

**EU cartel enforcement and its
compliance with procedural rights:
How can its effectiveness be
enhanced?**

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Thesis submitted for degree of Doctor of Philosophy

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September 2015

Word count: 99,998

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Abstract

The conformity of the European Commission's cartel enforcement policies with rights protection has become a topic of considerable importance in recent times. The wide-ranging discretion and enhanced investigatory powers that the Commission derives under Regulation 1/2003, coupled with the European Union's proposal to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, underlines the need for the Commission's policies and procedures to comply with the necessary rights protection requirements. This issue is amplified in cartel cases, because when the Commission fines an undertaking, the fine aims not merely to punish the undertaking in question but also to deter other undertakings from being involved in cartels in the future.

This thesis assesses whether the Commission's cartel enforcement policies comply with procedural rights and the ECHR. Alongside this analysis, the thesis identifies ways of enhancing the Commission's cartel enforcement policies, whilst ensuring they remain in compliance with the relevant rights protection provisions. It does so by considering each of the Commission's cartel enforcement policies in turn. Chapter 2 lays the foundations of the analysis by investigating why we would want undertakings to qualify for right protection and whether they do indeed qualify under the Convention. In Chapter 3, the Commission's fining guidelines and procedures are assessed, examining the potential legal certainty and equality concerns. It finds that, whilst compliance is achieved in the broad sense, several possible enhancements could be made to the current procedure. Chapter 4 considers the Commission's Leniency Notice; specifically, the case law of the EU courts regarding the disclosure of confidential leniency documents and the recently-enacted Damages Directive. It concludes that the drafters of the Damages Directive were correct to enact a blanket ban against disclosure because an undertaking may have a legitimate expectation of non-disclosure. However, the chapter also determines that there

is a more effective means of ensuring that the rights of *all* the parties are adequately protected. Chapter 5 assesses the Commission's settlement procedure and the ways it can be enhanced whilst complying with rights requirements. Although it establishes that a US-style plea bargaining procedure could be implemented within the EU – and would bring a variety of enhancements – it concludes that it would be more practical to improve the current procedure with four key additions. This would enable the vast majority of the benefits of a plea bargaining system to be realised without the need for a mass overhaul of the Commission's procedures.

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Abbreviations

CAT	Competition Appeals Tribunal
CFI	European Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
CoE	Council of Europe
DOJ	US Department of Justice (Antitrust Division)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECN	European Competition Network
GC	European General Court
GCR	Global Competition Review
ITP	Inability to pay discount
NC	National Champions
NCA	National Competition Authority
OFT	Office of Fair Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Acknowledgements

I wish to begin by thanking my supervisory team – Andreas Stephan, David Mead and Peter Whelan (now at Leeds University) – for their support and assistance. Andreas, your advice, comments and kind words have been so gratefully appreciated. Without your guidance this thesis would not have been possible. You have challenged my ideas and assumptions, where necessary, and enabled me to become a better researcher. David, you have provided me with your wisdom on human rights law and this has helped make the thesis what it is. Your encouragement, knowledge and advice has allowed me to develop this thesis into areas which would not have been possible otherwise.

The funding I received from the Faculty of Social Sciences is gratefully acknowledged. I wish to also extend my appreciation to the faculty members at the UEA Law School and the Centre for Competition Policy. Their support, advice and comments have also been sincerely appreciated.

For the last four years I have had the pleasure to research an area of law which I am passionate about. This experience has been made all the more better for being able to do so with my best friend, David Reader. It has been a privilege to work with you. Our stimulating and thought provoking discussions of competition and human rights law, late night writing sessions, games of squash and your support and friendship have been critical to the completion of this thesis. Thank you.

I would also like to thank my sister Kirstie Summers and her partner Dominic Dave for their help with the task of proof-reading the thesis and their love and support throughout.

To my mother and father – Naomi and Chris Summers – words cannot express how thankful and indebted I am to you. Without your love and support I never

would have got this far in my academic career. I am eternally grateful to you both.

Finally, I wish to thank my wonderful fiancée Kerry Dunn. You have been with me throughout all of the ups and downs and have made the hard times bearable. I could not have finished the PhD without your love and emotional support. You are my angel.

Scott Summers

September 2015

Chapter 1: Introduction

1.1 Introduction

This thesis assesses whether the European Commission's (hereafter 'the Commission') cartel enforcement policies comply with procedural rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹ (ECHR). Alongside this analysis it also assesses ways of improving the Commission's cartel enforcement policies – whilst remaining compliant with rights protection requirements.

1.1.1 Setting the scene

Competition policy seeks to ensure that undertakings compete fairly with each other to enable the benefits of competition to be achieved within the market.² The benefits of competition are multiple and may include lower prices for all, improved quality, greater choice for consumers, increased innovation, more efficiency, and heightened competitiveness in global markets.³ In an effort to see these benefits realised within the EU market, the Treaty on the Functioning of the European Union (TFEU), sets out a series of rules regarding cartels, abuses of a dominant position and state aid.⁴

In terms of infringements of competition law, cartel conduct is considered to be the most serious, given that such collusive agreements lead to a variety of anti-competitive issues. In particular, cartels can result in artificially inflated prices for goods and services and, in addition, a reduction in the production of these due to the fact that cartels can act in the same way as a monopoly, leading to a

¹ Rome, 4.XI.1950.

² For the sake of clarity, this thesis adopts the definition of an 'undertaking' that the EU courts adopt; see Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979; [1993] 4 CMLR 306, para 21.

³ European Commission, 'Why is competition policy important for consumers?' (European Commission Website) <http://ec.europa.eu/competition/consumers/why_en.html> accessed 4 April 2014.

⁴ The Treaty on the Functioning of the European Union [2008] OJ C115/47.

deadweight loss to society.⁵ Because of this, cartels have been likened to “cancers on the economy”.⁶ Article 101(1) of the TFEU tackles cartels by prohibiting, inter alia, agreements between competitors, concerted practices and decisions of associations of undertakings that fix prices, restrict output, share markets or rig bids.⁷ The Commission is tasked with enforcing Article 101 TFEU and has the power to impose fines on corporations for breaches of Article 101(1) TFEU.⁸ The Commission’s cartel enforcement regime consists of four main tools or policies. The first is Regulation 1/2003,⁹ which sets out the Commission’s powers and the rules on implementing competition that are laid down in Article 101 and 102 TFEU. The second of these is the Commission’s fining guidelines.¹⁰ These guidelines set out the various steps that the Commission undertakes when calculating the fine for a breach of Article 101(1) TFEU. The third of these enforcement policies is the Commission’s leniency notice.¹¹ This policy explains how and in what circumstances the Commission will award an undertaking a reduction in fine for self-reporting its involvement in a cartel and for providing the Commission with continued and complete cooperation. The fourth-main cartel-related policy operated by the Commission is the direct settlement procedure.¹² This procedure grants an undertaking a ten percent reduction in fine where the undertaking agrees to settle in lieu of the Commission having to follow the full standard procedure.

⁵ See George G Djolov, *The Economics of Competition: The Race to Monopoly* (Haworth Press 2006).

⁶ Graeme Samuel, ‘Cracking Cartels International and Australian Developments’ (Lecture 24.11.04) <<http://www.accc.gov.au/content/item.php?itemId=566510&nodeId=fbb75ca69cfd484197db3663ac100ab&fn=Session%201%20-%20Graeme%20Samuel%20-%20ACCC%20opening%20comments.rtf>> accessed 28th May 2011.

⁷ It should be noted that Article 101 TFEU only applies when the agreement affects trade between Member States.

⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1, Article 23 (2).

⁹ *ibid.*

¹⁰ Commission, ‘Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Guidelines on fining undertakings)’ [2006] OJ C210/02.

¹¹ Commission, ‘Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency in cartel cases)’ [2006] OJ C298/17.

¹² Commission, ‘Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases’ [2008] OJ C167/1.

These four main cartel enforcement policies offer a procedural basis in which to strengthen the practical enforcement of Article 101(1) TFEU by assisting the Commission in deterring, detecting, punishing and prosecuting cartels. To further enhance the effectiveness of Article 101(1) TFEU, one has to be careful as, by increasing the punishment and deterrence of cartel conduct, one needs to balance the goals of competition law – on the one hand – with the rights of companies – on the other hand.

The ECHR provides the key legal footing for human rights in Europe. The ECHR came into force on 3rd September 1953 and seeks to protect individuals from arbitrary abuses or interferences by the State. The desire and need for this protection has stemmed from a variety of concerns regarding rights protection within Europe but, in particular, relates to the atrocities that occurred during World War Two. Since the Convention has come into force, it has been recognised that individuals also need protection from powerful private powers that have the ability to unduly interfere with an individual's rights. The protection offered by the Convention extends beyond 'natural persons' to include 'legal persons',¹³ meaning that companies can also qualify for human rights protection. Indeed, in recent years there has been an increasing interest in the rights of companies and the ECHR,¹⁴ and particularly, in the context of EU cartel enforcement proceedings.¹⁵

This thesis considers these two areas of law – competition law and human rights

¹³ See, for example, *The Sunday Times v UK* [1979] 2 EHRR 245 and Article 34 ECHR.

¹⁴ For example see, Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) and Winfried Muijsenbegh and Sam Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 43.

¹⁵ For example see, Robert Lande, 'Quick – Somebody call Amnesty International! Intel says EU Antitrust fine violated Human Rights' (2009) 746(9) *Federal Trade Commission: Watch 1*, Albert Sanchez-Graells and Francisco Marcos, "'Human Rights" Protection for Corporate Antitrust Defendants: Are we not Going Overboard?' (2014) University of Leicester School of Law Research Paper No 14-04 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389715> accessed April 20th 2014. Particularly, we are finding the focus on companies rights protection being with regards to procedural rights protection, e.g. Angus MacCulloch, 'The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications' (2006) 26(2) *Legal studies* 211.

law – and analyses whether the Commission’s cartel enforcement policies comply with procedural rights and the rights contained within the ECHR. In addition to this research question, this thesis also identifies ways of improving and enhancing the Commission’s cartel enforcement policies whilst remaining compliant with an undertaking’s procedural rights. To effectively answer these questions, the thesis has been separated into five distinct chapters. Each chapter has its own unique set of questions that aim to assist in answering the abovementioned main research questions of the thesis.

To begin with, Chapter 2 seeks to determine whether corporations qualify for rights protection under the ECHR and why we might want corporations to have human rights protection. It then proceeds to explain why the ECHR has primarily been chosen for this analysis and the reasons why the protection of an undertakings procedural rights are important, in the context of the EU cartel enforcement regime. The research questions in this chapter form the foundation of the remainder of the thesis and are, therefore, of fundamental importance. This chapter is unique in that it is one of only a few studies that considers why undertakings may need rights protection in the context of EU cartel enforcement.

Chapter 3 asks whether the Commission’s fining process complies with the necessary requirements of the ECHR (particularly legal certainty) and the EU principle of equal treatment. The first section of the chapter focuses its attention solely on legal certainty, assessing whether specific considerations within the fining process comply with legal certainty; namely, (a) the use of non-exhaustive lists, (b) the ‘specific deterrence’ stage, and (c) the ten percent cap. The second section assesses whether the Commission applies specific stages in the Fining Guidelines equally to undertakings, particularly with regards to the ‘inability to pay discount’. It then proceeds to consider the significance of broader factors, including an undertaking’s nationality and size.

Chapter 4 discusses the recently passed Damages Directive and seeks to answer

whether the blanket ban it places on disclosure – in the context of leniency documents – is the correct approach for the EU to adopt.¹⁶ It undertakes this analysis by considering three potential procedural right challenges that an undertaking may attempt to make to disclosure: (a) its legitimate expectation of non-disclosure, (b) its right to privacy (Article 8 of the ECHR), and finally, (c) a breach of its confidence if disclosure occurs. Indeed, the discussion regarding the potential procedural right challenges that an undertaking can bring regarding disclosure is what makes this chapter unique, as the literature is lacking in this analysis. In addition, further novelty is derived from the chapter's consideration of whether the Damages Directive has found the correct balance with regards to disclosure based on an undertaking's rights.

Chapter 5 proceeds to identify what the Commission's direct settlement procedure can learn from the US plea bargaining system to help improve its utilisation, success and efficiency – whilst remaining compatible with Article 6 of the ECHR. In addition to this, Chapter 5 ascertains whether the EU could implement a plea bargaining system for managing and settling cartel cases. This chapter's novelty lies in the consideration of whether the EU could implement a US-style plea bargaining system and from the potential improvements that can be made to the current system based upon the lessons learned from the US system.

The thesis finally concludes with Chapter 6 considering how the current EU cartel enforcement programme can be improved to ensure fair and equal treatment to undertakings within the fining procedure, comply with rights protection and enhance the EU settlement programmes overall efficiency and utilisation. This chapter will identify and propose the policy reforms and recommendations that have been identified by this thesis and that are necessitated in order for the Commission to make these improvements.

¹⁶ Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union [2014] L 349/1.

1.1.2 Significance of the thesis

The research questions that this thesis seeks to answer are of great importance for a variety of reasons, which shall now be highlighted and discussed in detail below. Human rights have always played an important role within the EU.¹⁷ In 1969 the European Court of Justice (hereafter, 'the ECJ') itself acknowledged that it has a responsibility to protect 'the fundamental human rights enshrined in the general principles of Community law'.¹⁸ This was reaffirmed in the case of *Internationale Handelgesellschaft* where,¹⁹ in its dictum, the ECJ stated how fundamental rights form an integral part of the general principles of EU law which it must seek to protect. In addition, the ECJ has also held that international human rights treaties form another source of fundamental rights within the EU,²⁰ particularly the ECHR.²¹

One of the implications of the decisions regarding fundamental rights protection by the ECJ, particularly in light of *Internationale Handelgesellschaft* (owing to the conflicts with national law), was that it became necessary to develop a doctrine to protect fundamental human rights within the EU itself. This culminated in the creation of the Charter of Fundamental Rights of the European Union, which came into force in 2000.²²

It is therefore evident that fundamental rights protection has been a prominent issue that the EU and its courts have sought to effectively promote for a prolonged period of time. A consideration of whether the Commission's cartel enforcement policies comply with fundamental rights is of clear significance. Indeed, in a recent statement made by Štefan Füle, the European Commissioner

¹⁷ Moreover, ensuring that citizens receive equal treatment has also played a key role in the EU. See, for example, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women was passed to ensure equality amongst pay for men and women.

¹⁸ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

¹⁹ *Internationale Handelgesellschaft v Einfuhr – und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

²⁰ For example, see Case 4/73 *Nold v Commission* [1974] ECR 491.

²¹ For example, see Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

²² Charter of Fundamental Rights of the European Union [2000] OJ C 364/01, hereafter the 'CFREU'.

for Enlargement and European Neighbourhood Policy, he stated that “for the EU, human rights and fundamental freedoms are the *silver thread* running through our actions both at home and in our external relations”.²³ His words are a testament to the importance of ensuring that the Commission’s policies comply with human rights and fundamental freedoms, given the degree to which these rights permeate through wider EU policy.

In recent years, the need for fundamental rights to be protected in the EU has become more pronounced, with the EU’s pending accession to the ECHR.²⁴ As a result of Article 6(2) TEU, which obliges the EU to accede to the ECHR, there now exists a formal requirement for EU law and the Commission’s policies and procedures to be compliant with the ECHR.²⁵ While full membership by the EU of the ECHR is currently on hold, given CJEU Opinion 2/13, the clearly mandatory nature of Article 6(2) TEU (“The Union shall accede to the ECHR”) means membership must come at some stage.²⁶ Given that, if it remains non-compliant with the ECHR, the Commission risks breaching human rights whenever it enforces these policies and procedures on an individual or company.

Furthermore, it is also important that the Commission’s procedures are seen to be objectively legitimate by complying with fundamental legal principles such as certainty, equality and fairness. The importance of legitimacy within the application of the law should not be underestimated. If laws or the enforcement of laws are perceived to be arbitrary and illegitimate, the credibility of the

²³ Štefan Füle, ‘Human rights and fundamental freedoms — the silver thread running through our actions’ (Speech delivered to One World Documentary Film Festival, Brussels, 24 March 2014) <http://europa.eu/rapid/press-release_SPEECH-14-248_en.htm> accessed 24 March 2014.

²⁴ The Treaty of Lisbon Article 6, paragraph 2.

²⁵ The ECJ was recently asked to comment on the draft agreement for the accession of the EU to the ECHR and whether it is compatible with the EU Treaties. The Court identified a variety of potential issues with the EU’s accession, which will need addressing before the EU can accede to the ECHR. ECJ, ‘Request for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission’ <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=196643>> accessed 7 July 2015.

²⁶ Opinion 2/13 on EU Accession to the ECHR EU: C: 2014: 2454, [192] CJEU.

Commission and the law itself will be brought into question, and may be damaged.

Protecting the rights of corporations is becoming more widespread and,²⁷ as a consequence, it is now more likely that an undertaking accused of breaching competition law will argue that its rights have been infringed.²⁸ Indeed, the rights of corporations are more important than they have ever been in the context of potential competition law breaches, as fines for breaching competition law appear to be increasing along with the impact they have on firms.²⁹ As these fines are seen as punitive and aim to deter future breaches of competition law, and thus may well constitute 'proceedings of a criminal nature' and so come within the ambit of Article 6 and 7 of the ECHR, they run the risk of potentially breaching the ECHR and other procedural rights if they are too excessive, too uncertain or are not applied coherently.³⁰

The Commission has a wide-ranging discretion with regards to how it operates and applies its policies. This discretion could lead to undertakings being treated unfairly or, more importantly, it may lead to potential breaches of procedural rights or the ECHR. This problem has been exacerbated in recent years with the Commission gaining even wider and enhanced investigatory powers under Council Regulation 1/2003.³¹ Owing to this wide-ranging discretion, concerns surrounding abuses of process or unfairness in the application of the Commission's procedures can be raised by undertakings. Determining whether these concerns actually occur in practice is imperative, not only for undertakings but also more widely for the legitimacy of the Commission and its

²⁷ For example, see *Société Colas Est v France* (2004) 39 EHRR 17 and *Funke v France* (1993) 1 CMLR 897.

²⁸ For example, see *A. Menarini Diagnostics S.R.L. v Italie* (2011) App no 43509/08.

²⁹ There is evidence to support this, but also to contradict it. For example Veljanovski has found that in some instances fines are higher and in others they are lower. Cento Veljanovski, 'Are European Cartel Fines Ridiculously High?' (2012) Case Associates - Case Note <<http://www.casecon.com/data/pdfs/Casenote63HighfinesFeb2012.pdf>> accessed 30 May 2013.

³⁰ For example, see the Courts analysis in *Menarini* (n 28).

³¹ Council Regulation (n 8).

procedures.

1.2 Existing Literature

This section of the chapter offers a brief review of the key literature and the gaps within this literature with regards to the areas that the thesis considers. It should be noted that a significantly more detailed literature review is conducted within each of the subsequent chapters.

The works of many academics have informed this thesis, but those of particular influence in the shaping and scoping of it have been Wouter Wils,³² Arianna Andreangeli,³³ Andreas Scordamaglia-Tousis,³⁴ Marius Emberland,³⁵ Peter Whelan,³⁶ and Cento Veljanovski.³⁷

Much has been written on the EU Commission's cartel enforcement procedures and policies. However, to date, there is a lack of literature that analyses the Commission's cartel enforcement policies against the rights enshrined in the ECHR. Nonetheless, there has been research conducted into this area.³⁸ Some

³² Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005).

³³ Arianna Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar 2008).

³⁴ Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law International 2013).

³⁵ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006).

³⁶ See, Peter Whelan, 'Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off', Chapter 10 in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, Hart Publishing, Oxford, 2011; Peter Whelan, 'Protecting Human Rights in the Context of European Antitrust Criminalisation', Chapter 9, in Lianos & Kokorris (eds), *The Reform of EC Competition Law: Towards an Optimal Enforcement System*, Kluwer International: Amsterdam, 2010; and, Peter Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71(3) *Cambridge Law Journal* 677.

³⁷ For example, see Cento Veljanovski, 'European Cartel Fines under the 2006 Penalty Guidelines: A Statistical Analysis' (2010) *Case Associates* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723843> accessed 27 May 2013 and Cento Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence' (2007) 30(1) *World Competition* 65.

³⁸ See, for example, Evelyne M Ameye, 'The interplay between human rights and competition law in the EU' (2004) 25(6) *ECLR* 332, Wolfgang Weiss, 'Human rights and EU antitrust enforcement: News from Lisbon' (2011) 32(4) *ECLR* 186 and Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005).

authors have considered a selection of the Commission's procedures and policies against particular aspects of human rights or in an isolated context.³⁹

Wils has conducted an analysis of the various changes brought about by the Regulation 1/2003.⁴⁰ His work consisted of six essays that analysed the main characteristics of the new enforcement systems.⁴¹ The key part of his work, for this research, is his assessment of the compatibility of the new enforcement system with the ECHR and CFREU. Wils' main focus was around the right to fair trial, *ne bis in idem*, the privilege against self-incrimination, and the right to an independent and impartial tribunal. Nonetheless, this thesis is appreciably different to Wils' work. This thesis focuses its attention on the Commission's three cartel enforcement tools. It also considers a wider variety of rights, including, *inter alia*, legal certainty, the right to privacy, legitimate expectations and equal treatment.

Andreangeli has considered the procedural rights protection that those investigated by the Commission have in relation to Article 101 and 102 of the TFEU and the Merger Control Regulation.⁴² Her analysis focuses predominately on the notion of 'administrative fairness' enshrined within the ECHR under Article 6 and the role the hearing officer plays in this regard. This is a good foundation when considering procedural rights in the context of the Commission's cartel enforcement regime but this thesis considers a variety of different aspects to Andreangeli's work. To begin, this thesis focuses its attention solely on the Commission's cartel enforcement regime, whereas, Andreangeli's work considers a much broader range of competition enforcement tools. Although she considers a broader range of tools, her

³⁹ See, for example, Wouter P Wils, 'EU Anti-trust enforcement powers and procedural rights and guarantees: The interplay between EU law, national law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34(2) *World Competition* 189 and Angus MacCulloch, 'The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications' (2006) 26(2) *Legal studies* 211.

⁴⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1.

⁴¹ Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005).

⁴² Andreangeli (n 33).

analysis focuses solely on the consideration of 'administrative fairness'. Conversely, this thesis considers a much wider array of procedural rights; legal certainty, the right to privacy, the right to a fair trial, legitimate expectations and equal treatment. Furthermore, this thesis considers the Commission's fining guidelines, leniency policy, the recently enacted Damages Directive and the Commission's Settlement procedure against these various rights requirements. The role of the hearing officer *is* considered within this thesis but only in the context of the Commission's settlement procedure and how to improve this role, as Andreangeli has already conducted a thorough analysis of the role of the hearing officer within the context of cartel enforcement.

The research that has conducted the greatest extensive analysis (and is the most akin to this thesis) is that of Scordamaglia-Tousis, who has looked at various aspects of the Commission's cartel enforcement policies.⁴³ However, this thesis varies significantly to this previously conducted research in a number of aspects. To begin with, this thesis considers the Commission's three main cartel enforcement policies in the context of the ECHR and other procedural rights protections. It also conducts a detailed assessment of whether corporations have human rights and why we would want this to be the case, something that is lacking in the work of Scordamaglia-Tousis and the literature more widely in the context of cartel enforcement.⁴⁴ This thesis also studies whether the Commission's policies are applied equally in practice and considers privacy in the context of the disclosure of information to third parties, both of which are also novel contributions to the existing literature. Finally, this thesis also analyses whether the EU could implement a plea bargaining system to manage cartel settlement cases more effectively and whether it would comply with the Article 6 of the ECHR.

⁴³ Scordamaglia-Tousis (n 34).

⁴⁴ Scordamaglia-Tousis does *very* briefly discuss whether corporations can qualify for rights protection as legal entities.

Emberland has studied the ECHR and the jurisprudence from the European Court of Human Rights (hereafter, the 'ECtHR') and explored the rights protection afforded to companies under the Convention,⁴⁵ identifying how the Court has managed, and dealt with cases, which involved 'non-human legal persons'.⁴⁶ This is an excellent work for us to build our analysis of the application of corporations' rights to competition law within the EU on – something that is omitted in Emberland's work and analysis. However, there has been research conducted by Sanchez-Graells and Marcos regarding corporate right protection in antitrust cases.⁴⁷ Their research identified that there has been an increase in the rights protection of companies in competition cases and they were quite cynical of this. This thesis however, takes the diametrically opposing view to that of Sanchez-Graells and Marcos, the reasons for which will be discussed comprehensively in Chapter 2.

This thesis will therefore make a significant contribution to the existing literature by addressing these gaps. It analyses the Commission's fining, leniency and direct settlement policies in the context of rights protection and the ECHR, thereby furthering our knowledge in this area. Where the non-compliance or potential improvements are identified, policy recommendations shall be made.

⁴⁵ Emberland (n 35).

⁴⁶ *ibid* 206.

⁴⁷ Sanchez-Graells and Marcos (n 15).

1.3 Methodology

This thesis employs a variety of methodologies to enable the research questions to be answered in the most effective ways possible; specifically, it utilises doctrinal, comparative and empirical methodologies. Broadly speaking, this thesis considers two separate areas of law and how they interact with one another; ‘EU cartel enforcement’ and ‘human rights law’. The aim of the thesis being, (a) to establish whether the Commission’s cartel enforcement policies comply with procedural rights, and (b) identifying ways that cartel enforcement procedures can be further enhanced whilst remaining compliant with rights protection requirements.

The starting point for the analysis adopted within this thesis is to conduct a detailed doctrinal evaluation of the guidelines against the relevant ECHR provisions, the ECtHR jurisprudence and other legislation and case law from the relevant jurisdictions that considers procedural rights. This is crucial for answering the research questions within this thesis as it allows for the discussion of the necessary legal considerations alongside the guidelines. Beside this analysis, other academic literature — that has commented on the relevant Commission guidelines and procedural rights issues — is considered, allowing a more informed and complete analysis to be undertaken.

Chapters 3 and 5 then also undertake empirical analysis – which is both quantitative and qualitative – of Commission decisions. Chapter 3 seeks to identify whether the Commission’s policies have been applied equally to undertakings in practice, which requires consideration of empirical data to do so effectively. Chapter 3 also undertakes a qualitative analysis by considering a small number of cartel fining decisions in-detail, so as to assess and analyse how the Commission has applied its fining procedure in practice. The empirical data for the quantitative analysis in Chapter 3 is drawn from the Global Competition Review’s (hereafter, ‘the GCR’) raw data set, ‘GCR EU Cartel Survey’, which

contains information on cartels from January 2005 - July 2012. In addition to this, Chapter 3 also consults and considers the Commission's non-official web versions of decisions, as well as the decisions of the European Court of First Instance, hereafter the 'CFI', and the ECJ. Chapter 5 seeks to use empirical data to identify how the Commission's current settlement procedure can be improved. This part of the thesis utilises a second empirical dataset that was compiled by the author from the Commission's published non-confidential decisions, summary decisions and press releases. It comprises of the Commission's seventeen settlement decisions thus far and was up-to-date on the 30th March 2015. By including an empirical analysis of the Commission's application of its policies to undertakings, the thesis benefits from a greater robustness in terms of identifying trends and, in addition, it affords weight – in the form of hard data – to the findings regarding equal treatment and the Commission's settlement procedure.

Further to the above-discussed methods, Chapter 5 also undertakes a comparative analysis, considering the approach undertaken in the US – with regards to plea bargaining – to identify what the EU system can learn from the US approach in order to improve its own system of direct settlements, whilst still complying with the necessary rights guaranteed under Article 6 of the Convention. This analysis goes beyond a comparison of the current EU system and that of the US; it also identifies why we may wish to implement a US-style system, alongside iterating how this could be achieved in practice. It also utilises this comparison to help explain why there are differences in the efficiency and successfulness of each of the programmes.

1.4 Thesis Synopsis

The common theme running throughout this thesis regards assessing whether the Commission's various cartel enforcement policies comply with the necessary procedural rights – particularly those rights that are enshrined in the ECHR. Additionally, this thesis aims to identify ways of further enhancing the Commission's cartel enforcement policies whilst remaining compliant with rights protection. Because of these common themes, and the fact that Chapter 2 answers foundation questions regarding this research, the thesis is best read as a monograph. However, the thesis has been constructed so that, if one desired, each chapter may be read independently.

The importance and the benefits of utilising rights to assess the Commission's cartel enforcement procedures will be illustrated throughout the thesis (Chapters 2-6). Indeed, it will be shown that this is one of the core threads running throughout this thesis which binds it together and makes the research and analysis unified and unique. Broadly, the significant benefits this analysis brings to the thesis is that it enables the identification of potential improvements (both in the sense of efficiency and fairness) whilst also helping to legitimise the Commission's procedures, ensure it complies with procedural rights and balance the various rights of the parties involved.

The thesis is constructed of six chapters, with Chapters 3-5 each assessing a separate Commission cartel enforcement policy against specific rights to identify whether the policies comply with rights protection and how their protection can be further enhanced.

Chapter 2

Why corporations should qualify for rights protection under the ECHR and, why it is important that the Commission's cartel enforcement policies comply with procedural rights requirements

The ECHR has been in force since the 3rd September 1953 and provides a legal basis for the protection of human rights and fundamental freedoms within Europe. The importance of human rights protection has continued to increase in recent years, particularly with regards to the rights of companies. The need for this protection is perhaps most prevalent in competition cases where the fines imposed on companies by the Commission are punitive and deterrent in nature and are, hence, often very high and severe. With the EU recently agreeing to accede to the ECHR – in the Treaty of Lisbon – it will thus be crucial to ensure that the Commission’s policies comply with the requirements of the ECHR and identify whether undertakings will qualify for right protection under the Convention.⁴⁸ Therefore, the first section of this chapter assesses whether companies in the EU can qualify for rights protection under the ECHR and why one would want companies to have their rights protected. This section of the chapter identifies that companies do indeed qualify for rights protection under the ECHR and proceeds to identify a variety of reasons for why a company needs its rights protected and why this is desirable. It emphasises these points by conducting a detailed case study of the *Yukos Oil* case.

The second section of the chapter focuses on something distinct from the first research question. It begins by identifying why this thesis chooses to focus its attention predominately on the rights enshrined in ECHR as opposed to the CFREU. Therein, the section identifies the key ECHR rights and other procedural rights that the remainder of this thesis shall apply to the Commission’s cartel enforcement policies.⁴⁹ The chapter identifies the following key rights for the assessment of the Commission’s cartel enforcement policies against procedural rights protections:⁵⁰ legal certainty, the right to respect for one’s private and family life (his home and his correspondence), the right to a fair trial, equal

⁴⁸ 2007/C 306/01 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13 December 2007 (Article 6 para 2).

⁴⁹ These rights were chosen because they are most applicable to the Commission’s policies and have not been thoroughly analysed in the previous literature.

⁵⁰ These rights are applied to the following Commission polices: the Commission’s fining process, leniency policy and direct settlement procedure.

treatment, legitimate expectations and breach of confidence. This section of the chapter also examines and explains why these rights need to be complied with, having particular regard to the specific Commission cartel enforcement policies that the thesis assesses. A variety of factors and reasons for why the Commission's policies need to conform to these rights are then identified.

Chapter 3

Evaluating legal certainty and equal treatment within the European Commission's fining policy for cartels

An undertaking that violates Article 101(1) of the TFEU may be liable for fines of up to ten percent of its annual worldwide turnover.⁵¹ The fines imposed by the Commission have been substantial. For example, the highest fine the Commission has imposed on an undertaking was in excess of €896 million, whereas the largest fine imposed on a cartel was over €1.3 billion.⁵² It is therefore important that when the Commission imposes fines there is a clear and transparent process within which these fines are decided and that this process is applied equally to each undertaking. There are a variety of reasons why this is important, but one of particular relevance is that, following the entrance into force of the Treaty of Lisbon, there is now an obligation for the EU to accede to the ECHR. This therefore means that it will be necessary for the Commission's cartel enforcement processes to comply with the ECHR. This chapter assesses whether the Commission's fining process does indeed comply with the requirements of the ECHR, particularly in relation to legal certainty and also with the EU principle of equal treatment. The first section of this chapter analyses the Commission's fining process so as to establish whether it complies with the principle of legal certainty. Three particular areas of the Commission's fining process are assessed. First, the use of non-exhaustive lists; second, the calculation of the criterion of 'specific deterrence' and, finally, the use of a

⁵¹ Council Regulation (n 8).

⁵² Commission, 'Cartels - Leniency' <ec.europa.eu/competition/cartels/leniency/leniency.html> accessed 10 February 2013.

maximum ten percent cap is considered alongside the Commission's discretion to impose a fine under this cap. It identifies various concerns within the Commission's current fining process, but notes that these issues are not, in themselves, sufficient to lead to a breach of Article 7 of the ECHR.

The second section of this chapter analyses Commission fining decisions to identify whether the Commission has applied its fining process equally to all undertakings. Specifically, it considers the awarding of the inability to pay discount, the nationality of an undertaking, and whether the undertaking is classified as a so-called 'National Champion'. At this stage, the section identifies concerns with the application of the Commission's fining process, and recommendations are made in an effort to prevent further unequal applications of the fining policy by the Commission.

Chapter 4

Do the provisions in the Damages Directive on disclosure adequately balance the competing rights and interests at play?

In its fight to detect and uncover secretive cartels, the Commission operates a leniency policy. This helps the Commission to detect cartels by allowing an undertaking — which has participated in an illegal cartel — to report it to the Commission in exchange for a reduction in fine or immunity. In order to be granted complete immunity or a reduction in fine, there are strict requirements placed on an undertaking. One of these requirements is that an undertaking seeking immunity (or a reduction in fine) is to disclose and provide the Commission with information regarding the cartel. Recently, there has been a development of cases where private parties suing for damages against cartels have sought access to the leniency documentation held by the Commission and national competition authorities. In these cases it has been repeatedly held by the EU courts that a blanket ban on the disclosure of these documents would breach EU law, and thus disclosure must be decided on by a case-by-case basis by a national court. However, providing third party access to these documents

has raised a variety of concerns for leniency applicants and led to fears amongst many that this may deter potential future leniency applicants. To address this issue, part of the recently passed Damages Directive, provides for a total prohibition on the disclosure of leniency documents to third parties.

Given this recent development, the chapter takes this unique opportunity to discuss the Damages Directive in the context of protection of an undertaking's procedural rights. In particular, it seeks to answer whether the blanket ban placed on disclosure of leniency documents is the correct approach or indeed necessary. It achieves this analysis by considering three potential procedural right challenges that an undertaking may attempt to make if leniency documents were to be disclosed to third parties: (a) its legitimate expectation of non-disclosure; (b) its right to privacy (Article 8 of the ECHR); and finally, (c) a breach of its confidence if disclosure occurs. Using the analysis of these three potential procedural rights challenges, the chapter concludes by considering whether the Damages Directive has struck the correct balance with regards to disclosure. The chapter identifies that an undertaking would appear not to have a legitimate challenge under (b) and (c). However, it does seem that an undertaking would have a strong claim under (a) a legitimate expectation of non-disclosure. The chapter concludes that though the Damages Directive does address a potential rights protection issue, a better balance could be achieved by implementing an altered approach to the complete blanket ban on disclosure; this would mean that an undertakings procedural rights and the ability for a third party to bring follow on damage claims is more equitably balanced.

Chapter 5

What can the European Commission's Direct Settlement Procedure learn from the US Plea Bargaining System?

Since 2008, the Commission has operated a settlement procedure for cases involving cartels.⁵³ This procedure allows the Commission to quickly settle cases involving cartels via a simplified procedure. This procedure can only be followed in certain circumstances. For example, where an undertaking agrees to acknowledge its involvement and liability in the cartel and, in exchange, it is rewarded with a ten percent reduction in fine.

However, the uptake and use of this procedure has been slow, thus far only a mere seventeen cartel cases have been settled. The US, on the other hand, operates a highly developed, refined and efficient plea bargaining system for the settlement of US cartel cases,⁵⁴ which in the last twenty years, has led to over ninety percent of cartel cases in the US being concluded by plea agreements.⁵⁵ The EU settlement procedure has a variety of differences to that of the US plea bargaining system. For example, the EU system is not designed to be a bargaining system but, rather, is one which operates a fixed ten percent reduction in fine for cooperation.⁵⁶ This chapter therefore asks the question of what the EU settlement procedure can learn from the US plea bargaining system to help improve its utilisation, success and efficiency, whilst ensuring that it complies with Article 6 of the ECHR. The chapter begins by considering the cases that the Commission has settled so far under the procedure to identify weaknesses and procedural issues within the current approach. Then, the question of whether plea bargaining is compatible with Article 6 of the ECHR is deconstructed and analysed. Once it has been established that it is compatible, a discussion is had about the possibility of implementing such a system within the EU. This chapter identifies that it would indeed be possible to implement such a system within the EU as long as rather radical procedural changes are made. The analysis in this section has wider implications than just

⁵³ 30th June 2008. Please see: <http://europa.eu/rapid/press-release_IP-08-1056_en.htm?locale=en> accessed 21 March 2014.

⁵⁴ See <<http://www.justice.gov/atr/public/criminal/302601.pdf>> accessed 21 March 2014.

⁵⁵ Scott Hammond 'The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for all' (Speech delivered to OECD Competition Committee Working Party No.3, Paris, 17 October 2006).

⁵⁶ See, Maarten Pieter Schinkel, 'Bargaining in the Shadow of the European Settlement Procedure for Cartels' (2011) 56(2) *The Antitrust Bulletin* 461.

for the Commission's direct settlement procedure, as it identifies the necessary requirements that a signatory party to the Convention will need to ensure are met to utilise a plea bargaining system within their jurisdiction – so that it remains compliant with Article 6 of the ECHR. The chapter concludes by identifying ways in which the efficiency and utilisation of the EU direct settlement procedure can be improved whilst retaining compatibility with the ECHR. It identifies four suggestions for improvement to the current procedure.

Chapter 6

Conclusions, recommendations and improvements with regards to the EU cartel enforcement programme and its compliance with procedural rights

The sixth and final chapter concludes the thesis by considering the previous chapters' analysis and identifying ways in which the current EU cartel enforcement procedure can be improved to enhance compliance with the ECHR, the equal treatment of undertakings and to tackle other procedural rights concerns that have been identified. This research is presented as policy reforms where necessary and as recommendations for the Commission. This chapter ends by highlighting areas of further potential future research.

Chapter 2: Why Corporations should qualify for rights protection under the ECHR and, why it is important that the European Commission's cartel enforcement policies comply with procedural rights requirements?¹

2.1 Introduction

This chapter of the thesis assesses whether corporations qualify for rights protection under the European Convention of Human Rights (ECHR).² In addition to this, it determines how specific rights enshrined in the ECHR will apply to the European Commission's (hereafter, 'the Commission') cartel enforcement procedures once the EU has acceded to the ECHR and why it is important for the Commission's procedures to comply with the Convention, procedural rights requirements and the principle of equal treatment. This chapter forms the foundation of the thesis as, by answering the aforementioned questions, it establishes why the research in the latter chapters of the thesis are of fundamental importance. This chapter will illustrate that undertakings qualify for rights protection under the ECHR – when Member States apply national or EU competition law – and why the Commission's cartel

¹ A draft of part of Chapter 2 – which discussed whether and why companies need rights protection under the ECHR – was presented at the 6th Annual Law Research Colloquium in Norwich on the 21st May 2014, and at the Society of Legal Scholars' Conference 2014 in Nottingham on the 11th September 2014. The feedback and comments from the attendees of these events has been greatly appreciated.

² European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

enforcement procedures *will* need to comply with the rights enshrined within the ECHR once the EU accedes to the ECHR.

The ECHR has been in force since the 3rd September 1953 and provides a legal basis for the protection of human rights and fundamental freedoms within Europe. The Convention provides protection of civil and political rights that are considered 'essential',³ and the ECHR itself was a direct response to the human rights abuses that occurred during the Second World War.⁴ The Convention clearly states in Article 1 ECHR that signatory states must secure the rights within the Convention to everyone within their jurisdiction,⁵ and this includes corporations.⁶

The importance of human rights protection has continued to increase in recent years, particularly with regards to the rights of corporations in relation to EU Competition Law.⁷ Indeed, we find there have been a great many cases – that

³ Jacobs, White and Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 4.

⁴ David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 1.

⁵ (n 2) Article 1.

⁶ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) 3.

⁷ For example, much has been written on due process in EU Competition Law cases: Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law International 2013); Arianna Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing 2008); Marius Emberland, 'Protection against unwarranted searches and seizures of corporate premises under Article 8 of the European Convention on Human Rights: The *Colas est Sa v France* approach' (2003) 25(77) *Mich J Int'l* 77; Helene Andersson, 'Dawn raids under challenge' (2014) 35(3) *ECLR* 135; Albert Sanchez-Graells and Francisco Marcos, '"Human Rights" Protection for Corporate Antitrust Defendants: Are we not Going Overboard?' (2014) University of Leicester School of Law Research Paper No 14-04 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389715> accessed April 20th 2014; Angus MacCulloch, 'The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications' (2006) 26(2) *Legal studies* 211, 234; Georg Berrisch, 'The EU courts play a crucial role in ensuring compliance of the EU's system of competition law enforcement with due process rights' (2014) June (1) *CPI Antitrust Chronicle*; Evelyne Ameye, 'The interplay between human rights and competition law in the EU' (2004) 25(6) *ECLR* 332; Bruno Nascimbene, 'Fair trial and the rights of the defence in antitrust proceedings before the Commission: a need for reform?' (2013) 38(4) *EL Rev* 573; Peter Oliver and Thomas Bombois, 'Competition and Fundamental Rights Survey' (2014) 5(7) *Journal of European Competition Law & Practice* 498; Tim Ward QC and Brendan McGurk, 'Competition Law and Human Rights: The Privilege against Self-incrimination and related rights in Competition Investigations' (2013) *Comp Law* 304; Lyubomir Talev, 'ECHR Implications in the EU Competition Enforcement' (2010) <[52](http://www.varadinovlaw.com/en/wp-</p></div><div data-bbox=)

cover various areas of law – where corporations have argued that their fundamental rights have been infringed.⁸ The need for the protection of the rights of corporations is perhaps most prevalent in competition cases where the fines imposed on undertakings by the Commission are punitive and deterrent in nature and, thus, are often very high and severe – particularly when compared to fines for other administrative offences.⁹ Indeed, some undertakings that have been fined by the Commission have claimed that the fines imposed by the Commission are so large that they are effectively criminal fines that violate the corporation's rights.¹⁰

There has been a considerable amount of literature written generally on whether corporations should qualify for human rights, with a sizable amount arguing against corporations having rights protection, and a significantly lesser amount arguing that corporations *should* qualify for rights protection.¹¹ This

content/uploads/2010/12/clasf-paper-talev_echr_final_15092010.doc> accessed 27 April 2014; David Hart QC, 'European Commission fines and their compliance with Article 6' (UK Human Rights Blog) <<http://ukhumanrightsblog.com/2013/08/12/european-commission-fines-and-their-compliance-with-article-6/>> accessed 4 July 2014; Anca Chirita, 'Procedural rights in EU administrative competition proceedings: Ex ante Mergers' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492826> accessed 8th September 2014; Albert Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?' (2012) <<http://ssrn.com/abstract=2156904>> accessed 10th July 2014; Donald Slater, Sébastien Thomas and Denis Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: no need for reform?' (2009) The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08 <<https://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf>> accessed 5 January 2014; Michael Han and Janet Wang, 'Due process in Chinese Competition Law regime' (2014) June (1) CPI Antitrust Chronicle; Stephen Harris, 'Due process and procedural rights under the China anti-monopoly law' (2014) June (1) CPI Antitrust Chronicle; Paul Lugard, 'Procedural fairness and transparency in antitrust cases: Work in progress' (2014) June (1) CPI Antitrust Chronicle; Martin Möllmann, 'Due process in Antitrust Proceedings before the European Commission: Fundamental rights are not enough' (2014) June (1) CPI Antitrust Chronicle; Toshiaki Takigawa, 'Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences' (2014) June (1) CPI Antitrust Chronicle and Stanley Wong, 'The Independence of Decision-Maker Principle in Competition Law Enforcement' (2014) June (1) CPI Antitrust Chronicle.

⁸ For example, see *Société Colas Est v France* (2004) 39 EHRR 17, *The Sunday Times v UK* (1979) 2 EHRR 245 and *Autronic AG v Switzerland* (1990) ECHR 12.

⁹ Hart (n 7).

¹⁰ See Robert Lande, 'Quick – Somebody call Amnesty International! Intel says EU Antitrust fine violated Human Rights' (2009) 746(9) Federal Trade Commission: Watch 1.

¹¹ Emberland (n 6) 3; Marius Emberland, 'The Corporate Veil in the Case Law of the European Court of Human Rights' (2003) ZaoRV 63, 945; Lucien Dhooge, 'Human Rights for Transnational Corporations' (2007) 16(2) Journal of Transnational Law & Policy 197; Elizabeth Pollman,

debate has not merely been confined to the EU, it has and remains an ongoing discussion across the Atlantic too.¹² There are a variety of arguments for and against corporations having rights protection and these shall be identified and discussed in the next section of the chapter. However, there are a few key pieces of literature that warrant discussion at this early stage.

One of the most detailed and thorough discussions regarding the human rights of corporations under the ECHR is by Emberland.¹³ He identifies the ECtHR's response to complaints from corporations and how the Court has dealt with and managed these cases. This is an excellent piece yet it can be distinguished from this chapter. This thesis seeks to establish whether corporations qualify for rights under the Convention, and the reasons why we would want this to be the

'Reconceiving Corporate Personhood' (2011) 4 Utah Law Review 1629; Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010) 6; Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) HRLR 515-517; Anna Grear, 'Human Rights -- Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights Theory' (2006) 17 Law and Critique 171; Andreangeli (n 7) 15-23; Arianna Andreangeli 'Competition law and human rights: striking a balance between business freedom and regulatory intervention' in Lianos and Sokol (eds) *The Global Limits of Competition Law* (Stanford University Press, 2012) 22-36; Anat Scolnicov, 'Lifelike and Lifeless in Law: Do Corporations Have Human Rights?' Legal Studies Research Paper Series: University of Cambridge (2013); Christopher Harding, Uta Kohl and Naomi Salmon, *Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors* (Ashgate Publishing 2008), Uta Kohl 'The Sun, Liverpoolians and 'The Truth': A Corporate Right to Human Rights?'; Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443; Dale Rubin, 'Corporate Personhood: How the Courts have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals' (2010) 28 Quinnipiac Law Review 523; Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (Rodale Press 2004); Addo, 'The Corporation as a Victim of Human Rights Violations', in Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague Kluwer 1999); MacCulloch (n 7); Winfried H.A.M van den Muijsenbegh and Sam Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 Pacific McGeorge Global Business & Development Law Journal 43; Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press 2013); Israel De Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' (2012) 37(4) EL Rev 397; Richard Schragger and Micah Schwartzman, 'Some Realism About Corporate Rights' (2013) University of Virginia School of Law Public Law and Legal Theory Research Paper Series 2013-43 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360309> accessed March 20th 2014; Sanchez-Graells (n 7) and Helena Paul, 'Corporations are not human, so why should they have human rights?' <<http://econexus.info/publication/corporations-are-not-human-so-why-should-they-have-human-rights>> accessed 10 March 2014.

¹² For example, see Dhooge (ibid) and Pollman (ibid). Even churches have been considered for whether they should qualify for rights protection, see Schragger and Schwartzman (ibid).

¹³ Emberland (n 6).

case, it then focuses its attention to applying the most relevant ECHR rights (and other procedural rights) to the Commission's cartel enforcement procedure to ensure that the Commission's cartel enforcement procedures do not breach these rights.

In the specific context of competition law there has been a lack of discussion regarding whether corporations qualify for rights protection and whether they should or should not.¹⁴ MacCulloch has briefly engaged in a discussion on corporations and human rights, and has suggested that they have been extended to undertakings in competition law investigation cases, with specific regards to the privilege against self-incrimination.¹⁵ The most detailed discussion to date is that which Sanchez-Graells and Marcos contributed.¹⁶ They identified that there is a clear trend towards the increased protection of 'corporate human rights' in competition law cases, and are very skeptical of this; arguing that this increase is based upon an uncritical extension of human rights protection to corporations. They conclude their piece by warning of the potential harmful effects that can arise for competition and human rights law with an 'overstretched conception of due process protection.'¹⁷ This chapter takes the diametrically opposing view to that of Sanchez-Graells and Marcos. It will be illustrated later why it is believed that the rights have *not* been extended to corporations (under the ECHR) and why it is so valuable undertakings' rights are protected in competition law proceedings.

Scordamaglia-Tousis has considered procedural rights and how they can be reconciled with the EU cartel enforcement.¹⁸ Within this analysis he briefly discusses whether corporations can qualify for rights protection as legal entities. He has not, however, discussed the important and fundamental issues of why corporations need rights protection in the context of competition law

¹⁴ Andreangeli has consider this briefly in the competition of EU competition enforcement.

Andreangeli (n 7) 15-23.

¹⁵ MacCulloch (n 7).

¹⁶ Sanchez-Graells (n 7).

¹⁷ *ibid.*

¹⁸ Scordamaglia-Tousis (n 7).

proceedings or why we would wish for the Commission's cartel enforcement procedure to adhere to fundamental rights.¹⁹

Because of this lack of detailed analysis – of these issues within the current literature – this chapter aims to address the gap from the perspective of EU cartel enforcement. To effectively achieve this the chapter is structured in the following manner. The first section of this chapter assesses whether corporations in the EU can qualify for rights protection under the ECHR and why one would want companies to have their rights protected. The *Yukos Oil* case is utilised to discuss and highlight the reasons for corporations requiring human rights protection and the potential issues that can occur if rights are inadequately protected.²⁰ The second section of the chapter focuses on something that is distinct from the first section. It begins by identifying why it has been chosen for this thesis to focus its attention predominately on the ECHR as opposed to the Charter of Fundamental Rights of the European Union ('CFREU').²¹ Therein, the section identifies the key ECHR and procedural rights that the remainder of this thesis applies to the Commission's cartel enforcement policies.²² It then illustrates how these chosen rights apply and will be engaged by the Commission's cartel enforcement procedures. Finally, the last section of the chapter examines and explains why these rights (and the principle of equal treatment) need to be complied with, having particular regard to the three specific Commission cartel enforcement policies that the thesis assesses.

¹⁹ *ibid.*

²⁰ *Oao Neftyanaya Kompaniya Yukos v Russia* (2012) App no 14902/4.

²¹ Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

²² For clarity, these rights were chosen because they are most applicable to the Commission's policies and have not been thoroughly analysed in the existing literature.

2.2 Corporations and human rights

2.2.1 Do corporations qualify for human rights?

The first question that needs to be answered is whether corporations qualify for human rights protection under the ECHR. This section will illustrate that they do and argues compelling reasons why the answer to this question should be yes and indeed why we would want this to be the case.

The first place to begin when considering this question is to consult the Convention itself. When we read Article 1 of the ECHR, we see it clearly states that: 'The High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention'.²³ We can identify from this that signatory parties to the Convention must ensure that they provide these rights to *everyone* within their jurisdiction. The critical question here is how broadly we can interpret the term '*everyone*'. By its literal interpretation '*everyone*' is a broad and encompassing term but unfortunately, it provides no apparent indication as to whether its definition includes corporations. Consequently, we need to consider Article 34 of the Convention, which details individual applicants. It states that 'the Court may receive applications from any person, *non-governmental organisation or group of individuals* claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'.²⁴ Article 34 of the Convention therefore establishes who has locus standi to bring proceedings and, as is evident from the wording of the provision, this includes non-governmental organisations and groups of individuals. Thus, it appears on a literal interpretation, to include corporations, because non-governmental organisations include businesses. Furthermore, when we consult the original drafting of the Convention, it becomes apparent that the drafters had always intended for corporations to qualify for protection under the

²³ ECHR (n 2) *emphasis added*.

²⁴ *ibid*.

Convention.²⁵ For example, if we consider the first preliminary draft of the Convention, it contained a right petition to the ECtHR for ‘any natural or corporate person’.²⁶ This term was later amended to ‘corporate body’ and, eventually it was replaced with the term ‘non-governmental organisation’.²⁷ However, there was and remains no evidence to suggest that these changes to the terminology were implemented to diminish the rights protection of corporations.²⁸ Although, it has been noted by Emberland that this fails to explain why companies were ‘straightforwardly integrated in the Convention or [...] what form of protection corporate applicants actually enjoy’.²⁹ Regardless of this, it remains clear that corporations were always intended to have standing to bring a claim under the ECHR. Indeed, when we consider the case law of the ECtHR we see that the Court has had no issues with permitting corporations to bring claims or in providing corporations rights protection under the Convention.

The first corporate claim before the ECtHR arose in 1978 and involved a private media corporation’s dispute with the UK.³⁰ In this case – and all cases that have followed it – the Court has had no concerns with ensuring that corporations have their rights protected.³¹ For example, in the case of *Société Colas Est v France*,³² the ECtHR confirmed that it is comfortable with the *extension* of the protection offered by Article 8 of the Convention to a corporation’s business premises in certain circumstances.³³ This is because of the dynamic nature of

²⁵ This assessment is based on the discussions in Emberland (n 6) 35 and the *Travaux Préparatoires*.

²⁶ See A H Robertson (ed) *Collected Editions of the Travaux Préparatoires’ of the European Convention on Human Rights* (Martinus Nijhoff Dordrecht, 1975) vol 1 296 and 298.

²⁷ See A H Robertson (ed) *Collected Editions of the Travaux Préparatoires’ of the European Convention on Human Rights* (Martinus Nijhoff Dordrecht, 1975) vol 2 3 and 68.

²⁸ Emberland (n 6).

²⁹ *ibid* 36.

³⁰ *The Sunday Times* (n 8).

³¹ Similarly, in *Funke v France* (1993) 1 CMLR 897 the ECtHR was happy to discuss the ECHR in the ambient of a legal person.

³² (2004) 39 EHRR 17.

³³ *ibid* para 41.

the Convention – as it is a ‘living instrument’ – and the fact that it wished to ensure that the Convention covered ‘present-day conditions’.³⁴

The preceding discussion *clearly* demonstrates that corporations qualify for rights protection under the Convention. However, what has not been shown is why we would want this to be the case. This is what we shall now move on to consider, whether corporations should have rights protection and why one would wish for corporations to have their rights protected. This assessment will involve analysing the need for the protection of these rights from a ‘competition law’ perspective. Other general reasons for desiring corporations to have rights protection will also be identified, analysed and discussed.

2.2.2 The Arguments For and Against Rights Protection

The discussion of the arguments for and against corporations qualifying for rights protection shall begin with an assessment of the most pertinent arguments against corporations receiving rights protection.

2.2.2.1 The Arguments Against Rights Protection

A variety of arguments have been forwarded as to why corporations should not receive rights protection. These include: that the ECHR was never intended to protect the rights of corporations; corporations are not ‘human beings’ or ‘persons’ so how and why should human rights be extended to them?; granting corporations human rights dehumanises and degrades human rights; corporations have vast resources whereas human rights were developed to protect the vulnerable; the ‘flood-gate’ argument and the ‘selective rights only’ argument. These arguments shall now be analysed alongside the respective counter-arguments to illustrate why many of these arguments are *fundamentally* flawed, based on a misconception or inaccurate premises. Table 2.1 below, provides a brief overview of the aforementioned key arguments against corporations having right protection and the counter arguments.

³⁴ *ibid.*

Table 2.1. Arguments for and against Corporate Rights Protection

Arguments against corporations having human rights protection	Arguments for corporations qualifying for human rights protection
The ECHR was never intended to protect the rights of corporations.	The ECHR provides protection for corporations and this was always the drafters' intention.
Corporations are not 'human beings' or 'persons' so how and why should human rights be extended to them?	Corporations receiving right protection brings benefits to the legal system.
Granting corporations human rights dehumanises and degrades human rights.	Potential for stronger and better right protection for individuals.
Corporations have vast resources whereas human rights were developed to protect the vulnerable.	A corporation is, at the end of the day, a group of individual right holders.
The 'flood-gate' argument.	Corporations are treated as 'legal persons' in many areas of the law and are required to respect an individual person's human rights.
The 'selective rights only' argument.	Issues with 'dual prosecution' requirements.

'What we now face is the danger to human rights future presented by the genesis of a corporation-friendly human rights legal sensibility'.³⁵

Probably the most oft cited argument against corporations having rights protection is that corporations are not 'human beings' or 'persons', therefore, how can we give or *extend* 'human' rights to them?

This argument can be succinctly illustrated by the following quote from Edward, Baron Thurlow:³⁶ 'A corporation, unlike a human being, has 'no soul to be damned, and no body to be kicked''. One can see that this argument is based

³⁵ Anna Grear, *Redirecting Human Rights* (n 11) 6. Those who advocate that corporations should not receive rights protection, as it is damaging to human rights often raise concerns akin to this.

³⁶ Emberland (n 6) 27, quoting Edward Baron, Thurlow in E Knowles (ed) *The Oxford Dictionary of Quotations* (6th edn, Oxford University Press 2004) 550.

on the claim that ‘the physical embodiment of human rights in persons or individuals is a crucial and central feature present in their creation and recognition’.³⁷ The argument follows that, given corporations are not human and have no physical being, why should we – and how can we – provide them with rights protection? Those who advocate along these lines often claim that when corporations gain rights protection it leads to an extension of rights or legal protection that the original legislation never envisaged, allowed nor was designed for. Proponents of this view may take a ‘grant theory’ view of corporations. That is to say, they view corporations as an ‘artificial entity’ that owe their existence to the State – i.e. it is incorporated and allowed to trade by the State – and cannot therefore derive any rights.³⁸ This view was very prevalent in the US and EU in the pre-19th Century where corporations were heavily regulated and severely limited to what activities they could engage in.³⁹ However, this is not the case today. The formation of a corporation within the EU and US is far easier, with many of the restrictions and severe limitations having been removed.

Another argument put forward (that extends and builds upon the previous argument) is that by granting corporations rights, it degrades, devalues and dehumanises rights.⁴⁰ It is claimed that by allowing corporations to have rights, the value and importance of these fundamental rights is lost as they are being distorted and twisted to protect something that they were not designed to protect. Those who argue along these lines will often raise the context in which the ECHR was developed. Highlighting the atrocities inflicted on human beings in World War 2 and the fact that the Convention was primarily enacted to help prevent these evils from occurring again in the future. On this basis, these individuals will argue that the extension of rights to corporations goes *too* far as

³⁷ Sanchez-Graells (n 7) 5.

³⁸ Rubin (n 11) 535.

³⁹ For example, corporations were prohibited from engaging in any activities not specified in their charter. Rubin (n 11) 532.

⁴⁰ This has been effectively discussed in Scolnicov’s piece (n 11).

it is not what the Convention was designed for.⁴¹

At first glance, these two arguments – regarding the extension and dehumanisation of rights – appear to make some potentially robust assertions. Yet the fact of the matter is that both of these arguments are actually very dubious and can be refuted rather effortlessly. If one simply considers the original intention of the drafters of the Convention and consults the language used in the Convention itself, these arguments begin to fall. As was illustrated in the early stages of this chapter, the Convention was always intended to offer protection to corporations. Indeed, there has been no extension of the rights because corporations qualified for these rights from the enactment of the Convention. Corporations cannot therefore be accused of causing rights to be extended or manipulated; this is simply not the case, as corporations were always entitled to this protection.⁴² It would be justifiable to end the counter-argument on this basis alone,⁴³ but let us first consider some additional points of interest.

For arguments sake, let us accept the claim that corporations were *never* intended to qualify for rights protection when the Convention was first enacted. Would this mean that they should still not qualify now? If we consider how the ECtHR has developed its jurisprudence from the Convention, can we really still substantiate this claim? Social norms and values change over time and the law has to develop to reflect this. For example, there have been periods in legal history when homosexual practices within the UK were illegal and when women did not receive an equal paycheque to their male counterparts.⁴⁴ This is not the case today as our values and views as a society have altered. Therefore, a law that was once accepted as serving a legitimate purpose would be considered unacceptable in modern times. Hence, we see Parliament reformulate the law

⁴¹ Sanchez-Graells (n 7) 3.

⁴² What is less clear – as Emberland has noted (n 7) 36 – is what form of protection this takes.

⁴³ Which it would be possible to do as the aforementioned argument effectively counters the claims of dehumanisation and extension of rights.

⁴⁴ In 1967 the Sexual Offences Act 1967 came into force decriminalising homosexual acts.

to reflect modern standards, views and norms. The Convention itself allows for changes, as it is seen as a '*living instrument*' that adapts to modern day circumstances. Indeed, we find that this is one of the reasons that the Convention has been so effective in protecting rights, because it has the flexibility to adapt and change. This ability to adapt has allowed the Convention to extend rights into areas that people would not have necessarily thought of as originally intended for protection.⁴⁵

Can one legitimately say that this has led to a degradation of the value of rights, simply because they have been extended? No, it is more likely that one would claim that this extension serves to reinforce the protection of an individual's rights. Therefore, should it not also be the case if rights are extended to corporations, as it will result in better protection of individuals as well? Further to this, if we consider how important and influential corporations are today with regards to the community, one has to question why we would not want them to qualify for rights protection. For example, corporations affect our everyday lives, they employ citizens, impact on the local community and economy and they can protect the local environment too.⁴⁶ Based on this discussion, it seems reasonable to conclude that – owing to the importance of corporations today and the way that the Convention adapts to modern day circumstances – corporations would qualify for rights protection now even if they originally did not.

There is one more argument that needs to be raised against the claim that by corporations receiving rights protection they extend and dehumanise rights. This argument is two-fold. The first part relates to the fact that a corporation is treated as a legal person in many areas of law to enable it to be found liable for

⁴⁵ For example, consider the way the Court has interpreted 'within their jurisdiction' to mean or the decision in *Goodwin v UK* (1996) 22 EHRR 123.

⁴⁶ It has been suggested that corporate human rights have been enhanced because of the impact they can have on the rights of individuals, see Addo (n 11) 187.

criminal and civil offences.⁴⁷ For example, corporations in the UK can be charged with corporate manslaughter where a death occurs owing to a serious management failure that results in a gross breach of a duty of care.⁴⁸ In this case, as a corporation is a legal person, one wonders why we would not expect it to have some form of rights protection? This is a serious charge that will have grave implications for the corporation both financially and for its reputation, alongside having an impact on the corporation's employees and shareholders. The court may even impose remedial or publicity orders against the corporation.⁴⁹ If, on the one hand, we are willing to define a corporation as a 'legal person' to make it criminally liable, it seems somewhat one-sided and strange to state that they cannot also constitute a 'legal person' which qualifies for rights and, in turn, has protection of these rights.

The second part of the argument relates to the idea that there is an expectation that corporations will consider and protect the rights of individuals.⁵⁰ As we place an expectation on corporations to not infringe or unduly affect the rights of an individual, why would we not also expect them to themselves qualify for rights protection? This argument turns the tables on one of the arguments made by those opposing corporations having human rights. It is often argued that because corporations do not accept their human rights obligations, they should not be able to benefit from rights protection.⁵¹

With both of these arguments it seems illogical, on the one hand, to deny the corporation rights but, on the other, to treat it as a legal person or expect it to protect the rights of individuals, if it cannot itself qualify for this protection. Another argument raised is that corporations often have vast resources and wealth, and that human rights were designed to protect the *vulnerable* and

⁴⁷ For example, under UK Company Law a corporation is treated as a 'legal person'. Sanchez-Graells and Marcos have noted that corporations are legal persons but state that corporate personality is a fiction (n 7) 7.

⁴⁸ Corporate Manslaughter and Corporate Homicide Act 2007.

⁴⁹ *ibid* s9 and s10 respectively.

⁵⁰ This expectation has been discussed by Joseph in Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004).

⁵¹ Gear (n 11) 515-517.

weak individual against the *wealthy* and powerful State.⁵² The argument presumes that because of this it is unfair to provide a corporation with rights protection as it does not need them given its vast resources, which sometimes even exceed that of the State.⁵³

At first glance this argument appears to have a small amount of traction; corporations are often quite powerful and are relatively well-equipped to deal with legal issues. Although, one must remember that there are a great many small companies that do not have vast resources and are not powerful, but yet play an important role within the economy. For example, if we just consider the UK economy, there are an estimated 4.9 million private sector businesses – with small or medium sized enterprises accounting for 99.9 percent of these.⁵⁴ Consequently, it is necessary that we provide adequate protection for these companies, as they will not have vast resources and thus in many instances will be weaker and much less powerful than the State. There may also be instances where these small businesses, which lack in wealth and resources, have their rights infringed by the Commission and yet still wish to pursue a claim.⁵⁵ Further to this, it should be noted that the Commission is actually a powerful agency when it is compared to a corporation. The powers they have to investigate an alleged cartel are robust and wide-ranging, and the potential sanctions that they can impose for a breach of competition law are severe and potentially harmful to the economy. Therefore, the power balance is still favoured towards the Commission, with the weaker party in the case being the corporations. Wealth does not necessarily equate to power. One only needs to consider the illustrative case of Yukos Oil,⁵⁶ discussed later in this chapter, to be aware of the

⁵² This is an argument that Sanchez-Graells and Marcos have made in relation to due process rights (n 7) 7.

⁵³ Dhooge (n 11) 242.

⁵⁴ Department for Business Innovation & Skills, 'Business Population Estimates for the UK and Regions 2013' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254552/13-92-business-population-estimates-2013-stats-release-4.pdf> accessed 13 November 2014.

⁵⁵ It is, however, worth noting that it is questionable whether a small business would have the capital or resources in the first instance to bring a claim against the Commission even with these rights being protected.

⁵⁶ *Yukos* (n 20).

harm powerful government bodies can cause to corporations. Additionally, if we analogise the situation of power and wealth with that of an individual claiming an abuse of a human right, but who is also very wealthy, we would not expect the wealthy individual to forgo having their human rights protected just because they are wealthy. Hence, the argument made against corporations not receiving rights protection crumbles again, as rights apply to all, whether they are wealthy or better equipped to deal with a claim or not. If the previous line of argument was to be followed through completely, would this mean that suspected or convicted terrorists or murderers should not qualify for rights protection because of the crimes they have *allegedly* committed?⁵⁷ If so, this would go against the purpose of the Convention and would lead to the 'conditional application of human rights'.⁵⁸ Consequently, this argument actually appears illogical when one considers the potential outcome that it could lead to if it is followed through completely, and the fact that rights *are* applied to all individuals no matter what their status or wealth.

The next argument, which is often levied against corporations having rights, is linked to the aforementioned argument. Because corporations often have vast resources and wealth, it is argued by some that this – coupled with corporations qualifying for rights protection – will lead to many cases being brought by corporate applicants that will tie up the courts and lead to a large amount of cases going before the ECtHR. This in turn will mean that individual right holders will struggle to bring their claims as they often have fewer resources and less wealth than corporations,⁵⁹ who will have the ability to wait for the case to proceed through. This may be seen as a 'floodgate argument', i.e. that by corporations qualifying for rights protection there will be a significant rise in cases that the Court will not be able to cope with. Further to this, one might even suggest that corporations may try to use their wealth to lobby and influence key individuals to extend their rights further. However, what we are

⁵⁷ Muijsenbergh and Rezai (n 11) 52.

⁵⁸ This is an argument that was forwarded by Muijsenbergh and Rezai with regards to corporations right protection (n 11).

⁵⁹ Hartmann (n 11).

witnessing is that the ‘floodgate’ problem is not actually occurring in practice. Emberland has identified that in the five-year period between 1998-2003 there were 3307 judgments handed down by the Court, but only 126 of these were made by corporations or filed by persons pursuing corporate interests.⁶⁰ Thus, we see that the empirical data does not support this claim and, as such, the ‘floodgates’ argument is currently a non-starter. That said, as the EU accedes to the ECHR and the rights of corporations gain even more prominence and development, it will be interesting to see if these figures change and whether the argument gains increased merit, as the Commission’s fining procedures will be open to ECHR scrutiny. But, currently this argument is not an issue.

The final argument that shall be considered is perhaps the most difficult argument – for those who advocate for corporations to qualify for rights protection – to counter. The argument extends from one of the very first arguments to be considered in this chapter. As corporations are not human beings, there are certain rights that it appears very difficult to see being applicable to them – because of the very nature of those rights.⁶¹ For example, it is hard to imagine a corporation having the right to life or being able to be tortured. Therefore, how can corporations qualify for rights protection if a variety of the rights do not or cannot apply to them? Hence, it is claimed that this must mean that the ECHR was only ever intended to protect human beings as, if not, it means one has to ‘pick and choose’ which rights apply to a corporation. Consequently, this argument can be seen as one regarding ‘only selective rights’. The argument could be developed even further by claiming that if rights which required a ‘physical body’ – in the traditional sense of the term – were to be extended to corporations, this would be a step too far in the *creative* interpretation of human rights.

The so-called ‘selective rights’ criticism is an interesting one. It does appear that

⁶⁰ Emberland (n 6) 13-14.

⁶¹ Muijsenbergh and Rezai have noted with specific relation to certain rights that holding otherwise ‘could equate corporations with human beings on a level which borders the *incredible*’ (n 11) 51, emphasis added.

arguing that corporations should have a right to life (for example) is pushing and extending rights for corporations to the extreme. Nonetheless, is the argument regarding only having selective rights as serious a challenge to corporations qualifying for rights protection as it first seems?

If we consider an analogous situation, we can draw some interesting inferences. For this scenario we shall consider the Treaty on the Functioning of the European Union (TFEU). The TFEU is applicable to both individual citizens as well as corporations. We find that there are certain provisions that relate solely to the individual citizen, others exclusively to corporations and some which apply both to citizens and corporations.⁶² The fact that in certain situations the provision only applies to a corporation or an individual does not undermine the Treaty or what it seeks to represent and achieve. It still functions correctly and provides what it needs to. Thus, if we take this and apply it to the ECHR, we see that the Convention still functions as it was designed to when it provides the protection of certain rights for human beings and, in other situations, protects the rights of individuals as well as corporations. Undeniably, the rights themselves will not apply in all situations, even when an individual human being makes a claim of a rights violation, as only certain rights may have been engaged in that case. But, again, this does not mean that the Convention is not being used correctly or that it should not protect an individual's rights.

This section has illustrated that there are many misconceptions surrounding corporations having rights protection and the arguments forwarded against rights protection for corporations are actually weak and do not withstand deconstruction when analysed. There are a variety of other reasons and arguments as to why corporations *should* have their rights protected, which shall now be considered.

⁶² For example, Article 101 TFEU only applies to undertakings (corporations), though an individual may be classified as an undertaking in certain circumstances. But, an individual can claim for a breach of Article 101 TFEU. Article 45 TFEU allows for the freedom of movement of workers, but *only* applies to the free movement of individual citizens, not corporations.

2.2.2.2 Counter-Arguments for Rights Protection

To begin with, by granting corporations rights it can allow benefits to be brought to the legal system and,⁶³ in this case, the Commission's enforcement procedures. For example, where a corporation feels there has been a breach of a right contained within the ECHR, it is likely to appeal the Commission's fining decision and set out why it feels there has been a breach of a right within the ECHR. By corporations appealing the fines imposed by the Commission, it allows the Commission's fining procedures to be enhanced and clarified where the need arises. This is because when the court identifies the breach of a right – owing to an appeal by the corporation – the Commission will be able to amend the guidelines to reflect the identified infringement or to ensure that its practices take into consideration the identified issue in the future. Therefore, by corporations having rights, it brings benefits to the cartel enforcement procedure as a whole, ensuring that there is enhanced certainty and procedural propriety for all. In addition, it also helps to ensure that the enforcement procedures used by the Commission are applied fairly and consistently to corporations as, where it is not, the corporation could appeal the Commission's decision. Consequently, by allowing corporations to have rights protection it provides an incentive to the Commission to ensure that its procedures are applied correctly and equally to all, as in essence, the fact that a corporation has rights protection acts as a deterrent to the Commission applying the procedure arbitrarily or unfairly.

Another benefit derived from corporations having their rights protected is that this means individuals themselves within the corporation will have their rights better protected. There are potential situations where individuals would not have their rights protected or legal standing to bring a claim themselves, even though they may have been affected by a decision made by the Commission. Accordingly, by corporations having their rights protected, individual right holders gain protection that they may not have otherwise had. For instance, if a

⁶³ Others have discussed the potential benefits to society as a whole of granting corporations rights protection. For example, see Harding, Kohl and Salmon (n 11) 45-48.

corporation was fined heavily for a breach of Article 101 TFEU and, for arguments sake, the decision breaches Article 7 of the ECHR, and the fine the Commission had imposed led to the corporation making workers redundant and causes a drop in share price. The redundant members of the workforce and the shareholders would have no legal standing to raise concerns under the Convention about what has happened to the corporation regarding the fine. But, if the corporation qualifies for rights protection, it can challenge the Commission's decision on the grounds of legal certainty. If it is found by the Court that there has been a breach of Article 7 then these issues can be addressed. This means that the rights of the individuals affected by the Commission's decision (who themselves would not qualify in this instance for legal protection) would have been protected. This example illustrates that when corporations receive rights protection it can lead to greater benefits to individuals as a whole.

Arguments against corporations receiving rights protection often make reference to the nature of human beings and that rights protection was designed to defend physical beings, which corporations are not. What these arguments overlook and forget to take into account is that corporations consist of a group of individuals. Indeed, a corporation is effectively a collection of individual right holders. However, within UK Company Law we see that the company is treated as a separate entity to, and from, these individual right holders.⁶⁴ This principle is known as the 'corporate veil' and it limits the natural person's liability for the company. Nevertheless, in certain circumstances, this veil can be pierced so those behind the company can become liable for its debts.⁶⁵ What we see is that when these individual right holders come together for this shared purpose, i.e. the business, they can become an entity that cannot necessarily be broken down into the corresponding individual right

⁶⁴ Similarly, this is the case in the US.

⁶⁵ *Salomon v A Salomon & Co Ltd* [1897] AC 22.

holders.⁶⁶ For example, when a corporation makes a business decision, this is not inescapably the decision of an individual right holder. This decision will often be made by a group of right holders communally (for example, a Board of Directors) which means the decision is not that of one person but of many, i.e. the 'corporation'. In this sense, the 'corporation' has a will of its own as it creates its own goals and objectives. The corporation is therefore more than just the sum of its individuals' parts – the right holders – and, as such, is something distinct from this; if you will, a separate legal entity in its own right. Hence, its rights require protection.⁶⁷ This view of a corporation is analogous to the view ascribed by those who follow 'real entity theory'. This view holds that corporations owe their existence and legitimacy to the distinct and unified purposes and wills of groups.⁶⁸ What this argument establishes is that a corporation is made up of a collection of right holders, but its actions and decisions go beyond those of individual right holders. As such, the individuals behind the corporation need their rights protected by the corporation having its rights protected, because an individual right holder's rights will not be adequately protected as the corporation is distinct from the individual. Conversely here, nor will the corporation's rights be adequately protected by those of an individual right holder, as the corporation is distinct from that individual. For example, if one considers when the Commission conducts an investigation into a suspected cartel, it has broad powers under Regulation 1/2003/EC to conduct its investigation.⁶⁹ These powers include the ability to interview any natural or legal person who consents to being interviewed for the purpose of collecting information relating to the subject matter of an investigation.⁷⁰ Additionally, the Commission can search business premises and the homes of individuals.⁷¹ Therefore, individual rights holders become engaged

⁶⁶ However, this is not the only reason for the corporate veil, it is primarily there to protect the individual from liability for the company's debts if it is wound up.

⁶⁷ This would not be a view shared by all see Scolnicov (n 11) 8 and Schragger and Schwartzman (n 11).

⁶⁸ Rubin (n 11) 535.

⁶⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1

⁷⁰ *ibid.*

⁷¹ *ibid.*

by the Commission's investigation but the corporation will not have its rights adequately protected in this situation. Indeed, it is true that even the individual right holder's rights may not be sufficiently protected here.

One may wish to point to the illogicality of a corporation having a 'will' as individuals control the corporation and it does not have a mind itself to make decisions. However, this fails to understand the argument raised in the above discussion regarding the fact that an individual right holder in the case of a corporation does not usually make a decision. The decision is that of a group of rights holders, who put forward their ideas and then, through coordination and cohesion in the group, make a decision as the corporation. For example, it would be a flawed perception (in most cases, but particularly in the case of big corporations) to see a corporation as one individual who controls it. If one were to take this view, who then controls the corporation and makes the decision? Is it a worker lower down in the employment line? The management team? The Board of Directors? Or the shareholders perhaps?

The law in the UK typically views the decision of a company as having been made by the shareholders in a company. This therefore, reinforces the previous point and view that a corporation is a group of individuals who collectively make a decision and, thus, the protection of the rights of individual shareholders is *not* sufficient to protect the corporation.

The final argument that shall be discussed in support of corporations receiving rights protection is the 'dual prosecution' argument.⁷² This argument is based on the idea that if corporations do not receive the standard rights protection under the Convention that individuals would receive, it will lead to a situation where there will need to be separate offences or procedural safeguards for corporations as to those provided for individuals. This could lead to a variety of issues with the enforcement of the law. For instance, managing cases which

⁷² This is the name given to the argument by the author of this thesis, as it has not been seen raised in the literature in *any* guise before.

involve corporations as well as individuals will become more complex and difficult as they will have differing legal standards that will have to be met, as well as potentially differing charging requirements. This could lead to the legal system becoming burdened by the differing requirements and it might also result in issues with regards to legal certainty. This is because two separate bodies of case law will materialise for what is in essence the same offence. Additionally, if one needed to ensure that due process rights were protected and adhered to in another way – and not via the Convention – it could have cost implications. Therefore, as corporations are currently receiving rights protection under the ECHR, it makes no sense to change this approach as it could lead to other issues whilst trying to ensure that the legal requirements for the prosecution of corporate bodies are met.

This section of the chapter has identified the six core arguments that are often forwarded in opposition to corporations having human rights, which were as follows:

1. That the ECHR was never intended to protect a corporation's rights;
2. Corporations are not humans so how can they have human rights?;
3. Granting corporations rights degrades, devalues and dehumanises human rights;
4. Human rights were designed to protect the vulnerable, not corporations who have vast resources;
5. The 'flood-gate' argument around corporations bringing cases;
6. The criticisms around corporations only having 'selective rights'.

These arguments were analysed to show their weaknesses and flaws, and a variety of counter-arguments for corporations having rights protection were advanced, including:

1. The ECHR provides corporations with rights protection and it was always the drafter's intention;

2. By corporations having rights protection it brings additional benefits to the Commission's procedures;
3. It can lead to stronger and better rights protection for individuals;
4. A corporation is in essence a group of individual right holders;
5. Corporations are treated as 'legal persons' to be found guilty of offences in other areas of law;
6. The potential issues with 'dual prosecution' requirements.

This analysis and assessment of the arguments has shown why the claims against rights protection are weak. It also identified the benefits and reasons why the rights of corporations should be protected. However, perhaps the best way to demonstrate why corporations need their rights protected is to use an illustrative case that highlights the potential issues and problems that can arise for corporations, which is what the next section of this chapter accomplishes.

2.2.2.3 The Case of *Yukos Oil*

The case of Yukos Oil Company (hereafter, 'Yukos Oil'),⁷³ is an significant case which needs discussion when one wishes to study the protection of a corporation's rights. This is because the facts of the case and its outcome illustrate what can happen to a company when rights are not adequately protected at a national level.⁷⁴ In addition to this, it illustrates why corporations do in fact require some form of rights protection.

Before discussing the demonstrative case it is pertinent to make a few observations and to establish some of the background facts surrounding the

⁷³ *Yukos* (n 20).

⁷⁴ There are other cases that illustrate the importance of a corporation having its rights protected. For example, *Forminster Enterprises v Czech Republic* [2008] ECHR 1041 involved the seizure/freezing of a parent companies shares in the subsidiary after an alleged fraud by the directors of the subsidiary. This was held to be an unlawful violation of their right to peaceful enjoyment of possessions, under Article 1 Protocol 1 of the ECHR. In the case of *Fortum Corporation v Finland* [2003] ECHR 367 it was held that there was a violation of Article 6 ECHR when documents in an abuse of dominant position case were not disclosed to the company under investigation, but were disclosed to the court. Other examples include *MGN v UK* [2011] ECHR 66. However, *Yukos Oil* perhaps illustrates these problems most clearly given the extremes of the case.

case. This case is an *extreme* example of the problems that a corporation can potentially face, but it is often in these type of situations that we can identify why something is required; in this case, the protection of a corporation's rights and corporations having the ability to go to a truly independent body. It should be noted that the case of *Yukos Oil* did not involve competition law nor did it have anything to do with the Commission or its procedures. This case involved Russia and its national courts. Russia is not a member of the EU; nonetheless, it is a signatory State of the ECHR, which means that the Convention must be applied to those in its jurisdiction. Because of this the ECtHR has the power to adjudicate cases regarding alleged infringements of the Convention. Having said all of the above, this does not detract from the significance of this case with regards to the Commission's proceedings and the need for a corporation to have rights protection. This is something that is illustrated and discussed after the facts of *Yukos Oil* have been laid out.⁷⁵

Yukos Oil was originally a State-owned petroleum company until it was privatised in 1993. Once privatised the company traded for 13 years until it was declared bankrupt and ceased trading in August 2006. During this time, Michail Khodorkovsky operated in the oil industry and worked his way up to become the CEO of Yukos Oil. Yukos Oil performed incredibly well under Khodorkovsky's leadership and this led to the company 'accumulating tremendous wealth and influence'.⁷⁶ However, Khodorkovsky's political stance clashed with the views of the then Prime Minister, Vladimir Putin. This meant that by the end of 2003 the Russian Federation had begun questioning whether Yukos Oil had diligently paid its due taxes for the year of 2000. On the 8 December 2003, the Russian Tax Ministry announced a re-audit of Yukos Oil's accounts. This audit led to the Russian Tax Ministry concluding that Yukos Oil owed 2.9 billion euros. What was interesting about this *re-audit* was that it only took the Tax Ministry three weeks to conduct and conclude that the aforementioned tax was owed. Yukos

⁷⁵ Another good discussion of this case and the outcome of it can be found in Muijsenbegh and Rezai (n 11). This case discussion is based upon the case and their research into the judgment.

⁷⁶ *ibid* 60.

Oil was summoned to pay this amount within two days from the 14 April 2004.⁷⁷ The Russian Federation opted not to wait two days and the Tax Ministry requested a Moscow Court to order Yukos Oil to pay the amount and issue a freezing order for Yukos Oil's assets. This order was made on the same day, leaving Yukos Oil no time to release any assets. The hearing was scheduled for 21 May 2004, and Yukos Oil requested an adjournment but it was denied. A few days before the hearing, the Tax Ministry supplied Yukos Oil with an unnumbered document that comprised of over 71,000 pages.⁷⁸ However, the Tax Ministry supplied a well-ordered and numbered document to the Court, which Yukos Oil did not see until arriving in court. Yukos Oil was, nonetheless, given a thirty-minute period to consider the document on the lunch break. Yukos Oil was required by the Court on the 26 May 2004 to settle a large part of the claim. Yukos Oil attempted to appeal the Court's decision, but this failed and thus the Tax Ministry sought enforcement measures. This led to Yukos Oil's prime asset being auctioned off for a very small percentage of its actual worth, which eventually ended up in the hands of the state-owned Rosneft Oil Company. The Tax Ministry then pursued Yukos Oil for payment of back taxes from 2001-2004 totaling 20.1 billion euros. By this point, Yukos Oil was bankrupt and it was finally liquidated on the 12 November 2007. The counsel for Yukos Oil had lodged an application with the ECtHR under Article 34 ECHR, claiming breaches of various Convention rights on the 23 April 2004.

The Russian Federation raised an objection to the Court's jurisdiction, claiming that the Court had lost jurisdiction to hear the case as Yukos Oil had ceased to exist by the time the case was to be heard. On 20 September 2011 the Court gave its judgment on the merits after previous dealing with issues of standing.⁷⁹ The Court had no difficulty in holding that human rights provisions may be applicable to corporations. In actual fact, their applicability to corporations was never even a topic of discussion in this case.

⁷⁷ *ibid* 61.

⁷⁸ Yukos (n 20).

⁷⁹ *ibid*.

Addressing the Russian Federation's claim that the victim no longer existed and thus the Court had lost jurisdiction, the Court acknowledged the need for a victim to initiate proceedings, but refused to follow a rigid interpretation of this throughout. Again what we see here is the Court treating the Convention as a living instrument and making the Convention practical and effective, and not theoretical and illusory.⁸⁰ If the Court did not do this, it would allow the State to force undertakings to cease trading so as to prevent them from having their rights adequately protected.

The Court held that the Russian Federation had breached its duty to provide Yukos Oil with a fair trial, owing to the insufficient time it provided to Yukos Oil to adequately prepare its defence, and the unjustifiable restrictions placed on Yukos Oil's ability to appeal. The Court also held that the interference with Yukos Oil's property was unlawful due to the unforeseen change in the interpretation of a statutory time bar that laid down the period during which Yukos Oil could have been held liable. However, the Court rejected the other rights violations claimed by Yukos Oil.

This case highlights the importance of the need to protect a corporation's rights. From providing the facts of this case, it creates a powerful argument for the need for corporations to have their rights protected. When one hears of what happened in this case, it is difficult not to empathise with Yukos Oil and see what appears to be the excessively unfair treatment of a corporation. Indeed, one of the interesting features of this case was the 'potent and compelling demonstration of the importance of the mere availability of the [ECtHR], as an international independent judicial venue, for a brutalized corporation which simply had nowhere else to go.'⁸¹ Undeniably, many of the theoretical arguments regarding the potential concerns in the previous part of this chapter and why a corporation needs its rights protected, appear to play out

⁸⁰ Something which has been stated before by the Court before see *Airey v Ireland* (1979) 2 EHRR 305.

⁸¹ Muijsenbegh and Rezai (n 11) 62.

and occur in this case. What we can see is that by Yukos Oil having their rights protected they had a place to turn when they suffered an infringement of their rights.

Some may wish to question why it matters that Yukos Oil has its rights protected. Indeed, they may ask why it is important as it is only a corporation and what happens only affects shareholders. However, this is a short-sighted view that cannot be supported when one considers the possible implications of what happened to Yukos Oil. By Yukos Oil being forcefully bankrupted, there were consequences and 'knock-on effects' that were felt far wider than just by the shareholders. To begin with, Yukos Oil employees lost their jobs and, thus, their livelihoods. This would have meant that they had to find another job, which would have probably been difficult given that other workers from the same company were also likely to be looking for similar jobs – and those workers would likely have comparable skills to each other. Furthermore, one should not forget the implications losing a job would have had on that individual and the loved ones they supported. Here we can consider more than just the financial implications but also the physical and emotional consequences.

In addition to this, there will be effects of the bankruptcy to the economy. Some assets will have been sold on and, thus, will have been reutilised but many will not have. These will sit idle and therefore be unutilised which is a deadweight loss to the economy and society. Customers lose out too, as the industry loses competitive pressure as a corporation that is performing economically well is removed from the market. This increases the risks of collusion within the market, as there are fewer competitors, which can impact on the prices consumers end up having to pay. This is particularly true where the only remaining oil firms left within the market are state owned. Also, we must not forget the impact on Yukos Oil's suppliers here; there will be contracts that have been lost, having an impact on other businesses. Indeed, there will be some contracts, which were at the stage of partial completion where significant time and money had been invested which may have been irrecoverable if they

cannot transfer the purchase to another in time.

Finally, one should not forget or downplay the harm this caused shareholders. Put simply, shareholders will have lost the share capital that they invested in Yukos Oil. This may not seem a great deal but this has a variety of effects on the market and shareholders. Let us begin by considering the implications of this on the market. When businesses go bankrupt, this can lead to market uncertainty, particularly when they are a key part of the national infrastructure. For example, if we consider the ramifications of the bankruptcy of Lehman Brothers in the US and what then happened within the market to investor confidence.⁸² This uncertainty could also lead to a lack of investment by shareholders in companies and an unwillingness by banks to lend money to companies. This then has knock-on effects to the economy again. For the shareholder that has a diversified and wide-ranging portfolio, this loss may not be too great; however, for a shareholder who has a more limited portfolio or only invests in one company, this could have a massive impact on their savings and investments and, in turn, their future life.

Yet, it is important to reiterate that this case is a very extreme example where a corporation appears to have been systematically targeted by the government and their departmental bodies. But, nonetheless, minor breaches of rights can still have drastic consequences for corporations, the community and the people involved and, as such, this case only serves to strengthen the claims that corporations need to have their rights adequately protected. The next section of the chapter shall move on to consider why the thesis focuses its attention on the ECHR and which key ECHR and procedural rights will be discussed in the remainder of the thesis.

⁸² It is noted though, that this example is regarding financial markets that have their own unique requirements for certainty. Yet some of the certainty requirements will be the same for investors and companies within the energy market.

2.3 Why is rights protection important to cartel enforcement?

This section begins by identifying why the ECHR was chosen as opposed to the CFREU. It then identifies the key rights that the Commission's procedures shall be assessed against. Next, why and how these rights will be engaged is discussed. And finally, it illustrates why it is important for the Commission's fining process to be legally certain, clear and transparent. It also identifies why the Commission's fining process needs to be applied equally to undertakings when a breach of Article 101(1) TFEU is established. This section therefore lays the foundations for the research and demonstrates why the research questions this thesis seeks to answer are significant.

2.3.1 Why the ECHR and which rights?

The next part of this section outlines the reasons why this thesis applies the ECHR and the jurisprudence of the ECtHR to the Commission's cartel enforcement procedures instead of the EU's own CFREU and the EU courts' case law from the application of the CFREU.

The main reason for this choice stems from the nature of the ECHR. To begin with, the Convention is well-developed and has a strong body of jurisprudence behind it. Indeed, it is far greater developed than the EU's CFREU. The CFREU only came into force in 2009, whereas the ECHR has been in force since 1953. This means that the ECtHR has amassed a great deal of case law regarding the ECHR and how it is to be interpreted and applied. By having this, one can use the ECtHR's jurisprudence to analyse the Commission's cartel enforcement procedures effectively, which is something that would be difficult to do with the CFREU as information is lacking.⁸³

⁸³ Indeed, it is worth noting here that Article 52(3) of the CFREU regarding the scope of the guaranteed rights notes that 'in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention.'

Another important reason for choosing the ECHR over the CFREU is that the ECHR has a long established line of jurisprudence of offering rights protection to corporations.⁸⁴ It is acknowledged that the CFREU can also apply to corporations, but as noted before, the jurisprudence and this principle is not as well developed in its cases as it is under the ECHR. Furthermore, an undertaking that is fined by a National Competition Authority could bring a claim against the National Competition Authority based on a breach of a right contained within the Convention, as all EU Member States are signatories to the Convention.

Additionally, as identified in the aforementioned discussion – in Section 2.2 of this chapter – the importance of an independent and impartial court is imperative to ensure that the rights enshrined within the law are being applied effectively, correctly and fairly. As was seen in the case study of *Yukos Oil*, in extreme circumstances, a corporation can become a victim of a personal campaign by a State, an enforcement body or an individual. By utilising the ECHR over the CFREU, we are considering jurisprudence which is independent to that of the EU. Case law from the CFREU stems from EU courts, which – it maybe suggested – is neither impartial nor objective. Indeed, the EU Courts may be reluctant to find breaches of the CFREU if it would require a significant amendment to the Commission’s procedures in cartel enforcement cases. Therefore, by utilising ECtHR case law, it allows for an analysis of the Commission’s cartel enforcement procedures against an independent and objective standard.

Further to this, there is a requirement that the EU procedures comply with the ECHR in the future as the EU has agreed to accede to the ECHR under the Treaty of Lisbon.⁸⁵ However, given the opinion of the Court of Justice of the European

⁸⁴ For example, see *The Sunday Times* (n 8), *Funke* (n 31) and *Societe* (n 8).

⁸⁵ 2007/C 306/01 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13 December 2007 (Article 6 para 2). There has been much discussion within the literature with regards to the EU’s accession to the ECHR and the potential conflicts between the two supra-national bodies and their jurisprudence: Wolfgang Weib, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon’ (2011) 7(1) *European Constitutional Law Review* 64;

Union (CJEU), the EU's accession is currently on hold.⁸⁶ But, because Article 6(2) TEU is clearly mandatory – 'the Union shall accede to the ECHR' – it will have to come at some stage. Therefore, this means that the Commission's cartel enforcement procedures will have to comply with the rights contained within the ECHR and, thus, it is felt that the best source of rights to consider are those protected by the Convention.⁸⁷ Nonetheless, the observant will note that currently the EU is not a signatory state to the Convention and, as such, the Commission's policies do not need to comply with the Convention. Moreover, an undertaking will not have the ability to bring an action against the Commission as only signatory states can be brought before the ECtHR. Consequently, no action can lie against the Commission. This means that even if this thesis identifies issues within the Commission's fining procedures, an undertaking cannot raise a challenge before the ECtHR with regards to this.

This issue is less significant to the importance of the thesis as it first appears. As was noted previously, the EU has agreed to accede to the ECHR and therefore the Commission's procedures *will* need to comply with the Convention. This thesis therefore foreshadows how the Commission will have to behave when the ECHR accession comes about. Additionally, the EU courts regularly seek to follow the ECtHR jurisprudence and have held that the Commission's fining guidelines fall within the ambit of the ECHR.⁸⁸ In turn, this gives additional weight to the need to carry out this analysis as the EU courts seek to ensure the Commission's procedures and their rulings comply with the ECHR. Next, it is

Jörg Polakiewicz, 'EU law and the ECHR: will the European Union's accession square the circle?' (2013) 6 *European Human Rights Law Review* 592; Olivier De Schutter, 'The two Europes of Human Rights: The emerging division of tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14(3) *Columbia Journal of European Law* 509; Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos, *The EU Accession to the ECHR* (Hart Publishing 2014) and Kanstantsin Dzehtsiarou and others, *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014).

⁸⁶ Opinion 2/13 on EU Accession to the ECHR EU: C: 2014: 2454, [192] CJEU.

⁸⁷ Although it does appear that if the case were to go before the EU courts they would still prefer for the case to be framed under the CFEU as opposed to the ECHR. See the comments made by Advocate-General Kokott in the companion passage of her opinion Case C-501/11 P, *Schindler v Commission* [2013], Opinion of AG Kokott.

⁸⁸ See C-213/02 P, *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425 para 223. This is discussed at much greater length in the latter part of this chapter, where various AG opinions are used to highlight this point.

worth remembering that all EU Member States are also signatory states to the ECHR. By virtue of this, their National Competition Authorities would fall within the jurisdiction of ECHR law when they are enforcing National Competition Law. National Competition Law incorporates EU competition law and the fining procedure is often similar to that of the Commission's. Thus, the findings from this thesis will be applicable to Member States' National Competition Authorities.⁸⁹ Finally, the Commission can take over National Competition Law investigations when the case has 'community dimension'. This means that, depending on when the Commission takes over the case and who makes the final decision, that the undertakings concerned may still have an action against the National Competition Authority.

Because of the various reasons identified above, the long-established and developed ECHR and the ECtHR jurisprudence has been chosen to analyse against the Commission's cartel enforcement policies.

It has been identified that the following ECHR and procedural rights are the most pertinent to the assessment of the Commission's cartel enforcement policies:⁹⁰ legal certainty (which can be 'read in' through Article 7 ECHR),⁹¹ the right to respect for one's private and family life (his home and his correspondence – Article 8 ECHR), the right to a fair trial (Article 6 ECHR), the UK equitable doctrine of breach of confidence, the EU principles of equal treatment and legitimate expectations. It is important to be clear here that this thesis will be focusing its attention on the EU general principle, and requirement of, equal treatment and will *not* be considering Article 14 of the ECHR or Protocol 12. This is because both of these ECHR rights focus on non-discrimination, which is something that is different to equal treatment. Non-discrimination is not, per se, an issue that this thesis seeks to analyse. In this

⁸⁹ For example, see the *Menarini* judgment: *A. Menarini Diagnostics S.R.L. v Italie* (2011) App no 43509/08.

⁹⁰ These rights will be applied to the following Commission policies: the Commission's fining process, leniency policy and direct settlement procedure.

⁹¹ This will be discussed and illustrated in the latter part of this chapter.

context, the thesis considers the treatment of two undertakings in comparison to one another to identify whether they are treated equally and fairly or, where there is unequal treatment, whether there is a justification for this. Other reasons as to why the EU general principle is considered over the ECHR rights stems from the fact that Article 14 of the ECHR is a parasitic right and therefore requires another ECHR right in order for it to be engaged. Although Protocol 12 is a freestanding right, it has only been ratified by 17 Member States so it is not applicable amongst all of the signatory states to the ECHR, whereas the EU principle is applicable to all EU Member States.⁹² The reason these specific rights were chosen is because they are the most applicable to the Commission's policies and have not been thoroughly analysed in the existing literature.

2.3.2 Why and how will the chosen rights be engaged by the Commission's fining procedure?

2.3.2.1 Legal certainty

The first – and perhaps most fundamental – reason why legal certainty and equal treatment can be seen as important to EU cartel enforcement is that there is a legal *necessity* for adherence with these principles.⁹³ The Court of First Instance (CFI) has stated that when the Commission are calculating fines the assessment must 'be carried out in compliance with Community law, which includes not only the provisions of the Treaty but *also the general principles of law*'.⁹⁴ Within the EU there is a general principle of law that requires there to be legal certainty within the law.⁹⁵ This aside, one can see that the Commission views human rights as a key part of the EU legal framework and something it

⁹² Council of Europe, 'Protocol No 12 to the Convention'
<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=7/6/2009&CL=ENG>> accessed 18 November 2014.

⁹³ The EU courts have held for a long time that these rights need to be respected see Case 29/69 Case 29/69 *Stauder v City of Ulm* [1969] ECR 419 para 7 and comments made by Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 69. Additionally, The ECJ has held that the Commission's fining guidelines come within the principle of law for Article 7 (1) of the ECHR, see *Dansk* (n 88) para 223.

⁹⁴ Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567 para 151, emphasis added.

⁹⁵ Takis Tridimas, *The General Principles of EC Law* (Oxford University Press 1999) 163.

needs to adhere to when enforcing EU law.⁹⁶ For example, Baroness Ashton (First Vice President of the European Commission) has stated that she believes that ‘human rights should be the silver thread that runs through all the statements and actions of the European Union.’ Indeed, the EU has recently created the CFEU, to provide protection for human rights within the EU because they are so vital.⁹⁷

The essence of legal certainty within Europe can be derived from the general principle of legal certainty or Article 7 of the ECHR. Article 7(1) specifies that:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’

As we can identify from reading Article 7 of the ECHR, nowhere is there express mention of legal certainty. Thus, it is important that we begin by establishing why and how Article 7 includes the requirement of legal certainty.⁹⁸ It will then be necessary to show how and why Article 7 also extends to, and requires that, the penalties and guidelines used in the fining of undertakings – in cases of a breach of competition law – need to be legally certain. Finally, it is imperative to establish how the Commission’s fining procedure constitutes a *criminal sanction* to allow for the engagement of Article 7 ECHR.

⁹⁶ Catherine Ashton, ‘Remarks on the EU annual report on human rights’ (Speech delivered to European Parliament, Strasbourg, 12 June 2013) <http://europa.eu/rapid/press-release_SPEECH-13-527_en.htm> accessed 14 June 2013.

⁹⁷ Indeed, since the Charter has recently acquired its legally binding status ‘it has occupied an increasingly prominent place in law and policy-making process of the EU’ and, thus, it is now more important than ever to consider human rights issues. Butler (n 11).

⁹⁸ It is worth noting here that legal certainty is also a general principle of EU law. For a discussion of this see Tridimas (n 95) 163. Legal certainty requires that those subject to the law are able to know what the law is so as to be able to plan their actions accordingly; and with specific reference to Community legislation, it must be clear and predictable. See Joined Cases 212-17/80 *Salumi* [1981] ECR 2735 para 10

In summary, the text of Article 7 ECHR focuses on two separate requirements. The first is that a criminal conviction can only occur where the criminal offence existed at the time of the incriminating act or omission. The second is that, the penalty can be no higher than that that was applicable at the time the offence was committed.⁹⁹ It is, however, clear from the jurisprudence of the ECtHR that Article 7 of the Convention also requires that a criminal 'offence is clearly defined in law'.¹⁰⁰ Indeed, the European Court of Human Rights, hereafter the 'ECtHR' noted in *Kokkinakis* that:

'The Convention is not confined to prohibiting the retrospective application of the criminal law [...] it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) [...] it follows from this *that an offence must be clearly defined in law*'.¹⁰¹

The Court has held that this condition will be satisfied when an individual can decipher from the wording of the provision (or if need be with the courts' assistance in its interpretation) of what acts and omissions will make him liable.¹⁰² Therefore, the ECtHR has required that the law should allow an individual to be able to foresee the legal consequences that a given action may entail.¹⁰³ However, the Court has accepted that 'absolute certainty is unattainable',¹⁰⁴ as it would lead to the law being too rigid and, consequently, not flexible enough to be able to keep astride with the law's changing pace.¹⁰⁵

⁹⁹ Pieter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 651-652.

¹⁰⁰ *SW v UK* and *CR v UK* (1995) 21 EHRR 363 para 35, *Brumarescu v Romania* (2001) 33 EHRR 35 para 61 and *Veeber v Estonia (No 2)* (2004) 39 EHRR 125 paras 30-31.

¹⁰¹ *Kokkinakis v Greece* (1994) 17 EHRR 397 para 52, emphasis added.

¹⁰² *ibid.*

¹⁰³ *The Sunday Times* (n 8), para 49 and, *X Ltd and Y v UK* (1982) 28 DR 77 para 9.

¹⁰⁴ See para 35 of *R v Rimmington* [2006] 1 AC 459 discussing the ECtHR's interpretation of Article 7 ECHR.

¹⁰⁵ *The Sunday Times* (n 8) para 49 and, *X Ltd* (n 103) para 9. Indeed, the Court has noted that absolute certainty would be unobtainable in practice.

From considering the aforementioned ECtHR jurisprudence, we can identify that Article 7 of the ECHR includes a requirement for there to be legal certainty with regards to defining and setting out an offence in law.¹⁰⁶ However, Article 7 ECHR also requires that the punishment be of a criminal nature for it to apply. As a result, one may argue that when the Commission imposes fines these are *not* of a criminal nature (as it is an administrative system) consequently Article 7 of the ECHR cannot apply. For example, one may cite Article 23(5) of Regulation 1/2003, which specifically states that the Commission's decisions 'shall not be of a criminal law nature'.

However, the ECtHR has adopted an autonomous interpretation independent of the categorisation of legal proceedings under national law of the offence.¹⁰⁷ The ECtHR has embraced this approach to protect human rights effectively. If the Court were not to take an autonomous interpretation independent of the categorisation of legal proceedings under national law of the offence it could lead to rights not being adequately protected. In this regard, countries could classify offences as non-criminal to avoid the ECHR being applicable to them.¹⁰⁸ Indeed, without the Court adopting this approach, it would lead to a fractured application of rights, where Member States may contract out of rights protection by defining activities outside the scope of the protection. This would then allow for a situation where unequal treatment could occur to ECHR applicants based on the Member State that they are within. This would damage the ECHR's purpose and make it of limited use. Hence an autonomous interpretation by the Court is of utmost importance.

The ECtHR determines whether a sanction is 'criminal', within the meaning of the ECHR, by using – what are colloquially referred to as – the 'Engel-criteria'.¹⁰⁹

¹⁰⁶ This is something that various other legal scholars have also noted, for example see, Peter Whelan, 'Legal Certainty and Cartel Criminalisation within EU Member States' (2012) 71 (3) Cambridge Law Journal 677.

¹⁰⁷ For example, see *Engel v Netherlands* Series A no 2 (1976) 1 EHRR 647 and *Öztürk v Germany* (1984) 6 EHRR 409.

¹⁰⁸ Indeed, this was something noted by the ECtHR in *Engel* (n 107) para 81.

¹⁰⁹ *ibid.*

The 'Engel-criteria' consist of three separate considerations. First, the Court considers the classification of the offence under the Member State's law. Second, the nature of the offence in question is examined and, finally, the nature and degree of severity of the penalty that may be imposed is assessed.¹¹⁰ It is worth noting here that the Court holds that the second and third criteria are alternative and not necessarily cumulative,¹¹¹ although, they may be used cumulatively when neither alone is conclusive.¹¹²

One of the most important ECtHR decisions concerning the nature of competition law fines was the recent decision given by the Court in *Menarini* on the 27 September 2011.¹¹³ In this case, the Italian Competition Authority – Autorità Garante della Concorrenza e del Mercato (hereafter, the AGCM) – fined Menarini €6 million for their participation within a 'diabetes diagnostics test' cartel. Menarini sought to have the decision annulled by the Italian administrative court. The administrative court dismissed the case, as did the higher Italian courts. Thus, Menarini brought the matter before the ECtHR, claiming that as the case had not been considered by the Italian appeal courts – which had the jurisdiction to do so – there was a violation of Article 6(1) ECHR: the right to a fair trial.

The relevant part of the ECtHR judgment for this research was its statement and analysis on the nature of competition law fines. In this case, the Court confirmed that fines imposed by the Italian competition authority were penal in their nature and therefore constituted a 'criminal charge', meaning that Article 6(1) ECHR is engaged.¹¹⁴

The Court determined that the fines were of a criminal nature by applying the three 'Engel-criteria' to the circumstances in *Menarini*. First, the Court looked at

¹¹⁰ A good discussion by the ECtHR on the nature of penalties can be found in *K v Germany* (2012) ECHR 957 para 120-121.

¹¹¹ *Lutz v Germany* (1988) 10 EHRR 182 para 55.

¹¹² *Ezeh and Connors v UK* (2002) 35 EHRR 691.

¹¹³ *Menarini* (n 89).

¹¹⁴ *ibid* paras 28-45.

the classification of the infringement by the national legislation. The Italian legislation – like European legislation – classifies fines imposed by the competition authority as administrative and not criminal. However, the ECtHR did not see this as determinative and thus proceeded to consider the second criterion. Here, the Court looked at the nature of the offence itself and noted that competition law sought to preserve free market competition and that the AGCM supervises the enforcement of this.¹¹⁵ The AGCM therefore affects the general interests of society normally protected by criminal law, which had already been held to be criminal for the purposes of Article 6 ECHR in *Société Stenuit v France*.¹¹⁶ The Court also noted that the fine was essentially a punishment to deter repetition of the conduct.¹¹⁷ Thirdly, the Court assessed the nature and severity of the applied penalty. The Court felt that because of the high level of fines (€6 million euros) imposed on Menarini – and the fact that the penalty is aimed not just at punishing those who breach the law but, primarily, deterring those who committed the breach as well as deterring other undertakings from breaching the law – the fines were to be of a criminal nature.¹¹⁸

Yet, the astute will note that the *Menarini* judgment may have held that competition law fines are of criminal nature but that this was with regards to Article 6 ECHR and not Article 7 of the ECHR. Therefore, it needs to be shown that Article 7 adopts the same meaning of ‘criminal’ as that under Article 6 ECHR. The ECtHR held in the case of *Welch* that the meaning of ‘criminal’ for the purposes of Article 7 of the ECHR has to be interpreted autonomously, as is the case under Article 6 of the Convention.¹¹⁹ In this case the Court reiterated that it: ‘must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of

¹¹⁵ *ibid* para 40.

¹¹⁶ (1992) 14 EHRR 509.

¹¹⁷ *Menarini* (n 89) para 40.

¹¹⁸ *ibid* para 42.

¹¹⁹ See *Welch v UK* (1995) 20 EHRR 247 para 27.

Article 7.’¹²⁰ The Court in this case considered the relevant factors in determining whether a measure amounted to a penalty as being:

‘the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.’¹²¹

Because the ECtHR has adopted the aforementioned approaches when determining the nature of proceedings, it is argued – and accepted – within this research that the ECtHR would similarly hold that the Commission’s cartel enforcement sanctions, fall within the ambit of the ECHR. Particularly when one looks at the aims of EU competition law fines, one discovers that a key part of the fine is the deterrence of other undertakings from committing competition law breaches.¹²² This deterrence factor means that an undertaking is punished more harshly to deter other undertakings. Therefore, it falls under a ‘criminal sanction’ for the purposes of the ECHR – something the EU courts have recognised themselves.¹²³

One may wish to argue that, although the ECtHR sees competition law sanctions as of a criminal nature, the Commission and the European courts may *not* and, therefore, undertaking an analysis to ensure the Commission’s fining process complies with legal certainty is a moot point. However, this argument is profoundly flawed and the reasons for this shall now be examined.

First, EU jurisprudence has recognised the need for legal certainty within the law for a long time.¹²⁴ Indeed, we find that the European courts have held that it is important that this principle be complied with.¹²⁵ Because of this general requirement, it is argued that the need to comply with Article 7 of the ECHR is further strengthened.

¹²⁰ *ibid.*

¹²¹ *ibid* para 28.

¹²² See Case C-289/04 P, *Showa Denko v Commission* [2006] ECR I-5859 para 16, for example.

¹²³ See for example, C-199/92 P, *Hüls AG v Commission* [1999] ECR I-4287 para 149.

¹²⁴ *Salumi* (n 98).

¹²⁵ *Stauder* (n 93) para 7.

Second, following the Treaty of Lisbon there is an obligation for the EU to accede to the ECHR.¹²⁶ Therefore, it will be necessary that the Commission's processes in the criminal sphere comply with the requirements of legal certainty amongst other things.

Third, we find that the European courts view competition law rules as falling within the ambit of the ECHR. For example, the CFI in *Hüls* stated that:¹²⁷

'It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the *presumption of innocence* applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.'

Whilst it is acknowledged that this case concerned Article 6(2) ECHR, the fact that the court accepted that ECHR jurisprudence applied to an EU decision is the important factor for this research, as it means that other ECHR jurisprudence could apply too.

Fourth and finally, we find that the Advocates General are of the opinion that – although Article 23(5) of Regulation 1/2003 states that the fines are not of a criminal nature – the fines are of a criminal nature within the ambit of the ECHR. For example, Advocate General Bot's Opinion on the 26 October 2010 in Case C-352/09 P *ThyssenKrupp Nirosta v Commission* is very insightful and informative as to the beliefs and views which populate the Commission and the European courts:¹²⁸

¹²⁶ 2007/C 306/01 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13 December 2007 (Article 6 para 2).

¹²⁷ *Hüls* (n 123) para 150.

¹²⁸ Point [49].

‘While this procedure is not *stricto sensu* a criminal matter, it is none the less quasi-criminal in nature. The fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties and the Commission’s role, given its investigatory, examination and decision-making functions, is primarily one typical of criminal proceedings against undertakings. In my view, the procedure is therefore covered by ‘criminal’ within the meaning of Article 6(1) of the European Convention for the protection of human rights’

Similarly, one can also see that Advocate General Sharpston holds an analogous view to that of Advocate General Bot:¹²⁹

‘In the light of those criteria, I have 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 81(1) EC falls under the ‘criminal head’ of Article 6 ECHR as progressively defined by the European Court of Human Rights.’

These assertions help to illustrate that this is not just the perception of one individual, but also that of the community. Indeed, there are other opinions that could be offered, but it is believed that the above are sufficient to establish and support the author’s claims.¹³⁰ On this basis, it is clear that the requirements specified under Article 7 of the ECHR are viewed as applicable to the Commission’s fining process and,¹³¹ as such, it is important that this fining process adheres to these requirements, as non-compliance would mean the Commission’s procedures breach the law every time it enforces Article 101

¹²⁹ Case C-272/09 P, *KME Germany and Others v Commission* [2011], Opinion of AG Sharpston, point [64].

¹³⁰ For another example, see, the opinion of Advocate General Léger in Case C-185/95 P, *Baustahlgewebe v Commission* [1998] ECR I-8422, Opinion of AG Léger at para 31.

¹³¹ Based on the analysis, and the identification of the autonomous concept of ‘criminal’. *Welch* (n 119) paras 27-28 and *Engel* (n 107).

TFEU. For example, if the Commission's fining procedure fails to comply with legal certainty at various stages, or the disclosure by the Commission to third parties of confidential leniency documents breaches Article 8 of the ECHR, every time the Commission imposes a fine or provides third parties with access to these materials it would be breaching an undertaking's rights which are protected under the Convention.

2.3.2.2 Equal Treatment

The EU principle of equal treatment is also a prominent principle to consider here. Owing to the requirements of equal treatment, the Commission must ensure that it applies its fining policy equally to undertakings that are in the same position and, therefore, similar cases must be treated alike.¹³² It also means that 'different situations must not be treated in the same way' unless there are good reasons to align them.¹³³ The Commission may derogate from the principle of equality if it is 'objectively justifiable to do so'.¹³⁴ This is an important consideration for the Commission, as the General Court (GC) and the CJEU will consider this principle when a case is before them.¹³⁵ Thus, we can see that the Commission's fining process must comply with the requirement of equal treatment and, if it does not, the European courts will adjust the level of fines or overturn the Commission's decision. Indeed, we can see cases where the courts are willing to nullify fines when the Commission has made errors. For example, in a recent case before the CJEU,¹³⁶ the Court upheld the decision of the GC in annulling the fine imposed by the Commission. In this case it was held by both Courts that the Commission had made an error in its analysis in

¹³² Indeed, the European Courts have held that EU laws and measures must be read in the light of the principle of equal treatment: C-401/11 *Blanka Soukupová v Ministerstvo zemědělství* [2013] 223.

¹³³ Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881 para 240.

¹³⁴ *ibid.* This was also held in the following judgment of the court, which was specifically in relation to the Commission's leniency policy. Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission* (CFI, 14 December 2006) <curia.europa.eu/juris/showPdf.jsf?docid=66557&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1198709> accessed 10 March 2013 para 533.

¹³⁵ It has been held in Case 8/78 *Milac* [1978] ECR 1721 para 8, that the principle of equal treatment must be adhered to and upheld by all courts in the EU when they are enforcing EU law.

¹³⁶ See, C-287/11 P, *Commission v Aalberts Industries and Others* [2013].

regarding the parent liable for the infringements of competition law by its subsidiaries, because the Commission had failed to establish participation in a single, complex and continuous infringement.¹³⁷ Indeed, this helps illustrate the importance of exploring whether the Commission's fining process complies with the requirements of equal treatment.

2.3.2.3 Legitimate expectations, the right to respect for one's private and family life and breach of confidence

Chapter 4 of the thesis considers whether the disclosure of the Commission's leniency documentation to third parties – wishing to bring follow-on damage claims – can lead to a breach of (a) a 'legitimate expectation', (b) Article 8 of the ECHR and, (c) the equitable doctrine of breach of confidence. Chapter 4 will demonstrate how these specific rights and principles apply. However, it is worth drawing the reader's attention to a few matters in this section with regards to analysis of part (b) Article 8 ECHR. Article 8 is a 'qualified right' and therefore it will be imperative to establish first how the Commission disclosing leniency information to third parties would engage this right. The ECtHR has developed what is known as the 'standard approach' for dealing with cases that claim a breach of Articles 8 – 11 of the Convention,¹³⁸ which involves five stages. The first two stages of the 'standard approach' place the burden of proof on the claimant (of the right abused) – so in our case the undertaking that submitted the leniency documents – and the three latter stages shift this burden of proof to the State (the Commission here).

¹³⁷ The Courts did differ on their views here though. The ECJ held that the GC may have erred in law by disregarding the premise that the three companies formed a single economic entity. *ibid* para 29.

¹³⁸ Douwe Korff, 'The Standard Approach Under Articles 8-11 ECHR and Article 2 ECHR' <http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf> accessed 24 January 2014.

2.3.3 General arguments for the compliance with rights and the need of certainty and equal treatment in the Commission's cartel enforcement procedures

There are additional legitimate non-legal reasons for wishing for compliance with rights protection, certainty and equality within the Commission's fining process. These shall now be identified, outlined and discussed. The first of these is to prevent over-deterrence, which can potentially lead to a reduction in pro-competitive behaviour within the market. Second, is to prevent the perception of – or the actual occurrence of – abuses of process by the Commission. Third, is to retain the legitimacy of the underlying offence, the Commission and the fining process. Fourth, for the financial implications and harm that uncertainty in the fining process can cause. Fifth, so as to ensure that the leniency and settlement stages in the procedure are as effective as they can be and are actively utilised by undertakings. Sixth, and finally, to ensure legitimacy within the leniency and settlement stages of the fining procedure.

Uncertainty in the application of fines or the application of the fining procedure could cause concerns for undertakings, as businesses need certainty in respect of what potential punishments they can expect for infringements of competition rules.¹³⁹ Indeed, this is imperative as uncertainty may lead to an over-deterrence effect – or even an under-deterrence effect – being experienced.¹⁴⁰ Over-deterrence is detrimental to the market as it can deter legitimate business behaviour and conduct which, in turn, would lead to a

¹³⁹ One can also legitimately raise wider concerns in relation to uncertainty here. Specifically, with the definition and scope of the cartel offence under Article 101(1) TFEU. The offence itself includes 'concerted practices', which makes the conduct captured wider and more uncertain for undertakings.

¹⁴⁰ For example, John E Calfee and Richard Craswell, 'Some Effects of Uncertainty on Compliance with Legal Standards' (1984) 70(5) VLR 965 and Yannis Katsoulacos and David Ulph, 'The Welfare Effects of Legal Uncertainty and its Implications for Competition Policy Enforcement Procedures' (2010) CRESSE Working Paper V7 <<http://www.cresse.info/uploadfiles/Lagal%20Uncertainty%20and%20Optimal%20Enforcement%20Procedures%20May%202010.pdf>> accessed 9 July 2013, have found that legal uncertainty leads to over deterrence. Over-deterrence can also be referred to as a 'chilling effect', as it may chill legitimate business behaviour which is actually welfare enhancing for the economy.

reduction in competition, innovation and efficiency.¹⁴¹ This is a concern, as competition policy is there to enhance competition, innovation and efficiency and ensure that the marketplace is not being restricted in such a way as to reduce economic welfare.¹⁴² Thus, over-detering pro-competitive behaviour would undermine the policy objectives of competition law. Hence, it is important that the fining process is as certain as possible to avoid over-detering pro-competitive behaviour by undertakings.

However, it has been suggested that uncertainty in the Commission's fining process may enhance deterrence and, accordingly, it is actually beneficial to the EU cartel enforcement regime for there to be uncertainty in its fining procedure. Neelie Kroes, the former Commissioner for Competition, stated in a speech to the International Forum on European Competition Law, that she 'cannot see how allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance.'¹⁴³ Presumably what Kroes is highlighting here is that if an undertaking can conduct a cost/benefit analysis then they may well use this to decide whether to commit a breach of competition law. Indeed, the undertakings could theoretically then add this on as a business charge to consumers so the expense for any fine imposed by the Commission for being involved in a cartel is already included in the sale of the product or service.¹⁴⁴ Academic research has also highlighted that small amounts of uncertainty may

¹⁴¹ John M Connor and Robert H Lande, 'Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges' (Unpublished, September 2011) <http://works.bepress.com/robert_landel/6> accessed 21 February 2013, 6.

¹⁴² This statement is based upon comments made by Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 30. Within the EU, competition policy also seeks to enhance the well-being of its citizens, see Article 3, paragraph 1, The Treaty on European Union [2010] OJ C83/13, hereafter 'TEU'.

¹⁴³ Neelie Kroes, 'The First Hundred Days 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005' (Speech delivered to International Forum on European Competition Law, Brussels, 7 April 2005) <http://europa.eu/rapid/press-release_SPEECH-05-205_en.htm> accessed 6 July 2013.

¹⁴⁴ This would, however, require a thorough and accurate cost/benefit analysis and for other undertakings within that market to do the same and to include an additional charge for the potential fine. If not, the undertaking in question would have its prices much higher than the other firms in the market and consumers would seek to purchase the goods or services from other suppliers.

enhance deterrence.¹⁴⁵ Deterrence is important to cartel enforcement because one of its key aims is to deter future cartel conduct. For example, Werden has argued that ‘deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders’.¹⁴⁶ Thus, because of the harm caused by cartels, it is always better to deter and prevent cartels occurring in the first instance than trying to fix the harm that has occurred because of the cartel.¹⁴⁷

Based on the aforementioned comments, one may question if we should seek to ensure there is legal certainty within the Commission’s fining process. It is, however, important to remember the potential problems discussed above in regards to over-deterrence by having uncertainty within the fining process. This could mean that having uncertainty is less effective than having certainty overall. Additionally, the challenge levelled by Kroes is a questionable one. Even with clear guidelines, it is believed by the author that an undertaking would struggle to conduct an effective cost-benefit analysis for joining a cartel.

To begin with, an undertaking cannot be sure which jurisdiction’s competition authorities will investigate the cartel. If the cartel covers numerous markets, then multiple competition authorities may investigate the cartel and issue fines. As a result, to conduct an effective cost-benefit analysis, the undertaking will need to consider the fines of multiple competition authorities, which will make it harder for the undertaking to conduct a cost-benefit analysis, then would be

¹⁴⁵ Matthias Lang, ‘Legal Uncertainty - an Effective Deterrent in Competition Law?’ (Unpublished, February 2012)

<<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&ved=0CEwQFjAF&url=http%3A%2F%2Facle.uva.nl%2Fbinaries%2Fcontent%2Fassets%2Fsubsites%2Famsterdam-center-for-law--economics%2Fcr-meetings%2F2012%2Fpaper-lang-2012.pdf&ei=hDjYUcenMcWgOwWXvoDwAg&usg=AFQjCNFmyH1hYYaiv2oEFcBvpYzIKpIHxw&bv m=bv.48705608,d.d2k>> accessed 14 June 2013 and Peter Whelan ‘The *Degussa* Case’ (2008) 7(8) *Competition Law Insight* 13.

¹⁴⁶ Gregory Werden, ‘Sanctioning Cartel Activity: Let the Punishment fit the Crime’ (2009) 5(1) *Euro CJ* 26.

¹⁴⁷ For example, see John M Connor, ‘Cartel Detection and Duration Worldwide’ (2011) (2) September *CPI Antitrust Chronicle* 1.

the case if they only had to consider one competition authority's potential fines. Secondly, the undertaking will need to consider the costs of private damages actions for an effective cost-benefit analysis to be conducted. This will be more difficult for the undertaking to do effectively, as it will be harder to predict these costs.¹⁴⁸ Finally, an undertaking will also need to assess the cost of the potential harm done to its reputation and brand (image) for being in a cartel. This could be difficult to quantify effectively as it will depend substantially on the nature of the cartel and how it is reported within the media.¹⁴⁹ For these reasons, it is believed that the arguments put forward for there to be uncertainty within the fining process are not as robust or persuasive as they first appear when challenged by the counterarguments. Accordingly, it is argued in this research that uncertainty should be something we seek to avoid.

Uncertainty within the fining process – both in the sense of what fine can be imposed and the process (i.e. how the fine is calculated) – can also lead to the potential for abuse by the Commission in the application of fines on undertakings. Indeed, as the Commission has a great deal of discretion in the application of its fining policy this could lead to undertakings raising concerns against the Commission in regards to their application of the fining policy; namely, that it is not being applied fairly or equally to each firm. This in itself is not just a theoretical concern as it could potentially occur in practice. For example, the Commission could provide favourable treatment to a European firm in a cartel which involves other non-EU firms or they could provide favourable treatment to a national champion or European champion.¹⁵⁰ The Commission may never do this in practice but the potential for this to happen

¹⁴⁸ Particularly so where the US market is concerned as there is the potential for treble damages here.

¹⁴⁹ The importance and the role the media plays in affecting public opinion regarding a cartel has been discussed, with particular regards to criminal sanctions, by Stephan. See, Andreas Stephan, 'The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal' Chapter 17, *The Criminal Law of Competition in the UK and in the US: Failure and Success*, Mark Furse (eds), (Edward Elgar Publishing: Gloucestershire 2012).

¹⁵⁰ Section 3 of Chapter 3 of this thesis seeks to assess potential areas of unequal treatment in the Commission's fining process and identify whether it actually occurs in practice. In fact, it appears that there are indeed unequal applications of the fining procedures to non-national champion undertakings when compared to national champions.

when there is a lack of clarity within the procedure can still raise legitimate concerns in regards to inconsistency between cases.¹⁵¹ These potential concerns are important reasons as to why undertakings and citizens would look for the Commission's fining policy and process to be legally certain, clearly defined, transparent and applied equally to undertakings. Hence, ensuring that the Commission's fining process is certain and applied equally is of great importance.

Additional concerns may also be raised here in regards to the effect that uncertainty and unequal treatment can cause to the legitimacy of the offence that the fines are seeking to punish and deter.¹⁵² Equally, concerns can be raised in relation to its impact on the legitimacy of the Commission's power and its fining process. It is vital that the Commission's practice is seen to be fair and lawful because if citizens perceive the fines as being illegitimate this damages the underlying offence – the cartel prohibition Article 101(1) TFEU – and may lead to the enforcement of the law becoming more difficult.¹⁵³ If fines are seen as disproportionately high in regards to the offence – or that they are being calculated on an arbitrary or unfair basis – this too will lead to concerns about legitimacy of the Commission's practices as well as the cartel offence. The author has raised similar concerns in regards to leniency and the legitimacy of its use and the idea of the greater good before.¹⁵⁴ This is important as one would not wish for citizens or undertakings to see the imposition of fines on undertakings as simply a 'money making' exercise, as the cartel offence and the

¹⁵¹ This may occur unintentionally as biases could creep in within the decision making process. However, it could be that it does occur, but because the fining process affords a great deal of discretion to the Commission it is not possible for us to identify if this is occurring or not.

¹⁵² When we refer to 'legitimacy' here, we broadly mean the perception an individual has of the process or procedure in question.

¹⁵³ This could raise interesting issues about the morality of cartels and about the offence which the fines are seeking to punish and deter. A good discussion of the necessity for legitimacy within EU cartel law can be found in Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing 2010).

¹⁵⁴ Scott Summers, 'What should the Dishonesty Element of the UK Cartel Offence be Replaced with?' [2012] 1 Comp law 61.

Commission would lose their credibility.¹⁵⁵ All of the aforementioned points regarding legitimacy relate to the perception of *fairness* and *justice* within the law. They are broad concepts and ideas but, nevertheless, are still significant for citizens and undertakings. Indeed, they are fundamental principles which the law is based upon and thus must adhere to. Therefore, it is essential that we maintain legitimacy within the Commission's practices and within Article 101 TFEU; by the Commission being seen to apply its fining policy consistently and equally to all undertakings as well as the fining process being as transparent and legally certain as possible. This discussion of legitimacy has again highlighted the importance for the need of certainty and equal treatment within the fining process.

The next concern that shall be discussed in relation to the necessity for legal certainty and equal treatment in the Commission's fining process is the potential cost implications for undertakings. By having unclear procedures it can lead to undertakings having to spend excessive sums of money on legal advice in an attempt to identify how they – as undertakings – will be treated after being investigated and what the punishment (fine) is likely to be. This will have a direct effect on the undertaking's capital in a variety of ways. Firstly, it means funds are spent on legal advice instead of being used more effectively by the undertaking, which is detrimental to the economy. For instance, this capital could have been better invested in, for example, research and development, employees or products. Secondly, the uncertainty which stems from the undertaking not knowing what will happen to it transfers to market uncertainty, which is detrimental for business, share prices and can cause more instability in a potentially fragile market. What results is a deadweight loss to the economy which is detrimental for both the consumers and the firm. Hence, what we see here is another essential reason for us to seek legal certainty within the Commission's fining process, so that undertakings can utilise their capital more

¹⁵⁵ This could also affect compliance with the law. For example see, Jonathan Jackson et al, 'Why do people comply with the law? Legitimacy and the influence of legal institutions' (2012) 52(6) BJC 1051.

effectively when a breach of Article 101(1) TFEU is found. By enabling the undertaking to have a greater degree of certainty, this should result in a transfer of benefits for the economy and thus consumers.¹⁵⁶

The Commission's fining process includes two stages that can lead to – or allow for – a reduction in fine; these are the leniency (eighth) stage and the settlement (ninth) stage. As these stages form part of the Commission's overall fining procedure, they are also required to comply with legal certainty and to be applied fairly. There are, however, additional reasons why we would want these particular stages within the fining procedure to comply with rights protection, legal certainty and equal treatment. Indeed, for the fining procedure as a whole to be as effective as possible, it is necessary that there is compliance, certainty and equal treatment within these two stages of the fining procedure.

Let us begin by considering the Commission's leniency stage in the fining procedure. This stage allows the Commission to offer an undertaking immunity or partial-immunity from penalties for reporting, cooperating and assisting the Commission in its antitrust investigation.¹⁵⁷ Leniency is incredibly important and beneficial as it helps the Commission detect, destabilise and deter cartels.¹⁵⁸ However, to achieve these aims it is a necessary requirement that the leniency programme is clear, transparent and certain in its operation. The reasons for this will now be identified and explained.

To begin with, if an undertaking cannot be certain of the way the leniency programme will operate or be applied, it is likely they will not be encouraged to report a cartel. Indeed, Hansen et al note that legal certainty plays a key role in leniency applications as '*applications are predicated on legal certainty and on*

¹⁵⁶ Again, it is important here to remember that the EU seeks to enhance the well-being of EU citizens: Article 3, paragraph 1 TEU.

¹⁵⁷ Wouter P Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30(1) World Competition 25.

¹⁵⁸ Panayiotis Agisilaou, 'Collusion in Industrial Economics and Optimally Designed Leniency Programmes – A Survey' (2013) CCP Working Paper 13-3 <competitionpolicy.ac.uk/documents/107435/107587/13-3+Agisilaou.pdf/9b87613a-fb52-459f-8e9c-1eea7879547f> accessed 2 February 2013, 3.

net global benefits'.¹⁵⁹ This is because undertakings prefer some form of certainty in the way they will be treated, how the case will be handled and what they are required to do. If undertakings do not receive this then it is likely that the cartel will go unreported and, potentially, the cartel will continue undetected and lead to further harm to society. Indeed, what we can see from the history of the Commission's leniency programme is that when there was not a very clear or transparent process there was a lack of applications by undertakings under the Leniency Notice.¹⁶⁰ For example, under the Commission's 1996 Leniency Notice there was a *severe* lack of reporting and most of the cases undertaken by the Commission were identified by the US leniency programme and not its own.¹⁶¹ This obviously has an effect on the Commission's ability to detect, deter and investigate cartels. As these endeavours (detection, deterrence and investigation) are very important to the success of the Commission's cartel enforcement programme, one can see that it is crucial that the Commission ensures this stage is clear and applied fairly so as to encourage undertakings to report cartel behaviour to the Commission, as well as deter undertakings from becoming involved in a cartel in the first instance and, finally, so as to destabilise any current cartels.¹⁶²

This potential problem with a lack of certainty within the operation and application of the Commission's leniency programme has been heightened recently when the Commission withdrew the conditional immunity it had given to the undertaking Deltafina.¹⁶³ This meant that Deltafina received a €30 million fine for its failure to cooperate with the Commission. This in itself could potentially have the knock-on effect of leading to undertakings worrying that

¹⁵⁹ Marc Hansen et al, 'Leniency Programmes and Incentives: Is there room for improvement?' (Presentation at the ICN Cartel Workshop, Bruges, October 2011) <www.lw.com/presentations/leniency-programmes-and-incentives> accessed 18 March 2013. Emphasis added.

¹⁶⁰ Andreas Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) 5(3) *Journal of Competition Law & Economics* 537.

¹⁶¹ *ibid.*

¹⁶² This is owing to the fact that cartel participants will be unsure when a member of the cartel will renege on the agreement and report the cartel to attempt to receive immunity.

¹⁶³ C-578/11 P, *Deltafina v Commission* [2014].

their conditional immunity may be withdrawn by the Commission. It is, however, worth us now considering the facts of this case to understand why the Commission withdrew Deltafina's immunity and why the CJEU upheld the Commission's decision to do so. The question that needs to be answered is: "what did Deltafina do that amounted to a failure to cooperate with the Commission – which was so bad that it resulted in the conditional immunity being withdrawn?"

In this case, Deltafina informed the National Association of Italian Tobacco Processors of its cooperation with the Commission prior to the Commission conducting its dawn raids. The issue here was that the Commission had informed Deltafina to keep its leniency application secret so that the dawn raids and investigation would be as fruitful for the Commission as possible. By not keeping its application for leniency a secret, as it was required to do so by the Commission, it in effect informed other members of the cartel that the Commission would be conducting an investigation into their cartel. This offered the other undertakings the opportunity to dispose of evidence and conceal parts of the cartel. The Court noted that under the 2002 Leniency Notice an undertaking must 'fully' cooperate with the Commission on a 'continuous basis', which it held Deltafina had not done in this case, because of its disclosure to other members of the cartels. Thus, the Court affirmed the Commission's first ever decision to withdraw immunity from fines for a firm that was the initial undertaking to bring evidence of a cartel to the Commission.¹⁶⁴

Whilst this could cause undertakings to worry about the potential for the Commission to withdraw immunity and in turn, discourage leniency applications, it is unlikely in practice to lead to this. Undertakings are more likely

¹⁶⁴ Jones Day, Bernard Amory and Cecelia Kye, 'European Court of Justice upholds European Commission's first withdrawal of immunity for cartel whistleblower but finds General Court failed to timely adjudicate' (*Lexology*, 25 July 2014) <http://www.lexology.com/library/detail.aspx?g=95bb2d5f-0717-48f2-90f8-362f6a384056&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2014-08-01&utm_term=> accessed 27 July 2014.

to appreciate that this is a unique case and is the first time that the Commission has ever withdrawn immunity. Indeed, the only reason the Commission did so in this case was because Deltafina had not complied with the requirements placed on it by the Commission. Therefore, this case acts more as a timely reminder to undertakings that they must continue to fully cooperate with the Commission throughout its investigation and comply with the requirements placed upon it, or they may lose their conditional immunity.

By facilitating legal certainty within the leniency stage, it enables leniency to be as effective a tool as it can possibly be. This therefore means that the Commission can detect cartels at its most effective level. The other options for detecting cartels – market inquiries, customer complaints and market investigations – never result in the same cost efficiency and effectiveness as leniency does. Under the leniency programme, undertakings report the cartel (thus they assist in its detection) and provide a substantial amount of evidence to the Commission regarding the cartel, which helps the Commission save on the resources it would have had to use in attempting to identify and detect a cartel.¹⁶⁵ Hence, making leniency as effective as possible via adhering to legal certainty means that the Commission can focus and utilise its resources better. It has been identified that by having legal certainty within the leniency stage of fining process it should help encourage undertakings that are involved in a cartel to report that cartel because leniency destabilises the cartel and an undertaking knows how it will be treated and what to expect.

Let us now consider the settlement stage in the Commission's fining procedure and why we would seek for this to also be certain. The Commission's settlement procedure was adopted in 2008 and was designed to speed up the procedure in

¹⁶⁵ Although, it is important that the Commission still corroborates the information provided by the undertaking. For an example of the consequences of not doing so, one can consider the collapse of the Office of Fair Trading's case against the British Airways directors (*R v Burns and Others* [2010] EWCA Crim 1148).

cartel decisions.¹⁶⁶ The procedure itself is still very much in its infancy but, through the Commission and undertakings settling cases, various savings are made for both parties. For example, it saves the Commission and undertakings costs in the monetary sense as well as in time as they do not need to go through the often lengthy and costly court proceedings.¹⁶⁷ However, to achieve the procedural benefits and cost benefits of settlement, it is and will be important that this stage in the fining procedure is clear for undertakings to understand; as if not, undertakings will be unlikely to request to settle the case. The reasons why this is the case will now be discussed.

Again, like with leniency, for the benefits of the settlement procedure to be achieved it will be vital that this stage is also clear and transparent so that an undertaking understands how this stage will apply. Undertakings are unlikely to request to use settlements if they do not understand what they are required to do or what they have to agree to in order to qualify for this. If the undertaking cannot make sense of this stage early on within the Commission's proceedings then it means that the cost savings and efficiencies of this stage will not be achieved to their potential maximum and, as such, there will be a deadweight loss to both parties. Additionally, if an undertaking cannot understand how this stage in the fining procedure works, they may not be able to identify or fully understand the potential benefits of engaging with the Commission and utilising this stage and, as such, again an opportunity is missed simply owing to a lack of understanding of the procedure. Of course, this in itself can be remedied by providing clarity within the procedure and guidance on it. Indeed, perhaps this is part of the reason there has been such a slow uptake by undertakings to request to use this procedure. The cost benefits to the Commission in ensuring that this stage is used where possible cannot be emphasised enough.

¹⁶⁶ European Commission, 'Cartel Case Settlement'
<http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html
> accessed 13 September 2014.

¹⁶⁷ It should be noted, however, that agreeing to settle does not remove an undertaking's right to appeal the settlement decision to the EU courts.

Another reason that clarity within the operation and application of settlements (and leniency in this instance) will be beneficial is that it helps undertakings and – more generally – the wider public at large to understand why certain companies are treated differently to others, and why in some cases companies are even rewarded with immunity for reporting illegal behaviour that they have partaken in. This is key as it helps to encourage good business behaviour by identifying why these stages are required and it also helps bring legitimacy to these stages in the fining process. This is because undertakings and the general public are informed (through clarity and transparency of these stages) why they are necessary and how they are applied fairly. In addition, by having certainty, transparency and clarity it will help quell claims of unequal treatment in the application of these stages by the Commission, as it will be clear to undertakings why they have been treated differently, as the stages clearly explain why this is the case.

As we can see from the above discussion, it is imperative that the settlement stage is clear, certain and applied fairly and transparently so that the cost benefits of the utilisation of a settlement procedure come to fruition, that the application of this stage is seen as legitimate and that it is fairly applied.

This section of the chapter has identified why procedural rights, legal certainty and equal treatment are relevant considerations to the Commission's fining process. It has established that these principles need to be complied with for a variety of reasons, namely:

1. Because legal certainty and equal treatment are fundamental legal principles and hence are required to be complied with;
2. To prevent over-deterrence, which can lead to a reduction in pro-competitive behaviour within the market which competition law seeks to promote;
3. To prevent the perception of – or the actual occurrence of – abuses of process by the Commission;

4. To retain the legitimacy of the underlying offence, the Commission and the fining process;
5. For the financial implications and harm that uncertainty in the fining process can cause;
6. To ensure that the leniency and settlement stages in the procedure are as effective as they can be and are actively utilised by undertakings;
7. To ensure legitimacy in the leniency and settlement stages of the fining procedure.

Because of the aforementioned reasons, ensuring that the Commission's fining process complies with these principles is essential.

2.4 Conclusion

There has been considerable interest in recent years regarding procedural rights and rights protection within the area of EU Competition Law.¹⁶⁸ This chapter has furthered the discussion of this by considering a variety of questions within this topic area, which have previously not been effectively addressed within the literature. These contributions shall now be identified, as shall the main conclusions of the chapter.

The chapter began by considering whether corporations currently qualify for rights protection under the ECHR. The *Travaux Préparatoires* were consulted to illustrate how corporations were always envisaged by the drafters to qualify for rights protection under the Convention. Next, the chapter engaged in the highly topical discussion of whether corporations should qualify for rights protection under the ECHR. First, the arguments against corporations being granted rights protection were discussed and analysed. This was so the fallacies and weakness within these could be identified. A variety of arguments were examined which focused their attention on the 'extension', 'conceptual', 'flood gate' and 'selective rights only' arguments. These were identified as the standard 'categories of arguments' which were forwarded against corporations qualifying for rights protection. However, the flaws with these arguments were identified and illustrated to the reader. A notable criticism was the selective-right argument, which appeared to lead the strongest claim against corporations qualifying for protection. Nonetheless, by using an analogy with the TFEU it was possible to illustrate that this challenge was not as strong as it first appeared. Indeed, after this a series of counter arguments for corporations qualifying for rights protection were forwarded. These primarily comprised of illustrations and arguments as to why corporations need rights protection. This included a novel argument that had not been previous seen or discussed in the literature; namely, that by corporations not qualifying for the 'standard right protection'

¹⁶⁸ For example, the June 2014 CPI Antitrust Chronicle (Spring 2014, Vol 6 No 1) focused solely on due process rights.

this would lead to issues regarding dual prosecution requirements. This section was concluded with an analysis of a variety of cases to illustrate in practice why rights protection is necessary. This included a detailed discussion of the seminal case of *Yukos Oil*. This case clearly identified that without sufficient rights protection at an international level, serious rights abuses can occur which have further reaching consequences than just to the firm. For example, the local economy and community can also suffer when a corporation's rights are abused.

The chapter then shifted its focus and moved on to explaining the significance of the remainder of the research that this thesis conducts and why the research questions were specified as they were. This section begun by explaining the importance of the ECHR in the context of EU Competition Law. Then, the reason the ECHR was chosen to form the foundation for the assessment of the Commission's cartel enforcement procedures against was explained; namely, because it is has a well-developed body of jurisprudence and is a truly independent body.¹⁶⁹

The chapter concluded by demonstrating why there is a necessity for compliance with rights protection, legal certainty and equal application in the Commission's fining process. It was identified that this was not merely because of the legal requirements for compliance but for other additional non-legal benefits that can ensue from compliance with the principles of legal certainty and equal treatment.

Now that the foundation questions of the thesis have been answered – namely, why corporations need rights protection and why the ECHR is chosen and is applicable to the Commission's cartel enforcement policies – and their significance established, the remainder of the thesis will take each of the

¹⁶⁹ As independent as one can be. Even the ECtHR seems restrained in some respects, for instance, the fact that its continued existence is based on the consent of the signatory parties to abide by the Courts decisions and not to withdraw from the Convention. For a practical example of what seems to be a restrained approach in parts by the Court see the *Yukos Oil* judgment.

chosen rights and legal principles and apply them to the three cartel enforcement procedures of the Commission. First, Chapter 3 will consider legal certainty and equal treatment concerns alongside the Commission's current fining policy. Chapter 4 analyses disclosure of confidential leniency documents in follow-on damage cases beside an undertakings legitimate expectation of non-disclosure, the UK equitable doctrine of breach of confidence and the right to respect for private and family life. Finally, Chapter 5 concludes by analysing the Commission's direct settlement procedure and the US system of plea bargaining, in competition law cases, against the right to a fair trial so as to identify if the EU can enhance its direct settlement procedure from the US approach or implement a plea bargaining procedure.

Chapter 3: Evaluating legal certainty and equal treatment within the European Commission's fining policy for cartels¹

3.1 Introduction

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)² prohibits, inter alia, agreements between competitors, concerted practices and decisions of associations of undertakings that fix prices, restrict output, share markets or rig bids.³ An undertaking that violates this provision may be liable for fines of up to ten percent of its annual worldwide turnover.⁴ The European Commission (hereafter, 'the Commission') enforces Article 101 TFEU and has the power to impose corporate fines for breaches of Article 101(1) TFEU.⁵ The fines imposed by the Commission have been substantial. The highest fine the Commission has imposed on an undertaking is over €896 million and the largest fine imposed on a collective cartel is over €1.3 billion.⁶ Given the extensiveness of these fines, it is important that the Commission decides and imposes fines under a clear and transparent process that is applied equally to each undertaking. Indeed, there are general principles under EU law that require certainty and the equal application of the law. Legal certainty, for example, requires that 'those subject to the law [...] know what the law is so as to be able

¹ A draft of Chapter 3 was presented at the 8th Competition Law and Economics European Network ('CLEEN') Workshop in Norwich on the 10th June 2014. The feedback and comments from the attendees of the conference is greatly appreciated.

² [2008] OJ C115/47.

³ Article 101 TFEU only applies when the agreement affects trade between Member States.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1, Article 23 (2).

⁵ *ibid.*

⁶ Commission, 'Cartels - Leniency' <ec.europa.eu/competition/cartels/leniency/leniency.html> accessed 10 August 2015.

to plan their actions according'.⁷ On the other hand, equal treatment requires that undertakings be treated 'equally before the law'.⁸ Currently, the Commission's fining procedure may fall foul of these requirements so it is important to consider whether this is the case. In recent years, it has been suggested that fines imposed on undertakings have been increasing,⁹ so concerns regarding a clear, transparent and fairly applied fining process have become progressively more significant. Indeed, this suggestion of an increase in fining by the Commission has even led some commentators to question the Commission's fining procedures.¹⁰ For these reasons, this chapter aims to answer the questions (a) as to whether the Commission's fining procedure complies with the requirements of legal certainty and (b) whether the Commission applies its fining policy equally to all undertakings.

Research has been conducted into the Commission's fining procedure, often with particular focus being given to the optimal level of fines or to the ways of achieving the best deterrent effect.¹¹ Empirical analysis of the Commission's fining decisions has also been undertaken in the literature. Geradin and Henry have conducted a review of the EU fining policy under the old 1998 Fining

⁷ Takis Tridimas, *The General Principles of EC Law* (OUP, 1999) 163. See also, Joined Cases 212-17/80 *Salumi* [1981] ECR 2735.

⁸ Tridimas *ibid* 40. See also, Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881.

⁹ This is debatable; Veljanovski has found that in some instances fines are higher and in others they are lower. Cento Veljanovski, 'Are European Cartel Fines Ridiculously High?' (2012) Case Associates - Case Note

<<http://www.casecon.com/data/pdfs/Casenote63HighfinesFeb2012.pdf>> accessed 30 May 2013. Figures available from the Commission show fining levels have fluctuated between 2008 and 2015. Commission, 'Cartel Statistics'

<<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 10 August 2015.

¹⁰ Charles Forelle, 'EU Cartel Fines Elicit Human-Rights Argument' *The Wall Street Journal* (May 16 2011) <<http://online.wsj.com/article/SB10001424052748704681904576319442582839696-search.html>> accessed 31 May 2013, suggesting that 'the EU's procedures are so flawed it should not be permitted to dispense such big penalties at all'.

¹¹ For example, Wouter P Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) *World Competition* 183, Wernhard Moschel, 'Fines in European competition law' (2011) 32(7) *ECLR* 369 and Cento Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence' (2007) 30(1) *World Competition* 65.

Guidelines.¹² By considering the cases under the 1998 Guidelines they were able to make various observations, including: that most infringements were categorised as 'severe' or 'very severe', were of medium or long duration and, that the most aggravating factor for fining was being a ring leader. Others have assessed specific Commission and court decisions in an attempt to identify the extent to which deterrence is used in the setting of fines.¹³ In more recent years, others have analysed cases under the updated 2006 Fining Guidelines.¹⁴ For example, Veljanovski has undertaken an empirical analysis of twenty-two cartel-fining decisions handed down by the Commission.¹⁵ He identified a number of results, but of particular relevance for this research is the finding that the Commission's non-confidential published decisions often redact key information on the fining process. Connor has conducted research into whether the Commission has become more severe in its punishment of cartelists since the introduction of the 2006 Fining Guidelines.¹⁶ He found that the severity of cartel fines is more than five times higher than those calculated under the previous 1998 Guidelines, that the frequency and size of recidivism discounts had increased under these new Guidelines and that the Commission had been inconsistent in the application of the recidivism penalties in the manner promised in its 2006 Guidelines.¹⁷ Both of these pieces of research highlight what appears to be a lack of transparency in the Commission's fining procedure and suggests also that the Commission is not following its Fining Guidelines correctly. This therefore raises concerns with regards to legal certainty and the equal treatment of undertakings.

¹² Damien Geradin and David Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments' (2005) 1(2) ECJ 401.

¹³ Morten Hviid and Andreas Stephan, 'The Graphite Electrodes cartel: fines which deter?' Chapter 5, *Cases in European Competition Policy: The Economic Analysis*, Bruce Lyons (eds), (Cambridge University Press: Cambridge 2009).

¹⁴ Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Guidelines on fining undertakings)' [2006] OJ C210/02.

¹⁵ Cento Veljanovski, 'European Cartel Fines under the 2006 Penalty Guidelines: A Statistical Analysis' (2010) Case Associates
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723843> accessed 27 May 2013.

¹⁶ John M Connor, 'Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines' (2011) 32(1) ECLR 27.

¹⁷ Particularly, the Commission had been lenient towards undertakings by failing to take into account numerous previous violations.

Much of the research conducted into fines mentions certainty concerns within the Fining Guidelines and procedure, but fails to analyse these concerns in detail or assess the legal implications of this. There are, however, some exceptions to this. Torre, for example, has analysed each step in the 2006 Fining Guidelines and identified that non-retrospectivity is not breached by their application to cases prior to the enactment of the Guidelines. However, Torre did not consider other legal certainty and equal treatment concerns, which is one area where this chapter shall differ.¹⁸ Hawk and Nathalie have looked broadly at legal certainty concerns in relation to Article 101 TFEU but have not analysed the fining process itself.¹⁹ David has discussed some of the legal certainty concerns under the 2006 Fining Guidelines such as the areas of vagueness contained in parts of the Guidelines, the Commission's discretion and the need to achieve deterrence in a particular case.²⁰ He has not analysed every stage of the fining process in detail, nor has he assessed whether these concerns occur in practice. Scordamaglia-Tousis has considered legal certainty (in the context of foreseeability), non-retroactivity and *ne bis in idem* with regards to the Commission's 2006 Fining Guidelines.²¹ He identified that the 2006 Guidelines offer a departure from the old system of 'transparent unpredictability' and advocates that the Court provides clearer theoretical foundation for predictability.²² He also found that the Commission's current procedure does not manifestly depart from the European Convention on Human Rights,²³ hereafter 'the ECHR' minimum foreseeability threshold.²⁴ This chapter improves upon the research that Scordamaglia-Tousis has conducted by

¹⁸ Fernando C D L Torre, 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice' (2010) 33(3) *World Competition* 359.

¹⁹ Barry E Hawk and Denaeijer Nathalie, 'The Development of Articles 81 and 82: Legal Certainty' in Claus-Dieter Ehlermann & Isabela Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart Publishing: Oxford 2001) 129.

²⁰ Eric David, 'Chapter 8 – Tools for an Optimal Enforcement of European Antitrust Law: Examples of Guidelines on the Method of Setting Fines and on Commitment Proceedings. Is the European Commission Right?' in Ioannis Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International BV: Netherlands 2012) 139.

²¹ Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law International 2013).

²² *ibid* 419.

²³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

²⁴ Scordamaglia-Tousis (n 21) 419.

considering specific stages in the Commission's Fining Guidelines, the ten percent cap, the Commission's discretion within the application of the Guidelines, and whether the Guidelines are applied equally to undertakings in practice.

There has also been a lack of analysis within the literature of the concerns regarding equal treatment of undertakings in the application of the Commission's fining process.²⁵ This is an important consideration, given that the aforementioned literature appears to illustrate that the Commission is not following its Guidelines nor being very transparent with how it reaches its decisions.²⁶ The opportunity to assess whether the Commission has applied its fining policy equally is often available with the data collected by researchers but, unfortunately, a lack of analysis has been conducted into whether the Commission applies its policy equally to undertakings.²⁷ Gilliams has discussed competition law fines and the requirement of proportionality, which in parts incorporates the necessity for equality.²⁸ He identified the problem between balancing the need for proportionality with deterrence within fining undertakings.²⁹ However, there have been some studies considering equality within the Commission's fining procedure. Voss has examined the Commission's fining procedure and whether the principle of equality acts as a limit to the Commission's discretion.³⁰ She identified that the principle of equality has 'very

²⁵ Stephan has touched upon the differences in treatment of undertakings regarding the 'inability to pay discounts' briefly in Andreas Stephan, 'The bankruptcy wildcard in cartel cases' (2006) *Journal of Business Law* 510, 526-527.

²⁶ Veljanovski (n 15) and Connor (n 16).

²⁷ For example of opportunities for this analysis to be considered see, Cento Veljanovski, 'European Cartel Fines under the 2006 Penalty Guidelines: A Statistical Analysis' (2010) *Case Associates* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723843> accessed 27 May 2013, John M Connor, 'Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines' (2011) 32(1) *ECLR* 27, Damien Geradin and David Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments' (2005) 1(2) *ECJ* 401.

²⁸ Hans Gilliams, 'Proportionality of Fines for Infringements of Competition Law' in Dirk Arts and others (eds), *Liber Amicorum Jacques Steenbergen, mundi et Eurpae civil* (Larcier, 2014) and Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37(4) *World Competition* 435.

²⁹ This is something that is similarly problematic when balancing equality and deterrence.

³⁰ Katharina Voss, 'The Principle of Equality: A Limit to the Commission's Discretion in EU Competition Law Enforcement' (2013) *Global Antitrust Review* 149.

little influence' on the Commission's actions.³¹ This chapter goes further and considers specific stages within the Commission's Fining Guidelines to identify potential equality problems. Meyring has analysed one of the recent European General Court's (GC) judgments and identified that the Court is not ensuring consistency in the application of the Commission's Fining Guidelines.³² Thus, there is a clear gap here that warrants investigation. This chapter seeks to address this gap within the literature by assessing whether the Commission's fining process complies with the requirements of legal certainty and of equal treatment. To enable this research question to be answered and analysed effectively, the chapter is split into two sections.

The chapter begins by analysing the Commission's fining process so as to establish whether it complies with the principle of legal certainty. It achieves this analysis by assessing (a) the use of non-exhaustive lists, (b) the 'specific deterrence' stage, and (c) the ten percent cap. Alongside this assessment, an examination of the Commission's discretion is pursued, regarding what the benefits and problems with this discretion are and whether the Commission's fining process breaches Article 7 of the ECHR. After the potential legal certainty concerns within the Commission's fining process have been discussed, the chapter moves on to assess and analyse whether the Commission applies its fining process equally to all undertakings. It achieves this by considering the Commission's application of the Fining Guidelines to undertakings, specifically: (a) the inability to pay discount (hereafter, 'ITP') stage, (b) the nationality of an undertaking and (c) National Champions (hereafter, 'NC').

³¹ *ibid.*

³² Bernd Meyring, 'How much Consistency is Required for Cartel Fines?' (2013) 4(2) *Journal of European Competition Law & Practice* 142.

3.2 Is the EU cartel fining policy consistent with legal certainty?

As established in the previous chapter, it will be important that the Commission's policies comply with the rights enshrined in the ECHR, particularly legal certainty. This part of the chapter proceeds to analyse the Commission's fining process to identify whether it complies with the principle of legal certainty. Before commencing this analysis the Commission's fining procedure shall be examined and explained.

The Commission's fining policy is set out in a variety of policy documents. These documents are known as 'soft law' as they are Guidelines that aid the Commission in its interpretation and enforcement of the law. The Fining Guidelines themselves lay down the procedure for the fining process but should not be consulted alone, as they do not cover all of the Commission's policies in-depth.³³ One should also consult the Commission's leniency notice,³⁴ direct settlement procedure³⁵ and Council Regulation No 1/2003 documentation to fully understand the fining process.

The Commission published its original Guidelines on the method of setting fines on the 14 January 1998.³⁶ Prior to the introduction of the Guidelines, a variety of judgments by the EU courts highlighted the desirability of the Commission making its methods of calculating and enforcing fines more transparent.³⁷ Thus, the 1998 Guidelines were published to ensure that transparency and

³³ Commission, (n 14).

³⁴ Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency in cartel cases)' [2006] OJ C298/17.

³⁵ Commission, 'Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' [2008] OJ C167/1.

³⁶ Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' [1998] OJ C9/3. Prior to this, the fines were calculated without any Guidelines. The operation of this system led to a variety of concerns being raised against the Commission. See Bael for a discussion of these concerns: Ivo Van Bael, 'Fining a la carte: the lottery of the EU competition law' (1995) 16(4) ECLR 237.

³⁷ For example, see Case T-309/94 *KPN v Commission* [1998] II-1007 paras 77 and 78.

impartiality ensued in the Commission's decisions.³⁸ These Guidelines were then replaced with new Guidelines in 2006 to further develop this policy and to provide a greater degree of certainty for undertakings.

The Commission's leniency policy was introduced in its first incarnation in 1996, but was amended in 2002 and again in 2006 to provide a greater degree of certainty for undertakings in how leniency is awarded by the Commission.

On the 30 June 2008, the Commission introduced its settlement procedure.³⁹ This procedure allows undertakings to settle their case with the Commission and receive a reduction in fine for doing so. The settlement procedure helps speed up cases and reduces costs for the Commission and undertakings by allowing a streamlined approach to be taken.⁴⁰

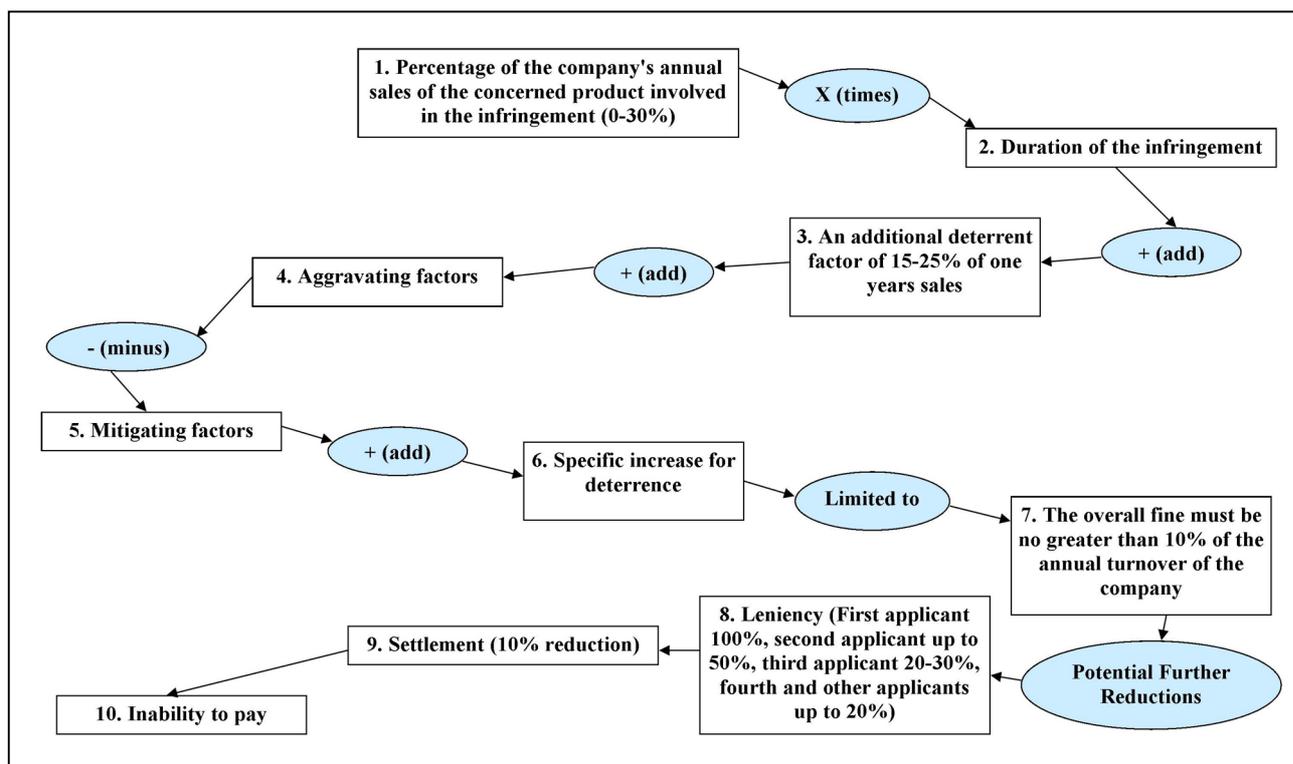
Diagram 3.1 below and Table Apen.1 in the Annex illustrates the method the Commission utilises when calculating fines for competition law breaches.

³⁸ Commission (n 14) para 3.

³⁹ Commission, 'Antitrust: Commission introduces settlement procedure for cartels' Commission press release (20 June 2008) <http://europa.eu/rapid/press-release_IP-08-1056_en.htm?locale=en> accessed 2 June 2013.

⁴⁰ Commission, 'Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions' <http://europa.eu/rapid/press-release_MEMO-08-458_en.htm> accessed 24 June 2013.

Diagram 3.1 Summary of the 2006 Commission Fining Process



The Commission has a great deal of discretion in the setting of a fine. Indeed, if one looks at the Fining Guidelines themselves, it clearly states that:

‘In exercising its power to impose such fines, the Commission enjoys *a wide margin of discretion* within the limits set by Regulation No 1/2003.’⁴¹

Discretion is beneficial in relation to flexibility to punish undertakings effectively for competition law breaches as, by having this flexibility, the Commission can take a variety of factors into consideration. For example, some undertakings’ competition law breaches may be more heinous than others and thus worthy of a harsher punishment, such as where the undertaking has previously engaged in a cartel or was a ringleader of the cartel and coerced other undertakings to join the cartel. However, by having this flexibility it also means that there is an

⁴¹ Commission (n 14) para 2, emphasis added.

inevitable trade-off with certainty for undertakings. This is because, to allow for this flexibility, there has to be a wider margin of appreciation for the Commission in the Guidelines than would otherwise be the case where the Guidelines were more restrictive. The important question here is whether the amount of discretion that the Commission has within the fining process causes enough of a challenge to legal certainty to raise legitimate concerns under Article 7 ECHR. To enable this analysis to be conducted effectively, the research shall focus on three specific areas of the Commission's fining process. First, the use of non-exhaustive lists shall be considered and assessed. Then, the calculation of the criterion of 'specific deterrence' will be analysed; and finally, the use of a maximum ten percent cap is considered alongside the Commission's discretion to impose a fine under this cap.

The empirical analysis within this section and the following section uses a variety of data sources. The data is predominately drawn from the Global Competition Review's (GCR) raw data set, 'GCR EU Cartel Survey', which contains information on cartels from January 2005 - July 2012.⁴² However, it also consults the Commission's non-official web versions of the decisions and GC and European Court of Justice (ECJ) decisions. Additionally, as Article 7 of the ECHR is being considered, cases from the European Court of Human Rights (ECtHR) will be assessed alongside other national cases that consider the ECHR or the national legislative equivalent.

3.2.1 The use of non-exhaustive lists

Within its fining process, the Commission utilises a non-exhaustive list of aggravating⁴³ and mitigating⁴⁴ factors that can lead the Commission to increase or reduce the fine it imposes on an undertaking.⁴⁵

⁴² GCR, 'GCR EU Cartel survey' <<http://globalcompetitionreview.com/indepth/444/eu-cartel-survey/>> accessed 12 July 2013.

⁴³ The aggregating factors listed in the Guidelines include the following: where an undertaking continues or repeats the same or similar infringement, where an undertaking refuses to cooperate or is obstructive and, finally, where the undertaking was the leader/instigator or was a coercer in the cartel.

Non-exhaustive lists by their very nature allow other factors – which are not listed – to be considered, owing to the fact that the list does not contain all the potential factors that can be considered by the Commission. Therefore, these lists can be seen as a form of guidance on likely (aggravating or mitigating) factors that the Commission can or could consider in its fining decision. By utilising a non-exhaustive list, it allows the Commission a degree of flexibility in its fining process so that they can consider factors on a case-by-case basis, which would not be possible if these lists were exhaustive. This flexibility is important, as each cartel’s situation and circumstances can be very different, and what may need to be considered in one cartel may not be relevant or important in another cartel decision.

From a legal certainty perspective, there appears to be two predominant concerns here. Firstly, does a non-exhaustive list provide enough certainty for an undertaking so as to comply with the requirements of legal certainty? Secondly, does the lack of specific guidance on how much the increase or decrease in fine will be from the aggravating or mitigating factor comply with Article 7 of the ECHR?

The benefits to the Commission and undertakings of the use of flexible non-exhaustive lists were highlighted above. This chapter shall now analyse the concerns that arise out of the utilisation of such lists. The flexibility, which was highly praised in the above discussion as a benefit, may also act as a detriment in allowing for a variety of factors to be considered. This means that undertakings cannot be certain of what factors will be considered by the Commission as the list is not completely exhaustive. This flexibility can also potentially allow impartiality and unequal treatment to enter the Commission’s

⁴⁴ Mitigating factors listed include: where an undertaking terminated the agreement as soon as the Commission intervened, where the undertaking can show that the infringement occurred because of negligence on its behalf, where the undertaking shows that their involvement in the infringement was substantially limited, where the undertaking effectively cooperates with the Commission or where the conduct was encouraged by legislation or public authorities.

⁴⁵ Step four of the Commission’s fining process allows for aggravating factors to be considered and step five allows for the consideration of mitigating factors.

decisions, as they can decide to consider other factors, as the lists are non-exhaustive and therefore flexible. This could mean that the Commission considers erroneous and irrelevant factors in their fining decisions. This lack of certainty shall now be assessed by utilising the relevant jurisprudence.

Upon examination of the relevant case law, we see that when non-exhaustive lists are discussed the Courts do not point to any ability of a non-exhaustive list to raise a challenge on legal certainty grounds. For example, in the ECtHR Grand Chamber decision of *Kononov v Latvia*,⁴⁶ the Charter annexed to the London Agreement was discussed.⁴⁷ This contained a 'non-exhaustive list of violations of the laws and customs of war'.⁴⁸ During this case, the Grand Chamber were addressing concerns the applicant raised in regards to legal certainty; yet the Court at no point suggested that a non-exhaustive list was insufficient for legal certainty to stem from that list. Similarly, in the UK case of *Regina (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)*⁴⁹ when the Court of Appeal discussed assisted suicide they considered the guidance that was given in the 'Code for Crown Prosecutors' for determining whether to prosecute a case or not. This Code included a list of a variety of non-exhaustive factors.⁵⁰ The Court of Appeal explained that this list was cited to illustrate 'the breadth of criteria that play a part depending on the particular crime concerned'.⁵¹ Given the comments made here one can see that the Court of Appeal do not feel that by merely having a potentially large non-exhaustive list of criteria that it automatically causes concerns on legal certainty grounds. Indeed, it seems from the comments made in this case that the Courts value the flexibility a list like this offers.

⁴⁶ (2010) ECHR 667.

⁴⁷ The Charter annexed to the London Agreement that was discussed in this case was the Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, often referred to as the 'Nuremberg Charter'. It sets down the procedures and laws by which the Nuremberg trials were to be conducted.

⁴⁸ *Kononov v Latvia* (2010) ECHR 667 para 117.

⁴⁹ [2009] UKHL 45.

⁵⁰ *ibid* para 16.

⁵¹ *ibid* para 17.

Based on these decisions, it seems implicit that the Courts are accepting that non-exhaustive lists provide – at least in principle – enough certainty to comply with the necessary requirements of legal certainty. Therefore, it seems reasonable to conclude that, by merely utilising a non-exhaustive list, it does not mean that uncertainty will ensue for undertakings. Indeed, we find numerous pieces of legislation and guidance which do in fact contain non-exhaustive lists. Therefore, the question that needs to be considered is one on the nature of guidance given by the Commission. This is where our attention shall now turn in our analysis, considering the implications of this lack of specific guidance on how much the increase or decrease in fine will be on the certainty of fines for undertakings.

One may instinctively believe that, given the lack of specific guidance on how much of an increase/decrease in the fine that the Commission may impose when considering an aggravating/mitigating factor, that it means that the process is uncertain. This is owing to the fact that an undertaking cannot be sure which factors the Commission will consider to be relevant for fining purposes. Therefore, it could be argued – and it would appear logical to believe – that the use of non-exhaustive lists (specifically within the Commission’s fining process) will fall foul of Article 7 ECHR.⁵² However, this is too superficial an analysis to base a full and thorough conclusion on and, therefore, we need to consider what the Courts have said when considering guidance and legal certainty.

To begin with, we see that when the ECtHR discusses legal certainty they highlight that it is not necessary for the law to be prescribed in such a way as to ensure complete certainty, as this is unobtainable in practice. For example, in *The Sunday Times v UK*, the Court stated that the law must be formulated:

⁵² Similarly, one could also raise potential concerns here about equal treatment, as without detailed guidance on how much of an increase or decrease will ensue from the consideration of these factors the Commission could apply this part of the analysis unequally.

‘with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail. Those consequences *need not be foreseeable with absolute certainty*: experience shows this to be unobtainable.’⁵³

Interestingly, this is something that the EU Courts have similarly held when they discuss legal certainty. They acknowledge that it is impossible to attain complete certainty and that a degree of unforeseeability is important so as to allow flexibility within decisions. In *Jungbunzlauer v Commission* the court said that:

‘To avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence *must* be permitted.’⁵⁴

The ECtHR has also acknowledged that, however clearly drafted a legal provision or guidance may be, there is an ‘inevitable element of judicial interpretation’.⁵⁵ In addition, the Court has also stated that ‘there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances’ by the Courts.⁵⁶ Moreover, the ECtHR has stated that the fact that a legal provision can be construed in more than one way does not mean ‘that it does not meet the requirement implied in the notion of prescribed by law’⁵⁷ or that this means that the legal provision will fail ‘to meet the requirement of foreseeability for the purposes of the Convention’.⁵⁸

⁵³ *The Sunday Times v UK* (1979) 2 EHRR 245 para 49 emphasis added.

⁵⁴ Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, para 84.

⁵⁵ See *Del Rio Prada v Spain* (2012) App no 42750/09 para 47.

⁵⁶ *ibid.*

⁵⁷ *Vogt v Germany* (1995) 21 EHRR 205 para 48.

⁵⁸ *Sahin v Turkey* (2005) 44 EHRR 99 para 91.

So, what does this mean for the Commission's Guidelines when they utilise a non-exhaustive list and the examples given contain no guidance as to what the increase/decrease will be?

What we see is that the lack of specific guidance on how much of an increase or decrease will result from these factors does not necessarily mean that a breach of Article 7 ECHR will ensue. The ECtHR allows for a degree of uncertainty and unforeseeability to occur in Guidelines.⁵⁹ If we consider the Commission's Fining Guidelines, the examples within the list of potential aggravating or mitigating factors helps make the Commission's decision less unforeseeable, as undertakings can foresee what factors are likely to influence the fine imposed upon them. However, they cannot tell exactly what – for example – the increase in fine for an aggravating factor will mean for them. Although, the undertaking does have an indication of likely factors to lead to an increase or decrease in the fine, and that the total overall fine is limited to ten percent of the undertaking's previous year's turnover. This fact, alongside the comments made by the ECtHR in the *Del Rio Prada* judgment – which allows for an element of judicial interpretation and uncertainty – means that the lack of specific guidance on how much of an increase or decrease in fine is *unlikely* to be sufficient to breach Article 7 ECHR.

However, what if the Commission were to apply different percentage fines based on these aggravating and mitigating factors; does this then mean that the fining process could be held to be uncertain?

The ECtHR have, in an analogous situation, stated that although 'tribunals may reach different conclusions, even when applying the same laws to the same facts, this does not necessarily mean that the laws are inaccessible or unforeseeable.'⁶⁰ The practical application of these comments can be seen in

⁵⁹ *The Sunday Times* (n 53), for example.

⁶⁰ *Wingrove v UK* (1996) 24 EHRR 1 para 38.

the ECtHR case of *Handyside v UK*.⁶¹ Therefore, we can see by analogy that it is likely that this stage in the Commission's fining process would be held by the ECtHR to be sufficiently certain for compliance with Article 7 of the ECHR even if the Commission were to award varying percentages based on the aggravating and mitigating circumstances in the cartel.

This section of analysis has shown that to meet the necessary standards of legal certainty 'absolute certainty' is not necessary. We found that what is actually necessary is what is *reasonable* given the circumstances. It has also been illustrated that when non-exhaustive lists have been referenced in cases, courts – from a variety of jurisdictions – have not suggested that they are legally uncertain. Thus, based on this analysis, one can deduce that the utilisation of non-exhaustive lists by the Commission would be unlikely to amount to a breach of Article 7 of the ECHR. However, what has also been seen is that there is room for improvement within these two stages of the Guidelines, particularly with regards to the percentage increase or decrease to the fine that an aggravating or mitigating factor will result in. This is something that is discussed again and addressed later in the chapter.

3.2.2 'Specific deterrence'

The next stage in the Commission's fining process that is assessed to identify whether the Commission's fining process is in compliance with legal certainty is the sixth stage. This stage allows for an increase in the fine imposed on undertakings for 'specific deterrence' and has been chosen as it builds upon the issues identified within the non-exhaustive lists stages of the Commission's fining process, as it appears to allow the Commission an even wider margin of discretion. Particularly, the content and wording of this stage appear to be rather encompassing and drafted in somewhat vague terms. The Commission defines this stage in its Guidelines as follows:⁶²

⁶¹ (1974) 17 YB 228.

⁶² Commission (n 14) Recital 30, *emphasis* added.

‘The Commission will pay particular attention to the need to ensure that fines have a *sufficiently deterrent effect*; to that end, it may *increase the fine* to be imposed on undertakings which have a *particularly large turnover* beyond the sales of goods or services to which the infringement relates.’

Therefore, it appears to allow for a large degree of uncertainty to enter the Commission’s fining decision. There appears to be three key issues here. First, it is unclear what is meant by the need to ensure that fines have a ‘sufficiently deterrent effect’. This is not defined within the guidance or explained in any greater depth in the Commission’s policy documents. Recital 31 of the Fining Guidelines does explain that the:

‘Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement.’

However, it is not clear if this is what the Commission means as to ‘sufficiently deter’ or whether they mean something different. More generally, there is much debate about how high fines need to be to ‘sufficiently deter’ cartel conduct. In fact, some have suggested that it would need to be so high that it is unachievable, as it would effectively need to bankrupt an undertaking; they have therefore advocated for the criminalisation of cartels to achieve this ‘sufficient deterrent’ effect.⁶³ Wils’ analysis on this issue identified that the *minimum* level of fines required to achieve this deterrent effect would ‘be in the order of 150 percent of the annual turnover in the products concerned violation.’⁶⁴ Wils determines this by assuming that a cartel increases the selling price by ten percent, leading to an increase in profits of five percent for the cartelised firms, that the average cartel would last five years and the probability

⁶³ Wouter P Wils, ‘Is criminalization of EU competition law the answer?’ (2005) 28(2) World Competition 117, 138.

⁶⁴ *ibid.* The calculation of this figure is in the context of economic deterrence theory.

of detection and punishment of that firm would be only sixteen percent. However, when we consider Connor's 2004 study,⁶⁵ he finds that the overcharge is much higher than what Wils has allocated for,⁶⁶ therefore meaning that the fine would need to be even greater to act as a deterrence. These two studies illustrate effectively the difficulty in determining a fine which would 'sufficiently deter' an undertaking in practice. This problem is further exacerbated as the Commission has provided a lack of guidance as to what its intended meaning of this is.

Second, the Guidelines state that the fine *may be* increased to achieve this deterrence but provide no guidance as to how much of an increase in fine this could be. This is perhaps because it will depend on the specific circumstances of each case as to how much of an additional increase is necessary to sufficiently deter. But this does not prevent the lack of clarification or identification of when this may occur from causing uncertainty for undertakings. Indeed, even consulting Commission decisions where this stage has been applied offers little assistance in identifying how much of an increase in fine this stage will lead to. The fine increases at this stage can be significant and can vary greatly. In some cases the increase has been as low as ten percent,⁶⁷ others twenty-five percent to one hundred percent,⁶⁸ and at the most severe one-hundred-and-fifty percent.⁶⁹ As one can see, it is difficult to identify how much of an increase in

⁶⁵ John Connor, 'Price-Fixing Overcharges: Legal and Economic Evidence' (2004) AAI Working Paper No. 04-05.

⁶⁶ He identified that the overcharge was in fact nearer twenty percent.

⁶⁷ In the *Professional Videotapes* (Case COMP 38.432) Commission Decision 2008/C57/08 [2007] OJ C57/10 Sony received a ten percent increase in its fine at this stage.

⁶⁸ Some of the undertakings in the *PO/Hard Haberdashery: Fasteners* (Case COMP 39.168) Commission Decision 2009/C47/08 [2007] OJ C47/8 cartel received a 25 percent increase. In the *Sodium Chlorate* (Case COMP 38.695) Commission Decision 2009/C137/06 [2008] OJ C137/6 cartel some members saw a 70 percent increase. Similarly, in the *Elevators and Escalators* (Case COMP 38.823) Commission Decision 2008/C75/10 [2007] OJ C75/19 some undertakings received a 70 percent increase with others receiving a 100 percent increase.

⁶⁹ In the *Dutch beer market* (Case COMP 37.766) Commission Decision 2008/C122/01 [2007] OJ C122/1 various undertakings received a 150 percent increase in fine.

fine, having this stage applied, will lead to for an undertaking, even when we consider Commission decisions.⁷⁰

Third, one can ask what is meant by a ‘particularly large turnover beyond the sales of goods or services to which the infringement relates’, as again this has not been defined. ‘Particularly large’ implies that a comparison needs to be made between undertakings’ turnovers, but yet no indication is given as to how this comparison will be calculated or how it will be conducted. The Guidelines appear to imply that, if an undertaking sells goods and services beyond those which have been cartelised and that said undertaking can be defined as ‘particularly large’, then they shall be fined higher to act as a deterrence. The uncertainty here stems from the language used within the guidance document, and the lack of guidance given on the actual application of this ‘specific increase for deterrence’. It may be presumed that what the Commission means in this stage, refers to the ability of the undertaking to absorb the fine and, where it can do so easily then the fine will need to be increased so as to ensure that the fine has a deterrent effect. However, it is unclear from the guidance provided if this is actually what is meant. The notion of imposing a harsher punishment on an undertaking that has a particularly large turnover as compared to undertakings with smaller turnovers is by no means a unique characteristic that is only found within the Commission’s Fining Guidelines. We find, for example, that individuals who are wealthier are often given larger fines by the courts when they commit a breach of the law so as to ensure that the fines themselves have an effect on that individual’s behaviour and deter them from breaching the law again. Indeed, it would seem unfair to fine the same amount to two individuals if one of them is significantly ‘better off’ than the other, as the individual in the better financial position would not truly feel the effect of the fine.

⁷⁰ Scordamaglia-Tousis (n 21) at 368, has similarly noted that there is no consistency in how the Commission is increasing the fine at this stage.

Nevertheless, there is a question to be considered here within this stage of the Commission's Fining Guidelines. This stage of the Guidelines appears to only apply to undertakings that have a large turnover beyond the market in question. Therefore, this stage would not apply to an undertaking that operates only within the cartelised market. So the hypothetical one needs to consider is a situation where an undertaking is a very large player in a cartelised market but, because it only operates in the cartelised market and no other, it avoids having this stage of the fining procedure applied to it. Given this, would the rest of the fining procedure accurately reflect the breach of the law when compared to an undertaking which operates in multiple markets and has this stage applied to them? Considering the Fining Guidelines, we can see that the first stage within the fining process takes into account the amount of sales and goods involved in the infringement and latter stages allow for an increase in the fine for aggravating factors. However, the difficulty here is that the first stage in the fining procedure is capped at thirty percent, so although this stage would reflect the undertaking's larger status in the cartelised market, it is limited to thirty percent. Therefore, when we consider the application of stage six, where there is no guidance on the percentage increase and thus no cap on the percentage increase, it is questionable how reflective the fine can be at stage one as stage six can allow for a much greater increase in the fine. This could lead to undertakings raising legitimate questions about the application of this stage and the differences in fining of the two undertakings, particularly when the firm, which is larger in the cartelised market, cannot have this stage applied to it as it only operates in the cartelised market.

This stage of the fining procedure also leads to a further intriguing issue, namely, if an undertaking operates in multiple markets it is likely to have this stage included in any fines it receives for being involved in a cartel. This means this stage actually acts as an incentive for that undertaking to ensure that it cartelises in all of its markets so that, if it receives a fine, this stage of the fine is accurately costed and minimised through the cartelisation of all of its markets because it will be fined based on its operation in multiple markets.

There is no further guidance provided in any of the Commission's publicly accessible documentation on the 'specific increase for deterrence' stage.

To begin the examination of this section of the Commission's fining process, we need to revisit the case law discussed in the previous section's analysis. In that section, the case law highlighted that the ECtHR and the EU Courts recognise that a degree of unforeseeability is inevitable and unavoidable.⁷¹ One of the questions identified in the current section is whether this stage within the Guidelines is encroached in terms that are too vague and broad.

The ECtHR has held that 'the law must be adequately accessible' and that 'an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions.'⁷² The EU Courts have also acknowledged the importance of a legal situation being 'sufficiently precise, clear and foreseeable'.⁷³

Taking these statements at face value may lead one to believe that this stage within the Commission's Guidelines would not allow an undertaking to be able to adequately foresee the consequences of its actions; as it is uncertain when this stage in the Commission's fining procedure will apply. Nonetheless, one needs to remember that an undertaking is still aware that the action of being in a cartel breaches Article 101 TFEU and that the potential punishment for that breach is a fine of up to ten per cent of its total turnover in the previous year. Additionally, it should be noted that these statements should *not* be read at face value and that they should be read alongside other case law. For example, in a recent appeal in the UK, the Supreme Court held that there was no failure to comply with the European principle of legal certainty.⁷⁴ This case involved the limitation period for bringing a damages claim in a competition case. The

⁷¹ *The Sunday Times* (n 53).

⁷² *SW v UK and CR v UK* (1995) 21 EHRR 363.

⁷³ For example see, Case C-361/88 *Commission v Germany* [1991] ECR I-2567 para 24 and Case C-221/94 *Commission v Luxembourg* [1996] ECR I-5669 para 22.

⁷⁴ *BLC Old Co Ltd & Others v BASF Plc & Ors* [2012] UKSC 45.

Supreme Court felt that the limitation period was sufficiently clear, foreseeable and precise so as to allow the individuals to ascertain their rights and obligations. The Supreme Court highlighted that the law does not need to be clear beyond doubt and that the 'true test is more flexible and [...] reflective'.⁷⁵ This case highlights the importance of not taking a statement from the Court out of context and that it needs to be considered alongside the other jurisprudence.

Another example can be seen from the ECtHR, where they have stated that for the law to meet the requirements of accessibility and foreseeability it must:

'Afford a measure of legal protection against arbitrary interferences by public authorities [...] in matters affecting fundamental rights it would be contrary to the rule of law, [...] for a legal discretion granted to the executive to be expressed in terms of an *unfettered power*. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.'⁷⁶

This statement highlights the necessity for guidance to be given when there is a wide-ranging discretion.⁷⁷ However, the ECtHR statement also shows how the Court acknowledges that there will be instances where parts of guidance or legislation do not provide detail on every eventuality and that a lot will depend

⁷⁵ *ibid* para 24.

⁷⁶ *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339 para 84 *emphasis added*.

⁷⁷ This is something which has also been highlighted in the ECtHR decision in *Liberty v UK* (2009) 48 EHRR 1 para 69.

on the content of the ‘instrument in question’.⁷⁸ This illustrates the flexible way in which the Convention operates and that there is no hard and fast rule with regards to legal certainty; indeed, we see it is flexible and affected by a variety of factors. When this statement is considered alongside the sixth stage within the Commission’s fining process, which aims to allow for sufficient deterrence – one of the key aims of cartel enforcement – it is accepted that, although this stage in the Guidelines is worded in vague terms, the ECtHR would accept and allow the Commission this flexibility. This is because it permits for the necessary deterrence of undertakings who may otherwise not feel the impact of a fine. Indeed, when we consider the decision of the ECtHR in *Del Rio Prada v Spain*,⁷⁹ where it was stated that ‘many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice’, we can see that it is likely that the ECtHR would hold that, although the language is vague in the Guidelines, it is still sufficient to comply with Article 7 ECHR. However, one needs to ask the question as to why the Commission would wish to provide Guidelines. Rather self-evidently Guidelines are provided to offer *guidance*, i.e. to assist in clarifying the procedure/process or application of the law. In this case does the Commission’s Fining Guidelines really achieve this aim? The sixth stage in the fining process is defined with incredible ambiguity, with there being no explanation of what it means to ‘sufficiently deter’ an undertaking or *how* this stage will be applied, *when* it will be applied or even how it is to be calculated. Therefore, one has to ask why *half-hearted* and indeed *unclear* Guidelines are being provided by the Commission. There is ample room here for improvement of these Guidelines, particularly with regards to this stage so as to remove some of these ambiguities and uncertainties. This is something that is addressed in the latter part of this section in the chapter.

⁷⁸ Similarly in *Regina (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2009] UKHL 45 para 101 the UK Court noted that it was impossible for there to be an exhaustive list of every eventuality.

⁷⁹ (2012) Application no 42750/09 para 47.

Both of the preceding parts of this section have discussed legal certainty and the Commission's fining process. This part has highlighted that even Guidelines that are drafted in vague terms can still allow for sufficient certainty to occur for compliance with Article 7 ECHR to ensue. What is important is that the Guidelines are taken as a whole. What has been identified thus far is that the Commission has a wide range of discretion within its fining procedure. The next part of this section shall assess the limiting factor on this discretion; namely, the ten percent turnover cap and also consider the Commission's discretion in more detail.

3.2.3 The ten percent cap

The final amount of the fine that the Commission can impose on an undertaking is limited to ten percent of the total turnover of the undertaking in the previous year.⁸⁰ One may assume that this provides an undertaking with clear certainty, as the undertaking will know that any fine imposed on itself for a cartel infringement cannot exceed ten percent of the firm's total turnover from the previous year. Indeed, there is certainty here because of the ten percent restriction as the undertaking knows what its turnover was for the previous year and can calculate ten percent of this.

There are, however, two areas of concern with regards to legal certainty that could be raised here. Firstly, how an undertaking is defined can affect the size of the fine imposed by the Commission as the ten percent cap applies to the undertaking's total turnover. Secondly, the discretion the Commission has within the fining procedure – with the only real limiting factor being the ten percent cap – and whether this cap is sufficient to comply with Article 7 ECHR.

How the Commission defines control of an undertaking is important because a parent company can be liable for a subsidiary company, where it is held that the parent company exercises a 'decisive influence' over the conduct of its

⁸⁰ Article 23(2) Regulation No1/2003 (n 51).

subsidiary company.⁸¹ In fact, where a parent company owns a hundred percent of the subsidiary there is a rebuttable presumption that it exercises 'decisive influence' over its subsidiary.⁸² This creates a problem for certainty for an undertaking if it has a parent company. This is because the ten percent cap on the fine imposed by the Commission relates to the total turnover; if this turnover were to be that of a parent company it would be much greater than that of just the subsidiary. If an undertaking cannot be sure of whether the cap will be applied to its total turnover or that of its parent, this will lead to a degree of uncertainty as the potential cap on the fine will be significantly higher than expected if the parent company's annual turnover is used.

This can also lead to other issues arising. Let us consider a hypothetical example to illustrate these issues. Consider, if you will, a parent company that has many small subsidiary companies, which means that it is very active in a variety of markets and thus has a very large overall turnover. Let us also assume that it would be held that it exercises a 'decisive influence' over these subsidiaries; although, it is not in fact aware of the cartelisation of a small market by one of its subsidiary companies. If the subsidiary company is found guilty of price fixing and the Commission issues fines against it and decides to base the cap on the annual turnover of the parent company, this will mean that the fines can be much larger than they would be for another undertaking in the cartelised market which was not a subsidiary company of a larger parent company. This could lead to one questioning whether the fines are proportionate, fair, reflective and based on the infringement as the parent company was not involved in the infringement, and yet its much greater annual turnover is being considered to increase the cap on the fine. This could even lead to some wishing to question whether the fines in this case are just being used as a 'money making exercise' as they are not representative of the infringement.

⁸¹ For example see Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151 para 50.

⁸² For example see Case T-112/05 *Akzo Nobel NV v Commission* [2007] para 4. The importance of the ability of an undertaking to be able to rebut this presumption can be illustrated by Case T-234/07 *Koninklijke Grolsch v Commission* [2011] ECR 11-6169.

That said, one could challenge this claim and argue that the fines should still be reflective of the infringement as the first stage in the fining procedure relates specifically to the infringed product market and this will therefore prevent other product markets being considered. However, this misunderstands the potential problem and issues here, as the other stages within the fining procedure do not relate to the specific cartelised market. Indeed, if there are multiple aggravating factors and the specific deterrence stage is applied in the fining procedure, this could raise the fine above the ten percent annual turnover of the subsidiary company, but as the Commission is using the parent company's turnover it would not be over the ten percent cap. Therefore, as the upper cap is much greater it means that the fine can be much higher than it would be for the other firms in the market that are not subsidiaries of a larger parent company. This raises a serious legal certainty issue from a parent company's perspective with regards to how it will know about its liability if it is not controlling the subsidiary company, and yet is still held to have a 'decisive influence' over it. This means in practice it will be necessary for a parent company to ensure that it carefully monitors its subsidiary company to ensure that it is complying with the legal requirements of Article 101 TFEU.

The significance of the concept of parent and subsidiary control is becoming increasingly important as, more recently, the issue of 'decisive influence' has been raised in cartel cases involving joint ventures. Indeed, where a joint venture undertaking engages in a collusive practice, it now appears that the Commission is prepared to attribute liability to the controlling parent firms.⁸³ This means that, in future cartel fining decisions that involve parent company liability, we may find appeals going to the European Courts based on this problem and the lack of certainty here. With regards to legal certainty, parent company liability appears to raise concerns, particularly with regard to

⁸³ Laura Atlee, 'Joint Venture... Subsidiary... What's the Difference for Cartel Liability and Fines?' (2012) 1 CPI Antitrust Chronicle <www.competitionpolicyinternational.com/joint-venture-subsi-dary-what-s-the-difference-for-cartel-liability-and-fines-2/> accessed 27 May 2013.

whether a parent company will be aware of the cartelisation by one of its subsidiaries and the level of fine that can then ensue from this.

As was noted at the beginning of this section, the Commission has a great deal of discretion in the setting of a fine. Indeed, the Fining Guidelines themselves clearly state that ‘in exercising its power to impose such fines, the Commission enjoys *a wide margin of discretion* within the limits set by Regulation No 1/2003.’⁸⁴ This chapter has identified reasons as to why it is beneficial for the Commission to have this discretion, but has also highlighted the ‘costs’ of allowing the Commission to retain this discretion with specific regards to certainty for undertakings. The key question is whether the discretion that the Commission retains under the ten percent cap to fine an undertaking however it decides, is too uncertain to comply with the legal certainty requirements protected by Article 7 ECHR. The European Courts have stated that the Commission, by adopting and implementing the Fining Guidelines, has ‘impose[d] a limit on the exercise of [its] discretion’.⁸⁵ This is important as unfettered discretion with no Guidelines would lead to the Commission’s fining process breaching legal certainty. For example, the ECtHR has stated in *Liberty v UK*⁸⁶ that:

‘The law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.’

Similarly, in the UK case of *Regina (Purdy) v Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)*⁸⁷ it was highlighted that discretion itself is not inconsistent with legal certainty as long as it ‘is

⁸⁴ Commission, (n 14) Recital 2, emphasis added.

⁸⁵ Case C-213/02 P, *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425 para 211.

⁸⁶ (2009) 48 EHRR 1 para 62.

⁸⁷ [2009] UKHL 45.

exercised and indicated with sufficient clarity'.⁸⁸ This case discussed the concept of discretion in great depth and provides us with some important information to consider with regards to our questions about discretion. The Court in this case noted the importance of adequate guidance being given to those who have to enforce the law so as to ensure that they 'avoid the criticism that their decision taking is arbitrary'.⁸⁹ Without this guidance, it is difficult for the Court to hold that the provision complies with the necessary requirements under legal certainty of accessibility and foreseeability.⁹⁰ Indeed, in this case the judge held that:

'In the absence of any such statement of policy, there is simply no sufficiently clear or relevant guidance available as to how the very widely expressed discretion accorded to the Director in section 2(4) of the 1961 Act will be exercised.'⁹¹

This case and analysis therein highlights that the Commission's wide ranging discretion is not automatically at odds with Article 7 ECHR, providing that adequate guidance is given by the Commission in the use of this procedure and the Guidelines are adequate.

The EU Courts have acknowledged that the Guidelines were adopted by the Commission to help increase legal certainty for undertakings.⁹² Although, it is worth noting that the ECJ has held that the Commission's Fining Guidelines are not to be taken as 'rules of law' that must be followed by the Commission in every given instance.⁹³ Therefore, we must remember that Guidelines are just that, a guide, and that by having Guidelines it does not mean that this is exactly what will happen in every given instance. It is, however, necessary that

⁸⁸ *ibid* para 41. This has also been confirmed in ECHR jurisprudence: *Goodwin v UK* (1996) EHRR 123, para 31 and *Sorvisto v Finland* (2009) App no 19348/04 (ECtHR, 13 January 2009) para 112.

⁸⁹ *Purdy* (n 78) para 46.

⁹⁰ *ibid* para 85.

⁹¹ *ibid* para 102.

⁹² See Case T-43/02 *Jungbunzlauer* (n 54) para 89.

⁹³ See Case C-397/03 P, *Archer Daniels Midland v Commission* [2006] ECR I-4429 para 91.

Guidelines are at least consulted and that they are representative of the Commission's fining decision process as, if they are ignored or not followed all of the time or are not representative, then there would be little point in their existence. Indeed, the ECJ has stated that the Commission must not depart from the Guidelines without giving reasons that are compatible with the principle of equal treatment.⁹⁴ This shows that, although the Guidelines may not be followed in every instance, they should give a clear indication to an undertaking of the likely fining decision process in the vast majority of cases.

The EU Courts have stated that the Commission's Guidelines do not bind the Court and that they are free to consider all aspects of the fine and make adjustments where necessary as they have 'unlimited jurisdiction'.⁹⁵ The importance and necessity of the Courts to actually consider all parts of the fine and to conduct a thorough analysis can be highlighted by the recent opinion (26th September 2013) of Advocate General Wathelet's on the appeal brought by Telefonica against the GC judgment.⁹⁶ Here, Advocate General Wathelet opined that the case should be referred back to the General Court for its failure to carry out an in-depth analysis into the calculation of the fine by the Commission.⁹⁷

Normally, when the EU Courts do consider and discuss legal certainty, they refer to the method in which the Commission has set the fine, not the actual level of the fine itself.⁹⁸ This decision is likely to be influenced by the fact that the Commission needs to assess a wide range of considerations and, therefore, a degree of discretion within the fining procedure is needed. Hence, it is impossible for the Commission to provide complete foreseeability of the amount of fines to be imposed. Indeed, this is something which the EU Courts

⁹⁴ *ibid.*

⁹⁵ Case C-338/00 P, *Volkswagen v Commission* [2003] ECR I-9189 para 147.

⁹⁶ Case C-296/12 P, *Telefónica de España v Commission* [2013] Opinion of AG Wathelet.

⁹⁷ *ibid.*

⁹⁸ For examples, please see the following cases: Case T-43/02 *Jungbunzlauer* (n 54) para 89 and Case C-213/02 P, *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425 para 213.

have acknowledged themselves.⁹⁹ From a competition law point of view we would not want the fines to be completely foreseeable, as some ambiguity in the calculation of the fine is important to ensure the necessary deterrent effect. Again, the issue we are observing here is one of balancing the two conflicting objectives. On the one hand we have the need for effective competition law enforcement and, on the other, we have the requirement for the programme to conform to the needs of rights protection and compliance.

What we have seen in this part of the chapter is that the Commission's discretion is predominantly limited by the ten percent cap on fines under Regulation No1/2003.¹⁰⁰ This ten percent cap may enable the Commission's fining procedure to comply with Article 7 of the ECHR, but this can still leave a lot to be desired from an undertaking's and citizen's perspective. Indeed, what has been identified in this chapter is that there are many areas within the Commission's Fining Guidelines that are unclear and ambiguous. This is something, which the author believes needs addressing, as Guidelines are designed to clarify the procedures and rules and should not cause further confusion or unnecessary uncertainty. By reducing the Commission's discretion further, clarity could be enhanced in the fining procedure, which would bring additional benefits alongside improved certainty for an undertaking whilst still encouraging competition compliance. These benefits, for example, could include a reduction in potential over-deterrence of pro-competitive behaviour and reduce the potential legal costs for undertakings.¹⁰¹

3.2.4 So how could the Commission's discretion be limited to allow these potential benefits to be realised?

These benefits could be achieved by reducing or further limiting the scope of the discretion afforded to the Commission through various stages of the fining process and by providing enhanced guidance. One area that would be greatly

⁹⁹ See Case T-15/02 *BASF v Commission* [2006] ECR II-497 para 226.

¹⁰⁰ Article 23(2).

¹⁰¹ All of these areas were discussed in detail in section two of Chapter 2.

improved is the objective legitimacy of the Commission as, with more detailed guidance, undertakings would understand why the fine was imposed on them and EU citizens would not see the Commission's fines as being decided in an arbitrary way.

On the other hand, one may wish to suggest that there are good reasons for the Commission to retain its wide range of discretion; for example, it could be justified to enable the Commission to have flexibility in the application of its fines. However, what has to be remembered is that the Guidelines do not bind the Commission,¹⁰² they provide guidance and the Commission can depart from them where it is reasonable and necessary to do so. Therefore, by providing more detailed Guidelines, undertakings would benefit as they have further certainty. But the Commission also benefits, as they still retain their discretion, and the offence and procedure gains additional legitimacy.

When one considers the fourth and fifth stages of the Commission's fining process, certainty could be further enhanced if the Commission were to give examples of how much the likely increase or decrease in fine might be. Currently an undertaking cannot be sure what sort of percentage increase or decrease it will receive for an aggravating or mitigating factor.¹⁰³ By doing this it would also enhance transparency and help facilitate the equal treatment of fining amongst undertakings, because it would be clearly identifiable when an reduction or increase is above the 'standard percentage' to be awarded. In this case, the Commission could simply explain what factors and reasons have led it to increase or decrease the percentage fine it awards. It is acknowledged, however, that the Fining Guidelines are not binding on the Commission so they may award higher or lower percentage fines based on the specific circumstances before them, but it does give an undertaking an illustration of

¹⁰² See Case C-397/03 P, *Archer Daniels Midland v Commission* [2006] ECR I-4429 para 91.

¹⁰³ The only way to try to identify this at the moment is to find the Commission's previous decisions and then attempt to identify what the average percentage figure is for the aggravating or mitigating factor. Unfortunately, there are cases where this information is redacted or not provided making this analysis difficult for the undertaking.

the likely increase or decrease based on that aggravating or mitigating factor and help to enhance the transparency of the enforcement of the Guidelines.

When the sixth stage of the fining process (specific deterrence) was analysed, it was identified that there was a lack of guidance on what constituted a 'sufficiently deterrent effect' and 'a particularly large turnover'. Therefore, guidance such as examples on what constitutes each of these would allow undertakings to identify in which situations this stage of the fining process is likely to apply to them. Alongside this, illustrations of the likely percentage increase in the fines could be given for this stage, as currently there is no information available regarding the possible increase. By providing this guidance it would also offer transparency so that 'outsiders' do not see the application of this stage of the fining process as a mere arbitrary and random punishment of certain undertakings.¹⁰⁴

Another potential way the specific deterrence stage could be enhanced is to set a minimum amount, a threshold (if you will), to which the Commission will apply this stage in the fining procedure. This would mean that when an undertaking has a certain market share and if turnover in other markets outside the effected market of the cartel are over-and-above the set market share and turnover, then the undertaking will automatically have this stage of the fining procedure applied to it.¹⁰⁵ This would reduce uncertainty because it would clearly set out when this stage would apply and, as it is automatic, it would mean concerns regarding equal treatment between undertakings should not arise (unless there are differences in the chosen percentage increases in the cases where it is applied). If the Guidelines also specify the range that the percentage increases will run from-and-to, this should again reduce uncertainty,

¹⁰⁴ When 'outsiders' are referred to in this chapter what is meant is individuals who are not privy to all of the Commission's information or decision-making process.

¹⁰⁵ This would not be a turnover figure, as this could not accurately capture other market shares, it would need to be based on the undertakings market share in other markets that are outside the cartelised one and thus would need to be a percentage figure.

claims of favouritism and the potential issues of unequal application of this stage.

However, there are some issues with adopting this approach. This would limit the Commission's discretion in the application of this stage, as the stage would become automatic when a certain threshold is met, meaning the Commission would be more restrained as to when it has to apply it. Although, from a legal certainty perspective, surely this is positive, as it removes the potential claims of arbitrary application of the stage and in any case, this stage should be applied in circumstances that are similar in each of the fining decisions anyway, i.e. when an undertaking has certain market shares and turnover outside of the cartelised market. One concern with this is at what percentage market share outside of the cartelised market and turnover should this stage be set at. Even once this is decided it could lead to appeals to the court where undertakings argue that the Commission has in fact assessed their market shares incorrectly and thus this stage of the fining procedure should not be applied to them. To effectively attempt to calculate at what level this threshold could be set is beyond the scope of this research and would require specialist economic analysis. Nonetheless, it is something that could be achieved in practice if the Commission were wishing to adopt this recommendation.

There are other areas within the Commission's fining process which could have increased certainty by further limiting the discretion or by providing additional guidance.¹⁰⁶ This reduction in discretion and improved guidance would improve certainty, limit bias and the potential for over-deterrence, as well as enhancing the legitimacy of the offence and the Commission.

If we apply the analysis and above discussion to the Commission's fining process in its entirety, it would appear that the requirements of legal certainty are met. This is owing to the fact that an undertaking can foresee sufficiently that by

¹⁰⁶ Such as stage one.

engaging in a cartel it could be fined by the Commission up to ten percent of their annual turnover. It is acknowledged that there are elements of uncertainty within the Commission's Fining Guidelines as to what effects certain stages will have on an undertaking's fine. However, there is a high degree of certainty in the ten percent limiting cap on the fines itself, bar the concerns raised in relation to parent firm liability. It is accepted that courts such as the House of Lords in the UK have stated that 'it is important to have clarity and certainty.'¹⁰⁷ Yet this requirement of certainty is not absolute, indeed 'the requirement is for sufficient rather than absolute certainty'.¹⁰⁸ Thus, when considering the fining process itself, the undertaking may not have absolute certainty but they do appear to have sufficient certainty when the Guidelines are considered as a whole entity. Therefore, the current Commission Fining Guidelines are compliant with Article 7 of the ECHR. However, as advocated in the discussion above, with improvements certainty could be further enhanced for undertakings without the loss of the Commission's flexibility.

3.2.5 Conclusions on the Commission's fining policy's compliance with legal certainty

In this section of the chapter, various stages within the Commission's fining process have been analysed. It has been shown, through the case law – of the EU courts, the ECtHR and national courts – and the application and analysis of that case law that the Commission's fining process does comply with the requirement of Article 7 ECHR. Yet, what has also been identified is that the Commission has a very wide range of discretion under the ten percent cap when it applies its policy, and therefore if the Commission were to limit its discretion further – through more restrictive guidance – this should enable enhanced certainty and transparency in the fining procedure.¹⁰⁹ This is important because greater certainty and transparency within the fining process

¹⁰⁷ *Warner v Commissioner of Police for the Metropolis* [1969] 2 AC 256 at p296, Lord Morris.

¹⁰⁸ *R v Misra & Anor* [2004] EWCA Crim 2375 para 34.

¹⁰⁹ This chapter has identified a variety of measures that will enhance the Guidelines by making them more restrictive. For instance, by providing examples of factors or increases and decreases, and providing clearer definitions and guidance of the various stages, particularly the 'specific deterrence' stage.

allows for the observance of fairer enforcement of the law. Given the identification of this current wide ranging enforcement discretion afforded to the Commission, it is important to proceed to assess whether the Commission is applying its fining policy fairly and consistency to all undertakings involved in a given cartel. This is examined in the next section of this chapter.

3.3 Equal treatment within the application of the Commission's Fining Guidelines?

Now that the previous section has identified and analysed the legal certainty concerns within the Commission's fining process the chapter can proceed to analyse whether the Commission applies its Fining Guidelines equally between undertakings. Equal treatment becomes a particular issue at a variety of stages in the fining process. This is particularly true in the instances of: the ITP, the nationality of an undertaking and NC. This section of the chapter proceeds to consider each of these in turn.

3.3.1 ITP discount

The first potential issue of equal treatment that shall be analysed is stage ten of the fining process where an undertaking's ITP *may* be considered at the Commission's discretion. Until Joaquin Almunia acceded to role of European Competition Commissioner, the Commission had taken a very strict line with the ITP, whereby former Commissioner Neelie Kroes had advocated for a zero tolerance policy against cartels.¹¹⁰ In the wake of the current economic crisis Commissioner Almunia has taken a softer approach towards the ITP of an undertaking.¹¹¹

So why should it be the case that the Commission worries if an undertaking becomes insolvent? Generally speaking, the consequences of an undertaking experiencing bankruptcy can be far worse for the industry – and moreover the economy – than when compared with offering a reduction in fine to allow the undertaking to continue to operate. The concerns that can be raised here fall

¹¹⁰ Neelie Kroes, 'Taking Competition Seriously – Anti-trust Reform in Europe' (IBA and European Commission Conference on 'Anti-trust reform in Europe: a year in practice', Brussels, March 2005) <europa.eu/rapid/press-release_SPEECH-05-157_en.pdf> accessed 1 July 2013.

¹¹¹ See for example, James Kanter, 'Europe's Antitrust Chief Shows Leniency on Fines' *New York Times* (New York, 23 June 2010) <www.nytimes.com/2010/06/24/business/global/24cartel.html?_r=0> accessed 1 July 2013. In truth, the global financial crisis can be seen to have forced Almunia's hand to some extent, with many EU firms facing dire economic plight. Thus, we can see why a softer approach has had to be taken by Almunia.

broadly into four categories.¹¹² The first is that the anticompetitive industry becomes even more concentrated by the subsequent departure of an undertaking from the market, which means that there is even less competitive pressure within the market and, thus, an increased likelihood of collusion in the future. Secondly, the social and economic costs that emanate from forcing an undertaking into bankruptcy can be exceedingly high. For example, bankruptcy may lead to a loss of jobs, skills and assets of material economic and societal worth. Thirdly, it makes it harder for third parties who purchase goods from the undertaking to claim damages from the cartel, as the undertaking no longer exists in the wake of its bankruptcy. Fourthly, bankrupting undertakings is likely to lead to large political pressure being placed on the Commission from business lobbying. In light of these potential issues and costs associated with bankrupting an undertaking, one can infer strong evidence to support the claim that it is disproportionate to bankrupt an undertaking when the alternative – a reduction in fine – will mean the undertaking can still compete in the market and, yet, also be punished for its infringement.

Now that the Commission takes a softer approach to the consideration of the ITP, it leads to greater concerns about equality in the fining process, because undertakings may receive discounts in their fines simply based on their financial circumstances. This can be best analysed by separating the issues into two separate categories, namely, ‘internal problems’ and ‘external problems’.

To begin with, the internal problems shall be discussed. Consider the following hypothetical scenario:

To make things simple there are three firms operating in a cartel: *Firm A*, *Firm B* and *Firm C*. *Firm A* can be seen as the more delinquent firm, as it is the cartel ringleader, has been a member throughout the duration of the cartel and has committed many instances of aggravating conduct. *Firm B*

¹¹² Stephan (n 25) 519-522.

joined the cartel midway through and was coerced into joining by *Firm A*. *Firm C* has been a member throughout the cartel with *Firm A*, but has not coerced other members to join or been the ringleader. The Commission detects the cartel and issues fines against all of the firms. *Firm A* is facing potential insolvency by the fines, and thus the Commission grant them an ITP discount on their fine. The discount *Firm A* receives – because it is in such poor financial standing – is 70% off the original fine, which was set by the Commission at 5%. Therefore, *Firm A*'s overall fine equates to 1.5% of its total turnover. *Firm B* was fined considerably beneath the 10% turnover cap as it had mitigating circumstances and received a 3% overall fine. *Firm C* also received a fine that was set at 5% of their total turnover. We now have the situation that *Firm A* the most delinquent firm is fined significantly less than *Firm B* and *C* who both have to pay a substantially higher fine than *Firm A* simply because *Firm A* is currently in a poor financial situation.

This hypothetical scenario raises the internal problems relating to equal treatment, namely that undertakings are treated differently solely on the basis of their financial stability. *Firm B* and *Firm C* would rightfully be questioning the logic behind the Commission's decision to fine them more than *Firm A*, given that *Firm A* was the most delinquent undertaking. At no stage did *Firm A*'s final plight detract from its ability to engage in the cartel and yet it is this that has determined its eventual fine. This problem is amplified here because of the lack of guidance given by the Commission that clearly explains how these decisions are made.¹¹³ The question here is *how much* of a concern this is, as each undertaking has the potential to receive a reduction in fine if it is unable to pay;

¹¹³ These concerns were similarly made in regards to legal certainty in section one.

this potential reduction would have been available to *Firm's B* and *C* had they have had severe financial problems. Moreover, it is objectively justifiable to allow for an ITP reduction to prevent the bankruptcy of an undertaking and the negative consequences which would stem from this, such as the exiting of the firm from the market and the loss of jobs. However, one has to consider whether *Firm A* is actually just an inefficient firm and by it being awarded a reduction in fine it is actually allowing an uneconomical firm to stay in the market and gain a potentially unfair competitive advantage over *Firms B and C*. Indeed, in practice this is something the EU courts have noted and thus,¹¹⁴ have held that the Commission is not *required* to take account of an undertakings poor financial standing in the calculation of the fine.

It is imperative that there is equality in the application of this stage when undertakings are in the same situation and have identical circumstances. Indeed, there exists a need for some form of transparency in regards to the way in which the Commission applies this stage within the fining process.

We now need to consider the external problems, which relate to (a) *when* the Commission will offer an ITP discount (i.e. under what circumstances), and (b) *how much* of a discount they will offer.

3.3.1(a) When the Commission will offer an ITP discount

What we need to identify with this first external problem is the criteria the Commission bases its decisions on. For example, is the decision based purely on the financial stability of an undertaking, or does the Commission consider wider issues such as the economic climate, employment or even the nationality of the undertaking?

To begin to attempt to answer this question, it is important to look at what the Commission's guidance states about what it will consider when making

¹¹⁴ Case T-384/06 *IBP and International Building Products France v Commission* [2011] para 120.

decisions. Unfortunately, the Commission's Guidelines provide little clarification on what the Commission shall consider. They do, however, make reference to the consideration of the 'specific social and economic context' of the undertaking's ITP and whether the initial fine would 'irretrievably jeopardise the economic viability of the undertaking'.¹¹⁵

In relation to considering the 'specific social and economic context' of the undertaking's ITP, a lack of clarity is a concern that has been raised before under the now obsolete 1998 Fining Guidelines.¹¹⁶ Stephan noted that this consideration would require a thorough review of the wider policies specified under the Treaty, including those relating employment and social protection.¹¹⁷ This would allow the Commission to consider a much broader range of criteria and provides limited clarity for us to assess whether the ITP is being applied equally to all undertakings, as it can be difficult to determine what the Commission is considering in its decision making process.¹¹⁸ Indeed, little clarification is offered under the 2006 Guidelines. Despite the fact that the 2006 Guidelines amend the criteria from a 'specific social context' to a 'specific social and *economic* context' this does little to alleviate the ambiguities surrounding *when* the Commission will grant an ITP reduction. In fact, this could actually be seen to have the effect of widening the scope of the criteria that Commission can consider.¹¹⁹ The EU courts however, can offer us some *limited* guidance through their case law here on *part* of the criteria. In the *Tokai Carbon* case the Court stated that the criterion of the 'specific social context' consists of situations where the undertaking having to pay the fine would lead to an

¹¹⁵ Commission (n 14) para 35.

¹¹⁶ Commission, (n 36). The ITP provision in these Guidelines referred to the 'specific social context' of an undertakings ITP.

¹¹⁷ Stephan (n 25) 525.

¹¹⁸ Indeed, Stephan's analysis of cases under the 1998 Guidelines shows numerous inconsistencies in the Commission's application of ITP requests. *ibid* 527.

¹¹⁹ The term 'economic' could equally apply to the economic conditions of the undertaking, as well as the market that it is in.

increase in ‘unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned’.¹²⁰

In relation to considering the ‘irretrievably jeopardise the economic viability of the undertaking’ criterion, the wording within the Commission’s guidance makes it appear that ITPs shall only be granted in exceptional circumstances. Indeed, the Guidelines expressly state that a reduction will not be granted for a ‘mere finding of an adverse or loss-making financial situation’.¹²¹ Taking a literal interpretation, it seems that an ITP will only be granted where an undertaking may go bankrupt or where the fine will cause the undertaking to be put in a position where it will become insolvent. This point within the guidance appears to offer some partial clarity as to when the Commission should be awarding an ITP. Owing to the economic crisis, the then Competition Commissioner Joaquín Almunia and Commissioner Janusz Lewandowski published an ‘Information Note’ offering some further *limited* information on the application of an ITP and *when* the Commission will award an ITP discount.¹²²

When the Commission considers the criterion of whether the fine will ‘irretrievably jeopardise the economic viability of the undertaking’ it will make this assessment based on a number of indicators derived from the Altman Z-score test.¹²³ The Commission will give more emphasis to the solvency and liquidity relative to capitalisation and profitability of the company; consider whether and how the fine would cause the aforementioned financial indicators to deteriorate; and, the Commission will examine historical financial data of the undertaking alongside two-year future predicted financial data.¹²⁴ With regards to the ‘specific social and economic context’ the Note provides that the

¹²⁰ Case T-236/01 *Tokai Carbon v Commission* [2004] ECR II-1181 paras 370-371. Note that this was with regards to the 1998 Fining Guidelines criteria.

¹²¹ Commission (n 14) para 35.

¹²² European Commission, ‘Information Note - Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines’, 12 June 2010 OJ 1922.

¹²³ *ibid* para 7.

¹²⁴ *ibid*.

Commission will interpret these criteria broadly.¹²⁵ Similarly, with the requirement that assets have to lose 'all of their value' the Note explains that the Commission will take a wider approach and not interpret this literally.¹²⁶ The Commission interprets this criterion to mean that the undertaking's productive assets 'significantly' lose their value.¹²⁷

Whilst the Information Note does provide further transparency to the awarding of an ITP discount, it leaves a lot of ambiguity and potential for unequal treatment to occur in this stage. For example, how, and what assessments will the Commission make with the future financial data they assess? The information provided within the Note does little to assist in understanding with clarity what will suffice to meet the requirement of the 'specific social and economic context', especially as the Commission is interpreting this broadly. Equally, the Note seems to make a somewhat arbitrary distinction in the consideration of the '*significantly* loses value' interpretation; between where assets are sold off, jobs are lost and the undertaking goes bankrupt, compared to where another undertaking is set to purchase these assets and employ the staff. Why should the Commission make this distinction here? What if the other undertaking purchases the assets and then sells them off or still closes the business and jobs are lost? The Note ignores these potential questions completely. Additionally, the Note provides no information on the likely or possible reduction that would be awarded. Finally, it is questionable as to what importance and value one can attribute to an Information Note. If it should form part of the guidance for the method of calculating and awarding an ITP it seems more coherent for this information to be contained within the main Guidelines and not in a separate document which is tucked away on the Commission's website.

¹²⁵ *ibid* para 8.

¹²⁶ *ibid* para 9.

¹²⁷ *ibid*.

So where does this leave the application of the ITP provision in practice? In a recent case, the Court of Justice of the European Union (CJEU) dismissed an appeal by Ziegler SA that was partially based on an alleged breach of the principle of equal treatment in relation to an ITP request.¹²⁸ Ziegler submitted an ITP request to the Commission after receiving a fine of 3.76% of its annual turnover imposed.¹²⁹ The Commission refused Ziegler's request but then proceeded to grant an ITP reduction of 70 percent to Interdean NV, which was a fellow member of the cartel.¹³⁰ Ziegler appealed to the GC on the grounds that the Commission had failed to consider its specific social and economic circumstances, in accordance with paragraph 35 of the 2006 Fining Guidelines.¹³¹ Ziegler believed that its financial circumstances were similar to that of Interdean that had received the ITP discount. Despite confirming that the Commission had failed to afford consideration to Ziegler's specific social and economic context, the GC ruled that Ziegler's circumstances were not comparable with those of Interdean's and, thus, Ziegler was not entitled to an ITP discount.¹³² Ziegler then appealed the GC decision to the CJEU and argued that – given the GC's finding that the Commission had made an error by failing to consider Ziegler's specific social and economic context – the GC could not legitimately conclude that Interdean was entitled to an ITP discount when it did not assess Ziegler's own ITP request on the same basis. Ziegler argued that reaching such a conclusion would infringe the principle of equal treatment.¹³³

The Commission countered Ziegler's accusation of unequal treatment by insisting that the specific circumstances of Interdean were 'wholly exceptional' and 'entirely special, for reasons which cannot be disclosed to Ziegler but which the GC was aware of.'¹³⁴ Therefore, these exceptional circumstances warranted

¹²⁸ Case C-439/11 P *Ziegler v Commission* (CJEU, 11 July 2013).

¹²⁹ *International Removal Services* (Case COMP/38.543) Commission Decision 2009/C 199/07 [2008] OJ C188/16.

¹³⁰ The CJEU judgment is silent on the name of this party, but the GC openly refers to Interdean in relation to the ITP elements of the original appeal.

¹³¹ Case T-199/08 *Ziegler v Commission* [2011] ECR II-3507 para 79.

¹³² *ibid* para 171.

¹³³ *Ziegler v Commission* (CJEU) (n 128) para 163.

¹³⁴ *ibid* para 165.

the Commission to depart from its general practice with regards to ITP requests, in accordance with the discretion it has under paragraph 37 of the 2006 Guidelines. In dismissing the appeal, the CJEU stated that, although the GC had found the Commission had failed to give full consideration to Ziegler's financial circumstances, the GC had not established whether or not Ziegler was unable to pay its fine. As such, the CJEU ruled that Ziegler's allegation that the GC had applied unequal treatment was unfounded.¹³⁵

This case is interesting because of the confidentiality behind the awarding of Interdean's ITP discount. In this case, the CJEU reiterated that 'the principle of equal treatment requires, inter alia, that comparable situations must not be treated differently, unless such treatment is objectively justified.'¹³⁶ However, if something is objectively justified on grounds which are kept confidential to other cartel members and the general public at large, it is impossible for us to say whether it is objectively justifiable or not. Moreover, how can one see the application of equal treatment when it appears to all those outside, that are not privy to the information, that this is unequal treatment. It is hoped that the Commission's policy in this case has been applied fairly and equally. However, because we are not privy to all the information we cannot be sure that it has and given such wide discretion and the secretive nature of the way this case was decided, it is difficult to see for certain how equal treatment has been given in this case. Thus, some may sympathise with Ziegler who made a challenge to the decision on equal treatment grounds but ended up with no ITP, left having to pay legal costs and no real explanation as to why it was not the victim of unequal treatment here. Admittedly there are issues if too much information is shared by the Commission,¹³⁷ such as the prospect of undertakings relying on information in an attempt to align itself into a position where the Commission is likely to award it an ITP. However, it is important that the Commission divulges at least some of the facts and circumstances of its decision so that the

¹³⁵ *ibid* para 170.

¹³⁶ *ibid* para 166.

¹³⁷ Which have been noted in the previous discussion.

undertakings – and more widely the general public at large – can observe that the law and the enforcement of the law is being conducted fairly and correctly to all undertakings which have contravened it.

3.3.1(b) How much of a discount they will offer

The next important consideration with regards to ITPs and equal treatment is how much discount the Commission will afford an undertaking. There is very little clarity as to how the Commission decides the size of a discount offered. Indeed, one can see the Guidelines make no mention as to the size of the discount and, as such, an analysis of whether the Commission applies its policy equally is difficult. Consequently, we must turn to the Commission's decisions to attempt to identify the level of discounts awarded by the Commission and whether the policy is applied equally to all undertakings.¹³⁸

The Commission is willing to offer a wide range of discounts when it comes to a reduction for an ITP. When we look at the decisions by the Commission we can see that this reduction ranges from 20 percent,¹³⁹ right up to 96 percent.¹⁴⁰ The Commission is willing to offer a wide range of discounts within this range. However, when we take the ITP raw data from the GCR data set,¹⁴¹ we can see that the mean average discount for a successful undertaking is 46.2 percent (to one decimal place), and the modal and median averages are both 50 percent. These findings are very similar to what Veljanovski found in his 2010 study.¹⁴² He identified that, of the 46 ITP applications considered in his study, only 12 of these were granted and the successful applicants received an average reduction in fine of 51 percent.

¹³⁸ Kienapfel and Wils have previously examined some of the first cases where the ITP discount has been awarded: Philip Kienapfel and Geert Wils, 'Inability to Pay – First cases and practical experiences' (2010) 3 Competition Policy Newsletter 3.

¹³⁹ Received by Almamet in the Calcium Carbide and Magnesium based reagents for the steel and gas Industries cartel. *Calcium Carbide and magnesium based reagents for the steel and gas industries* (Case COMP 39.396) Commission Decision 2009/C301/14 OJ C301/18.

¹⁴⁰ Received by Baerlocher in the Heat Stabilisers (Tin Stabilisers) cartel. *Heat Stabilisers* (Case COMP 38.589) Commission Decision 2010/C307/05 OJ C307/9.

¹⁴¹ GCR (n 42).

¹⁴² Veljanovski (n 15).

With such a wide range of reductions being offered and no express mention of how or why in a particular instance the Commission offers such a discount, it is difficult to see how the Commission is applying its policy equally. The arbitrary nature of these adjustments appears to make effective scrutiny impossible and inconsistencies inevitable and, hence, unequal treatment likely.

Considering the granting of ITP requests in the future, it will be interesting to see whether – in addition to appeals based on an undertaking not being granted an ITP discount – appeals may also be based upon the *amount* of ITP discount awarded to an undertaking; particularly where varying discounts are awarded in the same cartel. Given the flexibility that the Commission has exercised when awarding discounts in the past, some undertakings may be expectant of larger percentage discounts and, as such, base an appeal to the court when the amount granted is perceived by the undertaking to be too low relative to other undertakings within the cartel.¹⁴³

One can see within the ITP provision that there is such a degree of discretion attributed to the Commission that unequal treatment seems likely to occur in practice or at least has the potential to do so. Indeed, from the data we can see that undertakings in similar financial circumstances have been offered a diverse range of discounts. However, because of the arbitrary nature and the confidential way in which the Commission decides to offer an ITP, it is impossible to say for certain that there is unequal treatment. However, what one can say for certain is that the Commission is prepared to be very flexible with the discounts they offer undertakings for ITPs, and this flexibility is so great unequal application is a real probability. This means that this stage in the Commission's fining procedure could be greatly enhanced if the Commission were to introduce more transparency in the application of this stage and within the guidance documentation, as it will allow undertakings (as well as others) to

¹⁴³ Although, to an extent, financially unstable undertakings may be deterred from making an appeal on these grounds, given that they will be liable for the costs incurred from making an unsuccessful appeal.

see that the Commission is applying this stage in its fining procedure fairly and indiscriminately.¹⁴⁴ Indeed, this is important because in its current guise with the lack of information being provided by the Commission, and guidance on the likely reductions, we are seeing undertakings challenging the Commission on its application of this stage in the fining procedure.¹⁴⁵ This inevitably entails legal, social and economic costs for society that could be reduced or minimised with more transparency. With regards to the Commission's Information Note, the information contained within this does offer *partial* guidance, but it is unclear as to the relevance and indeed importance of this information now that the Competition Commissioner has changed. If these practices are to be followed in the future it would be beneficial – for clarity and completeness purposes – to incorporate the information in the Information Note into the Commission's main Guidelines for the method of setting the fine. Nonetheless, it is still important to ensure that this stage is not made unduly or overly transparent because of the potential concern that an undertaking may attempt to align itself and represent its financial position in a way that will enable it to qualify for a reduction in fine, which would mean some of the deterrence effect of the fine would be lost.¹⁴⁶ Therefore, it is important that the Commission ensures its strike the right balance between transparent application and clear guidance, on the one hand, and non-disclosure and discretion, on the other, is facilitated.

3.3.2 Nationality of an undertaking

The next area considered in regards to the application of equal treatment is that of an undertaking's nationality. This part will assess and analyse whether an undertaking's nationality has an effect on the fine imposed on it by the

¹⁴⁴ The difficulty that may be faced here will be with regards to the publishing of confidential business information. However, if the Commission redacts the most sensitive information and data it will be possible to enhance transparency and balance the needs of confidentiality. Indeed, it is worth noting that *some* of the financial data may already be in the public domain. Companies are required to file financial records publically in most EU Member States.

¹⁴⁵ For example see, Case C-439/11 P *Ziegler v Commission* (CJEU, 11 July 2013).

¹⁴⁶ It is worth noting though, that as this reduction in fine for ITP is completely discretionary and not guaranteed. If the Commission feels an undertaking is attempting to misrepresent its financial position it can decide to not allow or award a reduction in fine because of an undertakings ITP.

Commission. Specifically, this section shall focus on the comparison of the treatment of an undertaking of non-EU nationality against those of an EU nationality. To be clear, in this context when the nationality of an undertaking is referred to, what is meant is 'the country of the undertaking or group of undertakings involved in the cartel'.

The data utilised for the following empirical analysis and the proceeding section of the chapter is drawn from the previously discussed and employed GCR raw data set,¹⁴⁷ with the percentage fines imposed against the undertakings being consulted. These percentage fines are based on the worldwide market turnover of the undertakings. This data was chosen to be utilised as it allows a straightforward and direct comparison to be made of the fines within a specific cartel and the percentage fines imposed in other separate cartels on undertakings.

There are three possible approaches the Commission could adopt in the application of its fining policy with regards to an undertaking's nationality. First, the Commission could apply its fining policy in the same way to all undertakings no matter what their nationality. Second, they could apply favourable treatment to an undertaking based on their nationality or, finally, they could apply less favourable treatment to an undertaking based on their nationality.

Of course one would hope to see that the Commission applies its policy fairly and equally to all undertakings regardless of their nationality. If it does not, the punishment and decision that the Commission enforces would be arbitrary and unfair. When a policy is not applied fairly it can lead to economic costs, such as undertaking's appealing the Commission's decisions due to procedural impropriety and unfairness alongside the cost of the Commission losing part of its apparent legitimacy to be the enforcer of Article 101 TFEU. However, there are a variety of reasons why the Commission may seek to treat an undertaking

¹⁴⁷ GCR (n 42).

differently. For example, one may expect the Commission to protect or afford favourable treatment towards EU undertakings and therefore be harsher on undertakings, which are of a non-EU nationality. The benefit of the Commission adopting such an approach for EU national undertakings is that they would be better off than non-EU undertakings as the fines would be less for them and therefore they may be able to gain a competitive advantage, as the fine they receive is less. Additionally, the higher the fines the greater the benefits for the EU as the fines are absorbed into the EU's budget. However, it could be that the Commission wishes to make an example of a non-EU undertaking, which commits a competition law breach, so as to deter other non-EU national (and EU) undertakings from committing similar competition law breaches and, therefore, the Commission imposes larger fines on those undertakings. On the other hand, it may be that the Commission wishes to show that EU undertakings do not get preferential treatment over non-EU undertakings and, thus, they seek to redress this notion by positively discriminating against EU undertakings.

Given these different approaches the Commission could adopt to the consideration of an undertaking's nationality and the wide-ranging discretion it has in its application of the fining process, this chapter proceeds to analyse the empirical data to discover whether the Commission's fining process is applied equally based on the nationality of an undertaking.

Of the forty-three cartels reported in the GCR data set, thirty-four of these contained non-EU national undertakings. The majority of the non-EU firms comprised of undertakings from the following nationalities: Switzerland, the USA and Japan. In some of the Commission's decisions, information on the fines was redacted or not disclosed and, thus, in some decisions, information on the percentage fine given by the Commission is missing. What we can see from the information that has been disclosed is that there was a wide variety in the percentage of fines imposed on undertakings of both EU nationality and of non-

EU nationality. In some instances, EU undertakings received the lowest fines, and in others the highest.

For example, in the ‘MCAA’ cartel,¹⁴⁸ ‘PO Thread’ cartel,¹⁴⁹ ‘Butadiene Rubber and Emulsion Styrene Butadiene Rubber’ cartel and,¹⁵⁰ the ‘International Removal Services’ cartels,¹⁵¹ the percentage fines given to non-EU national undertakings were lower than that given to the EU national undertakings within the same cartel.¹⁵² In contrast, the decisions in the ‘Rubber Chemicals’ cartel,¹⁵³ ‘Flat Glass’¹⁵⁴ and ‘Consumer Detergents’ cartels,¹⁵⁵ saw the Commission attribute a higher percentage fine to non-EU national undertakings than the EU national undertakings in the same cartel. We also find that, within the same cartel, some non-EU undertakings receive the lowest fines whereas, in others, they receive higher fines; for example this was the case in the ‘Gas Insulated Switchgear’¹⁵⁶ and ‘Elevators and Escalators (Belgium)’ cartel.¹⁵⁷ Owing to this range in fining, all of the aforementioned Commission decisions highlight the Commission’s non-discriminatory approach in fining an undertaking with regards to the consideration of the undertaking’s nationality.

This section shall now analyse a selection of the Commission’s fining decisions to ensure this procedure is applied fairly in practice. It begins by considering three of the Commission’s decisions, then it examines two of these in great detail. These decisions were chosen as they are a representative sample of the Commission’s practices and some have unique and interesting factors

¹⁴⁸ MCAA (Case COMP/37.773) Commission Decision 2006/897/EC [2005] OJ L 353/12.

¹⁴⁹ PO Thread (Case COMP/38.337) Commission Decision 2008/C21/08 [2005] OJ C21/10.

¹⁵⁰ Butadiene Rubber and Emulsion Styrene Butadiene Rubber (Case COMP/38.638) Commission Decision 2008/C7/07 [2006] OJ C7/11.

¹⁵¹ International Removal Services (Case COMP/38.543) Commission Decision 2009/C188/07 [2008] OJ C188/16.

¹⁵² This is a selection of the Commission decisions; there are others.

¹⁵³ Rubber Chemicals (Case COMP 38.443) Commission Decision 2006/C353/50 [2005] OJ C353/50.

¹⁵⁴ Flat Glass (Case COMP 39.165) Commission Decision 2008/C127/11 [2007] OJ C127/9.

¹⁵⁵ Consumer Detergents (Case COMP 39.579) Commission Decision 2011/C193/06 [2011] OJ C193/14.

¹⁵⁶ Gas Insulated Switchgear (Case COMP 38.899) Commission Decision 2008/C5/07 [2007] OJ C5/7.

¹⁵⁷ Elevators and Escalators (n 68).

concerning the composition of the nationality of the undertakings and the way in which the Commission awarded fines within the decision.

In the '*DRAMS*' cartel there were ten undertakings involved,¹⁵⁸ but only one of the undertakings was of EU nationality. In this cartel, the Commission fined the EU undertaking – which was from Germany – the highest percentage fine of all of the cartel members.¹⁵⁹ Interestingly, the other non-EU national undertakings in this cartel received a substantially lower percentage fines. The majority of these percentage fines were under 0.24%, with only one non-EU national undertaking receiving a higher percentage fine than 0.24%: Hynix.¹⁶⁰ This is true even when the non-EU undertaking has a similar annual turnover to the EU national undertaking.¹⁶¹

The next cartel to be discussed is the '*Chloroprene Rubber*' cartel.¹⁶² This cartel involved six undertakings, four of which were of non-EU nationality. In this cartel, Bayer – an undertaking from Germany – received complete immunity, with the other EU undertaking (Eni / Polimeri Europa) receiving one of the lowest percentage fines. The highest percentage fine in this case was received by one of the non-EU undertakings – Denki Kagaku Kogyo / Denka – who were fined 2.14%.

In the '*PO/Hard Haberdashery: Fasteners*' cartel,¹⁶³ thirteen undertakings were involved and four of these undertakings were of non-EU nationality. In this case, the joint highest percentage fines (10%) were awarded by the Commission to an EU undertaking and a non-EU undertaking. This case, again, appears to highlight the Commission's impartial approach to fining based on nationality, as two undertakings from different nationalities were awarded the joint highest fines.

¹⁵⁸ *DRAMS* (Case COMP 38.511) Commission Decision 2011/C180/09 [2010] OJ C180/15.

¹⁵⁹ Infineon received a fine percentage of 1.87%.

¹⁶⁰ Hynix received a fine of 1.14%.

¹⁶¹ See Elpida's turnover compared to that of Infineon, where Elpida received 0.24% fine and Infineon 1.87% fine.

¹⁶² *Chloroprene Rubber* (Case COMP 38.629) Commission Decision 2008/C251/07 [2007] OJ C251/11.

¹⁶³ *PO/Hard Haberdashery: Fasteners* (n 68).

The next two Commission fining decisions to be discussed shall consider all of the stages of the Commission's fining procedure to help identify and illustrate how the Commission applies its fining procedure to undertakings of a non-EU nationality in practice, and so that any discrepancies within its approach can be highlighted and analysed.

The '*RAW Tobacco Italy*' cartel involved six undertakings,¹⁶⁴ three of whom were of EU nationality and three who were of non-EU nationality. In this cartel, the Commission proceeded to fine Romana Tabacchi, who was one of the EU national undertakings, with the highest percentage fine; whereas the three USA undertakings were given the lowest percentage fines.¹⁶⁵ The fining in this case was assessed under the now obsolete 1998 Fining Guidelines, but offers a good insight into the way the Commission conducts a fining assessment with regards to the treatment of EU and non-EU undertakings, with much of the information being disclosed. The Commission began by assessing the gravity of the infringement and noted that the production of raw tobacco in Italy accounted for 38% of the Community in-quota production.¹⁶⁶ It was also noted that the processors' infringement was considered very serious as they fixed purchase prices and shared purchased quantities.¹⁶⁷

As Deltafina appeared to be the biggest purchaser, the Commission felt the starting amount of the fine to be imposed on this undertaking should be the highest. Equally, as Transcatab, Dimon and Romana Tabacchi had smaller market shares, the Commission felt they should be grouped together and given the same size starting amount.¹⁶⁸ It was held that merely reflecting the market position would not be sufficient, thus a 1.5 multiplying factor was applied to Deltafina and a 1.25 multiplying factor was imposed to Dimon and

¹⁶⁴ *Raw Tobacco Italy* (Case COMP 38.281) Commission Decision 2006/901/EC [2005] OJ L353/45.

¹⁶⁵ It is worth noting here that the other two EU national undertakings' fines were non-disclosed.

¹⁶⁶ *Raw Tobacco Italy* (Case COMP 38.281) Commission Decision [2005] 366.

¹⁶⁷ *ibid* 367.

¹⁶⁸ *ibid* 372-373.

Transcatab.¹⁶⁹ Therefore, the Commission set the starting amounts of the fines as follows: Deltafina €37,500,000, Transcatab €12,500,000, Dimon (Mindo) €12,500,000 and Romana Tabacchi €10,000,000. The infringement lasted six years and four months for Deltafina, Dimon (Mindo) and Transcatab, so the Commission increased the fines by 60%.¹⁷⁰ Romana Tabacchi was involved in the infringement for two years and eight months and, as such, the Commission decided that the fine should be increased by 25%.¹⁷¹ This meant the basic amounts of the fines were as follows: Deltafina €60,000,000, Transcatab €20,000,000, Dimon (Mindo) €20,000,000 and Romana Tabacchi €12,500,000.

The Commission next considered attenuating circumstances. As Romana Tabacchi did not take part in certain aspects of the cartel, had disrupted the purpose of the cartel and had a weak market share, the Commission reduced the basic amount of the fine by 30%.¹⁷² Deltafina was the first undertaking to apply for leniency and had substantially contributed to the Commission's investigation by coordinating the submission of evidence to the Commission, so the Commission felt the basic amount should be reduced by 50%.¹⁷³ Therefore, the fines were amended as follows: Deltafina €30,000,000, Transcatab €20,000,000, Dimon (Mindo) €20,000,000 and Romana Tabacchi €8,750,000. The fines were then assessed to ensure that they complied with the 10% cap. Romana Tabacchi's fine had to be reduced to comply with the cap.¹⁷⁴ Additionally, as Mindo was originally part of the Dimon group, it was felt that it should be apportioned within the 10% of its turnover in its most recent business year.¹⁷⁵ Thus, the final fines imposed were as follows: Deltafina €30,000,000, Transcatab €14,000,000, Dimon (Mindo) €10,000,000 and Romana Tabacchi €2,050,000.

¹⁶⁹ *ibid* 374-375.

¹⁷⁰ *ibid* 377.

¹⁷¹ *ibid* 378.

¹⁷² *ibid* 380.

¹⁷³ *ibid* 385-398.

¹⁷⁴ *ibid* 402.

¹⁷⁵ *ibid* 404.

This case highlights how the Commission takes into consideration the specific factors of the case before it. For example, we can see that when undertakings have been involved in the infringement for longer periods of time, the fines will represent that figure.

By looking at the reasons why the Commission imposed the fines it did in this case, we can see that the Commission did not treat the three US undertakings prejudicially and that the percentage fines which were awarded throughout the various stages of the fining process were based on legitimate factors and considerations. Indeed, it is worth noting that, although Romana Tabacchi (an EU undertaking) received the highest percentage fine, it actually received one of the lowest monetary fines, due to its turnover. This again appears to illustrate that the Commission is operating and applying its fining policy consistently and fairly across the board irrespective of an undertaking's nationality.

The final Commission decision to be examined is the '*Professional Videotapes*' cartel.¹⁷⁶ This cartel is analysed in detail, as it is a rather unique decision, because it was comprised entirely of non-EU undertakings. There were only three undertakings involved in this cartel: Sony, Fuji and Maxwell, all of which were of Japanese nationality. Interestingly not one of the undertakings was granted complete immunity, owing to the fact that the Commission started the investigation on its own initiative.¹⁷⁷ The fines imposed by the Commission in this case are typical when compared to the fines imposed by the Commission in other cartels. Indeed, the fines were no higher or lower than in other cartels from the data set. This helps illustrate an impartial approach to the fining of undertakings based on their nationality by the Commission. We shall now look closer at the actual calculation of the fine by the Commission in this case because of its novelty of only containing non-EU national undertakings.¹⁷⁸ The

¹⁷⁶ *Professional Videotapes* (n 67).

¹⁷⁷ European Commission, 'Antitrust: Commission fines professional videotape producers over €74 million for price fixing cartel' (European Commission Website) <http://europa.eu/rapid/press-release_IP-07-1725_en.htm?locale=en> accessed 30 June 2014.

¹⁷⁸ *Professional Videotapes* (Case COMP 38.432) Commission Decision [2007].

Commission followed its standard 2006 fining procedure for calculating the fine to impose on an undertaking that has committed a breach of Article 101 TFEU. They began by setting the basic amount of the fines noting that the gravity of the fines can be up to 30% of the value of sales.¹⁷⁹ The Commission noted that the cartel conduct in this case was horizontal price-fixing which is one of the most harmful restrictions on competition.¹⁸⁰ Additionally, it noted that the three undertakings in this cartel had a combined market share of more than 85%,¹⁸¹ that the cartel's geographic scope included at least the EEA,¹⁸² and that the infringement was generally implemented.¹⁸³ Because of these factors the Commission decided to set the basic amount of the fine at 18% of the value of sales.¹⁸⁴ The next stage in the Commission's fining process required it to consider the duration of the infringement. As the cartel lasted at least two years and eight months, the Commission decided a multiplier of three was to be used.¹⁸⁵ Finally, the basic amount of the fine required the consideration of an additional deterrence amount. Here, the Commission felt that having considered:

‘the various factors discussed in recitals (206) to (209), particularly the nature, the combined market share and the geographic scope of the infringement, that an additional 17% of the value of sales would be appropriate.’¹⁸⁶

This meant that the basic fines on the undertakings were as follows: Sony €33,000,000, Fuji €22,000,000 and Maxell €18,000,000. The Commission then had to consider whether there were any aggravating or mitigating factors in the case. The Commission stated in its decision that Sony representatives had

¹⁷⁹ *ibid* 205.

¹⁸⁰ *ibid* 206.

¹⁸¹ *ibid* 207.

¹⁸² *ibid* 208.

¹⁸³ *ibid* 209.

¹⁸⁴ *ibid* 215.

¹⁸⁵ *ibid* 216.

¹⁸⁶ *ibid* 217.

refused to answer oral questions and that one employee had shredded documents from a file labeled “Competitors Pricing”.¹⁸⁷ Therefore, it was held that Sony’s behavior had ‘necessarily disrupted the proper conduct of the investigation and hindered the Commission’s inspectors in the exercise of their investigative powers.’¹⁸⁸

Because of this, Sony received a 30% increase to the basic amount of fine imposed on them.¹⁸⁹ The Commission held that there were no mitigating factors in this case.¹⁹⁰ The Commission then needed to assess whether there should be a specific increase for deterrence. It was noted that Sony had a particularly large turnover beyond the sales of goods or services to which the infringement relates and, in order to ensure that the fines had a sufficiently deterrent effect, the fines were increased by a further 10%.¹⁹¹

The next stage of the fining process required the Commission to ensure that the fines did not exceed 10% of the undertaking’s total turnover from the preceding business year. The ceiling was not attained in this case, which meant that the basic fines on the undertakings were: €47,190,000 for Sony, €22,000,000 for Fuji and €18,000,000 for Maxell. The Commission next considered the potential reductions for leniency applications. The Commission granted Fuji a reduction of 40% and Maxell 20% of the fine for the information and assistance they provided in the case.¹⁹² There were no settlements or considerations of ITPs in this decision so the final fines imposed on the undertakings were: Sony €47,190,000, Fuji €13,200,000 and Maxell €14,400,000.

¹⁸⁷ *ibid* 219.

¹⁸⁸ *ibid* 221.

¹⁸⁹ *ibid* 227.

¹⁹⁰ Interestingly Sony tried to argue that the implementation of a compliance programme after the breach of Article 101 TFEU should be seen as a mitigating factor. The Commission did not agree with this argument, although they did welcome the introduction of a compliance programme by Sony, *ibid* 241.

¹⁹¹ *ibid* 243-246.

¹⁹² *ibid* 256 and 261.

What this decision illustrates is that the Commission imposed the same percentage fine on all undertakings in this cartel in the first instance. The difference in percentage fines occurred when the aggravating, deterrence and leniency factors were considered. There were legitimate reasons for the Commission to treat the undertakings differently here; namely, owing to the differences between the undertakings' behaviour and conduct. When we consider this case broadly among the other fining decisions from the GCR data set, we see that the basic amount of the fine is relative to what the basic fines of other undertakings were set at; the majority in these cases being between 16-19%.¹⁹³ This case is important as if unequal treatment were to occur within the Commission's fining procedure, this would have been the ideal case for it to occur in as all of the undertakings were of a non-EU nationality. Yet what we find is no departure from the standard norm of the Commission's fining procedure. This is the case throughout the whole fining procedure decision, with none of the stages being applied differently to how they are in other cartel fining decisions by the Commission. Again this case strengthens the belief that the Commission does not discriminate on the grounds of an undertaking's nationality.

From the empirical data that is available to be analysed and the comparison undertaken above, one can see that there is no evidence of the Commission applying favorable treatment to an EU or a non-EU national undertaking. Indeed, from the above analysis, one can see that the Commission is applying its fining policy fairly when it comes to the consideration of an undertaking's nationality.

What has been illustrated is that the Commission takes a very much 'mixed approach' to the fining of undertakings with regards to their nationality; with there being some instances of the undertaking being fined highly but other

¹⁹³ There was one that was widely out of this range: *Marine Hoses Cartel* [*Marine Hoses* (Case COMP 39.406) Commission Decision 2009/C168/05 [2009] OJ C168/6] at 25%. See Table 4.2 'Selected Fining Cases Table'.

instances of the undertaking being fined to a lesser degree. Further to this, we have seen that even cartels which contain no EU national undertakings are not fined more leniently or harshly. When one looks at the calculation of the starting amount of the fine it can be seen that, across multiple cartels, the starting point is always around the 16% figure, and this is irrespective of the nationality of the undertakings involved in the cartel, even if they are all of a non-EU nationality.¹⁹⁴ We also see that when aggravating or mitigating factors are considered, the percentage increases for these across the various cartels is often the same and, if not, it is very similar.¹⁹⁵ We can therefore see that there is no evidence to suggest that the Commission is applying its policy unfairly to undertakings on the basis of their nationality. Indeed, when considering the calculation of the fine by the Commission, we see that it applies similar percentage fines to undertakings in analogous circumstances with very few deviations from the norm.¹⁹⁶ Whenever these deviations do occur, there are legitimate reasons for why the Commission has departed from the norm; for example, because the conduct of the undertaking involved necessitates it.¹⁹⁷

Additionally we can see that when the Commission imposes fines on undertakings, it follows the fining procedures laid down in the Guidelines and determines a fine for an undertaking in line with these procedures. Further to this, when we consider the awarding of leniency by the Commission, particularly the awarding of full immunity, we find from the empirical data that the Commission is willing to grant non-EU national undertakings leniency as well as EU national undertakings.¹⁹⁸ This appears to reiterate the idea that the

¹⁹⁴ See Table 4.2 'Selected Fining Cases Table'.

¹⁹⁵ *ibid.*

¹⁹⁶ This is across the Commission's whole fining process, whether it be the calculation of the basic amount, aggravating or mitigating circumstances or additional deterrence.

¹⁹⁷ For example, the undertaking in question may have cooperated, assisted or obstructed the Commission's investigation.

¹⁹⁸ For example, in the '*MCAA (Monochloroacetic Acid)*' cartel [*MCAA* (Case COMP/37.773) Commission Decision 2006/897/EC [2005] OJ L 353/12], Clariant – who were from Switzerland – were awarded complete immunity. Similarly, in the '*Fittings*' cartel [*Fittings* (Case COMP 38.121) Commission Decision 2007/691/EC [2006] OJ L283/63] a non-EU undertaking, Mueller, was also awarded full immunity.

Commission will not be prejudicial to an undertaking based on their nationality when they apply the fining procedure to a cartel.

Owing to this and the aforementioned discussion, it is forwarded that the nationality of an undertaking is not a factor that the Commission considers in the calculation of an undertaking's fine or in the awarding of leniency. Because of this, what we see is that, out of the three suggested hypotheses at the beginning of this section on the way the Commission could apply its fining policy, we find that Option One is the one that occurs in practice, i.e. that the Commission applies its fining policy in the same way to all undertakings no matter what their nationality.

3.3.3 National Champions

The final potential issue of equal treatment that this chapter shall analyse will assess the application of the fining process to undertakings that are classified as NCs. In this context, an NC can be defined as an undertaking which has a turnover of more than ten billion Euros. It should be noted that NCs analysed in this chapter can take the form of an EU Member State NC or that of a non-EU Member States NC.

There are three potential hypotheses relating to how NCs could be treated by the Commission: First, NCs are treated the same as any other undertaking in the cartel; second, they are treated more harshly in comparison to other non-NCs; or finally, they are treated more leniently in comparison with other cartel members that are not NCs.

So why would the Commission wish to treat an NC harshly or more leniently than another non-NC?¹⁹⁹

¹⁹⁹ It could also be the case that the Commission does not realise that it is being more lenient or harsh on an NC.

The Commission may wish to do this for a variety of reasons. For example, with regards to treating an NC more harshly, it could be that the Commission seeks to make an example of the NC to help deter other undertakings from committing competition law breaches. Indeed, because the undertaking is likely to be larger and more important within the product market, making a specific example of them may reduce the risks of other undertakings committing competition law breaches, as they fear that if the Commission is willing to impose a high fine on an important NC they will also do so to them.

On the other hand, the Commission may wish to be more lenient in the fining of an NC because they are so important within the product market and that over-fining them could be detrimental for the product market and may have other social and economic implications, such as an effect on employment.

Given the different approaches the Commission could potentially adopt, this chapter now proceeds to analyse the empirical data to discover whether there is equal treatment within the Commission's treatment of NCs and non-NCs.²⁰⁰

Of the forty-three cartels reported, twenty-five of these involved at least one NC. In many of the cartels, one of the NCs received complete immunity.²⁰¹ Often NCs received the lowest or some of the lowest percentage fines when compared to non-NCs. For example, in the '*Rubber Chemicals*' cartel there were four cartel members,²⁰² two of which were NCs. Both of the NCs received the lowest percentage fines with the other non-NCs receiving the highest fine and one receiving complete immunity. In the '*Bitumen Spain*' cartel,²⁰³ there were five undertakings involved, with four of them being NCs. One of the NCs was granted complete immunity and the other three got the lowest fines. The

²⁰⁰ Similarly, as with regards to the nationality of an undertaking, the empirical data consulted in this section will be the percentage fines the undertakings received. The percentage fines were based on the relevant worldwide market turnover.

²⁰¹ This was the case in thirteen of the twenty-five cartels. It should be noted that in some cartels information was not disclosed or was redacted, meaning it was impossible to identify which applicant was granted complete immunity.

²⁰² *Rubber Chemicals* (Case COMP 38.443) Commission Decision (n 153).

²⁰³ *Bitumen Spain* (Case COMP 38.710) Commission Decision 2009/C321/08 [2007] OJ C321/15.

'Methacrylates' cartel contained two NCs;²⁰⁴ one was granted complete leniency by the Commission and the other received a substantially lower percentage fine than the other nearest cartel participant's lowest percentage cartel fine (0.15 to 1.08 percent).²⁰⁵

There were many other instances of lower percentage fines being imposed on NCs than non-NCs. However, there were two cartels where the Commission fined NCs more harshly than non-NCs. The first of these was the '*Gas Insulated Switchgear*' cartel.²⁰⁶ This cartel had five NCs; one of which gained complete immunity, and another which was given the joint lowest percentage fine (with another non-NC). The other three NCs were attributed some of the highest percentage fines in this cartel. The second cartel – which bucks the trend of lower fines being given to NCs – was the '*Power Transformers*' cartel.²⁰⁷ This cartel had three NCs; again, one of the NCs was awarded complete immunity with the other two receiving the highest fines within the cartel.

What the empirical data appears to show is that the Commission, in many instances, offers favourable treatment to an NC over that of a non-NC in the same cartel. This would appear to be unequal treatment as the undertakings in question are in the same position, apart from one being classified as an NC. Indeed, as is evident from some of the cases above, the discrepancy of fines between NCs and non-NCs in some instances is far from negligible, with some having around a four percent difference. However, one may wish to suggest that this is to be expected, as NCs are likely to be the biggest undertakings in the cartel and thus active in many markets and therefore have a considerably larger annual turnover than non-NCs which means that the percentage fine will indeed be noticeably less. Nevertheless, this is a flawed argument for a variety

²⁰⁴ *Methacrylates* (Case COMP 38.645) Commission Decision 2006/793/EC [2006] OJ L322/20.

²⁰⁵ Again, a similar situation occurred in the '*Sodium Chlorate*' cartel [*Sodium Chlorate* (n 68)] (0.03 to 0.90 percent) and the '*Dutch beer market*' cartel [*Dutch beer market* (n 69)] (1.85 to 5.70 percent).

²⁰⁶ *Gas Insulated Switchgear* (Case COMP 38.899) Commission Decision (n 156).

²⁰⁷ *Power Transformers* (Case COMP 39.129) Commission Decision 2009/C296/08 [2009] OJ C296/21.

of reasons which shall now be explained. Firstly, the cap on the fine is ten percent of the worldwide annual turnover of the undertaking in question, not the affected product market. Therefore, the fine can be significantly higher than of just including the affected market. Secondly, the Commission's Fining Guidelines specifically attempt to address this problem via the sixth stage where an undertaking, which is considered to have a significantly large turnover outside the effected market, can have its fine increased to address this. This means that the fines in the cartel should effectively be similar percentages for NCs as to non-NCs. Yet, this appears not to be the case currently as the fines on the NC undertakings are of a significantly less percentage value, such as in the '*Bitumen Spain*' cartel²⁰⁸ and the '*Methacrylates*' cartel.²⁰⁹ It is observable that NC are being fined less but the reasoning for this is unclear, but may well relate to the aforementioned factors above.

In the future this research could be further expanded upon to try to identify why the NCs received more lenient treatment. For example, one could analyse whether there were mitigating factors which resulted in the imposition of lower fines than that received by non-NCs. Mitigating factors aside, however, it would appear clear that the Commission is actively *protecting* – and, as such, affording unequal treatment – to a select group of undertakings; namely, NCs. On the face of it, the Commission could also be seen to be applying a universal protectionist policy to all NCs, regardless of whether they are NCs within the EU or outside of it. One would, however, question the motives of the Commission in protecting non-EU NCs when these are often in direct competition with EU NCs.²¹⁰ Perhaps this may be attributed to other external factors such as political influence; namely, lobbying from the governments of large trade partners.

It is difficult to say with clarity that unequal treatment is definitely occurring, as we are not privy to all the information and data that is available to the

²⁰⁸ *Bitumen Spain* (Case COMP 38.710) Commission Decision (n 203).

²⁰⁹ *Methacrylates* (Case COMP 38.645) Commission Decision (n 204).

²¹⁰ However, it should be noted that the Commission has continuously reiterated its stance against adopting a protectionist culture within the EU. For example, Kroes (n110).

Commission. This issue is further compounded by the fact that the Commission has a wide-ranging discretion when it comes to the application of its fining policy to undertakings. However, the empirical data clearly shows that – in the twenty-five cartels that involved NCs – only two of these resulted in the NCs receiving the highest percentage fines in the cartel. This would appear to suggest unequal treatment in the application of the Commission’s fining process to undertakings. Thus, what we find is that the third potential hypothesis forwarded at the beginning of this section occurs; namely, NCs are treated more leniently in comparison to other non-NCs.

3.3.4 Conclusions on equal treatment

This second section of the chapter has analysed the potential equal treatment concerns with regards to three factors in the Commission’s fining process. Firstly, ITP discounts were analysed and we see that because of the secretive nature of the way they are awarded it is difficult to determine whether equal treatment is occurring. However, from an ‘outsider’s view’, it appears that the calculations are not necessarily applied equally,²¹¹ and because of the flexible and wide-ranging reductions in fines, it is highly likely that they are being applied unequally. Secondly, the nationality of the undertakings and the percentage of fine they received were assessed. We see that the empirical data shows that the Commission’s policy seems to be being applied fairly and non-discriminatory with regards to an undertaking’s nationality. Thirdly, NCs were discussed in relation to the percentage fine they received compared to non-NCs. What the data shows in most instances is that an NC receives a lower fine than a non-NC in the same cartel. Therefore, in this instance, there appears to be unequal treatment afoot. Hence, it is suggested that a greater degree of transparency within Commission decisions would be beneficial to prevent unequal treatment. It is believed that by being more transparent, it would help prevent unequal treatment or the perception of it as it would be easier to identify when equal treatment is not occurring and, thus, this would act as a

²¹¹ The *Ziegler* case being a potential example here.

tool for preventing unequal treatment. As was noted above in the Commission's differential treatment of Ziegler to Interdean in the application of the ITP discount, it seems hard to justify this differential treatment of the two cartelists, but if more information were to be disclosed – even if just to the parties involved – it would help quell this perception.

The final section of this chapter will now proceed to conclude the analysis of the Commission's fining process by discussing the research findings.

3.4 Conclusion

It is important that the Commission's fining process is legally certain and applied equally to undertakings. This chapter analysed the Commission's fining procedure to ensure that it complies with the requirements of legal certainty. It achieved this by assessing the potential legal certainty concerns within the Commission's fining process in relation to three areas. It was shown that non-exhaustive lists comply with Article 7 ECHR as does the Commission having a stage within the fining process which allows for an increase in the fine specifically for deterrence purposes. What was found from the application of the relevant ECtHR and EU case law was that by the Commission having a ten percent cap imposed on them – and the fact that they produce a set of Fining Guidelines – that the process meets the required legal standard of certainty under Article 7 ECHR. What was also noted in this section of analysis was the amount of discretion the Commission has in the application of the fining process. The benefits of this discretion were considered alongside the potential advantages of further limiting this discretion through guidance. As was stated above, it was felt that the Commission's fining process complies with Article 7 ECHR. Nonetheless, it was also proposed that if the Commission were to provide further guidance – and limit its discretion further through this guidance – this would be more beneficial for certainty in its fining procedure and produce much needed guidance. Indeed, examples of factors considered for mitigating and aggravating circumstances, and increases and decreases in the fines can be provided for within the Commission's Guidelines. Additionally, further guidance defining what is meant by 'specific deterrence' in the sixth stage of the Commission's fining process should be provided.

The chapter then proceeded to analyse the Commission's decisions to ascertain whether the Commission applied its fining policy and process fairly, equally and consistently to undertakings. Three specific areas of the Commission's fining process were examined. What was identified from this analysis is that because

of the lack of transparency regarding the ITP discount it is difficult to ascertain for certain how the Commission is applying this policy. It was noted that it seemed likely – due to the lack of transparency and such wide-ranging imposition of reductions – that this stage was being applied unequally. It was identified that the Commission is applying its policy equally with regards to the consideration of an undertaking’s nationality. However, it was identified when NC percentage fines were compared to those of non-NCs that the NC receives a lower percentage fine than that of non-NCs in the same cartel. This indicates that the Commission may be applying its fining policy preferentially to NCs. The issue this chapter has highlighted is that it is difficult to effectively analyse Commission decisions for equal treatment, as the decisions are reached in such a secretive way, with not all information being disclosed. Additionally, because the Commission retains such a wide discretion under the ten percent cap – in its application of the fining procedure – it is difficult for anyone outside the Commission to ascertain how the policy is actually being applied. Owing to this, the chapter identified that more transparency and clarity in the Commission’s decisions could ensure equal treatment of undertakings or at least the reduction in the perception of unequal treatment in some instances.

As has been shown, it is important for the Commission to retain legitimacy and to prevent possible legal problems by ensuring that their processes comply with legal certainty, and that any policies that they operate are applied equally and fairly. Currently, the Commission’s fining policy appears to comply with the necessary legal requirements of legal certainty. It is, however, difficult to ascertain whether the fining procedure is being applied equally and fairly. Nevertheless, it does appear in some instances that the fining policy is not being applied equally and fairly. The difficulty here is balancing certainty and transparency within the Commission’s Fining Guidelines and its application, on the one hand, with effective deterrence and enforcement (which requires a degree of uncertainty) on the other. Certainty for undertakings could be further improved by providing more detailed guidance, examples, and limiting the Commission’s discretion further through guidance documents as well as

requiring the Commission to be more transparent with its decisions. This should help enable the identification of whether the Commission's fining procedure is being applied equally and allow for greater certainty whilst still permitting effective deterrence to be achieved.

Chapter 4: Do the provisions in the Damages Directive on disclosure adequately balance the competing rights and interests at play?¹

4.1 Introduction

In the fight to detect and uncover secretive cartels, the European Commission (hereafter, 'the Commission') operates a leniency policy.² The Commission's leniency policy helps it to detect cartels by allowing an undertaking — which has participated in an illegal cartel — to report it to the Commission in exchange for a reduction in fine or immunity. This policy is important, as it is very difficult for the Commission to detect and penetrate secretive cartels. As we noted in Chapter 2 there are other options for detecting cartels, such as, market inquiries, customer complaints and market investigations. However, these are much more resource intensive for the Commission and are regularly less fruitful in detecting cartels.³ The Commission's leniency programme goes much further than merely assisting it in detecting cartels, it also helps to destabilise and deter current and future cartels, respectively.⁴ Because of the importance that the

¹ A draft of part of this chapter was presented at the CCP New Researchers Workshop in Norwich on the 13th June 2012, the International Graduate Legal Research Conference in London on the 14th April 2015, and the Southern Law PhD Conference in Portsmouth on the 1st May 2015. The feedback and comments from the attendees of the conference is greatly appreciated.

² Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency in cartel cases)' [2006] OJ C298/17.

³ Indeed, we see that since 1998 when the first leniency decision was given, eighty-four percent of the cases (eighty-three out of eighty-eight) were adopted on the basis of leniency cooperation. As of the 1 February 2013, see Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law International 2013) 11.

⁴ Panayiotis Agisilaou, 'Collusion in Industrial Economics and Optimally Designed Leniency Programmes – A Survey' (2013) CCP Working Paper 13-3 <competitionpolicy.ac.uk/documents/107435/107587/13-3+Agisilaou.pdf/9b87613a-fb52-459f-8e9c-1eea7879547f> accessed 2nd February 2013, 3.

Commission's leniency programme plays in deterring and detecting cartels it has been referred to as a 'weapon of mass dissuasion'.⁵

In order for an undertaking to be granted complete or partial immunity, there are strict requirements placed on it, necessitating that it cooperates and assists the Commission in its antitrust investigation.⁶ For example, the undertaking needs to provide a corporate statement – that includes a detailed description of the alleged cartel arrangement;⁷ the name and address of the legal entity;⁸ the names, positions and office locations of those involved;⁹ information on which other competition authorities it has applied to,¹⁰ and finally other evidence related to the alleged cartel.¹¹ There are also additional requirements placed upon an undertaking that they must comply with for a reduction in fine.¹²

In recent years there has been a line of cases developed through various EU Member States' national courts where private parties who are suing for damages against a cartel have sought access to the leniency documentation held by the Commission and national competition authorities (NCAs) to assist with their damage claim.¹³ This documentation can assist third parties, to help demonstrate that the cartel existed and also aid in the calculation of financial harm and loss caused to them by the cartel. However, if these documents are disclosed, it may discourage undertakings from reporting the cartel in the first instance, which is a potential issue – given the importance of the leniency programme for the detection of cartels. What we therefore see is an inherent

⁵ Joan R Borrell, Juan Luis Jimenez and Carmen Garcia, 'Evaluating antitrust leniency Programs' (2012) XREAP No. 2012-0 <papers.ssrn.com/sol3/papers.cfm?abstract_id=1993027> accessed 18 September 2012, 3.

⁶ Wouter P Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30(1) World Competition 25.

⁷ Commission Notice (n 2) (9)(a).

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.* (9)(b).

¹² *ibid.* (12).

¹³ For example, see *National Grid v Switchgear cartel* [2009] EWHC 1326 (Ch), [2009] UKCLR 838, *Case C-360/09 Pfleiderer AG v Bundeskartellamt* [2011] OJ C 232/5, *Case T-437/08 CDC Hydrogene Peroxide v Commission* [2012] OJ C 32/18 and *Case C-536/11 Bundeswettbewerbsbehörde v Donau Chemie AG and others* [2013].

tension within the law between the enforcement of public competition law, on the one hand, and the enforcement of private competition law, on the other. Access to leniency documents is important for third party claimants trying to sue for damages but unlimited disclosure of these confidential documents may deter and scare undertakings from applying for leniency in the first instance, which is central for detecting cartels. A recent development within this debate has been the enactment of the Damages Directive.¹⁴ Contained within the Directive – under Article 6(6)(a) – it is stipulated that leniency documents may not be disclosed to third parties in *any* circumstances.¹⁵ This technically now means that disclosure of leniency documents cannot happen in future once all Member States have implemented the requirements of the Directive.¹⁶ However, this sits in complete contradiction to what the European courts have repeatedly stated and held in its decisions. Therefore, given the European court’s views regarding the need for a case-by-case balancing act when disclosure of leniency documents to third parties is mooted,¹⁷ and the Damages Directive,¹⁸ taking the diametrically opposing view; this chapter takes the unique opportunity to consider (a) whether the blanket ban is necessary (from the prospective of the protection of an undertaking’s rights) and; (b) whether the Directive has struck the right balance between the protection of a third parties rights and the undertakings rights, and whether there may be a better balance to be had. In answering (a) the chapter considers potential rights challenges that an undertaking could seek to make if confidential leniency documents were disclosed to third parties. These rights challenges take three distinctive forms. The first (i) is an undertaking’s ‘*legitimate* expectation’ of non-

¹⁴ Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union [2014] L 349/1.

¹⁵ *ibid.* Specifically, 6(6) sets out that: ‘Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; (b) settlement submissions.’

¹⁶ All Member states are required to enact legislation to comply with the requirements of the Directive by the 27 December 2016. *ibid* Damages Directive, Article 21(1).

¹⁷ See Case C-536/11 *Bundswettbewerbshörde v Donau Chemie AG and others* [2013] and Case C-360/09 *Pfleiderer* (n 13).

¹⁸ Damages Directive (n 14).

disclosure. Here the legislation, guidelines and assurances given by the Commission against disclosure are examined to identify if a potential claim of a breach of this principle can be made. Second (ii) an undertaking's right to privacy under Article 8 of the ECHR is explored. Third, (iii) the unique possibility of whether there could be a breach of an undertakings confidence is investigated. After this analysis has been conducted, the second part of the chapter goes on to explore if the Directive gets the balance right and whether there is a way of improving this, or achieving it more effectively to ensure that both groups of rights needs are better protected.

Most of the literature that has considered the Commission's leniency programme focuses on determining its 'optimal' design and structure.¹⁹ That said, some of the potential human rights concerns within the leniency programme (in relation to Article 6 of the ECHR) have been considered.²⁰ There is also significant literature discussing the disclosure of confidential leniency documents, particularly with regard to the decision in *Pfleiderer* and the potential implications of the decision for the Commission's leniency programme.²¹ However, there has been no attention within the literature of the

¹⁹ For example, Wouter P Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30(1) *World Competition*, 25, Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs' (2007) CCP Working Paper 08-18 <competitionpolicy.ac.uk/documents/107435/107587/ccp08-18.pdf> accessed 12 February 2013, Joseph E Harrington Jr, 'Optimal Corporate Leniency Programs' (2008) 56(2) *The Journal of Industrial Economics* 215 and Panayiotis Agisilaou, 'Collusion in Industrial Economics and Optimally Designed Leniency Programmes – A Survey' (2013) CCP Working Paper 13-3 <competitionpolicy.ac.uk/documents/107435/107587/13-3+Agisilaou.pdf/9b87613a-fb52-459f-8e9c-1eea7879547f> accessed 2nd February 2013, 3.

²⁰ See, for example, Wouter P Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 140-142, Wouter P Wils, 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition: Law and Economics Review* 567 where an analysis of the potential self-incrimination issues was undertaken and Imran Aslam and Michael Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5(1) *CompLRev* 61.

²¹ Case C-360/09 *Pfleiderer* (n 13). For example, see Sebastian Peyer, 'Disclosure of Leniency Documents in the United Kingdom: Is the Draft Directive Creating Barriers?' (2013) August (1) *CPI Antitrust Chronicle* 1, Caroline Cauffman, 'Access to Leniency-Related Documents after *Pfleiderer*' (2011) 34(4) *W. Comp* 597, Gaetane Goddin, 'The *Pfleiderer* Judgment on Transparency: The National Sequel of the access to Document Saga' (2012) 3(1) *Journal of European Competition Law and Practice* 40, Thorsten Mäger, Daniel J Zimmer and Sarah Milde, 'Access to Leniency Documents – Another Piece in the Puzzle Regarding Public and Private Antitrust Enforcement? (Germany)' (2012) *Journal of European Competition Law and Practice*. Advance Access published <jeclap.oxfordjournals.org/content/early/2012/12/23/jeclap.lps075.full> accessed 1 March

potential procedural rights challenges that could be made by an undertaking if the Commission's leniency documentation is disclosed. Therefore, the analysis in section (a) of the chapter is completely novel. Nonetheless, a few practitioners have noted that there could also be issues with regards to Article 8 of the ECHR and the right to private life but they have gone no further than to note this observation.²² Scordamaglia-Tousis has considered the right to privacy in the context of inspections; particularly, he has looked at inspections carried out on 'business premises' and 'non-business premises'.²³ However, he has not considered Article 8 of the ECHR in the context of the disclosure of leniency documents. With regards to leniency Scordamaglia-Tousis has broadly considered it within his analysis of cartel fining procedure and its compatibility with fundamental rights.²⁴

As to whether there is a superior way to manage the disclosure of leniency documents – prior to the enactment of the Damages Directive – consideration has been had. Comparisons have been conducted between the EU and US systems to try to identify possible improvements and solutions to the *then*

2013, Caroline Cauffman, 'The Interaction of Leniency Programmes and Actions for Damages' (2011) 7(2) *ComplRev* 181 and Michael Sanders and others, 'Disclosure of leniency materials in follow-on damages actions: striking "the right balance" between the interests of leniency applicants and private claimants?' (2013) 34(4) *ECLR* 174.

²² Thomas Funke and Osborne Clarke 'EU Overview' in Samantha Mobley (ed) *Getting the Deal Through: Private Antitrust Litigation 2014* (Global Competition Review 2014) 59 and Frederic Louis, 'It is Always Darkest Before the Dawn: Litigating Access to cartel Leniency Documents in the EU' in Euan Burrows and Mark Clarke (eds), *The International Comparative Legal Guide to: Competition Litigation 2014* (6th edn, Global Legal Group 2013) 17. Research has, however, been conducted into issues of confidentiality, see Antonio Caruso, 'Leniency Programmes and Protection of Confidentiality: The Experience of the European Commission' (2010) 1(6) *Journal of European Competition Law and Practice* 453 and Arianna Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?' (2005) 2(1) *ComplRev* 31. There has also been a great deal of literature on the Directive itself, for example: Laura Guttuso, 'The enduring question of access to leniency materials in private proceedings: one draft Directive and several court rulings' (2014) 7(1) *GCLR* 10, Peter Stauber, 'The European draft Directive on antitrust damage claims and its potential consequences for German law' (2014) 7(1) *GCLR* 23 and Gianni De Stefano, 'Access of damage claimants to evidence arising out of EU cartel investigations: a fast evolving scenario' (2012) 5(3) *GCLR* 95.

²³ Scordamaglia-Tousis (n 3) 187 - 197.

²⁴ *ibid* 370 - 380.

problem of disclosure.²⁵ Canenbley and Steivorth asked whether the EU needs a one-step approach – namely, a single procedure to deal with fines and damages – to solve the problem.²⁶ Whereas, Petit has suggested four alternate ways of managing the disclosure of leniency information.²⁷ This literature shall be considered in the analysis of section 5 of the chapter. Because of the lack of analysis of these issues this chapter has the unique opportunity to discuss and analyse the novel issues around the disclosure of confidential leniency information and ways of enhancing the current system.

²⁵ Piet J Slot, 'Does the Pfleiderer judgment make the fight against international cartels more difficult?' (2013) 34(4) ECLR 197.

²⁶ Cornelis Canenbley and Till Steinvorth, 'Effective enforcement of competition law: Is there a solution to the conflict between leniency programmes and private damages actions?' (2011) 2(4) Journal of European Competition Law and Practice 315.

²⁷ Nicolas Petit, 'New Challenges for 21st Century Competition Authorities' (2013) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2207886 > accessed 21 March 2013, 9.

4.2 The Backdrop to the ‘Disclosure Dilemma’: The Case Law and the Damages Directive

Before conducting an assessment of the potential procedural rights challenges that an undertaking might utilise against the disclosure of confidential leniency documents, we need to understand what the courts have held with regards to disclosure, the potential benefits and detriments of allowing disclosure and what the Damages Directive stipulates.

The first case in which the European Court of Justice (ECJ) held that there was an existence – within EU law – of the right for a cartel victim to damages for the harm suffered by the cartel was the *Courage* case in 2001.²⁸ It was noted within this case that private damage actions help maintain ‘effective competition within the Community’ and, thus they have an important role to play alongside the public enforcement of competition law.²⁹ This principle (of the right to damages for harm suffered by a cartel) has subsequently been confirmed in latter decisions by the court.³⁰ Indeed, the court noted in the *Manfredi* judgment that it is the duty of a Member State to ensure that there is an *effective* regime of private damage claims in cases of competition law infringements.³¹

Whilst these cases set out the general principle that an individual who suffers harm because of the actions of a cartel has a right to damages from the cartel, it was not until the *Pfleiderer* case that we saw a significant development of the law to potentially facilitate access to leniency documents for third parties bringing follow-on damage claims.³² The *Pfleiderer* case arose in Germany from a request for access to leniency documents in a damages claim. *Pfleiderer*

²⁸ Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297.

²⁹ *ibid.*

³⁰ For example, see Joined cases C-295/04 and C-298/04 *Vincenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR I-6619.

³¹ *ibid.*

³² Case C-360/09 *Pfleiderer* (n 13).

sought full access to the leniency documents from the Bundeskartellamt of a 2008 cartel decision on three manufactures of decor paper. Pfeiderer was a customer of the undertakings that had formed a cartel and was seeking to bring an action for damages. The NCA refused access to the documents; thus, Pfeiderer took the Bundeskartellamt to court to gain access to the documents. This led to an Article 267 TFEU reference under the Treaty, to establish whether granting access to leniency documents was compatible with EU law. In its reply to the reference, the ECJ held that EU law *did not* prohibit third parties from accessing leniency documents when they are seeking damages, and that it is up to national courts to decide whether access should be granted according to their national law.³³ The ECJ specified that access *must be* decided upon by *weighing up* the interests in favour and against disclosing the documents in each given instance on a case-by-case basis. The ECJ did however also acknowledge in response to the Article 267 reference that granting access to leniency documents could be harmful to leniency programmes, but that this in itself could not prevent an individual's rights to bring a claim for damages. Thus, we began to see the development of this principle through the courts as undertakings harmed by cartels begun seeking access to these documents.

Prior to the *Pfeiderer* decision, the UK High Court – in the *National Grid* case – performed a balancing act regarding the disclosure of leniency documents.³⁴ The High Court held that it was necessary to disclose *selective* parts of the leniency documents, as certain parts of the documents were relevant to the claimant's case. As other parts of the documents were considered not to be relevant to the claimant's case the High Court would not disclose them. To perform this balancing act, the court used the principle of proportionality and decided that documents should only be disclosed when they were of '*real assistance*' to the claimants and when there is *no other* reasonable way for the claimant to obtain that information.³⁵ Similar to the ECJ, the High Court felt that

³³ Case C-360/09 *Pfeiderer* (n 13).

³⁴ *National Grid v Switchgear cartel* [2009] EWHC 1326 (Ch), [2009] UKCLR 838 para [44].

³⁵ *ibid.*

a blanket restriction on access to leniency documents would not be fair, but equally complete disclosure of documents in each and every case would not be appropriate. Thus, in this case the High Court went through the leniency documentation, paragraph-by-paragraph, and decided what the relevant and necessary information to disclose was. This case illustrates how a court can in practice perform the delicate balancing act of disclosure. It also highlights one of the crucial problems with this approach, that of uncertainty, as neither party can be sure in advance which information will be disclosed.

The case law regarding disclosure has subsequently been confirmed and further developed. In the *Hydrogene Peroxide* case it was held that the Commission may also have to disclose leniency documents,³⁶ and that leniency and cooperation programmes deserved no *higher level* of protection than private damage actions.³⁷

The Court of Justice of the European Union (CJEU) has also held that an Austrian law that prohibited third party access to the Cartel Court's files in competition law proceedings was not compatible with EU law.³⁸ The Court confirmed that when deciding whether to disclose leniency documents or not the national courts were *required* to weigh up the interests in favour of disclosure of the information and in support of the protection of that information.³⁹ The Court stated that the weighing-up is necessary as any rule that completely bans disclosure is liable to undermine the effective application of Article 101 TFEU and the rights that this confers to individuals. Similarly, in the *Kone* case it was held that Article 101 of the TFEU *must* be interpreted as meaning that it

³⁶ Case T-437/08 *CDC Hydrogene Peroxide v Commission* [2012] OJ C 32/18.

³⁷ It should be noted however, in this case access to leniency documents was sought under Council Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (the Transparency Regulation) [2001] OJ L145/43. It should also be noted that Article 47 of the Charter of Fundamental Rights of the European Union does not preclude the Commission from bringing a damages action on behalf of the EU for damages, in respect of loss sustained by an infringement of Article 101 TFEU. See Case C-199/11 *Otis and Others* [2012].

³⁸ Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others* [2013].

³⁹ *ibid* para [30].

precludes the legislation enacted by a Member State which categorically excludes, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.⁴⁰

Now we have considered the developed case law on disclosure, the benefits and potential issues with this disclosure of leniency documents needs examining.

By a third party being granted access to confidential leniency documents, it is likely to make it easier for them to bring follow-on damage actions, as they will have access to information they would be unlikely to obtain any other way.⁴¹ For example, they may gain access to detailed information on the cartel, the markets affected by the cartel, the artificial price rise caused by the cartel and the crucial documents pertaining to the cartel's activity. This will help enable the claimant to prove the existence and harm caused by the cartel. Thus, this can be seen as being beneficial and *fairer* for claimants, because it enables them financial retribution for the harm that the cartel caused them. In addition, it is likely to save claimants money, as once they gain access to the information it should make their case easier to prove, thus resulting in lower litigation costs. Finally, it is possible this will lead to a greater deterrent effect on cartelists involved in a cartel (and those contemplating joining a cartel) as, if there are more damage claims, undertakings will have potentially greater costs for being involved in a cartel because of third parties' abilities to bring effective follow-on damage claims. Thus, this approach also helps readdress the balance of welfare by placing welfare back in the hands of the parties affected by the cartel.

⁴⁰ Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG* [2014].

⁴¹ Though the EU does have discovery rules, these are somewhat ineffective for damage claimants; unlike the US that has robust discovery rules. See Natalya Mosunova, 'Disclosure of evidence in cartel litigations in the EU: Is balance of victims' rights and public interest possible?' (2015) 2(1) BRICS Law Journal 125 for a comparison and analysis of these.

However, there are various possible issues with granting third parties access to leniency documents. By there being the potential for third parties to be granted access to leniency documents it causes high levels of uncertainty for leniency applicants, as they may find that confidential documents they have submitted – to gain leniency – are given to third parties. The uncertainty here stems from the fact that the decision on whether to grant access or not to these documents is made by a court on a case-by-case basis. Therefore, a leniency applicant can never be certain as to whether the documentation they provide will be disclosed to a third party at a later date. This could effect the reporting, and thus detection, of cartels as undertakings may not be willing to come forward to report a cartel, which could be damaging for the EU cartel enforcement regime as a whole. This knock-on-effect could occur, because there would be a substantial reduction in the benefit of being the first undertaking to come forward to report the cartel and gain the immunity prize; as, although the undertaking may be immune from damages from the competition authority, private claimants may now be granted access to the first leniency applicants documentation. This will increase the private claimant's chance of success in a private damages case against the undertaking.

This problem is further exacerbated by the fact that an undertaking that does not apply for immunity or provide documents would be harder for the private claimant to sue than the undertaking that has provided the documents. Therefore, we see a strange situation occur that means, although the reporting undertaking is in a better position with regards to the Commission's investigation, it is in a significantly disadvantaged position in relation to potential follow-on private damage claims – when compared with undertakings that have not provided information to the Commission through its leniency programme.

However, it could be contended that the opposite is true, and that because the potential fines are so high undertakings would still apply for leniency, as the possible damage suits would be counteracted by the reduction in fine they

would receive for a leniency application. Yet this argument assumes that the threat that the cartel would have been uncovered and detected without leniency is sufficient to encourage an undertaking to report the cartel even though there is a risk of significant damages claims. As we noted in the beginning of this chapter it is unlikely to be the case as the probability of detection outside of the leniency programme is notably low. Nonetheless, this argument can be refuted as many cartels cross numerous legal jurisdictions and therefore it is more likely to be detected or reported in one of these jurisdictions.⁴² Thus, even with the potential risk of follow-on damage claims an undertaking has a persuasive influence to report the cartel.

The final issue considered with granting access to leniency documents is that, because this decision is done on a case-by-case basis, this could lead to a patchwork approach developing across the EU, where some Member State courts are more willing to grant access to documents than others. The European Competition Network (ECN) are aware of this potential problem and the other concerns that the decision in *Pfleiderer* has raised, and as such provided guidance on this matter through a Resolution,⁴³ to explain the position of the ECN competition authorities on this matter.

What we can identify from the aforementioned discussion – of the cases, and the benefits and detriments of disclosing leniency documents to third parties – is that a balancing act needs to be performed between private and public enforcement. Whilst public enforcement of competition law is of fundamental importance, it is also imperative that individuals who have suffered harm from a cartel can bring effective follow-on damage actions to readdress this harm. However, private enforcement must *not* occur to the detriment of public enforcement, as it is the main deterrent to cartels. Yet, private enforcement

⁴² Indeed, Stephan noted how many of the EU leniency applications followed US investigations (and leniency applications) – Andreas Stephan, ‘An Empirical Assessment of the European Leniency Notice’ (2009) 5(3) *Journal of Competition Law & Economics* 537.

⁴³ ‘Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012: Protection of leniency material in the context of civil damages actions’ <ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf> Accessed 13 June 2012.

must also not be discouraged because of the key role it plays in readdressing harm suffered to victims.

To address the identified concerns with the disclosure of leniency documents the Commission proposed a draft Damages Directive.⁴⁴ This was examined by the European Parliament,⁴⁵ and has now been enacted, and will come into force on the 27 December 2016.⁴⁶

The aim of the Directive is to ‘remove practical obstacles to compensation for all victims of infringements of EU antitrust law and to optimise the relationship between private enforcement of EU antitrust rules through damages actions and public enforcement by the Commission and NCAs.’⁴⁷ The Directive fell squarely on the side of protecting the public enforcement of competition law, because of the view that the leniency programme was crucial to the success of public enforcement. Article 5 of the Directive sets out the requirements regarding the disclosure of evidence.⁴⁸ However, Article 6 of the Directive discusses the limits on the disclosure of evidence from the file of a competition authority.⁴⁹ Specifically, it provides that leniency corporate statements and settlement submissions cannot, at anytime, be disclosed by a national court for damage actions.⁵⁰

As we can see, this is the diametrically opposing view to the position that the Court has taken regarding the disclosure of leniency documents. The Courts

⁴⁴ Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. 11.06.13 2013/0185 (COD).

⁴⁵ European Commission, Proposal for a Directive – Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Amendments by the European Parliament to the Commission proposal) 09.04.12 A7-0089/2.

⁴⁶ Damages Directive (n 14) Article 21(1).

⁴⁷ European Commission, ‘Directive on Antitrust Damages’ <http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html> accessed 13 September 2015.

⁴⁸ Damages Directive (n 14) Article 5.

⁴⁹ *ibid* Article 6.

⁵⁰ *ibid* Article 6 (6)a.

have repeatedly advocated for a balancing act to be performed in each case, stating that a blanket ban would breach EU law.⁵¹ This itself leads to an interesting question, because the Courts have been interpreting the TFEU (which is primary legislation) and stated that the law requires a balancing act when it comes to disclosure, and the Damages Directive is secondary legislation. The Damages Directive conflicts with what the EU Courts have repeatedly held and because of the supremacy of primary legislation over secondary legislation it is possible the courts may hold that the Damages Directive is usurped by its own interpretation of the TFEU. However, examination of this interesting point is outside the scope of this chapter and therefore the potential implications of this cannot be examined. Thus, this chapter will now assess if the Damages Directive has taken the correct approach by analysing if there are any procedural rights challenges that an undertaking could bring which would mean that disclosure of leniency documents would lead to a breach of these rights.

⁵¹ For example, Case C-360/09 *Pfleiderer* (n 13).

4.3 An Undertaking's 'Legitimate Expectations'

This section shall begin the analysis of the potential procedural rights challenges that an undertaking could make by considering whether disclosure of confidential leniency documents to third parties *could* amount to a breach of an undertaking's 'legitimate expectation'.

A legitimate expectation is where a constraint is placed on a public body – particularly when changing policies – by a legal duty to be fair.⁵² This can therefore be seen as part of the principle of natural justice.⁵³ Legitimate expectations 'is one of the most oft-invoked general principles of Community law'.⁵⁴ However, a legitimate expectation may only be invoked when the Commission or Community creates a situation which gives rise to a legitimate expectation.⁵⁵ This expectation can arise out of the Commission's conduct itself,⁵⁶ or legislation.⁵⁷ Thus, the first thing that we need to establish is whether a legitimate expectation has arisen. To achieve this, we need to identify if an undertaking can have a legitimate expectation that information provided in a leniency application to the Commission will not be disclosed to third parties in follow on damage actions. To enable us to do this we must begin by considering the Commission's Leniency Notice. Paragraph 38 of the Commission's Leniency Notice sets out that:⁵⁸

'The Commission is aware that this notice will create *legitimate expectations* on which undertakings may rely when disclosing the existence of a cartel to the Commission.'

⁵² *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755.

⁵³ Within the UK the principle of legitimate expectation was first recognised in the case of *Schmidt v Secretary of State for Home Affairs* [1968] EWCA Civ 1.

⁵⁴ Takis Tridimas *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 251.

⁵⁵ Case C-177/90 *Kuhn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35 para 14.

⁵⁶ Case C-289/81 *Mavridis v Parliament* [1983] ECR 1731 para 21, Case C-127/80 *Grogan v Commission* [1982] ECR 869.

⁵⁷ Case 74/74 *CNTA* [1975] ECR 533.

⁵⁸ Commission Notice (n 2) emphasis added.

What we can identify immediately from considering paragraph (38) is that the Commission is acknowledging that its Leniency Notice creates a legitimate expectation that undertakings may rely on. Yet, at the same time, the Notice provides no information as to what this legitimate expectation or expectations may be. Presumably one of these expectations would be a reduction in fine or complete immunity where the undertaking cooperates and provides the Commission with all the necessary information on the cartel as that is the premise of the Leniency Notice. But, can we also validly claim that an undertaking would have a legitimate expectation that the Commission would not disclose the information provided to it by the undertaking to anyone else or even third parties seeking to bring damage actions?

Broadly speaking one would expect confidential business information to be kept private where possible because of the nature of the information.⁵⁹ Therefore, *perhaps* an undertaking would have a legitimate right to believe and expect that the Commission would not disclose these documents to third parties. Let us now consider the Leniency Notice itself again to delve deeper into the possible foundation of this potential belief and expectation. We can see at paragraph (40) that:⁶⁰

‘The Commission considers that normally *public disclosure* of documents and written or recorded statements received in the context of this notice would undermine certain public or private interest, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001, even after the decision has been taken.’

⁵⁹ For example, non-disclosure agreements are often entered into between employees and employers, or it is part of an individual’s contract.

⁶⁰ Commission Notice (n 2).

And at paragraphs (33) and (35) of the Leniency Notice we can identify that:

'Access to corporate statements is *only granted* to the addressees of a statement of objections [...] other parties such as complainants *will not* be granted access to corporate statements.'⁶¹

'Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States [...] provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.'⁶²

What we recognise from examining these paragraphs is that the Commission quite clearly give, or at the very least provide the impression that, it will not disclose these documents to other parties. Indeed, reading the discussed paragraphs seems to highlight the Commission's concern of disclosing any confidential business information.⁶³ The Commission even goes so far as to note how the leniency documents will only be shared with competition authorities that have at least the same level of protection against disclosure as the Commission themselves.⁶⁴ Therefore, one can justifiably assume that the Commission values the protection of the non-disclosure of these documents. From examining the assurances given by the Commission in the Leniency Notice, it seems logical that an undertaking would reasonably believe, and therefore legitimately expect, that documents and information provided in a leniency application would not be disclosed to third parties to help facilitate the bringing of a follow on damage claim. But what of other EU Legislation that

⁶¹ *ibid* para (33) emphasis added.

⁶² *ibid* para (35).

⁶³ Owing to the potential harm it can do to future or current investigations.

⁶⁴ Commission Notice (n 2) para (35).

might lead to the establishment of a legitimate expectation of non-disclosure of leniency documents?

There are two crucial pieces of legislation here, Article 339 of the TFEU and Articles 27 and 28 of Council Regulation No 1/2003/EC.⁶⁵ Article 339 of the TFEU provides against disclosure of information by the members of the EU institutions, committees and officials, even after their duties have ceased. With particular protection being afforded here to the 'information about undertakings, *their business relations [and] their cost components*'.⁶⁶ Article 27 of Regulation 1/2003 – which focuses on the hearing of the parties, complainants and others – states that:⁶⁷

‘2. [...] They [other undertakings] shall be entitled to have access to the Commission's file, subject to the *legitimate interest* of undertakings in the *protection of their business secrets*. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States.

4. [...] Publication shall have regard to the *legitimate interest* of undertakings in the protection of *their business secrets*.’

Article 28 of Regulation 1/2003 (which regards professional secrecy) advocates:⁶⁸

‘1. [...] Information collected [...] *shall be used only for the purpose* for which it was acquired.

2. Without prejudice to the exchange and to the use of

⁶⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

⁶⁶ Article 339 TFEU, emphasis added.

⁶⁷ Regulation 1/2003 (n 65) Article 27 *emphasis* added.

⁶⁸ *ibid* Article 28 *emphasis* added.

information foreseen in [...] the Commission and the competition authorities of the Member States [...] *shall not disclose information* acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy.’

These pieces of legislation add weight to the claim that an undertaking can have a legitimate expectation with regard to non-disclosure of documents provided by it to the Commission. Therefore, when we consider these aforementioned pieces of legislation one can clearly see that the TFEU offers protection from disclosure of business secrets to third parties. Indeed, even Regulation 1/2003 Article 27 provides for this protection, noting undertakings will have a *legitimate interest* in this information’s protection. Though the Regulation does not expressly mention an undertaking forming a legitimate expectation, as it refers to a *legitimate interest*, one could reasonably infer – in this context – that a legitimate expectation can be formed. This is because the undertaking has a *legitimate interest* in protecting its business secrets. Article 28 of Regulation 1/2003 goes further than this though, by stating that the information will only be used for the purposes it was collected for. If one considers why the Commission collects leniency documentation, we can identify that it is collected to help prove the existence of a cartel and enable the Commission to prosecute that cartel.⁶⁹ The Leniency Notice nowhere expressly mentions that the information garnered from a leniency applicant will be provided to third parties for use in follow on damage actions. Indeed, nowhere in any of the Commission’s documentation does it state this. In fact it states that the information *will* be protected and *not* disclosed. Indeed, Article 28 of Regulation 1/2003 expressly states again that it will protect the information covered by ‘professional secrecy’. This therefore strengthens the reasons why an undertaking would legitimately expect the information it provides in a leniency application not to be disclosed to third parties.

⁶⁹ The leniency programme also seeks to encourage self-reporting and the disruption of cartels.

Additionally, there is a form of a legitimate expectation that an undertaking can rely upon when the legislation requires a Community institute to take into account a specific, well-defined interest,⁷⁰ known as a 'specific interest' legitimate expectation.⁷¹ In this case the well-defined interest that the legislation clearly sets out is that the Commission shall protect confidential business information from disclosure.⁷² Therefore, if the courts or the Commission were to allow the disclosure of this information an undertaking would have a claim under the 'specific interest' legitimate expectation.

From the aforementioned discussion it is clear that an undertaking will acquire a legitimate expectation of 'non-disclosure'. The next requirement is that there is a breach of this legitimate expectation. However, a breach can only be pleaded when the Commission has frustrated the legitimate expectation in question.⁷³ The case where the Commission discloses an undertaking's leniency application documentation (particularly the confidential information) to third parties will lead to the legitimate expectation of non-disclosure being frustrated and thus breached. However, when the EU Courts have considered cases regarding the 'specific interest' they will also consider any potential 'overriding public interest' that might justify the frustration of the legitimate expectation in the case before them.⁷⁴

When one considers the disclosure of leniency documents we see that a balancing problem arises. On the one hand we have the public enforcement of competition law – which seeks to prevent and deter cartels – and on the other, we have the private enforcement of competition law, which seeks to allow those harmed to recover losses for the harm caused by a cartel. It is very difficult to know which side a court would come down on in this matter; as it is important to allow parties to recover damages for the harm they have

⁷⁰ Case 74/74 *CNTA* (n 57).

⁷¹ *Tridimas* (n 54) 273.

⁷² As was noted earlier both Article 339 TFEU and Article 27 and 28 Regulation 1/2003 provide for this interest protection.

⁷³ Case T-123/89 *Chomel v Commission* [1990] ECR II-131 para 26.

⁷⁴ For example, see Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477.

suffered,⁷⁵ yet it is also important to ensure that undertakings are encouraged to provide leniency information so that the Commission can detect and deter cartels.⁷⁶ The question is which would and should be prioritised?

It could be claimed that protecting the public enforcement is the most important as without it follow on damage actions could never ensue, as cartels would go undetected. However, one could advance that even if this information were disclosed undertakings would still report cartels to avoid the severe fines when they are caught. This is not an easy question to answer but when we consider the legislation, Leniency Notice and the cases – that have come through the courts so far – it seems that the EU Court’s support a balancing of these two approaches and would only advocate for the provision of documentation when it is necessary.⁷⁷ This means that although an undertakings legitimate expectation may be breached by the Commission disclosing documents – there is potentially a public interest which *may* override this depending on how a court balances and priorities public and private enforcement of competition law. Additionally, we must note that the Courts have held that the principle of protection of legitimate expectations may *not* be relied upon by an undertaking that has committed a manifest infringement of the rules in force.⁷⁸ Based on this it is clear that an undertaking would acquire a legitimate expectation of non-disclosure but how a court would balance these two conflicting interests is uncertain.

This section of the chapter has asked whether an undertaking can have a legitimate expectation of non-disclosure of the information it provides to the Commission in exchange for immunity. From the consideration of the Leniency Notice, TFEU and Regulation 1/2003 we can see that it is reasonable for an undertaking to gain a legitimate expectation that the Commission would not

⁷⁵ Case C-453/99 *Courage* (n 28).

⁷⁶ Especially given how many cartels are detected only owing to the Leniency Notice.

⁷⁷ Case C-360/09 *Pfleiderer* (n 13).

⁷⁸ (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247 para 76).

disclose its confidential leniency information. This therefore means that the Commission in disclosing this information to third parties is breaching this legitimate expectation. However, what is harder to know is how a court would deal with a case where it was claimed that there has been a frustration of a legitimate expectation by the Commission, because of the potential public interest defence that can override the frustration of a legitimate interest. What one can say though, is that the Commission wishes to protect this information as much as possible as the legislation, Leniency Notice and even the cases regarding disclosure have sought to do this.

4.4 Disclosure and Article 8 of the ECHR

This section moves on to consider the second potential procedural rights challenge that an undertaking might seek to make. It examines whether disclosure of confidential leniency documents to third parties *could* amount to a breach of Article 8 of the ECHR.

Article 8 is a ‘qualified right’; therefore, it is important we establish how the disclosure of confidential Commission leniency documents to third parties could engage this right. The European Court of Human Rights (ECtHR) has developed what is known as the ‘standard approach’ for dealing with cases that assert a breach of Articles 8 – 11 of the Convention.⁷⁹ This process involves five stages, which shall now be examined in turn. The first two stages of the ‘standard approach’ place the burden of proof on the claimant (of the right abused), and the three latter stages shift this burden of proof to the State, or in our case the Commission.

The first stage of this approach requires the claimant to demonstrate that the issue in question falls within the scope of one of the substantive Articles of the Convention. The issue we are discussing regards confidential information provided to the Commission by an undertaking in exchange for leniency. Thus, we shall consider this alongside Article 8 of the ECHR. Article 8 specifies that:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence’.

When undertakings provide information to the Commission it is liable to be in the form of documentation or oral information, that the Commission can use to establish the existence of a cartel and which undertakings were involved. This

⁷⁹ Douwe Korff, ‘The Standard Approach Under Articles 8-11 ECHR and Article 2 ECHR’ <http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf> accessed 24 January 2014.

information is likely to contain confidential business information and data and, thus, this content could potentially fall within the ambit of the materials protected by Article 8 if it were to be disclosed to third parties. The ECtHR interprets Article 8 widely.⁸⁰ Indeed, we see that the Court has held that Article 8 includes protection for, legal persons,⁸¹ business premises and,⁸² a company's registered office, branch or other premises.⁸³ We can also identify that the Court has interpreted 'private and family life' widely. For example, it has been held that there is a positive obligation on the State to provide information concerning the fate of a newborn baby that was taken into hospital care and,⁸⁴ public information which is systematically collected and stored in files – held by the public bodies of the State – also falls within the ambit of Article 8.⁸⁵ Consequently, (given the jurisprudence and the wide interpretation) it seems highly likely that the Court would hold that this issue would fall within the scope of Article 8 ECHR.⁸⁶ This therefore means we can consider the second stage.

The second stage requires that there was an "interference" with the right.⁸⁷ 'Any "formality", "condition", "restriction" or "penalty" constitutes an interference.'⁸⁸ When we consider an undertaking giving the Commission confidential information we find that under the Commission's Leniency Notice,⁸⁹ an undertaking must meet a variety of requirements, including providing a corporate statement and,⁹⁰ all relevant information and evidence

⁸⁰ *ibid* 2.

⁸¹ *Société Stenuit v France* (1992) 14 EHRR 509.

⁸² *Niemietz v Germany* (1993) 16 EHRR 97.

⁸³ *Société Stenuit* (n 81) para 41.

⁸⁴ *Zorica Jovanović v Serbia* (2013) App no 21794/08.

⁸⁵ *Rotaru v Romania* (2000) ECHR 2000-V. Another example is the UK High Court case of *Mosley*. The High Court held that an equitable breach of confidence is covered by Article 8 ECHR. *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB).

⁸⁶ It is beyond doubt doctrinally in the UK at least that companies can actually enjoy a private life: see *R v Broadcasting Standards Commission ex parte BBC* (2000) 3 WLR 1327.

⁸⁷ Again, this stage has a low threshold.

⁸⁸ *Douwe Korff* (n 79) 2.

⁸⁹ Commission leniency notice (n 2).

⁹⁰ *ibid* (9)(a).

relating to the alleged cartel.⁹¹ Therefore, it is probable that this would meet the low threshold requirements for an “interference” with this right.

The third stage in the standard approach requires identification of whether the “interference” was based on – authorised or prescribed by – “law”. This in essence requires that there is a specific legal rule or regime that authorises the interfering act that is sought to be justified.⁹² Since the decision in *Pfleiderer*,⁹³ where the ECJ stated that access to leniency documents by third parties must be decided upon by weighing up the interests in favour and against disclosing the confidential documents in each given case on a case-by-case basis, there has been the legal potential for the Commission’s leniency documents to be disclosed to third parties.⁹⁴ We have also seen further cases since the *Pfleiderer* judgment that have illustrated how the balancing act for disclosure versus non-disclosure can be conducted.⁹⁵ Because the disclosure of documents is authorised and has been prescribed by the EU courts it is believed that the ECtHR would likely see this interference as being prescribed by law.

The fourth stage requires the consideration of whether ‘the interference pursued a “legitimate aim”?’ The legitimate aims for Article 8 ECHR are set out in the second paragraph of Article 8, and include: ‘national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others’. The ECtHR interprets these very widely.⁹⁶ Therefore, helping ensure that victims of a cartel can recover damages from the perpetrators should fall under a legitimate aim of Article 8, namely; the protection of rights and freedoms of others. Indeed, when we consider that the Commission has been actively attempting to encourage and enhance the ability to bring damages

⁹¹ *ibid* (12)(a).

⁹² *Silver and Others v UK* (1983) 5EHRR 383 paras 45-46

⁹³ Case C-360/09 *Pfleiderer* (n 13).

⁹⁴ The ECJ made its reference based on its interpretation of the TFEU and Regulation 1/2003.

⁹⁵ T-437/08 *CDC Hydrogene* (n 36) and Case C-536/11 *Bundeswettbewerbshörde* (n 38).

⁹⁶ For example, see *Groppera Radio AG and Others v Switzerland* (1990) 12 EHRR 321.

claims within the EU for a while now,⁹⁷ it is likely that the Court would consider this when making its determination of whether the interference pursued a legitimate aim.

The fifth stage within this approach is split into two parts. The first part (a) requires that the interference was “necessary in a democratic society” to achieve the legitimate aim in question in the particular case and “proportionate” to that aim, taking into account the “margin of appreciation” accorded to the State in question. The second part (b) asks whether there are appropriate and effective procedural guarantees against abuse? Part (b) will form part of the examination under the proportionately analysis. Let us disassemble the fifth stage and apply it to the situation of the disclosure of confidential leniency documents. In *Handyside v UK* the ECtHR explained what is meant by “necessary” in this context.⁹⁸ This was succinctly stipulated in *Olsson v Sweden (No 1)*:⁹⁹

‘The notion of necessity implies that an interference corresponds to a *pressing social need* and, in particular, that it is proportionate to the legitimate aim’

In our analysis the argument would be that there is a pressing social need for the disclosure of the leniency documents so that third parties can bring effective damages claims. As we established early in the chapter, it is difficult for undertakings to bring follow-on damage claims without access to this information, because proving the harm suffered and identifying the ‘cost’ of this harm is significantly difficult without the proof provided by the undertakings involved in the cartel.

⁹⁷ For example, see the Green Paper on Damages actions for breach of the EC antitrust rules COM (2005) 672, 19.12.2005 and the White Paper on Damage Actions for Breach of the EC antitrust rules COM (2008) 165, 02.04.2008.

⁹⁸ (1976) 1 EHRR 737 para 48.

⁹⁹ (1988) 11 EHRR 259 para 67.

Next, consideration needs to be had as to whether the interference was proportionate to achieve this aim. There is no precise test for proportionality within the ECHR,¹⁰⁰ but from the case law of the ECtHR we can extrapolate four general factors that the ECtHR regularly considers:¹⁰¹

(i) The level to which the interference impairs the very essence of the right.¹⁰²

This means we need to examine how serious the interference is to the right. For our analysis we therefore have to assess and balance the protection of confidential leniency documents – and the right to an undertaking’s privacy, against the right of third parties to receive redress and restitution (in the form of damages) for the harm caused by the cartel. We can see that by disclosing confidential documents this would involve an interference with Article 8. However, as the disclosure involves company documents and information, and not an individual’s personal data the Court will award the State greater latitude when assessing the interference.¹⁰³ Therefore, it is possible the court would accept that the interference is proportionate here.

(ii) Blanket rules do not allow for the examination of the merits of each individual case. Thus, blanket rules *can* be held to be disproportionate.¹⁰⁴ In this case there is not a blanket ban as the courts are required to conduct a balancing and weighing analysis on a case-by-case examination. This means that in each case the judges are assessing whether disclosure is necessary and what parts (if any) of the leniency documents need to be disclosed.

¹⁰⁰ There is a wealth of material on the concept of proportionality and balancing: recent examples would include: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012), Grant Huscroft, Bradley Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (Cambridge University Press 2014), Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Post-War Legal Discourse* (Cambridge University Press 2014) and, in the UK context, Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012).

¹⁰¹ John Wadham and others, *Blackstone’s Guide to the Human Rights Act 1998* (5th edn Oxford University Press 2009) 37.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ For example see, *Campbell v UK* (1992) 15 EHRR 137 para 62.

(iii) Whether there is a less restrictive alternative that is still equally effective to pursue the legitimate aim.¹⁰⁵ A good example of the application of this stage was in the *Campbell* case.¹⁰⁶ Here, it was held that a blanket measure to open all of the prisoners mail was disproportionate. It was held that opening only those letters reasonably considered to contain contraband would be proportionate. Thus, if we apply this to the consideration of the disclosure of leniency documents, we can identify that the approach currently used is proportionate as disclosure is examined on a case-by-case basis and it is not a blanket approach. However, there is another approach – the documents are disclosed to the Court but not to third parties (discussed later in this Chapter in Section 5) – which can achieve the same legitimate aim but is less restrictive on the leniency applicants' rights. Consequently, it is possible the Court would hold that the current approach is *not* proportionate as there is a less restrictive alternative that is still equally effective to pursue the legitimate aim.

(iv) Finally, are there any effective safeguards or judicial controls over the measure? This stage requires a consideration of the legal remedies of affected measures.¹⁰⁷ In the case of disclosure of leniency documents the protection in place centers around the court as it conducts the analysis itself and has to weigh up the pros and cons in each given case. Additionally, the case can be appealed to a higher court if a party feels the decision regarding disclosure was incorrect.

With regards to the margin of appreciation the ECtHR looks to see if the State (or in our case the Commission) has performed a balancing act between the two.¹⁰⁸ The Court will interpret this broadly or narrowly depending on the

¹⁰⁵ John Wardham and others (n 101) 38.

¹⁰⁶ *Campbell* (n 104).

¹⁰⁷ John Wardham and others (n 101) 38.

¹⁰⁸ *Hirst v UK (No 2)* (2005) 42 EHRR 849. The most comprehensive work on the margin of appreciation, though now dated, remains Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Leiden 1996) and more recently see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) – Chapter 4 "Two Concepts of the Margin of Appreciation".

nature of the rights in issue in the case.¹⁰⁹ It is therefore difficult to identify how the court will view this, but as it involves the disclosure of corporate documents it is probable that a wider margin of appreciation would be permitted here.¹¹⁰

As we can identify from the above analysis it is difficult to assess what the ECtHR would decide regarding the disclosure of leniency documents. However, the various stages have been examined and areas where problems or challenges may occur have been highlighted. This section of the Chapter has assessed whether an undertaking could bring a potential challenge under Article 8 of the ECHR to the disclosure of confidential leniency documents. From considering the five stages of the standard approach we have identified that it is possible that the ECtHR would hold that there is no breach of Article 8 when leniency documents are disclosed, assuming the disclosure is achieved proportionally by a case-by-case analysis. However, there is a less restrictive way to pursue the legitimate aim of follow-on damage actions and thus it is conversely possible that the Court would require the disclosure of documents to follow this procedure, as it is equally effective but protects both sets of rights more successfully.

¹⁰⁹ Jacobs, White and Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 326.

¹¹⁰ John Wardham and others (n 101).

4.5 Could Disclosure Amount to a Breach of Confidence?

The final potential procedural right challenge deliberated is the UK wrong of breach of confidence. Breach of confidence is an equitable doctrine that allows for an action when an individual's confidence has been breached. A duty of confidence occurs where confidential information comes to the knowledge of a person in circumstances where it would be unfair if it were then to be disclosed to others. This 'commonly arises in circumstances where there is or has been some relationship or transaction between the parties'.¹¹¹

For a breach of confidence to occur three key elements are required, which were set forth in the seminal case of *Coco v AN Clark* by Magarry J.¹¹² First, the information must have the necessary element of confidence about it, namely, it must not be in the public domain.¹¹³ Second, the information must have been imparted in circumstances where "an obligation of confidence" arises.¹¹⁴ Third, there needs to be an "unauthorised use" of the information that is to the detriment of the original communicator of the information.¹¹⁵

Let us now apply these three requirements for breach of confidence to the case of the disclosure of confidential Commission leniency documents to third parties, seeking to bring a damage claim against the undertaking that provided the leniency information to the Commission. To conduct this examination we shall utilise a hypothetical scenario involving a company called Widgets PLC (hereafter, 'Widgets'). Widgets are a member of a cartel facing *possible* investigation by the Commission. It pre-empts any possible enforcement by applying for leniency under the Commission's Leniency Notice. Widgets is successful and the Commission grants it leniency. However, the Commission

¹¹¹ John Cooke, *Law of Tort* (11th edn, Pearson Education Limited 2013) 500.

¹¹² *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

¹¹³ *ibid* para 47.

¹¹⁴ *ibid* para 48.

¹¹⁵ *ibid*. Note that if confidential information is obtained and disclosed *without* any abuse of a confidential relationship no tort will be committed: *Malone v Metropolitan Police Commissioner* [1979] 344 Ch.

had already begun investigation proceedings and Widgets was actually the second undertaking to come forward and report the cartel. It therefore receives a fine for its competition law infringement with a 50 percent reduction for assisting the Commission. Widgets believed this was the end of the matter. However, one of its customers – Buyers of Widgets PLC (hereafter, ‘BW’) is seeking to bring a damage claim for the harm it suffered because of the cartel. To prove the harm suffered, BW has sought access to the Commission’s leniency file. A court ordered disclosure of Widgets leniency documents, and BW now has the information it needs to prove the harm it has suffered. Could the disclosure of these documents amount to a breach of Widgets’ confidence?

First we need to begin by considering the information that Widgets gave to the Commission. This is likely to meet the requirements of ‘confidence’ – as per the first stage of the *Coco* test. The corporate statement that Widgets provided to the Commission obliges them to deliver business information that is confidential. This information will include details such as, product and geographic scope, market share and data on employees who were involved in the infringement.¹¹⁶ This data and information is not typically publically available, which is why the Commission seeks leniency applications – to detect cartels and have access to the information necessary to establish an infringement. Consequently, we can identify that the confidence requirement will be met at this stage.

Next, we need to ascertain whether an obligation of confidence arises when the Commission receives this confidential information from Widgets. This can only arise expressly or by implication of law from either the circumstances or the relationship. Indeed, an obligation of confidence will arise here as the Commission expressly notes within the Leniency Notice that it will not disclose information provided in a leniency application to third parties.¹¹⁷ Additionally, Widgets will rely on the other guarantees given within Regulation 1/2003 and

¹¹⁶ Commission Notice (n 2) (9)(a).

¹¹⁷ *ibid* para 40 and 33.

the assurances provided in regards to the protection of business secrets within Commission's files,¹¹⁸ and any publication.¹¹⁹ Alongside this, Widgets will rely on the guarantees that the information it provides is only used for the *purpose* it was collected for.¹²⁰ Thus, again it is likely that the court would hold that the second stage of the *Coco* test is fulfilled.

The third requirement for Widgets claim to succeed is that there is an "unauthorised use" of the information that it provided to the Commission and that it is to Widgets detriment. "Unauthorised use" in this context essentially means that it is effectively disclosed without Widgets' consent. Let us disassemble this and apply it to our case. Widgets provides the confidential information to the Commission in exchange for immunity, but what can the Commission use this information for? When we consider the Leniency Notice it makes it clear that the information provided to the Commission, in a leniency application, is provided to enable it to investigate a cartel and, then initiate legal proceedings against the cartel members, for a breach of Article 101(1) TFEU.¹²¹ The Leniency Notice does *not* provide for the information to be used in any other way, in fact, as we noted in the previous section's discussion, the Leniency Notice provides for the protection of the information garnered through the leniency programme.¹²² Widgets would not give consent for the information provided in its leniency application to be disclosed to third parties as it would mean a third party would gain access to confidential business information. In fact, if this were to occur it could actually place Widgets in a worse position (with regards to a follow-on damages claim) than an undertaking that did not apply for leniency. This is because the third party would not have that detailed information to prove the cartel and harm if there was not a leniency applicant. Therefore, it seems reasonable to believe that disclosing this

¹¹⁸ Regulation 1/2003 (n 65) Article 27 para 2.

¹¹⁹ *ibid* Article 27 para 4.

¹²⁰ *ibid* Article 28 para 2. It should also be noted that while *probably* only relevant to breach of confidence in the context of media intrusion – Widgets claim would be stronger if it is founded on a "reasonable expectation" of privacy following cases such as *Campbell v MGN* [2004] UKHL 22.

¹²¹ Commission Notice (n 2) para 1, 33, 35 and 40.

¹²² *ibid* para 33, 35 and 40.

information – to a third party seeking to sue the undertaking that provided this information – would be an unauthorised use of the information.

Subsequently, we need to identify whether this disclosure would be to the detriment of Widgets, as it provided the information to the Commission. If BW then uses the information disclosed from the Commission’s leniency documentation to sue Widgets it seems logical that this would be to the detriment of Widgets, as they will have expenses and damages to pay because of the documents. Therefore, this would likely mean that the third stage of the *Coco* test is also met.

What we therefore see is that the three crucial elements for a breach of confidence action *appear* to be met. However, there are a variety of other considerations to be had here as to whether an action for a breach of confidence would be upheld by the court.

First, one of the aims of breach of confidence is to prevent people, to whom the information has been divulged to in confidence, from using the information to gain an unfair advantage for themselves. One of the issues in our case with Widgets is, that it is not the Commission gaining a benefit here, but a third party (BW in our examples), who is acquiring access to the documents. This could lead to a potential problem, as there is no benefit to the Commission.¹²³

Second, as within legitimate expectations, breach of confidence permits courts to consider whether there is a public interest defence that would allow for the breach of confidence. In our example, BW might argue that there is a public interest in Widgets’ leniency documents being disclosed to enable it and other customers affected by the cartel to be able to bring follow-on damage claims.

¹²³ However, once a relationship has been established the obligation that binds the recipient of the confidential information then also binds any third party to whom that information is disclosed to. *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731.

In the *Spycatcher* case, the House of Lords set out three limiting principles for the rights of confidentiality in relation to the public interest.¹²⁴ First, the principle of confidentiality only applies to information to the extent that it is confidential.¹²⁵ This therefore means anything in the Commission's leniency documentation that is not confidential could be disclosed without breaching confidence. Second, the duty of confidence applies to neither useless information nor trivia.¹²⁶ Third – and the most important for our analysis – is that though there is a public interest that the law protects confidences, this public interest may be outweighed by other countervailing public interests, which favour disclosure. This principle requires the court to perform a balancing act weighing up the public interest in maintaining confidence against the counter public interest in favour of disclosure. This means that BW could seek for the court to hold that there would not be a breach of confidence as it would be in the public interest for these documents to be disclosed. However, the court in practice appears to permit a public interest in cases where there is a large proportion of the public that may be affected. For example, in *Lion Laboratories* the court held there was an overriding public interest in confidential information being disclosed regarding the Lion Intoximeter.¹²⁷ This was because the information (which raised serious doubts about the reliability of a specific model of intoximeter) affected the general public, as it was the sole evidence used in many prosecutions of 'drunk drivers'.¹²⁸ Nonetheless, the Court may also utilise the public interest defence in cases where a limited number of the public could be affected, even if there is not an imminent risk to an identifiable third party.¹²⁹ Thus, the key determinants in whether the court holds there to be a public interest in disclosure that overrides confidentiality is likely to depend on how many customers are affected by the cartels artificial price rises, and the impact on the wider general public at large.

¹²⁴ *Attorney General v Guardian Newspapers Ltd (No2) (Spycatcher)* [1990] 1 AC 109.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *Lion Laboratories Ltd v Evans* [1985] QB 526.

¹²⁸ *ibid.* Additionally, the court held in this case there is no requirement of iniquity on the part of the plaintiffs.

¹²⁹ Rosemary Pattenden, *The Law of Professional-client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (Oxford University Press 2003) 335.

Third, it is not technically the Commission that is disclosing the leniency documents; it is actually the Court that orders the disclosure of these. In fact we find that the Commission is refusing to disclose these documents and seeks to avoid disclosure of them at all costs. Hence, the third parties have to go to court in order to get the documents divulged. Thus, a breach of confidence is technically not occurring, as the third stage of the test is not being met, because it is an authorised disclosure and not an unauthorised one, as the court is requiring it. If the Commission were to be disclosing the documents then this would be a different situation, but it is not. Consequently, an undertaking would likely fail at the third stage.

Fourth, and finally, we need to examine the role of the equitable doctrine of 'clean hands'. This doctrine permits the court to consider whether an equitable remedy should not be allowed, as the claimant has acted unethically or in 'bad faith'. It then falls upon the defendant (BW in our case) to show that Widgets has not acted in good faith. BW would likely utilise the fact that Widgets had breached Article 101(1) TFEU to illustrate that Widgets had acted in bad faith. However, Widgets would likely counter this claim by arguing that whilst it had breached Article 101(1) TFEU it was seeking to readdress this by reporting the cartel to the Commission and assisting it in its investigation and paying the fine. Therefore, when it provided the leniency documents it did so in good faith. The court would then need to decide if Widgets has come with clean hands. It is likely the court would find that Widgets had not come before it with clean hands. This is because it had committed a breach of Article 101(1) TFEU and although it has reported this and assisted the Commission, it has still been involved in a cartel. Indeed, the court may question the true motives and incentives behind Widgets' leniency application.¹³⁰ In addition, it is also worth noting the Court's comments in *Gartside v Outram* regarding its view that there is 'no confidence as to the disclosure of iniquity'.¹³¹ Because of this, it may be

¹³⁰ Although Widgets may seek to argue it is because it feels remorseful about its actions, it may indeed be due to an ulterior motive, namely; the potential reduction in fine it can receive.

¹³¹ [1856] 26 LJ Ch (NS) 113, 114.

the case that the court holds that as Widgets breached Article 101(1) TFEU and the documents in question relate to that infringement that these cannot be protected. Conversely, it is possible because this information was provided to assist the Commission in its investigation and as Widgets is not seeking to conceal its illegal activity that this is not a case of iniquity.

By utilising the illustrative example of Widgets and BW we have been able to consider whether an undertaking could bring a claim for breach of confidence. Whilst it appeared that the three stages required for a breach of confidence were met, we identified a variety of reasons as to why Widgets claim would not succeed. First, the court orders disclosure of the Commission's leniency documents, not the Commission. Therefore, a breach of confidence is not occurring by the Commission, it is the Court choosing to disclose them. If the Commission were to disclose the documents this may lead to a different result, but this is not the case. Second, Widgets does not come with 'clean hands' as it has committed a breach of Article 101(1) TFEU and therefore is unlikely to succeed in its equitable claim. Third, there may be a public interest in the disclosure of this information to affected parties, although the court appears to take a narrow approach to the 'public interest'. Because of these reasons a breach of confidence claim against the disclosure of the Commission's leniency documents would be highly unlikely to succeed.

4.6 A better and fairer way forward?

As it has been established that there may be a potential challenge that an undertaking could make against disclosure – thus suggesting that the Damages Directive is correct to restrict access to these documents – we need to ascertain whether a *better* and *fairer* balance can be had between the protection of an undertaking's rights and a third party's rights. This shall be achieved by the consideration of four potential options with regards to the disclosure of leniency documents to third parties. The first option examined is the approach, which the Damages Directive currently adopts, that is to say, where a complete blanket ban is placed on the disclosure of leniency documents. Option 2 considers the approach that the European Courts had previously promoted, where the court has to perform a balancing act on a case-by-case basis of which parts (and whether) to disclose documents to the claimant. The third option explored is where the NCA or Commission – depending on which competition authority's documents the third party is seeking access to – decides on a case-by-case basis whether to disclose relevant parts of the leniency documentation to the third party or court. The final option mooted is where the Court has access to all of the leniency documentation to use in its damages claim analysis, but where it does *not* disclose this information to third parties.

Before beginning this analysis however, we must consider the options that have been proposed by other academics. Canenbley and Steivorth have asked whether the EU needs a one-step approach – namely, a single procedure to deal with fines and damages – to solve this problem.¹³² Whilst in theory this would be an ideal solution to the issue, it would require that the Commission be involved with managing the private enforcement of competition law. This would limit the rights of those that have been a victim of a cartel and mean that the Commission has to identify and include – within its fining calculation – a figure

¹³² Cornelis Canenbley and Till Steinvorth, 'Effective enforcement of competition law: Is there a solution to the conflict between leniency programmes and private damages actions?' (2011) 2(4) *Journal of European Competition Law and Practice* 315.

which represents the harm that the cartel has caused to the various victims. As a result, this is unlikely to work in practice and would require a significant amendment of the Commission current procedures, practices and focus of its work. Petit has suggested four alternate ways of managing the disclosure of this information:¹³³ (1) Judges could decide on a case-by-case basis; (2) competition authorities could allow the disclosure of certain types of information only; (3) disclosure could be limited to situations where the leniency applicant is placed in a worse situation than other conspirators; and (4) 'the damages borne by the leniency applicant may be transferred to its conspirators'.¹³⁴ These options offer differing possibilities to manage the disclosure of information. Judges deciding on a case-by-case basis forms part of the options considered within this Chapter, and shall therefore be examined in our later analysis. There are potential issues with Options 2-4, in regard to the identification of the type of information that would qualify for disclosure or what situations would be covered. Additionally, these options would still potentially allow for a procedural rights challenges to be made. Let us now move on to consider the four options proposed in this chapter.

4.6.1 Option 1 – A complete blanket ban

The first option that could be utilised is the approach that the Damages Directive takes. That is, to place a blanket ban on the disclosure of leniency documents in *all* cases. This has a variety of benefits (alongside an assortment of problems), which shall be examined.

By adopting this approach, it leads to *complete* certainty for all parties involved, as they know that the documents will not be disclosed to Courts or third parties in *any* circumstances. Indeed, the leniency and settlement documents shall remain completely confidential and can only ever be disclosed to NCAs who are members of the European Competition Network (ECN) and meet the

¹³³ Nicolas Petit, 'New Challenges for 21st Century Competition Authorities' (2013) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2207886 > accessed 21 March 2013, 9.

¹³⁴ *ibid.*

requirements of the network. This approach also prevents differing standards of disclosure and tests developing across the Member States. Additionally, it also ensures that leniency applications are not dissuaded from reporting cartels because there is no potential for disclosure of leniency documents.

Whilst this approach adequately protects the leniency applicant's rights this method leaves a lot wanting for the undertaking or individuals that have been harmed by the cartel and wish to bring damages claim. With a blanket ban in place third parties are not able to gain access to the leniency documentation, which provides them with crucial information to establish their claim and, assist in the calculation of the harm they have suffered because of a cartel. Thus, their right to bring a claim effectively is impacted upon. Owing to this we shall examine what other potential viable options are available to allow these two conflicting sets of rights to be balanced more fairly and, if possible, effectively.

4.6.2 Option 2 – The Court weighs – on a case-by-case basis – whether to disclose documents to third parties

The second option considered is the method that the European Courts repeatedly held was the approach that needed to be adopted – until the Damages Directive was enacted. Here, national courts conduct an assessment on a case-by-case basis to decide whether leniency documents, and particularly which specific parts should be disclosed to third parties to assist with their follow-on action. This approach means that only select parts of the leniency documentation is disclosed and *only* when it is necessary to do so, so that the claimant can substantiate its damages action.

Whilst this approach allows for a third party's rights to potentially be protected, by being granted access to the information they need to bring a damages claim, there are an assortment of deficits to this option. By operating an approach that varies and allows for a case-by-case evaluation, it leads to uncertainty for *all* the parties involved, because they are unsure as to when the information will be disclosed. There is no clarity for either party here, as it will be down to the

court's analysis of the facts of the case as to whether the third parties are granted access to parts of the leniency documents. Additionally, it can lead to arbitrary factors being considered in a given case and a patchwork approach developing across the Member States to the disclosure of documents; where some courts – which favour disclosure – may be more willing to grant unfettered access to these documents. Alongside these concerns this approach would also fall foul of an undertakings legitimate expectation of non-disclosure of these documents. However, one could attempt to address this problem by informing undertakings clearly that the information that they provide may be utilised by third parties bringing follow on damage actions. Nonetheless, this is unlikely to adequately incentivise undertakings to apply for leniency, and thus may lead to fewer leniency applications or the quality of information being provided by undertakings in applications deteriorating, which could have a knock-on effect for cartel enforcement and deterrence within the EU. The final factor worth noting here is that this approach means that the Court has to review *all* of the leniency documentation to decide which parts are relevant to the claimant. This has resource and cost implications for the Court and, thus, the parties involved.

4.6.3 Option 3 – The NCA or Commission decide on a case-by-case whether to disclose '*select parts*' of the leniency documentation to the third party or court

Option 3 addresses – in certain regards – some of the issues identified with Option 2. This approach sees the NCA or Commission (depending on whose leniency documentation the third party is seeking access to) deciding on a case-by-case basis whether to disclose relevant parts of the leniency application to (a) the third parties or (b) the national court. Consequently, this approach can be broken down in to two further options (a) and (b), which shall each now be considered. By the NCA or Commission deciding whether to disclose the documents to third parties it removes the issue identified earlier regarding the court having resource and cost implications with needing to examine the leniency documentation to decide what to disclose. However, it actually only

moves or shifts this cost onto the NCA or the Commission as they are now required to conduct this assessment.

This option would prevent the concerns raised about a patchwork approach occurring at the court level with regards to the disclosure of leniency documents across the EU. Unfortunately, this again only shifts the problem to the Commission or NCA, meaning that a unsystematic and piecemeal approach could still develop across the EU. This method also does nothing with regards to certainty for the parties involved. Under Option 3(a) third parties may still gain access to certain parts of the leniency documentation depending on whether the NCA or Commission decide that they require access to this information for their claim. However, under Option 3(b) no third party is granted access to the leniency documentation – this we can be certain on. Nevertheless, undertakings cannot still be sure which parts (if any) of their leniency application will be disclosed to the Court. Whilst Option 3(b) is clearly preferable to Option 3(a) – from an undertakings and a procedural right protection point of view – it is still questionable what information, how and if the Commission and NCAs would disclose the relevant leniency documentation. Indeed, we can see the ECN were so concerned about the potential for disclosure prior to the enactment of the Damages Directive that they produced a Resolution stating that:¹³⁵

‘as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, Competition Authorities take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes’.

¹³⁵ ‘Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012: Protection of leniency material in the context of civil damages actions’ <ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf> Accessed 13 June 2012.

Because of this we can deduce that Option 3 (a) and (b) would be unlikely to be workable in practice. Accordingly, Option 4 warrants examination.

4.6.4 Option 4 – The Court has access to all of the leniency documentation but does not disclose the information to third parties

Option 4 sees the national court being given access to all of the leniency documentation from the Commission or the NCA so it can utilise this in its assessment of the damages action (and if need be the calculation of damages to be awarded). This means that leniency documentation is not disclosed to the third parties, thus protecting the leniency applicant's rights. Consequently, this approach appears to offer the best balance between the protections of both parties' rights. The courts gain access to the information they need to effectively assess the damages claim – meaning that the affected third party can receive compensation for the harm suffered by the cartel – and the leniency applicant does not have its confidential business information disclosed to third parties. Whilst of course, the leniency applicant would wish to minimise its exposure to damage actions, this approach does at least offer the assurances that confidential information will not be disclosed to third parties and the general public at large. But, if the undertaking were that concerned regarding potential damage actions and competition law infringements, it would not have decided to breach Article 101(1) TFEU in the first instance.

There are, however, potential issues with adopting this approach. For example, there will be a lack of clarity (for all parties in the case) as to how the damages restitution was calculated. Indeed, as information is not disclosed to either party they will have no clear way of identifying how or why the court decided the way it did. This is because parts of the information that the judge may have based their decision on may have come from leniency documentation which is not to be disclosed to third parties. This could lead to either parties wishing to challenge the amount awarded due to uncertainty, unfairness and or lack of transparency. In a similar vein, if the claimant feels that the damages awarded do not sufficiently reflect the harm caused to them by the cartel they may seek

to have the damages reviewed and increased by an appeals court. Both of these have negative connotations for the enforcement of competition law. Nonetheless, certainty is achieved for both parties as they know the documents will *only* be disclosed to the court and used in its analysis of the damages actions and that no information will be given to third parties.

This option may also have the effect of dissuading potential future leniency applications because the information the applicant provides could then be utilised by judges in calculating a damages action against them. However, an undertaking that has been involved in a cartel will still have a significant incentive to seek leniency, as if the cartel is detected and the undertaking does not receive complete (or partial immunity) from the Commission's fines the resulting costs are likely to be significantly higher than any follow-on damage actions.¹³⁶ Nonetheless, it is difficult to discern if the risk of detection will still be sufficient to ensure that undertakings in the first instance will continue to report cartels. This approach does offer protection to a leniency applicant's confidential business information. In addition, by allowing effective follow-on damage actions to be brought by third parties there could be an increase in deterrence, as an undertaking will now need to include in its 'costing analysis' – of joining a cartel – the potential expense of follow-on actions (which could be brought more easily because of the disclosure of leniency documents to the court).

A further concern one may raise in regards to this approach is that the quality of the information gained through the Commission's leniency programme may deteriorate. This is because leniency applicants may seek to limit the potential cost of follow-on actions by providing the least amount of information required to qualify for immunity. However, this potential concern could be seen as somewhat unjustified. The Commission's leniency programme places reasonably strict requirements on what undertakings are mandated to provide

¹³⁶ So far, follow-on damage actions have fallen significantly short of the 'costs' of the fines imposed by the Commission through public enforcement.

to the Commission in order to qualify for immunity. In addition, if the Commission were to feel (or identify) that an undertaking was not fully cooperating, then they do not need to offer the undertaking partial (or complete) immunity, as they would be in breach of their requirements under the leniency programme.¹³⁷

Even with the potential aforementioned concerns regarding Option 4, this approach seems superior to the current approach. Whilst there are benefits to adopting the current approach – of placing a blanket ban on the disclosure of leniency documents in all contexts – it appears, to the author of this thesis, that Option 4 is a ‘fairer way’ to balance the rights of undertakings and third parties seeking to bring damage claims. Option 4 allows an undertaking to have its rights protected – as documentation would not be disclosed to third parties – and, third parties would have their rights protected, as they would still be able to bring effective damage claims. Undertakings – would of course – prefer the current approach where the leniency documentation is not disclosed to third parties or courts so it cannot be utilised in the calculation of damage actions. Except, this does not balance the leniency applicant’s and the cartel victim’s rights effectively or fairly. This Chapter therefore recommends that the Damages Directive be altered to include this change. In addition, the Commission should amend its Guidelines and documentation to recognise that disclosure can occur to Courts to allow for damage actions to be brought by third parties. Nonetheless, it should be reiterated throughout the Commission’s documentation that this information will *never* be disclosed to third parties and that confidential business information will remain undisclosed to third parties.

¹³⁷ Commission Notice (n 2) 12 (a).

4.7 Conclusion

The Leniency Notice is an important weapon in the Commission's arsenal against cartels. However, with the recent developments in European case law on follow-on damage actions concerns were raised from various sides about the potential effects that disclosure of leniency documents could have on the Commission's main tool against cartels. Consequently, we saw that a delicate balancing act is required between the protection of public enforcement of competition law, on the one hand, and private enforcement, on the other. However, because of the various concerns to the public enforcement of competition law, the Damages Directive provided for the complete blanket on the disclosure of leniency documents. Whilst this may protect the benefits of the Commission's leniency programme, this chapter has sought to identify whether allowing disclosure could have led to (i) a breach of an undertakings rights and, (ii) whether a better balance can be had between the protection of the rights of the leniency applicant and the cartel victims wishing to bring a follow-on damages claim than the current approach. The chapter achieved this analysis by investigating three possible rights challenges.

The first of these was the potential breach of an undertakings legitimate expectation. It was identified that if the Commission's leniency documents are disclosed this *could* lead to a breach of an undertakings legitimate expectation of non-disclosure (because of the various assurances given throughout the Commission's documentation). However, it was not clear whether in these circumstances the court would allow the overriding of the frustration of the legitimate expectation because of the potential public interest defence – which is wide and could allow for disclosure – so as to permit for the rights of third parties to be adequately protected.

Next, the possible Article 8 challenge that an undertaking could bring against disclosure was assessed. The five stages of the standard approach were

considered and led to two possible conclusions: (1) that it is possible that the ECtHR would hold that there is no breach of Article 8 because the disclosure of the documents is achieved proportionally owing to the case-by-case consideration of disclosure; (2) that there is a breach of Article 8 as there is a less restrictive way to pursue the follow-on damage actions – by disclosing the documents *only* to the courts and not the third parties. This achieves the aim of enabling third parties to be able to bring follow-on damage actions, and is as equally effective as the current approach, but it protects both sets of rights more effectively.

The final potential challenge analysed was that of a breach of confidence. Here we saw that a duty of confidentiality could arise, but that an undertaking could not rely on this for two reasons. First, the challenge would fail at the third stage of the *Coco* test.¹³⁸ Second, the leniency applicant does not come with ‘clean hands’ before the court.

From the analysis of these three possible challenges we can ascertain that there are potential rights arguments an undertaking could make and, thus, the Damages Directive is correct in seeking to protect the leniency applicant’s rights. However, this blanket ban means that a cartel victim finds it much harder to be able to bring a follow on-damages claim. Consequently, this chapter assessed whether there was a *better* and *fairer* way to balance these two sets of competing rights. It was identified that there is indeed a superior and fairer way to balance these rights. By granting *only* courts access to leniency documents – to be utilised in the proving and calculation of cartel damage actions – it allows for the fairer and more balanced protection of both sets of rights. Whilst this approach balances rights more fairly it should also prevent a drop in leniency applications, because undertakings will still be encouraged to apply for immunity – so as to avoid higher fines from the Commission and, because the

¹³⁸ *Coco* (n 112).

confidential information is not disclosed to third parties, there are no rights concerns or fears that confidential business information is released.

This chapter advocates that the Damages Directive is amended accordingly to allow for the disclosure of leniency documents to the courts in follow-on damage claims. This will enable effective private enforcement of competition law, whilst still protecting the crucial and fundamental role of the public enforcement of competition law.

Chapter 5: What can the European Commission's Direct Settlement Procedure learn from the US Plea Bargaining System?¹

5.1 Introduction

Since 2008, the European Commission (hereafter, 'the Commission') has operated a direct settlement procedure for cases involving cartels.² This procedure may be utilised when parties to the proceedings are prepared to acknowledge their participation in a cartel and their liability for an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).³ In exchange, the undertaking benefits from a ten percent reduction in its fine and an expedited and simplified procedure.⁴

The settlement procedure was implemented to allow the Commission to deal with cartel cases more efficiently and so its finite resources could be used more effectively.⁵ Indeed, given the current financial climate it has been seen as a *key* concern that the Commission's limited resources are utilised in the most effective ways possible. To bring about these efficiency gains, the Commission's settlement procedure is different in various ways to the standard procedure for the adoption of an infringement decision. For example, in settlement decisions

¹ Chapter 5 was presented at the 7th Annual Law Research Colloquium in Norwich on the 7th May 2015, the CCP Research Seminar Series in Norwich on the 22nd May 2015, the 9th CLEEN Workshop in Tilburg on the 29th May 2015 and the CCP New Researchers Workshop in Norwich on the 17th June 2015. The feedback and comments from the attendees of these events was greatly appreciated.

² 30th June 2008. Please see: <http://europa.eu/rapid/press-release_IP-08-1056_en.htm?locale=en> accessed 21 March 2014.

³ European Commission, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para [2].

⁴ *ibid* para [32].

⁵ *ibid* para [1].

the Commission issues a shorter streamlined Statement of Objections to the parties, gives a shorter final decision, and offers undertakings only restricted access to the file.

Nevertheless, the uptake and use of the EU direct settlement procedure has been slow. As of March 2015, the procedure had been in place seven years yet the Commission had concluded a *mere* seventeen cartel cases under it.⁶ In stark contrast, the US operates a highly developed, effective and efficient plea bargaining system,⁷ which leads to over ninety percent of cartel cases being concluded via plea bargains.⁸

The EU settlement procedure has a variety of procedural differences to that of the US plea bargaining system. For example, the EU system is not designed to be a bargaining system but,⁹ rather, one that operates a fixed ten percent reduction in fine for cooperation.¹⁰ The various differences between the EU and US approaches may account for the disparities in efficiency and effectiveness between the two systems.¹¹ In light of this, this chapter seeks to answer the question of what the EU direct settlement procedure can learn from the well-established US plea bargaining system to help improve its utilisation, success and efficiency. In undertaking this analysis, the chapter will ensure that the rights enshrined within the European Convention on Human Rights (ECHR) are

⁶ However, it should be noted that there has been a significant increase of settlements with the Commission recently from six (between 2008 – 2013) to eleven from (2013 – December 2014).

⁷ See <<http://www.justice.gov/atr/public/criminal/302601.pdf>> accessed 21 March 2014.

⁸ Scott Hammond, “The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for all” (Speech delivered to OECD Competition Committee Working Party No. 3, Paris, France October 17 2006) 1.

⁹ Indeed, this is something the Commission has strongly argued will not happen. For example, in its press release, ‘Antitrust: Commission introduces settlement procedure for cartels’ it stated that ‘the Commission neither *negotiates* nor *bargains* the use of evidence or the appropriate sanction’ <http://europa.eu/rapid/press-release_IP-08-1056_en.htm?locale=en> accessed 2 March 2015.

¹⁰ See, Maarten Pieter Schinkel, ‘Bargaining in the Shadow of the European Settlement Procedure for Cartels’ (2011) 56(2) *The Antitrust Bulletin* 461.

¹¹ Although it should be noted that this is not a view held by all, some feel that the EU settlement procedure is working effectively. For example, Laina and Bogdanov claim that the procedure is now a ‘well-oiled instrument’. Flavio Laina and Aleko Bogdanov, ‘The EU Cartel Settlement Procedure: Latest Developments’ (2014) 5(10) *Journal of European Competition Law & Practice* 717.

complied with, particularly Article 6 – the right to a fair trial. Indeed, this is one of the areas which differentiates this chapter and makes it unique from the previous research into the Commission’s direct settlement procedure and the Department of Justice’s (hereafter, ‘the DOJ’) plea bargaining system. The chapter will also take this unique opportunity to consider the potential of implementing a US-style plea bargaining system within the EU for Article 101 TFEU cases.

Research has been conducted generally in to the EU settlement procedure,¹² and the US plea bargaining system,¹³ however, there is little literature that compares the two or considers the potential rights implications of implementing a plea bargaining system.¹⁴ Nonetheless, there is some literature

¹² For example, see Mag. Marie-Therese Richter, ‘The Settlement procedure in the context of the enforcement tools of European competition law – a comparison and impact analysis’ (2012) 33(11) ECLR 537; Anne Tercinet, ‘Competition policies: Contributions to the Commission consultation on the draft settlement procedure in cartel cases’ (2008) 3 International Business Law Journal 365; Aurora Ascione and Massimo Motta, ‘Settlements in Cartel Cases’ (2008) MPRA paper 24416; Molly Kelley, ‘Settling for Settlement: The European Commission’s New Cartel Settlement Procedure’ (2010) 9(4) Washington University Global Studies Law Review 699; Maarten Pieter Schinkel, ‘Bargaining in the shadow of the European settlement procedure for cartels’ (2011) 56(2) The Antitrust Bulletin 461; Jochen Burrichter and Daniel Zimmer, ‘Reflections on the Implementation of a Plea Bargaining/Direct Settlement-System in EC Competition Law’ (2006) EU Competition Law and Policy Workshop/Proceedings 2006; and, Julian Joshua, ‘Settlements urged to ease cartel case clog’ (2007) 65 European Lawyer 10.

¹³ For example, Scott Hammond, “‘The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for all’” (2006) OECD Competition Committee Working Party No. 3, Paris France October 17 2006; Andreas Reindl, ‘The Legal Framework Governing Negotiated Settlements/Plea Agreements in Cartel Cases in the United States’ (2008) 13th Annual Competition Law and Policy Workshop Florence 6-7 June 2008; Shivani Pal, ‘Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals’ (2013) PhD Thesis; Pieter Kalbfleisch, ‘The Dutch Experience with Plea-bargaining/Direct Settlements’ (2008) Speech delivered at the 13th Annual Competition Law and Policy Workshop Florence 6-7 June 2008; and, Michael O’Kane and Jasvinder Nakhwal, ‘The Plea that crossed the sea’ (2008) 77 The European Lawyer 12.

¹⁴ With regards to the plea bargaining procedure in the US, Lynch and Wan have conducted separate analyses into some of the procedural concerns that may arise from having a plea bargaining system. Timothy Lynch, ‘The case against Plea Bargaining’ (2003) Regulation Fall 2003 24 and Tina Wan, ‘The unnecessary evil of plea bargaining: An unconstitutional conditions problem and a not-so-least restrictive alternative’ (2007) 17(1) Review of Law and Social Justice 33, 40. In the context of the EU settlement procedure and with regards to discussing procedural rights there has been little written. Scordamaglia conducted a critical assessment of the procedure considering the legal certainty issues: Andreas Scordamaglia, ‘The new Commission settlement procedure for cartels: A critical assessment’ (2009) 2 Global Antitrust Review 61. Zingales has discussed the role the hearing officer plays generally within cartel proceedings: Nicolò Zingales, ‘The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?’ (2010) 7(1) ComplRev 129. However, Lawrence, O’Kane, Rab and

where comparisons have been made between the EU settlement procedure and the US plea bargaining system. Macchi di Cellere and Mezzapesa have conducted a broad comparison between the two systems, just after the settlement procedure was implemented in the EU.¹⁵ At this time there was limited information on how the EU procedure would operate in practice and crucially, there had been no settlements. But, Macchi di Cellere and Mezzapesa focused their discussion around four key areas that they felt are important for settlement procedures to be successful: transparency, certainty, confidentiality and the awarding of reductions. O'Brien has examined some of the similarities and differences between the EU and US settlement procedures.¹⁶ O'Brien noted that there were a variety of similarities between the two programmes as well as some stark differences. Again, this discussion was had at the very early stages of the Commission's settlement procedure – prior to any cases having being settled under it. Moreover, there was a lack of discussion as to how each procedure maybe improved. Finally, Stephan has conducted a comparative analysis between the two systems to identify how they fare at enhancing efficiency and deterrence, whilst also maintaining transparency.¹⁷ He notes that the two systems are different in a variety of regards, but that in a number of respects the US settlement system achieves *greater* gains with regards to administrative efficiency.¹⁸

Research has also been conducted to examine the effectiveness of the Commission's current settlement procedure by considering the cases that have

Nakhwal considered whether a US plea bargaining system could offer something in UK criminal cartel offences. They felt that it could offer the OFT the opportunity to be 'imaginative in negotiating the outcome of criminal prosecutions,' alongside other *efficiency* benefits. Jon Lawrence, Michael O'Kane, Suzanne Rab and Jasvinder Nakhwal, 'Hardcore bargains: What could plea bargaining offer in UK criminal cartel cases?' (2008) *Comp Law* 17, 42.

¹⁵ Stefano Macchi di Cellere and Gluseppe Mezzapesa, 'The Commission's settlement package: EU-US comparison' (2009) 30(12) *ECLR* 604.

¹⁶ Ann O'Brien, "'Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions'" (2008) Antitrust Division of the Department of Justice – 13th Annual EU Competition Law and Policy Workshop, Florence, Italy June 6 2008.

¹⁷ Andreas Stephan, 'The Direct Settlement of EC Cartel Cases' (2009) 58(3) *International and Comparative Law Quarterly* 627.

¹⁸ *ibid* Stephan [653].

been settled thus far by the Commission.¹⁹ The most notable pieces of research regarding this are three separate works by Laina and Laurinen, Laina and Bogdanov and Dunne. Laina and Laurinen conducted an analysis of all the Commission's settlement decisions in 2013 and claimed that as the Commission had begun settling more cases it was building up a 'solid experience' in utilising the direct settlement procedure.²⁰ They also asserted that the efficiencies, 'which were the aim of the Commission when introducing the [settlement] system *have been achieved*'.²¹ This work was built upon and updated in 2014 when Laina and Bogdanov conducted another assessment of the settlement procedure, considering all fourteen cases that had been settled by the Commission, at the time.²² They identified that the procedure was now a 'well-oiled instrument', and that the pace of settling had accelerated in the period between 2013-2014.²³ Furthermore, they noted that the system had produced procedural efficiencies by reducing the duration of the procedure by two years.²⁴ However, one has to take into account that this study was conducted by the head of the cartel settlement unit at the Commission, and whether intentional or not, this could bias his opinion regarding the efficiency gains the settlement procedure is achieving. On the other hand, by the study being conducted by the head of the unit it allows for insights that other researchers, who are not involved with the procedure could not have.

Dunne has considered the Commission's settlement procedure in the context of the 'proliferation of hybrid cases'.²⁵ She considers the effects on the efficiency of the programme by the Commission operating hybrid settlements and ways of

¹⁹ For example, see Sean-Paul Brankin, 'The first cases under the Commission's cartel-settlement procedure: problems solved?' (2011) 32(4) ECLR 165; Anna-Louise Hinds, 'All settled? Some six years of cartel settlement' (2014) 35(6) ECLR 292; and, Angela Ortega Gonzalez, 'The cartel settlement procedure in practice' (2011) 32(4) ECLR 170.

²⁰ Flavio Laina and Elina Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) 4(4) Journal of European Competition Law & Practice 302, 303.

²¹ *ibid.*

²² Flavio Laina and Aleko Bogdanov, 'The EU Cartel Settlement Procedure: Latest Developments' (2014) 5(10) Journal of European Competition Law & Practice 717.

²³ *ibid.*

²⁴ *ibid.*

²⁵ Amy Dunne, 'Hybrid cases under the EU cartel settlement procedure: The individuality in collective infringement' (2015) 6(1) The King's Student Law Review 38.

improving the current system against this backdrop. Dunne identified that in order to salvage the efficiency gains of operating the procedure the Commission needs to remodel the framework of settling so as to place emphasis on the voluntariness of the consensus reached and individual targeted settlements.

As we can see from the literature, there has been a comparison between the two different settlement systems. However, these comparisons were all made prior to the Commission settling any cases under the procedure. Additionally, there has been no analysis of what the EU procedure could learn or take from the US experience, or whether a US-style settlement system could be beneficial for the EU. There has been a discussion of the efficiencies of the current systems, but not whilst considering all of the cases that have been settled or in the context of potential improvements. These are all issues that this chapter will address.

To effectively address these gaps within the literature the chapter is structured as follows. First, it begins by outlining the current EU and US settlement procedures so that the differences between the two procedures and areas for improvement can be identified. Then, the seventeen cases that have been settled thus far by the Commission are examined to allow for the identification of any trends and patterns that have occurred regarding procedural issues and potential areas for improvements. Next, the chapter moves on to consider the question of whether plea bargaining is compatible with the ECHR and particularly Article 6. The chapter conducts this assessment by considering various decisions by the European Court of Human Rights (hereafter, 'the ECtHR') involving the right to a fair trial. Whilst this analysis ensues, the procedural concerns and benefits of plea bargaining will be addressed through a discussion of the facts and decision in the *Natsvlshvili and Togonidze* judgment.²⁶

²⁶ *Natsvlshvili and Togonidze v Georgia* App no 9043/05 (ECtHR, 29 April 2014).

Once this analysis has been completed and it is established that plea bargaining is compatible with the ECHR, a discussion is then had regarding the possibility of implementing such a system within the EU to help improve the procedural efficiency and the effectiveness of the settlement procedure. This part of the chapter will have wider implications than just for the Commission's direct settlement procedure, as it will identify the necessary requirements that a signatory party to the ECHR will need to ensure are met to implement or utilise a plea bargaining system that remains compatible with Article 6 of the ECHR. After this assessment is completed other potential amendments to the EU settlement procedure will be considered. Finally, the chapter concludes by identifying the most effective and efficient ways in which the EU direct settlement procedure's efficiency and utilisation can be improved whilst remaining compatible with the ECHR.

The chapter will identify that there are two key areas in which the Commission's settlement programme currently has procedural shortcomings, (a) the amount of time it takes for a case to be settled and (b) the fact that various cases are having to proceed as hybrid ones. It also identifies that the EU could implement a plea bargaining system but that it would require a radical overhauling of procedures. Owing to this, there are four recommendations made that could be implemented to the current settlement procedure which could lead to efficiency gains that would not require a radical overhaul.

5.2 A plea bargaining system within the EU?

Before we can begin identifying ways of improving the EU direct settlement procedure it is necessary for us to understand how the current procedure works in practice. Consequently, this section shall outline how the Commission's direct settlement procedure operates in its current guise. Then, the DOJ's plea bargaining procedure will be outlined so we can identify how the two programmes differ. Next, the cases that have been settled by the Commission shall be explored to identify any reoccurring issues with the current procedure and areas where efficiency gains can be made. Finally, the analysis will conclude by discussing the plausibility of a plea bargaining system operating within the EU whilst remaining compliant with Article 6 of the ECHR.

5.2.1 The EU Direct Settlement Procedure and US Plea Bargaining Process

Prior to identifying how the EU settlement procedure and US plea bargaining systems operate there are a couple of matters that need to be discussed. The first of these concerns commitment decisions. It should be noted that this chapter will *only* consider the Commission and DOJ's settlement procedures. It will not reflect upon commitment decisions. It is important however that we identify the differences between commitment decisions and settlement decisions to clarify why these are not discussed. Commitment decisions fall under Article 9 of Regulation 1/2003,²⁷ and allow undertakings to offer commitments to address competition concerns that the Commission has identified. They do not result in a finding of infringement nor a fine being imposed on the undertakings. These are therefore significantly different to settlement decisions and are entirely inappropriate for consideration in cases of hard-core cartel agreements.

The second matter regards distinguishing the EU settlement procedure from the Commission's leniency policy, and in a similar vein, the US amnesty programme

²⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1.

to the DOJ's plea bargaining procedure. The EU leniency programme and direct settlement procedure are tools which serve very different purposes. The leniency programme is designed to be an investigative tool to help assist the Commission in detecting and uncovering cartels.²⁸ Here undertakings disclose the existence of a cartel to the Commission by bringing evidence to the Commission. The reduction in fine that an undertaking receives varies based on the value of the information and evidence that they provide to the Commission and when it is provided. The settlement procedure, on the other hand, seeks to speed up the procedure for adoption of cartel decisions. It simplifies and shortens the formal procedure to enable this and allows the Commission to invest resources in other cartel investigations and cases which in turn should increase the deterrence effect of enforcement.²⁹

The US similarly operates two programmes that have differing aims. The amnesty programme provides immunity to the first company to come forward and report a cartel. However, only one company can get immunity, all other companies can only get a reduction in fines by engaging in plea bargains with the DOJ. This means there is a strong incentive for companies to ensure they engage in negotiations with the DOJ. The DOJ operate a plea bargaining procedure to allow enforcement to be sped up, manage cartel cases more effectively and reduce potential litigation costs.

5.2.1.1. The EU Direct Settlement Procedure

The EU settlement procedure is laid down in the Commission's Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.³⁰ The procedure of settling can only begin after the Commission has conducted a full investigation into the cartel (as it would normally do in the 'standard'

²⁸ Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency in cartel cases)' [2006] OJ C298/17.

²⁹ Commission, 'Settlements' ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html accessed 15 February 2015.

³⁰ (Text with EEA relevance), Official Journal C 167, 2 July 2008.

procedure). This investigation can be triggered by the regular methods, such as market investigations or leniency applications. The Commission then assesses whether this infringement is suitable for settlement. When making this assessment the Commission considers a wide variety of criteria, such as, the probability of reaching a common understanding regarding the scope of potential objections within a reasonable timeframe.³¹ It is worth noting that an undertaking has no automatic right to settle with the Commission.³² This decision rests entirely with the Commission and indeed it should.³³ The Commission then sends letters to undertakings informing them that they are considering settlement and that undertakings may express their interest in settling with the Commission. The Commission will set a period of no less than two weeks for undertakings to respond to declare whether they wish to engage in settlement discussions.³⁴

Then settlement discussions begin between the Commission and the undertakings. The Commission determines the order and sequences of the bilateral agreements and when to disclose information that is in the file,³⁵ and upon request by a party, the Commission will grant the undertaking access to non-confidential versions of any specified accessible document listed in the case file.³⁶ Once the parties and the Commission have reached a 'common understanding' regarding the scope of potential objections and the estimation of the range of likely fines to be imposed on the undertaking – and the Commission takes the view that the procedural efficiencies are likely to be achieved – the Commission can grant a final time-limit of at least fifteen working days for an undertaking to introduce a final settlement.³⁷ This time-limit can be extended following a reasonable request from the undertakings.³⁸

³¹ Commission Notice (n 3) para [5].

³² *ibid* para [6].

³³ *ibid* para [5]. Automatically allowing undertakings the right to settle would diminish the deterrent effect of EU cartel enforcement.

³⁴ *ibid* para [11].

³⁵ *ibid* para [15].

³⁶ *ibid* para [16].

³⁷ *ibid* para [17].

³⁸ *ibid*.

The undertakings then submit settlement submissions to the Commission, which the Commission will acknowledge receipt of. The settlement submission must include: a *clear* and *unequivocal* acknowledgement of the parties' liability for the infringement(s); the maximum fine that the parties would accept in the settlement procedure; the acknowledgement that they have been sufficiently informed of the objections the Commission is seeking to raise against them; that they have had sufficient opportunity to raise their views before the Commission; and, finally that the parties do not envisage requesting access to the file or requesting to be heard again in an oral hearing unless the Commission does not reflect their settlement submissions in the Statement of Objections and the decision.³⁹

The Commission should then consider the parties' settlement submissions so that their rights of defence can be exercised effectively and taken into account in the preliminary analysis, where appropriate.⁴⁰ These can then be considered whilst the Commission is drafting the Statement of Objections.⁴¹ If the streamlined Statement of Objections reflects the parties' settlement submissions the parties should (within two weeks) reply by confirming the Statement of Objections corresponds to the contents of their settlement.⁴² It should be noted here that the Commission can adopt a Statement of Objections that does not reflect the parties settlement submission, and this would mean that the parties settlement submissions would be deemed to be withdrawn and therefore that the parties would no longer be bound by their settlement.⁴³ If the College of Commissioners agrees with the settlement it is then adopted and the decision is implemented.

Diagram 5.1 below illustrates the Commission's settlement procedure more simply in graphic form.

³⁹ *ibid* para [20].

⁴⁰ *ibid* para [24].

⁴¹ *ibid* para [25].

⁴² *ibid* para [26].

⁴³ *ibid* para [27].

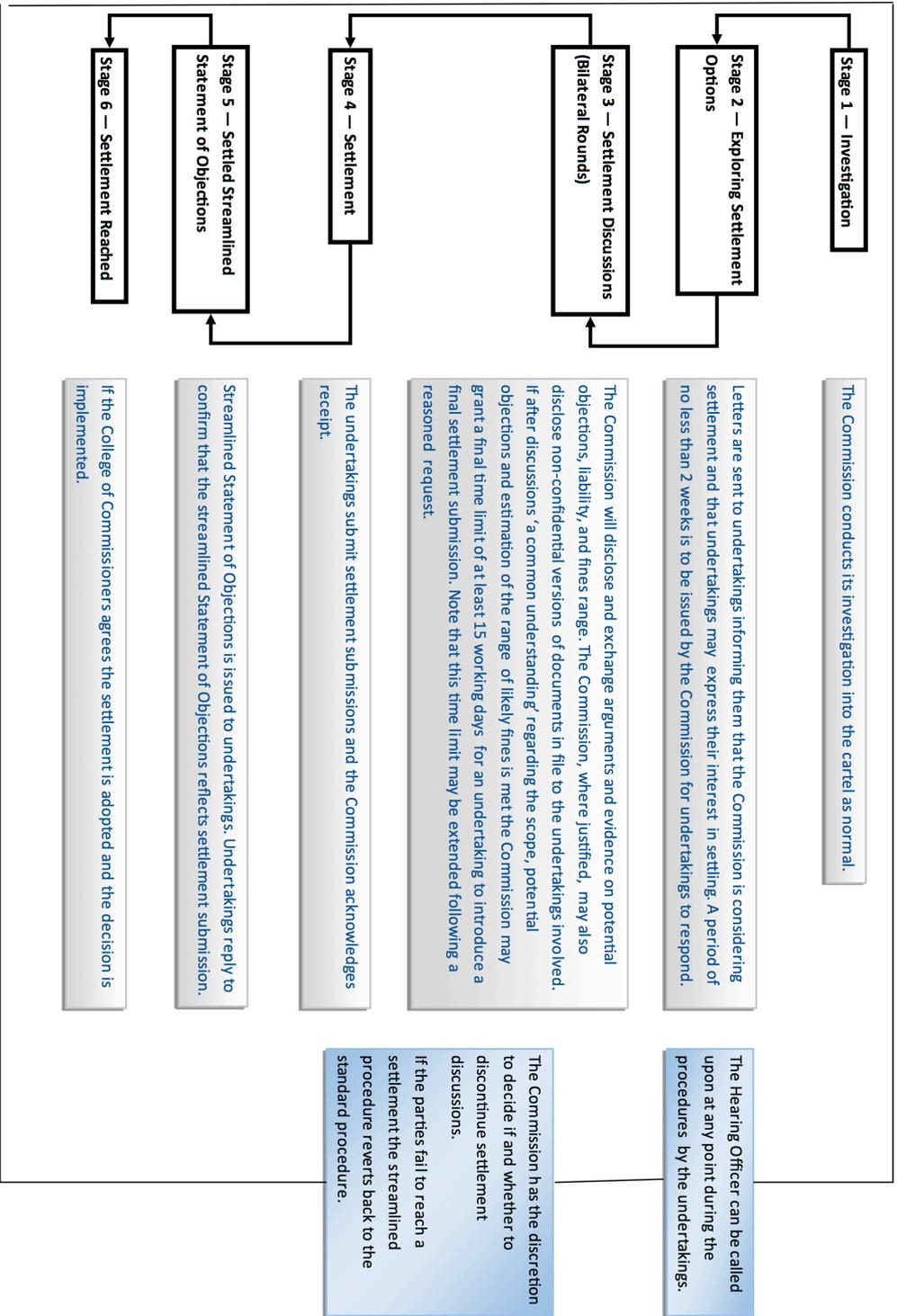


Diagram 5.1 EU Commission Direct Settlement Procedure

The final points to note before we leave the discussion of the EU settlement procedure are the procedural protections that are in place to ensure that an undertaking's rights are not unduly interfered with. First, an undertaking still has the right to appeal the settlement decision to the EU court (just like under the standard procedure) if it has any concerns regarding part of the decision. Second, although the parties waive certain procedural rights to engage in settlements, if at any point they have any apprehensions regarding due process they may call upon the Hearing Officer.⁴⁴ The Hearing Officer's role is to guarantee that the effective exercise of the undertaking's rights of defence is respected.⁴⁵ This includes *inter alia*, ensuring that the undertakings right to be heard and the right to access to the file are respected.⁴⁶ Additionally, the Hearing Officer ensures the protection of an undertaking's rights (such as legal professional privilege and the privilege against self-incrimination) during the Commission's investigation are met.

5.2.1.2 The US Plea Bargaining Procedure

The US utilises a different system for enforcing competition law to that of the EU; where the EU operates an administrative system, the US utilises criminal law enforcement. This means there are significant differences between the two systems and how the settlement procedures operate in practice.

These crucial differences are summarised in Table 5.2 below, with some of the key distinctions being discussed below the table.

⁴⁴ *ibid* para [18].

⁴⁵ *ibid*.

⁴⁶ European Commission, 'Hearing Officers' <http://ec.europa.eu/competition/hearing_officers/index_en.html> accessed 24 July 2015.

Table 5.2 EU and US Settlement Procedures Comparison

Criteria	EU	US
<i>Type of system</i>	Administrative	Criminal
<i>Aim of the tool</i>	To speed up the process and reduce costs	To gain information on cartels, speed up the process and reduce costs
<i>Who decides on whether there has been an infringement?</i>	The Commission	The Court
<i>Reduction in fines</i>	10% fixed	Variable based on the case
<i>Negotiating system?</i>	No	Yes
<i>Automatic right to settle?</i>	No	No
<i>When can settlement discussions start?</i>	Only after a full investigation has been conducted	At anytime in the investigation
<i>Right to appeal settlement?</i>	Yes	No

The DOJ does not determine whether a company has breached the law; they act as the prosecutor and a court and jury decide if an offence has been committed. The DOJ does, however, operate a plea bargaining programme, which distinguishes between individuals and corporations.⁴⁷ As the EU cartel enforcement procedure only applies to companies we shall focus our analysis to that of the DOJ's corporate plea bargaining programme.

A plea bargain between the DOJ and a company is a negotiated agreement. The company pleads guilty to a criminal offence and cooperates 'fully and truthfully' with the DOJ's on-going investigation, and waives its rights to appeal. In return for doing this, the company is granted concessions by the DOJ. These concessions lead to a lesser offence or reduced sanction. In antitrust cases these concessions mainly come in the form of a reduction in criminal fines.

⁴⁷ As follows, respectively: Antitrust Division of the Department of Justice, *Model Annotated Individual Plea Agreement (updated 2/18/2014)* – available at <<http://www.justice.gov/atr/public/criminal/302600.pdf>> and Antitrust Division of the Department of Justice, *Model Annotated Corporate Plea Agreement (updated 12/20/2013)* – available at <<http://www.justice.gov/atr/public/criminal/302601.pdf>>.

Once the court approves the plea bargain it becomes legally binding.

Plea bargains in the US are governed by the *Federal Rules of Criminal Procedure Rule 11* (hereafter, 'FRCPR 11'). 11(c) of the FRCPR sets out the three types of plea agreement that a company may be offered by the DOJ depending on the circumstances of the case. The first of these is a Type A agreement where the DOJ will not bring, or will move to dismiss, other charges against the company.⁴⁸ Type B agreements recommend,⁴⁹ that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (noting that such a request or recommendation does not bind the court).⁵⁰ Finally, there are Type C agreements where a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (and such a recommendation or request binds the court once the court accepts the plea agreement).⁵¹

Owing to the nature of these bargains, Type B agreements are the most commonly entered into by the DOJ in antitrust cases. This is because the courts are more willing to accept and endorse them as they are able to reject the proposed sentence and impose a different one where necessary.⁵²

What now follows below is an outline of the DOJ's plea bargaining procedure, however, as the methods of negotiating are extremely subjective it is only possible to make broad remarks based on how the procedure 'typically' operates in practice.⁵³ To begin, the DOJ initiates an antitrust investigation. This may arise from concerns that the DOJ has within the market, but more than likely will stem from an immunity applicant. After the investigation has begun

⁴⁸ FRCPR 11(c)(1)(a).

⁴⁹ Or agree not to oppose the defendant's request.

⁵⁰ FRCPR 11(c)(1)(b).

⁵¹ FRCPR 11(c)(1)(c).

⁵² The DOJ's 'Grand Jury Manual' Chapter 9, November 1991 (1st Edition) IX-1, IX-4.

⁵³ Diagram 5.2 below illustrates the DOJ's procedure graphically.

the defendant company usually initiates discussions with the DOJ. However, the DOJ themselves may start discussions with the defendant company. Next, the DOJ approves the commencement of negotiations with the company. Then, the DOJ internally discusses the parameters of the potential agreement. This discussion will include the consideration of factors such as: the provisions that should be considered as non-negotiable, the provisions that are negotiable and the likely range of the fine. Next, the DOJ will provide the company with a proposed draft agreement for the purpose of further discussions. Then, the company and DOJ will engage in negotiations over various parts of the agreement. Once an agreement is reached the DOJ and company will sign it. Finally, the plea agreement will go before a court, where it will assess the agreement. If the agreement is of Type A or C the court may then accept the agreement,⁵⁴ reject it,⁵⁵ or defer a decision until it has reviewed the presentence report.⁵⁶ If the plea agreement is a Type B agreement the court has to advise the company that it has no right to withdraw the plea if the court does not follow the recommendation or request.⁵⁷

Diagram 5.3 below illustrates the ‘typical’ DOJ plea bargaining procedure graphically.

⁵⁴ If the court does it must inform the company that the agreed disposition will be included in the judgment. FRCPR 11(c)(4).

⁵⁵ If the court does so it must specify the following on record and in open court: inform the company that the court has rejected the plea; inform the company that the court is not bound by the agreement and allow the company to withdraw its plea; and, if the company does not withdraw the plea the court may dispose of the case less favorably than was recommended in the plea agreement. FRCPR 11(c)(5).

⁵⁶ FRCPR 11(c)(3)(a).

⁵⁷ FRCPR 11(c)(3)(b).

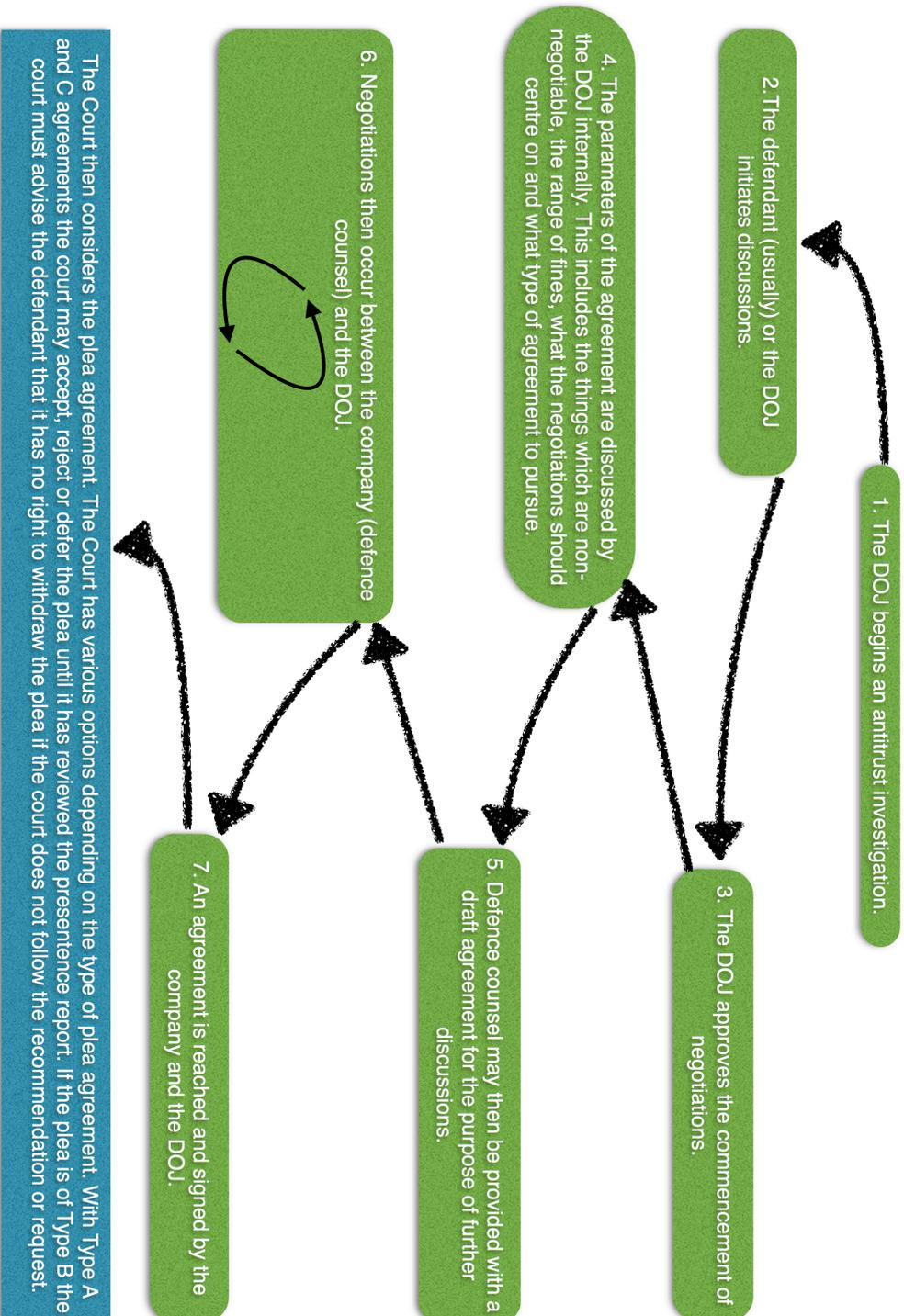


Diagram 5.3 'Typical' DOJ US Plea Bargaining Procedure

The final thing to note before we leave the discussion of the US plea bargaining procedure is the safety mechanisms that the US has in place to ensure that individuals rights are respected and that the agreement is entered into fairly and legally. To begin, within the corporate plea there will be a statement that the company will need to approve which notes that:

‘The plea has [been] entered into freely and voluntarily and not as the result of force, threats, assurances, promises or representations which are not contained within the plea agreement.’⁵⁸

However, the main guarantor of these protections is a US court. Under the FRCPR 11 section (b) there are a variety of rights that the court needs to ensure that company understands it has. Rather than list these in their entirety only the most pertinent shall be noted: the right to plead not guilty; the right to a jury trial; the right to be represented by counsel; the right to confront and cross-examine adverse witnesses; and, that if the company’s guilty plea is accepted it waives these rights.⁵⁹ The court also has to ensure the plea is voluntary and did not result from force, threats or promises (other than those contained within the plea agreement) before accepting the plea bargain.⁶⁰ Finally, the court must ensure that there is a factual basis for the plea.⁶¹

These protections are discussed in greater depth when the potential for a EU plea bargaining system is muted. These protections will be important as many of the aforementioned rights correspond directly across with equivalent elements from the ECHR’s right to a fair trial.

⁵⁸ Antitrust Division of the Department of Justice, *Model Annotated Corporate Plea Agreement (updated 12/20/2013)* – available at <<http://www.justice.gov/atr/public/criminal/302601.pdf>> para [21].

⁵⁹ FRCPR 11(b)(1).

⁶⁰ FRCPR 11(b)(2).

⁶¹ FRCPR 11(b)(3).

5.2.2 The Commission's Settlement Decisions thus far

Now that the procedural processes of the EU and US settlement programmes have been explained we can explore the cases that have been settled under the current EU procedure to help identify the areas where procedural improvements could be made and challenges that the Commission's settlement procedure presently faces. What will be identified from the empirical analysis in this section is that there are two key areas where further improvements and enhancements can be made to the Commission's settlement procedure. The first of these is the length of time that the Commission's decisions take, owing to the investigation and settlement negotiations periods, respectively. The second area relates to hybrid cases, particularly the resources it costs for the Commission to run dual procedures and the continuing growth in hybrid cases of this nature. The dataset for this analysis was compiled by the author from the Commission's published non-confidential decisions, summary decisions and press releases. It was last updated on the 30 March 2015.

The Commission thus far has settled seventeen cases, which represents a settlement rate of 27.87 percent.⁶² This is significantly lower than the US rate of over ninety percent of cases being settled by plea bargaining. However, one has to be careful when comparing such an established system to that of an infant one. For example, there are a variety of differences in the systems, such as the US utilising criminal sanctions and sanctions against individuals, and the fact that it is a proven settlement procedure. Nonetheless, accepting the limitations to this comparison, what we can derive from contrasting these figures is that there is significant room for the Commission to increase the utilisation of the settlement procedure to conclude cases. Table 5.4 below catalogues the seventeen cases that have been settled alongside the date of the decision, number of parties, the collective fines imposed on the settling and non-settling

⁶² These figures are correct to the 30 March 2015. The figure includes *all* (61) cases from June 2008-to-March 2015, *including* those still pending and 5 cases that were administratively closed. Though this percentage figure may be open to discussion over how it should be calculated, what is clear, however it is calculated, it is significantly less than the US figure.

parties and the length of time between the beginning of the settlement discussions and to the final adoption of the decisions.

Table 5.4 The Commission's Settlement Decisions

Decision	Date of Decision	Case Name and Number	Number of Parties - including first leniency applicant	Number of Parties Settling	Collective fines imposed on settling parties	Collective fines imposed on non-settling parties	Length of time between the beginning of the settlement discussion to the adoption of decision
1	19.05.2010	COMP/38.511 <i>DRAMs</i>	11	10 (excluding full immunity app)	€ 331,273,800	N/A	14 months
2	20.07.2010	COMP/38.866 <i>Animal Feed Phosphates</i>	6	4 (excluding full immunity app)	€ 115,797,000	€ 59,850,000	18 months
3	13.04.2011	COMP/39.579 <i>Consumer Detergents</i>	3	2 (excluding full immunity app)	€ 315,200,000	N/A	10 months
4	19.10.2011	COMP/39.605 <i>CRT Glass</i>	4	4	€ 128,736,000	N/A	15 months
5	07.12.2011	COMP/39.600 <i>Refrigeration Compressors</i>	5	4 (excluding full immunity app)	€ 161,198,000	N/A	13 months
6	27.06.2012	COMP/39.611 <i>Water Management Products</i>	3	3	€ 13,661,000	N/A	16 months
7	10.07.2013	AT.39748 <i>Automotive Wire Harnesses</i>	5	4 (excluding full immunity app)	€ 141,791,000	N/A	10 months
8	04.12.2013	AT.39861 <i>YIRD</i>	7	6	€ 669,719,000	No data for non-settling party	Information not available
9	04.12.2013	AT.39914 <i>EIRD</i>	7	4	€ 1,042,749,000	No data for non-settling parties	Information not available
10	29.01.2014	AT.39801 <i>Polyurethane Foam</i>	4	4	€ 114,077,000	N/A	Information not available
11	05.03.2014	AT.39952 <i>Power Exchanges</i>	2	2	€ 5,979,000	N/A	9 months
12	19.03.2014	AT.39922 <i>Bearings</i>	6	6	€ 953,306,000	N/A	12 months
13	02.04.2014	AT.39792 <i>Steel Abrasives</i>	5	4	€ 30,707,000	No data for non-settling party	14 months
14	25.06.2014	AT.39965 <i>Mushrooms</i>	4	3	€ 32,225,000	No data for non-settling party	14 months
15	21.10.2014	AT.39924 <i>SFIRD - CHF LIBOR</i>	2	2	€ 61,676,000	N/A	15 months
16	21.10.2014	AT.39924 <i>SFIRD - Bid Ask Spread Infringement</i>	4	4	€ 32,355,000	N/A	15 months
17	11.12.2014	AT.39780 <i>Envelopes</i>	5	5	€ 19,485,000	N/A	11 months

From Table 5.4 above we can see that the collective fines imposed on settling parties varies quite significantly. The highest fines imposed were in the *EIRD* case,⁶³ then the *Bearings* case and the third highest were levied in the *YIRD* settlement.⁶⁴ Within each of these settlements there were between four-to-six parties engaging in bilateral discussions with the Commission and the fines were significantly higher than the other settlement decisions due to the market share of the parties and the gravity of the infringement.

The Commission's first settlement decision was given in the *DRAMs* case on the 19th May 2010.⁶⁵ There are many elements of this settlement that are quite notable. First, although it was the Commission's first ever settlement it actually has been one of its quickest. As will be shown later this settlement falls straight within the median for the period of time it typically takes the Commission to adopt a decision from the beginning of the settlement to the final decision. Second, this case has had the most parties with which the Commission has sought to settle. It could indeed be that the Commission realised after this decision that settling with so many parties is challenging and hence why it has sought not to settle with more than seven parties since. Finally, collectively on all settling parties this has been one of the highest fines imposed – to be precise it has been the fourth highest. This may however be more down to the facts of the case – that there was a large number of parties involved in the case and the nature of the infringement – than that it was the Commission's first settlement decision.

The second settlement decision (*Animal Feed Phosphates*) followed quickly – only two months later.⁶⁶ Coincidentally, this also happened to be the first hybrid settlement decision by the Commission. Prior to this there were questions as to

⁶³ *Euro Interest Rate Derivatives - EIRD* (Case COMP 39.914) Commission Decision 4 December [2013].

⁶⁴ *Bearings* (Case COMP 39.922) Commission Decision [2014] 2014/C238/09 OJ C238/10 and *Yen Interest Rate Derivatives - YIRD* (Case COMP 39.861) Commission Decision 4 February [2013].

⁶⁵ *DRAMs* (Case COMP 38.511) Commission Decision 2011/C180/09 [2010] OJ C180/15.

⁶⁶ *Animal feed phosphates* (Case COMP 38.866) Commission Decision 2011/C111/10 [2010] OJ C111/19.

what would happen if some parties withdrew from the settlement discussions.⁶⁷ In this case, all parties were originally engaged in settlement discussions with the Commission. However, when the Commission provided the undertakings with all the information regarding the elements of the case, the scope of the infringement and the range of the fine Compagnie Financière et de Participation Roullier / Timab Industries S.A (hereafter, 'CFPR/TI') decided to discontinue settlement discussions. The Commission then ran two procedures – one by the streamlined approach, for the settling parties, and the standard procedure for CFPR/TI. Therefore, the full efficiency gains of settlement were not reached in this case as the Commission had to run one full procedure and one streamlined procedure. Coincidentally, CFPR/TI ended up appealing the Commission's decision before the General Court, thereby reducing the efficiency of the procedure even further.

In 2011 there was a rise in settled cases to three,⁶⁸ although 2012 saw a drop to one.⁶⁹ Since 2013 there has been an upward trend and a stark rise of settling,⁷⁰ in 2013 three cases were again settled and in 2014 this figure rose to eight.⁷¹ We therefore see that in the last two years there has been nearly a doubling in the number of cases being settled compared to pre-2013.

⁶⁷ For example, see the comments made by Macchi di Cellere and Mezzapesa (n 15) 609.

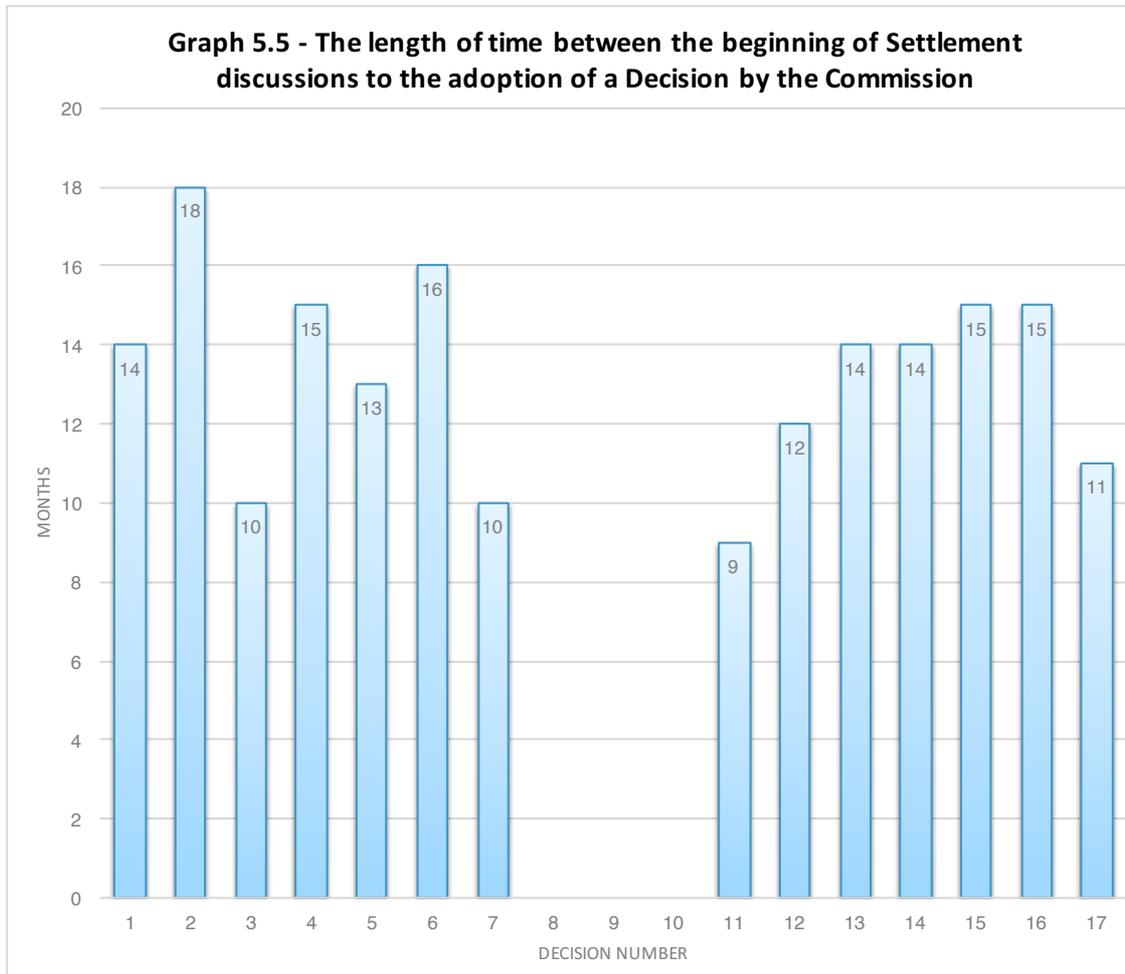
⁶⁸ *CRT Glass* (Case COMP 39.605) Commission Decision 2012/C48/07 [2011] OJ C48/18, *Refrigeration compressors* (Case COMP 39.600) Commission Decision 2012/C122/04 [2011] OJ C122/6 and *Consumer Detergents* (Case COMP 39.579) Commission Decision 2011/C193/06 [2011] OJ C193/14.

⁶⁹ *Water management products* (Case COMP 39.611) Commission Decision [2012] 2012/C335/04 OJ C335/4.

⁷⁰ *Automotive wire harnesses* (Case COMP 39.748) Commission Decision [2013] 2013/C283/05 OJ C283/5, *EIRD* (n 63) and *YIRD* (n 64).

⁷¹ *Envelopes* (Case COMP 39.780) Commission Decision [2014] 2015/C74/05 OJ C74/5, *Mushrooms* (Case COMP 39.965) Commission Decision [2014] 2014/C453/11 OJ C453/21, *Polyurethane foam* (Case COMP 39.801) Commission Decision [2014] 2014/C354/07 OJ C354/6, *Power Exchanges* (Case COMP 39.952) Commission Decision [2014] 2014/C334/06 OJ C334/5, *Smart Cards Chips* (Case COMP 39.574) Commission Decision 3 September [2014], *Steel abrasives* (Case COMP 39.792) Commission Decision [2014] 2014/C362/07 OJ C362/8, *Swiss Franc Interest Rate Derivatives - Bid Ask Spread Infringement* (Case COMP 39.924) Commission Decision [2014] 2015/C72/10 OJ C72/14 and *Swiss Franc Interest Rate Derivatives - CHF LIBOR* (Case COMP 39.924) Commission Decision [2014] 2015/C72/07 OJ C72/9.

We can also identify from Table 5.4 that when we consider the length of time it takes the Commission and undertakings to settle from the beginning of settlement discussions to the adoption of a decision there is a range of nine-to-eighteen months. This range is illustrated graphically below in Graph 5.5.



There is no publicly available data from the Commission regarding when they began settlement discussions in decisions 8, 9 and 10 (*YIRD*, *EIRD* and *Polyurethane Foam* decisions).⁷² Thus, the graph does not provide data for these decisions. From the other 14 decisions we can extrapolate that the mean length of time from the beginning of settlement decisions to the adoption of a decision by the Commission is 13.28 months (to two decimal places), the median was 14 months and the mode was 14-15 months. Therefore, what we

⁷² *YIRD* (n 64), *EIRD* (n 63) and *Polyurethane foam* (n 71).

can identify is that the settlement decisions average around 13.3 months. However, this figure is actually very deceptive, as it does not take into account the often long, protracted and drawn out investigation prior to the beginning of the settlement discussions. For example, if we consider the *Consumer Detergents* settlement decision we can see that the Commission launched inspections in June 2008,⁷³ but did not begin settlement discussions until late 2010. This meant that there was a two-year investigation period and a ten-month settlement period. Similarly, when we consider the *Envelopes* settlement decision we identify that the Commission began its investigation and conducted its first inspection on the 14 September 2010 and did not finish the investigation until January 2014, when it begun settlement discussions with the parties.⁷⁴ Therefore, what we can see is that when we include the investigation stage into these time periods we inevitably see that this period goes up significantly and into many years, sometimes more than trebling the overall time period when compared to the settlement discussion period.⁷⁵ Nonetheless, it should be noted that the settlement procedures are significantly quicker than the length of time it would take these procedures to progress via the standard procedure. Indeed, Laina and Bogdanov in their 2014 piece noted that the current settlement procedure has allowed a 'speeding up' of decisions by reducing the length of time it takes to reach a decision by an average of two years.⁷⁶

If we consider the cases that the Commission has settled, there has been a wide variation in the number of parties involved in settlement discussions. At the top-end there have been cases where the Commission has been in discussions with up to ten parties, and at the lower-end only two. When we consider all of the settlement decisions together we find that the mean is for there to be 4.17 parties involved in discussions (to two decimal places) and that the median and mode is 4. What we can see from this is that the cases that appear to get chosen for settlement decisions seem to average around four parties. This is

⁷³ *Consumer Detergents* (n 68).

⁷⁴ *Envelopes* (n 71).

⁷⁵ *ibid.*

⁷⁶ Laina and Bogdanov, (n 22) 720.

likely to be down to a multitude of factors, including the nature of cartels themselves – which require a limited number of suppliers that collectively have a high market share – but also it could be because this is an optimal number of parties for the Commission to manage and maintain settlement discussions with.

This chapter will now consider empirical settlement decisions in ‘hybrid cases’. To date, there have been five hybrid cases. These are cases where not all parties in the infringement decide to settle. These hybrid cases may take one of two forms. The first of these is where a party makes it clear from the beginning of the settlement discussions that it has no interest in partaking in them (Type 1); the other is where the party withdraws from the settlement discussions somewhere throughout them (Type 2). In hybrid cases – whichever of these ‘Types’ occur – it requires the Commission to run two procedures (if it plans to bring an infringement decision), one via the streamlined settlement procedure for the settling parties and the other via the normal standard procedure for the non-settling parties.

These are perhaps some of the most interesting and unusual cases for this chapter to explore, as the settlement procedure was primarily implemented to ‘allow the Commission to handle more cases with the same resources...[whilst] fostering the public interest in...the effective and timely punishment [of cartellists] and increasing overall deterrence’.⁷⁷ However, if the Commission has to run dual procedures this is unlikely to lead to positive efficiency gains. In essence the Commission will still have to conduct the full proceedings for at least one party – therefore more work and resources are required to go into this. In fact, it has the potential to be even less efficiently than just running the normal procedure as the Commission may have to invest even more resources due to failed settlement discussions.

⁷⁷ Commission Notice (n 3) para [1].

Having said this, the benefits of continuing to settle when one party withdraws should not be down played. Although the procedural gains will not be as significant – as would be the case if all parties were to settle – it should still save the Commission and undertakings resources from converting all parties back to the standard procedure.⁷⁸ Since the entering into force of the settlement procedure the Commission has managed five hybrid cases, with there being a fairly even split between these of Type 1 and 2 cases. As was noted earlier the first hybrid case occurred in 2010 and resulted from a party dropping out of the settlement discussions at a late stage.⁷⁹ In the *YIRD* case one undertaking did not partake in settlement discussions and thus the Commission run dual procedures.⁸⁰ Similarly, in the *EIRD* case three parties opted not to settle and the Commission chose to run dual procedures.⁸¹

It is perhaps concerning, from an efficiency point of view, that hybrid cases are becoming more common. The Commission is then opting to run the two procedural routes concurrently, and as has been previously noted this defeats part of the key efficiency objective of settlements. Indeed, even Laina and Bogdanov have stated categorically that unsuccessful settlements that are then followed by the standard procedure *do not* bring procedural efficiencies.⁸² Indeed, this is why it is imperative that we consider the potential role that plea bargaining could now play.

There are two final points that should be discussed before we leave our analysis of the empirical data on settlement decisions. First, if settlement discussions fail the Commission is more than willing to revert back to the standard procedure to enforce Article 101 (TFEU). Indeed, we saw this in the *Smart Cards Chip* case.⁸³ The Commission could not reach agreements with at least two of the

⁷⁸ For example, fewer Commission resources would have to be dedicated to oral hearings.

⁷⁹ *Animal feed phosphates* (n 66).

⁸⁰ *YIRD* (n 64).

⁸¹ *EIRD* (n 63).

⁸² Laina and Bogdanov (n 22) 718.

⁸³ *Smart Cards Chips* (n 71).

parties,⁸⁴ thus they diverted straight back to the standard procedure and would not let the undertakings involved get off the 'hook' just because the settlement discussions had failed – even though they had progressed along the settlement route quite far. Although it is good that the Commission continues to tackle cartelist after settlements fail, there are significant efficiency costs from having to switch back to the standard procedure after coming from the streamlined one; namely, it is more time consuming and resource intensive. This is both in the sense of switching between the two and also because the normal procedure is itself highly resource intensive and requires much more detail. For example, the Statement of Objections cannot be of a streamlined nature and undertakings have full access to the file.

The second and final thing to consider is that one of the settlement programmes key aims is to reduce costs, and in regards to reducing litigation costs it appears to have achieved this quite effectively. Normally many decisions that go via the standard procedure are appealed by undertakings before the European Courts. These appeals often focus on issues regarding the Commission's calculation of the fine, such as, the gravity or length of the cartel. However, so far based on the parties that have settled with the Commission, only one undertaking has sought to appeal the settlement decision – even though all parties have a right to appeal the settlement decisions. The appellant – Société Générale – was involved in the settlement discussion in the *EIRD* case. They are primarily appealing the settlement decision based on the Commission's determination of the value of sales.⁸⁵ This will be an interesting case to follow, as it will hopefully answer some of the questions around what happens when a settling party opts to appeal the settlement decision they agreed to. For example, questions such as to whether the reduction for settling will still apply, how the Court will reassess the calculation of the fine, how far it

⁸⁴ King & Wood Mallesons, 'Statement of objections sent to suspected participants in smart card chips cartel' <<http://www.kwm.com/en/uk/knowledge/insights/statement-of-objections-sent-to-suspected-participants-in-smart-card-chips-cartel-20130426>> accessed 25 July 2015.

⁸⁵ Case T-98/14 *Société Générale v Commission* OJ C142, 12th May 2014, 36-37- action brought on the 14th of February 2014.

will go at looking into the facts of the case, and what the Commission will need to produce and can argue in Court regarding the settlement will all potentially need answering.⁸⁶

The fact that so few appeals have occurred speaks to the credit of the current enforcement procedure. Although, it is likely that a significant part of this is down to the fact that settling parties can engage in discussions (and to a degree influence) the Commission with regards to a variety of factors in their case. It is still believed by the author that there are further efficiency gains that can be had with amendments to the current procedure. This is something that is sought to be explored more in the context of plea bargaining in the next section.

From the cases discussed within this section we can see that there are two key areas that could be further improved to enhance the efficiency and effectiveness of the current settlement procedure, and another area, which needs to be monitored closely. The first area relates to the length of time the decisions take as a whole. The settlement procedure time period averages around 13.28 months. With procedural enhancements made this period of time should be able to be reduced. However, the main issue – from an efficiency point of view – seems to be with the length of time that the investigation period can add to the settlement of the cases. From the examples considered we identify that the investigation period takes the greatest time and resources. As the Commission cannot begin settlement discussions with parties until the investigation has been fully completed this further exacerbates this issue. By identifying ways to reduce the investigation period and settlement period cost savings and procedural benefits could be achieved. The second area relates to hybrid cases. The procedural benefits here are greatly reduced from having to run two procedures. Ways of managing or improving the procedure in these cases could lead to great efficiency and cost savings. The final area that needs

⁸⁶ *ibid.* To date, limited information regarding the case has been released. In due course hopefully some of the questions will be answered.

monitoring closely is the case where Société Générale is appealing the settlement decision. This is so we can identify whether the case has a detrimental impact on the efficiency of the settlement programme. Depending on how the Court decides this case, it could lead to other undertakings seeking to appeal their settlement decisions to get a further reduction in fine, which in the future would lead to higher litigation costs and thus negatively impact on the procedural and cost efficiency benefits settlement brings the Commission. Either way, appeals are always detrimental to efficiency goals as there are resource implications for all concerned.

Given the aforementioned problems this chapter has identified with regards to the current settlement procedure, we shall now determine whether implementing a plea bargaining procedure within the EU for settling cartel cases would address the issues raised. To begin this analysis, we shall identify why one may wish to implement a plea bargaining system within the EU. Then, we shall assess whether plea bargaining is compatible with the ECHR through a discussion of the seminal case of *Natsvlishvili and Togonidze v Georgia*. This case concerns a challenge to a plea bargain brought by the defendant party to it. Once this discussion has been concluded and it has been demonstrated that plea bargaining is compatible with the ECHR our attention shall be focused on how a plea bargaining procedure could be realised within the EU.

5.2.3 Why we may wish to implement a plea bargaining system within the EU

If a plea bargaining system were implemented within the EU it would have the potential to address some of the concerns that have been identified with the current direct settlement procedure. Just to recap, there were two key areas of concerns and one area that needs to be monitored closely; (a) the length of time the investigation, settlement discussions and decisions take to be reached, (b) the efficiency in the management of hybrid cases, and (c) the impact the undertaking appealing the settlement decision has on future settlements.

The operation of a plea bargaining system within the EU instead of the current direct settlement procedure would have the potential to dramatically reduce the length of time the Commission's procedures take. These efficiency improvements would be achieved in various ways. To begin with, plea bargaining would offer the potential for undertakings and the Commission to begin negotiations and discussions from the opening of the Commission's investigations. This would mean that the undertakings could cooperate and assist the Commission with its investigation thereby reducing the length of time the Commission's investigation takes – which is currently the lengthiest part of the Commission's procedures. In addition, by entering discussions early with the Commission all parties are more likely to come to an agreement quicker than when they have to wait until the investigation is completed to begin discussions. Indeed, we see from the current settlement decisions that when these discussions begin they often focus around the value of sales and the scope of potential objections. Under a plea bargaining procedure these discussions could simply occur as the Commission is deciding on those issues, again leading to a reduction in the length of proceedings. This approach would offer the EU the ability to *speed up* the time it takes it to conclude the entirety of the case – from the investigation stage right through to the settlement stage.

There is however a cost of implementing a plea bargaining system to achieve these efficiency benefits. This cost is not financial though, it is at the expense of investigatory rigour. By allowing discussions to occur prior to the investigation being completed it potentially means that the investigation will not be as detailed and thorough. In addition, the role of judicial scrutiny is limited, as an undertaking loses its right to appeal. Although, we need to note that there would still be 'checks and balances' in place here. For example, the courts prior to authorising the plea agreement will have the opportunity to assess the Commission's case against the undertaking and ensure that there is a factual basis for the infringement charges against the undertaking. Additionally, an undertaking does not need to plea bargain, it can refuse to enter an agreement with the Commission and challenge the infringement decision when it is issued

before the General Court. The problem we are witnessing here is one of a trade-off between investigatory rigor (and the costs associated with this), on the one side, against, speed, efficiency and resource savings on the other. This is a delicate task to perform and currently the EU has chosen to ensure that investigatory rigor is of paramount importance. This is a respectable decision, but plea bargaining does not have to come at the complete cost of investigatory rigor. As will be illustrated later, with the necessary safety measures in place a reasonable balance can be had between right protection and efficiency gains.

Some may also wish to question the necessity for utilising plea bargaining within the EU when the Commission operates a leniency programme that is designed to help uncover cartels and provide information on the infringements. Whilst it is correct that the Commission operates a leniency programme that helps it collect evidence on cartels; plea bargaining offers something that the leniency programme does not. That is to say, it offers the ability for undertakings to engage in discussions and negotiations with the Commission. The benefit of facilitating discussions between the Commission and undertakings should not be underplayed. The efficiencies, which can be derived from this, are significant. In many instances it will mean undertakings do not seek to discontinue the negotiations and return to the standard procedure or appeal the decision. Litigation costs are substantial and by minimising them this enables the Commission to use those resources to investigate and deter other cartels. If a plea bargaining procedure were to be implemented within the EU the current leniency programme would need modifying. These modifications are discussed later in this section when how the EU could implement a plea bargaining system is considered.

Another benefit which is derived from plea bargaining over the current system is that the Commission will engage in separate discussions with each party. This will mean that one party will not be able to hold up the progress of settlement

discussions with all of the other parties in the negotiations.⁸⁷ Under the current system, this can occur and therefore the Commission's settlement discussions can only move at the speed of the *slowest* party.

However, under a plea bargaining programme this would be different. For example, if the Commission is in negotiations with a party (A) who are stalling, the Commission can still progress effectively with discussions with the other parties (B, C, D) independently and not have to wait for party (A) to conclude the discussions. In addition, plea bargaining may help the Commission in its investigation of the cartel. If we consider the above example again, we may find that party (B) is very keen to settle and get the best deal possible, so they provide the Commission with as much detailed information on the cartel and its activities as possible. This information could then be used by the Commission to help it in its investigation and negotiations with the other members of the cartel – parties (A, C and D).⁸⁸ There are even further potential benefits here. First, because all of the undertakings know that the other parties are also in negotiation talks with the Commission, this should help create a persuasive interest in cooperating and settling with the Commission – similar to the 'race for leniency'. Second, this approach will assist greatly in a hybrid case scenario, because the Commission is already managing the case against each party individually. If the Commission begins settlement discussions with a party and they drop out of these discussions, this will not affect the discussions the Commission is having/has had with the other parties and they can default back to the standard procedure against this party once the investigation and discussions with the other parties have been concluded. If the Commission waits it can then utilise all of the information it gains from the settlement discussions with the other parties to create its case against the non-settling party.

⁸⁷ In addition, it will mean that the Commission can utilise the fact that one party has settled to seek to pressurise the other parties into not defending themselves.

⁸⁸ Indeed, the ECtHR has held in *Karaman v Germany* App no 17103/10 (ECtHR, 27 Feb 2014), that confessions made in a plea-bargaining process by co-defendants in separate proceedings – to which the claimant was not a party to – do not amount to a violation of Article 6(2) ECHR (the presumption of innocence).

A potential concern with the Commission utilising a plea bargaining system is that some cases may not be appropriate for a plea agreement as they contain a novel legal issue that requires a more detailed analysis. If these cases were to be settled legal jurisprudence would not develop and parties may settle when there is actually not a sufficient case against them. However, this is actually not as much as a problem as it first appears. First, if the Commission feels this to be the case, or even the undertaking feels this, they can refuse to settle and appeal the infringement decision when it is issued. Second, as will be shown later, under the judicial safety measures the Court will need to be satisfied that there is a case to be answered. If the Court feels that the case against the undertaking(s) is questionable it can refuse the plea and force the parties to proceed down the normal procedure. Therefore, it is likely that we would see the Commission seek to choose the settlement cases wisely so as to ensure this is not a problem that would occur in practice.

An additional benefit that plea bargaining would bring for the Commission is that it would prevent further litigation costs, because once the Court endorses a plea bargain the undertaking loses its right to appeal. As litigation costs from undertakings appealing Commission infringement decisions are significantly high – in terms of finance and time – this will greatly benefit the Commission by reducing their costs and saving their finite resources. The Commission can then utilise the saved resources to detect and uncover additional cartels bringing further benefits to cartel deterrence. Though under the current direct settlement procedure there has only been one appeal, we cannot be sure as to what will happen in this case and whether other undertakings will look to bring appeals in the future. When an undertaking appeals the procedural benefits of settlement for the Commission are lost to a degree, as it has to prepare and put forward its case before the Court, which leads to weighty legal costs. Thus, by having this ability for an undertaking to appeal the agreement removed it has the potential to save on possible future appeal costs.

Having said this, implementing a plea bargaining system could lead to additional problems regarding the perception the general public (and those in the judiciary) have of utilising it. The general public may struggle to comprehend why companies should be allowed to negotiate with the Commission about their breach of competition law. Indeed, we see that Stephan identified that the general public have similar misapprehensions regarding the use of leniency in cartel cases.⁸⁹ Thus, there could be a comparable issue here. Actually, this problem with perception of negotiating with parties may be part of the reason the Commission has sought to reiterate on various occasions that it neither *negotiates* nor *bargains* in settlement decisions.⁹⁰ However, the concerns the general public may have could be addressed to a degree by the Commission explaining why bargaining in these cases can be beneficial and sometimes even necessary. Complex cases of fraud often require bargaining with the defendants, as they are so time consuming and difficult to prosecute.⁹¹

There are those within the judiciary who may come from backgrounds where plea bargains are frowned upon, seen as inappropriate or are treated with a great deal of cynicism and scepticism. For example, within the UK judiciary there seems to be a general consensus against the use of plea bargaining. Raphael has noted this strong feeling, observing that it is often argued that a US plea bargaining system would be inappropriate for the UK.⁹² In a similar vein, Lord Justice Maurice Kay in the *McKinnon* case stated that:⁹³

“We make no secret of the fact that we view with a degree of distaste the way in which the American authorities are

⁸⁹ Andreas Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ (2008) 5(1) CLR 123, 141.

⁹⁰ Commission, Press release, ‘Antitrust: Commission introduces settlement procedure for cartels’ <http://europa.eu/rapid/press-release_IP-08-1056_en.htm?locale=en> accessed 2 March 2015.

⁹¹ For example, one can see the UK’s position regarding plea bargaining complex fraud cases. Serious Fraud Office, *SFO Operational Handbook* (2012) – ‘Guilty Pleas and Plea Bargaining’.

⁹² Monty Raphael, ‘Plea Bargaining and the role of the lawyer’ (2008) Peters & Peters. Speech delivered to the European Criminal Bar Association at Bratislava 12 March 2008, 1. Similar concerns have also been raised by the Judiciary in Ireland see: Peter Charleton SC and Paul McDermott BL, ‘Constitutional Implications of Plea Bargaining’ (2000) July BarReview 476.

⁹³ *Gary McKinnon v Government of the USA Secretary of State for the Home Department* [2007] EWHC 762 (Admin) para [54].

alleged to have approached the plea bargain negotiations. Viewed from the perspective of an English court the notion that a prosecutor may seek to induce a plea of guilty on the basis that substantial benefits will be withdrawn if one is not forthcoming is anathema.”

This is a relevant consideration for our analysis because if judges sitting in the EU General Court are similarly sceptical or disapprove of the use of plea agreements it may cause issues if the EU were to implement a plea bargaining system. For example, it could lead to perfectly acceptable plea agreements being rejected, or unfairly scrutinised. However, the exact opposite could also occur, where judges who favour plea agreements may not conduct a thorough analysis of the case and treat it more as a ‘rubber stamping’ exercise. Nevertheless, these issues could successfully be addressed with clear guidance from the both the Commission and Court’s on plea bargaining and by ensuring that the necessary judicial safeguards – that are discussed later – are met.

A further concern that could be raised is with regards to the potential lack of consistency between the reductions the Commission awards in plea agreements. This issue stems from the fact that plea bargaining reductions could be very flexible and hence can lead to concerns regarding unequal treatment and the lack of legal certainty in settlement decisions – something which this thesis has discussed with regards to the Commission’s fining procedure in Chapter 3. But, this again is not really an issue because detailed guidelines (like those issued around the current leniency programme) can address these concerns by effectively helping undertakings understand what criteria are used in awarding the discounts and broadly how these ranges of discounts are set.

Simply transplanting a plea bargaining system into the EU cartel enforcement procedure may not be the answer to addressing the issues that this chapter has

identified. Indeed, Alkon has analysed whether transplanting plea bargaining procedures to countries which are trying to deal with multiple cases can solve their problems.⁹⁴ Her analysis identified that doing so can lead to unintended negative consequences and one has to identify if there are better ways of bringing reform to address the issues.⁹⁵ Yet, we have identified what the issues are with the current regime and seen what the potential benefits of implementing a plea bargaining procedure are, alongside the possible problems that could result from doing so. Let us now consider how we can implement the system within the EU and quell most of these concerns through the judicial safeguards, which would be put in place.

5.2.4 Is a system of plea bargaining compatible with the ECHR: the case of Natsvlshvili and Togonidze v Georgia?

As we are seeking to ascertain the ECtHR's decision and views on plea bargaining it is important that the facts and procedural background to this case are examined in detail so that we can understand how the plea bargain was agreed between the Georgian prosecutors office and the applicants.⁹⁶ This is crucial as we need to appreciate what procedural safeguards need to be in place to protect the individual's right of fair trial for plea bargaining to be permissible. Additionally, this is the first case where the ECtHR has assessed plea bargaining in the context of Article 6 of the ECHR. For these reasons the facts of the case and procedural process are discussed in-depth below.

5.2.4.1 The Procedural Process and Material Facts of the Case

There were two applicants to the case, the first applicant was Mr Natsvlshvili, and the second was Mrs Togonidze (henceforth, referred to as 'N' and 'T' respectively). The applicants were husband and wife – Georgian nationals – who at the time of the original charges resided in Georgia. Mr N was the deputy

⁹⁴ Cynthia Alkon, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' (2010) 19 *Transnational Law & Contemporary Problems* 355.

⁹⁵ *ibid* 418.

⁹⁶ Although this decision was not that of the Grand Chamber, the judgment of the Chamber of the Court has become final under Article 44(2) of the ECHR and thus it cannot be appealed.

Mayor of Kutaisi from 1993-to-1995 and the managing director of one of the most important public companies (hereafter, referred to as 'the factory') in the country from 1995-to-2000.⁹⁷ Mr N held 12.95 percent of the shares in the factory, Mrs T 2.6 percent and the State held the remaining 78.61 percent of shares.⁹⁸

In December 2002 Mr N was kidnapped and held for ransom. Whilst in his abductors' care Mr N was 'severely ill-treated' by his captors.⁹⁹ He was eventually released when his family paid a large ransom for his freedom. On March 12th 2004 charges were brought against him alleging that he had illegally reduced share capital in the factory. He was charged with 'making fictitious sales, transfers and write-offs, and spending the proceeds without regard to the company's interests'.¹⁰⁰ On March 15th 2004 Mr N was arrested and on the 16th he had appointed a lawyer to represent himself.¹⁰¹ When questioned on the 17th March 2004 Mr N protested his innocence and exercised his right to silence.¹⁰² On the same day, the prosecution brought an application before the Court for Mr N to be detained in custody as if not he may interfere with the case. The Court granted this application and he was held in custody for three months. On March 25th 2004 Mr N sent a letter to the prosecution stating that:

"Since I [Mr N] am not indifferent to the future of the automobile factory and consider it possible to settle the problems [I am having] with the State, I express my readiness to forfeit the shares in the factory which are currently in my and my wife's possession to the State."¹⁰³

⁹⁷ *Natsvlishvili and Togonidze* (n 26) para [9].

⁹⁸ *ibid* para [10].

⁹⁹ *ibid* para [11].

¹⁰⁰ *ibid* para [12].

¹⁰¹ *ibid* para [15].

¹⁰² *ibid* para [16].

¹⁰³ *ibid* para [18].

On the 14th June 2004 the Court extended Mr N's detention until the 15th July 2004, and then again in July until 15th September 2004.¹⁰⁴ For the first four months of Mr N's detention he spent it in a cell with the same person as who was charged with his kidnapping in 2002 – alongside another inmate who was serving a prison sentence for murder.¹⁰⁵ The Public Defender's Office complained that this put Mr N's 'physical and psychological well-being at risk,'¹⁰⁶ which led to him being placed in a different cell. It was not until the 1st of August 2004 that Mr N and his lawyer were given access to his case file and materials.¹⁰⁷ On the 6th August 2004 Mr N appointed a second lawyer, and on the 6th September 2004 the prosecutor's office finally terminated the investigation into him.¹⁰⁸ At this time, Mr N again protested his innocence, but confirmed his intention to cooperate with the prosecutions investigation.¹⁰⁹ On the same day as making this statement Mr N and Mrs T transferred their 12.95 and 2.6 (respectively) percentage of shares in the factory to the State. The prosecutor's office then demanded that Mr N's family pay 50,000 Georgian Lari to the 'Fund for the Development of State Bodies ensuring the Protection of the Law', but that Mr N's and Mrs T's names *must not* appear as the ones paying the money.¹¹⁰ Mrs M.I.-dze – who was Mrs T's sister-in-law – therefore made this payment on the family's behalf on the 8th September 2004 by bank transfer.¹¹¹

Mr N then filed a written statement with the prosecutor's office on 9th September 2004 to arrange a plea bargain with them.¹¹² In the written statement Mr N stated that he still considered himself to be innocent, but that he was willing to reach a settlement with the State. He stated that he would pay

¹⁰⁴ *ibid* para [19].

¹⁰⁵ *ibid* para [20].

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid* para [21].

¹⁰⁸ *ibid* para [22].

¹⁰⁹ *ibid*.

¹¹⁰ *ibid* para [25] this was according to a witness statement by Mrs M.I.-dze, who was Mrs T's sister-in-law.

¹¹¹ *ibid* para [26].

¹¹² *ibid* para [27]. This procedure had only recently been introduced into the Georgian judicial system in February 2004.

35,000 Georgian Lari to the State budget and that he *'fully understood* the contents of the agreement [plea bargain].¹¹³ The prosecutor's office – on the same day – offered him a plea bargain regarding the sentence to be imposed. The plea agreement noted that Mr N had refused to confess to the charges, but had *'actively cooperated with the investigation'* by repaying the harm he had caused by returning shares in the factory to the State.¹¹⁴ It was then noted by the prosecutors that even though this was a serious offence punishable with a prison sentence of six-to-twelve years, that it was still possible – due to the full compensation and interest of the most effective use of State resources to offer him a plea agreement.¹¹⁵ The prosecutor promised that he would request the court to convict Mr N without an examination of the merits and seeking a reduced sentence in the form of a 35,000 Georgian Lari fine.¹¹⁶ At this stage Mr N was informed that this plea agreement would not exclude him from civil liability and he stated that he *fully* understood this and the agreement itself again. He then stated how he was ready to accept the agreement and that the decision was *'not the result of any duress, pressure of any kind or undue promise'*.¹¹⁷ Mr N, his two lawyers and the prosecutor's office, then signed the plea bargain agreement. On the same day the prosecutor's office filled the plea agreement with the court requesting for its approval, and Mrs M.I.-dze paid the fine of 35,000 Georgian Lari.¹¹⁸

On the 10th September 2004 the City Court examined the prosecution office's request, and the judge again explained to Mr N about his rights under Article 679-3 of the Code of Criminal Procedure.¹¹⁹ Mr N then acknowledged that *'he was well aware of his rights and that he had agreed to bargain voluntarily, without having being subjected to any kind of undue pressure during the*

¹¹³ *ibid emphasis added.*

¹¹⁴ *ibid para [28].*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid paras [29 and 30].*

¹¹⁹ *ibid para [31].*

negotiations with the prosecutor'.¹²⁰ His lawyer also confirmed this to the court. They both then asked the judge to endorse the plea bargain stating they fully assumed the consequences. The Court accepted that the charges against Mr N were well founded,¹²¹ and that after judicial examination the plea bargain had been reached in accordance with the law and endorsed it and Mr N was consequently released.¹²²

5.2.4.2 Analysis of the ECtHR assessment of the case

The applicants raised various challenges before the ECtHR under the Convention. However, the relevant allegations for our analysis of the viability of plea bargaining within the EU are those that focus on the argument that the plea bargaining process had been an abuse of process and unfair and, therefore, was in breach of Article 6(1) of the ECHR; and, that the financial penalties imposed on the applicants as part of the plea bargain were a breach of their rights under Protocol 1, Article 1.¹²³

The ECtHR began by noting that it is a common feature of European criminal justice systems to allow for the accused to be granted a reduction in sentence or lessening of the charges if the defendant pleads guilty or provides assistance with the authorities investigation.¹²⁴ Indeed, if one wishes to consider how prevalent plea bargains are within the EU consulting the *Ahmad, Aswat, Ahsan and Mustafa v UK* case is fruitful – as in this case the ECtHR highlighted the prevalence of plea bargains within EU Member States – and signatory States to the Convention.¹²⁵

¹²⁰ *ibid.*

¹²¹ *ibid* para [32].

¹²² *ibid* para [33].

¹²³ *ibid* Para [3].

¹²⁴ *ibid* para [90].

¹²⁵ *Ahmad, Aswat, Ahsan and Mustafa v UK* App nos 24027/07, 11949/08 and 36742/08 partial decision as to admissibility (ECtHR, 6 July 2010), para [167]. For example, plea bargains have been involved in the following cases: *Slavcho Kostov v Bulgaria* App no 28674/03 (ECtHR, 27 November 2008) para [17]; *Ruciński v Poland* App no 33198/04, (ECtHR, 20 February 2007) para [12]; *Sardinias Albo v Italy* App no 56271/00 (ECtHR, 17 February 2005) para [22]; *Erdem v Germany* (dec) App no 38321/97 (ECtHR, 9 December 1999) and *Dimitrov and Hamanov v Bulgaria* App nos 48059/06 and 2708/09 (ECtHR, 10 August 2011).

In the *Natsvlshvili and Togonidze* case the Court stated that in itself it is not improper to have a plea bargaining system and that '[the Court] subscribes to the idea that plea bargaining, apart from offering [...] important benefits [...] can also, if applied correctly, be a successful tool in combating corruption and organised crime'.¹²⁶ Indeed, the Court has held before there is not anything improper in the process of a prosecuting authority offering charge or sentencing bargaining *as long as* the individual's rights are adequately protected.¹²⁷ The key question here becomes what is sufficient to form adequate protection of the individual's rights? The ECtHR sought to reiterate in the *Natsvlshvili and Togonidze* judgment that an individual can waive their procedural rights if they wish as there is nothing within the 'letter or spirit' of Article 6 ECHR which prohibits a person from waiving them *as long as* it is of their *freewill* and there are *sufficient safeguards* in place when they do so.¹²⁸ It is worth noting here that this is a belief that the ECtHR has held for some time now – for example, one can consider the comments of the Court in the *Scoppola* case from 2009.¹²⁹

The Court stated that Mr N waived his right to have the case against him examined on the merits as he struck a bargain and plead no contest to the charges with the prosecution authority.¹³⁰ However, the Court felt that when Mr N or *any* applicant strikes a plea agreement it needs to be accompanied by the following conditions:

- '(a) The bargain [has] to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and
- (b) the content of the bargain and the fairness of the

¹²⁶ *Natsvlshvili and Togonidze* (n 26) para [90].

¹²⁷ *Ahmad, Aswat, Ahsan and Mustafa v UK* App nos 24027/07, 11949/08 and 36742/08 partial decision as to admissibility (ECtHR, 6 July 2010).

¹²⁸ *Natsvlshvili and Togonidze* (n 26) para [91].

¹²⁹ *Scoppola v Italy (no. 2)* [GC] App no 10249/03 para 135, 17 September 2009.

¹³⁰ *Natsvlshvili and Togonidze* (n 26) para [92].

manner in which it had been reached between the parties had to be subjected to sufficient judicial review'.¹³¹

These requirements are what one can assume are necessitated by the ECtHR to ensure that an individual's rights are adequately protected. This therefore means that Mr N needed to be fully aware of the facts and legal consequences, and that he entered the plea agreement in a *genuinely* voluntary manner. In addition, the plea agreement has to also be subject to judicial review by a court. In Mr N's case one could question whether this has occurred. However, the ECtHR felt that there had been no violation of the Convention as: Mr N initiated the plea agreement;¹³² he expressed his own unequivocal willingness to repay the harm he caused to the State (through the shares);¹³³ he had legal representation throughout the proceedings and negotiations and adequate access to the case materials early on in the proceedings;¹³⁴ the plea was written up and then examined by the National Court, with the court not being bound by the agreement;¹³⁵ and finally, that Mr N had expressed regularly that there had been no undue pressure or coercion in the bargaining process.¹³⁶

Nevertheless, the author of this chapter is much more sceptical of the plea bargain agreement in this case than the Court has been. When we consider the facts of the case there seem to be some serious procedural irregularities which could have – in the authors mind – led to this plea bargain being held as being unfair, or potentially even, coerced. Let us begin with the fact that the Court held that Mr N had initiated the plea agreement. Yes, it is true that on the 25th March 2004 he sent a letter to the prosecution's office indicating he was willing to 'give' the shares back to the State, but we need to consider the reasons why he was so quick to make this offer, when in particular, the case was still being

¹³¹ *ibid.*

¹³² *ibid* para [93].

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid* paras [94] and [95]. The ECtHR placed a great amount of value on the national court being able to assess the written agreement and the fact that Mr N had begun the negotiation discussions himself.

¹³⁶ *ibid* para [93].

investigated. Mr N was detained in custody on the 17th March 2004 and held in a cell with the person who had been charged with his kidnapping in 2002. This letter was sent after spending eight days in a cell with the accused. It seems a reasonable premise to conclude that Mr N being placed in a cell with a person who has seriously mistreated him and kidnapped him would have a negative impact on his wellbeing. Indeed, it does not seem a stretch of the imagination to suggest that this may have been a massive factor in him seeking to enter a plea agreement. That is to say, he probably sought desperately to get out of jail and away from his previous kidnapper as soon as possible.

Another apprehension that can be had around this plea agreement is the peculiar way in which shares and money changed hands prior to the plea bargain being agreed. The shares in the factory were transferred back to the State at the very beginning of the case prior to any agreement even being made. This in itself seems highly questionable. The matter is however made worse when we consider that Mr N's family then had to pay 50,000 Georgian Lari to the 'Fund for the Development of State Bodies ensuring the Protection of the Law', but yet his and Mrs T's names *could not* appear as the ones that were paying the money. This meant that Mrs M.I.-dze – Mrs T's sister-in-law – had to make the payment. Then, Mr N had to pay a further 35,000 Georgian Lari to the State budget, which again was paid by Mrs M.I.-dze. This seems rather suspicious even to the uncynical. Why did two payments have to be made (one of which could not have the defendants name on it); why did the shares also have to be transferred back to the State of one of the country's most important companies? It is felt that these are questions that the ECtHR should have asked and conducted a more detailed analysis into as it seems counterintuitive not to when one is supposed to be ensuring that an individual's right to a fair trial is adequately protected. These questions still remain unanswered, and will do so now.

In the judgment, the ECtHR stated that, the National Court examined the plea agreement. However, what is not clear from the judgment is how much of an

analysis the National Court actually conducted into the agreement. It is acknowledged that the National Court did note that there was sufficient evidence to charge Mr N, confirmed that he understood his rights and that he had agreed to the agreement voluntarily. However, was sufficient time allotted to truly deliberate on the plea and the evidence against him? It is possible to conclude that given the time in which this plea agreement was considered in, that the National Court might have actually just been conducting more of a 'rubber stamping exercise' than truly assessing the case.

These concerns and procedural irregularities within plea agreements are something that has often been raised as potential issues and concerns within the academic literature on plea bargaining.¹³⁷ The vast majority of this literature is of US origin and therefore focuses on their procedure, but many of the concerns can transcend across all plea bargaining programmes. Therefore, we shall now consider some of the issues raised in the literature in regards to Mr N's case and into the implementation of plea bargaining system within a legal system.

It has been suggested that plea bargaining is unconstitutional as it sets up a system, which in essence, forces defendants to plead guilty and accept the plea bargain.¹³⁸ This is because if the defendant opts for a trial by jury the prosecution will charge the defendant more harshly than if they agree to plead.¹³⁹ This in turn leads to fewer trials by jury. One could see this as potentially being the case for Mr N where, he could have been prosecuted for an offence, which carried a potential prison sentence of six-to-twelve years but by plea bargaining he got a greatly reduced sentence, specifically, a fine.

¹³⁷ For example, Pal has written broadly on the various issues, Shivani Pal, 'Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals' (2013) PhD Thesis, p51-76.

¹³⁸ Timothy Lynch, 'The case against Plea Bargaining' (2003) Regulation Fall 2003 24 and Tina Wan, 'The unnecessary evil of plea bargaining: An unconstitutional conditions problem and a not-so-least restrictive alternative' (2007) 17(1) Review of Law and Social Justice 33, 40.

¹³⁹ *ibid* Lynch [25].

Though he had already spent time detained in prison so that he did not 'interfere with the case'.

Dervan and Eddkins have conducted a psychological study on college students to identify whether innocent 'defendants' would plead guilty.¹⁴⁰ They found that more than half of the innocent participants were willing to falsely admit guilt in return for a benefit.¹⁴¹ If we consider Mr N's case we can see that, right from the start of the case – and throughout the case – he maintained the claim that he was innocent but just wished to put the matter behind him. In cases like this it is worrying that the defendant does not go to a full trial so that the facts of the case can be fully assessed by the court; and hopefully a truly innocent defendant would be found not guilty here. It is scenarios like this where we see an innocent defendant coerced into pleading guilty because of the potential risks from taking the case to trial are much higher than accepting a plea bargain. This is the situation where plea bargaining becomes most dangerous to defendants; namely, a truly innocent defendant. Even though they are innocent they may not be able to prove their case, and no one can say with certainty what will happen if they go to court. But, if they accept the plea agreement they know what fine or sentence the prosecution will recommend and, if the court endorses the plea what fine or sentence they will receive. As Mr N found, once a court approves a plea agreement it is incredibly difficult for a defendant to manage to overturn it. In the US for example, there are only three categories that a defendant can raise a challenge under.¹⁴² Yet, even if the defendant can raise an issue under one of these categories they are unlikely to succeed in having the plea bargain overturned.¹⁴³ Plea bargains may lead to 'buyer's remorse' but a defendant cannot get it overturned simply because they regret

¹⁴⁰ Lucian Dervan and Vanessa Eddkins, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103(1) *Journal of Criminal Law and Criminology* 1.

¹⁴¹ *ibid* 36.

¹⁴² Prison Law Office, 'Challenging a Conviction or Sentence After a Plea Bargain' (2013). These are: (1) issues that can be raised on direct appeal *without* a certificate of probable cause; (2) issues that can be raised on direct appeal *only* with a certificate of probable cause and (3) issues that can be raised *only* in a state court petition for writ of habeas corpus.

¹⁴³ *ibid* [2].

agreeing to the decision. Indeed, the ECtHR noted that Mr N *chose* to waive his right to have the evidence and case heard and cannot have the agreement overturned just because he may regret the decision.

Given the fact that there are so many procedural irregularities within this plea bargain and that many of the criticisms levied against operating a plea bargaining system seem to occur here, it could legitimately lead one to question why the ECtHR did not find that in this case the plea agreement was unfair. Perhaps, given the fact that the plea bargaining system, had at the time, only recently been introduced in Georgia and that there has been further changes made to the system by the time the case went before the court the ECtHR sought not to interfere in the domestic system. However, whatever the reasons, this plea agreement appears unfair and the Court's decision (on the legality of *this* plea agreement) seems suspect. Indeed, even one of the judges within the decision was herself much more critical of the plea agreement. Judge Alvina Gyulumyan partially dissented with regards to whether there had been a violation of Article 6(1) ECHR and Protocol 7 Article 2. The reasons why Judge Gyulumyan dissented are insightful for our analysis of plea bargaining and raise similar concerns to those that the author has above.

Judge Gyulumyan began by stating that there was no objection or concerns raised in respect of the utilisation of a plea bargaining system. Indeed, she sought to make this fact crystal clear by stating that it was not her objective 'to call into question the system of plea bargaining as such, in general terms'.¹⁴⁴ The concerns, which she raised here, were related specifically to the circumstances of the case before the Court and the early Georgian model of plea bargaining.

The opinion of Judge Gyulumyan was that the question of whether Mr N and the prosecutions office were on 'equal footing' during the plea bargaining

¹⁴⁴ *Natsvlishvili and Togonidze* (n 26) para [2] Dissenting Opinion.

process could not have been thoroughly examined by the National Court as the plea bargaining process negotiations had not been recorded in full.¹⁴⁵ Judge Gyulumyan was also concerned that there had been several ‘shady factual circumstances of the case’ – such as factory shares changing hands as well as monetary payments prior to the procedural agreement being agreed – which leads to one questioning the equality of power during the negotiations.¹⁴⁶ In addition to these concerns Judge Gyulumyan had questions as to whether Mr N could have agreed to the plea bargain in a ‘truly voluntary manner’ because of the extremely high conviction rate in Georgia at the material time (99.6%).¹⁴⁷ Indeed, if we consider this objectively we can see that it was arguably almost a full-blown conclusion that he would have been convicted had he gone to court. Therefore, the best option for him would be to take whatever the prosecutor’s office would offer him with open-arms.

Judge Gyulumyan also expressed fears that the evidence against Mr N was not sufficiently examined by the National Court so as to ensure that there was a strong enough case against him that he had to answer. This was based on the fact that the National Court only examined the brief in a day and approved the plea bargain the next day. Judge Gyulumyan argues that this did not allow sufficient time for detailed consideration of the evidence against the defendant.¹⁴⁸

Lastly, Judge Gyulumyan raised concerns regarding the fact that Mr N could not lodge an appeal against the plea bargain at a national level, which limits the important role of judicial supervision in plea bargain agreements.¹⁴⁹ Therefore, she argued that there needs to be stricter procedural safeguards in place when a defendant enters a plea bargain but pleads not guilty to the charges.¹⁵⁰

¹⁴⁵ *ibid* para [3] Dissenting Opinion.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid* para [4] Dissenting Opinion.

¹⁴⁸ *ibid* para [5] Dissenting Opinion.

¹⁴⁹ *ibid* para [6] Dissenting Opinion.

¹⁵⁰ *ibid* para [7] Dissenting Opinion.

The concerns raised by Judge Gyulumyan are similar to those that the author raised and to what one would presumably have expected the other judges to wish to be discussed in the case. Perhaps this difference in opinion is down to the personal perception of the individual considering the issue, where some may take a more cautious approach to these matters than others. However, all of the concerns raised here appear to be matters that a court which is reviewing the plea agreement or the procedural process should consider, especially when they are deliberating on an individual's right to a fair trial.

In conclusion, as long as procedural safeguards are in place; namely, there is an independent court that assesses the plea agreement and the agreement is documented and entered into voluntarily by the defendant, then there will be no issues with Article 6 of the ECHR. Indeed, as long as these safe guards are met a company or individual may freely waive its/their right to a trial. Although the author feels there are areas of questions around the legality of the plea agreement in the *Natsvlishvili and Togonidze* case; plea bargaining systems themselves, are not suspect. However, to avoid the *issues* identified within the *Natsvlishvili and Togonidze* judgment it would be essential that if the EU were to implement a plea bargaining system that clear, documented guidance – on the use and procedure of the system – be provided. The next part of the chapter now takes the opportunity to consider how to potentially implement an EU-wide plea bargaining system for settling cartel cases.

5.2.5 How the EU could implement a Plea Bargaining System

We shall now take what we have learned from the previous discussion of the *Natsvlishvili and Togonidze v Georgia* case and identify how the EU could implement a plea bargaining system for settling cartel cases that would comply with Article 6 of the ECHR.

To implement a plea bargaining system within the EU there would need to be a significant and radical overhauling of the current cartel enforcement procedures, which is why this approach is referred to as the 'radical approach'

within this chapter. The procedure would still be an administrative one, as it is now. The Commission would conduct the investigation; calculate the fine and award leniency and settlement reductions to undertakings. However, the Commission would no longer determine whether there has been an infringement and impose the fine on an undertaking; this would be conducted by the General Court. This is a requirement of operating a plea bargaining system; namely, having effective judicial scrutiny of the agreement. The Commission in essence becomes the prosecutor. The Court will then assess the Commission's case and the calculation of the fine. Once they have conducted this assessment the Court will be able to endorse the Commission's decision (and if there is one the plea bargain) or reject the case if they feel there is no case to answer (or the plea bargain if it is inappropriate). The Commission would not need to produce a full decision under the normal route; it could create a streamlined one – as it does under the current settlement decision – to put its case before the Court. Although the plea bargain procedure means that Commission infringement decisions will need to go before the General Court for the infringement decision to become final – where currently the Commission makes the infringement decision final through the College of Commissioners – this will be very different to a fully litigated case that goes before the courts currently. Therefore, the litigation costs of having to have the decision imposed in court would be minimal and not on par with legal proceedings where an undertaking appeals a Commission decision.

The plea bargain that the Commission would enter into with a defendant would involve the undertaking waiving certain rights. For example, undertakings would be required to waive the right to appeal the Commission's decision (once the bargain has been approved by the Court), challenge the Commission's evidence, calculation and assumptions. Although, through the plea agreement the undertaking should have had a chance to effectively influence and discuss the Commission's evidence, calculations and assumptions. The undertaking would also have to admit its liability for the infringement of Article 101(1) TFEU. In return for waiving all of these rights an undertaking would receive a significant

reduction in the fine imposed upon it for its infringement, a much quicker decision and procedure, and have limited legal fees to pay, because the undertaking will not have to challenge the case before a court since it has influenced the decision through discussions with the Commission.

In addition to the above changes to the Commission's cartel enforcement programme, the Commission's leniency programme will also have to be amended if a plea bargaining procedure were implemented. The leniency programme would need to align itself more with the US-style of leniency programme. That is to say, only the first undertaking to come forward would be able to apply for leniency under the programme, the remaining undertakings would need to enter into plea bargains with the Commission. This change would be important, as it would encourage undertakings to settle so that the benefits of plea bargaining can be achieved. If undertakings can still get reductions in fines from a leniency programme then they may not opt into using plea bargains and the full procedure will therefore need to be followed as normal.

Let us now consider and remind ourselves of the necessary judicial safeguards which will also need to be put in place. The ECtHR listed these 'judicial safeguards' in the *Natsvlishvili and Togonidze v Georgia* case. The court stated that where there is a plea agreement involving a defendant it needs to be accompanied by the following conditions: that the bargain was accepted in full awareness of the facts of the case and the legal consequences in a genuinely voluntary manner to comply with Article 6 of the ECHR. In addition, the bargain's contents and the manner in which the parties had reached it have to be subjected to sufficient judicial review.¹⁵¹ For plea bargaining in cartel cases this will mean that the General Court will have to scrutinise the Commission's case against the undertakings and the plea bargain itself. The Court will need to satisfy itself that there is a case for the undertaking to answer and that the plea agreement was entered into freely and voluntarily and not as the result of

¹⁵¹ *Natsvlishvili and Togonidze* (n 26) Para [92].

force, threats, assurances, promises or representations from the Commission which are not contained within the plea agreement. To do this effectively the General Court will need to ensure that the bargain itself and the way in which it was reached had been done so fairly and legally by *thoroughly* examining and considering all the details of the agreement, the case and the negotiations. Because of this it will be very important that all of the negotiations are documented so that the Court can adequately inspect them and establish how the agreement was reached and ensure there were no false promises or coercion made. A potential way of addressing this could be to have an independent party sit in on all the discussions that reports directly to the court itself. This is something, which is explored more generally in the next section of the chapter as a potential improvement under the current settlement procedure; therefore, it will not be discussed in any depth here. Finally, the General Court will need to ensure that the undertaking is full aware of its procedural rights, the facts of the case and the legal consequences of entering into a plea bargain. As long as these requirements are met an undertaking waving certain procedural rights would not result in a breach of Article 6 ECHR. In addition, with these protections in place and the General Court thoroughly examining and scrutinising the plea agreements we should not see any of the concerns the author raised around the *Natsvlshvili and Togonidze v Georgia* judgment occurring.

In addition to the aforementioned considerations we also need to study the role of Article 263 TFEU when contemplating how the EU could implement a plea bargaining procedure. In essence, this Treaty provision stipulates that the European Court of Justice (hereafter, the 'CJEU') shall have the power to review the legality of acts of the Commission. It means that any Commission decision will be appealable or subject to review by the CJEU. The possible issue that one might propose here is, if a plea bargaining procedure were to be implemented within the EU this would lead to an undertaking losing its right to appeal the settlement agreement between it and the Commission to the CJEU. This would therefore mean that a plea bargaining procedure would fall foul of Article 263

TFEU and thus, it would not be possible to implement one within the EU for the settlement of cartel cases. However, this is not such a problem as it first appears. We need to remember that every plea agreement would be subject to review by the European Court before it would be accepted and implemented. This means that the court will assess the agreement and the case against the undertaking. Consequently, ensuring that there is a case against the undertaking, that the undertaking understands the implications of entering into the agreement, that it did so without duress and any false promises, and that the undertaking wishes to waive its right to appeal. Alongside this an undertaking has the right – under Article 6 of the ECHR – to waive its right to appeal where it wishes too. This therefore means that Article 263 TFEU will be complied with and will not be breached if a plea bargaining system were implemented within the EU.

As has been illustrated within this part of the chapter it is possible that the Commission could implement a plea bargaining system for cartel cases that would comply with the ECHR and also bring a variety of benefits to the settlement procedure. However, this would involve a radical overhauling of the Commission's current procedures, and the ways in which cartel cases are managed and dealt with. For these reasons, and the other concerns regarding plea bargaining raised in the chapter, it is felt that a plea bargaining procedure is unlikely to be implemented anytime soon within the EU even though it would bring significant procedural benefits for both the Commission and undertakings. Still, if the EU were to undertake the necessary changes to the Treaty and its policies then the benefits identified in this section can be achieved. Indeed, the analysis in this research will be invaluable to the implementation of such a procedure. The next section of this chapter will now consider other improvements that can be made to the Commission's settlement procedure which are less radical and easier to implement, but yet, can still bring procedural efficiency gains without some of the potential costs of plea bargaining.

5.3 Improvements to the current system

The previous section sought to identify the benefits that plea bargaining could bring to the EU. This section takes a more restrictive approach and considers less radical options for improving the Commission's direct settlement procedure. These options stem from the identification of areas within the current procedure that need improving and the comparison had with the US system of plea bargaining. There are four suggestions for improvements put forward within this section, specifically; (1) allowing an undertaking to request and begin settlement discussions with the Commission at any stage of the proceedings, including within the investigation period; (2) having the Hearing Officer sit in on all settlement discussions; (3) removing the mandatory ten percent reduction in settlements and allowing this to be flexible; and finally, (4) allowing undertakings to have an 'effective say' in negotiations. None, it is submitted, would involve violations of Article 6 ECHR and indeed several may go some way to reducing any extant risk of violation.

These options may be adopted as 'standalone' options or combined with one another in various arrangements to improve the efficiency of the current procedure. Each of the four options seeks to help address the problems identified in relation to time and resources in a variety of ways. There are further improvements that have been identified by the analysis, however, these would lead to the need to adopt the changes suggested under the 'radical approach' and thus they have not been discussed here again as they necessitate the need for substantially amending the Commission's procedures.¹⁵²

¹⁵² As an example, removing an undertakings right to appeal could lead to further cost savings as they would not be able to appeal the decision. However, to do this the settlement decision would need to be agreed by a Court for the necessary judicial safeguards to be met. Thus, it in essence would require the implementation of a plea bargaining procedure.

5.3.1 Option 1 – Allowing an undertaking to request and begin settlement discussions with the Commission at any stage within the proceedings

This first option would allow an undertaking – if the Commission deems it appropriate in the case – to begin settlement discussions with the Commission at any stage of its procedure. The benefits of allowing an undertaking to enter into discussions with the Commission in the investigation stage were highlighted and discussed in the previous section of the chapter when the implementation of a plea bargaining procedure within the EU was considered. Therefore, these benefits and potential issues need not be debated again. However, there are some additional points we can note and discuss here in this regard. Currently the Commission cannot instigate discussions until the full investigation has been conducted and this *dramatically* restricts and slows the procedure. Indeed, some practitioners have noted that ‘what actually delays the EU settlement is the exhaustive and long investigation,’¹⁵³ prior to the beginning of settlement discussions. Although, there are those who would dispute this claim. For example, Laina – the head of the cartel settlement unit at the Commission – believes ‘the fact that the Commission does a complete investigation before deciding whether a case will follow the settlement or the standard procedure’ allows for more flexibility in case, because if the settlement procedure is discontinued it enables the standard procedure to ‘kick in’ very quickly.¹⁵⁴

It is true that there are benefits from having the investigation completed prior to beginning settlement discussions, such as the ability to revert back quickly to the standard procedure. However, there are greater benefits that can be had by allowing undertakings to settle during the investigation. For example, there would be an increase in the speed of the investigation and consequently the decision because the discussions can begin earlier which allows the parties and the Commission to reach an agreement around the facts of the case sooner.

¹⁵³ David Vascott, ‘EU cartel settlements; are they working?’ (GCR News) <<https://www.lw.com/mediaCoverage/are-eu-cartel-settlements-working>> accessed 27 November 2014, interview, Hansen.

¹⁵⁴ *ibid* interview discussions with Laina.

Additionally, undertakings are more likely to seek to provide information and cooperate with the Commission's investigation, as they are involved in it. All of these reasons should then lead to a reduction in time and financial costs for the Commission and indeed the undertakings involved.

One of the biggest advantages of keeping the current settlement procedure and allowing an undertaking to begin settlement discussions during the investigation is that the judicial safety measures required in plea bargaining would not be necessary as an undertaking would not be mandated to waive its right to appeal. In essence the EU would gain one of the most beneficial features of the US plea bargaining system (with regards to speed and efficiency), yet this would come without the high costs usually associated with it. However, an additional safety measure, which should be put in place to help protect an undertakings rights if Option 1 were to be implemented would be that mooted in Option 2. A Hearing Officer should be present for settlement discussions whenever they transpire, but particularly when they occur in the investigatory stage.

5.3.2 Option 2 – Having the Hearing Officer sit in on all settlement discussions

Currently undertakings 'may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.'¹⁵⁵ This means that the Hearing Officer only becomes involved in the Commission's settlement procedure if an undertaking has concerns regarding due process and calls upon them. However, Option 2 would see the Hearing Officer sit in on all settlement discussions to ensure that due process rights are respected and that the settlement decisions are reached fairly. This would lead to a greater protection of an undertaking's rights, could increase the efficiency of the settlement procedure and potentially reduce the number of hybrid cases occurring. For instance, if an undertaking felt there

¹⁵⁵ Commission Notice (n 3) para [18].

were a due process problem and the Hearing Officer is not in the settlement discussions (as is the case now) then the discussions have to stop whilst the Hearing Officer investigates and addresses the undertakings concerns. The Hearing Officer will need to collect and evaluate the necessary information before the discussions and settlement can continue. Yet, had the Hearing Officer been in the settlement discussions when it happened they would fully appreciate the context, have the necessary information and be there to assess and address the problem immediately. By having a Hearing Officer within the settlement discussions it means that the undertakings concerns may be addressed and dealt with quickly which in turn leads to procedural efficiency gains over cases where the Hearing Officer is not there. It also means that the Hearing Officer maybe able to assist with communications and issues between the Commission and undertakings, ensuring that the discussions progress if there is a breakdown between the two parties. The primary reason to advocate for this Option though is where one of the other Options – particularly Option 1 or 4 – are sought to be implemented. In these cases having a Hearing Officer in the settlement discussions at all times will help ensure that the undertakings rights are adequately protected as Option 1 and 4 could potentially lead to due process issues and a loss of adequate right protection. Let us now consider the reasons for implementing Option 2 when Option 1 and 4 are employed.

In the instance of Option 1 it becomes important because the investigation will be less thorough as the Commission will not have completed its investigation. This means that the undertaking will be entering into discussions with the Commission when it does not have all the evidence. Therefore, it becomes paramount that an undertaking's due process rights are adequately protected and are seen to be. In the case of Option 4 being employed, an undertaking will be able to negotiate with the Commission on certain issues; it will therefore be important that there is a Hearing Officer present so as to ensure that the undertaking's right to defence is respected and that the Commission considers the parties' settlement submissions. By having the Hearing Officer present at

settlement discussions it can reduce the appearance of any procedural impropriety and ensure that an undertaking's rights are sufficiently protected. Currently there are only two Hearing Officers employed by the Commission for competition proceedings. Consequently, if this approach were to be considered for implementation it would become essential for the Commission to employ further Hearing Officers to ensure that there were enough staff to be involved in all stages of the settlement discussions.

However, a superior approach to utilising a Hearing Officer would be to implement a truly independent body to sit in on these procedures. This body would not report to or fall under the ambit of the DG Competition Commissioner but to the EU Commission as a whole or the EU Court (were the case to go before it under the plea bargaining model). Their role would be to ensure that an undertaking's due process rights are adequately protected and that the settlement decisions were reached fairly. This role would be of particular importance if the settlement decisions were to begin during the investigatory stage or involve negotiations. As these would be the cases where the Commission's case would be at its weakest, as they would not have conducted a full investigation and have all the information. In essence this body would be the same as a Hearing Officer but the DG Competition Commissioner would not oversee them. This would ensure and enable greater objectivity and impartiality in the proceedings.

Having an independent party or the Hearing Officer involved in the settlement discussions to ensure that an undertakings rights are adequately protected can lead to procedural efficiency benefits to the current procedure when compared to the counterfactual of not, but this improvement becomes *categorically* necessary when Option 1 or 4 are employed.

5.3.3 Option 3 – The removal of the arbitrary mandatory ten percent reduction in settlement decisions and allow a more flexible approach to be adopted

Currently the Commission awards settling undertakings a flat ten percent reduction in the fine for engaging in settlement discussions with them. This is low in comparison to many other jurisdictions.¹⁵⁶ For example, in the UK up to a twenty percent discount may be awarded for undertakings settling with the CMA.¹⁵⁷ In France, the fine ceiling is reduced from ten percent of global annual turnover to five percent when undertakings settle.¹⁵⁸ This reduction is an important part of the benefit of settling with the competition authority or Commission for an undertaking. Removing the mandatory reduction and allowing it to be more flexible, so as to represent how an undertaking assists the Commission in settling could lead to a greater willingness on the part of undertakings to settle and other procedural benefits relating to speed to be achieved. This is because undertakings will have an increased incentive and thus desire to cooperate to receive a higher reduction, as the reduction they can receive will vary based upon their assistance. By allowing undertakings greater reductions, so as to reflect the effort and information they provide this will incentivise and encourage cooperation, negotiation, discussions and information sharing with the Commission. All of this will lead to an enhancement of the settlement procedure.

Having said this, it has been implied that the Commission is already awarding greater discounts than the ten percent reduction via the leniency programme,¹⁵⁹ and through the way it is defining the scope and duration of the

¹⁵⁶ Sean-Paul Brankin, 'The first cases under the Commission's cartel-settlement procedure: problems solved?' (2011) 32(4) ECLR 165, 167.

¹⁵⁷ See Competition and Markets Authority, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288636/CM_A8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf> accessed 29 July 2015.

¹⁵⁸ Article L464-2 III of the French Commercial Code.

¹⁵⁹ Anna-Louise Hinds, 'All settled? Some six years of cartel settlement' (2014) 35(6) ECLR 292, 295/296.

infringement.¹⁶⁰ If this is the case, it is good that the Commission is rewarding undertakings for cooperating, however this procedure needs to be clear and transparent. Awarding discounts ‘under the table’ so to speak, does not enhance the procedure or allow undertakings to appreciate the true benefits of settling from the outside. This is because undertakings will be unaware of the potential reductions they may receive if they partake in a settlement with the Commission. The legislation and guidance clearly states that only a ten percent reduction for settling will be applied to the undertakings fine. A better way forward here would be for the Commission to remove the cap, and state the range of reductions that it will offer an undertaking when they cooperate. If the Commission were to produce detailed guidelines like they have for its leniency programme undertakings could consult these to understand what is required of them to achieve certain reductions. The Commission would retain a broad margin of discretion (like when enforcing the leniency programme) to award the settlement reductions based on the facts and circumstances of each individual settlement procedure.

By implementing a higher reduction for settling and producing clear guidance on how this range is defined the Commission would be able to allow more undertakings to appreciate the benefits of settling and encourage this.

5.3.4 Option 4 – Allowing undertakings to have an ‘effective say’ / negotiate with the Commission in settlement discussions

The fourth and final option would see that an undertaking could negotiate with the Commission over certain select points of the infringement. These points of discussion would be limited, with the Commission deciding which matters to negotiate on and, the Court having the final say on the calculation of the fine. These points would usually focus around: the length of the infringement, market definition and the value of the sales. This would facilitate discussions

¹⁶⁰ David Vascott, ‘EU cartel settlements; are they working?’ (GCR News) <<https://www.lw.com/mediaCoverage/are-eu-cartel-settlements-working>> accessed 27 November 2014.

and encourage further cooperation from an undertaking, as they would be able to influence the overall fine imposed upon them. This in turn should lead to more fruitful discussions, quicker settlements and a reduction in the likelihood of the settlement process being abandoned by an undertaking or the settlement decision being appealed.

Currently it is *purportedly* the case that the Commission will *not* negotiate or bargain with settling parties. As has been noted previously the Commission has on a variety of occasions stated that it does not negotiate with settling parties. By taking this approach it removes one of the greatest potential benefits that an undertaking could get from settling, namely the ability to discuss parts of the cases with the Commission. Yet having claimed this, the settlement procedure clearly states that the Commission should consider the parties' settlement submissions so that their rights of defence can be exercised effectively and taken into account in the preliminary analysis.¹⁶¹ In fact, when we consider the comments from practitioners who deal with settlement cases we see that it appears that the Commission may already be negotiating to a degree with settling parties. For example, Van Gerven a partner at Linklaters stated in an interview that there is an:

'Expectation that settlement discussions allow for a more meaningful discussion with the Commission staff than what would be possible in a standard procedure and that you have a higher likelihood to have these discussions affect the outcome. If you compare the sometimes very high fines after a standard procedure with the fines imposed in a settlement procedure, many lawyers perceive the settlement option now as attractive.'¹⁶²

¹⁶¹ Commission Notice (n 3) para [24].

¹⁶² David Vascott, 'EU cartel settlements; are they working?' (GCR News) <<https://www.lw.com/mediaCoverage/are-eu-cartel-settlements-working>> accessed 27 November 2014.

In a comparable vein Hansen, a partner at Latham & Watkins stated in the same joint interview that:

‘I am not so sure that settlement cases always end up with the same fine as cases resolved in a full procedure. I do have the impression that the dialogue with the Commission in the months leading to a settlement is able to *influence the scope and duration of the infringement*. And certainly the dialogue on affected turnover ensures that fines are set by reference to sales volumes that are clearly impacted by the infringement.’¹⁶³

What this appears to show is that practitioners believe that those undertakings, which do engage in settlement discussions with the Commission, can have an effect on the level of fine they receive. This perhaps helps explain in part why undertakings are so keen to settle with the Commission under its current procedure. Namely, some know that they can have an impact on the Commission’s findings and the resulting fine. If it is the case that undertakings can, and currently do, influence the Commission’s findings and analysis it would be beneficial to have this recognised within the settlement procedure documentation somewhere, clearly laying down the areas which the Commission may discuss or be willing to negotiate upon with the undertakings. This is important as without guidance on this we have the situation, which occurs before us now. We have the Commission stating that it does not negotiate; yet practitioners and the empirical data suggesting that they in fact do. There is no clarity over what points they may negotiate on. If undertakings are considering settling with the Commission and only read the guidelines and legislation they will not appreciate the ‘true value’ of settling. This is because they will be unaware of the potential for a greater reduction than the ten percent through the calculation on the effected sales or market. Since a greater

¹⁶³ *ibid.*

reduction in fine would be a further incentive for undertakings to cooperate and apply for settling it is important that this reduction and procedure is clearly laid down in guidelines for undertakings to understand. Indeed, for procedural transparency, fairness and legal certainty reasons it is important that clear guidance is provided. Whether it is the case that an undertaking can currently influence the Commission's decision or not, it would be a beneficial procedural improvement to put in place, alongside the necessary guidance regarding the points that can be negotiated.

This section has identified four potential improvements that could be made to the Commission's direct settlement system to further enhance its procedural efficiency. Though each of these options will bring differing levels of gains, the most beneficial of these appears to be Option 1: allowing undertakings to enter settlement discussions at any stage of the proceedings – including the investigatory stage. This is because the investigatory period typically takes a long time and has a significant impact on the length of the proceedings and the resources utilised during the case. However, Option 1 could come at the expense of investigatory rigor. Nevertheless, if the Hearing Officer is allowed to be witness to the settlement discussions (Option 2) these concerns should be reduced significantly. This section's suggested improvements can be seen as a 'hybrid approach' as they involve selected parts of the current procedure being improved and enhanced. The hybrid name originated from the fact that not all four of the options need choosing, this approach is more flexible – if you will a 'pick-and-mix' system – where any single option could be chosen in and on its own. Nevertheless, ideally all four of these options would be considered for implementation, but it is possible that only some could be chosen. This approach is the opposite to the 'radical approach' which would require all of the recommended changes to be made so as to allow the plea bargaining system to be implemented correctly and have the necessary judicial safety measures to comply with the ECHR.

5.4 Conclusions

This chapter has taken the timely opportunity to identify what the Commission's direct settlement process can learn from the DOJ's plea bargaining procedure to enhance its efficiency whilst complying with Article 6 of the ECHR. The Commission's direct settlement procedure has been in operation for seven years now, yet it has had a very slow uptake in use. In recent years there has been a rise in cases settled under the procedure yet there has still only been a mere seventeen cases settled. Nonetheless, the lack of cases being settled is not the real issue here, that is to say, although it is disappointing there has not been more settlements in this period of time, the real issues and concerns – from an efficiency and effective perspective – relate to (a) the amount of time it takes for a case to be settled and (b) the fact that various cases are having to proceed as hybrid ones.

The concerns under (a) relate to the matter that an undertaking cannot begin settlement discussions with the Commission until the Commission's investigation has been completed. This means that though the beginning of settlement discussions to the final imposition of the decision only takes an average of 13.28 months, the investigation takes considerably longer and significantly increases the period of time from the opening of an investigation to completion. Whilst it is true that the settlement procedure is quicker than the standard route saving both the Commission and undertakings financial and time resources it is still not as efficient and effective as it can be owing to the inability for an undertaking to begin settlement discussions with the Commission at an early stage. As was noted earlier, allowing these discussions at any stage will significantly enhance the dialogue between the Commission and undertakings and this in turn should help the Commission complete the investigation much more quickly, as undertakings are cooperating from the start. However, one has to be cautious here, as by reducing the Commission's investigatory rigour it can have a detrimental effect on the strength and

investigation of the case against an undertaking. Thus, it is important that investigatory rigour is carefully balanced against the efficiency and cost saving benefits.

The concerns raised in regards to (b) hybrid cases surround the fact that the Commission has to run two separate proceedings – one via the streamlined approach and one via the standard procedure. Whilst it is important for a variety of reasons – that were recognised within the chapter – for the Commission to be able to operate hybrid procedures, doing so inevitably has a resources implication cost. As the Commission implemented the settlement procedure with the aim of making the most efficient use of its resources it would seem important to identify ways of reducing the resource cost of the current hybrid system.

Through the examination of the Commission's direct settlement procedure – and a comparison with the US DOJ's plea bargaining system – it was identified that there are a variety of ways of addressing the two key aforementioned problems and further enhancing the current EU procedure. Broadly, these improvements could be achieved by adopting one of two distinct approaches, with each bringing varying levels of enhancement to the procedure. Adopting the first approach would involve a significant overhauling of the current EU cartel enforcement procedure, but has the potential to bring the most significant benefits. The first approach involved implementing a plea bargaining system within the EU and amending the Commission's leniency programme – so that it was an option open only to the first undertaking to come forward to report a cartel. This approach was defined as the 'radical approach', because of the significant overhauls to the procedure that it would lead to. The Commission would still conduct the investigation and calculate the fine that an undertaking should receive. However, this would then be authorised by the General Court, which in turn allows the Court to assess the calculation made by the Commission and scrutinise the settlement agreement (if any is made) with the undertaking. This approach would reduce the cost of litigation, remove

appeals,¹⁶⁴ and increase the speed of the current procedure and the investigative stage. By considering the ECtHR jurisprudence – particularly the *Natsvlshvili and Togonidze v Georgia* case – regarding Article 6 of the ECHR we identified that, as long as the necessary procedural safeguards are in place and sufficient judicial scrutiny occurs then a plea bargaining system that includes removing the right to appeal will comply with the ECHR.

The second approach was classified as the ‘hybrid approach’, as it involves selected parts of the current EU settlement procedure being amended to enhance it. There was an assortment of potential improvements muted within the chapter; which included the following:

1. Allowing an undertaking to request and begin settlement discussions with the Commission whilst the investigation into cartel conduct is still being conducted;
2. Having the Hearing Officer – or more ideally a truly independent party who can report concerns to the Commission/Court – sit in on all settlement discussions so as to ensure that undertakings rights are adequately protected and that settlements are reached fairly;
3. Removing the arbitrary mandatory ten percent reduction on settlements and allow this to be more flexible and to be based on how the undertakings assist the Commission within the settlement discussions;
4. Allowing undertakings to have an ‘effective say’ – and in part negotiate with the Commission on elements of the infringement.¹⁶⁵

Which of the aforementioned improvements are chosen would depend on how willing the policy makers are to make the changes, which to a degree will be affected by how extensive the suggested reform would be. Again, this will be down to balancing certainty and procedural rigor against speed, efficiency and cost concerns.

¹⁶⁴ Only undertakings that did not settle would have the ability to appeal the decision.

¹⁶⁵ Noting that in part this appears to be already happening to a degree.

Although the ‘radical approach’ would lead to potentially the greatest savings and improvements it would limit an undertakings ability to appeal and would require a significant change to the Commission’s current procedures and structure, including the need for every case to be heard before the General Court. For these reasons it is advocated that the ‘hybrid approach’ is the best way forward for the Commission to improve the current procedure; whereby, all of the recommendations from the second section of the chapter should be implemented. This should include, but is not limited to, allowing an undertaking to propose settlement discussions at any point of the investigation; having an independent party sit in on settlement discussions between the Commission and undertakings; and, the removal of the fixed ten percent reduction for settling. By implementing these changes the Commission’s settlement procedures efficiency can be enhanced – leading to greater cost savings. At the same time the settlement programme also becomes more appealing to undertakings because they can negotiate with the Commission and enter discussions at any point. This in turn should lead to a greater uptake and use of the programme, which will again help enhance its efficiency as the procedure is being effectively utilised by undertakings. It should also help ensure less hybrid cases occur as undertakings are able to influence the case and engage in discussions sooner with the Commission.

Whether the direct settlement procedure stays the same or one of the approaches forwarded in this chapter were to be considered it is important to note that the policy maker is required to perform a balancing act between ensuring a thorough and vigorous investigation, and legal certainty are met, on the one hand, and procedural speed, efficiency and cost to undertakings and EU citizens on the other. This is something that has been sought to be highlighted throughout the discussion of the issues within this chapter.

Finally, it is worth stressing again that this chapter has potential implications that go significantly further than just the Commission’s cartel enforcement policy. This chapter identifies and highlights the considerations signatory parties

to the ECHR need to undertake (and ensure are met) to implement or utilise a plea bargaining system, so that it complies with the ECHR. Therefore, the chapter has a much wider impact in the literature than that of just competition law; it affects other areas of civil law as well as criminal law – where a plea bargaining system is most likely to be sought to be implemented.

Chapter 6: Conclusions, recommendations and improvements with regards to the EU cartel enforcement programme and its compliance with procedural rights

6.1 Introduction

This thesis has analysed the European Commission's (hereafter the 'Commission') cartel enforcement policies to ensure compliance with rights enshrined in the European Convention on Human Rights,¹ 'the ECHR', other procedural rights; and to identify areas for further improvements to the Commission's cartel enforcement programme – while remaining compatible with rights protection. Whilst the thesis broadly found compliance, there were a variety of areas identified where improvements and enhancements could be made. The remainder of this Chapter discusses the findings and the policy recommendations that flow from the previous analysis. This Chapter concludes by discussing areas of potential future research.

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

6.2 Thesis Findings and Policy Recommendations

This thesis began by exploring whether corporations qualify for right protection under the ECHR and why one would want an undertaking to have its rights protected. The importance of the security of rights protection in the context of competition law proceedings was identified. It was concluded that corporations do qualify for right protection under the Convention, when national competition law legislation is being applied. However, until the EUs accession to the ECHR undertakings will not have standing to bring a claim against the Commission. Nonetheless, as this thesis made clear, this research is conducted against the backdrop of when the EU does accede to the ECHR, which the EU intends to do and has provided for, within the Treaty of Lisbon.² There were a variety of arguments put forward within the thesis as to why one would want undertakings to qualify for right protection, alongside an examination of the potential challenges. The key challenges against rights protection consisted of the following: (1) the ECHR was never intended to protect a corporation's rights; (2) corporations are not humans so how can they have human rights?; (3) granting corporations rights devalues and dehumanises human rights; (4) human rights were designed to protect the vulnerable, not corporations; (5) the 'flood-gate' argument; and (6) the criticisms around corporations only having 'selective rights'. The arguments against these and for undertakings to qualify for rights protection included that: (1) the ECHR provides corporations with rights protection and it was always the drafter's intention; (2) by corporations having rights protection it brings additional benefits to the Commission's procedures; (3) it can lead to stronger and better rights protection for individuals; (4) a corporation is in essence a group of individual right holders; (5) corporations are treated as 'legal persons' to be found guilty of offences in other areas of law; (6) the potential issues with 'dual prosecution' requirements.

² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, (Article 6 para 2).

This discussion was closed with an analysis of the *Yukos Oil* judgment to illustrate and highlight why this protection is necessary and what can happen – in extreme circumstances – when the protection of rights is potentially lacking.

Next a consideration was had as to how specific ECHR rights could become engaged when the Commission imposes fines on undertakings (and when the Convention is acceded to). Arguments were subsequently developed in regards to the importance of certainty and equal treatment within the Commissions fining procedures, which comprised of the following: (a) that legal certainty and equal treatment are fundamental legal principles and hence are required to be complied with; (b) compliance with these will help prevent over-deterrence, which could lead to a reduction in pro-competitive behaviour within the market which competition law seeks to promote; (c) by ensuring these principles are complied with it will prevent the perception or the actual occurrence of abuses of process by the Commission; (d) by complying it enables the retention of the legitimacy of the underlying offence, the Commission and the fining process itself; (e) the financial implications and harm that uncertainty in the fining process can cause to undertakings and the wider society as a whole; (f) so as to ensure that the leniency and settlement stages in the procedure are as *effective* and efficient as they can be and are actively utilised by undertakings; and finally, (g) to ensure legitimacy in the leniency and settlement stages of the fining procedure.

The aforementioned analysis established the importance of this thesis, which led to an examination of the various Commission procedures. The first of these considered was the Commission's fining procedure overall. This was assessed for its compliance with legal certainty.³ The chapter began by assessing (a) the use of non-exhaustive lists, (b) the 'specific deterrence' stage, and (c) the ten percent cap. Whilst it was identified that there were various concerns (from a legal certainty point of view) within the Commission's current fining process,

³ Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Guidelines on fining undertakings)' [2006] OJ C210/02.

none of these are *sufficient* to lead to a breach of legal certainty. Nevertheless, there were improvements identified that could be made to the current procedure – which would not detract from the current enforcement aims of deterrence, detection, prevention and punishment of cartelists – that would enhance certainty within the fining procedure.

The first recommendation for improvement is that examples should be offered as to the likely increase or decrease to the fine that might occur when an aggravating or mitigating factor is considered. The second proposal is made in a similar vein as the first and identifies that examples be given of what constitutes to ‘sufficiently deter’ and what is meant by ‘particularly large turnover beyond the sales of goods or services to which the infringement relates.’ As there is currently a lack of guidance on this, concerns were raised that this may lead to confusion and potential unequal application of this stage. A further recommendation (in relation to this stage) is that illustrations of the liable percentage increases in fines are given to enhance certainty for undertakings and procedural legitimacy. Currently there is no indication at this stage as to what the percentage increase in fine may be at to ‘sufficiently deter’, nor do the Commission decisions themselves provide much clarity as to what this may be. The third and final suggestion was that this stage of the fining procedure could have a clear minimum amount – to which when an undertaking that has this market share and turnover in another market outside the effected market – the Commission will automatically apply this stage of the fining procedure to. This could allow for the much needed clarity in this stage. However, this would limit the Commission’s discretion significantly and make it a requirement, thus it was not the authors advocated choice.

These potential improvements would require additional guidance being given by the Commission in its documentation but would not necessitate significant changes to its current practice. Though the improvements would see a further reduction of the discretion afforded to the Commission through various stages of the fining process, by this provision of enhanced fining guidance. However,

the Commission would still retain their broad margin of discretion and decision-making power but undertakings would gain more certainty and clarity whilst the offence and procedure itself would also gain from heightened legitimacy.

Next, the thesis analysed whether the Commission applies its fining policy equally to undertakings. Focus began by assessing the tenth stage of the Commission's fining procedure: the 'inability to pay discount'. It was identified that as the Commission was offering such a wide range of reductions with no express mention being given at this stage about how or why in a particular instance the Commission was awarding such a discount that it was difficult to understand how the Commission was applying this stage equally and fairly. Indeed, the arbitrary nature of these adjustments makes effective scrutiny of the reductions impossible and in fact, inconsistencies of application in this stage of the fining procedure inevitable. Owing to this, this stage can be greatly enhanced with more transparency with regards to the application of stage ten and more detailed guidance as to how this stage in the fining procedure is likely to be applied. But of course, the balance must be maintained here to ensure that transparent application and clear guidance is available as well as flexibility and discretion for the Commission. If the guidance is overly transparent it could potentially lead to undertakings being able to misrepresent their financial situation to an advantage to gain a reduction in fines that they should receive.

Next, focus moved onto the way fines – as a whole – are calculated and applied to undertakings based on their nationality. This section compared the treatment of an undertaking of non-EU nationality against those of an EU nationality; with the nationality of an undertaking being defined here as 'the country of the undertaking involved in the cartel'. What was identified from the empirical analysis of the thirty-four cartels which involved non-EU national undertakings (and the in-depth investigations of fining decisions) is that the Commission is currently applying its fining procedure equally based on an undertakings' nationality with no in discrepancies in the thirty-four cases. Therefore, the Commission should continue its current practices and continue to apply its

policy equally in this regard. Of course, periodic reviews and comparison of this data are necessary to ensure no *lapse* or *slippage* occurs from this current equality approach.

Finally, an analysis of the treatment of National Champions (NC) by the Commission was had. This examination defined a NC as an undertaking that has a turnover of more than ten billion Euros. Of the Commission's fining decisions, twenty-five involved at least one NC. It was identified that the NC often received the lowest or some of the lowest percentage fines when they were compared to non-NC. There were only two cartels where the Commission fined a NC more harshly than non-NC: the '*Gas Insulated Switchgear*' and the '*Power Transformers*' cartel.⁴ Therefore, the empirical data demonstrates that the Commission, in many instances, offers favourable treatment to an NC over that of a non-NC in the same cartel. This *appears* to be unequal treatment, as the undertakings in question are in the same position, apart from one being classified as an NC. Whilst this is true it must be noted that it is unclear as to the reasoning why NC are fined less. Thus, it is difficult to say with certainty that unequal treatment is definitely occurring, as we are not privy to all the information and data that is available to the Commission. However, the empirical data does clearly identify that – in the twenty-five cartels that involved NC – only two of these resulted in the NC receiving the highest percentage fines in the cartel. What is required here is further transparency from the Commission to identify why these undertakings received lower fines. Though there may not be unequal treatment there does *appear* to be unequal treatment in the application of the fining procedure to NC.

The thesis then moved on to assess the Commission's leniency programme,⁵ within the context of the Damages Directive, and the potential procedural rights

⁴ *Gas Insulated Switchgear* (Case COMP 38.899) Commission Decision 2008/C5/07 [2007] OJ C5/7 and *Power Transformers* (Case COMP 39.129) Commission Decision 2009/C296/08 [2009] OJ C296/21.

⁵ Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency in cartel cases)' [2006] OJ C298/17.

reasons for advocating for a blanket ban on the disclosure of leniency documents. While it was noted within the discussion that there were a variety of arguments that one could make about the importance of non-disclosure; this thesis focused on the novel potential procedural rights reasons. Indeed, this discussion is what made Chapter 4 unique to the previous conducted studies. Further originality was derived from the chapter's unique consideration of whether there were ways of enhancing the current approach to disclosure.

First an undertakings legitimate expectation of non-disclosure by the Commission was analysed. It was identified that throughout the Commissions' Guidance Documentation the Treaty on the Functioning of the European Union,⁶ and Regulation 1/2003 EC,⁷ a variety of assurances are given that confidential information will not be disclosed to third parties. Because of these assurances and the subsequent analysis undertaken considering the case law surrounding legitimate expectations it was identified that if confidential leniency information is disclosed to third parties it will likely lead to a breach of an undertakings legitimate expectation.

The second procedural right challenge considered here was under Article 8 of the ECHR. It was identified (by considering the five stages of the standard approach), that it was difficult to assess what the ECtHR would decide, with regards to the disclosure of leniency documents. It was noted that it is possible the Court would hold that there is no breach when leniency documents are divulged, because the disclosure is proportionate. However, because there is a less restrictive approach – which could pursue the legitimate aim of enabling third parties to bring follow-on damage actions – it is possible the Court will hold that Article 8 of the ECHR is breached, as this other approach is not followed.

⁶ The Treaty on the Functioning of the European Union [2008] OJ C115/47, hereafter the 'TFEU'.

⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1.

The final procedural right challenge considered was that of a breach of confidence. When the analysis began, this procedural right challenge appeared to be robust, however it became apparent that this challenge would not be one that an undertaking could succeed with. It was identified that the Commission never technically discloses the documents, it is a court, and thus, they have the power to decide on disclosure so would not see disclosure here as a breach of confidence. This therefore means that this challenge would fail at the third stage of the *Coco* test.⁸ In addition, it was concluded that even if an undertaking could substantiate the claim and meet the three stages of the *Coco* test it would be unlikely that the court would accept this challenge because the undertaking would not come to them with ‘clean hands’.

It was therefore identified that the strongest procedural right challenge an undertaking could bring against disclosure of leniency documents would be that by doing so breached an undertakings ‘legitimate expectation’ of non-disclosure. For this reason the Damages Directive has adopted the correct approach. Nonetheless, the next part of the analysis identified various potential options, which could lead to a better approach than placing a blanket ban on third parties being granted access to leniency documents. The approach recommended was that judges be granted full access to these documents so that they can balance both sets of rights effectively: those of the undertakings who have committed a breach of competition law and those of third parties who have been affected by the cartel. By allowing a judge to have access to this information it would not breach the legitimate expectation of an undertaking. This would allow a judge to conduct the necessary calculations so as to award third parties with damages that they are entitled to. However, if this approach were to be implemented it would be important that the Commissions’ Leniency notice – and the Damages Directive – are amended so that an undertaking understands that the information contained in a leniency application may be disclosed or utilised legitimately by a court in awarding a third party damages.

⁸ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

Finally, the thesis considered the Commission's direct settlement procedure,⁹ and ways of enhancing its efficiency, by comparing it to the US plea bargaining procedure – whilst ensuring compliance with Article 6 of the ECHR. In addition, an examination was had as to whether a plea bargaining system for cartel cases could be implemented within the EU and was compatible with the ECHR.

The discussion began by considering the Commission's seventeen settlement decisions thus far and identified areas where this procedure could be further enhanced. These improvements related to (a) the amount of time it takes for a case to be settled, and (b) the fact that various cases are having to proceed as hybrid cases. When the potential for the implementation of a plea bargaining procedure was examined it was identified that for it to comply with the requirements of Article 6 of the ECHR it would be necessary that; (a) the applicant accepts the bargain in a genuinely voluntary manner; (b) in the full awareness of the facts of the case and legal consequences of doing so; and finally, (c) that the content of the bargain and the fairness of the manner in which it was reached is subjected to sufficient judicial review.¹⁰ Though it was illustrated that it would be possible for the Commission to implement and utilise a plea bargaining procedure to settle cartel cases within the EU, it was not felt that this was the best way forward for the EU, because of the significant amendments that this would require to the Commission's procedures. In fact, it was felt that making specific changes to the current system would achieve a similar level of efficiency to that of the US plea bargaining system but retain what is at its core a separate *European Antitrust* approach. These measures comprised of (a) allowing undertakings to begin discussions during the Commission's investigation period; (b) amending the leniency programme so that it offers immunity only to the first undertaking, with others being required to settle with the Commission to gain a reduction; (c) ensuring that the Hearing

⁹ Commission, 'Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' [2008] OJ C167/1.

¹⁰ *Natsvlishvili and Togonidze v Georgia* App no 9043/05 (ECtHR, 29 April 2014) para 92.

Officer is involved in all settlement discussions; (d) removal of the mandatory ten percent reduction in settlement case and allowing this to be more flexible and determined based on the parties contribution; and finally (e) allowing –and perhaps more importantly acknowledging and recognising – undertakings have an ‘effective say’ in negotiations. These measures would not prove problematic for the Commission to implement into its current procedures and would enhance both the efficiency and transparency of the present approach. This is particularly true when compared with the complete overhaul to the Commission’s procedures that the ‘radical approach’ i.e. implementing a full plea bargaining system would require.

Finally, it is worth noting that the findings, in regards to the implementation of a plea bargaining system have a wider impact than just that of competition law. Indeed, the findings are of relevance to Member States that are contemplating implementing a plea bargaining procedure within their domestic law – and that are signatory states to the ECHR. The analysis in Chapter 5 discussed and identified how to implement a plea bargaining system whilst ensuring the correct judicial safety measures were in place.

By analysing the Commission’s cartel enforcement programme and assessing it critically against procedural rights requirements – whilst also aiming to ensure procedural rigour and fair and reasonable treatment – it has enabled the achievement of a variety of definite gains for the thesis. To begin, utilising procedural rights analysis in this way to assess the Commission’s cartel enforcement procedures has enabled us to understand where we are in regards to compliance now; and, it has offered us the opportunity to gain a better sense of where we should be heading and thus the necessary goals and objectives to achieve this in practice in the future. Further to this, it has facilitated the exploration of a variety of questions which have arisen as the analysis has been undertaken. These questions would not have been identified had this novel analysis not been undertaken. Whilst not all of these questions have been fully explored in this thesis (due to its focus and other constraints) it has allowed for

these questions to be raised so that in further research projects these can be explored by the author and others. These questions are of vital importance but are often overlooked or not investigated – or adequately addressed – within the literature. However, various questions which have arisen through the analysis within this thesis have been assessed. Such as the need for the correct balancing of conflicting rights interests (of the various parties) and enforcement objectives, and the inherent tension this leads to.

Chapter 3 examined this tension in two separate ways. First, it investigated the need for legal certainty under Article 7 of the ECHR, whilst balancing this against the requirement for there to be uncertainty in the calculation of the fine – to enable EU cartel enforcement to be effective. This chapter also then explored the tension further by identifying the issues with making the calculation of the fine too certain; namely, when the calculation is very clear undertakings could potentially plan and cost for it. Second, it examined equal treatment in regards to the calculation and administration of fines. Here, there is a necessity that similar cases be treated alike – to ensure compliance – but at the same time, for cartel enforcement to be a true deterrent and thus effective there needs to be a degree of uncertainty and flexibility in this calculation.

Chapter 4 explored the balancing of rights in regards to disclosure in leniency cases, whilst facilitating the legitimisation of the operation of the Commission's leniency programme and illustrating the importance and necessity of the procedure, alongside identifying ways of improving the current programme. Considering the conflicting rights of both the leniency applicant and the third parties enabled the identification and exploration of ways of better balancing both of these parties' rights. Namely, by granting only courts access to leniency documents – to be utilised in the proving and calculation of cartel damage actions – it enables a fairer and more balanced protection of both sets of rights.

Finally, Chapter 5 investigated the balancing of rights in a different way. It investigated the Commission's current direct settlement procedure and

compared it to the US plea bargaining system. Here, it was identified that cost savings and efficiency improvements could be made to the Commission's direct settlement procedure through the adoption of changes to the current programme or through the radical overhauling and implementation of a plea bargaining procedure. The balancing discussion here focused on the flexibility and efficiency gains which could come from the amendments or the implementation of a plea bargaining system versus the costs of doing so – a reduction in investigatory rigour and legal certainty.

These aforementioned questions regarding the balancing of rights are important to investigate and have an impact on the decisions that policy makers make but would often be overlooked in traditional legal analysis.

Another gain from this form of analysis is that it enabled other non-legal reasons for EU cartel enforcement compliance with procedural rights to be considered. These were able to be explored in this thesis and brought many benefits to the findings. Indeed, by asking and examining these questions the thesis was able to legitimise the Commission's procedures at various stages, particularly in regards to the necessity for the Commission to operate a leniency and direct settlement programme. Alongside this it was able to assess the fining procedure to identify areas where potential or actual abuses of process could occur, and consequently make recommendations for improvements here. Additionally, it was possible to examine the efficiency and effectiveness of the Commission's fining procedure whilst enhancing justice for all parties involved through ensuring that they were treated fairly and reasonably. This analysis assisted in ensuring greater effectiveness of the enforcement process through procedural rigour. Chapter 2 introduced these non-legal reasons and identified why they were crucial to consider within the analysis, with Chapters 3-5 building upon this and employing them in their analysis.

All of these aforementioned insightful discussions were only possible by taking this unique approach within the thesis, i.e. utilising procedural rights to assess

the compliance of the Commission's cartel enforcement procedures and identifying ways of better improving the procedures whilst remaining procedural right compliant. Additionally, by considering other non-legal factors and intertwining these with the procedural rights analysis it has created robust analytic findings and policy recommendations whilst at the same time leading to a strengthening of the common thread which has run throughout this thesis.

This thesis has made an important and invaluable contribution to the field of competition and procedural rights law by ascertaining whether the Commission's three key policies for cartel enforcement comply with the ECHR and other procedural rights requirements. In addition to this, it has identified improvements that can enhance detection, deterrence, prevention and the punishment of cartel conduct, whilst still remaining compliant with rights protection needs.

6.3 Future Research

A variety of further research-based projects could be founded and built upon the findings of this thesis. These potential projects shall now be briefly identified and explored.

The first interesting research project that could be explored is whether there is a more effective and efficient way of protecting a corporation's rights than via the ECHR.¹¹ For example, a possible approach could be to provide the protection of corporations' rights via a specific convention or piece of legislation. This piece of legislation would only apply to corporations and individuals would still have their rights protected under the ECHR or domestic legislative equivalents. This would mean that the legislation could be tailored to meet the specific needs and degree of protection that corporations require, which are different to those of individuals.

However, there would be difficulties in adopting this approach. For example, it would mean that a new convention or charter would have to be enacted and that countries would need to sign up or agree to it, which leads to questions regarding how achievable this would be in practice. Additionally, it would take years for the courts to develop jurisprudence and case law. Finally, this approach could also lead to assertions of the dehumanisation and the commercialisation of human rights.

Another potential method could be to grant corporations only specific rights under the ECHR and clearly state what these rights are. This would overcome some of the concerns regarding which rights apply to corporations under the ECHR. However, as the Convention is treated as a 'living instrument' by the courts, this seems unnecessary owing to the flexible approach adopted and the

¹¹ Answering this question was outside the scope of this research as it is seeking to assess whether the Commission's cartel enforcement policies comply with the rights enshrined within the ECHR and other procedural rights requirements.

way the Convention is able to take into consideration modern day circumstances. It is also questionable how plausible it would be to amend the Convention to specifically grant certain rights to corporations as opposed to other rights.

The second two possible future research projects could build upon the analysis of equal treatment within the Commission's fining procedure, as there is still a lack of examination of this issue within the literature. First, a further in-depth study of how the Commission is fining undertakings with regards to their nationality can be undertaken. The analysis can be developed by exploring the issue of nationality, by not merely considering EU vs. Non-EU nationality but, by breaking this down further into the various Member States to seek to identify if any discrepancies in application of the fining procedure can be identified at this level. Whilst undertaking this analysis, the post-July 2012 data could also be included and exploited as this was not incorporated within the analysis of this thesis. Second, the NC issue could be explored in vaster depth to seek to establish with greater certainty and clarity what is occurring in practice. From the analysis in this thesis it appears that NCs receive more lenient treatment, and the reasons for this and whether this is actually occurring need to be explored further. To achieve this, one could seek to drill down further within the cases that involve NC and analyse whether there were any mitigating factors which resulted in the reduced fines or if there were any aggravating factors which led to the non-NC receiving higher fines or if something else is occurring. In addition to this, the way the figures are calculated could also be considered to identify if there are any discrepancies in the starting points of the calculation of the fines or in the market definitions utilised by the Commission.

The examination in this thesis, with regards to the Commission's settlement decisions, forms an excellent foundation to develop further. To begin, it would be greatly beneficial to compare the time that it takes for the DOJ to conduct an

investigation to that of the Commission.¹² This would enable one to identify the impact that allowing parities to negotiate with the prosecuting body has to the period of time an investigation takes. This analysis would also allow for an effective comparison of the US approach to leniency (of only allowing the first firm forward immunity, with the rest gaining a reduction through plea bargaining) to that of the EU where information is gained through leniency and there is a fixed reduction for settlement. Alongside this analysis, comparing the period of time it takes for a case to be concluded through to settlement in the EU, against the period of time to reach an agreement in the US, would allow further evaluations to be made and drawn regarding the efficiencies, similarities and differences between the two systems. In addition, further development of this analysis could consider the length of time it takes for the Commissions' normal procedures to progress to that of the cases that they settle. This would allow an effective analysis of the benefits in reduction in times that the Commission and undertakings gain from the adoption of the settlement procedure. This examination could be even further enriched by also attempting to calculate the potential financial cost saving which are made through the settlement procedure over the standard procedure. If the aforementioned evaluations and analysis were undertaken it would produce data and allow for comparisons to be made with regards to the efficiency of the two systems (particularly with regards to time).

A further extension of the research regarding settlements would be to seek to identify whether the claims made by practitioners are correct, i.e. that undertakings that settle with the Commission are able to influence the outcome of the fine; in particular, by receiving a greater reduction than the standard ten percent for settling. To undertake this analysis one would need to consult the cases that have been settled and compare them to cases that were not settled – particularly cases where some parties did not settle – to identify whether there were differences in the way the fines were calculated. Additionally, one would

¹² This is something the author sought to do, but unfortunately could not gain access (at the time) to the necessary data.

wish to consider any formal statements made by the undertakings regarding the fine here, if any are given. By identifying if undertakings are able to influence the Commissions' decisions it could lead to a greater interest and utilisation of the procedure by undertakings.

Finally, it will be imperative that the author continues to maintain and update the settlements data set that he has created. This will enable future research to be conducted into the settlement decisions, particularly with regards to the time period it takes for settlement decisions to be concluded – so as to be able to identify whether this time period lessens as the procedure develops over time.

Appendices

Table Apen.1 Fine Calculation Table

The Basic Amount of the Fine
1. Percentage of the company's annual sales of the concerned product involved in the infringement (0-30%)*
X (times)
2. Duration of the infringement
+ (add)
3. An additional deterrent factor of 15-25% of one years sales
Adjustments to the Basic Amount
+ (add)
4. Aggravating factors**
- (minus)
5. Mitigating factors***
+ (add)
6. Specific increase for deterrence
Limited to (cannot be greater than)
7. The overall fine must be no greater than 10% of the annual turnover of the company
Potential Further Reductions
8. Leniency (First applicant 100%, second applicant up to 50%, third applicant 20-30%, fourth and other applicants up to 20%)
9. Settlement (10% reduction)
10. Inability to pay
Table Notes
<p>* This is determined based on the seriousness of the infringement: The nature of the infringement, geographic scope and whether the infringement was implemented.</p> <p>** For example: continuing or repeating a similar infringement, refusing to cooperate or being the leader of the cartel.</p> <p>*** For example: terminating the agreement as soon as the Commission intervenes, negligence by the undertaking, substantially limited involvement in the infringement, cooperating with the Commission or where the conduct was encouraged by legislation or public authorities.</p>

Table Apen.2 Selected Fining Cases Table

Cartel Name	Participants Name	Undertaking's Nationality	Basic Amount - Overall Gravity - (%)	Duration of Infringement in Months	Multiplier	Recidivism (%)	Leadership (%)	Additional Deterrence (%)
Professional Videotapes (Not Appealed)	Sony	Japan	18	32	3	N/A	N/A	10
	Fuji	Japan	18	32	3	N/A	N/A	N/A
	Maxwell	Japan	18	32	3	N/A	N/A	N/A
Flat Glass (Appeal Pending)	Asahi	Japan	18	13	1 (due to evidence submitted extending duration of cartel)	N/D	N/D	N/D
	Guardian	USA	18	10	1	N/D	N/D	N/D
	Pilkington	UK	18	13	1.5	N/D	N/D	N/D
	Saint-Gobain	France	18	13	1.5	N/D	N/D	N/D
Nitrile Butadiene Rubber (Not Appealed)	Bayer	Germany	16	24	2	50	N/A	10
	Zeon	Japan	16	24	0.5 (due to evidence submitted extending duration of cartel)	N/A	N/A	N/A
Car Glass (Appeals Pending)	Saint-Gobain	France	16	60	5	60	N/A	N/A
	Asahi / AGC Flat Glass	Japan	16	58	5	N/A	N/A	N/A
	Pilkington	UK	16	53	4.5	N/A	N/A	N/A
	Soliver	Belgium	16	16	1.5	N/A	N/A	N/A
Marine Hoses (Appeals Pending)	Bridgestone	Japan	25	228, 183	19, 15.5	N/A	30	N/A
	Yokoham	Japan	25	217	18.5	N/A	N/A	N/A
	Dunlop Oil & Marine / Continental	Germany	25	94, 81, 25	8, 7, 2.5	N/A	N/A	N/A
	Trelleborg	France	25	227, 107	19, 9	N/A	N/A	N/A
	Parker ITR	Italy	25	228, 63	19, 5.5	N/A	30	N/A
	Manuli	Italy	25	92	8	N/A	N/A	N/A
Power Transformers (Appeals Pending)	Siemens	Germany	16	47, 23	4.2	N/A	N/A	20
	ABB	Switzerland	16	47	4	50	N/A	N/A
	Alstom / Areva	France	16	47	4	N/A	N/A	N/A
LCD	Fuji	Japan	16	47	4	N/A	N/A	N/A
	Hitachi	Japan	16	47	4	N/A	N/A	20
	Toshiba	Japan	16	47	4	N/A	N/A	10
	Samsung	Korea	16	15	4	N/A	N/A	20
	LG Display	Korea	16	14	4	N/A	N/A	N/A
	AU Optronics	Taiwan	16	15	4	N/A	N/A	N/A
	Chimei Innolux Corporation	Taiwan	16	15	4	N/A	N/A	N/A
	Chunghwa Picture Tubes Corporation	Taiwan	16	15	4	N/A	N/A	N/A
HannStar Display Corporation	Taiwan	16	15	4	N/A	N/A	N/A	

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