



# CPI Antitrust Chronicle

## February 2012 (1)

### **Are Rights Finally Becoming Fundamental?**

Kristina Nordlander & Patrick Harrison  
Sidley Austin LLP

## Are Rights Finally Becoming Fundamental?

Kristina Nordlander & Patrick Harrison<sup>1</sup>

### I. INTRODUCTION

In the landmark 2005 Article 102 TFEU case regarding *Losec*, AstraZeneca was fined EUR 60 million for conduct that would not have been an infringement of EU competition law had AstraZeneca not been found to be dominant in the relevant market. The European Commission (“Commission”) found that the relevant market on which *Losec* competed should be defined narrowly to include only the newer class of medicines (Proton Pump Inhibitors (“PPIs”)) to the exclusion of their older equivalents (H2 Blockers). The Commission’s decision to define the market narrowly dictated that AstraZeneca’s shares were in excess of 50 percent. At such share levels, there exists a presumption of dominance that is extremely difficult to rebut. On appeal, AstraZeneca challenged the findings on market definition and dominance.<sup>2</sup> However, the EU’s General Court limited its review to whether the Commission had committed a “manifest error” of assessment in arriving at its findings. Having found no “manifest error,” the General Court upheld the Commission’s findings on market definition and dominance and largely upheld the Commission’s multi-million Euro fine.<sup>3</sup>

Is this fair? If a prosecutor comes to a view on market definition, which is a *sine qua non* for a finding of infringement and the imposition of a high punitive fine, but which is not then subject to full review by an independent court, does that really constitute a fair trial for purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”) and the Charter of Fundamental Rights of the European Union (“Charter”)?

The EU courts have often drawn indirectly on fundamental rights of the kinds set out in the ECHR and the Charter and incorporated them into EU law as “general principles.” However, the 2009 entry into force of the Lisbon Treaty, and the EU’s forthcoming direct accession to the ECHR seem set to give fundamental rights center stage in the application of EU law in general and EU competition law in particular.

This article does not undertake a full review of this fascinating area of law, but rather focuses briefly on four issues, which are critical to EU competition law enforcement and in which fundamental rights challenges may play a key role going forward:

---

<sup>1</sup> Kristina Nordlander is a partner in Sidley Austin LLP’s Brussels office. Patrick Harrison is an associate in Sidley Austin LLP’s London office. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients. The authors are grateful to Jessica Walch and Stuart Pibworth for their assistance in the preparation of this article, and to Ken Daly for his valuable comments.

<sup>2</sup> Case T-321/05, *AstraZeneca v Commission*, unreported.

<sup>3</sup> For a more detailed analysis of the AstraZeneca judgment see Nordlander & Harrison, *General Court’s AstraZeneca Judgment Set to Embolden Commission*, 9(2) CPI ANTITRUST CHRON. (September 2010).

1. The question of whether the EU courts exercise a sufficiently “full review” in order to render the Commission’s triple role as investigator, prosecutor, and judge compliant with the right to a fair trial as set out in Article 47 Charter and Article 6 ECHR.
2. The consistency of increasingly effects-based standards with the basic maxim of *nulla poena sine lege*, as enshrined in Article 49 Charter and Article 7 ECHR.
3. The appropriateness of legal presumptions in a system with questionable compliance with the right to a fair trial.
4. The issue of whether key procedural rights are sufficiently guaranteed in the course of the Commission’s investigations.

We conclude that several aspects of EU competition law and the Commission’s enforcement procedures are questionable at present, in particular in light of the often-limited review exercised by the EU courts. We may well see EU competition law fining decisions struck down in future if the European Court of Human Rights (“ECtHR”) or the EU courts conclude that EU competition law imposes sanctions that are of a criminal nature and subjects EU competition law proceedings to the full force of Articles 6 and 7 ECHR and Articles 47 and 49 Charter.

## II. BACKGROUND: THE CRIMINAL NATURE OF EU COMPETITION LAW

### A. Relevance of the ECHR and the Charter

Insofar as concerns EU law in general, Article 6(1) of the Treaty on European Union (“TEU”) incorporates the Charter into primary EU law. The Charter provides that its provisions should be construed in a similar manner to the corresponding rights guaranteed by the ECHR.<sup>4</sup> In addition, Article 6(2) TEU commits the EU to acceding directly to the ECHR in due course.

Insofar as concerns competition law in particular, in its September 2011 judgment in the *Menarini* case, the ECtHR confirmed that the ECHR was applicable to competition law proceedings.<sup>5</sup> Further, the Court of Justice of the European Union (the “CJEU”) appeared to suggest in its December 2011 judgment in *KME Germany* that the fundamental rights enshrined in the Charter were to be given greater importance in the assessment of competition law matters (although, in this particular case, the CJEU rejected the argument that the procedure in question infringed the applicant’s right to an effective judicial protection under Article 47 Charter).<sup>6</sup>

In sum, there has been a recent increase in awareness of—and focus on—the compatibility of EU law in general, and EU competition law sanctions and procedures in particular, with the fundamental rights set out in the Charter and the ECHR.

### B. The Criminal Nature of EU Competition Law Sanctions

Article 23(5) of Regulation 1/2003<sup>7</sup> (the main procedural regulation in EU competition law) claims that fines imposed for breaches of EU competition law “shall not be of a criminal law

<sup>4</sup> Article 52(3) Charter.

<sup>5</sup> ECtHR, *Menarini Diagnostics v Italy*, judgment of September 27, 2011, available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionSimilar=85522291&skin=hudoc-en&action=similar&portal=hbkm&Item=1&similar=frenchjudgement>.

<sup>6</sup> C-272/09 *KME Germany and Others v European Commission*, unreported. See ¶¶ 91 to 111.

<sup>7</sup> Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

nature.” However, in its 1976 judgment in *Engel & Others v Netherlands*,<sup>8</sup> the ECtHR set out a series of criteria by which it would determine whether a law was actually to be regarded as criminal in nature for the purposes of Article 6 ECHR. The ECtHR asked, first, does the domestic law in question treat the contested charges or penalties as criminal law? If the answer to this question is yes, this is likely to be determinative and the law in question will be considered criminal. If the answer is no (as under Regulation 1/2003), the ECtHR must then proceed to ask, second, whether the nature of the offense is of general concern and application or, third, whether the penalty that can be imposed operates as a punishment and/or deterrence (rather than being more in the form of pecuniary compensation for damage caused). If the answer to either the second or third question is yes, then the law should be considered of a criminal nature for the purposes of Article 6 ECHR.

Subsequent judgments, including those applying the Engel criteria, suggest that it is now clear that EU competition law, fines, and proceedings would be considered criminal in nature by the ECtHR.<sup>9</sup> For current purposes, the principal consequences of this finding are that Articles 6 and 7 ECHR and Articles 47 and 49 Charter will apply to ensure that there are adequate safeguards to secure, respectively, the right to a fair trial and the right to legal certainty (*nulla poena sine lege*).<sup>10</sup>

Although key ECHR and Charter cases to date have related to fines for cartel infringements, there seems little reason to believe that competition law infringements other than cartel offenses would not be treated in the same way. The Engel criteria focus on whether offenses are of general concern and application and whether available sanctions have a punishment or deterrent—as opposed to compensatory—character. Where the Commission imposes fines for infringements other than cartel activities (such as abuses of dominance, resale price maintenance, absolute territorial sales restrictions, etc.), those fines clearly have a punishment and deterrent character and the infringements to which they relate are of general concern (in that all are thought likely to result in consumer harm). In sum, despite the wording of Regulation 1/2003, it seems very likely that any EU competition law infringement sanctioned by punitive fines could be shown to be criminal in nature for ECHR and Charter purposes.

However, although it is now generally accepted that fines imposed for breaches of EU competition law are criminal in nature, there remains a degree of debate around whether EU competition law procedures and fines are of a hard-core criminal nature or are only on the periphery of criminality. This is important to the extent that procedures considered to be on the

---

<sup>8</sup> *Engel & Others v Netherlands*, judgment of June 8, 1976.

<sup>9</sup> See, for example, statements made by the ECtHR in *Jussila (Jussila v Finland)*, judgment of November 23, 2006, at ¶ 43), the more recent ECtHR statements in *Menarini* (in which the court affirmed that Italian competition law procedure—modeled on the EU competition law procedure—was criminal in nature) and the recent judgment of the CJEU in *KME Germany*, in which the Court appeared to accept the premise of the applicant’s argument that Article 47 Charter could apply to EU competition law proceedings.

<sup>10</sup> Article 6 ECHR provides, in relevant part, that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...] Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Article 47 Charter provides a similar formulation of this right to a fair trial. Article 7 ECHR provides, in relevant part, that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.” Article 49 Charter provides for similar protection of the principle of *nulla poena sine lege*.

periphery of criminal law may be subject to a lesser degree of scrutiny under the ECHR and the Charter.

On the one hand, Advocate General Sharpston stated as follows in her February 2011 Opinion in *KME Germany*:

If the fining procedure in the present case thus falls within the criminal sphere for the purposes of the ECHR (and the Charter), I would none the less agree that, in the words of the judgment in *Jussila*, it “differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency.”<sup>11,12</sup>

On the other hand, it has also been argued that the more recent ECtHR judgment in *Menarini* suggests that sanctions imposed for breaches of competition law are of a hard-core criminal nature. This argument is built, in large part, on the fact that the ECtHR applied Article 6 ECHR to the Italian competition law procedure (modeled on the EU procedure) but made no mention of its sanctions being on the periphery of criminality.<sup>13</sup> In addition, competition authorities such as the United Kingdom’s Office of Fair Trading (“OFT”) have studied other factors of relevance to competition law investigations, which would tend to support a finding that they could be viewed as hard-core criminal in nature, including the reputational damage and stigma that can result either from the instigation of a competition law investigation or the handing down of an infringement decision.<sup>14</sup>

Given: (i) the terms of the *Menarini* judgment; (ii) the growing influence of ECtHR judgments in the jurisprudence of the EU courts; and (iii) the fact that the EU will, in due course, accede directly to the ECHR, it is arguable that the “full stringency” of Articles 6 and 7 ECHR will be applied to EU competition law proceedings going forward. If the full stringency of Articles 6 and 7 ECHR is indeed to be applied to competition law proceedings, increased scrutiny should be expected in a number of areas. Even if the full stringency is not to be applied, the EU courts appear already to have accepted that the sanctions imposed in EU competition law cases are at least “on the periphery” of criminality, meaning that challenges under the relevant Articles of the ECHR will be possible.

### III. DO THE EU COURTS EXERCISE SUFFICIENT REVIEW OF EUROPEAN COMMISSION ANTITRUST DECISIONS?

If sanctions imposed by the Commission in EU competition cases were considered to be of a hard-core criminal nature, the triple role (of investigator, prosecutor, and judge)<sup>15</sup> that the Commission plays in assessing conduct would only be compatible with the Article 6 ECHR right to a fair trial if the Commission’s decisions were subject to a full jurisdiction review by an independent court.<sup>16</sup> Even if the sanctions were considered to be on the periphery of criminality,

<sup>11</sup> Case C-272/09 *KME Germany*, unreported, at ¶ 67. See also, AG Kokott opinion in Case C-109/10 *Solvay SA v European Commission* at ¶ 256.

<sup>12</sup> A similar approach was taken by the General Court in Case T-138/07, *Schindler*, unreported, at ¶ 30.

<sup>13</sup> See Bronckers & Vallery, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, 34(4) *WORLD COMPETITION* 535-570, at page 540 (2011).

<sup>14</sup> See, to this effect, the OFT, *The impact of competition interventions on compliance and deterrence*, (December 2011), available at: [http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft1391.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1391.pdf).

<sup>15</sup> The triple role played by the Commission is recognized in its *Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*.

<sup>16</sup> See, to this effect, the judgment in *Menarini* at ¶¶ 59 to 61 and the cases cited therein.

it cannot be excluded that Article 6 ECHR would be applied, in due course, so as to require a full jurisdiction review of the Commission's decisions.

Article 263 TFEU sets out the nature of judicial review in relation to Commission decisions. It provides that the EU courts are able to review acts of the Commission (including competition law decisions). In determining the legality of a Commission competition law decision, the General Court stated in *Microsoft Corporation v Commission* that its review under Article 263 TFEU:

is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been adequately stated and whether there has been any manifest error of assessment or a misuse of powers...<sup>17</sup>

This standard of limited review restricts the ability of addressees of Commission decisions to bring effective challenges to the substance of Commission infringement decisions.

A fuller review is provided for under Article 261 TFEU in relation to the level of fines imposed by the Commission.<sup>18</sup> With respect to challenges as to fine amounts, the General Court has unlimited jurisdiction and is able to adjust fines even where it finds only that there is a factual error (as opposed to a manifest error) in the Commission's assessment.

It is in the context of the Commission's triple role, and the limitations placed on the ability of undertakings to challenge Commission decisions in the General Court, that the recent *Menarini* judgment should be assessed.

*Menarini* concerned a fine imposed by the Italian competition authority (the "AGCM") for anticompetitive conduct (namely in the form of price-fixing and market-sharing) contrary to the Italian equivalent of Article 101 TFEU. Although *Menarini* paid the fine imposed, it appealed the decision to the Administrative Tribunal of Latium. *Menarini*'s appeal was rejected and it appealed to the ECtHR, alleging a breach of Article 6 ECHR on the basis that it had no access to a court with unlimited jurisdiction or to effective judicial review of the decision of the AGCM.

The ECtHR held that the severity of the fines imposed by the AGCM meant that they were of a criminal nature for purposes of Article 6 ECHR.<sup>19</sup> Affirming its previous judgment in *Kadubec v Slovakia*,<sup>20</sup> the ECtHR also held that where a fine of a criminal nature is imposed by an administrative authority, this is not necessarily incompatible with the ECHR provided (i) there is the opportunity to challenge the decision before a court or tribunal that is independent of the parties and the government, and (ii) that the court or tribunal is able to examine all of the questions of law and fact relevant to the dispute.<sup>21</sup> On the facts of the *Menarini* case, the ECtHR concluded that there was no breach of Article 6(1). However, Judge Pinto de Albuquerque provided a dissenting opinion, in which he argued that the Italian proceedings had in fact

---

<sup>17</sup> Case T-201/04 [2007] ECR II-3601, at ¶¶ 87 and 88.

<sup>18</sup> Article 31 of Regulation 1/2003 reflects the scope of this fuller review, providing that the EU courts may cancel, reduce or increase fines.

<sup>19</sup> ¶¶ 40 to 45.

<sup>20</sup> [1998] ECHR 81.

<sup>21</sup> ¶ 61.

breached Article 6(1) insofar as the Italian administrative courts were not courts with full jurisdiction over decisions taken by the AGCM.<sup>22</sup>

It is worth highlighting two particularly relevant aspects of the *Menarini* judgment and its two accompanying opinions:

- Similar to the EU system, the standard of judicial review at issue in *Menarini* was described (by the Administrative Tribunal of Latium) as being “weak” in nature, *i.e.* a more limited test of legality as opposed to a full rehearing of the case.
- It is clear from *Menarini* that what matters to the ECtHR is *de facto* the standard of review applied in the actual case at hand. In other words, compatibility with Article 6 ECHR will be determined by the review actually conducted by the individual court in the case at hand, and not by how the law purports to characterize the relevant standard of judicial review. The dissenting opinion by Judge Pinto de Albuquerque and a concurring opinion of Judge Sajó are interesting on this point—they both considered that a full, exhaustive review is necessary to meet the fair hearing requirements of Article 6 ECHR. However, on the facts, they disagreed as to whether the review actually went beyond the mandated legality check with Judge Sajó joining the majority in saying that, in the case at hand, a sufficiently comprehensive review had been undertaken.

Applying this judgment to EU competition law procedure, it is apparent that the Article 261 TFEU review of fine levels would be compatible with the right to a fair trial. However, the Article 263 TFEU review process would appear more questionable. Although Article 263 TFEU allows addressees to challenge Commission decisions and the General Court can (arguably) examine all questions of law and fact arising, the limited nature of the standard of review (manifest error of assessment) severely restricts addressees’ ability effectively to challenge decisions. Such a limitation is expressly referenced by Judge Pinto de Albuquerque:

Eu égard à la nature non juridictionnelle de l’AGCM et à l’étendue limitée de la juridiction administrative telle qu’elle a été entendue in abstracto et exercée in concreto par les instances judiciaires nationales, il y a eu violation de l’article 6.<sup>23,24</sup>

In its December 2011 judgment in *KME Germany*, the CJEU assessed an early articulation of the argument that a lack of full jurisdiction review on appeal meant that the combination of Commission proceedings and the General Court’s Article 263 TFEU “review of legality” constituted a breach of the Article 47 Charter right to effective judicial protection. Although the CJEU did not reference the ECtHR’s judgment in *Menarini* (or Judge Pinto de Albuquerque’s dissenting opinion), it did appear to accept that EU competition law fines and proceedings were criminal in nature and that Article 47 Charter necessitated that the General Court conduct a detailed review of Commission infringement decisions. The CJEU considered that the General Court had, in fact, conducted a sufficiently detailed review of the points raised by the applicant, and so held that the proceedings did not constitute an infringement of Article 47 Charter.

---

<sup>22</sup> ¶ 9 of the dissenting judgment.

<sup>23</sup> ¶ 11 of the dissenting judgment.

<sup>24</sup> Convenience translation: “Given the non-judicial nature of the AGCM and the limited scope of the administrative jurisdiction as it was expressed in the abstract and as it was exercised in practice by the national courts, there was a violation of Article 6.”

However, the CJEU emphasized the differences between the General Court's full jurisdiction on fines and its more limited jurisdiction under Article 263 TFEU, suggesting that, if there are further developments at the ECtHR on the application of Article 6 ECHR, it may be that the General Court's Article 263 TFEU review could be viewed as inadequate.

If it does prove possible to demonstrate that the combination of the Commission's triple role and the current Article 263 TFEU review process renders EU competition law proceedings incompatible with Article 6 ECHR and Article 47 Charter, what would the consequences be? In short, changes would be necessary. Such changes could be made either to the Commission's procedures or to the procedures of the Court (or its standard of review).

Reform of the Commission's procedures would most likely need to center on removing the Commission's triple role of investigator, prosecutor, and judge and adopting a more adversarial approach to competition proceedings.<sup>25</sup> However, it seems unlikely that such changes would be met with political approval, at least in the near term.

Reforms to the procedures of the Court or its standard of review appear more likely and possibly easier to put in place. Such reforms could consist of: (i) passing legislation to the effect that an applicant may require the General Court to conduct a full review of all aspects of Commission decisions where fines are imposed; (ii) gradually moving away (through purposive judgments referring to the EU's accession to the ECHR) from the current standard of review towards a more in-depth analysis in light of the increasing influence of the ECtHR and the prominence of the ECHR and the Charter; or (iii) creating a specialist competition law court (such as, for instance, the Competition Appeals Tribunal in the United Kingdom) which may be more inclined or better placed to conduct a fuller review of Commission decisions and, thus, more effectively secure compliance with the ECHR and the Charter.

One difficulty with an incremental approach to adjusting the standard of review is that, given, *inter alia*, the limited file before them and their lack of fact-finding powers, the EU courts may not be sufficiently well-equipped to undertake a full review of all aspects of Commission decisions. As a result, it may be that legislative or structural changes to the EU courts would be the more likely routes for reform in the event that EU competition law proceedings were considered to be in breach of Article 6 ECHR.

#### IV. IS THERE SUFFICIENT LEGAL CERTAINTY TO IMPOSE PUNITIVE FINES?

Article 49 Charter and Article 7 ECHR enshrine the *nulla poena sine lege* maxim that precludes the imposition of a penal sanction where the act in question was not unlawful at the time it was committed. ECtHR cases, such as *Kokkinakis v Greece*,<sup>26</sup> have clarified that the principle of *nulla poena sine lege* necessitates not only that criminal laws exist at the time of the conduct in question but also that they be sufficiently certain:

---

<sup>25</sup> Such an approach is taken with respect to the Federal Trade Commission in the United States in that the FTC acts as investigator and prosecutor but an administrative court acts as decision-maker. Equally, the U.K. government consultation on competition regime reform examines the possibility of removing the decision-making power of the OFT in U.K. competition law enforcement (*see* chapter 10, *available at*: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>).

<sup>26</sup> *Kokkinakis v Greece* (1994) 17 EHRR 397.



Article 7 [...] of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law.

It is questionable whether the Commission's practice in imposing fines for breaches of uncertain, effects-based rules, is consistent with the principle of *nulla poena sine lege*.

This is highlighted most strikingly by cases relating to Article 102 TFEU. Such cases are based invariably on highly complex and sometimes controversial findings as to market definition and, in recent times, have included findings of abuse that are entirely novel and arguably not adequately foreseeable either on the basis of the text of Article 102 TFEU, or on the basis of the EU courts' judgments (or the Commission's decisions or guidance) thereon.

With respect to market definition, there is a significant lack of legal certainty for those potentially facing a dominance allegation. The Commission's *Notice on Market Definition*<sup>27</sup> sets out an analytical framework of sorts but gives no detail as to how that framework will be applied in practice and, for the most part, simply lists a number of factors that might—or might not—be taken into account should the Commission consider it appropriate.

Narrow relevant product markets were the basis for findings of dominance (and, ultimately, infringement) in, among other cases, *AstraZeneca* (where the Commission defined the market to include just a newer class of medicines (PPIs) to the exclusion of the older drugs treating the same condition (H2 Blockers)), *Hugin*<sup>28</sup> (where the Commission determined that the relevant market was that for the supply of spare parts for Hugin's own cash registers), and *BBI/Boosey and Hawkes* (where the Commission defined the market to be that for British-style brass bands).<sup>29</sup> It is unclear whether or not the addressee companies in each case could reasonably foresee that the relevant product markets would be defined as narrowly as they were. Under the principle of *nulla poena sine lege*, such uncertainty in product market definition is problematic when conduct is legal for a company that is non-dominant, but illegal and capable of resulting in multi-million Euro fines for that same company if it happens to be found dominant.

In addition, the Commission's approach to defining what kind of conduct might constitute an abuse could be characterized as being somewhat unpredictable.<sup>30</sup> For instance, in *AstraZeneca* the Commission appeared to base part of one of its findings of abuse on a newly-created category of abuse arising out of an alleged "lack of transparency."

The Commission has recognized this problem and has attempted to introduce a greater degree of legal certainty into its application of Article 102 TFEU. Indeed, providing better

---

<sup>27</sup> *Notice on the definition of relevant market for the purposes of Community competition law*, OJ [1997] C 372/03.

<sup>28</sup> OJ [1978] L 22/23. The Commission determined that the relevant economic market was the market for the supply of spare parts for its machines (on which Hugin had a dominant position) and not the market for the supply of cash registers (on which it had a market share of 12 percent to 14 percent).

<sup>29</sup> OJ [1987] L 286/36.

<sup>30</sup> The Commission itself accepted that its findings of abuse in the *AstraZeneca* case were "novel" and claimed that it imposed a lower fine as a result (though the fine was still around €60 million). In some cases, however, the Commission has opted not to impose fines where it considered that it was not clear at the time of the conduct in question that it constituted an abuse for purposes of Article 102 TFEU (*see*, for example, case COMP/38.096, *Clearstream*, Commission decision of June 2, 2004).

guidance to companies was the purpose of the Commission's 2005 initiation of a review of its Article 102 TFEU policy. However, for several reasons, the resulting limited guidance on the Commission's "enforcement priorities" falls short of what is arguably needed to provide sufficient legal certainty to the business community.<sup>31</sup>

The shift towards a more "effects-based" approach to the various abuses discussed in the Commission's guidance may lead to better and more economically sound enforcement decisions. However, an in-house counsel needing to advise a sales director on the legality of a given pricing move or rebate structure may find it challenging to deduce whether or not such behavior might engage potential Article 102 TFEU liability and high fines.<sup>32</sup>

The net result is a frequent lack of clarity on how markets will be defined, what constitutes abuse, and how certain behavior might be assessed by the Commission. Even if fines imposed in Article 102 TFEU cases were considered only to be on the periphery of criminality, the ECtHR case law applying Article 7 ECHR requires that an entity can only be guilty of a criminal offense where it was sufficiently certain at the time of the commission of the offense that the relevant acts or omissions constituted a crime. It is far from clear that this is the case where Article 102 TFEU cases are made out on the basis of novel abuses and narrow market definitions. If the ECtHR or the EU courts were to consider that the levels of EU competition fines meant that sanctions were of a hard-core criminal nature, decisions of this kind would be even more vulnerable to challenge on the basis of Article 7 ECHR.

## V. CAN ANTITRUST ENFORCEMENT BE BASED ON (IR)REBUTTABLE PRESUMPTIONS?

Given the limited review of the complex evidential and economic aspects of a decision, the reliance by the Commission on presumptions in its enforcement of both Articles 101 and 102 TFEU may also be incompatible with Article 6 ECHR and Article 47 Charter. Article 6(2) ECHR expressly mandates, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." When combined with the Commission's triple role of investigator, prosecutor, and judge and the limited nature of the EU courts' review of Commission decisions, the nature of certain of the presumptions applicable to EU competition law cases may call into question compliance with Article 6 ECHR as a whole and the presumption of innocence mandated by Article 6(2) ECHR in particular.

The Commission can have recourse to a number of presumptions in putting together the components of an Article 101 TFEU case. First, according to its own vertical guidelines, the Commission can presume from a distributor's tacit acquiescence in the unilateral instructions of a supplier that the distributor has concluded an agreement with that supplier to carry out the instructions of the supplier.<sup>33</sup> This can be the case even if the instructions of the supplier are entirely unilateral, the distributor does not wish to carry out the instructions of the supplier, and the distributor expresses its opposition to the supplier's instructions.

---

<sup>31</sup> *Guidance on its enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings*, OJ [2009] C 45/02.

<sup>32</sup> See, to this effect, and more generally: K. H. Eichhorn, *EU Sanctions Policy and the Encouragement of Private Enforcement in Article 102 TFEU Cases*, ANTITRUST BETWEEN EU AND NATIONAL LAW (E.A. Raffaelli ed., 2011).

<sup>33</sup> This has been most recently stated by the Commission *Guidelines on Vertical Restraints* OJ [2010] C 130/01. See ¶ 25.

Second, the recent CJEU judgment in *T-Mobile* makes it clear that a competition authority can make a finding of infringement of Article 101 TFEU where competitors participate in just a single meeting (where potentially competitively sensitive information is exchanged) and their subsequent conduct on the market is aligned.<sup>34</sup> In effect, this means that parallel conduct on the market can be presumed to be the result of a single meeting among individual representatives of competitors without any requirement to show that the contact actually caused the parallel conduct in question.

Third, the Commission can also have recourse to a number of presumptions that allow it to conclude (without detailed assessment) that an agreement restricts competition within the meaning of Article 101(1) TFEU. Where an agreement is classed as a restriction “by object” under Article 101(1) TFEU, the Commission can move directly to assessing whether the agreement satisfies the (tough and restrictive) conditions for an exemption under Article 101(3) TFEU. Under Article 101(3) TFEU, the burden of proof is on the parties to the agreement who will have to adduce “convincing evidence” to persuade the Commission that the agreement’s pro-competitive effects are sufficient to merit exemption. As is emphasized in a number of different contexts,<sup>35</sup> where an agreement constitutes a restriction of competition “by object” it is unlikely to be capable of exemption under Article 101(3) TFEU. The result of the categorization of conduct as a restriction “by object” is that it creates a strong presumption of guilt, which can only be “rebutted” to the extent that the parties can demonstrate that the Article 101(3) criteria are satisfied.

Although having recourse to presumptions may be appropriate for hardcore restrictions of competition (such as price-fixing and market-sharing), the effective presumption of guilt that arises in relation to other practices such as information exchange,<sup>36</sup> resale price maintenance (“RPM”),<sup>37</sup> and dual-pricing<sup>38</sup> (all of which can attract the “object” tag) seems potentially inappropriate in light of the protection of the presumption of innocence that Article 6(2) ECHR is designed to confer.

Finally, in an Article 102 TFEU context, there is a long-standing presumption that an entity with a share of 50 percent or more of a relevant market is dominant.<sup>39</sup> This presumption can be particularly difficult to rebut before the Commission and is far from straightforward to overturn before the General Court. Arguments as to why the presumption should be rebutted will tend to be highly fact-specific and necessitate a detailed knowledge of the competitive pressures being exerted on the company with a share in excess of 50 percent. These are exactly the kind of arguments that are difficult to bring successfully in the Court under its “manifest error” standard of review.

---

<sup>34</sup> C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

<sup>35</sup> Including, notably, in a number of sections of the Commission’s *Guidelines on Vertical Restraints*.

<sup>36</sup> With respect to information exchange, in the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, the Commission recognizes that information exchange may result in efficiencies that may be raised under Article 101(3).

<sup>37</sup> With respect to RPM, the Commission, in its own vertical guidelines, recognizes the efficiencies associated with RPM and, in addition, allows for short-term derogations from this prohibition.

<sup>38</sup> Case C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

<sup>39</sup> Case C-62/86 *AKZO v Commission* [1991] ECR I-3359.

Although presumptions can have a legitimate and helpful role to play in reducing the burden on competition authorities, they can only be acceptable if they are both appropriate and genuinely rebuttable. Presumptions as to the existence of an agreement (*e.g.*, tacit acquiescence), presumptions as to causation (*e.g.*, *T-Mobile*), presumptions as to the anticompetitive effects of practices such as information exchange, RPM, or dual-pricing, and presumptions as to dominance above certain share levels appear problematic and in many cases unacceptably difficult to rebut.

Even if the ECtHR or the EU Courts considered competition law sanctions to be on the periphery of criminality, it would nonetheless be possible to bring strong arguments to the effect that a number of the aforementioned presumptions infringed the Article 6 ECHR right to a fair trial in general and the Article 6(2) ECHR presumption of innocence in particular. In the event that the ECtHR or the EU courts considered competition law sanctions to be of a hard-core criminal nature, the presumptions outlined above would appear even more open to challenge.

## VI. ARE PROCEDURAL RIGHTS SUFFICIENTLY GUARANTEED?

While the Commission has made a welcome effort to codify and improve its framework for procedural rights in the recently published notice on *Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*,<sup>40</sup> some shortcomings remain. In particular, certain decisions that are taken in the course of the administrative procedure and that can be critical to defendants on issues such as case allocation and the initiation of proceedings are not capable of appeal.<sup>41</sup>

Case allocation can have a significant impact on a defendant's chances of successfully defending its case. The defendant may consider that national precedents are more supportive of the conduct in question, or that it could expect a more sympathetic hearing from its national competition authority than from the Commission (or even that the national law standard of judicial review is more favorable than the "manifest error" standard applied by the General Court).<sup>42</sup>

Where issues regarding the appropriateness of fora arise in other contexts, they are often the subjects of specific, interim, appealable decisions. They can even be a matter for the defendants themselves to decide on. By way of example, in England and Wales, a number of criminal offenses are classed as being triable "either way" (*i.e.*, they can be tried before a Magistrates' court or before a full jury). In such instances, it is for the defendant to choose which forum it would prefer. Equally, in civil litigation in England and Wales, there is often a preliminary hearing as to the appropriateness of jurisdiction. Where there is disagreement on jurisdiction, a court will come to a judgment, which will be subject to appeal.

Insofar as concerns the initiation of proceedings, the Commission informs the parties of its decision before making a public announcement.<sup>43</sup> But this is far from sufficient to protect the parties from the reputational consequences that can flow from such an announcement. If a

---

<sup>40</sup> OJ [2011] C 308/6.

<sup>41</sup> Indeed, defendants are not even able to have recourse to the nominally independent hearing officer in relation to decisions on the initiation of proceedings or the allocation of cases.

<sup>42</sup> Indeed, a defendant might also be disadvantaged where a case is transferred from a jurisdiction that affords legal privilege to in-house counsel advice (such as the United Kingdom), to a jurisdiction (such as the European Union) which does not.

<sup>43</sup> ¶ 21 of the Commission's *Best Practices*.

defendant considers that there is “no case to answer,” it should perhaps have the option—as in civil litigation in many EU Member States—to seek the striking out of the Commission’s case before it announces its initiation of proceedings. The standard of proof could, of course, be reasonably high for such an action but it would at least afford the defendant the ability to challenge—before an independent court—a Commission decision to prioritize its case in a way that would have significant reputational and cost consequences for the defendant.

## VII. CONCLUSION

These are interesting times and recent judgments from the courts in Strasbourg and Luxembourg suggest that fundamental rights may finally be taking on a serious role in EU competition law enforcement and judicial review. The tension in particular between the Commission’s combined roles and the limitations in the General Court’s and CJEU’s review of Commission decisions is something to watch. The EU’s forthcoming direct accession to the ECHR gives the ECtHR and the EU courts the perfect opportunity to find that competition law proceedings must fully respect the right to a fair trial and the principle of *nulla poena sine lege* as enshrined in Articles 6 and 7 ECHR irrespective of whether competition law infringements are deemed to be hard-core criminal or in the periphery of criminality.

Based on the ECtHR’s reputation for activism, and the EU courts’ regular recourse to purposive reasoning where considered appropriate, we would hope that the years to come will give us reason to change some of the procedural and judicial review chapters in EU competition law textbooks.