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Article

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ABSTRACT

This paper deals with the fundamental procedural rights of companies that are targeted in the enforcement of Articles 101 and 102 TFEU by the European Commission or the competition authorities of the EU Member States. The paper first provides a (non-exhaustive) list of such rights as applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission, and explains the source of these fundamental rights in the EU legal order. The paper then examines the relationship between fundamental procedural rights and effective enforcement of Articles 101 and 102 TFEU. It argues that procedural rights often contribute to effective enforcement, but not always. The interplay between fundamental rights of legal persons and competition enforcement remains a balancing exercise, and this balancing exercise is not the same as in traditional criminal law. Finally, the paper examines the question whether or to what extent EU Member States can, for the enforcement of Articles 101 and 102 TFEU by their national competition authorities, provide for a lower or a higher level of procedural rights than the level of fundamental procedural rights applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission.

I. Introduction: Articles 101 and 102 TFEU and the European Competition Network

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings that affect trade between EU Member States and restrict competition without redeeming virtue. Article 102 TFEU prohibits abuse of a dominant position within the EU internal market or in a substantial part of it.[1]

Regulation 1/2003,[2] the main regulation giving effect to Articles 101 and Article 102 TFEU, entrusts both the European Commission and the competition authorities of the EU Member States (national competition authorities or NCAs), forming together the European Competition Network (ECN), with the task of pursuing infringements of Articles 101 and 102 TFEU.[3]

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1 These two prohibitions were previously contained in Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) and in Articles 81 and 82 of the Treaty establishing the European Community (EC).

2 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, last amended by Council Regulation (EC) No 1419/2006, [2006] OJ L269/1.

3 For a detailed analysis of Regulation 1/2003, in comparison with the regime preceding it, see my *Community Report* in D. Cahill and J.D. Cooke (eds), *The Modernisation of EU Competition Law Enforcement in the EU – FIDE 2004 National Reports* (Cambridge 2004), 661-736, also accessible at http://ssrn.com/author=456087, and my book *Principles of European Antitrust Enforcement* (Hart 2005). For a reminder of the genesis of Regulation 1/2003 and an overview of its main results, see my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087. Apart from the public enforcement by the European Commission and the competition authorities of the EU Member States, Articles 101 and 102 TFEU are also invoked in litigation between private parties in the courts of the EU Member States (private enforcement); see further my paper 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 *World Competition* 3, also accessible at http://ssrn.com/author=456087. The guarantees necessary to ensure respect for the rights of the defence in public enforcement are different from those which are necessary to safeguard the rights of the defence of a party involved in civil litigation; see Judgment in *Otto* v *Postbank*, C-60/92, EU:C:1993:876, paragraphs 15 to 17.

II. Fundamental procedural rights applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission

1. The European Commission's enforcement powers

To enable the European Commission to enforce Articles 101 and 102 TFEU, Regulation 1/2003 grants the European Commission a number of investigative and decisional powers. The European Commission's investigative powers are set out in Chapter V of Regulation 1/2003, the two main instruments being requests for information (Article 18) and inspections of business premises (Article 20). The European Commission's decisional powers are set out in Chapters III and VI of Regulation 1/2003, the two main instruments being decisions finding infringements and ordering their termination (Article 7) and imposing fines (Article 23(1)(a)).[4]

2. Enforcement only targets companies, not natural persons

In practice, the enforcement of Articles 101 and 102 TFEU by the European Commission targets only companies or other legal persons, not natural persons.[5]

The substantive antitrust prohibitions contained in Articles 101 and 102 TFEU are addressed to undertakings and associations of undertakings. The concept of undertaking in that context must be understood as designating an economic unit, even if in law that economic unit consists of several persons, natural or legal.[6] However, decisions by the European Commission (or by national competition authorities) ordering termination of infringements or imposing fines can only be addressed to persons, not least because such decisions must be enforced.[7] The same is true of investigative measures such as decisions requesting information or inspection decisions. The European Commission thus conducts the whole of its enforcement proceedings vis-à-vis the person or persons to whom the conduct of the undertaking can be imputed, typically a parent company and one or more of its subsidiaries. Each of these companies concerned by the proceedings is individually entitled to all the applicable procedural rights and safeguards.[8]

If the undertaking suspected of an infringement of Articles 101 or 102 TFEU were found to consist of an unincorporated business (a single trader, with or without employees, who has not incorporated her business, or a professional exercising her profession alone and unincorporated, or several natural persons operating a single business without any employment relationship between them and without any form of legal person), the European Commission would necessarily have to conduct its enforcement proceedings vis-à-vis the natural person or persons operating the business. However, this situation almost never occurs: in practice proceedings are always conducted against companies or other legal persons.[9]

4 For a detailed overview, see L. Ortiz Blanco (ed.), *EU Competition Procedure* (3rd edition, Oxford University Press 2013) and N. Kahn, *Kerse & Khan on EU Antitrust Procedure* (6th edition, Sweet & Maxwell 2012).

5 See further my paper 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117, also accessible at http://ssrn.com/author=456087.

6 Judgments in *Akzo Nobel NV and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 54 and 55 and in *Schindler Holding Ltd and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 102.

7 See Opinion of Advocate-General Kokott in *Akzo Nobel NV and Others* v *Commission*, Case C-97/08 P, EU:C:2009:262, paragraph 37, and Article 299 TFEU.

8 See Judgments in *Akzo Nobel NV and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 57, in *Akzo Nobel NV and Others* v *Commission*, T-47/10, EU:T:2015:506, paragraph 126 (confirmed on appeal in *Akzo Nobel NV and Others* v *Commission*, C-516/15 P, EU:C:2017:314) and in *LG Electronics Inc and Koninklijke Philips NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 45-46.

9 In the *Pre-Insulated Pipes* case, one of the undertakings fined for participation in the cartel was controlled and managed by a natural person, Dr. W. H., but the European Commission appears to have made an effort to avoid imposing the fine on him, identifying instead a collection of companies which it held jointly and severally liable for the fine; see recitals 157-160 and Article 3(d) of the Decision of 21 October 1998, *Pre-Insulated Pipe Cartel*, [1999] OJ L24/1, and paragraph 105 of the Judgment in *HFB and Others* v *Commission*, T-9/99, EU:T:2002:70, in which the Court found that the European Commission had 'intentionally' not established Dr H.'s liability.
See also Judgment in *Aristrain* v *Commission*, C-196/99 P, EU:C:2003:529, paragraphs 91 and 101.

3. A (non-exhaustive) list of fundamental procedural rights

The companies targeted by the European Commission's enforcement of Articles 101 and 102 TFEU benefit from a number of fundamental procedural rights, including:

- protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities (protection of privacy / right to the inviolability of the home),[10]
- the right not to be compelled to admit their participation in an infringement (privilege against self-incrimination),[11]
- legal professional privilege,[12]
- the presumption of innocence,[13]
- the right to be heard, and its corollary, the right of access to the file,[14]
- the right to careful and impartial examination,[15]
- the right to an adequate statement of reasons,[16]
- the right to effective judicial protection, [17]
- the right to a decision within a reasonable time,[18] and
- the principle of *ne bis in idem*.[19]

4. The source of fundamental procedural rights in the EU legal order

The fundamental rights applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission are nowadays primarily enshrined in the Charter of Fundamental Rights of the EU (the Charter or CFREU), but can also be found in general principles of EU law.[20]

According to Article 6(1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty in 2009, "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".[21]

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10 See Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), and Judgments in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19, in *Deutsche Bahn* v *Commission*, C-583/13 P, EU:C:2015:404, paragraphs 19 to 36, in *Nexans France and Nexans* v *Commission,* T-135/09, EU:T:2012:596, and in *České dráhy* v *Commission*, T-325/16, EU:T:2018:368.

11 See Judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 35-40; Judgment and Opinion of Advocate-General Geelhoed in *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432 and EU:C:2006:53; Judgment in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraphs 177 to 194; Opinion of Advocate-General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, paragraphs 149 to 164; recital 23 of Regulation 1/2003; and my paper 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567, also accessible at http://ssrn.com/author=456087. See further text accompanied by notes 114 to 132 below.

See also, on the compatibility of leniency and settlement procedures with the privilege against self-incrimination, Judgments in *Schindler* v *Commission*, T-138/07, EU:T:2011:362, paragraphs 148 to 158, and in *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11, paragraphs 84 to 87, and my papers 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25 and 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, both also accessible at http://ssrn.com/author=456087.

12 See Judgment in *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157; Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287; Judgment and Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512 and EU:C:2010:229; and my paper 'Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure' (2019) 42 *World Competition* 21, also accessible at http://ssrn.com/author=456087. See further text accompanied by notes 47 to 55, 79 to 83 and 90 to 113 below.

13 See Article 48(1) CFREU; Judgment in *Hüls* v *Commission*, C-199/92 P, EU:C:1999:358, paragraph 150; and Judgments in *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraphs 256 to 269 and in *Pometon* v *Commission*, T-433/16, EU:T:2019:201, paragraphs 52 to 103. See text accompanied also by notes 61 to 63 below.

14 See Article 41(2)(a) and (b) CFREU; Judgment in *Aalborg Portland and Others* v *Commission*, C-204/00 P etc., EU:C:2004:6, paragraphs 66 to 77; and Article 27(1) and (2) of Regulation 1/2003; and W. Wils and H. Abbott, 'Access to the File in Competition Proceedings Before the European Commission', (2019) 42 *World Competition* 255, updated version accessible at http://ssrn.com/author=456087.

15 See Article 41(1) CFREU; Judgments in *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, in *Teva* v *Commission*, T-679/14, EU:T:2018:919, paragraph 54, and in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraph 101.

16 See Article 41(2)(c) CFREU and Article 296 TFEU; Judgments in *Icap and Others* v *Commission*, C-39/18 P, EU:C:2019:584, in *Pometon* v *Commission*, T-433/16, EU:T:2019:201, paragraphs 348 to 394, in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraphs 29 to 40, and in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraphs 35 to 55.

17 See Article 47 CFREU; Article 31 of Regulation 1/2003; Judgment in *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraphs 71 to 77; Judgments in *Groupement des Cartes Bancaires* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 89 to 91, and in *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 141 to 147; and Judgment in *Deutsche Bahn* v *Commission*, C-583/13 P, EU:C:2015:404, paragraphs 41 to 48.

18 See Articles 41(1) and 47, second paragraph, CFREU; Judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Electrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, paragraphs 35 to 62; Opinion of Advocate-General Kokott in *Solvay* v *Commission*, C-109/10 P, EU:C:2011:256, paragraphs 229 to 277 and 305 to 357; Judgment in *Groupe Gascogne* v *Commission*, C-58/12 P, EU:C:2013:770, paragraphs 72 to 96; Judgment in *Bolloré* v *Commission,* C-414/12 P, EU:C:2014:301, paragraphs 104 to 109; View of Advocate-General Kokott in Opinion procedure 2/13, EU:C:2014:2475, paragraphs 153 to 155; Judgment in *The Goldman Sachs Group* v *Commission*, T-419/14, EU:T:2018:445, paragraphs 245 to 251; Judgment in *Italmobiliare* v *Commission*, T-523/15, EU:T:2019:499, paragraphs 153 to 160; and Final Report of the Hearing Officer of 1 July 2019 in Case AT.37956 *Reinforcing bars*.

19 See Article 50 CFREU; Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P etc., EU:C:2002:582, paragraphs 59 to 68; View of Advocate-General Kokott in Opinion procedure 2/13, EU:C:2014:2475, paragraph 152; and my paper 'The Principle of "Ne Bis in Idem" in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003)26 *World Competition* 131, also accessible at http://ssrn.com/author=456087.

20 For a more detailed analysis, see my paper 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189, also accessible at http://ssrn.com/author=456087.

21 The final text of the Charter has been published in: [2007] OJ C303/1.

See also recital 37 of Regulation 1/2003, which states that "this Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles".

According to its Preamble, the purpose of the Charter is "to strengthen the protection of fundamental rights […] by making those rights more visible in a Charter". The Charter "reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, […] and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights".[22]

According to Article 6(3) TEU, "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, […] constitute general principles of the Union's law".

Before the entry into force of the Lisbon Treaty, general principles of EU law (or "general principles of Community law" as they were called at the time) were the main source of fundamental procedural rights.[23] Given that, since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU has the same legal value as the Treaties, and given that the Charter contains the rights guaranteed by the Convention, and also draws upon the common constitutional traditions of the Member States, general principles of EU law are now a subsidiary and complementary source of fundamental procedural rights, which mainly serves to fill any gaps in the Charter.[24]

Whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the European Convention on Human Rights (ECHR) constitute general principles of EU law and whilst Article 52(3) CFREU provides that the rights in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the ECHR does not constitute, for as long as the European Union has not acceded to it,[25] a legal instrument which has been formally incorporated into EU law.[26]

5. The role of the EU Courts

The primary responsibility for respecting fundamental procedural rights in its enforcement of Articles 101 and 102 TFEU lies of course with the European Commission itself. The respect by the European Commission of the fundamental procedural rights applicable to its enforcement of Articles 101 and 102 TFEU is however ultimately ensured by the EU Courts (General Court and Court of Justice). While there is already a well-developed case-law going back several decades, novel issues of interpretation and application of those fundamental procedural rights keep coming up.

For example, in its judgment of 10 July 2019 in Case C-39/18 P *Commission* v *Icap and Others*,[27] the Court of Justice confirmed an earlier judgment of the General Court,[28] annulling a decision of the European Commission imposing a fine for an infringement of Article 101 TFEU for non-respect of the obligation to state reasons, enshrined in Article 296 TFEU and Article 41(2)(c) CFREU.[29] The Court of Justice thus clarified that the right to an adequate statement of reasons requires that, when the European Commission, for the determination of the amount of a fine, uses a method of calculation (other than a simple lump sum) that deviates from the method set out in its Fining Guidelines,[30] the European Commission must indicate in its decision all the factors taken into account and explain the relevance and weighting of these factors (without being obliged to provide figures relating to the method of calculation or to explain in detail the internal calculations which it has carried out).

22 See also Article 52 CFREU; the Explanations to the Charter, [2007] OJ C303/17; and Declaration No 1 concerning the Charter of Fundamental Rights of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, [2007] OJ C306/249.

23 See my paper 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law' (2006) 29 *World Competition* 3, also accessible at http://ssrn.com/author=456087, and G. Delledonne and F. Fabbrini, 'The founding myth of European human rights law: revisiting the role of national courts in the rise of EU human rights jurisprudence'(2019) *European Law Review* 178.

24 The main gap in the Charter is not relevant for the enforcement of Articles 101 and 102 TFEU by the European Commission but is relevant for the enforcement of Articles 101 and 102 TFEU by the competition authorities of the EU Member States. Because of its specific wording, Article 41 CFREU only applies to the institutions, bodies, offices and agencies of the European Union, not to the Member States. However, the content of Article 41 CFREU reflects general principles of EU law that as such apply also to the enforcement of Articles 101 and 102 TFEU by the competition authorities of the EU Member States; see Judgment in *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraphs 67 and 68, and text accompanied by notes 76 to 78 below.

25 Article 6(2) TEU, as inserted by the Lisbon Treaty in 2009, provides that the EU shall accede to the ECHR. Negotiations between the EU and the Council of Europe for an accession agreement were started in 2010 and a draft agreement was reached in 2013. However, in Opinion 2/13 of 18 December 2014, EU:C:2014:2454, the EU Court of Justice held that the draft agreement is not compatible with Article 6(2) TEU and with Protocol No 8 EU, which require that the accession agreement preserve the specific characteristics of the Union and Union law. Some commentators have come to the conclusion that "the accession of the European Union to the ECHR may now have turned into a *mission impossible*" (Editorial comments, *Common Market Law Review*, 52:1–16, 2015, at 14). Renewed negotiations between the EU and the Council of Europe will start in 2020.

26 Judgment in *Garlsson Real Estate and Others* v *Consob*, C-537/16, EU:C:2018:193, paragraph 24. As pointed out in paragraph 25 of the same judgment, according to the explanations relating to Article 52 of the Charter, Article 52(3) thereof is intended to ensure the necessary consistency between the Charter and the ECHR, "without thereby adversely affecting the autonomy of Union law and […] that of the Court of Justice of the European Union".

27 EU:C:2019:584.

28 Judgment in *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795.

29 See note 16 above.

30 Guidelines on the method of fines pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2.

In addition, in paragraph 34 of its judgment,[31] the Court of Justice appears to have endorsed the view expressed by Advocate-General Tanchev in his Opinion of 2 May 2019 that the right to be heard, enshrined in Article 41(2)(a) of the Charter,[32] further requires that the company concerned is also heard during the administrative procedure on this method of calculation, allowing the company to express its views on all the factors to be taken into account and their relevance and weighting before the European Commission adopts its decision.[33] The Court of Justice thus appears to have departed from its previous case-law according to which the European Commission only needed to hear the companies concerned on the main factual and legal criteria on which it intended to base the calculation of the fine, without the need to specify the way in which it intended to use those elements.[34]

6. The role of the Hearing Officer

Inside the European Commission, the primary responsibility for respecting the procedural rights of all parties involved in competition proceedings lies with the Directorate-General for Competition (DG Competition).[35] The European Commission has however also created in its internal organisation the function of the Hearing Officer, to whom the parties can turn during the administrative procedure for an independent review of any issues regarding the effective exercise of their procedural rights.[36]

For example, in Case AT.40054 *Ethanol Benchmarks*, which concerns an alleged infringement of Article 101 TFEU, the European Commission engaged in settlement discussions with all three of the groups of companies under investigation.[37] Whilst one of the groups of companies (Lantmännen) made a formal settlement submission, the two other groups of companies abandoned the settlement procedure. When the European Commission subsequently sent under the normal non-settlement procedure a statement of objections to the two non-settling groups of companies, DG Competition initially granted the two non-settling groups of companies access to Lantmännen's settlement submission under the conditions set out in Article 15(1b) of Regulation 773/2004 and paragraph 35 of the Settlement Notice,[38] but refused access to previous correspondence in the file concerning Lantmännen's settlement discussions, including in particular a number of so-called 'non-papers' submitted by Lantmännen during the settlement discussions. One of the two non-settling group of companies raised the issue with the Hearing Officer, claiming that its right of access to the file, enshrined in Article 41(2)(b) CFREU,[39] extended to the settlement correspondence between Lantmännen and the European Commission preceding Lantmännen's settlement submission. The Hearing Officer accepted the request of that non-settling group of companies and ordered that access be given to the said settlement correspondence under the conditions set out in paragraph 35 of the Settlement Notice.[40] Lantmännen brought an application for annulment of the Hearing Officer's decision before the General Court,[41] accompanied by an application for interim measures to stay the implementation of the Hearing Officer's decision. After the President of the General Court and the Vice-President of the Court of Justice rejected the application for interim measures,[42] Lantmännen withdrew its application for annulment.[43]

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31 As note 27 above.

32 See note 14 above.

33 Opinion of Advocate-General Tanchev in *Commission* v *Icap and Others*, C-39/18 P, EU:C:2019:359.

34 See Judgment of 6 July 2017 in *Toshiba* v *Commission*, C-180/16 P, EU:C:2017:520, paragraph 21 and 33, and the case-law referred to therein. See however also Judgment of the General Court of 7 November 2019 in *Campine and Campine Recycling* v *Commission*, T-240/17, EU:T:2019:778, paragraphs 350 to 360.

35 See recital 8 and Article 3(7) of Decision 2011/695/EU, as note 36 below.

36 See Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, [2011] OJ L275/29; see further my paper 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2012) 35 *World Competition* 431, updated version accessible at http://ssrn.com/author=456087.

37 On the European Commission's cartel settlement procedure, see Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18, last amended by Commission Regulation (EU) 2015/1348, [2005] OJ L208/3; Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, [2008] OJ C167/1, amended by Communication from the Commission – Amendments to the Commission Notice on the conduct of settlement procedures, [2015] OJ C256/2; and my paper 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, also accessible at http://ssrn.com/author=456087.

38 As note 37 above.

39 See note 14 above.

40 As note 37 above.

41 Case T-79/19 *Lantmännen and Lantmännen Agroetanol* v *Commission*. Among other arguments, Lantmännen claimed on the basis of the wording "confidential vis-à-vis third parties" in Article 10a(2) of Regulation 773/2004 and in paragraph 7 of the Settlement Notice that settlement discussions between the European Commission and a party to the proceedings are confidential vis-à-vis other (settling or non-settling) parties to the same proceedings. However, it is clear from an overall reading of both Regulation 1/2003 and Regulation 773/2004 that the term "third parties" in Article 10a(2) of Regulation 773/2004 means the same as elsewhere in Regulation 1/2003 and Regulation 773/2004, namely parties other than those that are the subject of given proceedings. This is corroborated by a combined reading of point 6 of the Settlement Notice and the first sentence of point 7 of that notice, where "third parties" are opposed to "parties to the proceedings", the latter including both settling and non-settling parties.

42 Order of the President of the General Court of 2 April 2019 in *Lantmännen and Lantmännen Agroetanol* v *Commission*, T-79/19 R, EU:T:2019:212, and Order of the Vice-President of the Court of Justice of 10 September 2019 in *Lantmännen and Lantmännen Agroetanol* v *Commission*, C-318/19 P(R), EU:C:2019:698.

43 See Order of the President of the Eighth Chamber of the General Court of 18 November 2019 in *Lantmännen and Lantmännen Agroetanol* v *Commission*, T-79/19, EU:T:2019:806.

III. Striking the right balance between fundamental rights and effective enforcement

1. Procedural rights often contribute to effective enforcement…

Procedural rights and effective law enforcement are not inherently antithetical. Rather to the contrary, procedural rights can contribute to effective enforcement in two ways:

- by enhancing the accuracy of the outcome of enforcement proceedings, and hence their deterrent effect; and
- by enhancing the perceived fairness of the law, and hence voluntary compliance with the law.[44]

In particular, the right to be heard before the competition authority adopts a decision finding an infringement, ordering its termination and/or imposing a fine and the right to effective judicial review of such decisions are useful for effective enforcement in that they safeguard against inaccurate decisions being taken or being upheld.

That only the guilty should be punished, and that sanctions should be proportionate to the infringement, not only reflects basic requirements of justice, but is also essential for the effectiveness of deterrence. Indeed, it is through the differential in expected sanctions between non-infringement and infringement, and between lesser and more serious infringements, that potential infringers are deterred from entering into infringements, or infringers are deterred from prolonging, extending or otherwise aggravating their infringements.

Secondly, procedural fairness not only constitutes a value in itself, but also contributes to the objective of ensuring compliance with the substantive law, to the extent that perceptions of fairness lead to greater voluntary compliance.[45]

Concerning in particular the right to effective judicial review, Commissioner Vestager recently expressed as follows these twin benefits of procedural rights for effective enforcement:

> "*At every stage in a competition investigation, we're aware that our reasoning and our choices have to satisfy the courts. So for us, the rule of law is a constant presence, in the work that we do.*
>
> *And that is a good thing – because it helps us reach better decisions. It reminds us to make our assumptions explicit. It helps us to make sure that we've considered every angle, looked at every arguments that could prove – or disprove – our case.*
>
> *And it also helps to build trust and acceptance for the work that we do. Of course, we can't expect companies to welcome being fined. But it is important that our society – business, consumers, politicians – are confident that we're taking those decisions for the right reasons*".[46]

2. …but not always: The example of legal professional privilege

Whereas procedural rights can contribute to effective enforcement, this is not always or not necessarily the case. Legal professional privilege provides a good example.[47]

Legal professional privilege is the expression commonly used to describe what the EU Court of Justice has called the "principle of confidentiality of written communications between lawyer and client".[48] As has been pointed out repeatedly,[49] the expression "legal professional privilege" is a misnomer, because it is a right of the client, not a privilege of the legal profession.[50]

It follows from legal professional privilege, as recognised by the EU Court of Justice since its 1982 judgment in *AM & S Europe* v *Commission*, that the European Commission cannot use its powers of investigation to compel the disclosure of communications between lawyers and clients, provided that, on the one hand, such communications are made for the purpose and in the interests of the client's rights of defence and, on the other

44 See also my paper 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, also accessible at http://ssrn.com/author=456087, text accompanied by footnotes 76 to 78.

45 See T.R. Tyler, *Why People Obey the Law* (Yale University Press 1990).

46 Speech 'Competition and the rule of law' (European Association of Judges, Copenhagen, 10 May 2019).

47 For a more detailed analysis, see my paper 'Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure' (2019) 42 *World Competition* 21, also accessible at http://ssrn.com/author=456087, and E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587.

48 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157. In its more recent judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, the Court of Justice also used the expression "legal professional privilege".

49 See Lord Wilberforce in *Waugh* v *British Railways Board* [1980] AC 251, at 531; Opinion of Advocate-General Warner in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1981:19, [1982] ECR 1619 at 1622 and 1633; and Opinion of Advocate-General Sir Gordon Slynn in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:17, [1982] ECR 1642 at 1650.

50 As has been pointed out by the EU Court of Justice, "the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if it considers that it is in his interest to do so"; see Judgments in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 28, and in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 90. See also Order in *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraph 12.

hand, the lawyers are independent lawyers, who are not bound to the client by a relationship of employment, and who are entitled to practise their profession in one of the EU (or EEA) Member States.[51]

In EU law, the protection of legal professional privilege thus circumscribed is a fundamental right, which constitutes a general principle of EU law and which can also be derived from Article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Article 47(1), second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for the rights of the defence).[52]

It is sometimes argued, in particular by the in-house lawyer and business lobbies that would want legal professional privilege to be extended to cover also in-house lawyers, that legal professional privilege would also be beneficial for effective enforcement in that it would lead to increased compliance with the antitrust prohibitions.[53]

This argument is neither convincing in theory, nor supported by empirical evidence.[54]

In theory, the argument would only work if legal professional privilege were limited to advice about future conduct (not past conduct) and conditional upon the legal advice being followed. Indeed, only if these cumulative conditions are met could the seeking of legal advice lead to more compliance. The fundamental right of legal professional privilege, as recognised by the EU Court of Justice, is not however subject to these conditions. Nor would it be if that right were to be extended to in-house lawyers.

Nor does the limited available evidence support the argument that legal professional privilege would lead to more compliance. For example, it turned out that AM & S Europe continued infringing Article 85 EEC (now Article 101 TFEU) for five years after it received the legal advice at stake in the *AM & S Europe* v *Commission* case.[55]

3. Reconciling fundamental rights and effective competition enforcement

To the extent that fundamental procedural rights and effective enforcement of Articles 101 and 102 TFEU may be in tension, the question arises how such tension should be resolved.

The answer to this question comes in two parts.

3.1. A balancing exercise

The first part of the answer is that a balancing exercise is required.

In the words of Advocate-General Geelhoed:

> *"[T]he interplay between the fundamental rights of legal persons and competition enforcement remains a balancing exercise: at stake are the protection of fundamental rights versus effective enforcement of [EU] competition law. As the Court of Justice held in Eco Swiss [C-126/97, EU:C:1999:269], [Article 101 TFEU] is a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [European Union] and, in particular for the functioning of the internal market. [Article 101 TFEU] forms part of public policy. … It is self-evident that the effective enforcement with reasonable means of the basic tenets of the [EU] legal order should remain possible, just as it is evident that the rights of the defence should be respected too".*[56]

In the hierarchy of norms of the EU legal order, fundamental rights, as recognised in particular by the Charter, on the one hand, and Articles 101 and 102 TFEU, on the other hand, are at the same level. Both are fundamental provisions. Whereas the enforcement of Articles 101 and 102 TFEU must respect fundamental rights, fundamental rights must also be interpreted and applied in a way that allows for effective enforcement of Articles 101 and 102 TFEU.

51 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraphs 18 to 27, confirmed by Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512. In subsequent judgments, the EU General Court has recognised that internal documents of a company summarising advice received in exercise of the company's rights of defence from external lawyers are also protected; see Order in *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraph 18. Similarly, internal preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, are protected if drawn up exclusively for the purpose of seeking legal advice from an external lawyer in exercise of the rights of defence; see Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 123. On the other hand, the mere fact that a document has been discussed with an external lawyer is not sufficient to give it protection; see Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 123.

52 See Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 47.

53 See for instance the written contribution by BIAC for the discussion at the OECD on the treatment of legally privileged information in competition proceedings, DAF/COMP/WP3/WD(2018)50 of 19 November 2018.

54 See E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587, at 596-606; L. Kaplow and S. Shavell, 'Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability' (1989) 102 *Harvard Law Review* 565; L. Kaplow and S. Shavell, 'Legal Advice About Acts Already Committed' (1990) 10 *International Review of Law and Economics* 149; S. Shavell, 'Legal Advice', in P. Newman (ed.), *New Palgrave Dictionary of Economics and the Law*, Volume 2 (1998), 516-520; I. Baum, 'Attorney Corporate Client Privilege: Who Represents the Corporation?' (2007) *Review of Law & Economics*, Vol. 3, Iss. 1, Article 5; and C.E. Parker, R.E. Rosen and V. Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) 22 *Georgetown Journal of Legal Ethics* 201.

55 See note 51 above and European Commission Decision of 6 August 1984 in Case IV/30.350 *Zinc Producer Group*, [1984] OJ L220/27.

56 Opinion of Advocate-General Geelhoed in *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:53, paragraph 67. See also recital 14 of the ECN+ Directive, as note 76 below, according to which "the design of [procedural] safeguards should strike a balance between the respect of fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced".

The latter requirement can also be found in Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR:

> "*The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of [the] fundamental rights [recognised by the Charter of Fundamental Rights of the EU] be ensured within the framework of the structure and objectives of the EU. […]*
>
> *The pursuit of the EU's objectives, […], is entrusted to a series of fundamental provisions, such as those providing for […] competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute […] to the implementation of the process of integration that is the raison d'être of the EU itself. […]*
>
> *Fundamental rights, as recognised in particular by the Charter, must […] be interpreted and applied within the EU in accordance with the [EU] constitutional framework […]".*[57]

For example, in the interpretation of the privilege against self-incrimination in the context of the enforcement of Articles 101 and 102 TFEU by the European Commission, the EU Courts have taken into account the need to preserve the effectiveness of this enforcement:

> *"Thus, an undertaking in receipt of a decision requesting information pursuant to Article 18(3) of Regulation No 1/2003 cannot be recognised as having an absolute right of silence. To acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the internal market are observed. A right of silence can be acknowledged only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".*[58]

Similarly, in the interpretation of the fundamental right to protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities,[59] in the context of inspections ordered by the European Commission pursuant to Article 20(4) of Regulation 1/2003, the EU Courts have taken into account the need to preserve the effectiveness of investigations into suspected infringements of Articles 101 and 102 TFEU:

> *"If however, in order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspending the infringement of which the undertaking subject to the inspection is suspected […], at the preliminary investigation stage, it cannot be required to indicate, besides the putative infringements that it intends to investigate, the evidence, that is to say, the indicia leading it to consider that Article 102 TFEU has possibly been infringed. Such an obligation would upset the balance struck by the case law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned […]".*[60]

Of course, in cases where the effective enforcement of Articles 101 and 102 TFEU is not seriously at stake, there is no need to adapt the interpretation and application of fundamental rights. For this reason, in *Icap* the General Court was undoubtedly right to reject the Commission's argument that, in a "hybrid" cartel settlement procedure, the objectives of rapidity and efficiency of the settlement procedure could justify the violation of the presumption of innocence of a non-settling party consisting in the fact that the Commission had already in the earlier decision regarding the settling parties taken a view on the non-settling party's participation in the infringement, before having heard the non-settling party in the normal procedure.[61] As the General Court pointed out, the Commission could easily have avoided the violation of the presumption of innocence by adopting the decision regarding the settlement parties and the decision regarding the non-settling party on the same day, as the Commission had done in another case.[62] As is apparent from the subsequent judgment in *Pometon*, depending on the facts of the case, a violation of the presumption of innocence can also be avoided by more careful drafting of the earlier decision regarding the settling parties.[63]

57 Opinion 2/13 of the Court of Justice of 18 December 2014, EU:C:2014:2454, paragraphs 170, 172 and 177.

58 Judgment in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraph 181, citing earlier case-law, going back to Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, T-305/95 etc., EU:T:1999:80, paragraph 448, confirmed by Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P etc., EU:C:2002:582, paragraph 272.

59 See note 10 above.

60 Judgment in *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 45, citing earlier case-law, in particular Judgment in *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 81.

61 Judgment in *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraphs 256 to 269, in particular paragraphs 264 to 268.

62 Idem, paragraph 268.

63 Judgment in *Pometon* v *Commission*, T-433/16, EU:T:2019:201, paragraphs 52 to 103.

3.2 Not the same balancing exercise as in traditional criminal law

Whilst the first part of the answer to the question how to resolve any tension between fundamental procedural rights and effective enforcement of Articles 101 and 102 TFEU is that a balancing exercise is required, the second part of the answer is that this balancing exercise is not the same as in traditional criminal law. The balance must rather be struck with due regard to the particular nature of competition law enforcement.

In the words of Advocate-General Ruiz-Jarabo Colomer:

> *"In general, […], the body of safeguards developed in the field of criminal law, which has as its protagonists the penalising State, on the one hand, and the individual charged with an offence on the other, is not transferred* en bloc *to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power. In the case of free competition, those parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct. I therefore consider it important that the procedural rules be adapted to the specific field of competition".* [64]

The need to have due regard to the particular nature of competition law enforcement is also fully recognised by the European Court of Human Rights.[65]

Lawyers advocating for more fundamental procedural rights protection in the enforcement of Articles 101 and 102 TFEU by the European Commission regularly argue along the following lines. *Primo*, EU antitrust enforcement is "criminal" within the meaning of the ECHR. *Secundo*, a given judgment of the European Court of Human Rights appears to require in some criminal case a procedural right or guarantee which does not appear to be available in EU antitrust proceedings. *Ergo*, EU antitrust proceedings are incompatible with the ECHR.

Such reasoning is liable to lead to erroneous conclusions to the extent that it disregards the case-law of the European Court of Human Rights which distinguishes, as to the level of protection required by the ECHR, according to the circumstances of the particular case:

> *"While the right to a fair trial under Article 6 [ECHR] is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case".* [66]

Particularly relevant in the context of the enforcement of Articles 101 and 102 TFEU by the European Commission are the distinction between the hard core of criminal law and other areas of the law which are only "criminal" within the Convention's wider meaning of that term, and the distinction between natural persons and companies.

Since its seminal judgment in *Jussila* v *Finland*,[67] the European Court of Human Rights distinguishes, within the broad range of procedures or penalties that are "criminal" within the meaning of Article 6 ECHR, between the "hard core of criminal law", and "cases not strictly belonging to the traditional categories of the criminal law", which "differ from the hard core of criminal law". Antitrust enforcement such as that undertaken by the European Commission, which only involves the imposition on companies of fines, belongs to the second category, outside the hard core of criminal law. The criminal-head guarantees laid down in Article 6 ECHR do "not necessarily apply with their full stringency" to cases belonging to the second category, outside the hard core of criminal law.[68]

This need for such a differentiated approach was recalled most recently by the European Court of Human Rights in its 2019 judgment in *SA-Capital Oy* v *Finland*:

> *"A differentiated approach […] can be seen to reflect the Court's […] general focus on regarding, as its primary concern, the fairness of the proceedings as a whole, with a view to ensuring the rights of defence while also remaining mindful of the interests of the public and the victims in the proper enforcement of the laws in question. […]*
>
> *Thus, in the light of the Court's established case-law, it is not a requirement under Article 6 of the Convention that proceedings such as those concerning sanctions for breaches of competition law be conducted according to the classical model of a criminal trial. […]*

64 Opinion of Advocate-General Ruiz-Jarabo Colomer in *Volkswagen* v *Commission*, C-338/00 P, EU:C:2002:591, paragraph 66.

65 See, for the most recent example, Judgment of the European Court of Human Rights of 14 February 2019 in Case of *SA-Capital Oy* v *Finland*, Application no. 5556/10, paragraphs 67 to 78.

66 Judgments of the European Court of Human Rights (Grand Chamber) of 29 June 2007 in Case of *O'Halloran and Francis* v *United Kingdom*, Applications nos. 15809/02 and 25624/02, paragraph 53, and of 13 September 2016 in Case of *Ibrahim and Others* v *United Kingdom*, Applications nos. 50541/08 and others, paragraph 250.

67 Judgment of the European Court of Human Rights (Grand Chamber) of 23 November 2006 in Case of *Jussila* v *Finland*, Application no. 73053/01.

68 Idem, paragraph 43. Competition enforcement proceedings that can only lead to the finding of an infringement of the competition rules, without any possibility of fines being imposed, may not even be "criminal" within the wider meaning of Article 6 ECHR and hence fall entirely outside Article 6 ECHR; see Judgment of 23 October 2018 in Case of *Produkcija Plus storitveno podjete d.a.o.* v *Solvenia*, Application no. 47072/15, paragraphs 40 to 43.

In this context, the Court is further called upon to assess those issues with due regard to the particular nature of competition proceedings. […]

[…], the Court acknowledges that cases concerning restrictions of competition typically involve complex and often wide-ranging economic matters and related factual issues, which means that the relevant elements of evidence will also be multifaceted. The Court is also aware of the strong public interest involved in the effective enforcement of competition law. Moreover, it is mindful of the fact that as a rule, the financial penalties applicable in this field are not imposed on natural persons but on corporate entities, quantified on the basis of the harmful effect of the anti-competitive conduct and taking into account the business turnover of the entities found to be in breach of competition rules".[69]

As already mentioned, the distinction between natural persons and companies also appears to be relevant for the level of protection offered by the ECHR.[70]

For instance, while the European Court of Human Rights has held that the protection of the home provided for in Article 8 ECHR may in certain circumstances be extended to cover business premises, it has also held that public authorities' entitlement to interfere with this right, in accordance with Article 8(2) ECHR, "might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case".[71]

As explained further below,[72] the distinction between natural persons and companies also appears to be particularly relevant for the privilege against self-incrimination.[73]

69 Judgment of the European Court of Human Rights of 14 February 2019 in Case of *SA-Capital Oy* v *Finland*, Application no. 5556/10, paragraphs 71, 72, 77 and 78.

70 See M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford 2006) and P.J. Oliver, *The Fundamental Rights of Companies: EU, US and International Law Compared* (Hart 2020 forthcoming); see also A. Winkler, *We The Corporations – How American Businesses Won Their Civil Rights* (Liveright 2018). Limburgs

71 Judgments of the European Court of Human rights of 16 April 2002 in *Colas Est and Others* v *France*, Application No 37971/97, paragraph 41, and of 16 December 1991 in *Niemitz* v *Germany*, Series A no. 251-B, paragraph 19.

72 See text accompanied by notes 114 to 132 below.

73 See also my papers 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567 and 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights'(2011) 34 *World Competition* 189, both also accessible at http://ssrn.com/author=456087.

IV. The enforcement of Articles 101 and 102 TFEU by EU Member State competition authorities

The above discussion has focussed on the enforcement of Articles 101 and 102 TFEU by the European Commission. As mentioned in the introduction, Articles 101 and 102 TFEU are also enforced by the competition authorities of the EU Member States (national competition authorities or NCAs). In fact, more than 85 % of cases are dealt with by the national competition authorities.[74]

This raises the question whether the same level of protection of fundamental procedural rights should apply to the enforcement of Articles 101 and 102 TFEU by the national competition authorities as that which applies to the the enforcement of Articles 101 and 102 TFEU by the European Commission.

The remainder of this paper deals with this question. The enforcement by national competition authorities of their national competition laws is not dealt with in this paper. It should however be kept in mind that Article 3(1) of Regulation 1/2003 contains an obligation for national competition authorities and national courts also to apply Articles 101 or 102 TFEU when applying national competition law to conduct falling within the scope of Articles 101 or 102 TFEU.[75]

1. Can EU Member States reduce fundamental rights protection below the EU level?

Can EU Member States apply a lower standard of protection of fundamental procedural rights to the enforcement of Articles 101 and 102 TFEU by their national competition authorities than the standard applicable to the enforcement of Articles 101 and 102 TFEU by the European Commission?

74 See the statistics at https://ec.europa.eu/competition/ecn/statistics.html, and my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087.

75 See my paper 'The obligation for the competition authorities of the EU Member States to apply EU antitrust law and the *Facebook* decision of the *Bundeskartellamt*.', Concurrences N° 3-2019, pp. 58-66, also accessible at http://ssrn.com/author=456087.

The answer to this question is clear and simple: no.

Article 3(1) of the so-called "ECN+ Directive" (Directive 2019/1)[76] states:

> "Proceedings concerning infringements of Articles 101 or 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union".

This provision merely repeats what already follows from the case-law of the EU Court of Justice and from Article 51(1) of the Charter.

Indeed, according to the case-law, the requirements flowing from the protection of fundamental rights in the EU legal order are also binding on the Member States when they implement EU rules.[77]

Article 51(1) of the Charter similarly provides that the provisions of the Charter also apply to the Member States when they are implementing EU law.[78]

1.1 The example of legal professional privilege

As mentioned above,[79] in EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right, deriving *inter alia* from the Charter of Fundamental Rights of the EU.

In most EU Member States, national law provides for legal professional privilege under the same or very similar conditions as under EU law.

It would be contrary to EU law for competition authorities or courts of the EU Member States in cases of enforcement of Articles 101 or 102 TFEU to grant legal professional privilege under more restrictive conditions than those laid down in the case-law of the EU Courts.

According to a recent comparative study by the OECD, in Germany, the right to claim legal privilege arises only after a specific investigation has started.[80]

This is more restrictive than under EU law. Indeed, according to the case-law of the EU Court of Justice, legal professional privilege covers correspondence between lawyers and clients "made for the purposes and in the interests of the client's rights of defence", covering not only "all written communications exchanged after the initiation of the administrative procedure under [Regulation 1/2003] which may lead to a decision on the application of [Articles 101 and 102 TFEU] or to a decision imposing a pecuniary sanction on the undertaking" but also "earlier written communications which have a relationship to the subject-matter of that procedure".[81] In *AM & S Europe* v *Commission*, the EU Court of Justice accepted on this ground the protection of communications that dated from several years before the initiation of proceedings but that were "drawn up during the period preceding, and immediately following, the accession of the United Kingdom to the [European Economic] Community, and that [were] principally concerned with how far it might be possible to avoid conflict between the applicant and the Community authorities on the applicant's position, in particular with regard to the Community provisions on competition".[82]

When enforcing Articles 101 or 102 TFEU, the German competition authority *Bundeskartellamt*, and the German courts supervising the *Bundeskartellamt*, must in this respect apply the broader EU law standard and not the narrower German law standard of legal professional privilege. Companies can directly invoke EU law to ensure their rights in this respect.[83]

2. Can EU Member States grant procedural rights above the EU level?

Can EU Member States in the enforcement of Articles 101 and 102 TFEU by their national competition authorities grant companies more extensive procedural rights than those available in the enforcement of Articles 101 and 102 TFEU by the European Commission?

76 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3.

77 Judgments in *Karlsson and Others*, C-292/97, EU:C:2000:202, paragraph 37, and in *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 38.

78 As already mentioned in note 24 above, because of its specific wording, Article 41 of the Charter only applies to the institutions, bodies, offices and agencies of the European Union, not to the Member States. However, the content of Article 41 CFREU reflects general principles of EU law that as such apply also to the enforcement of Articles 101 and 102 TFEU by the competition authorities of the EU Member States; see Judgment in *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraphs 67 and 68.

79 See text accompanied by note 52 above.

80 'Treatment of Legally Privileged Information in Competition Proceedings', Background Paper by the OECD Secretariat, DAF/COMP/WP3(2018)5 of 31 January 2019, paragraph 28. The law in Austria appears to be similar; see OECD, 'Summary of discussion of the roundtable on the treatment of legally privileged information in competition proceedings 26 November 2018', DAF/COMP/WP3/M(2018)2/ANN1/FINAL of 2 October 2019, at 6.

81 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 23.

82 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 34.

83 See also my paper 'Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure' (2019) 42 *World Competition* 21, also accessible at http://ssrn.com/author=456087, and OECD,'Summary of discussion of the roundtable on the treatment of legally privileged information in competition proceedings 26 November 2018', DAF/COMP/WP3/M(2018)2/ANN1/FINAL of 2 October 2019, at 6.

The answer to this question is more complex: generally yes, but not if such further procedural rights undermine the effective and uniform application of Articles 101 and 102 TFEU.

Article 35(1) of Regulation 1/2003 stipulates that the Member States are to "designate the competition authority or authorities responsible for the application of [Articles 101 and 102 TFEU] in such a way that the provisions of this regulation are effectively complied with".

In *VEBIC*, the EU Court of Justice clarified that "[t]he authorities so designated must, in accordance with the regulation, ensure that those Treaty Articles are applied effectively in the general interest", and that the laws of the Member States governing the powers and functioning of the national competition authorities "must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 and 102 TFEU are applied effectively by those authorities".[84]

On this basis, the Court of Justice ruled to be contrary to EU law a system such as that which existed at the time in Belgium and which precluded the Belgian competition authority from appearing as a defendant or respondent before the Brussels Appeal Court when its decisions applying Articles 101 or 102 TFEU were appealed by the companies concerned. [85]

In *Schenker*, the Court of Justice has, in addition to the requirements of effective enforcement in the general interest already set out in *VEBIC*, also subjected the enforcement of Articles 101 and 102 TFEU by the NCAs to a requirement of uniform application of those Treaty Articles.[86]

On the basis of this requirement of not only effective but also uniform application of Articles 101 and 102 TFEU, the Court of Justice held for instance in *Schenker* that, when national law establishes conditions relating to intention or negligence for the imposition of fines by their national competition authorities, those conditions should be at least as stringent as the conditions laid down in Article 23 of Regulation 1/2003 for the imposition of fines by the European Commission, and that immunity from fines under national leniency programmes can be accorded only in strictly exceptional situations, such as where an undertaking's co-operation has been decisive in detecting and actually suppressing the cartel.[87]

This requirement of effective and uniform application of Articles 101 and 102 TFEU appears to go further than the general principle of effectiveness as applicable in all areas of EU law where Member States are entrusted with a role in the enforcement of EU law.[88]

This stricter requirement of effectiveness and uniformity would indeed appear justified in the case of Articles 101 and 102 TFEU, which, as discussed above, constitute fundamental provisions of the EU constitutional framework.[89]

2.1 The example of legal professional privilege for in-house lawyers

In EU law, a necessary condition for communications between lawyers and clients to be protected by legal professional privilege is that the lawyers are independent lawyers, who are not bound to the client by a relationship of employment.[90]

Following lengthy debate among practitioners and scholars, the EU Court of Justice, following the Opinion of Advocate-General Kokott,[91] confirmed in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* the exclusion of in-house lawyers from legal professional privilege, even if those in-house lawyers are enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations.[92]

As the Court of Justice and Advocate-General Kokott explained, this exclusion of all in-house lawyers, even if enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations, is not discriminatory. Indeed, in-house lawyers are in a fundamentally different position from external lawyers, because of the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking.[93]

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84 Judgment in *VEBIC*, C-439/08, EU:C:2010:739, paragraphs 56 and 57.

85 Judgment in *VEBIC*, C-439/08, EU:C:2010:739; see further Article 30 of the ECN+ Directive, as note 76 above.

86 Judgment in *Schenker*, C-681/11, EU:C:2013:404, paragraphs 36, 46 and 49. See also Judgment in *AKKA/LAA*, C-177/16, EU:C:2017:689, paragraph 64, as well as recitals 10, 14, 16, 17, 40, 46 and 76 and Articles 4(1), 5(2) and 13(4) of the ECN+ Directive, as note 76 above.

87 Judgment in *Schenker*, C-681/11, EU:C:2013:404, paragraphs 36, 46 and 49; see also Article 13 and recital 42 and Article 17 of the ECN+ Directive, as note 76 above.

88 See Judgments in *Commission* v *Greece*, 68/88, EU:C:1989:339, paragraphs 23-25, in *Edis*, C-231/96, EU:C:1998:401, paragraphs 34 and 36-37, and in *Commission* v *Ireland*, C-354/99, EU:C:2001:550, paragraph 46.

89 See text accompanied by notes 56 to 57 above. See also Judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59 and 60, in which the EU Court of Justice held, in the context of the execution of a European arrest warrant, that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law, and the application of national standards of protection of fundamental rights cannot compromise the primacy, unity and effectiveness of EU law.

90 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraphs 21 to 26.

91 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229.

92 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512.
In-house lawyers, including those that are enrolled with a Bar or Law Society, are similarly excluded from representing parties (other than the EU or EEA Member States and the EU or EEA institutions) before the EU Courts; see Judgment in *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland* v *Commission*, C-422/11 P and C-423/11 P, EU:C:2012:553.

93 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 56 to 58 and Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraphs 58 to 71 and 83.

As further explained by Advocate-General Kokott:

> "*There is a structural danger that an enrolled in-house lawyer – even if, as is usually the case, he is himself of good character and has the best intentions – will encounter a conflict of interests between his professional obligations and the aims and wishes of his company*.
>
> *The susceptibility of an enrolled in-house lawyer to conflicts of interest also makes it difficult for him to raise an effective opposition to any abuses of legal professional privilege. Such abuse may, for example, consist in handing over evidence and information to an undertaking's legal department, under cover of a request for legal advice, for the sole or primary purpose, ultimately, of preventing the competition authorities of gaining access to that evidence and information. At worst, the functional departments of an undertaking may be tempted to misuse the company's internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel"*.[94]

Several attempts have been made to argue that the exclusion of in-house lawyers would somehow be contrary to the European Convention on Human Rights. These arguments were cogently rejected by Advocate-General Kokott.[95] The European Court of Human Rights has not expressed any support for extending legal professional privilege to communications inside a company involving legal advice provided by an in-house lawyer employed by that company.[96]

As I have argued elsewhere,[97] both the fundamental-rights arguments and the instrumental arguments for extending legal professional privilege to in-house lawyers are very weak.

Indeed, it is difficult to see how the possibility to consult in confidence an independent lawyer would be insufficient to guarantee fundamental rights, thereby creating a need to extend legal professional privilege to in-house counsel.[98] There is a wide choice of independent lawyers companies can turn to, and those companies that can afford to have in-house counsel can also afford to pay an independent lawyer.[99]

As mentioned above,[100] instrumental arguments, to the effect that extending legal professional privilege to in-house lawyers would lead to better compliance with Articles 101 and 102 TFEU, are not convincing either.

Instrumental arguments were also brought up in the legislative process leading to the adoption of Regulation No 1/2003. Indeed, the Economic and Monetary Committee of the European Parliament initially adopted an amendment providing for the extension of legal professional privilege to in-house counsel,[101] but this amendment, which was strongly opposed by the European Commission, was subsequently rejected in plenary session of the Parliament by 404 votes against and 69 votes in favour.[102] The EU Council also declined to include any such extension in Regulation No 1/2003. The European Parliament, EU Council and European Commission thus rejected the arguments that extension of legal professional privilege to in-house counsel would be beneficial for the enforcement of Articles 101 and 102 TFEU.

Finally, the American model cannot be invoked as an argument for extending legal professional privilege to in-house lawyers under EU law. Indeed, no direct comparison can be drawn with the enforcement system in the USA.

In the EU system, extending legal professional privilege to in-house lawyers would be detrimental to the effectiveness of inspections and thus the possibility to detect and collect evidence of cartels and other infringements of Articles 101 and 102 TFEU. Inspections are a crucial

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94 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraphs 149 and 150.

95 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, in particular paragraphs 47, 141, 148 and 152.

96 Idem, paragraph 141; see further the judgments of the European Court of Human Rights of 6 December 2012 in *Michaud* v *France* (Application no. 12323/11), of 2 April 2015 in *Vinci Construction and GMT génie civil et services* v *France* (Applications no. 63629/10 and 60567/10), and of 26 July 2002 in *Meftah and Others* v *France* (Applications no. 32911/96, 35267/97 and 34595/97), paragraphs 45 to 47.

97 See my papers 'Powers of investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law' (2006) 29 *World Competition* 3, text accompanied by footnotes 75 to 81, and 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189, text accompanied by footnotes 100 and 101, and my paper 'Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure' (2019) 42 *World Competition* 21; all three also accessible at http://ssrn.com/author=456087.

98 See also Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 95 and 96: "even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, were in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence. Thus, in-house lawyers are not always able to represent their employer before all the national courts, although such rules restrict the possibilities open to potential clients in their choice of the most appropriate legal counsel. It follows from those considerations that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions"; see also Judgment of the European Court of Human Rights of 26 July 2002 in *Meftah and Others* v *France* (Applications no. 32911/96, 35267/97 and 34595/97), paragraphs 45 to 47.

99 In fact extension of legal professional privilege to in-house lawyers might lead to less protection of fundamental rights, in that it could lead large undertakings to use only in-house counsel, thus reducing the availability of independent lawyers on the open market, to the detriment of smaller companies that cannot afford in-house counsel.

See also, on legal aid for companies, Judgment in *DEB* v *Bundesrepublik Deutschland*, C-279/09, EU:C:2010:811.

100 See text accompanied by notes 54 and 55 above.

101 Amendment No 10 contained in the Evans Report, EP Session document of 21 June 2001, PE 296.005.

102 Plenary of 6 September 2001, PE 308.749, page 35; see also Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 106.

instrument in EU antitrust enforcement.[103] European Commission decisions heavily rely on documentary evidence which must be collected on the spot and cannot be complemented by summoning witnesses.

Extending legal professional privilege to in-house lawyers would be detrimental to the effectiveness of inspections in two ways. First, it would reduce the universe of the documents which can be found during an inspection that may contain useful evidence of the suspected infringement. More so than legal opinions of in-house lawyers,[104] the descriptions of facts contained in, and documents attached to, the communications to in-house lawyers from other members of staff regularly contain useful evidence. Secondly, extending legal professional privilege to in-house lawyers would significantly complicate and slow down inspections, as difficult and time-consuming discussions would take place between the inspectors and the company's lawyers to determine which communications with in-house lawyers are privileged. Speed in inspections is often of great importance in practice.

If legal professional privilege were extended to in-house lawyers, it would be difficult to define its precise scope in a way which does not invite abuse.[105] In the US, where in-house lawyers are not as a matter of principle excluded from attorney-client privilege protection, the law appears to be rather uncertain. The problem is that unqualified application of the privilege to communications between all corporate employees and in-house counsel risks leading to zones of silence, through which the corporation could potentially channel all potentially incriminating documents and information. Lower court judgments and academic writing have proposed numerous competing tests to determine the acceptable scope of protection, mostly by limiting who is to be considered as the "client" to whom communications are confidential (only the board, not other staff, etc.). In *Upjohn*,[106] the US Supreme Court opted for a case-by-case approach under which each case has to be judged in the light of the rationale of legal privilege protection. This approach arguably leaves a lot of legal uncertainty.

One can easily imagine this borderline problem being much more serious in the case of the European Union, in the absence of a common practice or understanding concerning the role and nature of in-house lawyers in the EU Member States. In the US at least, in-house counsel is a well-established function, present in all (large) corporations.

The US investigation system does not in any event rely to the same extent as that of the EU on on-the-spot inspections to collect documentary evidence. The US enforcement agencies work with discovery orders and witnesses. Disputes on the scope of legal professional privilege do not impinge directly on the powers of the US Department of Justice to gather the necessary evidence. This is partly explained by the extensive investigatory powers at the US Department of Justice's disposal, in particular the power to perform secret recordings by informants of telephone calls and meetings. Furthermore, the basic features of the US system, including criminal sanctions on individuals, grand jury and plea bargaining give the US Department of Justice very significant leverage to obtain admissions from direct witnesses.[107]

Whilst the large majority of EU Member States exclude in-house lawyers from legal professional privilege, a few EU Member States also grant, under varying conditions, legal professional privilege protection to exchanges with in-house lawyers.[108]

In Portugal for instance, the *Tribunal do Comércio de Lisboa* (Lisbon Commercial Court) held in 2007 that in-house lawyers who are enrolled with the *Ordem dos Advogados* (Portuguese Bar Association) are also covered by legal professional privilege, even if the *Autoridade da Concorrência* (Portuguese Competition Authority) is investigating a suspected infringement of Articles 101 or 102 TFEU.[109]

The *Tribunal do Comércio de Lisboa* did however not examine the question whether such extension of legal professional privilege beyond the EU law standard would undermine the effective and uniform application of Articles 101 and 102 TFEU.

As explained above,[110] one of the reasons why under EU law legal professional privilege has not been extended to in-house lawyers, even if those in-house lawyers are enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations, is that such an extension would undermine the effectiveness of the enforcement of Articles 101 and 102 TFEU by the European Commission.

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103 The success of leniency does not reduce the need for effective inspections; rather to the contrary, effective investigation powers and effective sanctions are pre-conditions for operating a successful leniency programme; see further my papers 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, and 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39 *World Competition* 327, all three also accessible at http://ssrn.com/author=456087.

104 As to the legal opinions of in-house lawyers, the European Commission stated in paragraph 37 of its *XXXIInd Report on Competition Policy 2002* (2003) that it "will in future not consider, pursuant to its guidelines on the method of setting fines, as an aggravating circumstance to be taken into account in determining the amount of a pecuniary penalty to be imposed on a company, the fact that in-house legal advisers had warned the management of the illegality of the conduct forming the subject-matter of the Commission's decision. Such a communication may, however, be used as evidence of the existence of an infringement". On the European Commission's method of setting fines, see further my paper 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 *World Competition* 197, also accessible at http://ssrn.com/author=456087.

105 See also text accompanied by notes 93 and 94 above.

106 *Upjohn Co.* v *United States*, 449 U.S. 383 (1981).

107 For a critical assessment of the US system from a defence perspective, see L.W. Jacobs, 'Criminal Enforcement of Antitrust Laws – Problems with the U.S. Model', in B.E. Hawk (ed.) *2006 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2007), 25.

108 See 'Treatment of Legally Privileged Information in Competition Proceedings', Background Paper by the OECD Secretariat, DAF/COMP/WP3(2018)5 of 31 January 2019, paragraph 19 and footnote 3.

109 Tribunal do Comércio de Lisboa, Judgment of 6 December 2007 in *Unilever Jéronimo Martins* v *Autoridade da Concorrência*.

110 See text accompanied by notes 94 and 100 to 107 above.

There is no sound basis for assuming that the extension of legal professional privilege to in-house lawyers would not similarly affect the effectiveness of the enforcement of Articles 101 and 102 TFEU by the competition authorities of the Member States.[111]

It follows that those Member States that currently recognise legal professional privilege for in-house lawyers in the context of the enforcement of Articles 101 and 102 TFEU by their national competition authorities appear in breach of EU law.

I am not necessarily arguing that the competition authorities or courts of all those Member States can directly invoke EU law to deny legal professional privilege to exchanges with in-house lawyers. In particular in Member States where (contrary to the Portuguese example) legal professional privilege for in-house lawyers has an explicit legislative basis, such direct invocation of EU law risks offending against the principle of legal certainty, which is a general principle of EU law.[112] In any event, the Member States concerned are under an obligation to enact the necessary legislation to exclude all in-house lawyers from legal professional privilege in cases of enforcement of Articles 101 or 102 TFEU by their national competition authorities.[113] The European Commission could bring proceedings pursuant to Article 258 TFEU against those Member States that fail to do so.

2.2 The example of the right to remain silent for legal persons

Under EU law, companies or other legal persons investigated by the European Commission for possible infringement of Articles 101 or 102 TFEU are under an obligation to cooperate actively with the investigation. They cannot claim a general right to remain silent, the privilege against self-incrimination being limited to the right not to be compelled to provide the Commission with answers which might involve admission on the company's part of the existence of an infringement.[114]

As already mentioned above,[115] in refusing, in the context of the enforcement of Articles 101 and 102 TFEU by the European Commission, to extend the privilege against self-incrimination to a general right to remain silent, the EU Courts have taken into account the need to preserve the effectiveness of this enforcement:

> *"Thus, an undertaking in receipt of a decision requesting information pursuant to Article 18(3) of Regulation No 1/2003 cannot be recognised as having an absolute right of silence. To acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the internal market are observed. A right of silence can be acknowledged only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".*[116]

Whilst EU law does not grant a right to remain silent for companies and other legal persons, it recognises the right to remain silent for natural persons who are suspects or accused persons in criminal proceedings, in line with the case-law of the European Court of Human Rights.[117]

111 In none of the Member States concerned do the competition authorities, when enforcing Articles 101 and 102 TFEU, have criminal enforcement powers similar to those of the US Department of Justice that might counterbalance the weakening of enforcement powers resulting from the extension of legal professional privilege to in-house lawyers; see text accompanied by notes 103 to 107 above. Moreover, Article 13(1) of the ECN+ Directive, as note 76 above, obliges EU Member States to provide for the effective imposition of fines for violations of Articles 101 and 102 TFEU in non-criminal proceedings.

112 See Judgments in *X*, C-60/02, EU:C:2004:10, paragraph 61, in *Berlusconi*, Joined Cases C-387/02 etc., EU:C:2005:270, paragraph 74, and in *M.A.S.*, C-42/17, EU:C:2017:936.

113 Under UK law (still an EU Member State at the time of writing, and possibly after its exit from the EU still bound by EU law during a transitional period), legal professional privilege can be overridden or modified by statute; see UK House of Lords, *Three Rivers District Council and others (Respondents)* v *Governor and Company of the Bank of England (Appellants) (2004)*, [2004] UKHL 48, paragraph 25; Opinion of Advocate-General Warner in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1981:19, [1982] ECR 1619 at 1634 and 1636; and Opinion of Advocate-General Sir Gordon Slynn in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:17, [1982] ECR 1642 at 1658.
In Belgium, the extension of legal professional privilege to in-house counsel results from Article 5 of the Law of 1 March 2000, and could thus be reversed by repealing or amending this provision; see Judgment of the Brussels Court of Appeals of 5 March 2013 in Case 2011/MR/3.
It would not appear that in any of those Member States that extend legal professional privilege to in-house counsel this extension is in the nature of a constitutional or fundamental right. In any event, according to the case-law of the EU Court of Justice, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law, and the application of national standards of protection of fundamental rights cannot compromise the primacy, unity and effectiveness of EU law; see Judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraphs 59 and 60.

114 See Judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 35-40; Judgment and Opinion of Advocate-General Geelhoed in *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432 and EU:C:2006:53; Judgment in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraphs 177 to 194; Opinion of Advocate-General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, paragraphs 149 to 164; recital 23 of Regulation 1/2003; and my paper 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567, also accessible at http://ssrn.com/author=456087.

115 See text accompanied by note 58 above.

116 Judgment in *Qualcomm and Qualcomm Europe* v *Commission*, T-371/17, EU:T:2019:232, paragraph 181, citing earlier case-law, going back to Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, T-305/95 etc., EU:T:1999:80, paragraph 448, confirmed by Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P etc., EU:C:2002:582, paragraph 272.

117 See Articles 2 and 7(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, [2016] OJ L65/1.
See also case C-481/19 *DB* v *Consob*, currently pending before the EU Court of Justice.

All the judgments in which the European Court of Human Rights has recognised a right to remain silent under Article 6 ECHR concern natural persons.[118] The German Constitutional Court has held that the privilege against self-incrimination contained in the German Constitution does not extend to legal persons, because it is grounded in the protection of individual human dignity.[119] Similarly, under the U.S. Constitution, legal persons cannot invoke the privilege against self-incrimination.[120]

Distinguishing between natural and legal persons, and granting only the former a right to remain silent, indeed makes eminent sense.[121]

The right to remain silent protects suspects from being subjected to improper physical or psychological pressure, thus avoiding miscarriages of justice (as statements made under pressure risk being unreliable) and safeguarding human dignity and autonomy.[122]

The importance of the right to remain silent for natural persons in the context of traditional criminal law cannot be overstated, and can easily be illustrated with examples, such as that of the Birmingham Six.[123] In 1974, within hours of the explosion of bombs planted by the IRA in two crowded Birmingham pubs, five Irishmen were arrested. A sixth was arrested the next day. They were kept in police custody for three days and two nights, and subjected to violence and intimidation, resulting in four confessions. In the subsequent trial, the six men were found guilty of murder and sentenced to multiple life sentences. It later turned out that they had actually nothing to do with the bombings, and they finally were released in 1991, after 16 years in prison.

More generally, confession evidence has been implicated in numerous wrongful convictions, and psychological research has shown that false confessions are worryingly simple to extract.[124]

None of these serious concerns applies however to the situation of a company or other legal person being compelled to respond in writing, through its external lawyers or with their help,[125] to a written request for information from the European Commission or a national competition authority investigating a possible infringement of Articles 101 and 102 TFEU.

From a fundamental rights perspective, there is no justification whatsoever for treating the situation of legal persons responding in writing to written requests for information in competition investigations as similar to the questioning of natural persons in the context of traditional criminal law. Equating the two would be - to use the words of Advocate-General Ruiz-Jarabo Colomer quoted above [126] - a mockery.

As already mentioned,[127] according to the German Constitutional Court, the privilege against self-incrimination contained in the German Constitution does not extend to legal persons, because it is grounded in the protection of individual human dignity. Secondary (non-constitutional) German law has however extended the right to remain silent to legal persons in proceedings by the *Bundeskartellamt* that can lead to the imposition of a fine (*Bußgeldverfahren*).[128]

As mentioned above,[129] one of the reasons why the EU Courts have refused, in the context of the enforcement of Articles 101 and 102 TFEU by the European Commission, to extend the privilege against self-incrimination to a general right to remain silent, is that such extension would hinder the effective enforcement of Articles 101 and 102 TFEU by the European Commission. There is no reason to assume that this would be any different for the *Bundeskartellamt*.[130] In this respect, German law thus appears in breach of the EU law requirement of effective and uniform application of Articles 101 and 102 TFEU, and the German legislator is under an obligation to amend its law.

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118 See inter alia *Funke* v *France* (judgment of 25 February 1993, Series A no. 256-A), *John Murray v United Kingdom* (judgment of 8 February 1996, *Reports* 1996-I, p. 49), *Saunders* v *United Kingdom* (judgment of 17 December 1996, *Reports* 1996-VI, p. 2064), *J.B.* v *Switzerland* (judgment of 3 May 2001, Application no. 31827/96), *Weh* v *Austria* (judgment of 8 April 2004, Application no. 38544/97), *O'Halloran and Francis* v *United Kingdom* (judgment of 29 June 2007, Applications nos. 15809/02 and 25624/02). See also Opinion of Advocate-General Geelhoed in *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:531, paragraphs 62 to 67.

119 BVerfG, 26 February 1997, 1 BvR 2172/96.

120 *Braswell* v *United States*, 487 U.S. 99 (1988).

121 See also J. Dine, 'Criminal Law and the Privilege Against Self-Incrimination', in S. Peers and A. Ward, *The European Union Charter of Fundamental Rights* (Hart 2004), 269-286.

122 See European Court of Human Rights, *Saunders* v *United Kingdom*, 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2064.

123 See C. Mullin, *Error of Judgment: The Truth About the Birmingham Bombings* (Chatto & Windus 1986), and C. Mullin, 'Diary', *London Review of Books*, 21 February 2019.

124 See J.T. Perillo and S.M. Kassin, 'Inside Interrogation: The Lie, The Bluff, and False Confessions' (2011) 35 *Law and Human Behaviour* 327; 'False confessions – Silence is golden – People have a strange and worrying tendency to admit things they have not, in fact, done', *The Economist*, 13 August 2011; and S.M. Kassim, 'False Confessions: Causes, Consequences, and Implications for Reform' (2014) 1 *Policy Insights from the Behavioral and Brain Sciences* 112.

125 See Article 18(4) of Regulation 1/2003.

126 See text accompanied by note 64 above.

127 See text accompanied by note 119 above.

128 See § 81 Gesetz gegen Wettbewerbsbeschränkungen (GWB), § 46 Ordnungswidrigkeitengesetz (OWiG) and §§ 136, 426 and 444 Strafprozessordnung (StPO).

129 See text accompanied by notes 58 and 115 and 116 above.

130 See also K. Ost, 'The Right to an Independent and Impartial Tribunal and the Right not to Incriminate Oneself – With Special Regard to the Situation in Germany', in C. Baudenbacher (ed.), *Current Developments in European and International Competition Law – 14th St. Gallen International Competition Law Forum ICF 2007* (Helbing Lichtenhahn 2008) 201, and Bundeskartellamt, 'Kartellbußgeldverfahren zwischen deutschem Systemdenken und europäischer Konvergenz', Hintergrundpapier, Arbeitskreis Kartellrecht, 4.10.2012.

That German law needs to be changed in this respect follows also from the ECN+ Directive,[131] Article 8 of which provides as follows:

> "*Member States shall ensure that national administrative competition authorities may require undertakings and associations of undertakings to provide all necessary information for the application of Articles 101 and 102 TFEU […]. Such requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU. […]*"

That this provision is meant to harmonize the privilege against self-incrimination for legal persons along the lines of the case-law of the EU Courts is clear from the accompanying recital 35, which reads as follows:

> "*[…] While the right to require information is crucial for the detection of infringements, such requests […] should not compel an undertaking […] to admit that it has committed an infringement, which is incumbent on the NCAs to prove. This should be without prejudice to the obligations of undertakings […] to answer factual questions and to provide documents. […]*"

I understand that Germany is indeed in the process of amending its law in this respect as part of its transposition of the ECN+ Directive.[132] ■

131 See note 76 above.

132 See 'GWB10: Geplante Änderungen im Kartellbußgeldrecht', D'Kart Antitrust Blog https://www.d-kart.de/, 18 October 2019. According to Article 34(1) of the ECN+ Directive, as note 76 above, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 February 2021.

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