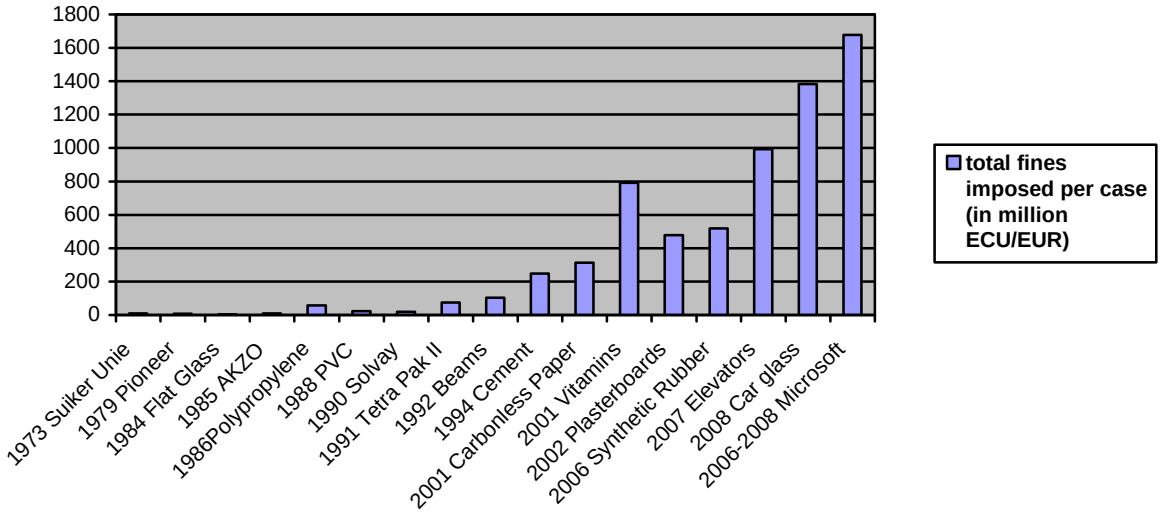
ENFORCEMENT BY THE COMMISSION

THE DECISIONAL AND ENFORCEMENT STRUCTURE IN ANTITRUST CASES AND THE COMMISSION'S FINING SYSTEM [1]

A. INTRODUCTION

In the last few years, fines imposed by the Commission on companies for competition law infringements have increased dramatically, as shown in the following graph[2]:



Given this new fining policy, as well as the increasingly intrusive investigative powers of the Commission, the question arises whether the current safeguard mechanisms which are offered in the Community are sufficient to comply with higher standards such as those which are to be found in Article 6 of the European Convention on Human Rights (hereinafter "ECHR").

Hereafter, the Working Group proposes to look at:

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[1] This paper is a slightly modified version of a report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe -- Time for a Review of Regulation 1/2003" which took place on 11 and 12 June 2009 in Brussels. The report was written by the following: Arianna Andreangeli, Onno Brouwer, Daniel de Feydeau, Ian Forrester, Damien Geradin, Assimakis Komninos, Karl Hofstetter, Yannis Katsoulacos, Christophe Lemaire, Matthew O'Regan, Luis Ortiz Blanco, Donald Slater, Sébastien Thomas, David Ulph, Denis Waelbroeck and Ute Zinsmeister.

[2] For detailed statistics on cartels for example, see the Commission's case statistics available under http://ec.europa.eu/competition/cartels/statistics/statistics.pdf. it appears that the ten of the highest fines per undertaking have all be imposed after 2001, with Saint Gobain leading with an individual fine of 896m €. See also the study realised by Professor Jürgen Schwarze with Dr. Rainer Bechtold and Dr. Wolfgang Bosch for Gleiss Lutz, "Deficiencies in European Competition Law – Critical analysis of the current practice and proposals for change".

- the practical problems resulting from the current enforcement structure in the light particularly of the huge fines currently imposed (part B),

- the legal problems flowing from the ever increasing "*criminalisation*" of competition law (part C),

- possible improvements as regards the enforcement system (part D),

- a possible improvement as regards the system of sanctions itself (part E).

B. THE PRACTICAL PROBLEMS RESULTING FROM THE CURRENT ENFORCEMENT STRUCTURE

As often stressed, the Commission is vested with wide powers in performing its various roles as investigator, prosecutor, decision-maker and enforcer of the EC Treaty's rules on competition. These roles inevitably involve conflicts with one another. Whilst the Commission is required to undertake an objective investigation, the reality is that lack of objectivity can creep into the investigative and decision-making processes at any stage.

The current system of enforcement under Regulation 1/2003 has limited means to counterbalance and control this, whether internally within the Commission or by the Community courts. This should not be taken as a criticism of individuals or institutions. It is the investigation and enforcement system itself, and the perception of resulting bias that is under scrutiny. As the ECtHR has observed, the difficulty is that the impact of possible bias on the outcome of a case is extremely difficult to measure:

> *"one of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts…Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence."*[3]

Justice must not "*simply be done, but be seen to be done*"[4]. This is why – as a matter of principle and save in exceptional cases - criminal sanctions should not be imposed at first instance by an administrative body.[5]

Administrative authorities simply do not offer the same guarantees as courts. As stressed by the ECJ itself, "*the actual status of those authorities is not in general such as to guarantee that they have the same degree of independence and impartiality as that which […] courts are recognised as having*" and *inter alia* do not offer the same guarantees for the affected parties to *"benefit from the exercise of the adversarial principle inherent to judicial proceedings which allows account to be*

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[3] Judgment of the ECtHR of 14 November 2006, *Tsfayo v. United Kingdom*, App. n° 60860/00, at para. 33.

[4] Quote attributed to Lord Hewart in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] K.B. 256, 259, quoted in the Judgment of the English House of Lords of 24 March 1999, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet Ugarte; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet Ugarte* (No 3) [1999] UKHL 147; [2000] 1 AC 147; [1999] 2 WLR 825; [1999] 2 All ER 97.

[5] Although the ECtHR has never had to decide on this question with regard to the EC, for obvious reasons of competence, it appears that this absence of formal separation at the Commission level between prosecutorial and adjudicative functions would very likely be incompatible with Article 6 ECHR. Interestingly, at the national level, the French *Cour de Cassation* has held that the participation of the *rapporteur* in the deliberations of the *Conseil de la Concurrence*, to the extent that he has undertaken investigations during the fact-finding process, was contrary to Article 6(1) ECHR: *TGV Nord et Pont de Normandie*, judgment of 5 October 1999. See further, Waelbroek and Griffiths, *French Cour de Cassation: T.G.V. Nord et Pont de Normandie*, [2000] 37 CMLRev 1465 - 1476.

taken of the arguments put forward by the different parties before the interests in issue are weighed one against the other at the time a decision is being taken".[6]

Therefore, it is imperative that the system of enforcement under Regulation 1/2003 be adapted so as to ensure that appropriate and correct decisions are reached on the basis of a proper and objective assessment of all available evidence.

(i) The Commission's powers of investigation, prosecution, decision and punishment

A typical antitrust case involves either an immunity application or a complaint, a dawn raid at the premises of undertakings suspected of infringing the Treaty's competition rules, subsequent information gathering by the Commission, the issuing of and replies to the statement of objections and the adoption of a final decision.[7] Whilst at any stage, the Commission may discontinue its investigation (for example, by rejecting a complaint[8] or simply closing its file[9]), the underlying ethos is that, for investigative resources to be devoted to a case, the investigation should lead to a prohibition decision. In other words, Commission investigations are *results driven*, which in itself can lead –even unwillingly– to bias as individual case teams seek to justify the resources put into a case (which can be substantial[10]), regardless of its strength.[11]

Under Regulation 1/2003, the Commission has the powers to investigate suspected infringements of Articles 81 and 82, whether on its own initiative or following a complaint;[12] find that an infringement has been committed;[13] impose structural and behavioural remedies to the infringement committed;[14] impose interim measures;[15] accept commitments, where it would otherwise intend to adopt a decision finding an infringement;[16] undertake sector inquiries;[17]

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[6] See the *ABNA* judgment of the ECJ of 6 December 2005, cases C-453/03 et al, at para 109.

[7] See for example, the speeches of the House of Lords in *In re Pinochet*, 15 January 1999, emphasising that in both civil and criminal litigation, it is important in ensuring confidence in the integrity of the administration of justice that courts are both free of bias and, even where no actual bias is found or alleged, there is no possibility of a perception of bias: "*in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality*" (per Lord Nolan) and "*public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable*" (per Lord Goff of Chieveley). See also the earlier House of Lords authority, *R v Gough* [1993] EC 646, in which Lord Goff of Chieveley held that "*there is an overriding public interest that there should be confidence in the integrity of the administration of justice… that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'*". See also generally for competition law, e.g. Kerse and Khan, *EC Antitrust Procedure* (5th edn, 2005), and *Bellamy & Child European Law of Competition* (Roth and Rose, eds; 6th ed, 2008), chapter 13.

[8] See for example COMP/36.568 (*Port of Helsingborg*); COMP/37.974 (UFEX/La Poste); available at http://ec.europa.eu/competition/antitrust/cases.

[9] For recent examples, see COMP/39.514 (*Inquiry in the pharmaceutical sector*); COMP/38.624 (*Deep-sea maritime transport of bulk liquids*); COMP/39.154 (*iTunes*), all available at http://ec.europa.eu/competition/antitrust/cases.

[10] A cartel investigation can often involve multiple simultaneous dawn raids, each requiring significant planning and coordination (including with the relevant national authorities) and, for at least two days, the commitment of substantial numbers of Commission and national authority staff. Thereafter, a case team of at least three or four Commission staff will be involved in the ongoing investigation of the case, together with more senior managers and possibly also the Chief Competition Economist's team.

[11] See for example the recent statements by John Fingleton (OFT) about the need to focus resources on cases that matter and are winable: http://business.timesonline.co.uk/tol/business/law/article4281743.ece; cf. also the discontinuance of a major cartel case (milk sector) after several years.

[12] Regulation 1/2003, Article 7.

[13] *id*.

[14] *id*.

[15] *id*., Article 8.

[16] *id*., Article 9.

require the provision of information;[18] interview any legal or natural person (with the person's consent) and to take statements;[19] undertake inspections of both business and private premises, land and means of transport, and to require explanations of facts or documents relating to the subject-matter and purpose of the investigation;[20] impose fines and/or periodic penalty payments for both procedural infringements and substantive infringements[21] (including by settling cases, which essentially involves a party accepting the Commission's version of events and waiving most of its procedural rights in return for, hopefully, a slightly lower fine[22]).

As Regulation 1/2003 itself recognises, the Commission's powers of inspection permit it to use *"coercive measures"*, with potentially serious fines for non-compliance.[23] In some Member States, such as the United Kingdom, obstruction of a Commission inspection is a criminal offence and can be punished severely.[24] The coercive nature of these powers is clear for instance from the context of the ongoing *Akzo* litigation concerning legal professional privilege: it is clear from the facts of that case that the disputed documents were handed over to the Commission's inspectors, under protest, only once the potential criminal legal consequences under UK law of a refusal to do so were communicated to the company and its advisers, who decided not to take the risk of a subsequent prosecution.[25] Similarly, the Commission can obtain extensive commitments (such as major divestitures in the recent *E-ON* or *RWE* cases[26]) under the threat of fines, or revisions of licensing terms as in the *Microsoft* case simply under the threat of daily penalties. Thus, the Commission has extremely wide ranging powers which rarely co-exist in one single institution.

(ii) The Commission has multiple roles that can conflict with one another

A merely brief review of the Commission's powers confirms that one administrative body is simultaneously, investigator, prosecutor, jury and judge. One prominent businessman, reflecting on a prohibited merger, has described it thus:

> *"the case team and the Commissioner, after acting as investigator and prosecutor for several months, became the judge and the jury. They ended up making the decision on their own proposal. The [oral] hearing itself is priceless… What a process – a hearing where the prosecutor also serves as judge!" and "unfortunately we were operating under a set of rules that allowed the Commission to function both as the opposing team and the umpire… Companies should have the right to a fair and public hearing in a reasonable time by an impartial tribunal."*[27]

The same criticisms can be made equally about the administrative process under Articles 81 and 82, which is substantially the same as that under the Merger Regulation.

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[17] *id*., Article 17.

[18] *id*., Article 18.

[19] *id*., Article 19.

[20] *id*., Articles 20 and 21.

[21] *id*., Articles 23 and 24.

[22] Cf. note 27 supra.

[23] Regulation 1/2003, Article 20(8) and 21(3).

[24] Competition Act. 1998, Section 65.

[25] Case T-125/03 and T-253/03, *Akzo Nobel v Commission* [2007] ECR II-3523, para. 4.

[26] See IP/08/1774 and IP/09/410.

[27] Jack Welch, *JACK: Straight from the Gut* (2001), pages 367 – 375. The merger case in question was Case COMP/M.2220 *General Electric/Honeywell*, Commission Decision of 3 July 2001. The Commission's decision was upheld by the Court of First Instance, albeit that the Court found serious fault with the Commission's "conglomerate effects" analysis, which was based more upon the (imperfect) application of economic theory than upon hard evidence and proper prospective analysis of likely competitive conditions: Case T-210/01, *General Electric v Commission* [2005] ECR II-5575, paras 65–69.

These criticisms are particularly important when the fines and periodic penalty payments imposed by the Commission are so large[28] and other remedies (including structural remedies) can have a significant commercial impact,[29] and the Community courts afford the Commission a very high level of discretion both in assessing evidence[30] and in deciding on the size of fines and periodic penalty payments.[31] Further, not only does the Commission sit in judgment on its own investigations, it then decides what penalties should be imposed for the infringements that it decides undertakings have committed. Although an administrative body, the Commission is, ultimately, a political institution. At all stages, its decisions are driven by a policy agenda: notably, there is a clear agenda to impose ever higher penalties on cartelists and others who are found to have infringed the Treaty's competition rules[32] and also to liberalise markets to the benefit of consumers[33]. As a result, there is at least a suspicion that the imposition of fines reflects the Commission's political priorities, and not necessarily the individual culpability of the undertaking.

These criticisms are also significant given the Commission's increased and heavy reliance upon immunity applications in cartel cases and complaints from competitors (particularly in Article 82 cases), and a reliance on presumptions, to the perceived relative exclusion of a proper investigation and assessment of the evidence as a whole. Whilst evidence from immunity applicants and complainants is part of the overall factual and evidential matrix of a case, it is only one part of the evidence and may not necessarily be reliable, as it has been prepared to suit the requirements and objectives of the supplying undertaking. Instead, there is a tendency by case handlers to accept that evidence of immunity applicants and complainants is true and unchallengeable evidence that an infringement has taken place.

(iii) Possible types of bias

Three main types of bias (known collectively as *"prosecutorial bias"*) could potentially arise in a situation in which an authority, such as the Commission, is entrusted with investigative, prosecutorial and adjudicative powers: these are known as confirmation bias, hindsight bias and policy bias.[34] They are essentially the result of psychological factors and can arise because case

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[28] The highest fine ever imposed on a single company was issued last year to Saint Gobain for its involvement in the car glass cartel, for a total amount reaching 896 million € (for more statistics, see http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).

[29] See e.g. the recent *E. ON* and *RWE* commitment decisions (IP/08/1774 and IP/09/410).

[30] Cf. note 61 *supra*.

[31] Cf. note 60 *supra*.

[32] See for example Neelie Kroes' statement at the International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice', Taking Competition Seriously – Anti-Trust Reform in Europe, Brussels, 10 March 2005: *"I do believe that we need to begin changing general perception of the competition rules. […] It is up to us to show that when we break up cartels, it is to stop money being stolen from customers' pockets."* See also UK OFT Chief executive John Fingleton, The war against international cartels: lessons from the battlefront. Speech presented at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy New York, October 14, 1999: *"Cartels involve substantial theft and economic harm"*.

[33] See Commission Press Releases in the *E.ON* and *RWE* Article 9 commitment cases, IP/08/1774 (*Commission opens German electricity market to competition*, 26 November 2008) and IP/09/410 (*Commission opens German gas market to competition by accepting commitments from RWE to divest transmission network*, 18 March 2009), respectively. In the former release, Commissioner Kroes commented that "*This unprecedented set of remedies will fundamentally change the landscape of German electricity markets and bring the prospect of more competition and more customer choice. For the first time in European antitrust history, a company is divesting very significant assets to address competition concerns. More than 20% of generation capacity will be available for competitors and newcomers and should have a positive impact on electricity prices to the direct benefit of consumers. The divestiture of the network will remove the ability of E.ON to use control of the network to favour its own production affiliate over its competitors*". In the latter release, she commented that "*This very substantial set of remedies will fundamentally change the landscape of German gas markets, with the prospect of more competition and more customer choice. I am particularly satisfied that the divestment constitutes a clear-cut and lasting solution to the concerns the Commission raised, ensuring that RWE will no longer be able to use the control of its network to favour its own gas supply affiliate over its competitors*."

[34] Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function* [2004] World competition: Law and Economic Review, Vol. 27, p. 202-224. Wils also identifies, but does not consider, other possible sources of prosecutorial bias: pursing cases to develop the law and a desire to intervene in the market beyond what is strictly necessary to resolve the competition issues presented in a particular case.

handlers may favour the finding of an infringement once proceedings have been commenced and investigative resources have been deployed.[35] Accordingly, these general psychological factors can affect even the most ethical professionals.

Confirmation bias may arise as a result of the natural tendency for a case investigator to search for and prefer evidence that supports his, and the case team's, belief that an infringement of the competition laws has been committed.[36] In other words, the case handler is likely to accept more readily the conclusion to a syllogism if it corresponds to his belief than if it does not, irrespective of its actual logical validity.[37]

Hindsight bias is related to a natural desire to justify one's past efforts, in particular to hierarchical supervisors and outsiders. It has been argued that it "*is understandable in human terms that Commission officials sometimes want to push through what they perceive to be 'their' case. And it explains why arguments put forward by the parties often appear to fall on deaf ears*".[38] As a result, case handlers and managers may be reluctant to accept that their views earlier in the case (even if honestly and legitimately held at the time) were no longer correct, with the benefit of information coming to light only later in the investigation.[39] In such circumstances, a case handler might be minded to continue with the investigation and, by ignoring the information adverse to his case, work towards an infringement decision, so as to justify and confirm the earlier decision to continue the investigation.

Policy bias arises from the understandable desire of case handlers and authorities to show a high level of enforcement activity, including not only "*convictions*", but also fines:[40] this is exemplified by the statistics published by DG COMP on its website[41] and by numerous speeches of Competition Commissioners justifying decisions imposing fines and the high level of these fines[42]. As Wils has conceded, this entails "*a potential risk of abuse, in that dubious cases might be pursued or fines might be inflated in order to keep up the statistics*."[43]

(iv) Measures taken to avoid prosecutorial bias

To avoid any prosecutorial bias, most countries in the world have opted for a system where prosecution is separated from adjudication of a case.[44] Such a system not only provides for

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[35] The existence of "*prosecutorial bias*" is not in itself a criticism of individual case handlers, but is a reflection of the investigative structure itself. Indeed, it may be similar to the bias that a defence lawyer might naturally develop in favour of his client.

[36] Wils, cited above, p. 215.

[37] *id*.

[38] Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17* [1996] 8 ECLR 428, at 430.

[39] Wils, cited above, p. 216.

[40] Wils, cited above, p. 217. Competition fines have become an important resource for the Community (with a total Community budget of € 126.5 billion in 2007, fines totalling more than € 2 billion constituted between 1% and 2% of the total budget. The Commission frequently emphasises the contribution of fine revenue: see press release or memo at time of a decision.

[41] See http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf.

[42] See, notably, the Speech of Neelie Kroes of 26 June 2007 (Speech 07/425, available on the Commission's website), where Ms. Kroes stated that *"[s]o far this year we have adopted three cartel decisions with fines totalling more than 2 billion euros. And I expect to bring several more investigations to an end later this year."* (Speech 07/425 delivered in Brussels on the 26th June 2007 before the European Parliament Economic and Monetary Affairs Committee).

[43] Wils, cited above, p. 217.

[44] Such as Korea, Japan, Canada, Australia and Norway for example. In the 27 EU Member States, practice is much more contrasted, with 14 countries (namely Bulgaria, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia and Slovenia) still allowing for sanctions to be taken by the investigating authorities, subject to subsequent judicial review by an independent court, while in the 13 others (namely Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Greece, Ireland, Malta, Spain, Sweden and the United Kingdom) these sanctions – which are often considered as having a criminal character – may only be imposed by an independent body or court (within the meaning of Article 6 ECHR), with the investigating authority playing the role of a prosecutor before it. This classification may be subject to some changes, depending on the definition of a court in every single case and to internal reforms. According to the Commission in its report (Commission staff working paper

greater impartiality, but enjoys higher legitimacy for those undertakings on which sanctions are imposed. The result is that there is a higher degree of acceptance of decisions and fewer appeals are brought before superior courts.[45]

In the Community however, investigation, prosecution and adjudication of a case remain in the same hands. True, the Commission has introduced certain reforms to limit to some extent potential bias. One can for instance think of the recent introduction of "*peer review panels*" composed of experienced officials whose role is to scrutinise the case team's conclusions with a "*fresh pair of eyes*". However:

- such peer review does not apply in every case[46];
- this system is by no means equivalent to having an independent judge taking a decision following a full trial in which both sides of the case are present;
- the Commissioners are not "*walled-off*" from discussion of the matter with the staff investigating the case while the case is under adjudication[47]; and
- the system lengthens the procedure but does not therefore replace the need for an extensive review by the judge.[48]

Other improvements such as the creation of a Hearing Officer or increased access to the Commission's file are not sufficient to alter these findings[49].

As a final remark, it is worth underlining that there is apparently no serious attempt to deny the existence (or at least risk) of prosecutorial bias in the Commission's decision making. The only conclusion that can be drawn is therefore either (a) it is believed that such prosecutorial bias does not matter or is somehow irrelevant or (b) it can be corrected by judicial review. As concerns (a), since the impact of prosecutorial bias cannot by definition be measured, generally ignoring the issue does not seem to be a viable option. As concerns (b), the Community courts do not conduct only limited review of Commission decisions and cannot therefore purport to correct all potential prosecutorial bias (see also below).

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accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003, Brussels, 29.4.2009 [COM(2009)206(final)], para. 192), 20 Member States would now have a system of one administrative authority investigating and deciding the case. Some reforms seem to have occurred very recently in Spain and in Estonia for example. This does not mean however that there is no separation, *within* the single administrative authority, of investigative and adjudicative functions.

[45] In this regard, see F. MONTAG, cited above, at p. 429: *"Undertakings often feel that they are treated unfairly and that their procedural rights are violated in the course of infringement proceedings. (…) [B]ecause undertakings are uncomfortable with the way in which infringement proceedings are carried out and decisions are reached, Commission decisions imposing significant fines lack acceptance."*

[46] If the peer review normally takes place before the issuing of a statement of objections in all cases applying Article 82 EC, it only applies to cases applying Article 81 EC "*where appropriate*" and in principle not in cartel cases. (See W. WILS, cited above, at p. 203).

[47] On the contrary, under Commission proceedings, the College of Commissioners (who is taking the final decision on the case by simple majority) only receives a proposal from the Competition Commissioner, who has himself or herself been briefed by the DG Competition officials dealing with the case, including the Chief Competition Economist and the review panel if they have been involved in the case, as well as by the Hearing Officer and possibly other Commission officials. See W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", cited above, pp. 203 and 207.

[48] W. WILS, cited above, p. 222.

[49] It should be reminded that the Hearing Officer is not only a member of the Commission but also a member of DG COMP, whose independence and impartiality is therefore very limited. Furthermore, the fact that its reports are only used for internal purposes and are not communicated to the parties is not really perceived as a major improvement for the protection of the parties' rights. For a more detailed discussion, see e.g. the HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION, "Strengthening the Role of the Hearing Officer in EC competition cases", XIXth report, 21.11.2000.

C. THE LEGAL PROBLEMS FLOWING FROM THE "*CRIMINALISATION*" OF COMPETITION LAW

In the following Section it will be shown that there are not only significant *practical* problems resulting from the current enforcement structure, as indicated above, but also that the increased criminalisation of the system entails a fundamental change in its *legal* nature with important consequences for the way in which it is to be designed.

C.1 Sanctions imposed by the Commission in competition proceedings are "*criminal charges*" within the meaning of Article 6 ECHR[50]

Given the level of the fines imposed today competition law proceedings in the fields of Articles 81 and 82 EC are increasingly likely to be classified as "*criminal*" under Article 6 ECHR. The fact that Article 23(5) of Regulation 1/2003 provides that the decision by which the Commission imposes a fine on undertakings "*shall not be of a criminal nature*" is in this regard irrelevant[51]. Indeed, under ECtHR case-law, classifications under domestic law as to the criminal nature of the offence have only a "*relative value*", as it would otherwise be easy for States to unilaterally limit the scope of protection enjoyed by individuals under Article 6 ECHR. [52] To determine whether proceedings involve the determination of a "*criminal charge*" in the sense of Article 6 ECHR, the ECtHR relies only to a certain extent the classification of the offence under domestic law and primarily on the so-called "*Engel criteria*"[53], i.e. the nature of the offence and the nature and severity of the penalty. The classification under domestic law provides no more than a starting point but carries less weight[54] than the other criteria which are more objective[55].

More specifically, the ECtHR found that a criminal charge is normally characterised by the fact that the norm is not only addressed to a specific group but is of a generally binding character[56], the sanctions imposed are not merely compensatory but truly punitive and meant to have a deterrent effect[57], and the level of the sanction and the stigma attaching to the offence are important.[58] In

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[50] For a more detailed analysis, see D. SLATER, S. THOMAS and D. WAELBROECK, "Competition law proceedings before the European Commission: no need for reform?", College of Europe Research Papers in Law, n°5/2008, available on-line at www.coleurope.eu. See also A. ANDREANGELI, EU Competition Enforcement and Human Rights, Edward Elgar, London, 2008, at pp. 23-30.

[51] This provision might however indicate that the Community has in fact no competence to adopt criminal sanctions, which is precisely what it is currently doing (see in that regard the study realised by Professor Jürgen Schwarze with Dr. Rainer Bechtold and Dr. Wolfgang Bosch for Gleiss Lutz, "Deficiencies in European Competition Law – Critical analysis of the current practice and proposals for change", p.23)

[52] See Judgement of the ECtHR of 8 June 1976, *Engel and others v. the Netherlands*, A 22, at para. 81; Judgement of the ECtHR of 21 February 1984, *Öztürk v. Germany*, A 73, at para. 49; *Ezeh & Connors*, *infra* note 54, at paras. 83, 100; Judgment of the ECtHR of 16 December 1997, *Tejedor Garcia*, App. n° 142/1996/761/962, ECR 1997-VIII, at para. 27. See the case-law of the ECtHR cited above. See accordingly W. WILS, "*The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*", 27(2) *World Competition* (2004), p. 208; D. WAELBROECK and D. FOSSELARD, cited above, p. 120; and K. LENAERTS and J. VANHAMME, cited above, p. 557.

[53] See in particular the judgments of the ECtHR in *Engel and others v. the Netherlands*, cited above, at para. 82; in *Öztürk v. Germany*, cited above, at para. 50; and of 23 November 2006, *Jussila v. Finland*, App. n° 73053/01, at para. 30.

[54] See the Judgement of the ECtHR of 9 October 2003, *Ezeh and Connors v. United Kingdom*, App. n° 39665/98 and 40086/98, at para. 86.

[55] *Öztürk v. Germany*, cited above, at para. 52.

[56] See for example the Judgement of the ECtHR of 24 February 1994, *Bendenoun v. France*, A 284, at para. 46; and *Jussila v. Finland*, cited above, at para. 38. This criterion is mainly used to distinguish criminal sanctions from mere disciplinary sanctions, which are by definition addressed only to a specific group or a specific profession (Judgement of 22 May 1990, *Weber v. Switzerland*, A 177, at para. 33).

[57] See the Judgement of the ECtHR of 7 July 1989, *Tre Traktörer AB v. Sweden*, A 159, at para. 46; and *Bendenoun v. France*, cited above, at para. 47: *"the tax surcharges are intended not as a pecuniary compensation for damage but essentially as a punishment to deter reoffending"*.

[58] Even if imprisonment is considered to be the criminal penalty *par excellence*, penalties other than deprivations of liberty have in the past also be considered severe enough to justify the applicability of Article 6. In the *Malige* case, for example (Judgment of 23 September 1998, Reports 1998-VII), concerning the docking of points from driving licenses after a conviction for a traffic offence, and where no possible detention as an alternative was involved, the Court found the

balancing these factors, the deterrent function of the sanction and its severity will carry particular weight.[59]

Applying these criteria to proceedings under Article 81 and 82 EC the following can be noted:

- Articles 81 and 82 EC are general rules applying to all undertakings;
- the central justification for EC competition law is protection of society against welfare loss caused by anticompetitive conduct[60], or as stated by the Commission of Human Rights in the *Stenuit case*: "*the aim pursued […] was to maintain free competition within the French market. The Order thus affected the general interests of society normally protected by criminal law […]*;"[61] and
- the fines imposed under Regulation 1/2003 have a clear punitive and deterrent character. This point is explicitly and repeatedly confirmed *inter alia* by the language used in the Commission's fining guidelines[62] and is also confirmed by ECJ case-law[63].

In the words of one Commission official who has published extensively on this subject *"it appears difficult to deny that the application of the criteria set out in the case law of the European Court of Human Rights leads to the conclusion that proceedings based on Regulation No 1/2003, leading to decisions in which the Commission finds violations of Articles 81 or 82 EC, orders their termination and imposes fines relate to "the determination of a criminal charge" within the meaning of Article 6 ECHR."*[64]

This analysis is furthermore confirmed by the ECtHR and the Human Rights Commission's own case-law[65], as well as the case-law in a number of Member States[66]. Contrary to what the EC

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measure to be of a severity to make it a criminal sanction (see P. VAN DIJK, F. VAN HOOF, A. VAN RIJN and L. ZWAAK, *Theory and Practice of the European Convention on Human Rights* (4th ed.), Intersentia, Antwerpen/Oxford, 2006, pp.548-554). In the *Weber* case (cited above), which concerned proceedings where the fine could amount to 500 Swiss francs and could be converted into a term of imprisonment in certain circumstances, the Court held that "*what was at stake was sufficiently important to warrant classifying the offence as a criminal one under the Convention*." In the *Schmautzer* case (Judgement of 23 October 1995, A 328-A), the Court held that driving without wearing a seat-belt, an administrative offence under Austrian law, was criminal in nature, due notably to the fact that the fine of 200 Austrian schillings had been accompanied by an order for committal to prison in case of non-payment.

59 See notably *Bendenoun v. France*, cited above, at para. 47; and *Jussila v. Finland*, cited above.

60 See notably A. Jones and B. Sufrin, *EC Competition Law*, 3rd edition, OUP, 2008, p. 44; R. Whish, *Competition Law*, Fifth edition, OUP, 2005, p. 17; See also the Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08), at para. 33: *"The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"*.

61 See Decision of the Commission of Human Rights of 27 February 1992, *Société Stenuit v. France*, 1992, A/232-A.

62 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003, JO C 210, 1 September 2006. in these Guidelines, the Commission states for example that "*fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)."; (…)* (emphasis added). See also for example Commissioner Neelie Kroes' declarations in the *Financial Times* of 29 November 2007 about the fines imposed by the Commission in the new flat glass cartel: "*the important thing is that the fine as a whole is sufficiently deterrent, so that none of these companies will be tempted to infringe the rules again.*"

63 See notably the *Musique diffusion française (Pioneer)* judgment in joined cases 100 to 103/80 [1983] ECR para. 109; see also the recent judgment in the Show Denko case, Case C-289/04 P [2006] ECR I-5859, para.23.

64 W. WILS, cited above, p. 209. See also C. D. EHLERMANN, "*Developments in Community Competition Law Procedures*", EC Competition Policy Newsletter, Vol. 1, n° 1, p. 2. See also the Opinion of Judge Vesterdorf, acting as Advocate General in the landmark *polypropylene* case: *" [i]n view of the fact – in my view confirmed to some extent by the judgment of the Court of Human Rights in the Öztürk case – that fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights. At all events, the framework formed by the existing body of rules and the judgements handed down hitherto it must therefore be sought to ensure that legal protection meets the standard otherwise regarded as reasonable in Europe."* (Case T-1/89 *Rhône Poulenc S.A. v. Commission* [1991] ECR II-867, at p. 885 – emphasis added).

65 HR Commission Report of 30 May 1991 in *Société Stenuit v. France*, cited above, at paras. 62-64.

courts found in some judgments, it is irrelevant in that regard whether "*the effectiveness of those proceedings*" would be "*affected if the argument that competition law formed part of criminal law were accepted*"[67].

In the Working group's opinion, the above conclusion applies not only to decisions culminating in a fine but also to *commitment decisions* which are meant to ensure compliance by companies with the competition rules and may, in case of non-compliance, lead to the opening of a formal procedure with the imposition of sanctions.[68] This is so in particular since, in most cases, commitments are in reality an alternative to fines and are *de facto* imposed under the threat of fines. In this sense, it is submitted that commitment decisions ought also to be regarded as falling under the criminal head of Article 6, as failure to comply with such commitments (which are more often unilaterally imposed than truly negotiated) will inevitably lead to criminal sanctions.[69] According to the ECtHR, the notion of "*criminal charge*" should be construed with due regard to "*the prominent place held in a democratic society by the right to a fair trial*", so as to prompt the Court to prefer a "*substantive*", rather than a "*formal*", conception of the "*charge*" contemplated by Article 6[70].

Similarly, the newly introduced *settlement procedure* for cartel cases[71] is still applicable in the context of a formal procedure leading to the imposition of criminal sanctions and therefore subject to the rules applicable under the criminal head of Article 6 ECHR. The only difference is that the fine may be lowered in exchange of such a waiver of procedural rights, as is the case for companies applying for leniency.[72]

On the basis of the above, it can only be concluded that EC competition law proceedings under Articles 81 and 82 EC are to be considered as "*criminal*" within the meaning of Article 6 ECHR. In the next Sections, the main consequences which should be drawn from this finding will be discussed both:

- for a proper enforcement procedure (Section C.2); and
- for the system of sanction itself (Section C.3).

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[66] See e.g. decision of 22-23 January 1987, *JORF*, 25 January 1987, p. 924; see also J-C and J-L. Fourgoux, "*Le Conseil de la concurrence dans la vie économique et juridique de l'Europe*", GP, 26-27 September 1990, p-12,13) and D. Waelbroeck and M. Griffiths, "French *Cour de Cassaction: TGV Nord et Pont de Normandie*, Judgment of 5 October 1999" case-note in 37 CMLR (2000) pp. 1465-1476.

[67] See e.g. the judgment of the CFI in case T-276/04, *Compagnie Maritime belge v. Commission*, nyr, para. 66 and the judgment of the ECJ in case C-338/00 P, *Volkswagen v. Commission* [2003] ECR I-9189, para. 97. Arguments of administrative efficiency or convenience are hardly sufficient to warrant infringements of fundamental rights. These arguments cannot affect the finding of the ECtHR that competition law procedures have to respect the basic requirements of Article 6 ECHR. It is worrying however to see as a quite general and recent development fundamental rights to be purely set aside, temporarily suspended or simply diminished for the declared purpose of attaining objectives such as the "good administration of justice" or the "effectiveness of the law". Such attempts have already been fiercely criticized by supreme courts in Europe and in the US in the context of the so-called "war on terror". There is no reason therefore to see why this would constitute a more valid argument in the field of EU competition law.

[68] See D. WAELBROECK, « Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges? », GCLC Working Paper 01/08, available at www.gclc.coleurop.be.

[69] See Article 23, para. 2, c) of Regulation 1/2003.

[70] See the judgment of the ECtHR of 27 February 1980, *Deweer v. Belgium*, A 35, App. n° 6903/75 at para. 44.

[71] See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171 1.7.2008, p. 3-5) and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1-6).

[72] One may wonder however whether such a "voluntary" waiver of procedural rights would also be consistent with Article 6 ECHR, especially when the authority negotiating a settlement with the company is the same as the one who takes the final decision imposing sanctions in case of failure of these negotiations (see D. WAELBROECK, « Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges? », cited above; see also the judgment of the ECtHR in *Deweer v. Belgium*, cited above).

C.2 The legal consequences of a "*criminal charge*" classification for a proper enforcement procedure

(i) Determination of the charge by an independent and impartial tribunal at first instance

The right to a fair trial as embodied in Article 6 ECHR requires that any judgement concerning the determination of civil rights or of any criminal charge be given by an "*independent and impartial tribunal established by law*". This right is often regarded as *"one of the most important guarantees of the whole Convention"*[73], it may therefore not be interpreted restrictively so that the rights guaranteed by this provision are not compromised. [74]

In the case of criminal charges, ECtHR case-law provides that such determinations must be made at first instance by an independent tribunal.

Thus, as stated by the ECtHR, in all criminal cases, "*there must be at first instance a tribunal which fully meets the requirements of Article 6 (…) and where the applicant has an entitlement to have its case "heard", with the opportunity* inter alia *to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.*"[75]

There are limited exceptions to the rule that criminal charges must be heard at first instance by an independent tribunal. This is so where the offence in question is minor, and there is a right of appeal against the decision before an independent and impartial tribunal which has powers of full jurisdictional review in relation to all aspects of the decision.

Thus :

- in *Le Compte v. Belgium*, the ECtHR held that at least for *"contestations" (disputes) over "civil rights and obligations"* requirements of *"flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect (…)."*[76]

- in the second *Le Compte* judgment, the ECHR further held that *"[i]n many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (…) is applicable, conferring powers in this manner does not in itself infringe the Convention (…). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the (administrative) organs themselves comply with the requirements of Article 6 (1) or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide for the guarantees of Article 6 para. 1 (…)."*[77]

- in the *Öztürk* case, the ECtHR then extended this line of case-law to certain criminal proceedings i.e. "*minor offences*", this being so *"[h]aving regard to the large number of minor offences, notably in the sphere of road traffic".* For these offences, the Court indicated that *"a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor*

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[73] See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, at p. 46.

[74] See for example the Judgement of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.

[75] *Jussila v. Finland*, cited above, at para. 40 (emphasis added).

[76] Judgment of the ECtHR of 23 June 1981 in the case *of Le Compte, Van Leuven and De Meyere v. Belgium*, A 54, at para. 51 (emphasis added). On the basis of this *le Compte* case-law, the CFI found in *Schneider* (judgment of 11 July 2007, case T-351/03, at para. 183) that in merger cases, the fact that the decisional power was with the Commission and not a court was no breach of Article 6 ECHR. Merger cases are however not criminal law cases (see above).

[77] Judgment of the ECtHR of 10 February 1983 in the case of *Albert and Le Compte v. Belgium*, series A 58, at para. 29 (emphasis added).

offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (…)."[78]

It follows from this case-law that the two-tier judicial review system provided for in *Le Compte* has indeed been accepted by the ECtHR but so far only as an exception to the general rule for cases concerning civil rights and obligations, for "*disciplinary cases*", and for criminal cases involving only "*minor offences*". Being an exception, it must be interpreted strictly[79].

In the case of "*minor offences*", the ECtHR thus considers that the procedural defects of the administrative stage can be outweighed by the benefits gained from the efficiency of the whole system (e.g. economy of procedural costs, expediency of the procedure, possibility for the administrative authority to concentrate its scarce resources on more serious cases, etc.) combined with the possibility to have these procedural defects redressed on appeal. However, in more important cases, the rights of the defence are too important to be outweighed by these relatively marginal advantages.

As stated by three members of the Human Rights Commission "*where criminal justice, as is often the case, is administered at two levels – at first instance and on appeal – it is not sufficient that the requirement of impartiality is satisfied at the appeal stage. While various minor procedural deficiencies may well be remedied in appeal proceedings, the requirement of an impartial tribunal is of such a fundamental character that it should be satisfied already during the trial at first instance, this being in general an essential – and perhaps even the most important – part of the criminal proceedings against an accused person, in particular where – as would seem to have been the situation in the present case – the evidence in the case was not heard again by the court of appeal.*"[80]

In view of the level today of the amount of the fines, the Working Group believes that competition law infringements leading to the imposition of sanctions cannot anymore be regarded legally as mere "*administrative sanctions*", or "*minor offences*"[81], and that the necessary safeguards provided by Article 6 ECHR have therefore to be accorded to the fullest extent. This implies thus that decisions in antitrust matters must be taken by an independent and impartial tribunal at first instance.

(ii) The hearing of the parties must be public

Beyond the fact that decisions in this area must be taken by an independent tribunal, it follows also from Article 6(1) of the ECHR that hearings of the parties in such cases must be public. According to the ECtHR, "*[a]n oral, and public hearing constitutes a fundamental principle enshrined in Article 6, §1*."[82] Hearings before the Commission in competition cases are not only

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[78] *Öztürk v. Germany*, cited above, at para. 56 (emphasis added).

[79] See for example the Judgement of 26 October 1984, *De Cubber v. Belgium*, Series A 86, at para. 32.

[80] See opinion of Mr H. Danelius, Mrs. G. H. Thune and Mr. L. Loucaides in the Report of the Human Rights Commission of 2 March 1995 in case *Thomann v. Switzerland*, App. n° 17602/91. It has to be observed that in this case the majority did not disagree with this finding of the minority but merely held that *in casu*, there was no lack of impartiality at the appeal stage. The mere fact that the accused had first been judged in his absence by the same judges that subsequently judged him on appeal did not reveal any lack of impartiality The Human Rights Commission recalled however (at para. 65) that impartiality was required already at first instance. A problem might occur for instance *"where a trial judge had previously held in the public prosecutor's department an office whose nature was such that he may have had to deal with the case (…), or exercised the functions of an investigating judge with extensive powers and particularly detailed knowledge of the files (…), or taken pre-trial decisions on the basis of legal provisions requiring a particularly confirmed suspicion (…)."*

[81] For a more detailed analysis, see D. SLATER, S. THOMAS and D. WAELBROECK, "Competition law proceedings before the European Commission: no need for reform?", cited above.

[82] Judgments of the ECtHR of 23 February 1994, *Fredin (n° 2)*, Series A283-A, para. 21; of 26 April 1995, *Fischer*, Series A312, para. 44; *Jussila v. Finland*, supra note 53, at para. 40 (emphasis added). See also the statement of Robert Badinter in *Le Monde* of 27.1.2004 concerning the project of direct settlement procedure in France: *"Le coeur de la procédure pénale, c'est l'audience. C'est le lieu où l'on décide de la valeur des preuves, de la culpabilité, enfin de la peine et de la réparation due à la victime. A l'audience, le procureur n'est pas une partie privilégiée. Le débat est public. Depuis la Révolution, cette publicité est une garantie pour le prévenu et pour le peuple que la justice n'est ni confisquée, ni*

held in private as a general rule, but there is not any right of defendant undertakings to a public hearing even when this is explicitly requested. Thus, on previous occasions, the Commission has refused the holding of a public hearing on the basis that it "*would play to the gallery rather than throw light on the issues at stake in the case*"[83]. This argument is hardly reconcilable with the fact that public hearings before courts have, on the contrary, always been regarded as an essential guarantee of the fairness and openness of debates.

(iii) The hearing must be held before the persons actually adjudicating the case

A third and even more fundamental difficulty with the current proceedings in EU competition cases is that the persons actually adjudicating the cases are not even present at the hearing[84]. Proceedings before the Commission in competition cases are led by a team of Commission officials investigating the case, whilst the decision is taken by the College of Commissioners, none of whom attended the hearing.

Recently, the OECD harshly criticised this aspect of the current EU system in the following terms: *"[n]o other jurisdiction in the OECD assigns decision–making responsibility in competition enforcement to a body like the Commission*" as indeed "*the Commission is too large to effectively deliberate and decide fact-intensive matters*"[85]. In the EU, "*when the Commission decides a matter, it has typically not heard directly the case against the proposed decision*", and *"[n]o Commissioner, including even the competition Commissioner, will have attended the hearing*"[86]. Ultimately, *"[a]ll depends on briefings from staff and there is no ex parte rule or other control on contacts between investigating staff and the Commissioners who decide the matter*."[87]

The table below shows that, in contrast to the Commission approach, in most EU Member States, hearings in competition law proceedings take place before the persons responsible for taking the final decision (whether it is an independent judge or an administrative authority):

Member State	**Body responsible for taking a decision imposing sanctions for competition law infringements**	**Right to an oral hearing before the members of this body who are ultimately taking the decision?**
Austria	Cartel Court	Yes
Belgium	Competition Council	Yes
Bulgaria	Commission for the Protection of Competition	Yes
Cyprus	Commission for the Protection of Competition	Yes
Czech Republic	Office for the Protection of	Yes (if necessary)

manipulée."

[83] See e.g. Microsoft's requests reported in F.T. 14 March 2006.

[84] It is indeed at Commission level, which is the decision maker at first instance that these safeguards have to apply. It is not sufficient in that regard to consider the Commission as an administrative authority and to consider therefore that the procedural safeguards provided by Article 6 ECHR do not apply to it. This amounts in fact to a tautological reasoning. It is the nature of the proceedings which is decisive, not the nature of the authority deciding upon the case. Interestingly, some foreign courts have already considered the Commission as a "tribunal" (see notably the US Supreme Court in the *Intel case – Intel Corp. v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466, cited in I. Forrester and A. Komninos, EU Administrative Law – Competition Law Adjudication", Sectoral Report on Adjudication in the Competition Field, American Bar Association, European Union Administrative Law Project, 2006, p. 6, available at: **http://www.abanet.org/adminlaw/eu/SectRptAdj-Competition--Komninos_spring2006.pdf**).

[85] OECD country studies – European Commission – Peer Review of Competition Law and Policy – 2005, p. 63, available at http://www.oecd.org/dataoecd/7/41/35908641.pdf.

[86] *Ibidem*, p. 64.

[87] *Ibidem.*

	Competition	
Denmark	Criminal Court	Yes
Estonia	Criminal Court	Yes
Finland	Market Court	Yes
France	Competition Council	Yes
Germany	Competition Authority	Yes
Greece	Competition Commission	Yes (but not always before all of them)
Hungary	Competition Council	Yes (but only in important cases)
Ireland	Court	Yes
Italy	Competition Authority	Yes
Latvia	Competition Council	Yes
Lithuania	Competition Council	Yes
Luxembourg	Competition Council	Yes
Malta	Court	Yes
The Netherlands	Director General of the Competition Authority	Yes
Poland	President of the Competition Office	No
Portugal	Competition Council	No
Romania	President of the Competition Council	Yes
Slovakia	Antimonopoly office	Yes
Slovenia	Competition Authority	Yes (but not always)
Spain	Competition Court	Yes (upon request)
Sweden	Court of First Instance	Yes (upon request)
United Kingdom	Office for Fair Trading	No
European Union	**European Commission (College of Commissioners)**	**No**

The same is true moreover for the major jurisdictions outside the EU:

Country	**Body responsible for taking a decision imposing sanctions for competition law infringements**	**Right to an oral hearing before the members of this body who are ultimately taking the decision?**
Australia	Court	Yes
Canada	Court	Yes
Japan	Court	Yes
South Korea	Court	Yes
Norway	Criminal Court	Yes
United States	Federal District Court	Yes

Thus, even in countries where there is no strict separation between investigatory, prosecutorial and adjudicative powers at the administrative stage, parties are at least normally given the opportunity to present their views to those members of the administrative body who will ultimately be taking the decision imposing sanctions. In this respect, the Commission's assertion that "*the Community system corresponds to the institutional choice of a majority of Member States*"[88] cannot be upheld. The fact that no such guarantee exists under the Community system constitutes a further major incompatibility of the current EU system with Article 6 ECHR[89].

(iv) The right to a "full jurisdictional review" by the Community courts

As they fall under the criminal head of Article 6 ECHR[90] and do not involve minor offences, competition cases should be decided at first instance by an independent and impartial tribunal.

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[88] Report on the functioning of Regulation 1/2003, *supra note* 44, para. 54.

[89] See above.

[90] See above Section (i). For a more in-depth analysis of the notion of *"tribunal having full jurisdiction"*, see e.g. D.

Even if it were accepted that the minor offences exception might be applied to competition cases, full jurisdictional review of decisions would still be required.

According to ECtHR case-law, power of full judicial review here means that the review court has the power to rehear the evidence or to substitute its own views to that of the administrative authority. Otherwise, there might never be a "*possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute"*.[91]

On this specific point, the *Schmautzer* decision[92] for instance made clear that there should be in principle no limitation to the jurisdiction of the reviewing court, charged with scrutinising the validity of an administrative decision determining a criminal charge.

Thus, in cases concerning the "*determination of a criminal charge*", the ECtHR requires that the appeal jurisdiction not only verifies the correct application of the law by the administrative authority but is also able to engage in a complete reassessment of the facts and of the evidence produced before it ("*de novo review*").[93] The Commission itself acknowledges this in its Report on the functioning of Regulation 1/2003 by recognising the need for the party concerned under the ECHR to be able to "*bring any such decision affecting it before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision*"[94].

By contrast, review by Community courts of Commission antitrust decisions is much more limited. As one of its former members has stated, the CFI is *"essentially, a review court. That is to say its function is not to rehear the case or to substitute its own opinion for that of the Commission, but to review the legality of what the Commission has decided."*[95] True, under Article 229 of the Treaty, jointly with Article 31 of Council Regulation No 1/2003, the ECJ enjoys "*unlimited jurisdiction*" as regards fines and other financial penalties imposed by the EU institutions. As a result, the Courts are empowered to "*cancel, reduce or increase*" the amount of the monetary sanctions imposed on the undertakings found responsible for the breach of the competition rules.[96]

However, with regard to judicial control over the "*substance*" of competition decisions, the courts enjoy under Article 230 of the Treaty only a rather limited, supervisory jurisdiction over the Commission's measures, restricted to the grounds of review listed in the Treaty. They cannot therefore substitute their own assessment at the economic and legal appraisal conducted by the Commission and contained in the impugned decision, nor can they *a fortiori* "*replace*" the decision

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WAELBROECK and D. FOSSELARD, cited above, at pp. 127-133.

91 Judgment of 14 November 2006, *Tsfayo v. U.K.*, App. n° 60860/00, at para. 48.

92 Appl. No. 15523/89, *Schmautzer v. Austria*, [1996] 21 EHRR 51, para. 36.

93 *Le Compte, Van Leuven and De Meyere v. Belgium*, cited above, at para. 51. See also the judgment of 23 October 1995, *Schmautzer v. Austria*, Series A328-A, at para. 36; of 29 April 1988, *Belilos v. Switzerland*, Series A 132,at paras. 69-70; of 27 January 2004, *Kyprianou v. Cyprus*, App. n° 73797/01, at paras. 43-46: and of 26 April 1995, *Fischer v. Austria*, Series A 312.

94 Report on the functioning of Regulation 1/2003, *supra note* 44, para. 56.

95 Judge D. BARRINGTON, cited in D. WAELBROECK and D. FOSSELARD, cited above, at p. 132.

96 The analysis of the case law indicates however that even with regard to fines, despite the potentially sweeping scope of their powers, the Community courts have been rather reluctant to second-guess the Commission, in consideration of the wide discretion the latter enjoyed and especially of the importance of the fining powers as a means to furthering and strengthening the implementation of competition policy (Case T-23/99, *LR AF v Commission*, [2002] ECR II-1705, para. 234-235, 237). It is only relatively recently that the CFI was occasionally prepared to take a more "*hands-on*" approach to reviewing fines: the Court was particularly mindful of the need to protect the legitimate expectations of the investigated parties that the Commission would adhere to its own guidelines in setting antitrust fines (compare in this regard joined cases C-189/02, 202/02, 205-208/02 and 213-02, *Dansk Rorindustri and others v Commission*, [2005] ECR I-5425, para. 279 with case T-26-02, *Daichii Pharma v Commission*, [2006] ECR II-713, paras. 129-130). Although the CFI acknowledged that the exercise of the wide discretion that the Commission enjoyed, at least in principle, could not be reduced to the application of a mathematical formula (Case T-26-02, *Daichii Pharma v Commission*, [2006] ECR II-713, para. 49), it nonetheless annulled the decision on the part in which it had set the fine on the ground that the Commission had failed to recognise the applicability of one of the "*attenuating circumstances*" listed in the Guidelines (*Id.*, para. 109-113).

by a new one, but will have to confine their scrutiny to whether the Commission respected the limits of its discretion, whether it respected the procedural rules and did not commit any manifest error of law or of fact or misused its powers.[97]

According to the CFI in *Societa Italiana Vetro*,[98] to hold otherwise would amount to disturbing the inter-institutional balance existing under the Treaty, as a result of which the Commission remains the best placed authority to conduct such complex evaluations.

Thus, the Community courts generally take the view that "*(…) the review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article [81(3)] of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisals or misuse of powers (…) It is not for the Court of First Instance to substitute its own assessment for that of the Commission.*"[99]

The same reasoning is also applied in Article 82 cases. In the recent *Wanadoo* judgment for instance, the CFI held that, *"as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion (…). The Court's review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."*[100] The same reasoning can be found in most judgments, such as most recently in the *Microsoft* or in the *Deutsche Telekom* cases.[101]

This standard of review is to be contrasted with the concept of "*full jurisdiction*" enshrined in Article 6(1) ECHR and entailing the power to give "*full consideration*" to all questions of law, of fact and merits. In a number of decisions[102], the ECtHR took the view that the court responsible for the scrutiny of administrative decisions deciding over a "*criminal charge*" should be empowered to consider all the facts of the case and consequently to reconsider the impugned decision in respect to all allegations, whether of fact or of law and in accordance with an adversarial procedure.

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[97] *Inter alia,* BAILEY, "*Scope of judicial review under Article 81 EC*", (2004) 41 *CMLRev* 1327 at p. 1332. See also TIILI and VANHAMME, "*The "power of appraisal" (pouvoir d'appreciation) of the European Communities vis-à-vis the powers of judicial review of the Communities' Court of Justice and Court of First Instance*", (1998-1999) 22 *Fordham Int'l L. J.* 885. Nevertheless, the case law suggests that the scope of the powers enjoyed by the Community courts in the area varies in relation to the nature of the grounds of review raised by the parties. On this specific point, the case law suggests that the CFI will exercise a "*comprehensive review*" of the impugned decision when an allegation of error of fact or of procedural impropriety is made (see e.g. case T-41/96, *Bayer AG v Commission*, [2000] ECR II-3383, para. 67, 69, 71; confirmed in case C-2/01, *BAI and Commission v Bayer*, [2004] ECR I-23, para. 48; also case T-44/90, *La Cinq SA v Commission*, [1992] ECR II-1, para. 48). By contrast, when the soundness of the "*complex economic assessment*" of the evidence before the Commission is questioned, the Community courts have held that it is not be for the EU judiciary to carry out a comprehensive review of the Commission's economic appraisal of the evidence and of the conclusions reached on the basis of the applicable competition rules.

[98] Joined cases T-68, 77-78/89, *Società Italiana Vetro SpA and Others v Commission*, [1992] ECR II-1403 at para. 319-320.

[99] See for example case T-17/93, *Matra Hachette v. Commission*, [1994] ECR II-595-656, at para. 104. (emphasis added). See further case 42/84, *Remia*, [1985] ECR 2545, para. 34, joined cases 142/84 and 156/84, *BAT and Reynolds*, [1987] ECR 4487, at para; 62, case C-194/99 P, *Thyssen Stahl*, [2003] ECR I-10821, at para. 78. See also the case-law cited above.

[100] See the recent CFI Judgment in case T-340/03, *France Télécom v. Commission (Wanadoo)*, at para. 129, emphasis added.

[101] Case T-201/04, *Microsoft v. Commission*, at para. 87: *"The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers."*

[102] See e.g. appl. No 10328/83, *Belilos v Switzerland*, [1988] 10 EHRR 466, para. 68-71; Appl. No 15523/89, *Schmautzer v Austria*, [1996] 21 EHRR 51, para. 36.

In the light of ECtHR case-law, it is clear that judicial review by the CFI in antitrust cases should not be limited to questions of law and to the determination of the appropriate level of the fine. The CFI cannot limit its analysis to *"manifest errors of appraisals or misuses of power"* but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts. "*Unlimited jurisdiction*" should thus not be limited to altering the amount of the fines imposed on companies, but should also extend to the very determination of the infringement giving rise to these sanctions[103].

Finally, the requirement for full judicial review also implies that a number of other features of the current system raise particular concerns. Thus, undue restrictions on the presentation of evidence and argument will clearly impair the Court's ability to conduct an adequate review (for example, excessive limitations on the length of pleadings, general refusal to accept oral testimony by witnesses except in exceptional circumstances, pressure from the Court to discontinue cases by threatening increases in fines[104] and the absence of suspensive effect of appeals).

C.3 THE LEGAL CONSEQUENCES OF A "CRIMINAL CHARGE" CLASSIFICATION AS REGARDS THE FINES AND OTHER SANCTIONS IMPOSED

The "*criminal charge*" classification of antitrust cases not only has procedural implications. The sanctions themselves should also comply with the major principles governing criminal law, as set out *inter alia* in the ECHR and in the Charter of fundamental rights[105]. In the light of these principles, the current EC fining regime raises, for example, (i) issues of compliance of the legal basis of the fines with the principles of legal certainty, foreseeability and non-retroactivity set out in Article 7 ECHR, (ii) issues connected with the concepts of liability in EC law, and (iii) issues connected with the leniency notice.

(i) Compliance with article 7 of the ECHR: principles of legal certainty, foreseeability and non-retroactivity

Among the various principles applicable, special reference deserves to be made (a) to the principles of legal certainty and foreseeability, and (b) to the principle of non-retroactivity, all set out in Article 7 of the ECHR.

(a) Legal certainty and foreseeability

The fundamental principle according to which any criminal sanction must be based on a sufficiently clear and unambiguous legal basis ("*nulla poena sin lege certa*") is guaranteed not only by Article 7(1) of the ECHR, but also by Article 49 of the Charter of Fundamental rights[106], and by the various Constitutions of EU Member States. According to the case law of the *ECtHR*, the principle of legal certainty and foreseeability applies both to the legislative basis of the offence and to the amount of the applicable penalty[107].

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[103] See also D. WAELBROECK and D. FOSSELARD, cited above, at pp. 127-133.

[104] Reference can here be made for instance to explicit threats made in some cases such as *Jungbunzlauer* by CFI judges that if parties did not withdraw their appeal, they might seriously consider an increase in fine.

[105] Pursuant to Article 6(2) EU, the European Union respects the fundamental rights as guaranteed by the ECHR, as well as the fundamental rights guaranteed by the constitutional traditions of the Member States. Although the Charter of Fundamental rights proclaimed on 7 December 2000 is not applicable law yet, recital no. 37 of Regulation 1/2003 specifies that the Regulation "*observes the principles recognised in particular by the Charter of fundamental rights*" and that it should be "*interpreted and applied with respect to those rights and principles*". The Regulation should therefore be binding for the interpretation of the Regulation, as the ECJ's case law recognises the applicability of the Charter as a standard of control of secondary legislation if this legislation explicitly refers to the Charter in its recitals (see ECJ, 27 June 2006 – Case C-540/03 – *Parliament v Council*, ECR 2006, I-5769, para. 38).

[106] It must also be specified that pursuant to Article 52 of the Charter, any limitation of the rights and freedom guaranteed by the Charter –which is likely to be the case when fines are imposed- may only be provided for by law.

[107] ECtHR, 22 March 2001, Cases 34044/96, 35532/97, 44801/98 – *Streletz, Kessler, Krentz v Germany*, NJW 2001, 3035, 3037.

In this regard, it is questionable whether Article 23 of Regulation 1/2003 meets the requirements of Article 7 of the ECHR. Article 23 merely refers to the need to take into consideration the gravity and duration of the practice, and sets the maximum limits of the fine at 10% of the undertaking's turnover. This framework is thus very broad.

As a result it is difficult to consider that the extensive –if not unlimited- discretion left to the Commission for the setting of fines is compatible with Article 7 ECHR. This is not to say that some level of flexibility should not be left for the interpretation and implementation of criminal sanctions set out by law. However, under the current fining regime, almost all the main elements determining the actual level of fines are not defined by Regulation 1/2003, but left to the Commission's discretion. The Commission sets the relevant criteria and methodology for the fixing of the fines, but also the conditions for the granting of immunities or reductions.

The lack of "*clear and unambiguous*" criteria is patent if one looks at Article 23 of Regulation 1/2003. For instance:

- according to Regulation 1/2003, an undertaking's liability for a breach of Articles 81 or 82 EC is established if it acted either "*intentionally*" or "*negligently*". However, in its decisional practice, the Commission does not usually specify whether the undertaking's involvement is intentional or negligent, and it either mixes the two concepts (action committed "*intentionally or at least negligently*"[108]) or it makes no reference to them at all. The failure to distinguish clearly between negligent and intentional conduct breaches arguably also the requirements for a "*clear*" legal basis for the fines as the two situations deserve obviously different levels of fines.

- for the same reasons, it would appear that aggravating and mitigating circumstances should also have a proper legal basis. When setting the fines, the Commission takes into account circumstances justifying an increase or decrease in the basic amount of the fines. The introduction of such factors without a legal basis is questionable. For instance, without any proper legal basis in Regulation 1/2003, the Commission has decided that should be considered as an aggravating circumstance "*where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100% for each such infringement established*". The introduction by the Commission of the concept of "*recidivism*" and the possibility to take into account not only its previous decisions but also national competition authorities' decisions in this regard should manifestly have a clear legal basis.

- many other difficulties arise from the interpretation of different concepts such as the concept of "*undertaking*", which does not have necessarily the same meaning in Article 81 EC and in Article 23 of Regulation 1/2003 (the entity directly responsible for the infringement or the group to which it belongs)[109], or of the "*preceding business year*" (last year of the infringement or latest financial year), as set out in Article 23.

- finally, as to Commission's leniency notice, despite the fact that it may have a decisive impact on the level of the fines and may actually lead to a total immunity, it is not a clear and unambiguous legal basis but a mere administrative act.

The Working Group considers that the drastic increase over recent years of the amount of fines is the most obvious illustration of the failure of the EC fining system to provide any significant guarantee in terms of legal certainty. Although the basic legal provisions governing the actual level of fines have remained largely unchanged since the adoption of Regulation 17/62 (in particular, the maximum level of fines remains unchanged), the actual sanctions an undertaking incurred for a hard-core cartel in the seventies can hardly be compared with those imposed today for an identical infringement.

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[108] Commission Decision of 14 May 1997, Case IV/34.621, 35.059/F-3 – *Irish Sugar plc*, OJ of 22 September 1997, L258/1.

[109] See, ECJ, 4 July 2006, T-304/02, *Hoek Loos NV/Commission*, ECR 2006, II-1887.

The Working Group considers that if antitrust fines are indeed –as indicated– "*criminal*" in nature, a much more specific legal basis is required than currently the case. It is in other words very doubtful whether –at the current level of fines– the view taken so far by the Community courts[110] that the maximum threshold of 10% of the undertaking's turnover and the reference to the gravity and duration of the practice are a sufficient limit to the Commission's discretion as regards fining decisions is correct.

Whilst it is true that legal provisions providing for criminal sanctions should be drafted in terms broad enough to allow some level of flexibility in their implementation, a total delegation by the legislator of most if not all of the elements determining the level of sanctions seems to go well beyond what is acceptable on this basis.

Nor is the fact that the Commission has limited its own discretionary powers by adopting guidelines and its decisional practice sufficient in the opinion of the Working Group to remedy the shortcomings of Regulation 1/2003 (particularly where the Commission regularly changes these guidelines and applies them then retroactively – see point (b) below).

Finally, as to the fact that the Commission's discretion is limited by the judicial review of the Community courts, it should be recalled that non-compliance with the requirements of Article 7 ECHR may not be compensated by the mere fact that the Commission's decisions are subject to appropriate judicial review. This is so *a fortiori* given the relative self-restraint of Community courts when it comes to the judicial review of the Commission's fining decisions.

(b) Principle of non-retroactivity

In parallel to the increase of the amount of the fines imposed in its decisional practice, the Commission has in the last 10 years modified twice the methodology governing the assessment of fines (adoption of the 1998 Guidelines[111] and adoption of the new 2006 Guidelines[112]). In its decisional practice, the Commission has systematically imposed fines based on the new fining guidelines applicable at the time of the decision even when these were not in force at the time of the infringement. In so far as the new guidelines were in fact more severe than those prevailing at the time of the infringement, this naturally raises the question of the compliance of this practice with the principle of non-retroactivity as set out in Article 7 ECHR.[113]

In *Dansk Rorindustri*[114], the ECJ –although it admitted that the Commission was bound by the principle of non-retroactivity set out in Article7 ECHR[115]– found that the adoption of more severe guidelines did not breach this principle as "*the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy*". On the contrary, "*the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy*" and undertakings must therefore "*take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past*".

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[110] CFI, 5 April 2006, *Degussa v. Commission*, T-279/02, ECR 2006, II-897, paras. 75 et seq.

[111] *Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty*, OJ C 009, 14 January 1998 p. 3.

[112] *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, OJ C 210 , 01 September 2006 p. 2.

[113] See also Article 49 of the Charter of Fundamental rights as well as the legal systems of EC Member States.

[114] ECJ, 28 June 2005, *Dansk Rorindustri and others v. Commission*, ECR 2005, I-5425, para. 214 et. seq..

[115] The CFI had considered that Article 7 was not applicable to the Commission's Guidelines because Regulation 17/62 –and not the Guidelines- was the relevant legal basis for the sanctions, so that the principle of non-retroactivity was not applicable to them. The ECJ dismissed this argument and found that "*the relevance of the Guidelines in the light of the principle of non-retroactivity does not presuppose that the Guidelines form the legal basis for the fines*". Indeed, the ECtHR has clearly established that the principle of non-retroactivity applies both to legal provisions and to case-law.

(ii) Issues relating to liability

From a criminal law point of view, the EC fining regime also raises a number of other questions connected with the concept of liability both (a) of the undertaking for its employees' behaviour and (b) of the parent entity of the group for its subsidiaries.

(a) Liability of the undertaking for its employees' behaviour

On the basis of the case law of the Community courts, undertakings are liable for their employees' behaviour even if the management was not aware of such behaviour. In addition, Community courts refuse to identify the person(s) acting intentional by negligent by in breach of the law as the sanctions imposed by the Commission "*are not of a criminal law nature*" and as such a requirement for identification "*would impinge seriously on the effectiveness of Community competition law*"[116].

In the opinion of the Working Group, it is questionable whether the standards establishing the liability of the undertaking for the behaviour of its employees are thereby accurately defined and whether this approach is at all acceptable from the point of view of the principles of the legality and personality of sanctions[117].

(b) Liability of the parent entity of the group for its subsidiaries

According to EC case law, the liability of an undertaking for the acts of its subsidiaries may be established either if the parent entity was directly involved in the infringement or if it exercised a decisive influence over the actions of its subsidiary. "*Decisive influence*" is legally presumed if the subsidiary is wholly-owned by the parent entity[118], although that presumption may be rebutted[119]. Various criteria are taken into consideration by the Commission to establish decisive influence (common market strategy, permanent cooperation, sales team provided by the parent company to the subsidiary, etc.).

On this basis, there is a tendency to hold parent entities of almost any group liable for an infringement of competition law of any subsidiary in the group, whatever its actual involvement in the alleged practice. This is so although there are again no clear legal provisions providing for the liability of parent companies. This wide discretion, in addition to the relative uncertainty of the criteria and lack of a clear legal basis for the liability of the parent entity, is a matter of concern from the perspective of criminal law. In addition to the lack of a sufficiently clear and unambiguous legal basis, it must be noted that this concept of parent liability is not recognised in legal systems of the Member States, and may actually infringe criminal law principles of personal liability and personality of sanctions.

(iii) Issues relating to the leniency notice

From the point of view of criminal law, also the Commission's leniency notice may raise difficult questions in the light of the privilege against self-incrimination ("*nemo tenetur*").

As is well-known, the ECtHR has considered that the privilege against self-incrimination is derived from the right to a fair trial guaranteed by Article 6 ECHR. According to the ECtHR, the privilege against self-incrimination presupposes "*that the prosecution in a criminal case seek to prove their*

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[116] C-338/00 P, *Volkswagen v. Commission*, *supra* note 21, para. 66.

[117] The principle of individuality of sanction was otherwise recognised e.g. in the *Wanadoo case*, T-340/03, *France Télécom v. Commission* [2007] ECR II-107, at para 66: "*It should be recalled that, according to the principle that penalties must be specific to the individual concerned, an undertaking may be penalised only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law*".

[118] CFI, 15 June 2005, *Tokai Carbon Co. Ltd v Commission*. T-71/03, T-74/03, T-87/03 and T-91/03. ECR 2005 p. II-10.

[119] ECJ, 16 November 2000, *Stora Kopparbergs Bergslags AB v Commission*, C-286/98 P., ECR 2000 p. I-09925.

case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused"[120].

In this context, it should be noted that the leniency notice has in practice a very strong coercive effect on companies to incriminate themselves because the level of fines is such that it makes it very difficult if not impossible for an undertaking to take the risk of not cooperating with the Commission (especially when the Commission has already initiated proceedings). The leniency notice thus *de facto* forces undertakings to confess the infringement.

It may here be wondered whether this effect of the leniency notice is not such that it denies in practice the right no to be compelled to confess an infringement.

C.4 CONCLUSIONS

It follows from the above legal analysis that – particularly as a result of the dramatic increase in fines recently – competition law proceedings in the fields of Articles 81 and 82 EC are very likely today to be classified as "*criminal*" under Article 6 ECHR.

The Working Group takes the view that if this finding is correct, this requires from a *legal point of view* a number of radical changes in both the enforcement procedure and the system for sanctions itself which will be discussed hereafter in Sections E and F.

Before doing so, the Working Group thought it might however be also worthwhile to briefly look in the next Section at the various *economic implications* of introducing different enforcement models.

D. THE WAY FORWARD AS REGARDS THE ENFORCEMENT SYSTEM

Having discussed the problem from a practical and a legal perspective, it is proposed in the following Sections to examine desirable reforms first as regards the enforcement system (Section D) and then as regards the system of sanctions itself (Section E).

As regards the enforcement system, the Report will discuss:

- first the possibility to introduce more fundamental or structural changes by separating decisional power from prosecutorial power – or at least giving the Court the power to "*remake*" the Commission's decision (Section D.1); and

- then less "*ambitious*" reforms that could be envisaged in order to improve the current situation (Section D.2).

D.1 Separation of decisional power from prosecutorial power (or at least giving the Court the power to "*remake*" the Commission's decision)

There are different ways in which the difficulties flowing from the lack of separation between the investigative and adjudicative functions of the Commission might be addressed:

- one (partial) solution would be the creation of an independent "*European Competition Agency*" ("*ECA*") – knowing that the extent to which such an approach would address the issues raised under Article 6 ECHR would depend in particular on what powers were granted to such an entity (investigative, decision making or both) and on its level of independence;

- another (though not entirely satisfactory) option would be to give the Community courts "*full jurisdictional control*" over Commission decisions;

- finally, a more complete solution would be to grant decision making power to the Community courts directly (or a judicial panel thereof).

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[120] ECtHR, 11 July 2006, Case 54810/00 – *Abu Bakah Jalloh v Germany*, EUGRZ 2007, 150, 161, para. 100.

These various options are investigated hereafter.

(i) Creation of an independent European Competition Agency (ECA)

- Introduction

Transferring the Commission's enforcement powers to an independent ECA would be a first solution.

Broadly speaking, creation of such an agency could potentially result in the following division of competencies:

- the ECA takes on the investigation task, leaving the adjudication task to the Commission itself (referred to hereafter as **"Model 1"**);
- the Commission is charged with investigation and "*making a case*", whereas ECA takes on the adjudicative function (referred to hereafter as **"Model 2"**);
- the ECA takes on tasks of investigation and adjudication, with the two functions being divided between different parts within the ECA (referred to hereafter as **"Model 3"**).

These models are considered individually below. As will be seen, each one has two variations: (a) where the ECA is effectively part of the Commission and (b) where the ECA is an entirely separate entity.

One question which arises in this context is the extent to which the creation of an ECA is compatible with the existing constitutional framework provided by the Treaty. There are clearly limits to what *the Commission itself* could delegate (to be contrasted with the possibility which the Community *legislator* has to define competences differently on the basis of the rules of the Treaty –see below Section (iii)). Under Community law, sub-delegations by an Institution of its *own* power are strictly limited by the principle of "*institutional balance*".[121] This principle, read in conjunction with the principle of attribution of powers laid down in Article 7(1) EC, means that an Institution may not itself unconditionally assign its powers to other Institutions or bodies. In particular, the Court held in *Meroni* that:

> "*From that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.*
>
> *To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective.*"[122]

The Court has later held that only "*clearly defined executive powers*" may be delegated by an Institution.[123] The principle of institutional balance prevents the Commission itself from delegating discretionary powers, including the power to find an infringement of competition law. This was indirectly confirmed by the Court's refusal to accept that the Commission delegates to one of its members the power to take such a decision.[124]

However, the existing constitutional structure could potentially allow the Commission to reorganise itself internally such that powers are exercised by a separate unit within the Commission having

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[121] Case C-70/88, *European Parliament v Council*, [1990] ECR I-2041.

[122] Case 9/1956, *Meroni v High Authority*, [1958] ECR 11 (English Special Edition, p. 133, at p. 152).

[123] Case C-301/02 P, *Tralli v European Central Bank*, [2005] ECR I-4071, para. 43.

[124] Case C-137/92 P, *Commission* v *BASF and Others*, [1994] ECR I-2555, para. 71.

greater guarantees of independence than those currently provided. This question of the limits of the existing constitutional structure shall be considered for each of the three above models.

- Model 1

In Model 1, the ECA takes on the investigation task, leaving the adjudication task to the Commission itself. The ECA could be envisaged here either as:

- a department within the Commission to which specific measures apply to ensure its independence (**"Model 1a"**); or

- an entirely separate entity from the Commission (**"Model 1b"**).

- Model 1a

A precedent for this type of delegation of investigative powers suggested in Model 1a can be found in the Decision creating the European Anti-Fraud Office ("*OLAF*"), as it provides for several mechanisms to guarantee OLAF's full independence and shield it from the influence of the Commission.[125]

According to Commission Decision No 1999/352 and Regulation No 1973/1999, OLAF enjoys wide-ranging powers of investigation into allegations of fraud, corruption and other professional misconduct threatening the EU financial interests. The officers are in fact empowered to obtain "*unannounced access*" to the premises of the EU institutions, to examine documents and records and ask for on the spot explanations.[126] OLAF is thus an independent investigator but has no decision making powers. After conducting the necessary investigations, it is only allowed to report its findings to the competent authorities and to recommend appropriate action against the individuals concerned.[127]

A distinctive feature of OLAF is the circumstance that it enjoys significant independence from the other EU institutions and bodies despite being formally a department of the European Commission:

- it discharges its functions under the supervision of the Surveillance Committee, whose members are appointed among individuals having appropriate skills and expertise and exercise their control tasks in accordance with principles of operational independence[128];

- the Director of OLAF is appointed by the Commission, but following a recommendation to that end by the Surveillance Committee, after consulting the Council and the European Parliament[129];

- the Director enjoys extensive management powers, limited autonomy in budgetary matters and is responsible in full independence for the initiation of new investigations[130];

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[125] Commission Decision (EC, ECSC, Euratom) No. 1999/352 of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ [1999] L 136/20 ; Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ [1999] L 136/1. See on this proposal ANDREANGELI, "*Toward an EU Competition Court: "article-6-proofing" antitrust proceedings before the Commission?*", (2007) 30 *World Competition* 595-622.

[126] See READER, "Moving forward, never backwards: preventing fraud in the European Union and defining European Central Bank independence", (2004) 27 *Fordham Int'l L J* 1509 at 1529-1530.

[127] WAKEFIELD, "Good governance and the European Anti Fraud Office", (2006) 12 (4) *EPL* 549 at 553.

[128] *Id.*, pp. 551-552.

[129] Decision 1999/352, Article 5.

[130] *Inter alia*, ODUDU, Case comment to C-11/00, *Commission v European Central Bank*, judgment of 10 July 2003, (2004) 41

- OLAF conducts its investigations in complete independence, and the Director of OLAF may "*neither seek nor take instructions*" from the other Institutions.[131]

OLAF's independence was emphasised by the ECJ in the 2003 *European Central Bank* judgment.[132] It had been alleged by the ECB that subjecting it to the investigative powers enjoyed by OLAF could have irremediably undermined its independence, especially in view of the Office's links, both structural and budgetary, with the Commission.[133] The ECB also alleged that there were insufficient safeguards as to the independence of the Office which, as a result of this, remained capable of launching investigations even when no *prima facie* case of corruption or mismanagement had been made.[134]

However, the ECJ rejected the allegation that being exposed to the possibility of being investigated by OLAF threatened the ECB's own independence as central bank; the Court held that OLAF enjoyed complete independence *vis-à-vis* the Commission and was subject to the rules of Community law when it exercised its investigative powers.[135] The ECJ emphasised the limited remit of the Office's investigative powers, the fact that it could start fresh investigations only upon a decision of its Director and on the basis of sufficiently serious suspicions of fraud, corruption or other financial mismanagement threatening the EU's economic interests.[136] In addition, the *ad hoc* safeguard of its independence especially *vis-à-vis* the Commission ensured that the Office would not exercise its investigative powers under political pressure.[137]

This judgment could thus provide support to a proposal to separate the investigating from the decision-making functions in antitrust cases and entrusting the investigative powers to a distinct unit within DG Competition, to the benefit of the quality, impartiality and fairness of the competition proceedings.

As is the case for OLAF, the ECA could be a *sui generis* department of the European Commission: despite belonging to that Institution, it would for all other intents and purposes be "*insulated*" from it, by means of *ad hoc* safeguards as regards the independence and integrity of its Director as well as of the control powers exercised on it by the Surveillance Committee. It is suggested that, short of creating a separate investigative body (such as the ECO), providing such a unit with "*OLAF type*" guarantees could foster fairer and more efficient competition enforcement.[138]

The ECA's independence could be further strengthened if it was made clear that its Director may not be removed from office during the term of his office, unless there are serious grounds for such removal and the Commission takes a reasoned decision in that regard.[139]

Much like the OLAF, the ECA would not under this model have the power to adopt decisions finding infringements but would conduct the investigation and adopt some recommendations similar to statement of objections that would then be sent to the Commission. These recommendations would probably not be directly challengeable because of their preparatory nature[140]. Only the other definitive decisions taken by the ECA, e.g. ordering inspections, should be subject to review

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CMLRev 1073 at 1081-1082.

[131] Decision 1999/352, Article 3.

[132] Case C-11/00, [2003] ECR I-7147.

[133] *Id.*, paras. 119-120.

[134] *Id.*, para. 121.

[135] *Id.*, paras. 138-139.

[136] *Id.*, paras. 140-141.

[137] *Id.*, para. 143; see also Opinion of AG Jacobs, para. 165.

[138] See e.g. House of Lords Select Committee on the EU, *XV Report*, para. 155.

[139] See Article 2 of Commission Decision 2001/462/EC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ [2001] L 162/21 ; and Regulation 40/94, Article 131.

[140] Case 60/81, *International Business Machines Corporation v Commission*, [1981] ECR 2639, para. 21

by the CFI, either directly as such or because the Commission would be deemed to have implicitly approved these acts[141].

As regards the compatibility of Model 1a with the current constitutional framework, there seems no reason to doubt that such an approach is possible. The fact that OLAF was established by means of a decision of the Commission and that its powers were later regulated by way of legislation suggests that a similar change in the area of competition enforcement could be introduced without Treaty amendment.

- Model 1b

In contrast to Model 1a, for which OLAF provides a precedent, Model 1b would consist in a body charged with investigation of competition law infringements that is entirely separate from the Commission. One potential objection to such an approach is that Article 85 EC provides that *"the Commission shall investigate cases of suspected infringement of these principles [i.e. of Articles 81 and 82 EC]".* Although this provision technically no longer applies[142], it has been used occasionally as an interpretative tool by the ECJ[143]. Moreover, Article 83(2)(d) states that the Council regulations shall *"define the respective functions of the Commission and the Court of Justice in applying [Article 83(2)]"*. Thus, it is the Council's role to attribute responsibility to the Commission without it being envisaged that the Commission can further sub-delegate as would be required by Model 1b.

Nonetheless, to the extent that Model 1b does not involve the delegation of decisional powers, it may still be compatible with the limited scope for delegation provided for by the case law (cited above).

Were investigative powers to be delegated to a separate ECA in this way, questions would arise as regards judicial protection against decisions of the ECA, similar to those raised under Model 1a. The same solution should apply here as for acts of other Community agencies.

- Model 2

In Model 2, the Commission is charged with investigation, whereas ECA takes on the adjudicative function. Again, the ECA could be envisaged here either as:

- a department within the Commission to which specific measures apply to ensure its independence (**"Model 2a"**); or

- an entirely separate entity from the Commission (**"Model 2b"**).

- Model 2a

Model 2a would appear to involve a true delegation of discretionary decision making powers by the College of Commissioners, albeit to a specially designated unit of the Commission itself. The difficulties generated by this type of approach from a constitutional point of view are therefore greater than those associated with Model 1a or Model 1b.

One potential way to address such concerns would be to delegate decisional powers but to leave the Commission with the ability to review the unit's decisions. However, such a power of review would inevitably water down the independence of the unit to some extent at least, and could in a worst case deprive the measures of any real practical effect.

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[141] See for instance Joined Cases T-369/94 and T-85/95, *DIR International Film v Commission*, [1998] ECR II-357, paras. 52-55.

[142] Article 85 EC is *"Without prejudice to Article 84"* which Article 84 only applies *"Until entry into force of the provisions adopted pursuant to Article 83".*

[143] See e.g. T-77/92, *Parker Pen,* [1997] ECR II-549; T-77/95, *SFEI*, [1999] ECR II-1.

- Model 2b

Model 2b implies delegation of the adjudicative function to an entity entirely separate from the Commission. A proposal similar to this was met with significant support in the course of the inquiry conducted by the House of Lords Select Committee on the EU on the CBI proposal for an EU competition court.[144] A number of witnesses to the inquiry favoured the possibility to limit the powers of the Commission to "*making a case*" and to leave to a separate decision maker the power to adopt a decision on the merits of the case. It was argued that a similar change would have the benefits of introducing a "*de-politicised*" decision making process, i.e. a system assisted by adequate due process and transparency guarantees and assisted by appropriate standards especially in terms of economic expertise, without the need to create a novel "*judicial body*".[145]

Model 2b, however, suffers from the same problems of constitutional compatibility mentioned in relation to Model 2a.

- Model 3

In Model 3, the ECA takes on tasks of investigation and adjudication, with the two functions being divided between different parts within the ECA. Model 3 could again be conceived either as a unit within the Commission or an entirely separate entity, although no distinction is made here as the arguments remain the same.

Suggestions analogous to Model 3 were already made in the 1990s, culminating with the proposal for the introduction of a "*European Cartel Office*" ("*ECO*").[146] As will be recalled, this proposal entailed the creation of an autonomous office, responsible for investigating and deciding over antitrust cases as well as allegations of anti-competitive mergers away from political pressures and as a result of more open, transparent and thus fairer procedures.[147] It was envisaged that the ECO's decisions would be subject to review on the part of the Commission and to judicial appeal before the CFI.[148]

Although at the time it was acknowledged that the Commission's administrative procedures raised significant concerns especially in terms of fairness and of transparency, there was also some fear that the creation of an independent office responsible for the application of antitrust and merger rules would increase the complexity of the existing enforcement framework[149], and also that the ECO would become a political orphan lacking sufficient legitimacy to act as a strong enforcement body. However, in light of the ever tougher sanctions imposed by the Commission in competition cases, it is unclear how strong these criticisms remain today.

One could moreover envisage some form of first stage administrative appeal of the ECO decisions, by a separate board of appeals within the organisation. The OHIM might provide an interesting precedent for such an arrangement within the EU, as Regulation 40/94 sets up a quasi-judicial Board of Appeals independent from the examiners who take decisions in first instance.[150]

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[144] CBI Brief, "The need for an EU Competition Court", 15 June 2006. HOUSE of LORDS SELECT COMMITTEE, *XV Report: an EU Competition Court*, session 2006-07, 23 April 2007 (hereinafter referred to as *XV Report*); the Report, the Minutes of Oral Evidence and the Written Evidence are available at: http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/75/75.pdf.

[145] See Minutes of Evidence given by Mr William Bishop, pp. 33-34; also, Minutes of Evidence given by Sir David Edward, pp. 52-53.

[146] See e.g. RILEY, "The European cartel Office: a guardian without weapons", (1997) 18 ECLR 3.

[147] RODGER, "Competition policy, liberalism and globalisation: a European perspective", (2000) 6 *Colum. J. Eur. L.* 289 at 293.

[148] See e.g. RILEY, "The European cartel Office: a guardian without weapons", (1997) 18 ECLR 3 at 7.

[149] Also as its competence would have been limited to Articles 81 and 82 EC and would not have extended to State aids or Article 86 EC cases. See RILEY, quoted above, pp. 11-12; also RODGER, "Competition policy, liberalism and globalisation: a European perspective", (2000) 6 *Colum. J. Eur. L.* 289 at 310.

[150] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ [1994] L 11/1, Article 131.

Notwithstanding the above advantages, similarly to Models 1b, 2a and 2b, Model 3 raises issues of validity of delegation of powers in light of existing case law. The potential for review by the Commission again poses problems of how effective independence of the ECO would be.

- Conclusion

In light of the above, the Working Group considers that Model 3, with an ECO entirely independent from the Commission would best respond to the concerns currently raised under Article 6 ECHR. However, such an approach would fail to fully address those concerns, to the extent that the ECO could not be qualified as an independent tribunal within the meaning of Article 6 ECHR.

Moreover, Model 3, as well as Models 1b and 2 would raise problems of compatibility with the existing constitutional framework –at least as long as the delegation is done by the Commission itself– and as a result none are clearly achievable without Treaty amendments.

The creation of an ECA, on the model of OLAF (Model 1a above) should however be compatible with the existing constitutional framework and already be a major progress. Article 83 EC would in this regard probably provide the required legal basis in so far as it enables the Council to adopt the necessary legislation to implement Articles 81 and 82 EC. Such an approach would, however, only partially remedy the deficiencies of the current procedure. It would have the merit undoubtedly to create a clear separation between investigative and adjudicative functions. However, the final decision finding competition infringement would most likely continue to be taken by a political body, the College of Commissioners, the members of which are not even present at the oral hearing. The procedure will thus remain unsatisfactory as long as reform within DG Competition to amend the final decision-making phase is not undertaken.

(ii) Giving the Community courts power of full jurisdictional review

- Legal basis

As discussed above, the case law of the ECtHR provides that (for minor offences) the requirements of Article 6 ECHR may be met where decisions regarding criminal charges are not decided at first instance by an independent tribunal but are nonetheless subject to full jurisdictional review by such a tribunal. This approach is only possible in very limited circumstances – in relation to minor and disciplinary offences – and is therefore in principle not appropriate for competition law infringements. Nonetheless, although not providing a fully satisfactory response to criticisms under Article 6 ECHR, granting full jurisdictional review to the Community courts (the CFI or a jurisdictional panel established under Article 225a EC) would at least partially address such criticisms.

Such an approach is already followed in, for example, the UK. According to the UK Competition Act 1998, Schedule 8, Section 3(1), the Competition Appeals Tribunal ("CAT") enjoys powers of judicial review on the merits as regards appeals against decisions of the OFT. Those powers involve the ability to annul the decision in full and *to substitute the Tribunal's own views* to those of the DG of the OFT as regards all matters of fact and of law.

As the CAT acknowledged, competition proceedings involve the determination of a "*criminal charge*". Consequently, in view of the seriousness of the matter, when their first phase is left to the authority of an administrative body (as, in the UK, the Director General of the OFT) which combines investigating and decision-making powers, it is essential that at the very least the judicial authority responsible for the review of the decisions adopted as a result of these proceedings is allowed to decide itself the case "*on the merits*".[151]

The most likely objection to introducing such full jurisdictional review of Commission competition decisions by the Community courts is that it is not possible within the current constitutional framework. Thus, the argument would run that the Community courts do not have unlimited

[151] *NAPP Pharmaceuticals v Director General of Fair Trading*, [2002] ECC 13, para. 93; see also para. 117-118.

jurisdiction, except as provided by Article 229 EC with regard to sanctions, and expanding this power of full jurisdiction through secondary legislation is not possible unless the Treaty was changed.

That the ECJ adheres to this view is supported by case law in the field of trademarks. Thus, Article 63 of Regulation 40/94 provides that "*The Court of Justice has jurisdiction to annul or to alter the contested decision*". However, the ECJ has nuanced this statement and stated that "*the review of that decision by the Community courts is confined to a review of the legality of that decision, and is thus not intended to re-examine the facts which were assessed within OHIM*"[152]. In other words, even where the OHIM Regulation explicitly grants powers of full jurisdictional review to the ECJ, the ECJ has apparently rejected these in favour of a more restrained review of legality only.

The problems associated with granting powers of full jurisdictional review to the Community courts were recently considered by the House of Lords Select Committee on the EU[153].

In this context it was argued by former CFI President Bo Vesterdorf, that the creation of a specialised judicial body responsible for the review "*on the merits*" would entail a radical departure from the principles inspiring the judicial architecture established by the founding treaties, which is geared toward a "*limited*", "*supervisory*" type of jurisdiction, as illustrated by Article 230 of the Treaty.[154] Vesterdorf also argued that it would be difficult to gather sufficient consensus behind a controversial proposal, entailing in substance the transfer to independent judges of powers hitherto conferred to the Commission as a "*quasi-administrative political body*".[155]

Notwithstanding the above, it is not clear that the existing constitutional framework excludes full jurisdictional review of competition decisions by the Community courts.

Article 229 EC clearly provides an example of such review when stating that the ECJ may be given by regulations "*unlimited jurisdiction with regard to the penalties provided for in such regulations*".

The EC Treaty provides however for other potential legal bases for introducing such a full jurisdictional review of the whole decision. One potential legal basis could be Article 83(2)(d), which provides that the Council should define through secondary legislation *"the respective functions of the Commission and Court of Justice in applying the provisions laid down in [Article 83(2)]"*[156]. It is unclear what would prevent the Council adopting, on the basis of this provision, a Regulation explicitly giving power to the Community courts (the CFI or a judicial panel created under Article 225a EC) to exercise full jurisdictional review of Commission competition decisions (indeed, as discussed in the following section, this provision could be used to grant decisional powers in competition matters to the Court of Justice at first instance). In the opinion of the Working Group there is no apparent reason why the relatively narrow wording of Articles 229 and 230 EC should stand in the way of separate and broader powers being granted on the basis of Article 83(2) EC.

One possible objection is that the inter-institutional balance laid down by the Treaty cannot be affected by secondary legislation[157]. However, such a position is incorrect, since the potential for alteration to the inter-institutional balance and the power to do so is itself provided for in the Treaty[158].

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[152] Case C-214/05 P, *Rossi v OHIM*, [2006] ECR I-7057, para. 50 (emphasis added); see Case T-247/01, *eCopy v OHIM*, [2002] ECR II-5301, para. 46.

[153] House of Lords, European Union Committee, 15th Report of Session 2006-07, An EU Competition Court, published 23 April 2007.

[154] *Ibid,* Minutes of Evidence given before Subcommittee E by Judge Bo Vesterdorf, pp. 98-99.

[155] *Ibid,* Minutes of Evidence given before Subcommittee E by Judge Bo Vesterdorf, pp. 99.

[156] The legal basis as regards review of merger control decisions would be Article 308 EC.

[157] *Ibid,* see e.g., written evidence submitted by the Office of Fair Trading, p. 6.

[158] This is, moreover, only one example of such a mechanism, see e.g. Article 202 EC.

Another possible objection is that Article 85 EC only envisages investigation and decision making in relation to the enforcement of Articles 81 and 82 EC *by the Commission* (and Member States). However, as noted above, Article 85 EC is effectively a transitional provision that remains in force only as long as legislation has not been adopted under Article 83 EC.

As regards the observation that Member States may not reach consensus on this issue, mentioned above, such a possibility clearly does not affect their power to do so and to adopt legislation on the point.

- Creation of a separate judicial panel?

In the event that powers of full jurisdictional review are granted to the Community courts, should a separate judicial panel be created under Article 225a EC to deal with appeals against competition decisions, or should jurisdiction remain with the CFI?

Pleading in favour of the establishment of a separate panel is in particular the fact that the task of full jurisdictional review is materially different from that currently undertaken by the CFI in other fields. Moreover, through the creation of a separate panel, it could be ensured that judges hearing the cases would have special expertise in the domain of competition law.

However, the establishment of a separate judicial panel potentially raises at least two concerns.

First, its actual viability given the likely workload. According to the statistics published by the CFI, between 2000 and 2005 only 35 appeals were brought against competition decisions. These data can be contrasted with the appeals concerning trademark decisions and orders, which totalled to 94 during the same period.[159] In light of this, it has been argued that the need to relieve the CFI of workload in the field of competition law may not be as forceful as would be necessary to support the creation of a specialised judicial panel.[160] This argument does not appear convincing. The level of workload represented by the granting of powers of full jurisdictional review cannot be measured in numbers of cases alone. The degree of complexity of competition cases generally greatly surpasses that of trade mark disputes and this with be further emphasised by the deepening of the standard of review. In addition, by freeing the Commission from adjudicating cases, it would have more resources to prosecute a higher number of cases.

Second, there could be concern that the creation of a specialised forum for the interpretation of competition rules could result in the latter being marginalised from the overarching EU legal system.[161] Whilst this may be a legitimate concern, it is a point that could potentially be raised in relation to any form of specialisation within the Community courts structure. Given that the Treaty explicitly provides for the creation of judicial panels, that specialisation of courts is widespread phenomenon in the judicial architecture of the Member States, and that judicial panels remain part of the overall Community courts system against whose rulings appeals on and appeals on points of law are available, fears of marginalisation would appear overstated.

- More extensive judicial review but without a power to "*remake*" the decision

Finally, the above discussion treats full jurisdictional review as implying a right to "*remake*" a Commission decision, *i.e.* to substitute the Commission assessment with that of the Court. One alternative to this approach would be to maintain the Court's right to annul (but not to replace). Commission decisions, but to provide for a more in depth review of the legality of the act. In other words, to reduce or even remove the Commission's margin of discretion. In such a case, a Regulation adopted on the basis of Article 83(2)(d) is potentially not necessary. The argument here

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[159] See Annual Report of the Court of First Instance (2005), available at: http://www.curia.europa.eu/en/instit/presentationfr/rapport/stat/st05tr.pdf, p. 5.

[160] House of Lords Select Committee of the European Union, Subcommittee E, hearing of 22 November 2006, Minutes of Evidence, p. 16.

[161] *Ibid* e.g. written evidence submitted by the Office of Fair Trading, p. 4; see also XV Report, para. 71.

would be that Article 230 EC must be interpreted in conformity with fundamental rights. Since Article 230 EC does not exclude such more extensive jurisdictional review and indeed proper judicial protection requires it, it must be seen as inherent in Article 230 EC.

This approach finds some support *inter alia* in the recent conclusions of Advocate General Bot in the *Bolloré* case, where he opined that:

> *"134. Cela signifie que, dans une procédure de nature quasi répressive, telle que celle en cause, dans laquelle la Commission exerce, à l'égard des entreprises, des fonctions d'enquête, d'instruction et de décision, le juge communautaire doit exercer un contrôle juridictionnel très poussé du respect par cette dernière des droits procéduraux des parties. En d'autres termes, nous pensons qu'il doit tirer toutes les conséquences qui s'imposent lorsque la Commission, dans l'exercice de ses prérogatives, ne respecte pas les droits fondamentaux reconnus aux entreprises dans le cadre de la procédure de mise en œuvre de l'article 81 CE.*
>
> *135. Or, dans la présente affaire, l'approche du Tribunal tend à restreindre le contrôle que doit, selon nous, exercer le juge sur les décisions de la Commission, au sens de l'article 6, paragraphe 1, de la CEDH. Cette approche peut, à notre avis, s'avérer dangereuse. En effet, dans un cas tel que celui en cause, considérer que la violation par la Commission du droit d'une entreprise à être entendue n'entache pas la décision dès lors que cette entreprise doit, en tout état de cause, répondre de l'infraction commise par autrui, revient à dire que la Commission peut impunément négliger les formes substantielles.*
>
> *136. Au vu de l'ensemble de ces éléments, nous considérons que le Tribunal a commis une erreur de droit dans le cadre de son appréciation de la violation des droits de la défense de Bolloré, en n'annulant aucun des éléments de la décision litigieuse mettant en cause directement et personnellement cette entreprise dans la commission de l'infraction. Selon nous, le Tribunal aurait dû tirer la conséquence qui s'imposait, à savoir l'annulation de la décision litigieuse en tant qu'elle était fondée sur le grief tiré de l'implication personnelle et directe de Bolloré dans l'infraction."*

It follows from the above discussion that the granting of powers of full jurisdictional review of Commission competition decisions to the Community courts would assist in ensuring respect for Article 6 ECHR and would, moreover, apparently be compatible with the existing constitutional framework, thus not requiring any specific Treaty amendments. Such developments could happen through development of the case law, but would benefit from the legal certainty of a clear legal foundation in the form of a Council Regulation based on Article 83(2)(d) EC. Jurisdiction could potentially be given to the CFI to hear such appeals, although a specialised judicial panel may be better placed for such a task.

(iii) Establishment of a specialised chamber within the CFI or a judicial panel exercising the effective adjudicative function in competition cases

The final and most satisfactory alternative would be to reallocate competition law enforcement powers between the Commission and the Community courts and give either a specialised chamber within the CFI or a newly established judicial panel,[162] the competence to adopt decisions establishing the existence of an infringement and impose fines on the undertakings involved.[163]

Under this new system, the Commission would remain responsible for carrying out investigations and for drafting the statement of objections.

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[162] Article 220 TEC, as amended by the Treaty of Nice**,** enables judicial panels to be attached to the CFI in order to exercise the judicial competence of that court. The Treaty envisages that panels will hear and determine at first instance "*certain classes of action or proceeding brought in specific areas*".

[163] F. Montag, "the Case for a Reform of Regulation 17/62 : Problems and Possible Solutions from a Practioner's Point of View", in B.E. Hawk (ed.) *Annual Proceedings of the Fordham Competition Law Institute 1998* (Juris, 1999), pp. 182-183.

However, once a statement of objections has been sent to the parties, it would then be for the specialised chamber within the CFI or the newly established judicial panel to hear the parties and to evaluate the evidence and arguments presented by the Commission and by the undertakings under investigation. The proceedings before the specialised chamber within the CFI or the newly established judicial panel would then end with the adoption of a decision establishing whether an infringement of Community law has been committed and if so, the imposition of fines.

Such a procedure would clearly have the major advantage of ensuring that proceedings are truly objective and fair with separate bodies acting as prosecutor and judge over a case. It would also reduce the overall duration of competition proceedings as not only would the procedure before the Commission be considerably shorter[164] but if decisions were taken by an independent court, this would render further judicial review less likely as parties would be more willing to accept the decisions taken by an independent court.

The redistribution of powers between the Commission and the Community courts may reduce the current level of appeals of competition cases, especially in cartel cases which are multi-party and the most "*resource-intensive*".[165] Thus, while appeals limited to points of law should be maintained, they may become less frequent in practice.

Should a separate judicial panel be created under Article 225a EC to deal with competition law cases, or should the power of decision be granted to the CFI?

This question raises similar points to those mentioned above in relation to the creation of a specialised judicial panel for the purposes of conducting full jurisdictional review. It appears to us that, where the decision on the merits is to be taken in the first instance by the Community courts, the arguments in favour of a separate judicial panel are all the stronger.

Finally, is the proposed system compatible with the current constitutional framework? Again, we consider that Article 83(2)(d) EC provides a potential legal basis for the passing of powers of decision in competition cases to the Community courts, for reasons similar to those set out above in relation to the establishment of full jurisdictional review. However, unlike the establishment of powers of full jurisdictional review, such a change could not be introduced by case law alone, given the necessary institutional changes involved but would require a formal legislative act.

(iv) Conclusion

Of the options discussed above, the Working Group believes that the one which would in principle guarantee full compatibility with Article 6 ECHR is discussed at (c) above, and involves granting decision making powers to the Community courts themselves, with the Commission acting as prosecutor. Article 83(2)(d) EC could potentially serve as a legal basis for such a change. Other changes envisaged above would not appear sufficient to ensure full compliance with Article 6 ECHR.

However, it is understood that all solutions proposed above involve significant changes to the existing system and, as such there is likely to be resistance to them. For this reason, the next Section considers a number of relatively minor adjustments that could be made, which would not remove fundamental incompatibilities with Article 6 ECHR but would nonetheless improve the current situation.

D.2 Other "*less ambitious*" reforms that could be envisaged in order to improve the enforcement system

If none of the above reforms can be adopted in the short term, it may be worthwhile investigating the possibility of more limited measures which might –if not remedy the problem– at least improve to some extent the current enforcement system.

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[164] Because it would end with the sending of the Statement Objections.

[165] House of Lords, Select Committee on the EU, 15th Report of Session 2006-07, An EU Competition Court, published 23 April 2007, see e.g. p. 23.

Rather than changing the allocation of powers and the institutional system, some less ambitious improvements at least could be more swiftly achieved, and a more balanced system be created thereby, among which the following ones may deserve consideration:

- separation within DG Competition itself of the prosecution from the adjudication of a case;
- formalisation and improvement of the working of peer review panels;
- increased role for the Hearing Officer;
- increased role for the Commission Legal Service and the Chief Competition Economist;
- improved procedures with increased respect for the rights of defence.

(i) Separation within DG Competition itself of the prosecution function from the adjudication of the case

The previous Sections analysed a number of issues concerning the current structure of the competition proceedings before the European Commission and suggested some possible structural reforms. If these reforms do not find necessary political support, the Working Group would welcome at least the adoption of more limited measures of internal organisation of DG Competition, aimed at separating the two phases of investigation and decision-making by entrusting each of them to a different unit within the Directorate. A separation of the investigation and adjudication of the cases between two distinct directorates of DG Competition existed in the early days of DG IV (as it was then called) and would already remove some possible bias by the rapporteur. [DG: This won't change anything. This will still be part of the same house and operate under the same boss.]

(ii) Formalisation and improvement of the working of peer review panels system

Second, the Working Group also believes that the recent creation of "*peer review panels*", composed of experienced officials, has been a major progress. Indeed, it has introduced an additional stage for a "*fresh pair of eyes*" to scrutinise the case team's work and conclusions and had led the Commission in some instances to drop unmeritorious cases.

However, whilst this process normally takes place in most Article 82 cases, it is applied in Article 81 cases only "*where appropriate*" and in principle it is not used in cartel cases.[166] Therefore, it will not apply in many of the cases (cartels) where the fines imposed are generally larger than in Article 82 cases[167] and non-cartel Article 81 cases.[168]

More fundamentally, as the process is entirely internal, the undertakings under investigation cannot take part and are not entitled to have access to any documents created by or for the panel, which will be "*internal documents*" and thus not disclosable under the access to file procedure.[169] Being an internal process, the question can legitimately be asked whether in some cases the *"fresh pair of eyes"* are not in practice there to assist the case team in building a stronger cases, rather than to identify and put a stop to weak cases.

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[166] Wils, cited above, at p. 203.

[167] With the exception of the *Microsoft* cases COMP/C-3/37.792 in the Commission's Decision of 24.3.2004 a fine of 497 million € was imposed, on top of which another 899 million € was added by its second Decision of 27.2/2008 for failure to comply with the 2004 Decision and perhaps also *Telefónica,* Commission Decision of 4.7.2007, *Wanadoo España v. Telefónica*, COMP/38.784 – fine of 151 million €.

[168] In the recent *Visa case* (COMP/D1/37.860), a fine of 10.2 million was imposed by the Commission in its decision of 3 October 2007.

[169] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 22.12.2005, C 325/7.

In no way can this process in any event be equated to a trial before an independent judge in which both sides of the case are present. Not only are the members of the panel serving Commission officials (hence being *"peer reviewers"*), but they will hear only one side of the case.

Equally, the Commissioners are not *"walled-off"* from discussion of the matter with the staff investigating the case while the case is under investigation.[170] Therefore, whilst the *"peer review"* system may improve the investigative procedure, it certainly does not replace the need for an extensive review by the Community judicature.[171]

Some improvement could here be introduced, such as allowing peer review by independent third parties, and formalising the rules and the status of such panels.

(iii) Increased role for the Hearing Officer

Third, some improvements could be considered in the function of the Hearing Officer. The position of the Hearing Officer was created in 1982 and his (or her) responsibilities and mandate (or terms of reference) have since been enlarged and strengthened, most recently in 2001.[172] The Hearing Officer's terms of reference describe him (or her) as "*an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings*".[173]

The Hearing Officer is given a number of responsibilities, including organising and conducting oral hearings[174] and ensuring that they are properly conducted and contributes to the objectivity of any decision subsequently adopted by the Commission.[175] In particular, the Hearing Officer must ensure that "*in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement*".[176] Another important responsibility is ensuring proper access to documents in the Commission's possession.[177] Finally, the Hearing Officer must provide a report to the Commissioner on the hearing and the conclusions he draws from it, both in terms of the exercise of the right to be heard and also his observations on the further progress of the proceedings.[178]

Subsequent to the oral hearing, the Hearing Officer also produces a final report, based on the draft Commission decision provided to the Advisory Committee, which covers the right to be heard.[179]

The fact that the powers and responsibilities of the Hearing Officer have increased over the years is certainly welcome. Initially the Hearing Officer was merely entrusted with the organisation and conduct of oral hearings in antitrust cases. Subsequently his functions were extended to include

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[170] On the contrary, under Commission proceedings, the College of Commissioners (who is taking the final decision on the case by simple majority) only receives a proposal from the Competition Commissioner, who has himself or herself been briefed by the DG Competition officials dealing with the case, including the Chief Competition Economist and the review panel if they have been involved in the case, as well as by the Hearing Officer and possibly other Commission officials. See Wils, cited above, pp. 203 and 207.

[171] Wils, cited above, p. 222.

[172] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ (2001) L 162/21.

[173] *id*., recital 3.

[174] *id*., Article 4. See also Article 11 concerning the possible disclosure in advance of questions that the Hearing Officer would like to have clarified at the Oral Hearing and also the essential elements of statements to be made at the hearing. It is not clear if these powers have been exercised by Hearing Officers.

[175] *id*., Article 5.

[176] *id*.

[177] *id*., Article 8.

[178] *id*, Article 13. Article 13(2) permits the Hearing Officer to make observations on "the need for further information, the withdrawal of certain objections or the reformulation of further objections".

[179] *id*., Article 15.

the supervision of the disclosure of documents and access to the file. His general role is to ensure that the procedural rights of companies involved in competition investigations are upheld. Generally, the Working Group is satisfied with his work in competition cases. The fact that the Directorate General of Trade has recently created a similar position demonstrates that the Hearing Officer serves a useful purpose and helps to ensure an adequate review process.

Moreover, currently, the responsibilities of the Hearing Officer are quite wide since Article 3(3) of his mandate states: "*the Hearing Officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission*".

Nevertheless, it may be queried whether these reforms have gone far enough. In the Working Group's view, the Hearing Officer's mandate could in particular be widened to include greater *examination of substantive issues*.[180] Under this approach, instead of concentrating only on procedural matters, the Hearing Officer could check that the decisions taken have a sufficient evidential base.

There are also other areas where the role of the Hearing Officer could be taken further and institutionalised. For instance, the Hearing Officer could be formally entrusted with resolving issues related to the protection of legal privilege in the course of "*dawn raids*". During inspections, disagreements regularly arise between lawyers and competition officials as to whether a specific document is protected by attorney-client confidentiality. Some officials take the view that in these situations these documents should be placed in a sealed envelope that is then sent to the Hearing Officer, while others simply decide on the spot and might include the documents in the file.

In the Working Group's view, the idea that such disputes ought systematically to be decided by the Hearing Officer should be formally included in the Hearing Officer's mandate. A careful reading of the CFI´s Judgment in *Akzo*[181] suggests that this solution - expressly advocated by some of the interveners in that case - would better respect the parties' rights of defence. Following the said judgment, the Commission is obliged indeed to decide on whether a document is privileged or not without taking a mere "*cursory look*" at it. Only then, and once the undertaking concerned has been given the opportunity to appeal this tacit decision before the Community courts, the Commission will be able to examine its content.

Vesting the Hearing Officer with the formal competence to examine the content of any disputed document before adopting a decision would minimise the risk of errors which could be detrimental for the investigation of the case or for the rights of defence of the parties. Given that the Hearing Officer is not involved in the investigation of the case, such examination would not run counter the rights of defence of the parties. Moreover, the possibility that undertakings would use the "*sealed envelope*" procedure only to delay the procedure would be minimised, and the burden of the procedural limits set in *Akzo* alleviated.

A third possible area of reform would be to *publish the Hearing Officer's interim reports*. Currently, the reports prepared by the Hearing Officers following the hearing (other than the final report) are

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[180] See also "*The review of the Merger Regulation*". Thirty-Second Report adopted by the Committee on European Union of the British Parliament on 23 July 2002. The said Report discussed whether the Hearing Officer should intervene in substantive matters during Commission merger control proceedings. The report included comments from the British Government, UNICE, the American Chamber of Commerce, and several British law firms**.**

[181] Judgment 17 September 2007, *Akzo Nobel Chemicals Ltd v Commission*, T125/03 and 253/03, where the CFI recalled that that the Commission's decision rejecting a request for protection of a specific document and ordering the production of the document *"constitutes an act capable of being challenged by an action for annulment, coupled, if need be, with a request for interim relief, seeking, inter alia, to suspend its operation until the Court has ruled on the action in the main proceedings*". (para. 48) The same would be true in cases where the Commission seizes a document in respect of which LPP is claimed and places it on the file without putting it in a sealed envelope, "*that physical act necessarily entails a tacit decision by the Commission*" which "*should therefore be open to challenge by an action for annulment*". (para. 49) In those cases, the Court concluded that "[p]*rotection under LPP also requires the Commission, once it has adopted its decision rejecting a request under that head, not to read the content of the documents in question until it has given the undertaking concerned the opportunity to refer the matter to the Court of First Instance. In that regard, the Commission is bound to wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of those documents*". (para.88)

internal Commission documents and are not made available to the parties. This reduces transparency and may create the impression that their only purpose is to improve the Commission's case.[182] It has been recommended that the reports be provided to the parties (and also to the other Commissioners) [183].

Finally, as regards the Hearing Officer's independence, it is true that the Hearing Officer does not currently belong to DG Competition but instead reports directly to the Commissioner for Competition. He (or she) is however still a Commission employee and reports directly to the Competition Commissioner[184]. Moreover, generally, Hearing Officers were employed within the Competition Directorate General before taking up their positions and the personnel working for the Hearing Officer is attached to DG Competition. One radical way of improving the Hearing Officer's independence would be to make him *completely independent from the Commission*, with a role similar to that of the Advocate General at the ECJ[185], or at least to increase the Hearing Officer's independence by, for instance, attaching him to the President of the Commission to whom he would directly report. The Working Group believes that a totally independent status for the Hearing Officer would strengthen his status and ensure most guarantees of fairness in the procedure.

(iv) Increased role for the Legal Service and the Chief Competition Economist

Fourthly, the question arises as to the role of the Legal Service and of the Chief Competition Economist. The Commission's Legal Service is involved in all competition cases. Its opinion must be sought on any formal act to be taken by the Commission, including before the issuing of a statement of objections and the submission of a draft decision to the Advisory Committee. It will also attend the oral hearing.[186]

In addition, not only the Legal Service but also DG Competition's Chief Competition Economist and his team are also involved in the majority of competition cases considered by the Commission.

However, it is unclear to what extent these two bodies are actively involved in the most significant enforcement cases, particularly cartel cases under Article 81[187] and whether or not they provide effective checks and balances, as their working is largely internal. The role of these bodies should therefore be formalised and rendered more transparent.

(v) Improved procedure with increased respect for the rights of defence

Fifthly, some improvements could be considered with regard to the right of defence. As the ECJ has repeatedly confirmed, respect for the rights of the defence in any procedure which might lead to the imposition of penalties, notably fines, constitutes a fundamental principle of Community law, which must be observed not only in criminal proceedings but also in the context of administrative proceedings[188]. A number of improvements could in this regard be envisaged in Regulation 1/2003 (or in the Implementing Regulation).

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[182] House of Lords European Union Select Committee, 19th Report, *Strengthening the Role of the Hearing Officer in EC Competition Cases*, 19 November 2000, paras. 59–61.

[183] *id*. Note, however, that whilst the Select Committee also recommended greater independence for the Hearing Officer (including no longer being attached to the Competition Directorate General) (*id*., paras. 68 – 72), it did not recommend that the hearings be turned into either a judicial trial or an adversarial process: "the parties' access to justice should remain directly before the Community courts. It is sufficient that there is an independent court that is able to provide full safeguards against abuse by scrutinising the legality, rationality and fairness of the Commission's decisions": *id*., para. 69.

[184] Hearing Officer Terms of Reference, Article 2(2).

[185] This proposal was made by the American Chamber of Commerce in the Report adopted by the British Parliament cited above.

[186] Kerse and Khan, *op cit*. at 36–37.

[187] It is notable that most cartel cases, and some other antitrust cases, appear to have little or no economic input at all even where this would be of assistance in determining whether an infringement has been committed, whether by object or effect.

[188] Judgment of 13 February 1979, *Hoffmann-Laroche* v *Commission*, Case 85/76 paragraph 9, [1979] ECR 461; Judgment of

- *Statement of Objections*

The rights of defence requires that statements of objections contain the essential elements used against an undertaking, such as the facts, how those facts are defined and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it[189].

Following the traditional approach of the Community courts as regards the calculation of the fines, the Commission fulfils its obligation to respect the undertakings' right to be heard provided that it indicates expressly in the statement of objections the main elements of fact and law which might lead to a fine being imposed, such as the gravity and duration of the alleged infringement and the fact that the infringement was committed "*deliberately or negligently*". Indeed, by establishing the said elements in the statement of objections, the Community courts consider that the Commission provides the undertakings concerned with the necessary material to defend themselves against the imposition of a fine[190].

However, the Working Group believes that there is room for improvement as regards the elements of fact and law to be included in the statement of objections particularly on the *calculation of the fine*. The Commission indeed does not detail generally in the statement of objections the specific aggravating circumstances that it intends to apply to the undertakings concerned. This makes it difficult to defend against an allegation of, for instance, leadership, as the statement of objections does not establish in a separate section the facts or conducts taken into account by the Commission in this regard. The point is nevertheless critical for the companies concerned as, for instance, the fact that a company is found to be a "*ringleader*" or "*instigator*" might result in the fine imposed on it being increased by up to 50%. Similarly, the Commission often does not announce in the statement of objections that it intends to apply to the concerned company the aggravating circumstance of recidivism. However, the application of the circumstance can provoke controversies as to its scope and the characterisation of the previous decisions that the Commission might use to sustain it.

Whilst most of the elements of fact used by the Commission to prove that a specific aggravating circumstance is applicable are indeed normally present in the statement of objections, they are often disparate, no connection is made between them and they are not properly defined in any particular way by the Commission. It is in practice only at the decision stage that such elements are brought together in a single section and the fact that a particular company is alleged to have incurred in a specific aggravating circumstance becomes apparent. Most of the time, therefore, companies have to second-guess the elements that they fear the Commission might use to calculate the fine in the decision.[191]

In order for the addressee of the statement of objections to be allowed an effective defence on the calculation of fines to be made in the decision, and specifically on the applicability of aggravating circumstances, the Working Group accordingly believes that Regulation 1/2003 should be

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2 October 2003, *Arbed* v *Commission*, Case C-176/99 P, paragraph 19, [2003] ECR I-10687; judgment of 16 December 2003, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, Case T-5/00 and T-6/00, paragraph 32, [2003] ECR II-5761; and judgment of 18 December 2008, *Sopropé*, Case C-349/07, paras. 26 and 36.

189 See Judgment of 2 October 2003, *Arbed* v *Commission*, Case C-176/99 P, paragraph 20, [2003] ECR I-10687.

190 Judgment 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, Case C-189/02 P, paragraph 428, [2005] ECR I-5425; see also Judgment 20 March 2002, *LR AF 1998* v *Commission*, Case T-23/99 [2002] ECR II-1705, paragraph 199 and the case law cited; Judgment of 15 June 2005, *Tokai Carbon* v *Commission*, Case T-71/03, paragraph 118 and paragraph 139; see also, to that effect, Judgment 7 June 1983, *Musique Diffusion française and Others* v *Commission*, Joined Cases 100/80 to 103/80, paragraph 21 [1983] ECR 1825.

191 In *Hoechst*, for instance, the Commission considered that the company had been the "*leader*" of the cartel but it did not establish this clearly in the statement of objections. On appeal, the company claimed that its defence rights had been violated before the CFI, who then reduced the fine on the basis that the statement of objections was not sufficiently precise as regards the allegations of leadership[191]. In short, the CFI considered that even though the statement of objections did contain the facts required to show that an aggravating circumstance might exist with respect to Hoechst, the Commission did not define them sufficiently precisely to enable the company to defend itself properly.

amended to as to require the statement of objections to detail with more precision than currently the Commission's intention to apply them and the elements that characterise the company, instead of scattering them throughout the document.

- Cross-examinations

Currently, a good part of the fact-finding process undertaken by DG Competition in antitrust proceedings relies on statements provided by leniency applicants. These applicants strive to provide the Commission with more "*added value*" than their competitors in the leniency race. The Commission might often be tempted to accept these declarations at face value and to elaborate on them in order to prepare requests for information addressed to the rest of the companies that are alleged to have participated in an antitrust infringement. However, these companies do not have a procedural channel to enable them to challenge directly the information provided by leniency applicants to the Commission. They find themselves subject to different allegations, yet they can not challenge the companies making allegations against them.

Under the present rules, where companies attempt to "*cross examine*" their counterparts in the oral hearing, there is no obligation to answer, and the answers to these questions are normally evasive and not properly prepared.

The Implementing Regulation describes the purpose of an oral hearing simply as "*the opportunity for the [addresses of a Statement of Objections] to develop their arguments*".[192] The one possibility is to ask questions to witnesses, if invited to do so by the Hearing Officer.[193] As a result, these hearings are not always well suited to testing the merits and evidence of each party's position: hearings generally become "*set piece*" events, with little or no ability to challenge witnesses. This is particularly critical when to prove its case the Commission relies heavily upon the statements of immunity or leniency applicants (often effectively made anonymously by the applicant's lawyers in an oral corporate statement) or other statements provided by witnesses. This may not be entirely compatible with the current case-law under which the competent Institution must examine carefully and impartially all the relevant elements of the case[194].

In order to make the process more transparent and comply more fully with the principle of equality of arms, the Working Group believes that it would be desirable for the companies subject to the investigation to be allowed to submit questions to be addressed to other companies part of the same investigation or even to third parties.

- *Time limits*

The Community courts have recognized as a general principle of European law that the Commission should adopt a decision concluding an administrative procedure relating to competition matters within a reasonable period of time [195]. Indeed, Article 6 of the ECHR provides not only that the decision be taken "*by a independent and impartial tribunal*", following a "*public hearing*" but that it be done so "*within a reasonable time*". Where this principle is infringed, this may not only lead to a mitigation of the fine but even to the annulment of the decision when the applicant proves the violation of his rights of defence.

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[192] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ (2004) L 123/18, Article 12.

[193] *id*., recital 13. See also Cases C-204/00 P etc *Aalborg Cement v Commission* [2004] ECR I-123, in which the Court of Justice held that the Commission is under no obligation to afford the undertakings concerned the opportunity to cross-examine the author of an incriminating document.

[194] Judgment 24 January 1992, *La Cinq* v *Commission*, Case T-44/90 paragraph 86, [1992] ECR II-1 and Judgment 20 March 2002, *ABB Asea Brown Boveri* v *Commission*, Case T-31/99 paragraph 99.

[195] Judgment of 22 of October 1997, *SCK y FNK v. Commission*, Case T-213/95 and T-18/96, para 56, ECR II-1739, and Judgment of 9 of September 1999, *UPS Europe v. Commission*, in Case T-127/98, para 37, ECR II-2633.

However, in practice, the Community courts have taken a particularly lenient line with the European Commission on this point[196]. In fact, it has been the Commission itself that has considered the consequences of "*excessive prolongation*" of the proceedings. In the *FETTCSA* decision, for example, the Commission took into account the fact that the time it had taken to deal with the case had exceeded a reasonable term when reducing the fine by 100,000 euros (the reply to the statement of objections was dated September 16, 1994 and the final decision was adopted on May 16, 2000)[197].

Greater respect for the principle of legal certainty and sound administration could easily be achieved by the Commission *establishing clear deadlines in the administrative process*. Complainants and parties of the investigation suffer damages derived from the excessive prolongation of the proceedings. Indeed, complainants might wait for the adoption of a Commission decision for years while this decision might finally declare that their complaint does not contain "*sufficient Community interest*". Had they been aware of this outcome earlier, they might not have lost precious time before bringing legal actions before national courts. By the same token, companies subject to a Commission investigation might suffer damage derived from the uncertainty of whether they may be imposed a substantial fine by the Commission. These companies might refrain from making investments that depend on the level of the fine. Furthermore, the employees with responsibility in the conduct investigated need to know within a reasonable time whether their conduct was illegal and the sanction that will be imposed on the company. This is the reason why in some jurisdictions national competition laws provide for a fixed deadline to conclude the investigation[198]. DG Competition itself is used to work with deadlines for instance in merger cases.

In the Working Group's view, deadlines ought to be laid down in the basic regulation (in the same way as they are laid down in the Merger Regulation) and this, at least, for the following situations:

- from the adoption of the statement of objections until the adoption of a final decision, and

- from the filing of the complaint until the adoption of the decision.

Indeed, there is currently no sufficient incentive for the Commission to finish its investigations on time. According to the calculations of an experienced official from the Commission's Legal Service, over the entire period 1999-2007, proceedings leading to cartel decisions took an average of 46.5 months, from the moment the Commission was first informed of the infringement until the adoption of the decision[199]. There is therefore significant room for improvement.

- *Public hearings*

As indicated above in Section C.2. (ii), the Working Group believes that in order to comply with the requirements of the ECHR, another improvement of the Community procedure might consist in making hearings public (or at least those parts of hearings that do not give rise to confidentiality problems for firms). At present, the public has normally no right to attend hearings before the Commission, let alone the press. This is in marked contrast to hearings before the Community

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[196] The reasonable character of the procedure's duration can be evaluate case by case taking into consideration the specifics circumstances and the facts of every cases, giving attention to the different stages of the procedure follow by the Commission, the interest's behavior during the procedure, and as well the complexity of the case and the importance for all interest parties. Judgment 22 of October 1997, *SCK y FNK v. Commission*, Cases T-213/95 and T-18/96, para. 57, ECR II-1739.

[197] Decision of the Commission 16 of May 2000 related to a procedure on article 81 TEC, case IV/34.018, Far East Trade Charges and Surcharges Agreement (FETTCSA), notified with number C(2000) 1170, DO L 268/1 de 20.10.2000, confirmed by Judgment 19 of march 2003, CMA *CGM and others v. Commission*, Case T-213/00, Rec. p. II-913.

[198] See Article 36 of the Spanish Competition Act, of 3 July 2007, which establishes that the maximum deadline to notify a Decision that puts and end to a competition proceeding will be 18 months from the moment that the Spanish NCA formally opens the administrative file.

[199] E.Gippini Fournier – Community Report FIDE 2008 (final), The Modernization of European Competition Law :First Experiences with Regulation 1/2003

courts, which are public. In the Working Group's view, such a reform might force the Commission to treat the submissions made by firms during the oral hearing with a greater degree of rigor and objectivity.[200]

- *Clarifying the status of all contacts between the Commission and the parties*

Also, the status of the contacts between the parties and the Commission is an issue requiring discussion and reform. This question is particularly sensitive if the Commission is –as currently the case– *"first judge"* in the matter. Indeed, contrary to prosecutors, it is normally inconceivable for judges to have *ex parte* discussions with individual parties to a case. Moreover, the case-law requires the Commission to examine carefully and impartially all the relevant elements of the case[201].

Clearly, the respect of rights of defence requires that the status of any communication between the parties and the Commission be clarified. At the very least, the obligation to keep a record of every meeting, telephone call and e-mail exchanged within any administrative procedure needs to be laid down in great detail.

E. THE WAY FORWARD AS REGARDS THE SYSTEM OF SANCTIONS

(i) Introduction of detailed principles on the setting of fines in Regulation 1/2003

In the light of the comments made above in Section C.3 and in order to comply with Article 7 ECHR, the Working Group believes that reforms should not only concern *procedures* but that Regulation 1/2003 should be amended to incorporate detailed principles governing the *setting of fines*.

The content and scope of these rules would have to include at least a detailed list of the specific criteria to be taken into consideration to determine the level of the fine similar to those existing currently only in Commission guidelines. As stated by the ECJ[202], "*a penalty even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis*". This requires accordingly a much more precise legal basis for fines than currently the case. Among the issues which could be envisaged are (i) the introduction of a maximum amount of the fine in absolute value (as is the case for criminal sanctions under national laws) and (ii) a graduation of that maximum amount according to the gravity of the infringement, with the possibility of distinct maximum amounts applicable respectively to less serious, serious and very serious infringements.

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[200] In order for this reform not to complicate oral hearings more than strictly necessary, one might want to distinguish between three levels of hearings. The first level would be open to all parties and the general public. At this level, firms would make whatever submissions they think appropriate and supply whatever information they want which raise no confidentiality issues. At the second level, access would be reserved to the parties investigated and to third parties with a legitimate interest, as currently occurs. Finally, the third level would be reserved to those undertakings that wish to make submissions solely before the Commission for sufficiently justified confidentiality reasons, which is also the case at present.

[201] Judgment 24 January 1992, *La Cinq* v *Commission*, Case T-44/90 para 86, [1992] ECR II-1 and judgment 20 March 2002, *ABB Asea Brown Boveri* v *Commission*, Case T-31/99 para 99. This matter has created problems in the past. For instance, in *Bavarian Lager* (Judgment 8 November 2007, *Babarian Lager Company v. Commission*, Case T 194/04), the claimant, an importer of German beer, demanded that the Commission disclose the names of participants in a meeting between the Commission, the UK authorities and the *Confédération des Brasseurs du Marché Commun* relating to exclusive purchasing contracts. The Commission made known some, but not all, of the information requested, arguing that Bavarian Lager had not established that the disclosure of individuals' names was needed to protect its interests. Bavarian Lager applied to the CFI for the annulment of this decision. The CFI held that, in this case, disclosure of the names of representatives of a collective body would not affect the protection of the privacy and integrity of the individuals concerned. The CFI therefore annulled the Commission's decision. Again, in *Hoechst* (Judgment 18 June 2008, *Hoechst*, Case T-410/03), Hoechst requested the Hearing Officer to allow access to the internal documents relating to the telephone contacts between the Commission and another company and asked him to investigate those telephone contacts. In the appeal before the CFI, it was found that during these contacts one of the officials responsible for the case had stated that "*fair warning would be given if another company would look like overtaking Chisso [the immunity applicant] under the requirements of [the Leniency Notice*"]. These facts led the CFI to conclude that, in this case, the Commission failed to have regard to the principles of sound administration and equal treatment.

[202] ECJ, 25 September 1984, Case 117/83, *Könecke v. Balm*, [1984] ECR 3291, para. 11.

In addition, aggravating and mitigating factors should also have a legal basis and the principle of non-retroactivity of new rules when they are introduced should ideally also be introduced explicitly in Regulation 1/2003.

Finally, contrary to its current practice the Commission should determine in what way an undertaking's conduct was either "i*ntentional*" or "*negligent*" before establishing its liability for an infringement of competition law. This would require the Commission to provide more accurate criteria for defining intentional and negligent conduct. Indeed, the principle of proportionality of fines clearly requires the sanctions for negligent conduct to be less severe than the sanctions for intentional conduct.

More generally, it is essential that criminal law sanctions be proportionate to the gravity of the infringement. Therefore the fines imposed by the Commission must be strictly correlated to the seriousness of the breach of competition rules (damages, benefits obtained, etc.).

(ii) Clarification of the principles governing liability for competition law infringements

(a) Company liability for employees and consideration of compliance efforts of an undertaking

As indicated above, the principle of individuality of sanctions makes it difficult to accept that a company should be automatically liable for its employees. In *Volkswagen*[203], the ECJ held that it is not necessary for the Commission to identify the persons whose acts reveal the intentional or negligent nature of the infringement. The ECJ held that identification is not required because fines are not of a criminal nature. However, as indicated above, that does not appear to be correct. The Working Group therefore believes that the Commission should first identify the individuals who participated in the infringement. The company's liability would then be established either if the employees are statutory representatives of the company or if they have not been insufficiently supervised by the statutory representatives.

Equally importantly, the existence of corporate *compliance programs* should be taken into consideration for this assessment and should either prevent the attribution of the employee's misconduct to the company or at the very least guarantee a total or partial immunity from fines. Indeed, currently the Commission does not take into consideration compliance efforts when setting the fines contrary to other competition authorities throughout the world[204]. These other authorities not only promote the introduction of compliance programmes within companies but also take them into account when assessing the company liability and when setting the fines. In the European Union where the Commission and national competition authorities apply the same substantive rules and belong to and cooperate within the European Competition Network, there is an obvious need for a convergent approach on compliance programmes.

The Working Group strongly believes that compliance programmes should be encouraged as they are instrumental in ensuring greater respect for the law, discovering possible infringements and terminating them.

However, in the current system, companies are penalised if they introduce compliance programmes. Indeed, compliance programmes require severe sanctions against employees breaching antitrust rules. Therefore, it is much more difficult to convince employees which participated in infringements to cooperate in disclosing details and therefore benefiting from the leniency programme.

If it is difficult in such circumstances to hold undertakings liable for their employees, one could envisage the adoption in European competition law of sanctions against the responsible individuals (as they exist in many legal systems throughout the world). It is believed that such sanctions

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[203] ECJ, 18 September 2003, Case C-338/00 P, *Volkswagen v. Commission*, [2003] ECR I-9189, paras. 94 et seq.

[204] This is in particular the case in the US, Canada, Australia, United-Kingdom and more recently in France.

against individuals for violations of competition law are more efficient than sanctions against undertakings.

(b) Parent liability for subsidiaries

For the same reasons, specific rules ought also to be introduced in Regulation 1/2003 on the liability of parent companies for their subsidiaries. It is thus necessary to identify clearly which legal entities belonging to the group can be held liable for the infringement of competition rules. In this regard, the principles governing the liability of parent companies for breaches of competition law committed by their subsidiaries should be circumscribed on the basis of the principles of EC Members States' national laws for parent-subsidiary liability. Ownership is clearly insufficient to establish such a liability. The parent company should only be liable it is in charge of the market behaviour of the subsidiary or gives instructions to it and also if it has infringed its duty to exercise control upon its subsidiary.

(iii) Modification of the legal framework and implementation of the leniency programme

Beyond the more basic questions as to the legality of leniency policies raised above in Section C.3., it appears necessary from an institutional perspective to incorporate at the very least the provisions on leniency in Regulation 1/2003 so as to remedy the current lack of legal basis for the fines reductions/immunities granted by the Commission, as is the case in certain Member States (such as France).

Moreover, from a substantive point of view, the Community courts' review of the Commission's decisions granting reductions should be reinforced, and the courts should also review with more caution the contributions of leniency applicants.

Finally, in order to reinforce the sincerity of the contributions, specific measures and sanctions should be introduced in case of abusive and/or false claims.

F. CONCLUSIONS

Fines imposed by the Commission in competition proceedings have increased dramatically in the last decade. Such a development and legal cannot go without an adaptation of the procedural and legal safeguards provided to companies accused of infringements. The effective enforcement of the law has to go hand in hand with the rights of the defence and the requirements of justice and fairness as laid down in Article 6 ECHR. The reforms which have been suggested by this Working Group become even more compelling in view of the accession of the Community to the ECHR following the entry into force of the Lisbon Treaty. The Community should make sure that its proceedings are "*Article 6 proof*" before acceding to the Convention if it wants to avoid such a sensitive issue to be brought to the ECtHR.

The Working Group therefore suggests that the enforcement system be improved by separating strictly investigative powers from decision making powers. Ideally, adjudicative powers should be given to the Community courts themselves, a solution which in the Working Group's opinion would not require any change in the Treaty but which could be based on Article 83(2)(d)EC.

It is the opinion of this Working Group that only such a solution would ensure full compliance with the requirements of the Convention, especially article 6 ECHR. Ensuring that full judicial review (as interpreted by the ECtHR) is provided by the Community courts would be an improvement but would not be sufficient to comply with the Convention.

The Working Group considers however also that relatively more limited improvements might already be made in order to increase the rights of the defence. These would include for example:

- to ensure a formal separation within DG COMP of the investigative and decisional powers;

- to improve and formalise the work of peer review panels;

- to increase the role of the Hearing Officer;

- to increase and formalise the role of the Legal Service and of the Chief Competition Economist;

- to allow for cross-examination of the evidence provided by leniency applicants;

- to organise public hearings;

- to clarify the status of all contacts between the Commission and the parties;

- to impose time limits to the Commission for taking a decision imposing sanctions.

With regard to the fines specifically, the Working Group suggests the following improvements:

- to state more clearly the elements that the Commission intends to take into account for the calculation of the fine in the statement of objections;

- to introduce detailed principles on the setting of fines in Regulation 1/2003 which ensure a better correlation between the level of the fines and the seriousness of the infringement;

- to clarify the principles governing liability for competition law infringements, notably by taking into account compliance efforts of undertakings and by ensuring that the rules regarding parent liability for subsidiaries are in conformity with the principle of individuality of penalties;

- to modify the legal framework and the implementation of the leniency programme.