European Community and Human Rights

The Antitrust Enforcement Procedure Facing Article 6 of the European Convention on Human Rights

Noémie de Bodin de Galembert

Institute of Comparative Law
McGill University, Montreal
Quebec, Canada

November 2002

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

Your file Votre référence
ISBN: 0-612-88118-0
Our file Notre référence
ISBN: 0-612-88118-0

Abstract

The Senator Lines' case, currently pending before the European Court for Human Rights, reveals a lack of procedural fairness of the European Antitrust enforcement under the terms of the European Convention for Human Rights. But in spite of a well-established concern for Fundamental Rights from the European Community, the later is still not bound by the Convention.

That is why it is critical that the EC accede to the Convention following the example of its branches. Meanwhile, it is necessary to determine whether the Member States could be held responsible for the Community's acts that violate the rights protected by the Convention. That is the question the Court will have to answer in the Senator Lines' case. Nevertheless, the Council Regulation which organises the antitrust enforcement procedure must be reformed in order to ensure an indispensable balance of power.

Résumé

L'affaire Senator Lines, en attente d'être jugée par la Cour Européenne des Droits de l'Homme, révèle la non conformité de la procédure communautaire de la concurrence aux droits protégés par la Convention Européenne des Droits de l'Homme. Toutefois, malgré une préoccupation réaffirmée de la Communauté Européenne pour les droits fondamentaux, cette dernière n'est toujours pas liée par la Convention.

C'est la raison pour laquelle il est indispensable de permettre l'adhésion de la Communauté Européenne à la Convention, comme l'ont d ailleurs réclamé l'ensemble de ses organes.

Dans l'attente d'une éventuelle adhésion, il est nécessaire de déterminer si la responsabilité des Etats Membres peut être retenue lorsque les actes de la Communauté violent les droits protégés par la Convention. C'est la question que devra trancher la Cour dans l'affaire *Senator Lines*.

Néanmoins, et même en cas de responsabilité collective, le règlement du Conseil qui établi la procédure communautaire de la concurrence doit être reformé afin d'assurer un indispensable rééquilibrage des pouvoirs.

ACKNOWLEDGEMENTS

I am most grateful for the thoughtful comments and suggestions of Professor Roderick A. Macdonald with respect to earlier drafts. I would like to thank Marie Didier Laurent and Benoit Robinot for their helpful comments. I would also like to acknowledge the invaluable assistance and deep availability of Mario Prost. Special thanks go to my parents who have supported my study at McGill University.

INTRODUCTION: THE DSR SENATOR LINES CASE

With the ongoing development of The European Union, the place of Human Rights within the Community's legislation as a standard of control for its institution's acts is becoming a concern that is more and more shared.

This concern is particularly relevant regarding acts and decisions of the powerful Commission of European Community (hereinafter the "EC Commission") acting in the field of competition law.

The case Senator Lines extraordinarily reveals two related issues: first, the antitrust procedures and the respect of the basic right to a judicial recourse, and second, the interesting question of the current impossibility to challenge acts of an European Community (hereinafter "EC") institution before the European Court of Human Rights (hereinafter the "ECtHR") whose control the fifteen Member States are subject to.

By decision of the EC Commission[1] applying article 15 of Regulation 17/62[2], DSR Senator Lines GmbH (hereinafter "SL") has to pay a fine of 13.7 million Euros for the infringement of EC competition rules. According to this decision, as a member of the Trans-Atlantic Conference Agreement (hereinafter "TACA"), it abused of its dominant position. Senator Lines is the second largest German shipping liner with an annual turnover of about 2.5 Billion Dem., but still only has a 3.2% market share, if the relevant market is trade within the scope of the TACA, since defined by the EC Commission as

[1] EC, *Commission Decision 99/243 of 16 September 1998*, [1999] O.J L.95/1 at 1.
[2] EC, *Council Regulation 17/62 of 6 February 1962 implementing articles 85 and 86 of the EEC Treaty*, [1962] O.J.L. 13/204 [hereinafter *Regulation 17*].

such.[3] Its major shareholder is a Korean company named Hanjin and which owns 80% of its shares.

SL, as well as the fourteen other members of the TACA, challenged this fine and this decision before the EC Court of First Instance (hereinafter the "CFI") and the appeal is currently pending. Under the terms of article 242 EC Treaty[4], the appeal before the CFI has in theory no suspensory effect. Since its requests for interim relief have all been dismissed at the Community level, and due to its incapacity to pay the fine or to provide an adequate bank guarantee, SL introduced a file before the ECtHR arguing that the decision of the EC Commission does not respect article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[5] (hereinafter the "ECHR") by imposing a fine before any court even ruled on its legality.[6] The particularity of such recourse lies in the fact that the applicant is challenging the fifteen EC Member States together, arguing that they are collectively and individually responsible for any breach of the Convention made by the EC Commission.

To introduce the subject, we will first have a brief look at the consequences of the inability of an undertaking to pay a fine imposed by the EC Commission for a breach of EC competition law.

---

[3] EC, *Commission Decision 99/243 of 16 September 1998*, [1999] O.J L.95/1 at 1.
[4] *Treaty establishing the European Community*, 27 March 1957,as amended by the Treaty of Amsterdam, article 242, O.J. C.340, at 145.[Hereinafter *EC Treaty*].
[5] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.
[6] *Senator Lines v. the 15 Member States of the European Union* ,Eur.Ct. H.R., application no. 56672/00.

A/ An inability to pay a tremendous fine requested by the Commission.

Senator Lines was a member of the TACA, as all major companies evolving within the same market. The conference agreement relates to liner shipping across the Atlantic, between United States of America and Northern Europe.

SL and the other parties of the TACA notified their agreement to the EC Commission in order to get an exemption under article 81(3) EC[7], exemption that only the EC Commission can provide.

On 16 September 1998, the EC Commission adopted a decision[8], finding that SL and the other TACA members had infringed article 81 and 82 EC. The decision also imposes a fine of 13.75 million Euros upon SL, payable within three months. This fine represented 11.53% of the worldwide annual turnover of SL in the transatlantic trade in the last year of the infringement.[9] SL and the fourteen other members of the TACA challenged the decision before the EC Court of First instance, contesting its legality and the appropriateness of the fine imposed. Among other arguments, the application included the breach of the right to be heard as guaranteed under article 6 of the ECHR and the erroneous calculation of the fine. The mains alleged violations regarding article 6, concerned a non proper access to the file, a lack of proper reasoning and impartiality, and a non valid statement of objections, as *inter alia* 32 requests for information were sent after the adoption of the statement of objections.

---

[7] Request by the Applicant to the EC, *Commission Decision 99/243 of 16 September 1998*, [1999] O.J L.95/1 at 1.

[8] EC, *Commission Decision 99/243 of 16 September 1998*, [1999] O.J L.95/1 at 1.

[9] The references made to the parties' arguments throughout this paper are based on the pleadings submitted by the parties in the pending proceedings before the European Court of Human Rights.

Due to the average length of the procedure and the complexity of the case, a judgement is not expected before the next three to four years. According to article 242 EC treaty, this appeal before the CFI has in theory no suspensor effect. Nevertheless, it follows from settled case law of the EC Courts that fines imposed by the Commission in competition matters need not be paid pending the appeal, provided that the applicant provides an adequate bank guarantee covering the amount of the fine plus interest.

SL claimed that the payment of such a tremendous fine would force it into bankruptcy. Moreover, due to its strained financial situation and its incapacity to provide adequate securities, SL faced a refusal from its house bank and others banks approached, to deliver the requested guarantee.

Hitherto the ECJ and the EC Commission have in theory accepted that pending an appeal against a Commission decision imposing a fine, a bank guarantee did not need to be provided and the fine did not need to be paid where in exceptional circumstances, the addressee of a Commission decision is not in a position to provide such a guarantee.[10] Therefore, SL tried to demonstrate that its particular situation could legitimate an interim relief.

B/ A request for interim relief dismissed.

SL first approached the EC Commission to obtain interim relief, given that it was financially unable to pay either the fine or to provide a bank guarantee. However, The Commission rejected its claim, arguing that so far, no attempt had been made to show that

[10] See in particular C.F.I. *Laakmann Karton* v. *Commission* T-301/94 R, [1994] E.C.R. II-1274 at 1279, E.C.J. *AEG* v. *Commission*, C-107/82 R, [1982] E.C.R. I-1549 at I-1551, and E.C.J.*Ferrieri die Roe Volciano* v. *Commission*, C-234/82 R, [1983] E.C.R. I-725 at I-727.

the majority shareholder would not be able to assist its subsidiary.[11] The decision clearly valorized the public interest in seeing the Commission's decisions implemented as well as seeing the Community's financial interest safeguarded. SL renewed its request before the CFI and subsequently in an appeal before the ECJ. Both applications relied on the fact that it would be forced into bankruptcy, should the EC Commission enforce the fine. The applicant further claimed that it was not in the position to provide the requested bank guarantee, its shareholders having consistently rejected its request for support, and that it had no legal remedy to force them to guarantee such support.

Nonetheless, both Courts upheld the Commission's approach in finding that the mere refusal opposed by Hanjin to provide assistance was irrelevant. Only the inability of the shareholder to provide assistance would allow SL to qualify for interim relief. Thus the CFI rejected the applicant's request by Order of 21 July 1999[12], and so did the ECJ, by Order of 14 December 1999[13].

C/ The global situation of the Group.

Both courts adopted an economic approach in this case. They both refused to disregard the financial situation of the main shareholder and took into consideration the global situation of the group.

[11] Letter of the EC Commission to the applicant of 10 February 1999.
[12] C.F.I. *DSR-Senator Lines* v. *Commission*, T-191/98 R, [1999] E.C.R. II-2531.
[13] E.C.J. *DSR-Senator Lines* v. *Commission*, C-364/99 P.R., [1999] E.C.R. I-8733.

The CFI acknowledged that the applicant had established with sufficient certainty that it was unable, by itself, to obtain the bank guarantee required by the Commission[14].

Not only did the CFI finally dispute that the applicant's shareholder refused the requested assistance. But the CFI distinguished between the shareholder's ability and capacity to provide the guarantee. It dismissed the appeal on the basis that SL was unable to demonstrate that its main shareholder was "prevented" from supporting it. Therefore, before the ECJ, SL submitted that the order of the CFI had failed to address the argument that it was legally impossible for the SL to compel its shareholders to provide the assistance.

In a December 14th 1999 ruling[15], the ECJ rejected its appeal and confirmed SL could not be exempt from the obligation to provide the guarantee as long as it had not proved that the main shareholder Hanjin was prevented from providing it with assistance.

To support this approach, the Commission and the Courts referred to settle case law according to which the judge, in assessing whether or not interim relief should be granted to an undertaking belonging to a group of companies, should always consider that group as a whole and its global economic situation.[16] In the present case, both companies can be seen as sharing common interests in as much as Hanjin owns 80% of SL.

This reasoning was contested by SL in its application file sent to the European Court of Human Rights[17], since it was not in a position to provide the EC Commission the guarantee, and moreover had no legal means to obtain assistance from its shareholders

---

[14] C.F.I. *DSR-Senator Lines* v. *Commission*, T-191/98 R, [1999] E.C.R. II-2531.
[15] E.C.J. *DSR-Senator Lines* v. *Commission* , C-364/99 P.R., [1999] E.C.R. I-8733.
[16] E.C.J. *R Hasselbad* v. *Commission* , C-86/82, [1982] ECR I-1555; C.F.I.*Laakmann Karton* v. *Commission* , T-301/94 R, [1994] E.C.R. II-1274 at 1282; C.F.I. *Cascades* v. *Commission*, T-308/94 R, [1995] ECR II-265, at 276.
[17] "Memorial to the Court (Eur. Ct. H.R.) Application file of DSR Senator Lines" (2001) 21 H.R.L.J. 112.

which had refused to assist it, it was being imposed a condition impossible to fulfil. SL also questioned the Commission's ability to tie the suspensor effect of the appeal to such an excessive and unreasonable requirement related to persons to whom the Commission has no legal relation and which the person to whom the Commission has a legal relation has no right to demand from these persons. SL also pointed out that it risked being in bankruptcy before its case had ever been heard by any court, in violation of the presumption of innocence and the right to judicial recourse.

D/ A last chance before the European Court of Human Rights.

SL filed an application against the fifteen EC Member States before the ECtHR, based on article 34 ECHR and Court rules 45 and 47. Since the EC is not party to the Convention and that the ECJ clearly highlighted the current lack of EC competence to accede the Convention[18], SL claims that the Member States are both individually and collectively responsible for acts of the Community Institutions. The application file also states that the European Court of Human Rights is competent to rule on the compatibility of the decisions of the EC institutions with the ECHR.

SL notes that the orders of the EC Courts dismissing the applicant's request for interim relief enable the EC Commission to enforce its decision imposing a fine on the applicant before any court even ruled on its legality. As a result "the applicant's right to a fair hearing, the presumption of innocence, the right to judicial recourse, the rights of defense,

[18] E.C.J. *Opinion 2/94 on the accession of the Community to the European Convention on Human Rights* [1996] ECR I-1759, (1996) 17 H.R.L.J. 60 [hereinafter Opinion 2/94].

and the general right to a fair hearing as *inter alia* in article 6 of the ECHR have been infringed."[19]

The Strasbourg Court is thus confronted with the admissibility of an application filed directly against an EC antitrust decision, whose legal effects are limited to the EC system. Should it hold such an action admissible, it would, for the first time, have to rule on the conformity of an EC antitrust procedure with the requirements laid down in article 6 ECHR. On the contrary, should it hold such an action inadmissible, acts of EC institutions would avoid being controlled by the Strasbourg Court, whereas decisions of national authorities applying Community law fall under its jurisdiction.

The huge impact this unprecedented case may have on the EC antitrust system is incontestable.

That is the reason why it seems relevant to study the relationship between the European Community and Human Rights in general, and the ECHR in particular. Under the terms of international law, could the Member States be held responsible for the acts of EC institutions to which they delegated their powers? A positive answer could have a tremendous impact on the development of the European Union. One can suggest that the EC accedes the ECHR but none of the two distinct international organizations are yet legally able to make such an accession effective. This analysis is essential in order to figure out the reasons for the Strasbourg Court to accept or dismiss the application filed by Senator Lines.

In case of admissibility, the antitrust enforcement proceeding stated by Regulation 17/62 will have to face the rights laid down in article 6 of the ECHR. Not only could the

[19] "Memorial to the Court (Eur. Ct. H.R.) Application file of DSR Senator Lines" (2001) 21 H.R.L.J. 112.

question of fines imposed on undertakings could then be subject to the ECtHR control. Indeed, many dispositions within Regulation 17/62 could be contested with regards to the requirements of the Fundamental Rights of defense. Thus, if the Strasbourg Court decides to hold the present application admissible, Community action will henceforth be subject to its scrutiny. This would undoubtedly strengthened the standard of protection in the field of procedural rights within EC antitrust proceedings, and hopefully remedy some of the deficiencies.

In any case, even if the EC avoid the control of the Strasbourg Court, it is the whole antitrust enforcement procedure that must be reformed in order to be conform with the basic procedural rights which importance was acknowledged by the EC institutions themselves. Since 1969[20], The Court of Justice has held that fundamental rights form an integral part of the general principles of Community law whose observance the Court ensure. The EC Commission recently demonstrated that it was conscious of the need for reform and issued a White Paper[21] on the modernization of EC antitrust law. But the new proposal of the Commission for a regulation on the implementation of the rules on competition laid down in Articles 81 and 82 EC[22] gives rise to significant concerns: the Commission has increasing enforcement powers without the procedural guarantees being strengthened.

---

[20] E.C.J. *Stauder* v. *Commission*, C-29/69 [1969] E.C.R. I-419 [hereinafter *Stauder*].

[21] EC, *Commission White Paper of 28 April 1999 on Modernization of the rules implementing articles 85 and 86 [now 81 and 82] of the EC Treaty*, [1999] Commission program No 99/027, approved at Brussels on *28.04.99*.

[22] EC, *Commission Proposal of 27 September 2000 for a Council Regulation on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty* [2000], COM (200) 582

From a Human Rights standpoint, if the project were finalized, it would be a complete disappointment. From that perspective, the antitrust enforcement procedure needs a deep institutional and non-institutional reform.

PART I HUMAN RIGHTS WITHIN THE EC SYSTEM

A/ A CLEAR RECOGNITION OF HUMAN RIGHTS

Through the Case law of the European Court of Justice (1) as well as through the adoption in 2000 of a Charter of Fundamental Rights (2), the European Community demonstrated its concern for Human Rights.

1) Human Rights is the early case law of the ECJ.

When the original three treaties were concluded fifty years ago, they contained no provision concerning Human Rights in the conduct of Community's affairs..

The Court initially refused in several cases to consider the applicability of rights and principles, which were not expressly set out in the treaties.

In *Geitling*, the Court rejected the applicant's arguments holding that "Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights."[23]

Its attitude began to change in the late 60's with the *Stauder* case where it responded more positively to a claim invoking that implementation of a Community scheme represented

an infringement to the applicant's right to dignity. The ECJ's asserted that protection of Fundamental Rights was part of the general principle of EC law: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the Fundamental Human Rights enshrined in the general principles of Community Law and protected by the Court."[24]

The importance of the case lies in the recognition that Fundamental Human Rights did indeed form part of the general principles of Community Law and that the European Court of justice itself took the role of protector of individual rights.

In fact the Court has turned for inspiration in the enumeration of Fundamental Rights which it is willing to protect to these sources, but, in the case of the convention, it did so only after ratification by all the Member States in 1974.

Later on, in the case *Nold*, the ECJ added that "International Treaties for the protection of Human Rights to which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law."[25]

G.F. Mancini attributes the Court's "discovery" of Human Rights to a "well founded fear that in Germany and Italy the constitutionnal courts would assume power to test Community laws for compliance with fundamental rights enshrined in their own constitution."[26]

---

[23] E.C.J. *Geitling v. High Authority,* C-36,37,38, 40/59 [1960] E.C.R. I-423.
[24] *Stauder, supra* note 20 at 419.
[25] E.C.J., *Nold v. Commission,* C-4/73 [1974] E.C.R. I-491 at I-507; (1974) 2 C.M.L.Rev. 338.
[26] G.F. Mancini & D.T. Keeling, "Democracy and the European Court of Justice" (1994) 57 Mod. L. Rev. 175.

The ECJ's developments initially gained the support of Member States since Human Rights were usually used to restrict the competence of the Communities institutions rather than to limit Member States powers.

The Court's approach was given official legitimacy by a joint declaration of the Council, the Commission and the Parliament in 1977.[27] The declaration, although not legally binding, stressed the importance placed on human rights by the Member States and the Communities, who pledged to continue to respect Fundamental Rights.

The ECJ's progressive construction of a kind of unwritten bills of rights for the Community was gradually given express recognition within the treaties.

According to Article F of the Maastricht treaty [hereinafter "TEU"]:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutionnal traditions common to the Member States, as general principles of Community law.[28]

Furthermore, Article 6 TEU declares that respect for fundamental rights and freedoms constitute one of the basic principle on which the Union is founded.

Article 7 even provides a mechanism for sanctioning Member States that violates this principle in a grave or persistent manner.

Two years later, the eventuality of accession to the ECHR was officially evoked when the the Commission and Council circulated a memorendum raising the question of whether the European Community could accede the ECHR., thereby closing the gap identified by the Commission in the protection of Human Rights within the Community legal order.

---

[27] EC, *Joint Declaration by the European Parliament, the Council and the Commission concerning the Protection of Fundemental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedom,* [1977] O.J C.103/1 at 1.

However, the Convention is not part of Community Law and the ECJ.'s regularly recalls it, such as in *Mayr Melnhof Kartongesellschaft* when it has been stated that "The Court of First Instance has no jurisdiction to apply the European Convention on Human Rights and Fundamental Freedoms when reviewing an investigation under competition law, because the Convention is not itself part of Community Law."[29]

Nonetheless, European Courts routinely refer to the "special significance" of the Convention as a key source of inspiration for the general principles of Community law.[30] The importance of the ECHR and the case law of the ECtHR were at the center of the debate that occurred when the Charter was drafted.

If the provisions of the Charter mainly remind the ECJ's case law as well as the Convention's provisions, there is no reference to the ECtHR jurisprudence, and one should worry about the way both text will in the future be interpreted by the two Courts. This question was highlighted also by the litigation in the *Emesa Sugar* case[31] in which the ECJ's interpretation of the right to adversarial proceedings in the context of the role of the advocate General sits uneasily with ECHR jurisprudence.

Thus in order to draw an accurate picture of the protection of Human Rights in Europe, it seems essential to analyze the political environment and the scope of the Charter of Fundamental Rights.

---

[28] *Treaty establishing the European Union*, 7 February 1992, O.J. C.340, at 145.
[29] C.F.I. *Mayr-Melnhof Kartongesellschaft mbH* v. *Commission*, T-347/94, [1998] E.C.R. II-1751.
[30] See e.g. E.C.J. *ERT* v. *DEP*, C-260/89, [1991] E.C.R. I-2925 and E.C.J. *Kremzow* v. *Austria*, C-299/95, [1997] E.C.R. I-2629.
[31] E.C.J. *Emesa Sugar* v. *Aruba*, C-17/98 [2000] E.C.R. I-665 [hereinafter *Emesa Sugar*]

2) A recent and non binding Charter of Fundamental Rights.

First, the Charter initially aimed at improving the visibility of the Human Rights concern of the Union for European citizens, then responding the need to ensure legal certainty, and finally, ensuring coherence of Human Rights protection in Europe.

This has been obviously stated in the Cologne Conclusions, which began by asserting that:

> The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the court of Justice[...]. There appears to be a need, at the present stage of the Union's development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's Citizens.[32]

More than being merely situated in the logic of the evolution of the Community's institutions, through the ECJ's case law and the subsequent modifications of the treaties[33], the Charter is also the achievement of a German project.

Indeed, the origin of this initiative lies in the German Presidency of the Union in the first half of 1999. Following a 1996 Comité des sages report on Civic and Social Rights, two further reports on Human Rights were presented in 1998 and 1999 respectively, and the Charter was solemnly proclaimed at Nice in December 2000.

The Charter was drafted by a novel procedure, a special body being set up, including representatives of Member States, of national parliaments, of the European Parliament, and with observers of the Council of Europe and from the Court of Justice, for a total of 62 members directly involved in the drafting process.

---

[32] Cologne, 3&4 June 1999, Annex IV, (1999) 20 H.R.L.J. 503.

At the very beginning of the debates, there was much confusion on its purpose and scope. Although it was probably intended from the outset to be limited to the field of Community and Union law, some of the debate suggested that it might set up a new system of protection of Human Rights for the Union and the Member States at large.

Nevertheless, it became quickly obvious that it was not the intention but that the Charter was intended to be a consolidating process rather than an innovative one, since it specified that the rights to be contained were those in the European Convention, and derived from the " common constitutional traditions" of the Member States.

Moreover, the final draft was also unsatisfactory since it was not given legal force; instead the decision on its legal status was postponed to an uncertain future date.

a) A non binding Bill of Rights.

i. Addressees and attackable acts.

The Charter mainly includes the same rights that those already ensured by the Convention, with a special and noticeable addition of social and economic rights.

The real issue concerns the scope of the text and its applications. Uncertainty might have been created by incorporating both existing Community rights and rights which seed to have little to do with the community. But the position became clear in Chapter VII " general provisions" and in particular from article 51(1), which states: "The provisions of

[33] M. Fischbach, « Le Conseil de l'Europe et la Charte des droits fondementaux de l'Union européenne » (2000) 22 R.U.D.H. 7 [hereinafter «Fischbach »].

this Charter are addressed to the institutions and bodies of the Union…and to the Member States only when they are implementing Union law."[34]

Article 51(1) of the Charter[35] expressly states that it does not constitute a standard of control for Member States acting autonomously. Crucial for this is not the definition of the addressees, as this includes not only organs of the Community but also Member States. Instead, what is decisive is which acts of these authorities can be attacked. This must depend on whether the authoritative act can at least partly be ascribed to the European Community.

But the formula used in Article 51 seems to be narrower than the existing case law of the Court of Justice, which specifies that Member States are bound by fundamental rights guarantees when they are acting " within the scope of Community law".

However, for our purpose, there is no doubt that acts of the Commission in the field of competition law will belong to the list of "attackable acts."

ii. A non binding text due to lack of political will.

According to Grainne de Burca, the political desire to draw up an instrument proclaiming the role of Human Rights in the EU contrasts with the political will, evident in other

[34] EC, *European Union Charter of Fundamental Rights of 18 December 2000*, O.J. C. 364/1 art. 51 (I) [hereinafter "*EU Charter*"].
[35] *Ibid.*

contexts but apparent also within this Charter process, to constrain and keep within clear limits the Human Rights role of the European Union.[36]

Indeed, a degree of de facto legal enshrinement of Human Rights is already present within Community law, the ECHR is a point of reference, as it has been demonstrated above, for all the European institutions and its Member States. That is the reason why if the symbolic implications of Europe's own brand new Charter are evident, their policy relevance is considerably less so[37], the text being not binding.

Therefore, the best way to show their particular attachment to human rights being bound by a legal catalogue of rights would have been to permit accession of the European Community to the Convention. But the political will necessary to ensure accession has been persistently absent.

b) The horizontal provision: ECHR vis a vis Charter

i. Wording.

The Charter establishes a complex system of substantial limitations to Fundamental Rights[38]. First by virtue of Article 52(I)[39], the essence of all freedom is brought under absolute protection. Furthermore, according to the same article, any limitation must be in line with the principle of proportionality. The provision defines proportionality as asking

---

[36] G.de Burca, "Convergence and Divergence in European Public Law: the case of Human Rights", in P.Beaumont, C. Lyons & N. Walker, eds., *Convergence and divergence in European Public Law* (Hart Publishing, 2001).

[37] G.de Burca, "The drafting of the European Union Charter of Fundamental rights" [2001] Eur. L.Rev. 129.

[38] C. Engel, "The European Charter of Fundamental rights, A changed political opportunity Structure and its normative consequences", (2001) 7:2 Eur. L. J. 163.

[39] *EU Charter, supra* note 34, art. 52 (I).

that limitations be "necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."

Article 52(III) further declares the limitations of the parallels rights of the European Convention on Human Rights applicable.

> Insofar as this charter contains rights which correspond to rights guaranteed by the Convention for the protection of Human rights and fundamental Freedoms, the meanings and scope of those rights shall be the same as those laid down by said Convention. This provision shall not prevent Union law providing more extensive protection.[40]

It would be advisable to eliminate this provision once the European Charter of Fundamental Rights is incorporated into the EC or the EU treaty, lest the Community create a lawyers paradise on Fundamental Rights.

ii. The risk of divergence between the two courts

As far as the Charter borrowed the rights already protected by the ECHR, one should worry about the risk of divergent case law that could occur between the ECJ and the ECtHR.[41]

Even if the Charter will only act as a standard of control for authoritative actions that can be attributed to the Community, there will be an area of overlap between the Charter, the Fundamentals Rights of the nationals' constitutions, and the European Convention for Human rights.

It will undoubtedly be the case when Member States enforce the law of the Community or fulfill legislative orders of the law of the Community as this is attributed to the Community within the demonstrated restrictions. At the same time, the Member States

[40] *EU Charter*, *supra* note 34, art. 52 (III).
[41] *Emesa Sugar*, *supra* note 31 at 665.

use their own authoritative power. Therefore these actions are also subject to the Fundamentals Rights of the national constitutions and of the ECHR.

That is the reason why the two observers, at the stage of the Charter's drafting, argued in favor of the opportunity to include a reference to the case law of the ECtHR within the horizontal provision. According to Mr. Fischbach: «Il faudra absolument assurer les bénéfices de cette jurisprudence à ceux dont les litiges relèveront de la Charte. La sécurité juridique est à ce prix.»[42]

One should keep in mind that the ECJ will review Human Rights only in the field of Community law, which has been obviously quite rare. Nevertheless, if the Charter was to be applied at the whole European Union level, including its new powers in immigration, asylum and judicial cooperation, it will create a heavy number of new kinds of cases before the ECJ. Therefore, the increasing risk of facing divergent case law cannot be denied and the lack of horizontal cooperation between the two courts as well as the lack of reference to the ECtHR case law within the horizontal provision of the Charter will contribute to the current legal uncertainty in the protection of Human Rights in Europe.

Nevertheless, should one challenge the undeniable advantage that European citizen would benefit from such divergence? Indeed, as long as many human rights texts are applicable, the rights holders benefit from the opportunity of a battle of the forum and can strategically attempt to shift the conflict to a forum whose Fundamental Rights appear to be more in their favor. But this is the only advantage that can be found in the existing

[42] Fischbach, *supra* note 33 at 7.

situation. Moreover, the positive practical effect of such a " forum shopping" can easily face contestations on an equality ground.

Everyone agreed upon the necessity to make accession of the EU to the ECHR possible. But the drafters of the Charter who specified that "the Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the treaties"[43], disappointedly decided to respect the position of the ECJ concerning the lack of competence of the EC to rule and act in the Human Rights field[44].

Nevertheless, the debate around such accession was undoubtedly reactivated because of the lack of legal certainty still problematical after the proclamation of the Charter.

Therefore, a further reform which deserves fuller consideration would be to arrange for the Community (or the Union) to accede to the European Convention on Human Rights.[45]

B/ PROPOSALS FOR A COHERENT PROTECTION SYSTEM.

To ensure an efficient Human Rights protection system in Europe, two propositions can be made: to permit the accession of the Community to the Convention (1) or to hold Member States responsible for the breach of the Convention (2).

1) Accession of the European Community to the ECHR.

Following a brief analysis of the need (a), the several effects of such accession will be stated (b).

---

[43] *EU Charter, supra* note 34, art. 51 (II).
[44] *Opinion 2/94, supra* note 18.
[45] F. G. Jacobs, "Human rights in the European Union: the role of the Court of Justice."(2001) 26 Eur. L. Rev. 331.

a) Need for a formal accession.

i. Closing gap in legal protection.

At the drafting Convention's very first sitting on December 17th 1999, the EU Commissioner Antonio Vitorino said that the adoption of the Charter would neither prevent accession to the ECHR nor make it unnecessary.[46] It has been repeatedly advocated that for reasons of legal certainty and legal clarity, accession to the ECHR would be a logical and sensible addition to the Charter. More than that, according to Florence Benoit Rohmer[47], the debate on the accession opportunity even regained interest with the discussion of the Charter whose writers could not avoid making references to many rights already protected by the Convention.

The past arguments used for the accession also gained added weight through the extension of the European Union's powers in Amsterdam in 1998 and in Nice in 2000.

Achieving coherence within Human Rights in Europe is mostly a political matter: the credibility of the European Union's Human Rights policy is at stake. Indeed, does it make sense to make ratification of the ECHR a condition for EU membership, when the EU itself and its legislation are exempt from supervision by the Convention's bodies?[48]

In 1979, the EC Commission and Council circulated a memorendum raising the issue of whether the EC should accede to the ECHR, thereby closing the gap identified by the Commission in the protection of Human Rights within the Community legal order.

---

[46] Record of the first meeting of the body to draw up a Draft Charter of Fundamental Rights for the European Union, CHARTE 4105/BODY 1, p.8.

[47] F. Benoit-Rohmer, "L'adhesion de l'Union à la Convention européenne des droits de l'homme ", (2000) R.U.D.H. 57. [hereinafter « Benoit-Rohmer »].

[48] H.C. Kruger & J.Polakiewicz, "Proposals for a Coherent Human Rights Protection System in Europe, the ECHR and the EU Charter of Fundamental Rights" (2001) 22:1-4 H.R.L.J. 4.

Both the Economic and Social Council[49] and the European Parliament[50] endorsed the view at that time that the Community should accede the European Convention. The 1998 *comité des sages* also came out in favour of accession.

The Commission, which renewed the formal proposal in 1990, essentially gave three reasons to justify the need for accession[51]. First, it recalled that the institutions are not subject to an external control mechanism, unlike the Member States themselves whose activities are subject both to the ECJ and the Convention authorities. Then, the Commission added that the Single European Act and the Maastricht Treaty commit the Member States and the Community to respect the rights enshrined in the European Convention on Human Rights. Finally, it insisted on the fact that the Community, in entering with agreements with third States, emphasised the importance for those States to respect Human Rights. That is the reason why the Community could be seen somewhat hypocritical in approach if it demanded greater commitment from others that it is willing to give itself.

Indeed, EU is the only legal space left in Europe that is not subject to external scrutiny by the Strasbourg Court.

---

[49] EC, Council of Europe's parliamentary assembly :see Recommendation 1479 (2000) of 29 September 2000 Doc 8819 report of the Committee on Legal Affairs and Human Rights (reporter M. Magnusson)

[50] EC, European parliament's resolution, sitting of 16 March 2000, when it called again on the intergovernmental conference "to enable the Union to become party to the ECHR so as to establish close cooperation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights." See *European Parliament resolution on the drafting of a EU charter of Fundemental Rights* A5-0064/2000 (plenary session).

[51] All these issues and projects are discussed in *the Commission communication on the accession of the Community to the ECHR and the Community legal order*, com communication of 19.10.1990, SEC (90) 2087 Final; memorandum on the accession of the European communities to the convention for the protection of Human Rights and Fundamental Freedom, adopted by the Commission on April 4 1979, Bulletin of the EC, supp.2/79.

Ulricht Everling in 1977 did already find unsatisfactory that Member States could be able to establish a Community, transfer sovereign powers to it, and this way evade the HR Convention.

Some authors[52] also added that the particularity of the Community system that reside into the tranfer of sovereign powers, is an argument in favor of the accession because only the European Union is able to modify its legislation that would be contrary to the ECHR. It is thus essential for the Union to be itself responsible for it.

The lack of legal protection in the field of Human Rights is frequently revealed. Checks and balances within the Community are inappropriate, due to the lack of efficient remedies for individuals or legal persons to pursue alleged fundamental rights infringements with regards to a number of administrative EU prerogatives, or its satellite agencies. Moreover, there exists a procedural deficit before the ECJ. For instance, applications alleging that such rights have been violated by primary Community law or the ECJ itself cannot be brought before the ECtHR. Furthermore, concerning the secondary Community law, procedural requirements for private applications are relatively restrictive.

Additionally, areas such as visas asylum and immigration, where Fundamental Rights are greatly at stake, are subject to merely limited scrutiny by the ECJ, and with police and judicial cooperation, the European Court of Justice can only act on the basis of an optional clause.

[52] See V. Constantinesco, "Débats sur le troisième thème: La Protection des droits / Charte des droits fondementaux et Convention Européenne des droits de l'homme." (2000) R.U.D.H. 62.

Finally, the Luxembourg Court has no jurisdiction to review the proportionality of action taken by the police.

According to Hans Kruger and Jorg Polakiewicz[53], accession to EU would close these gaps in legal protection and thus make a significant contribution to establish that area of freedom, security and justice which is referred to in Article 29 of the EU treaty.

They consider that the only way out of this dilemma is accession, which would also have the advantage for the EC to fully participate in Strasbourg proceedings, which are more and more often concerned with EC and EU law.

Florence Benoit Rohmer[54] adds that the accession would have the undeniable beneficial effect of suppressing the risks of divergent case law in interpretation and in application of the provisions that the Charter borrowed to the Convention.

Divergent case law between Strasbourg and Luxembourg is likely to occur when the ECJ decides not to take into account a Strasbourg judgment, or when the ECJ has to determine matter not yet decided in Strasbourg, with the ECtHR subsequently disavowing it. Both hypotheses already occurred, the most remarkable and recent example being *Orkem*[55] and *Mannesmannrohren-Werke AG v. Commission*[56], as opposed *to Funke v. France*[57].

---

[53] H.C. Kruger & J.Polakiewicz, "Proposals for a coherent Human Rights Protection System in Europe, the ECHR and the EU Charter of Fundamental Rights" (2001) 22:1/4 H.R.L.J. 1.

[54] Benoit-Rohmer, *supra* note 47 at.58.

[55] E.C.J. *Orkem* v. *Commission*, C-374/87, [1989] E.C.R. I-3283 at I-3344. [hereinafter *Orkem*].

[56] C.F.I. *Mannesmannrohren-Werke Ag* v. *Commission*,T-112/98, [2001] E.C.R. II-729 [hereinafter *Mannesmannrohren*].

[57] *Funke v. France* (1993), 256A Eur. Ct. H.R. (Ser.A) [hereinafter *Funke*].

But even if this so called divergence of case law may, to some extent, be explained on specific facts of each case rather than disagreement on issues of principle[58], a formal accession could secure legal certainty and coherence of Human Rights protection within Europe.

It is now obvious that only accession could unify the control of Human Rights under the same jurisdiction, and could consequently ensure their harmonization, in the interest of European citizens' legal certainty, while guaranteeing the minimal protection standards of Human Rights in Europe.

ii. Opinion 2/94 of the ECJ and the political Status quo.

The European Council has, according to the terms of article 300 of the treaty, seized the ECJ with a request for an advisory opinion concerning the implication of accession of the Communities to the ECHR.

On March 28th 1996, the EC Court stated that, as Community law then stood, the Community had no competence to accede the Convention.[59]

In short, the Court considered that the Community had to respect Fundamental Rights but that the Treaty did not confer any general power on the Community Institutions to enact rules on Human Rights or to conclude international convention in this field.

There was no legal power, either a specific enumerated power or any implied power, which would allow the accession.

---

[58] View expressed to P. Drzemeczewski by N.P. Engel, editor of the H.R.L.J.(interviewed in April 2001) and exposed in P. Drzemeczewski, *"The Council of Europe's position with respect to the EU Charter of Fundamental Rights"*, (2001) 22:1-4 H.R.L.J. 28.

[59] Opinion 2/94, *supra* note 17 at 1759.

None of the reference to the Convention in the Single European Act or in the preamble of the Maastricht Treaty, neither the concept of European citizenship nor yet the general power contained in art 235 of the Treaty, could, according to the Court, provide legal basis for the Community accession.

Indeed, accession would go beyond the scope of the article 235 EC (now article 308 TEU), which gave the Community power to act where necessary to achieve the objectives of the Treaty.

Subsequently, the only way to achieve Accession and then to ensure a minimal standard of protection of European citizens' Human Rights, is to amend the Treaty.

Following this opinion, the European Parliament called on the intergovernmental conference for such an amendment.[60]

Thus, it belongs to political institutions and Member States to determine whether accession is to be achieved. But in pleadings before the ECJ, the European Commission and only three EC Member States (Belgium, Germany and Greece) indicated their support for accession to the ECHR, three (France, Spain and the UK) took a negative stand, while Denmark, Portugal and the Netherlands appeared to be undecided.

Therefore, if accession only needs a concrete political will, the idea does not seem to please every party. Discussions must take place within the fifteen Member States, and probably within twenty five Member States soon. They would probably rather let the

[60] Agence Europe, News Release (19 September 1995).

Community accede the Convention, than being held responsible for the acts of the Community institutions that violate the Convention's provisions.[61]

b) Effects of the Accession

i. Autonomy of the EU's legal system and the Problem of subordination of the ECJ to the European Court of Human Rights.

One of the main accession's effect would be to impose an external judicial control of the European Court of Human Rights on the Community's institutions, increasing even more the unacceptable length of proceeding.

Although it is indisputable that the EU would then gain democratic credibility, the existence of such a control was considered by the ECJ in its opinion 2/94[62] as a major obstacle to accession.

For instance, in the case of an interpretation conflict, the ECHR would have had the last word and such a conflict would certainly subordinate the ECJ to the ECHR.

Pierre Drzemeczewski pointed out this relevant issue and wondered "why should or ought the ECJ seek an authoritative determination/interpretation-or even advisory opinion- from the ECHR on an issue of Human Rights law within the realm of its 'sovereign' competence on EC/EU matters, irrespective of the Charter Status?"[63]

---

[61] See the future decision of the Eur.Ct.H.R. in *Senator Lines v. the 15 Member States* where they could be collectively held responsible for the European Commission acting in competition law.

[62] Opinion 2/94, *supra* note 17 at 1759.

[63] P. Drzemeczewski, "*The Council of Europe's position with respect to the EU Charter of Fundamental Rights*", (2001) 22:1/4 H.R.L.J. 14.

Nonetheless, the ECHR only gives declaratory judgments and merely declares the national legislation as being incompatible with the terms of the ECHR. Thus if the EU accede the ECHR, like other parties, the EC institutions would, under article 46(1) of the ECHR, have a measure of discretion in executing the Strasbourg Court's judgments.[64] In other words, external scrutiny in the field of Fundamental and Human Rights in no way conflicts with the ECJ's role as the court of last instance for the interpretation of Community law.[65]

Moreover, the ECtHR would only intervene in Community cases when applicants allege that their fundamental rights have not been respected. Thus, the feared limitation of the ECJ's autonomy must be moderated.

It has also been argued that accession would avoid weakening the EC "Primauté" by the Member States. Indeed, if a Member State were held responsible under the Convention for a national act that executes Community law, the Member State would have no choice but to respect only one of its international obligations. In those circumstances, the Member State may automatically check if Community law, which it has to ensure the application, does respect Fundamentals Rights. And it could decide not to apply the relevant Community legislation if it appears that it does not respect the rights enshrined by the Convention. Then, we face the risk of being in the same logic as in the case law *Solange*[66] in Germany or *Frontini*[67] in Italy that subordinated the "primauté" of

---

[64] *Norris v. Ireland* (1988), 142A Eur. Ct. H.R. (Ser.A) 50; *Vermeire v. Belgium* (1991), 214C Eur. Ct. H.R. (Ser. A), (1992) 13 H.R.L.J. 49.

[65] H.C. Kruger & J.Polakiewicz, "*Proposals for a coherent Human Rights Protection System in Europe, the ECHR and the EU Charter of Fundamental Rights*" (2001) 22:1/4 H.R.L.J. 9.

[66] *Solange*, cour constitutionnel allemande, deuxieme chambre, 29 mai 1974, internationale Handelsgesellschaft/EVGF (Solange I), BverfGE 37, p.271 = EuGRZ 1974, p.5.

Community law to the respect of Fundamental Rights. Accession would temperate this risk in ensuring the existence of a control of the conformity of Community law to Fundamental Rights.

Finally, accession would have the added advantage of enabling the EU institutions to fully participate in Strasbourg proceedings and to put their views directly to the Strasbourg Court in cases involving EC or EU law. To achieve that representation of the European Communities within the Convention, some questions have previously to be answered.

ii. Necessary technical adaptations.

One should keep in mind that the protocol no11 has already reduced the number of obstacles, notably in suppressing the intervention of the «comité des ministres» at the step of the litigation settlement.

The first issue at stake concerning the technical aspect of accession is whether it is the EU or the EC that should accede the ECHR. The Union is much broader than the Community because it includes the second and the third pillar. But the Union is not supposed to have legal personnality and then should not be entitled to conclude any such international convention. That said, it is possible in the European constuction history, to find some counter-examples where the Union acted as having a legal international personnality.[68] Firstly, it is the Union that enlarged the Schengen agreements to Iceland and Norway, and no contestations occurred.

---

[67] *Frontini*, Cour constitutionnelle italienne, arrêt no 183/73 du 27 decembre 1973, Frontini e Pozzani /Min. Fin., Riv. Dir. Int., 1974, p. 130; texte en italien et en allemand in : EuGRZ 1975, pp. 311-315.

[68] Benoit-Rohmer, *supra* note 47 at 60.

Secondly, it is also the Union that sends its representatives abroad in order to represent it. For this reason, the EU could see its responsibility being hold, so why couldn't it accede the Convention? Logically, the Union would then only be responsible for the acts adopted and executed by itself, and probably also for the execution by Member States of Community acts when they do not possess any discretion.

Under Article 35b of the ECHR, the European Court of Human Rights cannot review applications that have already been subject to an international judicial decision. Does that provision prevent the ECtHR from reviewing the ECJ's judgments? According to the latter in the *dufay*'s case[69], the ECJ's is considered as an internal jurisdiction by the Strasbourg Court. Thus the issue seems settled.

Nonetheless, one should not allow the interstates recourses that the Convention permits in order to prevent the Strasbourg Court from settling litigations that may oppose the EU and one of its own Member State.

There is still the critical question of who should represent the EU or the EC within the ECtHR.One should realize that the Union would not accept being under control of a Chamber essentially composed of third states citizens. Several solutions have been suggested: Should it be national judges or *ad hoc* judges ? Should they establish a special chamber, in majority composed of EU Member States judges, to which the cases related to the Community shall be confered?

[69] *Dufay v. European Community* (1989), 13539/88 Eur. Comm. H.R. D.R. [hereinafter *Dufay*].

According to Florence Benoit-Rohmer, it would be better that the EU or EC be represented by a "Community judge", elected in this aim. She points out the importance of the European Parliament being associated to the elaboration of the candidates'list.
On this point, a representant of the ECtHR confirmed the approval of the judicial institution to change its internal rules in order to guarantee the existence of a special chamber wherein a majority of Member States representants would consider the conformity of Community's decision to the ECHR.[70]

However, the Convention, even if accession will hopefully be achieved in the following years, is not entirely applicable to Community acts and law yet. The only serious way to ensure the respect for the rights enshrined by it, is to consider that the fifteen Member States are responsible for it, because of their transferred power to the EC. Senator lines, in its application[71], pleads such a liability under article 1 of the Convention. That is the reason why it seems essential to draw up the current and accurate position of the ECtHR on the issue in order to evalue the chance for SL to see its arguments received by the Court.

2) Could the Member States, on the basis of article 1 ECHR, be held responsible for the alleged violation of Article 6 ECHR?

[70] Fischbach, *supra* note 33 at 7.
[71] "Memorial to the Court" (ECtHR): Application file of DSR Senator Lines, 21:1/3 H.R.L.J. 112.

Given the fact that the Convention is not binding on the Community on the one hand, but that all EU Member States are party to that Treaty on the other hand, the parties have raised two issues in relation to the competence of the Strasbourg Court.

The first one concerns the relevance of the 'equivalence theory' to determine whether the Court should at all consider an application challenging the compatibility of an act issued by a Community Institution with the Convention. The second issue addresses the question whether Member States may be held liable under the Convention for such a Community act.

a) Relevance of the 'equivalence theory'.

i. Arguments.

The Member States submit that the Strasbourg Court should not consider the application made in the present case. To support this argument, they refer to the decision on admissibility ruled by the European Commission of Human Rights (hereinafter HR Commission) in the case *M&Co*[72]. *M&Co* was imposed a fine by the EC Commission for breach of Article 85(1) EC. Having exhausted all domestic remedies, the applicant filed an action with the HR Commission against the writ of execution the German Government had adopted in order to implement the Commission decision.

On that occasion, the HR Commission formulated the "theory of equivalence" according to which "The transfer of power to an international organisation is not incompatible with

[72] *M&Co. v. the Federal Republic* (1990), 13258/87 Eur. Comm. H.R. D.R. 145, 68 Y.B. Eur. Conv. H.R. 138 [hereinafter *M&Co*].

the Convention provided that within that organisation fundamental rights will receive an equivalent protection."[73]

The HR Commission notes that the legal system of the European. Communities not only secure fundamental rights but also provides for control of their observance.

The defendants derive from this statement that where signatory states transfer power to an international organisation they fulfil their obligations under the Convention by ensuring that fundamental rights form part of the law governing the organisation and that there is an appropriate mechanism for enforcing those rights. In that respect, as long as an effective protection exists within the Community system, there is no scope for any action against Community acts under the Convention.

In their opinion, the judicial review established in the Community order is equivalent to the one carried out by the Strasbourg organs. Thus they submit that existence of a real system of control for the respect of Fundamental Rights lying in the heart of the Community order must lead the Court to declare itself lacking the competence to consider the complaint advanced by the applicant company.

On the contrary, the applicant argues that if the court dismisses the case on grounds of lack of competence simply because the act subject to complaint emanates from the Community, this will have the effect of absolving the contracting states from their responsibility under the Convention for each power transferred to the EC, this running contrary to the purpose and object of the Convention.

---

[73] *Ibid.*

ii. Discussion.

It is important to recall that the *M&Co* decision is a fairly old case and was never confirmed in later case law.

Indeed, the theory of equivalence was derived by the HR Commission from the *Solange* case law of the Bundesverfassungsgericht. Given the supremacy of EC law over national law, the German Court accepted to "pass" on its control over Fundamental Rights to the ECJ, as long as the ECJ is capable of carrying out such a task. The same reasoning however can hardly be transposed to the relationship between two international legal orders where no such hierarchical link exists. On the basis of which principle should the Strasbourg Court rely on the Community judge to enforce the Convention?

The theory of equivalence appears inappropriate in such a context[74], especially if considered as a test the Court should use to assess the admissibility of the application at stake.

It appears indeed that, if the Strasbourg Court abstains from exercising its control solely on the basis that Community law in general recognises the right of access to court and that the Community courts generally enforce this right. This comes down to assuming that all Community acts are in conformity with the requirements of the Convention as soon as they are subject to the control of EC Judges. Such an approach gives authority to Member States, acting through the Community institutions, to deal with Human Rights in the field of powers they have transferred to the EC, without being subject to any kind of control under the Convention.

---

[74] See opinion supporting this thesis, C.L. Rozakis "La position des organes de la Communauté européenne des droits de l'Homme à l'égard des actes de l'ordre juridique communautaire", in *La protection des droits de l'Homme dans le cadre européen* (Baden Baden, 1991) 295.

In order to be effective, this theory of equivalence would in fact require a case-by-case assessment of the guarantees available within the system. Such an 'in concreto' approach implies for the Court an examination of the substance already at the stage of admissibility. On the basis of these observations, the equivalence theory should not be regarded as a relevant admissibility test. More significantly, the parties have addressed the question whether Member States may be held responsible under article 1 of the Convention for acts taken by the Community institutions.

According to Article 1 ECHR, High Contracting Parties can only be held responsible for acts falling within their jurisdiction. Therefore, the question is whether the Member States, members of the Convention, have exercised jurisdiction when a measure has been adopted by a supranational body, such as the European Commission, considering that this supranational body operates on the basis of competencies delegated by the Member States.

The position of the defendants in this respect is that state responsibility does not disappear automatically when it delegates specific competencies to international organisations. However, they submit that such responsibility may be called into play only when the contested act is the direct result of the Member States exercising their sovereign powers.

Senator Lines submits on the other hand that, according to article 1 ECHR, each contracting state is responsible for securing the rights guaranteed by the Convention in every respect. Therefore, concerning acts of the Community Institutions, including decisions issued in EC Competition procedures infringing the Convention, the applicant claims the existence of a general right to hold Member States responsible, regardless of the nature of the powers transferred.

In order to establish whether Member States could be held responsible for the refusal by the Community Institutions to grant SL interim relief for the payment of the fine, it is necessary to start out by analysing the Strasbourg case law on Member States' responsibility for acts adopted in the EC framework, and the ways both parties approach this case law.

b) Analysis of the Strasbourg case law.

Among the cases already reviewed by the Strasbourg Court, three groups can be identified: cases concerning acts issued by the Member States themselves in the framework of EC law, cases concerning acts issued by the Community Institutions, and finally the judgement in *Matthews*, which constitutes a distinct situation.

i. Acts issued by the Member States themselves in the framework of EC law.

The ECtHR and the former Human Rights Commission have on several occasions dealt with alleged violations arising from national acts implementing Community law.

In the case *Etienne Tête v. France*[75], the French Act of 1977 organising the elections of French representatives to the European Parliament had been adopted pursuant to Community legislation relating to the European Parliament elections. In this field, Member States were given a margin of appreciation to implement Community measure, given that their electoral systems vary in place and time. The Commission declared itself competent to examine whether France could be held responsible for the alleged violation

of the Convention, namely the provision protecting 'the free expression of the opinion of the people in the choice of the legislature'.

In the case *Procola v. Luxembourg*[76], a national law implementing a Community regulation on milk quotas, was at stake. The Member States enjoyed less discretion in its implementation than in *Etienne Tête*. The HR Commission also accepted jurisdiction to rule on the compatibility with the Convention of these legal provisions.

The next step was the judgement of the ECtHR in *Cantoni v. France.*[77] Here the Court examined whether an article of the French public health code, which itself was based almost word for word on a Community directive, was contrary to article 7 of the ECHR. The Court did not consider this to limit its jurisdiction. It stated in paragraph 30 that "the fact, pointed to by the Government, that Article L. 511 of the Public Health Code is based almost word for word on Community Directive 65/65 [...] does not remove it from the ambit of Article 7 of the Convention (art. 7)."[78]

Therefore, it seems clear, after *Cantoni*, that the Court considers itself competent to examine all national acts implementing Community law.

However, when the Court examined the merits of that case, it found that article 7 had not been violated. It hereby avoided the outbreak of a redoubtable dilemma. Should France, for instance, have been held liable for breach of the Convention, it would have to choose between continuing to implement the Community Directive in breach of the Convention or ending the violation but thereby failing to fulfil its obligations under Community law.

---

[75] *Etienne Tête v. France* (1987), 1123/84 Eur. Comm. H.R. D.R. 52.
[76] *Procola and others v. Luxembourg* (1993), 14570/89 Eur. Comm. H.R. D.R. 5.
[77] *Cantoni v. France* (1996) Eur. Ct. H.R. (Ser.A.) 161.
[78] *Ibid.*

It is worth noting that there is a fundamental difference between the mentioned case law and the facts giving rise to the present dispute. The case law referred to deals with implementation measures issued by Member States whereas Senator Lines complains about acts issued directly by the Community institutions. The applicant does not explain how the invoked case law can be transposed to the contested acts, and indeed no statement by the ECtHR has by now supported such an assumption.

ii. Acts issued by the Community Institutions.

In the case *CFDT v. European Communities*, the HR Commission[79] was seized with an application contesting a decision taken by the Council of the European Community.

The applicant complained that it had not been designated as representative organisation entitled to submit lists of candidates for the election of the ECSC "Consultative Committee"[80]. For the applicant, this constituted a violation of Articles 11, 13 and 14 ECHR.

The application was directed against the EC or alternatively against the Member States jointly or severally. Concerning the EC itself, the Commission rejected jurisdiction by stating that it was not a contracting party to the Convention. As for the complaint against the Member States, it fell outside the Commission's jurisdiction "since these States by taking part in the decision of the Council of the European Communities had not in the circumstances of the instant case exercised their "jurisdiction" within the meaning of article 1 of the Convention."[81]

---

[79] *CFDT v. European Community* (1977), 8030/77 Eur. Comm. H.R. D.R. 13 Y.B. Eur. Conv. H.R. 231 [hereinafter *CFDT*].
[80] *Ibid*, at 239.
[81] *Ibid*, at 240.

The Member States refer to *CFDT* in order to demonstrate that they do not incur liability solely by virtue of acts adopted by the Community authorities[82], not even the Council, which is composed of Member States representatives.

The *CFDT* jurisprudence is, from a factual point of view, a strong argument for the defendants to support the thesis according to which they cannot be held liable for acts issued by the Commission. Like in the present case, the act examined was an ordinary act issued by a Community Institution.

One should on the other hand consider that the *CFDT* case is a fairly old decision, and that the Commission recently dismissed similar applications on other grounds, even though it could have done so on the grounds of lack of competence. An example is the *Dufay* case[83], which concerned the compatibility with the Convention of the dismissal of an employee of the European Parliament. In this case the Commission clearly could have rejected the application pursuant to the reasoning in *CFDT*. However, it rejected the case on the grounds that domestic remedies had not been exhausted, the applicant having failed to bring the case before the ECJ. This clearly constitutes a different approach from the former one. Furthermore, it can be argued that the exhaustion of domestic remedies test presupposes that the Court considers itself competent in the first place.

Consequently, it is hardly possible to conclude from the prior case law that the Court will necessarily take the approach adopted by the Commission in *CFDT*.[84]

---

[82] Senator Line on the other hand does not even mention the case.
[83] *Dufay*, *supra* note 69.
[84] *CFDT*, *supra* note 79.

iii. The Matthews' case: a real step?

Perhaps the most important case is the recent judgement of the Court in *Matthews v. United Kingdom.*[85]

The *Matthews'* case concerned the compatibility of a Council provision on the one hand and a provision of the Maastricht Treaty on the other with Article 3 of Protocol n°1 to the Convention.

The Council decision laid down provisions concerning the elections of the European Parliament. Specific provisions concerning the election of the representatives by direct universal suffrage were contained in the 1976 Act attached to the Council decision. This act foresaw that its provisions would only apply in respect of the UK, thereby excluding Gibraltar and precluding its citizens from participating in the elections of the European Parliament. In order to enter into force, the 1976 Act had to be agreed upon by each Member States according to their own constitutional rules, as it is required for any international treaty. Finally, the Maastricht Treaty was also at stake in so far as it extends the Parliament's competencies.

In this case, the United Kingdom was held responsible for a breach of the Convention despite the fact that the contested acts were treaties falling within the Community legal order and not national acts as such. The Court stated that, as a contracting party to both the Maastricht Treaty and the 1976 Act "the United Kingdom is responsible under article 1 of the Convention for securing the rights guaranteed by article 3 of Protocol n°1 in Gibraltar regardless of whether the elections were purely domestic or European."[86]

---

[85] *Matthews v. United Kingdom* (1999), 24833/94 Eur. Ct. H.R. (Ser. A) [hereinafter *Matthews*].
[86] ibid, at para. 86.

One could consider that the Court in *Matthews* acknowledged its competence to rule on the compatibility of EC acts with the Convention. It follows that since all Member States are 'high contracting parties', there must be a possibility to hold them responsible under the Convention, even in cases where they have transferred competence to the European Communities.

On the contrary, one could submit that this judgement does not justify the conclusion that Member States are responsible under the Convention in respect of every act issued within the Community framework The Court does not diverge from the approach followed in earlier cases, according to which Member States' liability comes into play only when the act subject to control falls within the scope of Member States' jurisdiction. In this respect, it is stressed that the United Kingdom retained liability in this particular case because the measures in question, the 1976 Act and the Maastricht Treaty, were themselves international agreements freely entered into by the United Kingdom.

The factual situation in *Matthews* may indeed be distinguished from thjjhe facts of the present case. On the one hand, the acts at stake in *Matthews* were international treaties that each Member State had signed according to their internal constitutional rules. On the other hand, Senator Lines in the present case challenges the refusal to suspend an antitrust procedure, first issued by the Commission and later confirmed by Orders of the CFI and the ECJ. One case deals with primary Community legislation, the other concerns secondary Community law acts, whose legal effects are confined within the EC system. Whereas the latter category of acts is subject to scrutiny before the Court of Justice, primary legislation is not.

It therefore seems fairly drastic to draw from *Matthews* the conclusion that from now on, the Court recognises its jurisdiction over all Community acts[87]. This also seems to be the message from the HR Court, when it mentions expressly[88] that the case is not about ordinary acts of the Community Institutions.

Nonetheless, several elements in the *Matthews* judgement tend to indicate that the Court could, in the future, declare itself competent to rule on ordinary Community law acts.

As already mentioned above, the acts at stake in *Matthews* were not acts issued as such by the institutions but adopted within the Community law framework. To that extent, these are no longer ordinary national acts implementing Community legislation. The HR Court here extends the scope of its intervention to the Community law system. This in itself constitutes a significant step towards an acceptance to examine disputes relating to EC law acts.[89]

Several statements in the judgement confirm this interpretation. First, the Court seems to be drawing a convergence between Community and national legislation in relation to the Convention:

> There is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to "secure" the rights in Article 3

---

[87] F. Benoit-Rohmer, "*Chronique d'une décision annoncée: l'affaire Senator Lines devant la Cour Européenne des droits de l'homme*", L'Europe des libertés, (2001) pp.3-7, at p.4..

[88] *Matthews*, *supra* note 85 at para.33.

[89] G. Gori & F. Kauf-Gazin, "L'arrêt Matthews: Une protection globale des droits de l'Homme par Une vision réductrice de l'ordre juridique communautaire ?" (2000), Europe-Edition du Jurisclasseur 5.

of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation.[90]

Secondly, the Court states that when High Contracting parties enter into another international agreement, as the Member States have done with the Maastricht Treaty, they are "(...) responsible ratione materiae under article 1 of the Convention (...), for the consequences of that Treaty."[91]

This rationale may be broadly extended. If Member States are responsible under the Convention for the results of the Maastricht Treaty, one could argue that they are also responsible for the consequences flowing directly from the Rome Treaty establishing the Communities. And moreover, the same reasoning could apply to acts adopted within the Council of Ministers by unanimity. These are also agreements freely entered into by each Member State. And if an agreement is reached by the Council of Ministers by way of qualified majority voting, even the ones voting against a proposal had in the first place freely entered into a system where obligations may be imposed in such a way. It follows that they should remain liable in any case.

Of course, it could be argued that a decision issued within antitrust proceedings does not flow directly from an agreement freely entered into by the Member States. Indeed, the Senator lines case deals with an act taken by the European Commission, which is the Community 's supranational body. It can be argued however, that the Commission only

---

[90] *Matthews*, *supra* note 85 at para.34, see also para. 29 where the Court refers to its Judgement in case *United Communist Party of Turkey and others v. Turkey* (1998), Eur. Ct. H.R. (Ser.A) Reports of Judgements & Decisions 1998-I, pp.17-18 para.29, where it states that "Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the Member States' "jurisdiction" from scrutiny under the Convention."

enjoys the powers it derives from the Treaty. Such a counter argument is strengthened by another statement made in the *Matthews* judgement:

> The suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position (pursuant to which it is required to secure the rights under the Convention in respect of European legislation, in the same way as those rights are required to be secured in respect of purely domestic legislation), as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1.[92]

Thereby, the Court appears to be giving clear signals of changes in its coming case law. One can derive from this judgement that Member States are also responsible for consequences of the Treaty establishing the European Communities whereby they agreed on the creation of EC institutions to which powers were transferred. This constitutes a strong argument in favour of their liability under the Convention for acts of the EC institutions. Thus the Court, if loyal to the principles set out in *Matthews,* could very well extend the scope of Member States' liability under the Convention, to acts adopted within the Community law framework.[93]

Nonetheless, a last case should be mentioned. The ECtHR was recently seized with an action brought, as in the case at stake, against the 15 EU Member States. Thereby, the applicant claimed that the contested procedure conducted before the CFI and the ECJ was

---

[91] *Matthews*, *supra* note 85, at para.33.
[92] *Matthew*, supra note 85 at para.34.

in breach of Article 6 of the Convention. In its decision[94], the Court carefully avoided the question of Members State's liability in relation to EC law acts and dismissed the case on another ground thereby leaving it open whether Member States could be made liable under Article 1 ECHR for acts issued by the Community institutions in breach of the Convention.

c) Discussion: Reasons for the Court to accept or dismiss the application filed by Senator Lines.

Having examined the Strasbourg case law, both some legal and practical elements shall be now taken into consideration before concluding on the admissibility of the present application.

i.From a legal point of view.

This question must be addressed in the light of two principles of International Law that to some extent run contrary to each other. On the one hand, one should consider the principle according to which States cannot be held responsible for damaging acts of international organisations simply by virtue of their status as members of these organisations (j). On the other hand, a state is liable for the obligations it has to fulfil under a Treaty even if it subsequently concludes another international agreement, which disables it from performing its obligations under the earlier Treaty (jj).

---

[93] A. Bultrini, "La responsabilité des Etats Membres de l'Union Européenne pour les violations de la Convention Européenne des Droits de l'Homme imputables au système communautaire" [2002] Rev.Trim.Dr.h. 23 [hereinafter Bultrini].

[94] *Société Guerin Automobile v. the 15 Member States of the European Community* (2000); See also Bultrini, *supra* note 93 at 24.

j. The "legal personality" of the Community

Principle of distinction between legal personalities.

It flows from the legal personality of an international organisation that it is to be distinguished from the States that form it. In respect thereof, such an entity must answer for its own acts and States party to it cannot, by reason of membership, be held liable to fulfil the latter's obligation towards third parties[95].

The EC is an International Organisation with legal personality as stated by Article 281 EC. Therefore, according to the defendants, the institutions set up within the framework of the Community should be seen as independent from the composing Member States.

Thus, considering this principle of distinction, it is submitted that Member States do not incur liability for acts emanating from the EC institutions.

In the context of the present case however, two limits can be opposed to this principle. The first one concerns the specific nature of the Community system; the second one refers to the legal personality of the Community.

As far as the nature of the system is concerned, acts of the institutions could be seen as the result of the collective co-operation between Member States. Thus, actions taken by the institutions may be regarded as actions of the Member States under other forms. This submission does not necessarily run contrary to the above-described principle, provided

[95] For an illustration of this principle, see e.g. the resolution of 1 September 1995, issued by the French Institute of International Law: "There exists no general rule of International law which provides that Member States are, solely by reason of their membership, responsible jointly or subsidiarity for the obligations of an international organisation of which they are members" as referred to by the French Government in its reply to the DSR-Senator Lines application.

that one accepts the view that the EC is no longer a "classical" international organisation.[96].

Several elements support this position. Of course, for the purposes of International law, the Community constitutes a legal entity distinct from its Member States.[97] However, regarding Human Rights, the approach may need to be different. Its institutional structure on the one hand and its functioning on the other give it a unique character.[98] To that extent, the Community can be regarded more as an integrated structure shared by its members than as an organisation independent and clearly separate from them.

Indeed, from an institutional point of view, the EC constitutes an "original" organisation in the life of which Member States are involved at every crucial steps, in so far as they appoint the Commissioners, designate the judges and are themselves represented within the Council of Ministers.

Its functioning relies inter alia on the "direct effect" doctrine[99], under which some provisions of Community law can be relied upon by individuals. In that respect, Community institutions carry out tasks such as legislative ones that are traditionally exercised by national authorities and have direct impact on citizens.

Thus, from the perspective of the ECHR, Community Institutions are bodies within which common goals of the Member States are better achieved than at national level. Therefore, it can be argued that their action stems directly from the Member States' will, under another form.

---

[96] Bultrini, *supra* note 93 at 32.

[97] F. Benoit-Rohmer, "Chronique d'une décision annoncée: l'affaire Senator Lines devant la Cour Européenne des droits de l'homme" [2001] L'Europe des libertés at p.5.

[98] I. Cheyne, "International Agreement and the EC Legal System" [1994] Eur.L. Rev. 583.

[99] E.C.J. *Van Gend & Loos v. Commission* C-26/62, [1963] E.C.R. I-001.where the EEC is said to constitute "a new legal order of international law".

From this point of view, how could Member States not be concerned and eventually held responsible for actions taken by the Community institutions in breach of the Convention?

This analysis is strengthened if one considers the "legal personality of the Community". The concept of "legal personality" is a fiction which, taken separately, does not constitute more than a formalistic legal understanding[100]. In respect thereof, the liability of the members of an international organisation for the actions taken by the latter, may not only be based on its legal personality. More important is to consider whether the legal personality of the entity at stake in a particular case does actually go beyond the mere formalistic understanding.

Should the organisation be fully able to take over powers that were transferred to it by its members, one may assume that legal personality in this case also excludes members' liability in the field of transferred powers.

When it comes however to the protection of the human rights enshrined in the Convention, clearly the Community is denied the possibility to stand for its actions when a violation of the Convention is claimed. Indeed, the Court of Justice in Opinion 2/94[101] held that as Community law now stands, the latter has no competence to accede the Convention.

It follows that the concept of legal personality for the purpose of the present situation, does not necessarily allow a distinction between actions taken by Member States on the one hand and actions taken by Institutions on the other.

---

[100] A. Von Bogdandy, "The legal case for unity: the European Union as a single organisation with a single legal system" (1999) 36 C.M.L.Rev. 893.

[101] Opinion 2/94, *supra* note 18.

Therefore, in this line of reasoning, Member States' liability for breach of the Convention performed by the Community Institutions should be possible. This position appears to be all the more arguable when considering the following principle.

> *jj. States cannot escape their obligations under a treaty by entering into a subsequent one.*

Account should also be taken of the principle of customary international law[102] that guarantees that States party to one treaty are prevented from resorting to the creation of international organisations in order to avoid their obligations under the earlier treaty.
In order to support this statement, one can refer to the *M&Co* decision where the European Commission for Human Rights states that:

> If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligation under the first treaty, it will be answerable for any resulting breach of its obligation under the earlier treaty (...) transfer of powers (from the Member States to the Community) does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of transferred powers.[103]

In order to effectively guarantee the values contained in the Convention, it appears necessary, at least as a transitional solution, to make Member States responsible when breaches of the Convention are made within the Community law framework. As will be

[102] Embodied in the Vienna Convention on the Law of Treaties, Article 30(4)(a).

demonstrated now, this position remains valid, even if counter arguments exist also at a practical level.

ii. From a practical point of view

j. Arguments against the admissibility of an application directed against an EC measure.

Should the Court decide in its coming judgement to exercise scrutiny over the contested acts and thereby establish that Member States may from now on incur liability under the Convention for acts adopted by the Community Institutions, this would incontestably raise dilemma.

It would first of all lead to conflicts at the national level. National judges who apply both conventional law and Community law will inevitably have to disobey one or the other legal orders.

The European Commission in its written observations[104] in this case is strongly opposed to the possibility for the Strasbourg Court to exercise scrutiny over acts of the Institutions. In its opinion, such a step would pose a threat to the very foundation of the EC; as constant unilateral scrutiny and possible non-observance by Member States of EC acts would undermine the autonomy and the supra-nationality of the Community legal order.

---

[103] *M&Co, supra* note 72 at 145.

[104] para 39 of the written observations submitted by the Commission in the present case.

It submits furthermore that scrutiny by the Strasbourg Court would also have the practical result of making the Community a respondent before this Court without enjoying the rights of representation and the procedural safeguards that other respondents have.[105]
Should the Court however hold the action admissible, measures would have to be taken to improve the situation. Member States authorities would be forced to rethink the system. This would give the Institutions a strong incentive to think of a new and better solution.

jj. Arguments in favour of the admissibility of an application directed against an EC measure.

Since neither acts nor behaviours emanating from the Community Institutions ever gave rise to Member States liability under the Convention, this entire category of acts adopted within a framework set up by States that are all members of the ECHR, thereby escape the control mechanism of that Convention. Indeed, as far as acts issued by Community institutions are concerned, only the Community judge, which until now remains unbound by the Convention, has jurisdiction to rule on their validity.[106]
That situation reveals an urgent need to determine who should be held answerable for the growing number of Community acts. Indeed, one can understand that the HR Commission, confronted to Community acts in cases such as *CFDT*[107] in 1978, decided to restrain its control without fearing a major loophole in the protection of Human Rights. Since then however, the scope of Community competencies has significantly increased,

[105] Ibid, at para 40
[106] E.C.J *Foto Frost v/ Hauptzollamt Lübeck-Ost*, C-314/85, [1987] E.C.R. I-4199, at para.16-17.
[107] CFDT, supra note 79.

simultaneously widening the category of acts falling outside any scrutiny in relation to the Convention. Yet these acts have a direct impact on individuals. In that context, some consider "that the Community, despite its growing powers, enjoys an immunity which one would not expect in post-Berlin Wall Europe."[108]

The area of competition law is an excellent example. In the field of Articles 81 and 82 EC, the Community institutions are competent to decide what behaviour is acceptable and may impose fines entailing a significant impact on the individual undertakings. Moreover, the entry into force of the European Community Merger Regulation[109] in 1989 gave rise to another category of vital decisions for the future of enterprises that also escapes scrutiny.

The disparities at times occurring between the ECJ's interpretations of the Convention on the one hand and the Strasbourg Court's interpretation on the other hand supports this view.

The problem has notably been highlighted by the conflicting case law of the two courts on the privilege against self-incrimination in competition cases. Article 6 ECHR in that context is given two different contents when applied by the Luxembourg Court on the one hand and by the Strasbourg Court on the other.

First in the *Orkem* case[110], the applicant claimed before the ECJ that in competition proceedings the principle that no one may be compelled to give evidence against himself

---

[108] R.Lawson, "Confusion and Conflict ? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in R. Lawson & M. de Blois, eds., *The Dynamics of the Protection of Human Rights in Europe* (1994), at. 231 [hereinafter "Lawson"].

[109] EC, Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] O.J. L. 395/1.

[110] *Orkem, supra* note 55.

had been violated. The ECJ confirmed the right, generally to rely upon article 6 ECHR[111]. But it refused to accept that the wording of article 6, as interpreted by the Strasbourg judges, indicates the existence of a right not to give evidence against oneself.

The HR Court for its part confirmed in a later judgement, *Funke v. France,* that article 6 ECHR does entail a right for undertakings under investigation by the competition authorities not to incriminate themselves.

This however, did not prevent the CFI in the *PVC* case[112] to restate the *Orkem* principle, merely adding that the recognition of an absolute right of silence would constitute an unjustified hindrance to the Commission in its task of enforcing the competition rules.

In the recent case *Mannesmannröhren-Werke v. Commission*[113], the applicant was asked questions by the Commission as part of its investigation into a suspected cartel. Later on, having refused to answer the questions, the applicant relied before the CFI on the right not to incriminate oneself. It cited *Funke*[114] and claimed that article 6 afforded greater protection than that given under *Orkem.*[115]

As preliminary point, the CFI observed that it is not competent to assess the legality of an investigation relating to competition in the light of the Convention provisions, in so far as those provisions do not in their own right form part of Community law. Nonetheless, it recalled that the Convention itself forms part of Community law as a general principle of law and by virtue of Article 6(2) TEU. And it then dismisses the applicant's argument based on article 6 with the following remarkable statement:

---

[111] *Ibid*, at para.30.
[112] C.F.I. *PVC v. Commission,* T-305/94, [1999] E.C.R. II-931
[113] *Mannesmannröhren, supra* note 56 at para.59.
[114] *Funke, supra* note 57.
[115] *Orkem, supra* note 55.

> As for the argument that articles 6(1) and 6(2) of the Convention allow the addressee of a request for information not to reply to questions, even if purely factual, and to refuse to produce documents to the Commission, it is sufficient to note that the applicant may not rely directly on the Convention before the Community Courts.[116]

It seems to flow from this judgement that applicants before the CFI and the ECJ may rely on the Convention as a general principle of EC law, as interpreted by the Community courts. The latter however shall in no way have to take the Strasbourg case law into account.[117]

To the argument put forward by the European Commission in the SL case, declaring the case admissible would lead to conflicts on the national level, it must be pointed out that a risk of conflict already exists[118]. Indeed, how should national judges reconcile the divergences referred to above between Strasbourg and Luxembourg, having to apply on the one hand Community law and on the other hand the Convention?

---

[116] *Mannesmannröhren*, *supra* note 56 at para 61.
[117] P.R. Willis, "You have the right to remain silent...or do you? The privilege against self-incrimination following Mannesmannröhren-Werke and other recent decisions" [2001] *European Competition Law Journal* 319.
[118] Lawson, *supra* note 108 at 229.

PART II :
REGULATION 17/62 FACING THE RIGHTS PROTECTED BY THE CONVENTION

If the Court decides to hold the application filed by SL admissible, it will then turn to assess whether the contested antitrust proceeding was indeed conducted in breach of the right to a fair trial, cf. article 6 ECHR. For that purpose, the Court will have to confine itself to examining whether the Community Institutions did comply with the requirements laid down in article 6 ECHR. It should not go as far however as to substitute its own assessment of the factual situation to the assessment already carried out by the Community judges[119]. The Court's task is to protect the rights set forth in the Convention, and not to act as a fourth instance.

The content of article 6 ECHR, in particular the rights enshrined in paragraphs 1 and 2 and the applicability of that provision to the facts of the present case shall be briefly introduced in a first section. Then, Council Regulation 17/62[120] will be examined in a second section, in order to determine whether the procedure before the EC Commission in competition law provides the rights guaranteed in article 6.

A/ INTRODUCING THE LEGAL ENVIRONMENT;

[119] C.F.I *DSR-Senator Lines v Commission*, T-191/98 R, [1999] E.C.R. II-2531; E.C.J. *DSR-Senator Lines v Commission*, C-364/99 P.R, [1999] E.C.R. I-8733.
[120] *Regulation 17, supra* note 2.

1) Introducing article 6 ECHR

a) General.

Article 6 ECHR lays down the right to a fair and public trial within a reasonable time. The case law shows that the Court considers itself competent for an in-depth examination of the way in which that article is interpreted and applied.[121]

Unlike the Articles 6(2) and 6(3), which apply exclusively to criminal cases, the first paragraph applies also to proceedings relating to civil rights and obligations.

In the present case, the applicant claims the violation of Article 6(1) as such, the right to "access to Court" and Article 6(2) which sets forth that the person who is charged with a criminal offence shall be presumed innocent until proved guilty in law.

b) Access to Court.

This right is not laid down in express terms in article 6(1). In fact, the text only refers to entitlement to a fair and public hearing by a court. The Court however, in its *Golder*[122] judgement, held that article 6 is to be read in the light of two principles: a civil claim must be capable of being submitted to a judge, as one of the universally recognised fundamental principles of law; and the principle of international law which forbids the denial of justice.

The right of access implies that, in any case involving disputes over civil rights and obligations or criminal charges, there must be access to a court of law with full jurisdiction over the dispute at stake, i.e. competence to rule both on the facts and in law.

---

[121] P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (The Hague: Kluwer Law International, 1998) at 391 [hereinafter "Van Dijk"].

c) Presumption of innocence

Article 6(2) deals with the presumption of innocence. This is a special aspect relating to criminal cases of the general concept of 'fair trial' in paragraph 1. For that reason no further inquiry is made as to the possible violation of this provision, when a violation of the first paragraph has already been found.[123]

In the *Minelli* case, the Court defines this second paragraph in the sense that the provision has been violated if: "without the accused having previously been proved guilty according to the law and notably, without him having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty".[124]

If a person is merely presumed guilty, then a violation exists. The presumption may be violated not only by a court but also by other public authorities.[125]

Having briefly described the contents of the provisions relied upon by the applicant, the question of their applicability to the present dispute shall now be dealt with.

2) Applicability of article 6 ECHR to EC antitrust proceedings cases resulting in the imposition of fines upon companies.

The applicability of article 6 ECHR raises first the question as to whether a legal person may invoke article 6, and secondly, the question of the nature of the fines imposed within EC antitrust proceedings.

---

[122] *Golder v. United Kingdom* (1975), 18A Eur. Ct. H.R. (Ser. A) 17.
[123] *Deweer v. Belgium* (1980), 35A Eur. Ct. H.R. (Ser. A) 30; See also Van Dijk, *supra* note 121 at 458.
[124] *Minelli v. Switzerland* (1983), 62A Eur. Ct. H.R. (Ser. A) 18.
[125] *Allenet de Ribemont v. France* (1995), 308A Eur. Ct. H.R. (Ser. A) 16.

a) The Right for a legal person to invoke article 6.

It is settled case law[126] that article 6 applies not only to natural persons but also to companies as autonomous legal entities, having their seat in the territory of one of the High Contracting parties, thus also deserving the protection of the Convention.

It flows from the case law that no distinction is to be drawn between natural and legal persons for the purposes of article 6. For instance, the Court[127] again recently accepted to award compensation for non-pecuniary damages to a commercial company.

b) Criminal nature of the charge against the applicant.

It is also relevant to decide whether the fines imposed on SL are of a criminal nature. If not, SL can only enjoy the rights under article 6(1). Only if the answer is affirmative does the presumption of innocence apply.

It could be argued that this is of minor importance since the main claim in this case is the prevention of access to court enshrined in paragraph 1. It will nonetheless be discussed below for the purposes of situating EC antitrust procedure in the framework of article 6. In many other competition cases it will be crucial to define the charge as "criminal" to get the protection awarded in paragraphs 2 and 3, such as the right to contradiction and prevention against self-incrimination.

[126] *Union Alimentaria Sanders SA v. Spain* (1989), 157A Eur. Ct. H.R. (Ser. A).
[127] *Comingersoll S.A. v. Portugal* (2000), Eur. Ct. H.R. (Ser. A) at para 35, unreported.

i. The notion of criminal charge according to the HR Court's case law

The HR Court in its case law considers the notion of criminal charge as being autonomous. It has developed three alternative criteria to determine whether a charge falls within article 6.

The first criterion is the classification of the charge under domestic law. However, this serves only as a starting point. If an offence is not classified as criminal under national law, it can nevertheless fall within the scope of article 6. As stated by the ECtHR in the *Öztürk* case:

> If the contracting States were able at their discretion by classifying an offence as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.[128]

For such cases, the Court has developed two further criteria.

The second criterion relates to the scope of the violated norm and the purpose of the penalty. The Court in *Öztürk*[129] held that a sanction remains criminal for the purpose of the Convention, even if it is decriminalised under national law, as long as it keeps its 'deterrent' and 'punitive' character.[130]

---

[128] *Öztürk v. Germany* (1984), 73A Eur Ct. H.R. (Ser. A) 18 [hereinafter *Öztürk*].
[129] *Ibid*, at 53.
[130] *Benedoun v. France* (1994), 284A Eur. Ct. H.R. (Ser. A).

The third and very often decisive criterion is that of the nature and severity of the penalty opposed to the violator of the norm. With respect to 'fiscal penalties' for iinstance, the Court adopted the position that article 6 applies to tax surcharges because of their deterrent and punitive nature and of the fact that they were substantial[131].

ii. Nature of fines imposed within antitrust procedures.

j. The HR Commission decisions in that field.

The HR Commission has on two occasions decided that these procedures have a criminal character within the meaning of article 6 ECHR.

In the *M&Co*[132] case, where an action against the enforcement of an EC Commission decision imposing a fine was brought under article 6, the HR Commission declared in an obiter dictum that, in order to examine the application "it can be assured that the antitrust proceedings in question would fall under article 6, had they been conducted by German and not by European judicial authorities".[133]

It thus considered that the above described criteria in the case of the EC Commission decision imposing a fine in that case was met.

This position was confirmed in the case *Stenuit v. France*[134], where the fines imposed by the French antitrust authorities were also said to have a criminal character. The Commission found first of all that their administrative nature under national law and the

---

[132] *M&Co, supra* note 72 at 145.
[133] Ibid.
[134] *Société Stenuit v. France* (1992), 232A Eur. Comm. H.R. D.R. [hereinafter *Société Stenuit*].

fact that an administrative body imposed them were irrelevant. It further considered the aim of the challenged provisions, which was to maintain free competition within the French market, and in the Commission's opinion, was therefore affecting the general interests of society normally protected by criminal law. The wording of the provisions also conveyed the character of criminal law provisions ("infractions" and "contravenant"). Finally, considering their nature and severity, it found that the penalties in question clearly intended to act as deterrents.

Thus, the two cases are strong precedents suggesting that EC antitrust proceedings resulting in the imposition of fines have a criminal nature. The observation made by the HR Commission in *Stenuit* can easily be transposed to EC antitrust proceedings. It is true that article 15(2) of Regulation 17/62[135] states that fines imposed under that Regulation shall not be of a criminal law nature. This however, as seen above, does not bind the HR Court in any way. Furthermore, the wording of that provision certainly speaks in favour of the criminal law character of the procedure[136]. According to that provision, the fine imposed under Regulation 17/62 can amount to ten percent of the world-wide turnover in the preceding year of each of the undertakings participating in the infringement, which clearly suggests the deterrent effect and the severity of the sanction.

Until now, the HR Court never had to address directly the issue of the nature of competition law procedures. The *Stenuit* case was settled before the Court had the opportunity to examine it.

---

[135] *Regulation 17*, *supra* note 2.

[136] See the French version where it is particularly obvious, the text speaks of 'infraction' and of 'communication de griefs'.

jj. The position of the Community institutions.

In their recent case law[137], the Community Courts also acknowledge that the fundamental rights laid down in article 6 are applicable to EC Commission decisions imposing fines on undertakings.

Moreover, there is a clear tendency towards criminalisation of Competition law in the European Community. Thus, the recent developments in the enforcement field strongly supports the criminal character of the sanctions imposed. One of the major objectives of the Commission in the past few years has been to increase the efficiency of EC antitrust enforcement and therefore the deterrent character of the sanctions imposed.

In 1998, the Commission published a notice[138] on its new method to set fines. It gave up its traditional policy of evaluating fines according to the maximum percentage of the product concerned by the anti-competitive conduct. Its new fining practice has a more deterrent effect, which explains the recent increase in the general fine level.[139] Nowadays, fines correspond at least to the profits derived from the infringement of competition rules.[140]

It appears in conclusion that decisions of the European Commission imposing fines under Regulation 17/62, as in the present case, should be construed as the determination of a criminal charge against the undertaking concerned.

---

[137] E.C.J. *Hüls AG* v. Commission, C-199/92 P,[1999] E.C.R. I-150; E.C.J. *Hüls AG v. Commission* ,C-137/92P-DEP, E.C.R. I-23.

[138] EC, *Commission's Guidelines on the method of setting fines imposed pursuant to article 15(2) of Council Regulation. 17/62 and article 65(5) of the ECSC Treaty*; (1998) O.J. C9/3.

[139] Report from the Competition Law and Policy Workshop organised by the Robert Schuman Centre forAdvanced Studies. June 1st and 2nd 2001, online: EUI Florence homepage, <http://www.iue.it/RSC/Competition2001.html>

[140] P.J.Wils "The Commission's New Method for calculating Fines in Antitrust Cases", (1998) Eur. L. Rev at 52.

B INFRINGMENT MADE BY REGULATION 17/62 TO ARTICLE 6 ECHR.

1)Does the law in EC antitrust proceedings provide for access to court?

To examine the conformity of EC antitrust proceedings with the right of access to court, the following two elements must be considered. Firstly, is the Commission itself a tribunal as required by article 6(1) (a) ? If this is not the case, recourse to a tribunal to obtain judicial review of Commission decisions must be made available to individuals (b).

a).The Commission is not a tribunal within the meaning of article 6(1) of the Convention.

Under Article 85 EC, the Commission has the duty of ensuring the application of articles 81 and 82 EC and of investigating suspected infringements of these articles. Since 1962, the enforcement of articles 81 and 82 has been governed by Regulation 17/62[141], adopted by the Council on the basis of article 83 EC. Upon discovering facts that indicate a competition violation, the Commission is entrusted with the charge to issue a formal decision on whether there has been an infringement of the competition law provisions[142]. Where it believes that there has been a competition violation, it decides whether to prosecute the case. Articles 3 and 16 of Regulation 17/62 allow the Commission to order undertakings to bring any infringement of articles 81 and 82 to an end, and if necessary under compulsion of periodic penalty payments. Article 15(2) empowers the Commission to impose on undertakings or associations of undertakings fines not exceeding 10 % of the turnover in the proceeding business year of each of the undertakings participating in the violation of Articles 81 and 82 EC, whether intentional or negligent. The Commission

[141] *Regulation 17, supra* note 2.
[142] Ibid, arts 2 & 3(1).

proposal for a new Council Regulation[143] replacing Regulation 17/62 does not include any change in this respect.

This description alone shows that the Commission is not a court but an administrative body. The Commission can be said to intervene throughout the antitrust procedure, as policeman, prosecutor and judge.[144] It follows that such an institution clearly fails to fulfil the requirement of article 6(1) ECHR[145] as far as the concept of 'judicial body' is concerned.

This does not imply that EC antitrust procedures infringe article 6 ECHR. A further analysis must be made.

b)Existence of an appeal procedure before the Court of First Instance and the Court of Justice.

It can be deduced from a settled case law of the HR Court that the system at stake is in conformity with article 6, in as much as it provides that administrative decisions can be challenged before the Community judiciary.[146]

i. The HR Court's case law.

While confronted to disputes over civil rights and obligations conducted before administrative or professional bodies, the HR Court[147] has stated indeed that Article 6(1)

---

[143] EC, *Commission Proposal of 27 September 2000 for a Council Regulation on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty* [2000], COM (200) 582.
[144] See the arguments of the applicant in E.C.J. *Musique Diffusion française v. Commission*, C-100-103/80, [1983] E.C.R. I-1825 [hereinafter *Musique diffusion française*].
[145] See the settled case law on this point: ibid, at para.7-11 and see also C.F.I. *Shell v. Commission,* T-11/89, [1992] E.C.R. II-757, at para.39..
[146] EC Treaty, supra note 4, article 230.

requires at least one of the two following systems: either the administrative organs themselves comply with the requirement of article 6(1) or they do not comply but are subject to subsequent control by a judicial body that has "full jurisdiction" and upholds the guarantee provided for in article 6(1).

The Court later indicated in *Öztürk*[148], a case concerning offences in the sphere of road traffic, that the same reasoning also applies to criminal proceedings.[149]

Concerning antitrust proceedings, the HR Commission found in *Stenuit* that there had been a violation of the Convention, however not because the French antitrust authorities were not an independent and impartial tribunal but because the French Conseil d'Etat had refused to exercise full jurisdiction when examining the appeal brought against the decision adopted by these antitrust authorities. It had indeed refused to look into the merits of the charge against the applicant company[150]. Likewise, EC antitrust procedures infringe article 6 ECHR in this respect only if Commission decisions cannot be subject of review by a Community court.

ii. Availability of a recourse to a tribunal.

The CFI was precisely created to examine actions brought by private parties against the administrative authorities of the Community, notably in EC antitrust proceedings[151]. Appeals on grounds of law may be further made to the ECJ. Applicants have thus at their disposal a two-tier-system of judicial review

---

[147] *Le Compte Van Leuven and De Meyere* v. *Belgium* (1981), 43A Eur. Ct. H.R. (Ser. A) 23 at para.51; *Albert and Le Compte* v. Belgium (1983), 68A Eur. Ct. H.R. (Ser. A) 16 at para.29.
[148] Öztürk, *supra* note 128, at 21.
[149] *Ibid*, at 22.
[150] *Société Stenuit*, *supra* note 134, at para 72.
[151] K. Lenaerts & J.Vanhamme, "Procedural rights of private parties in the Community administrative process", (1997) 34 C.M.L.Rev. 557.

Furthermore, it is generally accepted that according to article 17 of Regulation 17[152], Community courts also have "full jurisdiction" within the meaning of article 172 EC to review decisions whereby the Commission has fixed a fine or imposed penalty payments. Some authors doubt whether the CFI, when reviewing the legality of the Commission decision[153], can really be considered as having "full jurisdiction." The exact meaning is still unclear.[154] But some commentators[155] strongly consider that the availability of appeals before the CFI does not provide sufficient guarantee. For instance Rein Wesseling had formulated his reasoning in the following words:

> It is sometimes argued that although the Commission does not form an independent tribunal which Article 6 ECHR requires, the Court of First instance does form such a tribunal. This would imply that the application of Articles 81(1) and 82 is in line with the requirements of the ECHR. However, in view of the limited nature of the judicial review exercised by the Community courts in respect of Commission decisions on the basis of article 81(3) there is no independent tribunal in the application of that provision.[156]

Whatever the answer to the question of the effective full jurisdiction of the Courts, the CFI has provided a partial answer to the question of the application of article 6. Indeed it has held in the so-called *Soda Ash* case, that antitrust law enforcement procedures are guided by the principle of "equality of arms."[157]

---

[152] *Regulation 17*, *supra* note 2.

[153] Indeed, the CFI within its "full jurisdiction" may only modify the fine, however, it may not annul as such the fine for reasons linked to the appropriateness or expediency of the Commission decision. See D. Waelbroeck & D. Fosselard, "Should the decision making power in EC Antitrust Procedures be left to an Independent Judge ? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures" [1994] Y. B. Eur. L. 127 [hereinafter "Waelbroeck"].

[154] *X v. Switzerland* (1994), 77A Eur. Ct. H.R. (Ser. A) 44. The meaning given to the terms "full jurisdictional review" by the HR Court is still unclear.

[155] Waelbroeck, *supra* note 153, at 111. But for the opposite thesis, see e.g. K. Lenaerts and J.Vanhamme, "Procedural Rights of private Parties in the Community Administrative Process", (1997) 434 C.M.L. Rev. 556.

[156] R. Wesseling, "The draft-regulation modernizing the competition rules : the Commission is married to one idea." (2001) 26 Eur. L. Rev. 375.

[157] C.F.I. *Imperial Chemical Industries v. Commission*, T-36/91, [1995] E.C.R. II-1847 [hereinafter *ICI*].

Although the real scope of this decision is still uncertain[158], in appears that the applicability of the principle of the "equality of arms" in EC antitrust law implies that the system will not stand.[159]

The following analysis of the procedure before the Commission will demonstrate that there cannot be equality between the private parties and the DG competition in a procedure investigated, prosecuted, and ended by the DG competition itself.

Thus even if the question whether the degree of review of the Commission's decisions exercised by the CFI lives up to the standard of Article 6 has remained unanswered[160], the whole procedure can eventually be challenged on this ground. Indeed, article 6 principles can undoubtedly be applied : If the ECtHR considers that the appeal before the European Courts does not provide a sufficient access to court, article 6 will apply to the procedure before the Commission. If the Strasbourg Court decides conversely, the same antitrust procedure can still be challenged on the basis of the violation of the "equality of arms" principle which application has been proclaimed by the CFI.

Anyway, the procedure has to respect the standard of natural justice of article 6 ECHR if the Community does not want to be seen hypocritical as it continually repeated its attachment to Fundamental Rights. Indeed, though the case law of the European courts, through the wording of article 6 (2) TEU, through the adoption of the Charter, and

---

[158] C-D. Ehlermann & B.-J Drijber, "Legal Protection of Enterprises: Administrative Procedure, in particular Access to files and Confidentiality." (1996) 17 Eur.L. Rev. 375.

[159] R.Wesseling, *The Modernisation of EC Antitrust law*, (Oxford and Portland, Oregon: Hart Publishing, 2000), at 166 [hereinafter "Wesseling"].

[160] Ibid.

through the several pleadings of its institutions in favour of the accession, the Community has made clear that Fundamental Human Rights were guaranteed within it system.

Thus, the incontestable unfairness of the antitrust proceedings handled by the commission will be examined. It will be demonstrated that its lack of transparency and the legal uncertainty created by this opaque procedure cannot be denied and must be reformed.

2) An institutional Problem : the central position of the EC Commission and the lack of transparency.

a) The Commission determines antitrust policy.

At present Community is responsible for the legislation (i) as well as the enforcement of antitrust law (ii).

i. Through the legislative process.

The Council is supposed to be in charge of the antitrust legislation but it mainly delegates its powers to the Commission letting the latter adopt block exemption regulations which declare art 81(1) EC inapplicable to certain categories of agreements and concerted practices.[161]

Thus, and considering the huge impact of those block exemptions on antitrust policy, the Commission is the one responsible for the antitrust policy and the antitrust enforcement as well.

---

[161] See e.g. *EC, Council Regulation 19/65 of 2 March 1965 on the application of Art. 81(3) of the Treaty to certain categories of agreements and concerted practices as amended by Council Regulation 1215/1999 of 10 June 1999*, O.J. L. 148/1.

One could deny the centralisation of the legislative power in the hand of the Commission arguing that the European Parliament and the Economic and Social Committee bring forward their views on draft block exemption regulations. Furthermore, it could be argued that Members States themselves intervene in the legislative process though the Advisory Committee that is consulted on Commission's policy initiatives in the field of restrictive practices and dominant position.

Nevertheless, neither the European Parliament , nor the Advisory Committee or the ECOSOC' opinions bind the Commission when it finally adopt such regulations.

ii. Through the enforcement procedure.

According to R. Wesseling[162], the capacity to issue block exemption regulations enables the Commission to conduct antitrust policy complementary to the policy which it pursues by antitrust law enforcement in individual cases. Thus one should consider that in conducting the enforcement of antitrust law in individual cases, the Commission is also involved indirectly in the legislative process.

Once more, within the antitrust enforcement procedure, the Advisory Committee merely gives its opinion on draft decisions, but it remains confidential. Regarding the political control of the European Parliament and the ECOSOC, it is unfortunately limited to their opinions on the Commission's annual reports on competition policy .

b/ The Commission controls the decision making.

Preliminarily, there are four ways for the Commission to be aware of the behavior and of agreements eventually anti competitive under the terms of article 81 EC treaty. Firstly,

complaints can be lodged in order to alert the DG Competition on a specific alleged infringement. Alternatively there is the widespread notification system that leads the parties to an agreement to seek a kind of «authorization» from a Community antitrust law perspective.

In addition to the notification system that permits the Commission to be informed of the competitive behaviour of the market's actors, the Commission can on its own initiative, discover potential infringements to antitrust law in examining specifically certain sectors of the economy.

i. Investigation.

During the procedural phase of investigation, the Commission is given broad powers to request the information it considers essential. It can even obtain the information required by carrying out the investigations as far as it considers it necessary to fulfil its duties in ensuring compliance with Community antitrust law.

ii. Prosecution.

If at the end of the investigation, The DG competition suspects an infringement of antitrust law, the Commission initiates the prosecution though a "Statement of Objections" that is sent to the companies prosecuted. The defendant may reply in writing to the allegations made and can also benefit an oral hearing at the offices of DG Competition.

---

[162] Wesseling, *supra* note 159 at 252.

Subsequently, it is the task of the same body, the DG competition, to decide whether he then dispose sufficient information to confirm the merits of the statement of objections and whether to proceed to a prohibition decision! On the basis of these observations, commentators perceive antitrust law procedure as unfair. For Instance, Wesseling expressed the criticism holding that: "the principal sense of injustice is seen to lie in the fact that the same persons who suspect anti-competitive conduct substantiate their concern in a statement of objections and subsequently decide whether their earlier objections were justified."[163]

iii. Decision

The prohibition decision takes the form of a formal decision drafted by the DG competition, that requires the termination of the infringement. Upon approval of the Commission's legal service, the draft is then submitted to the Advisory Committee.

It is then that the Advisory Committee intervenes. It is worth recalling that the body is composed of Member States representatives and that its opinion at that stage of the individual procedure will remain confidential, even for the defendant.

Its consultation may lead the DG competition to review its draft, but in practice it hardly happens. There is merely never difference between the draft issued by the DG Competition before the Advisory Committee's consultation and the one that will afterwards be finally submitted by the commissioner to the college of Commissioners. Its role is thus almost a Fundamental rights' "facade" aimed at giving credibility to the administrative process that mainly only occurred in the Commissions' offices.

[163] Wesseling, *supra* note 161 at 168.

Therefore, the Commission' autonomy is conditional only on hearing the parties to the alleged anti competitive agreements and the Advisory Committee.[164]

The Commission is thus the master of the procedure from the outset to its finalization, and is seen to act as police, investigator, prosecutor and judge. The Commission has tried several types of internal organization of its services. But whatever the internal organization of the DG IV is, the final decision will always be taken at the top of the same pyramid even if it has a differently structured basis.

The undeniable lack of transparency within the decision making of Commission is still challenged by commentators[165], in spite of the continuing case law of the European Community courts endorsing the institutional framework in which antitrust law is enforced.[166]

3) Lack of transparency through the non-binding Advisory Committee opinions.

In the existing institutional framework, three degrees of committee procedures can be found: the Regulatory Committee procedure, the Management Committee procedure and finally the Advisory Committee procedure. The existence of their intervention denotes a set of cooperative decision-making process typically involving Member States representatives and experts who hold the task of controlling the delegation of the

[164] Wesseling, *supra* note 159 at 169.
[165] See e.g., W.P.J.Wils, «La compatibilité des procédures communautaires en matiere de concurrence avec la convention européenne des droits de l'homme.» (1996) 32 C.D.E.329.
[166] See e.g. C.F.I. *Shell v. Commission* T-11/89 [1992] ECR II-757 and *Musique Diffusion Francaise, supra* note 144.

Council's powers to the Commission.[167] The chosen formula of the Advisory Committee for the antitrust procedure represents the highest degree of autonomy for the Commission. Indeed, firstly, if in theory the Commission is supposed to highly take into account their comments on the draft decision, it is in practice completely free to adopt its own draft despite the objections of whatever magnitude from the Committee. Moreover, there is no possibility for a referral to the Council, contrary to the other two kinds of committees. Finally, contrary to the existing Advisory Committee in the concentrations field, the one on restrictive practices and monopolies cannot recommend publication of its opinion. Such a reform could be seen as a little step towards transparency that deeply lacks currently.

On the basis of those observations, it can be observed that its counterweight lacks strength and one could wonder whether its existence is more or less only justified by the need for democratic visibility rather than by a real procedural fairness concern. Once again the Commission may be seen to hold much uncontrollable power.

4) Antitrust enforcement procedure and legal certainty : the doubtful practice of comfort letters.

At the end of the investigation, when all the necessary information are obtained, the case handler, who belong to the DG Competition staff, will give its opinion on whether there are sufficient grounds for continuing the proceedings. Then, the *raporteur*, if the answer is negative, will terminate the investigation and in theory, a negative clearance decision is

[167] Wesseling, *supra* note 159 at 180.

given back in order to close the file. But given that only a small number of agreements is covered by block exemptions adopted by the Commission, this has led to an enormous number of cases pending before the Commission. Due to its limited resources it is practically impossible for the Commission to deal with all these notifications in the way foreseen by Regulation 17/62.[168] As a consequence, the Commission adopted its practice of issuing so called comfort letters instead of formal exemption decisions.

From a fundamental procedural rights standpoint, this practice is highly contestable.

Comfort letters are issued by DG IV itself, unlike formal decisions which must be approved by the entire Commission. They contain very short reasoning in some cases but more often do not give reasoning at all. The Commission, in general, merely states that at the time the comfort letter is issued, it does not see any reason for intervening against the respective agreement and will therefore close the file. But the Commission always reserves itself the right to change his view and open proceedings at any time.

A comfort letter has virtually no legal force on its own and is therefore not binding upon the national courts, or the Commission.

As the Court observed in *Lancôme v. ETOS*[169], the only legal effect which a comfort letter provides is in fact a negative one: it ends the provisional validity from which notified old agreement benefits. Therefore, they leave parties with an entire lack of legal certainty.

Moreover, a small minority of comfort letter does receive extensive publicity via a press release, sometimes to be completed by a case summary in the annual report.

---

[168] *Regulation 17*, *supra* note 2.

[169] E.C.J. *Lancôme v. ETOS* C-99/79, [1980] E.C.R I-2535, (1981) 2 C.M.L.Rev. 164.

Thus, the lack of systematic publicity coverage, together with the lack of reasoning means that comfort letters do not become part of a body of established Commission's practices.[170]

The recent new merger regulation did notably suppress that practice and the defendant now automatically benefit a formal letter that close its file. Conversely, the formal letter provides more legal certainty for defendants. Firstly, according to the terms of the Treaty, formal letters must be reasoned. They must "state the reasons on which they are based and shall refer to any proposal or opinions which were required to be obtained pursuant to this treaty".[171] Secondly, the opinion that must be obtained pursuant to the above treaty's provision is the one of the Advisory Committee.[172] Thirdly, formal letters must be published.[173] Finally, if they contain an exemption, "they shall be issued for a specified period and conditions and obligations must be attached thereto."[174]

One could plead in favor of a reform that would compel the Commission to issue comfort letters reasoned, published and limited in time. However, they would merely remain the expression of the views of the DG IV services, without the Advisory Committee. Then, it is possible to assert: "even with such a reform, they would not turn into acts which legal force could rival that of formal decision."[175]

Undertakings are thus left with the choice of either postponing the project for an indefinite time or running the risk of going ahead on the basis of a comfort letter which

---

[170] Luc Gyselen, *Publication policy of the Commission with regards to Comfort letters*, in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell (1992), eds.) [hereinafter "Gyselen"].
[171] EC Treaty, supra note 4, art. 190
[172] *Regulation 17*, *supra* note 2, art. 10.3.
[173] *Regulation 17*, *supra* note 2, art 21.
[174] *Regulation 17*, *supra* note 2, art 8.1.
[175] Gyselen, *supra* note 170.

the Commission might renounce as soon as complaints from competitors or consumers become known.

5) Other infringements to classical procedural rights

a) The right to a fair hearing.

Especially in competition cases, the Community judicial branch had frequently recognized that the guarantee of the right to a fair hearing was "a fundamental principle of Community law which must be respected in all circumstances."[176]

The Luxembourg Court found, once again in *Imperial Chemical Industries v Commission*[177] that 'the undertaking concerned must...be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission'. Or, as the Court of First instance chose to put it its *Lisrestal* judgement, the natural or legal person concerned should be able to "effectively make known his views on the evidence against him which the administrative authority has taken as the basis for the decision at issue".[178]

Under the Convention, the right to be heard forms part of the right to a 'fair and public hearing' as guaranteed in Article 6(1), assuring an 'equality of arms'.[179] It is essential to recall that the ECJ itself has recently acknowledged the necessity to respect the 'equality of arms' principle in competition proceedings.[180]

---

[176] See e.g. in the field of competition law, E.C.J., *Hoffman-La Roche v. Commission* C-85/76, [1979] E.C.R. I-461, at paras. 9 & 11; C.F.I., *Solvay v. Commission* T-30/91, [1995] E.C.R. II-1775, at para 59.
[177] *ICI*, *supra* note 157 at para 49.
[178] C.F.I. *Lirestal v. Commission* T-450/93, [1994] E.C.R. II-1177, at para 42.
[179] *Neumeister v. Austria* (1968), 8A Eur. Ct. H.R.

Apparently, the legislation of the Community has take into account the judicial recommendation and grants such a right.[181] Firstly, article 19(1) of Regulation 17/62[182] obliges the Commission to hear the undertaking concerned on "the matters to which it takes objections. Moreover, this provision is applicable not only to undertakings targeted by the Commission, but also to undertakings unsuccessfully applying for negative clearance or exemption. Secondly Article 19(2) of the same regulation provides the right to be heard to third parties in proceedings in the outcome of which they demonstrate a "sufficient interest".

But these requirements are formulated from the Court's standpoint. And undertakings would rather wish to make use of its right to submit observations before their case attain the judicial stage. At that moment, it should be aware of the existence of all documents that are in the case-handling authority's possession. It is not currently the case even if some improvements have been made towards the good direction.

The current system grants a right to be heard by an independent hearing officer. However, undertakings are frequently given the impression that their defense in antitrust infringement procedures has not been heard because the wording of the Commission's final decision is often almost identical to the wording of the statement of objections issued by the Commission. This practice raises serious doubts as to the practical value of the parties' rights of defense in proceedings before the Commission. Indeed, one should contest the real efficiency of the oral hearing that the private parties may request.

---

[180] *ICI, supra* note 157.

[181] EC, *Council Regulation 2842/98 on the hearing of the parties in certain procedures under Art 81 and 82 of the EC treaty* [1998] O.J. L. 354/18.

Moreover, Article 9(1) of regulation 99/63[183] provides that persons appointed by the commission for that purpose conduct oral hearings. Thus, to what extend could is he really independent from the DG Competition? Given that its report is merely an internal document of the Commission, undertakings do not have the possibility to comment on his findings. Furthermore, the report of the hearing officer does not bind the Commission. Therefore, it does not contain any decisive element that the Court should take into account in order to exercise its judicial control[184] and although the undertakings have the right to an oral hearing before an independent officer, practice has shown that is it extremely difficult for the hearing officer to influence the position of the case-handlers within DG IV.

Furthermore, in spite of the apparent respect of the right to a fair hearing, one of its corollaries, the access to the Commission file, seems to suggest some criticism.

b) The right to have access to the Commission's file.

"As competition laws with fines now be regarded as criminal in nature[185], it would be seen that denial of a right to seed documents relevant, or which could be relevant, to the defense, would probably amount the infringement of Article 6 of the European Convention on Human Rights."[186]

---

[182] *Regulation 17, supra* note 2.
[183] EC, *Council Regulation 99/63, on the hearings provided for in Art. 19(1) and (2) of Council Regulation no. 17/62*, [1963] O.J. Spec. ed. 47.
[184] C.F.I. *Chemie Linz v. Commission* T-15/89, [1992] E.C.R. II-1275.
[185] *Société Stenuit, supra* note 134.
[186] D. Vaughan, *Access to the file and confidentiality*, in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell (1992), eds.)

Before December 1994, the DG competition was in charge of determining to which documents a company will get access for preparing its defense. But the doubts concerning the fairness and the transparency of the system increased dramatically in the aftermath of the *Italian flat Glass* case in which it was revealed that officials in DG competition had deleted exculpating passages before sending the file to the parties concerned![187]

Subsequently, the Commission published new binding terms of reference[188] that recognized the need to grant the task to someone else than the case handler itself and it is now the independent hearing officer who decides these matters. Nevertheless, the procedure is still considered unfair by those commentators who perceive the procedure as contentious.[189]

Following many suggestions on the idea that procedural errors should be judged and sanctioned during the investigation phase, it has been proposed to entrust the hearing officer with the task of an ombudsman in competition law procedures. Therefore, the Commission has adopted the proposition in a decision of 12 December 1994[190]. In the light of its Article 5, the hearing officer is given decision making powers in cases where an undertaking considers that it was wrongfully denied access to the file, or if it fears that the Commission may grant access to documents containing business secret. Nonetheless, one can consider that it is still to early to know whether the new approach constitutes an adequate remedy.

---

[187] E.C.J., *Societa Italiano Vetro and Others v. Commission* Joined Cases T-68 & 77-78/89, [1992] E.C.R. II-1403.

[188] EC, Commission's new binding term of reference [1994] O.J. L. 330/67.

[189] See Wesseling, *supra* note 159; but see K. Lenaertz & J. Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process" (1997) 37 C.M.L.R. 531.

Parallely, in order to correctly prepare their defense, the parties should be able to know the content and the scope of the objections. That is supposed to be guaranteed through the communication of the statement of objections. Although some commentators consider that the provisions on the statement of objections can be deemed to be satisfactory[191], one should contest the complete character of the statement. Indeed, after replying to the statement of objection and after attending the hearing, the defendant (as well as the complainant) stops being formally involved in the decision-making process. Thus, they are not entitled to see the report of the Hearing Officer and they have no access to the minutes of the Advisory Committee's meeting. Subsequently, they are not kept informed about the contents of the draft decision that is being circulated to the Commission's members nor of the Commission's deliberations on this draft. This lack of the complainant's involvement can be seen as reveal the lack of transparency of the whole antitrust enforcement procedure.

That is the reason why some commentators suggest that, at least, the Hearing Officer's report be sent to the parties.[192] But as regards to this proposal, others doubt whether that step would enhance the freedom of action of the Hearing Officer.[193] This doubt seems justified to Van der Woude's point of view. Indeed, "if his findings were to be made

---

[190] EC, Commission's new binding term of reference [1994] O.J. L. 330/67.

[191] Ehlermann, "The European Administration and the Public Administration of Member States with regard to competition law", [1995] Eur.C.L.Rev. 456.

[192] House of Lords' select Committee on the European Communities, *report on the enforcement of Competition rules*, Session 1993-1994, 1st Report, 7 Dec. 1993, London, HMSO, at p. 15.

[193] See e.g. Ehlermann, "The European Administration and the Public Administration of Member States with regard to competition law", [1995] Eur.C.L.Rev. 456.

public, the hearing officer would be reluctant to express himself freely, since his words might, rightly or wrongly, be repeated during court proceedings."[194]

Finally, Ivo van Bael points out a last practice of the Commission that also highlights the transparency issue. He submits that when the Commission has adopted its decision and goes to the press to explain it in some detail, the defendant will only have received a copy of the operative part of the decision. He considers in other words that "at that time, the press enjoy a greater level of transparency then the defendant."[195]

It is hoped that the recent Commission notice on the internal rules of procedure for processing requests for access to the file[196], which the Commission adopted in order to ensure compatibility between its administrative practice and the ECJ's case law, will effectively improve the situation. However theses rules have not been yet tested in Court, and they expressly do not relate to rights of third parties, and of complainants in particular.

c).The right not to self incriminate.

The right that the accused possess not to commit self incrimination arises again from article 6(2) TEU in connection with Article 6(2) ECHR regarding criminal procedure. Nevertheless, its scope in competition law seems still disputed.[197]

---

[194] M. Van der Woude, "Hearing Officer and EC Antitrust Procedures ; The Art of Making Subjective Procedures more objective." (1996) 33 C.M.L.Rev. 545.

[195] I. Van Bael, *Transparency of EC Commission Proceedings* , in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell eds. (1992)).

[196] EC, *Commission Notice on the internal rules of procedures for processing requests for access to the file* [1997] O.J. C.23/3.

[197] See S. Gleb & E. Zeitler, "Fair Trial Rights and the European Community's Fight Against Fraud." (2001) 7 Eur. L. J. 233.

Indeed, In *Orkem v Commission*, the ECJ seemed to restrict the beneficiary of the right to 'natural person charge with an offence in criminal proceedings.' The Court even conclude from a comparative analysis with national law that nothing indicates the existence of the principle "which may be relied on by legal persons in relation to infringements in the economic sphere, in particular infringements in the economic sphere, in particular infringements of competition law."[198] At this occasion, occurred one of the most well-known conflict between the ECJ and he ECtHR, which held in *Funke v. France* [199] that article 6 of the Convention prohibits all forms of self incrimination and that, therefore, no one can be forced to provide any self incriminatory documents.

But the scope of that decision has to be examined in the light of the fact that a natural person was concerned. It would have been highly more relevant if the applicant were a legal person.

Nevertheless, the ECJ in the same judgement, also specified that if the Commission could compel undertakings to provide all necessary information and disclose documents, it "may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove".[200]

In practice, this does not clarify the question as to whether an undertaking could benefit the right in order to break the investigation of the Commission. Some commentators

[198] *Orkem, supra* note 55.
[199] *Funke, supra* note 57.

consider that "this may lead to a privilege of non disclosure for undertakings in the area of competition law."[201]

d).The right to a timely decision.

The ECJ regards the rights to a timely decision to be one of the fundamental rights forming an integral part of the general principles of law, whose observance the Community judicature ensures.[202] In the case *SCK and FNK v. Commission*[203], the Courts held that the question as to whether the duration of an administrative proceeding is reasonable must be determined in relation with the specific circumstances of each case and, in particular, its context, the various procedural stages, the conduct of the parties in the course of the procedure, the complexity of the case, and its importance for the various parties involved.

Concerning the ECHR, the right is still protected within article 6(1) since it stipulates that 'everyone is entitled to a fair and public hearing within a reasonable time.'

It is established Strasbourg case law that time starts to run from the moment the private party has been targeted by the administrative authority. Thus, the compliance with the reasonableness requirement of Article 6(1) does not depend solely on the efficiency of the Court, but also on the working rhythm of Commission. But the Commission is not subjected to any legal time frames with regard to the investigation and the adoption of a decision in antitrust enforcement proceedings. And so far, neither the Community

---

[200] *Orkem, supra* note 55,at paras 34 & 35; see also C.F.I. *Société Générale v. Commission,* [1995] E.C.R. II-570, para 74.

[201] See S. Gleb and E. Zeitler, "Fair Trial Rights and the European Community's Fight Against Fraud" (2001) 7 Eur. L. J. 233.

legislature nor the Courts have exercised much pressure on the Commission with regards to time limits.[204] Thus, this often leaves undertakings in a position where for several years they have no indication whatsoever as to the outcome of the investigations carried out by the Commission.

However, considering the traditional complexity of antitrust cases, such a criticism on the length of proceedings may be seen as almost irrelevant. Furthermore, the current lack of procedural fairness may lead to a modernization of the rules governing antitrust enforcement. And such a welcome reform may increase its length if it is decided to organize differently the existing procedure. That is the reason why the right to a timely decision should not be invoked excessively in the competition field if one agrees with the real need for reform. Otherwise, the risk of seeing the necessary reform being postponed may increase.

---

[202] See e.g. C.F.I. *SCK and FNK v. Commission*, [1997] E.C.R. II-1739, at para 55 [hereinafter *SCK*]; E.C.J. *Guerin Automobiles v. Commission,* [1997] E.C.R. I-1503, at para 38.
[203] *SCK, supra* note 202, at para 57.
[204] K. Lenaertz & J. Vanhamme, "Procedural rights of private parties in the Community administrative process"(1997) 434 C.M.L. Rev. 567.

CONCLUSION PROPOSAL FOR REFORM

In the past few years, the Commission has issued many guidelines, notice and papers in the antitrust enforcement field, clarifying its position and demonstrating its good faith towards more transparency (A). Nevertheless, it will be shown that its efforts seem unsatisfactory and that only a deep institutional reform could effectively solve the problem (B).

A/ NON INSTITUTIONNAL REFORM

1) Examples of effort already done

a) In the fining practice.

The Commission has issued welcome guidelines on its contested opaque practice of fining undertakings.[205]

The first criticism concerned the absence of a fines tariff. It is a criticism that could be easily contested because if companies could make a cost/ benefit analysis before entering into the anti-competitive behavior or agreement, fines would lost their whole deterrent effect. Tarification thus serves deterrence, as long as the tariff is either sufficiently detailed or sufficiently flexible to accommodate relevant differences between individual

[205]EC, *Commission Guidelines on the method of setting fines imposed pursuant to 15(2) of Council Regulation. 17/62*, [1998] O.J. C. 9/3.

cases, and that the amount is set at the right level. The new method goes in this direction according to Wouter P.J. Wils.[206]

The second criticism of the old fining practices of the Commission concerned the absence of full reasoning in individual fining decision. The new method makes possible for the Commission to remedy this problem by setting out the entire calculation in the recital of the decision.

b)In strengthening the role of the Hearing Officer.

The Commission has recently announced that the role of the hearing officer will be enhanced, acknowledging that he " plays an important role in safeguarding the right of defense, a key principle of law to which the Commission is fully committed."[207] From now on, the Hearing Officer will be attached directly to the competition commissioner and his/her report will be made available to the parties and will be published in the European's Union Official Journal.[208] This will certainly give greater visibility and more weight to the hearing officer, reinforcing the protection of the legitimate interest of the parties in the fair conduct of the proceedings as well as greatly enhancing the transparency of the commission procedure.

Nevertheless, even though the Hearing Officer will not belong to the DG for competition any more, the Commission is still responsible for its appointment, for the termination of

[206] W.P.J. Wils «The Commission's New Method for Calculating Fines in Antitrust Cases», (1998) 23 Eur. L. Rev. 252.
[207] EC, *Commission Press Release* of 23 May 2001 IP/01/736.
[208] EC, *Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings*, [2001] O.J. L. 162 at 21.

the appointment as well as for its transfer. Thus, one could wonder whether the reform towards its independence could have been more complete.

c)In decentralizing the notification task.

One of the undeniable positive effect of the decentralization foreseen in the White Paper[209] is the end of the notification monopolies. Indeed, a certain amount of cases will now have to be notified to and handled by the national authorities. Thus, undertakings may now have an access to the ECtHR in case of violation of their rights protected by article 6 ECHR. Consequently, it is not doubtful that a greater degree of protection will be provided.

Moreover, the cases newly handled by the national authorities will also benefit the legal time frames that most of the Member States' competition authority have to respect.

2) Efforts still unsatisfactory.

a)Reforming through non binding guidelines: example of the access to the file issue.

Due to the silence of the treaty and the Council's regulations on the question, the Commission issued a notice on the internal rules of procedures for processing requests for access to the file in 1997[210]. But those type of guidelines are not legally binding and do not create individual rights for undertakings involved. A suggestion has been made to lay

[209] EC, *Commission White paper of 28 April 1999 on Modernization of the rules implementing articles 85 and 86 [now 81 and 82] of the EC Treaty*, [1999] Commission program No 99/027, approved at Brussels on 28.04.99.

down provisions concerning the right of access to the file directly in Regulation 17[211] or in a separate regulation. Such an amendment would provide undertakings with legal certainty as to the scope of their rights of defense and would also put more pressure on the Commission to strictly respect these rights.

b)The Current Modernization of EC antitrust law.

Under the terms of the draft regulation, the Commission powers of investigation are increased in three respects It may interview any person that may be in possession of useful information[212]. It may search the homes of directors, managers and staff of "undertakings concerned"[213] and finally, it may seal any premises (including homes) during inspection[214].

The other interesting point is that the Commission is seeking a general competence to adopt block exemption, thus increasing its already formidable autonomous powers in the field of competition law. On the basis of this proposal, the Council, and thus Member States will be totally excluded from policy-making at the Community level, apart from their consultative powers through the Advisory Committee on restrictive practice and dominant position.

This draft regulation forms part of a more general modernization of EC antitrust law.

But the existing institutional framework is largely left untouched

---

[210] EC, *Commission Notice on the internal rules of procedure for processing requests for access to the file*, [1997] O.J. C.23/3.
[211] *Regulation 17*, *supra* note 2.
[212] EC, *Commission Proposal of 27 September 2000 for a Council Regulation on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty* [2000], COM (200) 582, Article 19 [hereinafter *Draft Regulation*].
[213] *Draft Regulation*, *supra* note 212 at article 20 (2) (b).
[214] *Draft Regulation*, *supra* note 212 at article 20 (2) (e).

This is particularly remarkable since the creator of this modernization program, the former commissioner Van Miert, acknowledged explicitly that the institutional framework within which Community antitrust law is applied needed to be reformed.[215] Nevertheless, the program contains some new institutional elements such as the foreseen network of national competition authorities coordinating the decentralized enforcement of articles 81 and 82. Moreover the draft regulation itself contains some minor amendments to the existing procedure like the proposal that the Advisory Committee may recommend that its opinion in a particular case is published.[216]

But why should the Commission remain the main institution enforcing article 81 and 82 at the Community level?

One of the traditional arguments in favor of this exclusive competence was that the application of article 81(3) included a margin of policy discretion.[217]

But leaving the decision-making to a court or an independent agency could close the persistent debate on the pertinence of the commission acting both as a prosecutor and judge. There is little doubt that the commission lacks the guarantee of independence and political impartiality to form an independent tribunal in the sense of article 6 ECHR. Moreover, according to many commentators[218], in view of the limited nature of the judicial review exercised by the Community Courts in respect of Commission's decisions on the basis of article 81(3) EC treaty[219], there is not independent tribunal in the application of that provision. Thus it appears that the Commission should be replaced by a

---

[215] S. Wilks & L. McGowan, "Disarming the Commission: the debate over a European Cartel Office." [1995] C. L. M.J. 35.

[216] *Draft Regulation*, *supra* note 212, article 14(5).

[217] R. Wesseling, "The draft regulation modernising the competiton rules : The Commission is married to one idea" (2001) 26 Eur. L. Rev. 375.

[218] *Ibid.*

body which fulfills the requirements of article 6 ECHR. This word imply that the application of article 81(1) and 82 EC treaty[220] is in line with the requirements of the ECHR. Further, the introduction of an institutional separation between the prosecuting and decision-making institution could also provide a solution to the problem emphasized by the CFI when ruling that EC antitrust law procedures need to respect the principle of equality of arms.[221]

The problem become even more acute in a system, proposed by the draft regulation, in which the Commission will be competent to lay charges on companies for abuse of dominant position and order divestitures of assets of the company if it considers this desirable. It should be acknowledged that no Chinese wall within DG competition and no increase in the independence of the Hearing Officer can ultimately solve this problem of natural justice.[222] The general modernization program provides a good opportunity for establishing the separation between prosecuting and the decision-making.

B/ INSTITUTIONNAL PROPOSAL FOR REFORM;

1)Separating the two stages of the enforcement.

Restructuring within the DG IV, separating the investigation activities from the decision-making process, may at least partly solve the existing problem of lack of objectivity and

---

[219] *EC Treaty*, *supra* note 4.
[220] *Ibid.*
[221] *ICI*, *supra* note 157.
[222] R. Wesseling, "The draft regulation modernizing the competition rules : The Commission is married to one idea" (2001) 26 Eur. L. Rev. 376.

could hopefully restore the equality of arms required by the Court in the so-called *Soda ash* case.[223]

This would involve a clearer distinction between the two stages of the infringement proceedings with one administrative level carrying out investigations and drafting the statement of objections and another drafting the first decision to be adopted by the College of Commissioners. But instead of granting the decision task to an administrative body, it could be to a judicial one.

The Court of First Instance could be given the competence to adopt the decision stating the existence of an infringement and imposing fines upon the undertakings involved. Then, the Commission in turn would remain responsible for carrying out investigations and for drafting the statement of objections. It would thus concentrate on collecting evidence and conducting the preliminary procedure and would stop being involved once the statement of objections is presented to the parties and to the CFI. The Court would subsequently be responsible for hearing the parties and for the evaluation of evidence and the arguments presented to it by the Commission on the one hand and by the parties on the other hand. The proceedings before the Court would end with the adoption of the decision establishing whether an infringement took place and with the imposition of fines.

Such a solution provides a truly objective and fair proceeding with two entirely separate legal body acting as prosecutor and judge over the case. Moreover, this would solve the

[223] *ICI, supra* note 157.

problem of the parties' right of access to the file as the Court itself would decide who will be granted access to the file and to what extent.

Although the adoption of a decision by the Court of First Instance would necessarily take somewhat longer than if one and the same authority were to carry out investigations and adopt the decision, this possible prolongation would be more than outweighed by the fact that the decision is taken by an independent court. Indeed, such a decision would be far more acceptable to undertakings and would render a further review by a court unnecessary in most cases.

That is the reason why such a separation of powers seems to be the most adequate reform in order to effectively solve all the fundamental downfalls of the present enforcement regime. Nonetheless, the creation of an independent agency is frequently suggested. It seems however that it is not the preferable solution as it will be demonstrated in the final part of this paper.

2) An independent European Cartel Office?

The majority of the proponents of such an independent agency usually begins with the assumption that further expansion of the role and independence of the hearing officer forms a moderate improvement as prosecution and judgement would continue to be made by one institution.[224]. The original proposals for an independent Cartel Office date far back, but due to the broadening of EC competence, the issue was recently revitalised. It

[224] See Wesseling, supra note 159 at 169. But see the further reflexions of M. Van Der Woude, "Hearing officers and EC Antitrust Procedures; the Art of making Subjective Procedures More Objective" (1996) 33 C.M.L.Rev. 531.

also reveals the current concern for Human Rights in general, procedural rights in particular. The debate on the merits of such an independent enforcement agency acquired practical significance when the German delegation to the 1996 Intergovernmental Conference proposed the establishment of such an institution.[225]

Then, it was further revived with the introduction of the Merger Control Regulation[226] when it was widely felt that the exercise of merger control should be left to an independent body rather than to a political institution such as the Commission. The concept was initially modeled after the German federal Cartel Office being an independent administrative body. Then, independent antitrust authorities have meanwhile also been established in Denmark, Belgium, France, Finland, Greece, Italy, the Netherlands, Portugal, Spain and in the United Kingdom.

Most of the proponents suggest that the scope of jurisdiction of such an independent body should be restricted to the application of article 81 and 82 to private undertakings leaving the public sector to the Commission.[227] The main reason behind the proposal for an independent agency is the idea that such a body would be less exposed to political influence exercised by the Commission as a political institution. But as far as the application of article 81 and 82 is concerned, the issue of political influence has always been less important than in the field of merger control. Also there has not been evidence that over the past 40 years the Commission was guided by political rather than competitive considerations to a larger extent than any of the national competition authorities.

---

[225] C.D. Ehlermann, "Reflexions on a European Cartel Office" (1995) 32 C.M.L.Rev. 471.

[226] EC, Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] O.J. L. 395/1.

Rather it is submitted that such a reform would increase the political control of the Commission or of the Council on the acts of the newly created body. And thus, the possibilities of exercising political influence in competition cases would be reinforced.

Moreover, according to some commentators, the creation of an Independent Cartel Office would not strengthen the procedural rights for undertakings in infringement procedures unless new procedural rules were to be adopted at the same time. Furthermore, it would still be the same administrative body that would act as prosecutor and judge at the same time.

Some other practical objections should be mentioned. First in the context of the European Community, the process of establishing a new institution is complicated, protracted and in the case of an antitrust agency, would be a highly politicized process.[228] A second practical problem is the coordination of separate strands to competition policy. To Create a separate enforcement body for the antitrust rules would isolate the assessment of those cases from broader competition policy concerns.[229]

Therefore, in spite of a broad support, the idea of a European Cartel Office does not provide a solution for the most important practical problems in competition enforcement proceedings today.

---

[227] i.e. The application of Article 90 EC treaty and the rules on State aids..

[228] Wesseling, *supra* note 159 at p. 172.

[229] Schaub, *Decision making at the centre- Working Paper IV* In L. Laudati and C.D. Ehlermann (eds), Robert Schuman Centre Annual on European Competition Law (The Hague, Kluwer Law International, 1997) no 24, at p. 79-87.

At least the European Union seems to think of a way to go out of this dilemma. Indeed, the concern for a better protection of Human Rights in general and procedural rights in particular is becoming more and more shared. Thus, and especially with the soon enlargement of the Union, it is highly necessary to reorganize the balance of power within the Union's Branches and to let the HR Court have a complete control over EU Institutions.

LEGISLATION

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

EC, *Council Regulation 17/62 of 6 February 1962 implementing articles 85 and 86 of the EEC Treaty*, [1962] O.J.L. 13/204, art 8.1, art 10.3, art 21.

EC, *Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings*, [1989] O.J. L. 395/1.

EC, *Council Regulation 19/65 of 2 March 1965 on the application of Art. 81(3) of the Treaty to certain categories of agreements and concerted practices* as amended by Council Regulation 1215/1999 of 10 June 1999, O.J. L. 148/1.

EC, *Council Regulation 2842/98 on the hearing of the parties in certain procedures under Art 81 and 82 of the EC treaty* [1998] O.J. L. 354/18.

EC, *Council Regulation 99/63, on the hearings provided for in Art. 19(1) and (2) of Council Regulation no. 17/62*, [1963] O.J. Spec. ed. 47.

Treaty establishing the European Community, 25 March 1957, as amended by the Treaty of Amsterdam, article 242, article 230, O.J. C.340.

Treaty establishing the European Union, 7 February 1992, O.J. C.340.

EC, *Commission Proposal of 27 September 2000 for a Council Regulation on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty* [2000], COM (200) 582, article 14 (5), 19, 20 (2) (b), 20 (2) (e).

EC, *Commission White Paper of 28 April 1999 on Modernization of the rules implementing articles 85 and 86 [now 81 and 82] of the EC Treaty*, [1999] Commission program No 99/027, approved at Brussels on 28.04.99.

EC, *Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings*, [2001] O.J. L. 162 at 21.

EC, *Commission Guidelines on the method of setting fines imposed pursuant to 15(2) of Council Regulation. 17/62*, [1998] O.J. C. 9/3.

EC, European Union Charter of Fundamental Rights of 18 December 2000, O.J. C. 364/1 art. 51 (I),art 51(II), art. 52 (I), art. 52 (III).

EC, *Joint Declaration by the European Parliament, the Council and the Commission concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedom,* [1977] O.J C.103/1.

JURISPRUDENCE

EC Court of First Instance

C.F.I. *Cascades* v. *Commission*, T-308/94 R, [1995] ECR II-265 at II-276.
C.F.I. *Chemie Linz v. Commission* T-15/89, [1992] E.C.R. II-1275.
C.F.I. *DSR-Senator Lines* v. *Commission*, T-191/98 R, [1999] E.C.R. II-2531.
C.F.I. *Imperial Chemical Industries v. Commission*, T-36/91, [1995] E.C.R. II-1847.
C.F.I. *Laakmann Karton* v. *Commission* T-301/94 R, [1994] E.C.R. II-1274 at 1279.
C.F.I. *Lirestal v. Commission* T-450/93, [1994] E.C.R. II-1177.
C.F.I. *Mannesmannrohren-Werke Ag* v. *Commission*,T-112/98, [2001] E.C.R. II-729.
C.F.I. *Mayr-Melnhof Kartongesellschaft mbH* v. *Commission*, T-347/94, [1998] E.C.R. II-1751.
C.F.I. *PVC v. Commission,* T-305/94, [1999] E.C.R. II-931.
C.F.I. *SCK and FNK v. Commission*, [1997] E.C.R. II-1739.
C.F.I. *Shell v. Commission,* T-11/89, [1992] E.C.R. II-757.
C.F.I. *Société Générale v. Commission,* [1995] E.C.R. II-570.
C.F.I., *Solvay v. Commission* T-30/91, [1995] E.C.R. II-1775.

European Court of Justice

E.C.J. *AEG* v. *Commission*, C-107/82 R, [1982] E.C.R. I-1549 at I-1551.
E.C.J. *Emesa Sugar* v. *Aruba*, C-17/98 [2000] E.C.R. I-665.
E.C.J. *ERT* v. *DEP*, C-260/89, [1991] E.C.R. I-2925.
E.C.J. *DSR-Senator Lines* v. *Commission*, C-364/99 P.R., [1999] E.C.R. I-8733.
E.C.J. *Ferrieri die Roe Volciano* v. *Commission,* C-234/82 R, [1983] E.C.R. I-725 at I-727.
E.C.J *Foto Frost v. Hauptzollamt Lübeck-Ost*, C-314/85, [1987] E.C.R. I-4199.
E.C.J. *Geitling v. High Authority,* C-36,37,38, 40/59 [1960] E.C.R. I-423.
E.C.J. *Guerin Automobiles v. Commission,* [1997] E.C.R. I-1503.
E.C.J., *Hoffman-La Roche v. Commission* C-85/76, [1979] E.C.R. I-461.
E.C.J. *Hüls AG* v. Commission, C-199/92 P,[1999] E.C.R. I-150.
E.C.J. *Hüls AG v. Commission* ,C-137/92P-DEP, E.C.R. I-23.
E.C.J. *Kremzow* v. *Austria*, C-299/95, [1997] E.C.R. I-2629.
E.C.J. *Lancôme v. ETOS* C-99/79, [1980] E.C.R I-2535.
E.C.J. *Musique Diffusion française v. Commission*, C-100-103/80, [1983] E.C.R. I-1825.
E.C.J. *Nold v. Commission,* C-4/73 [1974] E.C.R. I-491 at I-507.
E.C.J. *Orkem* v. *Commission*, C-374/87, [1989] E.C.R. I-3283 at I-3344.
E.C.J. *R Hasselbad* v. *Commission* , C-86/82, [1982] ECR I-1555.

E.C.J., *Societa Italiano Vetro and Others v. Commission* Joined Cases T-68 & 77-78/89, [1992] E.C.R. II-1403.
E.C.J. *Stauder* v. *Commission*, C-29/69 [1969] E.C.R. I-419.
E.C.J. *Van Gend & Loos v. Commission* C-26/62, [1963] E.C.R. I-001.

European Court / Commission of Human Rights

.

Albert and Le Compte v. Belgium (1983), 68A Eur. Ct. H.R. (Ser. A) 16.
Allenet de Ribemont v. France (1995), 308A Eur. Ct. H.R. (Ser. A) 16.
Bendenoun v. France (1994), 284 A Eur. Ct. H.R. (Ser. A)
Cantoni v. France (1996) Eur. Ct. H.R. (Ser.A.) 161.
CFDT v. European Community (1977), 8030/77 Eur. Comm. H.R. D.R. 13 Y.B. Eur. Conv. H.R. 231.
Comingersoll S.A. v. Portugal (2000), Eur. Ct. H.R. (Ser. A) at para 35, unreported.
Deweer v. Belgium (1980), 35A Eur. Ct. H.R. (Ser. A) 30.
Dufay v. European Community (1989), 13539/88 Eur. Comm. H.R. D.R.
Etienne Tête v. France (1987), 1123/84 Eur. Comm. H.R. D.R. 52.
Funke v. France (1993), 256A Eur. Ct. H.R. (Ser.A).
Golder v. United Kingdom (1975), 18A Eur. Ct. H.R. (Ser. A) 17.
Le Compte Van Leuven and De Meyere v. *Belgium* (1981), 43A Eur. Ct. H.R. (Ser. A) 23.
Matthews v/ United Kingdom (1999), 24833/94 Eur. Ct. H.R. (Ser.A).
M&Co. v. the Federal Republic (1990), 13258/87 Eur. Comm. H.R. D.R. 145, 68 Y.B. Eur. Conv. H.R. 138.
Minelli v. Switzerland (1983), 62A Eur. Ct. H.R. (Ser. A) 18.
Neumeister v. Austria (1968), 8A Eur. Ct. H.R. (Ser. A).
Norris v. Ireland (1988), 142A Eur. Ct. H.R. (Ser.A) 50.
Procola and others v. Luxembourg (1993), 14570/89 Eur. Comm. H.R. D.R. 5.
Öztürk v. Germany (1984), 73A Eur Ct. H.R. (Ser. A) 18.
Senator Lines v. the 15 Member States of the European Union ,Eur.Ct. H.R., application no. 56672/00.
Société Stenuit v. France (1992), 232A Eur. Comm. H.R. D.R.
Union Alimentaria Sanders SA v. Spain (1989), 157A Eur. Ct. H.R. (Ser. A).
United Communist Party of Turkey and others v. Turkey (1998), Eur. Ct. H.R. (Ser.A) Reports of Judgements & Decisions 1998-I at 17.
Vermeire v. Belgium (1991), 214C Eur. Ct. H.R. (Ser. A).
X v. Switzerland (1994), 77A Eur. Ct. H.R. (Ser. A) 44.

Other Courts

Frontini, Cour Constitutionnelle Italienne, arrêt no 183/73 du 27 decembre 1973, Frontini e Pozzani /Min. Fin., Riv. Dir. Int., 1974, p. 130; texte en italien et en allemand in : EuGRZ 1975, pp. 311-315.

Solange, Cour Constitutionnel Allemande, deuxieme chambre, 29 mai 1974, internationale Handelsgesellschaft/EVGF (Solange I), BverfGE 37, p.271 = EuGRZ 1974, p.5.

SECONDARY MATERIAL : MONOGRAPHS

Gyselen, L. *Publication policy of the Commission with regards to Comfort letters*, in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell (1992), eds.).

Lawson, R. "Confusion and Conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in Lawson, R. & de Blois, M. eds., *The Dynamics of the Protection of Human Rights in Europe* (1994), at. 231.

Rozakis, C.L. "La position des organes de la Communauté européenne des droits de l'Homme à l'égard des actes de l'ordre juridique communautaire", in *La protection des droits de l'Homme dans le cadre européen* (Baden Baden, 1991) 295.

Van Bael, I. *Transparency of EC Commission Proceedings* , in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell eds. (1992)).

Van Dijk, P & Van Hoof, G.J.H. *Theory and Practice of the European Convention on Human Rights*, (The Hague: Kluwer Law International,ed,1998).

Vaughan, D. *Access to the file and confidentiality*, in Procedure and enforcement in EC and US Competition law, proceedings of the Leiden Europa institut Seminar on User Friendly Competition law. (Piet Jan Slot and Alison McDonnell (1992), eds.).

Wesseling, R. *The Modernisation of EC Antitrust law*, (Oxford and Portland, Oregon: Hart Publishing, 2000).

SECONDARY MATERIAL : ARTICLES

Benoit-Rohmer, F. "L'adhésion de l'Union à la Convention européenne des droits de l'homme ", (2000) R.U.D.H. 57.

Benoit-Rohmer, F. "Chronique d'une décision annoncée: l'affaire Senator Lines devant la Cour Européenne des droits de l'homme", L'Europe des libertés, (2001) at 3.

Bultrini, A. "La responsabilité des Etats Membres de l'Union Européenne pour les violations de la Convention Européenne des Droits de l'Homme imputables au système communautaire" [2002] Rev.Trim.Dr.h. 23.

Burca (de), G. "Convergence and Divergence in European Public Law: the case of Human Rights", in P.Beaumont, C. Lyons & N. Walker, eds., *Convergence and divergence in European Public Law* (Hart Publishing, 2001).

Burca (de), G. "The drafting of the European Union Charter of Fundamental rights" [2001] Eur. L.Rev. 129.ial to the Court (Eur. Ct. H.R.) Application file of DSR Senator Lines" (2001) 21 H.R.L.J. 112.

Cheyne, I. "International Agreement and the EC Legal System" [1994] Eur.L. Rev. 583.

Constantinesco, V. "Débats sur le troisième thème: La Protection des droits / Charte des droits fondamentaux et Convention Européenne des droits de l'homme." (2000) R.U.D.H. 62.

Drzemeczewski, P. (view expressed to),by Engel, N.P. editor of the H.R.L.J.(interviewed in April 2001) and exposed in Drzemeczewski, P. "The Council of Europe's position with respect to the EU Charter of Fundamental Rights", (2001) 22:1-4 H.R.L.J. 28.

Drzemeczewski, P. "The Council of Europe's position with respect to the EU Charter of Fundamental Rights", (2001) 22:1/4 H.R.L.J. 14.

Ehlermann, C-D "Reflexions on a European Cartel Office" (1995) 32 C.M.L.Rev. 471.

Ehlermann, C-D. "The European Administration and the Public Administration of Member States with regard to competition law", [1995] Eur.C.L.Rev. 456.

Ehlermann, C-D, & Drijber, B-J "Legal Protection of Enterprises: Administrative Procedure, in particular Access to files and Confidentiality." (1996) 17 Eur.L. Rev. 375.

Engel, C. "The European Charter of Fundamental rights, A changed political opportunity Structure and its normative consequences", (2001) 7:2 Eur. L. J. 163.

Fischbach, M. « Le Conseil de l'Europe et la Charte des droits fondamentaux de l'Union Européenne » (2000) 22 R.U.D.H. 7.

Gleb, S & Zeitler, E. "Fair Trial Rights and the European Community's Fight Against Fraud." (2001) 7 Eur. L. J. 233.

Gori, G & Kauf-Gazin, F. "L'arrêt Matthews: Une protection globale des droits de l'Homme par Une vision réductrice de l'ordre juridique communautaire ?" (2000), Europe-Edition du Jurisclasseur 5.

Jacobs, F.G. "Human rights in the European Union: the role of the Court of Justice."(2001) 26 Eur. L. Rev. 331.

Kruger, H.C. & Polakiewicz, J. "Proposals for a Coherent Human Rights Protection System in Europe, the ECHR and the EU Charter of Fundamental Rights" (2001) 22:1-4 H.R.L.J. 4.

Lenaerts, K. & Vanhamme, J. "Procedural Rights of private Parties in the Community Administrative Process", (1997) 434 C.M.L. Rev. 556.

Mancini, G.F. & Keeling, D.T. "Democracy and the European Court of Justice" (1994) 57 Mod. L. Rev. 175.

Van der Woude, M. "Hearing Officer and EC Antitrust Procedures ; The Art of Making Subjective Procedures more objective." (1996) 33 C.M.L.Rev. 545.

Von Bogdandy, A. "The legal case for unity: the European Union as a single organization with a single legal system" (1999) 36 C.M.L.Rev. 893.

Waelbroeck, D. & Fosselard, D. "Should the decision making power in EC Antitrust Procedures be left to an Independent Judge ? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures" [1994] Y. B. Eur. L. 127.

Wesseling, R. "The draft-regulation modernizing the competition rules : the Commission is married to one idea." (2001) 26 Eur. L. Rev. 375.

Wils, P.J. «La compatibilité des procédures communautaires en matiere de concurrence avec la convention européenne des droits de l'homme.» (1996) 32 C.D.E.329.

Willis, P.R. "You have the right to remain silent...or do you? The privilege against self-incrimination following Mannesmannröhren-Werke and other recent decisions" [2001] *European Competition Law Journal* 319.

Wils, P.J. "The Commission's New Method for calculating Fines in Antitrust Cases", (1998) Eur. L. Rev at 52.

Wilks, S. & McGowan, L. "Disarming the Commission: the debate over a European Cartel Office." [1995] C. L. M.J. 35.

OTHER MATERIAL

E.C.J. *Opinion 2/94 on the accession of the Community to the European Convention on Human Rights* [1996] ECR I-1759.

Record of the first meeting of the body to draw up a Draft Charter of Fundamental Rights for the European Union, CHARTE 4105/BODY 1, p.8.

EC, Council of Europe's parliamentary assembly Recommendation 1479 (2000) of 29 September 2000 Doc 8819 report of the Committee on Legal Affairs and Human Rights (reporter M. Magnusson).

EC, European Parliament Resolution of 16 March 2000 on the drafting of a EU charter of Fundemental Rights (2000), A5-0064/2000 (plenary session).

EC, *Commission communication on the accession of the Community to the ECHR and the Community legal order*, com communication of 19.10.1990, SEC (90) 2087 Final; memorandum on the accession of the European communities to the convention for the protection of Human Rights and Fundamental Freedom, adopted by the Commission on April 4 1979, Bulletin of the EC, supp.2/79.

House of Lords' select Committee on the European Communities, *report on the enforcement of Competition rules*, Session 1993-1994, 1st Report, 7 Dec. 1993, London, HMSO, at p. 15.

Report from the Competition Law and Policy Workshop organised by the Robert Schuman Centre forAdvanced Studies. June 1st and 2nd 2001, online: EUI Florence homepage, <http://www.iue.it/RSC/Competition2001.html>