Due process in competition cases

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I – Introduction

Under Regulation No 1/2003,² the European Commission has the power to find infringements of the European Union (“EU”) competition rules and to impose fines on undertakings and associations of undertakings that have intentionally or negligently infringed these provisions. Such a fine may amount to ten percent of the worldwide turnover of the undertaking or association concerned in the preceding business year.³ In a procedure relating to the infringement of the EU competition rules, the Commission combines the functions of investigator and decision-maker.

The considerable powers exercised by the Commission under Regulation No 1/2003 require the application of checks and balances. In this respect, recital 37 of the preamble to Regulation No 1/2003 states that “[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the [EU] [and that …] [a]ccordingly, this Regulation should be interpreted and applied with respect to those rights and principles”.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the provisions of the Charter of Fundamental Rights of the EU (“Charter”) “have the same legal value as the Treaties”.⁴ The binding character of the provisions of the Charter have already found an

¹ All opinions expressed are personal.
⁴ Article 6(1) TEU.
echo in the case-law of the General Court of the EU (“EGC”) and the Court of Justice of the EU (“ECJ”) *inter alia* in the field of competition law. This contribution will mainly focus on recent case-law on the compatibility of EU proceedings in competition cases with the guarantees of due process. Those guarantees are now enshrined in Articles 47 to 50 of the Charter.

**II – The nature of the sanction imposed by the Commission: evolution**

Regulation No 1/2003 expressly provides that the fines imposed by the Commission on undertakings and associations which have infringed the EU competition rules “shall not be of a criminal law nature”. It is not therefore surprising that the EGC has consistently held that Commission decisions imposing fines for infringements of competition law are not of a criminal law nature.

The ECJ, by contrast, has avoided addressing that question explicitly. It follows from its judgment in *Bonda* that three criteria are relevant for determining the nature of the sanctions imposed under Regulation No 1/2003. These criteria, which coincide with the criteria developed by the European Court of Human Rights (ECtHR) in *Engel*, are firstly the legal classification of the offence under the law, secondly the very nature of the offence under the law, secondly the very nature of the offence and thirdly the nature and degree of severity of the penalty that the person concerned is liable to incur.

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5 Article 23(5) of Regulation No 1/2003, cited in n. 2.


7 See e.g. ECJ, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rerindustri and Others v Commission* [2005] E.C.R. I-5425, paras 65-76.

8 ECJ (judgment of June 5, 2012), Case C-489/10 *Bonda*, not yet reported, para. 37. The ECJ referred in this respect to the case law of the European Court of Human Rights.

9 ECtHR (judgment of June 8, 1976), *Engel and Others v. the Netherlands* §§ 80 to 82, Series A no. 22, and ECtHR (10 February 2009), *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53.
It should be noted that although the ECJ has so far never confirmed that competition fines are of a criminal nature, it has nevertheless ensured that the procedural guarantees of the European Convention on Human Rights (ECHR) and the Charter with respect to criminal proceedings are respected in practice. The EFTA Court went a step further and addressed the issue directly by holding that proceedings for the imposition of fines under competition law fall, as a matter of principle, within the criminal sphere. Similarly, the ECtHR held in *Menarini Diagnostics v Italy* that a fine imposed for a violation of national competition rules was of a criminal law nature and related to a criminal charge within the meaning of Article 6(1) of the ECHR.

**III – Due process**

**a) Requirements of due process**

The nature of fines imposed for infringements of EU competition rules, described above, implies that the guarantees of title VI of the Charter (Articles 47 to 50) are applicable to competition proceedings.

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10 By contrast, Advocate General Sharpston explicitly stated in *KME and Others v Commission* that she had “little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article [101(1) TFEU] falls under the ‘criminal head’ of Article 6 ECHR”: see opinion Advocate General Sharpston in ECJ (judgment of December 8, 2011), Case C-272/09 P *KME and Others v Commission*, not yet reported, para. 64.

11 With respect to *ne bis in idem*, see e.g. ECJ, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para. 59; ECJ, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paras 338 to 340; ECJ, Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, para. 50; ECJ (judgment of February 14, 2012), Case C-17/10 *Toshiba Corporation and Others*, not yet reported, para 94; with respect to the right to summon and hear witnesses and the non-retroactivity of criminal law, see e.g. ECJ, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] E.C.R. I-5425, paras 65-76 and para. 202, respectively; with respect to the presumption of innocence, see e.g. ECJ, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, para. 150.

12 In its judgment of April 18, 2012, *Posten Norge* (Case E-15/10, para. 88), the EFTA Court explained in this respect: “penalties such as the one at issue pursue aims of both repressive and preventive character. They are intended to act, in the interest of society in general and the good functioning of the EEA single market in particular, as a deterrent against future breaches of the competition rules both for the perpetrator and for all other undertakings that enjoy a dominant position on the market. Accordingly, having regard to the nature of the infringements in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall, as a matter of principle, within the criminal sphere for the purposes of Article 6 ECHR.”

13 ECtHR (judgment of September 27, 2011), *Menarini Diagnostics v Italy*, case n° 43509/08, § 44.
It has nevertheless been argued that the safeguards applicable in competition law proceedings differ from those that govern criminal proceedings proper.\textsuperscript{14} Paraphrasing the words of the judgment of the ECtHR in \textit{Jussila v Finland},\textsuperscript{15} Advocate General Sharpston has thus considered that the fining procedure in competition cases ‘differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency’.\textsuperscript{16}

But are the principles of \textit{Jussila v Finland} applicable to competition law proceedings? That judgment concerned a fiscal surcharge for tax fraud imposed by the Finnish tax authorities. The applicant claimed that, pursuant to Article 6(1) ECHR, an oral hearing should have been held before the administrative court which confirmed that surcharge. The ECtHR dismissed this plea by reference to the nature of the fiscal surcharge. In its reasoning, it established a link with competition law. In deciding that “it is self-evident that there are criminal cases which do not carry any significant degree of stigma” and that “[t]here are clearly ‘criminal charges’ of differing weight”, the ECtHR referred to the “gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example […] competition law”.\textsuperscript{17}

b) Right to an effective remedy and fair trial (Article 47 of Charter)

According to settled case-law, the Commission is not a tribunal\textsuperscript{18} within the meaning of Article 47 of the Charter.\textsuperscript{19} However, this does not preclude the possibility that the


\textsuperscript{15} ECtHR (judgment of November 23, 2006), \textit{Jussila v Finland}, n° 73053/01, § 43, Reports of Judgments and Decisions 2006-XIV.

\textsuperscript{16} Opinion of Advocate General Sharpston in ECJ (judgment of December 8, 2011), Case C-272/09 P \textit{KME and Others v Commission}, not yet reported, para. 67.

\textsuperscript{17} See n. 15.


\textsuperscript{19} Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. The case-law of the ECJ therefore only refers to Article 47 of the Charter since the entry into force of the Lisbon Treaty (see
procedure for finding an infringement and imposing fines *taken as a whole* may be regarded as satisfying the requirements of that provision.\(^{20}\) Fines may indeed be imposed by an administrative body which does not itself comply with the requirements of Article 47 of the Charter, provided that the decision of that body is subject to subsequent review by a judicial body that has full jurisdiction and does in fact comply with those requirements.\(^{21}\)

Applicants in competition cases have claimed that the proceedings before the EGC and ECJ do not satisfy the requirements of due process under Article 47 of the Charter. Firstly, they have criticized the fact that the EU Courts do not conduct a de-novo trial and cannot substitute their own judgment for that of the Commission. Secondly, it has been argued that the EU Courts do not conduct a full review of the legality of the contested decision since they allow the Commission a margin of discretion in economic matters.\(^{22}\)

The EGC and ECJ dismiss this criticism. They rightly consider that the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU affords all the safeguards required by Article 47 of the Charter.

Indeed, the judicial review provided for by the Treaties involves review by the EGC of both the law and the facts, subject to a further review by the ECJ, in case of an appeal, on points of law.\(^{23}\) The EGC has the power to assess the evidence, to annul the contested decision, in whole or in part, and to alter the amount of a fine.\(^{24}\) It should be stressed that with respect to the fine, the review of legality provided for in Article 263 TFEU is

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20 See EGC (judgment of July 13, 2011), Case T-138/07 Schindler Holding and Others v Commission, not yet reported, para. 54 and case-law cited.

21 ECtHR (judgments of October 23, 1995), Schmautzer, Umlauft, Gradinger, Pramstaller, Palao and Pfarrmeier v. Austria, Series A n° 328 A-C and 329 A-C, §§ 34, 37, 42 and 39, 41 et 38; ECtHR (judgment of September 27, 2011), Menarini Diagnostics v Italy, case n° 43509/08, § 59.


23 ECJ (judgment of December 8, 2011), Case C-272/09 P KME and Others v Commission, not yet reported, para. 106; ECJ (judgment of December 8, 2011), Case C-386/10 P Chalkor v Commission, not yet reported, para. 67; ECJ (judgment of December 8, 2011), Case C-389/10 P KME Germany and Others v Commission, not yet reported, para. 133; ECJ (judgment of November 6, 2012), Case C-199/11 Otis and Others, not yet reported, para. 47, para. 63.

24 *Ibidem.*
supplemented by a power of unlimited jurisdiction. This means that in respect of the amount of the fine the EGC can substitute its own judgment for that of the Commission.

It is true that in areas giving rise to complex economic assessments, the Commission has a margin of discretion. The ECJ, however, explicitly stresses that the EU Courts cannot use that margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts. The EGC will thus review the Commission’s interpretation of information of an economic nature and establish not only whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

The bottom line is that the Commission’s case for finding an infringement of Articles 101 TFEU and 102 TFEU must be convincing. The evidence relied upon must be sufficiently precise and consistent to support the firm conviction that the infringement took place. Where there is doubt as regards the existence of the infringement, the EGC will give the benefit of that doubt to the applicant. As a result, the EGC will conclude that the

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25 Article 261 TFEU and Article 31 of Regulation No 1/2003.
26 ECJ (judgment of November 22, 2012), Case C-89/11 P E.ON Energie v Commission, not yet reported, para. 124 and case-law cited.
Commission has not established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point.\(^\text{32}\) Indeed, given the nature of Commission decisions imposing fines for the infringement of competition law, the principle of the presumption of innocence, set out in Article 48 of the Charter, applies to competition proceedings that may result in the imposition of fines or periodic penalty payments.\(^\text{33}\)

c) Rights of defence (Articles 41(2) and 48 of Charter)

i) Access to the file

The parties under investigation in competition law infringement proceedings have access to the Commission’s file pursuant to Article 27(2) of Regulation No 1/2003. Such access ensures that those parties can effectively exercise their rights of defence.\(^\text{34}\) The Commission’s obligation to grant access to its file therefore extends to all the documents which may be relevant for the defence of the undertaking(s) or association(s) concerned and include both incriminating and exculpatory evidence. However, access to the Commission’s file is not absolute since, according to Article 27(2) of Regulation No 1/2003 and settled case-law,\(^\text{35}\) it does not extend to “confidential information and internal documents of the Commission or the competition authorities of the Member States”.

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\(^\text{34}\) ECJ, Aalborg Portland and Others v Commission, cited in n. 11, para. 68; ECJ (judgment of July 1, 2010), Case C-407/08 P Knauf Gips v Commission, not yet reported, para. 22.

Infringement of the right of access to the Commission’s file during the administrative proceedings prior to the adoption of a decision will, in principle, lead to the annulment of the decision finding the infringement provided that it can be demonstrated that the rights of defence of the undertaking or association concerned have been affected. Where access to the file, and in particular to exculpatory documents, has not been granted at the stage of the administrative proceedings, the party concerned does not have to show that if it had had access to the non-disclosed documents the Commission decision would have been different in content but only that those documents could have been useful for its defence.

It is, however, impossible to substantiate such a plea before the EGC if one does not have access to the documents concerned. For this reason, when, in the context of an action seeking annulment of the Commission’s decision finding an infringement of the EU competition rules, an applicant challenges the Commission’s refusal to disclose one or more documents during the administrative proceedings, the EGC will generally require their disclosure in the proceedings before it. The applicant will then be invited to inspect the documents and to substantiate its plea alleging infringement of its rights of defence.

In Solvay, when the EGC ordered the disclosure of the file during the judicial proceedings, the Commission had to admit that some sub-files were missing. The Commission was unable even to draw up a list of the documents which those sub-files contained, because the indexes to the relevant binders could not be located either. Nevertheless, the EGC dismissed the plea alleging a violation of Solvay’s rights of defence. It held that there was no reason to presume that that undertaking could have discovered in the missing “sub-files” documents casting doubt on the Commission’s findings. Upon an appeal brought by Solvay, the ECJ quashed the EGC’s judgment and annulled the Commission’s decision finding an infringement. The ECJ pointed out that it could not be ruled out that Solvay might have found evidence in the missing sub-files which would have enabled it to offer an interpretation of the facts different to the interpretation adopted by the Commission,

36 ECJ, Limburgse Vinyl Maatschappij and Others v Commission, cited in n. 11, para. 317; ECJ (judgment of October 25, 2011), Case C-110/10 P Solvay v Commission, not yet reported, para. 50.


and which might therefore have been of use for its defence. The ECJ stressed that the point at issue was not that a limited number of documents were missing, the content of which could have been reconstructed from other sources, but that the Commission was unable to produce entire sub-files which could have contained essential documents relating to the procedure before it and which might have been relevant to Solvay’s defence.  

ii) Interplay between Regulation No 1049/2001 on access to documents and the specific Regulations in the field of competition law

As already mentioned, under Regulation No 1/2003, access to the Commission’s file for parties under investigation in EU competition law infringement proceedings is not absolute. Furthermore, that Regulation does not grant access rights to third parties. The same principles apply in EU merger control investigations as well as in State aid proceedings. It should be added that in these latter proceedings, only the Member State concerned has access to the Commission’s file. That right does not extend to the beneficiary of the aid, nor to competing undertakings.

It may therefore be tempting for a third party or for the beneficiary of the aid in State aid proceedings – or even for a party under investigation in competition law infringement proceedings or merger control proceedings seeking access to internal documents of the Commission – to make use of Regulation No 1049/2001 in order to obtain access – or a more complete access – to the Commission’s file. The purpose of this latter Regulation is


indeed to give the fullest possible effect to the right of public access to documents of the institutions.\textsuperscript{43}

The ECJ has examined the interplay between the specific rules for access to the Commission’s administrative file in particular types of proceedings and the general rules for access to documents laid down by Regulation No 1049/2001 in different judgments relating to merger control and State aid proceedings, respectively.\textsuperscript{44}

In \textit{Agrofert}\textsuperscript{45} and \textit{Odile Jacob},\textsuperscript{46} third parties which – as already mentioned – do not have the right to consult the Commission’s file under the Merger Regulation,\textsuperscript{47} sought access, on the basis of Regulation No 1049/2001, to documents of the Commission’s administrative file in two different merger control investigations. In both cases, the Commission had refused to disclose the requested documents. To justify its refusal of disclosure, the Commission relied on the exceptions to the right of access laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001 relating, respectively, to the protection of commercial interests and to the protection of the purpose of investigations. Both companies brought actions before the EGC which annulled the Commission’s decisions after holding that, even if it were accepted that the documents requested could be covered by the exceptions relied on, the Commission had failed in its obligation to demonstrate, in a concrete and individual manner, that those documents did in fact undermine the interests protected by those exceptions.\textsuperscript{48}

On an appeal brought by the Commission, the ECJ set aside the EGC’s judgment. It recalled that Regulation No 1049/2001 and the specific Regulation in the field of merger control have different objectives. The former regulation is designed to ensure the greatest

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\item \textsuperscript{43} ECJ (judgment of July 21, 2011), Case C-506/08 \textit{Sweden v MyTravel and Commission}, not yet reported, para. 73 and case-law cited.
\item \textsuperscript{44} See on this topic, O. Speltdoorn, “The Technische Glaswerke Ilmenau Ruling: A Step Backwards for Transparency in EU Competition Cases?” in \textit{Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh}, (2012) 439.
\item \textsuperscript{45} ECJ (judgment of June 28, 2012), Case C-477/10 \textit{Commission v Agrofert Holding}, not yet reported.
\item \textsuperscript{46} ECJ (judgment of June 28, 2012), Case C-404/10 \textit{Commission v Éditions Odile Jacob}, not yet reported.
\item \textsuperscript{47} Regulation No 139/2004, see n. 40.
\end{itemize}
possible transparency of the decision-making process of public authorities and of the information on which they base their decisions. It is thus designed to facilitate, as far as possible, the exercise of the right of access to documents and to promote good administrative practices. By contrast, the rules with respect to access to the file in the Merger Regulation are designed to ensure respect for professional and business secrecy in merger control proceedings.\textsuperscript{49} Neither Regulation No 1049/2001 nor the Merger Regulation contains any provision expressly giving one regulation primacy over the other. Therefore, each of those regulations has to be applied in a manner which is compatible with the provisions of the other and which does not impede a coherent application of both.\textsuperscript{50}

Whatever the legal basis on which it is granted, access to the file enables interested parties to obtain the observations and documents submitted to the Commission. The ECJ has therefore held that generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged, in the context of such a procedure, between the Commission and the notifying parties or third parties would jeopardise the balance which the EU legislature wished to ensure in the Merger Regulation between the obligation on undertakings to communicate possibly sensitive commercial information to the Commission in order that it may assess the compatibility of the proposed transaction with the internal market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional and business secrecy, for the information so provided to the Commission, on the other hand. If persons other than those authorised to access the file by the merger control legislation were able to obtain access to the documents on the basis of Regulation No 1049/2001, the scheme instituted by the merger control legislation would be undermined. Consequently, for the purpose of the interpretation of the exceptions provided for by Regulation No 1049/2001,\textsuperscript{51} there exists a general presumption that disclosure of documents relating to merger control proceedings undermines, in principle, the protection of the commercial interests of the undertakings involved in the

\textsuperscript{49} ECJ, Commission v Agrofert Holding, cited in n. 45, para. 51; ECJ, Commission v Éditions Odile Jacob, cited in n. 46, para. 109.

\textsuperscript{50} ECJ, Commission v Agrofert Holding, cited in n. 45, para. 52; ECJ, Commission v Éditions Odile Jacob, cited in n. 46, para. 110.

\textsuperscript{51} Exceptions under the first and third indent of Article 4(2) of Regulation No 1049/2001.
merger and also the protection of the purpose of investigations relating to the merger control proceedings.\textsuperscript{52}

According to the ECJ, the existence of that general presumption must be acknowledged irrespective of whether the request for access relates to merger control proceedings which are already closed or to those that are pending. The publication of sensitive information concerning the economic activities of the undertakings involved is liable to harm their commercial interests, regardless of whether merger control proceedings are pending. Furthermore, the prospect of such publication after merger control proceedings have been closed risks adversely affecting the willingness of undertakings to cooperate while such proceedings are pending.\textsuperscript{53}

In \textit{Technische Glaswerke Ilmenau}, the ECJ followed a similar reasoning with respect to access to documents in State aid proceedings.\textsuperscript{54} Under Regulation No 659/1999, the rights of defence only extend to the Member State responsible for granting the aid, which means that, under the general scheme of that Regulation, only that Member State has a right to consult the documents on the Commission’s administrative file. That fact must be taken into account for the purposes of interpreting the exception under Regulation No 1049/2001 relating to the protection of the objectives of investigative activities.\textsuperscript{55} If other interested parties, such as the beneficiary of the aid in \textit{Technische Glaswerke Ilmenau}, were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission’s administrative file, the system for the review of State aid would be called into question.\textsuperscript{56} Therefore, there exists a general presumption that the

\textsuperscript{52} ECJ, \textit{Commission v Agrofert Holding}, cited in n. 45, paras 61-64; ECJ, \textit{Commission v Éditions Odile Jacob}, cited in n. 46, para. 120-123.

\textsuperscript{53} ECJ, \textit{Commission v Agrofert Holding}, cited in n. 45, para. 66; ECJ, \textit{Commission v Éditions Odile Jacob}, cited in n. 46, para. 124. This general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001: see ECJ, \textit{Commission v Agrofert Holding}, cited in n. 45, para. 68; ECJ, \textit{Commission v Éditions Odile Jacob}, cited in n. 46, para. 126.

\textsuperscript{54} ECJ, Case C-139/07 P \textit{Commission v Technische Glaswerke Ilmenau} \[2010\] E.C.R. I-5885.

\textsuperscript{55} Exception laid down by Article 4(2), third indent, of Regulation No 1049/2001.

\textsuperscript{56} ECJ, \textit{Commission v Technische Glaswerke Ilmenau}, cited in n. 54, paras 57-58.
disclosure of documents in the administrative file in State aid proceedings in principle undermines the protection of the objectives of investigative activities.\textsuperscript{57}

However, it follows from \textit{MyTravel}\textsuperscript{58} that the above reasoning, developed by the ECJ with respect to access to documents exchanged between the Commission and the notifying party/parties or third parties, does not apply to \textit{internal documents} of the Commission, at least once the proceedings to which the internal documents relate have been closed and the decision has become final. When refusing access to internal documents, the Commission generally refers to the exceptions provided for in Article 4(2), second indent, or Article 4(3) Regulation No 1049/2001 relating to court proceedings and legal advice and to the protection of the decision-making process. \textit{MyTravel}, formerly Airtours, was a notifying party in merger control proceedings. Those proceedings led to a decision declaring the merger incompatible with the internal market. Having obtained the annulment of that negative decision by means of an action before the CFI,\textsuperscript{59} the company sought access to internal documents of the Commission relating to the latter decision with a view to starting proceedings for damages against the Commission. The ECJ ruled that the exceptions relating to court proceedings and legal advice and to the protection of the decision-making process cannot be applied, without further examination, when the proceedings to which the internal documents relate have been closed and the decision has become final. In such circumstances, the ECJ held that in order to be able to refuse access to internal documents, the Commission is obliged to carry out a concrete, individual examination of the document at issue and to provide specific reasons for which it considers that its disclosure would concretely and actually undermine the interests protected by Article 4(3) or by the second indent of Article 4(2) of Regulation No 1049/2001.\textsuperscript{60}

\textsuperscript{57} ECJ, \textit{Commission v Technische Glaswerke Ilmenau}, cited in n. 54, para. 61. This general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001 (ibid. para. 62).

\textsuperscript{58} ECJ, Case C-506/08 P \textit{Sweden v MyTravel and Commission}, cited in n. 43.


\textsuperscript{60} ECJ, Case C-506/08 P \textit{Sweden v MyTravel and Commission}, cited in n. 43, para. 98; see also ECJ, \textit{Commission v Agrofert Holding}, cited in n. 45, para. 74.
Two lessons can be drawn from the above case-law. Firstly, tempting as it may be for a concerned party or a third party to try to obtain more comprehensive access to the Commission’s file than that to which it is entitled (or not entitled) under the specific regulations in the field of competition law concerned, such efforts will generally be in vain. Secondly, the ECJ balances the different interests at stake and sees to it that the arrangements for access to the file instituted by the specific regulations in the field of competition law are not undermined by a generalised access to the Commission’s administrative file.

The ECJ embarked upon a similar balancing of the interests at stake in *Pfleiderer*. 61 This case concerned proceedings before the German Bundeskartellamt in which that competition authority had fined different wallpaper manufacturers for having infringed Article 101 TFEU. Pfleiderer sought full access to the file of the Bundeskartellamt relating to the cartel with a view to preparing civil actions for damages. As an industrial purchaser of such paper, Pfleiderer claimed to have sustained serious harm resulting from the cartel. The refusal of the Bundeskartellamt to grant such access was challenged before the competent national court which, in turn, made a reference for a preliminary ruling to the ECJ. The national court wanted to know, in particular, whether EU competition law was to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications.

On the one hand, the ECJ recalled that leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective. They therefore serve the objective of effective application of Articles 101 TFEU and 102 TFEU. However, the effectiveness of those programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant the request for leniency by exempting the undertaking in question, in whole or in part, from the fine which they might otherwise have imposed. 62 On the other hand, any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or

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61 ECJ (judgment of June 14, 2011), Case C-360/09 Pfleiderer, not yet reported.

62 ECJ, Case C-360/09 Pfleiderer, cited in n. 61, paras 25-26.
distort competition. Moreover, the existence of such a right strengthens the working of the EU competition rules by discouraging agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the EU.

EU law does not therefore preclude a person who has been adversely affected by an infringement of EU competition law and who is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is therefore up to the national court and authorities to weigh, on the basis of their national law, the respective interests at stake: those in favour of disclosure of the information and those in favour of the protection of that information provided voluntarily by the applicant for leniency.

d) Principle of legality and proportionality of criminal offences and penalties (Article 49 of the Charter)

The principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is enshrined in Article 49 of the Charter, requires that European Union rules define offences and penalties clearly.

In Degussa, the applicant claimed that Article 15(2) of Regulation No 17 – now Article 23(2) and (3) of Regulation No 1/2003 – which empowers the Commission to impose fines on undertakings and associations of undertakings that have infringed the EU competition rules, does not satisfy the requirements of the principle of legality. According to the applicant in that case, the criteria laid down by the EU legislator for setting fines are

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64 ECJ, Case C-360/09 Pfleiderer, cited in n. 61, para. 29.

65 ECJ, Case C-360/09 Pfleiderer, cited in n. 61, paras 30-32.


too vague since they leave an absolute discretion to the Commission when deciding on the appropriateness and the amount of the fine. The EGC dismissed that plea and its judgment was upheld by the ECJ on appeal.68

The reasoning of the EU Courts is as follows. First, Article 23(2) of Regulation No 1/2003 lays down an objective yardstick in providing that, for each undertaking or association of undertakings, the fine imposed may not exceed 10% of its worldwide turnover. Thus, the fine which may be imposed is subject to a quantifiable and absolute upper limit. Secondly, Article 23(3) of Regulation No 1/2003, which complements Article 23(2) of that regulation, requires the Commission to fix fines in each individual case having ‘regard … both to the gravity and to the duration of the infringement’.69 Thirdly, the adoption by the Commission of Guidelines on the method of setting fines has further clarified the limits, already implicit under Article 23(2) and (3) of Regulation No 1/2003, that circumscribe the exercise by the Commission of its discretion.70

Consequently, the power of the Commission to impose fines for infringements of the EU competition rules respects the principle of legality. Indeed, on the basis of the provisions of Regulation No 1/2003 and the Commission’s own Guidelines, a prudent trader is able, if need be by taking legal advice, to foresee in a sufficiently precise manner the method and order of magnitude of the fine which he is likely to incur for a given line of conduct. The fact that that trader cannot know in advance precisely the level of the fine which the Commission will impose in each individual case does not constitute a breach of the principle that penalties must have a proper legal basis. Indeed, in light of the gravity of the infringements which the Commission is called upon to investigate, the objectives of punishment and deterrence justify preventing undertakings from being able to calculate, in advance, the amount of the fine which would be imposed on them for that unlawful conduct. Indeed, were such a calculation possible then undertakings would be in a

68 ECJ, Evonik Degussa v Commission, cited in n. 66.
69 See EGC, Degussa v Commission, cited in n. 67, para. 75; EGC, Case T-446/05 Amann & Söhne et Cousin Filterie v Commission [2010] ECR II-1255, para. 141
70 EGC, Degussa v Commission, cited in n. 67, para. 82.
position to weigh up the benefits which they would derive from their participation in an infringement as against the risk of having to pay an identifiable fine.\textsuperscript{71}

Article 49 of the Charter also enshrines the proportionality principle by providing in its third paragraph that “[t]he severity of penalties must not be disproportionate to the criminal offence.” Provided that the Commission respects the 10\% upper limit for the fine and does not err in assessing the gravity and duration of the infringement, it is unlikely that a fine will violate this principle.\textsuperscript{72}

e) Ne bis in idem (article 50 of the Charter)

EU law and national competition law apply in parallel.\textsuperscript{73} Indeed, competition rules at European and at Member State level view restrictions on competition from different angles\textsuperscript{74} and their areas of application do not coincide.\textsuperscript{75} That situation has not been affected by the enactment of Regulation No 1/2003.\textsuperscript{76}

But can different competition authorities in Europe, namely the Commission and one or more national competition authorities, deal with \textit{one and the same} cartel and impose


\textsuperscript{72} See EGC, Case T-141/08 \textit{E.ON Energie v Commission} [2010] ECR II-5761, para. 294, upheld upon appeal in ECJ (judgment of November 22, 2012), Case C-89/11 P \textit{E.ON Energie v Commission}, cited in n. 33, paras 123 to 138. In his opinion in the latter case, Advocate General Bot held that “(a)n examination of the proportionality of a fine must [...] take into account all the elements of the case, such as the conduct of the undertaking and the part it played in setting up the anti-competitive practice, its size, the value of the products concerned or the profit derived from the infringement, the deterrent effect which is desired and the risks which infringements of that kind represent to the objectives of the European Union” (para. 114). According to the Advocate General, the EGC did not fully exercise its unlimited jurisdiction since it did not “assess the amount of the fine beyond merely the points of law or of fact disputed by the undertaking concerned” (para. 115). The ECJ did not follow the Advocate General’s opinion on this point.

\textsuperscript{73} ECJ, \textit{Wilhelm and Others} [1969] ECR 1, para. 3; ECJ, Case C-137/00 \textit{Milk Marque and National Farmers’ Union} [2003] ECR I-7975, para. 61; ECJ, Joined Cases C-295/04 to C-298/04 \textit{Manfredi and Others} [2006] ECR I-6619, para. 38.

\textsuperscript{74} ECJ, \textit{Wilhelm and Others}, cited in n. 73, para. 3; ECJ, \textit{Manfredi and Others}, cited in n. 73, para. 38; ECJ, Case C-550/07 \textit{Akzo Nobel Chemicals and Akcros Chemicals v Commission} [2010] ECR I-8301, para. 103.

\textsuperscript{75} ECJ, Case C-505/07 \textit{Compañía Española de Comercialización de Aceite} [2009] ECR I-8963, para. 52.

\textsuperscript{76} ECJ (judgment of February 14, 2012), Case C-17/10 \textit{Toshiba Corporation and Others}, not yet reported, para. 82.
penalties on the participating undertakings on the basis of the relevant provisions of EU and national competition law, respectively?

A literal interpretation of the provisions of Regulation No 1/2003 does not rule this out. On the contrary, Article 16(2) of this Regulation expressly provides that where the competition authorities of the Member States rule on agreements, decisions or practices falling within the scope of Articles 101 or 102 TFEU which already form the subject-matter of a Commission decision, they cannot take decisions which would contradict the decision adopted by the Commission, thereby confirming that the Member States retain their power to act even if the Commission has itself already taken a decision.\(^{77}\)

However, as has already been mentioned, Regulation No 1/2003 must be interpreted and applied in a way that is consistent with the rights and principles enshrined in the Charter. The question thus arises whether the \textit{ne bis in idem} principle laid down in Article 50 of the Charter prevents a national competition authority from imposing fines on an undertaking where the Commission has already fined that same undertaking for its participation in the same cartel. This question was a core issue in the \textit{Toshiba} case.\(^{78}\)

According to the \textit{ne bis in idem} principle which, according to settled case-law, must be complied with in proceedings for the imposition of fines under competition law,\(^{79}\) “[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”.

The \textit{Toshiba} case concerned a cartel, uncovered in 2004, involving various European and Japanese undertakings active in the electrical engineering sector. Both the Commission and the Czech competition authority imposed fines on the undertakings concerned. The Czech competition authority’s decision was issued after the Commission’s decision was adopted. The Czech competition authority applied only national antitrust law and confined

\(^{77}\) ECJ, \textit{Toshiba Corporation and Others}, cited in n. 76, para. 85.

\(^{78}\) ECJ, \textit{Toshiba Corporation and Others}, cited in n. 76.

the penalty to the cartel’s effects on the territory of the Czech Republic during a period prior to 1 May 2004, the date of the Czech Republic’s accession to the EU.

Upon a reference for a preliminary ruling under Article 267 TFEU from a Czech court, the ECJ first recalled its case-law according to which, in competition law cases, the application of the *ne bis in idem* principle is subject to the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected. The fact that the ECJ confirmed that the third condition, namely “unity of the legal interest protected”, was applicable may seem questionable. Advocate General Kokott had indeed strongly pleaded against such line in her opinion after pointing out that in areas of law other than competition law, the ECJ had not applied that third condition. To interpret and apply the *ne bis in idem* principle so differently depending on the area of law concerned would be detrimental to the unity of the EU legal order and would also be contrary to the requirement of homogeneity laid down in Article 52(3) of the Charter which states that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. Indeed, the case-law of the ECtHR relating to Article 4(1) of Protocol No 7 to the ECHR, which enshrines the *ne bis in idem* principle at Convention level, does not mention any criterion relating to the unity of the legal interest protected.

Possible explanations for the reference to the “unity of the legal interest protected” criterion in *Toshiba*, thus making it more difficult for subjects of the law to rely on the principle, are – in line with the reasoning of the ECtHR in *Jussila v Finland* – that criminal law guarantees do not apply with their full stringency in competition cases, as well as the fact that not all the Member States have ratified Protocol No 7 to the ECHR.

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83 ECtHR, *Jussila v Finland*, cited in n. 15.
while others have ratified it subject to reservations or interpretative declarations in relation to Article 4.  

In any event, the ECJ did not base its ruling in Toshiba on the “unity of the legal interest protected” criterion. It held that there was no breach of the ne bis in idem principle since the “identity of the facts” criterion was not fulfilled. According to the ECJ, whether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect. Since the Commission’s decision did not cover any anti-competitive consequences of the cartel in the territory of the Czech Republic in the period prior to 1 May 2004, whereas the decision of the Czech competition authority imposed fines only in relation to that territory and that period, the two decisions did not concern the same facts within the meaning of Article 50 of the Charter.

It remains to be seen whether the ECJ will, referring to the criterion of “unity of the legal interest protected” deem a decision of a national competition authority compatible with Article 50 of the Charter where a previous Commission decision concerned the same cartel and took into account its anti-competitive consequences in the territory of that national competition authority during the same period.

IV – National law must guarantee the full effectiveness of EU competition law

Thus far, this contribution has focused on the principles of due process guaranteed to the party adversely affected by a Commission decision in the field of competition law. However, a case generally involves at least two different parties. Since the Commission is

84 See opinion AG Cruz Villalon in ECJ (judgment of February 26, 2013), Case C-617/10 Åkerberg Fransson, not yet reported, para. 72.
85 ECJ, Toshiba Corporation and Others, cited in n. 76, para. 98.
86 Ibid., paras 99 and 102.
87 It is by reference to that criterion that the Court has rejected the application of a prohibition against prosecution and punishment for the same cause of action in antitrust proceedings involving the EU’s relationship with non-member States: see opinion AG Kokott in ECJ, Toshiba Corporation and Others, cited in n. 76, para. 115 and case-law cited.
not a tribunal within the meaning of Article 47 of the Charter, it acts as the defendant institution in proceedings brought before the EGC against the decisions it has adopted in the field of competition law. It goes without saying that the Statute of the Court of Justice of the European Union as well as the Rules of Procedure of the EGC (and upon appeal those of the ECJ) also guarantee a fair trial as regards the defendant institution.

Where a national competition authority adopts a decision finding an infringement of EU competition law, such decision may be challenged before the competent national court and national procedural rules will apply. In \textit{VEBIC},\textsuperscript{88} the ECJ was called upon to examine a particular characteristic of Belgian competition law, namely the fact that the Belgian competition authority \textit{could not} act as a defendant in judicial proceedings brought against its own decisions. Considering that such a system was incompatible with Regulation No 1/2003, the Brussels Court of Appeal referred a preliminary question to the ECJ.

According to the ECJ, although Regulation No 1/2003 leaves it to the domestic legal order of each Member State to determine the procedural rules governing legal proceedings brought against decisions of its competition authority, such rules must not jeopardise the attainment of the basic objective of the Regulation, which is to ensure that the EU competition rules are applied effectively. If the national competition authority is prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly ‘captive’ to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field of activity such as the finding of competition law infringements and the imposition of fines in respect of them, which involves complex legal and economic assessments, the very existence of such a risk is liable to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of EU competition rules. For this reason, under the system set up by Regulation No 1/2003, a national competition authority should be entitled to participate, as a defendant, in proceedings before a national court challenging a decision that that authority has taken.\textsuperscript{89}

\textsuperscript{88} ECJ, Case C-439/08 \textit{VEBIC} [2010] E.C.R. I-12471.

\textsuperscript{89} ECJ, \textit{VEBIC}, cited in n. 88, paras 57-59.
Similar considerations regarding the full effectiveness of the EU competition rules were at issue in *Otis*. That case concerned an action for damages brought by the EU before the Belgian courts in respect of the loss the EU had sustained as a result of a cartel in which several manufacturers of elevators had taken part. The EU had contracted with those companies for the installation and maintenance of elevators on its premises and had paid an excessive price as a result of the anti-competitive practices at issue. Since the Commission had itself established the infringement of Article 101 TFEU, the referring court sought to know whether the EU’s action was compatible with Article 47 of the Charter.

According to the ECJ, the EU can – just like any other subject of the law – claim compensation for the loss it has sustained as a result of an infringement of the EU competition rules. Such a right in fact strengthens the working of the EU competition rules and can make a significant contribution to the maintenance of effective competition in the EU. The rule that national courts may not take decisions that run counter to a Commission decision finding an infringement of Articles 101 and/or 102 TFEU does not mean that the companies against which such action for damages is lodged are denied their right of access to a tribunal. Indeed, as mentioned above, EU law provides for a system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU which affords all the safeguards required by Article 47 of the Charter.

V – Conclusion

Whilst the ECJ has never gone so far as to qualify fines imposed for infringements of EU competition law as being criminal in nature, it has effectively applied the rights to due process, to an effective remedy and to a fair trial provided for in the Charter and under the ECHR. In particular, the ECJ has consistently and correctly rejected arguments to the effect that the Commission’s role as investigator and decision-maker, subject to a judicial

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90 ECJ (judgment of November 6, 2012), Case C-199/11 *Otis and Others*, not yet reported.


92 Article 16(2) of Regulation No 1/2003.

93 ECJ, *Otis and Others*, cited in n. 90, paras 54-56.
review of its rulings by the EGC, is incompatible with the safeguards required by Article 47 of the Charter. The ECJ has also rejected criticisms alleging that, in the field of competition law, the requirements of the legality of the offence and penalty are not properly respected, holding that Article 23 of Regulation No 1/2003 provides undertakings with sufficient legal certainty with regard to the level of fines that may be imposed.

As regards rights of the defence, the ECJ has recognised that access to the file, although essential, must also be analysed in practical terms by reference to the circumstances of the particular case. Whilst the fact that a small number of documents has not been disclosed during the administrative procedure may not suffice to justify the annulment of a decision, the absence from the file of a substantial number of potentially exculpatory documents is liable to do so. The ECJ has also taken the position that the general right of public access to documents does not supplant the rules provided for by the specific Regulations applicable to competition and State aid matters. Indeed, those rules allow for a nuanced and balanced approach to access to the file that takes account of the particularities of the different types of proceedings that they are designed to regulate.

The ECJ has also had occasion to apply, in competition proceedings, the *ne bis in idem* principle, enshrined in Article 50 of the Charter. Finally, it should be noted that national law is required to guarantee the full effectiveness of EU competition law, both where a decision of a national competition authority is at issue and in the context of private enforcement actions, which have an important role to play in the maintenance of effective competition in the EU.