

Fundamental Procedural Rights & Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network

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All views expressed are strictly personal

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Fundamental procedural rights applicable to antitrust enforcement by the European Commission

- protection against arbitrary and disproportionate intervention (protection of privacy / right to the inviolability of the home)
- right not be compelled to admit one's participation in an infringement (privilege against self-incrimination)
- legal professional privilege
- presumption of innocence
- right to be heard
- right to careful and impartial examination
- right to an adequate statement of reasons
- right to effective judicial protection
- right to a decision within a reasonable time
- principle of *ne bis in idem*
- ...

Source of fundamental rights in the EU legal order

Charter of
Fundamental Rights
of the EU



ECHR

common constitutional traditions

general principles of
EU law



ECHR

common constitutional traditions

The central role of the EU Courts

Example:

Judgment of Court of Justice of 10 July 2019 in Case C-39/18 P *Commission v Icap*, confirming Judgment of the General Court in Case T-180/15 *Icap v Commission*:

right to an adequate statement of reasons as to the method used for the calculation of a fine

see also **Opinion of AG Tachev of 2 May 2019:**

right to be heard on the fine calculation method

The role of the European Commission's Hearing Officer

Example:

Case AT.40054 *Ethanol benchmarks*

right of access to the file in hybrid cartel proceedings:
access by a non-settling party
to exchanges between a settling party and the Commission
prior to the settlement submission,
including so-called 'non-papers'

see Order of the Vice-President of the Court of Justice of 10 September 2019 in Case C-318/19 P(R) *Lantmännen v Commission*, confirming Order of the President of the General Court of 2 April 2019 in Case T-79/19 R

The role of the European Ombudman

Example:

Decision in Case 1311/2018/VB (30 September 2019)

« the Commission's position that its exchanges with the NCAs in the context of the ECN are confidential is justified and correct »

Procedural rights often contribute to effective enforcement ...

by enhancing the accuracy of decisions
(and hence their deterrent effect)

e.g.: - right to be heard
- judicial review

Commissioner M. Vestager:
« At every stage in a competition investigation, we're aware that our reasoning and our choices have to satisfy the courts [...] And that's a good thing – because it helps us reach better decisions. [...]

by enhancing the perceived fairness of the law
(and hence voluntary compliance)

cf. Tom Tyler, *Why people obey the law* (Yale 1990)

[...] And it also helps to build trust and acceptance for the work that we do.

[...] » (speech 'Competition and the rule of law', European Association of Judges, Copenhagen, 10 May 2019)

... but not always : the example of LPP

legal professional privilege (LPP) in EU law:

= a right of the client, not a privilege of the legal profession

= a legal rule protecting certain lawyer-client communications against compelled disclosure in (antitrust) law enforcement proceedings

LPP: foundation in EU law

➤ fundamental right

↘ flows from Article 7 EU Charter / Article 8 ECHR (protection of communications) in conjunction with Article 47 EU Charter / Article 6 ECHR (right to fair trial, right to be advised, defended and represented, respect for the rights of the defence)

(Judgment in *AM&S Europe v Commission*, 155/79, EU:C:1982:157; Judgment and Opinion of AG Kokott in *Akzo Nobel Chemicals and Ackros Chemicals v Commission*, C-550/07 P, EU:C:2010:512 and EU:C:2010:229)

LPP: scope under EU law

- communications made for the purpose and in the interests of the company's rights of defence
- with an independent lawyer, not bound to the client by a relationship of employment, and entitled to practise in an EU or EEA Member State

Does LPP lead to increased compliance?

- in **theory**, the argument only works if LPP is limited to advice about future conduct (not past conduct) and conditional upon the legal advice being followed
- no **empirical evidence**
e.g. AM&S continued infringing for five years

Fundamental rights and competition enforcement: a balancing exercise

“[T]he interplay between the fundamental rights of legal persons and competition enforcement remains a balancing exercise: at stake are the protection of fundamental rights versus effective enforcement of [EU] competition law. As the Court of Justice held in *Eco Swiss* [C-126/97, EU:C:1999:269], [Article 101 TFEU] is a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [European Union] and, in particular for the functioning of the internal market. [Article 101 TFEU] forms part of public policy. ... It is self-evident that the effective enforcement with reasonable means of the basic tenets of the [EU] legal order should remain possible, just as it is evident that the rights of the defence should be respected too.”

(AG Geelhoed, Opinion in *Commission v SGL Carbon*, C-301/04 P, EU:C:2006:53, paragraph 67)

Not the same balancing exercise as in classical criminal law

“In general, [...], the body of safeguards developed in the field of criminal law, which has as its protagonists the penalising State, on the one hand, and the individual charged with an offence on the other, is not transferred *en bloc* to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power. In the case of free competition, those parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct. I therefore consider it important that the procedural rules be adapted to the specific field of competition.”

(AG Ruiz-Jarabo Colomer, *Volkswagen v Commission*, C-338/00 P, EU:C:2002:591, para 66)

CJEU, Opinion 2/13

(Accession of EU to ECHR)

- ❖ "The pursuit of the EU's objectives, [...], is entrusted to a series of fundamental provisions, such as those providing for [...] competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute [...] to the implementation of the process of integration that is the *raison d'être* of the EU itself." (§ 172)
 - ❖ "The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of [the] fundamental rights [recognised by the Charter of Fundamental Rights of the EU] be ensured within the framework of the structure and objectives of the EU." (§ 170)
- "Fundamental rights, as recognised in particular by the Charter, must [...] be interpreted and applied within the EU in accordance with the [EU] constitutional framework [...]" (§ 177)

Nature of EU competition law & level of protection under the ECHR

- the European Court of Human Rights (ECtHR) case law generally distinguishes as to the level of protection required by the ECHR according to the circumstances of the specific case
- particularly relevant distinctions for EU competition law:
 - ❖ hard core of criminal law ↔ other areas of the law that are only criminal within the Convention's wider meaning of 'criminal'
 - ❖ natural persons ↔ companies

ECtHR, *SA-Capital Oy v Finland* (14 Febr. 2019)

« A differentiated approach [...] can be seen to reflect the Court's [...] general focus on regarding, as its primary concern, the fairness of the proceedings as a whole, with a view to ensuring the rights of defence while also remaining mindful of the interests of the public and the victims in the proper enforcement of the laws in question »

(para 71)

« in the light of the Court's established case-law, it is not a requirement under Article 6 of the Convention that proceedings such as those concerning sanctions for breaches of competition law be conducted according to the classical model of a criminal trial »

(para 72)

ECtHR, *SA-Capital Oy v Finland* (14 Febr. 2019)

« [...] assess those issues with due regard to the particular nature of competition proceedings » (para 77)

« the Court acknowledges that cases concerning restrictions of competition typically involve complex and often wide-ranging economic matters and related factual issues, which means that the relevant elements of evidence will also be multifaceted. The Court is also aware of the strong public interest involved in the effective enforcement of competition law. Moreover, it is mindful of the fact that as a rule, the financial penalties applicable in this field are not imposed on natural persons but on corporate entities, quantified on the basis of the harmful effect of the anti-competitive conduct and taking into account the business turnover of the entities found to be in breach of competition rules» (para 78)

Enforcement of Articles 101 and 102 TFEU by EU Member State competition authorities

Can EU Member States reduce fundamental rights protection below the EU level?

e.g.:

- ✓ LPP in Germany and Austria

Can EU Member States grant procedural rights above the EU level?

e.g.:

- ✓ LPP for in-house lawyers
- ✓ right to silence

Can EU Member States reduce protection below the EU level?

Article 3(1) of « ECN+ » Directive (EU) 2019/1 :

« Proceedings concerning infringements of Articles 101 and 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union. »

= nothing new :

- CJEU case-law: « the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on the Member States when they implement [EU] rules »
(*Karlsson and Others*, C-292/97, EU:C:2000:202, paragraph 37; *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 38)
- Article 51(1) Charter: « The provisions of this Charter are addressed to [...] the Member States [...] when they are implementing Union law. »

Can EU Member States grant procedural rights above the EU level?

Recital 14 of « ECN+ » Directive (EU) 2019/1 :

« [...] The design of [procedural] safeguards should strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced. »

= again nothing new :

- under EU law, Member States are under an obligation to ensure the effective and uniform application of Articles 101 and 102 TFEU by their competition authorities.

(Article 35(1) of Regulation 1/2003 and Judgments in *Schenker*, C-681/11, EU:C:2013:404, paras 36, 46 and 49, and in *AKKA/LAA*, C-177/16, EU:C:2017:689, para 64)

LPP in EU law: exclusion of in-house lawyers

- even if enrolled with a Bar or Law Society and subject to professional ethical obligations
- fundamental difference with external lawyers: economic dependence + personal identification with the company
- structural danger of conflicts of interest & difficulty of raising effective opposition to any abuses of LPP

(Judgment and Opinion AG Kokott in *Akzo Nobel Chemicals and Ackros Chemicals v Commission*, C-550/07 P, EU:C:2010:512 and EU:C:2010:229)

LPP in Portuguese law: inclusion of in-house lawyers

- in-house lawyers who are enrolled with the Portuguese Bar Association (*Ordem dos Advogados*) are also covered by LPP
- even if the *Autoridade da Concorrência* is investigating a suspected infringement of Articles 101 or 102 TFEU

(Tribunal do Comércio de Lisboa, *Unilever Jerónimo Martins v Autoridade da Concorrência*, 6/12/2007)

No fundamental-rights justification for extending LPP to in-house lawyers

- ECtHR has not expressed any support for extending LPP to communications inside a company involving legal advice provided by an in-house lawyer employed by the company
- possibility to consult in confidence an external lawyer is sufficient to guarantee fundamental rights; wide choice of external lawyers, and companies that can afford in-house counsel can also afford to pay an independent lawyer

Extending LPP undermines the effectiveness of inspections

- 1) reduction of the universe of documents containing useful information that can be found during an inspection
- 2) complication and slowing-down of inspections because of discussions on LPP, given the difficulty of defining precise scope in a way that does not invite abuse

Enforcement of Articles 101 and 102 TFEU by EU Member State competition authorities

- EU legislature and EU courts have refused extension of LPP to in-house lawyers *inter alia* because such extension would undermine the effectiveness of the enforcement of Articles 101 & 102 TFEU by the European Commission
- no sound basis for assuming that the extension of LPP to in-house lawyers does not similarly undermine the effectiveness of the enforcement of Articles 101 & 102 TFEU by the EU Member State competition authorities

Privilege against self-incrimination in EU law

➤ 374/87 *Orkem v Commission* (1989):

undertakings are under an "obligation to cooperate actively with the investigation", but cannot be compelled "to provide [the Commission] with answers which might involve admission on [the undertaking's] part of the existence of an infringement"

➤ Opinion AG Geelhoed in C-301/04 P *Commission v SGL Carbon* (2006), §§ 62-64:

- ECtHR case law concerning right to silence concerns natural persons in the context of "classical" criminal law
- in the USA companies cannot invoke the Fifth Amendment privilege against self-incrimination

No fundamental-rights justification for a right to silence for legal persons

right to silence protects suspects from being subjected to improper physical or psychological pressure

- thus avoiding miscarriages of justice (as statements made under pressure risk being unreliable) e.g. Birmingham Six
- and safeguarding human dignity and autonomy

↔ fundamentally different situation of companies being obliged to respond in writing to written requests for information in competition investigations

Privilege against self-incrimination in German law (nemo tenetur principle)

- fundamental right only for natural persons
(BVerfG, judgment of 26 February 1997, 1 BvR 2172/96)

- Bundeskartellamt fines procedure
(*Bußgeldverfahren*):

secondary law extends the right to silence as applicable to natural persons also to legal persons

(§ 81 GWB → § 46 OWiG → §§ 136, 426 and 444 StPO)

« ECN+ » Directive (EU) 2019/1

Article 8:

« Member States shall ensure that national administrative competition authorities may require undertakings [...] to provide all necessary information for the application of Articles 101 and 102 TFEU [...]. Such requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU. [...] »

Recital 35:

« [...] While the right to require information is crucial for the detection of infringements, such requests [...] should not compel an undertaking [...] to admit that it has committed an infringement, which is incumbent on the NCAs to prove. This should be without prejudice to the obligations of undertakings [...] to answer factual questions and to provide documents. »

Further reading

"EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights" (2011)

"Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure" (2018)

"Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis" (2003)

and a forthcoming new paper

"Fundamental Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network"

available at

<http://ssrn.com/author=456087>