1. Introduction

1. INTRODUCTION: AIMS AND OBJECTIVES

Since the inception of the European Economic Community Articles 81 and 82 of the EC Treaty have provided powerful tools for the establishment of genuine and undistorted competition and, overall, for the realisation of the Common Market.[1] In addition, the enactment in 1989 of the Merger Control Regulation[2] seeks to protect effective competition against changes in the structure of the relevant markets by establishing a compulsory system for ex ante screening of mergers and acquisitions liable to affect trade among the Member States.[3] However, the concentration of extensive investigative powers and of the decision-making function, including the power to impose substantial financial penalties in the hands of only one institution, the European Commission, has raised questions concerning the fairness of the procedures for the enforcement of the EC antitrust and merger rules.

The objective of this work is to examine the procedural rights enjoyed by the undertakings concerned by proceedings for the application of, respectively, Articles 81 and 82 of the EC Treaty and the Merger Control Regulation and to discuss their compliance with the notion of 'fair procedure' enshrined in the European Convention on Human Rights (hereinafter referred to also as ECHR). This assessment will be conducted in accordance with the 'composite approach' adopted by the European Court of Human Rights in its case law concerning the conformity of domestic administrative proceedings aimed at the 'determination of civil rights or obligations or of a criminal charge' with

[1] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [1959–62] OJ Spec. Ed. 57, hereinafter referred to as Council Regulation No 17/62. Regulation 17/62 has been repealed by Council Regulation No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([2003] OJ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), which entered into force on 1 May 2004. See, *inter alia*, SLOT, 'A view from the mountain: 40 years of developments in EC competition law', (2004) 41 *CMLRev* 443.

[2] Council Regulation No 4064 of 21 December 1989 on the control of concentrations between undertakings, [1989] OJ L395/1.

[3] For an examination of the Merger Control Regulation, see generally KERSE and COOK, *EC Merger Control*, 4th edn (2005) London: Sweet and Maxwell.

Article 6(1) ECHR. Consequently, it will require an examination of the scope of the rights enjoyed by the investigated parties during the administrative procedure as well as of their right to challenge the Commission decision before the Court of First Instance (CFI) and the European Court of Justice (ECJ).

2. THE ROLE OF THE COMMISSION IN COMPETITION ENFORCEMENT: A PROBLEM OF FAIRNESS

The application of the Community competition rules falls within the competence of the European Commission. With respect to the application of Articles 81 and 82 EC Treaty, the current Implementing Regulation, i.e. Council Regulation No 1/2003,[4] confers on the Commission extensive fact-finding, decision-making and sanctioning powers that are exercised in close cooperation with the competition authorities of Member States (hereinafter referred to also as NCAs) within the European Competition Network (hereinafter referred to also as ECN).[5]

Proceedings can be started either *proprio motu* or following a complaint. The first phase of the procedure aims at gathering of evidence through the exercise of investigative powers, allowing the Commission to request information from the investigated parties, to inspect their premises, to seize records and to ask for 'on-the-spot' explanations. The second phase of the procedure begins with the formal statement of the allegations of anti-competitive conduct on the part of the Commission and is articulated in a written and an oral hearing before a final decision is adopted.[6]

The procedure for controlling concentrations[7] starts with the notification to the Commission of the proposed transactions having a 'Community dimension'; the framework provides for a 'one-stop-shop' for assessing concentra-

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[4] Council Regulation No 1 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). The Regulation repealed Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [1959–62] OJ Spec. Ed. 57, hereinafter referred to as Council Regulation No 17/62.

[5] Recitals II-III-IV, Preamble to Council Regulation (EC) No 1/2003. *Inter alia*, VENIT, 'Brave new world: the Modernisation and Decentralisation of enforcement under Articles 81 and 82 of the EC Treaty', (2003) 40 *CMLRev* 545 at 555–56.

[6] For commentary on EC Antitrust Procedure, see generally KERSE and KHAN, *EC Antitrust Procedure*, 5th edn (2004) London: Sweet and Maxwell.

[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter referred to as the EC Merger Control Regulation), [2004] OJ L24/1.

tions that meet the prescribed turnover thresholds. It is articulated in two stages and according to tight time limits, namely 25 working days for phase I and 90 working days for phase II proceedings. The second phase of the procedure allows a full consideration of the merger in the event of 'serious doubts' as to its compatibility with the Common Market arising from the first, summary examination stage. For the purpose of outlining these concerns, a statement of objections is served so as to allow the concerned parties to submit written observations and to appear at an oral hearing before the adoption of a final decision. Extensive contact between Commission officials and the notifying undertakings is maintained throughout the procedure.[8]

That cursory examination of the structural characteristics of competition proceedings before the Commission highlights a common feature, namely, that in either context the Commission acts as investigator, prosecutor and decision-maker. The concentration of these functions in the hands of the same authority was criticised by commentators as potentially threatening the undertakings' right to a 'fair procedure' before the Commission.[9] Montag noted in 1996:

> A close look at the Commission's practice in infringement proceedings to date makes clear the necessity for reform in this area, especially when looked at from the perspective of the subjects of the proceedings, that is, from the undertakings' point of view. Undertakings often feel that they are treated unfairly and that their procedural rights are violated in the course of infringement proceedings.[10]

Several factors emerged as being the cause of these concerns,[11] namely the breadth of the Commission's investigative powers, the absence, in the context of the enforcement of Articles 81 and 82 EC Treaty, of precise deadlines for the adoption of a final decision on single cases and the absence of separation between the investigative and decision-making functions.[12] The purpose of the present work is therefore to explore whether these concerns are warranted by examining the procedural rights and safeguards available to the investigated parties in the course of antitrust and merger procedures in the light of standards of 'administrative due process' enshrined in the ECHR.

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[8] For an examination of the Merger Control Regulation, see generally KERSE and COOK, *EC Merger Control*.

[9] *Inter alia*, MONTAG, 'The case for a radical reform of the infringement procedure under Regulation 17', (1996) 17 *ECLR* 428; WINCKLER, 'Some comments on procedures and remedies under EC merger control rules: something rotten in the kingdom of EC merger control?', (2003) 26 *W. Comp.* 219.

[10] MONTAG, 'The case for a radical reform of the infringement procedure under Regulation 17', at 428–29.

[11] *Id.*, p. 429.

[12] *Inter alia*, WESSELING, 'The Draft-Regulation modernising the competition rules: the Commission is married to one idea', (2001) 26 *ECLR* 357, at 361.

The remainder of Chapter 1 will thus address some general issues related to the protection of fundamental rights in the Community framework and the relevance of the ECHR in that context, including the extent to which the Convention can be applied to legal persons and especially to business entities and the nature of competition proceedings before the Commission for the purpose of the application of Article 6(1) ECHR.

Thereafter, Chapters 2, 3 and 4 will address the degree of protection afforded by EC law to, respectively, the right to be heard and to have access to the Commission file, the right to legal professional privilege and to the privilege against self-incrimination, and will assess them in the light of the standards enshrined in Article 6(1) of the Convention. This examination will illustrate, on the one hand, that the position adopted by EC law[13] is consistent with the 'composite approach' advocated by the European Court of Human Rights in articulating the concept of 'fair administrative procedure'.[14] On the other hand, it will raise significant issues with respect to the scope of the right to obtain access to the evidence held by the Commission and especially to the safeguards attending its exercise, the function of the hearing officer in this context and the extent to which Community law protects the confidentiality of lawyer-client correspondence[15] and the right against self-incrimination.[16]

Chapter 5 will examine the right to challenge Commission antitrust and merger decisions before the CFI and the ECJ and assess its scope in the light of the relevant principles provided by the ECHR as regards the right to obtain the judicial scrutiny of public authorities' decisions having a 'civil' or 'criminal' character. It will argue that whereas the more 'vigilant' attitude to judicial control in merger matters is to be welcomed,[17] the restrained approach adopted by the ECJ in the scrutiny of 'complex economic appraisals' made by the Commission in the antitrust context[18] could give rise to concerns in the light of the Convention. It will therefore suggest that the 'criminal' nature of proceedings for the application of Articles 81 and 82 EC Treaty may require the introduction of stricter standards of review, perhaps extending to the 'merits' of the Commission decisions.

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13 *Inter alia,* case T-156/94, *Siderurgica Aristrain Madrid SL v Commission*, [1999] ECR II-645.

14 Appl. Nos 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29.

15 Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575.

16 Case 27/88, *Orkem v Commission*, [1989] ECR 3355.

17 *Inter alia,* case T-342/99, *Airtours plc v Commission*, [2002] ECR II-2585; joined cases 5 and 80/02, *Tetra Laval v Commission*, [2002] ECR II-4519.

18 *Inter alia,* joined cases T-68, 77-78/89, *Società Italiana Vetro SpA and Others v Commission*, [1992] ECR II-1403.

Chapter 6 will address some of the issues arising from the impact of the Modernisation Regulation on the extent of procedural rights enjoyed by the investigated parties and will highlight the risk that the right to a fair procedure enjoyed by the investigated undertakings could be eroded as a result of the absence of harmonisation of the rules concerning the admissibility of evidence, the procedure and the sanctions applicable to competition cases across the ECN.[19] It will be argued that, although the more proactive attitude of the European Court of Human Rights in assessing the 'equivalent protection' of human rights in the Community framework vis-à-vis the ECHR shown in *Matthews*[20] appears to have given way to a more hands-off approach in the later *Bosphorus* case,[21] there may still be doubts as regards the compliance of the measures of cooperation adopted by the NCAs to fulfil their obligations under Council Regulation No 1/2003.

Finally, Chapter 7 will discuss the current standards of 'administrative due process' provided by EC law in the area of competition enforcement and will suggest solutions to the perceived divergences from the principles enshrined in Article 6(1) ECHR. It will argue that, in consideration of the ongoing developments of fundamental rights protection in the EC legal system and especially of the increasing willingness of the Community courts to engage in an in-depth analysis of the ECHR,[22] a new 'Community due process' clause could be emerging, which may be increasingly consistent with the Convention. However, it will also demonstrate that these developments are likely to have a considerable impact not only on the legal standards governing the Commission's investigative powers and practices, but also on the current standards of judicial scrutiny applicable to competition decisions.

The chapter will argue that the need to ensure the 'Article-6-proofing' of EC antitrust proceedings in the light of emerging higher standards of 'due process' could also pose an ultimate challenge to the Council, who could perhaps reflect on whether to introduce wider-ranging reforms of the framework for the enforcement of Articles 81 and 82 EC Treaty. Consequently, it will examine some of the alternatives to the existing system, including the creation of a specialised judicial panel responsible for the review 'on the merits' of antitrust decisions, the conferral of fact-finding powers to a body

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[19] Commission Notice on cooperation within the Network of competition authorities, [2004] OJ C101/43; see also Recital XVI, Preamble to Council Regulation No 1/2003.

[20] Appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 361.

[21] Appl. No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1.

[22] E.g. case C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279.

separate from the Commission and the internal reorganisation of DG Competition to ensure the separation of the investigation from the decision-making phase of the proceedings between two different units within the Directorate General.

Chapter 7 will conclude that, although in principle the creation of a 'jurisdiction on the merits' in the area of the enforcement of Articles 81 and 82 of the EC Treaty would constitute the most appropriate solution for ensuring conformity of the proceedings with Article 6(1) ECHR, due to its overarching institutional implications it may instead be more viable to opt for internal restructuring of DG Competition so as to establish a clear demarcation between the units responsible for the investigation and the adoption of decisions in antitrust cases, perhaps in conformity with the blueprint offered by the European Anti-Fraud Office.[23]

3. OUTLINE: THE PROTECTION OF HUMAN RIGHTS IN EC LAW AND COMPETITION PROCEEDINGS: GENERAL ISSUES

Illustrated above are the aims and objectives of the present work and the issues which it seeks to address. The remainder of this Chapter will address the general issues concerning the protection of fundamental rights in the EC legal system and the extent to which the ECHR can be considered relevant in the determination of applicable human rights standards. Thereafter, it will examine whether the Convention principles governing the concept of 'fair trial' and 'fair administrative procedure' are applicable to business entities affected by competition enforcement proceedings before the European Commission.

4. THE DEVELOPMENT OF FUNDAMENTAL RIGHTS STANDARDS IN THE COMMUNITY CONTEXT: PERSPECTIVES FROM THE ECJ

It is accepted that the protection of human rights was not a pressing concern in the early stages of the Community legal system. The silence of the

[23] Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999, [1999] OJ L136/20; Regulation 1073/1999 of 25 May 1999 of the Council and the European Parliament, concerning investigations conducted by the European Anti-Fraud Office (OLAF), [1999] L136/1. Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-7147.

Founding Treaty can be explained in relation to the perception of the Community as an organisation of limited remit that pursued objectives of an economic nature[24] and was therefore regarded as neutral vis-à-vis safeguarding the individual's fundamental rights.[25] However, the affirmation of the principles of supremacy and direct effect of EC law questioned that assumption of neutrality and raised concerns, especially at national level, that human rights guarantees could be affected by Community measures in a manner which was not compatible with the principles enshrined in domestic constitutions.[26]

In response to that challenge the ECJ developed 'Community-own' standards for the protection of human rights that would be binding on the EC institutions[27] and on the Member States in the implementation of Community law.[28] The Court acknowledged that the general principles of EC law provided autonomous human rights standards inspired by the 'constitutional traditions common to the Member States' [29] and by international treaties in which the Member States have collaborated or to which they have acceded,[30] and whose protection would be secured within the framework and objectives of the EC Treaty.[31]

Backed by expressions of commitment on the part of the political institutions,[32] the ECJ succeeded in maintaining the autonomy and supremacy of

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[24] DOUGLAS-SCOTT, *The Constitutional Law of the European Union* (2002) Longman, p. 432.

[25] WEILER, 'Eurocracy and distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities', (1986) 61 *Wash. Law Rev.* 1103 at 1111; see also DAUSES, 'The protection of fundamental rights in the Community legal order', (1985) 10 *ELRev* 398 at 400.

[26] DAUSES, footnote 25, pp. 399–400. See e.g. case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel*, [1970] ECR 1125; cf. the adverse position of the German Constitutional Court, described, *inter alia,* in CROSSLAND, 'Three major decisions given by the Bundesverfassungsgericht (Federal Constitutional Court)', (1994) 19 *ELRev* 202, and reversed only in case 69/85, *Wunsche Handelsgesellschaft*, [1986] ECR 947. Also, see DOUGLAS-SCOTT, *The Constitutional Law of the European Union* (2002) Longman, p. 440.

[27] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 4.

[28] Case C-5/88, *Wachauf v Bundesamt fur Ernahrung und Fortwirtschaft*, [1989] ECR 2609, para. 19; see also case C-260/89, *ERT AE v DEP and Sotirios Kouvelas*, [1991] ECR I-2925, paras. 42–43.

[29] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 4.

[30] Case 4/73, *Nold v Commission*, [1974] ECR 491, para. 13.

[31] *Inter alia,* HARTLEY, *The Foundations of European Community Law*, 5th edn (2003) Oxford University Press, p. 137.

[32] E.G. Joint Declaration of the European Parliament, the Council and the Commission, [1977] OJ C301/1; Article F(2) [now 6(2)] Treaty of the European

Community law and, at the same time, in providing a degree of human rights protection inspired by principles already accepted at national level.[33] In this respect, the European Convention on Human Rights has a key role as a special source of inspiration.[34] Also, the increasing willingness of the Luxembourg Courts to engage in an in-depth analysis of its provision as well as of the European Court of Human Rights' case law can be read as demonstrating that, despite the absence of formal accession to the Convention, the European human rights discourse is developing toward progressively more common standards of protection.[35]

In the light of the above considerations the solemn proclamation of the EU Charter of Fundamental Rights[36] appears to be the culmination of this process of fundamental rights consolidation.[37] The drafting of an extensive and wide-ranging human rights catalogue applicable to the action of both the EU institutions and bodies and the Member States 'only when they are implementing Union law'[38] provides perhaps the highest expression of the *acquis communautaire* as regards fundamental rights protection.[39]

The importance of the Charter is also reflected in the case law of the Community Courts. In its recent *Re: Right to Family Reunification* judgment,[40] the ECJ clearly stated that the 'principal aim of the Charter' was 'to reaffirm rights as they result in particular from the common constitutional traditions and international obligations common to the Member States',[41]

Union. *Inter alia,* LENAERTS and VAN NUFFEL, *Constitutional Law of the European Union*, 2nd edn (2004) London: Sweet and Maxwell, pp. 720–721.

33 CRAIG and DeBÙRCA, *EU Law: text, cases and materials*, 3rd edn (2002) Oxford University Press, p. 324.

34 Case 4/73, *Nold v Commission*, [1974] ECR 491, para. 13.

35 See e.g. case C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279, para. 42; for commentary, JACOBS, 'European Community Law and the European Convention of Human Rights', in CURTIN & HEUKELS (eds.), *Institutional Dynamics of European Integration*, Vol. II (1997) Dordrecht, London, Nijhoff, 516–72 at 563.

36 Part II, Treaty establishing a Constitution for Europe, [2003] OJ C169.

37 DeBÙRCA and ASCHENBRENNER, 'The development of European constitutionalism and the role of the EU Charter of Fundamental Rights', (2003) 9 *Colum. J. Eur. L.* 355 at 379.

38 Article 51(1), EU Charter of Fundamental Rights; see e.g. Case C-112/00, *E. Schmidtberger, Internationale Transporte und Planzuge v Austria*, [2003] ECR I-5659, paras. 56–57, 60 and 64. For commentary, see, *inter alia*, BIONDI, 'Free trade, a mountain road and the right to protest: European economic freedoms and fundamental individual rights', (2004) *EHRLR* 51 at 58–59.

39 LENAERTS & DeSMIJTER, 'A Bill of Rights for the European Union', (2001) 38 *CMLRev* 273 at 292.

40 Case C-540/03, *European Parliament v Council*, judgment of 27 June 2006, [2006] ECR I-5769.

41 *Id.*, para. 38.

including the 'case law of the Court and of the European Court of Human Rights.'[42] Accordingly it may be argued that the position occupied in its context by the Convention as the 'minimum standard' of protection of those rights that are common to both instruments[43] illustrates its continuity with the system of shared values and principles from which the *acquis* developed.[44]

In this respect, the circumstance that, in accordance with Article 6 of the Draft Constitutional Treaty approved at the Lisbon Inter-Governmental Conference in July 2007, the EU Charter for Fundamental Rights will become binding on the EU institutions and on the Member States when they implement Union law[45] can be interpreted as confirming the authority of the Charter as the point of arrival of the process of consolidation started by the ECJ with its *Internationale Handelsgesellschaft* and *Nold* judgments.[46] In addition, paragraph 2 of the same provision establishes the legal basis for the EU accession to the ECHR, as a result of which the EU measures will become challengeable before the European Court of Human Rights and, accordingly, demonstrates the centrality of the Convention in the European human rights discourse.[47]

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[42] *Ibid.* For commentary, see DRYWOOD, 'Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision', (2007) 32(3) *ELRev* 396.

[43] Article 52(3), EU Charter: 'Insofar 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 by the said Convention. This provision shall not prevent Union law from providing more extensive protection.' For commentary, *inter alia*, LEMMENS, 'The relation between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights—Substantive aspects', (2001) 8 *Maastricht J. of Euro. and Comp. L.* 49 at 54. Also ARNULL, 'From Charter to Constitution and beyond: fundamental rights in the new European Union', (2003) *PL* Winter 774 at 786.

[44] *Inter alia*, DOUGLAS SCOTT, 'The Charter of Fundamental Rights as a constitutional document', (2004) *EHRLR* 37 at 48–49; ARNULL, 'From Charter to Constitution and beyond', at 780.

[45] *Inter alia*, EECKHOUT, 'The EU Charter of Fundamental Rights and the federal question', (2002) 39 *CMLRev* 945 at 968–69; also, DEFEIS, 'A Constitution for the European Union? A transatlantic perspective', (2005) 19 *Temp. Int'l & Comp. L J* 351 at 379–80.

[46] WETZEL, 'Improving fundamental rights protection in the European Union: resolving the conflict and confusion between the Luxembourg and Strasbourg Courts', (2003) 71 *Fordham L. Rev.* 2823 at 2853.

[47] For commentary, see, *inter alia*, CARRUTHERS, 'Beware of lawyers bearing gifts: a critical evaluation of the proposals on fundamental rights in the EU constitutional treaty', (2004) *EHRLR* 424 at 433–34; also, ARNULL, 'From Charter to Constitution and beyond', at 786.

It can be concluded that over the 50 years since the inception of the EEC, autonomous human rights standards have developed through the case law of the ECJ and are now a core element of the *acquis communautaire* of which the EU Charter of Fundamental Rights constitutes perhaps the most authoritative statement.[48] In this context the ECHR emerges as a key source of inspiration for the Community courts and for the Charter's drafters. However, the EC/EU is not a party to the Convention.[49] It is thus necessary to assess the position of the European Court of Human Rights with respect to the compliance of Community fundamental rights with the ECHR. This issue will be dealt with in the following section.

5. EC FUNDAMENTAL RIGHTS PRINCIPLES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE VIEW FROM STRASBOURG

An in-depth analysis of the case law of the European Court of Human Rights concerning the compatibility of the Community fundamental rights with the ECHR is clearly beyond the scope of this work. Suffice to say, the approach adopted by the Strasbourg Court appears to have evolved from an overall attitude of trust towards the degree of protection provided at Community level to an increasing willingness to hold the Contracting States to account for allegations that Convention rights were not effectively protected in the EC context.[50]

Although the EC cannot be held responsible before the Court with respect to allegations that the Community institutions infringed the ECHR due to lack of jurisdiction *ratione personae*,[51] the Convention organs have not excluded in principle the responsibility of the Member States for an infringement of the Convention resulting from a Community measure. Rather, it was held that the Contracting States remain responsible for the observance of the ECHR even in

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[48] DEFEIS, 'A Constitution for the European Union?', at 379–80; see also the Opinion of AG Mischo, joined cases C-20 and 64/00, *Booker Aquaculture v Scottish Ministers*, [2003] ECR I-7411, para. 126.

[49] Opinion 2/94, on *Accession of the Community to the ECHR*, [1996] ECR I-1759, para. 27. See, *inter alia*, YOUNG, 'The Charter, Constitution and human rights: is this the beginning or the end for human rights protection by Community law?', (2005) 11 *EPL* 219 at 226–27.

[50] *Inter alia*, CANOR, '*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?', (2000) 25 *ELRev* 3 at 4.

[51] Appl. No 8030/77, *CFDT v European Communities*, [1979] 13 D & R 231 at 240. But cf. Article 6, Draft Constitutional Treaty, IGC 1/2007, Brussels, 23 July 2007. *Infra*, Chapter 7, section 1.1.

respect of acts adopted in areas for which powers have been transferred to international organisations.[52]

Article 1 of the Convention was therefore interpreted as requiring that, in the event of such a transfer, human rights receive protection at least equivalent to that of the Convention within the framework of the international organisation.[53] In light of this approach, it was concluded in the *CFDT* decision that, in consideration of the human rights standards recognised by the general principles of EC law and of the judicial mechanisms to ensure their safeguard, the EC met that requirement of 'equivalent protection' and that as a result the European Court of Human Rights would not exercise its scrutiny powers with respect to the Community measures complained of.[54]

However, in later judgments the Strasbourg Court seemed to depart from its 'trusting approach' to the assessment of the adherence of EC action to the principles enshrined in the Convention.[55] In *Matthews v United Kingdom*[56] the Court held that, despite being unable to review the compliance of Community measures as such with the Convention, it remained competent to verify that Contracting States had 'secured the Convention rights in respect to European legislation'.[57] In that case it found a violation of the applicant's Convention rights in the circumstance that she had been left without a judicial remedy to vindicate her right to vote in parliamentary elections for the European Parliament, enshrined in Article 3 of Protocol I to the Convention.[58]

Matthews was hailed by some commentators as the first step towards the construction of a de facto 'vertical relationship between the ECJ and the European Court of Human Rights in respect of the protection of human rights vis-à-vis the EC institutions'.[59] Other authors, however, argued, perhaps less radically, that the conclusions adopted in that decision were motivated by the absence of any judicial remedy enabling the applicant to challenge the

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52 Appl. 13258/87, *M & Co v Germany*, [1990] 64 D & R 138 at 145.

53 Appl. No 8030/77, *CFDT v European Communities*, [1979] 13 D & R 231 at 240.

54 *Ibid. Inter alia*, DUVIGNEAU, 'From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights protection in the European Union', (1998) 25 *LIEI* 61 at 83.

55 E.g. Appl. No 17862/91, *Cantoni v France*, unreported, HUDOC case number 45/1995/551/637, para. 30.

56 Appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 361.

57 *Id.*, para. 34.

58 *Id.*, para. 33. Also, *mutatis mutandis*, Appl. No 26083, *Waite and Kennedy v Germany*, [1999] 30 EHRR 261 at para. 68. For commentary, *inter alia*, SCHERMERS, *Matthews v United Kingdom*, judgment of 18 February 1999, case comment, (1999) 36 *CMLRev* 673 at 679.

59 CANOR, '*Primus inter pares*. Who is the ultimate guardian of Fundamental Rights in Europe?', (2000) 25 *ELRev* 3 at 4.

measure in question either before the national courts or before the ECJ.[60] Since the measure at issue was an annex to the Treaty of Amsterdam and as a result could not be challenged either in Luxembourg or in national courts, it was indispensable to redress that shortcoming in the protection of Mrs Matthews's human rights by allowing her access to the Strasbourg machinery.[61]

It is submitted that this interpretation appears to have been confirmed by the later *Bosphorus* judgment.[62] In *Bosphorus* the applicant had alleged that the impoundment by the Irish authorities of an aircraft belonging to the national airline company of the Former Republic of Yugoslavia, imposed to fulfil the obligations incumbent on Ireland as a result of the Council Regulation[63] enacted to give effect to the UN Resolution imposing economic sanctions on former Yugoslavia, violated its rights to enjoy property peacefully.[64]

The Strasbourg court reiterated that, although the Contracting States were allowed to transfer sovereign powers to international organisations, that transfer did not exonerate them from liability under the Convention.[65] Action taken to fulfil obligations arising from membership of such organisations would therefore conform to the ECHR so long as the relevant organisation provided protection at least equivalent to fundamental rights, having regard to both their substantive content and the mechanisms aimed at securing their observance.[66] In that context, the Court made it clear that 'equivalent' should be interpreted not as meaning 'identical' but rather 'comparable' with the degree of human rights protection provided by the ECHR in the circumstances of each case.[67]

On the merits the Court found no violation of the Convention. First, it stated that 'the finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection'.[68] The Court then held that the substantive content of the EC general principles of law and the role played by the ECHR in that context, together

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60 SCHERMERS, *Matthews v United Kingdom*, judgment of 18 February 1999, case comment, (1999) 36 *CMLRev* 673 at 679–80.

61 CANOR, '*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?', (2000) 25 *ELRev* 3 at 5.

62 Appl. No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1.

63 Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the EEC and the Federal Republic of Yugoslavia (Serbia and Montenegro), [1993] OJ L102/14.

64 Appl. No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1, part B and C of the judgment.

65 *Id.*, para. 154.

66 *Id.*, para. 155.

67 *Ibid.*

68 *Id.*, para. 155.

with the effectiveness of 'the mechanisms of control in place to ensure the observance of such rights',[69] secured a degree of protection provided by EC law 'comparable' to that of the ECHR.[70]

The European Court of Human Rights took the view that this 'presumption of equivalence' could be rebutted, and therefore the Court's jurisdiction would be exercised only if the applicant could prove that in the circumstances of the case the safeguarding of human rights in the Community context had been 'manifestly deficient'. However, the Court gave no indication of the circumstances in which this threshold would be met. Judge Ress suggested in his concurring opinion that a similar finding could be reached, for instance, in cases when the ECJ had no jurisdiction to review the measure in question, when the Court had adopted an 'excessively restrictive' view of the right claimed by the applicant or when it had departed from established case law of the Strasbourg Court without good reason.[71]

Just like *Matthews*, *Bosphorus* was widely discussed. Commentators criticised the European Court of Human Rights as being too lenient vis-à-vis the EC institutions and as setting the standards of proof necessary to rebut the presumption of equivalent protection too high and therefore not entirely consistent with the practical and effective protection of Convention rights.[72] Furthermore, concern was expressed at the possibility that this judgment could open the way to more frequent 'indirect human rights challenges' to EC measures,[73] with significant implications for the relationship between the European Court of Human Rights, the respondent states and the Community institutions.[74]

However, it is argued that the *Bosphorus* judgment could also be interpreted as demonstrating that, rather than adopting an activist stance in the scrutiny of EC measures through the medium of the Member States, the European Court of Human Rights may in fact have preferred a more restrained attitude to the review of claims stemming from EC action.[75] It was suggested that the general and abstract examination of the system of judicial protection

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69 *Id.*, para. 160.

70 *Id.*, para. 164.

71 *Id.*, concurring separate opinion of Judge Ress, para. 3.

72 COSTELLO, 'The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe', (2006) 6 *Hum. Rts. L. Rev.* 87 at 102.

73 HARMSEN, 'National responsibility for European Community acts under the European Convention on Human Rights: recasting the accession debate', (2001) 7 *EPL* 625 at 646.

74 *Id.*, p. 645.

75 See e.g. PHELPS, 'Reflections on Bosphorus and human rights in Europe', (2006) 81 *Tul. L. Rev.* 251 at 271–72

provided by the EC Treaty before both the ECJ and the national courts, together with the standard of 'manifest deficiency' which should be satisfied before the Strasbourg Court can step in to review the act complained of, could be interpreted as indicating a hands-off, middle-ground approach to the scrutiny of similar cases.[76]

By assessing the 'guarantees offered and the mechanisms controlling their observance in the EC', the Court emphasised the 'systemic' equivalent protection of human rights in the Community framework and accordingly sent a strong signal to potential applicants that *Bosphorus*-type claims would stand a very limited chance of success.[77] However, it also demonstrated that it would continue to be vigilant on the degree of fundamental rights protection in the Community legal system and would exercise its jurisdiction if 'the specific circumstances of a case might reveal unexpected "shortcomings" in the EC's systems of human rights' protections [*sic*]'.[78]

Although admittedly it does not resolve all the issues arising from the possibility of human rights challenges to the EC action via the medium of the Member States, the *Bosphorus* decision can be interpreted as suggesting that the European Court of Human Rights is likely to be reluctant to engage in the detailed scrutiny of similar cases. It was suggested that, in a way which resembles the approach adopted by the German Constitutional Court in its *Solange* judgments,[79] the Court would only exercise a residual jurisdiction. It would therefore go beyond the presumption of 'equivalent protection of human rights' in the Community context only in the event of a breakdown in the safeguards provided by the ECJ and the domestic courts in respect of allegations of human rights breaches caused by EC measures.[80]

Accordingly, it can be concluded that, although significant questions concerning the interaction between the Community legal system and the Convention machinery remain open, the *Bosphorus* judgment appears to have marked an at least partial return by the European Court of Human Rights to the 'trusting approach' to the human rights supervision of EC action. This

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[76] HOFFMEISTER, '*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirket v Ireland*', case comment, (2006) 100 *Am J Int'l L* 442 at 447.

[77] *Ibid.*

[78] *Ibid.*

[79] German Constitutional Court, judgment of 7 June 2000: 'Constitutional review of the EC Regulation on bananas', 102 BVerfGE 147 (2000). For commentary, HOFFMEISTER, Case comment to German Bundesverfassugsgericht: *Alcan*, Decision of 17 February 2000; *Constitutional review of EC Regulation on bananas*, Decision of 7 June 2000, (2001) 38 *CMLRev* 791 at 797–98.

[80] BANNER and THOMPSON, 'Human rights' review of state acts performed in compliance with EC Law: Bosphorus Airways v Ireland', (2005) 6 *EHRLR* 649 at 657.

outcome could, in turn, be explained as a consequence of the 'consolidation' of the EC/EU human rights discourse achieved over the years and of the vital role played by the ECHR itself in shaping the principles applied in this context by the ECJ.[81]

6. HUMAN RIGHTS AND BUSINESS ENTITIES: THE REACH OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE CORPORATE CONTEXT

The previous sections briefly illustrated the degree of protection afforded to fundamental rights by EC law and in that context illustrated that, despite not being binding on the European institutions, the European Convention on Human Rights enshrines relevant standards for the assessment of their action in consideration of the Convention's role as a special source of guidance in shaping the EC general principles. However, it cannot be denied that the ECHR as a human rights catalogue was designed primarily as a means to protect natural persons from the arbitrary or excessive exercise of State power. Consequently, a preliminary question should be examined, namely to what extent the safeguards laid down in the Convention can be applied to non-individual actors and especially to business entities.[82]

It will be recalled that Article 1 ECHR obliges all the Contracting States to secure the human rights provided by the Convention to 'everyone' in their jurisdiction. Accordingly, it could be argued that the term 'everyone' can be read as encompassing both natural and legal persons, including commercial entities, provided that they find themselves within the reach of the respondent State.[83] However, it is submitted that, despite being apparently convincing, this literal argument is not wholly satisfactory. First, it could be argued that a literal reading of the Convention is not consistent with the approach adopted by the Strasbourg court itself, which often defies the literal wording of the ECHR and prefers a reading of its provisions 'in the light of its object and purpose' and of 'the present day conditions' in which they are to be applied.[84]

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[81] See, e.g., BESSON, 'The European Union and human rights: towards a post-national human rights institution?', (2006) 6 *Hum. Rts. L. Rev.* 323 at 344–45; cf. PHELPS, 'Reflections on Bosphorus and human rights in Europe', (2006) 81 *Tul. L. Rev.* 251 at 275–76.

[82] For a general study of these issues, see most recently EMBERLAND, *The Human Rights of Companies*, (2005) Oxford University Press.

[83] EMBERLAND, pp. 33–34.

[84] *Inter alia*, OVEY and WHITE, *European Convention on Human Rights*, 3rd edn, (2002) Oxford University Press, pp. 34–35.

And second, this interpretation does not appear to take into adequate consideration the substratum of principles and values at the basis of the Convention and the extent to which they may be used to justify its application to protect corporate entities.[85]

Although the limited remit of this work does not allow for an exhaustive examination of these issues, it may be noted that the ECHR constitutes the expression of a specific system of values, among which the principles of individual dignity, democracy and the rule of law feature prominently. Commentators pointed out that democracy constitutes the 'spiritual bedrock of the Convention'[86] and the only political model contemplated as compatible with it, a model which is governed by principles such as free political debate, free elections and freedom of association.[87] The 'objective value' of the rule of law, applicable to all forms of exercise of public power,[88] also ensures that the action of government be restrained by law to avoid 'the arbitrary exercise of power and to secure equality and foreseeability (. . .)'.[89]

The values of the free market play a vital role within the model of liberal democracy at the foundation of the Convention by ensuring not only the personal but also the economic liberty of the individual.[90] In addition, it is acknowledged that there is no express reference to freedom of enterprise. However, the recognition in the Convention, albeit not unlimited, of the right to peaceful enjoyment of property, of freedom of association and of the right to receive and to impart information, including that of a 'commercial' nature,[91] seems to demonstrate the importance of business freedom as an aspect of the democratic society on which the ECHR is grounded.[92]

In this context, the emergence of the limited liability company as a vehicle through which freedom of enterprise can be exercised has played a key role in the economic development of the Contracting States.[93] However, it has also raised significant issues concerning the control of corporations in an economic and political system in which economic rights and freedoms are not unlimited

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85 EMBERLAND (footnote 82), p. 25.
86 *Id.*, p. 40.
87 *Id.*, p. 41.
88 *Id.*, p. 47.
89 *Id.*, p. 45.
90 See, *inter alia*, OVEY and WHITE, *European Convention on Human Rights*, p. 302.
91 Appl. No. 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, ser. A No 165, [1990] 12 EHRR 161; see *infra*, this section.
92 EMBERLAND (footnote 82), pp. 48–49.
93 *Ibid.*

and has consequently prompted the creation of often complex and pervasive systems for the regulation of the activities of private enterprises.[94]

Accordingly, it is submitted that it is in this context that the function of the Convention as a means through which corporate actors can seek protection of fundamental entitlements such as the right to fair and impartial legal process, freedom of association for the purpose of creating a juristic person and, albeit more controversially, the right to the protection of a sphere of privacy, should be understood.[95] Commentators forcefully argued that the recognition of the rule of law as an 'objective concept', as a result of which the ECHR becomes an instrument for the protection of 'everyone' from the arbitrary and excessive exercise of public power, provides a strong justification for the application of its provisions to the benefit of private enterprises, especially in the context of regulatory regimes.[96]

However, it is clear from its very text that not all of the Convention's safeguards are equally applicable to business entities: rules enshrining, for instance, the right to protection against torture or arbitrary detention or the right to respect for one's family life are clearly designed only for human beings. By contrast, 'classical' civil rights, such as the right to a fair trial, can be easily extended to corporate applicants.[97]

The practice of the European Court of Human Rights supports the view that the reach of the Convention should cover the business context and therefore 'secure' at least some of the rights listed therein not only in respect of individuals but also to legal persons. In the *Niemitz* case[98] the Court took the view that the notion of 'private life' could not be restricted 'to an "inner circle" in which the individual may live his own personal life as he chooses'[99] and should also encompass his or her 'right to establish and develop relationships with other human beings'. Consequently it was held that its meaning should be construed as also encompassing 'activities of a professional or business nature',[100] since it is in the course of such activities that individuals enjoy

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94 *Inter alia*, TRAINOR, 'A comparative analysis of a corporation's right against self-incrimination', (1994–1995) 18 *Fordham Int'l L J* 2139 at 2165–66.

95 EMBERLAND (footnote 82), p. 51.

96 *Ibid.*

97 E.g. Appl. No 14369/88, *Noviflora Sweden AB v Sweden*, Commission Decision, [1993] 15 EHRR CD6; paras. 2(b) and 4. For commentary, *inter alia*, MacCULLOCH, 'The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications', (2006) 26(2) *Legal Studies* 211 at 235.

98 Appl. No 13710/88, *Niemitz v Germany*, ser. A No 251-B, [1993] 16 EHRR 17.

99 *Id.*, para. 29.

100 *Ibid.*

significant opportunities to build relations with the outside world.[101] As a result, the concept of 'home' laid down in Article 8 ECHR was read as comprising the applicant's business premises: a more restrictive interpretation would have impaired the function of that provision, which is to protect individuals against the arbitrary interference of the public authorities.[102]

This reading of the concept of 'home' for the purpose of the Convention was confirmed in the later *Ste Colas Est* judgment, which concerned the legality of competition inspection powers provided by French law.[103] The European Court of Human Rights held that in view of the broad connotation assigned to the word 'domicile' in the context of the French version of the Convention vis-à-vis the notion of 'home', the safeguards provided by Article 8 ECHR should extend to business premises or professional offices.[104] Accordingly, it was concluded that given the nature of the Convention as a 'living instrument',[105] Article 8 ECHR should be read as enshrining a 'right to respect for a company's registered office, branches or other business premises'.[106]

The application of the Convention's safeguards was also sought for the protection of freedom of commercial speech and expression, including advertising. In *Markt Intern*[107] the Court held that information of a commercial nature could not be excluded from the scope of Article 10 ECHR.[108] On the contrary, an active specialised press constituted an essential factor in a market economy, in as much as, by ensuring a degree of 'scrutiny of the [undertaking's] practices by its competitors',[109] it fostered 'the openness of business activities'.[110]

The later *Casado Coca* judgment[111] reiterated that Article 10 ECHR protected the freedom to impart information of whatever nature, including that

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101 *Ibid.*

102 *Id.*, para. 31. See also, *mutatis mutandis*, Appl. No 10461/83, *Chappell v United Kingdom*, Report of the European Commission on Human Rights, 14 October 1987, [1989] 11 EHRR CD543, paras. 96–99; judgment of the European Court of Human Rights, 30 March 1989, [1990] 12 EHRR 1, para. 51.

103 Appl. No 37971/97, *Ste Colas Est and Others v France*, judgment of 16 April 2002, [2004] 39 EHRR 17.

104 *Id.*, para. 40.

105 *Id.*, para. 41.

106 *Ibid.*

107 Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, ser. A No 165, [1990] 12 EHRR 161.

108 *Id.*, para. 26.

109 *Id.*, para. 35.

110 *Ibid.*

111 Appl. No 15450/89, *Casado Coca v Spain*, ser. A No 285, [1994] 18 EHRR 1.

'of a commercial nature . . . and even light music and commercials transmitted by cable'.[112] The Court clearly extended the safeguards provided by Article 10 of the Convention to natural and legal persons engaged in economic activities,[113] namely to 'undertakings', to adopt terminology developed in the context of EC competition law.[114] It therefore embraced a purposive approach in the interpretation of the Convention and ensured that the function of its provisions would not be jeopardised.[115]

Nonetheless, it cannot be denied that the application of human rights guarantees to corporate entities gives rise to specific issues caused by the circumstance that these safeguards were originally developed to protect the life, physical integrity and human dignity of natural persons. Although it is acknowledged that certain rights are entirely applicable to corporate entities just as to individuals, the extension to legal persons of other guarantees is far more controversial.

It will be illustrated in later chapters that whether business enterprises can claim a 'right to silence' and not to incriminate themselves in the course of regulatory investigations and judicial proceedings constitutes a telling example of the difficulties stemming from the application of 'traditional' human rights standards to corporate entities.[116] This prompts the question of how to reconcile the competing interests of the effective functioning of regulatory frameworks and the protection of fundamental entitlements claimed by business entities.

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112 *Ibid.*

113 But cf. Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, ser. A No 165, [1990] 12 EHRR 161 at paras. 33, 35 and 37 with Appl. No 9815/82, *Lingens v Austria*, judgment of 8 July 1986, ser. A No 103, [1986] 8 EHRR 103 at paras. 41–42.

114 *Inter alia*, case C-41/90, *Hofner and Elsner v Macroton*, [1991] ECR I-1979, para. 21.

115 See Appl. No 37971/97, *Ste Colas Est and Others v France*, judgment of 16 April 2002, [2004] 39 EHRR 17, para. 41. See also, *mutatis mutandis*, case C-185/95, *Baustahlgewebe v Commission*, [1998] ECR I-8417, per AG Leger, para. 33. For commentary, *inter alia*, VENIT and LOUKO, 'The Commission's new power to question and its implications on human rights', in HAWK (ed.), *International Antitrust Law and Policy*, *Annual Proceedings of the Fordham Corporate Law Institute* (2005) New York: Juris Publishing, p. 675 at 696–97. But cf. DEKEYSER and GAUER, 'The new enforcement system for Articles 81 and 82 and the rights of defence', in HAWK (ed.), *International Antitrust Law and Policy*, p. 549 at 562.

116 For an examination of the issue with respect to the protection of the right against self-incrimination, see, *inter alia*, TRAINOR, 'A comparative analysis of a corporation's right against self-incrimination', (1994–1995) 18 *Fordham Int'l L J* 2139; RILEY, '*Saunders* and the power to obtain information in Community and United Kingdom competition law', (2000) 25 *ELRev* 264; MacCULLOCH, 'The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications', (2006) 26(2) *Legal Studies* 211.

It was suggested that the European Court of Human Rights may have responded to these concerns by adopting a 'more lenient' approach in the assessment of allegations of Convention breaches raised by business entities.[117] Judgments such as *Groppera Radio*[118] and perhaps more significantly *Markt Intern Verlag*[119] appear to indicate that in principle the Strasbourg Court looks favourably on the possibility for corporate applicants to rely on Article 10 ECHR against restrictions of their right to disseminate commercial information, such as advertising. However, the examination of the appraisal made by the Court of the legality of the interference with the applicants' right to freedom of expression suggests the adoption of a more deferential approach to the discretion exercised by the Contracting States' authorities in the regulation of the economic activities.[120]

Although the judgment will be examined in more detail in later chapters, it is noteworthy that in *Markt Intern Verlag*[121] the Court expressly stated that 'in commercial matters and in particular in an area as complex and fluctuating as that of unfair competition' its scrutiny would be confined 'to the question whether the measures taken on the national level are justifiable in principle and proportionate'.[122]

The position adopted in this judgment can be contrasted with other decisions taken in the context of the protection of 'political' speech, such as, for instance, *Silver*[123] or *Handyside*.[124] In these cases the Court was far less reluctant to engage in an analysis as to whether the restrictions on the applicants' right to free expression were necessary in a democratic society for the achievement of a legitimate aim, as prescribed by Article 10(2) ECHR.

Accordingly, it was held that, although the State authorities are best placed to assess the necessity in a democratic society of imposing restrictions on the exercise of certain fundamental rights and freedoms and for that purpose enjoy a measure of discretion, their 'margin of appreciation' is not unlimited but is

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117 EMBERLAND (footnote 82), pp. 128–130.

118 Appl. No 10890/84, *Groppera Radio AG and others v Switzerland*, judgment of 28 March 1990, ser. A, No 173, [1990] 12 EHRR 321.

119 *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, ser. A No 165, [1990] 12 EHRR 161.

120 EMBERLAND (footnote 82), pp. 129–30.

121 Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, ser. A No 165, [1990] 12 EHRR 161.

122 *Id.*, para. 33.

123 Appl. Nos. 5947/72 6205/73, 7052/75, 7061/75 7107/75, 7113/75, 7136/75, judgment of 25 March 1983, ser. A No 61, [1983] 5 EHRR 347.

124 *Handyside v United Kingdom*, judgment of 7 December 1976, ser. A No 24, [1979–80] 1 EHRR 737.

at all times subjected to the supervision of the Convention organs.[125] It would therefore fall within the Strasbourg Court's jurisdiction to consider whether the interferences with the Convention rights alleged by the applicant responded 'to a "pressing social need" and [were] "proportionate to the legitimate aim pursued" '.[126]

However, it is not entirely clear how the 'varying standards' for the scrutiny of State measures impinging on the freedom of speech adopted in the 'commercial' as opposed to the 'political' arena may be explained. Commentators argued that in 'commercial speech' cases the European Court of Human Rights did not adopt the 'substantive standard of control over the domestic authorities' assessment of "necessity" '[127] applicable to 'political' speech cases. Instead, and by reason of the different context in which the Contracting States exercised their margin of appreciation, it opted for a formal type of scrutiny, limited to verifying 'whether the proportionality assessment under the "necessity" criterion has (. . .) been undertaken at national level'.[128,129]

It cannot be denied that the adoption of such a generous standard of review leaves considerable discretion to the national authorities and raises the question whether it can be justified in the light of the function of the ECHR as a means to protect 'everyone' from the arbitrary and excessive exercise of powers by the public authorities.[130] Even though these issues will be directly addressed in later chapters, it is necessary to point out already at this stage that there may be compelling reasons for the recognition of a broader margin of appreciation on the part of the domestic authorities in the sphere of the regulation of economic activities.

As Emberland put it, 'the Convention's profound reverence for democratic processes'[131] and the recognition of a wide ambit of discretion enjoyed by the legislators of the Contracting States in making choices concerning the 'public regulation of private economic activity for the benefit of the common good'[132]

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125 *Handyside v United Kingdom*, judgment of 7 December 1976, ser. A No 24, [1979–80] 1 EHRR 737, para. 48. For commentary, OVEY and WHITE, *European Convention on Human Rights*, pp. 210–11.

126 Appl. Nos. 5947/72 6205/73, 7052/75, 7061/75 7107/75, 7113/75, 7136/75, *Silver v United Kingdom* judgment of 25 March 1983, ser. A No 61, [1983] 5 EHRR 347, para. 97. For commentary, OVEY and WHITE, *European Convention on Human Rights*, pp. 276–77.

127 *Id.*, p. 166.

128 *Id.*, p. 167.

129 EMBERLAND (footnote 82), p. 165.

130 *Id.*, p. 177.

131 *Id.*, p. 184.

132 *Id.*, p. 192.

could constitute legitimate grounds for a more 'lenient' attitude on the part of the Strasbourg Court as regards claims brought by corporate applicants.[133] As a result, the concern for maintaining the 'social function' of private property and free enterprise,[134] together with the recognition that 'commercial speech' does not engage the value of democracy to the same extent as speech in the 'political arena',[135] could provide a convincing explanation for the adoption of less stringent standards for the review of allegations of infringement of the Convention raised by corporate entities acting in the commercial sphere.[136]

In the light of the analysis conducted so far it is concluded that the ECHR, being a human rights instrument rooted in principles such as democracy and the rule of law and embedded in the values of European liberalism, can in principle provide for the protection of certain fundamental rights to corporate entities engaged in commercial activities. However, a closer examination of the case law reveals that even though 'classical' human rights standards can be claimed by economic actors, such as the right to free speech, the standards of review applied by the European Court of Human Rights in examining the allegations raised by these applicants may not be as stringent as those adhered to outside the 'commercial arena'.

It could be argued that the 'lenient approach' to human rights adjudication emerging in the business context may be justified in the light of the 'social function of private property' and of the need to respect the integrity of the democratic decision-making processes in each Contracting State with respect to the determination of economic and regulatory choices. Nevertheless, the adoption of differing standards of review also raises questions concerning how the balance should be struck between the rights claimed by business entities and the common interests sought by the Contracting States in individual cases.

As a result, it is not entirely clear how the scope of rights such as the entitlement to a fair trial, the confidentiality of lawyer-client communications and the right to remain silent in the face of questioning, especially during regulatory investigations, should be fashioned. Nonetheless, before examining these issues in more detail, it is necessary to examine the extent to which the ECHR is applicable to the action of public authorities in the context of the regulation of economic activities and especially to the action of the European Commission in the area of competition enforcement. This other general question will be examined in the following section.

133 *Id.*, p. 193.
134 *Id.*, pp. 190–91.
135 *Id.*, p. 187.
136 *Id.*, p. 193.

7. COMPETITION ENFORCEMENT AND THE REACH OF ARTICLE 6(1) OF THE ECHR: THE NATURE OF THE ANTITRUST AND MERGER PROCEEDINGS IN EC LAW

The nature of the proceedings for the application of Articles 81 and 82 EC Treaty and of the Merger Regulation is widely disputed. The Community legislature constantly reiterated that the procedure before the Commission is 'administrative' in essence, as is demonstrated by Article 23(5) of Council Regulation No 1/2003, according to which decisions imposing financial penalties for antitrust violation 'shall not be of a criminal nature'.

Several commentators, however, challenged the legislative statement and alleged that since these proceedings can 'culminate in the imposition of fines having a criminal law character',[137] they actually 'relate to the determination of a criminal charge'.[138] Consequently, they argued that they did not comply with the requirements laid down by Article 6(1) ECHR, on account of the concentration of the investigative and decision-making functions on the Commission. However, the appeals brought against Commission competition decisions on grounds of a violation of Article 6(1) ECHR have been constantly dismissed by the Strasbourg organs.[139]

The possibility that the Convention could be successfully invoked in order to challenge a competition decision was also constantly denied by the ECJ[140] 'precisely because it [the Commission] is not independent of the executive'[141] and is entrusted with carrying out merely an administrative function.[142] The observance of the procedural guarantees laid down by the regulations governing the enforcement of competition law, together with the availability of the action for annulment before the CFI under Article 230 EC Treaty[143] was considered sufficient to meet the requirements of a fair hearing for the undertakings concerned.[144]

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137 DRABEK, 'A fair hearing before EC institutions', (2001) 4 *Euro. Rev. of Private Law* 529 at 532.

138 *Id.*, p. 533.

139 E.g. Appl. 13258/87, *M & Co v Germany*, [1990] 64 D & R 138.

140 *Inter alia*, case 45/69, *Boehringer Mannheim v Commission*, [1970] ECR 153, para. 23; case T-11/89, *Shell v Commission*, [1992] ECR II-757, para. 39.

141 DRABEK, 'A fair hearing before EC institutions', (2003) 4 *ERPL* 529 at 533.

142 *Inter alia*, cases 100–103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825, per AG Slynn, p. 1920.

143 Case T-156/94, *Siderurgica Aristrain Madrid SL v Commission*, [1999] ECR II-645, para. 102 and 109.

144 *Inter alia*, joined Cases 209-15 and 218/78, *Heinz van Landewyck Sarl v Commission*, [1980] ECR 3125, para. 81.

Nonetheless, the view that Article 6(1) ECHR would not in principle be relevant for competition proceedings before the Commission could be open to question in the light of the case law of the European Court of Human Rights. Although none of the Convention norms lay down specific 'administrative fairness' standards applicable to proceedings before non-judicial authorities, the Court was mindful of the fact that according to 'the administrative law of all contracting states . . . in numerous different fields public authorities are empowered by law to take various forms of action impinging on the private rights of citizens'.[145] It therefore adopted a substantive test to determine whether the exercise of administrative powers by public authorities could be considered to fall within the scope of Article 6(1) ECHR, so as to prevent the safeguards contained in the Convention and especially the right to a fair trial, being withheld merely due to national law classifications.[146]

With respect to the notion of 'criminal charge', the Strasbourg Court was often faced with controversial issues involving 'lesser offences (. . .) where a policy of decriminalisation is in operation'.[147] In these cases it took the view that the existence of a 'criminal charge' should be dependent on substantive factors, namely 'the nature and severity of the offence and the penalty' and 'the purpose of the fine', i.e. whether the latter 'was both deterrent and punitive (. . .)'.[148]

As a result, it was held in *Schmautzer*[149] that motoring offences, despite being classified by national law as belonging to 'the administrative sphere . . . are nevertheless criminal in nature'.[150] The Court pointed to several circumstances, namely, that national law 'refer[red] to administrative *offences* and administrative *criminal* procedure'[151] and that 'the fine imposed on the applicant was accompanied by an order for his committal to prison in the event of his defaulting on payment'.[152]

A similar approach was also adopted in the interpretation of the concept of

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145 Appl. No 7598/76, *Kaplan v United Kingdom*, Commission Decision, [1982] 4 EHRR 64, para. 150.

146 BOYLE, 'Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights', (1984) *PL* 89 at 90.

147 OVEY and WHITE, *Jacobs and White: The European Convention on Human Rights*, p. 141.

148 *Ibid.*

149 Appl. No 15523/89, *Schmautzer v Austria*, [1996] 21 EHRR 511.

150 *Id.*, para. 28, emphasis in the original text.

151 *Ibid.* Also Appl. No 8544/79, *Ozturk v Germany*, [1984] 6 EHRR 409, paras. 55–56.

152 *Ibid.* Also, Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, paras. 56–57, 61; for an examination of the nature of domestic antitrust proceedings, *infra*, Chapter 2, footnote 205 and accompanying text.

a 'determination of civil rights and obligations'. In the *LeCompte, Van Leuven and de Meyere* judgment the European Court of Human Rights took the view that the French term ' "contestation" (dispute) . . . should not be construed too technically and (. . .) should be given a substantive rather than formal meaning'[153] and concluded that Article 6(1) ECHR should be applicable to all proceedings, be they judicial or administrative, whose 'result (. . .) [is] directly decisive'[154] for the existence or the exercise of a substantive right. Furthermore, provided that it was 'genuine and of a serious nature',[155] the dispute could 'relate not only to the actual existence of the right but also to its scope or the manner in which it may be exercised'.[156]

Therefore, in *Sramek*, the Court held that the outcome of proceedings before the Austrian Regional Property Transactions Authority 'was "decisive for private rights and obligations" '[157] of the applicant. In fact, the task of the authority was to rule as to whether the contract for the sale of land satisfied the statutory conditions in order to produce its legal effects and consequently its 'unfavourable decision (. . .) would – and did – mean that the transaction was null and void'. [158]

Having regard to the nature of competition proceedings, it is noteworthy that this issue was addressed by the now-defunct European Commission on Human Rights in the *Stenuit* case.[159] Although the Commission was aware of the circumstance that the French Conseil d'Etat had ruled that antitrust sanctions were not of a criminal nature,[160] it took the different view that, in consideration of the 'nature of the offence', the enforcement of French competition law nevertheless possessed a 'criminal aspect . . . for the purpose of the Convention'.[161]

The Human Rights Commission relied heavily on a 'combination of concordant factors'[162] including the goal of the provisions, which was 'to maintain free competition within the French market',[163] their general scope of application[164] and the deterrent nature of the penalty provided for those

153 Ser. A No 43, *LeCompte, Van Leuven and de Meyere v Belgium*, [1982] 4 EHRR 1, para. 45.
154 *Id.*, para. 47.
155 Appl. No 10426/83, *Pudas v Sweden*, [1988] 10 EHRR 380, para. 31.
156 *Ibid.*
157 Appl. No 8790/79, *Sramek v Austria*, [1985] 7 EHRR 351, para. 34.
158 *Ibid.*
159 Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401.
160 *Id.*, para. 56.
161 *Id.*, para. 61.
162 *Id.*, para. 66.
163 *Id.*, para. 62.
164 *Id.*, para. 63.

responsible for competition infringements, i.e. 5 per cent of their total annual revenue.[165]

The position adopted in *Stenuit* supports the argument that the procedure for the enforcement of Articles 81 and 82 EC Treaty can also be considered to be 'criminal' in nature according to the ECHR. In fact, they concern the detection and sanction of violations of norms of general application[166] adopted in the general interest, namely the protection of free competition in the common market.[167] As to the nature and severity of the sanction which the concerned undertakings risk incurring, investigated firms may be fined up to 10 per cent of their worldwide turnover. It is therefore clear that such penalties are intended to be both deterrent and punitive.[168]

It may be argued that increasing awareness of the 'quasi-criminal' nature of antitrust proceedings has also emerged from the more recent case law of the ECJ and CFI. It is noteworthy that in his Opinion to the *Hercules Chemicals* case,[169] AG Vesterdorf argued that proceedings enforcing Articles 81 and 82 EC Treaty 'do in fact . . . have a criminal law character'[170] and should therefore comply with the requirements laid down by Article 6(1) ECHR. According to the Advocate General, it was 'vitally important' in the Community context 'that the ECJ should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights'.[171]

This view was shared by Advocate General Leger, who took the view in his Opinion in *Baustahlgewebe v Commission*[172] that 'in the light of the case law of the European Court of Human Rights . . . the present case involves a "crim-

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165 *Id.*, para. 64. See also, *mutatis mutandis*, Appl. No 37971/97, *Ste Colas Est and Others v France*, judgment of 16 April 2002, para. 46, 48–49.

166 *Inter alia*, RILEY, 'Saunders and the power to obtain information in Community and United Kingdom competition law', (2000) 25 *ELRev* 264 at 271.

167 *Inter alia* WILS, 'The combination of the Investigative and prosecutorial function and the adjudicative function in EC Antitrust enforcement: a legal and economic analysis', (2004) 27 *W. Comp.* 201 at 208.

168 Case T-7/89, *SA Hercules Chemicals NV v Commission (Re: the Polypropylene Cartel)*, [1991] ECR II-1711; per AG Vesterdorf, reported in [1991] ECR II-867, para. I.3. See also, *mutatis mutandis*, Appl. No 69042/01, *OO Neste St Petersburg and Others v Russia*, decision of 3 June 2004 (third section), not yet reported, part 2(b).

169 Case T-7/89, *SA Hercules Chemicals v Commission*, [1991] ECR II-1711.

170 Per AG Vesterdorf, [1991] ECR II-867, para. I.3.

171 *Ibid*. See also, *mutatis mutandis*, case C-198/01, *Consorzio Italiano Fiammiferi v Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055, Opinion of AG Francis Jacobs, para. 52.

172 Case 185/95, [1998] ECR I-8417

inal charge" ',[173] the appeal being directed at a Commission decision imposing fines for an antitrust breach. Consequently, the Advocate General concluded that the applicant was entitled to the protections enshrined in Article 6 of the European Convention.[174]

Similarly, in her recent Opinion to the *Dutch Electricians Federation* case[175] Advocate General Kokott suggested that, although Article 6(1) ECHR is not per se directly applicable to the proceedings before the Commission,[176] in assessing whether action had been taken 'within a reasonable time', as is required by the general principles of EC law, the ECJ will conform 'closely to the settled case law of the European Court of Human Rights' concerning that issue.[177]

It could be suggested that the CFI has shown an increasing awareness of the criminal nature of competition proceedings within the meaning given to the concept of a 'criminal charge' by the Strasbourg Court. In its recent *JFE v Commission* decision[178] the Court held with respect to the reach of the presumption of innocence in EC competition proceedings:

> given the nature of the infringements . . . and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules relating to undertakings that may result in the imposition of fines or periodic penalty payments (. . .).[179]

In reaching this conclusion the CFI referred to judgments of the European Court of Human Rights such as *Lutz*[180] and *Ozturk*[181] which, like the *Schmautzer* case,[182] cited above, concerned the legality of proceedings for the

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[173] Per AG Leger, para. 31.

[174] *Id.*, para. 30, 32. See HOGAN, 'The use of compelled evidence in European competition law cases', in HAWK (ed.), *International Antitrust Law and Policy*, p. 659 at 671–72.

[175] Case C-105/04 P, *Netherlandse Feteratieve Vereigning voor de Goothandel op Elektrotechnisch Gebied v Commission*, Opinion of AG Kokott, delivered on 8 December 2005, [2006] ECR I-8725.

[176] Per AG Kokott, para. 107, footnote 57.

[177] *Id.*, para. 108. Cf. T-23/99, *LR AF 1998 A/S v Commission,* [2002] ECR II-1705, paras. 220–21; also, *mutatis mutandis*, T-9/99, *HFB v Commission*, [2002] ECR II-1487, paras. 390–91.

[178] Case T-67/00, [2004] ECR II-2501.

[179] *Id.*, para. 178.

[180] Appl. No 9912/82, *Lutz v Germany*, judgment of 25 August 1987, [1988] 10 EHRR 182, para. 57.

[181] Appl. No 8744/79, *Ozturk v Germany*, judgment of 21 February 1985, ser. A No 73, [1984] 6 EHRR 409, paras. 55–56.

[182] Appl. No 15523/89, *Schmautzer v Austria*, [1996] 21 EHRR 511.

detection and repression of certain 'decriminalised' motoring offences that had been recognised as having a criminal character. Consequently, it is submitted that although the Court did not expressly define EC antitrust proceedings as criminal, the clear reference to the case law of the Strasbourg Court concerning administrative proceedings that are 'criminal in nature' would appear to support the view that the undertakings affected by competition proceedings before the Commission are entitled to the safeguards enshrined in the right to a fair hearing in accordance with Article 6(1) ECHR.[183]

It is submitted that the trend toward the criminalisation of cartels currently ongoing in the jurisdiction of some Member States, where violations of the prohibition of some forms of hardcore anti-competitive conduct are considered criminal offences, should also be taken into account. For instance, in the United Kingdom, according to s. 188 of the 2002 Enterprise Act, 'an individual is guilty of an offence if he dishonestly agrees with one or more persons to make or implement, or to cause to be made or implemented, arrangements' which would constitute so called 'hardcore' forms of anti-competitive conduct, namely price fixing, restrictions of output and supply, market partitioning or bid-rigging.

Commentators forcefully argued that the offence 'bears no resemblance to the [Chapter I] prohibition',[184] namely the prohibition of cartel behaviour or indeed to Article 81 EC Treaty.[185] However, the criminalisation of cartels in the laws of some of the Member States could be interpreted as a sign of the 'strong determination to robustly tackle hard-core cartel conduct'.[186] It also demonstrates that these forms of behaviour are perceived as extremely harmful to the public interest and the common economic welfare.[187] A similar trend appears also to be emerging in the context of the Commission's enforcement of Article 81 EC Treaty. The new Fining Guidelines[188] and the revised Leniency programme[189] demonstrate the Commission's commitment to the

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183 VENIT and LOUKO, 'The Commission's new power to question and its implications on human rights', in HAWK (ed.), *International Antitrust Law and Policy*, pp. 698–99.

184 MacCULLOCH, 'The cartel offence and the criminalisation of United Kingdom competition law', (2003) *Journal of Business Law* Nov 616 at 619.

185 *Id.*, pp. 620–21.

186 NASH and FURSE, 'Partners in crime – the cartel offence in UK law', (2004) 15 *International Company and Commercial Law Review* 138 at 153.

187 JOSHUA, 'A Sherman Act bridgehead in Europe, or a ghost ship in mid-Atlantic? A close look at the United Kingdom proposals to criminalise hardcore cartel conduct', (2002) 23 *ECLR* 231 at 245.

188 Commission guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2.

189 Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C207/04.

effective enforcement of Article 81 EC Treaty through, on the one hand, the imposition of financial penalties having a truly deterrent and punitive character and, on the other hand, the promise of immunity from fines as a means to encourage cooperation and as a result to boost cartel detection.[190]

By contrast with antitrust cases, no decision has been handed down to date on the question of the nature of merger proceedings. However, commentators suggested that merger proceedings may be classified as leading to the 'determination of civil rights and obligations'.[191] The purpose of merger control is to assess whether the notified concentration is capable of adversely affecting competition in the common market in particular by creating or strengthening a dominant position. Also the transaction is suspended, save in the exceptional cases listed in the Regulation,[192] until such time as the Commission adopts a decision.

A parallel can be drawn with those proceedings provided by the laws of some of the contracting states to the European Convention on Human Rights and aimed at the authorisation of land transactions, such as those at issue in the *Sramek* case,[193] examined above. In addition, in its other *Ringeisen* judgment the European Court of Human Rights held that a procedure aimed at approving the contract for the purchase of land fell within the scope of Article 6(1) ECHR, being concerned with the determination of civil rights and obligations and 'decisive for the relations in civil law' between the applicant and his counterpart in the land transaction.[194]

Merger proceedings, being aimed at verifying that the notified transaction is compatible with rules of free competition within the common market, are 'decisive for the relations in civil law' between the merging parties, by the same token to that in the procedure at issue in *Ringeisen*: in fact, it will depend on their outcome whether the parties will be allowed to carry out the concentration itself. They can thus be considered to be concerned with the determination of

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190 See, *inter alia*, GALE, 'The Leniency regime and the fight against cartels by the Directorate General for Competition', (2004) 25 *Company Lawyer* 324 at 327; also WILS, 'Leniency in antitrust enforcement: theory and practice', (2007) 30 *W. Comp.* 25; WILS, 'The European Commission 2006 Guidelines on antitrust fines: a legal and economic analysis', (2007) 30 *W. Comp.* 197.

191 WAELBROECK and FOSSELARD, 'Should the decision-making power in EC Antitrust procedures be left to an independent judge? – The impact of the European Convention on Human Rights on EC Antitrust procedures', (1994) 14 *YEL* 111 at 124–25; and, more recently, WILS, 'The combination of the investigative and prosecutorial function and the adjudicative function in EC Antitrust enforcement: a legal and economic analysis', (2004) 27 *W. Comp.* 201 at 209.

192 Article 7, EC Merger Control Regulation.

193 Appl. No 8790/79, *Sramek v Austria*, [1985] 7 EHRR 351.

194 Ser. A No 13, *Ringeisen v Austria*, [1979–80] 1 EHRR 455, para. 94.

the parties' civil rights and obligations and must be subject to the requirements laid down by Article 6(1) ECHR.

It can therefore be concluded that the adoption of the 'substantive' test elaborated with respect to administrative proceedings in the areas of, *inter alia*, town and environmental planning and repression of minor motoring offences, has allowed the European Court of Human Rights to extend the reach of Article 6(1) of the Convention to a variety of administrative proceedings. As a result, it may be convincingly argued that the standards of administrative fairness enshrined in the ECHR should provide a benchmark to assess the fairness of the competition procedures before the Commission. This assessment will be conducted in the following chapters.