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Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties' freedom to contract and to enjoy property

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This paper seeks to analyse the issues emerging from the imposition of certain antitrust remedies, such as the obligation to grant intellectual property licenses regarding key inventions covered by patent or copyright and to stipulate contracts with other firms, including competitors, as a means to remedy the consequences of antitrust infringements. It will consider the extent to which Article 7 remedies can be reconciled with other important tenets of the market economy, such as the freedom to contract and the right to peacefully enjoy one's possessions. After briefly examining the rationale for the application of certain human rights' guarantees to competition investigations and decisions, the first part of the paper will consider the questions of whether and to what extent the European Convention on Human Rights protects economic freedom and compare the current position with that adopted by the US Supreme Court. The second part will illustrate the notion of competition remedies and consider whether the principles governing them are compatible with current human rights standards as well as with the concept of the rule of law as a tool to protect 'everyone' from the arbitrary or disproportionate use of public power. The final part of the paper will argue that although antitrust remedies pursue a legitimate objective, i.e. the preservation of economic well-being through competitive markets, they must also comply with basic human rights safeguards, such as the protection of property and of freedom to contract, by striking a "fair balance" between the common good and the legitimate interests of the affected undertakings. It will be concluded that the practice in this area should conform to standards consistent with the principles enshrined in the ECHR and to the substantive concept of 'rule of law', i.e. accuracy, administrability, consistency, objectivity, applicability and transparency.

1. INTRODUCTION

Fostering genuine competition across the Common Market is at the forefront of the action of the European Commission. To achieve this goal, the 2003 Modernisation Regulation strengthened its powers of investigation and sanction and provided an express legal basis for imposing behavioural or structural obligations on undertakings found to have infringed the competition rules, in order to end the breach. However, the case law concerning Article 102 TFEU demonstrates that antitrust remedies can have a pervasive impact on the right of the concerned firms to enjoy their property and to choose freely their contractual partners. Consequently, a question emerges as to where

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the boundary should be drawn between enhancing competition through administrative action and safeguarding business freedom.

The first part of this paper will examine the approach adopted by EU competition law in respect to antitrust remedies and will analyse it in the light of the right to peacefully enjoy one's property and freedom of contract, provided by the European Convention on Human Rights (hereinafter referred to as ECHR). Thereafter, the standards of protection of business freedom in the US Constitution will be scrutinised with particular regard for the question of whether antitrust enforcement can constitute a legitimate ground for restraining the ability of commercial actors to freely determine how to conduct their affairs on the market, especially by forcing them to share their inventions with rivals.

The paper will then consider whether the requirements of 'necessity' and 'proportionality' governing antitrust remedies in EU law are compatible with the human rights standards enshrined in Article 1, Protocol I to the ECHR. It will be argued that although antitrust remedies pursue a legitimate objective, i.e. the preservation of competition to encourage economic progress, they should be compatible with the protection of property and the freedom to stipulate contracts and with the rule of law and especially its requirement that a 'fair balance' be struck between the common good and the legitimate interests of the concerned parties.

For this reason, the paper will suggest that the existing criteria governing antitrust remedies in refusal to deal cases should be inspired by a more restrained attitude as regards the extent to which the Commission can impose on dominant undertaking an obligation to 'share' the outcome of their investment with others. It will be argued that the pre-existing rules enshrined in the ECJ's *IMS Health* judgment could constitute a useful blueprint to develop these new standards.

2. ANTITRUST REMEDIES AS A MEANS TO 'BRING THE INFRINGEMENT TO AN END' IN EU COMPETITION ENFORCEMENT

Council Regulation No 1/2003's Article 7 empowers the Commission to 'impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'. However, antitrust remedies had already been imposed by the Commission under Council Regulation No 17/62[1] on the basis of its Article 3(1), according to which the Commission could 'by decision require the undertakings or the associations of undertakings concerned to' terminate their infringement.[2]

Thus, the ECJ held in its *Commercial Solvents* judgment[3] that this provision should be applied to each individual case having regard to the features of the breach established

1 See e.g. WHISH, *Competition Law*, 5th Ed, 2005: OUP, pp 254-55.

2 See, *inter alia*, Case T-170/06, *Alrosa v Commission*, [2007] ECR II-2601, para 102-103.

3 Case 6 and 7/73, *Commercial Solvents and ICI v Commission*, [1974] ECR 223.

by the decision[4] and should be read as allowing the Commission not only to oblige the parties to cease anti-competitive behaviour but also 'to do certain acts and provide certain advantages which have been wrongfully withheld' to restore competition on the relevant market.[5] The Court rejected the applicants' arguments that by ordering them to provide 'specific supplies' to a former customer[6] had acted outside the remit of its powers and upheld the obligation imposed on Commercial Solvents to continue supplying an existing customer with a view to avoiding the latter being excluded from the relevant, downstream market.[7]

The same principles were later applied in the *Magill* case, concerning instead the question of whether a refusal to grant an intellectual property licence on the part of a dominant undertaking infringed Article 102 TFEU. Both the General Court and the Court of Justice confirmed the decision finding an infringement of the prohibition contained in Article 102 TFEU and the legality of the remedy imposed on the applicants.[8] Thus, the Commission could impose obligations 'to take or to refrain from taking certain actions' to bring the infringement to an end and if required:[9] forcing the applicants to license the use of copyrighted information to third parties had accordingly been necessary and proportionate to restore antitrust compliance.[10]

Today, Article 7 of Regulation No 1/2003 not only provides a firm and express legal basis for the imposition of remedies, but also reiterates the applicability of the same criteria of 'necessity' and 'proportionality' in their design, whose observance appears directly related to the application of the substantive rules that are relevant to ascertain whether the EU competition rules have been infringed.

A detailed examination of the case law and of the issues arising from the application of Article 102 TFEU to refusals to deal and to license intellectual property rights goes beyond the remit of this paper. It is however beyond doubt that that the principles governing the finding of an infringement of Article 102 in cases of refusals to deal have undergone significant change. If in its older case law the Court of Justice had taken the view that refusals to deal and especially to license intellectual property rights would infringe the EU competition rules only exceptionally,[11] in later judgments it seemed to somehow 'mellow down' its approach.

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4 *Id.*, para 45.

5 *Ibid.*

6 *Id.*, para 44.

7 *Id.*, para 46.

8 Case T-69/89, *RTE v Commission*, [1991] ECR II-485, especially paras 70-73; Case C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, especially paras 91, 93-94.

9 Case T-69/89, *RTE v Commission*, [1991] ECR II-485, para 97.

10 C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, para 93.

11 See e.g. case 238/87, *Volvo v Veng*, [1988] ECR 6211, para 8-9. For commentary, see Evans & Padilla, *The Law and Economics of Article 82 EC Treaty*, 2006, Oxford/Portland OR: Hart Publishing, pp 409-410, 424.

The Court held in the *IMS Health* preliminary ruling that a refusal to grant an intellectual property license would breach Article 102 TFEU only if the 'input' covered by the license was 'indispensable' to operate on a distinct market, in the sense of not being duplicable.[12] The complainant would also have to establish that, after the access to the protected input, it would be able to offer a 'new product', i.e. output that is genuinely novel and not a duplicate of existing goods or services, and that the refusal was not objectively justified.[13] This test was read as providing a framework to counterbalance the preservation of effective competition, especially in markets where innovation is a key factor for the rivalry between undertakings, and the concern for encouraging the drive to invest and furthering technical development.[14]

Later decisions,[15] together with the Guidance document published by the Commission in 2009 on the application of Article 102 TFEU to exclusionary abuses (hereinafter referred to as 2009 Guidance)[16] seem to have distanced themselves from this 'finely balanced' approach.[17] It is argued that perhaps influenced by its victory in the *Microsoft* case,[18] the Commission adopted a more generous stance in respect to the conditions enumerated in the *IMS Health* test that had hitherto served the purpose of striking a balance between safeguarding the 'process' of competition and encouraging future investment by providing appropriate financial rewards.[19]

According to the Commission's 2009 Guidance,[20] refusing to deal with a competitor and to license an input regarded as 'indispensable' to compete effectively on a given

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[12] Case C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, para 48; see also Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, para 28.

[13] Case C-418/01, cit. (fn. 12), para 48-49; see also Opinion of AG Tizzano, para 62.

[14] *Id.*, per AG Tizzano, para 62; see also para 48 of the judgment. For commentary, see, *inter alia*, Hatzopoulos, "Refusal to Deal: the EC essential facilities doctrine", in Amato & Ehlermann (Eds), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, p 354.

[15] E.g. Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601 (hereinafter referred to as *Microsoft* 2007 judgment), see especially para 331, 434-435; see also Commission Decision of 24 May 2004, *Microsoft*, C(2004) 900 (hereinafter referred to as *Microsoft* 2004 Decision), especially para 669, 684-685; see also, Commission Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (hereinafter referred to as 2005 Discussion Paper), para 235. For commentary, see *inter alia* Pardolesi & Renda, 'The European Commission's case against Microsoft: Kill Bill?', (2004) 27(4) *W Comp* 513 at pp 537-541.

[16] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, C(2009) 864C (final), 9 February 2009, available at: http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf (hereinafter referred to as 2009 Guidance).

[17] See e.g. Rousseva, 'Abuse of dominant position defences: objective justification and Article 82 in the era of Modernisation', in Amato & Ehlermann (Eds.), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, pp 394-395.

[18] Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601 (hereinafter referred to as 2007 *Microsoft* judgment).

[19] Case C-7/97, *Bronner GmbH v Mediaprint*, [1998] ECR I-7791, paras 41, 43-44. See 2009 Guidance, paras 81, 86; also 2005 Discussion Paper, para 228. For commentary, see, inter alia, Kitch, 'The nature and function of the patent system', (1977) 20 *J Law & Econ* 265 at 278-279.

[20] See 2009 Guidance, paras 81, 86-89.

market would result in (or be likely to lead to) consumer harm not only if the refusal prevented rivals from supplying a 'novel' product, but also if it jeopardised their ability to engage in 'follow-on' innovation.[21] However, it may legitimately be questioned whether the new approach is capable of continuing to fulfil the 'balancing function' played by the *IMS* test and especially to reconcile the interests of rivals in the short term with the objective of boosting long term investment by powerful firms.[22]

It is concluded that the current approach raises a serious question as to whether the interpretation of Article 102 TFEU in refusals to license cases constitutes a proportionate response to the concurring needs to reconcile the integrity of intellectual property for the purpose of fostering technical development and to maintain effective competition.[23] After addressing some general issues relating to their applicability to corporate actors, the next sections will consider whether the reading of Article 102 TFEU adopted by the Commission and the EU Courts can be reconciled with the rules protecting property rights and freedom of contract provided by the European Convention on Human Rights.

3. ANTITRUST REMEDIES AND HUMAN RIGHTS' PROTECTION: BALANCING EFFECTIVE COMPETITION AGAINST THE ECHR 'ECONOMIC RIGHTS'

3.1. Human rights, corporate actors and competition enforcement: introductory remarks

The limited purvey of this paper does not allow a detailed examination of the question of whether the human rights' guarantees enshrined in the ECHR are applicable to 'corporate actors' as well as the issue of the relevance of the Convention rules for the overall 'fairness' of competition proceedings before the Commission or the NCAs, the latter when they enforce the Treaty antitrust rules. Suffice to say that, despite having been originally envisaged to protect individuals' rights, the Convention provides in Article 1 for a duty on the Contracting Parties to secure the rights it contains to 'everyone' within their jurisdiction, regardless of their status or legal nature.[24]

Having regard specifically to business freedom, it was suggested that the Convention's founding values and especially its commitment to personal liberty, favour the

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[21] *Id.*, para 87; cf. Case C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, para 43. For commentary, *inter alia*, Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?', (2009) 34(4) *ELRev* 584 at 608.

[22] 2009 Guidance, para. 89. For commentary, see, *inter alia*, Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation', TILEC Discussion Paper, May 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#, pp 12-13.

[23] E.g. Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, paras 28, 41-44; for commentary, inter alia, Hatzopoulos, 'Refusal to Deal: the EC essential facilities doctrine', in Amato & Ehlermann (Eds), *EC Competition Law: a critical assessment*, 2006: Oxford, Portland OR, Hart Publishing, p 354 *et seq.*; also Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?', (2009) 34(4) *ELRev* 584 at 608-610.

[24] See, e.g., Emberland, *The human rights of companies*, (2005) Oxford University Press, pp 33-34.

protection of a number of rights having an 'economic substance', such as the right to peacefully enjoy property and in that context, freedom of covenant.[25]

Commentators argued that the protection of property rights is fully consistent with the essence of the rule of law: by confining the exercise of discretionary powers only to cases in which governmental intervention is strictly necessary to promote the 'most productive' use of resources, this principle protects the incentive to invest in new technical advancements,[26] ensures that any adverse effects of these forms of public intervention on individual rights are offset by imposing certain procedural requirements and therefore establishes a duty to grant compensation to those affected by it,[27] consistently with principles of 'fairness', foreseeability and proportionality.[28]

It is suggested that the ECHR is consistent with these principles, being inspired by political democracy and personal freedom, the latter intended as the 'absence of (arbitrary) public encroachment of the private sphere',[29] and providing safeguards such as the right to a fair trial and the protection of individual rights against arbitrary or disproportionate interferences on the part of State authorities, as provided by, *inter alia*, Articles 8(2) and 10(2) of the Convention.[30] The emphasis placed on the requirements of clarity and foreseeability of the law governing these interferences conforms to the conditions of legal certainty enshrined in the rule of law.[31]

In this context, freedom of enterprise is consistent with the protection of individual freedom and of the right to peacefully enjoy property.[32] However, it is clear that these entitlements are not unlimited but can be subjected to constraints in the public interest.[33] Consequently, whereas the rule of law does not prevent States from providing 'regulatory structures' for the economy, how can it be ensured that these

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[25] See e.g. Ovey and White, *European Convention on Human Rights*, 3rd Ed, 2002: Oxford University Press, p 302; also Emberland, ibid, pp 48-49; Andreangeli, *EU Competition enforcement and Human Rights*, 2008: Cheltenham, E Elgar, pp 16-17. See e.g. World Bank, World Development Report 2002: Building Institutions For Markets 105 (2002), available at http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm, p 133.

[26] See e.g. Cass, 'Property rights systems and the rule of law', Boston University School of Law, Working Paper Series—Public Law and Legal Theory, #03=-6, available at: http://ssrn.com/abstract_id=392783, pp 4-5; see also p 7.

[27] *Id*., pp 16-20; see also Lord Bingham, 'The Rule of Law', 6th Sir David Williams Lecture, 16 November 2006, House of Lords, transcript available at: www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript_php, pp 2, 5-6; see also p 9.

[28] Hayek, *The Road to Serfdom*, 1944 (reprinted in 2008), Abingdon/New York: Routledge, p 84.

[29] Emberland, op cit, n 24, pp 40-41, 43, 47.

[30] See e.g. *Handyside v United Kingdom*, [1979-1980] 1 EHRR 737, para 48. See also appl. No 5947/72, *Silver v United Kingdom*, [1983] 5 EHRR 347, para 97.

[31] Hayek, op cit, n 28, pp 37-38; see also Emberland, op cit, n 24, pp 37, 43.

[32] See e.g. Ovey & White, *European Convention on Human Rights*, 3rd Ed, 2002: Oxford University Press, p 302; also Emberland, op cit, n 24, pp 48-49; Andreangeli, *EU Competition enforcement and Human Rights*, 2008: Cheltenham, E Elgar, pp 16-17.

[33] See e.g. Trainor, 'A comparative analysis of a corporation's right against self-incrimination', (1994-95) 18 *Fordham Int'l L J*, p 239; see especially pp 2165-2166.

frameworks are shaped in a manner that respects and does not unduly hinder the enjoyment of these rights?[34]

It is argued that these considerations are all the more relevant for competition enforcement structures. Although commentators have suggested that free competition provides a 'better way of guiding individual efforts than any other' and have therefore argued in favour of the free market economy, they have also emphasised that, for competition to work not only 'efficiently' but also 'well', it is necessary to establish legal structures destined to ensure that markets work 'beneficially', especially through the appropriate organisation of [*inter alia*] 'money … and channels of information'.[35]

In this context the ECHR constitutes the 'rule book' regulating the conformity of the regulatory frameworks in the economic arena with the rule of law principles.[36] In several judgments the European Court of Human Rights was prepared to extend some of the Convention safeguards to individuals or legal entities engaged in professional or business activities.[37] However, the case law shows that in balancing the right of individuals or companies to pursue lawful business activities freely with the pursuit of the common good the standards of protection of Convention rights may not have the same intensity as in cases concerning 'non-commercial' activities.[38]

The Court acknowledged that in the control and regulation of the economy Contracting States should be allowed a wide margin of appreciation and consequently confined its powers of review to considering whether any measures affecting the rights of economic actors had been 'justifiable in principle and proportionate' to the goal they pursued.[39] This approach may be contrasted with the scrutiny of measures adopted by public authorities to restrain Convention rights in the 'political' arena. In *Handyside*, it was held that the discretion of the public authorities as to whether any restriction on the applicant's right to free speech was 'necessary' in a democratic society was not unlimited.[40]

Therefore, the Court would have to be satisfied that in the circumstances of the case, the interference with the applicants' right to free speech responded to a pressing social

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[34] Cass, 'Property rights systems and the rule of law', Boston University School of Law, Working Paper Series—Public Law and Legal Theory, #03=-6, available at: http://ssrn.com/abstract_id=392783, pp 4-5; see also pp 7 and 14; also Emberland, op cit, n 24, p 51.

[35] Hayek, op cit, n 28, pp 38-39.

[36] See Emberland, op cit, n 24, pp 48-49; also Andreangeli, op cit, n 32, pp 17-18.

[37] See e.g. appl. No 13710/88, *Niemitz v Germany*, ser. A No 251-B, [1993] 16 EHRR 17, paras 29-31; also appl. No 37971/97, *Ste Colas Est and others v France*, [2004] 39 EHRR 17, paras 40-41.

[38] See, *inter alia*, Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, Ser. A No 165, [1990] EHRR 161, paras 33-35; also appl. No 15450/89, *Casado Coca v Spain*, ser. A No 285, [1994] 18 EHRR 1, paras 39-41; appl. No 10890/94, *Groppera Radio v Switzerland*, [1990] 12 EHRR 321, para 48.

[39] Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, op cit, n 38, para 33; also appl. No 10890/94, *Groppera Radio*, *ibid*., para 48.

[40] *Handyside v United Kingdom*, [1979-1980] 1 EHRR 737, para 48. See also appl. No 5947/72, *Silver v United Kngdom*, [1983] 5 EHRR 347, para 97.

need and was proportionate to the legitimate aim it pursued[41] and, without reconsidering the 'merits' of the measure, would be empowered to review it to ensure that the reasons adduced by the authorities to support the scope and intensity of the interference were 'relevant and sufficient'.[42] By contrast, although in principle corporate entities are entitled to the protection of some of the Convention safeguards, the standards applicable to them appear somewhat less exacting than those relevant for natural persons.[43]

But how can this divergence be justified? It was suggested that this differing approach could stem from the ideological differences existing among the Contracting States as regards the inclusion of 'free market friendly' rights and freedoms in the Convention.[44] It is added that whereas the different treatment of 'commercial' vis-à-vis 'political speech' may be owed by the circumstance that freedom of expression in the 'political arena' lies at the very core of the values underpinning the Convention, the protection of property and economic freedom would be more 'relative' values. Therefore, while any interference with the freedom to engage in political debate should be carefully scrutinised to protect the integrity of the democratic process,[45] protecting the right to impart and receive information within the market would not deserve an equally extensive protection.[46] Or, to put it in another way, the farther we move from the 'core values' of the ECHR, the more lenient the applicable standard is likely to be and, consequently, the wider the margin of appreciation for the public authorities becomes.[47]

After having illustrated some of the arguments in support of the application of the ECHR to corporate entities, it is necessary to briefly address the rationale for the relevance of the Convention for EU competition enforcement. It may be recalled that the EU is not a party to the Convention.[48] However, the lack of accession has not prevented the Court from developing a body of rules, part of the general principles of Community law, protecting the fundamental rights of individuals and legal entities affected by the exercise of powers by the EU institutions.[49] In this context, the ECHR

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41 *Id.*, paras 49-50.

42 *Id.*, para 50. For commentary, see e.g. Ovey & White, *European Convention on Human Rights*, 3rd Ed, 2002: Oxford University Press, pp 276-77.

43 See e.g. Emberland, op cit, n 24, pp 128-130; also Andreangeli, op cit, n 32, pp 20-21.

44 See, *inter alia*, *mutatis mutandis*, Kenna, "Housing rights: positive duties and enforceable rights at the European Court of Human Rights", (2008) (2) *EHRLR* 193, pp 194-195; also Emberland, op cit, n 24, pp 28-29; see also p 34.

45 See, inter alia, appl. No 9815/82, *Lingens v Austria*, [1986] 8 EHRR 407, paras 40-41; for commentary, see Ovey & White, *European Convention on Human Rights*, 3rd Ed, 2002: Oxford University Press, pp 210-211; also Emberland, op cit, n 24, p 192.

46 See Emberland, op cit, n 24, p 187; also, e.g. Andreangeli, op cit, n 32, p 22.

47 See e.g. Emberland, op cit, n 24, p 193.

48 See e.g. appl. No 8030/77, *CFDT v European Communities*, [1979] 13 D & R 231 at 240.

49 See e.g. Opinion 2/94, *Re: Accession to the European Convention on Human Rights*, [1996] ECR I-1759; also T-156/94, *Siderurgica Aristrain Madrid v Commission*, [1999] ECR II-645, paras 26-27.

has been recognised as the principal 'source of inspiration' for the interpretation of these principles.[50]

The applicability of some of the fundamental safeguards contained in the Convention to undertakings concerned by antitrust proceedings has long been a 'hot topic'.[51] Already in its *Stenuit* report the now defunct European Commission of Human Rights held that that the notion of 'criminal charge' had a 'Convention meaning' independent of domestic law[52] and determined by a number of factors, such as whether the rules allegedly being infringed were of 'general application', the severity of the penalty, and whether the latter was deterrent and punitive.[53] As a result, domestic antitrust proceedings, despite being classified as 'administrative' by national legislation, were 'criminal' in nature.[54]

Despite their initial reluctance to extend the applicability, even indirect, of some of the Convention guarantees to competition proceedings,[55] the EU courts have been increasingly willing to rely on the ECHR in the interpretation of the general principles of Community law. For instance, AG Kokott observed in her Opinion to the *Dutch Electricians Federation* case that although the ECHR would not be directly applicable per se to the proceedings before the Commission,[56] it would however provide guidance as to what constitutes a 'fair procedure' before the EU institutions.[57]

Importantly, the CFI held in its *JFE* decision that Article 6(1) ECHR and especially of the presumption of innocence would be especially relevant in competition cases, due to the nature of the infringement and the degree of severity of the penalties likely to be

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[50] See Protocol 8 to the Treaty on the European Union and the Treaty on the functioning of the European Union, OJ 2008, C115/1; also, Recital IV, Preamble to the Treaty on the European Union and the Treaty on the functioning of the European Union, OJ 2008, C115/1.

[51] See*, inter alia*, Andreangeli *et al*., 'Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System' prepared for the fifth annual conference of the Global Competition Law Centre, College of Europe, held in Brussels, June 11-12, 2009.

[52] Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, paras 62-63; see also, more recently, appl. No 15523/89, *Schmautzer v Austria*, [1996] 16 EHRR 511, para 28. For commentary, *inter alia*, Boyle, 'Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights', (1984) *PL* 89.

[53] See e.g. Case C-198/01, *CIF v Autorita' Garante della Concorrenza e del Mercato*, [2003] ECR I-8055, per AG Jacobs, para 52; also case C-105/04 P, *NFVGEG v Commission* (Re: Dutch Electricians' cartel), [2006] ECR I-8725, per AG Kokott, para 107. For commentary, *inter alia*, Wils, 'The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis' (2004) 27 *W. Comp.* 201; Andreangeli, op cit, n 32, pp 25 ff.

[54] Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, para 56, 61. See also, appl. No 73053/01, *Jussila v Finland*, judgment of 23 November 2006, [2007] EHRR 45, para 43.

[55] Case T-156/94, *Siderurgica Aristrain Madrid v Commission*, [1999] ECR II-645, paras 23-24, 27.

[56] Case C-105/04 P, *Netherlandse Federatieve Vereigning voor de Goothandel op Elektroteknisch Gebied v Commission*, [2006] ECR I-8725, per AG Kokott, para 107, n 57.

[57] *Id.*, para 108. See also Case T-7/89, *SA Hercules Chemicals v Commission*, [1991] ECR II-1771, per AG Vesterdorf, para I.3; also, *inter alia*, case C-185/95, *Baustahlgewebe v Commission*, [1998] ECR I-8417, per AG Leger, para 31.

imposed on the applicant.[58] However, to what extent can the needs of effective competition enforcement and more generally of the efficient functioning of regulatory structures be balanced against these fundamental rights guarantees?

On this point, the Strasbourg court held that while the right to a fair trial is in itself absolute, whether the applicant had received a 'fair hearing' in the individual case would depend on the circumstances of the proceedings:[59] in fact, the applicable standard of protection cannot be determined 'in isolation' but must take into account the context in which it is invoked and the values affected by the alleged interference. It was concluded that although criminal proceedings in principle required the application of strict procedural safeguards, due to the gravity characterising them, there may be cases in which no such 'stigma' was present[60] and for which the application of the 'full' guarantees attending a criminal trial could not be justified.[61]

Similarly, in *O'Halloran and Francis*, concerning the right to silence in administrative proceedings aimed at the detection and sanction of motoring offences, it was held that although the right to a fair trial is absolute in itself, its constituent elements, including the right not to contribute to incriminate oneself, may actually vary in their scope,[62] due to the circumstances of the case, the nature of the proceedings and the safeguards attending the taking of that evidence.[63] The Strasbourg court observed that when choosing to perform certain activities, individuals often accept, expressly or implicitly, to submit to specific obligations and responsibilities within a regulatory regime which may therefore limit the reach of their rights in the course of proceedings designed to enforce these obligations in the common interest.[64] Thus, all the Convention requires is respect for the essence of the right to a 'fair procedure' in the face of compulsion in the taking of evidence.[65]

It is concluded that the commitment to fundamental rights' protection justifies the application of some of the Convention guarantees to the investigated firms in competition proceedings, albeit through the 'medium' of the general principles of EU law. However, a question remains open as to how to reconcile the protection of the right to a 'fair procedure', the right to peacefully enjoy one's property and the freedom to contract with legitimate objectives of public interest.

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58 Case T-67/00, *JFE v Commission*, [2004] ECR II-2501, para 178.

59 See e.g. appl. Nos. 15809/02 and 25624/02, *O' Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 53.

60 Appl. No 73053/01, *Jussila v Finland*, judgment of 23 November 2006, [2007] EHRR 45, para 43.

61 *Ibid.* See also paras 46-48.

62 Appl. Nos. 15809/02 and 25624/02, *O' Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 53.

63 *Ibid.* See also appl. No 54810/00, *Jalloh v Germany*, [2007] 44 EHRR 32, para 117.

64 Appl. Nos. 15809/02 and 25624/02, *O' Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para 57. See also, *mutatis mutandis*, *Brown v Stott*, Privy Council, 5 December 2000, [2003] 1 AC 681, per Lord Bingham, p 703.

65 *Ibid.*

The next sections will investigate the impact of the powers enjoyed by the Commission to 'bring the infringement to an end' on economic freedom and the right to peacefully enjoy property granted to the investigated firms under the ECHR. They will also consider the Convention standards of protection against the background of the US case law relating to the protection of freedom of covenant under the US Constitution's 'Due Process' clause.

3.2. Economic freedoms and property rights 'European style': looking for a 'fair balance'

Section 3.1 considered a number of arguments supporting the application of certain guarantees enshrined in the European Convention on Human Rights and suggested that the protection of property and of the freedom of enterprise in a market economy is compatible with principles of human dignity, personal liberty and other rights, including freedom of association. This section will analyse the current standards of protection afforded by the ECHR to the right to peacefully enjoy one's property and to the freedom of contract.

The right to enjoy property is enshrined in Article 1 of Protocol I to the ECHR, according to which 'every natural or legal person is entitled to the peaceful enjoyment of his possession'. This is not, however, an absolute right, but may be limited, subject to the requirements laid down in that provision.[66] In respect to the notion of a 'deprivation' of property, as opposed to the imposition of 'controls' over its use, the European Court of Human Rights took the view that in assessing the impact that the measure complained of has had on her legal position regard should be had to the circumstances of each case and especially to the 'realities' of the position of the individual applicant.[67] Thus, the decisive question appears to be whether the applicant was deprived of her 'title' to the possessions so as to be no longer able to dispose of them or the measure adopted by the public authorities had only affected her ability to enjoy the property.[68]

A similarly flexible approach has informed the interpretation of the notion of 'possession' in the ECHR. According to the Strasbourg Court, this concept should be given an 'autonomous meaning'[69] and encompass tangible and intangible goods and, in appropriate circumstances, the 'legitimate expectation' to the acquisition of a right.[70] Intellectual property rights have been held to fall within the remit of Article 1, Protocol

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[66] See e.g. appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, judgment of 30 August 2007, para 52.

[67] Appl. No 7151/75-7152/75, *Sporrong & Lonroth v Sweden*, [1983] 5 EHRR 35, para 63.

[68] See e.g, appl. No 43278/98, *Velikovi and others v Bulgaria*, [2009] 48 EHRR 27, para 159-160; cf. Appl. 17647/04, *Edwards v Malta*, judgment of 14 January 2007, not yet reported, para 59-60.

[69] See e.g. appl. 58472/00, *Dima v Romania*, judgment of 16 November 2006, unrep, para 34.

[70] *Inter alia*, appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 31, 33; also, appl. 8543/79, *Van Marle v the Netherlands*, [1986] 6 EHRR 483, para 39-41; appl. No 44912/98, *Kopecky v Slovakia*, judgment of 28 September 2004, para 52. See also, *mutatis mutandis*, appl. No 13427/87, *Stran Greek Refineries and another v Greece*, [1995] 19 EHRR 293, para 60.

I.[71] In the *Anheuser Busch* decision[72] the Court's Grand Chamber stated that an application for registration of a trademark could constitute a 'possession' for the purpose of the ECHR[73] due to the 'legal and financial rights and interests' arising from it, which are liable to confer it a specific economic value[74] and therefore a 'proprietary' nature.[75]

It was noted above that at the core of the ECHR scrutiny of measures affecting property rights is the extent to which they struck a 'fair balance' between the public interest it pursued and the protection of the rights of the individual or legal person concerned. The Strasbourg Court has indicated several requirements that should be satisfied: any constraint on the right to enjoy one's property should be 'prescribed by law' - in other words, it must find a legal basis in domestic provisions and the latter must be 'sufficiently accessible, precise and foreseeable'.[76] Further, that constraint must have a legitimate aim and pursue the 'general interest of the community'[77] and, finally, be 'necessary' to achieve that objective of public interest.

The Court recognised that although public authorities enjoyed a considerable margin of appreciation in the assessment of this requirement,[78] their discretion would remain subject to 'European supervision' as to whether a 'fair balance' had been maintained between the 'demands of the general interest of the community and the requirements of protection of the individual's fundamental rights',[79] on the basis of the 'overall examination of the various interests in issue'.[80]

The Strasbourg court would have to be satisfied that the measure had ensured a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised',[81] taking into account the scope of discretion enjoyed by the authorities in applying the relevant rules and their uncertainty[82] and the nature and inherent 'fairness' of the proceedings,[83] including the possibility to challenge the

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71 See e.g. appl. No 28743/03, *Melnychuk v Ukraine*, admissibility decision of 5 July 2005, unreported, para 3.

72 Appl. No 73049/01, *Anheuser Busch v Portugal*, [2007] 45 EHRR 36, para 72.

73 *Id.*, para 75.

74 *Id.*, para 76.

75 *Id.*, para 78.

76 Appl. No 33202/96, *Beyeler v Italy*, [2001] 33 EHRR 52, para 109. See also appl. No 9006/80, *Lithgow v United Kingdom*, [1985] 7 EHRR 56, para 110.

77 Appl. No 33202/96, *Beyeler v Italy*, ibid, para 111.

78 Appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, judgment of 30 August 2007, para 55.

79 Appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, ibid, para 53.

80 Appl. No 25088/95, *Chassagnou v France*, [2000] 29 EHRR 615, para 75; see also appl. 9006/80, *Lithgow v United Kingdom*, op cit, n 76, para 120-21; appl. No 44302/02, *Pye (Oxford) Ltd and another v United Kingdom*, op cit, n 76, para 55.

81 Appl. No 25088/95, *Chassagnou v France*, ibid, para 82-83, 85.

82 Appl. No 33202/96, *Beyeler v Italy*, op cit, n 76, para 110.

83 Appl. 13616/88, *Hentrich v France*, [1996] 21 EHRR 199, para 45.

findings and assessments made by the authorities concerned by way of an appeal.[84] Another key consideration in the assessment of the proportionality of an interference with property rights is the existence of compensation for the aggrieved individuals or legal persons. Thus, expropriations[85] and controls on the use of property without compensation or remuneration are normally considered to be a 'disproportionate' interference with the applicant's rights.[86]

Having regard to the standards of protection of freedom to contract the European Court of Human Rights stated in *Ghigo v Malta* that measures controlling the amount of rent that landlords could impose on their tenants constituted a form of 'control on the use' of that property. Since the right 'to receive a market rent and to terminate leases' was the expression of the owner's right to exploit the economic value of the property,[87] it enjoyed the protection of the ECHR.[88]

Consequently, state authorities, despite being entitled to adopt wide ranging housing legislation to ensure the 'just distribution … of housing resources'[89] were obliged to safeguard the 'essence' of the rights enshrined in Article 1, Protocol I.[90] Regard must be had to 'the conditions for reducing the rent' in individual cases and to 'the extent of the State's interference with freedom of contract and contractual relations in the lease market', including the length of the interference and the amount of rent paid to the landlord[91] and the existence of fair and appropriate remedies for the protection of their rights.[92]

It can be concluded that the ECHR protects the right to enjoy one's possessions, whether tangible or intangible, and the freedom of covenant of 'everyone' within the jurisdiction of the Contracting States. However, these rights are not absolute but can be subjected to limits in the public interest and providing that a 'fair balance' is struck

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84 *Id.*, para. 42, 46; see also para 49.

85 See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, paras 31, 33; see also para 39.

86 See appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, para. 38-39; also para 46. See also appl. No 13092/87 and 13984/88, *Holy Monasteries v Greece,* [1995] 20 EHRR 1, paras 80-83, 85; appl. 9006/80, *Lithgow v United Kingdom*, cit., para 205; more recently, appl. No 19589/92, *B v the Netherlands*, Commission Report, 19 May 1994, paras 71-72; see also paras 60, 65-66.

87 Appl. No 31122/05, *Ghigo v Malta*, judgment of 26 September 2006, unrep, para 50.

88 *Id.*, para 49. See also appl. No 10522/83, *Mellacher v Austria*, [1990] 12 EHRR 391, paras 43-44.

89 Appl. No 31122/05*, Ghigo v Malta*, op cit, n 87, para 58. Also, appl. No 22774/93, *Imoobiliare Saffi v Italy*, [2000] 30 EHRR 756, para 52.

90 Appl. No 31122/05*, Ghigo v Malta*, op cit, n 87, paras 62, 68. See also paras 65-66, 68-69. See also, *mutatis mutandis*, appl. No 31443/96, *Broniowski v Poland*, [2005] 40 EHRR 31, para 144; more recently, appl. No 35014/97, *Hutten-Czapska v Poland*, judgment of 19 June 2006, [2007] 45 EHRR 4, paras 195-196, 200-202, 217, 223-224.

91 *Id.*, para 68; see also paras 65-66, 68-69. See also, *mutatis mutandis*, appl. No 31443/96, *Broniowski v Poland*, [2005] 40 EHRR 31, para 144; more recently, appl. No 35014/97, *Hutten-Czapska v Poland*, judgment of 19 June 2006, [2007] 45 EHRR 4, paras 195-196, 200-202, 217, 223-224.

92 Appl. No 24/1994, *Scollo v Italy*, [1996] 22 EHRR 514, paras 26-27, 38-40, 44. See also appl. No 46129, *Zvolski and Zvolska v Slovakia*, judgment of 22 November 2002, unrep, paras 59-60, 73-75.

between the 'common good' and the essence of the applicant's rights.[93] The next section will examine the approach adopted by the European Court of Human Rights in respect to forced IP licences.

3.3. Intellectual property rights, progress and competition in the ECHR framework

Section 3.2 illustrated that Article 1, Protocol I to the ECHR encompasses intangible as well as tangible goods and that its aim is striking a 'fair balance' between the need to protect the essence of these rights and the achievement of goals in the public interest. This section will address the position adopted by the Strasbourg court in relation to compulsory intellectual property licenses. Although these cases have been rare, they represent a peculiar example of 'interference' with Convention rights in order to encourage industrial innovation.

One such case was that of *Smith Kline and French Laboratories v the Netherlands*,[94] which was the subject of a friendly settlement[95] and was therefore only dealt with at admissibility stage by the now defunct European Commission on Human Rights. According to the Commission report, the grant of a 'compulsory licence' constituted a form of 'control on the use of property' of the patent holder.[96] It was held that one of the essential attributes of patent rights was the conferral 'on its owner [of] the sole right of exploitation' of the invention and that the grant of 'rights to others under that patent [was not] an inevitable or automatic consequence'.[97] Consequently, it was indispensable to assess whether imposing a duty to licence was 'prescribed by law' and pursued 'a legitimate aim in a proportionate manner'.[98]

The Commission observed that many Contracting States provided frameworks allowing 'other persons to make use of a particular patented product' and that in this area they should enjoy a significant margin of appreciation:[99] forced licences could be granted only to 'encourage technological and economic development' and if the disclosure of the invention could result in the supply of a 'new product or process … capable of industrial application'.[100]

It was held that the scope of the licence at issue was limited to allowing the licensee to employ its own invention[101] and that the holder of the 'primary' patent had been

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93 See e.g., *mutatis mutandis*, Daintith, 'The constitutional protection of economic rights' (2004) 2(1) *Int'l J of Const'l L* 56 at 84-86.

94 Appl. No 12633/87, decision of 4 October 1990.

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

96 Appl. No 12633/87, decision of 4 October 1990, part III.

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*

entitled to royalties.[102] Thus, the Commission, in declaring the application admissible, stated that the respondent state had not overstepped the limits of its discretion and, consequently, the applicant's rights had not been infringed.[103]

The *Smith Kline* report suggests that any forced IP licence must provide for adequate compensation and be limited in its scope to reconcile the competing interests of the IP holder to the protection of the value of its investment, for the purpose of furthering innovation, and to the continued innovation of the industry on the part of the holder's rivals.[104] However, it remains open to question whether the imposition of similar obligation for the purpose of restoring competition, as envisaged in the application of Article 102 TFEU, satisfies these criteria. After briefly examining the rules protecting property rights and freedom of contract in US constitutional law, the next sections will attempt to answer these questions.

3.4. Freedom of covenant and property rights in the US Constitution: brief remarks

Sections 3.2 and 3.3 examined the standards of protection applicable to the right to enjoy property and to freedom of contract under the ECHR. Before moving on to consider the extent to which the restrictions on these rights imposed by the European Commission, in the exercise of its function as competition enforcer, comply with the ECHR standards, it is helpful to consider, albeit briefly, the degree of protection afforded to them under the US Constitution.

According to the Fifth Amendment, 'no person shall [*inter alia*] … be deprived of … property without due process of law; nor shall private property be taken for public use without just compensation'. In addition, the 'due process clause' contained in the Fourteenth Amendment may be relied on vis-à-vis the federate states to seek protection of the individual's freedom of covenant.[105]

The case law appears to suggest that a shift has taken place from a liberal approach to freedom of contract and of enterprise, in which the rights of the individual tended to take precedence over the exercise of public powers, to a more 'interventionist' approach, as a result of which the Supreme Court has been more willing to justify state action in the public interest that encroaches in the individual's economic freedoms. It was held in *Lochner* that 'the general right to make a contract in relation to his business is part of the liberty of the individual' and is therefore protected by the 'Due Process' clauses contained in the US Constitution.[106]

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[102] *Ibid.*

[103] *Ibid.*

[104] See e.g. Ohly et al., 'Artistic freedom versus privacy—a delicate balance' (2008) 38(5) *IIC* 526 at 551-552; also Geiger, 'Constitutionalising intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) 37(4) *IIC* 371 at 399.

[105] See e.g. Mayer, 'Substantive due process rediscovered: the rise and fall of liberty of contract' (2008-09) 60 *Mercer L Rev* 563 at 572 ff.

[106] *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Peckham J at 541.

Nonetheless, the Court recognised that each State enjoyed 'certain powers … somewhat vaguely termed police powers' that limit the rights of liberty and property enjoyed by each individual for the 'safety, general health and morals and general welfare of the public'[107] and must be exercised within the bounds of 'constitutional restraint'.[108] The key question therefore is whether the restriction imposed on the applicant's rights constituted a 'fair, reasonable and appropriate exercise of police power' or instead was an 'unreasonable, unnecessary and disproportionate interference with the right of the individual to his personal liberty' and in that context of his freedom of contract.[109] The act in question must therefore bear a 'direct relation, as a means to an end, and the end itself must be appropriate and legitimate'.[110]

On the merits, the Supreme Court found for the applicant: it was held that the statute at issue, in which the legislature of the State of New York had set a maximum number of working hours for persons employed in certain trades, constituted a 'meddlesome interference with the freedoms of the individual'.[111] Although these measures pursued the legitimate goal of protection of public health, the legislature had not proven the existence of any 'fair ground, reasonable in and of itself, to say that there [was] a material danger to the public health of the employees', in the absence of any limits on the number of hours that they could work each day.[112]

Lochner was widely criticised and the limited remit of this paper does not allow for a detailed consideration of these arguments.[113] Mr Justice Holmes, dissenting, argued that the case had been 'decided upon an economic theory which a large part of the country [did] not entertain' and that the Constitution could not be constructed in the light of either a 'paternalistic' approach to the relationship between the individual and the state or of a 'laissez faire' attitude to economic freedom.[114] Mr Justice Harlan added that the right to freely enter in contracts could be subjected to limitations 'for the common good and the well-being of society'.[115]

In later cases, the Supreme Court appeared to retreat from this supposedly 'pro free market' stance. In *Carolene Products*[116] it held that the authorities retained the power to regulate commerce for reasons of public interest and that it was within the legitimate

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[107] *Ibid.*

[108] *Id.*, p.542.

[109] *Id.*, p. 543.

[110] *Ibid.*

[111] *Id.*, p. 545.

[112] *Ibid.*

[113] See e.g. Burling, 'The challenges of due process, 1983 and property rights', ALI-ABA working paper, 2004, available at http://ssrn.com/abstract=666987; also Bernstein, 'Bolling, equal protection, due process and Lochnerphobia', Law and Economics working paper series no 05-14, available at http://ssrn.com/abstract_id=761926.

[114] *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Holmes J, pp 546-547.

[115] Per Harlan J, pp 548.

[116] *US v Carolene Products*, 304 US 144, 58 S Ct 778.

powers of the legislature to exclude from trade products whose consumption may be 'injurious to the public health, morals or welfare'.[117] Thus, a measure outlawing the sale of products that failed to meet 'a minimum of particular nutritive elements in a widely used article of food' to protecting the public from fraudulent substitution had not violated the 14th Amendment.[118]

The Supreme Court would not, therefore, declare legislative measures affecting economic activities unconstitutional unless 'in the light of the facts made known or generally assumed [they were] … of such a character as to preclude the assumption that [they have] … some rational basis within the knowledge and experience of the legislators',[119] in light of the circumstances of the case and without going as far as to 'second-guess' the choice of the legislature.[120]

The approach adopted in *Carolene* was upheld in other judgments concerning the legality of legal monopolies and measures fixing prices. According to *Nebbia* 'neither property rights nor contract rights [were] absolute' but could be limited to what was necessary 'to advance the safety, happiness and prosperity of [the] people and to provide for [their] general welfare'.[121] A legislative measure affecting the individuals' rights and freedoms would be consistent with the 'Due Process' clause if it was 'not … unreasonable, arbitrary or capricious' and imposed only those limitations on the complainant's rights that bear 'a real and substantial relation' with their objective.[122] It was concluded that legislation introduced in the State of New York to control prices on the sale of milk had not infringed the 14th Amendment. In the view of the Supreme Court, since the Constitution did not provide an absolute guarantee for the freedom to engage in and conduct a business activity, States' legislatures and Congress could restrict the freedom of individuals to conduct their business in the public interest.[123]

Roberts J emphasised that although the growing importance of free competition had led both the States' and the federal legislature to prohibit monopolies or other forms of control on prices and trading conditions,[124] there may be circumstances in which 'existing maladjustments' in the functioning of individual markets could be 'corrected' by public intervention even though that adversely impacted on the freedom of the entrepreneurs concerned to set prices for their goods or services.[125] If these measures bore 'a reasonable relation to a proper legislative purpose' and were not discriminatory or arbitrary, they would remain consistent with the Due Process clause, without the

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[117] Per Stone J at 781.

[118] *Ibid.*

[119] *Id.*, p 783.

[120] *Id.*, pp 783-784.

[121] *Nebbia v State of New York*, 291 US 502, 54 S Ct 505, per Roberts J at 523.

[122] *Id.*, p 525.

[123] *Id.*, pp 527-528.

[124] *Id.*, p 528.

[125] *Id.*, pp 529, 531-532.

Courts being able to adjudge the 'wisdom of the policy', its 'adequacy or predictability'.[126]

It is therefore concluded that the US Supreme Court recognises economic freedom, freedom of covenant and the right to enjoy one's property as one of the rights protected by the US Constitution and relies on the 'Due Process' clause to prevent undue interferences with it.[127] However, their protection is not unlimited but can be subject to constraints for the common good of society, subject to criteria of 'proportionality' and 'fairness'.[128]

The next section will therefore briefly consider how the US Supreme Court has addressed the issues arising from the imposition of restrictions on economic freedom of firms in the application of the US Sherman Act, and especially its section 2.

3.5. Of intellectual property rights and antitrust infringements: the US Supreme Court case law on refusals to deal

Section 3.4 briefly illustrated the approach adopted by the US Supreme Court to restrictions of property rights and freedom of covenant imposed by public authorities both at state and at federal level in the light of the Due Process clause. However, the regulation of commercial activities is only one of the areas in which public authorities have sought to restrict freedom of covenant and to dispose of property: antitrust enforcement is another one. Nonetheless, Courts have been reluctant to restrain the freedom of undertakings to discontinue its business dealings with other firms.

It was held in *Colgate*, a case concerning an alleged infringement of Section 1 of the Sherman Act, that in principle the antitrust rules could not be relied upon to impose a duty to deal with another company, especially a rival.[129] The Court took the view that the objective of that Act was to protect the freedom of trade of every individual or corporation and that, consequently, its provisions could not be read as limiting the discretion to choose business partners or the conditions of trade, unless it could be demonstrated that the firm had acted for the 'purpose to create or maintain a monopoly'.[130] On the merits it was concluded that the respondent, by refusing to continue supplying retailers who had declined to sell its product above an agreed price, had not infringed Section 1 of the Sherman Act.[131]

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[126] *Id.*, p 538. Cf. *New State Ice Co. v Liebmann*, 285 US 262, 52 S Ct 371, see especially pp 373-375.

[127] For commentary, see e.g. Daintith, 'The constitutional protection of economic rights' (2004) 2(1) *Int'l J of Const'l L* 56 at 81-82.

[128] *Lochner v State of New York*, (1905) 198 US 45, 25 S. Ct. 539, per Peckham J at 543; see also *Adkins v Children's Hospital of the District of Columbia*, 261 US 525, 43 S Ct 394, especially pp 545-546 and 551. For commentary, see Mayer, op cit, n 105, p 657.

[129] *US v Colgate*, 250 US 300, 39 S Ct 465 at 307.

[130] *Ibid.*

[131] *Id.*, at 306.

The same principle appears to have had a more limited application in cases concerning allegations of infringement of section 2 of the Act.[132] In *Lorain Journal* the Supreme Court ruled that the attempt on the part of a publisher to boycott a competing radio station by refusing to provide advertising to third parties who also advertised on air with the latter violated section 2 of the Sherman Act.[133] The Court rejected the appellant's argument that its conduct was justified by its right to select freely its customers and held that the latter was 'neither absolute nor exempt from regulation'.[134] Accordingly, refusing to deal with a specific customer could result in an infringement of the antitrust rules if its purpose was the monopolisation of the market for the supply of advertising.[135]

The Supreme Court upheld the decree imposing on the applicant an obligation to supply advertising space to customers, regardless of whether the latter had stipulated similar contracts with the competing radio station. It took the view that the measure was neither arbitrary nor disproportionate to the aim it sought to achieve, being limited as to its duration and scope, since it concerned well identified commercial activities, and subject to limited powers of judicial supervision.[136]

It could be argued that the Supreme Court in *Lorain* confirmed the approach developed in cases such as *Nebbia* or *Carolene Products*. This judgment reiterated that freedom of covenant could be subjected to limits for the purpose of achieving a public interest goal - in this case, that of preserving competition in a market characterised by the presence of a monopolist. However, any such restriction should not exceed what is 'reasonably consistent with the circumstances of the case' and not impose unduly burdensome limitations on the monopolist thus striking a 'fair balance' between the legitimate interests of the monopolists and the needs of genuine, undistorted competition.[137]

In the later *Aspen Skiing* case[138] the Supreme Court confirmed that a monopolist, despite being under no general duty to cooperate with other firms and especially with its rivals, did not enjoy an absolute right to select its customers and to participate in specific commercial ventures[139] and that, just as in *Lorain Journal*, its right to refuse to deal with a competitor could be limited in the interest of undistorted competition.[140] The Court emphasised that although the appellant's behaviour was not as 'relentless and predatory' as in *Lorain Journal*, it evidenced its willingness to 'squeeze' a smaller

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[132] See e.g. Lopatka and Page, 'Bargaining and monopolisation: in search of the "boundary of section 2 liability" between *Aspen* and *Trinko*' (2005) 73 *Antirust. L J* 115, pp 125-126.

[133] *Lorain Journal v US*, 342 US 143, 72 S. Ct. 181, per Burton J at 186.

[134] *Id.*, p 187.

[135] *Ibid.*

[136] *Id.*, p 188.

[137] See Mayer, op ci, n 105, pp 638-639; see also p 657.

[138] *Aspen Skiing Co v Aspen Highland Skiing Co*, 472 US 585, 105 S. Ct. 2847.

[139] *Id.*, pp 600-601.

[140] *Id.*, p 603; see also pp 604-605, 607-608.

competitor out of the market.[141] Accordingly, imposing a limit on the appellant's freedom to (refuse to) contract was justified in the light of the circumstances.

The position adopted in *Aspen* may, however, be contrasted with the later *Trinko* decision,[142] which concerned allegations of monopolisation on the part of *Verizon*, the incumbent in the US telecommunication market: the incumbent had been accused of engaging in the 'constructive' refusal to grant access to its infrastructure, namely, of downgrading the quality of its services on the wholesale segment of the telecommunication market with a view to damaging the position of its rivals on the retail segment.

This decision was very widely debated and cannot be examined in any depth in this paper. It is suggested that Mr Justice Scalia, speaking for the Court, took a rather restrictive view of what could constitute an exception to the general principle expressed in *Colgate*.[143] He held that the refusal by a monopolist to deal with a rival would infringe Section 2 only if it could be shown that it had been motivated by 'anti-competitive malice' and, having regard to the nature of the activity and the structure of the market, it could have only been justified as a means of excluding a rival from the relevant market.[144]

The circumstance that the market for telecommunications was subject to regulation and that Verizon had already been sanctioned by the sector authorities for the infringement of its obligation to grant access to its infrastructure vis-à-vis its customers, an obligation that had originated from legislation and not from a contractual arrangement, weighed heavily in the decision of the Court not to impose a separate antitrust remedy on the respondent.[145] However, it is also clear from the judgment itself that the 1996 US Telecommunications Act had not expressly pre-empted the Sherman Act from applying to prima facie exclusionary practices.[146] As a result, commentators doubted that the approach prevailing in *Trinko* could allow the courts to strike an appropriate balance between the need to encourage investment on the part of the monopolist and the objective of ensuring genuine competition in all circumstances.[147]

Other authors proposed a different reading of the judgment. It was argued that *Trinko* could be reconciled with a view of innovation which can be fully justified in the light of an idea of competition as 'growth or development as a consequence of a superior

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[141] *Id.*, pp 610-611.

[142] *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398, 124 S Ct 872.

[143] *Id.*, p 408.

[144] *Id.*, pp 409-410. See e.g. Fox, 'Is there life in *Aspen* after *Trinko*? The silent revolution of section 2 of the Sherman Act' (2005-2006) 73 *Antitrust L J* 153 at 167.

[145] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004), per Scalia J at 411; see also p 407.

[146] *Id.*, pp 404-405.

[147] *Inter alia*, Fox, 'Is there life in *Aspen* after *Trinko*? The silent revolution of section 2 of the Sherman Act' (2005-2006) 73 *Antitrust L J* 153 at 167.

product, business acumen or historical accident'.[148] Thus, although its rationale could not be easily applicable outside the realm of 'regulated industries',[149] *Trinko*'s selective application of the *Aspen* principles seems to indicate a trend toward 'tipping the scales' in favour of encouraging 'powerful' firms to continue innovating rather than of supporting competition 'as a process' across the whole industry. [150]

Consequently, it could be argued that *Trinko*, consistently with *Lochner*'s 'presumption in favour of liberty',[151] upheld business freedom, unless there was a 'compelling reason' for interfering with it to avoid that the application of Section 2 of the Sherman Act could hamper the incentive to innovate even in cases involving powerful firms.[152] However, what remains to some degree undetermined is the extent of that incentive: how far should the monopolist remain free to choose its business partners? Could this freedom ever be restrained to safeguard competition 'as a process'?

A useful reference can be made to judgments concerning refusals to licence IPRs and to sell products covered by patents or trademarks. In the *Independent Service Organisations (ISO)* decision[153] the Federal Circuit of the Court of Appeals held that the ownership of intellectual property rights, while it does not confer a 'privilege to violate the antitrust laws', does not constitute irrefutable proof of market power being enjoyed by their holder[154] or oblige their holder to grant licences allowing others to take advantage of the fruits of her investment and innovation.[155] However, a refusal to licence by a powerful firm would breach the antitrust rules if the intellectual property right had been 'obtained through knowing and wilful fraud' or the litigation was a 'mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor'.[156]

Consequently, the holder of an intellectual property right would be in principle free to exploit its invention, if necessary by refusing to allow other to use it unless it could be shown that, in so doing, it is extending its market power 'improperly', i.e. by acting

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[148] *United States v Grinnell Corp.*, 384 US, at 570-571, 86 S. Ct. at 1005.

[149] See e.g. Economides, 'Vertical leverage and the sacrifice principle: why the Supreme Court got Trinko wrong', NET Institute Working paper #05-05, Stern Business School, NYU, pp 28-29, available at SSRN: http://ssrn.com/abstract=797142; see also Fox, 'A tale of two jurisdictions and an orphan case: antitrust, intellectual property, and refusal to deal' (2004-2005) 28 *Fordham Int'l L J* 952 at 965-66.

[150] Lopatka and Page, 'Bargaining and monopolisation: in search of the "boundary of section 2 liability" between *Aspen* and *Trinko*' (2005) 73 *Antit. L J* 115, pp 128-129; see also Gavil, 'Exclusionary distribution strategies by dominant firms: striking a better balance' (2004) 72 *Antitrust L J* 3 at 34.

[151] See e.g. Cavanagh, '*Trinko*: a kinder, gentler approach to dominant firms under the antitrust laws?' (2007) 59 *Me L Rev* 111 at 127; see also Gavil, 'Exclusionary distribution strategies by dominant firms: striking a better balance' (2004) 72 *Antitrust L J* 3 at 34; cf. Meese, 'Property, *Aspen*, and refusals to deal' (2005-2005) 73 *Antitrust L J* 81 at 85-86.

[152] Meese, 'Property, *Aspen*, and refusals to deal' (2005-2005) 73 *Antitrust L J* 81 at 94-95; see also pp 98-99.

[153] *In re: Independent Service Organisations antitrust litigation CSU, LLC and others v Xerox*, 203 F 3d 1322.

[154] *Id.*, p 1325.

[155] *Id.*, p 1326. See *US v Colgate & Co*, 250 US 300 at 307.

[156] *Ibid.*

'beyond the scope of the patent'[157] and regardless of the 'subjective motivation' at the basis of the holder's conduct.[158]

In *Grumman*[159] the Federal Court of Appeals explained that this principle constituted an implied exception to the scope of the antitrust rules to reward the investment in innovation made by the holder of the patent or copyright and thereby promote consumer welfare in the long term.[160] The Court stated that the incentive to pursuing technical development would be put at risk by allowing the wider competition law scrutiny of the patent or copyright holder's refusal to grant a licence to a third party[161] since it would deny the owner of IPRs any 'appropriate compensation' for their efforts.[162]

The brief analysis of the *ISO* and *Grumman* decisions seems to suggest that the scope of the 'optimal incentive' to innovate afforded to the IPRs owner is relatively wide[163] and therefore should find a limit only when it could be shown that the IP holder was 'abusing its patent'.[164] However, it remains open to question whether the limited scope left for antitrust intervention could actually foster the attainment of genuine competition and consumer welfare.[165]

This point was addressed by the 9th Circuit of the Federal Court of Appeals in *Kodak*:[166] Beezer J reiterated that the right to refuse to deal with another firm, especially a rival, despite being 'highly valued', was not unlimited.[167] Thus he held that this right could not be exercised to exclude competition from the same or from a neighbouring market vis-à-vis the one in which the monopolist enjoys market power.[168] It was held that the application of the competition rules and the protection of the exclusivity granted to the IPRs owner by the patent laws pursued objectives of economic efficiency and consumer welfare by, respectively, 'promoting a competitive market place' and fuelling new investment and innovation.[169] Therefore, the Court held that ownership of an IP

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[157] *Id.*, pp 1327-1328.

[158] *Id.*, p 1327. See also, *mutatis mutandis*, *Eastman Kodak Co. v Image Technical Services*, 504 US 451, 112 S Ct 2072, pp 2087-88 and 2090-2091.

[159] *Data General Corp v Grumman System Support Corp*, 36 F. 3d 1147.

[160] *Id.*, p 1186.

[161] *Ibid.* See also, *inter alia*, *Telecom Technical Services Inc v Rolm* Co, 388 F. 3d 820 at 826-827.

[162] See e.g. Bauer, 'Refusals to deal with competitors by owners of patents and copyrights: reflections on the Image Technical and Xerox decisions' (2006) 55 *DePaul L Rev* 1211 at 1223.

[163] *Id.*, p 1220.

[164] *Inter alia*, Bauer, op cit, n 162, pp 1241-1242.

[165] *Id.*, pp 1221-22.

[166] *Image Technical Services Inc v Eastman Kodak Co*, 125 F Rd 1195.

[167] *Id.*, p 1210.

[168] *Id.*, p 1211.

[169] *Id.*, pp 1214-1215.

right did not provide a 'blanket' immunity from antitrust liability and could not be exercised to exclude rivals from the market.[170]

Thus, Kodak's refusal to continue supplying its customers with spare parts for its own products constituted an infringement of Section 2 of the Sherman Act since it revealed an 'exclusionary intent' and had injured the customers' interests since to allow an IP owner to exercise its rights in such a way as to kick out a rival from a neighbouring market would be tantamount as to allow her to extend the scope of her IPRs beyond their statutory remit.[171]

Commenting on the *Kodak* judgment, it was suggested that just as in *ISO*, the Court of Appeals was well aware of the difficulties arising from policing monopolists' unilateral behaviour.[172] However, in the light of the circumstances of the case and especially of the fact that Kodak had discontinued an existing pattern of distribution of some of its products, the 9th Circuit was prepared to extend the rationale of *Grumman* to a case in which the patent owner had sought to extend an otherwise lawful monopoly 'beyond' its statutory limits by seeking to exclude rivals from the market.[173]

It is concluded that the US Superior courts, while confirming the need to strike a 'fair balance' between the effective protection of IP rights and genuine competition, have adopted a cautious approach to the imposition of duties to license for the purpose of enforcing the antitrust rules. The next section will examine whether the EU rules governing antitrust remedies are compatible with the ECHR requirements and in that context consider the extent to which the US law principles concerning these issues can provide a suitable alternative to resolve possible conflicts between the two European sets of standards.

4. ANTITRUST REMEDIES IN THE EU AND THE PROTECTION OF "ECONOMIC RIGHTS": HOW TO STRIKE A "FAIR BALANCE" BETWEEN THE NEEDS OF COMPETITION AND THE RIGHTS OF POWERFUL FIRMS?

4.1. Structural and behavioural remedies and the right to 'peacefully enjoy one's possessions': are the Commission's powers consistent with the ECHR?

Section 2 examined the principles governing antitrust remedies and illustrated how the framing of behavioural remedies to end a competition infringement must conform to criteria of 'necessity' and 'proportionality' and depends on the features of the breach as well as on the relevant substantive rules.[174] It also argued that the criteria governing the

[170] *Id.*, pp 1215-1216.

[171] *Id.*, pp 1218-1219.

[172] See *id.*, pp 1211, 1217-1218; for commentary, Carrier, 'Refusals to license intellectual property after *Trinko*' (2006) 55 *DePaul L Rev* 1191 at 1204.

[173] *Id.*, p 1216; see, *inter alia*, Bauer, op cit, n 162, pp 1233-1234.

[174] E.g. Case T-170/06, *Alrosa v Commission*, [2007] ECR II-2601, paras 101, 104-107; for commentary, see *inter alia*, Wind, 'Remedies and sanctions under Article 82 of the EC Treaty' (2005) 26(12) *ECLR* 659.

EU antitrust remedies imposed for unlawful refusals to deal and to license may not strike a balance between genuine competition and the need to encourage innovation.

Thereafter, section 3 examined the standards of protection afforded by the ECHR to the right to enjoy property and argued that although the Contracting States retain the power to impose limits on their enjoyment under specific circumstances and in the public interest, they are under the obligation to ensure that the essence of these rights is not irremediably impaired.[175]

This section will consider the extent to which the current approach to antitrust remedies, especially those imposed by the Commission in 'refusals to licence' cases, under Article 102 TFEU, is compatible with the standards of protection enjoyed by the peaceful enjoyment of property, especially intellectual, and by freedom of contract under the European Convention. It is reminded that the choice of antitrust remedies must remain subject to the principle of proportionality,[176] according to which 'the burdens imposed on undertakings in order to bring an infringement to an end [must] not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed'.

In the light of the approaches adopted, respectively, by the EU institutions and by the European Court of Human Rights, it is not entirely clear whether the concept of 'proportionality' at the basis of the framing of antitrust remedies according to Council Regulation No 1/2003 is as exacting as the requirements dictated by the Convention.[177] On this point, the European Convention on Human Rights has been interpreted as providing a degree of protection to the freedom of 'everyone' to decide whether and with whom to stipulate contracts, this principle being a component of economic and personal freedom.[178]

Having regard specifically to compulsory patent licences, the *Smith Kline v the Netherlands* case[179] stated that these constituted forms of 'control on the use of property', in accordance with Article 1, Protocol I,[180] which should only be allowed in order to further 'technological and economic development'. Thus, the individual or company requesting them should demonstrate that thanks to the licence a 'new product or

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[175] *Supra*, sect 3.2; see e.g. appl. No 25088/95, *Chassagnou v France*, [2000] 29 EHRR 615, para 82-85.

[176] See e.g. Commission Decision 94/19/EEC, *Sea Link v Stena Line*, OJ 1994, L15/8; also joined Cases 6/7/73, *ICI and Commercial Solvents v Commission*, [1974] ECR 223; more recently, Case T201/04, *Microsoft v Commission*, [2007] ECR II-3601, para 1276.

[177] For commentary, see, *inter alia*, Montagnani, 'Remedies to exclusionary innovation in the high-tech sector: is there a lesson from the Microsoft saga?' (2007) 30(4) *W. Comp.* 623; also Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation', TILEC Discussion Paper, May 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#. For the ECHR approach, see e.g. appl. No 73049/01, *Anheuser-Busch v Portugal*, judgment of 11 January 2007, [2007] 45 EHRR 36; also appl. No 35841/02, *ORF v Austria*, judgment of 7 December 2006.

[178] Appl. No 35014/97, judgment of 19 June 2006, [2007] 45 EHRR 4, para 195, 223-224.

[179] Appl. No 12633/87, decision of the European Commission on Human Rights, 4 October 1990.

[180] *Id.*, part IV.

process', i.e. a product which does not constitute an 'obvious' offshoot of existing technology would be developed and supplied and upon payment of royalties proportionate to the value of the invention.[181]

This approach may be contrasted with the position adopted in EU competition law. Section 2 argued that the Commission and the European Courts have moved away from a rather cautious interpretation of Article 102 TFEU in respect to refusals to licence IP rights on the part of dominant firms to a far more generous view of how this provision should be applied to individual cases. It was suggested that, perhaps under the 'influence' of the 2007 *Microsoft* CFI judgment, the Commission 2009 Guidance has departed from the hitherto narrow reading of the conditions of 'new product' and of 'indispensability' of the input protected by IPRs and to have embraced a more 'generous' interpretation of the concepts of 'objective necessity' and of 'likely consumer harm'. However, this move was criticised as focusing too heavily on the protection of competitors rather than on fostering 'long term' innovation and competition 'on the merits'.[182]

It is therefore questionable whether the approach adopted in the 2009 Guidance can be reconciled with the ECHR standards.[183] It could be argued that the Guidance, by placing significant emphasis on encouraging follow-on innovation, does not seem to 'capture' the actual impact of a forced licence on the long term incentive to innovate of individual firms and, therefore, could create a danger of allowing 'copy-cat' development at the expense of 'genuine' technical development, thus remaining at variance with the concept of 'proportionality' resulting from the ECHR.[184]

It is suggested that without going as far as to embrace the rather 'pro-enterprise' approach championed by the US Supreme Court in its *Trinko* decision,[185] the Commission could have framed its standard for the assessment of the 'necessity' and 'proportionality' of antitrust remedies in such a way as to reflect the importance of encouraging innovation, even when denying a licence may appear capable of putting rivals at a disadvantage because the latter may no longer be able to offer similar or only upgraded products.[186]

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[181] *Ibid.*

[182] See 2009 Guidance, paras 83-84, 87-88; cf. Case C-418/01, *IMS Health GmbH v OHG & NDC Health GmbH*, [2001] ECR I-5039, para 48. For commentary, see, *inter alia*, Larouche, 'The European Microsoft case at the crossroads of competition policy and innovation', TILEC Discussion Paper, May 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165#.

[183] Appl. No 12633/87, *Smith Kline v the Netherlands,* decision of 4 October 1990 (European Commission of Human Rights), part IV.

[184] 2009 Guidance, para 87.

[185] *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398, 124 S Ct 872, pp 409-410. For commentary, see, *inter alia*, Carrier, 'Refusals to license intellectual property after *Trinko*' (2006) 55 *DePaul L Rev* 1191 at 1208-1209; also Spulber & Yoo, 'Mandating access to telecom and the internet: the hidden side of *Trinko*' (2007) 107 *Colum L Rev* 1822 at 1873-1874, pp 1882-1884.

[186] See e.g. Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?' (2009) 34(4) *ELRev* 584 at 610.

It is added that the notion of 'likely consumer harm' and of 'necessity' of the input, resulting from the 2009 Guidance, could be criticised as lacking clarity.[187] In respect to the former, 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 assessment of the 'new product' requirement.[188] It is therefore submitted that the 2009 Guidance may have been another 'lost opportunity' for the Commission to increase the clarity and foreseeability of the interpretation of Article 102 TFEU, as would have been required, *inter alia*, by the ECHR.[189]

Similar concerns may be raised in relation to the conditions governing licenses in individual cases. Although it is clear that royalties should be payable to the licensor, there does not seem to be any 'hard and fast' rule governing the determination of their amount, which is left to the discretion of the European Commission. This position can be contrasted with the ECHR case law on controls on the use of property according to which providing 'adequate compensation' constitutes a key aspect of the proportionality assessment[190] and should be ensured in accordance with reasonably foreseeable, clear and precise rules.[191]

Against this background, it could be argued that the absence of clear guidelines as to the determination of royalties in return for a compulsory licence is not entirely consistent with the standards dictated by the ECHR and could raise issues as to whether the position of the licensor is adequately protected against the non-arbitrary restrictions of her exclusive IP rights.

The case law of the European Court of Human Rights also indicates that the overall 'fairness' of the proceedings leading to the adoption of measures interfering with property rights and the existence of appropriate remedies to protect the position of the affected parties ensure the proportionality of the interference with their property rights.[192] In respect to the former, a number of questions have been raised as to the extent to which the features of the antitrust proceedings before the Commission are compatible with the notion of 'fair procedure' enshrined in the ECHR.[193] It is now

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[187] See e.g., *mutatis mutandis*, Robinson, 'On refusing to deal with rivals' (2002) 87 *Cornell L Rev* 1177 at 1996-1997; also, *inter alia*, Katsoulacos, 'Optimal legal standards for refusals to license intellectual property: a welfare-based analysis' (2009) 5 *J Comp L & E* 269 at 287-288.

[188] See case C-418/01, *IMS Health GmbH v OHG & NDC Health GmbH*, [2001] ECR I-5039, para 48; cf. 2007 *Microsoft* judgment, para 647; for commentary, *inter alia*, Hatzopoulos, 'Refusal to deal: the EC Essential facilities doctrine', in Amato & Ehlermann (Eds), *EC Competition Law: a critical assessment*, 2007: Oxford, Portland/Oregon, Hart Publishing, p 354.

[189] See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, para 67-68.

[190] See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 38; also appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, paras 38-39.

[191] See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68.

[192] See e.g. appl. 13616/88, *Hentrich v France*, [1994] 18 EHRR, paras 45-46, 49.

[193] See e.g. Andreangeli, op cit, n 32, pp 224 ff.

accepted that due to the general applicability of Articles 101 and 102 of the Treaty and to the deterrent and punitive nature of the fines that can be imposed, competition cases at EU level are of a 'criminal' nature.[194] Consequently, it was doubted that the concentration of the functions of 'police, prosecutor and judge' in the hands of the Commission alone, albeit under the (limited) judicial supervision exercised by the CFI and the ECJ, would be compatible with the Convention.[195]

In *Jussila v Finland* the Strasbourg court seemed to accept that these safeguards would not apply to competition cases with the same intensity as to 'fully criminal' court cases concerning charges raised against an individual. However, it is submitted that there are a number of 'problem areas' in the rules governing Commission's antitrust action, such as those related to admissibility of evidence, the right against self-incrimination and the protection of lawyer-client confidentiality and in the context of the decentralised enforcement of the Treaty competition rules, the observance of the principle of *ne bis in idem*.[196]

Having regard more closely to the ex post monitoring of antitrust remedies, the 2007 *Microsoft* judgment demonstrated the difficulties inherent to it and tested the limits of the powers conferred to the Commission.[197] It could be argued that the annulment of the part of the 2004 decision creating and disciplining the operation of the 'monitoring trustee'[198] is especially telling of the need to provide more precise boundaries to the scope of the discretion enjoyed by the Commission in framing antitrust remedies in respect to decisions imposing an obligation to deal and to license under Article 102 TFEU.[199]

It is therefore suggested that the current approach adopted by the Commission appears to fall short of the requirements dictated by the ECHR in a number of respects. Firstly, the analysis of the conditions governing the application of Article 102 TFEU to refusals to licence in the light of the case law of the Strasbourg court concerning Article 1, Protocol I to the ECHR has demonstrated that the approach emerging from the Commission's 2009 Guidance does not take into sufficient account the need to protect

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194 See e.g. Case T-77/00, *JFE and others v Commission*, [2004] ECR II-250, paras 173, 177-178. For commentary, *inter alia*, Wils, 'The combination of the investigative and the prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis' (2004) 27(2) *W. Comp.* 201 at 210.

195 *Inter alia*, Case T-156/94, *Aristrain v Commission*, [1999] ECR II-645, paras 87-90. See *inter alia* Andreangeli, op cit, n 32, pp 226-227.

196 See e.g. Case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR 1, para 11; also Case T-224/00, *Archer Daniels Midland v Commission*, [2003] ECR II-2597, paras 89-90. Cf. e.g. appl. No 370/950/97, *Franz Fischer v Austria*, judgment of 29 May 2001, unrep, paras 22, 25, 29; for commentary, *inter alia*, Andreangeli, op cit, n 32, pp 207 ff; cf. Wils, *Principles of European Antitrust enforcement*, 2005: Oxford/Portland, OR, Hart Publishing, pp 96 ff.

197 Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 1265, 1269-1270.

198 See e.g. Commission Decision of 24 March 2004, *Microsoft*, OJ 2004, C900/1, para 1043.

199 See 2007 *Microsoft* judgment, para 1268; for commentary, see, *inter alia*, case comment to Case T-201/04, Microsoft v Commission, (2008) 45(3) *CMLRev* 863 at p 868.

the drive to invest of the holder of the IPRs and to favour the pursuit of genuine innovation.[200]

Secondly, given the importance of freedom of contract[201] the imposition of such a wide ranging remedy as the forced grant of an IP licence without clear and precise criteria defining the amount of the royalties payable to the licensor or predetermined supervisory proceedings may not be entirely consistent with the requirements laid down by the ECHR for the protection of property rights.[202] And thirdly, the indeterminacy of the criteria governing this type of remedy, such as the 'new product' requirement, and the lack of precise guidelines as to the way in which these decisions should be enforced and monitored contribute to expanding the hiatus between the existing EU antitrust law standards and the European Convention rules.

Consequently, the question appears to be what the 'way forward' is to resolve these concerns. The next sections will examine the question of whether adopting more stringent standards governing refusals to licence could go some way toward addressing the perceived lack of consistency and of inherent 'fairness' and proportionality of this type of remedy, with a view to ensuring its compliance with the requirements of the 'rule of law'.

4.2. Looking for a 'fair balance': is 'going backwards' the solution for EU antitrust remedies?

Section 4.1 illustrated a number of issues arising from the analysis of antitrust remedies imposed in refusal to license cases in light of the principles enshrined in the ECHR and argued that the test arising from the 2009 Guidance may not ensure the imposition of 'proportionate' obligations on the undertaking found to be responsible for an infringement of Article 102 TFEU.[203] Consequently, it could be wondered whether a 'return' to the stricter conditions governing refusals to deal dictated by earlier case law could go some way to ensure that the antitrust remedies comply with the principles of 'fairness' and 'proportionality' of Article 1, Protocol I.

Having regard to what constitutes an 'essential input', it could be argued that a firm requesting a license should demonstrate the absence of an 'alternative' to the good protected by patent or copyright, or at the very least, should prove that duplicating the existing one would be impossible or excessively difficult, as affirmed by the ECJ in *Bronner*.[204] A similar condition would be more consistent with the principle laid down in

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[200] Appl. No 12633/87, *Smith Kline v the Netherlands,* decision of 4 October 1990 (European Commission of Human Rights), part IV.

[201] See e.g. appl. No 31122/05, *Ghigo v Malta*, judgment of 26 September 2006, paras 62, 65-66, 68-69.

[202] See e.g. appl. No 17849/91, *Pressos Compania Naviera v Belgium*, [1996] 21 EHRR 301, para 38; also appl. No 19247/03, *Balan v Moldova*, judgment of 29 January 2008, paras 38-39.

[203] See 2009 Guidance, paras 86-87. Cf. Larouche, op cit, n 177, pp 12-13; see also Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?' (2009) 34(4) *ELRev* 584 at 605-606.

[204] Case C-7/97, *Bronner v Mediaprint*, [1998] ECR I-7791, para 28.

Smith Kline according to which a compulsory licence would constitute a 'proportionate' control on the use of intellectual property only if the patent was indispensable to allow the working of an existing or later patent for the purpose of continuing technical development in a specific industry.

In respect to the 'new product' condition, it is submitted that the *IMS Health* preliminary ruling and especially the opinion of AG Tizzano had captured in many ways the essence of the balancing exercise that must be conducted to reconcile the interests of IPRs owners and the goals of public interest demanding a compulsory license.[205] It is argued that by requiring the firm seeking the licence to prove that, thanks to the access to the protected input, a 'novel' product would be supplied the ECJ had balanced the needs of innovation with the legitimate interests of the copyright holder in a manner consistent with the requirements of the ECHR.[206] Consequently, compulsory licences would be restricted to cases in which as a result of the transfer of technology a product would be developed which is not an 'obvious' offshoot of existing inventions and would therefore meet consumer needs hitherto not satisfied by current supplies.

It is acknowledged that such a strict view of what is a 'new product' would probably not allow the forced disclosure of protected inputs to support 'follow on' innovation. However, it is argued that a less interventionist approach to the application of Article 102 TFEU to these cases would be preferable to the position adopted in the 2009 Guidance, since it would reduce the risk of 'upsetting' the incentive to invest in further technical development on the part of the owner of key technologies by limiting the reach of the resulting remedies only to cases in which consumers would be clearly likely to benefit from the offer of 'genuinely novel' products.[207]

The rather liberal approach adopted by the 2009 Guidance in relation to refusals to license could also be criticised for its lack of clarity. It is recalled from section 4.1 that to comply with the Convention requirements, the rules governing any interference with property rights should be 'prescribed by law', i.e. sufficiently clear and precise as to allow the individual or legal person affected by these measures to foresee the consequences of the exercise of public powers on their legal position.[208]

Section 3.1 illustrated that the compliance with criteria of legal certainty and predictability is of capital importance in competition policy. It was argued that since competition law provides the 'rules of the game' in the market, it capable of channelling the behaviour of all economic actors in 'welfare enhancing directions' and, in so doing,

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[205] C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co*, [2004] ECR I-5039, paras 48-49; also, Opinion of AG Tizzano, para 62.

[206] See e.g. Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?' (2009) 34(4) *ELRev* 584 at 587-588; also Montagnani, 'Remedies to exclusionary innovation in the high-tech sector: is there a lesson from the Microsoft saga?' (2007) 30 *W Comp* 623 at 625.

[207] See, *inter alia*, Andreangeli, ibid, pp 608-609.

[208] See e.g. appl. No 8795/79, *James v United Kingdom*, [1986] 8 EHRR 123, para 67; see also, *mutatis mutandis*, appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68.

ensures that the powers of the public authorities entrusted with 'creating the scaffolding' for the functioning of the economy are confined within well defined boundaries.[209]

Against this background, it could be argued that the generous view adopted by the Commission in respect to refusals to deal has not only 'diluted' the meaning of the original criteria determining a finding of abuse to the point that they can no longer 'strike a balance' between the goal of genuine competition and the need to foster innovation.[210] They have also become so 'opaque' that they do not appear capable of assisting dominant companies in assessing the future antitrust consequences of their decision to deny access to their inventions.

The concept of 'likely consumer harm', seen in light of the old 'new product' requirement, illustrates how legal certainty could be jeopardised. Whereas the 2009 Guidance refers generally to the likelihood that a forced license could lead to future technical development (including 'follow on' innovation) and considers this concept as almost equivalent to the requirement that access to IP rights result in the supply of 'brand new' products,[211] the 'new product' limited forced licenses only to cases in which they enabled the licensee to supply a genuinely novel product or service.[212]

Against this background, it is argued that if it was already difficult to assess whether the 'new product' condition had been fulfilled, due to the complexity of this inherently technical appraisal, it would be even more complicated to predict the directions of the technical development of a specific industry as well as the possible impact that a compulsory licence could have on it.[213] Consequently, it is suggested that recourse to conditions that are more similar to the 'old' *IMS Health* test would go some way toward ensuring not only that the criterion in question fulfils its 'critical function' in the appraisal of refusals to licence but also complies with requirements of clarity, foreseeability and legal certainty and ultimately with the rule of law.[214]

In the light of the 2009 Guidance and of the *Microsoft* case, it can be doubted that the Commission and the General Court, at least, will adopt an approach similar to the earlier legal standards. The next section will explore whether the US practice as regards the restrictions of property rights and of freedom of covenant, both generally and under section 2 of the Sherman Act, can offer further insights and a blueprint for a sufficiently clear, reasonable and non-arbitrary set of conditions.

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[209] Stucke, 'Does the rule of reason violate the rule of law?' (2009) 42(5) *UC Davis L Rev* 101 at 144-145.

[210] See e.g. Andreangeli, 'Interoperability as an essential facilities in the *Microsoft* case: encouraging competition or stifling innovation?' (2009) 34(4) *ELRev* 584 at 609-610.

[211] See 2009 Guidance, paras 86-89. For commentary, Larouche, op cit, n 243, pp 12-13.

[212] Hatzopoulos, 'Refusal to Deal: the EC essential facilities doctrine', in Amato & Ehlermann (eds), *EC Competition Law: a critical assessment*, 2007: Oxford/Portland, Oregon, Hart Publishing, pp 348-350.

[213] *Id.*, pp 353-354.

[214] See e.g. Larouche, op cit, n 177, p 9; also Andreangeli, op cit, n 210, pp 587-89.

4.3. Refusal to licence as an 'exceptional' case of monopolisation: insights from the application of the Due Process clause and of Section 2 of the Sherman Act

Section 3.4 illustrated the approach adopted by the US Supreme Court in relation to restrictions of property rights and of freedom of covenant in commercial activities. It was argued that the initial 'laissez-faire' attitude shown by the Court in *Lochner*, according to which the Due Process clause enshrined in the 5th and 14th Amendments should be read as providing a 'presumption in favour of liberty' that can only be rebutted in exceptional cases, was gradually replaced by a more interventionist stance, according to which the Courts would not question the validity of measures affecting property rights or freedom of covenant unless the former had been restricted in an arbitrary or disproportionate manner.[215]

Thereafter, section 3.5 illustrated that the American judicature is extremely cautious in imposing on commercial entities, even powerful ones, any obligation to deal with their rivals.[216] It was illustrated that a finding of monopolisation in cases of refusals to licence IP rights would only occur if the IPRs owner was acting 'beyond the scope of the patent',[217] i.e. if its refusal to grant a licence was clearly aimed at excluding rivals from the relevant market.[218]

Against this background, it may be questioned whether the application of a standard inspired by the approach to refusals to licence established by the US superior courts could be a viable alternative to the position adopted in the 2009 Guidance. It is suggested that by relying on the concept of 'abuse of patent' as a means to define what constitutes 'monopolisation' and by requiring proof of 'anti-competitive malice', the US Courts may be in danger of overlooking cases in which a forced licence may actually have led to 'genuine' technical advancement.[219]

Commentators suggested that the Supreme Court in *Trinko* may have assumed perhaps too readily that legitimately acquired economic power almost inevitably led to further innovation and that this innovation could have been 'translated' in consumer welfare.[220] According to Stucke, '*Trinko* ignores the costs of monopolies to future innovation' and, with its emphasis on the importance of 'monopoly rents' as a means to encourage investment in R&D, creates the risk of increasing costs for other firms wishing to bring that innovation forward.[221]

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[215] See e.g. *Nebbia v State of New York*, 291 US 502, 54 S Ct 505, per Roberts J at 538.

[216] *US v Colgate & Co*, 250 US 300 at 307.

[217] *In re: Independent Service Organisations antitrust litigation CSU, LLC and others v Xerox*, 203 F 3d 1322, p 1327; also *Telecom Technical Services Inc v Rolm* Co, 388 F. 3d 820 at 826-827.

[218] *Data General Corp v Grumman System Support Corp*, 36 F. 3d 1147 at p 1187.

[219] Stucke, 'Should the Government prosecute monopolies?' (2009) 2 *Univ of Illin L Rev* 497, pp 511-512.

[220] *Id.*, p 513.

[221] *Id.*, p 514.

Although they accepted that monitoring the observance of antitrust remedies targeting unilateral behaviour raises significant difficulties for the Courts,[222] other authors were left partially unconvinced by the arguments in favour of the narrow application of Section 2 of the Sherman Act to refusals to licence.[223] Thus, it may be argued that the approach developed by the US superior courts in respect to the application of section 2 of the Sherman Act to unilateral refusals to licence IP rights, whilst being motivated by justifiable concerns for the continuing drive to innovation of 'powerful' firms as well as for the difficulties arising from the ex post oversight of the remedies imposed for an infringement, may be too restrictive to strike a 'fair balance' between the needs of 'free enterprise' and the objective of undistorted competition and ultimately of technical development.

Accordingly, it is concluded that the US style view of this type of practices does not constitute an entirely suitable alternative to the 2009 Guidance on the application of Article 102 TFEU to like cases. What, instead, the earlier sections seem to suggest is that an alternative benchmark which is both 'proportionate', as required by the ECHR, and 'workable', i.e. consistent with the requirements of 'quality of the law' dictated by the Convention and enshrined in the principles of the rule of law could be found in existing principles of EU competition law.

5. A 'PROPORTIONATE' REMEDY TO ABUSIVE REFUSALS TO LICENCE: WHERE DO WE GO FROM HERE? TENTATIVE CONCLUSIONS

The previous sections analysed the conditions governing antitrust remedies according to Article 7 of Council Regulation No 1/2003 and illustrated how the Commission can considerably restrict the right of the parties concerned to enjoy their possessions and to choose whether and with whom to conclude contracts, protected by human rights instruments such as the ECHR. It was argued that since its 'appropriateness' to the infringement constitutes a key consideration as to its legality, the assessment of the compliance of a given remedy with the principles enshrined in the Convention cannot be separated from a consideration of the substantive rules governing that individual breaches.

A number of concerns have emerged on the extent to which especially the generous approach adopted by the Commission in its 2009 Guidance could actually ensure that a fair balance is struck between the legitimate interest of the parties concerned and the goal of genuine competition. It was argued that the Commission's Guidance may have 'watered down' the criteria governing the finding of abusive behaviour in refusal to licence cases to the point that they would not only be incapable of balancing these two

[222] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004), per Scalia J at 414; see e.g. Hovenkamp, 'The legal periphery of individual firm conduct', U Iowa Legal Studies Research paper No 07-21, available at SSRN: http://ssrn.com/abstract=1014426, p. 2-4; also Stucke, op cit, n 219, pp 544-545.

[223] See e.g., *mutatis mutandis*, Baker, 'Beyond Schumpeter vs Arrow: how antitrust fosters innovation' (June 2007). Available at SSRN: http://ssrn.com/abstract=96226, pp 17-18; see also pp 20-21, 24-25, 30-31.

competing objectives, but would also be inconsistent, at least in part, with canons of clarity, legal certainty and predictability on which adherence to the rule of law rests.

As a result, questions have been raised as to whether alternative approaches could be developed to address these concerns. Could a set of conditions for antitrust remedies applicable to refusals to licence be developed in the light of the relevant principles developed in the context of the ECHR outright? Or would this 'transplantation' cause more problems than it actually resolves? Section 4.2 illustrated how a 'return' to the original *IMS Health* approach would go some way toward ensuring compliance with the Convention standards: especially the notions of 'indispensability' and of 'new product' appear rather close to the *Smith Kline* requirement of proportionality and could therefore constitute an ideal 'starting point' in the development of a new set of conditions for this type of remedy.

It was suggested that the Court of Justice's view of the notions of 'indispensability' and of 'new product' would allow that 'balancing exercise' between the needs of innovation and the realisation of genuinely competitive market conditions predicated in *Smith Kline* and could therefore provide a useful frame of reference for antitrust remedies. It was added that a 'return' to the *IMS Health* set of conditions would ensure compliance with the requirements of clarity, foreseeability and legal certainty enshrined in the rule of law. Although the test is likely to prompt potentially complex questions of fact, it would be capable of providing a sufficiently reliable framework for the assessment of 'suspicious' refusals to license, which is so important if antitrust standards are to be applied to 'channel' economic behaviour in 'welfare enhancing directions'.[224]

It is added that discussing the compliance of antitrust remedies with the standards governing property rights and freedom of contract has led us to question once again whether the rules applicable to unilateral exclusionary conduct, and especially to refusals to license, under Article 102 TFEU, can reconcile the apparently diverging goals of competition and technical innovation.

This paper has argued that the 2009 Guidance adopted a position which appears partly incapable of reconciling the apparently conflicting goals of competition and technical innovation as well as unlikely to give any clear guidance to the antitrust authorities and the concerned parties alike as to whether denying an IP licence in a given case would actually be compatible with Article 102 TFEU. Therefore it is hoped that just as any 'good wine connoisseur' the Commission and the ECJ will come to appreciate once again the 'quality' of the 'vintage' *IMS Health* requirements and therefore to frame the rules applicable to the antitrust remedies in this area in a way which respects the dictates of the rule of law without discouraging dominant companies from engaging in technical development.

[224] See e.g. appl. No 8691/79, *Malone v United Kingdom*, [1985] 7 EHRR 14, paras 67-68. For commentary, Fallon, 'The rule of law as a concept in constitutional discourse' (1997) 91(1) *Colum L Rev* 1 at 7-8; see also Stucke, op cit, n 209, pp 143-44.