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Some Reflections on the Dynamics of the Due Process Discourse in EC Competition Law

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This article discusses 'due process' requirements in the application and enforcement of EC competition law. It proposes an analytical model whereby 'due process' requirements are categorized as elements of sub-systems interacting with each other. These sub-systems include international law, Community law, national laws, and aspirations of the users of the system. The article tests the application of the model by looking at the principle of *ne bis in idem* (double jeopardy), the privilege against self-incrimination, legal professional privilege, and the role of complainants and third parties in national proceedings. It concludes that the dynamic process of adoption and definition of standards of procedural fairness facilitates both vertical interaction between the Community legal order and the legal systems of the Member States and horizontal interaction between the legal systems of the Member States. This on-going process shifts the focus from national law requirements to the transnational dimension, which becomes the common ground for policy discussion, enforcement practice, and decision-making. This dynamism is conducive to 'spontaneous harmonization', a process of convergence which is more suited to the highly technical and context-specific nature of certain procedural requirements than harmonization through binding measures.

1. INTRODUCTION

The theme of 'due process' in competition law proceedings is not new but is now more topical than it was before. This is the result of the combined effect of several factors.

First, the reforms of competition law enforcement known as 'modernization' have introduced a new set of procedural rules at European level. They have decentralized the application of EC competition law. However, the procedures applied by the Commission and the national competition authorities of the EU Member States differ from each other. This is seen in some quarters as creating uncertainty. Thus, the 'due process' discourse is often used to point to the perceived shortcomings of competition enforcement in the 'brave new world'.

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Second, there is increased enforcement activity of the EC and national competition law prohibitions in the EU by a plurality of authorities. The Commission and the national competition authorities have been given new powers and are using existing powers more frequently and proactively. Publicity of enforcement activity and the rhetoric deployed by public authorities in relation to cartels and other serious infringements of competition law raise the profile of public and private enforcement. Inevitably, issues relating to the process of enforcement become more important, both in theory and in practice.

Third, 'due process' requirements have seen their scope of application expand at international and national levels. At international level, the European Court of Human Rights interpreted the concept of 'criminal charge' under Article 6 of the European Convention of Human Rights autonomously and broadly. This made it possible to import 'due process' requirements thus far confined to the field of criminal law into the realm of administrative law. In the UK, the requirements of Article 6 of the European Human Rights Convention were 'brought home' by the Human Rights Act 1998. UK courts are now required to apply Article 6 and to construe and give effect to primary and subordinate legislation in a way which is compatible with the Convention rights[1]. On the other hand, administrative law itself has expanded into new areas of economic regulation where prohibitions enforced by way of pecuniary or other sanctions have become more and more frequent.

This article is an attempt to sketch out a methodology to analyse 'due process' issues at national level. It focuses on competition law but makes suggestions that may be of wider application. The structure of the analysis is as follows. First, the article will address the question of the implications of the 'due process' discourse for the development of English law and Community law. Second, it will propose an analytical model whereby 'due process' requirements can be categorized as elements of sub-systems, including, for instance, public international law, Community law, and national laws, interacting with each other. Third, it will look at instances in which the proposed methodology can help clarify and understand the legal process of adoption and application of procedural requirements. It will focus on the following areas: a) *ne bis in idem* (double jeopardy); b) privilege against self-incrimination; c) legal professional privilege; d) the role of complainants and third parties in national proceedings. The final section of the article summarizes its principal conclusions.

2. DUE PROCESS, ENGLISH LAW AND EUROPEAN CONVERGENCE

The term 'due process' in competition proceedings, and indeed in any civil, criminal, and administrative proceedings, does not have a clearly defined meaning. In the field of administrative law, the very term 'due process' sounds unfamiliar and novel. In English law, traditionally the questions raised under the heading of 'due process' would be better understood in terms of 'natural justice' or 'fairness'.

[1] Human Rights Act 1998, s 3(1).

In *Re Pergamon Press Ltd*, Lord Denning MR described the powers and function of inspectors appointed by the Board of Trade under the Companies Act 1948.[2] He stated that the inspectors did not make a decision: their task was to investigate and report. However, their report could have serious repercussions:[3]

> They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up […].

He went on to say:[4]

> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative […]. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.

The courts have widely explored the requirement for quasi-judicial and even administrative bodies to be fair. And fairness means fairness to all. Not only to those that a tribunal or administrative body intends to sanction or criticize but to all persons whose rights, interests and legitimate expectations are affected by a decision which the tribunal or administrative body intends to make.[5] So, what does the concept of 'due process' add to the requirements of fairness and natural justice?

Focusing the analysis on UK competition law, including the powers to apply and enforce Articles 81 and 82 EC under national law, I would argue that the debate on 'due process' requirements has two distinct consequences.

The first is that in English law, the current debate on 'due process' shifts the focus from the method of the common law to the analysis of procedural rights. Traditionally, the courts have exercised jurisdiction over tribunals and administrative bodies requiring them to act fairly. The case law developed general principles but the application of the principles was specific to the sector affected, for instance licensing, employment, and the treatment of aliens. More importantly, under this approach procedural rights are determined according to the method of the common law: the court will rule after hearing argument based on the relevant authorities taking account of a wide variety of factors, including the nature of the person's interest, the type of decision being given, and the type of subject-matter. To put it another way, the court will embark upon a balancing exercise in which it weighs up three types of factors, described by Paul Craig as being 'the individual interest at issue; the benefits to be derived from added

2 *Re Pergamon Press Ltd* [1971] 1 Ch 388.

3 Ibid, 399.

4 Ibid, 399 – 400.

5 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 168 – 170.

procedural safeguards; and the costs to the administration, both direct and indirect, of complying with these procedural safeguards'.[6]

The concept of 'due process' and the current debate on 'procedural rights' implies the adoption of pre-determined standards of fairness which the decision-maker, be it a court or an administrative body, must apply by virtue of their legal force or their status in the value system of the society. The analysis whereby 'due process' requirements are adopted and applied is no longer a balancing test but an exercise in the hermeneutics of rights. The right may not be absolute. Limitations imposed on it may be justified and the analysis of the justification may require a balancing exercise not different from that carried out at common law. However, under a rights-based approach, the balancing test applies after a relevant procedural safeguard has been identified and described in its substance and scope. At common law, the balancing test applies in order to determine whether a 'procedural right' ought to be recognized to the applicant in the first place.

The second consequence relates to the European and international dimensions. Here, the novel concept of 'due process' shifts the focus of the legal analysis from principles and rules of national administrative law to transnational and international standards of justice. This becomes, both in theory and in practice, an instrument of convergence at European level. Based on a commonly understood, albeit at times vague and imprecise, concept of 'due process', it is possible to establish a productive process of comparison and cross-fertilization in the EU both vertically and horizontally: vertically between the national legal systems and the Community legal order and horizontally between the legal systems of the Member States. Comparison and cross-fertilization may be the basis for convergence occurring without the need for formal harmonization measures but rather through a self-governed process of adoption and adaptation of procedural models.

3. THE ANALYTICAL MODEL

The concept of 'due process' is indeterminate both in Community and in national laws. The Community courts have applied requirements of procedural fairness on a case-by-case basis. National legal systems recognize principles and rules of procedural fairness under different approaches and in different ways.

In the definition of the concept of 'due process', a useful starting point may be to identify the legal basis of the requirement under consideration. The concept of 'due process' is polyhedral. This is even more important from the viewpoint of a national competition authority, which applies a multiplicity of standards originating in legal instruments or rules of different provenance, status, and force. Within the broad definition of 'due process' requirements, it may be helpful to identify six sub-systems. They are the following:

- International standards not effective under national law (in the UK, this was the case of Article 6 of the European Human Rights Convention before the Human Rights Act 1998 came into force);

[6] P Craig, *Administrative Law,* 5th edn, London, Sweet & Maxwell, 2003, 425.

- International standards effective under national law (this is now the case of Convention Rights under the Human Rights Act 1998 in the UK);
- Community law (with varying degrees of intensity: fundamental rights, general principles, EC Treaty provisions, rules adopted under the EC Treaty);
- National constitutional standards ('rigid' or 'flexible', enshrined in written constitutions or emerging from the case law);
- National law (here also with different degrees of intensity/generality: general principles and specific provisions, primary/secondary legislation and common law);
- Aspirations of the users of the system voiced by their legal advisers, lobbying groups, and politicians ('legitimate expectations'[7] of the users of the system in the 'modern democratic society'[8]).

It may be interesting to focus on some of the features of the proposed model that will be applied and developed throughout this paper. I would like to focus on the following elements. First, the nature of the model as a system and a process. Second, its static and dynamic dimensions.

The sub-systems identified above, taken together, are a system and a process.

They are a system because they interact with each other. General principles of Community law may be based on, and often derive from, the legal systems of the Member States. International standards of justice influence the development of Community law and may be binding under national law. National constitutional standards interact with Community law and inform the interpretation of national law. Aspirations of the users of the legal system find their way in all the sub-systems identified above through the judicial system or through lobbying or political pressure.

The sub-systems identified above are also a process because they can be understood as a temporal sequence. 'Due process' requirements under national law may be later recognized as general principles of Community law by the Community courts or may be adopted in Community legislation. Procedural rights under Community law may be adopted under national law. Lobbying and political pressure or cases brought in the courts by the users of the system may result in new procedural rights being recognized at national, European, or international level.

The proposed model is both static and dynamic.

The model is static when 'due process' requirements are analysed within the sub-system where they belong. This makes it possible to identify their origin, legal force, and the consequences of their violation. More importantly, the model is also dynamic because it

[7] This meaning of 'legitimate expectation' should not be confused with the technical concept of legitimate expectations in administrative law or in Community law.

[8] The idea of a 'modern democratic society' is neutral in terms of the analysis of the sociological, economic, and political structure of current Western democracies. In this context, the concept simply assumes that the users of the system will have expectations as to how the system should work based on a set of historically accepted and socially/politically shared values and principles.

makes it possible to analyse the transposition of procedural rights from one sub-system to the other. Fairness requirements may be subject to a legal transplant from one sub-system to another. This dynamic process may change the nature and function of legal norms depending on the degree to which they are context-specific or self-standing. A context-specific norm is one that requires, for its construction and application, a set of further technical concepts and rules that are specific to the sub-system where the norm originates. An example is the principle of double jeopardy or *ne bis in idem*. A self-standing norm consists in an analytical framework or logical structure which does not require, for its construction and application, a set of further technical concepts and rules that are specific to the sub-system where the norm originates. An example may be the principle of proportionality.

The proposed model may be used to describe and explain the process of adoption, definition and application of procedural rights. The following analysis will focus on some of the procedural guarantees relevant in EC and domestic competition proceedings.

4. APPLICATION OF THE MODEL

4.1. *Ne Bis In Idem* (Double Jeopardy)

(a) The problem

The enforcement of competition law by competition authorities and courts raises the question as to whether it is possible to apply administrative, civil, and criminal sanctions in respect of an agreement or practice which has already been subject to previous proceedings. The problem only arises if multiple sanctions are imposed on the same person. The principle that could prevent concurrent or subsequent proceedings in these circumstances is the principle of *ne bis in idem* or double jeopardy. There is enshrined in international conventions and in Community law a wide concept of the double jeopardy rule. This broader principle tends to be applied to proceedings that are criminal in nature albeit not criminal under national law. Furthermore, this principle may have a transnational application, i.e. may be applied to proceedings taking place in different states. While proceedings against individuals are not barred by proceedings against companies and civil remedies are not barred by proceedings of a criminal nature, the question must be asked as to whether investigations of a criminal nature against undertakings may be barred because the same, or substantially the same, infringement has already been investigated by the same or a different authority in the same or even in a different State.

(b) The nature of the principle of *ne bis in idem*

The double jeopardy rule originates in the criminal law systems of the states. Its application is generally limited to proceedings that are criminal under national law. Its effect is to bar a second prosecution when the defendant has been already validly acquitted or convicted for the same offence or, in certain circumstances, for an offence based on the same or substantially the same facts. In English criminal law a plea of autrefois aquit or autrefois convict bars a second prosecution if the defendant has been previously acquitted or convicted of the same offence as that of which he is charged in

the second prosecution.[9] Furthermore, under the doctrine of abuse of process, the court is required to stay proceedings if the defendant has previously been acquitted or convicted on the same or substantially the same facts (albeit of a different offence), unless there are exceptional circumstances.[10] Similar rules exist in most legal systems.

The double jeopardy rule originating in the national criminal law systems is now recognized in international conventions. Focusing the analysis on the European dimension, Article 4 of Protocol No 7 to the European Human Rights Convention states:[11]

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, of if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

International and transnational sub-systems interact with each other. Thus, even if Protocol 7 has not been ratified by the United Kingdom, since the rights protected by the Convention may be regarded as fundamental rights in Community law, Article 4 of Protocol No 7 may indirectly affect the legal position in the UK in the enforcement of EC competition law through the jurisprudence of the Court of Justice.[12] It should also be noted that in the transposition of the principle in Article 4 of Protocol 7 into Community law, the scope of the rule changes. While Article 4 only applies to proceedings within the same jurisdiction and does not provide for a principle of transnational *ne bis in idem*, Article 50 of the European Charter of Fundamental Rights[13] departs from the traditional view that the double jeopardy rule only applies to criminal

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9 *Connelly v DPP* [1964] AC 1254, 1339 – 1340, HL, *per* Lord Devlin.

10 Ibid.

11 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950), Protocol No 7, Art 4.

12 European Human Rights Convention, Protocol No 7, Art 4 was referred to by the Court of Justice as reflecting a 'fundamental principle of Community law' in Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P, C-251/99P, C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij NV (LVM) v Commission of the European Communities (PVC No 2)* [2002] ECR I-8375, para 59; see also WPJ Wils, 'The Principle of *Ne Nis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' [2003] World Competition 131, 133. For a general overview of the problems arising from the application of the European Human Rights Convention to administrative proceedings by the Commission, see A Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' [2002] ICLQ 55 – 89 and R Wainwright, 'Human Rights: What Have They to Do with Competition Law?' M Andenas, M Hutchings, Ph Marsden (eds), *Current Competition Law* Vol III, London, British Institute of Intl and Comparative Law, 2005, 473 - 480.

13 Charter of Fundamental Rights of the European Union, OJ 2000, C364/1 (the European Charter of Fundamental Rights).

proceedings within the same jurisdiction and adopts a principle of Community-wide *ne bis in idem*. Article 50 states:

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The Charter is not legally binding in itself.[14] It is addressed to the Member States only insofar as they apply Community law.[15] However, it is a highly influential statement of the fundamental rights protected by Community law. Furthermore, its binding effect may follow from its being expression of 'general principles of Community law' under Articles 6(2) and 46(d) of the EU Treaty.

A Framework Decision concerning the application of the 'ne bis in idem' principle to be adopted under Article 34(2)(b) of the Treaty on European Union[16] is currently under negotiation.[17] If a Framework Decision is adopted, it is likely to have implications for criminal prosecutions of individuals and corporate bodies for competition law related crimes arising from the same or substantially the same facts in different Member States. It is, however, not clear whether any Framework Decision that may be adopted will apply to infringements that are not criminal under national law and to proceedings that take place without the involvement of a court exercising criminal jurisdiction under national law.[18]

(c) Multiple administrative proceedings

Under the current system, the problem arises because administrative proceedings by the Commission or the Office of Fair Trading may be criminal for the purposes of the European Human Rights Convention[19] and, it would appear, for the purposes of the interpretation of the Charter.[20] Protocol 7 to the European Human Rights Convention

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[14] The Preamble of the European Charter of Fundamental Rights states: 'This Charter reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […]'.

[15] European Charter of Fundamental Rights, Art 15(1).

[16] Treaty on European Union (consolidated text), OJ 2002, C325/5.

[17] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle, OJ 2003, C100/24.

[18] As the Framework Decision is currently under negotiation and it is difficult to speculate as to what form it will take if adopted, this article focuses on the analysis of the law as presently in force.

[19] The European Court of Human Rights adopted a substantive test for the definition of the autonomous meaning of 'criminal charge' under Article 6 of the Convention in *Engel v Netherlands* (1979/80) 1 EHRR 647. Administrative proceedings under Community law may be considered criminal for the purposes of Article 6 of the European Human Rights Convention: Case C-235/92P *Montecatini Spa v Commission of the European Communities* [1999] ECR I-4539, paras 175-176. The same applies to proceedings under the Competition Act 1998: *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (Napp No 3)* [2001] Comp AR 33, [2002] ECC 3, paras 68 – 76; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (Napp No 4)* [2002] ECC 13, paras 98 – 103.

[20] European Charter of Fundamental Rights, Art 52(3): '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'.

and the Article 50 of the European Charter provide for the right not to be tried twice for the same offence. This would appear to be a general principle of Community law and, arguably, binding on Member States insofar as they apply Community law. However, its extent and application in competition law proceedings is not entirely clear. Yet, some guidance may be found the case law of the Court of Justice.

The Court of Justice rejected a broad interpretation of the *ne bis in idem* principle in competition matters. It held in the *PVC (No 2)* case[21]:

> The application of that principle […] presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. Thus, the principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second.

In the light of this judgment, in EC competition law the relevant test for the application of the principle of *ne bis in idem* seems to be whether the infringement or the non-infringement has been established in a decision not subject to (further) appeal or judicial review application.

The *PVC (No 2)* case was concerned with subsequent proceedings brought by the same authority. The problem is further complicated because the same agreement or conduct may give rise to liability under different legal systems. Community law and national law may both apply to the same anti-competitive agreement or conduct. Legal systems of states outside the Community may also impose sanctions for the same agreement or conduct that may be subject to an infringement decision for breach of Community competition law. The principle of double jeopardy comes into play where the same undertaking is subject to fines for the same or substantially the same facts albeit under different legal provisions in different legal systems.

The Court of Justice has taken a pragmatic approach to the problem of multiple fining decisions under different legal systems. It held in *Walt Wilhelm v Bundeskartellamt* that parallel proceedings under Community and national competition laws are permissible insofar any later fining decision takes into account any fines already imposed on the same person in previous decisions.[22]

In *Boehringer Mannheim GmbH v Commission*, the Court of Justice considered whether the fines imposed by the Commission should take into account any penalties imposed by State authorities outside the European Community. The Court held, on the facts, that the agreements that were the subject matter of the criminal prosecution in the US were

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[21] *(PVC No 2)* case (op cit n 12), paras 61 - 62.

[22] Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, para 11. This rule against double jeopardy in fining decisions follows from a principle of 'natural justice' (ibid).

different in 'their object and their geographical emphasis' to the cartel investigated by the Commission.[23] As a consequence, no issue of *ne bis in idem* arose.[24]

The EC position in relation to multiple fining decisions has been adopted under UK law. Section 38(9) of the Competition Act 1998 provides that in setting the amount of a penalty under Part I of the Act, the Office of Fair Trading, the Competition Appeal Tribunal and any court to which an appeal lies as to the amount of the penalty, must take into account any penalty or fine imposed by the Commission, or by a court or other body in another Member State in respect of the same agreement or conduct. Therefore, penalties and fines imposed by authorities and courts of third states, i.e. states that are not Members of the EU, are not taken into account.

A related question is whether a subsequent investigation may be barred by a decision accepting commitments under Article 5 of Regulation 1/2003.[25] The Court of Justice gave some guidance on the issue of *ne bis in idem* with regard to settlements in *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*.[26] In that case, the Court gave a preliminary ruling on two references raising the same issue on the interpretation of the Convention Implementing the Schengen Agreement, which, in Chapter 3 of Title III, provides for the application of the *ne bis in idem* principle.

Criminal proceedings against Mr Gözütok in the Netherlands had been discontinued following acceptance by Mr Gözütok to pay a sum of money determined by the prosecution. The German authorities wanted to prosecute Mr Gözütok for the same offence. Proceedings against Mr Brügge raised the same question. The Court held that where the prosecution is discontinued by decision of the prosecuting authority and on condition that the accused performs obligations determined by the prosecution, further proceedings are precluded. However, the Court clarified that a relevant fact in reaching this conclusion was that under national law a further prosecution was definitively barred.[27] Therefore, the consequences of discontinuing proceedings under national law were material to the decision as to whether the discontinuance was a final disposal of the case. The Court also stated that what matters is not the procedure *per se*, e.g. whether the discontinuance of proceedings is embodied in a formal judicial decision, but the effect of discontinuing proceedings.

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[23] Case 7/72 *Boehringer Mannheim GmbH v Commission of the European Communities* [1972] ECR 1281, para 4.

[24] Ibid, paras 5 – 8.

[25] 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 (Regulation 1/2003), Art 5 states: 'The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: — requiring that an infringement be brought to an end, — ordering interim measures, — accepting commitments, — imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

[26] Joined cases C-187/01 and C-385/01 *Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01)* [2003] ECR I-1345.

[27] Ibid, para 30.

(d) Neighbouring principles: legal certainty and legitimate expectations

Finally, the principles of legal certainty and legitimate expectations might also at times prevent a public authority from acting in a manner which reneges on previous decisions. However, the application of these principles to enforcement proceedings beyond the application of the *ne bis in idem* rule is probably very limited. If an investigation does not terminate with a final infringement or non-infringement decision that bars further proceedings, there is no reason why launching such further proceedings would offend against the principle of legal certainty or the parties' legitimate expectations.

In *Klöckner-Werke AG v High Authority* the Court of Justice said:[28]

> […] The administrative authority is not always bound by its previous actions in its public activities by virtue of a rule which, in relations between the same parties, forbids them to venire contra factum proprium.

In the *Perfumes* cases, the Court of Justice considered the legal effect of letters by Commission officials stating that in view of the small market share of the companies concerned and the competitive structure of the relevant market there was no need for the Commission to take action on the basis of the facts in its possession and, therefore, the file was closed.[29] The Court noted that the letters in question were pure case closure letters based upon the facts in the Commission's possession. They were not binding on national courts.[30] It followed that such case closure letters did not have legal effects and were not binding on the Commission. However, they gave rise to legitimate expectations for the undertakings concerned that their agreement was compatible with Article 81 EC. Therefore, unless there was a material change of circumstances or the case closure or comfort letter was adopted on the basis of incorrect or incomplete information, the Commission was prevented from reopening the investigation.[31]

(e) The application of the principle of *ne bis in idem* to national competition proceedings

There is currently no case law on whether and how the principle of *ne bis in idem* might apply to proceedings brought by national competition authorities for the application and enforcement of Articles 81 and 82 EC. However, the analytical model proposed in this paper leads to some tentative conclusions:

a) the principle of *ne bis in idem* has been transplanted from national law to international conventions and then adopted by Community law based both on the national legal systems of the EU Member States and on public international law standards. Currently, the principle is been re-imported into the national legal systems of the Member States

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[28] Joined Cases 17/61 and 20/61 *Klöckner-Werke AG v High Authority of the European Coal and Steel Community* [1962] ECR 615.

[29] Joined Cases 253/78 and 1-3/79 *Procureur de la Republique v Bruno Giry and Guerlain SA* [1980] ECR 2327; Case 31/80 *NV L'Oréal v PVBA "De Nieuwe AMCK"* [1980] ECR 3775, 3805.

[30] Ibid.

[31] AG Reischl in his Opinion in the *L'Oréal* case [1980] ECR 3775, 3805; PM Roth (ed), *C Bellamy and G Child: European Community Law of Competition,* 5th edn, London, Sweet & Maxwell, 2001, 874 – 875.

after having been transformed by the dynamic process of transplant from national law into public international law and into Community law;

b) the difficulty in the process results from the context-specific and not self-standing nature of the principle. The concept of *ne bis in idem* has been transposed from the national criminal law systems into a transnational/international context where autonomous concepts of 'criminal charge' and 'criminal proceedings' were adopted. The same principle, together with the autonomous concepts of 'criminal charge' and 'criminal proceedings', is now been transposed into national law again not in the field of criminal law, where it originated, but in the field of administrative law;

c) this further transposition requires adapting the tests adopted by the Community courts to the national legal systems under the framework of Regulation 1/2003. Therefore, because of the very nature of the process of adoption of the standard, it is not possible to provide solutions that are the same in all Member States and in all circumstances;

d) because of the context-specific and not self-standing nature of the concept of *ne bis in idem*, an acute problem arises with regard to decisions by national competition authorities or the Commission that are based on lack of evidence of the infringement after a full investigation has been conducted with the involvement of the parties to the alleged infringement. In criminal proceedings, lack of evidence leads to an acquittal, i.e. a decision barring further proceedings. In civil proceedings the same fundamental principle applies: a party failing to prove his case fails on the merits. If the claimant fails to establish any element of the cause of action the court will give judgment for the defendant. This judgment is a final decision on the merits that bars further proceedings under the doctrine of *res judicata*. However, the same principles may not apply to administrative authorities even where the administrative proceedings are criminal in nature for the purposes of the application of international standards. Transposing an international standard created with the aim of ensuring the fairness of criminal trials into national administrative law systems based on discretionary powers of investigation may be problematic;

e) it is possible to predict that parties to administrative investigations and their legal advisers will rely on the principle of *ne bis in idem* and national and Community courts will further clarify its scope in relation to the system of concurrent powers under Regulation 1/2003. The process is on-going and while guidance may be found in the current case law, the substance and scope of the principle may have to be redefined in the new context. Furthermore, its substance and scope will be, at least in part, dependent on the features of the national administrative law systems in which the principle is applied.

4.2. Privilege against Self-Incrimination

(a) The privilege and the exercise of powers of compulsion

In criminal proceedings in England, the privilege against self-incrimination includes the right not to answer any question which could, directly or indirectly, incriminate the defendant under examination. It extends to pre-trial procedures to prevent compulsory

disclosure. It also includes the right not to be compelled to give any answers when questioned by the police under caution. Beyond the scope of criminal law, in relation to administrative enquiries and procedures, financial services legislation progressively enabled administrative authorities to exercise powers of compelling answers in the investigation of corporate fraud.[32] Investigators exercising powers of compulsion are under obligation to give a person whom they propose to criticize a fair opportunity to answer such criticisms as are levelled against them[33] and must base their findings on material having probative value.[34] Significantly, though, these statutes, in their original form, made it possible for prosecuting authorities to use the answers given under compulsory questioning in subsequent criminal proceedings. Evidence obtained under compulsion by administrative authorities other than the Serious Fraud Office was not subject to statutory limitations on admissibility at the trial of any criminal offences until the law came under scrutiny by the European Court of Human Rights in the *Saunders* case.

In *Saunders v The United Kingdom,*[35] the European Court of Human Rights addressed two important issues. The first was that compulsion to answer questions in the context of administrative proceedings is not a breach of Article 6 of the Convention *per se*.[36] The second was that answers compulsorily obtained in a non-judicial investigation may not be used to incriminate the accused in criminal proceedings.[37] It is clear from *Saunders* that oral evidence obtained under compulsion in administrative proceedings must be inadmissible as evidence-in-chief in criminal proceedings under Article 6 of the European Human Rights Convention. It is also clear that evidence which has an existence independent of the will of the suspect may be obtained under compulsion.[38]

The Court in *Saunders* accepted that the privilege does not apply in the compulsion to disclose certain types of non-testimonial evidence. In this respect, *Saunders* might appear to be at odds with *Funke v France*[39] and *JB v Switzerland*[40], where the Court found that the privilege had been infringed because of the compulsion to produce documents. In the *Funke* case, the Court found that the applicant's Article 6(1) right to a fair trial had been violated simply on the grounds of that he had been compelled under threat of penal sanctions to disclose self-incriminating documents. This view was reiterated in the case of *JB v Switzerland*, in which the decision of the Swiss tax authorities to

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32 Companies Act 1985, s 434; Insolvency Act 1986, ss 236 and 433; Insurance Companies Act 1982, s 43A; Company Directors Disqualification Act 1986, s 20; Building Societies Act 1986, s 57; Financial Services Act 1986, ss 105 and 177; Banking Act 1987, ss 39 and 41 - 42; Companies Act 1989, s 83; and Friendly Societies Act 1992, s 67.

33 *Re Pergamon Press Ltd* (op cit n 2).

34 *Mahon v Air New Zealand* [1984] AC 808, 820.

35 *Saunders v United Kingdom* (1997) 23 EHRR 313, ECtHR. The case concerned the admissibility in criminal proceedings of transcripts of compulsory interviews held under sections 434 and 436 of the Companies Act 1985.

36 Ibid, para 67

37 Ibid, para 74

38 Ibid, para 69.

39 *Funke v France* (1993) 16 EHRR 297, ECtHR.

40 *JB v Switzerland* [2001] Crim LR 748, ECtHR.

prosecute and fine the applicant upon his refusal to supply them with information they had requested was found to have violated his Article 6(1) rights to a fair trial.

However, the cases of *Funke* and *JB* are of a more limited application. The Court in *Funke* emphasized the fact that the French prosecuting authority simply *believed* that the relevant documents existed; they were not certain of their existence.[41] The notion of the 'fishing expedition' was precisely the sort of procedural abuse that fair trial provisions were intended to inhibit. Similarly, the sustainability of the *JB* case depends on the particular type of evidentiary material concerned. The Swiss tax authorities sought documentary evidence that the Court considered not to have an existence independent of the will of the applicant, the feature that the Court itself used to distinguish *JB* from *Saunders*.[42]

The rule under Article 6 of the European Human Rights Convention, therefore, appears to be that powers of compulsion may not be used to compel the testimony of a person charged with a criminal offence for the purpose of using the compelled testimony to incriminate the defendant at the criminal trial. The use of compulsion is, however, legitimate where that evidential material already exists.[43] Compelled production of documents is an infringement of the privilege only if the order for production is of the nature of a 'fishing expedition'[44] or requires the addressee to generate the documentary evidence to be produced.[45]

Adverse inferences may be drawn from the defendant's silence without violating Article 6 of the European Human Rights Convention.[46] In the light of *Saunders*, it was not entirely clear whether testimonial evidence obtained under powers of compulsion could be used to attack credibility or under the doctrine of previous inconsistent statements. The European Court of Human Rights in *Saunders* levelled criticism at the use of the evidence obtained under compulsion 'to contradict or cast doubt upon other statements of the accused' and at the impact that the extensive use of previous statements might have had on the jury.[47] However, in the *Saunders* case the transcripts of the compulsory interviews were used as evidence-in-chief. The question of whether compelled statements could be used to attack credibility or under the doctrine of

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41 *Funke v France* (op cit n 39), para 44. For the application of the Fifth Amendment privilege to production of pre-existing documents, see: *Fisher v United States* 425 US 391 (1976) and *United States v Hubbell* 120 S Ct 2037 (2000).

42 *JB v Switzerland* (op cit n 40), para 68.

43 *A-G's Reference (No 7 2000)* [2001] 1 WLR 1979, CA Crim Div. For a fine judicial criticism of the distinction between pre-existing evidence and new evidence see *Brown v Stott* [2001] 2 WLR 817, 837, PC, *per* Lord Bingham.

44 *Funke v France* (op cit n 39).

45 *JB v Switzerland* (op cit n 40).

46 *John Murray v United Kingdom* (1996) 22 EHRR 29, ECtHR. Arguably, the mode of trial by judge alone played a role in the judgment of the European Court of Human Rights (ibid, at 51) and in the Report of the European Commission of Human Rights (*John Murray v the United Kingdom* App 18739/91 (1994) 18 EHRR 1, 59, Eur Commission of Human Rights). This point was central to the partly concurring, partly dissenting opinion of N Bratza QC (*John Murray v the United Kingdom*, Partly concurring, partly dissenting opinion of Mr N Bratza, para 1).

47 *Saunders v United Kingdom* (op cit n 35), paras 71 and 72.

previous inconsistent statements was addressed in the case of *Shannon v United Kingdom*. In that case, the European Court of Human Rights held that the permissible use of statements obtained under compulsion against the defendant 'if he had relied on evidence inconsistent with it' did constitute a violation of Article 6(1) of the European Human Rights Convention because 'such use would have deprived the applicant of the right to determine what evidence he wished to put before the trial court, and could have amounted to 'resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'.[48]

Prior to the *Saunders* case, in the UK statements obtained by the Serious Fraud Office using powers of compulsion were already inadmissible at trial under section 2(8) of the Criminal Justice Act 1987. However, *Saunders* made it clear that use at trial of statements obtained under compulsion in procedures other than criminal investigations and proceedings may be an infringement of Article 6 of the Convention. In the light of *Saunders*, the reforms in Youth Justice and Criminal Evidence Act 1999 neutralized most of the differences between the safeguards applicable to Serious Fraud Office's investigations and other administrative investigations. As a result of these reforms, the current rule on admissibility of statements obtained under compulsion is that they cannot be used against the maker of the statement in subsequent criminal proceedings other than for offences equivalent to perjury or otherwise making false testimony in court or providing false or misleading information to the investigating authority unless two cumulative conditions are fulfilled: a) the defendant makes a statement inconsistent with the previous statement; b) evidence relating to the previous statement is adduced, or a question relating to it is asked, in the proceedings by or on behalf of the maker of the statement.[49] As the analysis in this section has shown, the better view is that this rule on admissibility is consistent with Article 6 of the European Human Rights Convention. The position would not appear to have changed as a result of *Shannon v the United Kingdom*[50] as this case concerned the procedural protection afforded to the defendant prior to the amendments introduced by the Youth Justice and Criminal Evidence Act 1999.

(b) The scope of the privilege in criminal investigations under national law

While the *Saunders* case required strengthening the protection of the privilege against self-incrimination especially in the context of concurrent proceedings, at the national level the privilege was been eroded in two ways. Firstly, the Criminal Justice and Public Order Act 1994 had already allowed the court or jury to draw 'such inferences as appear proper' from the defendant's failure to give evidence in court;[51] failure to mention when questioned by police a fact which he could reasonably have been expected to mention and on which he later relies;[52] failure to explain to police his

[48] *Shannon v the United Kingdom* (Application No 6563/03), ECtHR, 4 October 2005.

[49] Youth Justice and Criminal Evidence Act 1999, s 59 and Sch 3, amending a number of statutory provisions, including section 2 of the Criminal Justice Act 1987.

[50] *Shannon v the United Kingdom* (op cit n 48).

[51] Criminal Justice and Public Order Act 1994, s 35

[52] Ibid, s 34

possession of, or proximity to any object, substance or mark;[53] and failure to explain to police his presence at a particular place.[54] These provisions had been supplemented by provisions of the Criminal Procedure and Investigations Act 1996, section 11 of which entitled the court to draw adverse inferences from the simple fact of the failure of a defendant to disclose a defence statement in accordance with section 5, or from the fact that disclosure of the defence statement was late. Section 11 of the Criminal Procedure and Investigations Act 1996 in its original form has been substituted by section 39 of the Criminal Justice Act 2003, which extends the pre-existing section 11 to include new instances of failure of the defence to comply with disclosure obligations. Failure to comply with disclosure obligations by the defence may attract adverse comment by any parties, in some circumstances with leave, or by the judge, and adverse inferences may be drawn against the defendant.

The second way in which the privilege against self-incrimination has been eroded in English law in the context of criminal proceedings is by entrusting the investigating authorities with powers to compel production of documents and answers to questions. The precursor provision is section 2 of the Criminal Justice Act 1987 and the trend has since been confirmed.

The new provisions of the Enterprise Act 2002 on the investigation of hard core cartels mirror the provisions of the Criminal Justice Act 1987, as amended as a result of the *Saunders* case. Section 192(1) of the Enterprise Act mirrors section 2(2) of the Criminal Justice Act 1987, whilst powers in relation to documents are conferred by subsections (2) – (4). Section 196 restricts the use of statements in response to a requirement imposed by virtue of section 192 or 193 in the same way as restrictions on admissibility are set by section 2 of the Criminal Justice Act as amended by the Youth Justice and Criminal Evidence Act 1999. Sections 30A, 65B, and 65K of the Competition Act 1998 introduce limitations on admissibility of statements obtained in response of requirements under the civil provisions of the Act in criminal prosecutions against the maker of the statement.

Thus, in the context of competition law criminal investigations, the privilege against self-incrimination has been overridden by statute. However, the interaction between the European Human Rights Convention and the UK legal system required a strengthening of the protection of the privilege which is now reflected in the relevant provisions of the Enterprise Act 2002 and the Competition Act 1998. Statements obtained under compulsion are inadmissible in evidence unless the maker of the statement gives evidence inconsistent with it and "evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution". The widening of the scope of protection was triggered by the application of a user of the system to the European Court of Human Rights and led to statutory amendments in national law. It is also important to note that while at the time when *Saunders* was decided and the Youth Justice and Criminal Evidence Act 1999 received the royal assent the European Human Rights Convention was not applicable

[53] Ibid, s 36

[54] Ibid, s 37

in the UK, the Human Rights Act 1998 has since given effect to the Convention in domestic law. The Act requires the courts to 'take into account' any decision, judgment or declaration of the European Court of Human Rights and any opinion or decision of the European Commission on Human Rights, insofar as it is relevant to do so.[55] Primary legislation must be read in a way that is compatible with the Convention.[56] It is unlawful for courts, as public bodies, to act in a way that is incompatible with Convention rights.[57]

(c) The scope of the privilege in proceedings by the EC Commission

A second area for consideration is the scope of the privilege in administrative proceedings that may be criminal in nature for the purpose of Article 6 of the European Human Rights Convention. In England, there is no settled case law on the scope of the privilege in these circumstances.

The Community courts have, however, addressed the issue on several occasions. The fundamental assumption is that in proceedings before the Commission for infringements of Articles 81 and 82 EC undertakings under investigation do not have an unqualified privilege against self-incrimination. Before formal proceedings are instituted,[58] the objective of assuring compliance with Community competition law led the Council to give the Commission wide powers of investigation. There is, therefore, a strong policy reason for the limitations on the rights of the undertakings in that preliminary phase.[59]

In the *Orkem* case, the Court of Justice asked itself the question as to whether general principles of Community law, which include fundamental rights recognized by the legal systems of the Member States, warranted Orkem's claim that the Commission had no power to compel an undertaking under investigation to disclose information that might provide evidence of an infringement of competition law. The Court of Justice rejected this argument mainly on the grounds that the 'laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings.'[60] The Court also held that an unqualified right to silence was neither embodied in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms nor in Article 14 of the International Covenant on Civil and Political Rights.[61] However, the Court granted the undertaking under investigation a minimal protection to the extent that it was held to be an infringement of the rights of defence to compel an undertaking to make statements

55 Human Rights Act 1998, s 2.

56 Ibid, s 3.

57 Ibid, s 6

58 Formal proceedings are opened when the Commission notifies the parties to the alleged infringement of its intention to proceed to a decision and no later than the service of the statement of objections.

59 Case 374/87 *Orkem v Commission of the European Communities* [1989] ECR 3283, para 19.

60 Ibid, para 29.

61 Ibid, paras 30 - 31. The Court's reasoning in relation to Article 6 of the ECHR is now to be read in the light of the subsequent case law of the Court in Strasbourg: see WPJ Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' [2003] World Competition 567, 574 – 578.

'which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove.'[62] Therefore, directly and indirectly incriminating questions may not be asked of an undertaking under investigation. The rights of defence upheld by the Court of Justice in the *Orkem* case are a fundamental principle of Community law. They are a limitation on the powers of investigation under Articles 18 and 20(2)(e) of Regulation 1/2003.

In the light of the *Orkem* case, it is useful to define directly incriminating questions as questions requiring the undertaking to confess guilt. Indirectly incriminating questions, on the other hand, are questions asked in such a way so 'as to compel the applicant to acknowledge its participation' in activities prohibited by EC competition law.[63]

Orkem is a development of the jurisprudence of the Court of Justice on the rights of defence in competition law proceedings. In *Hoechst v Commission*, the Court had already stated, relying on *Michelin v Commission*,[64] that the rights of defence are a fundamental principle of Community law.[65] In the *Hoechst* case, the Court drew a distinction between rights that have to be respected only in formal proceedings that follow the service of the statement of objections,[66] and rights that 'must be respected as from the preliminary-inquiry stage.'[67] The right not to be compelled to answer directly or indirectly incriminating questions falls within the latter category.

In *Societé Generale v Commission*, the Court of First Instance rejected a complaint that the Commission had compelled the undertaking under investigation to give self-incriminating answers thus infringing its rights of defence. The Court said that the Commission may not compel an undertaking 'to provide answers which might involve an admission on its part of the existence of an infringement which is incumbent on the Commission to prove.'[68] The Court considered that the answers requested were 'purely factual and cannot be regarded as capable of requiring the applicant to admit the existence of an infringement of the rules on competition.'[69]

The principles laid down in *Orkem* and *Societé Generale* have been considered again by the Court of First Instance in *Mannesmann v Commission*.[70] The judgment correctly applies the test laid down in *Orkem* to the questions asked of the applicant by the

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62 *Orkem* case (op cit n 59), para 35.

63 Ibid, paras 38 - 39.

64 Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, para 7.

65 Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859, para 14.

66 Example of such rights is the right to be heard. The right to a hearing only arises in the administrative procedure and is not upheld at the investigative stage.

67 *Hoechst v Commission* (op cit n 65), para 16. Examples of such rights are the right to legal professional privilege and the right to legal representation: see Case 155/79 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 1575.

68 Case T-34/93 *Société Générale v Commission of the European Communities* [1995] ECR II-545, para 74.

69 Ibid, para 75.

70 Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II–729, paras 60 – 67.

Commission. However, the Court of First Instance in *Mannesmann* went on to say that requests of purely factual questions and production of documents already in existence are compatible with the rights of defence and the right to a fair legal process as recognised by the Community legal order in the same fashion as they are by Article 6 of the European Human Rights Convention.

It is not clear whether the test of 'purely factual questions and production of documents already in existence' and the test in *Orkem* are exactly coextensive. The Court of Justice in *Orkem* drew a distinction between questions aiming at extracting factual information and questions relating to the purpose and objective of certain alleged behaviour.[71] In *Orkem*, however, the test of the factual or evaluative-incriminating nature of the question relates to the answers to the question rather than to the questions themselves. It is not the way in which the question if formulated but rather the nature of the admission sought of the undertaking that determines whether or not the rights of defence have been infringed. There is nothing to suggest that the Court of First Instance in *Mannesmann* was narrowing the scope of the rule in *Orkem*. It is more likely that the test of 'purely factual questions' in *Mannesmann* relates to the type of information the Commission requires of the undertaking. The Court of First Instance in *Mannesmann* clearly understood the answers given and the documents produced as disclosing pure facts to which different interpretations could be attached, these interpretations being the subject matter of the second phase of the procedure.[72] In this respect, the language used by the Court of First Instance in *Societé Generale*, which refers to 'purely factual answers' rather than 'purely factual questions', is clearer and, therefore, should be adopted instead of the more ambiguous formula in *Mannesmann*.

In conclusion, in proceedings before the Commission the Community courts have upheld claims to privilege against self-incrimination with respect to questions aiming at extracting an admission of guilt from the undertaking under investigation. This applies to questions asking whether or not the infringement has been committed (directly incriminating questions) and questions asking for the reason and rationale of certain behaviours (indirectly incriminating questions). Questions asking for purely factual information do not fall within this category although they may be used to 'incriminate' the undertaking in question.

(d) The scope of the privilege in national administrative proceedings

Turning now to the problem of the privilege against self-incrimination in national administrative proceedings, it is noteworthy that there is no settled case law on the substance and scope of the privilege. However, the application of the proposed analytical model yields the following conclusions:

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[71] *Orkem* case (op cit n 59), para 38.

[72] *Mannesmannröhren-Werke v Commission* (op cit n 70), 78: 'There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising its rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission'.

a) the privilege against self-incrimination in administrative proceedings may be a Convention right and is a fundamental principle of Community law;

b) technically, and insofar as it is held that the privilege is a binding Community law principle that Member States have to respect when applying Community law, the privilege as understood in Community law takes precedence over the Article 6 of the European Human Rights Convention under UK law;

c) in the dynamic process of definition and application of the standard, arguments are generally drawn both from the case law of the Community courts and the jurisprudence of the European Court of Human Rights;

d) national courts are likely to apply both set of precedents in an integrated way, reconciling any possible conflicts;

e) the precise scope of the privilege under national law is yet to be defined but the current administrative practice seems to follow closely the case law of the Community courts.

4.3. Legal professional privilege

This section deals with legal professional privilege (or 'confidentiality' under Scots law). The public policy justifying the protection of confidential communications between a lawyer and its client is stated by Lord Scott in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*:[73]

> […] it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else […]

Lord Scott's judgment draws upon a consistent line of authorities recognizing the nature of the privilege as a fundamental element of any system based on the rule of law.[74] The same policy reasons led the Community courts to rule that the legal professional privilege is a fundamental principle within the meaning of 'law' in Article 220 EC. In his Opinion in *AM & S Europe Ltd v Commission*, Advocate General Slynn said:[75]

> [The privilege] essentially springs from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

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[73] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, 649 – 650.

[74] See, for instance, *R v Special Comr of Income Tax, ex p Morgan Grenfell & Co Ltd* [2003] 1 AC 563.

[75] Opinion of AG Slynn in Case 155/79 *AM & S Europe Ltd v Commission* [1983] QB 878, 913.

The Court of Justice in the *AM & S* case broadly recognized that the laws of the Member States protect the confidentiality of communications between lawyer and client as it 'serves the requirements […] that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it'.[76] However, the Court limited the legal professional privilege in three ways. First, the communication must be 'made for the purposes and in the interests of the client's rights of defence'.[77] Second, it must take place between the client and an independent lawyer, excluding lawyers that are employees of the client.[78] Third, the lawyer must be 'entitled to practice' or, as the French text states, 'inscrit au barreau', in a Member State.[79]

The dynamics of adoption and definition of Community law standards of 'due process' can be further illustrated by *Akzo Nobel Chemicals Ltd v Commission* (application to the President of the CFI for interim measures).[80] In that case, the applicants argued that communications between in-house counsel and the management of the company should be covered by the Community legal professional privilege. Here, the aspiration of the users of the system to be granted a procedural right is based on the protection afforded under national law. The President of the CFI noted the Commission's argument that not all Member States recognized a legal professional privilege in relation to communications with in-house counsel.[81] On the other hand, he went on to say that the judgment of the Court of Justice in the *AM & S* case was based on the interpretation of principles common to the Member States in 1982.[82] Since then, several Member States adopted rules that extend the scope of legal professional privilege to cover communications with in-house counsel. Furthermore, there are many instances in which lawyers employed by a firm are subject to the same set of deontological rules as independent lawyers are.[83] Therefore, in the legal systems of the Member States and possibly, as a consequence, in Community law, it is less and less plausible to presume that the fact that a lawyer is employed by his client is such as to exclude the requirement of independence of the lawyer as an officer of the court.[84]

The reasoning of the President of the CFI is consistent with precedent. The protection of communications between independent lawyers and their clients in the legal systems

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[76] *AM & S Europe Ltd v Commission* (op cit n 67), para 18.

[77] Ibid, para 21.

[78] Ibid.

[79] Ibid, paras 25 – 26.

[80] Joined Cases T-125/03R and T-253/03R *Akzo Nobel Chemicals Ltd v Commission*, (30 October 2003, unreported), para 121. The order of the President of the Court of First Instance granting interim measures was annulled on appeal to the President of the Court of Justice on the grounds that it was not established that the order was necessary to prevent serious and irreparable harm to the applicant: Case C-7/04P(R) *Commission v Akzo Nobel Chemicals Ltd* (27 September 2004, unreported). However, the President of the Court of Justice did not comment on the analysis relating to whether or not legal professional privilege should extend to communications with in-house counsel.

[81] Joined Cases T-125/03R and T-253/03R *Akzo Nobel Chemicals Ltd v Commission* (op cit n 80).

[82] Ibid, para 122.

[83] Ibid, para 124.

[84] Ibid, para 125.

of the Member States was material to the judgment of the ECJ in *AM & S v Commission*, where the Court referred to 'the legal traditions common to the Member States'.[85] Furthermore, the policy justifications for the privilege recognized by the Court of Justice in the *AM & S* case are not necessarily excluded by the fact that the lawyer is employed by the client insofar the lawyer is asked to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs.[86]

The *AM & S* and *AKZO* cases on legal professional privilege in Community law can be understood as a quite straightforward application of the proposed model. Firms and their legal advisers as users of the system have an aspiration, or a 'legitimate expectation', that legal professional privilege should be upheld in Community law. In this respect, it is interesting to note that in both cases professional associations of lawyers intervened in the proceedings. The introduction of, or the attempt to broaden the scope of, the 'due process' requirement in Community law in thus triggered by the users of the system and argued on the basis of the law of the Member States that already recognize the requirement.

4.4. Position of complainants and other third parties in investigations under the Competition Act 1998

The impact of Community law on national standards of procedural fairness may go beyond the sphere of the national application of Community law. In *Pernod Ricard SA v Office of Fair Trading*, the appellants argued that the OFT should have disclosed a non-confidential version of the notice under rule 14 of the OFT's rules (the equivalent of the statement of objections) to them and consulted them before closing an investigation into an alleged abuse of dominant position by Bacardi-Martini Ltd. The notice in question had been served on the undertaking alleged to have abused its dominant position but not on the complainant. The proceedings had been conducted under the Competition Act 1998 and at the relevant time the OFT did not have the power to apply Articles 81 and 82 EC. The appellants had complained to the OFT about exclusionary practices by Bacardi and, in the words of the Competition Appeal Tribunal, its 'interests were directly and closely affected by the outcome of the OFT's investigation'.[87]

The Tribunal ruled against the OFT on two alternative grounds: 1) section 60 of the Competition Act 1998; 2) the administrative law duty to act fairly. The reasoning of the Tribunal in relation to both grounds demonstrates that the requirements of 'due process' under Community law have played a significant role in the judgment.

As regards the ground based on section 60 of the Competition Act 1998, the decisive role of Community law for the Tribunal's conclusion is clear. Section 60 of the Act requires the OFT, the concurrent regulators, and any UK court or tribunal to ensure that questions arising under Part I of the Competition Act 1998 in relation to

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[85] *AM & S Europe Ltd v Commission* (op cit n 67), para 66.

[86] Ibid, para 24.

[87] *Pernod Ricard SA v Office of Fair Trading* [2004] CAT 10, para 236.

competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the Community. This duty only arises so far as it is practicable having regard to any material difference between the provisions in question. The Tribunal held that the OFT should have given the appellants the same opportunities to be heard as they would have been given under Community law. Whether or not this is the correct legal position under UK law, it is important to note that the consequence of the Tribunal's ruling was that the OFT was bound by the rules applicable in Commission proceedings. Section 60 of the Competition act 1998 was thus construed so as to ensure consistency between Community law and national law not only in the application of the substantive provisions but also in the area of 'due process'.

As regards the ground based on the duty of fairness under English law, the Tribunal held that it had been unfair, in the circumstances of the case, not to disclose a non-confidential version of the notice under rule 14 of the OFT's rules to the appellants. It went on to say:

> Moreover, whatever the strict interpretation of section 60, in deciding what would be a fair and reasonable exercise of the OFT's discretion, we think we are entitled to take into account how the EC Commission would proceed in similar circumstances.

This case demonstrates that Community law requirements of 'due process' influence English law in two ways. The first may be through section 60 of the Competition Act 1998 if the Tribunal was correct to hold that issues of procedure are 'questions […] in relation to competition within the United Kingdom' and insofar as there are no relevant differences between the provisions concerned. The second is through a 'softer' process of convergence of national law towards Community law based on the interpretation of national law taking into account how the question would be determined under Community law.

The *Pernod* case bears witness to the complexity of the process of adoption and application of 'due process' requirements. In the *AM & S* and *AKZO* cases, national law standards interact with Community law, through the concept of 'legal traditions common to the Member States', to give rise to new fairness requirements at Community level. In the *Pernod* case, Community law interacts with national law, through a national law provision aimed to ensure consistency between Community law and national law or through a process of converging interpretation of national law, to reshape and clarify national fairness requirements in a way which is consistent with Community law.

E. CONCLUSION

This paper argued that the term 'due process' is not a defined legal concept in itself. The term, however, is important because it contributes to the discourse on procedural fairness in two ways. At national level, it shifts the focus from the common law approach to the hermeneutics of rights. While at common law the requirement of procedural fairness is the result of a balancing exercise, a rights-based approach generally means that the substance and scope of the 'right' must be identified before

carrying out any balancing exercise relating to the extent to which the right can be limited or interfered with. At European level, the concept of 'due process' provides a shared platform for vertical and horizontal convergence.

In legal terms, the concept of 'due process' is better described as a set of procedural requirements belonging in legal sub-systems, which include international law, Community law, national law, and aspirations of the users of the system. This model is a system and a process. It is a system because the constituent sub-systems interact with each other. It is a process because procedural requirements may be transplanted from one sub-system to the other in a temporal sequence. The model has a static and a dynamic dimension. The static dimension relates to the basis of the requirement, its origin, and the remedies for its infringement. The dynamic dimension relates to the process of transplant of 'due process' requirements from one sub-system into another. The transplant process is more complex if the requirement in question is context-specific and not self-standing while the less context-specific the requirement is, the more straightforward the transplant. This paper applies the proposed model to the principle of *ne bis in idem*, the privilege against self-incrimination, the legal professional privilege, and the determination of the rights of complainants and other third parties in national competition proceedings.

Starting with the *ne bis in idem* principle, there is currently no case law on how this principle might apply to the types of decision that may be adopted by national competition authorities. The application of the analytical model proposed in this paper leads to the following conclusions: a) the principle of *ne bis in idem* has been transplanted from national law to international conventions. It was then adopted by Community law based both on the national legal systems of the EU Member States and on public international law standards. Currently, the principle is been re-imported into the national legal systems of the Member States after having been transformed by the dynamic process of transplant from national law into public international law and Community law; b) the difficulty in the process results from the context-specific and not self-standing nature of the principle of *ne bis in idem*. It has been transposed from the national criminal law systems into a transnational/international context where autonomous concepts of 'criminal charge' and 'criminal proceedings' were adopted. The same principle, together with the autonomous concepts of 'criminal charge' and 'criminal proceedings', is now been transposed back into national law not in the field of national criminal law, where it originated, but in the field of administrative law; c) this further transposition requires adapting the tests adopted by the Community courts to the national legal systems under the framework of Regulation 1/2003. Therefore, because of the very nature of the process of adoption of the standard, it is not possible to provide solutions that are the same in all Member States and in all circumstances, the reason being the context-specific and not self-standing nature of the standard; d) an acute problem arises with regard to decisions by national competition authorities or the Commission that are based on lack of evidence of the infringement after a full investigation has been conducted with the involvement of the parties to the alleged infringement. In criminal proceedings lack of evidence leads to an acquittal, i.e. a decision barring further proceedings. In civil proceedings the same fundamental principle applies: a party failing to prove his case fails on the merits. If the claimant fails

to establish any element of the cause of action the court will give judgment for the defendant. This judgment is a final decision on the merits that bars further proceedings under the doctrine of *res judicata*. However, the same principles may not apply to administrative authorities even where the administrative proceedings are criminal in nature for the purposes of the application of international standards. Transposing an international standard created with the aim of ensuring the fairness of criminal trials into national administrative law systems based on discretionary powers of investigation may be problematic; e) it is possible to predict that parties to administrative investigations and their legal advisers will rely on the principle of *ne bis in idem* more often than in the past because of the system of concurrent enforcement of competition law under Regulation 1/2003. The process is on-going and while guidance may be found in the current case law, the substance and scope of the principle may have to be redefined in the new context in a way which is, at least in part, dependent on the features of the national administrative law systems in which the principle is applied.

The substance and scope of the privilege against self-incrimination in criminal law have been shaped in centuries of judicial interpretation and statutory interventions. However, even this highly developed area of national law was not immune from the influence of the European Human Rights Convention. The widening of the scope of protection under national law was triggered by the application of a user of the system to the European Court of Human Rights and led to statutory amendments in national law. The current provisions on use of statements obtained under compulsion contained in the Enterprise Act 2002 and the Competition Act 1998 are the result of this process.

Insofar as administrative proceedings are concerned, the privilege against self-incrimination has the dual nature of a Convention right and a fundamental principle of Community law. While technically, under UK law the Community law privilege takes precedence over the Article 6 of the European Human Rights Convention, arguments based on the privilege are generally drawn both from Community law and the jurisprudence of the European Court of Human Rights, without distinctions. National courts are likely to apply both set of precedents in an integrated way, reconciling any possible conflicts. The precise scope of the privilege under national law is yet to be defined but the current administrative practice seems to follow closely the case law of the Community courts.

The current topics of legal professional privilege in Community law and complainants' and other third parties' rights in UK law can also be more easily explained under the proposed model. The issue of legal professional privilege in EC law may depend, to a significant extent, on the position under the national laws of the Member States. On the other hand, complainants' and other third parties' rights under UK law are a question of national administrative law where Community law may have a significant role to play.

In conclusion, the 'due process' discourse and the dynamic process of adoption and definition of standards of procedural fairness facilitate two types of interaction: a) vertical interaction between the Community legal order and the legal systems of the Member States; b) horizontal interaction between the legal systems of the Member

States.[88] This on-going process shifts the focus from national law requirements to transnational concepts and principles. Such concepts and principles serve two functions. The first is analytical. They form the common ground for the discussion on policy, enforcement practice, and decision-making, including the legislative process. The second is instrumental. The adoption of shared concepts and principles makes it possible to compare models adopted under national law, to share experiences and best practices and, if appropriate, to change national law or practice in the framework of an osmotic process. The result may be convergence through 'spontaneous harmonization' rather than binding measures. It would appear that 'spontaneous harmonization' may be more appropriate in the field of 'due process' because of the highly technical and context-specific nature of certain procedural requirements.

[88] While the vertical interaction lies at the heart of the application of Community law, the horizontal interaction in the field of procedural law is still embryonic. However, the horizontal interaction is as important as the vertical interaction in the process of spontaneous harmonization of the legal systems of the EU Member States.