
THE COMPETITION LAW REVIEW

Volume 7 Issue 1 pp 5-52

December 2010

**Cartel Proof, Imputation and Sanctioning in European Competition Law:
Reconciling effective enforcement and adequate protection of procedural
guarantees***Andreas Scordamaglia**

The paper assesses the interplay between ‘fundamental procedural guarantees’ and the need to ensure ‘effective cartel enforcement’ as reflected on the rules concerning the legal proof of cartel infringements. More specifically, in view of the new provisions of the Lisbon Treaty that accords ‘Treaty value’ to the Charter and paves the Union’s accession to the ECHR, the paper first analyses the legal framework where fundamental rights operate in Europe. After identifying the rights that are pertinent in cartel proceedings, the paper attempts a novel reading of the characterisation of the legal nature of competition proceedings. Against this general background, the article embarks upon a detailed examination of the rules dealing with the legal characterisation, attribution of liability and sanctioning of cartels. It is submitted that the extensive use of presumptions is justified in view of the ‘information asymmetry’ characterising cartel infringement and no longer constitutes a risk of abuse in view of the increased probative value of evidence obtained through Leniency. Nevertheless, possible inconsistencies with regard to the ECHR standards could arise in the future with regard to the unpredictability of the sanctioning rules and the automatic way parental liability is established. Concluding, it is submitted that the current level of protection does accommodate the issues at stake as to workably reconcile effectiveness and a reasonable protection of defence rights, as well as, the risk of opportunistic use of procedural guarantees. Moreover, speculating on the future interplay between the Luxemburg and Strasburg courts, it is proposed that the Community enforcement system, benefiting from the *Bosphorus* presumption of legality and the ‘manifest deficiency’ rebuttability standard, will remain unaffected.

1. INTRODUCTION**1.1 The place of cartel enforcement in the general ‘due process’ debate**

The question of ‘due process’ in Community competition proceedings has been at the forefront of the future competition reforms debate. Academia, practitioners and even the press¹ have increasingly voiced some criticism with regard to an alleged deficient protection of the undertakings’ rights of defence in Community antitrust administrative proceedings. Their recurrent argument is that in light of the noticeable increase in the magnitude of antitrust fines, competition proceedings should no longer be considered

* EUI, Florence.

¹ The Economist, ‘Antitrust in the European Union - Unchained watchdog: Businesses think Europe’s trustbusters should be kept on a tighter leash’, Feb 18th 2010, http://www.economist.com/business-finance/displaystory.cfm?story_id=15546333. ; The Economist, ‘Prosecutor, judge and jury: Enforcement of competition law in Europe is unjust and must change’, Feb 18th 2010, http://www.economist.com/opinion/displaystory.cfm?story_id=15545914.

administrative but rather criminal, thereby triggering the higher level of protection guaranteed by the European Convention of Human Rights (hereafter ECHR)² and in particular Article 6 ('right to a fair trial').³ The criticism has not been to no avail as numerous articles have been written, in particular by Commission affiliates,⁴ defending the current enforcement structure as sufficient to guarantee the fundamental rights of investigated parties. Moreover, at the political level, in a recent speech⁵ the newly appointed Competition Commissioner Almunia sought to tame the criticism on matters of due process by reiterating that the Commission's internal checks and balances do guarantee the fairness and transparency of proceedings, acknowledging that possible improvements could be achieved in the future.⁶ Aside this alleged inherent institutional downside of European antitrust enforcement, the debate has become more topical due to the ramifications of the Lisbon Treaty which, not only finally made the Charter of Fundamental Rights (hereafter Charter)⁷ legally binding, according to its Treaty value, but also streamlined the future accession of the EU to the ECHR.

Against this background, the 'due process' debate calls for a horizontal appraisal of the current level of procedural safeguards that covers the whole spectrum of competition infringements. For, if the revisiting of fundamental rights protection is to be prompted by the increased magnitude of fines, the assessment of public competition enforcement against the rules on 'due process' cannot be conducted in a fragmented manner, distinguishing between different types of Article 101 or 102 TFEU⁸ infringements. This is so, because Article 23(2)(a) of Regulation 1/2003⁹ makes no distinction between the types of infringement with regard to the magnitude of the imposed fines. Indeed, very severe fines have been imposed in both fields of abuse of dominance, often based on complex economic theories of harm, as well as in cases with obvious anticompetitive

² European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4.11.1950.

³ See SLATER, D., et al. (2008) 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', GCLC Working Paper 04/08.

⁴ See articles of members of the Legal Service (in their non-institutional capacity) WILS, W. P. J. (2010) 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', *World Competition*, Vol.33, p.5–29 ; CASTILLO DE LA TORRE, F. (2009) 'Evidence, Proof and Judicial Review in Cartel Cases', *World Competition*, Vol.32(4), p.505–578, or the former Secretary General of DG Comp, LOWE, P. (2009) 'Cartels, Fines, and Due Process', *Global Competition Policy - Online magazine*, June (2) and LOWE, P. (2009) 'Reflections on the past seven years – Competition policy challenges in Europe', 17 November 2009, Kyonote speech, Conrad Hotel, Brussels.

⁵ ALMUNIA, J. (2010) Speech 10/81, 'Antitrust policy: the road ahead', *International Forum on EU Competition Law*, 09.03.2010, Brussels, p 5.

⁶ The Commissioner also recalled the efforts undertaken by DG Comp in the recent 'Best Practices Guidelines' aimed at improving the transparency and predictability of antitrust proceedings. See Commission Press release, IP/10/2, 'Antitrust: improved transparency and predictability of proceedings', 06.01.2010.

⁷ Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁸ Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.3.2010.

⁹ Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16.12.2002, OJ 2003, L1/1.

effects, such as cartel infringements. Furthermore, the Charter or ECHR rights involved in competition proceedings are recurrent and associate less to the actual type of anticompetitive conduct and more to the proceedings that surround its investigation. Despite the pluridimensional nature of the debate, the paper focuses on ‘due process’ aspects that are of specific importance to cartels, and in particular those pertaining to their legal qualification. What justifies such an ‘autonomous’ analysis of the law, are the specificities that cartel infringements present.

1.2 Specificities of cartel enforcement justifying an autonomous analysis

In the course of the so-called ‘war on cartels’, waged on both sides of the Atlantic,¹⁰ cartels have been attributed demeaning epithets such as the ‘ultimate evil of antitrust’,¹¹ the ‘most egregious violation of competition law’¹² or the ‘scourges of competition’¹³ - a ‘most damaging type of anti-competitive practice’¹⁴ calling for a ‘zero tolerance policy’ as to ‘stop money being stolen from customers’ pockets’.¹⁵ Yet, it is not their patent deleterious effect on markets that, from an enforcement point of view, distinguishes cartels from any other type of competition infringements. Rather, it is the inaccessibility of incriminating evidence that characterises a cartel. The clandestine character of cartels grants cartel participants a monopoly (over competition enforcers) regarding the possession of such evidence. On top of this, especially in view of today’s increasing technological advancements,¹⁶ evidence detection is hardened and cartelists remain in full control over its existence and its elimination. Moreover, irrespective of their clandestine character, cartels are difficult to prove due to their varying and mutating characteristics. Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of

¹⁰ See in the EU Commissioner Neelie Kroes Speech 07/128, ‘Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe’, Brussels, 8th March 2007, p 4. See in the US, AG Hammond of the DoJ, ‘The detection, prosecution and deterrence of cartel offences remain the highest priority of the Antitrust Division’, in HAMMOND, S. D. (2008) ‘Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program’, 56th Annual Spring Meeting - ABA Section of Antitrust Law, p 1.

¹¹ *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) per U.S. Supreme Court Justice Antonin Scalia.

¹² OECD, Recommendations of the Council concerning Effective Action against Hard Core Cartels - 1998, <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.

¹³ Neelie Kroes, Competition Commissioner, Press Release IP/06/698, ‘European Commission Competition: Commission Imposes Fines of €344.5 Million on Producers of Acrylic Glass for Price Fixing’ (31 May 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/698&format=HTML>

¹⁴ Commissioner Neelie Kroes Speech 05/157, ‘Taking Competition Seriously – Anti-Trust Reform in Europe’, International Bar Association / European Commission Conference, 10.03.05, p 6.

¹⁵ *Ibid.*, pp 5,6. An internal study undertaken by the Commission showed that the harm caused by the cartels, fined by the Commission during the period 2005-2007, is estimated around €7.5billion, on the basis of a 10% overcharge assumption - See also LOWE, P. (2009) *supra* fn 4, p 2.

¹⁶ See JALABERT-DOURY, N. (2009) ‘Digital evidence searches in competition investigations : best practices for effective fundamental rights: results of an international survey among defense lawyers’, *Concurrences: revue des droits de la concurrence*, No 4, pp 65-73.

each individual undertaking may vary and take different forms. These specificities impose a near unbearable threshold for competition authorities to prove in detail an infringement, let aside to impose an appropriate sanction reflecting the cartelists' real participation.¹⁷

It is against these specificities of cartels that the whole debate on a potential trade-off between 'effective enforcement' and 'procedural guarantees' is framed; the 'informational asymmetry' justifies a separate analysis despite the fact that often the terms of the debate with regard to public enforcement are of a transversal nature. In other words, from a normative point of view, in order to overcome the informational asymmetry competition authorities should be able to rely on legal rules that do not restrict their capacity to investigate and legally prove the existence of a cartel.

1.3. Structure of the paper

In essence, the paper is based on a conceptually simple premise - undertakings participating in cartels have a strategic advantage compared to competition authorities in that they are in possession and control of all incriminating evidence. This structural imbalance that ultimately hinders detection justifies the adaptation of evidence-related rules that aim at overcoming the informational asymmetry: i) in the investigatory phase, by increasing the investigatory capacity and the application of lenient procedural guarantees and ii) in the post-investigatory phase, by lowering the standard of proof (legal proof) and facilitating rules on liability and sanctioning. The paper focuses only on the latter, and in particular analyses the rules on legal characterisation of cartels, the rules on imputation of liability and those on imposition of fines. The potential loosening of those legal rules needed to promote 'effective enforcement' are therefore analysed against the relevant fundamental rights, especially those pertaining to Articles 6 and 7 ECHR.

Building on this premise the paper is structured in three parts: the first, theoretical, Part 2 lays out the general framework of fundamental right protection in the context of cartel proceedings as to be able to analyse with better foresight, in Part 3, the place of fundamental rights in the legal characterisation, imputation and sanctioning rules. Finally, in Part 4, some general conclusions will be drawn on the necessity of introducing further reforms as to strike a reasonable balance between the two goals of effectiveness and adequate protection in that area of law.

2. THE GENERAL LEGAL FRAMEWORK OF 'COMPETITION' PROCEDURAL GUARANTEES IN THE EU

This part analyses in detail the general legal protection accorded to 'procedural guarantees' in the context of antitrust proceedings. It first sketches the general Community legal framework of human rights protection (2.1) and contextualises the

¹⁷ For a detailed account of the probational difficulties see Joined Cases C-204/00 P, *Aalborg Portland A/S v Commission (Cement)*, [2004] ECR I-123, paras 54-59.

relevant rights of competition proceedings (2.2). It then discusses the contentious issue of the legal nature of Commission proceedings (2.3) that is fundamental with regard to the assessment of the issues of proof discussed thereafter.

2.1 General legal framework of human rights protection in the EU

The protection of procedural guarantees pertaining to evidence should be viewed against the more general background of human rights protection in the EU.¹⁸ While all Member States are parties to the European Convention of Human Rights (ECHR) the same does not apply (yet) for the European Union. From the early days, the principles of supremacy and direct effect of EC law brought some uneasiness in the relationship between Community law and fundamental rights protected in the national order. In a notorious series of cases¹⁹ the Court proclaimed that ‘respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice’. In guaranteeing the effective protection of those rights the Court drew inspiration from the constitutional traditions common to the Member States and from the international treaties, explicitly stating the special significance of the ECHR.²⁰ While formally attributed the status of general principles of EC law in Article 6(2) of the Treaty on European Union, the ECHR has never become directly part of the *acquis communautaire* and thus, nor directly applicable as such. This raised questions in particular as to the enforceability of the ECHR *vis-à-vis* the Community institutions. In view of the institutional implications of constitutional significance, a possible accession to the Convention had to be brought, according to the Court, only by way of Treaty amendment.²¹

The Community response to this *legal vacuum* was to enact the ‘Charter of Fundamental Rights’ in 2000, marking an ambitious effort for the consolidation of fundamental rights that, while modelled on the ECHR, opted for the possibility of a more extensive protection. Its *sui generis* legal value (‘solemn proclamation’) meant that it served a declaratory purpose²² that, however, lacked legally binding force on Member States and Community institutions. Despite this ambiguity concerning the legal value of the Charter, the Court referred to the Charter in a series of judgements, thereby reflecting its willingness and commitment to protect fundamental rights.²³ In the field of

¹⁸ See AMEYE, E. M. (2004) ‘The Interplay between Human Rights and Competition Law in the EU’, *European Competition Law Review*, 25, 332-341.

¹⁹ E.g. Case 11/70, *Internationale Handelsgesellschaft mbH*, 17.12.70, [1970] ECR 1125, para 4.

²⁰ Case 36/75, *Rutili* [1975] ECR 1219, para 32 ; Case C-260/89, *ERT* [1991] ECR I-2925, para 41.

²¹ Opinion 2/94, *Accession by the Community to the ECHR*, [1996] ECR I-1759, paras 34-36.

²² GRAIG, P. (2006) *EU Administrative law*, OUP, Collected courses of the Academy of European Law; vol. 16/1, p 385, 493-495.

²³ BURGORGUE-LARSEN, L. (2006) ‘L'apparition de la Charte des droits fondamentaux de l'Union dans la jurisprudence de la CJCE ou les vertus du contrôle de légalité communautaire’, *L'actualité juridique: droit administratif*, No.41, pp 2285-2288; See also Opinion of A.G. Kokott, Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, December 13, 2007, ft 59, ‘Admittedly, the Charter of fundamental rights does

competition proceedings, the Court expressly pointed that most of the relevant rights were in substance already protected in Community law prior to the adoption of the Charter²⁴ as general principles of law. It is therefore to no surprise that Regulation 1/2003 incorporates the Charter's protection by specifying that its provisions should be interpreted and applied with respect to the Charter rights and principles.²⁵

The recently ratified Lisbon Treaty²⁶ seems to bring an end to this legal ambiguity as it attributes to the Charter the 'same value as that of the Treaties'.²⁷ Furthermore, as of December 1st 2009, it enables the Union to become member to the ECHR. Therefore, it is in light of the ramifications of the Lisbon Treaty, namely the 'constitutionalisation' of two parallel systems of protection of fundamental rights, that the analysis of the procedural guarantees related to evidence should be carried out. Until the Union's accession to the ECHR²⁸ (in mid-March 2010 the long-lasting accession negotiations started),²⁹ the Convention's minimum protection standards will officially be safeguarded by the Community Courts by means of the Charter (*by proxy*) as, by virtue of Article 52(3) of the Charter, 'in so far as this Charter contains rights which correspond to rights guaranteed by the ECHR the meaning and scope of those rights shall be the same as those laid down by the Convention'.

2.2. 'Human Rights' in the context of cartel investigations

2.2.1. Is it possible to apply 'human rights' to 'companies'?

Prior to providing an exhaustive outline of the relevant procedural rights, a preliminary question should be posed; can undertakings be beneficiaries of Charter or Convention rights? Whether that is objectionable due to the risk of abusive use of human rights by large corporations falls beyond the scope of analysis of this paper.³⁰ Nevertheless, it suffices to say that according to some authors the framers of the ECHR have always intended to extend protection to companies, in view of the socio-economic

not yet as such have binding legal effect comparable to that of primary law, but as a source of recognition of law it does shed light on the fundamental rights guaranteed by Community law³.

²⁴ Case T-210/01, *General Electric v Commission*, [2005] ECR II-5575, para 725; See also the Commission's solemn commitment of compliance with the Charter (statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000).

²⁵ Recital 37 of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16.12.2002, OJ 2003, L1/1.

²⁶ Consolidated Treaties on European Union and on the Functioning of the European Union, 2008 OJ, C115/01.

²⁷ Article 6(1) of the Consolidated Treaty on European Union (Note the UK and Polish opt-out protocols).

²⁸ Article 6(2) of the Consolidated Treaty on European Union.

²⁹ See speech of Justice and Fundamental Rights Commissioner, Viviane Reding, of March 18th, 2010, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe', available at www.ec.europa.eu/commission_2010-2014/.../speech_20100318_1_en.pdf.

³⁰ For an extensive analysis of this dilemma see EMBERLAND, M. (2006) *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press.

implications traditionally taken into account by the European Court of Human Rights (hereafter ECtHR). Generally, it is widely accepted that the Convention was conceived to operate in a socio-economic environment characterized by democracy, the rule of law and free-market economy,³¹ the latter justifying the extension of protection of some fundamental rights to corporate entities. Nevertheless, not all rights are transposable to legal entities, especially when the ‘human’ element of the right makes such transposition impossible (e.g. right to life). Besides, the dividing line between ‘human’ and ‘supra-human’ rights is not always clear, as exemplified in the case of the right against ‘self-incrimination’.³² In such situations Courts would either inevitably adapt with regard to the intensity of the protection granted or bar the claim – either way they would have to resort to policy considerations.

2.2.2. An overview of pertinent rights in cartel enforcement

The Strasbourg Court has extended some rights and freedoms that by nature can be extended, *mutatis mutandis*, to companies and corporate entities.³³ The legal unenforceability of the ECHR rights before Community Courts has not dissuaded undertakings from invoking ECHR rights in support of their claims. Notably, the range of rights invoked goes far beyond the classical Article 6 guarantees. The most commonly invoked right in cartel appeals is that of right to a fair trial (Article 6(1)). Rather surprisingly, this fundamental article has most frequently been invoked to challenge the capacity of the Commission to conduct impartially and independently antitrust proceedings due to its dual institutional role of judge and prosecutor.³⁴ Moreover, a great number of cases are brought on the ground of the Commission’s failure to deliver a decision within reasonable time.³⁵ Other claims are made in relation to the way the Commission retrieved or used evidence to find an infringement, usually alleging the use of inadmissible, insufficient or illegal incriminating evidence³⁶ or of an infringement of the right against self-incrimination.³⁷ Moreover, numerous are also the claims that allege a breach of the right to a fair hearing,³⁸ inadequate access to file³⁹ or

³¹ ANDREANGELI, A. (2008) *EU competition enforcement and human rights*, Cheltenham, UK; Northampton, MA: Edward Elgar, p 22; EMBERLAND, M. (2006), *supra fn 30*, p 40.

³² Case 374/87, *Orkem v Commission*, [1989] ECR 3283, paras 28-31, where the ECJ held that the right against self-incrimination is limited natural persons only.

³³ See the landmark decision *Pudas v Sweden A 125* (1987); (1988) 10 EHRR 30 which extends protection under the ECHR to legal persons undertaking private commercial activities.

³⁴ See early cases Joined Cases 209-215, 218/78, *Van Landenyeck*, [1980] ECR 3125, paras 80-81 and Joined Cases 100-103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1825, or more recently Case T-54/03, *Lafarge v Commission*, [2008] E.C.R. II-120, paras 33-39.

³⁵ See first case C-185/95 P *Baustahlgevebe v Commission* [1998] ECR I-8417, or more recently Case T-58/01, *Solvay v Commission*, [2009], paras 91-96.

³⁶ See Case T-30/91, *Solvay SA v. Commission*, [1995] E.C.R. II-1775, para 31.

³⁷ See Case 374/87, *Orkem v Commission*, *supra fn 32*, paras 18-30.

³⁸ See Case T-213/95, *SCK and FNK v Commission*, [1997] ECR II-1739, para 215.

³⁹ See Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P, *Aalborg Portland A/S v Commission (Cement)*, [2004] ECR I-123, paras 65-71.

unequal treatment.⁴⁰ Finally, Article 6(1) has been also used to challenge the insufficient motivation, evidence presentation before the Court⁴¹ and the lack of predictability or transparency in the manner of imposition of fines.⁴²

Apart from Article 6(1) derivative rights, a very common claim is that of the infringement of the presumption of innocence usually by means of an illegal reversal of the burden of proof, or insufficient probative value of evidence infringing the *in dubio pro reo* principle (Article 6(2)).⁴³ Furthermore, parties have frequently invoked the principle of *nulla poena sine lege* (Article 7)⁴⁴ and the right of inviolability of the home (Article 8).⁴⁵ Also, a significant number of claims have also alleged breach of the *ne bis in idem* principle⁴⁶ of Article 4 of Protocol No.7.⁴⁷ Finally, some very specific rights have also made their appearance before Community Courts in the context of cartel litigation, such as the right to information on proper language (Article 6(3)(a)),⁴⁸ as well as the right to witness examination (Article 6(3)(d))⁴⁹ or some rights that are more remotely linked to cartel enforcement, such as the right to liberty and security (Article 5),⁵⁰ the freedom of expression (Article 10)⁵¹ and of assembly and association (Article 11).⁵²

Moreover, despite its lack of legally binding force (it became legally binding only as of December 1st 2009) the Charter has also been invoked in cartel cases, but generally in support of the aforementioned Convention rights, i.e. the right to respect for private

⁴⁰ See Case T-347/94, *Mayr-Melnhof Kartongesellschaft v Commission*, [1998] ECR II 1751, paras 9-11.

⁴¹ For instance with regard to the invitation to submit common oral defence: Case C-238/99 P, *Limburgse Vinyl Maatschappij and others (PVC II) v Commission*, [2002] ECR I-8375, para 345; the absence of cross examination of witnesses: Joined Cases C 204/00 P, *Aalborg Portland A/S v Commission (Cement)*, *supra* fn 39, para 200.

⁴² See *infra* part 3.2.

⁴³ See Case T-10/89, *Hoechst v Commission*, [1992] ECR II-629, para 252.

⁴⁴ In chronological order Case T-23/99, *LR AF 1998 v Commission*, [2002] ECR II-1705. Paras 212, 218-219, 233; Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, [2003] ECR II-2597, para 39; Case T-99/04, *AC-Treuband v Commission*, [2008], paras 85-100

⁴⁵ See Case 46/87, *Hoechst / Commission*, [1989] ECR 2859, para 18.

⁴⁶ See Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *LVM etc. v Commission*, [1999] ECR II-931, para.54 ; Case T-38/02, *Groupe Danone v. Commission*, [2005] ECR II-4407, para 184 ; Case T-24/07, *ThyssenKrupp Stainless v Commission*, [2009] ECR II-2309, para 178 .

⁴⁷ Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No.11, Strasbourg, 22.11.1984.

⁴⁸ Case T-338/94, *Finnboard v Commission*, [1998] ECR II-1617, paras 39; Case T-99/04, *AC-Treuband v Commission*, [2008] ECR II-1501, paras 23-45.

⁴⁹ Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 389; Case T-109/02, *Bolloré v Commission*, [2007] ECR II-947, para 86.

⁵⁰ Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 327; Case C-238/99 P, *Limburgse Vinyl Maatschappij and others (PVC II) v Commission*, [2002] ECR I-8375, para 234.

⁵¹ See Case 43/82, *VBVB and VBBB v Commission*, [1984] ECR 19, paras 21-34; Case T-112/98, *Mannesmannröhren-Werke v Commission*, [2001] ECR II-729, paras 56-57.

⁵² Case C-235/92 P, *Montecatini v Commission*, [1999] ECR I-4539, para 137.

and family life (Article 7), the right of access to documents (Article 42),⁵³ the right to an effective remedy and a fair trial (Article 47(2)),⁵⁴ the presumption of innocence (Article 48(1)),⁵⁵ the right of defence (Article 48(2)),⁵⁶ the principle of legality and proportionality of criminal offences and penalties (Article 49(1))⁵⁷ and *ne bis in idem* (Article 50).⁵⁸ Furthermore, the right to property (Article 17)⁵⁹ and the right of equality before the law (Article 20)⁶⁰ have also been discussed before the Courts. Finally, some unrelated to competition enforcement freedoms have also been raised, such as the freedom of assembly and association (Article 12(1)).⁶¹

In conclusion, practice shows that undertakings have traditionally linked their claims to Convention rights. Charter rights have rarely been used to ground an autonomous claim but rather to second Convention rights. In view of the ‘constitutionalisation’ of the Charter, this trend is very likely to change and parties will be more inclined to refer to Charter provisions.

2.3. The legal nature of Commission proceedings

In the famous Dyestuffs case the plaintiffs made the following argument. They argued that ‘since the fines authorized by Regulation 17 are not of a criminal law nature, they should be imposed not in order to punish infringements which have already occurred, but in order to prevent their recurrence’.⁶² The Court rejected that argument as imposing such a limitation ‘would considerably reduce the deterrent effect of fines’. The question posed by plaintiffs goes at the core of the discussion regarding the legal nature of enforcement procedures. If deterrence is the objective, as a matter of principle, it remains unclear why the whole procedure should not be attributed a criminal facet.

Qualification of the legal nature of the cartel procedures is determinant not only with regard to the procedural guarantees of the undertakings concerned but also as to

⁵³ Joined Cases C 204/00 P, *Aalborg Portland A/S*, supra fn 39, para 94.

⁵⁴ See Case T-112/98, *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, paras 15-16, 76; Case T-99/04, *AC-Treuband v Commission*, [2008] ECR II-1501, para 77.

⁵⁵ See Cases T-22/02 and T-23/02, *Sumitomo Chemical v Commission*, [2005] ECR II-4065, para 68, 103; Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, [2007] ECR II-4225, paras 46,75.

⁵⁶ See Case T-99/04, *AC-Treuband v Commission*, [2008] ECR II-1501, para 23.

⁵⁷ Case C-76/06 P, *Britannia Alloys & Chemicals v Commission*, [2007] ECR I-4005, para 76; Case T-259/02, *Raiffeisen Zentralbank Österreich v Commission*, [2006] ECR II-5169, para 217; Case T-279/02, *Degussa v Commission*, [2006] ECR II-897, Case T-43/02, *Jungbunzlauer v Commission*, [2006] ECR II-3435, paras 65-68; Case T-99/04, *AC-Treuband v Commission*, [2008] ECR II-1501, para 83.

⁵⁸ See infra part 3.3.3.

⁵⁹ Opinion of A.G. Kokott in Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, [2007], para 214.

⁶⁰ Case T-161/05, *Hoechst GmbH v Commission*, [2009] ECR II-3555, paras 44, 68.

⁶¹ Case T-217/03, *FNCBV and others v Commission*, [2006] ECR II-4987, para 95.

⁶² Case 49/69, *BASF v Commission*, [1972] ECR 713, para 37.

determine the rules on proof, and in particular the evidential standard and burden of proof. Both at the EC level, but also at the national level, the legal qualification of the cartel proceedings determines the applicable substantial and procedural law, which in turn qualify the requisite standard or burden of proof. This in practice can mean that at the level of public enforcement, qualifying the cartel procedure as a criminal procedure would *de jure* suggest that the standard of proof should be set higher compared to a mere administrative law qualification.

2.3.1. The ‘administrative’ law classification deriving from a ‘formal/textual’ interpretation of the Community Courts

Article 23(5) of Regulation 1/2003 stipulates that decisions imposing, *inter alia*, sanctions for infringement, ‘shall not be of a criminal law nature’. *A contrario*, this textual interpretation suggests that fines imposed are administrative in nature, and therefore the procedure and, in particular, the rules on evidence, are not to be subjected to criminal standards. The non-criminal characterisation of the Commission proceedings has been present from the very beginning of the Commission’s activities. For instance, while the initial 1960 Commission proposal of Regulation 17/62 did not include such an explicit characterisation,⁶³ its explanatory note regarding sanctions the Commission mentioned that ‘ces amendes ont le caractère de mesures administratives et non de sanctions pénales’.⁶⁴ This was effectively endorsed in the adopted version of Regulation 17 in Article 15(4).

According to this literal interpretation, the Commission was entrusted by the EC Treaty as an administrative body possessing the hybrid powers of ‘investigating cases’, as well as finding that there have been ‘infringements of article 81 and 82’, and imposing appropriate ‘measures’ to bring the infringement to an end. Therefore, as pointed by Wils, it combines the ‘investigative and prosecutorial function with the adjudicative or decision-making function’.⁶⁵ These particular prerogatives of the Commission in applying competition law have prompted the ECJ to state in numerous occasions⁶⁶ that the Commission is not to be regarded as a ‘tribunal’ within the meaning of Article 6 of the ECHR.⁶⁷ This interpretation also reflects the formal current position of the Commission as expressed by its Director General, Philip Lowe.⁶⁸

⁶³ See Article 13 of Commission proposal IV/COM(60)158 final, p 46.

⁶⁴ «Exposé de motifs», p 19, IV/COM(60)158 final, p 18.

⁶⁵ WILS, W. P. J. (2004) ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’, *World Competition*, 27, 201-224; VESTERDORF, B. (2005) ‘Judicial review in EC competition law: reflections on the role of the Community courts in the EC system of competition law enforcement’, *Competition policy international*, 1, 3-27.

⁶⁶ Joined Cases 209-215, 218/78, *Van Landuyck*, [1980] ECR 3125, para 81 ; Joined Cases 100-103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1825, para 7.

⁶⁷ ORTIZ BLANCO, L. (2006) *European Community competition procedure*, Oxford, Oxford University Press, p 159.

⁶⁸ LOWE, P. (2009), *supra* fn 4.

The Court has, also, from its early case law and several times pointed out that the procedure before the Commission is administrative in nature.⁶⁹ Therefore the general principles of EU law, as applicable to Community competition law, need not necessarily have the same scope as when they apply to a situation covered by criminal law *stricto sensu*.⁷⁰ *Mutati mutandis*, the required standard of proof should be lower compared to the criminal one.

2.3.2. The ‘criminal’ law classification under the ECHR

2.3.2.1. The ECtHR notion of ‘autonomous criminal charge’

Besides this textual interpretation, AG Vesterdorf pointed that competition fines, notwithstanding what is stated in the Regulation, have a ‘criminal character’,⁷¹ and AG Léger,⁷² referring to ECtHR case law, described as an undisputed fact that fines amount to ‘criminal charges’. This suggested that along the ‘administrative’ law qualification in the EU a parallel ‘criminal law’ qualification existed under the ECtHR approach. The rationale behind this conception of a fine is explained by the ECtHR itself in *Deweere v Belgium*,⁷³ namely that:

‘the prominent place held in a democratic society by the right to a fair trial ... prompts the Court to prefer a “substantive”, rather than a “formal”, conception of the “charge” contemplated by Art.6-1. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question’.⁷⁴

The ECtHR was first confronted with a criminal qualification question in the famous *Engel* case⁷⁵ of 1976, where it laid out three criteria for determining whether proceedings in the sphere of military service, which are purportedly disciplinary, encroach on the criminal sphere and thus become subject to Art 6 guarantees. Accordingly, the Court examined: i) whether the provision defining the offence charged belongs to criminal law, according to the legal system of the respondent State, ii) the very nature of the offence; and, iii) the degree of severity of the penalty that the person concerned risks incurring. Under today’s established ECtHR’s jurisprudence, the criteria ii) and iii) are alternative and not necessarily cumulative,⁷⁶ although, ‘this does

⁶⁹ See Case 45/69, *Boehringer Mannheim v Commission* [1970] ECR 153, para 23. For recent cases see Case T-99/04, *AC-Treuhand v Commission*, [2008] ECR II-1501, para 113; Joint Cases C 204/00 P, 205/00 P, a.o., *Aalborg Portland A/S v Commission (Cement)*, *supra* fn 39, para 200; Joined Cases T-25,103-104/95, *Cimenteries CBR v. Commission*, [2000] ECR II-491, paras 717-718.

⁷⁰ Joined Cases C-189/02 P, a.o., *Danske Rørindustri A/S v Commission (Pre-insulated Pipes)*, [2005] ECR I-5425, paras 215-223.

⁷¹ Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v. Commission*, [1991] ECR II-867, para 885.

⁷² Opinion of AG Léger in Case C-185/95 P, *Baustablgenebe GmbH v EC*, [1998] ECR I-8417, para 31.

⁷³ *Deweere v Belgium*, A 35, para 44, [1980].

⁷⁴ See SLATER, D., *supra* fn 3, p 5.

⁷⁵ Judgment of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22, at para 81.

⁷⁶ Judgment of the ECtHR of 9 October 2003, *Ezgeb and Connors v. United Kingdom*, App. n° 39665/98 and 40086/98, at para 86.

not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge'.⁷⁷ Moreover, the 'autonomous' qualification applies transversally to Article 6, namely, to Article 6(1), to issues on the burden of proof (Article 6(2)) and the concrete rights of Article 6(3)⁷⁸ as well as to Article 7.

In *Öztürk v. Germany*⁷⁹ the ECtHR crystallized its conception of a fine by clarifying the scope of application of Art 6. *In casu*, a Turkish national lodged a complaint before the European Commission of Human Rights (hereafter HR Commission) on the grounds that the obligation to pay the interpretation costs incurred on the proceedings for a road traffic violation was in breach of Art 6(3)(e) of the ECHR.⁸⁰ The German government claimed that the applicant was not charged with a 'criminal offence'.⁸¹ Having regard to the second and third *Engels* criteria, the Court assessed the provisions of the German law. The Court acknowledged that the law provided punishment only in the form of a pecuniary fine, despite the fact that the fine exceeded the economical advantage the offender had obtained as a result of committing the offence. Moreover, if it exceeded the normal legal maximum penalty, the penalty could have been raised even more. More, the imposition of such a fine triggered through a 'point system' the risk for the offender of having his driving license withdrawn by the administrative authorities or his vehicle confiscated. In the Court's view, these measures that were accessory to the fine could have had serious effects on the life of the person concerned.⁸² All these factors led the Commission to conclude that the very nature of regulatory fine offences was criminal in character even if in the German legal system they did not belong to criminal law.⁸³ Recently in *Martinen v Finland*,⁸⁴ the Court reiterated the 'autonomous' meaning of the expression 'charge' as referring to cases where an 'individual's situation' has been 'substantially affected'.⁸⁵

⁷⁷ See *Bendenoun v France*, judgment of 24 February 1994, Series A no. 284, p 20, § 47; *Benham v the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p 756, § 56; *Garyfallou AEBE v. Greece*, judgment of 24 September 1997, *Reports* 1997-V, p 1830, § 33; and *Lauko v. Slovakia*, judgment of 2 September 1998, *Reports* 1998-VI, pp 2504-05, § 57).

⁷⁸ See *Phillips v UK*, Appl. no. 41087/98, [2001], para 35; OVEY, C. (2006) *Jacobs and White : the European Convention on Human Rights*, Oxford University Press, p 193.

⁷⁹ Judgment of the ECtHR of 21 February 1984, *Öztürk v. Germany*, A 73, paras 47-49.

⁸⁰ Art.6(3)(e) provides: 'Everyone charged with a criminal offence has the following minimum rights: ... to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

⁸¹ *Öztürk v. Germany*, supra fn 79, para 25.

⁸² *Ibid.*, paras 62-63.

⁸³ *Ibid.*, para 65.

⁸⁴ *Martinen v. Finland*, Appl. no. 19235/03, [2009].

⁸⁵ *Serves v. France*, 20 October 1997, para 42, *Reports of Judgments and Decisions* 1997-VI.

2.3.2.2. The application of the ECtHR case-law in competition fines and tax surtaxes

The ECtHR dealt only twice with the legal qualification of competition sanctions. In the first, the often cited *Société Stenuit*⁸⁶ decision, the HR Commission was asked to decide whether a French Ministerial decision to impose a fine constituted, for the purpose of the Convention, an imposition of a ‘criminal charge’ to which Article 6 guarantees accordingly applied (*in casu*, the right to be heard by a tribunal). France claimed that administrative authorities should be capable of imposing penalties provided that the interests of the person concerned are protected by guarantees and that by setting up a ‘Competition Commission’ France intended to establish a ‘fully adversarial’ administrative procedure where those guarantees would be provided. France also pointed that proceedings preceding the Competition Commission’s involvement were administrative and not judicial acts. The Commission rejected those arguments and found that the administrative fine was effectively a criminal charge. It first pointed that the fine was aimed to promote competition within the French market, thus affecting the general interests of society that are usually protected by criminal law. Moreover, it took account of the considerable level of the fine (5% of the undertaking’s annual turnover), proving the dissuasive goal of the sanction.⁸⁷ Thus, accordingly, the Commission ruled that the criminal nature of the case ‘stems without ambiguity from the range of the examined concordant indications’.⁸⁸ The second case, *M. & Co. v Germany*,⁸⁹ concerned a Commission competition case also brought before the HR Commission where the applicant requested to hold Germany responsible for failing to examine, before issuing a writ of execution for an ECJ judgement, whether Article 6 had been respected throughout the Commission antitrust proceedings. Despite declaring the application inadmissible, the HR Commission held that ‘for the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 had they been conducted by German and not by European judicial authorities’.

Despite the clear HR Commission’s proposition that competition fines should be characterized as criminal charges, those decisions are of weak precedential value (3rd importance level according to the ECtHR ranking).⁹⁰ The *Société Stenuit* case could have been significant, had the case not been struck out by the ECtHR⁹¹ only on procedural grounds and with no assessment on the merits. In the absence of any other conclusive authority, it appears helpful to draw some inspiration from the tax-surcharges case law

⁸⁶ *Société Stenuit v. France*, Appl. no. 11598/85, 11/07/1989 of the European Commission of Human Rights (at the time dealing with first instance applications).

⁸⁷ *Société Stenuit v France*, Appl. No. 11598/85, Report of the Commission, 30 May 1991, para 64.

⁸⁸ In French “il ressort sans ambiguïté du faisceau es indications concordantes relevées ci-avant”, *Société Stenuit v France*, supra fn 87, para 64.

⁸⁹ *M. & Co. v Germany*, Appl. no. 13258/87, 09/02/1990.

⁹⁰ ‘Low importance’: Judgments with little legal interest - those applying existing case-law, friendly settlements and striking out judgments. – see <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

⁹¹ *Société Stenuit v France*, Appl. no. 11598/85, [1992].

of the Strasbourg Court, where interesting *obiter dicta* had been pronounced also with regard to competition fines.⁹²

In the recent case *Jussila v Finland*⁹³ the ECtHR reiterated the *Engel* criteria⁹⁴ in a VAT case. The case provides authority for two significant changes: the enlargement of the scope of ‘criminal charge’ and the adjustability of the level of protection of Article 6(1). *In casu*, the applicant alleged that he had not received a fair hearing in the proceedings in which a tax surcharge was imposed, as he had not been given the possibility to challenge the reliability and accuracy of the report on the tax inspection (by cross-examining the tax inspector and obtaining supporting testimony by his own expert at an oral hearing). The applicant was found, following errors in his tax returns, liable to pay VAT and an additional ten per cent surcharge – an overall amount of €308.80. The issue arose whether the proceedings were ‘criminal’ within the autonomous meaning of Article 6 and thus attracted the guarantees of Article 6 under that head. To answer the question, the Court in applied the ‘*Engel* criteria’.

With regard to the first *Engel* criterion, the ECtHR held that the fact that tax-surcharges were not classified as criminal but as part of the fiscal regime was not decisive.⁹⁵ As for the nature of the offence, it observed the general scope of application (to taxpayers in generally) and the fact that tax surcharges, not intended as pecuniary compensation for damages, had a deterrent and punitive purpose that sufficed to establish the criminal nature of the offence. Finally, with regard to the third criterion the Court held that the minor nature of the penalty, which distinguished the case from previous tax-related decisions,⁹⁶ does not remove the matter from the scope of Article 6.⁹⁷

Having established the criminal nature of the proceedings, the ECtHR moved on tackling the question whether in the facts of the case the tax surcharge proceedings complied with Article 6. With an obvious intention to clarify the law, it held:

‘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

⁹² For an extensive analysis see WILS, W. P. J. (2010) , *supra* fn 4, pp 5–29.

⁹³ Judgment of the ECtHR (Grand Chambre) of 3 November 2006, *Jussila v Finland*, Application no.173053/01, [2006].

⁹⁴ *Ibid.*, paras 30–31.

⁹⁵ *Jussila v Finland*, Application no. 173053/01, [2006], para 37.

⁹⁶ *Janosevic v. Sweden*, Appl. no. 34619/97, 23/07/2002 and *Bendenoun*, Appl. no. 12547/86, Série A n°284, [1994].

⁹⁷ *Supra* fn 95, para 38, Referring to *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54; also *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, para 55.

the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ... , prison disciplinary proceedings ... , customs law ... , competition law ... and penalties imposed by a court with jurisdiction in financial matters. ... Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'.⁹⁸

Thus, the ECtHR viewed that the gradual broadening of the criminal law characterisation meant that the criminal head guarantees would not apply 'in their full stringency'. On the facts of the case, therefore, tax surcharges differed from hardcore criminal law. The ECtHR carefully examined the precise grounds for requesting an oral hearing, and concluded that, as a matter of fact, no particular issues of credibility arose in the proceedings which required oral presentation of evidence and that issues of fact and law could adequately be addressed and decided on the basis of written submissions.⁹⁹ Moreover, the denial of granting an oral hearing was done on good grounds after an assessment of the Administrative Court.

2.4. Concluding remarks

The gradual broadening of the notion of a 'criminal charge' under the ECtHR jurisprudence means that unequivocally competition proceedings receive a double classification: for the Community legal order that of 'administrative law' and for the ECHR legal order that of 'criminal' law.¹⁰⁰ The dual characterization can coexist as, in the words of the ECtHR, the 'classification as non-criminal law at the national level would not be affected by the applying of guarantees of Art.6 to the said proceedings'.¹⁰¹ Therefore, a 'manichaist' type of approach in favour of either type of classification should be rejected outright.

Nevertheless, in the context of the general matter in question regarding possible future clashes between the two Courts, it appears of outmost importance to compare the approaches of the two Courts in their respective assessments. While the ECJ has consistently rejected a parallelism to criminal law standards in competition proceedings, the ECtHR has engaged into a broadening of the concept of a 'criminal charge' whose effects is, however, watered-down by introducing a differentiated standard of application of procedural guarantees depending on whether they fall in the 'hardcore' or 'non-hardcore' type of offences.

Accordingly, this could essentially end the debate on the applicable standard of protection as these 'diluted' ECtHR standards to a great extent are similar, or in

⁹⁸ Supra fn 95, para 43.

⁹⁹ Ibid., para 47.

¹⁰⁰ See also WILS, W. P. J. (2010) 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', *World Competition*, Vol.33, p 12.

¹⁰¹ *Öztürk v Germany*, supra fn 79, para 66.

Bosphorus parlance,¹⁰² offer ‘equivalent’ protection to that of the Community administrative standards. It is submitted, however, that the ‘non-hardcore’ standards applicable by the ECtHR are not applied *in abstracto*, but are always attached to very specific rights (*in casu*, the right to an oral hearing), following a meticulous factual assessment of each appeal, that does not only take into account a ‘*faisceau d’indices*’ that includes the very relevant for competition matters level of the penalty incurred. This contextual analysis essentially means that the same factual elements will be taken into account twice, first at the level of legal qualification, and thereafter, at the level of assessment of infringement of the right. The ECtHR thus indirectly shows its teleological willingness to assess in detail cases of ‘administrative colouring’ that would have otherwise have failed to pass the first stage of criminal law classification under a restrictive application of the *Engel* test. This approach is not immune to criticism. The dissenting opinions of four judges¹⁰³ in *Jussila* shows that some judges oppose this fragmentation of criminal guarantees and propose a theoretically more sound system of stricter criminal law classification (along the *Engel* criteria) and an ensuing uniform application of stringency in the compatibility stage of assessment.

3. CARTEL ENFORCEMENT AND PROCEDURAL GUARANTEES – AN ANALYSIS OF THE RULES OF LEGAL CHARACTERISATION, ATTRIBUTION OF LIABILITY AND SANCTIONING OF CARTELS

Montesquieu, in his seminal work ‘*De l’esprit des lois*’ observed that ‘natural equity demands that the degree of proof should be proportionable to the greatness of the accusation’.¹⁰⁴ While the ‘greatness of the accusation’ in cartel infringements is undisputed – especially in light of the magnitude the incurred sanctions - it appears less clear to what extent this should affect the ‘degree of proof’ of those infringements, especially having regard to their specificities.

As a matter of fact, with regard to the legal characterisation, cartels are one of the few areas of EC antitrust where the ensuing anticompetitive effects of the alleged offence are rarely disputed. This property of cartels prompted the terminological characterisation use of a ‘*per se*’ infringement or an infringement ‘*by object*’ in EC law parlance. Nevertheless, this *a priori* undisputed legal characterisation does not make cartel prosecution any easier as, for the reasons mentioned above, the probatory difficulty lies not within the substantive rules themselves, but within the facts that support the application of those rule. Reflecting these difficulties, the legal characterization of cartels relies to a great extent on presumptions or on *per se* inconclusive evidence that potentially could clash with the general Article 6(2)

¹⁰²Judgment of the ECtHR of 30 June 2005, *Bosphorus Airways v. Ireland* (no.45036/98).

¹⁰³Jointly partly dissenting opinion of Judges Costa, Cabral, Barreto and Mularoni, and Caflisch, paras 7-10; See also Dissenting Opinions of Judges Zupani and Spielmann that considered that an infringement of Article 6-1 had occurred.

¹⁰⁴‘L’équité naturelle demande que le degré de preuve soit proportionné à la grandeur de l’accusation’, *De l’esprit des Lois*, 1748.

guarantees such as the presumption of innocence and the ensuing *in dubio pro reo* principle.

Another increasingly important area that is linked to the probatory standards is that concerning the imputability of a cartel conduct on parent companies. The law as applied today seems to favour a (justified) irrebuttable presumption of liability in the context of full-ownership, and seems to mechanically extend that presumption also in the context of undertakings holding a majority shareholding. The deviation from the general principle of personal responsibility countering the general *presumption of innocence* could constitute a thorny point of contention in the future.

Along the same lines, fines imposed on cartels can also be challenged on the same grounds, yet an additional fundamental rights' dimension, that of the infringement of the principle '*nulla poena sine lege*' of Article 7, is often being invoked as to contest the insufficient predictability of the liability incurred in cartel investigations. Moreover, in the context of international cartel investigations, a significant number of claims have also alleged breach of the double penalization principle of Article 4 of ECHR Protocol No.7.

3.1. The legal characterization of cartels

3.1.1. The expansive interpretation of 'agreements' and 'concerted practices'.

3.1.1.1. The legal definition of 'agreements' and 'concerted practices'

The authors of the EC Treaty, in drafting the original Article 85(1), used the three terms 'agreements', 'decisions' and 'concerted practices', in an effort to capture in its scope of application all types of cooperation arrangements. As argued by AG Vesterdorf,¹⁰⁵ *a priori*, a contextual and historical interpretation of Article 101 TFEU would favour the predisposition of an expansive reading of the terms as to cover all types of arrangements and avoid any *lacuna* in the scope of application. This *ratio legis* has been acknowledged by the Court in its early judgments.¹⁰⁶ The general principle underlying Article 101(1) TFEU and justifying the expansionist approach is that each economic operator must determine independently the policy, which it intends to adopt on the market.¹⁰⁷

Given the ever-evolving ingenuity of cartelists to form differentiated cartel schemes, it seems inappropriate to adopt the formalistic approach of exhaustively enumerating the forms of cooperation that would constitute a cartel. Suffice here to espouse the Commission's definition:

¹⁰⁵Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-867. Part D(1)(3)(c).

¹⁰⁶See Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, para 64.

¹⁰⁷Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), point 14. Referring to cases C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para 116; and Joined Cases 40/73 to 48/73 a.o., *Suiker Unie*, [1975] ECR 1663, para 173.

‘Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors’.¹⁰⁸

It follows that the term ‘cartel’ is legally fluid with no precise boundaries. Hence, it would appear more appropriate to attribute to it a purely descriptive function, portraying any form of horizontal cooperation between undertakings that restricts or distorts competition. The Commission (or any NCA) would need to prove three components of the offence to meet the so-called ‘requisite legal standard’;¹⁰⁹ namely, i) the existence of a prohibited form of cooperation between undertakings, ii) that has as its object or effect the prevention, restriction or distortion of competition and, finally, iii) an effect on intra-community trade. Usually the last two components are more easily met and are often presumed, upon sufficient proof of the first.

Community Courts have responded to the probatory difficulties of cartels through the adoption of a flexible interpretation on the legal characterisation of the notion of collusion, and through an amenable approach regarding the proof of an effect on competition and intra-community trade. This, in the area of cartels, has permitted the effective prosecution of cartels, which under a narrow, literal interpretation of the Treaty would probably have failed.

Recently, in *Bayer v Commission*,¹¹⁰ the CFI, for the first time ventured to define the term ‘agreement’ as a concept that ‘centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention’.¹¹¹ It follows that what competition authorities or private parties have to focus on in proving the legal requisites of an agreement is a) the concurrence of wills for a collusive conduct, and b) the faithful expression of the parties’ intention. Just like in the case of ‘agreements’, the notion of concerted practice was also not defined in the Treaty, and for a long time remained ‘untested waters’.¹¹² It took 15 years before the Court delivered its first clarifying judgement in the so-called *Dyestuffs* cases. On appeal,¹¹³ the Court of Justice

¹⁰⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, OJ, point 1.

¹⁰⁹ Equivalent term of ‘standard of proof’ used by the Court in a series of cases; e.g. Case T-12/89, *Solvay & Cie SA v. Commission*, [1992] ECR II-907, para 70.

¹¹⁰ Case T-41/96, *Bayer v. Commission*, [2000] ECR II-3383.

¹¹¹ *Ibid.*, para 69.

¹¹² DERINGER, A. (1968) *The competition law of the European Economic Community : a commentary on the EEC rules of competition (Articles 85-90)*, New York: Commerce Clearing House, p 12.

¹¹³ Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, para 57 The appeal was brought on the ground, *inter alia*, that the decision was based on the Commission’s erroneous understanding of the concept of concerted

(hereafter ECJ) made the following statement of principle holding that the objective of referring to ‘concerted practices’ in Article 101(1) TFEU was to:

‘bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants’.

The Court was given a second chance to further elaborate on the concept three years later, in the so-called *Sugar cartel* case.¹¹⁴ The Court, refined the *ICI* definition as follows:

The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.

Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.¹¹⁵

In sum, the Court has clarified that ‘concerted practices’ can take the form of direct or indirect contact, the object or effect of which influences the conduct on the market of an actual or potential competitor. Thus, notwithstanding that the Treaty does not impose an obligation on undertakings to behave in a competitive or rational manner,¹¹⁶ it does prohibit any contact that could influence the capacity of a company to behave independently.

Despite the welcome clarification of the two definitions, the equivocalness and broadness of the description still make it difficult in practice to pinpoint a concrete distinguishing element between ‘agreements’ and ‘concerted practices’. This

practice, which, allegedly was used as synonymous to perfectly legal ‘conscious parallelism’. Definition taken over also in the recent judgement Case C-8/08, *T-Mobile Netherlands and others*, [2009] ECR I-4529, para 26.

¹¹⁴Joined Cases 40-48, 50, 54-56, 111, 113-114/73, *Coöperatieve Vereniging “Suiker Unie” UA v. Commission*, [1975] E.C.R. 1663.

¹¹⁵*Ibid.*, paras 173-174.

¹¹⁶BRAULT, D. (2006) De la preuve en cas de comportements parallèles mais non coordonnés, *Revue Lamy de la Concurrence*, 9, 94

corroborates towards concluding that the two notions are in practice tautologous. Such thesis is further supported by decisional practice that shows that the two concepts are complementary to each other and could even be used interchangeably. In the words of the Commission, ‘cases may arise where collusion presents some of the elements of both forms of prohibited cooperation’.¹¹⁷

This problem of potential definitional overlap has been dealt with pragmatically, having regard to the specificities of cartel offences. Advocate General Reischl was the first to characterise the debate on the conceptual distinction ‘an unimportant argument of classification’.¹¹⁸ The Commission opined in its *Polypropylene* decision, that ‘the importance of the concept of a concerted practice does not thus result so much from the distinction between it and an “agreement” as from the distinction between forms of collusion falling under Article 85(1) and mere parallel behaviour with no element of concertation’.¹¹⁹ This approach was implicitly endorsed by the CFI on appeal in *Poulenc*¹²⁰ and further elaborated in *LVM*.¹²¹ The first case introduced the notion of a ‘single, overall agreement’, while the second one accepted the ‘joint unspecified classification’ of agreements ‘and/or’ concerted practices.

Summing up, in the words of Richard Whish the Community Courts, ‘seem to have deliberately refrained from construing the expressions “agreement” and “concerted practice” in a legalistic or formalistic manner’. Essentially, the judicial activism of the Court advanced such an expansive and liberal reading of Article 101(1) TFEU that the latter would essentially be applicable to any contact between undertakings aimed at removing uncertainty over the future market behaviour. This came as a response to the conscious practical difficulties faced by competition authorities in meeting the legal test of the infringement.¹²² So, while both principles of ‘single overall agreement’ and of ‘single qualification’ have been introduced by the Court to facilitate proof, the impact on the legal characterisation is immense, as in practice the Court implicitly modifies the scope of application of Article 101 TFEU to any kind of proven form of collusive action.

¹¹⁷ Commission Decision IV/31.149, *Polypropylene*, [1986] OJ L 230/1, para.86

¹¹⁸ Opinion of A.G. Reischl, Joined Cases 209-215 and 218/78, *Heintz van Landenyeck SARL and others v Commission*, [1980] ECR 3125.

¹¹⁹ Commission Decision IV/31.149, *Polypropylene*, [1986] OJ L 230/1, para 87.

¹²⁰ Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-867, para 105.

¹²¹ Joint Cases T-305-307/94 etc., *LVM etc. v Commission*, [1999] ECR II-931, paras 696-698.

¹²² Contrasting this approach, Guerrin holds that in some judgements, the Court deviated from this ‘single, overall agreement approach’. For instance he points that in six of the *Polypropylene* appeal cases the Court reduced the fines following an extensive analysis of each incriminating act individually (ex. price initiatives, participation in meetings) and evaluating the evidence of the firm’s participation in this act separately from its global conduct over a long period. As an illustration, he points that in *Shell v Commission* (Case T-11/89, para 190) Shell, that was guilty of participating in a cartel agreement from mid-1977 to September 1983, was acquitted of participating in a January-May 1981 price initiative; See GUERRIN, M. and KYRIAZIS, G. (1993) *Cartels: proof and procedural issues*, Fordham Corporate law Institute, p 811.

3.1.1.2. Reliance on ‘presumptions’ for proving the existence of ‘agreements’ or ‘concerted practices’ – ‘participation’ and ‘public distancing’

In qualifying an agreement/concentration, the Court uses a number of presumptions.¹²³ The first one is that of a presumption of infringement in case of ‘cartel participation’. In other words, the existence of the faithfully intended concurrence of wills seems to be an objective test as it is automatically presumed upon evidence of active or passive participation in a meeting with an anti-competitive object.¹²⁴ In practice, on the grounds of participation in an agreement, the Commission usually infers the intention, even when the parties themselves argue the opposite.¹²⁵ Thus, it has been held that communication of an agreement to the parties and its tacit acceptance suffice to prove the existence of intention, and therefore of an agreement.¹²⁶ While, for instance, in *Petrofina*¹²⁷ passive participation was disproved based on evidence that the undertaking had, even minimally, contributed to the cartel meetings, in *Hercules Chemicals* the CFI¹²⁸ went a step further, ruling that the Commission was right to infer participation of an undertaking that did, ‘not publicly distance itself from what was discussed, as this gave the impression to the other participants that it subscribed to the results of the meetings and would act in conformity with them’. Summing up, the passive/active participation distinction practically serves no purpose in the finding of an infringement, although, it might be taken into account in determining the level of the fine imposed.

The aforementioned ‘public distancing’ requirement pronounced by the CFI in *Hercules Chemicals* was further clarified in *Solvay*, where the Court said that to rebut the presumption an undertaking had ‘to adduce evidence to show that its participation in the meetings was without any anti-competitive intention, by showing that it had

¹²³See also BRUZZONE, G. and BOCCACCIO, M. (2009) ‘Impact-based assessment and use of legal presumptions in EC competition law: the search for the proper mix’, *World Competition*, Vol.32, no.4, pp 465-484.

¹²⁴The difference between active or passive participation pertains to the role played by the party in the formation of the cartel policy. However, decisional practice shows that passive participation as a defence is quasi-inexistent, given that the Court will presume active participation whenever a member has been present to a cartel meeting. Case T-348/94, *Enso Española v Commission*, [1998] ECR.II-1875, paras 303-304; see also Joined Cases C 204/00 P, *a.o.*, *Aalborg Portland A/S v Commission (Cement)*, *supra* fn 39, para 81; Case T-120/04, *Peróxidos Orgánicos v Commission*, [2006] ECR II-4441, para 68.

¹²⁵As put by Advocate General Slynn, ‘the mere presence of the representative of one undertaking at a meeting at which other agree to distort competition does not by itself amount to the participation of the first undertaking in a concerted practice. But the attendance at such a meeting may be taken as evidence that he was aware of the agreements; and in conjunction with other evidence of the conduct of the undertaking it may, in appropriate cases, be taken to indicate the existence of a common intention necessary to constitute a concerted practice’ (Opinion of A.G. Slynn in Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1914, p 1930)

¹²⁶Case C-277/87, *Sandoz prodotti farmaceutici SpA v Commission*, [1990], ECR I-45, para 11.

¹²⁷Case T-2/89, *Petrofina SA v Commission*, [1991] ECR II-1087, paras 92-93.

¹²⁸Case T-7/89, *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, para 232; Case T-9/99, *HFB and Others v Commission*, [2002] ECR II-1487, para 223; Case T-303/02, *Westfalen Gassen Nederland v Commission*, [2006] ECR II-4567.

indicated to its competitors that it was participating in the meetings in a spirit which was different from theirs'.¹²⁹ Moreover, even where only one of the participants reveals its intentions, this is not sufficient to exclude the possibility of an agreement or concerted practice.¹³⁰ As explained by the Court in *Aalborg* the, 'reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it', and that, 'failure to report to the administrative authorities effectively encourages the continuation of the infringement and compromises its discovery'.¹³¹

Despite the escape route offered to meeting participants to evade liability through 'public distancing', the CFI indicated that from the, 'existing case law the concept of an undertaking's publically distancing itself, it being a means of avoiding liability, must be interpreted narrowly'.¹³² This narrow scope probably explains why the 'public distancing defence' has rarely been successful in practice,¹³³ thus amounting to a '*probatio diabolica*'.

Using this logic, one of the participants in the *Greek Ferries* case,¹³⁴ pleading the public distancing defence claimed that to 'demand evidence that it publicly distanced itself from the aims of the cartel is to ask the impossible' as minutes are rarely taken in cartel meetings. The Court opposed this approach denoting that an undertaking need do 'no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken'.¹³⁵ It was immaterial whether the participants took notes of the minutes or not. What had to be proved was that the means chosen by the undertaking for publicly distancing did in fact have the effect of conveying its disagreement to the other undertakings that attended the meeting in a firm and clear manner. Therefore, mere assertions such as alleged telephone calls without documentary evidence were of insufficient probative value to that end. The rationale behind this narrow approach is clear - the Court wants to avoid having situations where undertakings rely on fabricated evidence in order to escape the already hard to find incriminating evidence.¹³⁶

¹²⁹Case T-12/89, *Solvay & Cie SA v Commission*, [1992] ECR II-907, para 99; Case T-15/89, *Chemie Linz v Commission*, [1992] ECR II-1275, para 135.

¹³⁰Case T-202/98, *Tate & Lyle and others v Commission*, [2001] ECR II-2035, para 54.

¹³¹Joint Cases C 204/00 P, 205/00 P, *Aalborg Portland*, *supra* fn 39, paras 82, 84.

¹³²Case T-61/99, *Adriatica di Navigazione v Commission (Greek Ferries)*, [2003] ECR II-5349, para 135.

¹³³BAILEY, D. (2008) 'Publicly distancing oneself from a cartel', *World competition*, Vol. 31, no.2, pp 177-203.

¹³⁴*Supra* fn 132, paras 135-140.

¹³⁵*Ibid.*, para 137.

¹³⁶In the words of AG Mischo 'an undertaking's participation in such meetings must be taken to mean that it intends to participate in the decisions made, and that it would be impossible to prevent infringements of competition law committed by cartels if it were to be accepted that an undertaking may attend such meetings with impunity'. Opinion of AG Mischo in Case C-291/98 P, *Sarrió v Commission*, [2000] ECR I-9991, para 45.

While the meaning of the ‘public distancing defence’ is evident, Community and national decisional practice has shown that its applicability is less clear. The defence can be raised for avoiding liability but also in order to attenuate the fine for participating in a cartel. Parties can argue either that they had expressed their public distancing from the very beginning¹³⁷ (whereby they would be exempted from any ensuing liability), or that they participated but decided to terminate their involvement.¹³⁸ For instance, in *Westfalen* the applicant did not dispute the fact of having participated in the meeting, nor the anti-competitive content of those meetings, but argued that in the light of its behaviour in those meetings it should have been considered to have publicly distanced itself to a sufficient degree. In particular, with regard to price increases it had stated that it ‘did not commit to implementing a fixed increase in prices’, which the Court interpreted as a ‘vague conduct akin to tacit approval’, thus, complicitly constituting a passive mode of participation.¹³⁹

Whether the ‘public distancing’ defence is successful is obviously a matter of fact but also of the quality of the evidence adduced. However, based on existing case-law it can be said that some common cumulative requirements should be satisfied for a successful plea. According to Bailey, those requirements are six,¹⁴⁰ namely: a) the act of ‘public distancing must take place without undue delay’, b) the objectives of the cartel must be denounced, c) clearly and unequivocally to the other cartel members, d) a firm must avoid discussing its own pricing or marketing strategy, e) the firm must be able to prove that its subsequent conduct on the market was determined independently and, finally f) the company must not attend any further meetings.

The recent 2009 ECJ judgement *Archer Daniels Midland*¹⁴¹ seems to add an important seventh requirement, shedding some more light on how the Court perceives ‘public distancing’. On the fact of the case *ADM* appealed the CFI judgement on the grounds that it had publicly stated its wish to end its participation by leaving before the end of a meeting.¹⁴² On the other hand the Commission claimed that the relevant test of a public dissociation from a cartel is ‘whether the members of the cartel understood the conduct of the undertaking as terminating its participation in such an agreement’ and that it was for the undertaking to discharge the burden of proving it. According to the Commission the fact that the plaintiff had left did not mean that it ended its participation.¹⁴³ The ECJ confirmed the CFI analysis, expressly saying that ‘it was for ADM to provide evidence that the members of the cartel considered that ADM was

¹³⁷ For example Case T-303/02, *Westfalen Gassen Nederland v Commission*, [2006] ECR II-4567, paras 60-61.

¹³⁸ See UK case *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17, para 1046.

¹³⁹ See supra fn 137, para 84.

¹⁴⁰ For extensive analysis on each requirement see BAILEY, D., (2008), supra fn 133, pp 189-203.

¹⁴¹ Case C-510/06 P, *Archer Daniels Midland v Commission*, [2009] ECR I-1843.

¹⁴² It also claimed that Article 81 EC ‘does not allow subjective factors to be used as the basis for identifying a breach of its provisions but merely prohibits overt acts’.

¹⁴³ Supra fn 141, paras 116-119.

ending its participation'.¹⁴⁴ In civil law jargon, there is therefore a duty of result (obligation de resultat), that of convincing the other participants, rather than a duty of means (obligation de moyen) that the undertaking had made it explicit.

Interestingly, the Court went on to say that the act of leaving the cartel did not constitute an attenuating circumstance granting fine reduction, 'in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement, as that could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if their conduct were discovered they could expect, by then curtailing the infringement, their fine to be reduced'.¹⁴⁵

Finally, it is observed that there are situations where the already difficult to rebut presumption of participation becomes irrebuttable. For instance, it seems impossible for a party that has disclosed pricing information to its competitors to use the 'public distancing' defence. The only option for the repentant undertaking would be to 'blow the whistle' in the framework of the leniency notice¹⁴⁶ to a competition authority.

3.1.2. The absence of an 'effects-based' analysis in proving 'agreements' and 'concerted practices'

3.1.2.1. 'Object *or* Effect' analysis and cartels

As explained above, a 'cartel offence' is made up of three components, i) the existence of a prohibited form of cooperation, ii) that has as its object or effect the restriction of competition, and iii) an effect on intra-community trade. This section dwells upon the second component of the restriction, that is often overlooked with regard to cartels, namely, the proof of the 'object/effect' restriction.

The Treaty expressly prohibits agreements that have as their 'object or effect' the restriction of competition. The Court explained in *STM*¹⁴⁷ that the conjunction 'or' shows that the two terms are alternative, which leads to first consider the precise purpose of the agreement (object), and, where an analysis of the clauses of the agreement itself 'does not reveal the effect on competition to be sufficiently deleterious', to consider the consequences (effects) of the agreement.

Competition law adopts a functional approach, namely that the contact has the effect of eliminating, or substantially reducing, uncertainty over the future market conduct.¹⁴⁸

¹⁴⁴Ibid., para 120.

¹⁴⁵Ibid., para 149.

¹⁴⁶Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, pp 17-22.

¹⁴⁷Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 337, p 249.

¹⁴⁸See Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/08, p 15 referring to Joined Cases T-25/95 etc., *Cimenteries CBR*, [2000] ECR II-491, paras 1849 and 1852; and Joined Cases T-202/98 etc., *British Sugar*, [2001] ECR II-2035, paras 58-60.

As a rule of thumb, anti-competitive agreements are caught when they are likely to have an ‘appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation’.¹⁴⁹ Recently the Court pointed that the effects can well be felt on the market where undertakings exercise their commercial activity, or even on the neighbouring and/or emerging markets on which at least one of the participating undertakings is not present, concluding that ‘any restriction of competition within the common market may be classed as an “agreement between undertakings” within the meaning of Article 81(1) EC’.¹⁵⁰

Obviously the concept of a restriction of competition is an economic notion that has been debated at large. As pointed by Joliet it is by ‘hypothesis impossible to determine what the “normal” terms of competition would be in the absence of the incriminated behaviour’.¹⁵¹ In the case of cartels, such an effect is presumed in the presence of ‘agreements’ with an anti-competitive object, and therefore there is no need to examine the effects on the market. As for ‘concerted practices’, some contemplation should be given on the distinction between the ‘subsequent conduct’ and ‘restriction of competition’, which although different by definition, have at large been equated in practice by the Court.

The Court has in many occasions repeated that for agreements that have as an object the restriction of competition there was no need to take account of the concrete effects of an agreement in the market.¹⁵² In its first cartel decision *Chemifarma* the Court held, *inter alia*, that without ruling out the possibility that the agreement had no effect on competition in the common market, ‘such a situation cannot render lawful an agreement the object of which is to restrict competition’.¹⁵³ The Commission institutionalised this practice in its Article 81(3) Guidelines.¹⁵⁴ The rule is based on the presumption that because of their deleterious nature, restrictions by object concerning prices, output and market-sharing have a direct negative impact on competition and, thus, would render any further analysis superfluous.

The Article 81(3) Guidelines define restrictions by object as those that ‘by their very nature have the potential of restricting competition’¹⁵⁵ and refers to the black-listed restrictions in block exemptions for an illustration.¹⁵⁶ In *Compagnie Royale* the ECJ explained that the restrictions are determined not by the parties’ intention, but by the

¹⁴⁹ Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/08, point 16.

¹⁵⁰ Case T-99/04, *AC-Treuband v Commission*, [2008] ECR II-1501, para 122 referring to Case T-328/03, *O2 (Germany) v Commission*, [2006] ECR II-1231, paras 65-73.

¹⁵¹ JOLIET, R. (1974) ‘La notion de pratique concertée et l’arrêt ICI dans une perspective comparative’, *Cahiers de droit européen*, p 275.

¹⁵² Case 56/64, *Consten and Grundig v Commission EEC*, [1966] ECR 429, para 6.

¹⁵³ Case 41/69, *ACF Chemiefarma NV v Commission*, [1970] ECR 661, para 127.

¹⁵⁴ Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/08, point 20.

¹⁵⁵ *Ibid.*, point 21.

¹⁵⁶ *Ibid.*, point 23.

aims pursued by the agreement in light of the economic context.¹⁵⁷ This introduces an objective and economic-based assessment. Article 81(3) Guidelines offer some further helpful guidance through the enumeration of a number of factors that should be taken into account in assessing the legality of the object of the contact.¹⁵⁸ Having regard to those guidelines, it appears highly unlikely that a cartel would not be considered to have an anticompetitive object. For instance, evidence showing participation in meetings where parties agree on prices, market shares and output, by definition leads to a misallocation of resources and higher prices. In the presence of such evidence, a cartel constitutes, using a notion of the law of tort, a ‘strict liability’ offence.¹⁵⁹ Yet, it is important to be able to show that such an object existed, as proof of mere contact would not suffice (although it could trigger a Commission investigation as in the *Carlsberg/Heineken* case).¹⁶⁰

The Court has made it clear that the criteria for establishing an object/effect characterisation are ‘applicable irrespective of whether the case entails an agreement, a decision or a concerted practice’.¹⁶¹ As mentioned above, for a ‘concerted practice’ to exist, competing undertakings must have direct or indirect contacts aimed at knowingly removing uncertainty as to the future market behaviour. This definition does not answer the question as to whether the concerted practice should be put in effect (referring to subsequent conduct on the market) or whether it should have produced anti-competitive effects (referring to the ‘object or effect’ distinction). From a probative point of view the two questions are intertwined as, in order to prove the practice of concertation, a competition authority would often have to adduce evidence of anti-competitive effects.

The question of proof of subsequent conduct on the market in the case of ‘concerted practices’ has attracted special interest from the early days as reflected in a series of Advocate General opinions¹⁶² and legal doctrine.¹⁶³

¹⁵⁷Joined Cases 29-30/83, *Compagnie Asturienne des mines and Rheinzink v Commission*, [1984] ECR 1679, para 26.

¹⁵⁸These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition’ (footnotes omitted).

¹⁵⁹The equivalent of a ‘responsabilité sans faute’ or ‘responsabilité objective’ under French civil law.

¹⁶⁰See for example Case 37.851 PO/ *Carlsberg + Heineken* where evidence of a scheduled telephone call of the CEOs of the two competing firms was enough to trigger further investigations; Press release IP/02/1603, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1603&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁶¹Case C-8/08, *T-Mobile Netherlands and others*, [2009] ECR I-4529, para 24.

¹⁶²Opinion of A.G. Gand in Case 16/65, *Firma G. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1965] ECR 877; Joined opinion of A.G. Mayras in Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619; Opinion of A.G. Reischl in Joined Cases 209-215 and 218/78,

In the *Polypropylene* judgements, the CFI evaded giving a clear answer holding that:

‘the parties could not have failed to take account directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, (the plaintiff’s) competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market’.¹⁶⁴

This finding equates possession of cartel-deriving information to anticompetitive conduct, based on the presumption that the former will inevitably influence the latter. This position seemed not to be literally followed by the ECJ in the appeal decision of *Hüls*¹⁶⁵ that was controversially greeted by legal scholarship.¹⁶⁶ The ECJ held that the concept of a concerted practice ‘implies, besides undertakings concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two’. This, *a priori*, seemed to add a third component to the ‘concerted practice’ equation, namely, the causal link. Accordingly, on top of proving contact aimed at reducing competition, the Commission was required to establish a ‘causal nexus’ between the concertation and the actual conduct. This hinted the re-introduction of a significant additional burden for competition authorities. Yet, the Court made sure to alleviate the burden of the causal link by means of a rebuttable presumption against concerting undertakings holding that:

‘subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market’.¹⁶⁷

This second statement essentially reintroduced, in a more principled way, the CFI’s *Polypropylene* position. The burden of proof for the Commission is significantly low, as essentially the latter is required to prove only concertation to establish the existence of the infringement and of the anti-competitive effects. It follows that, in the words of Guerrin,¹⁶⁸ a, ‘concertation with anti-competitive object is presumed to give rise to de facto concerted conduct on the market. It belongs to the incriminated company to

Heintz van Landenyeck SARL and others v Commission, [1980] ECR 3125; Opinion of A.G. Slynn in Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission*, [1983] ECR 1825.

¹⁶³For a review of academic literature on the concept of ‘concerted practices’ until 1991 see Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-867.

¹⁶⁴Case T-1/89, *Rhône-Poulenc SA v Commission*, [1991] ECR II-II-867, para 123.

¹⁶⁵Case C-199/92 P, *Hüls v Commission*, [1999] ECR I-4287, para 161.

¹⁶⁶See WHISH, R. (2003) *Competition Law*, London, Lexis Nexis, 5th ed, p 107, especially fn 244.

¹⁶⁷Supra fn 165, para 162.

¹⁶⁸GUERRIN, M. and KYRIAZIS, G. (1993), *supra* fn 122, p 800.

prove either the complete absence of conduct, or that its actual conduct was totally independent from the knowledge it acquired during the concertation’.

The Court in *Hüls* was confronted with a second, subtly different question, namely, whether there was still a necessity to prove the restriction of competition, once an anticompetitive concerted practice is found to exist, irrespective of whether the market conduct has effectively been put into practice or not. The ECJ delivered the following elucidating principle:

‘a concerted practice as defined above is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market. First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition’.¹⁶⁹

In *Anic*, a judgement rendered on the same day, the Court added that requiring an effects-based analysis ‘would break down the unity and generality of the prohibited phenomenon and would remove from the ambit of the prohibition, without any reason, certain types of collusion which are no less dangerous than others’.¹⁷⁰

3.1.2.2. The ‘rebuttability’ of the ‘object/effect’ presumption

As acknowledged also by the Court, the fact that an agreement or a concerted practice has an anti-competitive object does not necessarily mean that that conduct will in reality produce a specific effect of restricting or distorting competition.¹⁷¹ Therefore, as a matter of law, the theoretical possibility of arguing that a firm’s subsequent conduct on the market was determined independently of its participation in the cartel is still present, although the so-called ‘*Anic* presumption’ is undoubtedly very difficult to rebut.¹⁷²

Along these lines, the Court confirmed that the fact that an agreement with an anticompetitive object had not been implemented was not sufficient to remove it from the prohibition of Article 101(1) TFEU on the grounds that competition had not been distorted.¹⁷³ In *Polypropylene*¹⁷⁴ the appellants challenged this approach, asking the Commission to prove on the basis of objective facts, that there was a sufficient

¹⁶⁹Supra fn 165, paras 163-165.

¹⁷⁰Case C-49/92 P, *Commission v ANIC Partecipazioni SpA*, [1999] ECR I-4125, para 108.

¹⁷¹Supra fn 165, para 164.

¹⁷²BAILEY, D. (2008), supra fn 133, p 183.

¹⁷³See also Case 86/82, *Hasselblad v Commission*, [1984] ECR 883.

¹⁷⁴Case T-13/89, *ICI v Commission*, [1992] ECR II-102, paras 273-294.

probability that the object could be achieved. They claimed that their conduct on the market had been determined independently of what had been agreed and that due to the market conditions the outcome of their conduct would anyway have been the same, with or without the concertation. While not rejecting in principle the claimants' argument, in that the market conditions were indeed likely to affect the price, the Court held that the evidence submitted by the Commission was sufficient to demonstrate that the agreement was potentially apt to restrict competition. The fact that an anticompetitive clause had not been implemented did not prove that it has had no effect, as it could create a 'visual and psychological' effect, which contributed to a partitioning of the market.¹⁷⁵ Accordingly, partial compliance¹⁷⁶ or even non-compliance is not sufficient to prove the absence of restriction of competition.¹⁷⁷ It follows that the possibility for incriminated companies to prove by means of a complex economic analysis that an agreement was inapt, even potentially, to restrict competition is still available, although its success would appear extremely difficult in practice.¹⁷⁸

It is argued that incriminating presumption of negative effects on the market is so strong, that, probably, the only way to rebut it would be to argue that the 'object' could not have affected the market, due to the material impossibility of doing so, for example, by proving that the undertakings have not remained active on the market. Nonetheless, given that in competition law even a potential restriction of competition suffices to establish an infringement, lack of presence on the market might not suffice.¹⁷⁹ Besides, case-law suggests it is immaterial for establishing liability whether a company is active in a different market to the one of the cartel as long as it has contributed to the cartel's aims.¹⁸⁰ The CFI was given the opportunity to clarify this in the recently decided case of *Treuhand*.¹⁸¹ The case concerned AC-Treuhand AG, a consultancy firm, which had provided three producers of organic peroxides with various services essentially consisting in assisting and contributing to the cartel's objectives as an organiser and guardian of the successful implementation of the anticompetitive agreements. The Commission found the undertaking liable for its anticompetitive conduct and imposed a symbolic fine of EUR 1000. *Treuhand* appealed, *inter alia*, on the ground that an

¹⁷⁵ Case 19/77, *Miller International Schallplatten GmbH v Commission*, [1978] ECR 131, para 7-8; Case T-77/92, *Parker Pen v Commission*, [1994] ECR II-549, para 55.

¹⁷⁶ Case 246/86, *SC Belasco and others v Commission*, [1989] ECR 2117, paras 21-23.

¹⁷⁷ Case 86/82, *Hasselblad (GB) Limited v Commission*, [1984] ECR 883, para 46; Joins Cases C-89/85, 104/85, 114/85, 116/85, 117/85 & 125/85-129/85, *Ahlström (Wood Pulp)*, [1993] ECR I-1307, para 175.

¹⁷⁸ GUERRIN, M. and KYRIAZIS, G. (1993) *supra* fn 122; for an illustration of that difficulty in proving the independency of the pricing decision see the *Toy and games* case before the CAT, BAILEY, D. (2008), *supra* fn 133, p 201.

¹⁷⁹ For example, in Joined Cases C-189/02 P, 202/02 P, a.o., *Dansk Rorindustri A/S v Commission (Pre-insulated Pipes)*, [2005] ECR I-5425, para 146, the ECJ, the practical impossibility of implementing the agreed boycott could not 'discharge its liability for having participated in that measure, unless it publicly distanced itself from what was agreed at the meeting'.

¹⁸⁰ See Opinion of AG Tizzano in Joined Cases C-189/02 P, 202/02 P, a.o., *Dansk Rorindustri A/S v Commission (Pre-insulated Pipes)*, [2005] ECR I-5425, paras 193-194.

¹⁸¹ Case T-99/04, *AC-Treuhand v Commission*, [2008] ECR II-1501.

undertaking cannot be held liable for a cartel if it is not active on the market on which the restriction of competition takes place, namely the organic peroxides industry. The Commission submitted that whether an undertaking is active on the market at issue was not relevant for holding it liable for active participation, as it was ‘irrelevant whether or not a participant in an infringement derived a profit from it, since Article 81(1) is not based on the criterion of enrichment but on that of jeopardising competition’.¹⁸² The CFI rejected the appeal but following a different reasoning. While it starts its analysis with an invitation for the Community judicature to clarify the scope of the notions ‘agreement’ and ‘undertaking’ with regard to the perpetrator of the restriction,¹⁸³ it concludes, based on a literal reading of Article 81, that the term ‘agreements between undertakings’ does not require a restrictive interpretation. Therefore, it purports that there was no need to require that the market of the ‘perpetrator’ of the restriction be exactly the same as the one on which that restriction is deemed to materialise.¹⁸⁴ The fact that an undertaking is not active on the market on which the restriction of competition materializes, should not exclude its liability for having participated in the implementation of a cartel. In addition to that, the fact that it has participated only in an accessory way is not sufficient to exclude its liability for the entire infringement, although this should be taken into account at the stage of determining the sanction. The judgment highlights the *quasi-automatic* system of liability that ensues from mere cartel participation, and acknowledges the fact that the degree of participation will only be considered and reflected at the sanctioning phase.¹⁸⁵

3.1.3. Concluding remarks

Both ‘agreements’ and ‘concerted practices’ constitute by definition offences whose actual effects do not need to be proven. The implications of this approach are far reaching¹⁸⁶ as they attribute to ‘agreements’ and ‘concerted practices’ exactly the same anticompetitive consequences, despite the fact that the intensity of cooperation in the former is stronger than in the latter. Moreover, the limited room for rebutting the ‘participation’ presumptions through the ‘public distancing’ defence indicates also the

¹⁸² Ibid., para 109 referring to Case C-195/99 P, *Krupp Hoesch Stahl v Commission*, [2003] ECR I-10937, para 85.

¹⁸³ More precisely to ‘that the Community judicature has yet to give an explicit ruling on the question whether the notions of agreement and undertaking as used in Article 81(1) EC are conceived in accordance with a ‘unitary’ perspective, so as to cover any undertaking which has contributed to the committing of an infringement, irrespective of the economic sector in which that undertaking is normally active or – as the applicant submits – in accordance with a ‘bipolar’ perspective, so that a distinction is drawn between undertakings which ‘perpetrate’ an infringement and those whose role is one of ‘complicity’ in the infringement’.

¹⁸⁴ Case T-99/04, *AC-Treuhand v Commission*, [2008] ECR II-1501, paras 122-123.

¹⁸⁵ As pointed by Judge Wahl, this is a ‘teleological’ decision for two reasons; first, in that an accomplice falls also under the scope of the prohibition and second, in that it multiplies the potential leniency applicants. In WAHL, N. (2009) ‘Obsession with Justice - Competition law infringements and their perpetrators’, in KANNINEN, et al, (2009) *EU competition law in context: essays in honour of Virpi Tüli*, Oxford, Hart Publishing, p 67.

¹⁸⁶ ALBORS-LLORENS, A. (2006) ‘Horizontal agreements and concerted practices in EC competition law: unlawful and legitimate contacts between competitors’, *The Antitrust Bulletin*, 51, p.848.

predisposition of the Court to favour ‘efficiency’ over a strict application of the rule of presumption of innocence. Similarly, the *de facto* impossibility of rebutting the ‘object’ presumption means that from an enforcement point of view, the rule disentangles the Commission from the difficult task of having to prove concrete effects on the market.

This jurisprudence shows that cartels are dealt as a *quasi-automatic* system of liability that ensues from mere cartel participation and acknowledges the fact that the degree of participation will only be considered and reflected at the sanctioning phase. From a ECHR point of view, the use of presumptions in criminal cases is not necessarily contrary to Article 6. As pointed in *Salabiaku v France*,¹⁸⁷ the right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations is not absolute, since, ‘presumptions of fact or law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within the reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence’.

Finally, it is submitted that the clear judicial preference of promoting efficiency over Article 6 guarantees, though thorny as they may have been in early case law, is of a weakening importance. The predominant reliance on Leniency ensures that more reliable evidence proving cartel participation is used, attenuating the need to infer cartels from complicated factual evidence.

3.2. Rules of attribution of liability in cartel infringements

Another area of cartel law that has raised a substantial number of questions is that of the manner the Commission imputes liability on undertakings. The pertinent question, from a ‘due process’ point of view, is the insufficiency in proving the actual involvement of undertakings in a particular conduct, therefore an infringement of the *in dubio pro reo* principle and of Article 6.

3.2.1. The underlying principles of attribution of liability

The predisposition for the Commission and NCAs to impute liability to parent companies is often justified by a series of functional aspects ultimately aimed to lead to extra-deterrence. First, a parent company, even where not directly accountable for the infringement, has a higher turnover than its subsidiaries and therefore will be asked to pay higher fines. Secondly, a side-effect of holding the parent company liable is that of leading to more responsible management over the behaviour of subsidiaries. Besides, in light of that objective, competition authorities may be able to invoke recidivism more often against a parent company than over its subsidiaries.¹⁸⁸ Thirdly, there is a jurisdictional dimension in holding parent companies liable as loose imputability rules

¹⁸⁷ 7 October 1988, § 28, Series A no. 141-A.

¹⁸⁸ WAHL, N. (2009), *supra* fn 185, p 68.

facilitate the persecution of parent companies located outside the EU that were indirectly involved in European cartels.¹⁸⁹

The Community rules of imputation of responsibility are therefore conceived against this competition policy background of public enforcement that aims at punishment, deterrence and instauration of a competition culture. EC competition law is based on the ‘principle of personal responsibility’ of the economic entity that committed the infringement,¹⁹⁰ which essentially means that where an infringement is found to have been committed ‘it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it’.¹⁹¹ While the operation of the principle arose in the context of litigation pertaining to the succession of liability, it is also the underlying principle of its imputation. As explained by the Commission, in the context of undertakings comprising several legal entities, ‘the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking’.¹⁹²

Issues of parental company responsibility are more or less simple to deal with when the company itself has committed an infringement. The situation appears less clear when the parent company has not been personally involved in the infringement but its subsidiaries have. The traditional rule of thumb in attributing liability for a cartel infringement within a group of undertakings is to determine whether a subsidiary acted autonomously/independently or whether it merely followed instructions from its parent company.¹⁹³ In the former case a subsidiary may be solely liable, while in the latter the subsidiary’s anti-competitive conduct may be imputed also to its parent company.¹⁹⁴ While this rule seems to naturally articulate the principle of personal responsibility, that is concordant with the Article 6 requirements, its practical

¹⁸⁹ See for an illustration Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, paras 124-146.

¹⁹⁰ Case C-49/92 P, *Commission v ANIC Partecipazioni SpA*, [1999] ECR I-4125, para 78; Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR, para 75.

¹⁹¹ Case T-6/89, *Enichem Anic v Commission*, [1991] ECR II-1623, para 236; see also Case T-161/05, *Hoechst GmbH v Commission*, [2009] ECR II-3555, para 50. ‘According to settled case-law, it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking’; See also Commission Decision COMP/38.620 - *Hydrogen peroxide*, OJ L 353, 13.12.2006, pp 54-59, para 436, ‘the principle of personal liability according to which punishment should be applied only to the offender’.

¹⁹² Commission Decision COMP/38.638 - *Synthetic rubber (BR/ESBR)*, OJ C7, 12.01.2008, para 396.

¹⁹³ See Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, where the parent company argued that the conduct is to be imputed to its subsidiaries and not itself, especially due to the separate legal personality. The Court explained that this was not sufficient to exclude the imputability of its conduct to the parent company, especially when the subsidiary ‘does not decide independently upon its own conduct on the market, but carries out in all material respects the instructions given to it by the parent company’. See also Cases T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission*, [1993] ECR II-389, para 149; C-65/02 P, *ThyssenKrupp v Commission*, [2005] ECR I-6773, para 66.

¹⁹⁴ Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, para 58.

application has raised several difficulties, especially with regard to the characterisation of an ‘autonomous’ behaviour and its appraisal by the Commission.

3.2.2. The parental liability in cases of full-ownership

3.2.2.1. The ‘presumption’ of liability in cases of full ownership

Early case law suggested that, in order to impute liability on the parent company, the Commission had to prove not only that it was ‘able to exercise decisive influence over the policy’ but also that it ‘in fact used this power’.¹⁹⁵ In *AEG*,¹⁹⁶ however, the Court alleviated the second probatory condition in the case of wholly-owned subsidiaries, explaining that such a check appeared superfluous as ‘a whole-owned subsidiary necessarily follows a policy laid down by the same bodies as, under its statutes, determine the parent’s policy’. While this seemed to clarify the law, some doubt was cast in *Stora*¹⁹⁷ where the ECJ seemed to suggest that holding all of the shares of a subsidiary in itself did not suffice¹⁹⁸ and that additional evidence of ‘decisive influence’ had to be adduced.

‘A 100 per cent shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company. The imputation to the parent company of its subsidiary’s conduct is always dependent on a finding that management power was actually exercised’.¹⁹⁹

In the same judgement, the Court, nevertheless, explained that in such circumstances it was legitimate to ‘assume that the parent company in fact exercised decisive influence over its subsidiary’s conduct’.²⁰⁰ The *Stora* rule, however, seemed to be completely disregarded in posterior CFI decisions²⁰¹ that quasi-automatically attributed liability

¹⁹⁵ Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619 para 137.

¹⁹⁶ Case 107/82, *AEG v Commission*, [1983] ECR 3151, para 50; on the facts of the case the parent company did not dispute that it was in a position to exert a decisive influence on its subsidiaries, but argued that it did not make use of this power.

¹⁹⁷ Case C-286/98 P, *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925.

¹⁹⁸ *Ibid.*, para 28. ‘Thus, contrary to the appellant’s contention, the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary’s commercial policy, or produced evidence to support its claim that the subsidiary was autonomous’. However, the ECJ further explained that the CFI had rightly also relied on the fact that the appellant had not disputed that it was in a position to exert decisive influence on its subsidiary’s commercial policy. In *Akzo* (C-97/08 P) [2009], para 62 the ECJ explained that the additional criteria mentioned in *Stora* were mentioned by the Court for ‘the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption mentioned in paragraph 60 of this judgment subject to the production of additional indicia relating to the actual exercise of influence by the parent company’.

¹⁹⁹ *Ibid.* para 23; reiterated in Case T-325/01, *DaimlerChrysler v Commission*, [2005] ECR-II-3319, para 218.

²⁰⁰ *Ibid.*, para 29.

²⁰¹ Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, para 290; Case T-325/01, *DaimlerChrysler v Commission*, [2005], ECR II-3319, para 219; Case T-314/01, *Avebe BA v Commission*, [2006] ECR II-3085, para 136.

merely on the basis of full shareholding only. Nonetheless, inconsistent statements were still being made by the CFI. In *Bolloré*²⁰² the CFI unequivocally held that full shareholding was not in itself sufficient to attribute liability and that more than the extent of the shareholding had to be shown in the ‘form of indicia’ as it ‘need not necessarily take the form of evidence of instruction given by the parent company to its subsidiary’.²⁰³ Along the same lines, in *Aristrain*²⁰⁴ the ECJ itself held that ‘the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other’.²⁰⁵ The legal person in charge has to be identified as the ‘head of the group with responsibility for coordinating the group’s activities’. This seems to reaffirm the *Stora* case-law, in that while ‘decisive influence’ is presumed where a company fully owns a subsidiary, such a presumption is also dependent on some kind of managerial influence of that parent company.²⁰⁶

Possible persisting doubts dissolved in the recent *Akzo* judgment,²⁰⁷ where the ECJ explained that in the *Stora* judgment the additional circumstances were mentioned ‘for the sole purpose of identifying all the elements on which the CFI had based its reasoning’.²⁰⁸ The case concerned an appeal brought by a holding company of a group (Akzo Novel NV) against a Commission decision that found that Akzo and several of its wholly owned subsidiaries had committed an infringement by participating in the vitamins cartel. While only four subsidiaries had been found to have directly committed the infringement, the Commission had also fined the holding company on the ground that it exerted decisive influence over the commercial policy of its wholly-owned

²⁰² Case T-109/02, *Bolloré v Commission*, [2007] ECR II-947, para 132.

²⁰³ *Ibid.*, para 132.

²⁰⁴ Case C-196/99 P, *Aristrain v Commission*, [2003], ECR I-11005.

²⁰⁵ *Ibid.*, paras 98-99.

²⁰⁶ See Case T-309/94, *Koninklijke KNP BT v Commission*, [1998] ECR II-1007, where the CFI ruled that the Commission is entitled to attribute to a parent company, representing a group of companies, responsibility for the unlawful conduct of one of its subsidiaries where there is concrete evidence implicating the parent company in the subsidiary’s anti-competitive actions. That is the position where a member of the parent company’s management board has participated, as a representative of its subsidiary, in meetings between bodies engaged in discussions with an anti-competitive object, and has even presided over meetings held by the central body of a cartel. The Commission is also entitled to attribute to the parent company responsibility for the conduct of a second subsidiary which has participated in meetings of some of those bodies, since, in involving itself in the participation of one of its subsidiaries in the anti-competitive actions, the parent company is aware, and must also approve of, that subsidiary’s participation in the infringement in which the first subsidiary took part.

²⁰⁷ Although the position was also reiterated by the CFI in *Itochu* where it was held that, ‘where a subsidiary is wholly owned by its parent company, it was unnecessary to ascertain whether the parent had in fact influenced the commercial policy of its subsidiary, as there was a simple presumption that the parent exercised decisive influence over its subsidiary conduct on the market’. Case T-12/03, *Itochu Corp v Commission*, [2009] ECR II-909.

²⁰⁸ Case T-175/05, *Akzo Nobel and Others v Commission*, [2009] ECR I-8237, para 92.

subsidiaries. Akzo appealed, *inter alia*, on the ground that the Commission was wrong to have imputed a joint liability on the parent merely based on the finding that it had the full shareholding of the subsidiaries, without showing that it had in fact determined the commercial behaviour of the subsidiaries by exercising decisive influence. The ECJ rejected the appeal explicating that where a parent company has the totality of shareholding it is sufficient for the Commission to prove that

‘the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market’.²⁰⁹

3.2.2.2. Rebutting the presumption

According to the *Akzo* ruling, it is for the parent company to put before the Commission any evidence relating to ‘the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity’.²¹⁰ More concretely, the Commission has explained that to rebut the presumption the parent company must show that

‘it was not in a position to exert a decisive influence on its wholly-owned subsidiary’s commercial policy, or that the subsidiary nonetheless determined autonomously its commercial policy (that is, the parent company, despite its controlling rights, did not actually exercise a decisive influence as regards the basic orientations of the subsidiary’s commercial strategy and operations on the market)’.²¹¹

Be that as it may, the Commission itself acknowledged the scarcity of a successful rebuttal, given that ‘a situation in which subsidiaries are controlled by their parent company but nevertheless remain entirely “autonomous” is extremely rare’.²¹² Thus, in practice, the burden imposed on parent companies amounts to a ‘*probatio diabolica*’ and it remains questionable whether such a possibility is indeed available. The CFI has identified the following elements in proving liability: whether the parent company was able to influence pricing, production distribution, sales objectives, gross margins, sales

²⁰⁹ Ibid., para 61.

²¹⁰ Ibid., para 65.

²¹¹ Commission Decision COMP/38.823 - *Elevators and escalators*, OJ C 75, 26.03.2008, para 650.

²¹² Commission Decision COMP/38.638 - *Synthetic rubber (BR/ESBR)*, OJ C 7, 12.01.2008, para 397; In that regard AG Kokkott points out that ‘presumption rules are by no means unknown in competition law. (59) On the contrary, the characteristics of evidence tendered as proof of infringements of competition rules imply that it must be open to the authority or private party on whom the burden of proof lies to draw certain conclusions from typical sequences of events on the basis of common experience’, Opinion of A.G. Kokkott in Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, para 72.

costs, cash flow, stocks and marketing.²¹³ Thus, it seems logical that parent companies could rely on the same type of evidence to rebut the presumption.

A final issue with regard to the rebuttability is whether a parent company can be held liable where the subsidiary not only acts autonomously but also contrary to the parent's instructions to abide by competition laws. For instance, in the pending case *Amertranseuro International Holdings*²¹⁴ the plaintiffs, *inter alia*, argued that they were erroneously held liable as they were 'neither aware, nor could have been aware of the subsidiary's involvement in the alleged infringement'. In that regard the CFI has clearly explained that proof of the subsidiary's autonomous behaviour, in the sense of not compliance with the instructions given by the parent company, can exonerate the parent company of its liability.²¹⁵ Yet, it is reminded that according to Article 23(2) of Regulation 1/2003, the Commission may impose fines to undertakings where they have intentionally or *negligently* infringed Article 101(1) TFEU. Does the absence of appropriate control over the infringing subsidiary company amount to negligence? Obviously, this depends on the facts of the matter. Arguably, from a deterrence and an enforcement efficiency point of view, holding the parent company liable is more appropriate, as not only it induces responsible management, but also facilitates the proof of competition authorities.²¹⁶

Decisional practice has shown however, that not all full-owners are *ipso facto* held liable. In the *Spanish Raw Tobacco*²¹⁷ the Commission abstained to impute responsibility on the parent company of the wholly-owned subsidiary on that grounds that 'apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement',²¹⁸ or that 'the 100% shareholding was purely financial'. Yet, this case must be exceptional as, despite the factual and legal similarity, the Commission departed from its finding on the subsequent *Italian Raw Tobacco* decision.²¹⁹ Moreover, in other recent decisions the purely financial nature of the shareholding did not exempt the parent company from liability. For instance, in *Schunk*²²⁰ the CFI ruled that the corporate object of the holding, i.e. 'the acquisition, the sale, the administration, in particular the strategic management of industrial

²¹³ Case T-112/05, *Akzo Nobel v Commission*, [2007] ECR II-5049, para 64.

²¹⁴ Case T-212/08, *Amertranseuro International Holdings v Commission*, action brought on 4 June 2008, OJ C 197, 2.8.2008, p 32.

²¹⁵ *Supra* fn 213, para 62.

²¹⁶ Similar arguments put forward with regard to Employer and Employee liability issues. See p 110 and fn 42 in WILS, W. P. J. (2000) 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', *European Law Review*, 25(2).

²¹⁷ Commission Decision COMP/38.238 - *Spanish Raw Tobacco*, OJ L 102, 19.04.2007

²¹⁸ *Ibid.*, para 376.

²¹⁹ Commission Decision COMP/38.281 - *Italian raw tobacco*, OJ L 353, 13.12.2006 as noted in RIESENKAMPPF, A. and KRAUTHAUSEN, U. (2010) 'Liability of parent companies for antitrust violations of their subsidiaries', *European competition law review*, Vol.31, issue 1, pp 38-41.

²²⁰ Case T-69/04, *Schunk and Schunk Koblenstoff-Technik v Commission*, [2008] ECR II-2567.

participations' is broad enough to encompass and permit the management and running of its subsidiaries, despite the fact that it does not exercise any industrial or commercial activity.²²¹

The trend of strict applications of the *AKZO* presumption rules has provoked a wave of appeals currently pending before the Community Courts.²²² Their further clarification of the 'rebuttability' of the *AKZO* presumption will be very welcome. Finally, using the aforementioned ECJ's *Aristain*²²³ judgment, holding that the share-capital is insufficient in itself to establish an economic unit unless there is an identified influence on the coordination of the group's activities, offers some authority to suggest that the 'management influence' element could remain pertinent in deciding the liability of a parent company in the context of a conglomerate group. In *Hoffman-La Roche*, for instance, the Commission decided to address the decision on the basis of separate management.²²⁴ In such a context the parent company can operate in a completely different market than the one of its subsidiary and apply absolutely no managerial supervision on the decisions of its subsidiary.

3.2.3. The parental liability in cases of non-full ownership

In addition, the situation remains uncertain with regard to groups of companies where the parent company does not possess the totality (or quasi-totality) of the shareholding but merely the majority of it.²²⁵ Early case law acknowledges that a parent company can influence its subsidiary's policy even when holding the majority of the shares²²⁶ or where it *de facto* determines its conduct.²²⁷ While the issue has not come up before the Community Courts, Commission decisional practice can be indicative. In the recent *Carbon carbide*²²⁸ decision neither the Slovak mother-company (HSE – a Slovenian energy company), nor the Slovak mother-company (*Garantovaná*) had any full control over their respective subsidiaries (TDR Ruse) that were involved in the cartel. The decision could stand for authority that (an allegedly) 70% of the shares held by the parent can suffice to form a presumption of liability, thus further expanding the scope

²²¹ Ibid., para 61-62.

²²² See *infra* fn 229.

²²³ Case C-196/99 P, *Aristain v Commission*, [2003], *supra* fn 204.

²²⁴ Commission Decision COMP/37.512 - *Vitamins*, OJ L 6, 10.01.2003, pp 1-89, para 643-644 ; 'In the case of Solvay Pharmaceuticals BV, this undertaking directly participated in the infringement and operates as a *functionally separate entity* from its parent Solvay SA. The Commission therefore addresses this Decision to Solvay Pharmaceuticals BV'.

²²⁵ As explained by Wils, 'is it sufficient that the parent company holds all the shares of its subsidiary, or more than half of them, for both companies to constitute a single undertaking?' WILS, W. P. J. (2000) *supra* fn 216, p 103.

²²⁶ Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, [1972] ECR 619, para 136.

²²⁷ Commission Decision COMP/38.238 - *Spanish Raw Tobacco*, *supra* fn 217, p 373.

²²⁸ Commission Decision COMP/39.396 - *Calcium carbide*, 22.07.2009.

of imputability. Two appeals are currently pending before the CFI, which should cast some clarification on the future scope of the presumption.²²⁹

In such a scenario, a claimant will not be able to benefit from the *AKZO* presumption but the Court seized would have to first analyse whether the group constitutes a ‘single economic unit’ in the meaning of Article 101 TFEU. In that regard consideration should be given to the economic and legal links between the entities concerned. Accordingly, if the court views that the entities form a ‘single economic unit’, it can accept a claim against the parent, as, according to the Court, such a legal qualification ‘enables the Commission to impose fines to the parent company, without having to establish the personal involvement of the latter in the infringement’.²³⁰ On the other hand, if the Court considers that the two entities do not form an ‘undertaking’ in the meaning of Article 101 TFEU, the plaintiff should probably adduce proof of ‘decisive influence over the commercial conduct of its subsidiary’ that will probably relate to the corporate structure of the group.

3.2.4. Concluding remarks

This *AKZO* reasoning shows that the Court prioritises the ‘structure of the group’ over the ‘actual involvement’ of a legal entity in a cartel, thus departing from a strict application of the principle of ‘personal responsibility’. This trend is reflected in two recent Commission decisions that unequivocally explained that ‘the principle of the autonomy of a legal entity and economic autonomy are company law principles that are not relevant once a group of companies is held to form a single undertaking for the purposes of applying Article 81 of the Treaty’.²³¹ Such an approach clearly differs from the original approach of the Court when first explaining that ‘in view of the unity of the group thus formed, the actions of the subsidiaries may in *certain* circumstances be attributed to the parent company’.²³²

Despite the obvious advantages of an easy practical implementation favouring legal certainty, the *AKZO* presumption that so flagrantly departs from a system of personal responsibility sits at odds with the basic procedural requirement of presumption of innocence.²³³ Undoubtedly, the fact that the parent company can still rebut the presumption shows *a priori* that the parent’s liability is not one of a strict liability regime. This leads to a reversal of the burden of proof that, according to AG Kokkot, is not

²²⁹ Case T-399/09, Case T-399/09, *Holding Slovenske elektrarne (HSE) v Commission*, 06.10.09 (pending); Case T-392/09, *1.Garantovaná v Commission*, 02.10.09 (pending).

²³⁰ Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, para 59.

²³¹ Commission Decision COMP/38.645 - *Methacrylates*, OJ L 322, 22.11.2006, pp 20-23, para 273; Commission Decision COMP/38.620 - *Hydrogen peroxide*, OJ L 353, 13.12.2006, pp 54-59, para 436.

²³² Emphasis added. *ICI*, op cit, n 226, para 135. For instance in *ICI* the Court considered the fact that the parent held all / the majority of the shares in the subsidiaries, exercised decisive influence over their policy in selling prices (paras 136-138).

²³³ Opinion of A.G. Kokott in Case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-8237, paras 70-76; See also RIESENKAMPFF, A. and KRAUTHAUSEN, U. (2010) *supra* fn 219, p 41.

incompatible with the presumption of innocence,²³⁴ as only the ‘standard of proof’ is in fact being affected. Nevertheless, despite such rhetorics, a crystallization of a quasi-automatic system of attribution of liability on parent companies, especially in cases of mere majority ownership - no matter how well justified it might be in terms of deterrence and responsible management - could constitute a flagrant departure from the initial ECJ’s focus on personal responsibility. Moreover, in view of the contextual approach espoused by the ECtHR, one should question whether such practice could survive an Article 6(2) scrutiny in the future.

3.3. The rules on cartel fines in view of the principle of ‘*legality*’ and the rule against ‘*double penalization*’

3.3.1. The general context of judicial review of fines

The numerical expansion of cartel decisions,²³⁵ and the undisputed escalation in the level of fines,²³⁶ also meant a growing need of judicial review in antitrust matters. The 1991 formation of the CFI signalled an expansion of the number of cartel-related cases dealt with by European Courts. Today’s extensive body of case law on cartels extends up to a total of 245 judgements, 99 by the ECJ and 146 by the CFI/EGC.²³⁷ It can be generally submitted that the increase of appeals is closely associated to the aforementioned massive expansion of the level of fines imposed on undertakings. Generally, the case-law has gradually evolved from a very substantive law focus on the elements that constitute a cartel (instructive phase), towards a type of review that examines procedural guarantees (fundamental rights phase), and especially, following the adoption of the Leniency Programme, a phase where the proportionality and appropriateness of fines are being scrutinized (fine-control phase). Today, ‘one cartel decision triggers an average of 3 to 4 court cases’.²³⁸ It is submitted that this increase is mainly due to the current uncertainty surrounding the sanctioning rules. Fines are appealed in approximately 90% of the Commission decisions, approximately 60% of which successfully with an average fine reduction of 19%.²³⁹

²³⁴ Opinion of A.G. Kokott in Case C-97/08 P, *Aexo Nobel v Commission*, [2009] ECR I-8237, para 74.

²³⁵ From the late 60s till now the Commission has produced a total of approximately 130 cartel infringement decisions. Yet, the Commission has produced approximately as many decisions over the last 10 years as it had over the previous 30 years, before the introduction of the first leniency programme.

²³⁶ According to the Commission’s statistics, since 1990 the Commission has imposed a total of more than €13.5 bn of fines on companies, €13 bn of which (i.e. approx. 95%) within the 2000-2009 period. Last updated: total of €13,543,887,360, as of 17 December 2009, those figures do not correspond to the figures of the actual fines paid by the companies following the CFI’s correction of the fine. See <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

²³⁷ As of Feb 25th, 2011.

²³⁸ Commissioner Neelie Kroes Speech/05/205, ‘The First Hundred Days’, 40th Anniversary of the Studienvereinigung Kartellrecht 1965- 2005, International Forum on European Competition Law, Brussels, 7th April 2005.

²³⁹ VELJANOVSKI, C. (2007) ‘European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis’, SSRN, p 5; Veljanovski calculated that from 1998 September 2007, the CFI has decided appeals on fines over

The focal shift on the contestability of cartel decisions on the area of fines meant that the latter were challenged on wide spectrum of legal grounds.²⁴⁰ The ones hereby analysed are those more pertinent within the general ‘efficiency’ v ‘fundamental rights protection’ debate. The first argues that the unpredictability of the current legal framework on fines potentially conflicts with the principle of legality (*nulla poena sine lege*);²⁴¹ the second argues that the imposition of fines in international cartels can clash with the rule against double penalization (*ne bis in idem*).²⁴² Each will, in turn, be analyzed.

3.3.2. The unpredictability of the EC rules on fines and the principle of legality

The general principle of legality stipulates that no one should be convicted or punished except in respect of a breach of a pre-existing rule of law.²⁴³ One of the applications of the principle (besides non-retroactivity) is that ‘criminal law’ should be clearly defined. This principle is recognised in Article 7 ECHR, granted a general principle of EU law status by the Community Courts²⁴⁴ and incorporated in Article 49 of the Charter. Moreover, it has traditionally been considered to be a corollary to the principle of legal certainty, also accorded a status of a general principle of EU law.²⁴⁵ Under ECtHR case law, Article 7 applies in the case of ‘criminal offences’ where ‘penalties’ are incurred, and given that the interpretation of both those autonomous notions are consistent with that of the *Engel* criteria of Article 6²⁴⁶, competition proceedings fall within the scope of its application. Moreover, on the applicability of the principle on rules that take the

€6 billion, or, over 98% of all fines imposed by the Commission. Fines were appealed in 45 out of the 50 cartels (19 still pending) by one or more firms, i.e. in 90% of the cases. Moreover, empirical evidence suggests that 59% of these appeals (16/24) were successful in achieving an average reduction of 19.3% (i.e. from a total of €1,753.4 million to €1,415.5 million).

²⁴⁰See FREUND, H.-J. (2006) ‘Application of general principles of Community law in the review of Commission decisions on fines by the Community Courts’, ERA-Forum., 1, 40-52; SCHWARZE, J. R. (2007) ‘Les sanctions imposées pour les infractions au droit européen de la concurrence selon l'article 23 du règlement no. 1/2003 CE à la lumière des principes généraux du droit’, Revue trimestrielle de droit européen, 1, 1-24.

²⁴¹See DEBROUX, M. (2006) ‘L' "imprévisibilité transparente": La politique de sanction de la Commission en matière de cartels’, Concurrences, 4, 46-55; LÓPEZ, J. J. P. (2006) ‘The Aggravating Circumstance of Recidivism and the Principle of Legality in the EC Fining Policy: Nulla Poena Sine Lege?’, World Competition, 29, 441-457; WHELAN, P. (2008) ‘The Degussa case : the Court of First Instance and the European Court of Justice have taken a clear line on legal certainty and antitrust fines’, Competition law insight, Vol. 7, p.13-15.

²⁴²WILS, W. P. J. (2003) ‘The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis’, World Competition, 26, 131-148; PAULIS, E. (2005) ‘Le règlement n° 1/2003 et le principe du ne bis in idem’, Concurrences, 1, 32-40; FREUND, H.-J. (2006), supra fn 240, 40-52.

²⁴³See OVEY, C. (2006) *Jacobs and White: the European Convention on Human Rights*, Oxford University Press, p 209.

²⁴⁴Case C-63/83, *Kirk*, [1984] ECR 2689, para 22.

²⁴⁵Case 29/69 *Stander* [1969] ECR 419, para 7.

²⁴⁶*Welch v UK*, [1993], Series A, No.307-A, according to which other factors to be taken into account are the nature and purpose of the measure, its characterisation under national law, and the procedures involved in the making and implementation of the measure, and its severity.

form of a non-legally binding norm, such as the Commission Guidelines,²⁴⁷ the ECJ recalls that they latter form ‘rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment’.²⁴⁸ Thus, in that regard, Guidelines qualify as a legal norm to which Article 7 applies.

The Community transposition of the principle of legality of Article 7 commands that Community legislation must be ‘unequivocal and its application must be predictable for those subject to it’.²⁴⁹ Furthermore, these certainty and predictability requirements must be observed more strictly in cases of rules liable to entail financial consequences.²⁵⁰ On top of that, in cases where a provision empowers the Commission to act (e.g. to impose fines) the Council must ‘clearly specify the bounds of the power conferred’.²⁵¹ All these requirements regarding the quality and predictability of Community rules have led a significant number of undertakings to appeal on the grounds of the vagueness and unpredictability of Community rules on the imposition of fines.

3.3.2.1. The evolution of the fining rules and ‘predictability’

The lack of sufficient transparency with regard to the Commission’s discretion to impose fines has been a constant source of criticism under the old Regulation 17 general provisions and it persisted despite the adoption of the first ‘1998 Guidelines’²⁵² or the present-day ‘2006 Guidelines’.²⁵³ In view of the increased level of fines and the success of the Leniency programme, the Commission issued the ‘1998 Fining Guidelines’ as a means to ensure further ‘transparency and impartiality’.²⁵⁴ This signalled the departure from the unwritten but long-lasting decisional practice towards a more formalized set of rules that were meant to offer further transparency. While the analysis of the fining mechanism goes beyond the scope of this paper, suffice to say that, according to Community Courts,²⁵⁵ the 1998 Guidelines (and by analogy the current 2006 Guidelines) did not introduce a new method of calculation, given that fines continue to be calculated according to the two (old) Regulation 17 criteria, namely the gravity of the infringement and its duration. As a consequence, claims pertaining to

²⁴⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, pp 2-5 replacing the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, p 3.

²⁴⁸ Case C-167/04 P, *JCB Service v Commission*, [2006] ECR I-8935, para 207.

²⁴⁹ See for example Case 70/83, *Kloppenborg*, [1984] ECR 1075, para 11.

²⁵⁰ Case 326/85, *Netherlands v Commission*, [1987] ECR 5091, para 24.

²⁵¹ See Case 291/86, *Central-Import Münster*, [1988] ECR 3679, para 13.

²⁵² 1998 Guidelines, supra fn 247.

²⁵³ 2006 Guidelines, supra fn 247.

²⁵⁴ See para 3 of 1998 Guidelines, supra fn 247.

²⁵⁵ Case T-23/99, *LR AF 1998 v Commission*, [2002] ECR II-1705, paras 231-232.

the principle of non-retroactivity were doomed to fail,²⁵⁶ not least due to the CFI's acknowledgement that the Commission could at 'any time adjust the level of fines to the needs of that (competition) policy'.²⁵⁷

3.3.2.2. The ECHR (loose) interpretation of the principle of legality

ECtHR rulings suggest that a provision of law must clearly define crimes and the relevant penalties, a requirement that is met when 'the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation, what acts and omissions will make him criminally liable'.²⁵⁸ The ECtHR has traditionally accepted loosely defined laws to be compatible with Article 7 based on, *inter alia*, the need to avoid 'excessive rigidity and to keep pace with changing circumstances'.²⁵⁹ It follows that Article 7 does not require legal provisions to be so precise that the potential consequence of an infringement of those provisions 'should be foreseeable with absolute certainty'.²⁶⁰ Along these lines, in *Margareta v. Sweden* the ECtHR held that

'the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference'.²⁶¹

3.3.2.3. The Community Courts application of the ECtHR case-law in competition cases

Community Courts, confronted with Article 7 claims, drew inspiration from the ECtHR interpretation of the principle, expressly acknowledging that 'there is nothing that would justify the Court giving a different interpretation of the principle of legality (of the ECtHR)'.²⁶² In light of the aforementioned loose standards of foreseeability under the ECHR, the Community Courts have rejected the totality of the claims, on a series of different grounds.

First, the Court took the view that the ceiling fine of 10% of the undertaking's turnover is reasonable having regard to the interested defended by the Commission.²⁶³ Secondly,

²⁵⁶ See for example Joined Cases C-189/02 P, etc., *Dansk Rorindustri A/S v Commission (Pre-insulated Pipes)*, [2005] ECR I-5425; Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, [2003] ECR II-2597, paras 39-61.

²⁵⁷ Joined Cases 100-103/80, *SA Musique Diffusion française v Commission*, [1983], para 109, Case T-12/89, *Solvay & Cie SA v. Commission*, [1992] ECR II-907, para 309.

²⁵⁸ *Coëme v. Belgium*, 22 June 2000, 2000-VII, p 1, para 145.

²⁵⁹ See for instance *Kokkinakis v. Greece*, Series A, No.260-A [1994], paras 40-52.

²⁶⁰ Case T-43/02, *Jungbunzlauer v Commission*, [2006] ECR II-3435, para 79.

²⁶¹ *Margareta & Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A, no. 226-A, para 75.

²⁶² Case T-43/02, *Jungbunzlauer v Commission*, supra fn 260, para 81.

²⁶³ *Ibid.*, para 86.

the principles of proportionality and equal treatment, together with the existing accessible decision-making practice form a reasonably well predictable system of imposition of fines.²⁶⁴ Thirdly, the existing Guidelines offer the relevant information that enables to ‘foresee to the requisite legal standard the methods and order of magnitude of the fines incurred for any given conduct’.²⁶⁵ Along these lines, the undisputed fact that undertakings are not in a position to ‘know in advance the exact level of the fines’ is, according to the Court, not such as to establish a violation of the principle of legality,²⁶⁶ especially given that the Decision must ‘show the Commission’s reasoning clearly and unequivocally’.²⁶⁷

Apart from those legal grounds, the CFI in *Jungbunzlauer* also employs a ‘competition policy’ argument that appears significant in the context of the ‘efficiency’ debate. As a matter of fact the Court held that:

‘to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted. A fine subject to sufficiently circumscribed variation between the minimum and the maximum amounts which may be imposed for a given offence may therefore render the penalty more effective both from the viewpoint of its application and its deterrent effect’.²⁶⁸

The same position, but with an even more explicit wording, was reiterated by the Court in *Degussa*²⁶⁹ where the CFI held that:

‘due to the gravity of the infringements which the Commission is required to penalise, the objectives of punishment and deterrence justify preventing undertakings from being in a position to assess the benefits which they would derive from their participation in an infringement by taking account, in advance, of the amount of the fine which would be imposed on them on account of that unlawful conduct’.²⁷⁰

The Court’s approach is fully concordant with the Commission’s official policy according to which ‘a greater degree of foreseeability and reliability in the calculation of fines would be inconsistent with the principle that the fine must, first, take account of the particular circumstances of the case and, second, have a deterrent effect sufficient to ensure compliance by undertakings with the competition rules’.²⁷¹

²⁶⁴ Ibid., paras 87-88.

²⁶⁵ Ibid., para 90.

²⁶⁶ Ibid., para 90.

²⁶⁷ Ibid., para 91.

²⁶⁸ Ibid., para 84.

²⁶⁹ Case T-279/02, *Degussa v Commission*, [2006] ECR II-897.

²⁷⁰ Ibid., para 83.

²⁷¹ Case T-43/02, *Jungbunzlauer v Commission*, supra fn 260, para 56.

According to this approach shared both by the Community Courts and by the Commission, a reasonable level of unpredictability impacts on the enforcement efficiency. Using the words of former Commissioner Kroes, it is unclear how ‘allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance’.²⁷² In a way, the increased transparency brought into the system by the Guidelines does not imply an increased predictability, and purposefully so. As pointed by the Court itself, ‘the objective of the Guidelines is ... transparency and impartiality, and not the foreseeability of the level of the fines’.²⁷³ This fear of internalization of possible fines in the cost/benefit analysis of the undertaking’s choice in engaging in cartel activity is justified, especially, in view of the secret characteristics of cartels. The counter-argument, however, points to the direction that rules on fines should provide full awareness of the possible consequences of a criminal act as to ensure deterrence, just like in any traditional type of criminal offence. The argument is *a priori* valid, although, partly flawed since the maximum penalty, that of 10% of the undertaking’s turnover, does provide a certain fine benchmark which should be able to act as a deterrent to cartel conduct. Nevertheless, it remains undisputed that from a legitimacy point of view, clearly defined rules offer fewer possibilities for contesting a fine and reduce the undertaking’s propensity to sue following the delivery of the Commission’s decision.

3.3.3. The application of the *ne bis in idem* principle in the case of international cartels

The principle against double penalisation (double jeopardy) is enshrined in Article 4 of Protocol No.7 to the ECHR,²⁷⁴ accorded the status of a general principle of EU law²⁷⁵ and encoded in Article 50 of the Charter. The principle essentially prescribes that a person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. The principle, in competition matters, ‘precludes an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision’.²⁷⁶ As first pointed by the ECJ in *Aalborg*, the application of the principle is conditional upon three cumulative requirements: the identity of the facts, the unity of the offender and the unity the legal interest protected.²⁷⁷

It is not surprising that due to the international operation of cartels, some undertakings involved in global cartels face the risk of sanctions for the same cartel in different

²⁷²Commissioner Neelie Kroes Speech/05/205, *supra* fn 238, p 6.

²⁷³Case T-15/02, *BAF v Commission*, [2006] ECR II-497, para 250.

²⁷⁴Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No.11, Strasbourg, 22.11.1984

²⁷⁵Case C-289/04 P, *Showa Denko v Commission*, [2006] ECR I-5859, para 50.

²⁷⁶Case T-24/07, *ThyssenKrupp Stainless v Commission*, [2009] ECR II-1501, para 178; for an early application see Case 7/72, *Boehringer Mannheim v Commission* [1972] ECR 1281, para 3.

²⁷⁷Joined Cases C-204/00 P, *Aalborg Portland A/S*, *supra* fn 39, para 338.

jurisdictions. In Europe, a significant number of undertakings involved in similar worldwide cartels have argued before the Community Courts that being imposed a sanction for the same conduct in two different jurisdictions amounts to an illegal double penalisation that should be taken into account by the Commission when imposing fines. Of course, this presupposes that the fine imposed in one jurisdiction also takes account of the effects of the cartel on the market in the other jurisdiction (ex. fine on the total turnover of the undertaking) as to meet the requirement of identity of facts. As pointed by the Court in *Archer Midlands Daniels*, ‘where the sanction imposed in a non-member country covers only the applications or effects of the cartel on the market of that State and the Community sanction covers only the applications or effects of the cartel on the Community market, the facts are not identical’²⁷⁸ and, thereby, the first condition for the applicability of the principle is absent.

There are two distinct situations to be assessed in that regard; firstly, where the concurrent fines are imposed by a National Competition Authority (NCA) and the Commission (both belonging to the European Competition Network); and, secondly, where the concurrent fines are imposed by a European competition authority and a competition authority of a non-Member State. As explained by the Court, ‘the principle *ne bis in idem* does not apply to situations in which the legal systems and competition authorities of non-Member States intervene within their own jurisdiction’.²⁷⁹ The distinction is key and the rationale is explained in detail *SGL Carbon*.²⁸⁰

Having established this fundamental rule, the Court proceeded with its substantiation. In that respect, it ruled that the inapplicability of the *ne bis in idem* is absolute, in the sense that in a non-Member State scenario European competition authorities are not asked to ‘set off’ a penalty imposed by a non-member State, even where the three *Aalborg* conditions are met. This follows from the Court’s ruling that ‘there is no other principle of law obliging the Commission to take account of proceedings and penalties to which the appellant has been subject in non-member States’²⁸¹ – both at the public international law level, as well as having regard to the positive committee principles found in EU-US bilateral agreements.

While the application of this rule might, *a priori*, strike as contrary to a feeling of ‘natural justice’, it constitutes another illustration of judicial activism in interpreting a fundamental right in a contextual manner that favours ‘efficiency’.

²⁷⁸ Case C-397/03 P, *Archer Daniels Midland v Commission*, [2006] ECR I-4429, para 69.

²⁷⁹ Case C-289/04 P, *Showa Denko v Commission*, [2006] ECR I-5859, para 56 and Case C-308/04 P, *SGL Carbon v Commission*, [2006] ECR I-5977, para 32.

²⁸⁰ Case C-308/04 P, *SGL Carbon v Commission*, *ibid*, para 28-32 ; ‘the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States’ legal systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules’.

²⁸¹ Case C-289/04 P, *Showa Denko v Commission*, [2006] ECR I-5859, para 57.

3.3.4. Concluding remarks

The Community Court interpretation of the Community rules on sanctioning in view of the principle of legality and *ne bis in idem* unambiguously favour efficiency over a strict application of fundamental guarantees. Following the adoption of the 2006 Guidelines, that aim at bringing even further transparency (but not necessarily predictability) in the sanctioning mechanisms, future actions contesting the legality of the fines are likely to fizzle out. Moreover, one should not underestimate the future use of the Cartel Settlement procedure,²⁸² which substantially limits the unpredictability of the potential fine incurred. Under this new procedure, undertakings are asked to settle on the basis of an estimation of a ‘range of fines’, thereby getting exposed with a predictable amount at an early stage of the proceedings, which is likely to further limit any successful appeal on the ground of ‘unpredictability’.²⁸³ Finally, the risk of ‘double-penalization’ in the context of international cartels remains topical, not least following to the intensification of international cooperation in this field, although successful challenges on such grounds still remain implausible.

4. GENERAL CONCLUSION

The debate on the ‘upgrading’ of fundamental rights protection in competition law enforcement, while at the forefront of the reforms discourse, is not novel. It is reminded that as early as in 1991, AG Vesterdorf, citing *Öztürk*,²⁸⁴ pointed that, notwithstanding the explicit administrative qualification, competition proceedings have a ‘criminal law character’²⁸⁵ and therefore ‘it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the ECHR’ ensuring that ‘legal protection within the Community meets the standard otherwise regarded as reasonable in Europe’.²⁸⁶ In the wake of the Lisbon Treaty, the debate is revived due to the constitutionalisation of the Charter, and the EU prospective of becoming member to the ECHR. In analysing the legal nature of antitrust proceedings, that indicates the minimum threshold of protection, we infer that no ‘black or white’ qualification exists, in the sense that proceedings are either exclusively administrative or criminal. Rather the legal nature is portrayed by ‘shades of grey’, a parallel and non-mutually exclusive qualification that corresponds to the contextual analysis undertaken by the ECtHR, in applying criminal standards where it sees fit.

²⁸² See Article 10a-2d in 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 L 171, 1.7.2008, pp 3-5.

²⁸³ For an exhaustive analysis of the settlement procedure for cartels see SCORDAMAGLIA, A. (2009) ‘The new Commission settlement procedure for cartels: a critical assessment’, *Global Antitrust Review*, Issue 2, pp 61-91.

²⁸⁴ *Öztürk v. Germany*, supra fn 79, paras 47-49.

²⁸⁵ Opinion of A.G. Vesterdorf in Case T-1/89, *Rhône-Poulenc SA v. Commission*, [1991] ECR II-867, para 885.

²⁸⁶ *Ibid.*, para 885.

In examining the concrete impact of procedural guarantees on the rules governing the legal characterisation, attribution and sanctioning of cartels, it is extrapolated that Community Courts have not only applied Community legislation in a teleological manner that favours the efficiency of cartel enforcement, but have often done so following a contextual and instrumentalist interpretation of ECHR rights. Rules on the legal characterisation of cartels are less prone to be challenged on fundamental right grounds in the future, due to the quasi-exclusive reliance on sound concertation evidence acquired through Leniency. Along the same lines, rules on fines, although still unpredictable due to the persisting discretion enjoyed by the Commission under the 2006 Guidelines, are also less likely to be challenged on grounds of legality. This also depends on the success of the new cartel settlement procedure that effectively reduces the level of unpredictability. However, the same cannot be said with regard to the *ne bis in idem*, as, having regard to the intensified international cooperation of competition authorities, concurrent sanctions are likely to be imposed. Finally, it is submitted that some questions remain open in the area of law on the attribution of liability, especially in the cases of majority shareholding, that would soon need to be further clarified by the Community Courts given that the departure from the ‘personal responsibility’ focus appears discordant from a ‘presumption of innocence’ point of view.

Finally, when speculating on the future possibility of a ‘double’ ECJ/ECtHR scrutiny (following EU’s accession to the ECHR) one should take into account that the ECtHR, in *Bosphorus*,²⁸⁷ following a meticulous examination of the current state of fundamental rights protection in the EU, came to the conclusion that Community affords sufficient protection to the fundamental rights and therefore benefits from a presumption of legality.²⁸⁸ This presumption is rebuttable if, in the circumstances of a particular case, it is considered that the protection of Convention rights is ‘manifestly deficient’.²⁸⁹ It is hard to detect such a ‘manifestly deficient’ protection in the field of competition enforcement, especially in light of the ECJ judicial review of cases. However, this does not exclude the possibility that undertakings challenge Commission competition decisions in the future. Yet, under the exhaustion of all domestic remedies rule (Article 35 ECHR), undertakings would be able to challenge the compatibility of a Commission decision only after having exhausted the legal means of appeal before the Community Courts. Moreover, the ECtHR would not rule on the validity of the decision itself, which belongs to the exclusive jurisdiction of the Community Courts, but only with respect to its compatibility with the Convention. A finding of a Convention violation would therefore not necessarily, nor automatically translate into a finding of a Community law violation.²⁹⁰ Despite these drawbacks, the theoretical possibility of effective judicial supervision of the Community Courts by the Strasbourg court should,

²⁸⁷ Judgment of the ECtHR of 30 June 2005, *Bosphorus Airways v. Ireland* (no.45036/98).

²⁸⁸ *Ibid.*, para 165.

²⁸⁹ *Ibid.*, para 156.

²⁹⁰ It would of course, *de facto*, belong to the Community legal order to rectify the legal situation of the concerned undertaking, and to interpret *ex nunc* the contentious provision in light of the Strasbourg Court’s interpretation.

in theory, ensure the absolute equivalence in terms of judicial protection of those rights. In that regard it is suggested that the Community Courts, in the context of their contextual approach, have shown the required flexibility in interpreting procedural guarantees in a manner not detached from the competition enforcement needs and priorities. In that regard, excessive, abusive or opportunistic use of procedural guarantees, ultimately aimed at obstructing proceedings and stagnating procedural efficiency, is unlikely to succeed before Community Courts, and most probably before the Strasbourg Court.²⁹¹

²⁹¹As argued by Emberland, ‘the Court’s handling of corporate claims normally concern situations where the applicant in question seeks Convention shelter against the exercise of regulatory authority that impinges on the companies’ activities and interest. Corporate applicants squarely use the Convention as a means to restrain regulatory authority in the economic sphere’, EMBERLAND, M. (2006), *supra* fn 30, p 17.