

COMPETITION LAW AND FUNDAMENTAL RIGHTS: SOME UNRESOLVED ISSUES

1. INTRODUCTION

Procedural fairness

1.1 In the recent appeals before the CAT against the OFT's decision on Bid rigging in the Construction Industry in England ("the Construction Appeals"), one of the arguments put forward on behalf of a number of appellants was to the effect that aspects of the procedures adopted by the OFT in determining that there had been a breach of competition law in their case were, in effect, contrary to what might now term "the rights of the defence".

1.2 Thus, in its judgment in *GMI Construction Holdings plc* the CAT was highly critical of the procedures adopted by the OFT in leading evidence in support of their allegations by the use of "flagrantly leading questions" in their interviews with witnesses.¹ In *AH Willis & Sons Ltd*, the CAT criticised the OFT for seeking to rely upon material contained in notes and transcripts of these interviews as evidence against a third party.² And in

¹ *GMI Construction Holdings plc v. OFT* [2011] CAT 12 (27 April 2011) at paras 54-55

"54. Read generously, Mr Nelson's answers might - just about - qualify as a statement that the reference to GMI was indeed an *aide-memoire* to Mr Nelson that GMI had provided cover in respect of this tender, albeit that those answers were made in response to flagrantly leading questions.

55. Given that Mr Nelson had no specific recollection of the tender for the Lancaster Park Contract, we do not believe that he can have had any recollection of what he meant or thought when he wrote "GMI" on the Irwins Tender Form. This, we suspect, explains the vagueness - or, as GMI would have it, meaninglessness - of his response "There you go, yeah". In the light of what Mr Nelson is recorded as saying in the OFT Nelson Interview 2, pages 22ff (see paragraph 48 above), the notation "GMI" might be just as likely to be Mr Nelson noting his view of who was bound to win the tender, or whom he might consider approaching for a cover, or both."

² *AH Willis & Sons Ltd v OFT* [2011] CAT 13 (27 April 2011) at paras 66-8:

"66. [D]ifficult and important questions arise in relation to the "evidence" adduced by the OFT. We have already noted that the transcript of Mr Russ' interview with the OFT does not appear to have been satisfactorily reviewed by and attested to by Mr Russ (see paragraph 54 above). Certainly he has not endorsed the transcript with a statement of truth or even signed it.

67. More fundamentally, we have considerable doubts as to whether material contained in transcripts of interview - even if reviewed and attested - is a satisfactory means of evidencing alleged infringements in cases of this kind. It is one thing to use a transcript of interview as evidence of relevant admissions by the interviewee; it is quite another thing to attempt to use it as evidence against

*Durkan Holdings Limited and others v OFT*³ the CAT was critical of the OFT for failing to prepare and lodge signed witness statements to allow for proper cross-examination of the evidence contained therein.

a third party. In paragraph 81 of the Tribunal's decision in *Argos Limited v The Office of Fair Trading* [2003] CAT 16, the Tribunal observed that "notes of interview are not, in our view, satisfactory substitutes for witness statements". We agree. A witness statement will set out the relevant facts, will be attested to by the witness by way of a statement of truth, and will enable the witness to be exposed to cross-examination should the accuracy and/or truth of those facts be disputed. This is not to say that relevant interview transcripts cannot or should not be put before the Tribunal in support of a witness statement. It is simply that they are not a substitute for it.

68. We do not therefore agree with the suggestion in numbered paragraph 2 of the OFT's letter to the Tribunal dated 6 August 2010, and referenced to *inter alia* this appeal, that the preparation of a witness statement in circumstances such as the present would be "a complete triumph of form over substance". Where crucial facts are disputed it may in certain cases, and depending upon what if any other evidence is available, be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have to turn on the burden of proof. It is therefore all the more important from the OFT's perspective that there should be probative evidence before the Tribunal. Thus, even if the OFT has not obtained witness statements in order to fortify its own decision-making process, once it becomes clear that there is a material dispute as to the facts on which its decision was based, the OFT should consider to what extent such statements are necessary or desirable in order to support those facts in an appeal, subject always to the provisions of rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372). It is, of course, not normally the role of the Tribunal to decide whether and if so which witnesses should be deposed or called to give evidence by any party."

³ *Durkan Holdings Limited and others v OFT* [2011] CAT 6 (22 March 2011) at 108-110:

"108. At the hearing before us, four witnesses from the Appellants provided statements and were tendered for cross-examination on this issue. But there was no witness statement provided by the OFT and therefore no cross-examination to test the OFT's version of events. The evidence before us comprised the Claremont Close Report, the transcript of Mr Goodbun's interview in 2007 and the account in the Decision of the information given to the OFT by Mansell's solicitors about how cover pricing worked in general. The OFT's decision not to lodge witness statements in support of its case caused us some concern, as we made clear at the outset of the hearing in this appeal. The OFT was asking us to uphold a finding of infringement – for which it had imposed a fine of over £3 million – on the basis of a transcript of an interview with a person who was apparently not the person who had written the notes on the key contemporaneous document. Mr Beard argued that criticism of the OFT's approach to proving its case would be "a complete triumph of form over substance" and that there was no real difference between the transcript we were shown and a witness statement setting out the same facts supported by a statement of truth.

109. On 6 August 2010, after the hearings in all 25 appeals against the Decision had been completed, the OFT wrote to the Tribunal summarising its position and explaining how the transcripts had been prepared and checked for accuracy. This letter, however, misses the point. No one is suggesting that Mr Goodbun was lying in his interview or that the transcript does not fully and properly record what he said. The significance of the failure to produce a witness statement is two-fold. First, Mr Goodbun has not been pressed about any of his answers – his comments in the interview in 2007 appear to have been simply taken at face value throughout the investigation and this appeal. If, once the appeal had been lodged, the OFT had gone back to Mr Goodbun to take a witness statement they may well have filled in many of the gaps that currently exist in the account of what happened. Faced with only the transcript of the interview, we do not know, for example, whether Mr Goodbun's evidence was based on what Mr Hart had told him had actually happened or whether he was simply inferring from the marks on the document the same "facts" as any person familiar with what went on generally in the industry could infer. We do not know what Mr Goodbun's reaction would have been had he been told that Mr Sharpe vehemently denied that he had given a cover price. Mr Goodbun was not asked whether there might be an alternative explanation for the marks on the Report.

1.3 Interestingly the CAT ultimately analysed these procedural failings as amounting, in some cases, to a failure on the part of the OFT to meet the burden of proof that rests on it to show that these infringements were in fact committed by the parties so charged, rather than explicitly as fundamental breaches of the parties' common law rights to procedural fairness⁴ or Convention right under Article 6 ECHR to a fair trial.⁵

Retrospective changes to methods of calculating penalties

1.4 It was also argued by some appellants that the methodology used by the OFT to determine the penalty to be imposed on those the OFT found to be guilty of breaches of competition law was Convention incompatible. Thus it was said in *Kier* that the OFT's application of a MDT which was not specifically provided for in their Penalty Guidance "offended the principle of legal certainty as enshrined in Article 1 of Protocol 1 ECHR"⁶.

110. The second disadvantage of relying on an interview transcript is that Mr Goodbun's evidence has not been tested by cross-examination, a process which might also have generated a better understanding of the strength of the case against Durkan Limited. We reject the OFT's suggestion, made both at the hearing and in their letter of 6 August 2010, that because it was open to Durkan Limited to call Mr Goodbun as a witness for the purposes of cross-examining him and they decided not to do so, that Durkan is somehow restricted in the extent to which it can challenge what is recorded in the transcript of his interview. It is not the task of the Appellant to supplement the evidence relied on by the OFT. Similarly, we reject the suggestion that because the Tribunal did not exercise its powers on its own initiative to call Mr Goodbun, his "evidence" is somehow immune from criticism."

⁴ See, by contrast, *Crest Nicholson Plc v Office of Fair Trading* [2009] EWHC 1875 (Admin) per Cranston J at para 47

"47 If enforcement authorities have wide discretion in conducting an investigation, it hardly needs to be said that they must still act with procedural fairness. It is well established that the constraints of natural justice apply to preliminary steps in an investigation, which in themselves may not involve legal consequences, but which may lead to acts or decisions which do."

⁵ The placing (and standard) of the required burden of proof may also be analysed and in fundamental rights terms. See *Argos Ltd and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at para 70:

"70 [Counsel for the appellants] also submitted that, if there were any doubt as to a finding of fact made by the Tribunal, JJB is entitled to the benefit of that doubt, on general principles and particularly having regard to the status of the proceedings as being criminal in nature for the purposes of Article 6 of the ECHR. As a matter of general principle that is a fair point."

⁶ This argument is recorded by the CAT in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 at §146. In *Jokela v Finland* (2003) 37 EHRR 26, the European Court of Human Rights set out its overall approach to the question of justification for the interference in property rights at [45]-[49]. At [45] the Court said:

"Although [A1/P1] contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied a comprehensive view must be taken of the applicable procedures."

1.5 And in *Tomlinson* it was argued that the change in the OFT's practice from calculating the starting point for penalties on the basis of turnover in the year prior to the end of the infringement to calculating it on the basis of turnover in the year prior to the decision were incompatible with the principles set out in Article 7 ECHR.⁷

1.6 In the event, these ECHR based arguments were rejected as ill-founded in law by the various CATs before which they were argued⁸ and so they played no part in the ultimate decisions.⁹

⁷ This argument is recorded at *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 (24 March 2011) at §83(iii) and in *Barrett Estate Services v. OFT* [2011] CAT 9 (17 April 2011) at para 17

⁸ See *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 (24 March 2011) at §§108-110:

“108. Seddon and Tomlinson sought to distinguish *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38, [2004] 1 WLR 2278 by arguing that the maximum applicable penalty with which the fines imposed on them had to be compared was not the statutory cap under the Original Turnover Order but rather the maximum fine that could have properly been imposed under the earlier Guidance for this particular infringement. We do not consider that is a correct reading of *Uttley*. The question whether the offences committed by Uttley could at the date of his conviction properly have resulted in a sentence of life imprisonment was not considered by their Lordships as relevant to the question whether life imprisonment should be treated as the maximum “applicable” in that case. This was also clear from the judgment of the European Court of Human Rights to which Baroness Hale and Lord Rodger referred: *Coëme v Belgium* Application nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, at paragraph 145:

‘The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.’

109. For this purpose, therefore, the maximum “applicable” fine for infringements occurring before 1 May 2004 was the statutory cap imposed by the Original Turnover Order and not the maximum that could properly have been imposed by the OFT in accordance with the Guidance in force at the time. This is the case even though the OFT was under a statutory obligation to have regard to the Guidance extant at the time of imposing the penalty.

110. In the Decision the OFT made clear that in respect of infringements committed before 1 May 2004, it accepted that the penalty it proposed to impose must not exceed the maximum penalty applicable prior to that date, namely 10 per cent of the turnover in the United Kingdom of the undertaking in the Infringement Year (Decision, VI.370/1711). That was the correct approach and we reject the challenge based on article 7 ECHR.”

⁹ See *Barrett Estate Services and others v. OFT* [2011] CAT 9 (17 April 2011) at para 22

“We agree with and adopt the Tribunal’s conclusion at paragraphs 109 to 110 of the Tomlinson Judgment [*G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7] that Article 7(1) ECHR does not preclude the imposition of a higher penalty by the OFT than could have been imposed at the time of the infringement, provided that the maximum penalty (the statutory cap imposed by the Turnover Order) that applied at the time of the infringement is not exceeded.

Parallels with criminal procedures and penalties ?

1.7 In *Tomlinson* the CAT also rejected the submission that penalties imposed for breach of the Chapter I prohibition were flawed because they were out of proportion to breaches of health and safety law and the offence of corporate manslaughter, holding that such comparisons were

“too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act”

and that

“any search for some overarching principles of fairness or reasonableness across all regimes which impose financial penalties would be an unproductive search [since] ... there is no scheme of rationality which is able to bring the fining regime under the 1998 Act into line with the universe of criminal penalties and imperatives for justice in diverse fields of criminal application.”¹⁰

¹⁰ *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 (24 March 2011) at §§136-9:

“136. Some of the Present Appellants drew comparisons with fines set for other kinds of statutory infringements which had led to consequences much more serious than those being considered in the current case. Sol in particular referred to the Court of Appeal’s judgment in *R v Balfour Beatty Rail Infrastructure Services* [2006] EWCA Crim 1586, [2007] 1 Cr App R (S) 65. That case arose from the Hatfield rail disaster in 2000 in which 102 passengers were injured and four lost their lives. Balfour Beatty was convicted of serious breaches of section 3 of the Health and Safety at Work Act 1974 and fined £7.5 million. Its group turnover in the year in which it was prosecuted was just under £5 billion and its pre-tax profit was £141 million. Seddon says that this is “an appropriate cross-check” for the Tribunal in considering the justice of the penalties imposed in this Decision.

137. Seddon also referred to the *Definitive Guideline published by the Sentencing Guidelines Council for Corporate Manslaughter & Health and Safety Offences Causing Death*. Those Guidelines indicate that fines are likely to range between £500,000 and “millions of pounds” for corporate manslaughter and between £100,000 and “hundreds of thousands of pounds or more” for health and safety offences resulting in death. Seddon argue that the fine imposed on it of £1,516,646 appears to be much higher than the fines contemplated by the Guideline.

138. We consider that these comparators are too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act. The 1998 Act does not require the OFT to consider fines in other statutory contexts when deciding how to exercise its discretion under section 36. The statutory maximum fine for a competition infringement is set in section 36(8), apparently without regard to fines in those other contexts. The Guidance which the OFT is required to publish, and which has been approved by the Secretary of State, does not suggest that the OFT must or should have regard to fines for corporate manslaughter or for breaches of the Health and Safety at Work Act 1974 as relevant pointers when setting the fines for cartel infringements. We accept the OFT’s submissions that those other regimes are subject to different policy imperatives from those which apply here.

139. We also agree with the OFT that any search for some overarching principles of fairness or reasonableness across all regimes which impose financial penalties would be an unproductive search. As the OFT put it, there is no scheme of rationality which is able to bring the fining regime under the 1998 Act into line with the universe of criminal penalties and imperatives for justice in diverse fields of criminal application. It is true that certain factors, such as the relative culpability of the behaviour may be relevant in all such contexts. But that does not suggest to us that the corporate manslaughter fines

1.8 This refusal by the CAT to have regard to regard to penalties imposed on companies in criminal contexts – at least as a comparator or cross-check – is perhaps surprising given that the criminal law may be applied in all its vigour against individuals found to be guilty of a “Cartel Offence” contrary to Section 188 of the Enterprise Act 2002 if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, certain hard-core anti-competitive arrangements (including bid-rigging, market sharing and price fixing agreements). An individual may be found guilty of the Cartel Offence even where he undertook the relevant acts on behalf of a body corporate or in the course of his employment. If convicted of the Cartel Offence on indictment the penalties include imprisonment for a term not exceeding five years or to a fine (which is not subject to a statutory limit). And if summarily convicted of the Cartel Offence, the penalties include imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum (presently £5,000 in England and Wales; £10,000 in Scotland and £5,000 in Northern Ireland).¹¹

1.9 In any event one is left with the uncomfortable result that breaches of competition law resulting in the imposition of penalties intended to “reflect the seriousness of the infringement, and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices”¹² are dealt with more punitively than corporate criminal offences, including those offences resulting in the deaths of individuals.

should operate in some way as a ceiling or benchmark for the fines that are imposed under the 1998 Act.”

¹¹ See section 190(1)(b) Enterprise Act 2002, as read with Schedule 1 Interpretation Act 1978 (as amended) Magistrates’ Courts Act 1980 s.32 (as amended); s.225(8) Criminal Procedure (Scotland) Act 1995 (as amended); Article 4 Fines and Penalties (Northern Ireland) Order 1984 (as amended).

¹² OFT 423 §1.4. See too *Kier Group PLC and others v Office of Fair Trading* [2011] CAT 3 at §§140, 175, 202, 231

2. RELEVANCE OF FUNDAMENTAL RIGHTS TO COMPETITION LAW ?

2.1 In *Barrett Estate Services and others* the CAT expressly noted that for the avoidance of doubt, the OFT's response to the Convention rights points raised against them "was made without prejudice to the question of whether the imposition of a penalty for collusive tendering is a criminal sanction/penalty for the purposes of Articles 6 and 7 ECHR (which the OFT did not concede)." ¹³

2.2 This coyness over the question of the applicability of ECHR considerations to OFT penalty decisions seems slightly odd given that the CAT has previously expressly relied upon Article 6 ECHR in determining that it had full jurisdiction to "revoke, or vary the amount of, a penalty ... if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance". ¹⁴

2.3 But it may be that the reluctance on the part of the OFT – and of the CAT – fully to commit to a Convention (or other fundamental) rights based analysis of competition law reflects the ambivalence at an EU level, both as regards practice of the Commission and in the competition law case law of the CJEU. Section 60 of the Competition Act 1998 seeks to ensure that UK competition law is applied in the UK in a manner which is consistent with their equivalent provisions in EU competition law. Courts in the UK applying the provisions of the 1998 Act to the domestic UK market must therefore have regard to any relevant decision or statement of the Commission, and apply the principles laid down by the Treaty and by the CJEU, and any relevant decision of that Court, in determining any corresponding question arising in EU competition law. The problem is that the CJEU's case law on fundamental rights and competition law issues is less than satisfactory.

¹³ *Barrett Estate Services and others v. OFT* [2011] CAT 9 (17 April 2011) at footnote 8

¹⁴ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at para 499:
"... [T]he Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment."

This passage was quoted with approval by the Court of Appeal in *Argos Ltd and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at para 162.

EU Competition law enforcement procedures: criminal or administrative?

2.4 Article 6(1) ECHR has been found by the European Court of Human Rights to include an implicit right of access to a court,¹⁵ and that the enforcement of a court's judgment has been held to be an integral part of the "trial" for the purposes of Article 6(1) ECHR.¹⁶ In *Senator Lines GmbH v 15 Member States of the European Union*,¹⁷ a challenge was brought before the European Court of Human Rights as to the compatibility of the right to a fair trial under Art 6(1) ECHR with the right of the European Commission to impose such fines under EU law. This challenge was supported by the Council of the Bars and Law Societies of the European Union (CCBE), the European Company Lawyers Association (ECLA), the *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH) and the International Commission of Jurists (ICJ). In the event, the Grand Chamber of the ECtHR did not have to decide on the merits of the challenge as, by the time it came to consider matters, the applicant could no longer claim victim status, noting:

'The applicant company claimed that, if the fine imposed on it were enforced before the proceedings had been judicially determined, then its access to court would have been denied. In so doing, the applicant company was relying, in substance, on *Segi and Gestoras Pro-Amnistia and Others v 15 EU Member States* [2002] ECHR 6422/02, 9916/02 (Third Section, 23 May 2002), namely that it had produced reasonable and convincing evidence of the likelihood that a violation affecting it would occur. As events transpired, the fine imposed on the applicant company was neither paid nor enforced, and the applicant company's challenge to the fine (along with the related challenge by other companies) was not merely heard, but ended with the final quashing of the fine. Accordingly, the facts of the present case were never such as to permit the applicant company to claim to be a victim of a violation of its Convention rights. By the time of the "final decision" in the case – the judgment of 30 September 2003 of the Court of First Instances – it was clear that the applicant company could not produce "reasonable and convincing" evidence of the likelihood that a violation affecting it would occur, because on that date it was certain that there was no justification for the applicant company's fear of the fine being enforced before the Court of First Instance hearing.'

2.5 The Belgian undertaking Solvay which was accused, among others, by the Commission of abusing its dominant position on the market for soda ash from 1983 to 1990 has now simultaneously raised parallel proceedings against the Commission before the CJEU¹⁸

¹⁵ *Golder v United Kingdom* (1979-80) 1 EHRR 524.

¹⁶ See *Scordino v Italy (No 1)* (2007) 45 EHRR 7 (Grand Chamber) at para 196, referring to, among other cases, *Hornsby v Greece* (1997) 24 EHRR 250.

¹⁷ *Senator Lines GmbH v 15 Member States of the European Union* (2004) 39 EHRR SE3

¹⁸ Case C-109/10 P *Solvay SA v European Commission* [2011] ECR I-nyr

and against all 27 Member States of the European Union before the ECtHR¹⁹ relying on the provisions of Article 6 ECHR in the context of an EU competition law matter to complain that it was not granted due access to the file and that, as a result, its rights of defence have been infringed. Solvay also claims that the administrative and judicial proceedings in this case were excessively long. This, it contends, constitutes an infringement of its fundamental right under Article 6 ECHR to have its case adjudicated upon within a reasonable time.

2.6 It is clear, then, that the issue of the compatibility with fundamental rights of the current investigation and enforcement powers in relation to EU competition law is a matter of concern within the EU institutions. One particular matter which has exercised the CJEU is whether or not procedures before the Commission in respect of its investigation and prosecution of alleged breaches of the requirements of EU competition law are to be classified as “merely administrative”²⁰ or as “essentially criminal”²¹ in nature. Some of the implications of this classification are spelt out in the submissions for the applicant before the Court of First Instances in the case of *Jungbunzlauer v Commission*:

“Jungbunzlauer observes that the Court has already recognised that the fines provided for in Article 15 of Regulation No 17 are not in the nature of periodic penalty payments, but that their object is to suppress illegal activities and to prevent any repetition (Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, paragraphs 172 and 173) which, according to Jungbunzlauer, is consistent with the broad interpretation of the concept of criminal charge given by the European Court of Human Rights.

...

The applicant considers that this conclusion is not affected by the words used in Article 15(4) of Regulation No 17, which states that decisions imposing fines are not ‘of a criminal law nature’, because, according to the case-law of the European Court of Human Rights, the decisive factor is not the description of a legal act, but its actual content.

...

Seventhly, Jungbunzlauer observes that in an article published in 1993, a Commission official admitted that the procedure capable of leading to fines under Regulation No 17 ‘[seems] to be far from what is usually described as due process’.²²

¹⁹ Solvay’s application to the ECtHR was made on 26 February 2010. See the Opinion of Advocate General Kokott of 14 April 2011 in Case C-109/10 P *Solvay SA v European Commission* [2011] ECR I-nyr at para 6

²⁰ See, eg, Joined Cases C-204/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123 at para 200; and Joined Cases T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491 paras 717 and 718.

²¹ See Case C-199/92 *Hüls v Commission* [1999] ECR I-4287, holding at para 150 that the ‘fundamental rights applicable to criminal law ... apply to proceedings culminating in competition law fines’.

²² Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435 at paras 46–47, 61

2.7 The classification of competition law enforcement proceedings as administrative or (quasi-) criminal certainly has implications for the degree to which the Commission procedures would be subject to judicial challenge. The CJEU has said that such principles as *nullum crimen* or *nulla poena sine lege* should not necessarily have the same scope in “administrative proceedings” as they do in situations covered by criminal law ‘in the strict sense’.²³ The CJEU has also asserted that “the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted”.²⁴

2.8 One commentator has observed in defence of the current EU competition law regime as follows:

“Many of the claims of incompatibility of EU antitrust procedures with the Convention appear to be based on reasoning along the following lines: *Primo*, EU antitrust enforcement is ‘criminal’ within the meaning of the Convention. *Secundo*, some judgment of the European Court of Human Rights appears to require in some criminal case a procedural right or guarantee which does not appear to be available in EU antitrust proceedings. *Ergo*, EU antitrust proceedings are incompatible with the Convention.

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

‘While the right to a fair trial under Article 6 [ECHR] is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.’²⁵

Particularly relevant in the context of EU antitrust procedures are the distinction between the hard core of criminal law²⁶ and other areas of the law which are only criminal within the

²³ See Joined Cases C-189/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paras 215–23.

²⁴ See to that effect, Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, para 97. See too Case T-276/04 *Compagnie maritime belge SA v Commission* [2008] ECR II-1277 at para 66.

²⁵ Judgment of the European Court of Human Rights (Grand Chamber) of 29 June 2007 in Case of *O’Halloran and Francis v United Kingdom* (2008) 46 EHRR 21 paragraph 53. [This case concerned a citizen’s right to remain silent and the privilege against self-incrimination in criminal trials concerning road traffic offences. These rights are not expressly provided for within article 6 ECHR but have been imp[lied into the notion of fair trial by the Strasbourg Court on the basis of ‘generally recognised international standards’.]

²⁶ See *Goldmann and Szénászky v. Hungary* [2010] 17604/05 (Second Section, 30 November 2010) at paras 19–20:

“19. [I]n the case of *Fejde v. Sweden* (29 October 1991, Series A no. 212-C, § 33), no violation of the applicant’s defence rights was found – although no oral hearing had taken place before the appellate court – because of the minor character of the offence with which the applicant had been charged and the prohibition against increasing his sentence on appeal.

20. The Court is however convinced that the present application does not concern the exception set out in the case of *Fejde* and that the general rule obliging the second-instance courts to hold a hearing must be applied. This consideration holds true even for the retrial in question, since the merits of the case were again embarked on and new evidence was being taken. The Court takes this view notably because the charges

Convention's wider meaning of 'criminal', and the distinction between natural persons and companies.'²⁷

2.9 The consistent jurisprudence of the European Court of Human Rights since its Grand Chamber decision in *Ferrazzini v Italy*²⁸ has been that tax matters form part of the “hard core of public-authority prerogatives”, with the public nature of the relationship between the taxpayer and the community remaining predominant, and that, accordingly, tax disputes fall outside the scope of civil rights and obligations for the purposes of the civil limb of Article 6(1) ECHR, despite the pecuniary effects they necessarily produce for the taxpayer. But there is certainly scope to argue that the decisions of the CJEU to date on this issue have paid insufficient regard for the developing line of jurisprudence from the imposition of tax surcharges,²⁹ or fiscal penalties or fines associated with late payment of tax,³⁰ are to be taken as imposing what are to be regarded as, within the “autonomous

against the applicants – aggravated embezzlement – indisputably belong to the hard core of criminal law. Furthermore, what was at stake for the applicants was imprisonment, and they were actually sentenced to a suspended prison term, which obviously carried a significant degree of stigma (see, *a contrario*, *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIII).”

²⁷ 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: Law and Economics Review*.

²⁸ *Ferrazzini v Italy* (2002) 34 EHRR 45 at para 29.

²⁹ See *Västberga Taxi Aktiebolag and Vulic v Sweden* [2002] ECHR 36985/97 (First Section, 23 July 2002) at paras 76–82.

³⁰ *Impar Ltd v Lithuania* [2010] ECHR 13102/04 (Second Section, 5 January 2010) at paras 21-2:

“21. The present case concerns tax litigation in which the applicant company was found, following fraudulent book-keeping, liable to pay a fine in the amount of LTL 808,929 (approximately EUR 231,122). The Court has consistently held that, generally, tax disputes fall outside the scope of “civil rights and obligations” under Article 6 of the Convention, despite the pecuniary effects which they necessarily produce for the taxpayer (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII). The facts of the instant case do not give reason to review that conclusion.

22. However, having considered the circumstances of the present case, the Court finds that the general character of the legal provisions imposing fines for persistent tax law violations, the purpose of the penalty, which was both deterrent and punitive, as well as its severity, suffice to show that, for the purposes of Article 6 of the Convention, the applicant company was charged with a criminal offence (see *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, §§ 76-82, 23 July 2002, and *Jussila v. Finland* [GC], no. 73053/01, §§ 30-38, ECHR 2006-XIII). It follows, that the Government's plea that the complaint is incompatible *ratione materiae* must be dismissed....

33. [U]nder Article 1 of Protocol No. 1 to the Convention the applicant company argued that the fine of LTL 808,929 (approximately EUR 231,122) which the tax authorities imposed upon it amounted to a breach of its property rights.

34. The Court recalls that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see *Ferrazzini*, cited above, § 29). The Court has likewise held that the Contracting States must be free to empower tax authorities to impose fines even in large amounts (see, *mutatis mutandis*, *Bendenoun v. France*, 24 February 1994, § 46, Series A no. 284). Although the fine imposed

meaning of Article 6 ECHR”, criminal penalties and as attracting the guarantees of Article 6(1) ECHR with its reference to determination of any criminal charge.³¹

2.10 Thus in *Jussila v Finland*,³² the Grand Chamber of the Strasbourg Court, in effect, overturned earlier decisions of the European Commission on Human Rights³³ and unequivocally confirmed that, while a claim to tax itself continues to fall outside the ambit of Article 6(1) ECHR, automatic surcharges of even minimal amounts will constitute for Convention purposes a criminal penalty, and so the proceedings resulting in the imposition of such penalties or surcharges will attract the fairness protections set out in Article 6(1) ECHR³⁴ (though not necessarily the full rigour of the specific protections set out in Article 6(2) and (3) ECHR). As the Strasbourg Court has observed:

[W]hile there is no doubt as to the importance of tax to the effective functioning of the State, it is not convinced that removing procedural safeguards in the imposition of punitive penalties

on the applicant company could be considered heavy, no convincing reasons have been put forward to the Court to explain why it cannot be regarded as compatible with the above-mentioned legitimate State interests. Consequently, this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.”

³¹ See *Paykar Yev Haghtanak Ltd v. Armenia* [2007] ECHR 21638/03(Third Section, 20 December 2007) at para 32:

“The Court reiterates at the outset that tax disputes fall outside the scope of civil rights and obligations under Article 6, despite the pecuniary effects which they necessarily produce for the taxpayer (see, among other authorities, *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII). However, when such proceedings involve the imposition of surcharges or fines, then they may, in certain circumstances, attract the guarantees of Article 6 under its ‘criminal’ head...”

³² *Jussila v Finland* (2007) 45 EHRR 39 (Grand Chamber) at para 43:

“[T]he autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk v. Germany* (1984) 6 EHRR 409), prison disciplinary proceedings (*Campbell and Fell v. The United Kingdom*, (1985) 7 EHRR 165), customs law (*Salabiaku v. France*(1991) 13 EHRR 379), competition law (*Société Stenuit v. France* (1992) 14 EHRR 509) and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France* (2002) 32 EHRR 47). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency”.

³³ See, eg, *Smith v United Kingdom*. (1996) 21 EHRR CD 74, holding that the fact that late payment of the local government community charge, or poll tax, attracted an automatic 10% surcharge did not attract the protection of Art 6 ECHR; and *ANM & Co v United Kingdom* [1995] ECommHR 25602/94 (First Section, 29 November 1995), holding that the use of a summary warrant procedure with no possibility of a court hearing or contradictor to obtain an decree for the enforcement of unpaid local authority business rate claims, did not fall within the ambit of Art 6 ECHR.

³⁴ See to like effect *Janosevic v Sweden* (2004) 38 EHRR 22, where the Court noted, in the context of automatic surcharges for arrears in tax payments:

“[I]n employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim to be achieved.”

in the sphere of taxation is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention..... Furthermore, the tax surcharges in the present case were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. Without more, the Court considers that this alone establishes the criminal nature of the offence Hence, Article 6 applies under its criminal head.³⁵

2.10 By the same token, and notwithstanding the importance of EU anti-trust law for the functioning of the EU, it is not clear that the removal of - or failure to make express provision for - adequate procedural safeguards for undertakings subject to investigation by the Commission for alleged breaches of the law (and, if found guilty by the Commission, liable to the imposition of substantial financial penalties) can be thought to be consonant with the spirit and purpose of the ECHR.³⁶ Certainly in *Société Stenuit v. France*³⁷ the European Human Rights Commission was unequivocal in finding that the provisions of Article 6(1) in its criminal limb applied to the decision of the French Minister acting under national competition law to impose a fine for breach of national competition law and amounted to the “determination of a criminal charge”. Accordingly, the applicant was entitled to a fair hearing before an impartial tribunal, and the failure to provide such a hearing was a violation of Article 6(1) ECHR.

2.11 More recently Advocate General Sharpston has conceded as follows:

“[T]he procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC [now Article 101(1) TFEU] falls under the ‘criminal head’ of Article 6 ECHR as progressively defined by the European Court of Human Rights. The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.”³⁸

³⁵ *Lajos Kovacs v Hungary* [2008] ECHR 8174/05 (Second Section, 17 July 2008) at paras 14-15 (footnotes omitted).

³⁶ See also *Dubus S.A. v. France* [2009] ECHR 5242/04 (Fifth Section, 11 June 2009) where the Strasbourg court held unanimously that there had been a violation of Article 6(1) ECHR right to a fair trial in relation to professional disciplinary proceedings which had been brought by the Banking Commission against the applicant, an investment company. The court based its finding on the fact that there was no clear distinction between the functions of prosecution, investigation and adjudication of the Banking Commission, the supervisory authority chaired by the Governor of the Bank of France which was responsible for credit and investment establishments operating out of France.

³⁷ *Société Stenuit v. France* (1992) 14 EHRR 509

³⁸ Opinion of Advocate General Sharpston of 10 February 2011 in Case C-272/09 P *KME Germany AG, formerly KM Europa Metal AG v. Commission* [2011] ECR I-nyr

2.12 The decision of the CJEU in this case was awaited at the time of writing. It remains to be seen as to whether or not Advocate General Sharpston analysis and concession will be followed by the CJEU.

Administrative Penalties (“Fines”) for breach of EU competition law

2.13 The Court of Justice has consistently held that the principle of legality is a corollary to the principle of legal certainty. The principle of legality in EU law requires in particular that where an EU rule imposes or permits the imposition of penalties, that rule must be clear and precise, so that the persons concerned may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.³⁹ The principle applies not only to provisions establishing the elements which constitute an offence, but also to those specifying the consequences arising from an offence.⁴⁰ And this principle must be observed not only in relation to provisions of a criminal nature but also to specific administrative instruments, for example in the enforcement of EU competition law, whereby such “administrative penalties” may be imposed.⁴¹

2.14 The Commission’s previous decision-making practice is not formally binding as such on the Commission when it determines the amount of a fine.⁴² But in setting such “administrative penalties” pursuant to Regulation 1/2003, the Commission is bound by the general principles of law – particularly the principle of equal treatment – in any determination as to the criteria and the method of calculation to be used. Thus, in setting fines, the Commission cannot lawfully treat properly comparable situations differently or different situations in the same way, unless such treatment is objectively justified.⁴³ With a view to transparency and to increase legal certainty for the undertakings concerned, the Commission has also published guidelines setting out the calculation method which it imposes on itself in each particular case. Further, in any decision imposing a fine the

³⁹ See, to that effect, Case 169/80 *Gondrand* [1981] ECR 1931, para 17; and Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, para 27.

⁴⁰ See, to that effect, Case C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, paras 22 and 25.

⁴¹ See Case 137/85 *Maizena* [1987] ECR 4587, paras 14 and 15.

⁴² See, to that effect, Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, para 234; and Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, para 254.

⁴³ See Case 106/83 *Sermide* [1984] ECR 4209, para 28; and Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, para 309.

Commission is obliged – in accordance with Article 296(2) TFEU – to state the reasons for its decision, particularly with regard to the amount of the fine and the method of calculation. The statement of reasons must show the Commission’s reasoning clearly and unequivocally, so that those concerned can know the justification for the measure taken in order to decide whether it would be expedient to refer the matter to the CJEU and allow that that Court properly to exercise its power of judicial review.⁴⁴

2.15 The Commission further refined and elaborated its fining policy in its 2006 Fining Guidelines.⁴⁵ The Grand Chamber of the Court of Justice has made the following observations in relation to the then applicable Commission Guidelines⁴⁶ on its methods for fixing fines:

209. [A]lthough those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures (see Case C-171/00 P *Libéros v Commission* [2002] ECR I-451, paragraph 35).

210. That case-law applies *a fortiori* to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.

211. In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain

⁴⁴ See Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, para 91; and Case C-367/95 P *Commission v Sytraval and another* [1998] ECR I-1718.

⁴⁵ See *Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C210/2. In the UK, the Office of Fair Trading has also issued various circulars giving guidance on its approach to the enforcement of competition law within the UK, including as to the appropriate amount of a penalty in the event of a finding of a breach.

⁴⁶ In 1998 the Commission issued *Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty* [1998] OJ C9/3, intended to “ensure the transparency and impartiality of the Commission’s decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover”. These Guidelines were meant to allow all parties concerned to understand that the Commission was following ‘a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules’. According to s 1 of the Guidelines, “[that] basic amount of the fine will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17”. Under s 2 of the Guidelines, the basic amount will be increased where there are aggravating circumstances such as, for example, repeated infringement of the same type by the same undertaking or undertakings. According to s 3 of the Guidelines, the basic amount will be reduced where there are specific attenuating circumstances.

conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects ...

213. [A]lthough the Guidelines do not constitute the legal basis of the contested decision, they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings.⁴⁷

2.16 The CJEU has also held – specifically within the context of EU competition law enforcement – that it is a fundamental right not to not to have penalties applied which are more punitive than those which might reasonably have been expected to have been applied at the time of the offending conduct.⁴⁸

2.17 This is now reflected in the terms of Article 49(1) of the EU Charter of Fundamental Rights which states in relation to criminal offences that “nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed [and] if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.” But, of course, the EU institutions deny that the levelling of fines or administrative charges) in competition law cases involves the imposition of a penalty in respect of a criminal offence and so the direct applicability of this Charter provision is questionable.

2.18 The CJEU has held that the principle of *ne bis in idem* – that is to say, the right not to be tried or punished twice for the same offence⁴⁹ – cannot be prayed in aid against EU

⁴⁷ Joined Cases C-189/02 P etc *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paras 209–11 and 213.

⁴⁸ Joined Cases C-189/02 P etc *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425 (Grand Chamber). See also Joined Cases T-259/02 to T-264/02 & T-271/02 *Raiffeisen Zentralbank Österreich AG v Commission* [2006] ECR II-5169 at paras 217–18:

“Erste takes exception to the method followed in calculating the fines on the ground that the Commission, by applying guidelines adopted after the cessation of the infringement and by having again made its practice more stringent during autumn 2001, breached the principle of non-retroactivity upheld by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 49 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (*OJ* 2000 C 364, p 1). ... As held by the Court in its judgment in Joined Cases C-189/02 P etc *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425 paragraphs 202 to 232, that plea must be rejected, given that the Guidelines and, in particular, the new method of calculating fines which they incorporate, even if it is accepted they had an aggravating effect on the level of fines imposed, were reasonably foreseeable by undertakings such as the applicants when the infringements in question were committed.”

⁴⁹ See now EU Charter of Fundamental Rights, Article 50:

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

competition law infringement proceedings where the earlier proceedings relied upon were taken by competition law enforcement agencies of non-EU Member States in respect of breaches of the competition law requirements of those non-EU jurisdictions.⁵⁰

2.19 The EU principle of effectiveness requires, for instance, that the penalties imposed by (EU and national) competition authorities for breach of EU competition law are of a sufficient level to be effective.⁵¹ Article 49(3) of the Charter of Fundamental Rights might be thought in pulling in the other direction in providing that “the severity of penalties must not be disproportionate to the criminal offence”, but again this may not be directly prayed in aid in an EU law context so long as the contention is maintained that fines in respect of competition law are not to be regarded as the imposition of penalties for criminal offence.

3. CONCLUSION

3.1 As has been noted:

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable but in fact essential⁵²

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

⁵⁰ Thus in Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, paras 50 to 63, and Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paras 26 to 39, the Court of Justice rejected the argument that sanctions imposed in a non-Member State in the sphere of competition law must be taken into consideration when setting the fine.

⁵¹ See Case C-429/07 *Inspecteur van de Belastingdienst v X* [2009] ECR I-4833 at paragraph 37:

“The effectiveness of the penalties imposed by the national or [EU] competition authorities on the basis of [Article 103(2)(a) TFEU] is [...] a condition for the coherent application of [Articles 101 TFEU and 102 TFEU].”

⁵² *Handbook on European non-discrimination law* (Luxembourg: Publications Office of the European Union, 2011) a joint production of the EU’s Agency for Fundamental Rights and the European Court of Human Rights at 3. This book is described by the Agency of Fundamental Rights in their press release of 21 March 2011 as

“the first publication to present and explain the body of non-discrimination law stemming from the European Convention on Human Rights and European Union law as a single, converging legal system.”

3.2 The CJEU has, to date, been clear that EU law takes precedence over all other claims of international law.⁵³ According to a long-established line of cases from the Court of Justice, EU law is said to have precedence over agreements, such as the ECHR, concluded within the framework of the Council of Europe, certainly in so far as EU law is more favourable to individuals,⁵⁴ and in any event in all cases involving a conflict over fundamental rights guaranteed under national law, whatever the degree of protection to individuals conferred thereunder.⁵⁵ The assumption seems to have been that that the claims of EU law and the requirements of the ECHR would (could?) never be in any significant conflict.⁵⁶

3.3 But what if they do conflict ? One result of the fact that the CJEU, in the development of its fundamental rights jurisprudence, holds itself out to be a European Supreme Court, finally and authoritatively interpreting for the EU Member States the provisions of the ECHR, at least when these issues arise within a field also covered by EU law, is that the Member States of the EU are subject to two masters in fundamental rights issues: the European Court of Justice under the TEU and TFEU; and the European Court of Human Rights under the ECHR. And unless and until the EU formally accedes to the ECHR, there is, as a matter of strict law, simply no machinery for the formal resolution of

⁵³ Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. See, however, Case T-85/09 *Kadi v Commission*, 30 September, [2010] ECR II-nyr at paras 115–21:

“[C]ertain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties, and more particularly Article 177(3) EC, Articles 297 EC and 307 EC, Article 11(1) EU and Article 19(2) EU (see, also Article 3(5) TEU and Article 21(1) and (2) TEU, as well as declaration No 13 of the Conference of the Representatives of the Governments of the Member States concerning the common foreign and security policy annexed to the Treaty of Lisbon, which stresses that “the [EU] and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its members for the maintenance of international peace and security”. ... The General Court acknowledges that those criticisms are not entirely without foundation.”

⁵⁴ See Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681 *per* AG Lenz at 2690.

⁵⁵ See Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 at para 3, quoted above at para 6.04.

⁵⁶ Case C-168/91 *Konstantinidis v Stadt Altensteig Standesamt* [1993] ECR I-1191, where AG Jacobs stated at para 51 of his Opinion:

“As for the possibility of conflicting rulings on the interpretation of the Convention that has existed ever since the Court of Justice recognized that the Convention may be invoked under EU law. Such a possibility does not seem to have caused serious problems.”

divergences between the two European Courts on the proper interpretation of fundamental rights provisions.

3.4 What this means is that, in principle, the State authorities within the Council of Europe may be found by the Strasbourg Court to have breached the requirements of the ECHR even where the matter at issue comes within the sphere of EU law and the Member States have in fact no discretion or power to do other than what is required of them under EU law.⁵⁷ It would appear that in such a situation the authorities of the Member State will be damned by the Strasbourg Court if they act in accordance with EU law but in breach of Convention rights, but they will be damned by the Luxembourg Court if they act in breach of the requirements of EU law.⁵⁸

3.5 The overall result of the fundamental rights jurisprudence of the CJEU – whether or not intended by the Court of Justice – is that, from the point of view of the national courts of the Member States of EU, there are effectively two final human rights courts in Europe – one based in Luxembourg as regards matters of EU law and another based in Strasbourg as regards non-EU law matters.⁵⁹ And, as we have seen, the two courts do not always speak with the one voice. Thus while the EU remains outside the jurisdiction of the European Court of Human Rights, the claim by the CJEU that it may properly consider and apply fundamental rights principles to assess the compatibility with EU law of the action and omissions of Member States, creates problems for national courts attempting

⁵⁷ See, eg, *Matthews v United Kingdom* (1999) 28 EHRR 361, where the UK was held responsible by the Strasbourg Court for the denial of voting rights to the European Parliament to British citizens resident in Gibraltar contrary to those individuals' Convention rights under Protocol 1 Art 3 to participate in free elections, 'which will ensure the free expression of the opinion of the people in the choice of the legislature', notwithstanding that the extent of voting rights to the European Parliament was a matter for the EU institutions rather than individual Member States. And in *Cantoni v France*, 15 November, [1996] RJD 1996-V, 1614, the ECtHR held that the fact that a national legislative provision at issue was based almost word for word on an EU directive does not remove the provision from the requirements of the Convention, or the responsibility of the Contracting State to ensure that any offences imposed thereby met the standards of clarity and certainty required by Art 7 of the Convention. See, too, *Guérin Automobiles EURL v The Member States of the European Community* [2000] ECHR 51717/99 (Third Section, 4 July 2000), concerning a complaint of the failure by the European Commission to act on the applicant's complaint of a competitor's breach of EU competition law after the exhaustion of remedies before the Court of Justice (see Case 282/95P *Guérin Automobiles EURL v The Commission* [1997] ECR I-1503).

⁵⁸ See I Canor, 'Primus inter pares: who is the ultimate guardian of fundamental rights in Europe' (2000) *EL Rev* 3; and A O'Neill, "Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act" [2002] *Public Law* 724.

⁵⁹ Opinion 2/94 *Re ECHR Accession* [1996] ECR I-1759.

to apply and protect fundamental rights within their own jurisdiction in that it potentially creates two standards of fundamental rights protection – that guaranteed under the ECHR and that protected by EU law.

3.6 At the time of writing, negotiations were underway between these two European (EU and Council of Europe) institutions,⁶⁰ with a view to seeing whether and how the EU – and EU law – could be integrated within the Strasbourg system for the protection of European human rights.⁶¹ In a Joint Statement from the Presidents of the European Court of Human Rights (Judge Costa) and of the Court of Justice of the European Union (Judge Skouris) issued in late January 2011, it was suggested by the judges that it would be expedient for the contracting parties to make provision in any agreement between the EU and the Council of Europe for a 'flexible procedure' to allow for the prior involvement of the Court of Justice in all cases where an application to the Strasbourg alleges that a provision of EU law is incompatible with the ECHR. The two presiding judges seem to envisage the possibility of some kind of 'preliminary reference' down from the Strasbourg Court to the CJEU, in applications from individuals complaining of an incompatibility between EU law and the ECHR, so as to allow the CJEU to exercise an 'internal review' on the issue before the European Court of Human Rights exercises its 'external review' under the Convention.

3.7 The required European Treaty bases for the accession of the EU to the ECHR are, at least from the perspective of EU law, now in place. But while the CJEU's initial veto on EU accession to the ECHR⁶² may have been removed by these Treaty amendments, any

⁶⁰ See Council of the European Union, Doc 6855/10, 25–26 February 2010, 13; Council of the European Union, Doc 10630/10, 3–4 June 2010; European Commission, IP/10/906, 7 July 2010.

⁶¹ See T Lock, 'EU accession to the ECHR: implications for judicial review in Strasbourg' (2010) 35 *EL Rev* 777 at 778:

“The negotiations will result in an accession treaty, which will have to be ratified by all 47 members to the Convention as well as by the European Union according to the procedures set out in Article 218 TFEU. According to that provision, the Council will have to decide unanimously, having obtained the consent of the European Parliament. In addition, each Member State will have to ratify the Treaty in accordance with its national constitutional provisions, a process which may become further delayed if one or more Member States ask the ECJ for an opinion in accordance with Article 218(11) TFEU as to whether the Accession Treaty is compatible with the Treaties. Depending on the outcome of such an opinion renegotiations might become necessary.”

⁶² Opinion 2/94 *Re Accession by the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

accession Treaty to the ECHR still requires the CJEU's approval as being consistent with the requirements of EU law.⁶³ Further, the requirement of unanimity in the Council, the consent of the European Parliament and ratification by each of the Member States before such an accession agreement can be concluded creates a whole new series of potential hurdles within the EU system. Accordingly, whether the powers granted under the European Treaties are ever acted upon and an accession agreement concluded, will require serious political will and impetus from all of the Member States and the other EU institutions.

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⁶³ In its Opinion 1/91 *Re a Draft Treaty on a European Economic Area* [1991] ECR I-6079, the Court of Justice vetoed the establishment of an EEA court hierarchy to provide a system of judicial supervision over the whole EEA beyond the EU. The proposed new court structure consisted of an independent EEA Court, functionally integrated with the ECJ, and an EEA Court of First Instance. The new EEA courts were to consist of a number of judges from the ECJ and the CFI sitting together, with judges appointed from the various EFTA Member States. The Court of Justice found that such a system of judicial supervision proposed under the draft EEA Treaty was not lawful on the grounds, *inter alia*, that the proposed system of EEA courts might undermine the autonomy of the EU legal order in pursuing its own particular objectives, going so far as to claim (at paras 70–71):

“Article 238 of the EEC Treaty [now, after amendment, Art 218 TFEU] does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty [now, after amendment, Art 19(1) TEU] *and, more generally, with the very foundations of Community law*. For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.” (emphasis added).

See, to similar effect, Opinion 1/09 *Re draft agreement on the European and Community Patents Court*, 9 March, [2011] ECR I-nyr at para 89:

“[T]he envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. Consequently, the CJEU (Full Court) gives the following Opinion: the envisaged agreement creating a unified patent litigation system (currently called “European and Community Patents Court”) is not compatible with the provisions of the EU Treaty and the FEU Treaty.”