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Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements

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There is no doubt that cartels are among the most serious violations of antitrust laws and that companies whose participation in a cartel has been proven need to be subject to the appropriate fines. Fighting cartels is a priority for the European Commission (Commission) and antitrust agencies of major jurisdictions around the world, as evidenced by their deployment of tools such as leniency programmes, not to mention the severe fines and sanctions which, in certain jurisdictions (*e.g.* the US, the UK and Brazil), include imprisonment, and close co-ordination of investigations among agencies around the world. The purpose of this article in honour of Judge Pernilla Lindh is to signal a number of issues that companies involved in a European cartel investigation may face and to suggest improvements in terms of due process, a cardinal notion that should guide the action of the Commission as well as the European Union courts.

"Rights of defence must be respected in all proceedings in which sanctions may be imposed, a reminder of particular importance in the context of ever-increasing fines and other grave consequences attached to cartel decisions."

This reflection starts from the undisputed principle that any company under investigation benefits from the presumption of innocence. This applies when proving the existence of a cartel and the involvement (extent and duration) of each of its members. The burden of proof is on the Commission. Both during the administrative procedure and before the courts in Luxembourg, the accused must be given the benefit of the doubt. Neither the existence of a cartel nor the participation of individual entities can be established up to the requisite legal standard if there are still any doubts lingering in the decision-maker's mind.[1] Accordingly, the EU Courts have in the past annulled, entirely or partially, cartel decisions for lack of sufficient evidence.[2]

A second obvious starting point to highlight is the importance of the rights of defence for the entity under investigation.[3] The Cement judgment, rendered by a Chamber of the Court of First Instance presided over by Judge Pernilla Lindh underlined 'the fundamental principle of Community law that the rights of defence must be respected in all proceedings in which sanctions may be imposed',[4] a reminder of particular importance in the context of ever-increasing fines and other grave consequences attached to cartel decisions.[5]

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Cartel investigations by the Commission are shaped by the dynamics and special features of the leniency programme.[6] In a high-stakes game, leniency applicants have strong incentives to declare that a cartel existed, to denounce other companies as participants and to provide as much information as possible in order to obtain conditional immunity or leniency and preserve it until the final decision. The success of this programme requires more attention than ever on due process.

We believe improvements are possible, manageable and necessary to protect the credibility of the system and competition law generally. We think that these proposals are feasible notwithstanding the outcome of the controversial discussion on whether the whole European sanctioning model should be changed.[7] In this regard, in appeals by KME and Chalkor against a copper-tube cartel fine, the Court of Justice has held that the EU's administrative system of imposing antitrust sanctions and having them reviewed in court is in line with fundamental rights.[8]

This reflection is all the more appropriate in the context of the changes introduced by the Lisbon Treaty. Indeed, following the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union[9] became legally binding on the Commission, the EU Courts and all other EU institutions. The Charter reflects the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[10] as interpreted by the European Court of Human Rights (ECtHR),[11] now an influential source of interpretation and protection of the fundamental rights guaranteed by EU law. Furthermore, the EU has begun negotiations to accede to the ECHR.[12] As a result, human rights issues (like the rights of defence) will become even more relevant in proceedings before the Commission and the EU Courts in cartel cases.

Rights of Defence During the Administrative Procedure Before the Commission

The Commission's Directorate General for Competition (DG Competition) has made significant efforts over recent years to render its processes more transparent and subject to greater internal scrutiny, including the recent publication of best practice guidelines for competition proceedings,[13] and an explanatory note regarding its inspection authorisations,[14] as well as most recently an antitrust manual of procedures.[15] Indeed, these steps are part of a long and gradual evolution towards better and a more fair administration of competition proceedings. However, issues of procedural unfairness and rights of defence remain, in particular in relation to dawn raids, access to the file, the role of the Hearing Officer, and the overall duration of the administrative proceedings.

Dawn Raids

In the midst of an unannounced inspection at the very beginning of a Commission investigation, certain procedural steps may have a long lasting adverse impact on a company's right of defence. The case law mandates that the rights of defence must be respected even at this preliminary stage,[16] as dawn raids may infringe certain procedural rights of the inspected companies as interpreted by the ECtHR.[17]

Is the Privacy of Companies Sufficiently Protected?

In 1989, the Court of Justice held that the general right to privacy, as recognised in Article 8(1) ECHR, did not apply to business premises, but only to private dwellings of natural persons as there was no ECHR case law on the matter at the

time.[18] Later on, the ECtHR ruled that entering into the applicants' premises by the French competition authorities without prior judicial warrant and without a police officer with judicial investigation powers being present infringed Article 8 ECHR.[19] Subsequently, the Court of Justice acknowledged that businesses may also have a right to privacy, albeit within certain limits. The Court suggested that the exception contained in Article 8(2) ECHR (*i.e.*, the right of interference of the investigating authorities) may be more generous where business premises are concerned.[20]

Following the entry into force of the Lisbon Treaty, is the general right to privacy, as recognised in Article 8(1) ECHR and now also in Article 7 of the Charter, sufficiently protected by the Commission in the context of dawn raids? The Commission (and the EU Courts) could adopt a more protective approach considering that the ECtHR has held that the right to privacy encompasses the privacy of business premises or offices of legal persons and does not qualify or limit such right in comparison to physical persons.

Self-incrimination and Dawn Raids

Under EU case law, the privilege against self-incrimination, which emanates from the right to a fair trial and the presumption of innocence enshrined in Article 6 ECHR and Articles 47 and 48 of the Charter, prevents the Commission from compelling an undertaking to provide answers which might involve an admission as to its participation in an infringement.[21] The EU Courts have so far extended the protection against self-incrimination only to answers to information requests made in the course of the investigation when answering such questions would result in a direct admission of the existence of an infringement. Under the recently revised mandate of the Hearing Officer, parties feeling that they should not be compelled to reply to questions that might force them to admit to an infringement may refer the matter to the Hearing Officer, who may adopt a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director responsible of the conclusions drawn.[22]

However, the courts do not consider that such protection applies to documents discovered during dawn raids or supplied in response to an information request.[23] The ECtHR, however, takes a broader view and applies the privilege to pre-existing documents in certain instances, such as, for example, a situation where an individual would be compelled to provide evidence.[24]

Are the Safeguards Against Fishing Expeditions Sufficiently Efficient?

The decision authorising a dawn raid is typically very brief and rests on information submitted by an immunity applicant. Given the dynamics of the leniency programme, which rewards disclosure of as much information as possible at this early point in the investigation, such information will not have been subject to any independent verification or corroboration process. It will not have been supported or challenged by evidence from other parties and can therefore be considered at best as one-sided and at worse as unreliable, subjective and potentially just plain wrong. Indeed, there is no possibility of *prior* judicial review of the actual substantive merits of a dawn-raid decision, either from the factual or the legal point of view.[25] A decision authorising a dawn raid may certainly be challenged before the General Court under Article 263 TFEU and an annulment would prevent the Commission from using the acquired evidence.[26] However, it is legitimate to query whether this control is sufficient in scope and effect.

In *Roquette Frères* the Court held that the review carried out by the EU Courts was limited to ensure that 'the investigation decision itself is in no way arbitrary, that is

to say, that it has not been adopted in the absence of facts capable of justifying the investigation'.[27] In *Hoechst* and in *Dow* the Court held that the Commission is, in any case, required to specify the subject matter and purpose of the investigation.[28] However, the reality is that the Commission has never seen any of its dawn raid authorisation decisions even minimally criticised, let alone annulled, despite numerous rulings by the EU Courts. The courts have always rejected the claims put forward by applicants, who often argued that the statement of reasons of the inspection decision was insufficient, and this even in cases where the Commission had drafted the decision in very general terms[29] or when the scarce reasoning in combination with the particular context of the case made it very difficult for the company to comprehend the actual scope of the investigation.[30]

The General Court is currently being confronted with cases where the applicant argues that the Commission has not been precise enough when describing the subject matter of an inspection thus creating the risk of a fishing expedition.[31] While it is true that some degree of control may be available at national level, the levels of judicial oversight by the national courts rarely go beyond examining whether the coercive measures in question are not arbitrary and are proportionate to the purpose of the investigation.[32] In particular, a national court may not demand the information and evidence in the Commission's file on which the latter's suspicions are based.[33] In addition, the national court may refuse to grant assistance after giving the Commission the opportunity to rectify its decision.[34] Finally, the decision of the national court cannot be challenged before the General Court.[35]

Invariably endorsing dawn raid decisions does not give the Commission any incentive to pay more attention to the reasoning and material scope of such decisions. The clear perception among practitioners is that the Commission does not pay sufficient attention to such issues when crafting dawn raid decisions, which are the only elements available to their addressees in order to decide, within minutes, how best to co-operate with the inspectors without compromising their defence.[36]

The Commission's conduct during a dawn raid can only be reviewed if the company brings an action against the infringement decision. This review is arguably more complete,[37] yet it may well remain insufficient and unsatisfactory particularly as it would only take place once a decision on the merits has been reached.

These concerns are all the more relevant since the ECtHR partially invalidated a French court order authorising the searches on the premises of certain companies because the order could only be reviewed on points of law by the French Supreme Court, the Cour de cassation.[38] The ECtHR emphasised that parties must be able to rely on 'the certainty of effective judicial review within a reasonable time period'.

Access to the File

Companies involved in a cartel investigation can assess the evidence in possession of the Commission. Indeed, access to the file is one of the procedural guarantees intended to protect the principle of equality of arms and the rights of the defence. The Commission has taken considerable steps to ensure that it satisfies its obligations to grant parties to investigations appropriate access to the information contained in its investigation file: when the Statement of Objections (SO) is issued in cartel cases, parties are provided with a CD-ROM that contains an electronic version of the Commission's file.[39] Further, there is a procedure by which the Hearing Officer can settle disputes between the parties, the information providers and the DG Competition over access to information contained in the Commission's file.[40]

However, the effectiveness of the 'access to file' procedure is undermined by a number of factors, namely the fact that access to the file is limited in time and not available to investigated companies before the issuance of the SO.[41] The situation is different at national level where several Member States (Spain, France and Italy), allow parties to have access to the file very early in the process and as many times as required.

This limitation is compounded by the fact that the parties are not given access to the replies to the SO of the other parties involved (SO Replies), despite settled case law requiring that the undertaking concerned must have been given the opportunity during the administrative procedure to make its views known on the veracity and relevance of allegations made by the Commission in its decision.[42] It should not be for the Commission to decide which documents are of use to the defence;[43] the undertaking concerned should have the opportunity to examine all the documents in the investigation file.[44] SO Replies may include both incriminating and exculpatory evidence.[45]

Clearly, the failure to give access to inculpatory evidence breaches the rights of the defence if the Commission relied on that document to support its objections concerning the existence of an infringement.[46] Yet, in its decisions, the Commission often does not hesitate to quote SO Replies from other companies to rebut arguments put forward by a party contesting the existence of the cartel, its duration or its characteristics, as well as its participation.

In addition, where an exculpatory document has not been communicated, the undertaking concerned should only be required to establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission.[47] With particular reference to SO Replies, the ECJ has specified that the undertaking concerned does not have to show that, had it had access to those replies, the Commission decision would have been different in content, but only that it would have been able to use the replies for its defence.[48] It is sufficient for the undertaking to show that it would have been able to put forward evidence which did not converge with the Commission's at that stage and would therefore have been able to have some influence on the Commission's assessment.[49] Access to the file is intended to enable the company concerned to *ensure a better defence*.[50]

In light of the above, the Commission should allow investigated companies to have access to SO Replies and to give them an opportunity to comment on such replies when they consider it necessary to their defence — as is customary practice in national proceedings.[51] This would avoid tedious litigation in Luxembourg, where companies are currently obliged to request the General Court to arrange for access to the file during the proceedings, an ex post exercise that has limitations in terms of ensuring effective judicial protection.

Role of the Hearing Officer

The oral hearing allows the parties to be heard in reply to the SO, and, where appropriate, to supplement the written evidence or to inform the Commission of other relevant matters. The fact that the hearing is not open to the general public and may even be held partially *in camera* guarantees that all attendees can express themselves freely and without constraint.[52]

However, certain characteristics of the hearing could be improved. For instance, the hearing offers no real opportunity for cross-examination of either the immunity applicant or the DG Competition's case team. There is no real debate on the merits

between the case team and the parties (at most the former will have the possibility of raising relevant issues in answering the latter's questions). Also, a party that is not a leniency applicant has only very limited opportunity to engage in a dialogue with the leniency applicants. Cross-examination of witnesses is not possible.

Currently the Hearing Officer may make certain observations on the substance of part of the case. After the oral hearing, the Hearing Officer prepares a report to the Commissioner for Competition concerning procedural issues which may contain also contain

> 'observations on the further progress and impartiality of the proceedings. In so doing, the hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements relevant to the gravity and duration of any infringement. Such observations may relate to, inter alia, the need for further information, the withdrawal of certain objections, or the formulation of further objections or suggestions for further investigative measures'.[53]

While it is certain that the Hearing Officer can be a useful safeguard, the role remains predominantly reactive rather than proactive. Its capacity to push back the case team and the lower hierarchy is limited to highly exceptional cases, where investigation failures are blatant.

The Commission has so far been reluctant to give the Hearing Officer a clear role of checking and balancing the merits of the case. While the recently revised mandate strengthens the role of the Hearing Officer as the guardian of procedural rights,[54] it still does not allow for the effective scrutiny of the work of the case team. Such changes would not require a Copernican revolution of the current enforcement model but would greatly improve the current perception of the system in terms of due process and objectivity.

Another suggestion would be to make it compulsory for the Cabinet of the Competition Commissioner (and ideally also for other Commissioners) to be present at the hearing. As of today, one leaves the hearing room with the impression that the exercise is merely a benign waste of time as it is directed at the case team and its immediate hierarchy, whose views on the case are most probably already well determined and whose capacity to reconsider the positions expressed in the SO is also extremely limited.

Duration of Cartel Proceedings

Another hurdle for any company involved in a cartel investigation is the length of time needed to reach a decision, which is rarely less than four years and often six or even seven years. These time spans are so significant as to be unfair, due to the lack of legal certainty that the investigated companies must face during such prolonged periods and other negative consequences including harm to reputation, significant loss of management time, attention and resources required to handle the defence, and the disclosing and provisioning obligations that listed companies have to meet during years of investigation.

Under Article 6(1) ECHR and Article 41 of the Charter, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time.[55] It is a general principle of EU law that the Commission must act within a reasonable time in handling the administrative procedures of its competence, including obviously those related to cartel investigations.[56] The excessive length of cartel proceedings can entail an annulment of the decision when there is proof that it

adversely affected the ability of the undertakings concerned to defend themselves.[57]

While the reasonableness of a period cannot be assessed by reference to a precise maximum limit determined in the abstract but, rather, must be appraised in the light of the specific circumstances of each case,[58] it is worth noting that EU Courts have considered as 'reasonable' extremely long administrative proceedings, namely between five and six years.[59] In the *Dutch Beer* cartel, the Commission reduced the fine on each undertaking involved by €100,000, as it accepted the claim that the length of the administrative procedure, which had continued for more than seven years after the initial inspections were conducted, had been unreasonable.[60] In turn, the General Court found that the length of the administrative procedure infringed the principle that proceedings must be completed within a reasonable time period.[61]

In reaching decisions and making judgment calls on how to instruct a cartel investigation the Commission should take due account of the fact that as long as the procedure lasts, companies must continue to make accounting provision for a possible fine, pay legal advisors, commit company time and resources, and disclose the ongoing investigation to shareholders, insurers and auditors. The lack of binding deadlines (with rules to stop the clock if need be) in cartel investigations by the Commission, in contrast with merger procedures, is very difficult to explain and understand. The fact that many national competition authorities have to comply with binding deadlines to instruct and decide their cases, and that they have consistently managed to adopt decisions, often within less than two years, is a clear indication of the usefulness and feasibility of introducing binding deadlines for the DG Competition when handling cartel investigations. Translation requirements should not be an acceptable explanation for such differences between national authorities and the Commission. Binding deadlines (*e.g.* 3 years) should not be difficult to implement and would significantly improve legal certainty and due process.

Protection of Rights of Defence and Other Legitimate Interests of Applicants During Proceedings Before the EU Courts

As concerns judicial proceedings, the EU Courts' efforts to reduce the costs and time required to adjudicate cases should not come at the expense of the rights of applicant.

Length of Written Submissions

The 'Practice Directions to Parties' limit the length of written submissions: the application and the defence should not exceed 50 pages (and 25 pages for the reply and the rejoinder).[62] This limit may be exceeded 'in cases involving particularly complex legal or factual issues'. Despite the fact that cartel cases are usually complex, the General Court regularly requires the applicant to abide by the 'indicative' page limitation. These limits apply — with some flexibility — to applications challenging cartel decisions, which often have more than 300 pages, excluding annexes.

Given the complexity of these decisions, limiting the applicants to 100 or 120 pages can seriously compromise their right to effective judicial protection,[63] which supposes the right to raise, and duly reason, all pleas that appear serious and appropriate. Indeed, the fundamental principle of effective judicial protection, enshrined in Article 47 of the Charter, prevails over the Practice Directions, which in any event are not binding.[64] The non-binding nature of the Practice Directions

makes the insistence with which the General Court requires the parties to shorten submissions above 50 pages all the more surprising. But in practice, non-compliance is rarely an option as most counsel would rather avoid initiating proceedings by contradicting a specific request of the court.

Shifting parts of their main text to footnotes or to annexes in order to bring down the number of pages of an application cannot be beneficial to the Court, its judges and référendaires. If the justification and final goal of the General Court is to reduce the number of pages that have to be translated the applicant should be asked to provide a French translation of its briefs. But why should the General Court be more worried about the workload of its translation division than the Commission seems to be when it comes to its own decisions? After all, its cartel decisions are also translated, and not only into French, but also into all official languages for publication in the Official Journal.

The right to an impartial tribunal entails that a company is de facto but also de jure, in a position to present its arguments fully and without improper limitations.[65] It is submitted that capping the length of written submissions is unnecessary and can result in unfairness and a breach of the principle of equality of arms. In our view, there should be no maximum length of pleadings for complex cartel cases. The General Court in deciding on legal costs will always be able to act against excessively lengthy submissions.[66]

Limits on the Use of Annexes

The standard applicable to the admissibility and use of annexes is too onerous: there must be no new arguments in law in the annexes;[67] the main pleading must contain specific references to annexes.[68] A general reference in the annexes to all the arguments made during the administrative procedure is not admissible.[69] The nature of annexes is purely evidential and ancillary.[70] When combined with the strict application of the practice guidelines on the length of applications, these limits and conditions can come very close to denying an effective right to judicial protection.

A more flexible approach would be desirable. Indeed, the judges are often open to reading annexes in English (*i.e.*, not requiring a translation into French), which shows that the translation concern is not so serious.

Single Round of Written Submissions

Until very recently the normal practice of the EU Courts in most cases — and certainly in cartel cases — was to allow for a second round of briefs (reply and rejoinder) in which the parties could further discuss, clarify or nuance their arguments. However, in recent times this approach seems to have been revisited by the General Court,[71] making it more challenging for addressees of cartel decisions to make their case. The possibility of having a second round of briefs was no doubt helpful in alleviating the effects of the aforementioned cap on the length of briefs. However, if this second round is no longer available, the quality of the debate before the General Court may suffer.

Hearings at the General Court allow for a thorough discussion of issues of fact and law. However, doing away with the second round of written pleadings will have a negative impact on the hearing, in particular when it comes to evidence. The second round is not a mere repetition, but rather a focused set of clarifications, nuances and confirmations that allow the court and the parties to have a better understanding of the boundaries of the case, the main issues at stake and the detailed argumentation of each party. Such clarifications, responses and corrections

cannot be properly addressed in the course of the oral procedure. Many arguments would require a verbatim reading of documents or case law. The time required would vastly exceed the duration of an oral submission.

In addition to the right to a fair trial (Article 6 ECHR and Article 47 Charter), the principle of equality of arms is also at stake. The Commission has two chances to develop its argument, firstly in its not-limited-in-length decisions adopted without any time constraint, and subsequently, in its defence. Applicants should be granted the possibility of rebutting all allegations against them in writing, including those raised by the Commission in its pleadings.[72] The EU Courts need to take into consideration 'all the information'[73] casting doubts about the correctness of the decision. Procedural economy cannot justify a limit on the applicants' right to use that information or otherwise defend themselves.

The seriousness of the problem is exacerbated by recent changes concerning the report for the hearing. Recent changes to the Practice Directions have removed the right of the parties to use the report for the hearing 'to check that their pleas and arguments have been properly understood' and to suggest amendments.[74] This means that the hearing is the only opportunity to correct any errors or misunderstandings.

Conclusion

This short contribution to the *Liber Amicorum* in honour of Judge Pernilla Lindh — a Judge who has always been preoccupied by issues relating to the rights of defence and due process — identifies a few areas where protection could be enhanced in proceedings before the Commission and subsequent appeals before the EU Courts in Luxembourg. Our suggestions for improvement would be relatively easy to implement.

The increased focus on fundamental rights due to the Charter, and the future accession of the EU to the ECHR, provides a genuine opportunity to reflect upon improvements which could easily be implemented without delay. The EU would be better positioned to counter the growing chorus of voices criticising the current enforcement model where the same entity investigates and decides. As for the EU Courts, the main change brought about by the Lisbon Treaty is the likelihood that their rulings may one day be challenged before the ECtHR in Strasbourg. Such prospect should also trigger a reflection as to the importance of making sure that any measure adopted to reduce the backlog of the General Court does not negatively affect the effective exercise of the rights of defence and, in particular, the principle of equality of arms. Cost and time efficiency should not come at the expense of due process and the right to a full and effective judicial review.

Endnotes

[1] Case T-45/07 *Unipetrol v Commission*, judgment of 13 July 2011 nyr, para 48.

[2] The whole decision was annulled for lack of sufficient proof in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and ors v Commission*, [1993] ECR I-1307; Case T-337/94 *Enso-Gutzeit v Commission*, [1998] II-1571, paras 144, 148–54; Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and ors v Commission*, [2006] ECR II-3567; Case T-44/07 *Kaucuk v Commission*, judgment of 13 July 2011 nyr, paras 59–68; Case T-45/07 *Unipetrol v Commission*, judgment of 13 July 2011 nyr, paras 59–68; Case T-53/07 *Trade-Stomil v Commission*, judgment of 13 July 2011 nyr, paras 73–78. In other instances cartel decisions were partially annulled because the Commission had not taken into account all the evidence brought by the applicant: Case T-185/06 *L'Air liquide v Commission*, judgment of 16 June 2011 nyr, paras 74–83; Case T-196/06 *Edison v Commission*, judgment of 16 June 2011 nyr, paras 87–94.

[3] The importance of due process was pointed out by AG Warner and confirmed by the Court for the first time in 1974 in Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, para 15. Secondary legislation reflects the case law. *See, e.g.* Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (current Arts 101 and 102 TFEU), [2003] OJ L/1/1, Art 27(2): 'The rights of defence of the parties concerned shall be fully respected in the proceedings'.

[4] Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and orsand ors v Commission*, [2000] ECR II-491, para 106.

[5] *See* statistics on the website of the Commission's Directorate General for Competition, *available at* ec.europa.eu/competition/cartels/statistics/statistics.pdf, paras 1.2 and 1.4 showing how cartel fines increased by almost 17 times from 1990–94 and from 2005–09.

[6] *See* Commission notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C/298/17.

[7] While the current system incorporates a number of checks and balances that seek to ensure the impartiality of the Commission's decisions, many argue that the Commission's multiple role in administrative proceedings as judge, jury, legislator and prosecutor infringe the right of the investigated company to an independent and impartial tribunal under Art 47(2) of the Charter of Fundamental Rights of the European Union and Art 6 of the ECHR, as interpreted by the case law of the ECtHR. *See* I Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 *EL Rev* 817; D Slater, S Thomas & D Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2008) 04 *Global Competition Law Centre Working Paper*. The Commission argues that the impartial tribunal for competition cases does not need to be at the level of the administrative procedure before the Commission and that the control exerted by the General Court suffices; several authors argue that such standard is not sufficient since EU Courts respect the Commission's margin of appreciation in competition cases with a sort of judicial deference. *See* D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2011) *TILEC Discussion Paper*; M Siragusa, 'Access to the Courts in a Community Based on the Rule of Law', contribution for the workshop 'Access to Justice' organised on the occasion of the symposium 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009, 129. In a recent article the President of the General Court recognised that 'the General Court exercises a standard of review respectful of the institutional balance as set out in the treaties in applying a marginal review to elements of the Commission's decision that come within the margin of appreciation of this institution'. *See* M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2 *JECLAP* 295 at 313. The ECtHR has ruled that in any event competition decisions should have to be subject to a full judicial review (*Bistrović v Croatia*, 31 May 2007, § 51; *Kyprianou v Cyprus*, (2007) 44 EHRR 27, 27 January 2004, § 44) examining the different allegations in fact and in law (*Menarini Diagnostics v Italy*, 27 September 2011, § 63).

[8] Cases C-272/09 P *KME Germany and ors v Commission*, C-386/10 P *Chalkor v Commission* and C-389/10 P *KME Germany and ors v Commission*, judgments of 8 December 2011 nyr, para 106. The Court of Justice seems to introduce a stronger standard of review to be applied to antitrust decisions ('in-depth review' at para 102 or 'full and unrestricted review, in law and in fact' at para 109).

[9] Charter of Fundamental Rights of the European Union, [2010] OJ C/83/389.

[10] The Declaration on the Charter provides that '[t]he Charter of Fundamental Rights of the European Union … confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. *See also* Arts 52(3) ('[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection') and 53 ('nothing in this EU Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [by the ECHR]') of the Charter.

[11] The Preamble of the Charter provides that the Charter 'reaffirms' the rights as they result, inter alia, from the case law of the ECtHR.

[12] *See* www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp.

[13] Commission notice on Best Practices for the Conduct of Proceedings Concerning Arts 101 and 102 TFEU, [2011] C/306/6 (the 'Best Practices for Proceedings Concerning Arts 101 and 102 TFEU').

[14] Explanatory Note to an Authorisation to Conduct an Inspection in Execution of a Commission Decision, *available at* ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

[15] DG Competition's Antitrust Manual of Procedures, March 2012, *available at* http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

[16] Case 374/87 *Orkem v Commission*, [1989] ECR 3283, para 33.

[17] *See* W Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition*; I Aslam and M Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5 *Competition Law Review*.

[18] *See* Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para 17.

[19] *Niemietz v Germany*, Series A no 251-B, (1993) 16 EHRR 97, § 27–33; *Colas Est and ors v France*, ECHR 2002-III, § 49; (2004) 39 EHRR 17.

[20] Case C-94/00 *Roquette Frères and ors v Commission*, [2002] ECR I-9011, para 29 ('the right of interference' established by Art 8(2) of the ECHR 'might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case').

[21] Case 374/87 *Orkem v Commission*, [1989] ECR 3283, paras 34–35. The *Orkem* principle is now essentially reflected in Recital 23 of Regulation 1/2003, which states that: 'when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement'. However, applying this apparently straightforward principle, in practice, will inevitably give rise to difficulties in grey areas.

[22] Art 4(2)(b) of the Decision of the President of the European Commission of 13 October 2011 on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings, [2011] OJ L/275/29 (the 'Terms of Reference of the Hearing Officer').

[23] *Ibid*; the *Orkem* decision was confirmed in Case C-301/04 *Commission v SGL Carbon* [2006] ECR I-5915. For the application of the privilege against self-incrimination as concerns information requests, see Case T-446/05 *Amann & Söhne v Commission*, [2010] ECR II-1255, para 329.

[24] In *Funke* (*Funke v France*, Series A no 256-A, (1993) 16 EHRR 297), the ECtHR held that Mr Funke's rights under Art 6 ECHR were violated when he was required to produce bank statements by customs authorities investigating charges against him and then convicted for refusing to supply those documents. The scope of the *Funke* ruling was cast into doubt by the subsequent ECtHR judgment in Saunders (*Saunders v the United Kingdom*, Reports 1996-VI, (1997) 23 EHRR 313), where the ECtHR held that the use in criminal proceedings against Mr Saunders of answers obtained under compulsion from him during an investigation by inspectors was a violation of his rights under Art 6 ECHR; the

ECtHR, however, went on to observe that 'the right not to incriminate oneself … does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect'. Recently the ECtHR expressed clearly its broad take on the right to self-incrimination in the *JB* ruling (*JB v Switzerland*, ECHR 2001-III, § 66) at paras 66 ('the authorities were attempting to compel the applicant to submit documents which would have provided information as to his income with a view to the assessment of his taxes'), 68 ('the present case does not involve material of this nature which, like that considered in Saunders, has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person') and 71 ('the Court considers that there has been a violation of the right under Art 6 § 1 of the Convention not to incriminate oneself').

[25] *See* Cases T-289/11 and T-290/11 *Deutsche Bahn and ors v Commission*, [2011] OJ C/238/22: 'Second plea: infringement of the fundamental right to an effective legal remedy by reason of the lack of possibility of prior judicial review of the inspection decision, both from the factual and the legal point of view' (the investigated conduct is not a cartel but a rebate system in the supply of electromotive power).

[26] Commission Decision of 7 October 1992, Case IV/33.791 – CSM [1992] OJ L/305/16, recital 18.

[27] *See, e.g.* Case C-94/00 *Roquette Frères and ors v Commission* [2002] ECR I-9011, para 55.

[28] Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para 29; Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para 40.

[29] Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para 42 ('[a]lthough the statement of the reasons on which the contested decision is based is drawn up in very general terms which might well have been made more precise, and is therefore open to criticism in that respect, it none the less contains the essential indications'); Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para 11. *See also* Case T-23/09 CNOP and *CCG v Commission*, judgment of 26 October 2010 nyr, para 41 ('[i]mposer une obligation de motivation plus lourde à la Commission à cet égard ne tiendrait pas dûment compte du caractère préliminaire de l'inspection').

[30] Cases T-339/04 *France Télécom v Commission* [2007] ECR II-00521, paras 57–58: '[t]he fact that that information was not mentioned in the contested decision could not have adversely affected the rights of the defence or prevented the applicant from assessing the scope of its duty to co-operate with the Commission during the inspection'; Case T-266/03 *Groupement des cartes bancaires v Commission* [2007] ECR II-83, paras 47 ff: 'quant au contexte dans lequel la décision attaquée s'inscrit, force est de constater que les différents éléments avancés par le requérant ne démontrent pas en quoi le contexte de la décision attaquée implique que la Commission a manqué à son obligation de motivation'.

[31] *See* Cases T-289/11 and T-290/11 *Deutsche Bahn and ors v Commission*, [2011] OJ C/238/22: '[t]hird plea: infringement of defence rights by reason of a disproportionately wide and non-specific subject-matter of the inspection ('fishing expedition')'.

[32] Case C-94/00 *Roquette Frères and ors v Commission*, [2002] ECR I-9011, paras 30–40. *See also* Regulation 1/2003, at Art 20(8), which codifies the *Roquette Frères* ruling.

[33] *Ibid*, para 62.

[34] *Ibid*, para 94.

[35] *France Télécom v Commission* [2007] ECR II-521, n 30 above, paras 51–52.

[36] *See* C-521/09 P *Elf Aquitaine v Commission*, judgment of 29 September 2011 nyr, paras 118–19, where the ECJ considers the appropriate reasoning of a dawn-raid decision as a right of defence.

[37] *See* Case T-59/99 *Ventouris Group Enterprises v Commission* [2003] ECR II-5257, para 161, where the General Court alluded to the right of the involved undertaking to ask for judicial review of the 'intrinsic lawfulness of the investigation as part of its ... action for annulment of the final decision'.

[38] *Compagnie des Gaz de Pétrole Primagaz v France* (21 December 2010) and *Société Canal Plus and ors v France* (21 December 2010).

[39] Access to the file is provided for in Art 27(1) and (2) of Regulation 1/2003 as well as in Art 15(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts 81 and 82 of the EC Treaty (current Arts 101 and 102 TFEU), [2004] OJ L/123/18 (Implementing Regulation). *See also* Commission Notice on the rules for access to the Commission file in cases pursuant to Arts 81 and 82 of the EC Treaty (current Arts 101 and 102 TFEU), Arts 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, [2005] OJ C/325/7. *See also* Best Practices for Proceedings Concerning Arts 101 and 102 TFEU, n 13 above,,

s 3.1.2, paras 80 ff. Lastly, special rules govern access to corporate statements in cartel cases and settlement procedures: *see* Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C/298/17, paras 31–35; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art 7 and Art 23 of Council Regulation (EC) No 1/2003 in cartel cases, [2008] OJ C/167/1, paras 35–40.

[40] Art 7 of the Terms of Reference of the Hearing Officer, n 22 above.

[41] Art 27(2) of Regulation 1/2003 and Arts 15 and 16 of the Implementing Regulation.

[42] *See Dresdner Bank and ors v Commission*, n 2 above, para 155, and the case law cited therein.

[43] *See* Case T-36/91 *ICI v Commission*, [1995] ECR II-1847, para 91.

[44] *See* Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and ors v Commission*, [2004] ECR I-123, para 68, and the case law cited therein. In particular, '[a] party will … be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence – whether of an incriminating or of an exculpatory nature –, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence' (see Commission Notice on the rules for access to the Commission file, [2005] OJ C/325/7, para 27(2)).

[45] Case C-407/08 P *Knauf Gips v Commission*, [2010] ECR I-6375, para 22.

[46] *See Dresdner Bank and ors v Commission*, n 2 above, paras 157–58.

[47] *Aalborg Portland and ors v Commission*, [2004] ECR I-123, para 74, and the case law cited therein.

[48] *See* Cases C-109/10 *Solvay v Commission*, 25 October 2011 nyr, para 57

[49] Case T-24/07 *ThyssenKrupp Stainless v Commission*, [2009] ECR II-2309, para 274.

[50] The Court of Justice emphasises in its case-law concerning competition and anti-dumping proceedings that an infringement of the rights of defence must always be assumed where the undertaking concerned would have been *better able to ensure its defence* had there been no procedural error (C-194/99 P *Thyssen Stahl v Commission*, [2003] ECR I-10821, para 31; and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware v Council*, [2009] ECR I-9147, para 94). In addition, the jurisprudence of the ECtHR does not require a showing that the final outcome of the case would have been different in order to prove a breach of the rights of defence (*Monnell and Morris v. UK*, 2 March 1987, 10 EHRR 205 (1988)).

[51] *See, e.g.* decision of the Italian competition authority of 4 August 2011, Case no I729 – *Public Tender for Magnetic Resonance Equipment*.

[52] Best Practices for Proceedings Concerning Arts 101 and 102 TFEU, no 13 above,, paras 92–94.

[53] *See* Art 14(2) of the Terms of Reference of the Hearing Officer, n 22 above; *see also* M Albers and J Jourdan 'The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective' (2011) 2 *JECLAP* 185. The text contained in the revised Terms of Reference of the Hearing Officer is broader than it used to be. It remains to be seen whether this will affect the depth of the Hearing Officer's observations on the substance of the case.

[54] The Hearing Officer has new functions in the investigation phase such as resolving issues regarding legal professional privilege, intervening when a company considers that it has not been informed of its procedural status or intervening in disputes about the extension of deadlines to reply to information requests. *See* Art 4 of the Terms of Reference of the Hearing Officer, n 22 above.

[55] *Vallée v France*, Series A no 289, (1991) 18 EHRR 549.

[56] *Cimenteries CBR and ors v Commission*, n 4 above, para 707.

[57] Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2003] ECR II-5761, para 74, as confirmed by Case C-105/04 P [2006] I-8725, paras 41–62.

[58] Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij (LVM) and ors v Commission* [2002] ECR I-8375, para 192.

[59] The administrative procedure lasted approximately 68 months from the initial acts of the investigation to the adoption of the decision in 'Cement' (*Cimenteries CBR and ors v Commission*, n 4 above, paras 706–11), and approximately 62 months in the 'PVC' case (*see* Joined Cases T-305/94, T-306/94,

T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and ors v Commission*, [1999] ECR II-391, para 123). In both cases the duration of the proceedings was held to be 'reasonable' and, thus, not affecting the rights of defence of the parties.

[60] Commission Decision of 18 April 2007, Case COMP/B/37.766 – *Dutch Beer Market*.

[61] The Court also found that the flat-rate reduction given by the Commission did not take account of the amount of the fines and did not therefore constitute a reduction in the fine that was capable of adequately redressing the harm resulting from the excessive period taken. Consequently, the Court considered that in order to give the companies just satisfaction for the excessive duration of the procedure, the reduction should be increased to 5 percent of the fine. Case T-240/07 *Heineken and ors v Commission*, judgment of 16 June 2011 nyr, paras 429–34; Case T-235/07 *Bavaria v Commission*, judgment of 16 June 2011 nyr, paras 341–43 (appeal pending, *see* Case C-445/11).

[62] Practice Directions to Parties, [2007] OJ L/232/7, as amended, para 10.

[63] Case T-279/02 *Degussa v Commission*, [2006] ECR II-897, para 421, and case law cited.

[64] Case C-113/09 P(R) *Ziegler v Commission*, [2010] ECR I-50, para 33 ('les instructions pratiques du Tribunal aux parties sont non pas juridiquement contraignantes, mais indicatives').

[65] The President of the General Court, Marc Jaeger, in an interview indicated that 'it is obvious that if the Commission takes a decision with 200 or 300 pages ... the lawyers may legitimately feel the need to answer all the paras' (see *Mlex Magazine*, 'The View from the Bench', July–September 2011, 9).

[66] Rules of Procedure of the General Court, [1991] OJ L/136/1, as amended, Art 87(3) ('The General Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur').

[67] *See* T-201/04 *Microsoft v Commission*, [2004] ECR II-2977, paras 91–96.

[68] *Ibid*, paras 97–99.

[69] *See* Case T-30/09 *Engelhorn v OHIM*, [2010] ECR II-3803, paras 18–19; Case T-87/05 *Energias de Portugal v Commission*, [2005] ECR II-3753, para 182.

[70] *See* T-151/05 *NVV and ors v Commission*, [2009] ECR II-1219, paras 61–63.

[71] In at least one recent cartel case (*Airfreight*), the General Court, having established that the case file was sufficiently comprehensive to enable the parties to elaborate their pleas and arguments in the course of the oral procedure, and in accordance with Art 47(1) of the Rules of Procedure, decided that a second exchange of pleadings was unnecessary. The General Court rejected the request for a submission of further documents to supplement the application for annulment and the defence under Art 47(1) of the Rules of Procedure and, in particular, to submit a reply to the Commission's defence.

[72] The principle of equality of arms is a corollary of the very concept of a fair hearing, *see* Case C-514/07 *Sweden v API and Commission*, judgment of 21 September 2010 nyr, para 88.

[73] *See* Case C-12/03 P *Commission v Tetra Laval*, [2005] ECR I-987, para 39: 'Not only must the Community Courts, inter alia, establish whether the evidence relied on [by the Commission] is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'. *See also* Case C-269/90 T*echnische Universität München v Hauptzollamt München-Mitte*, [1991] ECR I-5469, para 14: '[W]here the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present'.

[74] *See* the General Court Amendments to the Practice Directions of the Parties, [2011] OJ L/180/52, where the Court has removed a passage detailing that the hearing report 'provides an objective summary of the case' and 'is meant to enable the parties to check that their pleas and arguments have been properly understood and to facilitate study of the documents before the Court by the other Members of the bench hearing the case'. An accompanying paragraph was also deleted that provided a mechanism for the parties to identify 'factual errors' in the hearing report and propose amendments where the parties believe the hearing report 'does not correctly convey the essence of a party's argument'.