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EU Competition Law and EU Charter of Fundamental Rights: An Evolving Partnership

A foreword to the E-Competitions Special Edition "ECHR & Competition law - an overview of EU and national case law"

ECHR, SANCTIONS / FINES / PENALTIES, RIGHTS OF DEFENCE, CRIMINAL SANCTIONS, FOREWORD, PRINCIPLE OF PROPORTIONALITY, NE BIS IN IDEM, COMPETITION POLICY, PRIVACY

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1. The Protection of Fundamental Rights in Competition Law

Fundamental rights are an integral element of the rule of the law, and any system which purports to respect the rule of law must be seen to respect the fundamental rights of the individuals subject to it. At this particular moment, with the COVID-19 pandemic, fundamental rights are an issue of special debate and concern. [*1*]

The European Union (the "EU") approach to fundamental rights is somewhat complex. The Member States are all subject to the system of the European Convention on Human Rights ("ECHR") and the European Court of Human Rights ("ECtHR"). [*2*] The EU Courts first referred to the ECHR in 1974, and have since then repeatedly stated that the ECHR enjoys "special significance" [*3*] in the EU. The relationship is now governed by Article 6(3) [*4*] of the Treaty on European Union (the "TEU") [*5*] which states:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The rights accorded under the ECHR therefore have been and are important in determining fundamental rights in the EU. The relationship between the EU legal order and the ECHR legal order has seen some tension over the years, however. The EU is not a party to the ECHR. There has long been the view that the accession of the Union to the ECHR would greatly reduce the risk of inconsistencies between ECtHR case law and the EU Courts' case law, and provide a means of redress if they did occur, by making the Union and its institutions subject to the jurisdiction of the ECtHR. [*6*] However, the European Court of Justice ("ECJ") concluded in Opinion 2/94 that the EU did not have competence to directly accede to the ECHR. [*7*] Even after the amendment in the Treaty of Lisbon, the proposed draft accession agreement of the EU to the ECHR was declared incompatible with the TEU in Opinion

2/13 [*8*] in a largely unpredicted decision which sent shock waves rippling around the legal community. [*9*] As a result, there are two parallel but intertwined legal orders, but there is no direct route to the ECtHR in the EU system for the review of EU acts.

Within the EU legal order, other developments occurred. The EU Charter of Fundamental Rights ("Charter") [*10*] was promulgated in 2000, in an effort to increase the visibility of these rights. The Charter was a non-binding, political document. [*11*] However, in 2009, the Treaty of Lisbon introduced clear binding legal force for the Charter.

Article 6(1) of the TEU states:

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

The Charter was intended "*to bring together all the rights found in the case law of the Court of Justice of the EU, the rights and freedoms enshrined in the European Convention on Human Rights, other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.*" [*12*] The Charter provides that the meaning and scope of the rights that correspond to those guaranteed under the ECHR are to be determined by reference to the text of the ECHR and also the case law the ECtHR; it is also clear from the Charter that while the level of protection guaranteed by the Charter may not be lower than that guaranteed by the ECHR, it may well be more extensive. [*13*] The effect of declaring the Charter to be a source of primary EU law was considered to "*send a clear message to all institutions and citizens within the Union about the EU's commitment to uphold the rights set out in the Charter*". [*14*]

In 2019, the 10th anniversary of the Charter becoming binding as source of primary EU law was celebrated. As the President of the ECJ, Koen Lenaerts, observed on that occasion, since the Charter has become legally binding, there is not only a quantitative shift in the case law of the EU Courts, in that the Charter is invoked more often, but also a "*qualitative change, going well beyond matters that concern the regulation of the internal market. The Charter as a legally binding text of a constitutional nature has given rise to a series of seminal judgments […] that have placed the protection of fundamental rights at the core of the European Legal Order.*" [*15*] The reference to the protection of an unalienable "essence" of the rights and freedoms in the Charter in Article 52(1) thereof ought to remind us that "*the core values are absolute*". [*16*] In light of this reference point, the EU Courts are able to develop a more autonomous interpretation of the Charter, potentially departing from the ECtHR's case law, while not providing any lower protection than that provided by the ECHR.

This is therefore an apt moment to consider the impact of the Charter on EU competition law.

EU competition law is a special beast. In a procedure relating to the infringement of EU competition rules, the European Commission ("Commission") combines the functions of investigator, prosecutor and decision-maker. [*17*] The Commission has the power to choose which matters to open, to search premises and question undertakings and individuals, to find infringements and to impose fines on undertakings that have intentionally or

negligently infringed these provisions; fines which may amount to ten per cent of the worldwide turnover of the undertaking or association concerned in the preceding business year. [*18*] Fines imposed in the recent past have included a total of more than €8 billion on Google [*19*] in respect of unilateral behaviour; for cartel behaviour, the highest fines to date have been of €752.6 million, €880.5 million and €1 billion respectively for Daimler, Scania and DAF in the truck cartel. [*20*]

For a period in competition law circles, there was vigorous discussion as to whether the procedures underlying the enforcement of EU competition law could be said to meet the requirements of the ECHR. [*21*] Despite the fact that the system of enforcement of EU competition law is established as an administrative system, the fines which the Commission may impose are (as can be seen from those quoted above) of a penal nature, and therefore involve a criminal charge. [*22*] It is well established that to satisfy Article 6(1) ECHR, the tribunal determining the "criminal charge" must not only be independent and impartial, but must also have full jurisdiction to examine and determine all questions of fact and law relevant to the dispute before it. The question is how far the EU system for judicial review of decisions by the Commission imposing fines in competition cases is compatible with Article 6(1) ECHR. Article 263 of the Treaty on the Functioning of the European Union ("TFEU") gives the General Court ("GC") power to review the legality of a Commission decision under particular grounds, [*23*] and Article 261 TFEU grants full jurisdiction to review the Commission's fine. The ECtHR was given an opportunity to consider the Italian system of competition law, which mirrors that of the EU, and concluded that this was compatible with Article 6(1). [*24*] The EU Courts also had an opportunity to consider the question, in two cases brought before it [*25*] regarding the mirror image provision included in Article 47 Charter, and the ECJ concluded:

"The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter." [*26*]

This case law – as unsatisfactory as it may seem – governs the debate for the moment. [*27*]

Another particular aspect of EU competition law relevant in considering fundamental rights is the fact that it is addressed to "undertakings" – i.e., companies and associations. It has, however, long been accepted that fundamental rights are not only for individuals, but belong to legal persons, too. [*28*] In particular, there is no issue that legal persons are entitled to the protection of their fundamental rights in EU competition law proceedings. [*29*]

The considerable powers exercised by the Commission clearly require the application of checks and balances. Indeed, Recital 37 of the preamble to Regulation 1/2003 states:

"[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the [EU] [and] [a]ccordingly, this Regulation should be interpreted and applied with respect to those rights and principles." [*30*]

One question is whether, since the Charter has entered into the EU's binding constitutional apparatus, there has been a change in how the Commission's powers – or those of the other institutions with a role to play in competition law – have been interpreted by the EU Courts.

2. Statistical Analysis on the use of the Charter in Competition Cases and Preliminary Conclusions

In order to address this question, we reviewed the use of the Charter in competition law cases brought before the GC and the ECJ from 1 January 2000 until 1 December 2009. This covers the period from when the Charter was formally promulgated to the entry into force of the Treaty of Lisbon, when the Charter became an integral part of the EU legal order, and after that date until now. [*31*] The methodology was the following: the starting point was the Court's online case law search engine, "Curia". [*32*] The complete period under review was 1 January 1990 to 30 April 2020. The subject matter was limited to competition law matters where (i) the Charter was referenced in the grounds of the judgment or the operative part of the judgment, or (ii) the ECHR was referenced in the grounds of the judgment or the operative part of the judgment. The review also included cases where an argument explicitly based on the Charter or the ECHR was put forward by the parties. Orders of the Court and Preliminary References [*33*] were not included. The review covered competition cases putting forward any article of the Charter (or the ECHR), focusing in particular on those raised most often in competition cases: Charter Articles 7, 41, 47, 48, 49 and 50.

Our review of the jurisprudence, in short, shows that there has been a substantial increase in the use of the fundamental rights arguments included in the Charter since the Charter gained primary legal status with binding force in 2009. The number of cases where a Charter-based argument was brought before the GC grew by 709%, from 23 to 186 cases. At the ECJ level, the number of cases with Charter arguments grew by 1360%, from five to 73 cases.

Overall, it is clear that in the competition law sphere, companies (or their legal counsel) are taking their rights seriously. [*34*] More arguments are being raised relying on the fundamental rights conferred by the Charter now that it is binding than before, when it was a non-binding measure. We did not wish to assume that prior to 2009, and in particular from 1 January 2000, all cases where arguments based on the rights conferred by the ECHR were made would also include Charter arguments. Therefore, we verified the number of cases prior to 2009 raising ECHR arguments in isolation, compared to the cases brought afterwards, and found support for this proposition. [*35*]

A general trend has been identified of a movement towards cases relying on the independent application of the Charter without referring to the equivalent article in the ECHR. [*36*] However, we have not yet seen this reflected in competition cases to any meaningful extent. [*37*]

But the real question is of course: what are the chances of success in bringing a fundamental rights argument in a competition case? Has this increased with the advent of the binding nature of the Charter?

Success rate of cases brought with Charter arguments	**2000-April 2020**	**2000-2009**	**2009-April 2020**
GC+ECJ in total	14%	4%	15%
GC	16%	0%	18%
ECJ	8%	20%	7%

In the GC, successful arguments using the Charter were made in zero out of the 23 cases brought prior to 2009, and 34 out of the 186 cases brought since it became binding, with the success rate moving from 0% to 18%. At ECJ level, successful arguments using the Charter were made in one case out of the five cases brought prior to 2009, and five cases out of the 73 cases brought since it became binding, so the success rate has moved from 20% to 7%.

Looked at overall, the chances of a Charter argument being successful seem frankly quite low, less than 20% for cases brought before the GC, and substantially lower at less than 10% for the ECJ. Taking the two courts together, our review suggests a 15% rate of success in the cases brought since the Charter became binding.

These results are somewhat discomforting. We would have expected a higher success rate at the GC compared to the ECJ. The GC is the court charged with carrying out a full review of the law and the facts, and is therefore more likely to consider due process arguments with more depth and vigour than the ECJ. The increased attention paid by the Commission to due process with the publication of Best Practices [***38***] and the enhanced role of the Hearing Officer [***39***] might have improved the conduct of the administrative process overall, but there has been an increasing number of appeals on due process grounds in the last 10 years. [***40***] The experience of practitioners is that the Commission services' procedures have clear imperfections, and in some cases substantial problems, and these can have important consequences in light of the magnitude of fines which are now systematically imposed by the Commission. Our results show that the GC does not often have sympathy for such arguments when brought in appeals before it, however. That the ECJ has even less sympathy for arguments which have already been rejected by the GC is unsurprising.

On the other hand, we do find it surprising that at an ECJ level we saw a decrease in the rate of successful reliance on Charter arguments after the Charter became binding – one successful case out of five brought (20% success rate) compared to five successful cases out of 73 brought (7% success rate). However, it may be not be very meaningful to rely on the statistics here, since the baseline of cases brought when the Charter was not binding is so low. [***41***]

We also looked at the cases which were brought on the basis of ECHR arguments alone prior to 2009, and we conclude that on the whole, there is a greater chance of success in litigation relying on the basis of the Charter than there was previously relying on the ECHR "mirror arguments". [***42***]

The overall conclusion of our analysis therefore supports our initial hypothesis: there is a greater chance of successfully relying on fundamental rights arguments in competition cases now that the Charter is a binding element of EU constitutional law than there was previously. Our findings show that the likelihood of such an argument successfully swaying either the GC or the ECJ is not high, however. Nevertheless, our experience is that where there is a good argument to be made on the basis of a fundamental right, it is definitely worth making: the Court may be persuaded, and annulment of a decision may result. [***43***] The fact that an argument may be difficult to win does not negate the value of making it where there are reasonable grounds. [***44***] While clearly fundamental rights are also included in EU competition law secondary instruments, [***45***] or recognised by the EU Courts as general principles of EU law, [***46***] the importance of having fundamental rights so clearly set out in the primary Treaties of the EU cannot be overemphasised. The Charter might be likened to the lighthouse sending out a guiding light to illuminate the environment around it; it provides a beacon of stability, clarity and authority to measure the procedures and the acts adopted by the Commission in the decisions it takes affecting individuals, legal and natural.

3. Key Rights guaranteed by the Charter relevant to EU Competition Law and

Selected Recent Cases

Although our statistical analysis covered all Charter rights, this article will focus on a number of rights set out in the Charter which have been shown to be of special significance in competition law cases: *Article 7*, on the right to privacy; *Article 41*, on the right to good administration (including the right to be heard and the right of access to file); *Article 48*, on the right to the presumption of innocence and protection of the rights of defence; *Article 49*, on the principles of legality and proportionality of criminal offences and penalties; and *Article 50*, on the right not to be tried or punished twice for the same offence.

Other important rights protected under the Charter and potentially relevant in competition proceedings are not covered in this article, either because they are rarely invoked, or can be regarded as an "umbrella right" covering various more specific procedural claims. For example, Article 42 on the access to documents appears to have been used as a basis of an argument in competition proceedings in only two cases – in both, unsuccessfully. [***47***] Cases where the applicant seeks to rely on access to file are likely to be based on the more specific applicable legislation such as the Commission Notice and Council Regulation (EC) No 139/2004. [***48***] Article 47 on the right to an effective remedy and to a fair trial was relied on in a significant number of competition cases; [***49***] however, it is often referenced in relation to a claim for "effective judicial protection" which may itself encompass a multitude of separate procedural rights. For example, while in *FSL*, [***50***] *Alcogroup [51]* and *British Airways [52]* Article 47 was invoked directly in support of the requirement to ensure "effective judicial protection", in *Alcogroup* Article 47 was also used to support an argument on the duty to state reasons [***53***] and in *Ferriera Valsabbia* Article 47 was relied on in support of the right to receive a judgment within a reasonable time. [***54***] Therefore, relying on the statistical findings derived from the application of the statistical research methodology described above would not have allowed us to infer the true picture of the use of Article 47.

3.1. Article 7 Charter – Right to privacy

We outline below each relevant provision, our statistical analysis relevant to that provision, and some recent cases which indicate how the provision has been used. [***55***]

Article 7 provides:

"Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications."

The right to privacy has gained increasing prominence in the competition jurisprudence of the EU Courts. It is important from a procedural perspective, specifically in the context of "dawn raids" by the Commission under Article 20 Regulation 1/2003. The role of the right to privacy is increasingly becoming a substantive issue in competition policy, but that is outwith the scope of this article. [***56***]

The right to privacy enshrined in Article 7 Charter is a general principle of EU law. [***57***] Article 8 Charter on the protection of personal data is grouped under the heading of the right to privacy, although its precise relation to Article 7 is unclear. [***58***] Article 8 ECHR contains similar wording to Article 7 Charter, and the Explanations of the Charter stress that Article 7 Charter "*corresponds*" to Article 8 ECHR. [***59***] It follows, considering that the right to privacy is not absolute, that the possible limitations to the right referred to in Article 8(2) ECHR are also available for Article 7 Charter, in addition to the general exception clause in Article 52(1) Charter. [***60***]

While it is clear that Article 8 ECHR also applies to economic actors, [*61*] the ECtHR found that the exceptions under Article 8(2) ECHR "*might well be more far-reaching where professional or business premises were involved*". [*62*] Therefore, it also follows that the protection for companies under Article 7 Charter is more limited than that enjoyed by individuals in a personal capacity. [*63*] Nonetheless, based on Article 52(3) Charter, there is nothing to stop Article 7 Charter being interpreted so as to allow a "*more extensive protection*" than the ECHR equivalent.

(a) Statistical analysis

Right to privacy arguments were included in 15 competition law cases in the period 1990-April 2020, but none were successful.

In the period 1990-December 2009, the right to privacy was invoked in only four judgments: in 1999, [*64*] 2002, [*65*] and 2003, [*66*] dealing with an Article 8 ECHR argument, and in 2006 responding to an Article 8 Charter argument [*67*] – the only reliance on this article in competition proceedings so far. The first time Article 7 Charter was raised in a competition judgment was in 2012, after which it was referred to on an almost annual basis up to 2019, with the exception of 2014 and in a peak of three cases in 2018. [*68*] Arguments relying on Article 8 ECHR largely developed in parallel with the invocation of Article 7 Charter. [*69*] In total, 11 cases with an argument relating to the right to privacy were decided in the period from December 2009-April 2020.

Out of the 15 relevant cases, only four represented an appeal before the ECJ. [*70*] Article 8 ECHR and Article 7 Charter were invoked together in all but four cases: in judgments in 1999, [*71*] 2002, [*72*] and 2003 [*73*] the reference to the ECHR was stand-alone, while in a case brought in 2014 [*74*] – for the first and so far only time, Article 7 Charter was invoked in a competition law case without support from Article 8 ECHR.

Therefore, it seems that the elevation of the Charter into a primary EU legal instrument in December 2009 has had a positive impact on the attractiveness for applicants to rely on Article 7 Charter (usually with Article 8 ECHR) before the EU Courts. As yet, the general trend which has been identified of a movement towards the independent application of the Charter without resorting to the ECHR [*75*] has been seen only once as regards the right to privacy.

(b) Recent cases referring to Article 7 Charter

Some of the most relevant judgments to date [*76*] on the right to privacy from a procedural perspective include *Silec Cable*, [*77*] *České dráhy*, [*78*] *Nexans*, [*79*] *Evonik*, [*80*] *Goldfish*, [*81*] and *Deutsche Bahn*. [*82*]

(i) Silec Cable

This case was noteworthy in that in its appeal to the ECJ, Silec Cable contended that the GC had infringed its fundamental right to the protection of confidential information enshrined in Article 7 Charter and Article 8 ECHR, through the publication of a communication between Silec Cable and another undertaking in the judgment under appeal. The Commission had accepted Silec Cable's claim for confidential treatment of that communication, and any reference to it had been redacted from the non-confidential published version of the contested decision. [*83*]

The ECJ rejected the argument presented by Silec Cable. It noted that "*such an infringement, even if it were established, would at the most be capable of giving rise to the non-contractual liability*" of the EU under Article 340(2) TFEU. [*84*] The ECJ held that such an argument could only succeed if the appellant could prove that the

disclosure of purportedly confidential information in the judgment under appeal had "*an effect on the outcome of the case*" before the GC. [***85***] This was not found to be the case, so the GC judgment and Commission decision remained, and any claims of damage resulting to the appellant (e.g., in follow-on civil suits) have to be handled separately.

This approach by the ECJ can be criticised as not giving an adequate remedy to the appellant, in practice.

(ii) České dráhy

České dráhy, the Czech state-owned railway operator, challenged the Commission's powers to carry out inspections in two linked cases: the first challenging the legality of a decision ordering it to submit to a dawn raid on suspicion of predatory pricing on one railway line (Prague – Ostrava), and the second challenging a decision based on evidence obtained during the first dawn raid.

České dráhy argued that the Commission decisions interfered with the rights guaranteed by Article 7 Charter and Article 8 ECHR and failed to meet the conditions which would justify such interference – namely, to pursue a legitimate aim, considering the lack of reasonable grounds to suspect an infringement, and to be necessary in a democratic society. [***86***]

The GC rejected the argument (and dismissed the first appeal and partially upheld the second). After acknowledging that the exercise of powers by the Commission under Article 20(4) Regulation 1/2003 would constitute an interference with the fundamental rights of the undertaking under Article 7 Charter, [***87***] the GC proceeded to analyse the contested decision under the conditions laid down in Article 52(1) Charter and Article 8(2) ECHR. The GC found that, since the inspection decision had been adopted on the basis of Article 20(4) Regulation 1/2003, the interference was "*provided for by law*". [***88***] Second, because the Commission's powers under Article 20 Regulation 1/2003 "*are intended to allow [it] to carry out its duty under the Treaties of ensuring compliance with the competition rules*", the inspection decision met the objectives of general interest recognised by the EU; [***89***] specifically, the Commission's function under Regulation 1/2003 to "*prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers*" [***90***] and to contribute "*to the maintenance of the system of competition intended by the Treaties, which undertakings have an absolute duty to comply with*". [***91***] Third, in so far as it did not exceed what is necessary to achieve the objective, the inspection decision was proportionate in light of Article 5(4) TFEU; [***92***] the Commission must resort to the "*least onerous*" option and the disadvantages caused must "*not be disproportionate to the aims pursued*". [***93***] Where an inspection decision is intended solely to enable the Commission to gather the information it requires to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality. [***94***]

Subsequently, České dráhy appealed the judgment to the ECJ, which did not consider Article 7 Charter and confirmed the approach taken by the GC. [***95***] As a result, the Commission's wide margin of discretion in conducting dawn raids has been confirmed under EU law; in particular, it is permissible for the Commission to base a decision to investigate on information received from a national competition authority without conducting its own assessment with regard to EU competition law, and the Commission is permitted to use a document not directly linked to the subject matter of the first investigation to form the basis of an unrelated suspected abuse. [***96***] Whether the ECtHR would agree is open to question.

(iii) Nexans

Nexans is a company which, along with Deutsche Bahn, has vigorously contested the Commission's approach to on-site investigations with some success. Nexans invoked Article 7 Charter in its appeal against the Commission's inspection decision, which subjected it to four days of investigation in France, resulting in copies of documents and computer hard drives being removed for further examination in Brussels. Nexans argued that, "*in so far as the copying 'en masse' of material which had not been examined by the Commission beforehand did not fall within the scope of the Commission's powers under Regulation No 1/2003*", its removal during an inspection amounted to an "*arbitrary and disproportionate*" intervention in Nexans' rights protected by Article 7 Charter. [***97***]

In response, the GC considered that [***98***] this complaint was unfounded and that the Commission, by making copies of data sets and placing them in the investigation file without checking the containing documents' relevance beforehand, had not reached beyond the powers conferred by Regulation 1/2003. [***99***] Even if the breach of Article 7 were to be interpreted as an independent claim, the GC still rejected it on the basis that the Commission's use of its powers was justifiable. [***100***]

Nexan's appeal was quashed by the EC, [***101***] but none of the arguments relating to fundamental rights were explicitly rejected. Unlike the Advocate General, the ECJ did not make any reference to the Charter in its findings. [***102***]

Interestingly, this is the only judgment to date where the appellant relies on Article 7 Charter as a self-standing right, without the support of Article 8 ECHR – presumably on the basis that Article 7 must be interpreted in light of Article 8 ECHR and ECtHR jurisprudence. Criticism has been made of the EU case law to date regarding Article 7 being incompatible with the ECtHR. [***103***]

(iv) Evonik Degussa

This case arose out of a decision taken by the Commission in 2006 regarding hydrogen peroxide and perborate. Evonik Degussa first appealed the decision to the GC, arguing *inter alia* that the decision infringed Article 8 ECHR and Article 7 Charter, and then appealed the GC findings in this regard to the ECJ. First, the GC held that contested information provided by applicants in a leniency statement lost its confidential status after five years and was therefore not protected by any right to privacy. According to Evonik, however, such information still constituted "*essential elements of its commercial position*" since "*its publication could cause it serious harm*" – an element the GC itself had acknowledged; [***104***] moreover, so Evonik claimed, to accept this presumption would have the effect of eliminating the protection of the leniency statements, since cartel proceedings generally last more than five years. [***105***] Evonik also considered that the Commission had illegally used information regarding a merger, since such information should be regarded as relating to their private activity. [***106***] The GC noted that, while the Commission must also observe the right to privacy, "*where it receives information from undertakings in the context of an investigation concerning an infringement of EU law [...], a person cannot [...] rely on Article 8 [ECHR] in order to complain of a loss of reputation which is the foreseeable consequence of his own actions*". [***107***] Therefore, Article 8 ECHR could not prevent the publication of information which concerns participation in a cartel infringement. [***108***] According to Evonik, because those statements were made under the leniency programme, their disclosure could not have been regarded as a foreseeable consequence of participating in the cartel [***109***] for which they should be protected under the right to privacy. [***110***]

The ECJ, in a judgment of its Grand Chamber, partially allowed the appeal, although it rejected both of the appellant's arguments based on Article 7 Charter. First, the ECJ noted that information which had been secret or confidential, but was at least five years old, has as a rule lost its secret or confidential nature, unless the applicant shows that that information "*still constitutes essential elements of its commercial position*." [***111***] This would be

valid for confidentiality claims as regards intervening parties before the EU Courts as well as for the publication of the Commission's infringement decision. [***112***] The ECJ found that Evonik had not put forward any such argument, however. [***113***] Second, the ECJ confirmed the GC's reasoning and stressed that Evonik failed to show that the disclosure could not be considered "*a foreseeable consequence of its participation in the cartel*". [***114***] Evonik had also failed to indicate the consequences of the disclosure for its right to respect for its private life. [***115***]

However, the ECJ did expressly recognise for the first time that information from leniency applications is protected, even when it has been transferred to a Commission decision or other document, and the Commission must exercise restraint in publishing such information. For example, it is not appropriate to include verbatim quotations from leniency applications, or repeat evidence where the source is recognisable. The Hearing Officer had considered that a decision on Evonik Degussa's fundamental objections to publication did not fall within his responsibility, but the ECJ found that the Hearing Officer should have examined any objection to publication which was based on grounds arising from rules or principles of EU law. [***116***]

(v) Goldfish

Goldfish, a trader in shrimps and other shellfish and crustaceans, appealed the Commission decision finding it liable for cartel conduct in North Sea shrimps. Goldfish contended at the GC that the secret recordings of their common telephone conversations made by a competitor constituted an unlawful means of proof, and the Commission should not have relied on them as evidence. [***117***] According to Goldfish, the use of such secret recordings was contrary to the Article 8 ECHR case law, the ECtHR's and the ECJ's case law, as well as the law of the Netherlands, where the recordings were made, and other Member States. [***118***]

The GC rejected the applicant's argument. The GC referred to the position under EU law that any type of evidence which is lawfully taken in the relevant Member State is in principle admissible before the EU Courts; [***119***] however, the EU Courts have, on occasion, agreed to take account of documents which had not been shown to have been obtained by proper means. [***120***] The GC referred specifically to Article 8 ECHR, in parallel with Article 7 Charter, noting that the interception of telecommunications is a limitation of the rights under Article 7 Charter.

Referring to the ECtHR in *Popescu v. Romania, [121]* the GC found that the use of evidence obtained in breach of Article 8 ECHR does not in itself breaches the principle of fairness in Article 6(1) ECHR, provided the applicant was not deprived of his rights of defence and the evidence was not the only proof relied on for a conviction. [***122***] In the case at hand, the GC considered that the evidence had been lawfully collected by the Commission (the recordings seem to have been made with a view to a leniency application by a competitor company, and were seized in a dawn raid of that company), and so the question was whether the Commission could use that information "*even though it was originally obtained by a third party, possibly […] in breach of the right to respect for the private life.*" [***123***] The GC was not persuaded that such evidence would be, as a rule, excluded in the courts of other Member States, or even the Netherlands. It considered that the Commission was entitled to use the recordings at issue as evidence [***124***] because the relevant procedural safeguards (e.g., access to file) were duly observed and the Commission had also relied on several other items of evidence. [***125***] Ultimately, the GC considered the recordings had an "*immediate and direct link to the subject matter*" of the investigation and were thus "*particularly valuable items of evidence*". [***126***]

A question resulting from this case is whether, if the secret recordings had been made in France, where it is illegal to adduce such evidence, the GC would have reached a different view. No further appeal was brought to the ECJ, so this may not be the last word on the issue.

(vi) Deutsche Bahn

Deutsche Bahn challenged a decision of the Commission to carry out an on-site inspection. It argued that the lack of prior judicial authorisation for the inspection constituted an infringement of Article 7 Charter and Article 8 ECHR. [***127***] The GC rejected this argument, and Deutsch Bahn appealed to the ECJ, claiming that the GC had disregarded the ECtHR's judgment in *Société Colas Est and Others v. France [**128**]* by holding that the absence of a prior judicial authorisation is only one of the factors considered by the ECtHR when deciding on an infringement of Article 8 ECHR. [***129***]

However, the ECJ concluded that there was no infringement of Article 7 Charter. It stressed that the ECtHR "*did hold that interference by a public authority could go further for professional or commercial premises or activities than in other cases*". [***130***] Moreover, it found the GC correctly considered the judgment in *Colas Est and Others v. France*. [***131***] The ECJ pointed out that the Commission's investigative powers under Article 20(2) Regulation 1/2003 are limited to allowing officials, inter alia, "*to enter premises of their choosing, to have access to documents they request and make copies thereof, and to have shown to them the contents of pieces of furniture they indicate*". [***132***] The ECJ noted that the possibility of post-inspection judicial review by the ECJ "*is considered by the ECtHR as capable of offsetting the lack of prior judicial authorisation and thus capable of constituting a fundamental guarantee in order to ensure the compatibility of the inspection measure in question with Article 8 [ECHR]*". [***133***] Therefore, the GC was correct in holding that the fundamental right to the inviolability of private premises, as protected by Article 8 ECHR, is not disregarded by there being no prior judicial authorisation, and there was also no infringement of Article 7 Charter. [***134***]

The ECJ partially allowed the appeal however, on other grounds.

3.2. Article 41 Charter – Right to good administration

Article 41 provides:

"Right to good administration

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
2. *This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
4. *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."*

The rights protected under Article 41 Charter: the right to have affairs handled impartially, fairly and within a reasonable time (Article 41(1) Charter), the right to be heard (Article 41(2)(a)), and the right to have access to file (Article 41(2)(b)) are all rights falling under other Charter articles and/or EU law sources. Article 47 Charter contains

the right to an effective remedy and to a fair trial, a right which is clearly similar to the right to have affairs handled impartially, fairly and within a reasonable time of Article 41(1) Charter. The right to be heard and the right to have access to file, as protected by Article 41(2)(a-b) are also covered by the broader umbrella of Article 48 Charter, i.e., the rights of defence and the presumption of innocence. [***135***]

The duty to state reasons is reflected more generally as part of the right to good administration in Article 41 Charter, and in Article 41(2)(c) Charter specifically. It provides for an " *obligation of the administration to give reasons for its decisions*". The Explanations to the Charter do not refer to any equivalent provision in the ECHR and instead refer to the EU rule of law and Article 296 TFEU. In fact, a broad body of law and jurisprudence on the duty to state reasons has been developed under Article 296 TFEU. [***136***] After the Charter was granted primary legal status in 2009, the EU Courts relied on this body of case law in order to interpret Article 41(2)(c).

The right to have the EU make good any damage caused by its institutions or by its servants in the performance of their duties, and the right to write to the institutions in one of the official languages, and have an answer in the same language (Articles 41(3) and (4) Charter) are not discussed in this article, but are included in the statistical data.

(a) Statistical Analysis

Article 41 arguments have often been combined with arguments based on other procedural human rights contained in the Charter, but an Article 41 argument in itself may include arguments involving access to file, rights to be heard and duty to state reasons. Overall, an increase in the number of cases referring to Article 41 can be seen after the entry into force of the Treaty of Lisbon, but little increase in the rate of success.

In the period 2000-2020, 101 GC cases were brought which included an Article 41 argument. The entry into force of the Lisbon Treaty resulted in a significant increase of GC cases including an Article 41 argument.

Before the Lisbon Treaty, only nine GC cases were brought which included an Article 41 argument, and none of these arguments were successful. After the entry into force of the Lisbon Treaty, a total of 92 cases were brought, including an Article 41 argument, of which eight were successful. Despite the significant increase of GC cases containing an Article 41 argument after the Charter gained primary legal status – an increase of 992%, the success rate of the cases relying on, amongst others, Article 41 of the Charter remains low at 9%.

When looking at statistics for ECJ cases, the story is similar. Prior to the Lisbon Treaty, only one case was brought containing an Article 41 argument. After the entry into force of the Lisbon Treaty a total of 15 cases at the ECJ had Article 41 arguments, but only one case was successful. [***137***]

Looking at both EU Courts together, they explicitly referred to Article 41(2)(a) Charter in thirteen judgments, all of them in the period 2011-2019; three concerned state aid while the others related to cartel practices. There have been four judgments explicitly referring to Article 41(2)(b) Charter, curiously all in 2018; three concerned State aid and one concerned cartel practices. There have been eight judgments explicitly referring to Article 41(2)(c) Charter, all in the period 2014-2019; three were cartel cases while the remaining five concerned State aid. Finally, there have been twenty-four judgments explicitly referring to Article 41(1) Charter in the period 2002-2019; seven related to State aid disputes and seventeen to cartel practices.

(b) Recent Cases referring to Article 41 Charter

(i) Icap

Icap is an example of the novel procedural issues that arise from hybrid cartel proceedings, i.e., proceedings where at least one of the parties decides not to settle with the Commission, whilst the other parties agreed to settle. [***138***]

Icap, a trader, was fined by the Commission for "facilitating" various infringements in the "LIBOR" Yen Interest Rate Derivates (YIRD) cartel. Icap decided not to settle with the Commission and so the investigation continued against it, while the Commission issued a fining decision under its settlement procedure against other financial institutions. The Commission then took its decision against Icap. Icap appealed this decision, arguing *inter alia* that the Commission breached its right to good administration and the presumption of innocence contrary to Article 41 Charter.

The GC considered both Article 41 and Article 48 Charter, and found that the presumption of innocence was breached, as the prior settlement decision very clearly reveals the Commission's position on Icap's participation in the unlawful conduct found with respect to the banks concerned. [***139***] The GC found that the Commission's position on the illegality of Icap's conduct and its liability for the infringements involved could easily be inferred from that decision. [***140***] Accordingly, the Commission breached the presumption of innocence in relation to Icap. However, the GC considered that the breach could not have a direct impact on the legality of the contested decision, in view of the separate and independent nature of the proceedings which gave rise to those two decisions. [***141***] The question was then whether the Commission showed the necessary impartiality in the decision it then took against Icap. [***142***] The GC quoted the case law of the Court on the need for subjective and objective impartiality by the Commission. [***143***] However, the GC was clear that such an argument could not *in itself* lead to the annulment of the contested decision, as an "*irregularity relating to a possible lack of objective impartiality on the part of the Commission would entail the annulment of that decision only if it were established that if it were it not for that irregularity, that decision would have been different in content.*" [***144***]

The GC allowed Icap's appeal on a number of other grounds however, and the case was unsuccessfully appealed to the ECJ by the Commission, albeit on a different legal issue.

(ii) Pometon

Pometon also involved hybrid cartel settlement decisions, this time in the steel abrasives cartel. Pometon withdrew from the settlement discussions and became subject to a Commission decision under its normal procedure, whilst the other companies involved reached a settlement agreement with the Commission.

Pometon argued on the basis of Articles 41, 47 and 48 Charter that its rights of defence, the presumption of innocence and the principle of impartiality were infringed due to the Commission's preceding reference to it in the settlement decision against the other steel abrasives producers. [***145***] It maintained that, due to the inherent time lag in hybrid cases, the Commission should have refrained from giving any unnecessary information regarding Pometon in assessing the guilt of the settling undertakings. [***146***]

The GC firstly recalled that the principle of the presumption of innocence applied to procedures relating to infringements of the competition rules, and also re-stated the fundamental obligation of impartiality which binds the Commission when drafting a settlement decision in the context of a "hybrid" procedure. However, the GC was unmoved by the argument as grounds to annul the decision, and concluded that the mention of Pometon in the

settlement decision did not mean that the Commission had established guilt in relation to Pometon. [***147***] Hence, the GC found that the Commission had not infringed the presumption of innocence sufficient to justify annulment. [***148***]

Pometon is currently under appeal. [***149***]

(iii) HSBC Holdings

HSBC Holdings ***[150]*** is another example of how arguments are often brought referring to the broad umbrella of fundamental rights in both Article 41 and Article 48. The presumption of innocence of Article 48 Charter is also encompassed by Article 41(1) Charter, albeit less explicitly. Similar to *Icap* and *Pometon*, the GC was again called upon to decide on the balance that needed to be struck in hybrid cartel cases where some parties decide to settle with the Commission and others do not – and unsurprisingly, the outcome of this case is aligned with those two.

HSBC claimed that its right to good administration was infringed by the Commission having adopted the contested decision subsequent to a settlement decision where the Commission had already adopted a position on HSBC's participation in the infringement at issue. [***151***] Along with its rights of defence and right to the presumption of innocence (both Article 48 Charter), HSBC argued that the settlement decision prejudged its liability and impaired its right to have its case handled impartially.

In response to this argument, the GC stated that the requirement of impartiality encompasses both subjective impartiality and objective impartiality. Subjective impartiality in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice; objective impartiality in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned. [***152***]

The GC continued: "*However, the issue whether any lack of objective impartiality on the part of the Commission which may have arisen from an infringement of the principle of the presumption of innocence with respect to HSBC when the settlement decision was adopted was able to impact the lawfulness of the contested decision is indissociable from the question whether the findings made in that decision are properly supported by the evidence adduced by the Commission.*" [***153***]

Therefore, a possible lack of impartiality on the part of the Commission can only lead to the annulment of a decision if the content of that decision would be different had the irregularity not occurred. [***154***] Because the Commission had established HSBC's participation in the infringement at issue to the required legal standard, the GC considered there was no reason to assume that, if the settlement decision had not been adopted before the contested decision, the content of the latter would have been different. [***155***]

By contrast, the GC upheld HSBC's plea that the Commission had failed to adequately state its reasoning for the reduction factor applied in the fine calculation, but no reference was made to the Charter in that respect. The case is currently on appeal.

The overall takeaway from the *Icap, Pometon,* and *HSBC* judgments is that the GC confirmed the central position of Article 41 Charter and the importance of the procedural rights of defence and the presumption of innocence in competition cases. These rights are specifically applicable to hybrid proceedings. However, the GC also emphasised the need to show that a breach of these provisions would have resulted in a potentially different outcome of the Commission's decision, if annulment is to be justified. The Commission had changed its

procedures in taking staggered decisions in hybrid proceedings because of these cases, and it is not yet clear how it plans to continue in the future. At the very least, the Commission must ensure that any reference to a non-settling party in one decision should not pre-judge the result as regards that party.

(iv) Saint-Gobain

Saint-Gobain brought an action for annulment of a Commission decision which had found the applicant liable for participating in a set of anti-competitive agreements and concerted practices in the car glass sector. A number of pleas referring to different Articles of the Charter were made, and the GC considered these Articles in many instances throughout its judgment. Relying on Article 41(2)(c) Charter and Article 296 TFEU, Saint-Gobain claimed that the Commission had not specifically stated the different sales figures on the basis of which the fine was calculated. [***156***] More specifically, the applicant accused the Commission of not having provided evidence to establish whether the sales figures it used were a result of an accurate or a flawed calculation. [***157***]

The GC rejected the plea. In the first judicial reference to Article 41(2)(c) Charter, it noted that Article 296 TFEU was now "*supplemented*" by this Article. The GC defined the purpose of the obligation to state reasons as enabling the EU Courts "*to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested*". [***158***] The GC then reviewed the relevant jurisprudence under Article 296 TFEU, and considered on the basis of the facts that the Commission's decision was not vitiated by flawed or insufficient reasoning. [***159***] The Charter thus did not help the applicant.

3.3. Article 48 Charter – Presumption of innocence and right of defence

Article 48 provides:

"Presumption of innocence and right of defence

1. *Everyone who has been charged shall be presumed innocent until proved guilty according to law.*
2. *Respect for the rights of the defence of anyone who has been charged shall be guaranteed."*

Due respect for the rights of defence in competition law proceedings, protected by Article 48 Charter reflecting Article 6 ECHR, must be accorded. [***160***] These include the following minimum rights:

- to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them;
- to have adequate time and facilities for the preparation of their defence;
- to defend themselves in person or through legal assistance of their own choosing or, if they lack sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

The concept of rights of defence is broad, and in combination with the presumption of innocence, the right of defence in Commission investigations broadly includes: the privilege against self-incrimination; the right to be heard; the right to be assisted by legal counsel and granted Legal Professional Privilege; and the right to good administration. Many cases regarding these rights have been brought over the years, relying particularly on the specific EU competition law procedural regulations which specify these protections.

(a) Statistical Analysis

Looking at how these rights have arisen on the basis of the Charter or ECHR in the EU Courts during the period 2000-2020, the pattern is that more often than not, the Article 48 argument was accompanied with claims based on the other procedural rights contained in the Charter.

Sixty cases including an Article 48 argument were brought to the GC. Prior to 2009, a mere five GC cases contained Article 48 arguments, and none of them were successful. Post Treaty of Lisbon, 55 GC cases contained Article 48 arguments, and six were successful.

The Lisbon Treaty therefore resulted in a strong increase of Article 48 arguments before the GC, an increase of 1000% in just over 11 years. However, the success rate of cases bringing Article 48 arguments remains rather low. Since 2009, only 11% of Article 48 arguments brought have been successful. Prior to 2009 there were no successes at all in cases relying on Article 48 Charter.

When looking at statistics for ECJ cases, the story is similar. Prior to the Lisbon Treaty, no Article 48 arguments were brought, and post Lisbon Treaty a total of 17 ECJ cases contained Article 48 arguments. None of those cases was successful though.

(b) Recent cases referring to Article 48 Charter

An Article 48 argument, whether based on the presumption of innocence (Article 48(1) Charter), or on the right of defence (Article 48(2) Charter), is frequently inherently intertwined with other rights protected in different Charter Articles, such as the right to good administration (Article 41 Charter), or the right to an effective remedy and to a fair trial (Article 47 Charter). In her Opinion on the *United Parcel Service* case discussed below, Advocate General Kokott held that the rights of defence emanate from the right to good administration. [***161***]

Whereas Article 48 rights of defence arguments are often used as a "passe-partout" final plea, secondary to more specific arguments, a rights of defence argument was invoked as key plea in *United Parcel Service, [162]* and re-stated by the GC, albeit in the form of an indirect reference to Article 48 of the Charter: "*the rights of the defence is a general principle of EU law enshrined in the Charter*". [***163***]

(i) United Parcel Service

In 2013, the Commission blocked United Parcel Service's ("UPS") attempted takeover of TNT Express. [***164***] UPS challenged this decision before the GC in 2017, claiming its rights of defence were infringed, as the econometric analysis on which the prohibition decision was based materially differed from all the versions used during the administrative procedure. [***165***] The GC annulled the decision, and this was recently upheld by the ECJ. [***166***]

The GC stated that the observance of the rights of the defence is a general principle of EU law enshrined in the Charter (i.e., Article 48 Charter) which must be guaranteed in all Commission proceedings. [***167***] It held that the right to a fair hearing, which forms part of the rights of the defence, is infringed if undertakings are not afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim, [***168***] which included the econometric analysis used by the Commission in its final decision. The GC was of the opinion that, despite the numerous similarities between the final econometric model and those discussed during the administrative procedure, the changes made to the final model could not be regarded as negligible. [***169***] As a result, "*the Commission cannot claim that it was not required to communicate the final econometric analysis model to the applicant before adopting the contested decision*". [***170***]

Accordingly, UPS' rights of defence were infringed, and the contested decision was annulled as UPS was denied the opportunity that it might have been better able to defend itself. [***171***]

The GC's decision was upheld on appeal. As mentioned above, Advocate General Kokott noted in her opinion that the rights of defence (i.e., Article 48 Charter) are an emanation of the right to good administration (i.e., Article 41 Charter). [***172***] The ECJ considered that the GC did not err in law by deciding that UPS' rights of defence were infringed. It approved the statement of Advocate General Kokott and made clear reference to the Charter: "*The disclosure of such models and methodological choices underlying their development is all the more necessary as it contributes…to ensuring that the procedure is fair, in accordance with the principle of good administration enshrined in Article 41 of the Charter*". [***173***] It found that the Commission's decision should be annulled on the basis that UPS could sufficiently demonstrate that there was even a slight chance that it would have been better able to defend itself if it had received the analysis model. [***174***]

The *United Parcel Service* judgments are unusual in a number of respects. A Commission merger decision was struck down, the grounds were a breach of a fundamental right, and the resulting procedural irregularity was considered to potentially affect the outcome of the decision.

The Advocate General Opinion and the judgments in the *United Parcel Service* case clearly show that Articles 41 and 48 are often intertwined.

3.4. Article 49 – Principles of legality and proportionality of criminal offences and penalties

Article 49 of the Charter provides:

"Principles of legality and proportionality of criminal offences and penalties

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable.*

2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*

3. *The severity of penalties must not be disproportionate to the criminal offence."*

(a) Statistical Analysis

Our analysis found that Article 49 has been used as the basis of an argument in competition proceedings in 66 judgments since 2000, of which 17 at the ECJ. Pre-Lisbon, only six judgments can be found, whereas starting from 2011 judgments containing an argument referring to Article 49 increase and reach their various peaks in 2013, 2014 and 2018 with eleven each, and in 2016 with nine judgments. Out of the 66 identified judgments, in only three of them was an Article 49 argument invoked successfully, all in the post-Lisbon period: *voestalpine*, [***175***] *Parker Hannifin*, [***176***] and *Infineon*. [***177***] In all three cases, Article 49 was invoked in relation to the principle of proportionality and independently, without reference to the ECHR.

(b) Recent Cases referring to Article 49 Charter

(i) Infineon

One of the most recent judgments containing a successful Article 49 argument is *Infineon*. [***178***] Infineon appealed the judgment of the GC, [***179***] which had dismissed the appellant's action for annulment of or a reduction of the fine relating to the Commission decision that had found Infineon to have participated in an EEA-wide cartel in the smart card chip sector in contravention of Article 101(1) TFEU.

Infineon argued that, by imposing on it a disproportionate fine, the Commission and the GC infringed Article 49 Charter. [***180***] More specifically, according to the appellant, the GC made a manifest error of assessment in failing to take into account Infineon's limited participation in the infringement, which then resulted in an incorrect calculation of the turnover for the purpose of determining the amount of the fine. [***181***]

The ECJ found that the GC was not entitled, without misconstruing the extent of its unlimited jurisdiction, to refrain from responding to the appellant's argument that "*the Commission had infringed the principle of proportionality by setting the amount of the fine imposed without taking into account the small number of contacts in which the appellant participated.*" [***182***] Therefore, for the ECJ, in so far as the GC did not "*review the proportionality of the amount of the fine imposed in relation to the number of contacts that it found against the appellant*" and did not state the reasons for it, the GC made an error of law. [***183***] The ECJ set aside the judgment of the GC in as much as the GC rejected the appellant's claim for a reduction of the amount of the fine and referred the case back to the GC.

3.5. Article 50 – Ne bis in idem

Article 50 Charter provides:

"Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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

This right is one of the general principles of EU law and of international law.

(a) Statistical Analysis

Our analysis found that Article 50 on the *ne bis in idem* principle has been used as the basis of an argument in competition proceedings in only seven judgments since 2000 [***184***] – six at the GC and one at the ECJ. In all four judgments relating back to the pre-Lisbon period, Article 50 Charter was invoked in conjunction with Article 4 of Protocol 7 ECHR. Only in the post-Lisbon judgments was Article 50 Charter invoked on an independent basis. [***185***] Admittedly, none of the arguments was successful. [***186***]

(b) Recent Cases referring to Article 50 Charter

(i) Marine Harvest

The most recent judgment on *ne bis in idem*, *Marine Harvest*, [***187***] represents the first time Article 50 has been brought as an argument before the ECJ in merger control proceedings. The case was unsuccessful before both the GC and the ECJ, however. The appeal sought the annulment of a decision fining the applicant for "gun jumping" in breach of the EU Merger Regulation. [***188***] The applicant initially directly acquired a 48.5 % share in another company, followed by a public offer for the remaining shares. After the end of the public offer, the applicant formally notified the concentration to the Commission and it was approved. But the Commission then issued a decision fining the Applicant €10 million for failing to notify the acquisition of *de facto* control, in breach of Article 4(1) Merger Regulation, and a further €10 million for implementing the concentration in breach of the standstill obligation laid down in Article 7(1) Merger Regulation. The applicant argued that the *ne bis in idem* principle prevented the Commission from imposing separate fines, and Advocate General Tanchev was sympathetic to this. The ECJ specifically referred to the Charter, noting that:

"That interpretation of the principle ne bis in idem is supported by the wording of Article 50 of the Charter of Fundamental Rights of the European Union and the rationale of that principle, that article thus specifically targeting the repetition of proceedings concerning the same material act which have been concluded by a final decision". [***189***]

Rather formalistically, however, the ECJ disregarded the Advocate General and found on the basis of the wording of the Merger Regulation that the double fines were justified.

4. Conclusion

The issue of fundamental rights in competition law and the impact of the Charter has given rise to a number of interesting cases in recent years. These rights have largely been pleaded in cases involving procedural abuses by the Commission in its role as the EU competition authority. Cases involving the Charter in other subject areas outside competition have been more constitutional in nature. [***190***] It will be interesting to see if the Charter rights to privacy and data protection will arise more substantively in competition cases in the future. In the meantime, as fines increase and private damages actions flourish, the fundamental rights of companies embodied in the Charter will remain an important check on the potential for the Commission to unlawfully exceed its powers in competition proceedings. Our statistical analysis has shown that cases with Charter-based arguments have increased since the Charter became legally binding, and we expect the Charter to continue to be used in judicial review. The key question is whether the EU Courts will provide the necessary ballast in a system which allows so much discretion.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[*1*] The law is stated as at June 2020, with minor updates. We write at a time when much of the world is in "lockdown" trying to tackle the global pandemic of COVID-19. The rights of individuals and their liberty to leave their houses and socialise in the face of government laws and recommendations on social isolation and self-quarantine are under debate. Individuals face curbs on previously accepted rights to privacy, becoming "data points" in the interests of electronic tracking to monitor disease spread. Scientists face death threats trying to counter over-enthusiastic messages of the efficacy of certain drugs or the development of vaccines. States roll out restrictive measures with no time limits and no one knows if "normal" freedoms will return. Fundamental rights are an issue of daily discussion.

[*2*] The ECHR was drafted in 1950 and entered into force in 1953, and the ECtHR was established in 1959.

[*3*] Case 4/73, *Nold v Commission*, ECLI:EU:C:1974:51, para. 13.

[*4*] Introduced by the Treaty of Maastricht in 1992 and amended by the Treaty of Amsterdam in 1997, and again by the Treaty of Lisbon in 2009.

[*5*] Consolidated Version of the Treaty on European Union [2010] OJ C83/1. See European Commission, '2018 report on the application of the EU Charter of Fundamental Rights' (European Union, 2019), available at: *https://op.europa.eu/en/publication-detail/-/publication/784b02a4-a1f2-11e9-9d01-01aa75ed71a1/language-en*.

[*6*] See, e.g., Select Committee on European Union, '10th report: Chapter 5: Fundamental Rights' (UK House of Lords, 2008), available at: *https://publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/6209.htm#n92*, para. 5.118: "*We have in the past identified strong reasons for supporting EU accession to the ECHR. The Strasbourg Court would then be recognised as the final authority in the field of human rights. This would assist to avoid any risk of conflict between European Union law and the European Convention on Human Rights as interpreted in Strasbourg, by placing fundamental rights on a single consistent foundation throughout the EU.*"

[*7*] Opinion 2/94, *Opinion pursuant to Article 228 of the EC Treaty: Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.

[*8*] Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

[9] This was despite the express wording of Article 6(2) TEU, which foresees accession. See, e.g., Arianna Andreangeli, 'EU Competition Enforcement and Compliance with Fundamental Rights' Standards: the Challenge and the Promise of Accession to the ECHR' (CPI Antitrust Chronicle, July 2015), available at: *https://www.competitionpolicyinternational.com/assets/Uploads/AndreangeliJul-151.pdf*.

[10] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 ("Charter"). See for a commentary, Koen Lenaerts and Jose Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Steve Peers, et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014) 1559; Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CMLRev 1267.

[11] However, over time, the EU Courts started to refer to it.

[12] European Commission, 'Why do we need the Charter?', available at: *https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en*.

[13] Article 52(3) Charter (op. cit.). See, e.g., Case C-524/15, *Menci*, EU:C:2018:197, para. 62.

[14] Select Committee on European Union (op. cit.) para. 5.68.

[15] See the speech for the occasion by Koen Lenaerts, 'Making the EU Charter of Fundamental Rights a Reality for All: 10th Anniversary of the Charter Becoming Legally Binding' (12 November 2019), available at: *https://ec.europa.eu/info/sites/info/files/charter_lenaerts12.11.19.pdf*, p. 2. The role of the ECJ in putting the protection of fundamental rights at the core of the EU legal order has not been without criticism, however. See, e.g., J.H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in M. Adams et al. (eds.), *Judging Europe's Judges* (Oxford 2013) 250, also Angela Ward and Jacquelyn MacLennan, 'Citizenship and Incremental Convergence with Fundamental Rights?' (2019) 78 Cambridge Law Journal 283.

[16] Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779.

[17] For a trenchant criticism of this see, e.g., Ian S Forrester, 'Due process in EC Competition cases: A distinguished institution with flawed procedures' (2009) 34 ELRev 817, and the literature cited. Three features of the Commission's procedures are in his view open to particular criticism: that the decision is taken by the College of Commissioners, who are political appointees; that there is no hearing before the decision-maker, i.e., these Commissioners, only before officials; and that the case team combines investigative and decision-making functions, with the consequent risk of "confirmation bias".

[18] Article 23, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ("Regulation 1/2003"). See ***Céline Gauer, Dominik Schnichels, Eddy de Smijter, Lars Kjølbye, Maija Laurila, Dorothe Dalheimer***, *The EU Council adopts new rules on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002, e-Competitions December 2002, Art. N° 38381* and ***Céline Gauer, Eddy de***

Smijter, Lars Kjølbye, Dorothe Dalheimer, *The Council of the EU adopts a new regulation on the implementation of Articles 81 and 82 of the EC Treaty (Regulation 1/2003), 16 December 2002, e-Competitions December 2002, Art. N° 38924.*

[***19***] See ***European Commission***, *The EU Commission imposes a fine of € 1.49 billion on a search engine company for abusing its dominant position by imposing restrictive clauses in contracts with third-party websites (Google AdSense), 20 March 2019, e-Competitions March 2019, Art. N° 89800.* Google has been fined in three cases: €1.49 billion in relation to online advertising, €4.34 billion as regards android mobile devices and €2.42 billion in relation to the use of its search engine to favour shopping services.

[***20***] European Commission, 'Cartel Statistics' (27 September 2019), available at: *https://ec.europa.eu/competition/cartels/statistics/statistics.pdf*.

[***21***] See, e.g. Ian Forrester, Antitrust judicial review: Highlights of EU and national case laws, May 2011, Concurrences N° 2-2011, Art. N° 35782, *www.concurrences.com*; Wouter P J Wils, 'EU Anti-trust Enforcement Powers and Procedural Rights and Guarantee: the Interplay between EU Law, National Law, the Charter of Fundamental Rights on the EU and the European Convention on Human Rights' (2011) 34 World Competition 189.

[***22***] See Case C-272/09 P, KME Germany, ECLI:EU:C:2011:63, Opinion of Advocate General Sharpston, paras 64 et seq., and the cases there cited, applying the principles of Engel and Others, (ECtHR, 8 June 1976) Series A no 22, para. 82: "*Decisions of the Commission imposing fines in competition cases involve a 'criminal charge' for the purposes of Article 6(1), not least because the purpose of such fines is to punish and deter.*" In addition to the fines which may be imposed on a company in a competition case, other consequences may follow such as the loss of value of the company, criminal penalties on individuals under national competition law, and "follow-on" civil damages actions against the company. This reinforces the nature of competition law as a serious criminal law system. See ***Ian Forrester, Mark D. Powell, Axel P. Schulz***, *The EU Court of Justice Advocate General Sharpston voices opinion on the standard of judicial review over fines in cartel cases (KME), 10 February 2011, e-Competitions February 2011, Art. N° 37619*, ***Damien Gerard***, *The ECJ Advocate General Sharpston addresses the scope of the EU Courts' jurisdiction over antitrust cases and fines (KME Germany), 10 February 2011, e-Competitions February 2011, Art. N° 35282*, and ***Anthony Dawes, Ian Forrester, Strati Sakellariou-Witt***, *ECJ Advocate General Sharpston voices opinion on the standard of judicial review over fines in cartel cases (KME), 10 February 2011, e-Competitions February 2011, Art. N° 47909.*

[***23***] More specifically, "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of powers". Control of legality on such grounds and also typically misuse of discretion, is conceptually distinct from, and more limited than, a full "appeal on the merits" which is effectively a review the facts, the law and all elements the correctness of the decision overall.

[***24***] *A. Menarini Diagnostics SRL v Italy*, (ECtHR, 27 September 2011) App. no 43509/08, paras 38-44. See ***Filippo Fioretti***, *The EU Court of Human Rights confirms that the Italian antitrust fining regime is compatible with human rights (Menarini), 27 September 2011, e-Competitions September 2011, Art. N° 77283.*

[***25***] Case C-272/09 P, KME Germany, ECLI:EU:C:2011:810 and Case C-386/10 P, Chalkor AE Epexergasias Metallon v Commission, ECLI:EU:C:2011:815. See ***European Court of Justice***, *The EU Court of Justice upholds the judgments of the General Court and the Commissions decisions relating to the two cartels in the copper industrial and copper plumbing tubes sectors and*

confirms the unlimited jurisdiction of the Courts in relation to the amount of fines (Chalkor) (KME), 8 December 2011, e-Competitions December 2011, Art. N° 93765 and ***Richard Burton**, The EU Court of Justice upholds General Court judgment in copper industrial and plumbing tubes cartel cases (KME / Chalkor), 8 December 2011, e-Competitions December 2011, Art. N° 58853.*

[*26*] *KME Germany* (op. cit.) para. 106.

[*27*] See ***Christopher Bellamy QC**, ECHR and competition law post Menarini: An overview of EU and national case law, 4 July 2012, e-Competitions ECHR, Art. N° 47946.*

[*28*] See, e.g., Peter J Oliver, 'Privacy and Data Protection: The Rights of Economic Actors' in Sybe de Vries, Ulf Bernitz, and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart Publishing, 2015) 287.

[*29*] Koen Lenaerts, 'Due process in competition cases' (2013) 1 NZKart 175.

[*30*] Recital 37, Regulation 1/2003 (op. cit.).

[*31*] As explained in the methodology we employed, whilst the presented statistics cover the use of the Charter in competition law cases brought before the GC and the ECJ from 1 January 2000 to 30 April 2020, our analysis extended to cover the period 1 January 1990 to 30 April 2020. This allowed us to gather empirical data on ECHR arguments that mirror the most relevant Charter articles, and review the use of procedural rights arguments prior to the promulgation of the Charter on 1 January 2000.

[*32*] The Curia search engine is available at: *http://curia.europa.eu/juris/recherche.jsf?cid=1522197*.

[*33*] Interestingly, the President of the ECJ, Judge Koen Lenaerts, has noted that "*[b]efore the Charter became legally binding in 2009, fundamental rights were only occasionally examined by the Court of Justice. Nowadays by contrast, the Charter is invoked in about 10% of all preliminary ruling procedures…*", See Lenaerts (op. cit.).

[*34*] Ronald Dworkin '*Taking Rights Seriously*' Harvard University Press 1977. See, e.g., Arianna Andreangeli, 'Competition Law & Human Rights: Striking A Balance Between Business Freedom And Regulatory Intervention' in Ioannis Lianos and Daniel D Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press, 2011) 22.

[*35*] At the GC, 29 cases were brought using only the ECHR (in addition to the 23 cases based on the Charter) prior to the Charter becoming binding, compared to 28 cases after (in addition to the 185 cases based on the Charter and/or the ECHR); and at the ECJ, 11 cases were brought with only ECHR arguments (in addition to the one based on the Charter) prior to the Charter becoming binding compared to 6 after (in addition to the 78 based on the Charter and/or ECHR arguments).

[*36*] Dorota Leczykiewicz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism' in Nicholas Barber, Maria Cahill, and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Bloomsbury 2019) 125, 150; Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal 168, 174.

[37] We have identified only one case where a Charter argument was brought without inclusion of the "mirror" ECHR provision. See, as regards Article 7 Charter, Case T-449/14, *Nexans France and Nexans v European Commission*, ECLI:EU:T:2018:456, ECLI:EU:C:2020:571. See ***Richard Burton, Argyrios Papaefthymiou***, *The EU Court of Justice upholds the Commission's right to continue inspection at Brussels premises in Power Cables cartel case (Nexans), 16 July 2020, e-Competitions August 2020, Art. N° 96291.*

[38] European Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/06. See ***European Competition Network Brief***, *The EU Commission reforms antitrust procedures and expands role of hearing officer, 20 October 2011, e-Competitions October 2011, Art. N° 40455.*

[39] The Hearing Officer's mandate was last revised in 2011, and transparency increased. See Hearing Officer for competition proceedings activity report, published since 2014, available at: *https://ec.europa.eu/competition/hearing_officers/annual_reports.html*.

[40] In addition, the respect of due process is an important aspect in the Commission's newly announced investigation tool, see Assimakis Komninos et al., 'The European Commission eyes the addition of a market investigation tool to its 60-year-old toolbox – but is it a chisel or a sledgehammer?' (Kluwer Competition Law Blog, 5 June 2020), available at: *http://competitionlawblog.kluwercompetitionlaw.com/2020/06/05/the-european-commission-eyes-the-addition-of-a-market-investigation-tool-to-its-60-year-old-toolbox-but-is-it-a-chisel-or-a-sledgehammer/?doing_wp_cron=1591678603.2408890724182128906250*.

[41] "*But what a weak barrier is truth when it stands in the way of an hypothesis!*", see Mary Wollstonecraft, *A Vindication of the Rights of Woman* (J Johnston 1792) 86.

[42] We saw that at GC level 29 cases were brought prior to 2009 with ECHR arguments in isolation, and 28 cases were brought after 2009 (of those 57 cases, some were related to decisions addressed to a large number of undertakings which then resulted in very similar ECHR-based cases, e.g., *CISAC* case, see Case T-442/08, *CISAC v Commission*, ECLI:EU:T:2013:188). Of these 28 cases, 26 received judgment between 2009-2013, and likely much of the written proceedings were done prior to 2009, or very shortly after 2009. The two other cases that relied solely on the Convention received judgment in 2018, and concerned a State Aid investigation in Italy. They were both unsuccessful. See Case T-186/15, *CSTP Azienda della Mobilità v Commission*, ECLI:EU:T:2018:431 and Case T-185/15, *Buonotourist v Commission*, ECLI:EU:T:2018:430). See ***Phedon Nicolaides***, *The EU General Court holds that the compatibility of a State aid depends on the rules that are applicable when aid measures produce effects (Buonotourist), 11 July 2018, e-Competitions July 2018, Art. N° 88433.* We consider the analysis on the basis of the Charter to be more meaningful. At ECJ level, there are 17 cases in total where ECHR arguments were brought in isolation. However, in eight of these cases a Charter article argument was brought unsuccessfully at a GC level. Of the nine other judgments in which no Charter article argument was raised at the GC level, five were judgments delivered prior to 2009, and four were delivered after 2009. Only two of those four judgments were delivered significantly later than 2009, and were the appeals of the two State Aid cases mentioned above, i.e., *CSTP Azienda della Mobilità v Commission* (op. cit.) and *Buonotourist v Commission* (op. cit.). As to the success rate, due to the success of an ECHR article argument in the 14 separate, yet very similar judgments following the CISAC investigation, the total success rate of ECHR arguments brought in isolation of 26% is inflated, and therefore should not be seen as an indicative statistic.

[43] E.g., in Case T-113/07, *Toshiba v Commission*, ECLI:EU:T:2011:343, the applicant raised a significant number of due process-related pleas, including that the Commission's method of

calculating its fine had breached the principle of equal treatment. The Court accepted this and annulled the decision, recognising that this was a fundamental principle of EU law clearly recognised by the Court's case law. ***Richard Burton***, *The EU General Court partially annuls fines imposed on Japanese participants in gas-insulated switchgear cartel (Hitachi / Toshiba / Mitsubishi / Fuji), 12 July 2011, e-Competitions July 2011, Art. N° 41081.*

[***44***] For the avoidance of doubt, the authors are not advocating deluging the EU Courts with specious pleas based on fundamental rights. That would debase the premise of this paper, which is that fundamental rights are important restraints on the freedom of institutions to abuse their powers, and the EU Courts should duly recognise these rights in reviewing the acts of institutions, including the Commission, in the competition law sphere.

[***45***] E.g., the conduct of inspections is covered by Articles 20 and 21, Regulation 1/2003 (op. cit.); the rights of defence, and the right of access to file in particular, are regulated by Article 27(2) of Regulation 1/2003 (op. cit.).

[***46***] E.g., Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 & 186/81, *W. Ferrario and Others v. Commission of the European Communities*, ECLI:EU:C:1983:178, p. 2367. The ECJ stated that "*the general principle of equality is one of the fundamental principles of the law of the Community… That principle requires that comparable situations shall not be treated differently unless such differentiation is objectively justified*".

[***47***] Case T-210/01, *General Electric Company v Commission*, ECLI:EU:T:2005:456 - see ***Don T. Hibner***, *The EU General Court denies the application for annulment of Commission decision on merger prohibition, though it finds that the assessment of the conglomerate effects resulting from the concentration was erroneous (GE / Honeywell International), 14 December 2005, e-Competitions December 2005, Art. N° 67417*; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S v Commission*, ECLI:EU:C:2004:6 - see ***European Court of Justice***, *The EU Court of Justice upholds the judgment of the General Court in the cement cartel case and sets fines of €53.6 million (Aalborg Portland / Irish Cement / Ciments français / Italcementi / Buzzi Unicem / Cementir), 7 January 2004, e-Competitions January 2004, Art. N° 93537.*

[***48***] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C325/7.

[***49***] E.g. Case T-201/17, *Printeos, SA v European Commission*, ECLI:EU:T:2019:81 - see ***Martin Favart***, *The EU General Court awards damages to an envelope producer due to the EU Commission's failure to include default interest when repaying an annulled cartel fine (Printeos), 12 February 2019, e-Competitions February 2019, Art. N° 89638*; Case T-582/15, *Silver Plastics GmbH & Co. KG*, ECLI:EU:T:2019:497, with appeal pending in C-702/19 P; Case T-447/14, *NKT Verwaltungs GmbH*, ECLI:EU:T:2018:443; Case T-208/13, *Portugal Telecom v Commission*, ECLI:EU:T:2016:368 - see ***Richard Burton***, *The EU General Court endorses a strict approach to ancillary restraints (Portugal Telecom / Telefónica), 28 June 2016, e-Competitions June 2016, Art. N° 80692*; Case C-373/17 P, *Agria Polska sp. z o.o. and Others v European Commission*, ECLI:EU:C:2018:756; Case C-264/16 P, *Deutsche Bahn AG and Others v European Commission*, ECLI:EU:C:2018:60; Case C-263/16 P, *Schenker Ltd v European Commission*, ECLI:EU:C:2018:58 - see ***Philip Bentley, Jacques Buhart, Mai Muto***, *The EU Court of Justice upholds fines imposed by the Commission on cartel participants in the air freight forwarding sector (Schenker), 1 February 2018, e-Competitions February 2018, Art. N° 89675*; C-514/14 P, *Éditions Odile Jacob SAS v European Commission*, ECLI:EU:C:2016:55 - see ***Lionel Lesur***, *The*

EU Commission corrects second time around a merger decision in the publishing sector after a defect was raised by the EU Court of Justice (Editions Odile Jacob), 28 January 2016, e-Competitions January 2016, Art. N° 78466 and ***Jacques Buhart***, *The EU Court of Justice confirms that the presence of the same person in either the managerial or supervisory boards of two companies does not establish a relationship of dependency between two undertakings (Odile Jacob / VUP & Lagardère), 28 January 2016, e-Competitions January 2016, Art. N° 92821*; Case C-454/16 P, *Global Steel Wire, SA and Others v European Commission*, ECLI:EU:C:2017:818 - see ***Richard Burton***, *The EU Court of Justice upholds General Court's judgments in a cartel case (Pre-stressing steel), 26 October 2017, e-Competitions October 2017, Art. N° 85299*; Case C-434/13 P, *European Commission v Parker Hannifin Manufacturing*, ECLI:EU:C:2014:2456 - see ***Porter Elliott***, *The EU Court of Justice refers a cartel case back to the EU General Court for a ruling on the merits (Parker Hannifin), 18 December 2014, e-Competitions December 2014, Art. N° 70808*.

[***50***] Case C-469/15 P, *FSL and Others v Commission*, ECLI:EU:C:2017:308, para. 61. See ***Richard Burton***, *The EU Court of Justice dismisses appeal against a judgment of the General Court which upheld the EU Commission's decision finding that a company participated in an illegal price-fixing cartel (Exotic Fruits cartel case), 27 April 2017, e-Competitions April 2017, Art. N° 84306* and ***Bernard Amory, Charlotte Breuvart, Cecelia Kye***, *The EU Court of Justice upholds use of evidence from a national authority other than a member state competition authority (Pacific Fruit), 27 April 2017, e-Competitions April 2017, Art. N° 84423*.

[***51***] Case C-403/18 P, *Alcogroup and Alcodis v Commission*, ECLI:EU:C:2019:870, para. 71. See ***Donald Slater, Christopher Eberhardt***, *The EU Court of Justice confirms a decision of the General Court which dismissed a company's request for the suspension of an investigation of documents marked as legally privileged (Alcodis / Alcogroup), 17 October 2019, e-Competitions October 2019, Art. N° 95726*.

[***52***] Case C-122/16 P, *British Airways v European Commission*, ECLI:EU:C:2017:861, para. 57.

[***53***] *Alcogroup* (op. cit.) para. 31.

[***54***] Joined Cases C-86/15 P and C-87/15 P, *Ferriera Valsabbia SpA and Others v European Commission*, ECLI:EU:C:2017:717, para. 52.

[***55***] The cases included are somewhat arbitrarily selected and by no means represent a complete review of recent jurisprudence. For a recent overview see e.g. J Jourdan, 'Competition Law and Fundamental Rights' (2018) JECLAP 9, 666.

[***56***] See, e.g., Oliver (op. cit.) 300-301; Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) 11(11) JIPLP 856; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International, 2016).

[***57***] Joined cases C-46/87 and C-227/88, *Hoechst v Commission*, EU:C:1989:337, para. 15.

[***58***] See, e.g., Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222, 226. See also Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2013:845, Opinion of Advocate General Cruz Villalòn, fn. 54, noting that the case law of the ECtHR on Article 8 ECHR remains relevant for the interpretation of Article 8 Charter.

[59] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[60] See Jean-Paul Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) 1715.

[61] *Amann v. Switzerland* (ECtHR, 16 February 2000) App no 27798/95, para. 65; *Société Colas Est and others v. France* (ECtHR, 16 April 2002) App. no 37971/97, para. 41.

[62] *Niemitz v. Germany* (ECtHR, 16 December 1992) App. no 3710/88, para. 31.

[63] Oliver (op. cit.) 301. See also Manon Julicher, et al., 'Protection of the EU Charter for Private Legal Entities and Public Authorities: The Personal Scope of Fundamental Rights within Europe Compared'(2019) 15 Utrecht L Rev 1, 6-7.

[64] Joined cases T-305/94 et al., *Limburgse Vinyl*, ECLI:EU:T:1999:80. See ***General Court of the European Union***, *The EU General Court confirms the Commission decision fining twelve participants in a PVC cartel and rejects claims on procedural errors (Limburgse and others), 20 April 1999, e-Competitions April 1999, Art. N° 93748.*

[65] Joined cases C-238/99 e.a. P, *Limburgse Vinyl Maatschappij e.a. v Commission*, ECLI:EU:C:2002:582.

[66] Case T-224/00, *Archer Daniels Midland Company*, ECLI:EU:T:2003:195.

[67] Case T-213/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities*, ECLI:EU:T:2006:151.

[68] 2012: Case T-410/09, *Almamet GmbH Handel mit Spänen und Pulvern aus Metall v European Commission*, ECLI:EU:T:2012:676 - see ***Richard Burton***, *The EU General Court dismisses four appeals in calcium carbide and magnesium reagents cartel case (Novácke chemické závody / Ecka Granulate / Almamet / 1.garagtovaná), 12 December 2012, e-Competitions December 2012, Art. N° 58211.* 2013: Joined Cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn and Others v Commission*, ECLI:EU:T:2013:404 - see ***David Leys***, *The EU General Court fully confirms the legality of the Commission's inspection decisions under the Regulation No 1/2003 and dismisses the appeals on all grounds (Deutsche Bahn), 6 September 2013, e-Competitions September 2013, Art. N° 57032.* 2015: Case T-341/12, *Evonik Degussa GmbH v European Commission*, ECLI:EU:T:2015:51; Case C-583/13, P *Deutsche Bahn and Others v Commission*, ECLI:EU:C:2015:404 - ***Peter Citron***, *The EU Court of Justice clarifies the ban of "fishing expeditions" during dawn raids (Deutsche Bahn), 18 June 2015, e-Competitions June 2015, Art. N° 74050.* 2016: Case T-54/14, *Goldfish BV and Others v European Commission*, ECLI:EU:T:2016:455 - see ***Mai Muto***, *The EU General Court confirms that the EU Commission may rely on recordings seized unlawfully by a third party in a dawn raid (Heiploeg), 8 September 2016, e-Competitions September 2016, Art. N° 92781.* 2017: Case C-162/15 P, *Evonik Degussa GmbH v European Commission*, ECLI:EU:C:2017:205. 2018: Case T-325/16, *České dráhy a.s. v European Commission*, ECLI:EU:T:2018:368, on appeal: Joined cases C-538/18 P and C-539/18 P, *České dráhy as v European Commission*, ECLI:EU:C:2020:53 - see ***Donald Slater***, *The EU Court of Justice dismisses the appeals against the Commission's decisions in the case of alleged predatory practices by the Czech railway incumbent (České dráhy), 30 January 2020, e-Competitions January 2020, Art. N° 95871*; *Nexans* (op. cit.); Case T-274/15, *Alcogroup and Alcodis v European Commission*, ECLI:EU:T:2018:179. 2019: Case C-599/18 P,

Silec Cable and General Cable Corp. v European Commission, ECLI:EU:C:2019:966 - see ***Alexi Dimitriou, Donald Slater***, *The EU Court of Justice dismisses an appeal seeking to set aside an earlier judgement by the General Court sanctioning a cartel of manufacturers of power cables (Verwaltungs), 14 November 2019, e-Competitions November 2019, Art. N° 94048.*

[***69***] 2012: *Almamet* (op. cit.). 2013: *Deutsche Bahn* (GC) (op. cit.). 2015: *Evonik Degussa* (GC) (op. cit.); *Deutsche Bahn* (ECJ) (op. cit.). 2016: *Goldfish* (op. cit.). 2017: *Evonik Degussa* (ECJ) (op. cit.). 2018: *České dráhy* (GC) (op. cit.); *Alcogroup* (op. cit.). 2019: *Silec Cable* (op. cit.).

[***70***] *Limburgse Vinyl* (ECJ) (op. cit.) in 2002. *Deutsche Bahn* (ECJ) (op. cit.) in 2015. *Evonik Degussa* (ECJ) (op. cit.) in 2017. *Silec Cable* (op. cit.) in 2019.

[***71***] *Limburgse Vinyl* (GC) (op. cit.).

[***72***] *Limburgse Vinyl* (ECJ) (op. cit.).

[***73***] *Archer Daniels Midland Company* (op. cit.).

[***74***] *Nexans* (op. cit.).

[***75***] Leczykiewicz (op. cit.) 150; de Búrca (op. cit.) 174.

[***76***] An interesting judgment on the horizon is Case T-254/17 *Intermarché Casino Achats v Commission*, pending.

[***77***] *Silec Cable* (op. cit.).

[***78***] *České dráhy* (GC) (op. cit.).

[***79***] *Nexans* (op. cit.).

[***80***] *Evonik Degussa* (ECJ) (op. cit.).

[***81***] *Goldfish* (op. cit.).

[***82***] *Deutsche Bahn* (ECJ) (op. cit.).

[***83***] *Silec Cable* (op. cit.) para. 24.

[***84***] *Silec Cable* (op. cit.) para. 61.

[***85***] Ibid.

[***86***] *České dráhy* (GC) (op. cit.) para. 162.

[***87***] *České dráhy* (GC) (op. cit.) para. 169. Recalling Articles 52(1) and 52(3) Charter and *Deutsche Bahn* (GC) (op. cit.) para. 65.

[**88**] *České dráhy* (GC) (op. cit.) paras 170-172, by analogy see Case T-187/11, *Trabelsi and Others* v *Council*, ECLI:EU:T:2013:273, para. 79.

[**89**] *České dráhy* (GC) (op. cit.) para. 174.

[**90**] *České dráhy* (GC) (op. cit.) para. 173. See also Case 136/79, *National Panasonic* v *Commission*, ECLI:EU:C:1980:169, para. 20.

[**91**] Ibid.

[**92**] Ibid.

[**93**] *České dráhy* (GC) (op. cit.) para. 113. See also *Deutsche Bahn* (GC) (op. cit.) para. 192.

[**94**] *České dráhy* (GC) (op. cit.) para. 114 (emphasis added). See also *Deutsche Bahn* (GC) (op. cit.) para. 193.

[**95**] Joined cases C-538/18 P and C-539/18 P, *České dráhy as v European Commission*, ECLI:EU:C:2020:53 - see ***Donald Slater**, The EU Court of Justice dismisses the appeals against the Commission's decisions in the case of alleged predatory practices by the Czech railway incumbent (České dráhy), 30 January 2020, e-Competitions January 2020, Art. N° 95871.*

[**96**] See Emily Xueref-Poviac, 'České dráhy: No obligations for the Commission to assess exculpatory evidence if there is already sufficient incriminating evidence to order an inspection' (2020) 11 JECLAP 47, 49.

[**97**] Case T-449/14, *Nexans v. European Commission*, ECLI:EU:T:2018:456, para. 39 (emphasis added).

[**98**] *Nexans* (op. cit.) para. 93.

[**99**] *Nexans* (op. cit.) para. 64.

[**100**] *Nexans* (op. cit.) paras 48-72, and 96.

[**101**] Case C-606/18 P, *Nexans v Commission*, ECLI:EU:C:2020:571.

[**102**] Advocate General Kokot noted: "*It is true that an inspection entails an intervention in the privacy of the undertaking and that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law, which is now codified in Article 7 of the Charter of Fundamental Rights of the European Union.…That does not mean, however, that the Commission's powers under Article 20 of Regulation No 1/2003 must be interpreted narrowly per se, as Nexans claims. Rather, those powers are to be interpreted and applied in such a way that strict respect for the rights of the undertakings concerned is guaranteed. The limitations to which the exercise of the Commission's powers is subject in the present context are not an end in themselves, but serve to ensure that those rights are respected.*" See Case C-606/18 P, *Nexans France and Nexans v Commission*, ECLI:EU:C:2020:207, Opinion of Advocate General Kokott, paras 60-61.

[**103**] See, e.g., Adam Steene, 'Nexans, Deutsche Bahn and the ECJ's Refusal to Follow ECHR Case Law on Dawn Raids' (2016) 7 JECLAP 180.

[**104**] *Evonik Degussa* (ECJ) (op. cit.) para. 59.

[**105**] *Evonik Degussa* (ECJ) (op. cit.) para. 62.

[**106**] *Evonik Degussa* (GC) (op. cit.) para. 124.

[**107**] *Evonik Degussa* (GC) (op. cit.) para. 125.

[**108**] *Evonik Degussa* (GC) (op. cit.) para. 126.

[**109**] Ibid.

[**110**] *Evonik Degussa* (ECJ) (op. cit.) para. 115.

[**111**] *Evonik Degussa* (ECJ) (op. cit.) para. 64 (emphasis added).

[**112**] Ibid.

[**113**] *Evonik Degussa* (ECJ) (op. cit.) para. 65.

[**114**] *Evonik Degussa* (ECJ) (op. cit.) para. 118.

[**115**] *Evonik Degussa* (ECJ) (op. cit.) para. 119.

[**116**] *Evonik Degussa* (ECJ) (op. cit.) para. 55. See also European Commission, 'Hearing Officer for Competition Proceedings: Activity Report 2017 and 2018', available at: *https://ec.europa.eu/competition/hearing_officers/activity_report_2017_2018_en.pdf*, p. 13.

[**117**] *Goldfish* (op. cit.) para. 35.

[**118**] *Goldfish* (op. cit.) para. 41.

[**119**] Case C-310/98 and C-406/98, *Met-Trans and Sagpol*, ECLI:EU:C:2000:154, para. 29.

[**120**] *Goldfish* (*op. cit.*) para. 44, noting "*to that effect, judgment of 8 July 2008, Franchet and Byk v Commission, T-48/05, EU:T:2008:257, paragraph 78 and the case-law cited*".

[**121**] *Popescu v. Romania* (ECtHR, 26 April 2007) App. no 27798/95, para. 106.

[**122**] *Goldfish* (op. cit.) para. 52.

[**123**] *Goldfish* (op. cit.) para. 60.

[**124**] *Goldfish* (op. cit.) para. 73.

[***125***] *Goldfish* (op. cit.) paras 63-67.

[***126***] *Goldfish* (op. cit.) para. 71 (emphasis added).

[***127***] *Deutsche Bahn* (ECJ) (op. cit.) para. 10.

[***128***] *Société Colas Est and Others v. France* (op. cit.).

[***129***] *Deutsche Bahn* (ECJ) (op. cit.) para. 14.

[***130***] *Deutsche Bahn* (ECJ) (op. cit.) para. 20, with reference to ECtHR, judgments in *Niemietz v. Germany* (op. cit.) and *Bernh Larsen Holding AS and Others v. Norway* (ECtHR, 14 March 2013) App. no 24117/08.

[***131***] *Deutsche Bahn* (ECJ) (op. cit.) para. 22.

[***132***] *Deutsche Bahn* (ECJ) (op. cit.) para. 23. See also *Hoechst* (op. cit.) para. 31.

[***133***] *Deutsche Bahn* (ECJ) (op. cit.) para. 32. See also *Delta Pekárny a.s. v. the Czech Republic* (ECtHR, 2 October 2014) App. no 97/11, paras 83, 87 and 92.

[***134***] *Deutsche Bahn* (ECJ) (op. cit.) paras 35-36.

[***135***] Access to file in competition investigations is also regulated by Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[***136***] Explanations (op. cit.). See Case 222/86, *Heylens*, ECLI:EU:C:1987:442, para. 15.

[***137***] Case C-110/10 P, *Solvay SA v European Commission*, ECLI:EU:C:2011:687. This case brought a brought argument based on the infringement of the rights of defence (Article 48 Charter) and the right to good administration (Article 41 Charter), and is a clear example of how the various rights contained in different Charter Articles are intertwined. Curiously, Article 48 is not referred to in the judgment as such. See ***Till Patrik Holterhus***, *The EU Court of Justice annuls fines imposed on Belgian chemicals company for anticompetitive conduct due to a breach of essential procedural requirements (Solvay), 25 October 2011, e-Competitions October 2011, Art. N° 40201.*

[***138***] Case T-180/15, *Icap plc and Others v European Commission*, ECLI:EU:T:2017:795 - see ***Richard Burton***, *The EU General Court partially annuls the Commission decision fining a financial company for facilitating cartels in the market of interest rate derivatives in Japanese yen (Icap), 10 November 2017, e-Competitions November 2017, Art. N° 85454* and ***Duncan Green, Charles Bankes***, *The EU General Court finds flaws in the EU Commission's decision and quashes the €14,9 million fine, but sustains underlying liability for "facilitation" of a cartel (Icap), 10 November 2017, e-Competitions November 2017, Art. N° 85619*; on appeal on other grounds Case C-19/18 P, *Commission v Icap and Others*, ECLI:EU:C:2019:584 - see ***Richard Burton***, *The EU Court of Justice reaffirms the General Court's decision to annul the fines imposed by the Commission in the Yen Interest Rate Derivatives cartel case (Icap), 10 July 2019, e-Competitions July 2019, Art. N° 91439.*

[***139***] *Icap* (op. cit) para. 259.

[***140***] *Icap* (op. cit) para. 260.

[***141***] *Icap* (op. cit) para. 269.

[***142***] *Icap* (op. cit) para. 273.

[***143***] *Icap* (op. cit) para. 272.

[***144***] *Icap* (op. cit) paras 274-280.

[***145***] Case T-433/16, *Pometon SpA v European Commission*, ECLI:EU:T:2019:201, paras 38 and 41. See ***Richard Burton***, *The EU General Court reduces a fine totalling over €30 million imposed in a cartel case (Pometon), 28 March 2019, e-Competitions March 2019, Art. N° 90356.*

[***146***] *Pometon* (op. cit.) paras 43-45.

[***147***] *Pometon* (op. cit.) para. 67, 68.

[***148***] *Pometon* (op. cit.) para. 75.

[***149***] Case C-440/19 P, pending before the ECJ.

[***150***] Case T-105/17, *HSBC Holdings and Others v Commission*, ECLI:EU:T:2019:675 see ***Elvira Aliende Rodriguez, Ruba Noorali, Matthew Readings***, *The EU General Court reaffirms the Commission's duty to provide sufficient reasons when explaining fine calculations in cartel cases (HSBC), 24 September 2019, e-Competitions September 2019, Art. N° 91999*, ***Clara García Fernández, Miguel Troncoso Ferrer, Sara Moya Izquierdo***, *The EU General Court annuls a cartel fine imposed by the Commission due to insufficient motivation (HSBC), 24 September 2019, e-Competitions September 2019, Art. N° 92030*, and ***Adeline-Raluca Toader***, *The EU General Court annuls a €33.6 million fine imposed in relation to the Euro Interest Rate Derivatives cartel because of the Commission's insufficient reasoning on the applied calculation method (HSBC), 24 September 2019, e-Competitions September 2019, Art. N° 92860*, appeal pending: Case C-883/19-P.

[***151***] *HSBC Holdings* (op. cit.) para. 51.

[***152***] *HSBC Holdings* (op. cit.) para. 286.

[***153***] *HSBC Holdings* (op. cit.) para. 287.

[***154***] Case T-62/98, *Volkswagen v Commission*, EU:T:2000:180, para. 283. See ***Konrad Schumm, Ulrich Krause-Heiber***, *The EU General Court confirms the Commission's decision concerning infringements of article 81 TEC in a motor vehicle distribution case (Volkswagen), 6 July 2000, e-Competitions July 2000, Art. N° 39163.*

[***155***] *HSBC Holdings* (op. cit.) para. 289.

[***156***] Case T-56/09, *Saint-Gobain Glass France & others v. European Commission*, ECLI:EU:T:2014:160, para.131.

[***157***] *Saint-Gobain* (op. cit.) para. 132.

[***158***] *Saint-Gobain* (op. cit.) para. 144. See Case C-196/99 P, *Aristrain v Commission*, ECLI:EU:C:2003:529, para. 52; Case 32/86, *Sisma v Commission*, ECLI:EU:C:1987:187, para. 8.

[***159***] *Saint-Gobain* (op. cit.) para. 162.

[***160***] *Menarini* (op. cit.) paras 38-44.

[***161***] Case C-265/17 P, *European Commission v United Parcel Service, Inc.*, ECLI:EU:C:2018:628, Opinion of Advocate General Kokott, para. 33. See ***Porter Elliott***, *The EU Court of Justice Advocate General Kokott issues an opinion supporting the rights of defence of merging parties (UPS / TNT), 25 July 2018, e-Competitions July 2018, Art. N° 87551.*

[***162***] Case T-194/13, *United Parcel Service v Commission*, ECLI:EU:T:2017:144. See ***James Killick***, *The EU General Court annuls a Commission decision prohibiting a merger in the parcel delivery sector on due process grounds (UPS / TNT), 7 March 2017, e-Competitions March 2017, Art. N° 83594*, ***Ian Small, Simon Chisholm***, *The EU General Court annuls the Commission's decision to prohibit a merger in the International express package delivery sector (UPS / TNT), 7 March 2017, e-Competitions March 2017, Art. N° 83635*, and ***Porter Elliott***, *The EU General Court annuls a prohibition merger decision and finds that the Commission had failed to properly communicate the final version of its econometric analysis (UPS / TNT), 7 March 2017, e-Competitions March 2017, Art. N° 83649.*

[***163***] *United Parcel Service* (op. cit.) para. 199.

[***164***] Case M.6570, *UPS/TNT Express* C (2013) 431 final. See ***Nicolas Petit***, *The EU Commission blocks a proposed acquisition in the express mail service (UPS / TNT), 30 January 2013, e-Competitions January 2013, Art. N° 54691* and ***Porter Elliott***, *The EU Commission prohibits a merger considering that efficiencies arguments were not sufficiently verifiable (UPS / TNT Express), 30 January 2013, e-Competitions Postal services, Art. N° 66954.*

[***165***] *United Parcel Service* (op. cit.) para. 160.

[***166***] Case C-265/17 P, *European Commission v United Parcel Service, Inc.*, ECLI:EU:C:2019:23. See ***Porter Elliott***, *The EU Court of Justice upholds the General Court's ruling that annulled the Commission's decision prohibiting a merger in the parcel delivery market (UPS / TNT), 16 January 2019, e-Competitions January 2019, Art. N° 88964*, ***James Killick, Assimakis Komninos***, *The EU Court of Justice dismisses the Commission's appeal against the annulment of its decision to prohibit a merger in the parcel delivery market (UPS / TNT), 16 January 2019, e-Competitions January 2019, Art. N° 89214*, and ***Charlotte Breuvart, Eric Barbier de la Serre, Serge Clerckx, Henry de la Barre d'Erquelinnes***, *The EU Court of Justice rules that the Commission violates rights of defence when it failed to share the final economic model used in its decision to block a merger (UPS / TNT), 16 January 2019, e-Competitions January 2019, Art. N° 89313.*

[***167***] *United Parcel Service* (op. cit.) para. 199.

[***168***] *United Parcel Service* (op. cit.) paras 199-200.

[***169***] *United Parcel Service* (op. cit.) para. 205.

[***170***] *United Parcel Service* (op. cit.) para. 209.

[***171***] *United Parcel Service* (op. cit.) paras 210-221.

[***172***] Opinion of Advocate General Kokott in *European Commission v United Parcel Service, Inc.* (op. cit.) para. 33.

[***173***] *European Commission v United Parcel Service, Inc.* (op. cit.) para. 34.

[***174***] *European Commission v United Parcel Service, Inc.* (op. cit.) para. 56.

[***175***] Case T-418/10, *voestalpine and voestalpine Wire Rod Austria v Commission*, ECLI:EU:T:2015:516. See ***Richard Burton***, *The EU General Court reduces the fines imposed by the Commission on three members of a EU pre-stressing steel market cartel (Pre-stressing steel cartel), 15 July 2015, e-Competitions July 2015, Art. N° 75154.*

[***176***] Case T-146/09 RENV, *Parker Hannifin Manufacturing and Parker-Hannifin v Commission*, ECLI:EU:T:2016:411. See ***Richard Burton***, *The EU General Court rules that a parent company cannot be held liable for aggravated circumstances of a subsidiary's conduct prior to the date of its acquisition (Parker Hannifin), 14 July 2016, e-Competitions July 2016, Art. N° 80693.*

[***177***] Case C-99/17 P, *Infineon Technologies v Commission*, ECLI:EU:C:2018:773. See ***Richard Burton***, *The EU Court of Justice partly upholds the judgement of the EU General Court in a cartel case but sends it back to reexamine the calculation of the fine (Infineon), 26 September 2018, e-Competitions September 2018, Art. N° 88021* and ***Jacques Buhart, Mai Muto, Philip Bentley***, *The EU Court of Justice refers a case back to the General Court to reconsider the possibility of mitigating circumstances on the fine calculation (Infineon), 26 September 2018, e-Competitions September 2018, Art. N° 89394.*

[***178***] *Infineon* (op. cit.).

[***179***] Case T-758/14, *Infineon Technologies v Commission*, EU:T:2016:737. See ***Richard Burton***, *The EU General Court dismisses the actions of undertakings in a cartel case and upholds the fines imposed by the Commission (Smart card chips cartel), 15 December 2016, e-Competitions December 2016, Art. N° 82637.*

[***180***] *Infineon* (op. cit.) para. 185.

[***181***] Ibid.

[***182***] *Infineon* (op. cit.) para. 206.

[***183***] *Infineon* (op. cit.) para. 207.

[***184***] In fact, some of the most important *ne bis in idem* cases in the competition sphere have been preliminary references (and therefore not covered in our analysis), e.g.: Case C-17/10, *Toshiba Corporation e.a.*, ECLI:EU:C:2012:72, before the Grand Chamber of the ECJ. The applicants appealed a decision of the Czech competition authority, claiming that there was a breach of the principle of *ne bis in idem* to have the same facts subject to a decision and penalty by a national authority and the Commission. The Charter was cited at the oral hearing. See, e.g. ***Jindrich Kloub***, *The EU Court of Justice renders a judgment on a Czech preliminary reference in the gas-insulated switchgear case (Toshiba), 14 February 2012, e-Competitions February 2012, Art. N° 42840*, ***Karel Svoboda***, *The EU Court of Justice confirms the power of the Czech Competition Authority to punish a pre-EU-accession cartel on the basis of Art. 101 TFEU (Toshiba), 14 February 2012, e-Competitions February 2012, Art. N° 45017*, and ***Anton Dinev***, *The EU Court of Justice rules on parallel enforcement under Regulation 1/2003 while declining to redefine ne bis in idem within the ECN (Toshiba), 14 February 2012, e-Competitions February 2012, Art. N° 49475*. See also Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2019:283, paras 30 and 32. Article 50 was also recently raised in Case T-466/17, *Printeos and Others v Commission*, ECLI:EU:T:2019:671, as grounds for the readoption of a decision by the Commission, but unsurprisingly rejected by the GC. See ***Richard Burton***, *The EU General Court dismisses an appeal against the re-adopted decision in the paper envelope cartel case (Printeos / Commission), 24 September 2019, e-Competitions September 2019, Art. N° 92152*.

[***185***] Case C-95/15 P, *H&R ChemPharm v Commission*, ECLI:EU:C:2017:125; Case C-10/18 P, *Marine Harvest v Commission*, ECLI:EU:C:2020:149 - see, e.g. ***Michele Giannino***, *The EU Court of Justice confirms the EU Commission's gun-jumping findings (Marine Harvest) , 4 March 2020, e-Competitions March 2020, Art. N° 93700*, ***Jakob Dewispelaere***, *The EU Court of Justice dismisses the appeal by a seafood company against the Commission's fine for failure to notify a transaction (Marine Harvest), 4 March 2020, e-Competitions March 2020, Art. N° 94735*, and ***Mark Jones, Christopher Peacock***, *The EU Court of Justice upholds the EU Commission's fines to a fish farmer and processor company for infringing merger control rules (Marine Harvest), 4 March 2020, e-Competitions August 2020, Art. N° 95787*.

[***186***] Please note that *ne bis in idem* arguments can also be brought forward as an argument based on the standalone general principle of law, as opposed to the principle contained in Article 50 Charter.

[***187***] *Marine Harvest* (op. cit.).

[***188***] Commission Decision C(2014) 5089 final of 23 July 2014, imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of the Merger Regulation 139/2004.

[***189***] *Marine Harvest* (op. cit.) para. 77.

[***190***] See, e.g., Case C-673/16, *Coman and Others*, ECLI:EU:C:2018:385.