



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Competition Law and Human Rights

Citation for published version:

Andreangeli, A 2009, 'Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention'.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Author final version (often known as postprint)

Publisher Rights Statement:

© Andreangeli, A. (2009). Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Competition Law & Human Rights: Striking A Balance Between Business Freedom And Regulatory Intervention

Arianna Andreangeli*

The protection of genuine competition represents a key objective for policy makers and law enforcers both at EU and at domestic level. However, the more proactive and incisive approach adopted by the European Commission toward enforcement raises several issues for the position of the parties affected by competition investigations. For a number of years, a lively and often strongly worded debate has been taking place as to the “fairness” of competition proceedings before the Commission. Tensions between freedom of enterprise and the protection of genuine competition have also become apparent in light of the considerable limits placed on the exercise of intellectual property rights enjoyed by a dominant undertaking. Consequently, an underlying question emerges as to where a line should be drawn between the pursuit of competition through administrative action and the effective protection of business freedom.

This paper will analyse some of the implications of a stronger competition enforcement framework for the rights enjoyed by the business entities affected by EU competition enforcement. The first part will consider the rationale at the basis of the application of “human rights-type” guarantees to corporate actors and the extent to which the current procedural safeguards are sufficient to fulfil the standards of due process enshrined in the European Convention on Human Rights.

The second part will address the questions arising from the impact of antitrust remedies on the property rights enjoyed by undertakings found to have infringed the competition rules against the background of their right to peacefully enjoy their “possessions” and to freely stipulate contracts. This chapter concludes that remedies entailing the obligation to license intellectual property rights (IPRs) to third parties may actually not be entirely consistent with

the standards enshrined in Article 1, Protocol I to the Convention as well as with rule of law principles.

I. Prelude: Competition Enforcement Between Effectiveness & Procedural “Fairness”

1. Preliminary observations

Competition policy lies at the core of the tasks of the European Union and requires the establishment and the operation of an effective framework for its implementation. For this purpose, the Commission enjoys extensive fact-finding and sanctioning powers.¹ In addition, Council Regulation No 1/2003 provides an express legal basis for the imposition of antitrust remedies. The 2003 reform also has pushed toward the decentralised application of Articles 101 and 102 TFEU to individual cases, thus boosting the involvement of national competition agencies and national courts,² and strengthening the cooperation among the competent agencies.³

Regulation No 1/2003 enshrines an obligation to provide information on new cases (Article 11) and confers to the Commission and the NCAs the power to exchange and use as evidence information gathered in the course of investigations (Article 12) and to carry out investigative measures on their reciprocal behalf. To ensure the smooth operation of these features, the Member States envisaged the creation of the European Competition Network (ECN). Established via an informal declaration in 2003, the ECN provides an “unofficial” space for the circulation of information and the resolution of issues arising from parallel investigations.⁴ However, due to its very nature, it does not act as a “clearing house” in the event of conflicts arising from multiple investigations pending in two or more jurisdictions or operate according to a uniform set of binding rules as to the collection and the transmission of evidence.⁵ According to Council Regulation No 1/2003, each NCA is only subject to the law

in force in its own jurisdiction.⁶ It follows that once evidence has been gathered in compliance with the applicable evidentiary rules, it can be transmitted to and used by a different authority regardless of any different, perhaps more protective legal standards, in force in the receiving jurisdiction.⁷

Six years since the full entry into force of the Modernisation Regulation have seen a number of successful antitrust decisions adopted by the Commission.⁸ However, they have not quelled the debate concerning the question of how to reconcile the current structure for the enforcement of Articles 101 and 102 TFEU with the observance of the human rights rules enshrined in the general principles of EU law.⁹ The circumstance that the Commission acts as investigator, prosecutor and judge in the cases it deals with and that its decisions are only subject to limited review as regards their substance, in accordance with Article 263 TFEU, have prompted a number commentators to argue that the existing procedural rules would threaten the effective protection of the rights of “due process” enjoyed by the investigated parties and should consequently be radically reformed.¹⁰ As a result, a question emerges as to how far these powers of investigation and sanction can actually go achieve a “fair balance” between the exercise of public power and the respect for the fundamental guarantees enjoyed by the investigated parties.¹¹ These questions will be addressed in the following sections.

2. The European Convention on Human Rights and EU competition proceedings—brief remarks

This section briefly discusses the question of whether the features of EU competition proceedings can be reconciled with a number of fundamental rights and principles, such as the right to a “fair hearing,” which demands, inter alia, that decisions affecting the determination of “civil rights or obligations” or “criminal charges” be adopted in accordance with canons of independence and impartiality.¹² The remit of this chapter does not allow for an exhaustive discussion of the scope and the degree of protection granted to fundamental

rights by EU law. The Court of Justice has elaborated autonomous human rights' safeguards as part of the general principles of EC/EU law and has acknowledged that instruments such as the ECHR play a significant role in inspiring the interpretation of these principles.¹³ The central position of the ECHR was confirmed by the EU Charter of Fundamental Rights, which is now legally binding on the Union institutions as well as on domestic authorities when they act within the scope of EU law.¹⁴

The primary aim of the ECHR was to protect natural persons against state abuses. Nonetheless, some suggest that the reliance on the part of the ECHR on the rule of law as a "cluster of principles" encompassing democracy, human dignity and personal freedom can provide a justification for the extension of some of its rules to corporate actors involved in commercial activities.¹⁵ Although public authorities, including supranational bodies, remain entitled to intervene in the private activities of individuals or corporate entities, they can only do so within precise limits.¹⁶ According to Hayek, the rule of law dictates that each expression of public power affecting the rights of individuals or legal entities must have a legal basis provided by sufficiently precise, clear and accessible rules and be constrained in accordance with canons of proportionality, equality and non-arbitrariness.¹⁷

Yet, despite being compatible with personal freedom and with the values of a democratic society, the market could not be left completely unbridled but should be subject to "carefully thought out legal frameworks" aimed at steering competition toward the public interest.¹⁸ Indeed, the presence in the ECHR of due process rules, of provisions defending the privacy of the home and of correspondence and the protection of property rights, albeit within limits dictated by the public interest and assessed in each case by the competent public authorities, are fully compatible with the "objective values" enshrined in the rule of law.¹⁹

This conclusion has very important consequences for commercial actors²⁰ who, due to their involvement in the market within "welfare states," are exposed to the impact of the

operation of potentially pervasive regulatory frameworks.²¹ However, the case law of the European Court of Human Rights suggests that the intensity of the protection afforded to entities active in the commercial arena must be carefully assessed and framed in such a way as to avoid irremediably hampering the effectiveness of these regulatory structures.²² In this context, the Court took the view that the Convention would allow for a somehow more “lenient” approach to be applied in respect to the protection of rights enjoyed by commercial entities.²³ At the same time, it emphasised that these constraints are only legitimate if they have a clear, foreseeable and accessible legal basis and are imposed in accordance with principles of non-arbitrariness and proportionality and after a procedure allowing those affected by them an opportunity to present their views and objections.²⁴

In the light of the above analysis, the ECHR provides for the protection of a number of fundamental safeguards to corporate entities engaged in commercial activities, in accordance with the rule of law. However, the remit of the ECHR cannot be determined “in isolation,” but must always take into account the context in which its application is invoked and the values and principles affected by the alleged interference.²⁵ Consequently, a question emerges as to how to strike a balance between effective regulation of economic activities and the respect for those human rights which, thanks to the “objective values” on which the ECHR is based, are enjoyed by commercial actors. Some of these issues will be examined in the following sections.

II. Human Rights’ Protection In Antitrust Procedure: Between Effective Enforcement & Due Process Standards

1. *Protecting the rights of the defence in competition investigations: the example of the privilege against self-incrimination*

The previous section briefly analysed the rationale for the extension of human rights protection to entities affected by the exercise of regulatory powers and argued that, while

public authorities should be allowed a margin of discretion in implementing their policy of regulation of the economy, they are obliged to strike a careful balance between the effective exercise of their function and the protection of fundamental entitlements enjoyed by the affected parties.

These considerations play an even more important role in competition proceedings. These proceedings, despite being conducted in “administrative frameworks” and not before the courts, are “criminal” in nature, given both their general applicability in the public interest and the deterrent and punitive nature of the sanctions that can be imposed for their infringement.²⁶ Accordingly, the proceedings leading to their application should be subjected to stringent standards as regards the hearing of the suspected infringers and the adoption of the final decisions.²⁷ However, to what extent the needs of effective competition enforcement and more generally of the efficient functioning of regulatory structures can be balanced against the respect of due process guarantees compatible with the ECHR in similar cases remains an open question.

This tension is particularly apparent regarding the different approaches adopted with respect to the protection of the right not to incriminate oneself in “criminal cases” before the European Court of Human Rights and the Court of Justice of the EU. The right to remain silent was recognised by the Strasbourg Court in *Funke* as one of the “international standards that lie at the heart of the concept of a fair trial” primarily to protect the integrity of the will of an accused against forms of improper compulsion in the taking of evidence.²⁸ Statements taken from the accused on pain of sanction for failure to cooperate and therefore “in the defiance of the will of the suspect”²⁹ could not later be used against him in separate criminal proceedings since the evidence had been obtained by coercion.³⁰

In the recent *O’ Halloran and Francis* case the European Court of Human Rights emphasised that while the right to a “fair trial” was in itself absolute, what actually made a

“fair trial,” i.e., its features, including the right to remain silent, should be assessed in each case in light of the legal context in which they are to operate.³¹ The circumstances of the case, the nature and the objectives of the proceedings and the intensity of the coercion exercised in taking the evidence would have to be carefully appraised.³²

Particularly for evidence obtained in the course of “regulatory” proceedings, the Strasbourg Court emphasised that individuals choosing to perform specific activities may be required to submit to “responsibilities and obligations as part of [a] regulatory regime,” which could also involve the duty to provide the authorities with potentially self-incriminating information and a corresponding restriction of their right to remain silent.³³ To conform to the ECHR, the Contracting States’ competent authorities would have to demonstrate that the applicable rules respected the “essence” of these rights.³⁴

By contrast, the Court of Justice of the EU held in *Orkem*³⁵ that firms affected by competition proceedings, despite not being entitled to “evade the Commission’s investigations”, enjoyed a limited degree of protection against self-incrimination in the course of their preliminary stages to avoid impairing irremediably their rights of the defence.³⁶ Even though the Commission officials could compel the investigated parties to provide all the factual information that may be known to them, regardless of the circumstance that it could be used as evidence against them,³⁷ they could not oblige the undertakings to give “answers which might involve an admission [...] of the existence of an infringement which is incumbent on the Commission to prove.”³⁸ To adopt a more extensive reading of the privilege would pose an unjustified obstacle to the Commission’s performance of its function.³⁹

Whereas the Strasbourg Court focuses on the nature and intensity of the coercive powers exercised to extract the evidence and on the procedural safeguards assisting that exercise, to ensure that the investigated parties’ right to a “fair trial” is not tainted by improper forms of

oppression on their will,⁴⁰ the Court of Justice of the EU restricts the scope of the privilege to evidence taken as a result of direct coercion (e.g., financial penalties) and takes as its “starting point” the substance of the questions directed at the investigated parties, i.e., whether they are merely of a “factual nature” or can lead to the admission of responsibility for the alleged infringement.⁴¹

Consequently, once a question concerns the existence of facts—even though the answer may allow the investigating officials to draw strong inferences of the undertakings’ responsibility—the Commission officials may demand an answer to it.⁴² Can the approach adopted in EU law can be reconciled with the human rights standards enshrined in the Convention? After the *O’ Halloran* judgment in the Strasbourg Court could justify the adoption of a more “nuanced” view of the components of the right to a “fair trial” in the regulatory arena.⁴³

Even taking into account the need to avoid jeopardising the effectiveness of these regulatory structures and the circumstance that competition investigations tend to involve legal entities,⁴⁴ the approach to the privilege adopted by the Court of Justice of the EU may not be entirely capable of striking a “fair balance” between the public interest and the need to preserve the essence of the undertakings’ rights of the defence and may therefore have to be restrained to adhere more closely to the Convention.⁴⁵ The scope of the right to remain silent should prevent the disclosure of self-incriminating information when it appears from the circumstances of the case that the degree of coercion exerted on the investigated parties was excessive or the safeguards attending the investigations have not been observed.⁴⁶

The different principles and objectives characterising the EU and the ECHR legal systems have led to the adoption, in the respective jurisdictions, of different standards for the protection of human rights within regulatory frameworks. However, it is beyond doubt that although the effective enforcement of the Treaty competition rules constitutes a primary

objective, its implementation should not go as far as to defy the essence of the undertakings' rights of the defence and should ensure that appropriate limitations to the Commission's powers are in place to avoid procedural abuses, in accordance with the principles enshrined in the rule of law, to which the EU institutions are committed.

2. *The decentralised application of Articles 101 and 102 TFEU and the need for "foreseeability" in competition enforcement*

Section 2.1 pointed out that Council Regulation No 1/2003 strongly moved toward the decentralised application of Articles 101 and 102 TFEU to individual cases. According to Article 5 of the Regulation, NCAs are now empowered to apply the Treaty competition rules to individual cases.⁴⁷ However, they do so in a radically changed landscape, characterised by their cooperation with the Commission and with one another within the ECN.⁴⁸

Since practices covered by Treaty antitrust rules have (or are likely to have), by definition, an impact on trade between Member States, they are capable of adversely affecting competition in markets falling within the jurisdiction of more than one NCA and therefore the framework established by the Modernisation Regulation is characterised by the possibility of parallel proceedings.⁴⁹ However, although cases are likely to be taken on by the authority or authorities that are "well-placed" to deal with the allegations⁵⁰ and may be "seized" by the Commission only, in accordance with Article 11(6) of the Regulation,⁵¹ parallel jurisdiction raises a number of issues for the protection of the rights of the defence and especially for the respect of the principle of *ne bis in idem*.

Article 4, Protocol VII to the ECHR enshrines this principle and recognises it as belonging to the general principles of Community law by the Court of Justice.⁵² Article 50 of the EU Charter of Fundamental Rights also confirms this principle.⁵³ Nonetheless, Regulation 1/2003 does not expressly protect *ne bis in idem*. Regulation 1/2003 is not only based on the principle of parallel jurisdiction, but reiterates also that a decision adopted by NCAs will not preclude the Commission or another national agency from taking action in respect to the

same infringement.⁵⁴ The rationale behind this difference is that since EU and domestic competition rules fulfil different policy objectives and their application addresses only those anti-competitive effects that occur within the jurisdiction of each individual authorities, the principle of *ne bis in idem* would not be applicable to prevent double prosecution on the part of the Commission⁵⁵ and would only be subject to the duty for the Commission to take in to account any earlier penalty in assessing the entity of the fine it wished to impose.⁵⁶

However, the European Court of Human Rights has taken the different view that the principle of *ne bis in idem* aims to prevent the repetition of criminal proceedings that have been concluded by a final decision.⁵⁷ Consequently, according to the European Court of Human Rights, this rule should be read as containing a right not only not to be sanctioned twice, but also not to be investigated and prosecuted twice for the same infringement.⁵⁸ Against this background, one may doubt that the possibility of parallel investigations envisaged by Council Regulation No 1/2003 could be regarded as being consistent with the ECHR⁵⁹ or with Article 50 of the EU Charter of Fundamental Rights, according to which no-one may be tried and punished twice for the same offence “within the Union”⁶⁰ and regardless of whether its effects may be felt within the jurisdiction of different enforcement authorities.⁶¹

The needs of the meaningful enforcement of the Treaty antitrust rules require effective enforcement action.⁶² However, even taking into account these important objectives, the very notion of parallel jurisdiction appears to fall short of the requirements of the rule of law⁶³ since it would not allow the investigated parties to identify the competent authority⁶⁴ and expose them to the risk of later prosecution “elsewhere” within the ECN.⁶⁵

The Commission can, whenever a case raises issues of “Community interest” and has a clear “transnational dimension,” seize jurisdiction over it and thus pre-empt other agencies from examining its merits or inflict sanctions on the firms found to be responsible for the

antitrust infringement in question. However, it has no obligation to take this action.

Consequently, it is unclear whether the current rules are capable of eliminating any of the concerns for the respect of the *ne bis in idem* rule, outlined above.⁶⁶

Accordingly, Council Regulation No 1/2003 should be reformed so as to preclude NCAs from launching further investigations in respect to allegations of anti-competitive behavior that have already been “disposed of” by other enforcement agencies and a fortiori by the European Commission,⁶⁷ unless the alleged “second” offence does not have “essential elements” in common with the one already being dealt with.⁶⁸

The very system of parallel competences characterising the Modernisation Regulation raises concerns for the protection of the investigated parties against double jeopardy⁶⁹ and seems to depart from the principles of foreseeability and legal certainty enshrined in the rule of law. The system should provide a rule of “administrative” *res judicata* precluding NCAs from taking action in respect to infringements that have already been investigated and sanctioned in other jurisdictions.

III. Human Rights Protection & Antitrust Remedies: Limiting Economic Freedom for the Purpose of Promoting Genuine Competition?

1. Human rights and the free market: the interplay between the peaceful enjoyment of property and Article 102 remedies in IP cases

The right to enjoy one’s property, despite not being absolute, is protected by the Convention.⁷⁰ It is therefore indispensable to confine the discretion of public authorities to “alter property rights in unpredictable ways” in the public interest.⁷¹ According to Article 1 of Protocol I to the ECHR, everyone has the right to the “peaceful enjoyment” of his or her possessions,⁷² i.e., tangible and intangible goods,⁷³ including intellectual property rights⁷⁴ and, albeit within limits, legal claims,⁷⁵ this right may either be forfeited altogether or can be constrained or “controlled” in its exercise.⁷⁶

However, these constraints should have an express legal basis, pursue a legitimate aim in the public interest and bear a relationship of proportionality between the needs of the public at large and the protection of the rights of the individuals or legal entities concerned by the exercise of the public power in the circumstances.⁷⁷ The presence of appropriate procedural rights, the availability of compensation for the deprivation of property or of adequate remuneration in case of constraints being placed on their exercise are key aspects in this assessment.⁷⁸

In relation to interferences with intellectual property rights, the Strasbourg Court held in *Balan* that the respondent state infringed the Convention by making repeated use of the applicant's copyrighted work despite his opposition and without paying any remuneration.⁷⁹ The Court held that the public interest could have equally been served by paying the applicant reasonable royalties.⁸⁰ The now defunct Human Rights Commission in the *Smith Kline and French Laboratories v the Netherlands* case,⁸¹ which was the subject of a friendly settlement,⁸² examined the compatibility of forced copyright licenses.

The Commission held that the grant of a "compulsory licence" constituted a form of "control on the use of property" of the patent holder⁸³ since it constrained "the sole right of exploitation" of the invention, granted to its owner.⁸⁴ Consequently, it was indispensable to assess whether a forced licence was consistent with the Convention, i.e. whether it was "prescribed by law" and sought to achieve "a legitimate aim in a proportionate manner."⁸⁵

The Commission pointed to the circumstance that patent rights were limited in many Contracting States and that the latter enjoyed a significant margin of appreciation.⁸⁶ It emphasised, however, that forced licences could only be granted to "encourage technological and economic development" and if as a result of the disclosure of the invention it could be expected that a "new product or process [...] capable of industrial application" could have been developed and supplied on the market.⁸⁷

On the merits, the Commission found that the licence was limited in scope to what was necessary to allow the party requiring it to employ its own invention⁸⁸ and that the holder of the “primary” patent had been entitled to royalties, thus establishing a reasonable link of proportionality between that legitimate aim and the restriction imposed on the applicant’s rights.⁸⁹ Therefore, the Commission, after declaring the application admissible, expressed the view that the respondent state had not infringed the applicant’s right to enjoy its intellectual property.⁹⁰

The above analysis supports the view that the Convention rules will apply to IPRs. However, it also identifies several issues that are peculiar to this type of property. As the Human Rights Commission recognised in *Smith Kline*, one of the key attributes of IP rights is the conferral of a de facto monopoly to their holder in respect to the possibility to duplicate a valuable “product” as a means to rewarding the investment made by the owner. Nonetheless, this “monopoly could overtime hamper the creativity” of third parties and therefore justify imposing limits on it to further genuine innovation.⁹¹

However, the rules governing these restrictions must be sufficiently clear and foreseeable. Each decision must also be adopted after having given the owner of the right a reasonable opportunity to be heard and must provide for adequate compensation in the form of reasonable royalties. Perhaps most importantly, the parties seeking to exploit the patent at issue must demonstrate that the compulsory licence would be likely to further innovation, by allowing them to manufacture a product displaying sufficiently “novel” features.⁹²

Consequently, although the ECHR protects property rights, including those concerning patents, trademarks and copyright, there may be a number of reasons why it is legitimate for the Contracting States to limit their scope in order to further other objectives of public interest. These limits must comport to the principles provided by Article 1, Protocol I to the Convention.

IV. Economic Freedom, Competition Enforcement & Antitrust Remedies: How To Strike A “Fair Balance” Against Powerful Undertakings?

1. *Behavioral antitrust remedies, compulsory licences and the right to “peacefully enjoy one’s possessions”*: Are the Commission’s powers consistent with the ECHR?

A number of questions may be raised in relation to the power enjoyed by the European Commission to “bring an infringement to an end” by imposing significant limits on the right of “powerful” firms to choose how to conduct themselves on the market.⁹³ In several decisions, especially concerning the application of Article 102 TFEU, the Commission has obliged dominant undertakings to “share” their own tangible property, such as transport infrastructures,⁹⁴ to enter into supply relations with other firms, even if that may prima facie be incompatible with their commercial interests⁹⁵ or ultimately to grant IP licences to their competitors in order to ensure that the latter may remain active on a relevant market in which their own proprietary technology has become “essential” to operate profitably.⁹⁶

This section will consider whether the current approach to the remedies imposed by the Commission in “refusals to licence” cases is compatible with the standards of protection enjoyed by the peaceful enjoyment of property under the European Convention. According to Article 7 of the Modernisation Regulation, the Commission enjoys the power to impose on the undertakings responsible for an antitrust breach such remedies that may be necessary to terminate the infringement and are proportionate to it.⁹⁷

Thus, the Commission can, after having found a violation of the Treaty antitrust rules, require the undertaking or undertakings responsible for it to modify their future behavior or, in exceptional cases, their structure in order to restore the status quo ante the competition infringement.⁹⁸ Paramount to the framing of antitrust remedies is the application of principles of “necessity” and of “proportionality”. The concept of “necessity” requires the antitrust authorities to design each remedy in the light of the type of infringement, as determined by

the relevant substantive rules.⁹⁹ Compliance with the principle of proportionality, instead, demands that the remedy constitute the only suitable means to bring the infringement to an end and that there be any less burdensome alternative to it.¹⁰⁰

It is clear from its text that Regulation No 1/2003 uses language which, at least on its face, is very similar to that adopted by the Strasbourg court. However, what is not clear is whether the standards adopted in the EU are as exacting as those enshrined in the ECHR.¹⁰¹ The Court of Justice had been reluctant to impose on dominant companies an obligation to grant IP licenses to their rivals.¹⁰² Refusals to license would only infringe Article 102 in “exceptional circumstances,” i.e., when the refusal related to inputs that were “indispensable” (because it could not be objectively duplicated, due to objective legal, technical or economic obstacles¹⁰³) for operating in a distinct market, it prevented the undertaking requesting that access from supplying a “new product”¹⁰⁴ and was not “objectively justified.”¹⁰⁵

The Court emphasised that the “new product” criteria would be the crucial factor in striking a balance between maintaining competition and protecting and fostering investment.¹⁰⁶ Consequently, at least in earlier cases, the Court identified only those inputs without access to which the requesting undertakings could not “produce new goods or services not offered by the owner of the rights and for which there was potential consumer demand.”¹⁰⁷ A more extensive view could “upset” the careful balance between effective competition and the legitimate interest of the IP owner to exploit her inventions and fostering investment.¹⁰⁸

Regarding the approach adopted in respect to “controls on the use of property” by the ECHR,¹⁰⁹ the view adopted in these relatively less recent judgments appears to be consistent with the Convention standards. It could be argued that the Court of Justice, just as the Convention organs, aimed to ensure that the interests of effective competition would prevail

over the exclusivity of IP rights only if the interference with the latter led to genuine technical advancement.¹¹⁰

However, it is questionable whether the above reading remains compatible with the current interpretation of Article 102 TFEU in relation to “exclusionary abuses.” More recent case law and especially the 2007 *Microsoft* judgment have heralded an approach which seems to privilege, at least in part, the interests of rivals over the incentive to innovate of the industrial leader.¹¹¹

The Commission stated in its 2009 Guidance on the application of Article 102 to exclusionary abuses (hereinafter referred to as 2009 Guidance) that a refusal to grant an IP license is likely to infringe the competition rules if the input covered by IPRs is “objectively necessary to compete effectively” on a related market, either because it cannot be duplicated or, perhaps more importantly, because the input is of “significant competitive importance” for the undertakings operating on that market.¹¹²

Consequently, the shift from the concept of “indispensability” to the “objective necessity” test now requires the Commission only to prove that without the license, rivals would not be able to compete with the same “ease” as the firm owning the IP right.¹¹³ As to the other requirement that the refusal to license lead to “likely consumer harm,” the Commission stated that this concept should be read to encompass cases in which not only the refusal prevented the undertakings seeking access from offering products or services that are not a “duplicate” of what is already available on the relevant market,¹¹⁴ but also if it prevented rivals from supplying “improved goods or services for which there is a potential demand” or which “contribute to technical development.”¹¹⁵

Consequently, the Commission moved away, at least in part, from the “innovation driven” concept of “new product” to a less stringent view of technical development, which would also cover forms of “follow on” innovation.¹¹⁶ It may not be that this relatively more

generous approach confirms to the need to strike a “fair balance” between genuine competition and encouraging and rewarding investment.¹¹⁷ It is also telling that so far the Commission and the EU Courts have been reluctant to accept that the concern for maintaining the integrity of investments made by dominant companies could constitute an “objective justification” for a refusal to license.¹¹⁸ Importantly, the 2009 Guidance does not even acknowledge the possibility for a powerful firm to refuse to grant or to limit the scope of an IP licence in order to recoup its costs and thereby protect the value of its inventions.¹¹⁹

Although, due to the limited remit of this contribution, it is not possible to engage in a more detailed analysis, I argue that the Commission relied perhaps too readily on the General Court’s conclusions in the *Microsoft* judgment to justify its views in the 2009 Guidance.¹²⁰ However, in doing so the Commission may have overlooked the “exceptional” nature of the merits of that case and not given sufficient consideration to the concerns for long term innovation which, up to the *IMS Health* preliminary ruling, had been at the forefront of the EU Courts’ jurisprudence.¹²¹

Additionally, the 2009 Guidance, by emphasising the importance of “follow-on” innovation did not wholly “capture” the impact of a forced licence on the long term incentive to innovate of individual firms. The Guidance thus appears inconsistent with the concept of “proportionality” resulting from the ECHR.¹²² In respect to the concept of “likely consumer harm,” it could be argued that by referring generally to products “contributing to technical development” the Commission has not resolved the evidentiary difficulties already characterising the “new product” condition.¹²³ Therefore, one may legitimately doubt whether the current EU approach meets the requirements of “clarity” and “foreseeability” enshrined in the rule of law.¹²⁴

Against this background, the “transition” from the restrained approach to *prima facie* abusive refusals to license developed by the Court of Justice to the more “lenient” criteria for

the assessment of these practices adopted by the General Court in *Microsoft* and perhaps more dramatically by the Commission's 2009 Guidance has led to results that are inconsistent, at least in part, with the principles enshrined in Article 1, Protocol I to the ECHR. The standards contained in the 2009 Guidance have not only been "diluted" so much that they are no longer capable of striking a "fair balance" between the common interest of protecting genuine competition and the protection of the rights of individual IP owner. They have also become so opaque that they do not allow dominant companies to foresee the antitrust law consequences of a refusal to license IP rights.¹²⁵

Thus, in respect to the concept of "likely consumer harm", the approach adopted by the 2009 Guidance¹²⁶ not only deprives this criterion of any "critical" function in the appraisal of these practices,¹²⁷ but also appears to have significantly increased the uncertainty characterising the assessment of the legality of a refusal to license, a development which does not appear consistent with the "prescribed by law" conditions required by the rule of law principles.¹²⁸ If it was already difficult to assess whether the "offshoot" of the exploitation of a given invention was genuinely "novel", it would be even more complex to predict, in substance, the direction of the technical development of a specific industry as well as the impact of the refusal to license on its course.

By contrast, the "new product" requirement established in the *IMS* decision,¹²⁹ despite presenting some evidentiary difficulties, provided a sufficiently precise paradigm for proving the degree of "novelty" of any prospective product.¹³⁰ However, in light of the Commission's views contained in the 2009 Guidance, it is doubtful that a "move backward" to the old *IMS* test may be forthcoming.

V. Economic Freedom: An Engine As Well As A Limit For Genuine Competition? Tentative Conclusions

The nature of antitrust proceedings as being “criminal in substance” has raised a number of concerns as to their compliance with standards of due process laid down by Article 6 of the ECHR.¹³¹ The examination of the current approaches adopted by the Court of Justice and the Commission in relation to the privilege against self-incrimination cast doubt on whether the level of protection afforded by EU law to the right to remain silent in the course of the Commission investigation is consistent with, ultimately, the rule of law.¹³²

In relation to the parallel jurisdiction at the basis of the Modernisation Regulation, the framework for the enforcement of the Treaty antitrust rules, while being aimed to ensuring an efficient allocation of cases and the prompt investigation and sanction of competition infringements, may be inconsistent with the protection of individual undertakings against double jeopardy within the ECN as a whole.¹³³

As to the power of the Commission to impose antitrust remedies, the case law of the European Court of Human Rights demonstrates that the Convention allows for limitations on the scope of the right of ‘everyone’ to enjoy peacefully their property as well as for restrictions in their freedom of contract, subject, however, to several conditions dictated by Article 1 of its Protocol I.¹³⁴ In respect to the power of the Commission to impose on the holder of an intellectual property right a duty to grant licences to other firms, the Human Rights Commission illustrated in its Smith Kline report the needs of innovation and the concern for strengthening the drive toward further technological development should be at the forefront of the assessment of whether a duty to licence constitutes a “proportionate” remedy to terminate an infringement of Article 102 TFEU. However, the European Court of Human Rights doubted that the 2009 Guidance on the priorities in the enforcement of Article 810, as influenced by the 2007 *Microsoft* decision, could be compatible with the standards governing the application of Article 1, Protocol I to the ECHR to compulsory licences and especially with the principle of proportionality.

More generally, discussing the compliance of antitrust remedies with human rights standards seems to question whether the current directions of antitrust enforcement have been appropriately set and whether the standards governing unilateral exclusionary conduct are “fit for purpose”, i.e., capable of reconciling the apparently diverging goals of competition and technical innovation. The past ten years have seen considerable success in uncovering anti-competitive behavior, albeit not without criticism. One hopes that the commitment to the ECHR expressed with the Lisbon Treaty will prompt a rethinking of the rules governing competition proceedings and remedies.

Bibliography

* Liverpool Law School, University of Liverpool. The author wishes to thank D. Daniel Sokol, of the University of Florida and Maurice E. Stucke, of the University of Tennessee, for the feedback on an earlier draft of this chapter. This work has also benefitted from helpful discussions with a number of colleagues at the 14th workshop of the Competition Law Scholars' Forum (ClaSF), held at the Inns of Court School of Law, City University of London, on 10 September 2009. The usual disclaimer applies.

¹ Council Regulation 17/62 , First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-1962 O.J. Spec. Ed. 57, *repealed by* Council Regulation 1/2002, The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1. *See* Piet Jan Slot, *A view from the mountain: 40 years of developments in EC competition law*, 41 Common Mkt. L. Rev. 443 (2004).

² *See Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 [now 81 and 82] of the EC Treaty*, COM (99) 101 final (Apr. 28, 1999); *see also* Council Regulation 1/2003, recitals 2-4, 2003 O.J. (L 1) 1 (EC); James S. Venit, *Brave New World: the Modernisation and Decentralisation of Enforcement Under Articles 81 and 82 of the EC Treaty*, 40 Common Mkt. L. Rev. 545, 555-56 (2003).

³ *See* Council Regulation 1/2003, recital 6, 2003 O.J. (L 1) 1 (EC). For commentary *see, inter alia*, Claus D. Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 Common Mkt. L. Rev. 537, 600.

⁴ Joint statement of the Council and the Commission made at the time when regulation No 1/2003 was adopted, Brussels 3.3.2003 (13.03), para. 2, 5, 7. *See, e.g.*, Alec Burnside & Helen Crossley, *Cooperative Mechanisms within the EU: A Blueprint for Future Cooperation at the International Level*, 10 Int'l Trade L. & Reg. 25 (2004).

⁵ *Id.* at para. 7; for commentary, see Arianna Andreangeli, *The Impact of the Modernisation Regulation on the Guarantees of Due Process in Competition Proceedings*, 31(3) Eur. L.J. 342, 343-44 (2006).

⁶ See Council Regulation 1/2003, *supra* note 3, at art. 22; see also Commission Notice on Cooperation within the Network of Competition Authorities, paras. 2 and 27.

⁷ See, e.g., *id.* at paras. 27-28; see also Office of Fair Trading, Powers of Investigation, (2004) OFT 404a, para. 6.3; for commentary see, e.g., Margaret Bloom, Director, Competition Enforcement, Exchange of Confidential Information Among Members of the EU Network of Competition Authorities, Speech at the Annual Competition Workshop at European University Institute, Florence (Mar. 13, 2002), available at http://www.of.gov.uk/shared_of/speeches/spe0302.pdf; cf. Denis Waelbroeck, 'Twelve Feet All Dangling Down and Six Necks Exceeding Long': The EU Network of Competition Authorities and the European Convention on Fundamental Rights, in European Competition Law Annual 2002: Constructing the EU network of Competition Authorities 465, 470 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2004).

⁸ Neelie Kroes, Commissioner, European Commission for Competition, Many Achievements, More to Do, Speech at the IBA Conference "Private and Public Enforcement of EU Competition Law—5 years on," Brussels (Mar. 12, 2009) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/106&format=HTML&aged=0&language=EN&guiLanguage=en>. See also, Neelie Kroes, Commissioner, European Commission for Competition, Exclusionary Abuses of Dominance—the Commission's Enforcement Priorities, Speech at the Fordham University Symposium, New York (Sept. 25, 2008) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/457&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁹ See Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorrastelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125.

¹⁰ See, e.g., Rein Wesseling, *The Draft Regulation Modernising the Competition Rules: The Commission is Married to One Idea*, 26 Eur. Competition L. Rev. 357 (2001).

¹¹ See, e.g., Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491; more recently, Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, 2002 E.C.R. I-6297.

¹² See, e.g., in respect to the right to silence, Case 374/87, *Orkem v. Commission*, 1989 E.C.R. I-3283; see also Case T-112/98, *Mannesmann-rohren Werke v. Commission*, 2001 E.C.R. II-729.

¹³ See, e.g., Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, para. 13; Opinion 2/94, *Re: Accession to the European Convention on Human Rights*, 1996 E.C.R. I-1759; see also Case T-156/94, *Siderurgica Aristrain Madrid v. Commission*, 1999 E.C.R. II-645, para. 26-7; for the ECHR, see, *inter alia*, *C.F.D.T. v. Commission*, App. No. 8030/77, (1979) 13 D. & R. 231; see also *M. & Co. v. Germany*, App. No. 13258/87, (1990) 64 D. & R. 138.

¹⁴ Charter of Fundamental Rights of the European Union art. 52(3), Dec. 14, 2007, 2007 O.J. (C303) 01; see Treaty of Lisbon Protocol 8, Dec. 13, 2007, 2008 O.J. (C115) 1; see also *id.* at Recital IV (Preamble to the Treaty on the European Union and the Treaty on the functioning of the European Union). For commentary, see, *inter alia*, Anthony Arnall, *From Charter to Constitution and beyond: fundamental rights in the new European Union*, 4 Pub. L. 774, 786 (2003).

¹⁵ See Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* 25, 33-4 (2006); see also *id.* at 40-41 and 47.

¹⁶ See Brian Tamanaha, *A Concise Guide to the Rule of Law*, 3, St John's University School of Law, Legal Studies Research Paper Series, #07-0082 available at <http://ssrn.com/abstract=1012051>.

¹⁷ Friedrich Hayek, *The Road to Serfdom* 75-6 (2008) (1944); *see also* Tamanaha, *supra* note 16, at 9; *see also* Thomas Franck, *Democracy, Legitimacy and the Rule of Law: Linkages*, 2, NYU School of Law, Public Law and Legal Theory Working Paper Series, #2/1999, *available at* http://papers.ssrn.com/paper.tat?abstract_id=201054.

¹⁸ Hayek, *supra* note 17, at 37-39; *see also, mutatis mutandis*, Scott Trainor, *A Comparative Analysis of a Corporation's Right Against Self-Incrimination*, 18 Fordham Int'l L J. 239 (1994).

¹⁹ *See* Groppera Radio v Switzerland, App. No. 10890/94, 12 Eur. H.R. Rep. 321, para. 48 (1990); *see also* Markt Intern Verlag GmbH and Klaus Bermann v Germany, Ser. A No. 165, 12 Eur. H.R. Rep. 161, para. 33. In EU law, *see, e.g.*, Case T-67/00, JFE and others v Commission, 2004 E.C.R. II-2501, para. 173, 177-78; *see also* Case C-413/08, Lafarge SA v Commission, Judgment of June 17, 2010, not yet reported, para. 29-30. For commentary, *see* Emberland, *supra* note 15, at 37-8, 43-5.

²⁰ *See, e.g.*, Niemitz v Germany, App. No. 13710/88, , Ser. A No. 251-B, 16 Eur. H.R. Rep. 17, para. 29-31 (1993); *see also* Ste Colas Est and others v France, App. No. 37971/97, , 39 Eur. H.R. Rep. 17, para. 40-41, 43-49 (2004); Casado Coca v Spain, App. No. 15450/89, Ser. A No. 285, 18 Eur. H.R. Rep. 1, para. 40 et seq (1994).

²¹ Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 30, St. John's University School of Law, Legal Studies Research Papers series, #08-0096, *available at* <http://ssrn.com/abstract=1087023>; *see also* Hayek, *supra* note 17, at 84; Emberland, *supra* note 15, at 43-5.

²² *See, e.g.*, Markt Intern Verlag GmbH and Klaus Bermann v Germany, Ser. A No. 165, Eur. H.R. Rep. 161, para. 33 (1990); *Cf.*, *e.g.*, Silver v United Kingdom App. No. 5947/72, , 5 Eur. H.R. Rep. 347, para. 97 (1983). For commentary *see inter alia* Emberland, *supra* note 15, at

190-93; *see also* Arianna Andreangeli, EU Competition enforcement and Human Rights 22 et seq. (2008).

²³ *See* Emberland, *supra* note 15, at 190-91; *see also* Lord Bingham, House of Lords, *The Rule of Law*, at 2, 5-6, 6th Sir David Williams Lecture, Nov. 16 2006, *available at* www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript_php; *Id.* at 9; *see, e.g.* Beyeler v Italy, App. No. 33202/96, 33 Eur. H.R. Rep. 52, para. 109 (2001); Lithgow v United Kingdom, App. No. 9006/80, 7 Eur. H.R. Rep. 56, para. 110 (1985).

²⁴ *See* Groppera Radio v Switzerland, *supra*, note 19, para. 49-50 (1990); *cf.* Lingens v Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407, para. 40-41 (1986); for commentary, *see* Clare Ovey and Robin White, European Convention on Human Rights 210-11, (3rd ed. 2002).

²⁵ *See, e.g.*, Emberland, *supra* note 15, at 193.

²⁶ *See, inter alia*, Ozturk v Germany, App. No. 8544/79, , 6 Eur. H.R. Rep. 409, paras. 55-6 (1984); for commentary, *see, e.g.*, Wouter P.J. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 World Competition L. & Econ. Rev. 201 (2004).

²⁷ *See, inter alia*, Schmautzer v Austria, App. No. 15523/89, 16 Eur. H.R. Rev. 511, para. 28 (1996); Stenuit v France, App. No. 11598/85, , E.C.C. 401, para. 56, 61-63 (1992); *see also*, Case T-7/89, SA Hercules Chemicals v. Commission, E.C.R. II-1771, per AG Vesterdorf, para. I.3 (1991); *see also, inter alia*, Case C-185/95, Baustahlgewebe v Commission, E.C.R. I-8417, per AG Leger, para. 31 (1998); Case C-105/04 P, NFVGEG v Commission (Re: Dutch Electricians' cartel), E.C.R. I-8725, per AG Kokott, para. 107 (2006). For commentary, *see, inter alia*, A. Boyle, *Administrative Justice, Judicial Review and the Right to a Fair Hearing Under the European Convention on Human Rights*, 1984 Pub. L. 89; *see also* Wouter P.J. Wils, *The Combination of the Investigative and Prosecutorial Function and*

the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, 27

W. Competition L. & Econ. Rev. 201; Andreangeli, *supra* note 22, at 23 et seq.

²⁸ Funke v France, App. No. 10828/94, 16 Eur. H.R. Rep. 297, para. 41-2 (1993).

²⁹ Saunders v United Kingdom, App. No. 43/1994/490/572, 23 Eur. H.R. Rep. 313, para. 68 (1997).

³⁰ *Id.* at para. 69.

³¹ O' Halloran and Francis v United Kingdom, App. Nos. 15809/02 and 25624/02, 46 Eur. H.R. Rep. 21, para. 53 (2008).

³² Jalloh v Germany, App. No. 54810/00, 44 Eur. H.R. Rep. 32, para. 117 (2007).

³³ O' Halloran and Francis v United Kingdom, *supra*, note 31, para. 57; *see also, mutatis mutandis*, Brown v Stott, Privy Council, 5 December 2000, 1 A.C. 681, per Lord Bingham, 703 (2003).

³⁴ *See, e.g.*, Jalloh v Germany, *supra* note 32, para. 95-97.

³⁵ Case 27/88, Orkem v Commission, E.C.R. 3355 (1989).

³⁶ *Id.* at para. 32.

³⁷ *Id.* at para. 34.

³⁸ *Id.* at para. 35.

³⁹ *Id.* at para. 44; *see also* para. 42; *see also* Case T-112/98, Mannesmannrohren—Werke v Commission, E.C.R. II-729, para. 66 (2001); *see, e.g.* Alan Riley, *Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law*, 21 Eur. L. Rev. 264, 269 (2000).

⁴⁰ Saunders v United Kingdom, *supra* note 29, para. 57; *see also id.* at para. 68; Jalloh v Germany, *supra* note 32, para. 114-115, 117. For commentary, *inter alia*, Tim Ward & Piers Gardner, *The Privilege Against Self-Incrimination: In Search of Legal Certainty*, 4 Eur. H.R. L. Rev. 388 (2003); *see also*, Alan Riley, *supra* note 39, 264.

-
- ⁴¹ See, e.g., Case C-238/99, LVM NV and Others v Commission, E.C.R. I-8375, para. 275 (2002); see also *id.* at para. 279-282. For commentary, *inter alia*, Alan Riley, *supra* note 39, 269; see also, Andreangeli, *supra* note 22, 134-35.
- ⁴² See also Case T-112/98, Mannesmannrohren—Werke v Commission, E.C.R. II-729, para. 66 (2001).
- ⁴³ O' Halloran and Francis v United Kingdom, App. Nos. 15809/02 and 25624/02, 46 Eur. H.R. Rep. 21, para. 53 (2008).
- ⁴⁴ See, e.g. Wouter P.J. Wils, *Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 W. Competition L. & Econ. Rev. 567, 577-78 (2003).
- ⁴⁵ See, e.g., Case C-238/99, LVM NV and Others v Commission, E.C.R. I-8375, para. 275 (2002); see also *id.* at para. 279-82. For commentary, see Angus MacCulloch, *The Privilege Against Self-Incrimination in Competition Investigations*, 26(1) L.S. 211, 218-19 (2006); see also *id.* at 233-35. See also Scott A. Trainor, *A Comparative Analysis of a Corporation's Right Against Self-Incrimination*, 18 Fordham Int'l. L. J. 2139, 2165-66 (1995); see Andreangeli, *supra* note 22, at 127-28.
- ⁴⁶ See, *mutatis mutandis*, Jalloh v Germany, *supra* note 32, para. 114-115; see also Ravon v France, App. No. 18497/03, judgment of 21 February 2008. unrep, para. 28; for commentary, see Anthony Dawes and Pascal Berghe, *'Little Pig, Little Pig, Let Me Come In: An Evaluation of the European Commission's Powers of Investigation in Competition Cases*, 30(9) Eur. Competition L. R. 407, 420-21 (2009).
- ⁴⁷ Article 5, Council Regulation No 1/2003.
- ⁴⁸ Recitals VI and VIII, Preamble to Council Regulation No 1/2003.
- ⁴⁹ *Id.* at para. 5; see, e.g., Alec Burnside and Helen Crossley, *Cooperative Mechanisms Within the EU: A Blueprint for Future Cooperation at the International Level*, 10 Int'l Trade L. & Reg. 25, 27 (2004).

⁵⁰ European Commission, *Commission Notice on Cooperation within the Network of Competition Authorities*, 2004 O.J. 101/43, para. 7-8 [hereinafter referred to as “Network Notice”]. For commentary, see, *inter alia*, Nazzini, *Concurrent proceedings in competition law*, 72 (2004); also, Andreangeli, *supra* note 22, 193-194.

⁵¹ See *Network Notice*, at para. 3,14.

⁵² Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to 252/99, C-254/99, *Lymburgse Vinyl Maatschappij and others v Commission*, E.C.R. I-8375, para. 59 (2002).

⁵³ See Denis Waelbroeck, ‘*Twelve Feet All Dangling Down and Six Necks Exceeding Long*’: *The EU Network of Competition Authorities and the European Convention on Fundamental Rights*, in *European Competition Law Annual 2002: Constructing the EU network of Competition Authorities* 465, 470 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2004).

⁵⁴ See, e.g., Case 14/68, *Walt Wilhelm v Bundeskartellamt*, E.C.R. 1, para. 11 (1969); for commentary, see Renato Nazzini, *supra* note 50, 123.

⁵⁵ Case 7/72, *Boehringer Mannheim v Commission*, E.C.R. 1281, per AG Mayras, para. 3-5 (1972); see also, *mutatis mutandis*, Case C-308/94 P, *SGL Carbon v Commission*, E.C.R. I-5977; para. 30-31 (2006).

⁵⁶ Case 14/68, *Walt Wilhelm v Commission*, *supra* note 54, para. 11. For commentary, see, e.g., Celine Gauer, *Due Process in the Face of Divergent National Procedures and Sanctions*, at 8, paper presented at the International Bar Association 2005 Conference: Decentralisation of EC Competition Law: A Year in Practice ; see also Kris Dekeyser et al., *The New Enforcement System for Articles 81 and 82 and the Rights of Defence*, in *International Antitrust Law and Policy*, Annual Proceedings from the Fordham Corporate Law Institute 549, 582-83 (Barry Hawk ed. 2005).

⁵⁷ *Gradinger v Austria*, App. No. 15963/90, judgment of 23 October 1995, Ser A No. 328-C, para. 53-5.

⁵⁸ Franz Fischer v Austria, App. No. 37950/97, judgment of 29 May 2001, para. 22, 25 and 29; *see also* Oliveira v Switzerland, App. No. 25711/94, 28 Eur. H.R. Rep. 289, para. 24-7 (1998).

⁵⁹ *See, inter alia*, Denis Waelbroeck, *supra* note 53, 470 ; *see also* Andreangeli, *supra* note 22, at 208-09.

⁶⁰ Case C-308/94 P, SGL Carbon v Commission, E.C.R. I-5977, para. 93 (2006).

⁶¹ Wouter P.J. Wils, *The Principle of ne bis in idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26(2) W. Competition L. & Econ. Rev. 131, 146 (2003).

⁶² *See, inter alia*, Gauer, *supra* note 56, at 9.

⁶³ *See* Hayek, *supra* note 17, at 83-4.

⁶⁴ *See, e.g.*, Denis Waelbroeck, *supra* note 53, 470; *see also* Andreangeli, *supra* note 22, at 208-09.

⁶⁵ For commentary, *see, inter alia*, Laurent Garzaniti, Jason Gudofsky & Jane Moffat, *Dawn of a New Era? Powers of Investigation and Enforcement Under Regulation 1/2003*, 72 Antitrust L.J. 159, 203-04 (2004).

⁶⁶ *Network Notice*, *supra* note 50, at para. 14; *see, e.g.* Gauer, *supra* note 56, at 6.

⁶⁷ *See, e.g.*, Andreangeli, *supra* note 22, at 210-11.

⁶⁸ *See, e.g., mutatis mutandis*, Case C-150/05, Van Straaten v Staat der nederlanden und Republiek Italie, E.C.R. I-9327, para. 53, 57 (2006); *cf.* Gradinger v Austria, App. No. 15693/90, judgment of 23 October 1995, Ser. A No. 328-C, para. 53; *see also* Oliveira v Switzerland, App. No. 25711/94, 28 Eur. H.R. Rep. 289, para. 25-7 (1998). For commentary, *see, inter alia*, Garzaniti et al., *supra* note 65, at 203-04.

⁶⁹ *See, inter alia*, Andreangeli, *supra* note 22, at 223.

⁷⁰ Hayek, *supra* note 17, at 108.

⁷¹ Ronald A. Cass, *Property Rights Systems and the Rule of Law*, at 2, 4, Boston University School of Law, Working Paper Series—Public Law and Legal Theory, #03=-6, *available at* http://ssrn.com/abstract_id=392783; *see also* Hayek, *supra* note 17, at 39-40.

⁷² *See, mutatis mutandis*, Cass, *supra* note 71, at 8.

⁷³ *Van Marle v the Netherlands*, App. 8543/79, , 6 Eur. H.R. Rep. 483, para. 39-41 (1986); *see also* *Anheuser Busch v Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36, paras. 72, 75-9 (2007).

⁷⁴ *Melnychuk v Ukraine*, App. No. 28743/03, admissibility decision of July 5, 2005, unreported, para. 3.

⁷⁵ *Pressos Compania Naviera v Belgium*, App. No. 17849/91, 21 Eur. H.R. Rep. 301 (1996); *see also* *Kopecky v Slovakia*, App. No. 44912/98, judgment of September 28, 2004, para. 52; *see also, mutatis mutandis*, *Stran Greek Refineries and another v Greece*, App. No. 13427/87, 19 Eur. H.R. Rep. 293, para. 60 (1995); *Schirmer v Poland*, App. No. 68880/01, 40 Eur. H.R. Rep. 47, para. 33-4 (2005); *cf., e.g., Prince Hans-Adam II of Liechtenstein v Germany*, App. No. 42527/98, 11 B. H.R. C. 526, para. 82-3 (2001).

⁷⁶ *See, inter alia*, *Sporrong & Lonroth v Sweden*, App. No. 7151/75-7152/75, 5 Eur. H.R. Rep. 35, para. 63 (1983); *Ghigo v Malta*, App. No. 31122/05, judgment of Sept. 26, 2006, unrep., para. 50.

⁷⁷ *See, e.g., Beyeler v Italy*, App. No. 33202/96, 33 Eur. H.R. Rep. 52, para. 109 (2001); *see also* *Lithgow v United Kingdom*, App. No. 9006/80, 7 Eur. H.R. Rep. 56, para. 111 (1985); *Pye (Oxford) Ltd and another v United Kingdom*, App. No. 44302/02, judgment of Aug. 30, 2007, para. 55.

⁷⁸ *See, e.g., Schirmer v Poland*, *supra* note 75, para. 34-5, 42-5; *see also* *Balan v Moldova*, App. No. 19247/03, judgment of Jan. 29, 2008, not yet reported, para. 38-9, 45-6; *Holy Monasteries v Greece*, App. No. 13092/87 and 13984/88, 20 Eur. H.R. Rep. 1, para. 80-83,

85 (1995); *Lithgow v United Kingdom*, *supra* note 77, para. 205; more recently, *B v the Netherlands*, App. No. 19589/92, Commission Report, May 19, 1994, para. 71-72; *see also id.* at para. 60, 65-6; *Beyeler v Italy*, *supra* note 77, para. 110; *Scollo v Italy*, App. No. 24/1994, 22 Eur. H.R. Rep. 514, para. 26-7 (1996).

⁷⁹ *Balan v Moldova*, *supra* note 78, para. 38-9.

⁸⁰ *Id.* at para. 45-6.

⁸¹ *Smith Kline and French Laboratories Ltd. v The Netherlands*, App. No. 12633/87, decision of Oct. 4, 1990 [hereinafter “*Smith Kline*”].

⁸² Report of the European Commission on Human Rights, 10 July 1991.

⁸³ *Smith Kline*, *supra* note 81, at part III.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See, e.g., A. Ohly et al., Artistic Freedom Versus Privacy—A Delicate Balance*, 38(5) Int’l Rev. of Intell. Prop. & Competition L. 526, 551-52 (2008); also Christophe Geiger, *Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37(4) Int’l Rev. of Intell. Prop. & Competition L. 371, 399; *cf., e.g., Verlagsgruppe News GmbH v Austria*, App. 10520/02, judgment of Dec. 14, 2006, E.M.L.R. 13.

⁹² *See, mutatis mutandis, Peter K. Yu, Reconceptualising Intellectual Property Interests in a Human Rights Framework*, 40 U. C. Davis L. Rev. 1039, 1090-091.

⁹³ See Article 7(1), Council Regulation 1/2003: “Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.”

⁹⁴ See, e.g., Commission Decision 94/19/EEC, *Sea Link v Stena Line*, 1994 O.J. L15/8.

⁹⁵ Joined Cases 6/7/73, *ICI and Commercial Solvents v Commission*, E.C.R. 223 (1974); most recently, Case T201/04, *Microsoft v Commission*, E.C.R. II-3601 (2007).

⁹⁶ Case T201/04, *Microsoft v Commission*, E.C.R. II-3601 (2007).

⁹⁷ Article 7, Council Regulation No 1/03; see also Article 3, Council Regulation No 17/62.

⁹⁸ See Recital 13, Preamble to Council Regulation No 1/2003; see also Case T-170/06, *Alrosa v Commission*, E.C.R. II-2601, especially para. 86-87, 99-100 (2007). For commentary, see, *inter alia*, Hubertus Von Rosenberg, *Unbundling Through the Back Door... The Case of Network Divestiture as a Remedy in the Energy Sector*, 30(5) Eur. Competition L. Rev. 237, 238.

⁹⁹ See, e.g., Joined Cases 6/7/73, *ICI and Commercial Solvents v Commission*, E.C.R. 223, para. 44-6.

¹⁰⁰ Von Rosenberg, *supra* note 98, at 241-42; see also Commission Notice on Remedies, 2008 O.J. C267/1, para. 7.

¹⁰¹ See, e.g., Hutten-Czapska v Poland, App. No. 35014/97, judgment of June 19, 2006, 45 Eur. H.R. Rep. 4, para. 195, 223-24 (2007).

¹⁰² See, e.g., Volvo v Veng, Case 238/87, E.C.R. 6211, para. 8-9 (1988). For commentary, see Robert O'Donaghue and Jorge Padilla, The Law and Economics of Article 82 EC Treaty 409-410, 424 (2006).

¹⁰³ Case C-7/97, Bronner v Mediaprint, E.C.R. I-7791, para. 28(1998); cf. Case T-201/04, Microsoft, supra note 96, para. 331; see also *id.* at para. 434-37. For commentary, see, *inter alia*, Roberto Pardolesi and Andrea Renda, *The European Commission's case against Microsoft: Kill Bill?*, 27(4) W. Competition 513, 537-41.

¹⁰⁴ Case C-418/01, IMS Health GmbH & Co v NDC Health GmbH & Co, E.C.R. I-5039, para. 49 (2004).

¹⁰⁵ Case C-241/91, RTE and ITP v Commission, E.C.R. I-743, para. 50-2 (1995); see also *id.* at para. 54 and 73.

¹⁰⁶ See, *inter alia*, Vassilis Hatzopoulos, *Refusal to Deal: The EC Essential Facilities Doctrine*, in EC Competition Law: A Critical Assessment 354, 354 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2006).

¹⁰⁷ Case C-418/01, IMS Health supra note 104, para. 49; see also Opinion of AG Tizzano, para. 62.

¹⁰⁸ See, *inter alia*, Ekaterina Rousseva, Abuse of Dominant Position Defences: Objective Justification and Article 82 in the Era of Modernisation, in EC Competition Law: A critical assessment 417-18, 430-31 (Giuliano Amato & Claus-Dieter Ehlermann eds., 2006).

¹⁰⁹ App. No. 12633/87, decision of Oct. 4, 1990, part III.

¹¹⁰ See 2005 Discussion Paper, para. 239-40; see also *IMS Health*, supra note 104, at para. 49.

¹¹¹ Case T-201/04, Microsoft, *supra* note 96, especially para. 621 et seq.; *see also* European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, at para. 89, C(2009) 864C (final), Feb. 9, 2009, *available at*: http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf [hereinafter referred to as "2009 Guidance"].

¹¹² 2009 Guidance, *supra* note 111, at para. 82; *cf.* Case C-7/97, Bronner GmbH v Mediaprint, E.C.R. I-7791, para. 41, 43-4(1998).

¹¹³ *See* 2009 Guidance at para. 81; *see also* Case T-201/04, Microsoft, *supra* note 96, para.389-90, 434-35. For commentary, *inter alia*, Arianna Andreangeli, *Interoperability as an "Essential Facility" in the Microsoft Case: Encouraging Competition or Stifling Innovation?*, 34(4) Eur. L. Rev. 584, 608-09 (2009).

¹¹⁴ 2009 Guidance, *supra* note 111, at para. 87.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at para. 87; *see also* Case T-201/04, Microsoft, *supra* note 96, especially paras. 646-47, 696, 702, 710-11.

¹¹⁷ *See, inter alia*, Andreangeli, *supra* note 113, at 610-11.

¹¹⁸ *See, e.g.,* 2005 Discussion Paper, *supra* note 110, at para. 235; *see also* 2009 Guidance, *supra* note 111, at para. 89; *see also* Case T-201/04, Microsoft, *supra* note 96, para. 705 et seq ; *cf.* Case C-95/04, British Airways v Commission, E.C.R. I-2331, para. 86 (2007). For commentary *see* Pierre Larouche, The European Microsoft Case at the Crossroads of Competition Policy and Innovation, at 12, TILEC Discussion Paper, No. 2008-021, May 2008, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#.

¹¹⁹ 2009 Guidance, *supra* note 111, at para. 28-29.

¹²⁰ See Case T-201/04, *Microsoft*, *supra* note 96, para. 331, 434-53; *see also* Commission Decision of May 24, 2004, C (2004) 900, 2007 O.J. C32/23, para. 669, 684-85. For commentary, *see, inter alia*, Pardolesi and Renda, *supra* note 103, at 537-41.

¹²¹ Case C-418/01, *IMS Health GmbH*, *supra* note 104, para. 48. For commentary, *see, e.g.*, case comment to Case T-201/04, *Microsoft v Commission*, 45(3) *Common Mkt. L. Rev* 863, 884 et seq (2008).

¹²² 2009 *Guidance*, *supra* note 111, at para. 87; *cf., inter alia*, *Hutten-Czapska v Poland*, *supra* note 110, para. 195, 223-24.

¹²³ See Case C-418/01, *IMS Health GmbH*, *supra* note 104, para. 48; *cf.* 2007 *Microsoft* judgment, para. 647. For commentary, *inter alia*, Hatzopoulos, *supra* note 106, at 354.

¹²⁴ See, *e.g.*, App. No. 8795/79, *James v United Kingdom*, 8 Eur. H.R. Rep. 123, para. 67 (1986); *see also, mutatis mutandis*, *Malone v United Kingdom*, App. No 8691/79, 7 Eur. H.R. Rep. 14, para. 67-8 (1985).

¹²⁵ See, *e.g.*, Andreangeli, *supra* note 22, at 609-10.

¹²⁶ See 2009 *Guidance*, *supra* note 111, at paras. 86-9. For commentary, *see* Larouche, *supra* note 118, at 12-3.

¹²⁷ See, *inter alia*, Marcus Glader, *Innovation Markets and competition analysis: EU Competition Law and US Antitrust Law* 242, 242-43 (2006); *see also* Andreangeli, *supra* note 117, at 608.

¹²⁸ See, *e.g.*, Richard H. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 *Colum. L. Rev.* 1, 7-8 (1997); *see also* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 *U.C. Davis L. Rev.* 1375 (2009).

¹²⁹ See, *e.g.*, Hatzopoulos, *supra* note 123, at 348-50.

¹³⁰ See, *inter alia*, Andreangeli, *supra* note 117, at 609-10.

¹³¹ *See, e.g.*, Jussila v Finland, App. No. 73053/01, judgment of Nov. 23, 2006, Eur. H.R. Rep. 45, para. 43 (2007).

¹³² *See, e.g.*, O' Halloran and Francis v United Kingdom, *supra* note 31, para. 53.

¹³³ *See, e.g.*, Denis Waelbroeck, *supra* note 53, 468.

¹³⁴ *See, e.g.*, Balan v Moldova, *supra* note 78, para. 39, 45-6.