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

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

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

The second part will address the questions arising from the impact of antitrust remedies on the property rights enjoyed by undertakings found to have infringed the competition rules against the background of their right to peacefully enjoy their “possessions” and to freely stipulate contracts. This chapter concludes that remedies entailing the obligation to license intellectual property rights (IPRs) to third parties may actually not be entirely consistent with
the standards enshrined in Article 1, Protocol I to the Convention as well as with rule of law principles.

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

1. Preliminary observations

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

Regulation No 1/2003 enshrines an obligation to provide information on new cases (Article 11) and confers to the Commission and the NCAs the power to exchange and use as evidence information gathered in the course of investigations (Article 12) and to carry out investigative measures on their reciprocal behalf. To ensure the smooth operation of these features, the Member States envisaged the creation of the European Competition Network (ECN). Established via an informal declaration in 2003, the ECN provides an “unofficial” space for the circulation of information and the resolution of issues arising from parallel investigations. However, due to its very nature, it does not act as a “clearing house” in the event of conflicts arising from multiple investigations pending in two or more jurisdictions or operate according to a uniform set of binding rules as to the collection and the transmission of evidence. According to Council Regulation No 1/2003, each NCA is only subject to the law
in force in its own jurisdiction. It follows that once evidence has been gathered in compliance with the applicable evidentiary rules, it can be transmitted to and used by a different authority regardless of any different, perhaps more protective legal standards, in force in the receiving jurisdiction.

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

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

This section briefly discusses the question of whether the features of EU competition proceedings can be reconciled with a number of fundamental rights and principles, such as the right to a “fair hearing,” which demands, inter alia, that decisions affecting the determination of “civil rights or obligations” or “criminal charges” be adopted in accordance with canons of independence and impartiality. The remit of this chapter does not allow for an exhaustive discussion of the scope and the degree of protection granted to fundamental
rights by EU law. The Court of Justice has elaborated autonomous human rights’ safeguards as part of the general principles of EC/EU law and has acknowledged that instruments such as the ECHR play a significant role in inspiring the interpretation of these principles. The central position of the ECHR was confirmed by the EU Charter of Fundamental Rights, which is now legally binding on the Union institutions as well as on domestic authorities when they act within the scope of EU law.

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

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

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

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

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

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

The previous section briefly analysed the rationale for the extension of human rights protection to entities affected by the exercise of regulatory powers and argued that, while
public authorities should be allowed a margin of discretion in implementing their policy of regulation of the economy, they are obliged to strike a careful balance between the effective exercise of their function and the protection of fundamental entitlements enjoyed by the affected parties.

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

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

In the recent O’Halloran and Francis case the European Court of Human Rights emphasised that while the right to a “fair trial” was in itself absolute, what actually made a
“fair trial,” i.e., its features, including the right to remain silent, should be assessed in each case in light of the legal context in which they are to operate.\(^{31}\) The circumstances of the case, the nature and the objectives of the proceedings and the intensity of the coercion exercised in taking the evidence would have to be carefully appraised.\(^{32}\)

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

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

Whereas the Strasbourg Court focuses on the nature and intensity of the coercive powers exercised to extract the evidence and on the procedural safeguards assisting that exercise, to ensure that the investigated parties’ right to a “fair trial” is not tainted by improper forms of
oppression on their will,\textsuperscript{40} the Court of Justice of the EU restricts the scope of the privilege to evidence taken as a result of direct coercion (e.g., financial penalties) and takes as its “starting point” the substance of the questions directed at the investigated parties, i.e., whether they are merely of a “factual nature” or can lead to the admission of responsibility for the alleged infringement.\textsuperscript{41}

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

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

The different principles and objectives characterising the EU and the ECHR legal systems have led to the adoption, in the respective jurisdictions, of different standards for the protection of human rights within regulatory frameworks. However, it is beyond doubt that although the effective enforcement of the Treaty competition rules constitutes a primary
objective, its implementation should not go as far as to defy the essence of the undertakings’
rights of the defence and should ensure that appropriate limitations to the Commission’s
powers are in place to avoid procedural abuses, in accordance with the principles enshrined in
the rule of law, to which the EU institutions are committed.

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

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

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

Article 4, Protocol VII to the ECHR enshrines this principle and recognises it as belonging
to the general principles of Community law by the Court of Justice. Article 50 of the EU
Charter of Fundamental Rights also confirms this principle. Nonetheless, Regulation 1/2003
does not expressly protect ne bis in idem. Regulation 1/2003 is not only based on the
principle of parallel jurisdiction, but reiterates also that a decision adopted by NCAs will not
preclude the Commission or another national agency from taking action in respect to the
same infringement. The rationale behind this difference is that since EU and domestic competition rules fulfil different policy objectives and their application addresses only those anti-competitive effects that occur within the jurisdiction of each individual authorities, the principle of *ne bis in idem* would not be applicable to prevent double prosecution on the part of the Commission and would only be subject to the duty for the Commission to take in to account any earlier penalty in assessing the entity of the fine it wished to impose.

However, the European Court of Human Rights has taken the different view that the principle of *ne bis in idem* aims to prevent the repetition of criminal proceedings that have been concluded by a final decision. Consequently, according to the European Court of Human Rights, this rule should be read as containing a right not only not to be sanctioned twice, but also not to be investigated and prosecuted twice for the same infringement.

Against this background, one may doubt that the possibility of parallel investigations envisaged by Council Regulation No 1/2003 could be regarded as being consistent with the ECHR or with Article 50 of the EU Charter of Fundamental Rights, according to which no-one may be tried and punished twice for the same offence “within the Union” and regardless of whether its effects may be felt within the jurisdiction of different enforcement authorities.

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

The Commission can, whenever a case raises issues of “Community interest” and has a clear “transnational dimension,” seize jurisdiction over it and thus pre-empt other agencies from examining its merits or inflict sanctions on the firms found to be responsible for the
antitrust infringement in question. However, it has no obligation to take this action. Consequently, it is unclear whether the current rules are capable of eliminating any of the concerns for the respect of the ne bis in idem rule, outlined above.\textsuperscript{66}

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

The very system of parallel competences characterising the Modernisation Regulation raises concerns for the protection of the investigated parties against double jeopardy\textsuperscript{69} and seems to depart from the principles of foreseeability and legal certainty enshrined in the rule of law. The system should provide a rule of “administrative” \textit{res judicata} precluding NCAs from taking action in respect to infringements that have already been investigated and sanctioned in other jurisdictions.

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

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

The right to enjoy one’s property, despite not being absolute, is protected by the Convention.\textsuperscript{70} It is therefore indispensable to confine the discretion of public authorities to “alter property rights in unpredictable ways” in the public interest.\textsuperscript{71} According to Article 1 of Protocol I to the ECHR, everyone has the right to the “peaceful enjoyment” of his or her possessions,\textsuperscript{72} i.e., tangible and intangible goods,\textsuperscript{73} including intellectual property rights\textsuperscript{74} and, albeit within limits, legal claims,\textsuperscript{75} this right may either be forfeited altogether or can be constrained or “controlled” in its exercise.\textsuperscript{76}
However, these constraints should have an express legal basis, pursue a legitimate aim in the public interest and bear a relationship of proportionality between the needs of the public at large and the protection of the rights of the individuals or legal entities concerned by the exercise of the public power in the circumstances. The presence of appropriate procedural rights, the availability of compensation for the deprivation of property or of adequate remuneration in case of constraints being placed on their exercise are key aspects in this assessment.

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

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

The Commission pointed to the circumstance that patent rights were limited in many Contracting States and that the latter enjoyed a significant margin of appreciation. It emphasised, however, that forced licences could only be granted to “encourage technological and economic development” and if as a result of the disclosure of the invention it could be expected that a “new product or process […] capable of industrial application” could have been developed and supplied on the market.
On the merits, the Commission found that the licence was limited in scope to what was necessary to allow the party requiring it to employ its own invention and that the holder of the “primary” patent had been entitled to royalties, thus establishing a reasonable link of proportionality between that legitimate aim and the restriction imposed on the applicant’s rights. Therefore, the Commission, after declaring the application admissible, expressed the view that the respondent state had not infringed the applicant’s right to enjoy its intellectual property.

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

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

Consequently, although the ECHR protects property rights, including those concerning patents, trademarks and copyright, there may be a number of reasons why it is legitimate for the Contracting States to limit their scope in order to further other objectives of public interest. These limits must comport to the principles provided by Article 1, Protocol I to the Convention.
IV. Economic Freedom, Competition Enforcement & Antitrust Remedies: How To Strike A “Fair Balance” Against Powerful Undertakings?

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

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

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

Thus, the Commission can, after having found a violation of the Treaty antitrust rules, require the undertaking or undertakings responsible for it to modify their future behavior or, in exceptional cases, their structure in order to restore the status quo ante the competition infringement. Paramount to the framing of antitrust remedies is the application of principles of “necessity” and of “proportionality”. The concept of “necessity” requires the antitrust authorities to design each remedy in the light of the type of infringement, as determined by
the relevant substantive rules. Compliance with the principle of proportionality, instead, demands that the remedy constitute the only suitable means to bring the infringement to an end and that there be any less burdensome alternative to it.

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

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

Regarding the approach adopted in respect to “controls on the use of property” by the ECHR, the view adopted in these relatively less recent judgments appears to be consistent with the Convention standards. It could be argued that the Court of Justice, just as the Convention organs, aimed to ensure that the interests of effective competition would prevail
over the exclusivity of IP rights only if the interference with the latter led to genuine technical advancement.\textsuperscript{110}

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

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

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

Consequently, the Commission moved away, at least in part, from the “innovation driven” concept of “new product” to a less stringent view of technical development, which would also cover forms of “follow on” innovation.\textsuperscript{116} It may not be that this relatively more
generous approach confirms to the need to strike a “fair balance” between genuine competition and encouraging and rewarding investment.\textsuperscript{117} It is also telling that so far the Commission and the EU Courts have been reluctant to accept that the concern for maintaining the integrity of investments made by dominant companies could constitute an “objective justification” for a refusal to license.\textsuperscript{118} Importantly, the 2009 Guidance does not even acknowledge the possibility for a powerful firm to refuse to grant or to limit the scope of an IP licence in order to recoup its costs and thereby protect the value of its inventions.\textsuperscript{119}

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

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

Against this background, the “transition” from the restrained approach to \textit{prima facie} abusive refusals to license developed by the Court of Justice to the more “lenient” criteria for
the assessment of these practices adopted by the General Court in *Microsoft* and perhaps more dramatically by the Commission’s 2009 Guidance has led to results that are inconsistent, at least in part, with the principles enshrined in Article 1, Protocol I to the ECHR. The standards contained in the 2009 Guidance have not only been “diluted” so much that they are no longer capable of striking a “fair balance” between the common interest of protecting genuine competition and the protection of the rights of individual IP owner. They have also become so opaque that they do not allow dominant companies to foresee the antitrust law consequences of a refusal to license IP rights.\(^ {125}\)

Thus, in respect to the concept of “likely consumer harm”, the approach adopted by the 2009 Guidance\(^ {126}\) not only deprives this criterion of any “critical” function in the appraisal of these practices,\(^ {127}\) but also appears to have significantly increased the uncertainty characterising the assessment of the legality of a refusal to license, a development which does not appear consistent with the “prescribed by law” conditions required by the rule of law principles.\(^ {128}\) If it was already difficult to assess whether the “offshoot” of the exploitation of a given invention was genuinely “novel”, it would be even more complex to predict, in substance, the direction of the technical development of a specific industry as well as the impact of the refusal to license on its course.

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

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

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

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

As to the power of the Commission to impose antitrust remedies, the case law of the European Court of Human Rights demonstrates that the Convention allows for limitations on the scope of the right of ‘everyone’ to enjoy peacefully their property as well as for restrictions in their freedom of contract, subject, however, to several conditions dictated by Article 1 of its Protocol I.\textsuperscript{134} In respect to the power of the Commission to impose on the holder of an intellectual property right a duty to grant licences to other firms, the Human Rights Commission illustrated in its Smith Kline report the needs of innovation and the concern for strengthening the drive toward further technological development should be at the forefront of the assessment of whether a duty to licence constitutes a “proportionate” remedy to terminate an infringement of Article 102 TFEU. However, the European Court of Human Rights doubted that the 2009 Guidance on the priorities in the enforcement of Article 810, as influenced by the 2007 Microsoft decision, could be compatible with the standards governing the application of Article 1, Protocol I to the ECHR to compulsory licences and especially with the principle of proportionality.
More generally, discussing the compliance of antitrust remedies with human rights standards seems to question whether the current directions of antitrust enforcement have been appropriately set and whether the standards governing unilateral exclusionary conduct are “fit for purpose”, i.e., capable of reconciling the apparently diverging goals of competition and technical innovation. The past ten years have seen considerable success in uncovering anti-competitive behavior, albeit not without criticism. One hopes that the commitment to the ECHR expressed with the Lisbon Treaty will prompt a rethinking of the rules governing competition proceedings and remedies.
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6 See Council Regulation 1/2003, *supra* note 3, at art. 22; see also Commission Notice on Cooperation within the Network of Competition Authorities, paras. 2 and 27.


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


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


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


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

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


the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, 27 W. Competition L. & Econ. Rev. 201; Andreangeli, supra note 22, at 23 et seq.


30 Id. at para. 69.


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

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


36 Id. at para. 32.

37 Id. at para. 34.

38 Id. at para. 35.

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

40 Saunders v United Kingdom, supra note 29, para. 57; see also id. at para. 68; Jalloh v Germany, supra note 32, para. 114-115, 117. For commentary, inter alia, Tim Ward & Piers Gardner, The Privilege Against Self-Incrimination: In Search of Legal Certainty, 4 Eur. H.R. L. Rev. 388 (2003); see also, Alan Riley, supra note 39, 264.
See, e.g., Case C-238/99, LVM NV and Others v Commission, E.C.R. I-8375, para. 275 (2002); see also id. at para. 279-282. For commentary, inter alia, Alan Riley, supra note 39, 269; see also, Andreangeli, supra note 22, 134-35.


See, e.g., Case C-238/99, LVM NV and Others v Commission, E.C.R. I-8375, para. 275 (2002); see also id. at para. 279-82. For commentary, see Angus MacCulloch, The Privilege Against Self-Incrimination in Competition Investigations, 26(1) L.S. 211, 218-19 (2006); see also id. at 233-35. See also Scott A. Trainor, A Comparative Analysis of a Corporation’s Right Against Self-Incrimination, 18 Fordham Int’l. L. J. 2139, 2165-66 (1995); see Andreangeli, supra note 22, at127-28.


Recitals VI and VIII, Preamble to Council Regulation No 1/2003.

Id. at para. 5; see, e.g., Alec Burnside and Helen Crossley, Cooperative Mechanisms Within the EU: A Blueprint for Future Cooperation at the International Level, 10 Int’l Trade L. & Reg. 25, 27 (2004).

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


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


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


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

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

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


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

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


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

Hayek, supra note 17, at 108.


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


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

80 Id. at para. 45-6.


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

84 Id.

85 Id.

86 Id.

87 Id.

88 Id.

89 Id.

90 Id.


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

see, e.g., commission decision 94/19/ee, sea link v stena line, 1994 o.j. l15/8.

joined cases 6/7/73, iCI and commercial solvents v commission, e.c.r. 223 (1974); most recently, case t201/04, microsoft v commission, e.c.r. II-3601 (2007).

case t201/04, microsoft v commission, e.c.r. II-3601 (2007).

article 7, council regulation no 1/03; see also article 3, council regulation no 17/62.

see recital 13, preamble to council regulation no 1/2003; see also case t-170/06, alrosa v commission, e.c.r. II-2601, especially para. 86-87, 99-100 (2007). for commentary, see, inter alia, hubertus von rosenberg, unbundling through the back door... the case of network divestiture as a remedy in the energy sector, 30(5) eur. competition l. rev. 237, 238.

see, e.g., joined cases 6/7/73, ICI and commercial solvents v Commission, E.C.R. 223, para. 44-6.

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


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


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


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


See 2005 Discussion Paper, para. 239-40; see also IMS Health, supra note 104, at para. 49.
Case T-201/04, Microsoft, supra note 96, especially para. 621 et seq.; see also European Commission, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, at para. 89, C(2009) 864C (final), Feb. 9, 2009, available at:


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

Id.

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

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


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

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


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


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

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

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


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

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

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

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

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