

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*

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This paper deals with the powers of the European Commission and the competition authorities of the EU Member States to enforce Articles 101 and 102 TFEU, and with the procedural rights and guarantees that circumscribe or limit these powers. It focuses in particular on the interplay between the different sources of law governing these matters: EU and national legislation, the Charter of Fundamental Rights of the EU, the European Convention on Human Rights, and the case-law of the EU Courts and the European Court of Human Rights.

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I. ENFORCEMENT POWERS

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings which restrict competition without redeeming virtue. Article 102 TFEU prohibits abuse of a dominant position.¹ Article 103(1) TFEU empowers the EU Council, acting upon a proposal from the European Commission (hereafter also: "the Commission") and after consulting the European Parliament,² to lay down the "appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102". Article 103(2) TFEU specifies that these regulations or directives "shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments; [...]". Article 105(1) TFEU provides that "the Commission shall ensure the application of the principles laid down in Articles 101 and 102".³

The main implementing regulation of Articles 101 and 102 TFEU, adopted on the basis of Article 103 TFEU, is Regulation 1/2003.⁴ Under Regulation 1/2003, both the European Commission and the competition authorities of the Member States (hereafter also: "the national competition authorities"), forming together a

¹ Merger control is not considered in this paper. On both the substantive content and the enforcement of Articles 101 and 102 TFEU, see generally R. Whish, *Competition Law*, 6th edition (Oxford University Press 2008), P. Roth and V. Rose (eds), *Bellamy & Child – European Community Law of Competition*, 6th edition (Oxford University Press 2008), J. Faull and A. Nikpay (eds), *The EC Law of Competition*, 2nd edition (Oxford University Press 2007), and G. Hirsch, F. Montag and F.J. Säcker, *Competition Law: European Community Practice and Procedure Article-by-Article Commentary* (Sweet & Maxwell 2008); on the enforcement of Articles 101 and 102 TFEU, see generally L. Ortiz Blanco (ed.), *EC Competition Procedure*, 2nd edition (Oxford University Press 2006), C.S. Kerse and N. Khan, *EC Antitrust Procedure*, 5th edition (Sweet & Maxwell 2005), E. Gippini-Fournier, Community Report for the FIDE XXIII Congress 2008, in H.F. Koeck and M.M. Karollus (eds), *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003* (Nomos 2008), F. Arbault and E. Sakkers, 'Cartels', in J. Faull and A. Nikpay (eds), as above, 745-1128, and my books *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002), *Principles of European Antitrust Enforcement* (Hart Publishing 2005) and *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008).

² Competition policy is one of the few remaining areas of EU activity in which the European Parliament has no co-legislative powers.

³ Article 105(1) and (2) TFEU could have been understood, like Article 104 TFEU, as merely transitional provisions, applicable only until the Council has exercised its implementing powers under Article 103 TFEU, but in *Masterfoods* (see note 15 below) the Court of Justice has made it clear that the provision in Article 105(1) that "the Commission shall ensure the application of the principles laid down in Articles 101 and 102" is not merely transitional.

⁴ 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; see further the literature listed in note 1 above.

network of competition authorities (hereafter also: "the competition authorities" and "the European Competition Network" or "ECN"),⁵ have the task of enforcing Articles 101 and 102 TFEU.⁶

A. European Commission

Regulation 1/2003 provides for the Commission's enforcement powers.

1. Investigative powers

The 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 (Articles 20 and 21).⁷

Under Article 18 of Regulation 1/2003, the Commission can require undertakings and associations of undertakings to provide all necessary information (i.e. either to hand over existing documents or to provide answers to questions) specified in the request within the time-limit fixed in the request. The Commission may, under Article 23(1)(b) of Regulation 1/2003, impose a fine of up to 1 % of their total turnover in the preceding business year on undertakings or associations of undertakings which, intentionally or negligently, supply incorrect, incomplete or misleading information or do not supply information within the required time-

⁵ See recital 15 and Article 11 of Regulation 1/2003, the European Commission's Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/03, and the webpages of the ECN, <http://ec.europa.eu/competition/ecn/>. As can be seen from the statistics published on the ECN webpages, for every case of suspected infringement of Articles 101 or 102 TFEU investigated by the European Commission, more than ten cases are investigated by the national competition authorities.

⁶ Articles 101 and 102 TFEU are also enforced through private litigation, but this paper only considers public enforcement. As the Court of Justice pointed out in its judgment of 10 November 1993 in Case C-60/92 *Otto v Postbank* [1993] ECR I-5707, paragraph 15: "The guarantees necessary to ensure respect for the rights of the defence of an individual in the course of an administrative procedure [...] are different from those which are necessary to safeguard the rights of the defence of a party involved in civil proceedings." On the private enforcement of Articles 101 and 102 TFEU generally, see European Commission, White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 of 2 April 2008, and accompanying Commission Staff Working Paper, SEC (2008)404; European Parliament, Resolution on the White Paper on damages actions for breach of the EC antitrust rules, A6-0123/2009, adopted on 26 March 2009; Opinion of Advocate General Mazák of 16 December 2010 in Case C-360/09 *Pfleiderer v Bundeskartellamt*, not yet published in ECR; A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008); and my paper 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3.

⁷ Under Article 19 of Regulation 1/2003, the Commission may also interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of the investigation, but this 'power to take statements' is a weaker power, in the absence of any obligation or any penalties, not even for providing misleading information.

limit. Article 24(1)(d) of Regulation 1/2003 allows the Commission to impose periodic penalty payments of up to 5 % of the average daily turnover in the preceding business year per day in order to compel undertakings or associations of undertakings to supply complete and correct information which it has requested by decision.⁸

Under Article 20 of Regulation 1/2003, the Commission may conduct all necessary inspections of undertakings and associations of undertakings. The officials and other persons authorised by the Commission to conduct the inspection have the power to enter any premises of the undertaking or association of undertakings, to examine all business-related records and to take or obtain copies or extracts from such records. Article 20(2)(d) of Regulation 1/2003 allows the Commission inspectors to seal any business premises and books or records for the period and to the extent necessary for the inspection. Under Article 20(2)(e), they are also empowered "to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers". Under Article 23(1)(c), (d) and (e) of Regulation 1/2003, the Commission can impose on the undertaking or association a fine of up to 1 % of the total turnover in the preceding business year where, intentionally or negligently, it produces business records in incomplete form, refuses to submit to inspections ordered by decision, or fails to provide, in response to a question asked in accordance with Article 20(2)(c), a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by decision,⁹ or where seals have been broken.¹⁰ Pursuant to Article 24(1)(e) of Regulation 1/2003, the

⁸ Where the Commission has made the request for information not in the form of a decision but in the form of a simple request, the undertaking or association of undertakings is not obliged to respond. Only if the undertaking or association, intentionally or negligently, provides incorrect or misleading information can it be penalised by the Commission under Article 23(1)(a) of Regulation 1/2003 with a fine of up to 1 % of its total turnover in the preceding business year.

⁹ Where the Commission chooses to conduct an inspection not on the basis of a decision but on the basis of a simple authorisation, the undertaking or association of undertakings is not obliged to submit to it. However, under Article 23(1)(c) and (d) of Regulation 1/2003, the Commission can impose on the undertaking or association a fine of up to 1 % of the total turnover in the preceding business year where, intentionally or negligently, it produces the required business-related records in incomplete form or where, in response to a question asked under Article 20(2)(e), it gives an incorrect or misleading answer, or fails to correct within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff.

Regulation 1/2003 does not provide for any penalty to be imposed on members of staff for failing to provide answers or for providing incorrect, incomplete or misleading answers in response to questions asked during an inspection. Penalties can only be imposed on the undertaking that fails to correct within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff; see further B. Vesterdorf, 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 701, at 727-729.

¹⁰ By judgment of 15 December 2010 in Case T-141/08 *E.ON Energie v European Commission*, not yet published in ECR, the General Court confirmed a Commission decision imposing a fine of 38 million € for the breach of a seal.

Commission can also impose periodic penalty payments of up to 5 % of the average daily turnover in the preceding business year per day in order to compel undertakings or associations to submit to an inspection ordered by decision. Moreover, Article 20(6) of Regulation 1/2003 provides that, where the Commission officials conducting the inspection find that an undertaking opposes an inspection ordered by decision, the Member State concerned shall afford them the necessary assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.¹¹

Article 21 of Regulation 1/2003 gives the Commission the power to order by decision an inspection of any other premises, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 101 or Article 102 of the Treaty, are being kept in those premises. As in the case of inspection of business premises, officials and other persons authorised by the Commission to conduct the inspection have the power to examine all business-related records and to take or obtain copies or extracts, but they have no power to seal or ask for explanations. The provisions of Article 20(6) of Regulation 1/2003, providing for assistance from national authorities to overcome opposition to an inspection, also apply to inspections under Article 21 of Regulation 1/2003, but the powers of the Commission to impose fines or periodic penalty payments under Articles 23 and 24 of Regulation 1/2003 are not applicable.

When the Commission conducts an inspection either of business premises under Article 20 or of private homes under Article 21 of Regulation 1/2003, its inspectors can receive "active assistance" of inspectors designated by the competition authority of the Member State in whose territory the inspection is conducted. Article 20(5) of Regulation 1/2003 provides that the Commission can request such assistance, or – interestingly – the national competition authority has the right to provide such assistance at its own request. The assisting national

¹¹ Apart from the possibility for the Commission itself to impose fines or periodic penalty payments to compel undertakings to submit to an inspection, the Commission thus relies on the authorities of the Member State in whose territory the inspection takes place to overcome opposition to its inspections. The Commission inspectors cannot themselves use any force.

In application of the General EU law principles of effectiveness and of equivalence (see (text accompanying) note 18 below), the assistance which the Member States provide to overcome opposition to Commission inspections must be effective, and at least equivalent to what the Member State would provide for in comparable situations of enforcement of its own national law.

Ultimately the effectiveness of the fines and periodic penalty payments which the Commission can impose under Articles 23 and 24 of Regulation 1/2003 to compel undertakings to submit to inspections or to answer requests for information, and to punish the provision of incorrect, incomplete or misleading information, also depends on assistance by the Member States. Indeed, if the company were to refuse to pay the fine or penalty payment, the Commission would make use of Article 299 TFEU, which provides that a national authority designated for this purpose by the Member State in the territory of which the Commission decision imposing the financial penalty is to be executed shall append an order for its enforcement to the Commission decision, allowing that decision to be enforced according to the rules of civil procedure in force in that Member State.

inspectors have the same powers as the Commission inspectors, as set out in Articles 20 and 21 of Regulation 1/2003.

Apart from obtaining assistance from the Member States for the inspections which it conducts itself, the Commission can also request the competition authorities of the Member States to conduct inspections on its behalf. Article 22(2) of Regulation 1/2003 provides as follows: "At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authority of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law." The powers of the national inspectors conducting inspections under Article 22(2) of Regulation 1/2003 are thus not those set out in Articles 20 and 21 of Regulation 1/2003, but those provided for in the national law of the Member State concerned.¹²

2. *Decision-making powers*

The Commission's decision-making powers are set out in Chapters III and VI of Regulation 1/2003, the three main instruments being decisions ordering termination of infringement (Article 7), imposing fines (Article 23(1)(a)) and making commitments binding (Article 9).

Article 7 of Regulation 1/2003 provides that, where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 101 or of Article 102 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Article 24(1)(a) of Regulation 1/2003 enables the Commission to impose periodic penalty payments of up to 5 % of the average daily turnover in the preceding business year per day in order to compel undertakings or associations to comply with a decision pursuant to Article 7.

Article 23(2)(a) of Regulation 1/2003 provides that the Commission may by decision impose fines, up to 10 % of their total turnover in the preceding business year, on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Articles 101 or 102 TFEU.

Article 9 of Regulation 1/2003 provides that, where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by

¹² However, the general EU law principles of effectiveness and equivalence (see (text accompanying) note 18 below) require that these powers must be effective, and at least equivalent to what the Member State would provide for in comparable situations of enforcement of its own national law.

decision make those commitments binding on the undertakings. Article 24(1)(c) empowers the Commission to impose periodic penalty payments to compel compliance with a commitment made binding, and Article 23(2)(c) enables the Commission to impose fines in case of intentional or negligent failure to comply with a commitment made binding.¹³

Article 8 of Regulation 1/2003 furthermore empowers the Commission to take interim measures, and Article 10 to make findings of inapplicability (non-infringement decisions), but neither of these powers has been used since the entry into application of Regulation 1/2003 on 1 May 2004.¹⁴

The EU Courts have interpreted the Commission's enforcement powers, as laid down in Regulation 1/2003, also in the light of the provisions of the Treaty. For instance, in *Masterfoods*, the Court of Justice held that "in order to fulfil the role assigned to it by [Article 105(1) TFEU], the Commission cannot be bound by a decision by a national court in application of [Articles 101 and 102 TFEU]. The Commission is therefore entitled to adopt at any time individual decisions under [Articles 101 and 102 TFEU], even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision".¹⁵

B. National competition authorities

1. Investigative powers

Regulation 1/2003 has not harmonized the investigative powers of the national competition authorities. The investigatory powers of a Member State's competition authority are thus in principle those provided for in the national law of that Member State.

¹³ Article 9(2)(b) of Regulation 1/2003 also allows the Commission to reopen proceedings where the undertakings concerned act contrary to their commitment. On commitment decisions generally, see my papers 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' (2006) 29 *World Competition* 345 and 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335.

As to the execution of decisions imposing fines or periodic penalty payments, see Article 299 TFEU and note 11 above.

¹⁴ See European Commission, Report on the functioning of Regulation 1/2003, COM(2009)206, and accompanying Staff Working Paper, SEC(2009)574, of 29 April 2009, and A. Nordstj, 'Regulation 1/2003: Power of the Commission to Adopt Interim Measures' (2006) *European Competition Law Review* 299.

¹⁵ Judgment of 14 December 2000 in Case C-344/98 *Masterfoods* [2000] ECR I-11412, paragraph 48.

Article 22(1) of Regulation 1/2003 provides that the "competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article [101] or Article [102] of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12".¹⁶

This provision allows national competition authorities to use their own powers of investigation to help each other, not an obligation to do so, unlike Articles 22(2) of Regulation 1/2003 which obliges national competition authorities to undertake inspections on behalf of the Commission at the latter's request.¹⁷ However, it could be argued that the principle of sincere cooperation between the Member States and the Union under Article 4(3) TEU, read together with Regulation 1/2003, would not be respected by a Member State whose competition authority unreasonably refuses reasonable requests for assistance from other national competition authorities.

Whilst in principle the national law of each Member State thus determines the investigative powers of the national competition authorities, some important constraints result from general principles of EU law, in particular from the principles of equivalence and effectiveness.¹⁸

These two general principles, which have been developed in the case-law of the EU Courts, apply whenever EU law entrusts Member States with the enforcement of EU law. The principle of equivalence requires that Member States do not discriminate against the enforcement of EU law in comparison with the enforcement of comparable national law. The principle of effectiveness requires that the enforcement of EU law is effective. The principle of effectiveness is reflected in Article 35(1) of Regulation 1/2003, which requires Member States to designate the competition authority or authorities responsible for the application

¹⁶ On Article 12 of Regulation 1/2003, see text accompanying notes 93 to 102 below. Even if not expressly mentioned in Regulation 1/2003, nothing prevents the Commission from using its powers of investigation on behalf of a national competition authority. The transmission of the information thus collected, and its subsequent use by the national competition authority would again be governed by Article 12 of Regulation 1/2003.

¹⁷ See text accompanying note 12 above; see also text accompanying note 11 above as the obligations for national (competition) authorities to assist the Commission under Articles 20(5) and 20(6) of Regulation 1/2003.

¹⁸ See inter alia Judgments of the Court of Justice of 21 September 1989 in Case 68/88, *Commission v Greece* [1989] ECR 2965, paragraphs 23-25, of 15 September 1998 in Case C-231/96, *Edis* [1998] ECR I-4990, paragraphs 34 and 36-37, and of 18 October 2001 in Case C-354/99, *Commission v Ireland* [2001] ECR I-7657, paragraph 46; see also P. Oliver, 'Le règlement 1/2003 et les principes d'efficacité et d'équivalence' (2005) 41 *Cahiers de droit européen* 351, and I. Simonsson, *Legitimacy in EU Cartel Control* (Hart 2010), Chapter 6.

of Articles 101 and 102 TFEU in such a way that the provisions of that regulation are effectively complied with.¹⁹

For instance, under the principle of equivalence, a Member State which has given its competition authority the power to conduct inspections in private homes in relation to suspected infringements of those provisions in national competition law corresponding to Articles 101 and 102 TFEU,²⁰ is obliged to provide for the same power in relation to suspected infringements of Articles 101 and 102 TFEU.

It could also be argued that, under the principle of effectiveness, all Member States are under an obligation to provide their national competition authorities with the power to conduct inspections at private homes. Indeed, the Commission's power to do so is based on the following reasoning in Recital 26 of Regulation 1/2003: "Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes.[...]" It is not apparent why this need for powers to search private homes so as to safeguard the effectiveness of inspections would be any different in the case of investigations by national competition authorities.

Such a line of reasoning would however not lead to the conclusion that competition authorities in Member States which have not (yet) provided for a power to inspect private homes in their legislation could now claim to have such power by virtue of EU law. This would be contrary to the principle of legal certainty, another general principle of EU law.²¹ But the Commission could possibly bring actions against the Member States before the Court of Justice under Article 258 TFEU, and if necessary subsequently under Article 260 TFEU, to make the Member States enact the necessary legislation.

In practice a certain degree of voluntary convergence of the enforcement powers of the national competition authorities has been taking place since the entry into force of Regulation 1/2003.²² This is in part driven by discussions between the European Commission and the national competition authorities within the ECN. The ECN has a Working Group on Cooperation Issues and Due Process, which is

¹⁹ See Judgment of the Court of Justice of 7 December 2010 in Case C-439/08 *VEBIC*, not yet reported in ECR.

²⁰ All EU Member States have national competition laws containing provisions similar to Articles 101 and 102 TFEU, but without the requirements relating to effect on trade between Member States and to a substantial part of the internal market; see also Article 3 of Regulation 1/2003.

²¹ See Judgments of the Court of Justice of 7 January 2004 in Case C-60/02, X [2004] ECR I-651, paragraph 61, and of 3 May 2005 in Joined Cases C-387/02 etc., *Berlusconi* [2005] ECR I-3565, paragraph 74.

²² See Staff Working Paper, as note 14 above, section 5.1.5.

currently working on further convergence in respect of both investigative and decision-making powers.²³

2. *Decision-making powers*

As to the decision-making powers of the national competition authorities, Article 5 of Regulation 1/2003 provides as follows:

"The competition authorities of the Member States shall have the power to apply [Articles 101 and 102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,*
- ordering interim measures,*
- accepting commitments,*
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.*

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part."

Article 5 of Regulation 1/2003 thus determines which types of decisions national competition authorities can take (and, conversely, which types of decisions they cannot take, notably findings of inapplicability or non-infringement decisions).²⁴

In contrast with the more detailed provisions of Regulation 1/2003 concerning the Commission's decision-making powers, Article 5 leaves a number of important questions unanswered, for instance whether national competition authorities can impose not only behavioural but also structural remedies, and the maximum amount of the fines and periodic penalty payments. These issues are thus in principle left to the national law of each Member State, together with the question what other penalties (e.g. director disqualification or imprisonment), if any, are provided for.

²³ See ECN Brief Special Issue 'A look inside the ECN: its members and its work' (December 2010), accessible at http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf, page 9.

²⁴ National competition authorities thus do not have the power to adopt decisions similar to the decisions the Commission may adopt under Article 10 of Regulation 1/2003; see text accompanying note 14 above. This difference relates to the Commission's specific role in clarifying the law and ensuring its consistent application throughout the EU; see Opinion of Advocate General Mazák of 7 December 2010 in Case C-375/09 *Tele2 Polska*, not yet published in ECR, and *Principles of European Antitrust Enforcement*, as note 1 above, section 1.1.4.3.3.

Whilst in principle the national law of each Member State thus determines, within the framework of Article 5 of Regulation 1/2003, the precise decision-making powers of the national competition authorities, the general EU law principles of equivalence and effectiveness again apply.²⁵

Under the principle of equivalence, for instance, a Member State which provides for imprisonment as a penalty in relation to a cartel prohibition in national law must do the same in relation to the cartel prohibition in Article 101 TFEU.²⁶

The principle of effectiveness requires, for instance, that the penalties imposed by national competition authorities are of a sufficient level to be effective.²⁷

In *VEBIC*, the Court of Justice also held that Article 35 of Regulation 1/2003 must be interpreted as precluding national rules which do not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.²⁸

II. PROCEDURAL RIGHTS AND GUARANTEES

A number of procedural rights and guarantees circumscribe or limit the competition authorities' (use of) enforcement powers. To give just a few examples:

Article 18 of Regulation 1/2003 stipulates that the Commission can only make requests for information "in order to carry out the duties assigned to it by this Regulation" and that the request or decision "shall stipulate the legal basis and purpose of the request". The Court of Justice has clarified that this implies that the request must identify, "with reasonable precision", the suspected infringement of Articles 101 or 102 TFEU, and that it can only be made if "the Commission could reasonably suppose, at the time of the request, that the document [or other information requested] would help it to determine whether the alleged

²⁵ See text accompanying note 18 above.

²⁶ See further my paper 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117.

²⁷ See also Judgment of the Court of Justice of 11 June 2009 in Case C-429/07 *Inspecteur van de Belastingdienst v X*, not yet reported in ECR, paragraph 37: "The effectiveness of the penalties imposed by the national or [EU] competition authorities on the basis of [Article 103(2)(a) TFEU] is [...] a condition for the coherent application of [Articles 101 TFEU and 102 TFEU]."

²⁸ Judgment of 7 December 2010 in Case C-439/08 *VEBIC*, not yet reported in ECR. The case concerned Belgian law, which did not provide for any role for the Belgian Competition Authority in appeals before the Brussels Court of Appeal against decisions of the Competition Council, which is the decision-making part of the Belgian Competition Authority and which is according to Belgian law an administrative court.

infringement had taken place".²⁹ According to the *Orkem* judgment of the Court of Justice, as well as Recital 23 of Regulation 1/2003, the Commission cannot use its powers under Article 18 of Regulation 1/2003 to compel undertakings to admit that they have committed an infringement of Articles 101 or 102 TFEU.³⁰ According to the *AM&S* judgment of the Court of Justice, the Commission cannot use its powers of investigation to take or to compel the production of lawyer-client communications made for the purpose and in the interests of the client's rights of defence and emanating from independent lawyers (legal professional privilege).³¹ As to inspections in private homes, Article 21(3) of Regulation 1/2003 provides that a Commission decision ordering such inspection "cannot be executed without prior authorisation from the national judicial authority of the Member State concerned".

Article 27(1) of Regulation 1/2003 provides that, before taking a decision finding an infringement, ordering its termination, ordering interim measures and/or imposing fines and/or periodic penalty payments, "the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity to be heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment". Article 27(2) adds that the parties concerned "shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States". Article 12 of Commission Regulation 773/2004 provides that the Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submission.³² Article 14(1) of Regulation 773/2004 provides that "hearings shall be conducted by a Hearing Officer in full independence".³³

²⁹ Opinion of Advocate General Jacobs of 15 December 1993 in Case C-36/92 P *SEP v Commission* [1994] ECR I-1914 (explicitly endorsed by the Court of Justice in its judgment of 19 May 1994 in the same case, [1994] ECR I-1932, paragraph 21), at paragraphs 30 and 21.

³⁰ Judgment of 18 October 1989 in Case 374/87 *Orkem v Commission* [1989] ECR 3343, paragraphs 35-40. Companies are however obliged to answer factual questions and to provide documents, even if this information may be used to establish against them the existence of an infringement. See also Opinion of Advocate General Geelhoed of 19 January 2006 and Judgment of the Court of Justice of 29 June 2006 in Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915.

³¹ Judgment of 18 May 1982 in Case 155/79 *AM&S v Commission* [1982] ECR 1575, in particular paragraphs 18, 20, 21 and 23; see also Opinion of Advocate General Kokott of 29 April 2010 and Judgment of the Court of Justice of 14 September 2010 in Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission*, not yet published in ECR, 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.

³² 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. This regulation

Under Article 263 TFEU, addressees of Commission decisions (as well as third parties that are directly and individually concerned) can bring an application for annulment of the decision before the EU General Court, and, on points of law, a further appeal to the Court of Justice. The Courts can annul the Commission decision, in whole or in part. According to the case-law of the EU Courts, "as a general rule the [EU Courts] undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met".³⁴ Under Article 261 TFEU and Article 31 of Regulation 1/2003, the General Court has "unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed".

This article does not attempt to list all the existing procedural rights and guarantees circumscribing or limiting the antitrust enforcement powers of the Commission and the national competition authorities,³⁵ but aims to describe generally the interplay between the different sources of law governing these matters: EU and national legislation, the Charter of Fundamental Rights of the EU, the European Convention on Human Rights, and the case-law of the EU Courts and the European Court of Human Rights.

A. European Commission

Procedural requirements applicable to the European Commission's antitrust enforcement proceedings mainly flow from the Charter of Fundamental Rights of the EU (hereafter also: "the Charter" and "CFREU"), the European Convention on Human Rights (hereafter also: "the Convention" and "ECHR"), general principles of EU law, EU regulations (in particular Regulation 1/2003 and Regulation 773/2004), and under certain circumstances also from the Commission's own statements and practice.

is based on Article 33 of Regulation 1/2003, which enables the Commission to adopt implementing provisions for that regulation.

³³ According to Article 1 of Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] OJ L 162/21, the general task of the hearing officer is to ensure that the effective exercise of the right to be heard is respected. To this effect, the hearing officer decides on requests for extension of the time limit for responding to a statement of objections (Article 10 of Decision 2001/462), decides on disputes concerning access to the file and disclosure of confidential information (Articles 8 and 9 of Decision 2001/462), conducts the oral hearing, and reports on the respect of the right to be heard (Articles 13, 15 and 16 of Decision 2001/462).

³⁴ Judgment of the General Court of 17 September 2007 in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601; see further my paper 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR' (2010) 33 *World Competition* 5 and F. Castillo de la Torre, 'Evidence, Proof and Judicial review in Cartel Cases' (2009) 32 *World Competition* 505.

³⁵ See the works referred to in note 1 above.

1. Charter of Fundamental Rights of the EU

Article 6(1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty, states: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".³⁶

The Charter does not create new rights.³⁷ According to its Preamble, the purpose 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".³⁸

Article 52 CFREU contains the following provisions on the interpretation of the rights contained in the Charter:³⁹

"[...]

2. *Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.*

3. *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down in the said Convention. This provision shall not prevent Union law providing more extensive protection.*

4. *In so far as this Chapter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*

[...]

³⁶ The final text of the Charter has been published in: [2007] OJ C303/1.

³⁷ See also United Kingdom House of Lords, European Union Committee, 10th Report of Session 2007-08, *The Treaty of Lisbon: an impact assessment*, Volume I: Report, paragraphs 5.37 to 5.103.

³⁸ See also 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.

³⁹ See also the last subparagraph of Article 6(1) TFEU: "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII [Articles 51 to 54] of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

7. *The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.*"⁴⁰

According to the explanation of Article 52(3) CFREU, the meaning and scope of rights which correspond to those guaranteed by the European Convention on Human Rights are to be determined not only by reference to the text of the Convention, but also, inter alia, by reference to the case-law of the European Court of Human Rights.⁴¹

For the proper interpretation of the rights contained in the Charter, it is thus necessary to know what the source of each of these rights is (ECHR, Treaties, constitutional traditions common to the Member States, other). The Explanations to the Charter provide guidance in this respect.

The main provisions of the Charter relevant in the context of EU antitrust enforcement are contained in Article 7 (respect for private life, home and communications)⁴², Article 41 (right to good administration, including inter alia the right to be heard and the right to have access to one's file)⁴³, Article 47 (right to an effective remedy and to a fair trial)⁴⁴, Article 48 (presumption of innocence

⁴⁰ These Explanations have been published in: [2007] OJ C303/17.

⁴¹ As note 40 above, and Judgment of the Court of Justice of 22 December 2010 in Case C-279/09 *DEB v Bundesrepublik Deutschland*, not yet reported in ECR, paragraph 35.

⁴² "Article 7

Respect for private and family life

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

⁴³ "Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its civil servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

⁴⁴ "Article 47

Right to an effective remedy and a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

and right of defence)⁴⁵, Article 49 (principles of legality and proportionality of criminal offences and penalties)⁴⁶ and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence)⁴⁷.

According to the Explanations to the Charter:⁴⁸

- Article 7 CFREU (respect for private life) has the same meaning and the same scope as Article 8 ECHR;
- Paragraphs 1 and 2, (a) and (b), of Article 41 CFREU (right to good administration) are based on the case-law of the EU Courts recognizing general principles of EU law, whereas paragraph 2, (c) and paragraphs 3 and 4 reproduce Article 296 TFEU, Article 340 TFEU, and Articles 20(2)(d) and 25 TFEU;
- The first paragraph of Article 47 CFREU (right to an effective remedy) is based on Article 13 ECHR, but is more extensive in that it guarantees the right to an effective remedy before a court, reflecting a general principle of EU law recognized in the case-law of the Court of Justice, whereas the second and third paragraphs of Article 47 CFREU (right to a fair trial) have the same meaning as Article 6(1) ECHR, but a wider scope in that they are not limited to the determination of civil rights and obligations or criminal charges;
- Article 48 CFREU (presumption of innocence and right of defence) has the same meaning and scope as Article 6(2) and (3) ECHR;

⁴⁵ "Article 48

Presumption of innocence and right of defence

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

⁴⁶ "Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence."

⁴⁷ "Article 50

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

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

⁴⁸ As note 40 above, explanations on the Articles concerned and explanations on Article 52; see also *DEB v Bundesrepublik Deutschland*, as note 41 above, paragraph 32.

- Article 49(1) and (2) CFREU (principle of legality of criminal offences and penalties) have the same meaning and scope as Article 7 ECHR,⁴⁹ whereas Article 49(3) CFREU (principle of proportionality of penalties) is based on the common constitutional traditions of the EU Member States and the case-law of the Court of Justice;
- Article 50 CFREU (right not to be tried or punished twice in criminal proceedings for the same criminal offence) has the same meaning as Article 4 of Protocol No 7 to the ECHR, but its scope is extended in that it applies not only within the jurisdiction of one State, but within the European Union.

Finally, Article 52(1) of the Charter contains the following provision concerning limitations on the exercise of these rights:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

There can be no doubt that the effective enforcement of Articles 101 and 102 TFEU constitutes an "objective of general interest recognised by the Union".⁵⁰

The importance of the requirement that limitations must be "provided for by law" is illustrated by the *Knauf* case. The Court of Justice overturned the judgment of the General Court which had held that a company could not challenge before the General Court for the first time a point which it had not contested in the administrative procedure before the Commission. The Court of Justice held that, "in the absence of a specific legal basis", there could be no such limitation of the rights to an effective remedy and of access to an independent tribunal as guaranteed by Article 47 CFREU.⁵¹ It is clear from *Schecke and Eifert* that a limitation laid down in a Commission regulation implementing a Council

⁴⁹ The Explanations mention as an exception the last sentence of Article 49(1) CFREU (rule of retroactivity of more lenient penal law). This exception has however disappeared following the recognition of this principle by the European Court of Human Rights in its Judgment of 17 September 2009, Application 10249/03 *Scoppola v Italy*.

⁵⁰ According to the judgment of the Court of Justice of 1 June 1999 in Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3079, paragraph 36, "[Article 101 TFEU] constitutes 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"; see also Judgment of 7 January 2004 in Joined Cases C-204/00 P etc. *Aalborg Portland and Others v Commission* [2004] I-123, paragraphs 53 and 54, and Opinion of Advocate General Geelhoed of 19 January 2006 in Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915, paragraph 67.

⁵¹ Judgment of 1 July 2010 in Case C-407/08 P *Knauf v Commission*, not yet reported in ECR, paragraph 91.

regulation can be regarded as "provided for by law" within the meaning of Article 52(1) CFREU.⁵²

2. *European Convention on Human Rights*

Before the entry into force of the Lisbon Treaty, the EU Courts already drew inspiration from the European Convention on Human Rights (to which all EU Member States are contracting parties)⁵³, and from the case-law of the European Court of Human Rights interpreting the Convention, when developing general principles of EU law.⁵⁴

As explained above,⁵⁵ the rights guaranteed by the European Convention of Human Rights are also contained in the Charter of Fundamental Rights of the EU, some in an extended form, and Article 52(3) CFREU stipulates that the rights contained in the Charter which correspond to rights guaranteed by the Convention have the same meaning and scope as the corresponding Convention rights, while allowing more extensive protection under EU law. Since the entry into force of the Lisbon Treaty, the Charter has within the EU legal order the same legal value as the EU Treaties.

The main provisions of the Convention relevant in the context of EU antitrust enforcement are Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 4 of Protocol No 7 to the Convention (right not to be tried or punished twice). As explained above,⁵⁶ the corresponding provisions of the Charter which contain these rights, some in an extended form, are Articles 47 and 48 CFREU, Article 49 CFREU, Article 7 CFREU, again Article 47 CFREU and Article 50 CFREU respectively.

In addition, Article 6(2) TEU provides: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵² Judgment of the Court of Justice of 9 November 2010 in Joined Cases C-92/09 and C-93/09 *Schecke and Eifert v Land Hessen*, not yet reported in ECR, paragraph 66.

⁵³ Apart from the 27 EU Member States, 20 other European countries are members of the Council of Europe and contracting parties to the European Convention on Human Rights; see <http://www.coe.int/>. Not all EU Member States have however signed and ratified all Protocols to the Convention; see <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>.

⁵⁴ See text accompanying note 78 below.

⁵⁵ Text accompanying notes 37 to 48 above.

⁵⁶ Text accompanying notes 48 and 49 above.

[...].⁵⁷ Negotiations on the European Union's accession to the Convention started on 7 July 2010.⁵⁸

This accession will open the possibility for anyone claiming that his or her rights under the Convention have been violated by the European Commission, or by the EU Courts reviewing the Commission's decision, to bring an application against the European Union before the European Court of Human Rights after all remedies before the EU Courts have been exhausted.⁵⁹

Over the years a number of authors and a number of litigants before the EU Courts have claimed that EU antitrust procedures are not compliant with the Convention.

In *Bosphorus v Ireland*, the European Court of Human Rights, considering in general the protection of fundamental rights by EU law, found that "the protection of fundamental rights by [EU] law can be considered to be [...] "equivalent" ["comparable"] to that of the Convention system".⁶⁰

⁵⁷ Article 59(2) ECHR, as inserted by Protocol No 14 to the Convention, provides: "The European Union may accede to this Convention".

Article 216(2) TFEU provides: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

⁵⁸ See http://www.coe.int/t/dc/files/themes/eu_and_coe/. Protocol No 8 to the EU Treaties provides that the accession agreement must preserve "the specific characteristics of the Union and Union law". Article 218(6), ii and (8) TFEU require for the conclusion of the agreement on the EU side a unanimous decision by the Council and the consent of the European Parliament, followed by ratification by the Member States. Article 218(11) provides for the possibility for a Member State, the European Parliament, the Council or the Commission to ask the opinion of the Court of Justice as to whether the envisaged agreement is compatible with the Treaties.

⁵⁹ Currently an application to the European Court of Human Rights for an alleged violation of the ECHR in the enforcement of EU antitrust law by the European Commission or the EU Courts would have to be brought either against all EU Member States jointly, on the basis that they concluded the EU Treaties allowing for the alleged violation (see European Court of Human Rights, Decision of 4 July 2000 as to the admissibility of Application 51717/99 *Guérin v 15 EU Member States*, and Decision of 10 March 2004 as to the admissibility of Application 56672/00 *Senator Lines v 15 EU Member States*), or against the Member State in which the Commission decision is enforced pursuant to Article 299 TFEU (see European Commission of Human Rights, Decision of 9 February 1990 concerning Application 13258/87, *M & Co v Germany*, and European Court of Human Rights, Judgment of 30 June 2005 in Case of *Bosphorus Airways v Ireland*, Application 45036/98).

⁶⁰ Judgment of the European Court of Human Rights of 30 June 2005 in Case of *Bosphorus v Ireland*, Application no. 45036/98, paragraphs 165 and 155. This convergence has no doubt been facilitated by the existing dialogue between the EU Court of Justice and the European Court of Human Rights; see Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, and lecture by J.P. Costa, President of the European Court of Human Rights, 'The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice' (King's College London, 7 October 2008), accessible at http://www.echr.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf.

Many of the claims of incompatibility of EU antitrust procedures with the Convention appear to be based on reasoning along the following lines: *Primo*, EU antitrust enforcement is "criminal" within the meaning of the Convention. *Secundo*, some 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 Convention.

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 Convention, 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."⁶¹

Particularly relevant in the context of EU antitrust procedures 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 "criminal", and the distinction between natural persons and companies.⁶²

As I have explained in more detail elsewhere,⁶³ decisions of the European Commission pursuant to Articles 7 and/or 23 of Regulation 1/2003, finding an infringement of Articles 101 or 102 TFEU, ordering its termination and/or imposing fines, concern a "criminal charge" within the wider, autonomous meaning of Article 6 ECHR.⁶⁴

⁶¹ Judgment 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.

⁶² See also Opinion of Advocate General Ruiz-Jarabo Colomer of 17 October 2002 in Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, paragraph 66: "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. [...]"

⁶³ See my paper 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR' (2010) 33 *World Competition* 5, and my earlier papers 'La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme' (1996) *Cahiers de droit européen* 329 and 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) *World Competition* 201.

⁶⁴ This is not contradicted by Article 23(5) of Regulation 1/2003, which provides that fining decisions are not criminal within the meaning of EU law; see references in note 63 above. Commitment

However, as is apparent from the judgment of the European Court of Human Rights in *Jussila v Finland*,⁶⁵ 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 done by the European Commission, which only involves the imposition on companies of fines that are not classified as "criminal" under domestic law, 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.⁶⁶

An example of this differential treatment, specifically mentioned in *Jussila v Finland*,⁶⁷ concerns the compatibility with Article 6 ECHR of the imposition of criminal fines, at first instance, by an administrative or non-judicial body that combines investigative and decision-making powers. Whereas in cases belonging to the hard core of criminal law Article 6 ECHR requires that penalties are imposed by an independent tribunal at first instance, it is not contrary to Article 6 ECHR for penalties belonging to the second category, outside the hard core of criminal law, to be imposed, at first instance, by an administrative or non-judicial body that combines investigative and decision-making powers, provided that there is a possibility of appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision".⁶⁸ The fact that in the EU antitrust enforcement system, the

decisions pursuant to Article 9 of Regulation 1/2003 do not determine a "criminal" charge within the meaning of Article 6 ECHR, as they leave open the question whether or not a violation of Articles 101 or 102 TFEU existed or still exists; see references in note 63 above, and Judgment of the French *Cour de cassation* of 4 November 2008 in Case 07-21.275 *Canal 9 v Les Indépendants*.

⁶⁵ Judgment of the European Court of Human Rights (Grand Chamber) of 23 November 2006 in Case of *Jussila v Finland*, Application no. 73053/01, paragraph 43.

⁶⁶ *Jussila v Finland*, as note 65 above, paragraph 43; see also the judgment of the EU Court of First Instance of 8 July 2008 in Case T-99/04 *AC-Treuhand v Commission*, [2008] ECR II-1501, paragraph 113.

⁶⁷ *Jussila v Finland*, as note 65 above, paragraph 43.

⁶⁸ *Jussila v Finland*, as note 65 above, and judgment of 21 May 2003, *Janosevic v Sweden*, Application No 34619/97, as referred to therein. The judgment of the European Court of Human Rights of 11 June 2009, *Dubus v France*, Application no. 5242/04, does not lead to a different conclusion, as it concerned a case where the first-instance decision-making body was a judicial body according to French law; see paragraph 26 of the judgment. Where a contracting party to the Convention chooses to give the first-instance decision-making power to a judicial body, as was the case with the French Banking Commission in *Dubus*, that judicial body must itself fulfil all the requirements of Article 6 ECHR. See further F. Zivy and I. Luc, 'L'équité procédurale devant l'Autorité de la concurrence', (2010) *Concurrences*, No 4, p. 85, at p. 92.

European Commission both investigates and takes the first-instance decision is thus not incompatible with the Convention.⁶⁹

The distinction between natural persons and companies may also be relevant for the level of protection offered by the Convention.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

The European Court of Human Rights has also, for example, as regards the grant of legal aid, accepted a difference in treatment between natural persons and legal persons, as well as a difference in treatment between profit-making companies, on the one hand, and natural persons and non-profit-making legal persons, on the other.⁷²

As I have explained in detail elsewhere,⁷³ the difference between natural persons and legal persons may also be relevant for the privilege against self-incrimination.⁷⁴ All existing judgments of the European Court of Human Rights on the privilege against self-incrimination and the right to silence were given in cases concerning natural persons.⁷⁵ No case concerning a legal person has been brought before the European Court of Human Rights yet. However, the German Constitutional Court has held that the privilege against self-incrimination

⁶⁹ For a detailed discussion as to whether the review of the Commission's decisions by the EU Courts fulfils the requirements of the Convention, see my paper referred to in note 63 above.

⁷⁰ See M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford 2006).

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 Decision of 26 August 2008, Application No 14565/04, *VP Diffusion v France*; see also *DEB v Bundesrepublik Deutschland*, as note 41 above.

⁷³ See my paper 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567.

⁷⁴ See also Opinion of Advocate General Geelhoed of 19 January 2006 in Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915, paragraphs 62 to 67.

⁷⁵ 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).

contained in the German Constitution does not extend to legal persons, because it is grounded in the protection of individual human dignity.⁷⁶ Similarly, under the U.S. Constitution, legal persons cannot invoke the privilege against self-incrimination.⁷⁷

3. *General principles of EU law*

Article 6(3) TEU states: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

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, apart from regulations, the main source of procedural rights.⁷⁸ 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 only a subsidiary and complementary source of procedural rights, which may serve to fill any lacunae in the Charter.⁷⁹

4. *Regulations*

Regulation 1/2003 and Commission Regulation 773/2004 set out many of the procedural rights and guarantees applicable to the enforcement of Articles 101 and 102 TFEU by the Commission.⁸⁰ Recital 37 of Regulation 1/2003 states:

⁷⁶ BVerG, 26 February 1997, 1 BvR 2172/96.

⁷⁷ *Braswell v United States*, 487 U.S. 99 (1988).

⁷⁸ See my earlier 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.

⁷⁹ See European Convention, Working Group II, Working document 19, *Hearing of Judge Mr. Vassilios Skouris – 17 September 2002*, accessible at <http://european-convention.eu.int/docs/wd2/3057.pdf>, at 8-9: "My feeling is that, from the point when the EU develops a binding set of fundamental rights, it will no longer be necessary to refer to the general principles of law and consequently to the common constitutional traditions and the ECHR as a parallel or "concurrent and equivalent" source for fundamental rights; they will merely form a subsidiary and complementary source. Accordingly, the Court of Justice would have recourse to the general principles of law only in order to make good any lacunae in the text of the Charter."

⁸⁰ See notes 4 and 32 above. Also worth mentioning are Council Regulation 1 determining the languages to be used by the European Economic Community [1958] OJ B17/385 (Special English Edition 1952-58, p 59), last amended by Council Regulation (EC) No 1791/2006 [2006] OJ L363/1, and Commission Decision 2001/462, as note 33 above.

"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."

With regard to some procedural rights and guarantees, Regulation 1/2003 codifies the case-law of the EU Courts. For instance, Article 20(8) of Regulation 1/2003, which defines the role of national courts in granting authorisation for assistance by national authorities in case of opposition to an inspection ordered by the Commission, restates the *Roquette* judgment of the Court of Justice.⁸¹ The second sentence of Recital 23 of Regulation 1/2003 restates the *Orkem* case-law concerning self-incrimination.⁸²

Such legislative codification of case-law raises the question to what extent the EU Courts should defer to this legislative codification, or to the views expressed in the legislative process, in cases where they are asked by litigants to extend the scope of procedural rights and guarantees set in earlier case-law. This issue was debated in *Akzo Nobel Chemicals and Akros Chemicals*, where the question was whether legal professional privilege as recognised in *AM&S* should be extended to in-house counsel.⁸³ Advocate-General Kokott opined that "when called upon to develop EU law by recognising general legal principles [...] the Court cannot disregard the opinions of the European Union institutions motivated by legislative policy".⁸⁴

5. Commission statements and practice

The Commission has often imposed on itself procedural rules exceeding the requirements laid down in the case-law of the EU Courts or in regulations or other binding acts.⁸⁵ For instance, in its Twelfth Report on Competition Policy, published in 1983, the Commission established a procedure for providing access to the file. In *Hercules Chemicals*, the General Court subsequently held that, even

⁸¹ Judgment of 22 October 2002 in Case C-94/00 *Roquette* [2002] ECR I-9011.

⁸² See (text accompanying) note 30 above.

⁸³ See (text accompanying) note 31 above.

⁸⁴ Opinion of Advocate General Kokott of 29 April 2010 and Judgment of 14 September 2010 in Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission*, not yet published in ECR, paragraph 107; see also 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 at 19-21.

⁸⁵ See Article 288 TFEU and note 80 above.

if there had been no prior obligation on the Commission to give such access to the file, the Commission could not depart from the rules it had imposed on itself.⁸⁶

In 2010, the Commission published Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, announcing a number of amendments to its procedures designed to improve transparency and predictability.⁸⁷

B. National competition authorities

Regulation 1/2003 has not harmonized the procedural rights and guarantees applicable to the enforcement of Articles 101 and 102 TFEU by the national competition authorities. In principle, the applicable rules are thus those provided for in the national law of the Member State concerned.

Given that all Member States are contracting parties to the European Convention on Human Rights, the procedural rights and guarantees resulting from its provisions, as interpreted by the European Court of Human Rights, are applicable in all Member States.⁸⁸

The Charter of Fundamental Rights of the EU is also applicable to the enforcement of Articles 101 or 102 TFEU by the national competition authorities. Indeed, Article 51(1) of the Charter states: "The provisions of this Charter are addressed [...] to the Member States [...] when they are implementing Union law".

The same holds for general principles of EU law. According to the case-law of the Court of Justice, "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".⁸⁹

⁸⁶ Judgment of 17 December 1991 in Case T-7/89 *Hercules Chemicals v Commission* [1991] II-1711, paragraphs 52 and 53. As mentioned above ((text accompanying) notes 32 and 41), access to the file is now provided for in Article 27(2) of Regulation 1/2003 and in Article 41(2)(b) CFREU.

⁸⁷ IP/10/2 of 6 January 2010; the text of the Best Practices is accessible at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf. While the Commission immediately started applying these Best Practices, it also invited public comments with a view to adjusting them.

⁸⁸ See (text accompanying) note 53 above. The national courts of a Member State may interpret the European Convention of Human Rights more extensively than the European Court of Human Rights. For instance the case-law of the French *Cour de cassation* prohibiting the official who has conducted the investigations from participating in the deliberations of the decision-making body of the authority is based on a reading of Article 6 ECHR which goes beyond the case-law of the European Court of Human Rights; see F. Zivy and I. Luc, as note 68 above, paragraphs 29 to 48.

⁸⁹ Judgment of 13 April 2000 in Case C-292/97 *Karlsson and Others* [2000] ECR I-2760, para 37.

Protocol No 30 to the EU Treaties on the application of the Charter of Fundamental Rights to Poland and the United Kingdom is an interpretative protocol rather than an opt-out, and should thus not lead to a different application of the Charter in the United Kingdom and Poland (and the Czech Republic) when compared with the rest of the Member States.⁹⁰

EU law does normally not prevent national law from providing for more extensive procedural rights or guarantees than required under the Charter and the general principles of EU law. For instance, national law may extend legal professional privilege to in-house counsel.⁹¹ The general EU law principles of equivalence and effectiveness would however oppose the provision in national law of more extensive procedural rights or guarantees if these additional protections make the enforcement of Articles 101 and 102 TFEU more burdensome than the enforcement of the equivalent prohibitions in national antitrust law, or if these additional protections make the enforcement of Articles 101 and 102 TFEU impossible or excessively difficult.⁹²

C. Information exchanged through the European Competition Network

As mentioned above,⁹³ Regulation 1/2003 allows for the competition authorities within the ECN to use their powers of investigation to assist each other. More generally, exchange of information between the competition authorities is allowed. Article 12(1) of Regulation 1/2003 reads as follows:

"For the purpose of applying Articles [101] and [102] of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information."

This rule is however limited by the following exception in Article 12(3) of Regulation 1/2003:

⁹⁰ Protocol No 30 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom, [2007] OJ C306/156. See United Kingdom House of Lords, European Union Committee, 10th Report of Session 2007-08, *The Treaty of Lisbon: an impact assessment*, Volume I: Report, paragraph 5.103 (d): "The Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States. [...] Indeed, given that, despite media reports, it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States." The European Council agreed on 29-30 October 2009 to extend Protocol No 30 to the Czech Republic in the next accession treaty; see Document 15265/09 CONCL 3.

⁹¹ See text accompanying notes 31 and 83 above and 95 to 102 below.

⁹² See text accompanying notes 18 to 21 and 25 to 28 above.

⁹³ Text accompanying notes 16 and 17 above.

"Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article [101] or Article [102] of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions."

Some additional clarification is provided for in the first, third and fourth sentence of Recital 16 of Regulation 1/2003:

"Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. [...] When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent."

Finally, the three last sentences of paragraph 27 of the Commission Notice on cooperation within the Network of Competition Authorities⁹⁴ explain further:

"Article 12 of [Regulation 1/2003] takes precedence over any contrary law of a Member State. The question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested."

When information is collected by one competition authority (the transmitting authority) and exchanged through the European Competition Network to be used by another competition authority (the receiving authority), this information can thus always be used as intelligence by the receiving authority. As to its use in evidence, a distinction is made between the use to impose sanctions on natural persons, and the use to impose sanctions on legal persons. The receiving authority can only use the information in evidence to impose custodial sanctions if the law of the transmitting authority foresees such sanctions in relation to violations of Articles 101 or 102 TFEU. As to other kinds of sanctions on natural persons (such as fines, or director disqualification), the receiving authority can use the exchanged information in evidence if either the law of the transmitting authority

⁹⁴ As note 5 above.

foresees the same kind of sanctions or the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. As to sanctions on legal persons, the receiving authority can always use the exchanged information in evidence if this information has been lawfully collected according to the law applicable to the transmitting authority. This is the case even if, according to national law, the receiving authority could not have collected this information itself, or could not have used the information if it had collected it.

This means for instance that the Office of Fair Trading, which itself under United Kingdom law cannot use its own powers of investigation to take or compel undertakings to give up certain correspondence with in-house legal counsel, could receive and use in evidence such information if collected by the European Commission or the German or French competition authorities, given that in EU law and in the national laws of Germany, France, and indeed most other Member States, legal professional privilege does not cover in-house lawyers.⁹⁵

This potential for a receiving authority to use in evidence exchanged information which it could not have collected itself, or could not have used if it had collected it, has been criticised in the literature as an "unacceptable" "circumvention" of procedural rights and guarantees, "that may erode fundamental rights".⁹⁶

Such fears appear to be unwarranted. First, the problem only concerns legal persons, not natural persons.⁹⁷ Secondly, as also explained above,⁹⁸ all members of the European Competition Network must respect the procedural rights and guarantees flowing from the European Convention on Human Rights, as interpreted by the European Court of Human Rights, as well as all procedural rights and guarantees which according to the case-law of the Court of Justice flow from the Charter of Fundamental Rights of the EU or from general principles of EU law.⁹⁹

⁹⁵ See text accompanying notes 31 and 83 above; OFT Guideline 404 *Powers of Investigation* (December 2004), paragraph 6.3 ("Whilst UK privilege rules would apply to cases being investigated in the UK by the OFT on its own behalf, the OFT could be sent the communications of in-house lawyers [...] by an NCA from another Member State where the communication of such lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation."); and B. Vesterdorf, as note 9 above, at 721-723. Similarly, other competition authorities could receive and use information collected by the Irish Competition Authority under its power to summon witnesses and examine them under oath (Section 31 of the Irish Competition Act 2002), even if those other authorities have no similar power to summon witnesses.

⁹⁶ M. Araujo, 'The Respect of Fundamental Rights Within the European Network of Competition Authorities', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 511-531, at 528 and 530.

⁹⁷ See text accompanying notes 93 to 95 above.

⁹⁸ See text accompanying notes 88 to 92 above.

⁹⁹ Including for example the *Orkem* and *AM&S* case law; see (text accompanying) notes 30 and 31 above.

The "eroded fundamental rights" can thus only be rights of legal persons which are recognised neither in the case-law of the European Court of Human Rights nor in the fundamental rights case-law of the Court of Justice. Indeed, it is difficult to find examples beyond that concerning legal privilege for in-house counsel.¹⁰⁰ The arguments for extending legal professional privilege to in-house lawyers are however very weak. It is difficult to see how the possibility to consult in confidence an independent lawyer is insufficient to guarantee the rights of defence, thereby creating a need to extend legal professional privilege to in-house counsel. Indeed, there is a wide choice of independent lawyers companies could turn to, and those companies which can afford to have in-house counsel can undoubtedly also afford to pay an independent lawyer.¹⁰¹

Finally, if an "erosion of fundamental rights" were ever seen to be happening, one could safely expect the EU Courts and the courts of the Member States with a lower level of protection to react by increasing procedural rights and guarantees.¹⁰²

III. SUMMARY

Regulation 1/2003 provides for the European Commission's investigative and decision-making powers in the enforcement of Articles 101 and 102 TFEU.

¹⁰⁰ See (text accompanying) note 95 above. In some earlier publications, I have mentioned an example concerning the privilege against self-incrimination (see inter alia *Principles of European Antitrust Enforcement*, as note 1 above, paragraph 207), but this example appears mistaken in the light of the judgment of the German Constitutional Court of 26 February 1997 referred to in note 76 above.

¹⁰¹ See further Opinion of Advocate General Kokott of 29 April 2010 and Judgment of the Court of Justice of 14 September 2010 in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, not yet published in ECR. Not surprisingly then, a large part of the arguments used by advocates of extending the *AM&S* ruling to in-house counsel are not based on considerations of principle, but rather on utilitarian or instrumental considerations relating to the effectiveness and efficiency of antitrust enforcement. It is in particular often argued that extending legal professional privilege to in-house counsel would result in better compliance with Articles 101 and 102 TFEU. However, the claim that legal professional privilege leads to increased compliance is highly questionable; see 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; E. Gippini-Fournier, as note 31 above, 596-606; and I. Baum, 'Attorney Corporate Client Privilege: Who Represents the Corporation?' (2007) *Review of Law & Economics*, Vol. 3, Iss. 1, Article 5.

¹⁰² See *Principles of European Antitrust Enforcement*, as note 1 above, paragraph 208 (footnote 282), and B. Vesterdorf, as note 9 above, at 722-723 ("Regulation No 1/2003 therefore sets the stage for a comprehensive interpenetration of the national procedural laws. It must be stressed that it will not necessarily level down the national laws: nothing in Regulation No 1/2003 prevents a Member State from increasing the current level of protection granted in its jurisdiction for the collection of evidence."); compare with Opinion of Advocate General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals*, as note 101 above, paragraph 137.

With the exception of its Articles 12 and 22(1) (which allow competition authorities to assist each other in their investigations) and Article 5 (which determines the types of decisions national competition authorities can take), Regulation 1/2003 leaves it in principle to the national laws of the Member States to determine the investigative and decision-making powers of their respective national competition authorities for the enforcement of Articles 101 and 102 TFEU. However, under the general EU law principles of equivalence and effectiveness and Article 35(1) of Regulation 1/2003, Member States are under an obligation to give their competition authorities enforcement powers that are effective and at least equivalent to the powers granted to enforce national competition law.

Procedural requirements applicable to the European Commission's antitrust enforcement proceedings mainly flow from the Charter of Fundamental Rights of the EU, the European Convention on Human Rights, general principles of EU law, EU regulations (in particular Regulation 1/2003 and Regulation 773/2004), and under certain circumstances also from the Commission's own statements and practice.

The Charter of Fundamental Rights of the EU, which by virtue of Article 6(1) TEU has the same legal value as the EU Treaties, does not create new rights but reaffirms the rights as they result inter alia from the European Convention on Human Rights, the common constitutional traditions of the Member States and the case-law of the EU Courts and the European Court of Human Rights. For the proper interpretation of the rights contained in the Charter, it is necessary to know the source of each of these rights. The Explanations to the Charter provide guidance in this respect. The meaning and scope of rights which correspond to those guaranteed by the European Convention on Human Rights are to be determined by reference to the Convention and the case-law of the European Court of Human Rights.

Article 6(2) TEU provides for the accession of the EU to the European Convention on Human Rights. This accession will open the possibility for anyone claiming that his or her rights under the Convention have been violated by the European Commission, or by the EU Courts reviewing the Commission's decision, to bring an application against the European Union before the European Court of Human Rights after all remedies before the EU Courts have been exhausted.

The case-law of the European Court of Human Rights distinguishes, as to the level of protection required by the European Convention on Human Rights, according to the circumstances of the particular case. Particularly relevant in the context of EU antitrust procedures 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 "criminal", and the distinction between natural persons and companies.

In principle, the procedural rights and guarantees applicable to the enforcement of Articles 101 and 102 TFEU by the national competition authorities are those provided for in the national law of the Member State concerned. All Member States are contracting parties to the European Convention on Human Rights. The Charter of Fundamental Rights of the EU is also applicable to the enforcement of

Articles 101 or 102 TFEU by the national competition authorities. The same holds for general principles of EU law.