

GAL Project
Institutional Design and Decision-Making Processes in European Competition Laws and Policy
Precis for workshop

Dr Ioannis Lianos (UCL) and Dr Arianna Andreangeli (University of Liverpool)

1. Overview of the EU competition enforcement structure

Established by the Treaty of Coal and Steel in 1951 and the Treaty of Rome on the European Economic Community in 1957, the competition law provisions of the constitutive Treaties have remained largely unchanged since the 1951 European Coal and Steel Community and 1957 European Economic Community Treaties, despite the various modifications of the constitutive Treaties.¹ Article 101 (1) of the TFEU² prohibits agreements, concerted practices and decisions of associations of undertakings that have as their object or effect to restrict competition and affect trade between Member States. In addition, Article 101(3) contains a “legal exception” to the sanction of nullity provided for otherwise unlawful practices, subject to the fulfilment of its four conditions, i.e. that they contribute to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit and do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In addition, in a multi-layered context such as that of the EU, each Member State has enacted its own competition rules and set up its own institutional arrangements within which to enforce them.

According to Article 105 TFEU, the European Commission is the agency primarily responsible for their application:³ however, the 2003 Modernisation Regulation has marked a decided change in this respect, by moving to a “legal exception” based system and by entrusting the national competition authorities and the national courts with the power to apply these rules in full in respect to individual cases⁴. Importantly the current Regulation also imposes on the NCAs substantial cooperation duties that are both reciprocal and owed to the Commission itself; nonetheless it does not contain any binding rules in respect to the allocation of new cases or for an “administrative res judicata” for NCAs’ decisions.⁵ Only the Commission can, by commencing fresh investigations, relieve national agencies of their jurisdiction to deal with specific complaints. More generally, the 2003 reforms have emphasised the role of NCAs and national courts in the application of the Treaty competition rules, the former, as was just anticipated, in close partnership with the Commission: however, there is considerable variance as

¹ For an historical overview of the evolution of the competition law idea in Europe, see GERBER, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998).

² Treaty on the Functioning of the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>

³ See e.g. Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ P 13, p. 204.

⁴ Article 3(2), Council Regulation 1/2003.

⁵ See e.g. Articles 11, 12, 22, Council Regulation No 1/2003.

regards the institutional design of these agencies across the Union, as well as regarding the powers they enjoy and the procedural rules and safeguards that assist their action.

The Commission can take action either proprio motu or following a complaint. For this purpose it enjoys significant investigative and sanctioning powers: it can request information, carry out inspections of the premises of individual firms and ask on the spot explanations (subject to the obligation to obtain a judicial warrant according to the applicable domestic rules) and, subject to their consent, interview the staff of the investigated firms. If it is ordered by a decision, the undertaking concerned cannot refuse to submit to the investigative measure in question.⁶ If following these preliminary measures the Commission finds that there are grounds for action, it is obliged to notify the investigated parties of the “objections” raised against them in writing: the former are entitled to examine the evidence gathered against them for the purpose of preparing their defence and are entitled to be heard in writing and orally.⁷

There are no deadlines within which a final decision must be adopted. The Commission can, if it finds an infringement, inflict fines up to 10% of the annual worldwide turnover of the parties concerned and/or impose antitrust remedies.⁸ The decisions of the Commission are subject to the review of the General Court and, on a point of law, of the Court of Justice. However, their review is, in relation to the substantial findings contained in them, limited to the existence of any manifest errors of law or of fact, of error in the interpretation of EU competition law and of misuse of powers.⁹ Unlimited jurisdiction can in any event be exercised in relation to the financial penalties imposed on the parties.

Merger control is, instead, a relatively recent “creature” of EU Law: established in 1989¹⁰ and substantially reformed in 2004,¹¹ the EU Merger Regulation provides for a centralised preventive and one-stop shop merger control system with a suspensory effect. The competence for the examination and the decision in merger cases with a Community dimension lies exclusively with the European Commission. Member States are free to develop their own merger control systems for mergers without a Community dimension. The concept of “Community dimension” is defined by Article 1 of the ECMR, which refers to specific quantitative thresholds of the turnover of the undertakings concerned and the cross-national influence of the transaction¹². The Commission proceeds to the examination of individual concentrations following their notification and according to a strict timeline: if the case discloses no considerable “concerns”, then the Commission will take a decision within 25 working days, according to Article 6 of the Merger Regulation. If, instead, the transaction warrants a closer examination, then the timeline is extended to up to 90 working days, in light of Article 8. As with competition decision, merger decisions are open to challenge before the EU courts,

⁶ See Artt. 17-21, Council Regulation No 1/2003.

⁷ See Artt. 27-28, Council Regulation No 1/2003.

⁸ See Artt. 24-25, Council Regulation No 1/2003; see also Guidelines on the method of setting fines, [2006] OJ C210/2.

⁹ See inter alia case 42/84, *Remia v Commission*, [1985] ECR 2585, especially para. 26; also, case T-155/04, *SELEX Sistemi Integrati SpA v Commission*, [2007] 4 CMLR 10, para. 28.

¹⁰ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] L 395/1. The case law of the European court of Justice had however extended the scope of application of Articles 101 TFEU and 102 TFEU to economic concentrations.

¹¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

¹² Article 1 ECMR contains a general threshold which is relevant to most of concentrations reviewed by the Commission (Art. 1(2)) and a special threshold which is brought into consideration if the quantitative thresholds in Art. 1(2) are not met (Art. 1(3)).

according to the same “limited standard” of review. However, the Court of Justice emphasised in a number of decision that the “forward looking” nature of merger investigation requires the Commission to substantiate its findings with clear, cogent and consistent evidence and on the basis of a painstaking investigation.¹³

In respect to the transparency and accountability of the Commission’s enforcement activity, it is important to emphasise that the Commission as a body is subject to the approval of the European Parliament to which it reports every year; in addition, its activity is subject to the oversight of the European Ombudsman as regards individual complaints of alleged “maladministration”. The Commission publishes every year an annual strategy plan, listing the principal objectives for its activity within that timeframe and also a yearly report on competition policy, to ensure the transparency of its action as well as to allow the appraisal of its institutional performance. The quality of individual decisions is also ensured by internal checks and balances, such as peer review panels. Also, scientific input is secured through the role of the Chief Competition Economist.¹⁴

It emerges from the above that the EU competition framework is, at least as far as its “centralised” nucleus (i.e. the Commission) is concerned, modelled along the lines of an integrated agency: in other words, the Commission is responsible for both the fact-finding and the decision making in respect to individual cases. The administrative decision adopted by it is in any event subject to the judicial scrutiny of a “full court”, i.e. an impartial and independent judicial authority: this is the General Court, whose decisions can be further appealed on points of law before the Court of Justice. The model chosen by the Treaty drafters and by the drafters of the Implementation Regulations, i.e. the “old” Council Regulation 17/62 and the current 2003 instrument, was inspired by the legal and administrative traditions of the founding member states who were all civil law countries. This trend can also be regarded as being consistent with the absence, at least at the outset, of any reference to the notion of “due process” rights and with the recourse to the more limited concept of “rights of defence”¹⁵ (*droits de la defense*).¹⁶ However, the enactment of the Modernisation Regulation, with its emphasis on decentralisation and with the increased reliance on domestic agencies, and the recent developments on the front of the protection of human rights, especially with the 2009 Treaty of Lisbon, have raised key questions as to the consistency of the current framework with the notion of “fairness” provided in the European legal traditions. These will be briefly addressed in the next section.

2. Summary assessment of the institutional arrangements: emerging problems

Various criticisms have been addressed to the administrative-centred EU competition law enforcement framework from different quarters¹⁷. A principal one is the integrated structure of

¹³ Case C-12/03, *Commission v Tetra Laval*, [2005] ECR I-987, para. 39.

¹⁴ Accessible at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

¹⁵ Case 17/74, *Transocean Marine Paint Association v Commission*, [1974] ECR 1063.

¹⁶ See *inter alia* HAYEK, *The Road to Serfdom* (Routledge 1944, reprinted in 2008), p. 75 et seq.; On the principle of the “Rule of law” in the European legal system see, PECH, “The Rule of Law as a Constitutional Principle of the European Union” (April 28, 2009). *Jean Monnet Working Paper Series* No. 4/2009. Available at SSRN: <http://ssrn.com/abstract=1463242>; On the elusive nature of the expression “rule of law” see, TAMANAHA, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2004); FALLON, “The rule of law as a concept in constitutional discourse”, (1997) 91(1) *Colum L Rev* 1.

¹⁷ See, MONTAG, ‘The Case for a Radical Reform of the Infringement Procedure under Regulation 17’, (1996) 8 *ECLR* 428; HOFMANN, ‘Good governance in European merger control: due process and checks and balances under

competition law enforcement, in particular the combination of the investigative, prosecutorial and adjudicative function in the same Institution, the European Commission. Certainly, the final decision is taken by “experienced political figures”¹⁸, the college of 27 commissioners, but it is suggested by the critics of the EU framework that the dominant role of the case team which reports to the DG Competition and is not only responsible for investigating of the case and proposing the decision but also for discussing the penalties and other remedies to be imposed, and the presence of the Competition policy Commissioner, to whom the DG Competition reports, in the Commission’s deliberations creates the risk of a prosecutorial bias, even at the earliest stages of the procedure.¹⁹

The starting point of almost all the criticisms addressed to the integrated structure of the European Commission is that the amount of fines for violation of EU competition law imposed by the latter has increased considerably to achieve deterrence objectives²⁰. Based on this allegedly high level of fines, the critics argue that these constitute penalties of “criminal nature”²¹ and thus should lead to the elevation of standards of due process to the rigorous standards of a criminal procedure²². The European Commission’s procedures allegedly do not conform to these standards, despite the various internal checks and balances that have been put in place by the Commission, as the hearing is not public or indeed occurs before the decision making organ (the latter being the College of Commissioners as a whole).²³ Furthermore, the decision-makers themselves are not judges and the Commission does not constitute a tribunal, rights of defence being limited²⁴.

Additional caveats of the current procedural framework are also that the Commission has “unlimited discretion” when imposing fines, as the only criteria specified in Article 23(3) of regulation 1/2003 for fixing fines is the gravity and the duration of the infringement, the lack of legal certainty as the criteria for setting fines are not sufficiently specified and clear in a hard law

review’, (2003) 24(3) *ECLR* 114-131; SCHWARZE & BECHTOLD, *Deficiencies in European Community Competition Law – Critical analysis of current practice and proposals for change* (Gleiss Lutz, September 2008) ; ICC (International Chamber of Commerce) Commission on Competition, ‘Due process in EU antitrust proceedings’ Policy statement, March 8, 2010, available at ; AMERICAN CHAMBER OF COMMERCE, ‘Explaining AMCham EU’s position on Due Process in EU Competition Cases’, Information paper, March 3, 2010, available at ; FORRESTER, ‘Due process in EC competition cases: a distinguished institution with flawed procedures’, (2009) 34(6) *ELRev.* 817-843; SLATER, THOMAS & WAELBROECK, *Competition Law Proceedings before the European Commission and the right to a fair trial: no need for reform?*, Global Competition Law Centre Working Paper 04/08; ANDREANGELI et al., *Enforcement by the Commission – the decisional and enforcement structure in antitrust cases and the Commission’s fining system*, in MEROLA & WAELBROECK (eds.), *Towards an optimal enforcement of competition rules in Europe*, Chapter 3 (Bruylant, Brussels, 2010).

¹⁸ ICC, ‘Due process in EU antitrust proceedings’, op. cit., at 1

¹⁹ Resolution on the 10th Report of the Commission of the European Communities on Competition Policy [1982] OJ C 11/78. See e.g. EHLERMANN, ‘Reflections on a European Cartel Office’, (1995) 32 *CMLRev* 471-486; also WILKS & MCGOWAN, ‘Disarming the Commission: the Debate over a European Cartel Office’, (1995) 32(2) *Journal of Common Market Studies* 259-273; VAN MIERT, ‘The Proposal for a European competition agency’, (1996) 2 *EC Competition Policy Newsletter*, available at http://ec.europa.eu/competition/speeches/text/sp1996_023_en.html . Preserving due process was not, however, among the reasons advanced for the institutional reform.

²⁰ SCHWARZE & BECHTOLD, op. cit., at 5 & figures at pp. 11-12.

²¹ See e.g. series A No 43, *LeCompte, Van Leuven and de Meyere v Belgium*, [1982] 4 *EHRR* 1, para. 45-47.

²² See, FORRESTER, op. cit., at 825; ICC, op. cit., at 2-3.

²³ See e.g. MEROLA and WAELBROECK (Eds), *Towards an optimal enforcement of competition rules in Europe*, 2010: Brussels, Bruylant, pp. 199 et seq.

²⁴ *Id.*, at 3.

text, but only in guidelines, which have no binding effect²⁵ and still remain highly imprecise, the leniency notice of the Commission operates against the presumption of innocence and the privilege against self-incrimination²⁶, the rules on the scope of liability of “undertakings” are unclear²⁷, the lack of effective judicial control of the fines, as the courts are limited to examining the pleas raised by the parties and do not fully examine the facts found by the Commission²⁸, and the fact that the legal professional privilege does not apply to in-house counsel²⁹.

It is added that although the decision of the Commission is subject to the judicial scrutiny of the EU courts, this right of appeal would not be sufficient to meet the requirements of a “fair hearing”. It is alleged that the limited scope of the Courts’ power of review, especially in respect to the complex economic evaluations carried out by the Commission, would not be consistent with the requirement that administrative decisions having a “criminal substance”, as argued above, be subjected to a full judicial appraisal, extending to all matters of fact and of law.³⁰ It was also alleged that the office of the hearing officer, important though it may be as a guarantee of general “fairness” of the oral hearing, due to her reporting duties, does not offer a sufficiently strong system of checks and balances.³¹

One could also highlight the considerable evolution of EU competition law procedures with the aim to safeguard the principle of due process, such as internal peer review processes, the enhancement of the role of the hearing officers and of the Chief Competition Economist. In addition, the Commission has enacted a number of Best Practices Guidelines on its procedures, seeking to increase the transparency and predictability of its action³². There is thus an effort to

²⁵ SCHWARZE & BECHTOLD, *op. cit.*, at 16-17 & 26-27.

²⁶ *Id.*, at 31-40. But cf. VELJANOVSKI, ‘European Cartel Fines Under the 2006 Penalty Guidelines - A Statistical Analysis’ (December 10, 2010). Available at SSRN: <http://ssrn.com/abstract=1723843> ;

²⁷ The European Commission extends the concept of undertaking to group of companies, not just the individual company (subsidiary) that committed the infringement in order to calculate the limit of 10% of the turnover for the fine. See most recently, Case C-97/08, *Akzo Nobel NV & Others v. Commission* [2009] ECR I-8237 and the pending case C-90/09, *General Química and Others v. Commission* [Opinion of AG Mazak].

²⁸ See, ICC, *op. cit.*, at 5-7, noting that (i) the level of the review of the General Court (GC) does not meet ECHR standards, in particular as the GC does not have the power to quash in all respects, on questions of fact and law, the decision of the European Commission, (ii) the GC does not use its unlimited jurisdiction on fines but only on rare occasions (the Report cites three) and (iii) appeals before the GC have no suspensory effect in general.

²⁹ *Id.* But see also appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29; also, *inter alia*, appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46 of the judgment; see also Commission Opinion, separate concurring Opinion of Mr N. Bratza, p. 354. For commentary, see e.g. BOYLE, “Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights”, (1984) *PL* 89 at p. 100; also ANDREANGELI, *EU Competition enforcement and human rights*, 2008: Cheltenham, E Elgar.

³⁰ See Appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29; also, *inter alia*, appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46 of the judgment; see also Commission Opinion, separate concurring Opinion of Mr N. Bratza, p. 354. For commentary, see e.g. BOYLE, “Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights”, (1984) *PL* 89 at p. 100; also ANDREANGELI, *EU Competition enforcement and human rights*, 2008: Cheltenham, E Elgar. For a consideration of issues relating to judicial review see HOUSE of LORDS SELECT COMMITTEE on the EUROPEAN UNION, *XIXth Report*, session 1999-2000, 21/11/2000, especially para 56 ff.

³¹ HOUSE of LORDS SELECT COMMITTEE on the EUROPEAN UNION, *XIXth Report*, session 1999-2000, 21/11/2000, para. 2.

³² Accessible at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>; for an example of the outcome of these efforts, see e.g. the “state of play” meetings, bilateral meetings between the Commission and one party, and the “triangular meetings”, between the Commission and all parties, which can be organized by the Commission and which give the opportunity to the parties “for open and frank discussions” and to make their points of view known at

increase the transparency of the procedure and the involvement of the parties early on during the first steps of the investigation process, although the Commission does not seem to question the inquisitorial, as opposed to adversarial character of the procedure.³³

However beneficial these changes may have been they have not quelled the debate concerning the issues just outlined: recent momentum to this discussion was created by the Treaty of Lisbon, with its emphasis on the EU's commitment to the rule of law and to the protection of fundamental rights and especially given the creation of an express legal basis for the accession to the European Convention on Human Rights, whose allegedly "higher standards" of administrative fairness have repeatedly been used to "beat" the Commission's enforcement framework. For instance, it was repeatedly alleged that the European Commission's administrative decision making stage would not protect the right to silence of individual undertaking to a sufficient degree vis-a-vis the Convention's standards: although it was accepted that the need for the achievement of regulatory goals could provide a justification for a degree of protection which is not as wide as that enjoyed by natural persons in "fully criminal" cases,³⁴ it was argued that limiting the reach of the privilege against self-incrimination only to "leading questions"³⁵ would not be sufficient to meet the ECHR requirements. It was also alleged that the "limited" nature of the scrutiny powers exercised by the EU Courts over the Commission decisions would not conform to the requirement that administrative measures affecting a "quasi-criminal" matter, such as antitrust cases, be subjected to a "full review" by a "proper" court of law, encompassing questions of law and of fact.³⁶

Separate concerns have also been raised in respect to the decentralised application of the Treaty competition rules as a "shared responsibility" with the NCAs: it was argued that the fact that parallel proceedings are allowed to take place in different national jurisdictions (only subject to the Commission's powers to relieve domestic agencies of jurisdiction in respect to individual cases),³⁷ would not be entirely consistent with the principle of *ne bis in idem*, i.e. with the right not to be investigated and sanctioned twice for the "same facts", namely for the same allegations as concerning the same parties.³⁸ Paramount was also a concern for the variance of institutional arrangements and of procedural rules and safeguards across the Union, factors which would

early on at several stages of the proceedings. See, http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf

³³ ITALIANER, "Safeguarding due process in antitrust proceedings", Fordham Competition Law Institute, September 23, 2010, available at http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf; for commentary, see e.g. HARLOW, "Global Administrative Law: The Quest for Principles and Values", (2006) 17(1) *European Journal of International Law* 187-214, at 208.

³⁴ See e.g. appl. Nos. 15809/02 and 25624/02, *O'Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para. 53; also appl. No 54810/00, *Jalloh v Germany*, [2007] 44 EHRR 32, para. 117.

³⁵ See, *inter alia*, case 374/87, *Orkem v Commission*, [1989] ECR 3283, especially para. 20-25.

³⁶ *Inter alia*, BOYLE, "Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights", (1984) *PL* 89 at p. 100; also WAELBROECK, "Twelve feet dangling down and six necks exceeding long". The EU network of competition authorities and the European Convention on Fundamental Rights", in EHLERMANN and ATANASIU (Eds.), *European Competition Law Annual 2002: constructing the EU network of competition authorities*, 2004: Hart Publishing, Oxford/ Portland, Oregon, p. 465.

³⁷ Cf. e.g., case C-328/05, *SGL Carbon v Commission*, [2007] ECR I-3921, para. 29. Also, COMMISSION of the EUROPEAN COMMUNITIES, *Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings*, 23 December 2005, SEC(2005) 1767, COM(2005) final 696, p. 8-9.

³⁸ *Inter alia*, appl. No. 37/950/97, *Franz Fischer v Austria*, judgment of 29 May 2001, not yet reported, para. 22, 25, 29; appl. No 15963/90, *Gradinger v Austria*, judgment of 23 October 1995, Ser. A, no 328-C (HUDOC Reference No 33/1994/480/562), paras. 53-54-55. See, *inter alia*, WILS, *Principles of European Antitrust enforcement*, 2005: Oxford, Portland, Oregon, Hart Publishing, p. 96.

allegedly hamper the protection of the rights of the defence of individual undertakings vis-a-vis the NCAs and the Commission, especially when they reciprocally cooperate in the investigation of individual allegations.³⁹ Having outlined some of the most frequent charges made against the existing EU competition enforcement structure, the next section will summarily list some of the suggestions for the improvement of the existing enforcement framework.

4. Conclusions: improving the existing enforcement structure for the EU competition rules

Section 2 briefly outlined some of the main charges made against the “fairness” of the EU competition enforcement framework. It was emphasised that the express commitment to the protection of fundamental rights, made inter alia in the 2009 Treaty of Lisbon, together with the possibility, in a not distant future, for the EU to become a party to the ECHR may add additional wind to the sails of change in this area. It was also pointed out that in principle the choice of an “integrated agency” for the application of the EU competition rules would not be incompatible with the Convention so long as requirements related to both the “administrative” and the “judicial stage” of these “complex” proceedings are met.⁴⁰ However, it was also argued that there are a number of inconsistencies vis-a-vis the ECHR standards, of which the limited scope for the right to silence constitutes perhaps one of the most glaring.

In respect to the judicial scrutiny of competition decisions, it was wondered whether moving to a “review on the merits” mechanism before the General Court could be a solution to the most important arguments against the status quo.⁴¹ On this point, it is suggested that however convincing this solution could be, it may not be feasible in as much as it would substantially shift away from the principles governing the inter-institutional structure of the EU in general and the relation between the EU courts and the Commission in particular, as far as the setting and implementing of competition policy goals are concerned.⁴²

Nonetheless, it is argued that there are a number of perhaps less far-reaching, yet at the same time effective, measures that can be adopted to ensure better consistency with the ECHR’s own “due process” rules without requiring an “overhaul” of the existing institutional arrangements. For instance, it is suggested that the right against self-incrimination, being a “judicial creature”, could be extended beyond its distinction between “factual” and “leading” questions and be fashioned, instead, around criteria inspired by an examination of the nature and

³⁹Network Notice, para. 27. VESTERDORF, “Legal professional privilege and the privilege against self-incrimination in EC law: recent developments and current issues”, in HAWK (Ed.), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute*, 2005: New York, Juris Publishing, p. 701 at 721.

⁴⁰ See Appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29; also, inter alia, appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46 of the judgment; see also Commission Opinion, separate concurring Opinion of Mr N. Bratza, p. 354. For commentary, see e.g. BOYLE, “Administrative justice, judicial review and the right to a fair hearing under the European Convention on Human Rights”, (1984) *PL* 89 at p. 100; also ANDREANGELI, *EU Competition enforcement and human rights*, 2008: Cheltenham, E Elgar. For a consideration of issues relating to judicial review see HOUSE OF LORDS SELECT COMMITTEE on the EUROPEAN UNION, *XIXth Report*, session 1999-2000, 21/11/2000, especially para 56 ff.

⁴¹ The Competition Appeals Tribunal enjoys powers of “review on the merits”, for the purpose of satisfying the requirements of “fair process” enshrined in the Human Rights Act 1998: Schedule 8, para 3(2), Competition Act 1998; for commentary, *inter alia*, FREEMAN and WHISH, *A guide to the Competition Act 1998*, 1999: Butterworths, London, p. 80 ff. See e.g. *NAPP Pharmaceuticals v Director General of Fair Trading*, [2002] ECC 13, para. 93, 117.

⁴² See e.g. written evidence submitted to the inquiry re: *XV Report* by the Office of Fair Trading, p. 6.

intensity of the coercion exerted on the individual firms. Having regard to the “decentralised” application of the EU competition rules, it is acknowledged that the working of the ECN has led to a degree of spontaneous cross-fertilisation of the substantial and procedural rules applied to individual cases: however, it is suggested that creating a form of “EU wide *res judicata*”, limiting NCAs in their ability to pursue cases that have already been dealt with elsewhere within the Union, could improve legal certainty for undertakings and conform with the Convention.

Having regard more generally to the arguments against the whole “integrated agency model” adopted for the Commission, it is suggested that separating in some way the decision-making and the investigating stages in individual cases could go some way toward ensuring more consistency with the ECHR requirements. On this point, it is wondered whether, short of entrusting the decision making with a judicial or quasi judicial authority which is totally independent of the investigative agency, erecting some form of “Chinese walls” between the Commission DGCompetition units responsible for, respectively, the fact-finding and the adoption of a final decision, could provide a useful compromise between effectiveness and due process. A similar arrangement inspires, for instance, the working of the EU anti-fraud agency OLAF as well as the working of the French Competition Authority. It is added that, in respect to OLAF, the independence of the two units has also passed the scrutiny of the Court of Justice in a case concerning the European Central Bank.⁴³

In conclusion, it is suggested that the overarching developments in terms of human rights protection in the EU may warrant the introduction of reforms for the current competition enforcement system. Nonetheless, in a multilayered system such as that of the Union, great care must be taken not to “upset” well-established equilibria, resulting inter alia from the founding Treaties. For this reason, it is submitted that whatever reforms are envisaged to meet the growing fundamental rights standards should take into account the more general institutional status quo and therefore may not be as wide-ranging as originally thought.

⁴³ Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999, [1999] OJ L136/20; Regulation 1073/1999 of 25 May 1999 of the Council and the European Parliament, concerning investigations conducted by the European Anti-Fraud Office (OLAF), [1999] L136/1; Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-7147, para 138-141; see also Opinion of AG Jacob, para. 165. For commentary, inter alia, ODUDU, Case comment to C-11/00, *Commission v European Central Bank*, judgment of 10 July 2003, (2004) 41 *CMLRev* 1073 at 1081-1082.