore argued in favour of the free market economy, they have also emphasised that, for competition to work not only ‘efficiently’ but also ‘well’, it is necessary to establish legal structures destined to ensure that markets work ‘beneficially’, especially through the appropriate organisation of [*inter alia*] ‘money ... and channels of information’.<sup>35</sup>

In this context the ECHR constitutes the ‘rule book’ regulating the conformity of the regulatory frameworks in the economic arena with the rule of law principles.<sup>36</sup> In several judgments the European Court of Human Rights was prepared to extend some of the Convention safeguards to individuals or legal entities engaged in professional or business activities.<sup>37</sup> However, the case law shows that in balancing the right of individuals or companies to pursue lawful business activities freely with the pursuit of the common good the standards of protection of Convention rights may not have the same intensity as in cases concerning ‘non-commercial’ activities.<sup>38</sup>

The Court acknowledged that in the control and regulation of the economy Contracting States should be allowed a wide margin of appreciation and consequently confined its powers of review to considering whether any measures affecting the rights of economic actors had been ‘justifiable in principle and proportionate’ to the goal they pursued.<sup>39</sup> This approach may be contrasted with the scrutiny of measures adopted by public authorities to restrain Convention rights in the ‘political’ arena. In *Handyside*, it was held that the discretion of the public authorities as to whether any restriction on the applicant’s right to free speech was ‘necessary’ in a democratic society was not unlimited.<sup>40</sup>

Therefore, the Court would have to be satisfied that in the circumstances of the case, the interference with the applicants’ right to free speech responded to a pressing social

<sup>34</sup> Cass, ‘Property rights systems and the rule of law’, Boston University School of Law, Working Paper Series—Public Law and Legal Theory, #03=-6, available at: [http://ssrn.com/abstract\\_id=392783](http://ssrn.com/abstract_id=392783), pp 4-5; see also pp 7 and 14; also Emberland, *op cit*, n 24, p 51.

<sup>35</sup> Hayek, *op cit*, n 28, pp 38-39.

<sup>36</sup> See Emberland, *op cit*, n 24, pp 48-49; also Andreangeli, *op cit*, n 32, pp 17-18.

<sup>37</sup> See e.g. appl. No 13710/88, *Niemitz v Germany*, ser. A No 251-B, [1993] 16 EHRR 17, paras 29-31; also appl. No 37971/97, *Ste Colas Est and others v France*, [2004] 39 EHRR 17, paras 40-41.

<sup>38</sup> See, *inter alia*, Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, Ser. A No 165, [1990] EHRR 161, paras 33-35; also appl. No 15450/89, *Casado Coca v Spain*, ser. A No 285, [1994] 18 EHRR 1, paras 39-41; appl. No 10890/94, *Groppera Radio v Switzerland*, [1990] 12 EHRR 321, para 48.

<sup>39</sup> Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, *op cit*, n 38, para 33; also appl. No 10890/94, *Groppera Radio*, *ibid.*, para 48.

<sup>40</sup> *Handyside v United Kingdom*, [1979-1980] 1 EHRR 737, para 48. See also appl. No 5947/72, *Silver v United Kingdom*, [1983] 5 EHRR 347, para 97.

need and was proportionate to the legitimate aim it pursued<sup>41</sup> and, without reconsidering the ‘merits’ of the measure, would be empowered to review it to ensure that the reasons adduced by the authorities to support the scope and intensity of the interference were ‘relevant and sufficient’.<sup>42</sup> By contrast, although in principle corporate entities are entitled to the protection of some of the Convention safeguards, the standards applicable to them appear somewhat less exacting than those relevant for natural persons.<sup>43</sup>

But how can this divergence be justified? It was suggested that this differing approach could stem from the ideological differences existing among the Contracting States as regards the inclusion of ‘free market friendly’ rights and freedoms in the Convention.<sup>44</sup> It is added that whereas the different treatment of ‘commercial’ vis-à-vis ‘political speech’ may be owed by the circumstance that freedom of expression in the ‘political arena’ lies at the very core of the values underpinning the Convention, the protection of property and economic freedom would be more ‘relative’ values. Therefore, while any interference with the freedom to engage in political debate should be carefully scrutinised to protect the integrity of the democratic process,<sup>45</sup> protecting the right to impart and receive information within the market would not deserve an equally extensive protection.<sup>46</sup> Or, to put it in another way, the farther we move from the ‘core values’ of the ECHR, the more lenient the applicable standard is likely to be and, consequently, the wider the margin of appreciation for the public authorities becomes.<sup>47</sup>

After having illustrated some of the arguments in support of the application of the ECHR to corporate entities, it is necessary to briefly address the rationale for the relevance of the Convention for EU competition enforcement. It may be recalled that the EU is not a party to the Convention.<sup>48</sup> However, the lack of accession has not prevented the Court from developing a body of rules, part of the general principles of Community law, protecting the fundamental rights of individuals and legal entities affected by the exercise of powers by the EU institutions.<sup>49</sup> In this context, the ECHR

---

<sup>41</sup> *Id.*, paras 49-50.

<sup>42</sup> *Id.*, para 50. For commentary, see e.g. Ovey & White, *European Convention on Human Rights*, 3<sup>rd</sup> Ed, 2002: Oxford University Press, pp 276-77.

<sup>43</sup> See e.g. Emberland, *op cit*, n 24, pp 128-130; also Andreangeli, *op cit*, n 32, pp 20-21.

<sup>44</sup> See, *inter alia*, *mutatis mutandis*, Kenna, “Housing rights: positive duties and enforceable rights at the European Court of Human Rights”, (2008) (2) *EHRLR* 193, pp 194-195; also Emberland, *op cit*, n 24, pp 28-29; see also p 34.

<sup>45</sup> See, *inter alia*, appl. No 9815/82, *Lingens v Austria*, [1986] 8 *EHRR* 407, paras 40-41; for commentary, see Ovey & White, *European Convention on Human Rights*, 3<sup>rd</sup> Ed, 2002: Oxford University Press, pp 210-211; also Emberland, *op cit*, n 24, p 192.

<sup>46</sup> See Emberland, *op cit*, n 24, p 187; also, e.g. Andreangeli, *op cit*, n 32, p 22.

<sup>47</sup> See e.g. Emberland, *op cit*, n 24, p 193.

<sup>48</sup> See e.g. appl. No 8030/77, *CFDT v European Communities*, [1979] 13 *D & R* 231 at 240.

<sup>49</sup> See e.g. Opinion 2/94, *Re: Accession to the European Convention on Human Rights*, [1996] *ECR* I-1759; also T-156/94, *Siderurgica Aristrain Madrid v Commission*, [1999] *ECR* II-645, paras 26-27.

has been recognised as the principal ‘source of inspiration’ for the interpretation of these principles.<sup>50</sup>

The applicability of some of the fundamental safeguards contained in the Convention to undertakings concerned by antitrust proceedings has long been a ‘hot topic’.<sup>51</sup> Already in its *Stenuit* report the now defunct European Commission of Human Rights held that the notion of ‘criminal charge’ had a ‘Convention meaning’ independent of domestic law<sup>52</sup> and determined by a number of factors, such as whether the rules allegedly being infringed were of ‘general application’, the severity of the penalty, and whether the latter was deterrent and punitive.<sup>53</sup> As a result, domestic antitrust proceedings, despite being classified as ‘administrative’ by national legislation, were ‘criminal’ in nature.<sup>54</sup>

Despite their initial reluctance to extend the applicability, even indirect, of some of the Convention guarantees to competition proceedings,<sup>55</sup> the EU courts have been increasingly willing to rely on the ECHR in the interpretation of the general principles of Community law. For instance, AG Kokott observed in her Opinion to the *Dutch Electricians Federation* case that although the ECHR would not be directly applicable per se to the proceedings before the Commission,<sup>56</sup> it would however provide guidance as to what constitutes a ‘fair procedure’ before the EU institutions.<sup>57</sup>

Importantly, the CFI held in its *JFE* decision that Article 6(1) ECHR and especially of the presumption of innocence would be especially relevant in competition cases, due to the nature of the infringement and the degree of severity of the penalties likely to be

<sup>50</sup> See Protocol 8 to the Treaty on the European Union and the Treaty on the functioning of the European Union, OJ 2008, C115/1; also, Recital IV, Preamble to the Treaty on the European Union and the Treaty on the functioning of the European Union, OJ 2008, C115/1.

<sup>51</sup> See, *inter alia*, Andreangeli *et al.*, ‘Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission’s Fining System’ prepared for the fifth annual conference of the Global Competition Law Centre, College of Europe, held in Brussels, June 11-12, 2009.

<sup>52</sup> Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, paras 62-63; see also, more recently, appl. No 15523/89, *Schmautzer v Austria*, [1996] 16 EHRR 511, para 28. For commentary, *inter alia*, Boyle, ‘Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights’, (1984) *PL* 89.

<sup>53</sup> See e.g. Case C-198/01, *CIF v Autorita’ Garante della Concorrenza e del Mercato*, [2003] ECR I-8055, per AG Jacobs, para 52; also case C-105/04 P, *NFV/GEG v Commission* (Re: Dutch Electricians’ cartel), [2006] ECR I-8725, per AG Kokott, para 107. For commentary, *inter alia*, Wils, ‘The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis’ (2004) 27 *W. Comp.* 201; Andreangeli, *op cit*, n 32, pp 25 ff.

<sup>54</sup> Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, para 56, 61. See also, appl. No 73053/01, *Jussila v Finland*, judgment of 23 November 2006, [2007] EHRR 45, para 43.

<sup>55</sup> Case T-156/94, *Siderurgica Aristrain Madrid v Commission*, [1999] ECR II-645, paras 23-24, 27.

<sup>56</sup> Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Goothandel op Elektrotechnisch Gebied v Commission*, [2006] ECR I-8725, per AG Kokott, para 107, n 57.

<sup>57</sup> *Id.*, para 108. See also Case T-7/89, *SA Hercules Chemicals v Commission*, [1991] ECR II-1771, per AG Vesterdorf, para I.3; also, *inter alia*, case C-185/95, *Baustabgewebe v Commission*, [1998] ECR I-8417, per AG Leger, para 31.

imposed on the applicant.<sup>58</sup> However, to what extent can the needs of effective competition enforcement and more generally of the efficient functioning of regulatory structures be balanced against these fundamental rights guarantees?

On this point, the Strasbourg court held that while the right to a fair trial is in itself absolute, whether the applicant had received a ‘fair hearing’ in the individual case would depend on the circumstances of the proceedings:<sup>59</sup> in fact, the applicable standard of protection cannot be determined ‘in isolation’ but must take into account the context in which it is invoked and the values affected by the alleged interference. It was concluded that although criminal proceedings in principle required the application of strict procedural safeguards, due to the gravity characterising them, there may be cases in which no such ‘stigma’ was present<sup>60</sup> and for which the application of the ‘full’ guarantees attending a criminal trial could not be justified.<sup>61</sup>

Similarly, in *O’Halloran and Francis*, concerning the right to silence in administrative proceedings aimed at the detection and sanction of motoring offences, it was held that although the right to a fair trial is absolute in itself, its constituent elements, including the right not to contribute to incriminate oneself, may actually vary in their scope,<sup>62</sup> due to the circumstances of the case, the nature of the proceedings and the safeguards attending the taking of that evidence.<sup>63</sup> The Strasbourg court observed that when choosing to perform certain activities, individuals often accept, expressly or implicitly, to submit to specific obligations and responsibilities within a regulatory regime which may therefore limit the reach of their rights in the course of proceedings designed to enforce these obligations in the common interest.<sup>64</sup> Thus, all the Convention requires is respect for the essence of the right to a ‘fair procedure’ in the face of compulsion in the taking of evidence.<sup>65</sup>

It is concluded that the commitment to fundamental rights’ protection justifies the application of some of the Convention guarantees to the investigated firms in competition proceedings, albeit through the ‘medium’ of the general principles of EU law. However, a question remains open as to how to reconcile the protection of the right to a ‘fair procedure’, the right to peacefully enjoy one’s property and the freedom to contract with legitimate objectives of public interest.

---

<sup>58</sup> Case T-67/00, *JFE v Commission*, [2004] ECR II-2501, para 178.

<sup>59</sup> See e.g. appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 53.

<sup>60</sup> Appl. No 73053/01, *Jussila v Finland*, judgment of 23 November 2006, [2007] EHRR 45, para 43.

<sup>61</sup> *Ibid.* See also paras 46-48.

<sup>62</sup> Appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 53.

<sup>63</sup> *Ibid.* See also appl. No 54810/00, *Jalloh v Germany*, [2007] 44 EHRR 32, para 117.

<sup>64</sup> Appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 57. See also, *mutatis mutandis*, *Brown v Stott*, Privy Council, 5 December 2000, [2003] 1 AC 681, per Lord Bingham, p 703.

<sup>65</sup> *Ibid.*

The next sections will investigate the impact of the powers enjoyed by the Commission to ‘bring the infringement to an end’ on economic freedom and the right to peacefully enjoy property granted to the investigated firms under the ECHR. They will also consider the Convention standards of protection against the background of the US case law relating to the protection of freedom of covenant under the US Constitution’s ‘Due Process’ clause.

### **3.2. Economic freedoms and property rights ‘European style’: looking for a ‘fair balance’**

Section 3.1 considered a number of arguments supporting the application of certain guarantees enshrined in the European Convention on Human Rights and suggested that the protection of property and of the freedom of enterprise in a market economy is compatible with principles of human dignity, personal liberty and other rights, including freedom of association. This section will analyse the current standards of protection afforded by the ECHR to the right to peacefully enjoy one’s property and to the freedom of contract.

The right to enjoy property is enshrined in Article 1 of Protocol I to the ECHR, according to which ‘every natural or legal person is entitled to the peaceful enjoyment of his possession’. This is not, however, an absolute right, but may be limited, subject to the requirements laid down in that provision.<sup>66</sup> In respect to the notion of a ‘deprivation’ of property, as opposed to the imposition of ‘controls’ over its use, the European Court of Human Rights took the view that in assessing the impact that the measure complained of has had on her legal position regard should be had to the circumstances of each case and especially to the ‘realities’ of the position of the individual applicant.<sup>67</sup> Thus, the decisive question appears to be whether the applicant was deprived of her ‘title’ to the possessions so as to be no longer able to dispose of them or the measure adopted by the public authorities had only affected her ability to enjoy the property.<sup>68</sup>

A similarly flexible approach has informed the interpretation of the notion of ‘possession’ in the ECHR. According to the Strasbourg Court, this concept should be given an ‘autonomous meaning’<sup>69</sup> and encompass tangible and intangible goods and, in appropriate circumstances, the ‘legitimate expectation’ to the acquisition of a right.<sup>70</sup> Intellectual property rights have been held to fall within the remit of Article 1, Protocol

<sup>66</sup> See e.g. appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, judgment of 30 August 2007, para 52.

<sup>67</sup> Appl. No 7151/75-7152/75, *Sporrong & Lönnroth v Sweden*, [1983] 5 EHRR 35, para 63.

<sup>68</sup> See e.g. appl. No 43278/98, *Velikovi and others v Bulgaria*, [2009] 48 EHRR 27, para 159-160; cf. Appl. 17647/04, *Edwards v Malta*, judgment of 14 January 2007, not yet reported, para 59-60.

<sup>69</sup> See e.g. appl. 58472/00, *Dima v Romania*, judgment of 16 November 2006, unrep, para 34.

<sup>70</sup> *Inter alia*, appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 31, 33; also, appl. 8543/79, *Van Marle v the Netherlands*, [1986] 6 EHRR 483, para 39-41; appl. No 44912/98, *Kopecky v Slovakia*, judgment of 28 September 2004, para 52. See also, *mutatis mutandis*, appl. No 13427/87, *Stran Greek Refineries and another v Greece*, [1995] 19 EHRR 293, para 60.

I.<sup>71</sup> In the *Anheuser Busch* decision<sup>72</sup> the Court's Grand Chamber stated that an application for registration of a trademark could constitute a 'possession' for the purpose of the ECHR<sup>73</sup> due to the 'legal and financial rights and interests' arising from it, which are liable to confer it a specific economic value<sup>74</sup> and therefore a 'proprietary' nature.<sup>75</sup>

It was noted above that at the core of the ECHR scrutiny of measures affecting property rights is the extent to which they struck a 'fair balance' between the public interest it pursued and the protection of the rights of the individual or legal person concerned. The Strasbourg Court has indicated several requirements that should be satisfied: any constraint on the right to enjoy one's property should be 'prescribed by law' - in other words, it must find a legal basis in domestic provisions and the latter must be 'sufficiently accessible, precise and foreseeable'.<sup>76</sup> Further, that constraint must have a legitimate aim and pursue the 'general interest of the community'<sup>77</sup> and, finally, be 'necessary' to achieve that objective of public interest.

The Court recognised that although public authorities enjoyed a considerable margin of appreciation in the assessment of this requirement,<sup>78</sup> their discretion would remain subject to 'European supervision' as to whether a 'fair balance' had been maintained between the 'demands of the general interest of the community and the requirements of protection of the individual's fundamental rights',<sup>79</sup> on the basis of the 'overall examination of the various interests in issue'.<sup>80</sup>

The Strasbourg court would have to be satisfied that the measure had ensured a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised',<sup>81</sup> taking into account the scope of discretion enjoyed by the authorities in applying the relevant rules and their uncertainty<sup>82</sup> and the nature and inherent 'fairness' of the proceedings,<sup>83</sup> including the possibility to challenge the

---

<sup>71</sup> See e.g. appl. No 28743/03, *Melnychuk v Ukraine*, admissibility decision of 5 July 2005, unreported, para 3.

<sup>72</sup> Appl. No 73049/01, *Anheuser Busch v Portugal*, [2007] 45 EHRR 36, para 72.

<sup>73</sup> *Id.*, para 75.

<sup>74</sup> *Id.*, para 76.

<sup>75</sup> *Id.*, para 78.

<sup>76</sup> Appl. No 33202/96, *Beyeler v Italy*, [2001] 33 EHRR 52, para 109. See also appl. No 9006/80, *Lithgow v United Kingdom*, [1985] 7 EHRR 56, para 110.

<sup>77</sup> Appl. No 33202/96, *Beyeler v Italy*, *ibid.*, para 111.

<sup>78</sup> Appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, judgment of 30 August 2007, para 55.

<sup>79</sup> Appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, *ibid.*, para 53.

<sup>80</sup> Appl. No 25088/95, *Chassagnou v France*, [2000] 29 EHRR 615, para 75; see also appl. 9006/80, *Lithgow v United Kingdom*, *op cit.*, n 76, para 120-21; appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, *op cit.*, n 76, para 55.

<sup>81</sup> Appl. No 25088/95, *Chassagnou v France*, *ibid.*, para 82-83, 85.

<sup>82</sup> Appl. No 33202/96, *Beyeler v Italy*, *op cit.*, n 76, para 110.

<sup>83</sup> Appl. 13616/88, *Hentrich v France*, [1996] 21 EHRR 199, para 45.

findings and assessments made by the authorities concerned by way of an appeal.<sup>84</sup> Another key consideration in the assessment of the proportionality of an interference with property rights is the existence of compensation for the aggrieved individuals or legal persons. Thus, expropriations<sup>85</sup> and controls on the use of property without compensation or remuneration are normally considered to be a ‘disproportionate’ interference with the applicant’s rights.<sup>86</sup>

Having regard to the standards of protection of freedom to contract the European Court of Human Rights stated in *Ghigo v Malta* that measures controlling the amount of rent that landlords could impose on their tenants constituted a form of ‘control on the use’ of that property. Since the right ‘to receive a market rent and to terminate leases’ was the expression of the owner’s right to exploit the economic value of the property,<sup>87</sup> it enjoyed the protection of the ECHR.<sup>88</sup>

Consequently, state authorities, despite being entitled to adopt wide ranging housing legislation to ensure the ‘just distribution ... of housing resources’<sup>89</sup> were obliged to safeguard the ‘essence’ of the rights enshrined in Article 1, Protocol I.<sup>90</sup> Regard must be had to ‘the conditions for reducing the rent’ in individual cases and to ‘the extent of the State’s interference with freedom of contract and contractual relations in the lease market’, including the length of the interference and the amount of rent paid to the landlord<sup>91</sup> and the existence of fair and appropriate remedies for the protection of their rights.<sup>92</sup>

It can be concluded that the ECHR protects the right to enjoy one’s possessions, whether tangible or intangible, and the freedom of covenant of ‘everyone’ within the jurisdiction of the Contracting States. However, these rights are not absolute but can be subjected to limits in the public interest and providing that a ‘fair balance’ is struck

<sup>84</sup> *Id.*, para. 42, 46; see also para 49.

<sup>85</sup> See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, paras 31, 33; see also para 39.

<sup>86</sup> See appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, para. 38-39; also para 46. See also appl. No 13092/87 and 13984/88, *Holy Monasteries v Greece*, [1995] 20 EHRR 1, paras 80-83, 85; appl. 9006/80, *Lithgow v United Kingdom*, cit., para 205; more recently, appl. No 19589/92, *B v the Netherlands*, Commission Report, 19 May 1994, paras 71-72; see also paras 60, 65-66.

<sup>87</sup> Appl. No 31122/05, *Ghigo v Malta*, judgment of 26 September 2006, unrep, para 50.

<sup>88</sup> *Id.*, para 49. See also appl. No 10522/83, *Mellacher v Austria*, [1990] 12 EHRR 391, paras 43-44.

<sup>89</sup> Appl. No 31122/05, *Ghigo v Malta*, op cit, n 87, para 58. Also, appl. No 22774/93, *Imobiliare Saffi v Italy*, [2000] 30 EHRR 756, para 52.

<sup>90</sup> Appl. No 31122/05, *Ghigo v Malta*, op cit, n 87, paras 62, 68. See also paras 65-66, 68-69. See also, *mutatis mutandis*, appl. No 31443/96, *Broniowski v Poland*, [2005] 40 EHRR 31, para 144; more recently, appl. No 35014/97, *Hutten-Czapaska v Poland*, judgment of 19 June 2006, [2007] 45 EHRR 4, paras 195-196, 200-202, 217, 223-224.

<sup>91</sup> *Id.*, para 68; see also paras 65-66, 68-69. See also, *mutatis mutandis*, appl. No 31443/96, *Broniowski v Poland*, [2005] 40 EHRR 31, para 144; more recently, appl. No 35014/97, *Hutten-Czapaska v Poland*, judgment of 19 June 2006, [2007] 45 EHRR 4, paras 195-196, 200-202, 217, 223-224.

<sup>92</sup> Appl. No 24/1994, *Scollo v Italy*, [1996] 22 EHRR 514, paras 26-27, 38-40, 44. See also appl. No 46129, *Zvolski and Zvolaska v Slovakia*, judgment of 22 November 2002, unrep, paras 59-60, 73-75.

between the ‘common good’ and the essence of the applicant’s rights.<sup>93</sup> The next section will examine the approach adopted by the European Court of Human Rights in respect to forced IP licences.

### **3.3. Intellectual property rights, progress and competition in the ECHR framework**

Section 3.2 illustrated that Article 1, Protocol I to the ECHR encompasses intangible as well as tangible goods and that its aim is striking a ‘fair balance’ between the need to protect the essence of these rights and the achievement of goals in the public interest. This section will address the position adopted by the Strasbourg court in relation to compulsory intellectual property licenses. Although these cases have been rare, they represent a peculiar example of ‘interference’ with Convention rights in order to encourage industrial innovation.

One such case was that of *Smith Kline and French Laboratories v the Netherlands*,<sup>94</sup> which was the subject of a friendly settlement<sup>95</sup> and was therefore only dealt with at admissibility stage by the now defunct European Commission on Human Rights. According to the Commission report, the grant of a ‘compulsory licence’ constituted a form of ‘control on the use of property’ of the patent holder.<sup>96</sup> It was held that one of the essential attributes of patent rights was the conferral ‘on its owner [of] the sole right of exploitation’ of the invention and that the grant of ‘rights to others under that patent [was not] an inevitable or automatic consequence’.<sup>97</sup> Consequently, it was indispensable to assess whether imposing a duty to licence was ‘prescribed by law’ and pursued ‘a legitimate aim in a proportionate manner’.<sup>98</sup>

The Commission observed that many Contracting States provided frameworks allowing ‘other persons to make use of a particular patented product’ and that in this area they should enjoy a significant margin of appreciation:<sup>99</sup> forced licences could be granted only to ‘encourage technological and economic development’ and if the disclosure of the invention could result in the supply of a ‘new product or process ... capable of industrial application’.<sup>100</sup>

It was held that the scope of the licence at issue was limited to allowing the licensee to employ its own invention<sup>101</sup> and that the holder of the ‘primary’ patent had been

---

<sup>93</sup> See e.g., *mutatis mutandis*, Daintith, ‘The constitutional protection of economic rights’ (2004) 2(1) *Int’l J of Const’l L* 56 at 84-86.

<sup>94</sup> Appl. No 12633/87, decision of 4 October 1990.

<sup>95</sup> Report of the European Commission on Human Rights, 10 July 1991.

<sup>96</sup> Appl. No 12633/87, decision of 4 October 1990, part III.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*



entitled to royalties.<sup>102</sup> Thus, the Commission, in declaring the application admissible, stated that the respondent state had not overstepped the limits of its discretion and, consequently, the applicant's rights had not been infringed.<sup>103</sup>

The *Smith Kline* report suggests that any forced IP licence must provide for adequate compensation and be limited in its scope to reconcile the competing interests of the IP holder to the protection of the value of its investment, for the purpose of furthering innovation, and to the continued innovation of the industry on the part of the holder's rivals.<sup>104</sup> However, it remains open to question whether the imposition of similar obligation for the purpose of restoring competition, as envisaged in the application of Article 102 TFEU, satisfies these criteria. After briefly examining the rules protecting property rights and freedom of contract in US constitutional law, the next sections will attempt to answer these questions.

### 3.4. Freedom of covenant and property rights in the US Constitution: brief remarks

Sections 3.2 and 3.3 examined the standards of protection applicable to the right to enjoy property and to freedom of contract under the ECHR. Before moving on to consider the extent to which the restrictions on these rights imposed by the European Commission, in the exercise of its function as competition enforcer, comply with the ECHR standards, it is helpful to consider, albeit briefly, the degree of protection afforded to them under the US Constitution.

According to the Fifth Amendment, 'no person shall [*inter alia*] ... be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation'. In addition, the 'due process clause' contained in the Fourteenth Amendment may be relied on vis-à-vis the federate states to seek protection of the individual's freedom of covenant.<sup>105</sup>

The case law appears to suggest that a shift has taken place from a liberal approach to freedom of contract and of enterprise, in which the rights of the individual tended to take precedence over the exercise of public powers, to a more 'interventionist' approach, as a result of which the Supreme Court has been more willing to justify state action in the public interest that encroaches in the individual's economic freedoms. It was held in *Lochner* that 'the general right to make a contract in relation to his business is part of the liberty of the individual' and is therefore protected by the 'Due Process' clauses contained in the US Constitution.<sup>106</sup>

---

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> See e.g. Ohly et al., 'Artistic freedom versus privacy—a delicate balance' (2008) 38(5) *IIC* 526 at 551-552; also Geiger, 'Constitutionalising intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) 37(4) *IIC* 371 at 399.

<sup>105</sup> See e.g. Mayer, 'Substantive due process rediscovered: the rise and fall of liberty of contract' (2008-09) 60 *Mercer L Rev* 563 at 572 ff.

<sup>106</sup> *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Peckham J at 541.

Nonetheless, the Court recognised that each State enjoyed ‘certain powers ... somewhat vaguely termed police powers’ that limit the rights of liberty and property enjoyed by each individual for the ‘safety, general health and morals and general welfare of the public’<sup>107</sup> and must be exercised within the bounds of ‘constitutional restraint’.<sup>108</sup> The key question therefore is whether the restriction imposed on the applicant’s rights constituted a ‘fair, reasonable and appropriate exercise of police power’ or instead was an ‘unreasonable, unnecessary and disproportionate interference with the right of the individual to his personal liberty’ and in that context of his freedom of contract.<sup>109</sup> The act in question must therefore bear a ‘direct relation, as a means to an end, and the end itself must be appropriate and legitimate’.<sup>110</sup>

On the merits, the Supreme Court found for the applicant: it was held that the statute at issue, in which the legislature of the State of New York had set a maximum number of working hours for persons employed in certain trades, constituted a ‘meddlesome interference with the freedoms of the individual’.<sup>111</sup> Although these measures pursued the legitimate goal of protection of public health, the legislature had not proven the existence of any ‘fair ground, reasonable in and of itself, to say that there [was] a material danger to the public health of the employees’, in the absence of any limits on the number of hours that they could work each day.<sup>112</sup>

*Lochner* was widely criticised and the limited remit of this paper does not allow for a detailed consideration of these arguments.<sup>113</sup> Mr Justice Holmes, dissenting, argued that the case had been ‘decided upon an economic theory which a large part of the country [did] not entertain’ and that the Constitution could not be constructed in the light of either a ‘paternalistic’ approach to the relationship between the individual and the state or of a ‘laissez faire’ attitude to economic freedom.<sup>114</sup> Mr Justice Harlan added that the right to freely enter in contracts could be subjected to limitations ‘for the common good and the well-being of society’.<sup>115</sup>

In later cases, the Supreme Court appeared to retreat from this supposedly ‘pro free market’ stance. In *Carolene Products*<sup>116</sup> it held that the authorities retained the power to regulate commerce for reasons of public interest and that it was within the legitimate

---

<sup>107</sup> *Ibid.*

<sup>108</sup> *Id.*, p.542.

<sup>109</sup> *Id.*, p. 543.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Id.*, p. 545.

<sup>112</sup> *Ibid.*

<sup>113</sup> See e.g. Burling, ‘The challenges of due process, 1983 and property rights’, ALI-ABA working paper, 2004, available at <http://ssrn.com/abstract=666987>; also Bernstein, ‘Bolling, equal protection, due process and Lochnerphobia’, Law and Economics working paper series no 05-14, available at [http://ssrn.com/abstract\\_id=761926](http://ssrn.com/abstract_id=761926).

<sup>114</sup> *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Holmes J, pp 546-547.

<sup>115</sup> Per Harlan J, pp 548.

<sup>116</sup> *US v Carolene Products*, 304 US 144, 58 S Ct 778.

powers of the legislature to exclude from trade products whose consumption may be 'injurious to the public health, morals or welfare'.<sup>117</sup> Thus, a measure outlawing the sale of products that failed to meet 'a minimum of particular nutritive elements in a widely used article of food' to protecting the public from fraudulent substitution had not violated the 14<sup>th</sup> Amendment.<sup>118</sup>

The Supreme Court would not, therefore, declare legislative measures affecting economic activities unconstitutional unless 'in the light of the facts made known or generally assumed [they were] ... of such a character as to preclude the assumption that [they have] ... some rational basis within the knowledge and experience of the legislators',<sup>119</sup> in light of the circumstances of the case and without going as far as to 'second-guess' the choice of the legislature.<sup>120</sup>

The approach adopted in *Carolene* was upheld in other judgments concerning the legality of legal monopolies and measures fixing prices. According to *Nebbia* 'neither property rights nor contract rights [were] absolute' but could be limited to what was necessary 'to advance the safety, happiness and prosperity of [the] people and to provide for [their] general welfare'.<sup>121</sup> A legislative measure affecting the individuals' rights and freedoms would be consistent with the 'Due Process' clause if it was 'not ... unreasonable, arbitrary or capricious' and imposed only those limitations on the complainant's rights that bear 'a real and substantial relation' with their objective.<sup>122</sup> It was concluded that legislation introduced in the State of New York to control prices on the sale of milk had not infringed the 14<sup>th</sup> Amendment. In the view of the Supreme Court, since the Constitution did not provide an absolute guarantee for the freedom to engage in and conduct a business activity, States' legislatures and Congress could restrict the freedom of individuals to conduct their business in the public interest.<sup>123</sup>

Roberts J emphasised that although the growing importance of free competition had led both the States' and the federal legislature to prohibit monopolies or other forms of control on prices and trading conditions,<sup>124</sup> there may be circumstances in which 'existing maladjustments' in the functioning of individual markets could be 'corrected' by public intervention even though that adversely impacted on the freedom of the entrepreneurs concerned to set prices for their goods or services.<sup>125</sup> If these measures bore 'a reasonable relation to a proper legislative purpose' and were not discriminatory or arbitrary, they would remain consistent with the Due Process clause, without the

---

<sup>117</sup> Per Stone J at 781.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Id.*, p 783.

<sup>120</sup> *Id.*, pp 783-784.

<sup>121</sup> *Nebbia v State of New York*, 291 US 502, 54 S Ct 505, per Roberts J at 523.

<sup>122</sup> *Id.*, p 525.

<sup>123</sup> *Id.*, pp 527-528.

<sup>124</sup> *Id.*, p 528.

<sup>125</sup> *Id.*, pp 529, 531-532.

Courts being able to adjudge the ‘wisdom of the policy’, its ‘adequacy or predictability’.<sup>126</sup>

It is therefore concluded that the US Supreme Court recognises economic freedom, freedom of covenant and the right to enjoy one’s property as one of the rights protected by the US Constitution and relies on the ‘Due Process’ clause to prevent undue interferences with it.<sup>127</sup> However, their protection is not unlimited but can be subject to constraints for the common good of society, subject to criteria of ‘proportionality’ and ‘fairness’.<sup>128</sup>

The next section will therefore briefly consider how the US Supreme Court has addressed the issues arising from the imposition of restrictions on economic freedom of firms in the application of the US Sherman Act, and especially its section 2.

### **3.5. Of intellectual property rights and antitrust infringements: the US Supreme Court case law on refusals to deal**

Section 3.4 briefly illustrated the approach adopted by the US Supreme Court to restrictions of property rights and freedom of covenant imposed by public authorities both at state and at federal level in the light of the Due Process clause. However, the regulation of commercial activities is only one of the areas in which public authorities have sought to restrict freedom of covenant and to dispose of property: antitrust enforcement is another one. Nonetheless, Courts have been reluctant to restrain the freedom of undertakings to discontinue its business dealings with other firms.

It was held in *Colgate*, a case concerning an alleged infringement of Section 1 of the Sherman Act, that in principle the antitrust rules could not be relied upon to impose a duty to deal with another company, especially a rival.<sup>129</sup> The Court took the view that the objective of that Act was to protect the freedom of trade of every individual or corporation and that, consequently, its provisions could not be read as limiting the discretion to choose business partners or the conditions of trade, unless it could be demonstrated that the firm had acted for the ‘purpose to create or maintain a monopoly’.<sup>130</sup> On the merits it was concluded that the respondent, by refusing to continue supplying retailers who had declined to sell its product above an agreed price, had not infringed Section 1 of the Sherman Act.<sup>131</sup>

---

<sup>126</sup> *Id.*, p 538. Cf. *New State Ice Co. v Liebmann*, 285 US 262, 52 S Ct 371, see especially pp 373-375.

<sup>127</sup> For commentary, see e.g. Daintith, ‘The constitutional protection of economic rights’ (2004) 2(1) *Int’l J of Const’l L* 56 at 81-82.

<sup>128</sup> *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Peckham J at 543; see also *Adkins v Children’s Hospital of the District of Columbia*, 261 US 525, 43 S Ct 394, especially pp 545-546 and 551. For commentary, see Mayer, *op cit*, n 105, p 657.

<sup>129</sup> *US v Colgate*, 250 US 300, 39 S Ct 465 at 307.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Id.*, at 306.

The same principle appears to have had a more limited application in cases concerning allegations of infringement of section 2 of the Act.<sup>132</sup> In *Lorain Journal* the Supreme Court ruled that the attempt on the part of a publisher to boycott a competing radio station by refusing to provide advertising to third parties who also advertised on air with the latter violated section 2 of the Sherman Act.<sup>133</sup> The Court rejected the appellant's argument that its conduct was justified by its right to select freely its customers and held that the latter was 'neither absolute nor exempt from regulation'.<sup>134</sup> Accordingly, refusing to deal with a specific customer could result in an infringement of the antitrust rules if its purpose was the monopolisation of the market for the supply of advertising.<sup>135</sup>

The Supreme Court upheld the decree imposing on the applicant an obligation to supply advertising space to customers, regardless of whether the latter had stipulated similar contracts with the competing radio station. It took the view that the measure was neither arbitrary nor disproportionate to the aim it sought to achieve, being limited as to its duration and scope, since it concerned well identified commercial activities, and subject to limited powers of judicial supervision.<sup>136</sup>

It could be argued that the Supreme Court in *Lorain* confirmed the approach developed in cases such as *Nebbia* or *Carolene Products*. This judgment reiterated that freedom of covenant could be subjected to limits for the purpose of achieving a public interest goal - in this case, that of preserving competition in a market characterised by the presence of a monopolist. However, any such restriction should not exceed what is 'reasonably consistent with the circumstances of the case' and not impose unduly burdensome limitations on the monopolist thus striking a 'fair balance' between the legitimate interests of the monopolists and the needs of genuine, undistorted competition.<sup>137</sup>

In the later *Aspen Skiing* case<sup>138</sup> the Supreme Court confirmed that a monopolist, despite being under no general duty to cooperate with other firms and especially with its rivals, did not enjoy an absolute right to select its customers and to participate in specific commercial ventures<sup>139</sup> and that, just as in *Lorain Journal*, its right to refuse to deal with a competitor could be limited in the interest of undistorted competition.<sup>140</sup> The Court emphasised that although the appellant's behaviour was not as 'relentless and predatory' as in *Lorain Journal*, it evidenced its willingness to 'squeeze' a smaller

---

<sup>132</sup> See e.g. Lopatka and Page, 'Bargaining and monopolisation: in search of the "boundary of section 2 liability" between *Aspen* and *Trinko*' (2005) 73 *Antitrust L.J.* 115, pp 125-126.

<sup>133</sup> *Lorain Journal v US*, 342 US 143, 72 S. Ct. 181, per Burton J at 186.

<sup>134</sup> *Id.*, p 187.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Id.*, p 188.

<sup>137</sup> See Mayer, *op ci*, n 105, pp 638-639; see also p 657.

<sup>138</sup> *Aspen Skiing Co v Aspen Highland Skiing Co*, 472 US 585, 105 S. Ct. 2847.

<sup>139</sup> *Id.*, pp 600-601.

<sup>140</sup> *Id.*, p 603; see also pp 604-605, 607-608.

competitor out of the market.<sup>141</sup> Accordingly, imposing a limit on the appellant's freedom to (refuse to) contract was justified in the light of the circumstances.

The position adopted in *Aspen* may, however, be contrasted with the later *Trinko* decision,<sup>142</sup> which concerned allegations of monopolisation on the part of *Verizon*, the incumbent in the US telecommunication market: the incumbent had been accused of engaging in the 'constructive' refusal to grant access to its infrastructure, namely, of downgrading the quality of its services on the wholesale segment of the telecommunication market with a view to damaging the position of its rivals on the retail segment.

This decision was very widely debated and cannot be examined in any depth in this paper. It is suggested that Mr Justice Scalia, speaking for the Court, took a rather restrictive view of what could constitute an exception to the general principle expressed in *Colgate*.<sup>143</sup> He held that the refusal by a monopolist to deal with a rival would infringe Section 2 only if it could be shown that it had been motivated by 'anti-competitive malice' and, having regard to the nature of the activity and the structure of the market, it could have only been justified as a means of excluding a rival from the relevant market.<sup>144</sup>

The circumstance that the market for telecommunications was subject to regulation and that *Verizon* had already been sanctioned by the sector authorities for the infringement of its obligation to grant access to its infrastructure vis-à-vis its customers, an obligation that had originated from legislation and not from a contractual arrangement, weighed heavily in the decision of the Court not to impose a separate antitrust remedy on the respondent.<sup>145</sup> However, it is also clear from the judgment itself that the 1996 US Telecommunications Act had not expressly pre-empted the Sherman Act from applying to prima facie exclusionary practices.<sup>146</sup> As a result, commentators doubted that the approach prevailing in *Trinko* could allow the courts to strike an appropriate balance between the need to encourage investment on the part of the monopolist and the objective of ensuring genuine competition in all circumstances.<sup>147</sup>

Other authors proposed a different reading of the judgment. It was argued that *Trinko* could be reconciled with a view of innovation which can be fully justified in the light of an idea of competition as 'growth or development as a consequence of a superior

---

<sup>141</sup> *Id.*, pp 610-611.

<sup>142</sup> *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398, 124 S Ct 872.

<sup>143</sup> *Id.*, p 408.

<sup>144</sup> *Id.*, pp 409-410. See e.g. Fox, 'Is there life in *Aspen* after *Trinko*? The silent revolution of section 2 of the Sherman Act' (2005-2006) 73 *Antitrust L.J.* 153 at 167.

<sup>145</sup> *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004), per Scalia J at 411; see also p 407.

<sup>146</sup> *Id.*, pp 404-405.

<sup>147</sup> *Inter alia*, Fox, 'Is there life in *Aspen* after *Trinko*? The silent revolution of section 2 of the Sherman Act' (2005-2006) 73 *Antitrust L.J.* 153 at 167.

product, business acumen or historical accident'.<sup>148</sup> Thus, although its rationale could not be easily applicable outside the realm of 'regulated industries',<sup>149</sup> *Trinko's* selective application of the *Aspen* principles seems to indicate a trend toward 'tipping the scales' in favour of encouraging 'powerful' firms to continue innovating rather than of supporting competition 'as a process' across the whole industry.<sup>150</sup>

Consequently, it could be argued that *Trinko*, consistently with *Lochner's* 'presumption in favour of liberty',<sup>151</sup> upheld business freedom, unless there was a 'compelling reason' for interfering with it to avoid that the application of Section 2 of the Sherman Act could hamper the incentive to innovate even in cases involving powerful firms.<sup>152</sup> However, what remains to some degree undetermined is the extent of that incentive: how far should the monopolist remain free to choose its business partners? Could this freedom ever be restrained to safeguard competition 'as a process'?

A useful reference can be made to judgments concerning refusals to licence IPRs and to sell products covered by patents or trademarks. In the *Independent Service Organisations (ISO)* decision<sup>153</sup> the Federal Circuit of the Court of Appeals held that the ownership of intellectual property rights, while it does not confer a 'privilege to violate the antitrust laws', does not constitute irrefutable proof of market power being enjoyed by their holder<sup>154</sup> or oblige their holder to grant licences allowing others to take advantage of the fruits of her investment and innovation.<sup>155</sup> However, a refusal to licence by a powerful firm would breach the antitrust rules if the intellectual property right had been 'obtained through knowing and wilful fraud' or the litigation was a 'mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor'.<sup>156</sup>

Consequently, the holder of an intellectual property right would be in principle free to exploit its invention, if necessary by refusing to allow other to use it unless it could be shown that, in so doing, it is extending its market power 'improperly', i.e. by acting

<sup>148</sup> *United States v Grinnell Corp.*, 384 US, at 570-571, 86 S. Ct. at 1005.

<sup>149</sup> See e.g. Economides, 'Vertical leverage and the sacrifice principle: why the Supreme Court got *Trinko* wrong', NET Institute Working paper #05-05, Stern Business School, NYU, pp 28-29, available at SSRN: <http://ssrn.com/abstract=797142>; see also Fox, 'A tale of two jurisdictions and an orphan case: antitrust, intellectual property, and refusal to deal' (2004-2005) 28 *Fordham Int'l L J* 952 at 965-66.

<sup>150</sup> Lopatka and Page, 'Bargaining and monopolisation: in search of the "boundary of section 2 liability" between *Aspen* and *Trinko*' (2005) 73 *Antit. L J* 115, pp 128-129; see also Gavil, 'Exclusionary distribution strategies by dominant firms: striking a better balance' (2004) 72 *Antitrust L J* 3 at 34.

<sup>151</sup> See e.g. Cavanagh, '*Trinko*: a kinder, gentler approach to dominant firms under the antitrust laws?' (2007) 59 *Me L Rev* 111 at 127; see also Gavil, 'Exclusionary distribution strategies by dominant firms: striking a better balance' (2004) 72 *Antitrust L J* 3 at 34; cf. Meese, 'Property, *Aspen*, and refusals to deal' (2005-2005) 73 *Antitrust L J* 81 at 85-86.

<sup>152</sup> Meese, 'Property, *Aspen*, and refusals to deal' (2005-2005) 73 *Antitrust L J* 81 at 94-95; see also pp 98-99.

<sup>153</sup> *In re: Independent Service Organisations antitrust litigation CSU, LLC and others v Xerox*, 203 F 3d 1322.

<sup>154</sup> *Id.*, p 1325.

<sup>155</sup> *Id.*, p 1326. See *US v Colgate & Co*, 250 US 300 at 307.

<sup>156</sup> *Ibid.*

‘beyond the scope of the patent’<sup>157</sup> and regardless of the ‘subjective motivation’ at the basis of the holder’s conduct.<sup>158</sup>

In *Grumman*<sup>159</sup> the Federal Court of Appeals explained that this principle constituted an implied exception to the scope of the antitrust rules to reward the investment in innovation made by the holder of the patent or copyright and thereby promote consumer welfare in the long term.<sup>160</sup> The Court stated that the incentive to pursuing technical development would be put at risk by allowing the wider competition law scrutiny of the patent or copyright holder’s refusal to grant a licence to a third party<sup>161</sup> since it would deny the owner of IPRs any ‘appropriate compensation’ for their efforts.<sup>162</sup>

The brief analysis of the *ISO* and *Grumman* decisions seems to suggest that the scope of the ‘optimal incentive’ to innovate afforded to the IPRs owner is relatively wide<sup>163</sup> and therefore should find a limit only when it could be shown that the IP holder was ‘abusing its patent’.<sup>164</sup> However, it remains open to question whether the limited scope left for antitrust intervention could actually foster the attainment of genuine competition and consumer welfare.<sup>165</sup>

This point was addressed by the 9<sup>th</sup> Circuit of the Federal Court of Appeals in *Kodak*:<sup>166</sup> Beezer J reiterated that the right to refuse to deal with another firm, especially a rival, despite being ‘highly valued’, was not unlimited.<sup>167</sup> Thus he held that this right could not be exercised to exclude competition from the same or from a neighbouring market vis-à-vis the one in which the monopolist enjoys market power.<sup>168</sup> It was held that the application of the competition rules and the protection of the exclusivity granted to the IPRs owner by the patent laws pursued objectives of economic efficiency and consumer welfare by, respectively, ‘promoting a competitive market place’ and fuelling new investment and innovation.<sup>169</sup> Therefore, the Court held that ownership of an IP

---

<sup>157</sup> *Id.*, pp 1327-1328.

<sup>158</sup> *Id.*, p 1327. See also, *mutatis mutandis*, *Eastman Kodak Co. v Image Technical Services*, 504 US 451, 112 S Ct 2072, pp 2087-88 and 2090-2091.

<sup>159</sup> *Data General Corp v Grumman System Support Corp*, 36 F. 3d 1147.

<sup>160</sup> *Id.*, p 1186.

<sup>161</sup> *Ibid.* See also, *inter alia*, *Telecom Technical Services Inc v Rolm Co*, 388 F. 3d 820 at 826-827.

<sup>162</sup> See e.g. Bauer, ‘Refusals to deal with competitors by owners of patents and copyrights: reflections on the Image Technical and Xerox decisions’ (2006) 55 *DePaul L Rev* 1211 at 1223.

<sup>163</sup> *Id.*, p 1220.

<sup>164</sup> *Inter alia*, Bauer, *op cit*, n 162, pp 1241-1242.

<sup>165</sup> *Id.*, pp 1221-22.

<sup>166</sup> *Image Technical Services Inc v Eastman Kodak Co*, 125 F Rd 1195.

<sup>167</sup> *Id.*, p 1210.

<sup>168</sup> *Id.*, p 1211.

<sup>169</sup> *Id.*, pp 1214-1215.



right did not provide a ‘blanket’ immunity from antitrust liability and could not be exercised to exclude rivals from the market.<sup>170</sup>

Thus, Kodak’s refusal to continue supplying its customers with spare parts for its own products constituted an infringement of Section 2 of the Sherman Act since it revealed an ‘exclusionary intent’ and had injured the customers’ interests since to allow an IP owner to exercise its rights in such a way as to kick out a rival from a neighbouring market would be tantamount as to allow her to extend the scope of her IPRs beyond their statutory remit.<sup>171</sup>

Commenting on the *Kodak* judgment, it was suggested that just as in *ISO*, the Court of Appeals was well aware of the difficulties arising from policing monopolists’ unilateral behaviour.<sup>172</sup> However, in the light of the circumstances of the case and especially of the fact that Kodak had discontinued an existing pattern of distribution of some of its products, the 9<sup>th</sup> Circuit was prepared to extend the rationale of *Grumman* to a case in which the patent owner had sought to extend an otherwise lawful monopoly ‘beyond’ its statutory limits by seeking to exclude rivals from the market.<sup>173</sup>

It is concluded that the US Superior courts, while confirming the need to strike a ‘fair balance’ between the effective protection of IP rights and genuine competition, have adopted a cautious approach to the imposition of duties to license for the purpose of enforcing the antitrust rules. The next section will examine whether the EU rules governing antitrust remedies are compatible with the ECHR requirements and in that context consider the extent to which the US law principles concerning these issues can provide a suitable alternative to resolve possible conflicts between the two European sets of standards.

#### **4. ANTITRUST REMEDIES IN THE EU AND THE PROTECTION OF “ECONOMIC RIGHTS”: HOW TO STRIKE A “FAIR BALANCE” BETWEEN THE NEEDS OF COMPETITION AND THE RIGHTS OF POWERFUL FIRMS?**

##### **4.1. Structural and behavioural remedies and the right to ‘peacefully enjoy one’s possessions’: are the Commission’s powers consistent with the ECHR?**

Section 2 examined the principles governing antitrust remedies and illustrated how the framing of behavioural remedies to end a competition infringement must conform to criteria of ‘necessity’ and ‘proportionality’ and depends on the features of the breach as well as on the relevant substantive rules.<sup>174</sup> It also argued that the criteria governing the

---

<sup>170</sup> *Id.*, pp 1215-1216.

<sup>171</sup> *Id.*, pp 1218-1219.

<sup>172</sup> See *id.*, pp 1211, 1217-1218; for commentary, Carrier, ‘Refusals to license intellectual property after *Trinko*’ (2006) 55 *DePaul L Rev* 1191 at 1204.

<sup>173</sup> *Id.*, p 1216; see, *inter alia*, Bauer, *op cit*, n 162, pp 1233-1234.

<sup>174</sup> E.g. Case T-170/06, *Alrosa v Commission*, [2007] ECR II-2601, paras 101, 104-107; for commentary, see *inter alia*, Wind, ‘Remedies and sanctions under Article 82 of the EC Treaty’ (2005) 26(12) *ECLR* 659.

EU antitrust remedies imposed for unlawful refusals to deal and to license may not strike a balance between genuine competition and the need to encourage innovation.

Thereafter, section 3 examined the standards of protection afforded by the ECHR to the right to enjoy property and argued that although the Contracting States retain the power to impose limits on their enjoyment under specific circumstances and in the public interest, they are under the obligation to ensure that the essence of these rights is not irremediably impaired.<sup>175</sup>

This section will consider the extent to which the current approach to antitrust remedies, especially those imposed by the Commission in ‘refusals to licence’ cases, under Article 102 TFEU, is compatible with the standards of protection enjoyed by the peaceful enjoyment of property, especially intellectual, and by freedom of contract under the European Convention. It is reminded that the choice of antitrust remedies must remain subject to the principle of proportionality,<sup>176</sup> according to which ‘the burdens imposed on undertakings in order to bring an infringement to an end [must] not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed’.

In the light of the approaches adopted, respectively, by the EU institutions and by the European Court of Human Rights, it is not entirely clear whether the concept of ‘proportionality’ at the basis of the framing of antitrust remedies according to Council Regulation No 1/2003 is as exacting as the requirements dictated by the Convention.<sup>177</sup> On this point, the European Convention on Human Rights has been interpreted as providing a degree of protection to the freedom of ‘everyone’ to decide whether and with whom to stipulate contracts, this principle being a component of economic and personal freedom.<sup>178</sup>

Having regard specifically to compulsory patent licences, the *Smith Kline v the Netherlands* case<sup>179</sup> stated that these constituted forms of ‘control on the use of property’, in accordance with Article 1, Protocol I,<sup>180</sup> which should only be allowed in order to further ‘technological and economic development’. Thus, the individual or company requesting them should demonstrate that thanks to the licence a ‘new product or

---

<sup>175</sup> *Supra*, sect 3.2; see e.g. appl. No 25088/95, *Chassagnou v France*, [2000] 29 EHRR 615, para 82-85.

<sup>176</sup> See e.g. Commission Decision 94/19/EEC, *Sea Link v Stena Line*, OJ 1994, L15/8; also joined Cases 6/7/73, *ICI and Commercial Solvents v Commission*, [1974] ECR 223; more recently, Case T201/04, *Microsoft v Commission*, [2007] ECR II-3601, para 1276.

<sup>177</sup> For commentary, see, *inter alia*, Montagnani, ‘Remedies to exclusionary innovation in the high-tech sector: is there a lesson from the Microsoft saga?’ (2007) 30(4) *W. Comp.* 623; also Larouche, ‘The European Microsoft case at the crossroads of competition policy and innovation’, TILEC Discussion Paper, May 2008, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1140165#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#). For the ECHR approach, see e.g. appl. No 73049/01, *Anheuser-Busch v Portugal*, judgment of 11 January 2007, [2007] 45 EHRR 36; also appl. No 35841/02, *ORF v Austria*, judgment of 7 December 2006.

<sup>178</sup> Appl. No 35014/97, judgment of 19 June 2006, [2007] 45 EHRR 4, para 195, 223-224.

<sup>179</sup> Appl. No 12633/87, decision of the European Commission on Human Rights, 4 October 1990.

<sup>180</sup> *Id.*, part IV.

process', i.e. a product which does not constitute an 'obvious' offshoot of existing technology would be developed and supplied and upon payment of royalties proportionate to the value of the invention.<sup>181</sup>

This approach may be contrasted with the position adopted in EU competition law. Section 2 argued that the Commission and the European Courts have moved away from a rather cautious interpretation of Article 102 TFEU in respect to refusals to licence IP rights on the part of dominant firms to a far more generous view of how this provision should be applied to individual cases. It was suggested that, perhaps under the 'influence' of the 2007 *Microsoft* CFI judgment, the Commission 2009 Guidance has departed from the hitherto narrow reading of the conditions of 'new product' and of 'indispensability' of the input protected by IPRs and to have embraced a more 'generous' interpretation of the concepts of 'objective necessity' and of 'likely consumer harm'. However, this move was criticised as focusing too heavily on the protection of competitors rather than on fostering 'long term' innovation and competition 'on the merits'.<sup>182</sup>

It is therefore questionable whether the approach adopted in the 2009 Guidance can be reconciled with the ECHR standards.<sup>183</sup> It could be argued that the Guidance, by placing significant emphasis on encouraging follow-on innovation, does not seem to 'capture' the actual impact of a forced licence on the long term incentive to innovate of individual firms and, therefore, could create a danger of allowing 'copy-cat' development at the expense of 'genuine' technical development, thus remaining at variance with the concept of 'proportionality' resulting from the ECHR.<sup>184</sup>

It is suggested that without going as far as to embrace the rather 'pro-enterprise' approach championed by the US Supreme Court in its *Trinko* decision,<sup>185</sup> the Commission could have framed its standard for the assessment of the 'necessity' and 'proportionality' of antitrust remedies in such a way as to reflect the importance of encouraging innovation, even when denying a licence may appear capable of putting rivals at a disadvantage because the latter may no longer be able to offer similar or only upgraded products.<sup>186</sup>

<sup>181</sup> *Ibid.*

<sup>182</sup> See 2009 Guidance, paras 83-84, 87-88; cf. Case C-418/01, *IMS Health GmbH v OHG & NDC Health GmbH*, [2001] ECR I-5039, para 48. For commentary, see, *inter alia*, Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation', TILEC Discussion Paper, May 2008, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1140165#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#).

<sup>183</sup> Appl. No 12633/87, *Smith Kline v the Netherlands*, decision of 4 October 1990 (European Commission of Human Rights), part IV.

<sup>184</sup> 2009 Guidance, para 87.

<sup>185</sup> *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398, 124 S Ct 872, pp 409-410. For commentary, see, *inter alia*, Carrier, 'Refusals to license intellectual property after *Trinko*' (2006) 55 *DePaul L Rev* 1191 at 1208-1209; also Spulber & Yoo, 'Mandating access to telecom and the internet: the hidden side of *Trinko*' (2007) 107 *Colum L Rev* 1822 at 1873-1874, pp 1882-1884.

<sup>186</sup> See e.g. Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?' (2009) 34(4) *ELRev* 584 at 610.

It is added that the notion of ‘likely consumer harm’ and of ‘necessity’ of the input, resulting from the 2009 Guidance, could be criticised as lacking clarity.<sup>187</sup> In respect to the former, it could be argued that by referring generally to products ‘contributing to technical development’ the Commission has not resolved the evidentiary difficulties already characterising the assessment of the ‘new product’ requirement.<sup>188</sup> It is therefore submitted that the 2009 Guidance may have been another ‘lost opportunity’ for the Commission to increase the clarity and foreseeability of the interpretation of Article 102 TFEU, as would have been required, *inter alia*, by the ECHR.<sup>189</sup>

Similar concerns may be raised in relation to the conditions governing licenses in individual cases. Although it is clear that royalties should be payable to the licensor, there does not seem to be any ‘hard and fast’ rule governing the determination of their amount, which is left to the discretion of the European Commission. This position can be contrasted with the ECHR case law on controls on the use of property according to which providing ‘adequate compensation’ constitutes a key aspect of the proportionality assessment<sup>190</sup> and should be ensured in accordance with reasonably foreseeable, clear and precise rules.<sup>191</sup>

Against this background, it could be argued that the absence of clear guidelines as to the determination of royalties in return for a compulsory licence is not entirely consistent with the standards dictated by the ECHR and could raise issues as to whether the position of the licensor is adequately protected against the non-arbitrary restrictions of her exclusive IP rights.

The case law of the European Court of Human Rights also indicates that the overall ‘fairness’ of the proceedings leading to the adoption of measures interfering with property rights and the existence of appropriate remedies to protect the position of the affected parties ensure the proportionality of the interference with their property rights.<sup>192</sup> In respect to the former, a number of questions have been raised as to the extent to which the features of the antitrust proceedings before the Commission are compatible with the notion of ‘fair procedure’ enshrined in the ECHR.<sup>193</sup> It is now

---

<sup>187</sup> See e.g., *mutatis mutandis*, Robinson, ‘On refusing to deal with rivals’ (2002) 87 *Cornell L Rev* 1177 at 1996-1997; also, *inter alia*, Katsoulacos, ‘Optimal legal standards for refusals to license intellectual property: a welfare-based analysis’ (2009) 5 *J Comp L & E* 269 at 287-288.

<sup>188</sup> See case C-418/01, *IMS Health GmbH v OHG & NDC Health GmbH*, [2001] ECR I-5039, para 48; cf. 2007 *Microsoft* judgment, para 647; for commentary, *inter alia*, Hatzopoulos, ‘Refusal to deal: the EC Essential facilities doctrine’, in Amato & Ehlermann (Eds), *EC Competition Law: a critical assessment*, 2007: Oxford, Portland/Oregon, Hart Publishing, p 354.

<sup>189</sup> See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, para 67-68.

<sup>190</sup> See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 38; also appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, paras 38-39.

<sup>191</sup> See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68.

<sup>192</sup> See e.g. appl. 13616/88, *Hentrich v France*, [1994] 18 EHRR, paras 45-46, 49.

<sup>193</sup> See e.g. Andreangeli, *op cit*, n 32, pp 224 ff.

accepted that due to the general applicability of Articles 101 and 102 of the Treaty and to the deterrent and punitive nature of the fines that can be imposed, competition cases at EU level are of a ‘criminal’ nature.<sup>194</sup> Consequently, it was doubted that the concentration of the functions of ‘police, prosecutor and judge’ in the hands of the Commission alone, albeit under the (limited) judicial supervision exercised by the CFI and the ECJ, would be compatible with the Convention.<sup>195</sup>

In *Jussila v Finland* the Strasbourg court seemed to accept that these safeguards would not apply to competition cases with the same intensity as to ‘fully criminal’ court cases concerning charges raised against an individual. However, it is submitted that there are a number of ‘problem areas’ in the rules governing Commission’s antitrust action, such as those related to admissibility of evidence, the right against self-incrimination and the protection of lawyer-client confidentiality and in the context of the decentralised enforcement of the Treaty competition rules, the observance of the principle of *ne bis in idem*.<sup>196</sup>

Having regard more closely to the ex post monitoring of antitrust remedies, the 2007 *Microsoft* judgment demonstrated the difficulties inherent to it and tested the limits of the powers conferred to the Commission.<sup>197</sup> It could be argued that the annulment of the part of the 2004 decision creating and disciplining the operation of the ‘monitoring trustee’<sup>198</sup> is especially telling of the need to provide more precise boundaries to the scope of the discretion enjoyed by the Commission in framing antitrust remedies in respect to decisions imposing an obligation to deal and to license under Article 102 TFEU.<sup>199</sup>

It is therefore suggested that the current approach adopted by the Commission appears to fall short of the requirements dictated by the ECHR in a number of respects. Firstly, the analysis of the conditions governing the application of Article 102 TFEU to refusals to licence in the light of the case law of the Strasbourg court concerning Article 1, Protocol I to the ECHR has demonstrated that the approach emerging from the Commission’s 2009 Guidance does not take into sufficient account the need to protect

<sup>194</sup> See e.g. Case T-77/00, *JFE and others v Commission*, [2004] ECR II-250, paras 173, 177-178. For commentary, *inter alia*, Wils, ‘The combination of the investigative and the prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis’ (2004) 27(2) *W. Comp.* 201 at 210.

<sup>195</sup> *Inter alia*, Case T-156/94, *Aristrain v Commission*, [1999] ECR II-645, paras 87-90. See *inter alia* Andreangeli, *op cit*, n 32, pp 226-227.

<sup>196</sup> See e.g. Case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR 1, para 11; also Case T-224/00, *Archer Daniels Midland v Commission*, [2003] ECR II-2597, paras 89-90. Cf. e.g. appl. No 370/950/97, *Franz Fischer v Austria*, judgment of 29 May 2001, unrep, paras 22, 25, 29; for commentary, *inter alia*, Andreangeli, *op cit*, n 32, pp 207 ff; cf. Wils, *Principles of European Antitrust enforcement*, 2005: Oxford/Portland, OR, Hart Publishing, pp 96 ff.

<sup>197</sup> Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 1265, 1269-1270.

<sup>198</sup> See e.g. Commission Decision of 24 March 2004, *Microsoft*, OJ 2004, C900/1, para 1043.

<sup>199</sup> See 2007 *Microsoft* judgment, para 1268; for commentary, see, *inter alia*, case comment to Case T-201/04, *Microsoft v Commission*, (2008) 45(3) *CMLRev* 863 at p 868.

the drive to invest of the holder of the IPRs and to favour the pursuit of genuine innovation.<sup>200</sup>

Secondly, given the importance of freedom of contract<sup>201</sup> the imposition of such a wide ranging remedy as the forced grant of an IP licence without clear and precise criteria defining the amount of the royalties payable to the licensor or predetermined supervisory proceedings may not be entirely consistent with the requirements laid down by the ECHR for the protection of property rights.<sup>202</sup> And thirdly, the indeterminacy of the criteria governing this type of remedy, such as the ‘new product’ requirement, and the lack of precise guidelines as to the way in which these decisions should be enforced and monitored contribute to expanding the hiatus between the existing EU antitrust law standards and the European Convention rules.

Consequently, the question appears to be what the ‘way forward’ is to resolve these concerns. The next sections will examine the question of whether adopting more stringent standards governing refusals to licence could go some way toward addressing the perceived lack of consistency and of inherent ‘fairness’ and proportionality of this type of remedy, with a view to ensuring its compliance with the requirements of the ‘rule of law’.

#### **4.2. Looking for a ‘fair balance’: is ‘going backwards’ the solution for EU antitrust remedies?**

Section 4.1 illustrated a number of issues arising from the analysis of antitrust remedies imposed in refusal to license cases in light of the principles enshrined in the ECHR and argued that the test arising from the 2009 Guidance may not ensure the imposition of ‘proportionate’ obligations on the undertaking found to be responsible for an infringement of Article 102 TFEU.<sup>203</sup> Consequently, it could be wondered whether a ‘return’ to the stricter conditions governing refusals to deal dictated by earlier case law could go some way to ensure that the antitrust remedies comply with the principles of ‘fairness’ and ‘proportionality’ of Article 1, Protocol I.

Having regard to what constitutes an ‘essential input’, it could be argued that a firm requesting a license should demonstrate the absence of an ‘alternative’ to the good protected by patent or copyright, or at the very least, should prove that duplicating the existing one would be impossible or excessively difficult, as affirmed by the ECJ in *Bronner*.<sup>204</sup> A similar condition would be more consistent with the principle laid down in

---

<sup>200</sup> Appl. No 12633/87, *Smith Kline v the Netherlands*, decision of 4 October 1990 (European Commission of Human Rights), part IV.

<sup>201</sup> See e.g. appl. No 31122/05, *Ghigo v Malta*, judgment of 26 September 2006, paras 62, 65-66, 68-69.

<sup>202</sup> See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 38; also appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, paras 38-39.

<sup>203</sup> See 2009 Guidance, paras 86-87. Cf. Larouche, op cit, n 177, pp 12-13; see also Andreangeli, ‘Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?’ (2009) 34(4) *ELRev* 584 at 605-606.

<sup>204</sup> Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, para 28.

*Smith Kline* according to which a compulsory licence would constitute a ‘proportionate’ control on the use of intellectual property only if the patent was indispensable to allow the working of an existing or later patent for the purpose of continuing technical development in a specific industry.

In respect to the ‘new product’ condition, it is submitted that the *IMS Health* preliminary ruling and especially the opinion of AG Tizzano had captured in many ways the essence of the balancing exercise that must be conducted to reconcile the interests of IPRs owners and the goals of public interest demanding a compulsory license.<sup>205</sup> It is argued that by requiring the firm seeking the licence to prove that, thanks to the access to the protected input, a ‘novel’ product would be supplied the ECJ had balanced the needs of innovation with the legitimate interests of the copyright holder in a manner consistent with the requirements of the ECHR.<sup>206</sup> Consequently, compulsory licences would be restricted to cases in which as a result of the transfer of technology a product would be developed which is not an ‘obvious’ offshoot of existing inventions and would therefore meet consumer needs hitherto not satisfied by current supplies.

It is acknowledged that such a strict view of what is a ‘new product’ would probably not allow the forced disclosure of protected inputs to support ‘follow on’ innovation. However, it is argued that a less interventionist approach to the application of Article 102 TFEU to these cases would be preferable to the position adopted in the 2009 Guidance, since it would reduce the risk of ‘upsetting’ the incentive to invest in further technical development on the part of the owner of key technologies by limiting the reach of the resulting remedies only to cases in which consumers would be clearly likely to benefit from the offer of ‘genuinely novel’ products.<sup>207</sup>

The rather liberal approach adopted by the 2009 Guidance in relation to refusals to license could also be criticised for its lack of clarity. It is recalled from section 4.1 that to comply with the Convention requirements, the rules governing any interference with property rights should be ‘prescribed by law’, i.e. sufficiently clear and precise as to allow the individual or legal person affected by these measures to foresee the consequences of the exercise of public powers on their legal position.<sup>208</sup>

Section 3.1 illustrated that the compliance with criteria of legal certainty and predictability is of capital importance in competition policy. It was argued that since competition law provides the ‘rules of the game’ in the market, it capable of channelling the behaviour of all economic actors in ‘welfare enhancing directions’ and, in so doing,

<sup>205</sup> C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, paras 48-49; also, Opinion of AG Tizzano, para 62.

<sup>206</sup> See e.g. Andreangeli, ‘Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?’ (2009) 34(4) *ELRev* 584 at 587-588; also Montagnani, ‘Remedies to exclusionary innovation in the high-tech sector: is there a lesson from the *Microsoft* saga?’ (2007) 30 *W Comp* 623 at 625.

<sup>207</sup> See, *inter alia*, Andreangeli, *ibid*, pp 608-609.

<sup>208</sup> See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68.

ensures that the powers of the public authorities entrusted with ‘creating the scaffolding’ for the functioning of the economy are confined within well defined boundaries.<sup>209</sup>

Against this background, it could be argued that the generous view adopted by the Commission in respect to refusals to deal has not only ‘diluted’ the meaning of the original criteria determining a finding of abuse to the point that they can no longer ‘strike a balance’ between the goal of genuine competition and the need to foster innovation.<sup>210</sup> They have also become so ‘opaque’ that they do not appear capable of assisting dominant companies in assessing the future antitrust consequences of their decision to deny access to their inventions.

The concept of ‘likely consumer harm’, seen in light of the old ‘new product’ requirement, illustrates how legal certainty could be jeopardised. Whereas the 2009 Guidance refers generally to the likelihood that a forced license could lead to future technical development (including ‘follow on’ innovation) and considers this concept as almost equivalent to the requirement that access to IP rights result in the supply of ‘brand new’ products,<sup>211</sup> the ‘new product’ limited forced licenses only to cases in which they enabled the licensee to supply a genuinely novel product or service.<sup>212</sup>

Against this background, it is argued that if it was already difficult to assess whether the ‘new product’ condition had been fulfilled, due to the complexity of this inherently technical appraisal, it would be even more complicated to predict the directions of the technical development of a specific industry as well as the possible impact that a compulsory licence could have on it.<sup>213</sup> Consequently, it is suggested that recourse to conditions that are more similar to the ‘old’ *IMS Health* test would go some way toward ensuring not only that the criterion in question fulfils its ‘critical function’ in the appraisal of refusals to licence but also complies with requirements of clarity, foreseeability and legal certainty and ultimately with the rule of law.<sup>214</sup>

In the light of the 2009 Guidance and of the *Microsoft* case, it can be doubted that the Commission and the General Court, at least, will adopt an approach similar to the earlier legal standards. The next section will explore whether the US practice as regards the restrictions of property rights and of freedom of covenant, both generally and under section 2 of the Sherman Act, can offer further insights and a blueprint for a sufficiently clear, reasonable and non-arbitrary set of conditions.

---

<sup>209</sup>Stucke, ‘Does the rule of reason violate the rule of law?’ (2009) 42(5) *UC Davis L Rev* 101 at 144-145.

<sup>210</sup>See e.g. Andreangeli, ‘Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?’ (2009) 34(4) *ELRev* 584 at 609-610.

<sup>211</sup>See 2009 Guidance, paras 86-89. For commentary, Larouche, op cit, n 243, pp 12-13.

<sup>212</sup>Hatzopoulos, ‘Refusal to Deal: the EC essential facilities doctrine’, in Amato & Ehlermann (eds), *EC Competition Law: a critical assessment*, 2007: Oxford/Portland, Oregon, Hart Publishing, pp 348-350.

<sup>213</sup>*Id.*, pp 353-354.

<sup>214</sup>See e.g. Larouche, op cit, n 177, p 9; also Andreangeli, op cit, n 210, pp 587-89.



### 4.3. Refusal to licence as an ‘exceptional’ case of monopolisation: insights from the application of the Due Process clause and of Section 2 of the Sherman Act

Section 3.4 illustrated the approach adopted by the US Supreme Court in relation to restrictions of property rights and of freedom of covenant in commercial activities. It was argued that the initial ‘laissez-faire’ attitude shown by the Court in *Lochner*, according to which the Due Process clause enshrined in the 5<sup>th</sup> and 14<sup>th</sup> Amendments should be read as providing a ‘presumption in favour of liberty’ that can only be rebutted in exceptional cases, was gradually replaced by a more interventionist stance, according to which the Courts would not question the validity of measures affecting property rights or freedom of covenant unless the former had been restricted in an arbitrary or disproportionate manner.<sup>215</sup>

Thereafter, section 3.5 illustrated that the American judicature is extremely cautious in imposing on commercial entities, even powerful ones, any obligation to deal with their rivals.<sup>216</sup> It was illustrated that a finding of monopolisation in cases of refusals to licence IP rights would only occur if the IPRs owner was acting ‘beyond the scope of the patent’,<sup>217</sup> i.e. if its refusal to grant a licence was clearly aimed at excluding rivals from the relevant market.<sup>218</sup>

Against this background, it may be questioned whether the application of a standard inspired by the approach to refusals to licence established by the US superior courts could be a viable alternative to the position adopted in the 2009 Guidance. It is suggested that by relying on the concept of ‘abuse of patent’ as a means to define what constitutes ‘monopolisation’ and by requiring proof of ‘anti-competitive malice’, the US Courts may be in danger of overlooking cases in which a forced licence may actually have led to ‘genuine’ technical advancement.<sup>219</sup>

Commentators suggested that the Supreme Court in *Trinko* may have assumed perhaps too readily that legitimately acquired economic power almost inevitably led to further innovation and that this innovation could have been ‘translated’ in consumer welfare.<sup>220</sup> According to Stucke, ‘*Trinko* ignores the costs of monopolies to future innovation’ and, with its emphasis on the importance of ‘monopoly rents’ as a means to encourage investment in R&D, creates the risk of increasing costs for other firms wishing to bring that innovation forward.<sup>221</sup>

---

<sup>215</sup> See e.g. *Nebbia v State of New York*, 291 US 502, 54 S Ct 505, per Roberts J at 538.

<sup>216</sup> *US v Colgate & Co*, 250 US 300 at 307.

<sup>217</sup> *In re: Independent Service Organisations antitrust litigation CSU, LLC and others v Xerox*, 203 F 3d 1322, p 1327; also *Telecom Technical Services Inc v Rolm Co*, 388 F. 3d 820 at 826-827.

<sup>218</sup> *Data General Corp v Grumman System Support Corp*, 36 F. 3d 1147 at p 1187.

<sup>219</sup> Stucke, ‘Should the Government prosecute monopolies?’ (2009) 2 *Univ of Illin L Rev* 497, pp 511-512.

<sup>220</sup> *Id.*, p 513.

<sup>221</sup> *Id.*, p 514.

Although they accepted that monitoring the observance of antitrust remedies targeting unilateral behaviour raises significant difficulties for the Courts,<sup>222</sup> other authors were left partially unconvinced by the arguments in favour of the narrow application of Section 2 of the Sherman Act to refusals to licence.<sup>223</sup> Thus, it may be argued that the approach developed by the US superior courts in respect to the application of section 2 of the Sherman Act to unilateral refusals to licence IP rights, whilst being motivated by justifiable concerns for the continuing drive to innovation of ‘powerful’ firms as well as for the difficulties arising from the ex post oversight of the remedies imposed for an infringement, may be too restrictive to strike a ‘fair balance’ between the needs of ‘free enterprise’ and the objective of undistorted competition and ultimately of technical development.

Accordingly, it is concluded that the US style view of this type of practices does not constitute an entirely suitable alternative to the 2009 Guidance on the application of Article 102 TFEU to like cases. What, instead, the earlier sections seem to suggest is that an alternative benchmark which is both ‘proportionate’, as required by the ECHR, and ‘workable’, i.e. consistent with the requirements of ‘quality of the law’ dictated by the Convention and enshrined in the principles of the rule of law could be found in existing principles of EU competition law.

## **5. A ‘PROPORTIONATE’ REMEDY TO ABUSIVE REFUSALS TO LICENCE: WHERE DO WE GO FROM HERE? TENTATIVE CONCLUSIONS**

The previous sections analysed the conditions governing antitrust remedies according to Article 7 of Council Regulation No 1/2003 and illustrated how the Commission can considerably restrict the right of the parties concerned to enjoy their possessions and to choose whether and with whom to conclude contracts, protected by human rights instruments such as the ECHR. It was argued that since its ‘appropriateness’ to the infringement constitutes a key consideration as to its legality, the assessment of the compliance of a given remedy with the principles enshrined in the Convention cannot be separated from a consideration of the substantive rules governing that individual breaches.

A number of concerns have emerged on the extent to which especially the generous approach adopted by the Commission in its 2009 Guidance could actually ensure that a fair balance is struck between the legitimate interest of the parties concerned and the goal of genuine competition. It was argued that the Commission’s Guidance may have ‘watered down’ the criteria governing the finding of abusive behaviour in refusal to licence cases to the point that they would not only be incapable of balancing these two

---

<sup>222</sup> *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004), per Scalia J at 414; see e.g. Hovenkamp, ‘The legal periphery of individual firm conduct’, U Iowa Legal Studies Research paper No 07-21, available at SSRN: <http://ssrn.com/abstract=1014426>, p. 2-4; also Stucke, op cit, n 219, pp 544-545.

<sup>223</sup> See e.g., *mutatis mutandis*, Baker, ‘Beyond Schumpeter vs Arrow: how antitrust fosters innovation’ (June 2007). Available at SSRN: <http://ssrn.com/abstract=96226>, pp 17-18; see also pp 20-21, 24-25, 30-31.

competing objectives, but would also be inconsistent, at least in part, with canons of clarity, legal certainty and predictability on which adherence to the rule of law rests.

As a result, questions have been raised as to whether alternative approaches could be developed to address these concerns. Could a set of conditions for antitrust remedies applicable to refusals to licence be developed in the light of the relevant principles developed in the context of the ECHR outright? Or would this ‘transplantation’ cause more problems than it actually resolves? Section 4.2 illustrated how a ‘return’ to the original *IMS Health* approach would go some way toward ensuring compliance with the Convention standards: especially the notions of ‘indispensability’ and of ‘new product’ appear rather close to the *Smith Kline* requirement of proportionality and could therefore constitute an ideal ‘starting point’ in the development of a new set of conditions for this type of remedy.

It was suggested that the Court of Justice’s view of the notions of ‘indispensability’ and of ‘new product’ would allow that ‘balancing exercise’ between the needs of innovation and the realisation of genuinely competitive market conditions predicated in *Smith Kline* and could therefore provide a useful frame of reference for antitrust remedies. It was added that a ‘return’ to the *IMS Health* set of conditions would ensure compliance with the requirements of clarity, foreseeability and legal certainty enshrined in the rule of law. Although the test is likely to prompt potentially complex questions of fact, it would be capable of providing a sufficiently reliable framework for the assessment of ‘suspicious’ refusals to license, which is so important if antitrust standards are to be applied to ‘channel’ economic behaviour in ‘welfare enhancing directions’.<sup>224</sup>

It is added that discussing the compliance of antitrust remedies with the standards governing property rights and freedom of contract has led us to question once again whether the rules applicable to unilateral exclusionary conduct, and especially to refusals to license, under Article 102 TFEU, can reconcile the apparently diverging goals of competition and technical innovation.

This paper has argued that the 2009 Guidance adopted a position which appears partly incapable of reconciling the apparently conflicting goals of competition and technical innovation as well as unlikely to give any clear guidance to the antitrust authorities and the concerned parties alike as to whether denying an IP licence in a given case would actually be compatible with Article 102 TFEU. Therefore it is hoped that just as any ‘good wine connoisseur’ the Commission and the ECJ will come to appreciate once again the ‘quality’ of the ‘vintage’ *IMS Health* requirements and therefore to frame the rules applicable to the antitrust remedies in this area in a way which respects the dictates of the rule of law without discouraging dominant companies from engaging in technical development.

---

<sup>224</sup>See e.g. appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68. For commentary, Fallon, ‘The rule of law as a concept in constitutional discourse’ (1997) 91(1) *Colum L Rev* 1 at 7-8; see also Stucke, *op cit*, n 209, pp 143-44.



---

**THE COMPETITION LAW REVIEW**

---

**Volume 6 Issue 2 pp 259-285****July 2010**

This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in

*James Killick & Pascal Berghé\**

---

This article assesses whether the current enforcement system of EU competition law complies with the requirements of Article 47 of the Charter of Fundamental Rights (CFR) and Article 6 European Convention of Human Rights (ECHR). It concludes that this is not the case and puts forward possible ways to remedy this deficiency. It argues that EU competition procedures fail to meet the core due process standards laid down by the ECHR and the CFR because fines are not imposed by an independent tribunal at first instance. In addition, the limited exception to that key principle does not apply as competition law infringement cannot be deemed ‘minor offences’ and the General Court’s review of the Commission decisions remains too limited. Therefore, it is suggested that EU Courts should ideally be granted the power to adopt final infringement decisions at first instance, so as to ensure full compliance with Article 6 ECHR. However, in light of the constitutional and practical difficulties raised by such a change, this article examines three alternatives: (i) creating a new independent competition authority; (ii) broadening the review powers of the EU Courts; and (iii) having an independent adjudicator adopt public findings on the case after a hearing at which the case team acts as prosecutor, after which the Commission would have to decide whether to adopt these findings or to take a different decision. While none of these alternatives would on its own fully comply with the requirements of Article 6 ECHR, it is submitted that the combination of broader judicial review plus having an independent adjudicator adopt public findings on the case could be put in place relatively quickly, would solve a number of the shortcomings of the current system and seems to be the best alternative in the short/medium term pending full reform.

---

**1. INTRODUCTION AND SUMMARY**

The title to this article was inspired by the Commission’s review of Regulation 1/2003 – a report which did not address the fundamental due process concerns shared by many involved in EU competition law. Instead, the Commission’s review of Regulation 1/2003 focused on possible (minor) enhancements of the Commission’s powers. The review dismissed due process criticisms, concluding that the functioning of Regulation 1/2003 was globally satisfactory, and did not call for any substantial change in the Commission’s enforcement policy. This article looks at the concerns affecting the enforcement of EU Competition law by the Commission (and some NCAs – though there are a number of NCAs with more advanced procedures) and concludes that fundamental change is needed to bring it in compliance with ECHR standards.

Many will say that this is not necessary given the current Commission system works satisfactorily. To convince you to continue reading, we would challenge you as follows:

---

\* Partner and Associate at White & Case LLP, Brussels. The opinions expressed in this article are entirely personal.

would you recommend that any other country adopt it as their (new) competition law? Would you advise that country that it would be appropriate and entirely above suspicion/criticism if competition infringements were to be decided – and hundreds of millions of Euros of punishment to be imposed – by 27 regional politicians, 26 of whom had no knowledge of the evidence and one who will have read a summary of the evidence prepared by the prosecuting officials? Would you recommend to that country that it should empower an administrative body to adopt the final decisions imposing significant punishments solely on the recommendations of the prosecutors, without the case having been tried before a neutral judge in a public and fair hearing? Would you advise that country to allow the administrative body overseen by regional politicians to impose huge penalties while allowing only limited judicial review? We submit that the EU's competition procedures are a model no other country concerned about due process would adopt if it was starting with a clean slate. We would therefore submit that this thought experiment confirms that EU competition procedures need to be urgently reformed.

The current enforcement system is not only one that countries putting in place new competition regimes would be advised not to follow, it is also unlawful because EU competition rules are criminal in nature in the sense of Article 6 of the European Convention of Human Rights (ECHR), which provides that a criminal penalty can only be imposed by an 'independent and impartial tribunal established by law'. More specifically, the case law provides that such criminal penalties must be imposed by an independent tribunal at first instance. There is only a limited exception to this rule in the case of offences that are (a) minor and (b) there is a right of appeal against the decision before an independent and impartial tribunal, which has powers of full jurisdictional review in relation to all aspects of the decision. Neither condition is met in EU competition cases: fines of hundreds of millions of Euros are not minor; and the review by the General Court is too limited. EU competition procedures thus fail to meet the core standards laid down by the ECHR.

Since 1 December 2009, the current system also fails to meet EU's own core standards for the very same reasons. With the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights (CFR) has been given 'the same legal value as the Treaties'.<sup>1</sup> In particular, Article 47 CFR, which provides for the right to 'an effective remedy before ... an independent and impartial tribunal previously established by law', mirrors the text of Article 6 ECHR. Thus, the meaning and scope of the rights provided by Article 47 CFR must be at least equivalent to those of Article 6 ECHR. This follows from Article 52(3) CFR, which expressly provides that the protection afforded by the CFR must be at least equivalent to the guarantees provided by the ECHR.<sup>2</sup> All the *acquis* for Article 6 ECHR is thus brought into EU law since there is

---

<sup>1</sup> Article 6(1) TEU.

<sup>2</sup> Pursuant to Article 52(3) CFR, which states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

now an express provision of primary law preventing EU Courts from adopting a lower standard of protection than the European Court of Human Rights (ECtHR).

The last part of the article looks at possible ways to remedy this deficiency. The ideal solution that clearly ensures full compliance with Article 6 ECHR would be to give EU Courts the power to adopt final infringement decisions at first instance. This solution raises significant constitutional questions – it could require a change to the Treaties to implement, as well as significant organisational changes. So this is probably best seen as a long term goal, rather than a solution in the near term. Few associated with the EU would be keen to suggest Treaty changes after the difficulties of securing approval for the Lisbon Treaty – a process which highlighted that changing the Treaty can take many years to achieve and is not a short or even medium term solution. Three other alternatives examined below are: creating a new competition authority independent from the Commission; broadening the review powers of the EU Courts with a view to remedying on appeal the potential shortcomings affecting the decision-making process at first instance (to the extent that this has not already been done by the CFR); and having an independent adjudicator adopt public findings on the case after a hearing at which the case team acts as prosecutor. The Commission would then have to decide whether to adopt these findings or to take a different decision.<sup>3</sup> While the feasibility of these solutions within the current Treaty framework may be less problematic than the alternative of Court-imposed punishments, none of these alternatives would on its own fully comply with the requirement of Article 6 ECHR, namely that cases be adjudicated by an independent tribunal at first instance. However, the combination of broader judicial review plus having an independent adjudicator adopt public findings on the case, could be put in place relatively quickly, would solve a number of the shortcomings of the current system and seems to be the best alternative in the short/medium term pending full reform.

In sum, we believe that Europe should lead the way in fair competition procedures; not set an example that other countries would be reluctant to follow. The Lisbon Treaty, now in force, provides that the CFR has the same legal value as any other article of the Treaty and that the European Union will accede to the ECHR. So now is the time to reform the system in a fundamental way, rather than tinkering with the details of Regulation 1/2003. Europe should have change we can believe in.

## 2. THE COMMISSION'S REVIEW OF REGULATION 1/2003

The Commission published on 30 April 2009 a report on the functioning of Regulation 1/2003 ('the Report').<sup>4</sup> The Report was a missed opportunity in that the Commission

---

<sup>3</sup> This system is modelled on the one that applies for pharmaceuticals, where the EMEA makes findings on e.g. whether a pharmaceutical should be taken off the market but it is the Commission that has the formal power to decide to ban the drug. In practice the Commission almost always follows the EMEA's findings.

<sup>4</sup> The Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003, COM(2009)206 final ("Report") is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0206:FIN:EN:PDF>. The Commission staff working paper accompanying the Communication from the Commission to the European Parliament and

chose not address the due process shortcomings of the current enforcement system of EU competition law, despite clear calls from the stakeholders who submitted comments during the public consultation preceding the adoption of the report.<sup>5</sup>

In particular, the Commission does not accept that the current enforcement system does not fully comply with Article 6 ECHR and states that ‘as far as decisions adopted are subject to independent judicial control, such systems are fully compatible with established case law of both the Community Courts as well as the European Court of Human Rights’.<sup>6</sup> The Commission also broadly interprets the exception to the principle of the right to have an independent court at first instance:

‘under the case law of the European Court of Human Rights, administrative adjudication even of certain matters qualified ‘criminal’ within the meaning of Article 6 of the ECHR is not incompatible with the Convention so long as the party concerned can bring any such decision affecting it before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.’<sup>7</sup>

However, as will be explained in more detail below, it is submitted that this does not accurately reflect the ECtHR’s case law, which requires that decisions be taken by an impartial and independent tribunal at both first and second instance. Moreover, as will be explored below, it is doubtful that the limited judicial review practised until now<sup>8</sup> by the EU Courts (pure ‘review of legality’), would satisfy the ECHR requirements as they are not entitled to engage in a complete reassessment of the facts and of the evidence produced before it (‘de novo review’).

In the Report, the Commission attempts to legitimise its own internal architecture, which fails to separate the investigating and deciding teams, by stressing that ‘most Member States have a system of one administrative authority investigating and deciding cases’.<sup>9</sup> But this does not make the Commission model legal – it may instead simply show that Member State authorities also need to change their procedures. In addition, it is noteworthy that some Member States such as France have actually moved away from the Commission model and have adopted instead a structure which distinguishes between the role of investigator and decision-maker.<sup>10</sup> Since 13 January 2008, there is a clear separation between the French Competition Authority’s investigatory function

---

Council - Report on the functioning of Regulation 1/2003, COM(2009)206 final, is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0574:FIN:EN:PDF>.

<sup>5</sup> See, for example, the comments of the International Chamber of Commerce and Business Europe, available at: [http://ec.europa.eu/competition/consultations/2008\\_regulation\\_1\\_2003/index.html](http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/index.html).

<sup>6</sup> Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 55.

<sup>7</sup> Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 56.

<sup>8</sup> There has, to date, not been a case where the Courts have adopted a wider scope of review based on the CFR – though if the interpretation of the CFR set out below is correct, this may happen in the future.

<sup>9</sup> Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 192.

<sup>10</sup> See the website of the Autorité de la Concurrence, [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=167&id\\_article=1079](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167&id_article=1079).



and its sanctioning function. In particular, the Board of the Competition Authority will not be involved in the investigations of cases.<sup>11</sup> Similarly, in Belgium, the Competition Service, incorporated within the Ministry of Economic Affairs, investigates, while the College of Competition Prosecutors (chaired by the Director General for Competition) prosecutes and the Competition Council is an administrative court which decides on the merits of the case.<sup>12</sup> A similar separation of investigatory and decision-making powers can be found in Spain where the Investigations Directorate conducts investigations, but decisions are adopted by the CNC Council.<sup>13</sup> So the Commission system cannot in fact be justified on the basis of Member State practices, since many Member States have a better approach.

It is a pity that instead of using the occasion of the review of Regulation 1/2003 to seek to enhance its procedures and ensure due process, the Commission decided not to engage on the issue and instead called for an increase in its powers. For example, the Commission argued in favour of an increasing recourse to Article 18(3) decisions.<sup>14</sup> It also called for sanctions when misleading or false replies are given to during voluntary interviews under Article 19.<sup>15</sup> Moreover, in paragraph 137 of the Report, the Commission expressed frustration that the ‘multi-stage procedure foreseen in Article 24 can prove relatively lengthy and cumbersome’ and states that ‘room for improvement should be examined’ - thus seeking to enhance its powers with regard to alleged non-compliance, while not addressing the procedural due process issues that have caused controversy in recent Article 24 procedures.<sup>16</sup> Hence the comment above that the Report was somewhat of a missed opportunity.

In recent months, in response to the growing criticism regarding its procedure, the Commission issued in January 2010 draft ‘Best Practices in proceedings concerning Articles 101 and 102 TFEU’ and ‘Best Practices on submission of economic evidence’ as well as ‘Hearing Officers’ Guidance Paper’.<sup>17</sup> A consultation took place on the draft texts and the Commission received many comments, with most saying that while the documents are a welcome step in the right direction, they do not go far enough. But there remains time for the Commission to address some of the criticisms of its procedure before it officially adopts these three documents.

---

<sup>11</sup> ‘An interview with Bruno Lasserre’, *Global Competition Review*, August/September 2008 (Vol 11 Issue 8).

<sup>12</sup> See the Competition Authority’s website: [http://economie.fgov.be/fr/entreprises/concurrence/Autorite\\_belge\\_concurrence\\_Introduction/index.jsp](http://economie.fgov.be/fr/entreprises/concurrence/Autorite_belge_concurrence_Introduction/index.jsp).

<sup>13</sup> See the Competition Authority’s website: <http://www.cncompetencia.es/Inicio/ConocerlaCNC/QueeslaCNC/tabid/77/Default.aspx>.

<sup>14</sup> Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 82.

<sup>15</sup> Report on the functioning of Regulation 1/2003, COM(2009)206 final, para 84.

<sup>16</sup> See, for example, Case T-167/08, *Microsoft v Commission*, pending, in relation to the Commission’s duty to clarify an obligation prior to imposing a penalty of €899 million for non-compliance with it.

<sup>17</sup> Available online at [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html).

### 3. COMPETITION CHARGES ARE CRIMINAL IN NATURE

Although Community competition law is nearly 50 years old, its genuine nature, whether administrative or criminal, remains debated today. The question is not really the correct classification of Community competition law but rather the practical consequences that would flow from recognising its criminal nature. Article 6 of the European Convention on Human Rights distinguishes between determination of civil rights and determination of criminal charges and subjects criminal proceedings to more stringent procedural guarantees – with which EU competition law does not fully comply.

#### 3.1. The ECtHR's test

The ECtHR, located in Strasbourg, has held that the concept of 'criminal charges' should receive an autonomous definition to avoid that states might be tempted to circumvent the due process protection guaranteed by the ECHR by designating a particular law as non-criminal.

In order to determine whether proceedings are 'criminal' within the meaning of Article 6 ECHR, the ECtHR has indicated in *Engel* that it will rely on (i) the domestic classification of the offence; (ii) the very nature of the offence; and (iii) the (nature and) degree of severity of the penalty.<sup>18</sup> These three criteria are not cumulative.<sup>19</sup> Since the ECtHR assesses the three criteria laid down in *Engel* disjunctively, the Court can conclude to the criminal nature of a proceeding even if only one of the three criteria is met.

- First, an offence will be deemed criminal if it is so labelled in domestic law, irrespective of its nature or the severity of the accompanying penalty. States are in principle free to designate as a criminal offence any act they choose, thus rendering applicable the specific protection of Article 6 ECHR.<sup>20</sup>
- Second, the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.<sup>21</sup> For instance, the ECtHR found in *Öztürk* that German road traffic offences remain criminal even if the maximum fines were low.
- Third, sanctions which come within the criminal sphere due to their nature and severity are sufficient to classify the proceedings as criminal, even if the offence itself could have been legitimately characterised as non-criminal (for instance, disciplinary).<sup>22</sup> For instance, the ECtHR found in *Engel* that disciplinary sanctions aiming at the imposition of serious punishments involving deprivation of liberty

---

<sup>18</sup> ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 82. All ECtHR judgments are available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

<sup>19</sup> ECtHR, Judgment of 25 August 1987, *Lutz v Germany*, para 55.

<sup>20</sup> ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 81.

<sup>21</sup> ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 54.

<sup>22</sup> ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 85.

were criminal in nature for the purpose of applying Article 6 ECHR, although the Court acknowledged that contraventions of legal rules governing the operation of the Netherlands armed forces could legitimately be labelled disciplinary by domestic law.

The ECtHR will stop its analysis as soon as it has determined that the proceedings in question should be deemed criminal, without necessarily examining all three criteria. The Court will only examine all three criteria if necessary to reach a conclusion on the genuine nature of the proceedings at stake. In such cases, the Court may adopt an overall approach and characterise a proceeding as criminal where a series of factors taken together and cumulatively point towards the concept of criminal charges even if none of these factors would be decisive on its own.<sup>23</sup> For instance, the Court found that the tax surcharges imposed on Mr Bendenoun amounted to ‘criminal charges’ because of the general scope and punitive aim of the underlying tax legislation as well as the very substantial amount of the tax surcharges. The Court found that the provision in question covered ‘all citizens in their capacity as taxpayers, and not a given group with a particular status’. The tax surcharges were intended ‘not as pecuniary compensation for damage but essentially as a punishment to deter reoffending’, and were imposed ‘under a general rule, whose purpose is both deterrent and punitive’. Lastly, the Court took into account the fact that the surcharges were ‘very substantial’.

Applying this standard, European competition law as enforced by the Commission and/or the NCAs should be deemed criminal if:

- European law classifies competition law as criminal; or
- Competition law infringements are criminal in nature; or
- Sanctions imposed by the Commission and/or the NCAs belong to the criminal sphere due to their nature and severity; or
- A series of factors point towards classifying competition law proceedings as criminal even if none of these factors would be decisive on its own.

### 3.2. First *Engel* criterion - the ‘domestic classification’ of EU competition law

Is European competition law classified as criminal under domestic law? It appears that it is not the case as Article 23(5) of Regulation 1/2003 expressly provides that ‘[d]ecisions taken pursuant to paragraphs 1 and 2 shall *not be of a criminal law nature*’.<sup>24</sup> Relying on this wording, the General Court has rejected claims that competition law should be considered penal in nature.<sup>25</sup> Therefore, EU competition law fails the first *Engel* criterion. European law classifies neither competition law infringements nor competition law sanctions as criminal.

<sup>23</sup> ECtHR, Judgment of 24 February 1994, *Bendenoun v France*, para 47.

<sup>24</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 (emphasis added).

<sup>25</sup> See e.g. Case T-83/91, *Tetra Pak v Commission*, [1994] ECR II-755, para 235; Case T-64/02, *Dr Hans Heubach v Commission*, [2005] ECR II-5137, para 205.

However, from an ECHR point of view, the domestic classification of proceedings is certainly the least important of the three *Engel* criteria. It only constitutes a ‘starting point’ for the analysis.<sup>26</sup> The domestic labelling of some proceedings as non-criminal is never determinative but simply obliges the Court to turn to the second and third *Engel* criteria.

In addition, the purpose of Article 23(5) of Regulation 1/2003 (and former Article 15(4) of Regulation 17/62) was not to define the level of procedural guarantees that EU competition proceedings should respect, but rather to avoid the political opposition of Member States to a transfer of sovereignty in the criminal sphere and sidestep any legal debate on the Community’s criminal competences.<sup>27</sup> In light of this historical background, the wording of the Regulation does not constitute a valid argument to oppose the application of the stricter procedural safeguards of Article 6 ECHR. Arguably, that reasoning was implicitly acknowledged by the EU Courts themselves: although they consider competition law as administrative, the EU Courts purport to provide parties with a protection equivalent to the guarantees provided by the ECHR. For instance, in *Mannesmannröhren*, the General Court held that:

‘those principles [the rights of defence and the right to fair legal process, both recognised in Community law] offer, in the specific field of competition law ... protection equivalent to that guaranteed by Article 6 of the [ECHR]’.<sup>28</sup>

Despite such a declaration of principle, it is submitted that EU Courts have not yet fully applied the Article 6 ECHR procedural safeguards. Notably they have to date failed to examine the compatibility of the overall enforcement structure of EU competition law by the Commission (and most NCAs) with the ECHR.

### **3.3. Second *Engel* criterion - the nature of competition law**

How does European competition law fare under the second *Engel* criterion? Under this criterion, the ECtHR assesses both the domestic legislation’s scope and underlying rationale to determine the genuine nature of proceedings.

First, the offence and sanctions must be imposed by general legal provisions.<sup>29</sup> The offence should come close to a ‘general prohibition in the public interest’.<sup>30</sup> Conversely, the offence will not be criminal if it only applies to a limited group with a special status. In that regard, Articles 101 and 102 TFEU are clearly provisions of general nature as

---

<sup>26</sup> ECtHR, Judgment of 8 June 1976, *Engel a.o. vs The Netherlands*, para 82.

<sup>27</sup> Joshua, ‘Attitudes to antitrust enforcement in the EU and the United States: Dodging the traffic warden or respecting the law?’, [1995] *Fordham Corporate Law Institute* 101; Kerse, *EC Antitrust Procedure*, Sweet & Maxwell, 4th edition, London, 1998, p 288 §7.02.

<sup>28</sup> Case T-112/98, *Mannesmannröhren v Commission*, [2001] ECR II-1125, para 77. The notion of ‘equivalent’ protection may have to be revisited given the wording of Article 52(3) of the CFR, which requires at least the same level of protection.

<sup>29</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 38.

<sup>30</sup> Karen Reid, *A practitioner’s guide to the European Convention of Human Rights*, 2nd Edition, Sweet & Maxwell, London, 2004, p 64.

they apply to all undertakings. Furthermore, the concept of undertaking has itself been broadly interpreted to cover ‘every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed’,<sup>31</sup> which further confirms the general nature of the two provisions.

Second, the aim of the legal provisions enacting the offence and imposing the sanction is particularly relevant. The ECtHR held in *Jussila* that the mere fact that the sanction was imposed by a rule whose purpose was deterrent and punitive was sufficient to establish the criminal nature of the offence, irrespective of the severity of the sanction itself:<sup>32</sup>

‘the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a *rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence.* The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but *does not remove the matter from the scope of Article 6.* Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge’.

Importantly, the objective nature of the infringement ‘does not necessarily deprive an offence of its criminal nature’.<sup>33</sup> It is thus irrelevant that European competition law has not historically dedicated much attention to ascertaining the existence of a subjective criminal intent or negligence, although this is formally required by Article 23 of Regulation 1/2003 and the 2006 Fining Guidelines. Though, interestingly, the recent Guidelines on exclusionary abuses of dominant position do seem to place a fair amount of emphasis on the importance of evidence of exclusionary intent.<sup>34</sup>

Crucially, deterrence and punishment are undeniably the two main aims pursued by Regulation 1/2003. The Commission tirelessly emphasises the importance of ensuring deterrence when justify its fining policy and fines in individual cases.<sup>35</sup> In particular, the express reference to ‘general deterrence’ in the 2006 Fining Guidelines confirms that the Commission seeks not only to punish and deter infringers, but also to deter

<sup>31</sup> Case C-41/90, *Höfnér and Elser v Macrotron*, [1991] ECR I-1979, para 21.

<sup>32</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 38 (emphasis added).

<sup>33</sup> ECtHR, Judgment of 23 July 2002, *Janosevic v Sweden*, para. 68.

<sup>34</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7, available at [http://ec.europa.eu/competition/antitrust/art82/guidance\\_en.pdf](http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf), for example at para 20.

<sup>35</sup> See Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2 (2006 Fining Guidelines), para 4; N Kroes, ‘Tackling cartels – A never-ending task’, Anti-cartel enforcement: criminal and administrative policy, Brasilia, 8 October 2009; N Kroes, ‘Power transformers cartel busted’, Opening remarks at press conference, Brussels, 7 October 2009; N Kroes, ‘Paraffin wax cartel’, Opening remarks at press conference, Brussels, 1 October 2008; N Kroes, ‘Settlements in cartel cases’, 12th annual competition conference, Fiesole, 19 September 2008.

companies in general from committing competition law infringements.<sup>36</sup> In that regard, EU competition law may be distinguished from a case relating to Russian competition law where the ECtHR found that sanctions were only imposed ‘for obstructing the authorities’ investigation, and do not serve as punishment for substantive antimonopoly violations’.<sup>37</sup>

A final element pointing towards classifying EU competition law as criminal is that competition law has been criminalised in some Member States. Although comparative law is far from being conclusive, the ECtHR has sometimes taken into account the criminal classification of the behaviour in other states as a further indication confirming its conclusion.<sup>38</sup>

On that basis, European competition law should be considered criminal in nature within the meaning of Article 6 ECHR on the basis of the legislation’s scope and underlying rationale.

### 3.4. Third *Engel* criterion - the nature and severity of competition law sanctions

Do EU competition law penalties belong to the criminal sphere? Under the third *Engel* criterion, the ECtHR assesses both the nature and severity of the sanctions.

First, as regards the nature of the sanction, criminal sanctions must be intended as a punishment to deter re-offending, not as a pecuniary compensation for the damage caused.<sup>39</sup> As noted above, deterrence is the key concept underpinning the Commission’s entire fining policy. While general deterrence was relevant for the second *Engel* criterion, the third *Engel* criterion is concerned with specific deterrence, i.e. punishment of companies having infringed competition law and deterring recidivism. Specific deterrence permeates the entire 2006 Fining Guidelines, as can be illustrated by the following most prominent references to that goal.

- Paragraph 4 of the 2006 Fining Guidelines provides that the, ‘Commission must ensure that its action has the necessary deterrent effect. Accordingly, when the Commission discovers that Article 81 or 82 [now, 101 or 102] of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence)’.
- Paragraph 25 provides for adding a so-called ‘entry fee’ to the basic amount, ‘in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements’.
- Paragraphs 30-31 provide for ‘a specific increase for deterrence’.

---

<sup>36</sup> Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2 (2006 Fining Guidelines), para 4.

<sup>37</sup> ECtHR, Decision of 3 June 2004, *OOO Neste St. Petersburg a.o. v Russia*, p 10.

<sup>38</sup> ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 53.

<sup>39</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 38 ; ECtHR, Judgment of 24 February 1994, *Bendenoun v France*, para 47.

The non-compensatory nature of the fines imposed by the Commission has been now emphasised by the Commission's active promotion of follow-on damages actions.<sup>40</sup> If any doubt remained, the existence of two distinct legal procedures demonstrates the distinct aims pursued by each of them: the imposition of competition fines aims at punishing past offences and deterring against (re-)offending in future whereas civil damages actions aim at compensating for the damage suffered by victims of the competition law infringement.

Second, as regards the severity of the sanction, the ECtHR looks at both the actual penalty imposed and, above all, the maximum penalty provided for by the relevant legislation.<sup>41</sup> Deprivation of liberty is obviously the archetype of criminal penalty. However, the imposition or the possibility of jail sentence is not necessary for proceedings to be deemed criminal on the basis of the third *Engel* criterion. Fines may be sufficient – the decisive element being not necessarily their amount but their purpose.

As described above, it is clear that the underlying rationale of the fines imposed by the Commission for competition law infringements meets the third *Engel* criterion. In addition, the very high level of the fines must be taken into account. Both individual fines and the annual total amount of fines have sharply increased in recent years. In 2004, the total of fines imposed in cartel cases amounted to €390 million. In 2008, the total was above €2.2 billion, i.e. an 800% increase for similar infringements. In 2008, the Commission also imposed a record €896 million fine on Saint-Gobain for price-fixing.<sup>42</sup> In 2009, the Commission set a new record and fined Intel €1.06 billion for abuse of a dominant position.<sup>43</sup> No other type of corporate wrongdoings can lead to the application of such high fines, even where the damage caused (e.g. to the environment) is enormous.<sup>44</sup>

It is submitted that fines of hundreds of million Euro reach the level of 'criminal severity'. More importantly, irrespective of the absolute amount of the fines, the imposition or the risk of imposition of a fine of up to 10% of the worldwide turnover of the entire group also reaches the level of criminal severity. Depending on the company's margin, such a fine can represent part, whole or more than the entire annual profit of the infringing company. When combined with the underlying aims of deterrence and punishment, and the accompanying stigma, it becomes difficult to contest that competition law fines imposed by the Commission are not criminal within

---

<sup>40</sup> The Commission now systematically include a reference to the possibility of lodging private damages actions at the end of its press releases of cartel decisions. See for instance press release IP/09/1432 (Power transformers), IP/09/1389 (re-adoption of decision in the concrete reinforcing bar cartel), IP/09/1169 (calcium carbide cartel). The Commission's White Paper can also be found at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>. A directive is under preparation.

<sup>41</sup> ECtHR, Judgment of 9 October 2003 (Grand Chamber), *Ezeh and Connors v United Kingdom*, para 120.

<sup>42</sup> Commission decision of 12 November 2008 in case COMP/39.125 – Car glass, OJ 2009, C173/13.

<sup>43</sup> Commission decision of 13 May 2009 in case COMP/37.990 – Intel, OJ 2009, C227/13.

<sup>44</sup> By way of contrast, Total was fined €375,000 for the oil pollution from the Erika.

the meaning of Article 6 ECHR. This analysis was recently confirmed by the ECtHR in *Dubus*:<sup>45</sup>

‘37. The Court notes that the applicant incurred a reprimand, a penalty of administrative nature in domestic law. However, the reading of Article L. 613-21 of the CMF (see paragraph 24 above) shows that the applicant company could have been struck off or been imposed a financial penalty ‘no higher than the mandatory minimum capital of the legal entity’. *Such penalties have important financial consequences and, thus, can be characterised as criminal penalties* (mutatis mutandis, *Guisset c. France*, no 33933/96, § 59, CEDH 2000 IX). Indeed, the Court repeats that the criminal characterisation of proceedings is function of the level of gravity of the legal maximum penalty that the person faces (*Engel*, op. cit. para. 82) and not function of the gravity of the penalty eventually imposed. The Court also considers, like the applicant, that the issued reprimand imposed was capable of damaging the company’s reputation, with undeniable monetary consequences.’

Lastly, it is important to point out that the fact that the fine cannot be converted into a jail sentence in case of non-payment has not been held decisive by the ECtHR.<sup>46</sup>

On that basis, European competition law should be considered criminal in nature or, at the very least, its underlying aims constitute a strong factor pointing towards a characterisation as criminal proceedings within the meaning of Article 6 ECHR.

### **3.5. Conclusion on the criminal nature of European competition law**

The record high fines recently imposed by the Commission have reignited the debate about the nature of EU competition law. The main elements demonstrating the criminal character of EU competition law have been present since its inception:

- EU competition law fines seek (and have always sought) to punish and deter offenders, as well as deterring others to offend; and
- the legal maximum fine is (and has always been) 10% of the annual worldwide turnover of the group, which represents an extremely significant amount of money for any undertaking.

It must therefore be concluded that European competition law is ‘criminal’ within the meaning of Article 6 ECHR, despite the wording of Article 23(5) of Regulation 1/2003. Judge Vesterdorf, acting as Advocate General in *Rhône Poulenc*, reached the same conclusion:

‘In view of the fact - in my view confirmed to some extent by the judgment of the Court of Human Rights in the *Öztürk* case - that the fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), *have a criminal law character*, it is vitally important that the Court should seek to bring about a state of legal affairs not

---

<sup>45</sup> ECtHR, Judgment of 11 July 2009, *Dubus v France*, para 37 (free translation from the French).

<sup>46</sup> ECtHR, Judgment of 23 July 2002, *Janosevic v Sweden*, para 69.



susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights'.<sup>47</sup>

Advocate General Léger also concurred in *Baustablgewebe* where it concluded that the case at stake involved a 'criminal charge' within the meaning of Article 6 ECHR.<sup>48</sup>

Arguing that EU competition law proceedings should not be deemed criminal because decisions are taken by an administrative body and not any court would turn the problem upside down. The question is not whether the requirements of Article 6 ECHR apply to the Commission given that it is an administrative body, but rather whether the fact that competition decisions are adopted by an administrative body is compliant with Article 6 ECHR given that EU competition law proceedings are criminal in nature.

Finally, we wonder whether the characterisation of EU competition proceedings as 'hard core criminal' or even 'criminal' in nature matters any more under EU law in light of Article 47 CFR. The Explanation of the CFR states that some CFR articles have a wider scope than their ECHR equivalent and adds that, 'Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation'.<sup>49</sup> Therefore, it is submitted that the *full* protection of Article 6 ECHR applies to EU competition law proceedings even if, *quod non*, they were merely considered administrative in nature.

#### 4. THE CURRENT ENFORCEMENT SYSTEM DOES NOT COMPLY WITH ECHR STANDARDS

##### 4.1. The shortcomings of the current system

Since EU competition law proceedings should be classified as criminal in nature, they should comply with the standard of Article 6 ECHR and, in particular, with the right to a fair and public hearing before an independent and impartial tribunal at first instance. As the ECtHR held in *Jussila*:

'An oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, § 79) and where an applicant has an entitlement to have his case 'heard', with the opportunity *inter alia* to give

<sup>47</sup> Joined opinion of Judge Vesterdorf acting as Advocate General in Cases T-1-4 & 6-15/89 *Rhône-Poulenc a.o. v Commission*, [1991] ECR II-867, at p 885 (emphasis added).

<sup>48</sup> Opinion of Advocate General Léger in case C-185/95 P, *Baustablgewebe v Commission*, [1998] ECR I-8417, para 31.

<sup>49</sup> Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, explanation on Article 52.

evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.<sup>50</sup>

Since the entry into force of the Lisbon Treaty, these very requirements form an integral part of EU primary law. Pursuant to Article 6(2) TEU, the Charter of Fundamental Rights has ‘the same legal value as the Treaties’.<sup>51</sup> Moreover, Article 52(3) CFR provides that:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

As this is made clear in the Explanations relating to the Charter of Fundamental Rights, ‘the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights’.<sup>52</sup>

It follows that Article 47 CFR, which mirrors the text of Article 6 ECHR, implements in EU law the protection afforded by Article 6 ECHR, as interpreted by the ECtHR, in its entirety and on an ongoing basis. Any future expansion of the ECHR protection decided by the ECtHR will also have to be reflected in EU law. Indeed, ‘the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR’.<sup>53</sup> Conversely, stricter standards may be developed autonomously pursuant to the Charter of Fundamental Rights. The ECHR constitutes a floor, not a ceiling.

However, European competition law does not comply with these requirements of Article 6. Pursuant to Regulation 1/2003, EU competition law charges are determined by the Commission at first instance, not by any independent and impartial tribunal as required by Article 6 ECHR. Instead of a judicial authority independent from the executive branch of the government, decisions are actually taken by the executive branch itself. The ultimate decision power is not even entrusted to a specialised administrative department within the Commission but rather to the College of Commissioners, a body composed of politicians without any particular (indeed, often without any) competition law or judicial expertise. Out of the 27 Commissioners, 26 will most likely have no detailed first-hand knowledge of the relevant evidence at all and will never read any of the documents contained in the case file. The Commissioner for Competition is likely to have a more in-depth knowledge of the case (though the level of knowledge may vary considerably between different cases) but does not attend the ‘hearing’ organised before the adoption of the infringement decision. In that regard,

---

<sup>50</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 40.

<sup>51</sup> Article 6(1) TEU.

<sup>52</sup> Explanations relating to the Charter of Fundamental Rights, OJ 2007, C303/17, explanation on Article 52.

<sup>53</sup> Explanations relating to the Charter of Fundamental Rights, OJ 2007, C303/17, explanation on Article 52.

the parties' appearance before the Hearing Officer can hardly qualify as the 'public hearing' required by Article 6 ECHR: it is not open to the public and, more fundamentally, it is held in the absence of the final adjudicator. The Hearing Officer has, at best, the power to make some private, non-binding comments to the Commissioner for Competition.<sup>54</sup> While the role of the Hearing Officer may constitute a welcome check and balance in the system, it cannot be equated to the presence of a judge. It is thus difficult to see how such a procedure could give the parties the opportunity to present their defence in a way that is consistent with the ECHR.

Moreover, the Commission cumulates the roles of investigator, prosecutor and judge. The confusion of the three roles within the same body can give rise to 'prosecutorial bias',<sup>55</sup> especially since the same team is entrusted with a case from the very first investigations to the drafting of the final infringement decision. The literature (see, e.g., the articles cited above) tells us that three types of bias come into play.

- As Commission officials act both as investigators and prosecutors, it is only human nature that they will tend to favour evidence and interpretations of evidence that support their own thesis – often pointing towards the guilty status of the investigated companies (confirmation bias).
- Equally, there is likely to be a tendency to pursue the proceedings up until the adoption of an infringement decision so as to justify retroactively the launch and continuation of the investigations (hindsight bias).
- Finally, they will tend to impose fines so as to demonstrate effective enforcement of competition law rules (policy bias).

The risk of prosecutorial bias does not come from the quality of the Commission staff – and let us be clear that we are not suggesting there is any wrongdoing or ill-intention on the part of DG COMP staff – but is a structural phenomenon directly resulting from the Commission's flawed structure. In other words, that risk will subsist as long as the current enforcement structure remains unchanged. Some recent Commission's initiatives,<sup>56</sup> notably to increase peer review, constitute a welcome first step in the right direction. However, more fundamental changes will be necessary to eradicate the risk of prosecutorial bias and meet Article 6 ECHR standards given that it is inadequate for an executive body such as the Commission to adjudicate on criminal offences and impose criminal fines, particularly in the light of their size in recent times.

---

<sup>54</sup> Commission Decision No 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ 2001, L162/21 (Hearing Officer Mandate), Article 13(2).

<sup>55</sup> GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 7 ; D Slater, S Thomas and D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial : no need for reform?', GCLC Working Paper 04/08, available at <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf>; W Wils, 'The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis', (2004) 27 *World Competition* 201.

<sup>56</sup> See, for example, GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 8.

## 4.2. There is no room for an EU competition law exception

It has sometimes been argued that Article 6 ECHR's requirements that the determination of criminal charges be made by an independent tribunal at first instance and that a public hearing be organised do not apply in the case of EU competition law on the ground that competition law does not constitute 'hard core criminal law'.<sup>57</sup>

It is true that the ECtHR has recognised that there can be criminal charges of differing weight, with the consequence that it has sometimes accepted that criminal penalties can be imposed in the first instance by a non-judicial body.<sup>58</sup> However, this constitutes an exception to a general principle. And in previous cases, the ECtHR has limited the scope of the exception to minor offences<sup>59</sup> and conditioned it on the existence of a full review on appeal by a court that entirely complies with all Article 6 ECHR requirements.<sup>60</sup> These two conditions for the exception to apply to European competition law are not satisfied.

---

<sup>57</sup> See, for example, Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights', (2010) 33(1) World Competition 5.

<sup>58</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para 43: 'While it may be noted that the above-mentioned cases in which an oral hearing was not considered necessary concerned proceedings falling under the civil head of Article 6 § 1 and that the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, 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. There are clearly "criminal charges" of differing weight.* What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a *gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law*, for example administrative penalties (*Öztürk v. Germany*), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80), customs law (*Salabiaku v. France*, judgment of 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v. France*, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the *criminal-head guarantees will not necessarily apply with their full stringency* (see *Bendenoun 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*, cited above)' (emphasis added).

<sup>59</sup> ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para 56: 'Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.

<sup>60</sup> ECtHR, Judgment of 23 June 1981, *Le Compte a.o. v Belgium*, para 51: 'In fact, their case was dealt with by three bodies – the Provincial Council, the Appeals Council and the Court of Cassation. The question therefore arises whether those bodies met the requirements of Article 6 par. 1. ... Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system ... the 'right to a court' (see the above-mentioned *Golder* judgment, p. 18, par. 36) and the right to a judicial determination of the dispute (see the above-mentioned *König* judgment, p. 34, par. 98 in fine) cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the

First, infringements leading to the imposition of fines of hundreds of million Euros cannot easily be qualified as ‘minor’ offences. In addition to the size of the financial penalties, there is also the stigma that attaches to competition law infringements. Commission’s decisions and inspections are extensively covered in both specialised and popular media. The condemnation or even the mere launch of an EU competition law investigation produces negative consequences for the undertakings at stake. Not just in terms of corporate image and damage to brands but also because the company is generally obliged to inform investors and make accounting provisions. These negatively impact the share price, can impact the company’s rating and can make it more difficult to access the financial markets. It is thus submitted that competition law infringements are not ‘minor offences’ on the basis of the severity of the sanction and the accompanying stigma/impact.

Second, even if one were to admit that competition law constitutes a ‘minor offence’, under the second part of the exception set forth above, since the Commission does not constitute an independent and impartial tribunal within the meaning of Article 6 ECHR, its decisions would have to be ‘subject to subsequent control by a *judicial body that has full jurisdiction* and does provide the guarantees of Article 6 para 1’.<sup>61</sup> However, (at least based on the current practice, i.e. that which pre-dates the entry into force of the Lisbon Treaty and the entry into effect of Article 52 of the CFR) it does not seem that the possibility to lodge an action for annulment before the EU Courts would meet the ECHR requirements in this respect.

In order for a court to have ‘full jurisdiction’ within the meaning of the ECHR, the ECtHR held that the judicial body must have ‘the power to quash in all respects, on questions of fact and law, the decision of the body below’.<sup>62</sup> Later, in *Kyprianou*, the ECtHR ruled on whether the review by the Cypriot Supreme Court of a condemnation for criminal contempt could cure the flaws that affected the trial before the lower court. Noting the absence of retrial of the case because the Supreme Court was lacking the competence to deal *de novo* with the case, the ECtHR concluded that the defects were not cured on appeal. The ECtHR held:

‘43. The Court notes that the decision of the Assize Court was subsequently reviewed by the Supreme Court. According to the Court’s case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, § 33).

44. However, in the present case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant’s

---

fault (see paragraph 33 above). It follows that Article 6 par. 1 (art. 6-1) was not satisfied unless its requirements were met by the Appeals Council itself.’

<sup>61</sup> ECtHR, Judgment of 10 February 1983, *Albert and Le Compte v Belgium*, para 29 (emphasis added).

<sup>62</sup> ECtHR, Judgment of 23 October 1995, *Schmautzer v Austria*, para 36.

complaints which are now before this Court. *There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an ab initio, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant.* Indeed, although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so.

45. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the delivery of the judgment by the Assize Court, i.e. on 14 February 2001. The applicant filed his appeal the next day, on 15 February 2001, whilst he was serving the five-day sentence of imprisonment. The decision on appeal was delivered on 2 April 2001, long after the sentence had been served.

46. In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was cured on appeal by the Supreme Court.<sup>63</sup>

In a subsequent judgment, the Grand Chamber upheld the judgment of the Chamber. Although the Grand Chamber primarily focused on the Supreme Court's decision not to quash the lower Court's judgment, it did not overrule the conclusions or the reasoning reproduced above.<sup>64</sup>

The review of Commission decisions by the EU Courts has not (until now<sup>65</sup>) met the *Kyprianou* standard. As provided by Article 263 TFEU, the EU Courts' competence is limited to voiding decisions that are illegal, without the possibility to substitute their own decision to that of the Commission. If a decision is annulled, it is then for the Commission to take the necessary measure to implement the General Court judgment.<sup>66</sup>

Furthermore, the competence of EU Courts is limited to review the Commission's legal and manifest errors (review of legality, not *de novo* review). They do not carry out a new and independent determination of the competition law charges contained in the SO. EU Courts also have tended to exercise self-restraint when it comes to 'complex factual

---

<sup>63</sup> ECtHR, Judgment of 27 January 2004, *Kyprianou v Cyprus*, paras 43-46 (emphasis added).

<sup>64</sup> ECtHR, Judgment of 15 December 2005 (Grand Chamber), *Kyprianou v Cyprus*, para 134.

<sup>65</sup> We are not yet aware of any case where the EU Courts have expressly applied a higher standard of review pursuant to the CFR.

<sup>66</sup> Article 233 EC.

or economic assessments'.<sup>67</sup> Faced with such appraisals of fact, EU Courts have tended to give a significant margin of discretion to the Commission, limiting their control to manifest errors of appreciation. One reason for this previous self-restraint may be the limitations in the General Court's own procedures, which do not make it easy for the General Court to adjudicate complex factual or economic matters where two experts can disagree about the assessment. The EU Courts have not substituted their own assessment of matters of appreciation to that of the Commission.<sup>68</sup>

Even with regard to fines, EU Courts have to date only exercised their power of full jurisdiction to correct fines if they have found an illegality. Moreover, they have only exercised that power of full jurisdiction in a very small number of cases. Generally the Courts' review has been limited to checking whether the Commission has made a manifest error in applying its fining guidelines.<sup>69</sup> The Courts have been reluctant to make use of their power in the absence of any illegality, although they would legally be entitled to do so. Indeed, the ECJ has previously rejected a plea of disproportionality in the absence of any illegality in the General Court decision.<sup>70</sup> Lastly, appeals before the General Court have no suspensive effects.<sup>71</sup> The fine must be paid or a bank guarantee produced – it has only been in very rare circumstances that the EU Courts have been willing to adopt interim measures forego the obligation to pay or provide a guarantee<sup>72</sup> – though this may have to change based on the CFR given the ECtHR's judgment in *Västberga Taxi Aktieföretag & Vulic v. Sweden*.<sup>73</sup> The cost of a bank guarantee for sums over €100 million can in and of itself be sufficiently high as to be penal in nature – not

<sup>67</sup> Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras 168-169; case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 87-89.

<sup>68</sup> Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 87-89; case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras 168-169.

<sup>69</sup> See, Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?', GCP, June 2009, available at: <http://www.globalcompetitionpolicy.org/index.php?&id=2115&action=600>

<sup>70</sup> Case C-320/95 P, *Società Finanziaria Siderurgica Finsider v Commission*, [1994] ECR I-5697, paras 45-46; Case C-310/93 P, *BPB Industries and British Gypsum v Commission*, [1995] ECR I-865, para 34.

<sup>71</sup> Article 242 EC.

<sup>72</sup> See for instance Order in Case T-252/03 R, *Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) v Commission*, [2004] ECR II-31, paras 30-31.

<sup>73</sup> ECtHR, Judgment of 23 July 2002, *Västberga Taxi Aktieföretag & Vulic v. Sweden*, where the ECtHR held at para. 120 that: 'in cases where considerable amounts have been the subject of enforcement, reimbursement may not fully compensate the individual taxpayer for his or her losses. A system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is therefore open to criticism and should be subjected to strict scrutiny'. The Court of First Instance held (prior to the entry into force of the Lisbon Treaty) in T-384/06R, *IBP a.o. v Commission*, [2007] ECR II-30 that there was no fundamental rights problem in enforcing the sanction prior to the appeal being heard given that the availability of bank guarantee and the possibility of interim measures. However, the Commission has recently adopted a more restrictive policy and no longer allows all companies which have filed an appeal to the General Court to provide a bank guarantee instead of paying provisionally the fine – and interim measures are only available in 'exceptional circumstances'. These changes, combined with the new legal force of the CFR, most notably Article 52(3), may mean that this precedent may not in the future be decided in the same way.

least given that the costs of the bank guarantee cannot necessarily be recovered if the appeal is successful.<sup>74</sup>

To conclude, it is submitted that the defects that affect the proceedings before the Commission are not be cured (in ECHR terms) by the possibility to appeal the decisions before the General Court. The judicial review of Commission decisions by EU Courts has not historically been broad enough to qualify under the ECtHR as being of ‘full jurisdiction’. We use the word ‘historically’ here because it is submitted that now the CFR is in force the EU Courts should adopt a more rigorous level of review than they have in the past in order to respect the principles set out in the ECtHR caselaw. This would be a welcome step forward in due process terms, but it would not in itself resolve the ECHR problem given that competition law infringements are not ‘minor offences’.

## **5. PUTTING THE ENFORCEMENT SYSTEM BACK IN COMPLIANCE WITH THE ECHR AND THE CFR**

After having concluded that the current enforcement system is not compliant with the ECHR or the CFR, the next issue becomes how best to remedy the problem.<sup>75</sup> Below four options are explored, namely: (i) creating an independent competition agency, (ii) granting full jurisdiction to EU Courts, (iii) entrusting the EU Courts with the task of adopting infringement decisions at first instance, and (iv) creating an independent judicial panel within or under the auspices of the Commission. In light of the difficulties recently experienced in having proposed Treaty changes ratified, the discussion of each option will also include some thoughts on whether these solutions could be implemented within the existing constitutional framework.

### **5.1. The creation of an independent competition agency**

Before discussing the possible modalities to implement an independent competition authority or European Cartel Office (ECO), as a previous incarnation of such an idea was labelled, it must be stressed that this solution would only partially solve existing ECHR compliance problems. As argued in previous sections of this article, competition law charges are serious criminal offences and thus require the involvement of a tribunal at first instance. The creation of an independent ECO would remove the threat of political colouring of the final decisions (including the penalties) and provide additional procedural guarantees. However, the administrative nature of such an ECO would continue to be problematic under the ECHR.

The creation of an independent ECO could be implemented in several different ways.<sup>76</sup> Basically, the two main questions are (i) whether the ECO would still be part of the

---

<sup>74</sup> Case T-113/04, *Atlantic Container Line a.o. v Commission*, [2007] ECR II-171.

<sup>75</sup> See also the analysis carried out by the GCLC: GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission’s fining system.

<sup>76</sup> For a full analysis, see GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission’s fining system.



Commission or be a newly created independent authority and (ii) whether the ECO will be entrusted with investigative powers, adjudicative powers or both.

Delegating the Commission's current powers of investigation to a specialised department thereof does not raise any difficult constitutional question and could be built on the model of the European Anti-Fraud Office (OLAF). The College of Commissioners could retain its decisional power while the ECO could be delegated the power to conduct the investigations and, maybe, to issue the SO. Much like the OLAF, some guarantees of independence can be added such as the impossibility to remove its director before the end of his term except for some enumerated exceptional circumstances. Although this solution is the easier to implement, it is also probably the less useful as it does not deal with one of the current criticisms, namely the political nature of the final decision maker.

Delegating the College of Commissioners' power of decision to an independent internal department of the Commission would raise serious constitutional questions. In particular, the ECJ has already refused to accept that the Commission delegates to one of its members the power to adopt a decision finding a competition law infringement.<sup>77</sup> The ECJ has held that only 'clearly defined executive powers' may be delegated by an institution – not discretionary powers.<sup>78</sup>

Allocating the power to find infringements to a newly created independent ECO would improve the procedural guarantees of the defendants. However, this solution is also difficult to implement within the current constitutional framework. Clearly, in the absence of any Treaty change, it would be impossible to create a new autonomous institution on the model of the European Central Bank. As noted in the previous paragraph, the ECJ opposes a delegation of discretionary powers. Furthermore, the ECJ held that the principle of institutional balance, read in conjunction with the principle of attribution of powers laid down in Article 7(1) EC (now, Article 7 TFEU), means that an institution may not unconditionally assign its powers to other institutions or bodies.<sup>79</sup>

In other words, if we consider that the power to enforce Articles 101 and 102 TFEU has been granted to the Commission by Article 105 of the Treaty, it would be difficult to re-allocate it to any other entity. However, some have argued that Article 105 TFEU no longer applies following the implementation of Article 103 TFEU by the Council.<sup>80</sup> If this thesis were followed,<sup>81</sup> it would then become possible for the Council to adopt

---

<sup>77</sup> Case C-137/92 P, *Commission v BASF and Others*, [1994] ECR I-2555, para 71.

<sup>78</sup> Case C-301/02 P, *Tralli v European Central Bank*, [2005] ECR I-4071, para 43.

<sup>79</sup> Case 9/1956, *Meroni v High Authority*, [1958] ECR 11 (English Special Edition, p 133, at p 152).

<sup>80</sup> GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system, p 32

<sup>81</sup> And the accompanying argument being accepted that the Treaty does not itself allocate enforcement powers to a specific institution, such that the re-allocation of these powers by secondary legislation would not risk violating the respect of the institutional balance.

with the Parliament a new Regulation redefining the powers of the Commission for the enforcement of competition law and allocating most of them to a newly created independent body.

The creation of an independent European Cartel Office thus may raise constitutional difficulties within the current Treaty framework. In any event, this solution would not fully comply with ECHR because a criminal punishment would not be imposed by a court at first instance. It does not seem the best solution in the short or long term.

## 5.2. Granting full jurisdiction to the EU Courts

Broadening the EU Courts' review power would enhance the protection of defendants. However, if (as we argue above) competition law infringements are not considered minor criminal offences, one could still argue that it would not be sufficient to comply fully with the guarantees provided by the ECHR. Nevertheless, it could contribute to curing the defects of proceedings before the Commission.

Pursuant to Article 263 TFEU, EU Courts normally have only a competence of annulment. According to Article 266 TFEU, it is for the Commission to take the necessary measures to comply with the judgment of the General Court and Court of Justice. The EU Courts do not have the power to substitute their own decision to that of the Commission, except with regard to penalties where expressly granted unlimited jurisdiction by secondary legislation (Article 262 TFEU).

Despite the somewhat expansive language of Article 31 of Regulation 1/2003 which provides that 'the Court of Justice shall have unlimited jurisdiction to review *decisions* whereby the Commission has fixed a fine or periodic penalty payment' (emphasis added), the ECJ is unlikely to accept to exercise unlimited jurisdiction over the entire decision beyond the penalty. With regard to the Office of Harmonisation for the Internal Market (OHIM), where secondary legislation was even more expansive, the Court of Justice held that 'the review of that decision by the Community Courts is confined to a review of the legality of that decision, and is thus not intended to re-examine the facts which were assessed within OHIM'<sup>82</sup> despite the language of Article 63(3) of Regulation 40/94 which provided that, 'The Court of Justice has jurisdiction to annul or to alter the contested decision'.

It has been argued that, with regard to competition law, the Treaty itself provides for a basis to expand the EU Courts' power of review.<sup>83</sup> Indeed, Article 103 TFEU entrusts the Council with the task of adopting secondary legislation notably, 'to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments' and 'to define the respective functions of the Commission and of the Court of Justice of the European Union in

---

<sup>82</sup> Case C-214/05 P, *Rossi v OHIM*, [2006] ECR I-7057, para 50; see Case T-247/01, *eCopy v OHIM*, [2002] ECR II-5301, para 46.

<sup>83</sup> GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system

applying the provisions laid down in this paragraph'. Thus, some argue that the expanded powers of the Courts could be achieved based on secondary legislation based on the current Treaty – albeit that the Courts did not seem attracted to this line of argument in the *OHIM* case cited above.

A more promising line of argument is that the CFR, which has the same status as Treaty Articles such as Article 263 TFEU, already obliges the EU Courts to adopt a wider level of judicial review in competition cases which are criminal in nature.<sup>84</sup> This is because the EU Courts are now by virtue of the CFR obliged to offer the same standard of protection for criminal cases as is prescribed by Article 6(1) ECHR. This follows from the fact that Article 47 CFR is identical in content to Article 6(1) ECHR and from the statement in Article 52(3) CFR that the EU will offer identical protection under the CFR to that established by the ECHR (if not a higher level of protection). Given the ECtHR case law cited above, and the fact that the EU Courts are bound to respect the CFR like other Treaty articles, we would argue that the EU Courts are already obliged to offer a full judicial review in criminal competition cases.

Thus, even if the EU Courts are not expressly granted the power to remake decisions by secondary legislation, they should expand their control of the Commission in criminal competition cases. Instead of deferring to the Commission for any factual or economic assessment viewed as complex, they should more fully exercise their competence of annulment (which could take the level of review significantly closer to a full review as understood by the ECHR). Indeed, EU Courts are fully entitled to question the Commission's reasoning in detail. Community general principles of law and the CFR are broad enough to give the EU Courts the necessary tools to review critically all aspects of the Commission's decisions.

More effective and broader judicial review would clearly be of great benefit, not just to the accused parties but also potentially to the Commission given that the validity of the latter's position would doubtless be confirmed in many cases. To the extent it can be achieved without a Treaty change, it should be pursued. But given the absence of an independent tribunal at first instance where criminal penalties are being imposed, this second alternative is not the complete solution to the ECHR issues identified above.

### **5.3. Giving the power to take decisions to EU Courts**

Entrusting the power to adopt infringement decisions and impose fines to EU Courts instead of the Commission would constitute a fundamental change. From an ECHR point of view, this solution would provide the highest procedural guarantees to defendants as determinations of guilt would be made by a judicial body at first instance. The Commission would retain the power to investigate and would probably act as a public prosecutor before the Courts, issuing a statement of objections and demanding the imposition of a penalty at the Hearing. Conversely, the Commission would be

---

<sup>84</sup> If one accepts this argument, the corollary may be that a lower level of judicial review may be appropriate in non-criminal antitrust cases.

stripped of its decisional power. The advantage of the system is that it solves most of the problems at a stroke. Prosecutorial bias is less of an issue since the Commission's role would be limited to prosecuting infringements. There is no confusion between the prosecution and decision phases. The political nature of the College of Commissioners is also less disturbing: after all, public prosecutors are in most jurisdictions somewhat related to the executive branch of the government and the Minister for Justice. It could also enable the Commission to be even more rigorous in pursuit of cases.

The problem is how to reach such a solution. Some have argued that the Treaty itself provides a legal basis to implement such a structure without any need of Treaty amendment.<sup>85</sup> As previously noted, Article 103 TFEU empowers the Council to legislate in order 'to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph'. On that basis, the Council would be entitled to strip the Commission of its decisional power and allocate them to the Courts. In addition, Article 257 TFEU empowers the Council and the Parliament to create judicial panels. The argument thus goes that it would be possible to create a competition law-specific judicial panel which would deal with all competition cases. However, this argument is not universally accepted so Treaty changes may well be needed for this radical solution.

Moreover, there would have to be significant changes in how the EU courts function. In particular, they would have to have a greater budget and increased staff – they would need to have sufficient resources to decide complex and fact-heavy cases. That is not something that could be implemented in the short- or medium-term.

Although this option may require Treaty changes, and a significant shift in how the EU courts function, it is the only one that enables full compliance with Article 6 ECHR. So this should be a long term goal, in that it leads to a system that clearly meets Article 6 ECHR, albeit that it is unlikely that such a system would emerge in the short or even medium term.

#### **5.4. Creating an independent adjudicator within the Commission or under its auspices**

The final possibility would be to create an independent panel of adjudicators within the Commission or under its auspices. This could be a system of administrative judges or a much strengthened version of the existing Hearing Officer. In such a system, DG COMP would remain in charge of investigating competition cases. However, the current Oral Hearing before the Hearing Officer would become a genuine administrative trial before an independent adjudicator who would write up his or her findings in a ruling that would be of similar length and detail as a Commission decision today. Thus, DG COMP would act as prosecutor and would present its case, whereas the parties would have the right to defend themselves. It would be for the adjudicator

---

<sup>85</sup> GCLC, Working Group Report on the enforcement by the Commission, the decisional and enforcement structure in antitrust cases and the Commission's fining system,

to deliver a ruling on procedural issues and on the merits of the case. However, to avoid the constitutional issues set out above, this ruling would then be formally approved or rejected by the College of Commissioners.

In this way, the Commission would formally remain the final decision-maker while in practice the decision would in effect be taken by the independent adjudicator. There is a precedent for such a system from the field of medicines. When adopting a decision as whether or not to authorise the placing on the market of a medicinal product – including whether to ban a product currently on the market for safety grounds – the Commission places great reliance on the opinion given by the European Medicines Agency (EMA) as to whether the conditions for granting a marketing authorisation are satisfied.<sup>86</sup> Before giving its opinion, the EMA conducts an in-depth scientific assessment of the data provided by an applicant,<sup>87</sup> including laboratory and animal studies which assess the chemical, biological and toxicological properties of the compound against the targeted disease and clinical trial data resulting from three phases of clinical trials, i.e. experiments conducted on human beings under very strict ethical and technical rules.<sup>88</sup> As a result, and while the Commission formally retains the power to adopt a final decision which is not in accordance with the opinion of the EMA,<sup>89</sup> in practice, the Commission will nearly always rubber-stamp the scientific assessment conducted by the EMA.

There are two advantages of this sort of system. On the one hand, the introduction of a genuinely independent adjudicator at the end of the investigative phase constitutes a clear improvement of the current system. It should remove the inherent prosecutorial bias that currently characterises the procedure before the Commission. The guarantee of having an independent administrative judge delivering the decision would thus enhance the defendants' rights of defence.

On the other hand, by limiting the role of the adjudicator such that he or she does not formally adopt the final decision, no major constitutional reshuffle is needed. Formally, there would be no real delegation of powers as the decision would continue to be approved by the College of Commissioners. This advantage is considerable in light of the difficulties seen in ratifying the Lisbon Treaty.

---

<sup>86</sup> See Article 12(1) of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004, L136/1).

<sup>87</sup> Article 6(1) of Regulation 726/2004.

<sup>88</sup> Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, OJ 2001, L121/33; Directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products, OJ 2005, L91/13.

<sup>89</sup> Article 10(1) of Regulation 726/2004 provides that 'where the draft decision is not in accordance with the opinion of the Agency, the Commission shall annex a detailed explanation of the reasons for the differences'.

It is true that under this system final decisions would continue to be adopted by a body composed of politicians who have no knowledge of the details of the case. But the EMEA shows that such a system does work – there is no sense that the Commission seeks to second guess the EMEA when it comes to scientific assessment. The practice that the EMEA’s findings are followed is a strong one – and an equally strong practice would we think quickly develop in relation to competition matters. And if the Commission did ever decide to overrule its specialist competition judge, then one would expect such a decision to be very carefully justified.

It is submitted that the EU should strongly consider this fourth approach, which seems to deliver many advantages in due process terms while being relatively easy to implement. Unfortunately, the Commission does not currently seem to be keen on such an approach. The Hearing Officers’ Guidance Paper is limited to codifying the current practices and does not suggest improvements to the *status quo*. If the Commission does not wish to use a Best Practices document to initiate such a policy change, then it should publish a Green or White Paper on the subject that would identify several options and follow up by consulting interested stakeholders.

## 6. CONCLUSION

The Irish referendum and the consequent entry into force of the Lisbon Treaty will prove to be significant events for competition law practitioners. The impact of the CFR, which has the same status as other Treaty articles, is still to be felt – but it seems to make the case-law of the ECtHR on Article 6 ECHR part of EU law since 1 December 2009. In addition, Article 6(2) EU as amended by the Lisbon Treaty provides that the European Union will accede to the ECHR.

Any future Commission cartel decisions will be reviewed against the standards of Article 6 ECHR by the EU Courts (pursuant to Articles 47 and 52(3) of the CFR)<sup>90</sup> and also (post accession to the ECHR) by the ECtHR. The ECtHR is thus becoming the final adjudicator over human rights protection in EU law, with its case-law being binding upon the EU Courts. The ECtHR is likely to be more willing to review the compatibility of the entire enforcement structure. It is submitted that the ECtHR will hold that European competition is indeed of criminal nature and will draw the necessary conclusions. There is accordingly a real chance that future cartel decisions may be set aside for non-compatibility with the ECHR, unless the Commission itself actively anticipates that outcome and embraces change. This article argues that it is time for the Commission to do so – and to come out in favour of reform.

---

<sup>90</sup> Although the content of the ECHR was already deemed to be part of EU law prior to the entry into force of the Lisbon Treaty as fundamental principles of EU law, the European Courts developed their own interpretation of the ECHR and the ECtHR’s body of case-law. The European Courts considered Strasbourg’s jurisprudence as persuasive but not binding authority. It is submitted that this situation is changed by the entry into force of the CFR. But any inconsistency would certainly be resolved once the EU accedes to the ECHR and parties can bring cases challenging EU procedures in Strasbourg.

In the long term, the best solution would be the third alternative - if the EU had independent courts imposing competition decisions. But there are a number of hurdles before this solution could become a reality.

A more pragmatic short and medium term solution would be a combination of the second and the fourth alternative: the Commission should create an independent judicial panel within the Commission or under its auspices and the EU Courts should apply a higher standard of judicial review (whether based on the CFR or on secondary legislation). The independent adjudicator would issue public findings which would then be adopted by the Commission as its decision like the EMEA in medical matters. This would give good levels of procedural guarantees and would be quicker to implement. This is favoured by the present authors as an immediate solution until the ideal long-term solution of an independent court can be put into place. In addition, the General Court can and should engage in broader judicial review than it does today.

These changes would ensure that Europe is in future be an example to the rest of the world in terms of due process – not something that we would be hesitant to advise other countries to copy.

---

**THE COMPETITION LAW REVIEW**

---

Volume 6 Issue 2 pp 287-297

July 2010

Book Review - Christopher Townley, *Article 81 EC and Public Policy*,  
Oxford/Portland, OR, Hart Publishing, 2009, 363 + i-xxxiii. ISBN 978-  
1841139685

*Arianna Andreangeli\**

---

The ‘modernisation’ of EU competition law has been a buzzword since 1999, leading to groundbreaking reforms in 2003. The enactment of Council Regulation 1/2003<sup>1</sup> enhanced the powers of the Commission in finding and sanctioning competition infringement and provided express legal footing for the cooperation between the Commission and the national competition authorities as well as, albeit to a lesser degree and in different forms, the national courts. In what constituted perhaps the most evident change, the 2003 Regulation abolished the ‘exemption monopoly’ enjoyed, under Regulation No 17/62, by the Commission itself and established a regime of direct applicability of not just the prohibition contained in paragraph 1 of Article 101 TFEU, but also of the ‘exemption clause’ enshrined in Article 101(3) TFEU. Commenting on the Modernisation White Paper, published by the Commission at the end of 1999, Claus D Ehlermann voiced his support, albeit with some reservations, for the reform plans proposed by the Commission and later embodied in the new Regulation and emphasised how totally decentralising the application of Article 101 TFEU was a radical and courageous step as well as perhaps the only way in which the Commission could retain its guiding role in the enforcement of the EU competition rules in an enlarged and increasingly diverse Europe.<sup>2</sup> However, these reforms did not resolve the difficulties associated with the interpretation of the exemption clause, as well as of Article 101 TFEU as a whole. In fact, the implementation of the Modernisation ‘package’ took place against a very complex background of case law concerning the manner in which the prohibition clause should be interpreted and especially concerning whether it should provide for some of the elements characterising the ‘standard of reason’ developed by the US Supreme Court in its reading of Section 1 of the Sherman Act.

As is well known, the ‘default position’ of the Commission and, at least up to a point, of the EU Courts<sup>3</sup> has been to exclude that the prohibition clause should be interpreted as allowing for a degree of balancing between pro- and anti-competitive effects of

---

\* Liverpool Law School, University of Liverpool.

<sup>1</sup> Regulation 1/2003/EC, OJ 2003, L1/1.

<sup>2</sup> CD Ehlermann, ‘The modernisation of EC competition policy: a legal and cultural revolution’ (2000) 37(3) CMLRev 537, pp 588-590.

<sup>3</sup> See eg Case T-328/03 *O2 v Commission* [2006] ECR II-1231; for commentary, *inter alia*, Jones, ‘Analysis of agreements under US and EC antitrust law—convergence or divergence?’ (2006) 51(4) Antitrust Bulletin 691; also, Marquis, ‘O2 (Germany v Commission and the exotic mysteries of Article 81(1))’ (2007) 32(1) ELRev 29.



restrictive practices.<sup>4</sup> The ‘bifurcated structure’ of Article 101 TFEU, framed in a ‘prohibition’ and an ‘exemption’ clause, meant that the ‘first step’ of the assessment entailed a consideration of whether an arrangement having an appreciable effect on interstate trade had an anti-competitive object or resulted in anti-competitive effects, either actual or potential. If, following this stage of the assessment, a practice was shown to have a ‘restrictive nature’, in the sense outlined by the prohibition clause, the second step of that assessment would entail a consideration of its allegedly pro-competitive effects and a determination of whether the latter outweighed the practice’s negative impact on the market. In this specific respect, although they acknowledged that the assessment of whether an arrangement entailed a restriction of competition should be carried out in light of a more ‘economics based’ approach, the Commission and the Courts repeatedly emphasised that the appropriate ‘place’ for this assessment should be the framework provided by Article 101(3) TFEU.<sup>5</sup>

According to the Commission’s Guidelines on the application of Article 101(3) TFEU, published after the enactment of the Modernisation Regulation, the function of Article 101(3) TFEU would be to recognise that ‘restrictive agreements may generate objective economic benefits’ which, if they outweighed the negative impact on competition caused by a given practice and assessed in light of Article 101(1) TFEU, by meeting the four conditions listed in the exemption clause, would render the sanction of nullity provided by paragraph 2 inapplicable to the practice.<sup>6</sup>

This interpretation of Article 101 TFEU was, however, thrown in discussion by a number of judgments concerning the interpretation of the notion of ‘restriction of competition’ especially in cases involving allegations of ‘less obvious’ infringements of the competition rules. Thus, in *Remia* and *Pronuptia* the Court of Justice expressly recognised that certain prima facie restrictive practices would fall outside the scope of Article 101(1) TFEU if having regard to their legal and economic context and to the conditions of competition within a given market, they pursued a ‘legitimate commercial purpose’ and were limited in their duration and geographic scope.<sup>7</sup> The apparent ‘extension’ of these concepts of necessity and proportionality to cases concerning prima facie restrictive practices adopted in the ‘public interest’ contributed to casting a shadow to the bipartite structure of Article 101 TFEU championed by the Commission and the Courts. Commenting on cases such as *Wouters* or *Meca Medina*,<sup>8</sup> commentators argued that by incorporating, in substance, an element of ‘balancing’ of the pro- with

---

<sup>4</sup> See, for example, Case T-112/99 *Metropole (M6) and others v Commission* [2001] ECR II-2459, paras 72, 75. Also, Commission Guidelines on Article 81(3) EC, OJ 2004, C101/97, especially paras 11-12.

<sup>5</sup> *Inter alia*, Case T-374/94 *ENS and others v Commission* [1998] ECR II-3141, paras 136-137; also Commission Guidelines, op cit, n 4, paras 11, 33-34.

<sup>6</sup> See Commission Guidelines, *ibid*, especially paras 32-34.

<sup>7</sup> See, for example, Case 42/84 *Remia BV v Commission* [1985] ECR 2545, paras 17-19; also Case 161/84 *Pronuptia de Paris* [1986] ECR 353, especially paras 14-18. For commentary see, *inter alia*, Whish, *Competition Law*, 6<sup>th</sup> ed, Oxford, OUP, 2008, pp 124 & 126.

<sup>8</sup> Case C-309/99 *Wouters v Algemene Raad* [2002] ECR I-1577; see also Case C-519/04 P *Meca Medina and Majceek v Commission* [2006] ECR I-6991.

the anti-competitive effects of the arrangements at issue, the Court of Justice had de facto adopted a ‘rule of reason’ approach to its assessment of the existence of a restriction of competition.<sup>9</sup>

These developments, coupled with the other *O2* judgment,<sup>10</sup> with its emphasis on the need to apply a ‘counterfactual analysis’ to the assessment of whether the arrangement restricted competition within the meaning of the prohibition clause, therefore prompt significant questions as to how we should construct the framework for assessment provided by Article 101 TFEU: should we continue to assume that the ‘division of labour’ between paragraph 1 and paragraph 3 is more or less ‘equal’<sup>11</sup> as suggested by the Courts’ earlier case law and by the Commission’s guidance documents? Or should we perhaps recognise that, as a result of the pressure toward a more ‘economics based’ and ‘realistic’ view of what constitutes a ‘restriction of competition’, this structure has changed?<sup>12</sup>

In the aftermath of the *O2* decision, a number of commentators suggested that the application of a ‘comparative analysis’ of the state of competition on the relevant market ‘without’ vis-à-vis ‘with’ the agreement *de facto* allowed the General Court to apply a test which was very close to what we would have regarded as ‘rule of reason’ and which allowed at least a degree of ‘balancing’ to take place at the stage of application of Article 101(1) TFEU. However, if this is indeed the case, what does the application of the ‘counterfactual analysis’ championed by the General Court mean for the function of the exemption clause? Should we consider the scope of Article 101(3) TFEU to be limited only to exempting ‘hard-core’ restrictions of competition? And what type of objectives should this ‘residual’ balancing function take into account? Also, in respect to less ‘serious’ infringements, will its scope be limited to performing the role of ‘public interest exception’?

Overall, these recent decisions question our approach to the interpretation of Article 101 TFEU and especially its effectiveness not just for the attainment of its prime objective, i.e. the protection and strengthening of competition within the single market, but also for the achievement of other, non-strictly economic goals. In fact, it is apparent from the Courts’ case law and the Commission practice that the application of this provision to individual cases has often involved, whatever the precise ‘framework’ for assessment, the engagement of ‘public policy’ goals, on the basis of a purposive reading of the Treaty as a whole and especially of the ‘old’ Articles 2 and 3 EC.

---

<sup>9</sup> For example, Marquis, ‘*O2* (Germany v Commission and the exotic mysteries of Article 81(1))’ (2007) 32(1) ELRev 29 at 44.

<sup>10</sup> Case T-328/03 *O2 v Commission* [2006] ECR II-1231.

<sup>11</sup> Jones, ‘Analysis of agreements under US and EC antitrust law—convergence or divergence?’ (2006) 51(4) Antitrust Bulletin 691 at 788.

<sup>12</sup> Marquis, ‘*O2* (Germany v Commission and the exotic mysteries of Article 81(1))’ (2007) 32(1) ELRev 29 at 44.

The examination of the extent to which *prima facie* restrictive practices result in the attainment of ‘positive’ objectives that are protected within the spectrum of the Treaty itself has often taken place in light of the four conditions of the exemption clause: that was the case of *CECED*,<sup>13</sup> concerning agreed reduction of output for the purpose of environmental protection. However, other cases, one of which was *Wouters*,<sup>14</sup> have seen these ‘public interest considerations’ play a part in the assessment of the existence of a ‘restriction of competition’, within Article 101(1) TFEU. In the light of the above considerations and also on the ongoing debate on the structure of Article 101 TFEU, what is the ‘right place’ for these ‘non-competition goals’ to be appropriately taken into account and weighed against the anti-competitive effects of individual practices? Is this exercise compatible with the very structure of the EU Treaties and with the *raison d’être* of Article 101 TFEU itself?

The book by Townley constitutes a timely, informative and strongly argued response to these and to other questions. The book discusses the role of public policy goals in the implementation of competition policy and seeks to provide a framework within which the ‘balancing’ exercise between, on the one hand, the preservation of effective rivalry on the market and, on the other hand, the attainment of other, not necessarily ‘economic’ goals can be carried out. At the basis of this examination appears to be the conviction that, for competition policy in the EU to be truly effective and perhaps most importantly, fully consistent with the spirit of the Founding Treaties the competition rules cannot be read in isolation, but must necessarily be applied against a background of values, objectives and principles that go beyond their realm and embrace the ‘European project’ as a whole.

The book is divided into three parts: in the first part the author considers the rationale for the relevance of policy objectives for the implementation of EU competition policy with a view to demonstrating that these objectives are still relevant today and that their relevance is consistent with the design of the Treaty. For this reason, Chapter 1 provides a theoretical discussion as to the ‘why’ goals other than just the pursuit of economic efficiency should be relevant in the competition assessment and as to ‘when’ their assessment should be carried out in the context of implementing competition policy. With respect to the theoretical rationale for the incorporation of non-welfare objectives into competition policy, the author argues that if competition law is to benefit society as a whole, it must necessarily pursue a ‘total’ welfare goal, namely an objective of welfare which sums up not just what is ‘good’ for producers, in terms of productive efficiency and profit maximisation, but also what is ‘good’ for consumers. It is in fact only in this way that competition policy can actually both ensure efficient markets and remain morally and politically justifiable.

To maintain the integrity of competition policy as a whole this process of ‘incorporation’ of public policy within purely economic objectives can only occur in

---

<sup>13</sup> Commission Decision 2000/475/EEC of 24 January 1999, *CECED*, OJ 2000, L187/47.

<sup>14</sup> Case C-309/99 *Wouters v Algemene Raad* [2002] ECR I-1577.

certain conditions and within relatively strict confines. In relation to the former, the author points out that the consideration of public policy objectives must be both open and transparent, to maintain the legitimacy of the decision making process and that the relevance of these objectives must be acknowledged at the outset. In relation to the latter issue of ‘when’ this process of ‘incorporation’ should occur, the author recognises the difficulties associated with addressing this question in a ‘legal vacuum’. Nonetheless, he argues that, consistently with adopting a ‘total welfare’ goal, competition intervention should occur when there is a reduction in the consumer welfare standard. In addition, and so that the legitimacy of the decision making is preserved, the outcomes of this intervention should be appreciable and take into account the extent to which other institutional actors, especially the legislature, have already intervened in the area.

In Chapter 2, the author discusses the question of the ‘why’ public policy objectives should be relevant in implementing competition policy within the EC/EU legal framework. In the first part, the chapter analyses the arguments in favour of incorporating these objectives in the application of Article 101 TFEU and does so from the standpoint of the overarching goals of the Treaty, starting from the old Articles 2 and 3 of the EC Treaty. The author analyses these general provisions and demonstrates that both the very structure of the Treaty itself and the presence within it of a number of ‘policy linking clauses’, namely provisions identifying individual policy goals and providing a framework within which these objectives can be ‘taken into account’ in the attainment of other policy objectives, favours the idea that, if the Treaty itself is to deliver its ‘ultimate aims’ there must be a process of continuous balancing or ‘reconciling’ among these objectives. The author emphasises how, even when the Treaty seems to draw a hierarchy of values, it rarely suggests ‘exclusion’ as a way of resolving tensions, opting, instead, for a balancing exercise whose outcome can change in response to the circumstances.

He then analyses specific cases to provide examples of the approach adopted by the EU institutions in dealing with this process: thus, in relation to the idea of ‘exclusion’ of a value in event of conflict, he examines, among others, the case of *Albany*,<sup>15</sup> concerning the apparent tension between social policy, especially in labour relations, and the achievement of effective competition, and argues that while the ECJ had probably been entitled to conclude that the latter objective should yield precedence to the former, it could be questioned whether the two sets of objectives could be at all irreconcilable. In respect to the more frequent dynamic of compromise, the *Wouters*<sup>16</sup> and *Meca Medina*<sup>17</sup> cases are regarded as providing a powerful example of how non-economic goals can be embedded in Article 101 TFEU decision making. The author acknowledges that the exemption clause, due to its relatively narrow boundaries, cannot be used to incorporate all policy objectives in this process and therefore argues that, in

---

<sup>15</sup> Case C-67/96, [1999] ECR I-5751, paras 60-70.

<sup>16</sup> Case C-309/99, [2002] ECR I-1577, paras 94-98.

<sup>17</sup> Case C-519/04 P, [2006] ECR I-6991.

addition to adopting a 'generous reading' of its four conditions to allow that balancing, adopting a teleological reading of Article 101 TFEU as a whole may be required to allow that balancing to happen.

In the final part, chapter 2 examines a number of objections to the balancing of public policy and competition objectives. The author dismisses the arguments based on an alleged 'public/private' divide within the Treaty as a result of which public policy goals should not come into the picture in the application of directly effective rules as being 'incompatible' with the 'functional' definition of 'undertaking' and with the very letter of the Treaty. He points out that where the Treaty drafters wished to exclude the applicability of the EU competition rules, they did so expressly and therefore argues that, in the silence of the Treaty, balancing public policy goals with competition policy should remain possible. Overall, he argues that while from a theoretical standpoint, balancing, while possible, should be carried out within strict confines, the picture of the 'practical' approach to that 'reconciliation' process is one in which both the Treaty itself and the institutions 'embrace the balancing of these objectives' against the goals of Articles 101 and 102 TFEU readily.

Townley points out that this readiness to embrace disparate policy goals may come a cost, which is perceived by a number of commentators as well as, to a degree, by the author itself, to lie in a loss of legal certainty. Against this background, a question emerges as to how these public policy objectives should be incorporated in the competition decision making process in individual cases and how the balance should be struck between them, and this constitutes the subject matter for Part 2. In Chapter 3, the author considers what he terms as 'mere-balancing' of public policy against competition objectives within the scope of Article 101(1) TFEU: this process involves balancing the former against the latter 'outside of the economic efficiency assessment', that is, at the stage in which the decision-maker considers whether a given practice falls within the remit of the prohibition clause because it appreciably restricts competition. The author considers in particular two public policy goals, namely market integration and environmental protection. On the basis of the analysis of *Consten*<sup>18</sup> the author argues that the ECJ appears to have developed a per se rule on the basis of the assumption that the goal of establishing the common market ought to prevail over strictly efficiency related objectives.

He then moves on to consider how the Commission tilted the balance between economic efficiency and environmental protection in its policy statements and in individual cases. It is suggested that while the latter is undoubtedly more and more important in the Commission's policy agenda, 'where' actually that balance may lay is still an open question. In the latter part of the chapter the author considers two allied questions, the first being what the limits are to this 'balancing' within Article 101(1) TFEU: he argues that the doctrine of 'ancillary restraints' could be regarded as a framework within which this assessment may be conducted. However, he also points

---

<sup>18</sup> Case 56/64 *Consten and Grundig v Commission* [1966] ECR 429.

out that this theory does not seem entirely compatible with other decisions, such as *Wouters* or *Meca Medina*, where a regulatory, as opposed to a commercial goal is pursued.

The second question relates instead to ‘why’ the balancing exercise takes place at both the prohibition and the exemption stage. The author argues that this may be due to procedural as well as substantive reasons. In relation to the former, he especially wonders whether, had the agreements in *Wouters* and *Meca Medina* been notified to the Commission and thus subjected to the appraisal under the four conditions of Article 101(3) TFEU, the outcome of the decision may have been the same, especially in light of the differing outcomes that balancing carried out within the prohibition as opposed to the exemption clause could have and asks whether, now that the exemption monopoly has been abolished, this question may have become moot, with the consequence that the boundaries between non-efficiency related and public policy objectives are now more blurred.

Chapter 4 considers, instead, the ‘mere-balancing’ exercise within the framework of the exemption clause. The author argues that Article 101(3) TFEU has been consistently used, especially in the Commission’s administrative practice, to reconcile non-economic objectives with those of competition policy, both alone and in reciprocal combination and to that end points to the wide reading of the ‘efficiency’ condition, contained in Article 101(3)(a) as a means to allowing that balancing. However, what he also emphasise is that the ‘process’ through which this balancing occurs remains often unrefined and relatively vague and that, more generally, it is still unclear whether any ‘hierarchy of values’ can be drawn between public policy objectives as well as between the latter and the economic efficiency rationale guiding the exemption clause.

In Chapter 5 the author considers the other mode of balancing public policy objectives against the pursuit of genuine competition, namely ‘market balancing’, which entails accommodating public policy goals within the economic efficiency assessment of individual practices and considers how the Commission had carried it out in its decision making activity. The chapter examines three distinct aspects of this analysis, namely the apparent tension between producer and consumer welfare, the interplay between productive efficiencies (including the drive to invest) and allocative efficiencies and the overall impact of these factors on the welfare standard adopted in the competition analysis.

It is argued that, although the Commission does not tend to be particularly explicit in its ‘market balancing’ of individual practices, some trends can be detected. The author points out how the Commission openly advocates a consumer welfare approach, in its policy statements, while at the same time allowing industrial policy considerations to emerge in individual cases. Thereafter he considers the approach to productive efficiency and points out how, for all the emphasis on consumer welfare as a ‘value’ within the competition decision-making process, the Commission seems prepared, in order to boost R&D investment, to accept significant losses in allocative efficiency, thus suggesting a marked preference for a partial, as opposed to a total equilibrium

analysis, in which market definition plays a key part in the legal assessment of *prima facie* anti-competitive practices.

At the same time, the author emphasises how the General Court has in a number of cases hinted at the possibility to go 'beyond' the partial equilibrium approach, by taking into account not only the effects of a practice on the relevant market or indeed on a given group of consumers but also any benefits that it may have on other markets. Consequently, he argues that although the current Article 101(3) Guidelines go some way toward putting the Commission's position on a clearer and more certain footing, the framework for analysis that they propose is still relatively indefinite and unstructured and therefore demands proper explanations of how the market balancing is actually conducted.

In the final part the book reflects on both the 'why' and the 'how' the balancing of public policy against competition goals should be conducted within Article 101 TFEU and, after highlighting a number of issues arising from the preceding analysis, suggests a possible solution to ensure more transparency, predictability and more respect for economic principles in this assessment. Chapter 6 analyses how the balancing should be conducted in the context of the prohibition clause: the author starts from the consideration of the concept of 'restriction of competition' and makes a convincing argument in favour of reading that concept as referring to practices entailing an appreciable restriction of consumer welfare, rather than to a general restriction of the parties' economic freedom. Thereafter, he considers the actual dynamics of the balancing (both mere and market) within Article 101(1) TFEU and argues that for the sake of clarity and predictability, market balancing should not occur when interpreting and applying the prohibition clause, for that would lead to the analysis straying too far from its focus on consumer welfare. Nor, in the author's opinion, should mere balancing occur when applying the prohibition clause: Townley points out that, although the competition authorities should not be reduced to being 'hostages to clarity', it would be preferable to confine consumer welfare considerations to Article 101(1) TFEU, to safeguard the transparency and coherence of this process, and to employ the framework provided by the exemption clause to conduct mere balancing. Although this solution may give rise to difficulties due to the confines of the four conditions listed in Article 101(3), it would preserve the 'integrity' of Article 101(1) as a 'consumer welfare focused' clause.

In Chapter 7 the book deals with public policy balancing in the context of the exemption clause and does so in relation to each of the four tests listed by Article 101(3) TFEU. The author points out how, due to the generous interpretation of the first condition that has prevailed in the case law of the EU Courts and of the Commission, allowing for public policy balancing within the exemption clause leaves that test as a 'wide' one, focused in substance on the impact of public policy goals on consumer welfare. Consequently, he suggests that the other three limbs of the exemption clause should be applied so as to 'refine' the outcome of the first stage of the assessment and thereby determine how far competition can be restricted in order to achieve the balance between the competing goals pursued in individual cases.

Therefore, the author suggests that the notion of ‘fair share to consumers’, contained in the second condition, should be read as to restrict the impact of the ‘tolerated’ restriction only to the private end users of the relevant goods or services (p 282). In addition, and consistently with the structure of the exemption clause, he advocates the use of the two ‘negative conditions’ to identify the scope for ‘optimal antitrust intervention’ and to ensure that any market distortions resulting from the pursuit of non-competition objectives are kept to a minimum. Overall, he argues that:

‘considering all relevant non-economic objectives under [Article 101(3) TFEU] ... is in line with the view of the Treaty ... of a wide range of interlinking, self-reinforcing and conflicting objectives ... which should be blended to achieve the optimal Community balance’ (p 283)

That application of the exemption clause would also ensure more transparency and predictability in the decision making and is likely to limit the possibility for individual decision-makers to ‘distort’ the framework for analysis provided by Article 101 TFEU to accommodate and achieve policy goals. However, as the author points out, adopting a generous view of what constitutes an ‘improvement in the efficiency’ of production or distribution, as suggested earlier, carries with it a number of evidentiary and conceptual difficulties. It is for this reason that the last Chapter of the book is dedicated to suggesting an ‘alternative’ blueprint for the balancing process. However, it is worth emphasising that the framework proposed by the author does not indicate to the Commission, the national courts and the national competition authorities ‘how to balance’: that is in fact largely determined by the domestic rules, in accordance with the principle of national autonomy, albeit within the confines of the general principles of EU law. What the author seeks to suggest, instead, is a ‘minimum framework’ articulated along three distinct areas: first of all, it is indispensable to determine what the ‘ultimate objective’ of the exercise will be. The second step is to identify the factors affecting the relative ‘weight’ of each of the relevant objectives within the balancing process. And the third step is to consider how, at least generally, this balancing exercise can be conducted, in light of the nature of the meta-objective as well as of the relative importance of the concurring competition and policy goals involved.

In relation to the first step of the proposed framework, the chapter explores the pros and cons of defining the ultimate objective of the balancing exercise and argues forcefully in favour of it, to the benefit of clarity and predictability. With respect to the factors informing the relative importance to be attached to each goal, the author points out how, for all the difficulties involved in attaching a specific ‘weight’ to individual objectives (a process which remains in many respects inherently arbitrary), this process is likely to simplify the balancing process and suggests that the primary source for this specific stage of the framework should be the Founding Treaty. Consequently, he suggests that a cost/benefit-type analysis that takes into account also the passage of time and an assessment of the ‘appreciability’ of the impact of the practice should be employed, to ensure uniform decision making and optimal intervention. Finally, the chapter discusses how this balancing should occur in practice and to that end suggests the selection and adoption of a ‘common meter’ through which different outcomes can



be 'converted' and made comparable (p 305). It is argued that, whatever the meter chosen by the decision maker and whatever its nature (quantitative or qualitative) it is indispensable to ensure that it is used consistently and applied clearly and predictably.

In his overall conclusions, Townley recapitulates on the arguments and the discussion developed throughout the book and makes a number of convincing remarks about the relevance of public policy in the application of Article 101 TFEU, the manner in which these goals should be balanced against the pursuit of competition, to the benefit of consumer welfare and about how this process should be articulated. The author brings into sharp focus the apparent tension between the tendency to treat competition law as a 'legal sub-system' insulated from the rest of EU law and the demands for a more holistic interpretation of Article 101 TFEU, which must be informed by the overarching objectives of the Treaty.

Townley is fully aware of the difficulties associated with this process, of its lack of clarity and consistency, as shown in relation to the Commission's decision-making practice, and especially of the risk that as a result of it the framework of analysis enshrined in Article 101 may be irremediably altered. For this reason, he suggests that, while the analytical approach characterising Article 101(1) should be fully informed by the goals of consumer welfare, it should be for the exemption clause to provide a forum within which policy goal can be weighed against the objective of genuine competition, with the first test providing the structure for a 'full balancing' and the other three tests allowing for its outcome to be 'refined' to ensure optimal and proportionate antitrust intervention. Consequently, he argues that, as is illustrated in Chapter 8, the Commission should provide guidance as to how this balancing process should occur. Townley points out that while not being 'reduced to a mathematical formula' (p 317), a possible framework for analysis should entail the determination of an ultimate objective for it, should contain an indication, albeit a general one, of the relative weight to be attached to each of the relevant policy goals, in both qualitative and quantitative terms, and should give some indication of how the assessment of each goal can be converted into a common meter to allow for a comparison of inherently diverse objectives. In fact, it is only by laying down clearer guidelines that this mechanism can operate in a manner which is clear, uniform and predictable and therefore consistent with legal certainty, while at the same time satisfying the need for flexibility of decision making in individual cases.

*Article 81 and Public Policy* constitutes a timely and constructive contribution to the debate on the direction of competition policy in changing and challenging times. Christopher Townley gives a dispassionate and convincing account of the trends and the themes characterising the application of Article 101 TFEU in cases involving the attainment of public policy goals alongside the more 'traditional' objective of protecting and enhancing effective competition: his commentary is extremely exhaustive and engaging and encourages stimulating reflection in the reader and, it is hoped, food for thought for policy makers at EU and national level.

Overall, this is as much a book about the goals of ‘the law’ as it is one about the objectives of competition law: in his conclusions, Townley points out how, since competition policy is deeply embedded in the EU ‘legal order’s constitution’, it has a ‘transversal’ impact on the way in which each of the Treaty’s provisions should be read and therefore calls almost ‘naturally’ for public policy goals to be reconciled with as well as attained through competition policy. This is undoubtedly true, not just for competition policy, and it should inform the ‘holistic’ implementation of that policy on the part of the Commission as well as of its domestic partners. There may be less agreement as to ‘how’ to carry out this balancing process in individual cases: however, as Townley has convincingly illustrated, the ‘if’ and the ‘why’ this process should be conducted are beyond doubt.