The enforcement powers of the EC commission in competition law proceedings and general principles of community law

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CONTENTS

Bibliography

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Introduction.

"At one moment they would be battling fiercely for markets, cutting prices, trying to undersell one another; at the next, they would be courting one another, trying to make an arrangement to apportion the world's markets amongst themselves; at still the next, they would be exploring mergers and acquisitions. On many occasions they would be doing all three in an atmosphere of great suspicion and mistrust, no matter how great the cordiality at any given moment:"

Yergin, *"The Prize: the Epic Quest for Oil, Money and Power."*

The regulation of competition within the European Community stands as one of the original and principal objectives of the Treaty of Rome 1957. Article 3 of the EC Treaty sets out the steps to be taken by the Community in order to achieve fulfilment of the two related aims of Article 2 EC: the establishment of a Common Market and an Economic and Monetary Union. To facilitate the creation of a Common Market, the Treaty requires under Article 3(g), the institution of "a system ensuring that competition in the internal market is not distorted".
Regulation of competition is then fundamental to the creation of a single market. The close relationship between competition policy and the free movement of goods had been appreciated since the early years of the Community. In its Fifth General Report on the Activities of the EEC in 1971, the Commission emphasised the degree to which these two areas are related:

"The creation and development of this unified market would be difficult if not impossible if while conventional trade barriers among the Six were being speedily reduced, other obstacles, less visible but equally restrictive were allowed to persist. These may arise from Member States applying different economic and fiscal regulations, or systems of state aid, or from the abuse of dominant positions on the part of private firms or from agreements to restrict competition among them."

Competition policy is therefore fundamental to the objectives of the Community. It is often termed one of the "three pillars" of Community law; the free movement of goods and the free movement of workers forming the other two pillars.
Provision for the implementation of Community competition policy was made in the original Treaty of Rome in 1957. Articles 85-90 contain the rules applying to private and public

undertakings. Article 85 prohibits forms of co-operation between firms that are anti-competitive whilst Article 86 prohibits the abuse of market power by a single undertaking that dominates a market for goods or services. Under Article 89(1) EC the European Commission has a general duty "to ensure the application of the principles laid down in Articles 85 and 86". Under Article 87(1) EC the Council was required to adopt appropriate regulations and directives to give effect the principles set out in Articles 85 and 86. It did this in Regulation 17/62. This regulation sets out the powers available to the Commission and the procedures to be followed in the enforcement of competition policy.

This study examines the method of enforcement of competition policy. As one of the principal elements in the system of Community law, the operation and control of competition policy enforcement mechanisms provided under the Treaty is of fundamental importance to the application of Community law.

This examination of competition policy enforcement is set in the context of the application of general principles of Community law. The general principles as developed by the European Court of Justice are scrutinised in their relationship and application to competition law enforcement procedures. Chapter One of this work studies the development of the body of law that forms the general principles of Community law with particular emphasis on the development of fundamental human rights as a Community general principle. Later chapters assess the application of those general principles to the enforcement procedures in Regulation 17/62. Chapter Two analyses the right to be heard in competition law proceedings and the extent to which this right is granted under the general provisions of the Treaty and under Regulation 17/62. Chapter Three examines the position of the European Commission and the plurality of its roles in competition law proceedings. This involves scrutiny of the powers of the Commission at the various stages in the enforcement of competition cases, from investigation through to the issuing of a decision.

Chapter Four analyses the investigative powers of the Commission. This involves a discussion of the powers of the Commission to conduct what has become known as a "dawn raid" upon the offices of undertakings suspected of infringing Articles 85 or 86 of the Treaty. Chapter Five assesses the development of legal and professional privilege as a general

principle of Community law. This development is traced through competition law cases where undertakings have challenged the claims of the Commission to documents containing communications between the undertaking and its lawyer. The position of the in-house lawyer is also assessed.

Finally in Chapter Six issues of confidentiality relating to professional and business secrets in competition law proceedings are addressed. Legislative provision in this field is scrutinised. The contribution of the Court of Justice in the protection of business secrets is also examined.

Each Chapter of this work seeks to assess the current state of the law and offer a critique of its operation in the different areas examined. Proposals for reform, where they are considered necessary, are made in the body of each chapter.

Chapter One.

General Principles of Community law.

The purpose of this first chapter is to examine the development of general principles as a source of Community law. This will provide a basis for the examination, in later chapters, of the relationship between these principles, and the powers of the EC Commission in the enforcement of competition policy under Regulation 17/62.
This discussion will begin with an examination of the historical development of the concept of general principles through the case law of the European Court. The position and the impact of the European Convention of Human Rights as a source of general principles under Community law will then be examined. The chapter will end with a critique of recent legal developments in the field of fundamental human rights within the Community.
No legal system can provide in its constitution or body of legislation for all questions that may come before its courts. In the same way the legislation and Treaties of the Community, whilst providing a framework, or a traite cadre, has in no way provided a comprehensive system of law. It is probable that this was a deliberate policy on the part of those who drafted the original Treaties. The reasons for this are twofold. Firstly, and from a purely practical point of view, it would have been difficult to provide more than a framework system due to the complexity and sensitivity of the task in hand and the number of Member States involved. Secondly, a framework alone was provided in order to develop a dynamic and evolving system of law which would be responsive to the Community as it matured. This framework, coupled with the judicial activism of the Court has provided the basis for the formulation of Community general principles.

1.1 Sources of General Principles

Ken Leanaerts[1] views the catalogue of Community rights having as their nucleus the fundamental rights as contained in the European Convention of Human Rights and its present and future protocols. The next circle is made up of general principles of law that are incorporated into the body of Community law by virtue of Article 164 of the Treaty of Rome. This states "The Court of Justice shall ensure that in the interpretation and application of this Treaty *the law* is observed". This would appear to refer to a higher law to be applied in the interpretation of Community law. It is from this Article that principles of law that exist in some member states have been deemed to be Community general principles.

The third circle of Community fundamental rights are, according to Leanaerts, made up of the rights specifically related to the status of citizen of the Community. Finally the outer circle of rights are those which can be termed "aspirational" fundamental rights. These include social and economic rights, cultural and educational rights and consumer rights.

In this examination of Community general principles the first two sources of rights, those included in ECHR, and those provided under *"the law"* as referred to in Article 164 and other Treaty provisions will be examined. The rights included in Leanearts third and outer circle all have these two provisions as their source.

1.2 General Principles Adopted under Treaty Provisions and the Laws of the Member States

In addition to Article 164 of the Treaty, Article 173 provides more specific provision for the development of general principles. It lays down the grounds on which a Community act may be annulled by the Court. One of these grounds is "infringement of this Treaty, *or of any rule of law* relating to its application".

[1] "Fundamental Rights to be included in a Community Catalogue" (1991) 16 EL Rev. 367

As with Article 164 this again appears to refer to some body of law beyond the Treaty. This Article is of particular relevance to competition law as will be illustrated in Chapter Two of this work.

Article 215(2) EC deals with liability in tort and expressly provides that the liability of the Community is based on the "... general principles common to the laws of the Member States". This illustrates the willingness on the part of the Community founders to apply general principles even in the absence of specific Treaty provision. The crucial issue in any examination of the general principles of Community law is the method adopted in the development and application of these principles. To understand this method, the historical development of general principles by the Court of Justice must be examined.

General principles of the member states are interpreted as forming part of the law of the Community if they exist in some significant part amongst the member states. According to Leanearts,[2] "General principles of Community law all share the characteristic of being based - in their very essence, not necessarily in their precise contours - on the common legal traditions of the member states".

It is not essential that the principle be accepted by the legal systems of all the member states but that it "...conforms to a trend within the majority of the member states".[3]

In *Hoogovens v. High Authority*,[4] Advocate General Lagrange stated that the Court is not content to adopt the common denominator between different systems but "...chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to it to be the best...".

Once adopted as a general principle, that principle becomes one of Community law and not national law. Thus Community law in Member states will be interpreted in the context of the general principles. However this applies only to areas of law that fall within Community competency.

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[2] "Fundamental Rights to be included in a Community Catalogue" (1991) 16 EL Rev. 367
[3] Hartley "Foundations of European Community Law" Third Edition p.138
[4] Case 14/61 [1962] ECR 253 at 283-84

The historical development of general principles in Community law can be best illustrated by identifying specific areas and their development. The areas identified in this work are those of relevance to the role of the Commission in the competition law enforcement process. These will be examined in Chapters Two to Five of this work. The role of the Court of Justice has of course been pivotal in the formulation of general principles. The Court has evolved these principles in a manner akin to the judicial development of the common law. "As in so many areas of European Law, the history of the evolution of Community human rights is at once a history of ECJ activism."[5] This development has not been without its problems. In the field of fundamental human rights as Community general principles, Member states have been particularly resistant to interference in what they perceive to be an area of exclusively national competence. This has been the case particularly with Germany and can be seen in the cases of *Stauder*[6] and *Internationale Handelsgesellschaft*[7] discussed below.

The Court has not been shy of proclaiming their pivotal role in the formulation of general principles. Referring to the role of the Court in this field John Temple Lang has stated,[8] "We are building what has not existed for fifteen hundred years, a common law of Europe".

Perhaps the most influential general principle is that of fundamental human rights. This has been a relatively recent development in Community law. There is no human rights basis to the Treaty framework which was and remains essentially an economic treaty. According to Hartley: "...it is probably fair to say that the conversion of the European Court to a specific doctrine of human rights has been as much a matter of expediency as conviction"[9].

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[5] Ian Ward "A Critical Approach to European Law"p138 Butterworths 1996
[6] Case 29/69 [1969] ECR 419
[7] Case 11/71 [1970] ECR 1125
[8] "The Sphere in Which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles" Legal Issues of European Integration 23 1991
[9] "Foundations of European Community Law" Third Edition p.139

This issue of expediency is entwined with the concept supremacy of Community law. Supremacy has from the early days been strongly enforced by the Court.[10] Most national courts came to accept this but some were faced with problems posed by their own constitutions. This was particularly the case for Germany. German lawyers questioned whether Community law could prevail over those provisions of the German constitution concerning human rights which were entrenched in their system after the second world war. There was no question of denying the supremacy of Community law over ordinary German law. However as German national legislation has to comply with the principles of the constitution, some German lawyers took the view that Community law could not apply in Germany if it violated the fundamental human rights provisions of the constitution. This was the situation that prevailed in the 1960's.

In the first case to discuss the conflict[11] the Court remained intransigent and declared Community law supreme over the national human rights provision. Germany remained adamant that it could not deviate from its pursuit of the protection of human rights within its constitution. Faced with this challenge to its supremacy, the Court took a conciliatory stance. In *Stauder v. City of Ulm*[12] it declared the Community concept of human rights. The Court went onto state that it would annul any provision of Community law contrary to human rights. The facts of the case are not relevant here, but in dismissing the claimants case the Court stated:[13] " Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Courts".

The principle was further developed in *Internationale Handelsgesellschaft.*[14] This case concerned the principle of proportionality. Under German law this doctrine permits public authorities to impose on the citizen only those obligations that are

[10] Case 6/64 *Costa v. ENEL* [1964] ECR 585
[11] Case 1/58 *Stork v. High Commission* [1959] ECR 17
[12] Case 29/69 [1969] ECR 419
[13] at para 10
[14] Case 11/71[1970] ECR 1125

necessary for attaining the public objective in question. The Community provision was challenged in the German courts and its validity was referred to the European Court. The European Court stated that its validity could only be judged according to Community law and not under national law. On this basis even if the human rights provisions of a Member State are violated this would not invalidate the Community provision. This defiant stance was however softened by adding:

"However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice."[15]

The next development took place in *Nold v. Commission.*[16] Here the Court considered the right to property and the free pursuit of an economic activity. The Court recognised these two rights as principles of Community law but held that they must not be regarded as absolute and unqualified but subject to the limitations of the overall objectives of the Community. In the course of its judgement the Court made the following statement:

"In safeguarding these (fundamental) rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.
Similarly, international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."

As with all general principles, there is no strict rule that national provisions on fundamental rights will be incorporated into Community law. The Court is "inspired" by such provisions and the concepts underlying them, but does not see itself as bound by them. Some writers however are at odds with this view.[17] Schermers states that in

[15] The Court has since adopted the principle of proportionality as a general principle and it is invoked frequently. See as a UK example on a reference to the Court of Justice Case 181/84 *R. v. Intervention Board for Agricultural Produce, ex parte Man (Sugar)* [1985] ECR 2889
[16] Case 4/73 [1974] ECR 491
[17] see Schermers "The EC Bound by Fundamental Human Rights" (1990) 27 CMLRev. 249 at 253-5.

most situations the Court will consider itself bound by general principles as they exist in member states:

"Where one member state considers a particular principle so important that it incorporates it in its Constitution, one may safely submit that principle forms part of the European cultural heritage. Even though other states may not give it any constitutional rank they will normally accept it, also as a principle of law. To be recognised as a principle of Community law the principle does not necessarily have to be incorporated into the written legal system of each member state."

Hartley, in his discussion on this topic[18]states that policy dictates the Court's approach. If the right is accepted throughout the Community and the right does not prejudice fundamental Community aims, then the Court would probably accept it, even if it was constitutionally accepted in only one Member State.[19]
It appears that the Court has adopted a method of extracting from national laws rules of law which apply to the application of the Treaty. Rather than approaching this exercise in a arithmetical manner i.e. by examining if a particular principle applies in the majority of member states and ruling it applicable, it selects which particular national rules when applied to the objectives of the Treaty appear the most effective in fulfilling the aims of the particular Community provision. A particularly good example of this can be seen in the development of the general principle of legal and professional privilege as discussed in Chapter 5.

1.3 General Principles and the Role of European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms is the most influential treaty in terms of its impact on the formulation of Community general principles. All the Community member states are signatory to the Convention. As the Court of Justice developed an acceptance of fundamental rights as

[18] "Foundations of Community Law" at p. 144
[19] With the proviso that the right in question is uncontroversial eg. abortion in *Grogan* Case 159/90 (1991) ECR 4685. This discussion is unfortunately outside the range of this work.

general principles of law which it had a duty to uphold, the impact of the European Convention, itself a major source of these rights, increased. The status of the European Convention as a source of fundamental rights under Community law has been analysed in a number of cases before the Court.

In the *ERT* [20]case, the Court was asked for a preliminary ruling on the effect of, *inter alia* Article 10 of the European Convention on Community law. The case was concerned with the legality of a national system of exclusive television rights. The Court declared: "The European Convention on Human Rights has special significance...It follows that the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed".[21] The Court went on to explain the status of the European Convention in Community law and in the domestic laws of the member states:

"As the Court has held...it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community.On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights."[22]

The Court has on numerous occasions been called upon to examine the status of the European Convention in Community law disputes regarding competition law issues. Chapters Three and Four provide specific details of this.

It is essential in any analysis of the European Convention and Community law to appreciate the constitutional relationship between them. This is an area of confusion in the minds of many - particularly the British media who class the two systems of law together as "Europe", failing to understand the fundamental differences and complex relationship between them.

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[20] Case C-290/89 [1991]ECR I-2925
[21] at para 41
[22] at para 42

The European Convention on Human Rights was drafted in 1950 under the auspices of the Council of Europe, an international organisation composed of twenty five Western European states. It was intended to uphold common political traditions of individual civil liberties and the rule of law. It was drafted in the aftermath of the second world war and was designed as a protection against the arbitrary use of political power which had resulted in the atrocities of the war time period. All of the member states of the European Communities are signatories to the European Convention together with the emerging democracies of Eastern Europe. In many member states the convention has been directly incorporated into domestic law. As the UK has no written constitution, to form part of UK law the Convention would have to be incorporated into domestic law by Act of Parliament.[23] This has not yet taken place. In strict legal terms therefore the Convention cannot be relied upon in the UK courts. In the case of *Brind*[24] the applicant sought to rely upon the Convention to interpret domestic legislation. The House of Lords declined to do so stating that this would be "a judicial usurpation of the legislative function".[25] Despite the position taken by the House of Lords in *Brind,* in more and more cases, ranging from legal representation for prisoners[26] to freedom of expression [27] the provisions of Convention are being argued before UK courts and are being referred to by UK judges in their decisions. It remains the case however that the Convention is not a directly effective source of law in UK courts. This position is in direct contrast to that of Community law. By virtue of the European Communities Act 1972, Community law is incorporated into the domestic law of the UK and in the event of conflict, Community law prevails.[28]

The European Court of Justice has, since its inception treated the Convention as a source law in formulating its general principles. It has done this on the basis that if a

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[23] this area of constitutional reform is currently being debated by the main political parties in the UK.
[24] *Rv. Secretary of State for the Home Department, ex parte Brind* [1991] 1 All ER 720
[25] as per Lord Bridge
[26] eg. *Rv. Secretary of State for the Home Department, ex parte Anderson* [1984] QB 778
[27] eg. *Attorney - General v. Guardian Newspapers (Nos 1 and 2[*1987] 3 All ER 316

[28] on this point see the classic speech of Lord Denning in *Bulmer Ltd. v. Bollinger SA [*1974] Ch. 401

member state is signatory to, or was involved in the development of an international treaty that forms part of that state's laws, this should be treated in the same way as general principles deriving from domestic law.[29] In a number of cases the Court has established that "any rule of law relating to the application of the Treaty" as provided by Article 173, includes the Convention by virtue of it forming part of the law of the member states.[30] This means that under the general principles of Community law, Community acts are themselves void when they conflict with the Convention. This is an area of conflicting opinion between the Court and the member states. In *Hauer*[31]the Court emphasised that it was its preserve and it alone who would "exercise the balancing test" that determines at which point a human rights issue is a matter of Community or national concern. This conflicts with the ideas as expressed in the later *ERT*[32] decision that member states retain automatic jurisdiction to consider human rights issues at a non-Community level. In both *ERT* and *Klensch*[33] the Court appeared to backtrack from the position taken in *Hauer*. In *Klensch* it was keen to stress the limitations of its own jurisdiction to Community matters only. This raises the question of what exactly is a Community matter. This vexed question is of course the subject of ongoing political debate within the member states of the Community.

The status of the Convention in Community law has been the subject of considerable debate in recent years within the Community institutions. The Parliament has adopted a number of resolutions on the topic of the Convention becoming integrated into Community law. The Commission has discussed the possibility of the Community acceding as if it were a member state to the Convention. This would have the effect of subordinating the jurisdiction of the Court to that of the Court of Human Rights in respect of fundamental rights issues.

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[29] for a detailed discussion of fundamental rights and international agreements see *Hauer v. Rheinland-Pflaz* Case 44/79 [1979] ECR 3727

[30] see *Kirk* Case 63/83 [1984] ECR 2689 at 2585 and the Second *AKZO* Case 5/85 [1986] ECR at 2612

[31] Case 44/79 [1979] ECR 3727

[32] Case C-290/89 [1991]ECRI-2925

[33] Case 201-2/85 [1986] ECR 3477

In a Joint Declaration on Fundamental Rights in 1977,[34] the three political Community institutions agreed to incorporate the Convention into its "soft law" measures ie.recommendations, opinions, conclusions and declarations. In its Declaration on Democracy made in Copenhagen in 1978, the Heads of Government of the Member States indicated approval of the Joint Declaration of the previous year and declared "that respect for and maintenance of representative democracy and human rights are essential elements of membership of the European Communities." This pattern of increased reference to the Convention continued with the Single European Act in 1986. The preamble to that Act refers to the fundamental rights recognised in *inter alia* the constitutions and laws of the Member states and the European Convention.

In the Treaty of European Union in 1993 a stronger commitment to the Convention was undertaken.

Article F(2) EC as amended by the TEU provides that

" The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the traditions common to the Member States."

The constitutional impact of this provision is problematic. Article F(2) is contained in Title I of the TEU which does not form part of the EC Treaty and is therefore not directly applicable law. Further, Article L of the TEU expressly excludes Article F(2) from the jurisdiction of the Court of Justice. There is therefore no mechanism available under the Treaties to enforce the commitment made in Article F(2). The Article does little more than reflect the increasing awareness at the political level of the need for the Union to respect fundamental rights.

Article F(2) does however give formal recognition in the Treaty (albeit only in the TEU and not incorporated into the EC Treaty) to what has in fact been part of the

[34] OJ 1977 C103/1

jurisprudence of the Court since *Stauder*. Therefore as the Court held in *Wachauf v. Germany,*[35] the Community cannot accept measures that are incompatible with the observance of human rights. This effectively means that when there is a conflict between a national law that is intended to implement Community law (for example to fulfil the terms of a directive) and the terms of the Convention, the Court will rule the national measure as contrary to Community law. On the same basis if an act of a Community institution is challenged as being in breach of the Convention, then the Court must rule the measure invalid. Of course the application of the Convention is limited to matters that fall within the Community's competency. The Court defined the limits of its powers in *Demirel v. Stadt Schwabisch Gmund* [36] stating that it (the Court) had no power to examine "the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law". According to Professor Arnull[37] the unofficial observance by the European Court of the Convention has created a weakness in the enforcement of the fundamental rights as laid down in the Convention.

"However, the transfer of competence involved in acceding to the Community resulted in a corresponding diminution in the jurisdiction of the organs of the Convention, in the sense that matters which would previously have been dealt with at the national level were now to be dealt with by the institutions of an entity which was not subject to the control mechanisms established by the Convention."

This would appear to conflict with the frequently proclaimed commitment of the Community to respecting fundamental rights. As a result of this the question of the Community itself acceding to the European Convention was raised in 1979. Such accession would result in the Community institutions being subject to the same review mechanisms as member states under the Convention. The 1979 memorandum[38] published by the Commission with the intention of encouraging debate on the issue

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[35] Case 5/88 [1989] ECR 2609
[36] Case 12/86 [1987] ECR 3719
[37] "Opinion 2/94 and its implications for the future constitution of the Union" University of Cambridge Centre for European Legal Studies Occasional Paper No.1
[38] Bulletin of the European Communities, Supplement 2/79

failed to find favour with the Council and no action was taken. In 1990, after the Single European Act in which express reference was made to the Convention, the Commission asked the Council for authority to negotiate the details of the accession of the Community to the Convention. According to the Commission "...no matter how closely the Luxembourg Court monitors human rights, it is not the same as scrutiny by the Strasbourg Court, which is outside the Community legal system and to which the constitutional courts and supreme courts of the member states are subject".

The view of the Commission was that accession to the Convention would effect the legal systems of member states only in relation to the scope of a Community legal act. It would not create any new obligations on the member states beyond those already falling within the competency of the Community. The accession would they believed, provide the citizens of the member states with better protection against Community measures that might infringe their fundamental rights.

As a result of the request from the Commission, the Council asked the Court of Justice for an Opinion whether accession by the Community to the Convention would be compatible with the EC Treaty.

The Court responded to this in Opinion 2/94 28th March 1996. In it the Court concluded that the Community did not have the competency to accede to the Convention without amendment to the EC Treaty. The powers conferred under Article 235[39] of the Treaty did not provide competency for the Community to accede to the

[39] which states "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."
The member states were not unanimous in their support of the proposed accession. Whether this was a factor in the formulation of the Court's Opinion is doubtful. Professor Schermers in his comments and conclusions in the CELS Occasional Paper suggests that the Court's conclusion may have been different had all the member states supported the proposal. Professor Dashwood in the same forum doubted this. In his opinion "The Treaties in all their detail, represent a bargain that was democratically assented to, according to the different constitutional requirements of the Member States, when they joined the Community (or Union). Changes to that bargain ought not simply to be agreed by the representatives of Governments". It is submitted that such a view is an accurate analysis of the law in that the dramatic change to the structure of the Community should be debated in a wider forum before the proper course, that of Treaty amendment could be implemented. Such a course of action is also politically expedient in a climate of scepticism within some member states of the ever increasing powers of the Community.

Convention. It declared that as already established through the case law of the Court respect for human rights is a condition of the lawfulness of Community acts.

"Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order."[40]

Consequently the Court stated that such fundamental changes to the nature of the Community would "...be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment."[41]

For the purposes of this work the Opinion of the Court is important. One vital issue is the potential problem of the Court of Human Rights adopting a view of the scope of the Convention that differs from that taken by the European Court. It is submitted that this has rarely occurred[42] and that in cases where this has been the case any

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[40] Opinion 2/94 of March 28,1996 para 34

[41] at para 35

[42] One particular example of differing interpretations of the provisions of ECHR by the Court of Human Rights can be seen in relation to Article 6(1) of the Convention and the right to be protected from giving self incriminating information.
In Case 374/87 *Orkem v Commission* [1989] ECR 3283 the Court denied that any express right to remain silent exists under Regulation 17/62. The Court did however examine whether the right to silence forms part of the general principles of Community law of which fundamental rights are an integral part. In examining the laws of the Member States the Court found that the right not to give evidence against oneself applies only to a natural person charged with a criminal offence. According to the Court:

" A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the ecomnomic sphere, in particular infringements of competition law." (at p. 3350)

The Court went on to consider whether Article 6(1) ECHR provided protection against self incrimination to an undertaking in competition law proceedings.
Article 6 (1) ECHR provides:

" In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the intersets of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

discrepancy between the two is marginal. Professor Arnull[43] believes that where proceedings can be brought before the Court of Justice the level of protection for fundamental rights afforded to the parties is adequate. This has been the experience of litigants before the Court of Justice in competition law issues where the influence of the Convention has been very strong in the development of fundamental rights.
So for those who have locus standi to bring a case before the Court of Justice fundamental rights are guaranteed and within the area of Community competence will apply the fundamental rights developed by the Court and inspired by the Convention. However the Opinion does not resolve the absence of recourse to law for individuals

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Article 6 is considered further in Chapter Three of this work in relation to the role of the Commission and its conformity to "an independent and impartial tribunal established by law".
In *Orkem* the Court concluded that no protection against self incrimination was provided by Article 6. It held:

" As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself."

This view is now at odds with the more recent decision of the European Court of Human Rights in the case of *Funke v France,* Judgement of 25 Feb. 1993 (No.256A), 16 E.C.H.R.R. 297. In this case Funke submitted to the European Court that his conviction for refusing to disclose documents requested by the French customs authorities risked his right to a fair trial as secured in Article 6(1) ECHR as the request violated the right not to give evidence against oneself. The European Court agreed stating that: " The special features of customs law... cannot justify such an infringement of the right of anyone "charged with a criminal offence" within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating oneself."
The European Court of Human Rights has therefore declared the existence of protection from self incrimination under Article 6(1) and has applied this right to an economic infringement. A conflict now exists between the interpretation of the European Court of Human Rights in Funke and the Court in *Orkem.*
In *Orkem*, the Court, having stated that Article 6(1) did not provide protection against self incrimination or a right to remain silent, went on to hold that the rights of the defence that form a fundamental principle of the Community legal order, prevented the Commission from compelling an undertaking "to provide it with answers that might involve an admission on its part of the existence of an infringement [of the Treaty competition rules] which it is incumbent upon the Commission to prove".
According to Professor Arnull, (see footnote 43) any discrepancy between the two courts as to the interpretation of Article 6(1) will be small. He states " There may admittedly be room for argument over whether the rights of the defence under EC law have precisely the same scope as the right not to incriminate oneself under Article 6 of the Convention, but any discrepancy is likely to be marginal". Whilst this may be the case in practical terms, such a position does not resolve the underlying conflict between the two systems of law. If different approaches are adopted by the two courts over the interpretation of the Convention in factually similar cases, individual Member States and litigants will inevitably adopt different interpretations of these provisions. This lack of certainty and consistency adds still more weight to the evidence in favour of the accession of the Community to the Convention.

[43] CELS Occasional Paper N.1

who do not satisfy the strict rules laid down in Article 173 and who claims that his or her fundamental rights have been infringed by a Community institution. This issue is of importance in competition proceedings as it concerns the fundamental right to be heard as discussed in Chapter Two. Professors Arnull,Schermers and Dashwood[44] all propose easing the conditions for the admissibility of actions brought by individuals under Article 173(4). Professor Arnull suggests an alternative to this in the creation of a new specific remedy giving individuals direct access to the Court where they consider their human rights have been violated by a Community institution or by national authorities acting under powers derived from the Treaty. It is submitted that this proposal would have to be strictly interpreted to prevent the abuse of such a procedure. Some restrictions as to locus standi must operate in any system to regulate and filter access to the courts. This issue is discussed in more detail in Chapter Two.

1.4 Conclusion

Despite the confidence of Professors Arnull, Schermers and Dashwood the Opinion of the Court does not lay to rest the issue of the status of fundamental rights in Community law. There remain two main areas of concern. The first is that of the inconsistency of application of the Convention in member states and the second relates to the conflict in the underlying rationale of the Convention and the Treaty of Rome.

On the first issue the amendments proposed by the above Professors are "stop-gap" measures and fail to address the wider question of the status of fundamental rights under the Convention and their relationship with the Community member states and the Community itself. The Community cannot develop a universally founded human rights jurisprudence because, as national law remains supreme in certain areas, application of the Convention is not universal. The citizens of those member states who have incorporated the Convention into their constitutions will remain better

[44] CELS Occasional Paper No.1

protected than those who have not, the United Kingdom for example. The recent discussion by the Court of Appeal in *Brind* demonstrates how opposed the UK is to any suspicion of incorporation "through the back door".[45] In *M& Co v Germany*[46] the applicant brought their human rights case about an alleged Community violation not against the Community (as they were not confident of the status of the Convention under Community law), but against the German government, on the basis that the German authorities executed a Community act in breach of their human rights obligations under the Convention. The Human Rights Commission held *inter alia* that member states of the Convention remain responsible for alleged violation of the Convention regardless of whether the act in question is in consequence of obligations to international bodies. Otherwise according to the Human Rights Commission "...the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character". However the Commission went on to state that if the transfer of power was to a body who observed fundamental rights and accorded them equivalent protection to the Convention, then this would not be incompatible with the Convention. "The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance."

The Human Rights Commission was not unanimous in this decision. According to Professor Schermers,[47] the decision can be explained to a large extent by the expectation on the part of the Human Rights Commission that the Community would ultimately accede to the Convention and did not wish to interfere in the Community system at that stage. According to Schemers, now that the Community Court has blocked accession to the Convention the next case brought before the Human Rights Commission on similar grounds may well be decided differently. If this were the case, the status of the Convention in each of the Community member states would become

[45] at the time of writing both the Labour and Liberal Democrat parties have committed themselves to a review of the UK constitution which would involve incorporation of the Convention .
[46] App.no. 13258/87 *M& Co v Germany*
[47] Comments and Conclusions on Opinion 2/94, CELS Occasional Paper No. 1p.16

pivotal providing an indirect remedy against the Community. This would result in inconsistencies of application amongst the member states.

The second area of concern that the Opinion 2/94 leaves unresolved relates to the conflict in the rationales of the Community and the Convention. There will ultimately be inconsistencies between the two as the rights laid down in the Convention are fundamental human rights. Those which apply in Community law are primarily economic rights and fundamental rights are subject to the economic goals of the Community. Indeed the economic goals of the Community could be interpreted as fundamental human rights in themselves. There is then a conflict between the economic goals of the Treaty and the promotion of fundamental human rights. Where such conflict occurs the economic rights of the Treaty take priority over the human rights. In *Nold*[48] the Court stated that a balance must be made between the substance of fundamental human rights and "certain limits justified by the overall objectives pursued by the Community". In *Wachauf*[49] the Court, whilst confirming its commitment to fundamental human rights, was careful to emphasise that any fundamental rights were not absolute and must be interpreted in the light of wider economic and social interests. This conflict in the rationales between the Convention and the EC Treaty persists. According to Van Dijk[50], "Consequently, it seems to leave larger room for placing the objectives of the Community above the human rights objectives; a *raison d'Etat* approach which is alien to international human rights standards".

Van Dijk proposes that the solution to this conflict would be the Treaty amendment required for the Community to accede to the Convention according to Opinion 2/94 28th March 1996. This amendment could be one of the results of the Inter-Governmental Conference concerning revision of the Treaty Establishing the European Union. Van Dijk is doubtful that consensus between member states on such

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[48] Case 4/73 [1974] ECR 491

[49] Case 5/88 [1989] ECR 2609

[50] "Judicial Protection of Human Rights in the European Union" Exeter Paper in European Law No. 1 p.8

an amendment would be reached. In the event of failure to reach a consensus on amendment he calls for "Co-ordination as a minimum option".[51] This would involve formalising the existing practice of consultation between the two judicial bodies in periodical meetings where the two Courts would discuss issues of interpretation and to what extent the different contexts of the two organisations justify certain variations. According to Ward[52] "...the root of the problem lies in the absence of a charter, or catalogue, of fundamental rights against which the economic rights of the Community can be tested". This absence is, according to Ward, "an incubator for inconsistency" in the interpretation of fundamental human rights.

Some authors accuse the Court of Justice of deliberately failing to guarantee fundamental rights within the Community.

" it must be questioned whether the court has ever been motivated by a concern for any supposed lack of adequate protection of fundamental rights within the Community...the court has employed fundamental rights instrumentally, so as to accelerate the process of legal integration in the Community. It has not protected these fundamental rights for their own sake. It has not taken these rights seriously."[53]

Fundamental human rights have been used selectively in areas of Community competence to promote legal integration and the economic objectives of the Community. This criticism is given greater force by the recent Court opinion rejecting the competency of the Community to accede to the Convention.

The way forward in the protection of fundamental human rights in the Community is for the Treaty to be revised to permit accession to the Convention. This appears to be the only mechanism that would guarantee consistency of application of human rights protection. This would clearly establish that, while the two courts remain supreme in their respective areas of competence, the European Court of Human Rights in Strasbourg is empowered to give the final interpretation of Convention provisions.

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[51] ibid at p.10

[52] Ian Ward "A Critical Introduction to European Law" p28

[53] Coppel & O'Neill " The European Court of Justice: taking rights seriously?" 12 Legal Studies 227 pp227-228

This would also go some way to resolving the complex issue of the precise definition of those acts of the Member States that are subject to review by the Court of Human Rights for their compliance with human rights principles because they fall within the scope of Community law, and those acts of the member states which, although issues of Community law are also involved, are not subject to that review because they fall within the primary competence of the legislature of the member states.
Ultimately, as with all Community developments any progress towards Treaty amendment to facilitate accession to the Convention will depend upon the political will of the member states. In the current political climate it appears that such a development is unlikely in the near future. Whilst this is the case, the individual citizen will be subject to different human rights laws depending on country of birth or residence and the particular rights issue involved. According to Clapham[54] the emphasis must shift from the member state "actor" to the citizen "victim " in European Human Rights law:

"The rhetoric of human rights should not be underestimated. Human rights talk permeates into every sphere of life and not only serves to focus people's demands but also has a certain educational force which in the end is the best way to ensure that human dignity is protected. The challenge of the Community is to build on its achievements so far."

If the vital importance of human rights is to be recognised in Community law the Treaty must be amended to facilitate accession to the European Convention of Human Rights by the Community. This would remove conflicts in the interpretation and application of the Convention between the member states and the Community and provide a uniform system of appeal to the Commission of Human Rights to all Community citizens on matters of Community competence.

[54] "A Human Rights Policy for the European Community" 10 Yearbook of European Law 309 p.366

Chapter Two

The Right to be Heard and Competition Law.

All of the general principles of law discussed in this work have been developed by the jurisprudence of the Court of First Instance and the Court of Justice through the procedure of judicial review.

Judicial review of the decisions of the Commission in competition law is provided in Articles 173 and 175 EC. It was through the procedure of judicial review under Article 173 EC that the general principle of the right to be heard was established. Judicial review is crucial to the principle of the right to be heard. Only if parties have the right to challenge acts which adversely impact upon them and be heard in the Court, can the general principle of the right to be heard be claimed to be effective in Community law.

It is therefore essential in any discussion of the right to be heard in competition proceedings to examine how judicial review operates in this area.

Before this however, it is important to look at the general principle of the right to be heard in Community law and more particularly in competition law proceedings.

Provision for interested parties to be heard is granted in competition proceedings in Article 19 Regulation 17/62[1] and Article 1 Regulation 99/63.[2] The former article states that the Commission shall give the undertakings concerned the opportunity to be heard in matters on which the Commission has objected. Regulation 99/63 deals with the hearing procedure and states that upon notification of the objections of the Commission to the undertaking, a time limit will be set within which the undertaking may inform the Commission of their view.

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[1] Regulation No.17. First Regulation Implementing Articles 85 and 86 of the Treaty.OJ Sp. Ed. 1962, No.204/62 p.87

[2] Regulation No. 99/63/EEC of the Commission of 25 July 1963 on the Hearings Provided for in Article 19(1) and (2) of Council Regulation No. 17.OJ Sp. Ed.1963, No.2268/63,p.47

2.1 The General Principle

The first case in which the right to be heard was discussed in competition proceedings was in the *Transocean Marine Paint* case.[3] In this case the applicants were a group of manufacturers who had made an agreement concerning the composition of their products, trademarks, quality control and division of their sales territory. The Commission had granted exemption under Article 85 (3) EC. On application to renew the exemption, the Commission imposed new conditions. The applicants argued that they had not been given the opportunity to make objections to the amended conditions to the Commission and that therefore the decision of the Commission was invalid due to procedural defect.

The applicants applied to the Court under Article 173 of the Treaty seeking annulment of the Commission's decision that was addressed to them.

In the Court, Advocate General Warner proposed that the case should be decided on the basis of the principle in English law of audi alteram partem.[4] He argued that the right to be heard was a general principle of Community law and was therefore binding on the Commission even in the absence of a specific legal provision. According to Advocate General Warner:

"There is a rule embedded in the law of some of our countries that an administrative authority, before wielding a statutory power to the detriment of a particular person, must in general hear what that person has to say about that matter even if the statute does not expressly require it."

He reached this conclusion after a survey of the legal systems of the member states in which he pointed out the important role that the right to be heard plays in English law. He also explained that the principle exists in various forms in other member states.

"In my opinion, it matters little whether the applicable rule is subsumed under the title "audi "alteram partem" or...under the concept of "droits de la defense". What is undoubted is that French administrative law does acknowledge the existence of those "principes generaux du droit" which I have mentioned."

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[3] Case 17/74 [1974] ECR 1063.

[4] that is as a principle of natural justice no man should be condemned unheard. See *Ridge v Baldwin* [1964]AC 40

This view was accepted by the Court who stated that there is a general principle of Community law that "...a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known". The Court deduced from this that breach of the rule of the right to be heard would be regarded as a breach of an essential requirement under Article 173 of the Treaty. As the disputed condition in the decision was severable, it was annulled and the rest of the decision was allowed whilst the Commission was given the opportunity to reach a fresh decision on the point after hearing the observations of the Association.

Since the *Transocean* decision, the Court has developed a general doctrine of what it calls the "rights of the defence" that equates with the English principle of natural justice and the American concept of due process.

In the subsequent decision of *Mollet v. Commission* [5] the *Transocean* formula was narrowed. In *Mollet* the Court stated that for the principle of the right to be heard to be enforced in circumstances where this was not provided under statute, the measure must be one that is liable "...gravely to prejudice the interests of the individual" rather than those interests that are "perceptibly affected" by a decision as formulated in *Transocean.*

Having examined the general principle of the right to be heard, this chapter will go on to examine the provision for judicial review in Community law and its relevance to competition policy and enforcement. It will then proceed to discuss the application of the law to acts of the Commission. Thereafter the rules relating to locus standi will be studied as these are of fundamental importance to the issue of third party rights and the right to be heard. Finally the procedural issue of access to file and its importance to the issue of the right to be heard will be examined.

[5] Case 75/77 [1978] ECR 19

2.2 Judicial Review under the EC Treaty

Article 173 of the EC Treaty provides for a system of judicial review of all the acts of the Council and Commission other than recommendations or opinions. The Court has developed and enlarged its competency to review "...all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".[6]

Thereafter Article 173 provides unrestricted locus standi to the Member States, the Council and the Commission. Restricted locus standi is granted to natural or legal persons to challenge acts. They have standing to challenge decisions that are addressed to themselves. Applicants who wish to challenge a decision that is not addressed to them must establish direct and individual concern.

The grounds for challenge cover lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and finally, misuse of powers.

There is a strict two month time limit that applies to commencement of proceedings before the Court when challenging an act under Article 173.

2.3 Reviewable Acts

Competition law cases have been prominent in the Court on the issue of which measures are reviewable. Decisions of the Commission in competition cases are unproblematic as they are covered by Article 173 which provides that all the acts of the Council and the Commission other than recommendations and opinions are reviewable. However certain procedural measures and acts that fall short of decisions have been held to be reviewable by the Court. As noted above, the *ERTA* decision[7] extended the jurisdiction of the Court to review all measures adopted by the Council and Commission that are intended to have legal effects.

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[6] Case 22/70 *Commission v. Council (ERTA Case)* [1971] ECR 263. Note also that Article 173 was amended under the Treaty of European Union so that the Court can review the legality of acts "adopted jointly by the European Parliament and the Council ...and of acts of the European Parliament intended to produce legal effects *vis a vis* third parties".

[7] Case 22/70 [1971] ECR 263

Thus the test becomes one of the effect of act in question, rather than the strict substance of the act itself. This method of interpretation is illustrated in *Cimenteries v Commission*[8] where the Court found a Commission Notice, notified by registered letter to be a reviewable act under Article 173.

In the *Cimenteries* case the Societe Anonyme Cimenteries was one of a number of undertakings who had entered into an agreement called the "Noordwijks Cement Accord" that, *inter alia,* divided up the market for the supply of cement and clinker using quotas. The undertakings involved notified the Commission of the agreement in accordance with Regulation 17/62 and applied for exemption from Article 85(3).

In response the Commission addressed a notice to the undertaking under Article 15(6) Regulation 17/62. This removes exemption from fines for breach of Article 85 granted by Article 15(5) Regulation 17/62 to notified agreements. This reflected the Commission's view that the agreement breached Article 85(1) and that no grounds for exemption were applicable under Article 85(3). The Commission sent the notice by registered letter.

The undertakings concerned brought an action under Article 173 challenging the validity of the Commission's notice and letter. The rationale behind the challenge was as follows. It was unlikely that the Commission would change its view as to the legality of the agreement when taking its final decision under Regulation 17/62. The probable effect therefore of the notice withdrawing exemption from a fine would be to force the undertakings to terminate the agreement. According to the Court " the preliminary measure would thus have the effect of saving the Commission from having to give a final decision thanks to the efficacy of the mere threat of a fine".[9]

The Court therefore concluded that the Commission's notice and registered letter constituted a reviewable measure that deprived the undertaking of

"...the advantages of a legal situation which Article 15(5) attached to the notification of the agreement, and exposed them to grave financial risk. Thus the said measure affected the

[8] Cases 8-11/66 [1967] ECR 75
[9] ibid p. 93

interests of the undertakings by bringing about a distinct change in their legal position... It thus constitutes not a mere opinion but a decision."[10]

In the later case of *IBM v. Commission*[11] the Court decided that a letter sent by the Commission to an undertaking being investigated under Article 17/62, containing a statement of objections against the undertaking and requiring it to reply within a specified time, was not a reviewable act. It stated that in principle provisional measures designed to prepare the basis for a final decision are not reviewable. It distinguished *IBM* from the *Cimenteries* case as follows;

"A statement of objections does not compel the undertaking concerned to alter or reconsider its marketing practices and it does not have the effect of depriving it of the protection hitherto available to it against the application of a fine, as is the case when the Commission informs an undertaking, pursuant to Article 15(6) of Regulation 17, of the results of the preliminary examination of an agreement which has been notified by the undertaking."[12]

In *Air France v. Commission* [13] the spokesman for the Competition Commissioner announced that the Commission had declared that it had no jurisdiction under the Merger Regulation[14] to examine the acquisition of one airline by another. The applicant, a private party sought annulment of the decision made in the statement of the spokesman. This would require the Court finding that the statement was in fact a decision as this would be the only way in which the private party could seek annulment. The Court of First Instance concluded that the "act" had a definitive nature and had been made public. Further it found that "any measure the legal effects of which are binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position is an act or decision that may be the subject of an action under Article 173 for a declaration that it is void".[15]

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[10] ibid p. 91
[11] Case 60/81 [1981] ECR 2639
[12] ibid p. 2654
[13] Case T-3/93 [1994] ECR II- 121
[14] Council Regulation 4064/89 OJ L395/1 (corrected and published in (1990) OJ L257/90) on the control of concentrations between undertakings.
[15] Case T-3/93 [1994] ECR II 149

The finding by the Court that an act can be classified as a decision is crucial to the natural or legal person who is seeking annulment of that act. Without it there is no case and the act would not be open to challenge by bodies other than privileged applicants. Consequently Professor Greaves[16] finds that where a challenge is made against a quasi-judicial administrative act, (as is often the case with the Commission in competition investigations) the Court is less concerned with questions as to the substance of the act concerned, than with the legal effects of the act on the person challenging it.

2.4 Locus Standi and Non Privileged Applicants. Third Party Rights

It appears therefore that the Court has been generous in its interpretation of what constitutes a reviewable act under Article 173. As stated above, this is an essential prerequisite to a party who wishes to challenge an act. Thereafter another hurdle must be overcome: that of convincing the Court that they have locus standi to challenge the act in question before the Court.

The issue of third party rights is an essential element in the definition of the general principle of the right to be heard as stated in the *Transocean Marine Paint*[17] case. As stated earlier, the right for undertakings concerned in competition proceedings to be heard is provided by Article 1 Regulation 99/63 and Article 19 Regulation 17/62. In relation to third parties, Article 3(2) of Regulation 17/62 grants the right for natural or legal persons who have a legitimate interest in a case to bring it to the attention of the Commission by way of a complaint. Thus the competition law provisions do provide for the right to be heard independently of Article 173.

To provide a complete picture of third party rights in competition law, rights under Regulation 17/62 and Article 173 must be considered.[18]

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[16] "The Nature and Binding Effect of Decisions under Article 189 EC" (1996) 21 E.LRev 3

[17] Case 17/74 [1974] ECR 1063

[18] on this see Neuwahl "Article 173 Paragraph 4 EC;Past, Present and Possible Future" (1996) 21 ELRev. Feb p 23 for a discussion of the interepretation by the Court of individual concern in anti-dumping cases.

Complainants using the provisions of Regulation 17/62 will often be competitors whose interests are being damaged as a result of undertakings in the market operating a cartel in breach of Article 85 EC.[19] Other complaints may be caused by the refusal to supply goods to the complainant by an undertaking acting allegedly in breach of its dominant position and consequently in breach of Article 86 EC.[20]

The number of such complaints submitted to the Commission has seen a marked increase in recent years. Vesterdorf,[21] a judge of the Court of First Instance estimates that the total is currently 100 per year.

The first issue to consider is how generous is the Commission in its interpretation of legitimate interest under Article 3 (2) of Regulation 17/62. In fact both the Court and the Commission have been generous in their interpretation of Article 3(2). The following is a limited example of parties whom the Commission and the Court have held to possess legitimate interest under Article 3(2):

- a competitor
- a competitor injured by predatory pricing
- persons injured by a refusal to supply a dominant company.

There are however no decisions of the Court that address the question of legitimate interest directly. Kerse[22] suggests that a party with legitimate interest "...should be likely to suffer injury or loss directly". According to Vestordorf, " having a legitimate interest must presumably be understood as meaning that the complainant is required to demonstrate on the balance of probabilities that he has a reasonably direct and substantial interest in the outcome of the complaint".

A further view is expressed by Temple Lang; "...the complainant should have a reasonably direct and practical interest in the outcome of the proceedings".

A generous interpretation of legitimate interest can be seen in the 1985 complaint from the Transport and General Workers Union. The union complained on the grounds that they were

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[19] for example Case 35/83 *BAT & Reynolds v Commission* [1985] ECR 363

[20] for example *Commercial Solvents v. Commission* [1992] ECR 1105

[21] " Complaints Concerning Infringements of Competition Law within the Context of European Community Law."CML Rev. 1994 77

[22] "EC Antitrust Procedure" 3rd Edition p220

the body representing workers laid off through the closure of a petrol works due to alleged concerted practices between British Petroleum and Texaco. The Commission agreed.

Even if the third party cannot establish a legitimate interest under Article 3(2) of Regulation 17/62, he or she should still be advised to complain to the Commission under Article 3(2)(b) which allows private parties to bring complaints to the attention of the Commission who can initiate proceedings on its own behalf under Article 3(1) of the Regulation. However parties who follow such a procedure are in a weaker position to those who have established a legitimate interest under Article 3(2).

The reason for this is that if the complainant is rejected by the Commission on the grounds of lack of legitimate interest this will be addressed to the complainant as a decision of the Commission. The complainant can then bring an action for annulment of that decision under Article 173(4) of the Treaty which provides: "any natural or legal persons may...institute proceedings against a decision addressed to that person or against which, although in the form of a regulation or a decision addressed to another person , is of direct and individual concern to the former".

If however the Commission has initiated proceedings on its own behalf under Article 3(1) based on a complaint from a third party under Article 3(2)(b) of Regulation 17/62, the complainant can only challenge the Decision to exempt on the grounds of it being of direct and individual concern under Article 173 EC.

The issue of direct and individual concern under Article 173(4) EC is therefore crucial to the third party complainant in competition proceedings.

The test established by the Court to establish direct and individual concern was first stated in *Plaumann v. Commission*[23] as:

"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."

[23] Case 25/62 [1963] ECR 95

The Court has adopted a more generous approach than that established in *Plaumann* in cases where Community institutions undertake what is sometimes called " quasi- judicial " activity.[24] This includes anti-dumping measures and competition procedures. So where Community law grants procedural rights as it does in competition proceedings under Regulation 17/62, a more generous interpretation of Article 173(4) is applied.

An example of this can be seen in *Metro v. Commission(No. 1).*[25]

In this case Metro maintained that the distribution system operated by SABA was in breach of Article 85 EC. Metro complained under Article 3(2) Regulation 17/62 which allows private parties to bring complaints to the attention of the Commission. The Commission decided that certain aspects of the distribution system were not in breach of Article 85 and addressed this decision to SABA. The issue was whether Metro could challenge the decision by claiming individual concern to a decision addressed to another. The Court granted Metro standing. It said:

"It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with wholly or in part, to institute proceedings in order to protect their legitimate interests.
In those circumstances the applicant must be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the contested decision and the application is accordingly admissible."

The Court therefore in competition law cases (and to a similar degree in anti-dumping cases) has adopted the view that if a party has a right to intervene before an administrative agency (as is the case for a third party to complain to the Commission under Article 3(2)(b)), then that party has a corresponding right to seek judicial review of the agency's decisions. In the complex area of competition law where secondary legislation has provided a sophisticated system of rights and obligations to undertakings as well as heavy penalties for failure to comply with the law, it is imperative that the right to be heard is effective. Therefore the

[24] see Neuwahl "Article 173 Paragraph 4 EC;Past, Present and Possible Future"(1996) 21 EL Rev.23 for further discussion on this point.
[25] Case 26/76 [1977] ECR 1875

ability for third parties to challenge the acts of the Commission is an essential element in the development of the general principles of Community law and can indeed be classed as a fundamental right under law.

Whilst the Court has been generous in its interpretation of third party rights in competition law cases, legislative provision remains restrictive. The strict provisions of Article 173(4) mean that an individual who feels that they have suffered harm as a result of an act of a Community institution yet fails to satisfy Article 173(4) is effectively left without a remedy. Therefore the fundamental rights of individuals may ultimately be unenforceable due to the strict provisions of Article 173.

As discussed in Chapter One, the Court of Justice has recently rejected the competency of the Community to accede to the European Convention on Human Rights. Accession would require amendment to the Treaty. It appears from this study that the observance and enforcement of fundamental principles by the Court is rigorous when applicants satisfy the rules under Article 173. However, the rules under Article 173 are too strict to ensure that someone who claims that his or her fundamental rights have been infringed by a Community institution can always have recourse to the Court.[26] Professors Arnull, Schermers and Dashwood[27]suggest that conditions for admissibility under Article 173 be eased to permit wider access to the Court. A bolder way forward would be to recognise that the right to seek judicial review of government action where the applicant is adversely affected is in itself a fundamental right that must be upheld by the Community. This could be adopted into the general principles of the Community on the basis of the existing laws in the member states and the provisions of the Convention. This would provide a guarantee to injured third parties that recourse to justice is available under Community law.

[26] this point was made in the House of Lords Select Committee Report on the Enforcement of Competition Policy in 1992 at para.78.

[27] CELS Occasional Paper No.1 on Opinion 2/94 of March 28,1996.

2.5 The Role of the Hearing Officer

In 1994 the Hearing Officer, who had been introduced into competition proceedings in 1982, was given new terms of reference in respect of third party rights.[28]Article 3 of the terms of reference authorises the Hearing Officer to decide, after consultation with the responsible Director of DG VI(the Competition Policy Directorate), whether third parties should be allowed to be heard. This means that the Hearing Officer has to decide whether the third parties have a legitimate interest falling within Article 19(2) Regulation 17/62 and Article 5 Regulation 99/63. The Hearing Officer may only take a negative decision denying the third party the right to be heard after having given the third party the opportunity to comment on the reasons given for concluding that the third party lacks sufficient interest in the case. This enhancement of the role of the Hearing Officer is an important procedural development. It goes some way to removing some of the hitherto exclusive powers of the Commission in the competition law enforcement process that will be examined in detail in Chapter Three. It does not however alter the strict legal criteria to be satisfied under Treaty provision. Only the more radical proposal of the elevation of the right of judicial review for all aggrieved parties into a general principle of Community law would satisfy the demands of administrative justice as a fundamental right.

2.6 Access to File

According to Art Van Liedekerke,[29] " the right of access to information is an essential component of the right to be heard and necessary to ensure the full and effective protection of the rights of defence".

A final topic for discussion before ending this examination of the right to be heard is the issue of access to file. Although this issue does not fall within a consideration of judicial review, a discussion of the right to be heard would be incomplete without it. This topic also reveals the

[28] O.J.1994 L330/67
[29] CML Rev. (1995) 963

recent changes in the Commission towards greater protection of the rights of the defence of the parties in competition proceedings. The impetus for these changes has been the various criticisms of the extensive powers of the Commission in this area as discussed in Chapter Three of this work.

Prior to 1982 the right to be heard appeared to be curtailed by the inability of the complainant to require disclosure of the administrative file by the Commission on their case. The Commission was only required to disclose those documents upon which it proposed to rely. In *VBVB and VBBB v Commission*[30] the Court stated:

"... although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned."

However since the judgement in *VBVB* that there existed no legal duty on the Commission to disclose its files, the Commission has chosen to permit improved access to its files except for internal working documents and information protected by the rules on professional secrecy.[31] When the issue came before the Court of First Instance in 1992 in *Hercules v Commission*[32] it concluded that the Commission now does have an obligation to make its files available subject to the exceptions referred to above.

As mentioned earlier in this Chapter, on 1st September 1982 the Commission appointed a Hearing Officer whose function is to preside over the hearings and to ensure that the rights of the defence are properly respected. He must be present throughout the hearing and has direct access to the Commissioner responsible for Competition for whom he prepares a report on the case. In *ICI v Commission* [33] however, the Court ruled that the parties are not entitled his report.

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[30] Cases 43 &63/82 [1984] ECR 19
[31] 12th Report on Competition Policy points 34-35
[32] Case T- 7/89 [1992] 4 CMLR
[33] Case 85/76 [1979]ECR 461

In 1994 Commission Decision of 12 December[34] codifies and extends the position and competence of the Hearing Officer. Article 19 of Regulation 17/62 as discussed above, requires that the Commission before taking a decision shall give the parties concerned their opportunity to present their views on the matter. Access to the file of the Commission is therefore essential for the parties to ascertain the full details of the case. The 1994 Decision contains specific rules for access to and disclosure of certain documents in the Commission's file. It also provides for a specific procedure to be followed where an undertaking involved in competition proceedings has reason to believe that the Commission possesses documents which have not been disclosed to it where those documents are necessary for the proper exercise of the right to be heard. The overall effect of the 1994 Decision is to extend and protect the rights of defence by greater access to file. It should be noted that the Court differentiates between parties under investigation and third parties on the issue of access to the Commission's file. In *Matra v Commission* [35] the Court of First Instance emphasised that the rights of access are more limited in the case of third parties than the rights of parties actually under investigation. Subject of course to the rules of professional secrecy, it is difficult to sustain such a position, particularly if the third party can establish legitimate concern in the case.

The confidentiality of the Hearing Officer's report remains unchanged by the 1994 terms of reference for Hearing Officers. The House of Lords Select Committee recommended in its 1993 Report that the Report of the Hearing Officer be sent to the parties. The new terms of reference did not implement this recommendation. Marc Van Der Woude[36] supports this position commenting "...If his findings were made public, then the Hearing Officer would be reluctant to express himself freely, since his words might, rightly or wrongly be repeated during court proceedings".

In conclusion this discussion illustrates that the development of the right to be heard in competition proceedings has been evolving constantly over the last two decades since the

[34] Commission Decision of 12 December 1994 on the terms of reference of hearings officers in competition procedures before the Commission, OJ 1994, L 330/67

[35] Case T-17/93 [1994] ECR 595

[36] "Hearing Officers and EC Antitrust Procedures;The Art of Making Subjective Procedures More Objective." CMLRev.33 1996 p531

Transocean case. The Court has responded carefully on this issue, ensuring that in areas such as competition law in which the Commission plays such a pivotal administrative role, the right to be heard is protected by granting a more generous interpretation on the issue reviewable acts and locus standi under Article 173. In addition to this the Commission has initiated changes in its procedures to grant parties greater access to their files. How far these changes go in reducing the criticism that the Commission fails to provide a fair hearing due to the plurality of its roles must be seen in the context of the proposed amendments to the role of the Commission in Chapter Three of this work.

Chapter Three

The Commission and the Plurality of its Roles in Competition Law Proceedings.

As stated in the introduction, this work attempts to examine the role of the Commission in the enforcement of competition policy with particular regard to the issue of general principles of law and fundamental rights. Perhaps the most central issue in this field, and certainly one that has attracted widespread comment is that of the plurality of roles adopted by the Commission in the enforcement process. The question of separation of powers, particularly with regard to investigation and enforcement is central to the fundamental right of the individual to a fair hearing.

The chapter will begin with a brief outline of the role of the Commission as provided by legislation in the enforcement process. Thereafter a critique of the system will be discussed. The role of the Court of Justice and the Court of First Instance in the enforcement process will then be examined.

After consideration of the criticisms of the system under Community law, the role and potential impact of the European Convention on Human Rights will be scrutinised. As a direct source of Community law by virtue of Article F of the Treaty of European Union, Article 6 of the Convention which guarantees a fair and public hearing by an independent and impartial tribunal, poses a considerable challenge to the plurality of roles enjoyed currently by the Commission. The extent to which Article 6 impacts on the powers of the Commission will be assessed.

3.1 The Role of the Commission in the Enforcement of Competition Law

The legislation regulating competition policy has its source in Article 87 EC. This empowers the Council to adopt measures to give effect to the principles contained in Articles 85 and 86.

It did this in Regulation 17/62. This regulation lays down the powers of the Commission in the enforcement process. Further legislative provision was made to amplify enforcement procedures in Regulation 99/63 which is concerned with the conduct of hearings under Regulation 17/62.

Under Regulation 17/62 the Commission enjoys wide powers of investigation. These powers are discussed at length in Chapter Four of this work. After investigation, and a finding by the Commission of breach of Articles 85 or 86 by the undertaking, the Commission can, under Article 3(1) Regulation 17/62, require the undertakings to terminate these infringements. It may do so either on its own initiative, upon application by a member state or by a third party claiming a legitimate interest. If the Commission initiates proceedings under Article 3 it must serve on the parties concerned a statement of objections indicating its objections to their behaviour. The statement of objections contains a statement of the facts and a legal assessment of the alleged infringement. The Commission is not permitted to take action against firms in respect of matters that have not been included in the statement of objections.[1] The Commission may not rely on information that it is unable to divulge because it amounts to a business secret.[2]

The recipient of the statement of objections must reply to the Commission within a period fixed by the Commission. The recipient also has the right to an oral hearing. Interested third parties may also be heard. The rights of third parties in competition proceedings are discussed in Chapter Two. The conduct of hearings and the role of the Hearings Officer are also discussed in Chapter Two.

Having conducted the investigation and heard the evidence of the interested parties, the Commission may come to a formal decision that requires that the parties terminate the infringement. Under Articles 15 and 16 of Regulation 17/62 the Commission is empowered to fine firms who are guilty of offences under Articles 85 and 86.

The decisions of the Commission are subject to judicial review by the Court of Justice and since 1989[3] by the Court of First Instance under Articles 173 and 175 EEC. Judicial review of

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[1] Case 89/85 *A Ahlstrom Oy v Commission* [1993] 4 CMLR 407

[2] see Chapter Six of this work

[3] Council Decision 88/591/ECSC,EEC,Eurotom of 24 Oct. 1988 (1988)O.J. L319

the decisions of the Commission in competition proceedings are discussed in detail in Chapter Two.

From this albeit extremely brief overview of the role of the Commission in competition law proceedings, it is evident that the Commission exercises exclusive power at every stage of the enforcement process, from investigation through to prosecution and finally to the ultimate decision and sanction. A fundamental question for consideration therefore is whether it is appropriate for one body to be simultaneously the detective, the prosecutor, the negotiator and the decision maker.

3.2 The House of Lords Select Committee and its Conclusions

Many commentators on competition law have over the years remarked on the objections to the plurality of roles enjoyed by the Commission. "The criticism has been that the Commission acts as policeman, prosecutor, judge and jury and that the enforcement procedure is inherently unfair"[4] and "...The applicable rules of procedure laid down by Regulation 19 remain rather "Kafkaesque" in that the Commission combines the role of prosecutor, judge and jury..."[5]

Certainly the enforcement of Community competition policy is very different from that in the United Kingdom where the various functions are distributed between different institutions. The issue of the separation of powers in relation to the enforcement of competition policy was examined by the House of Lords Select Committee into the Enforcement of Competition Rules.[6] Other bodies have also carried out reviews of the enforcement process. In the Merger Control Enquiry in 1989 Jeremy Lever QC proposed:

"The establishment of a small Directorate General separate from DG IV that would be responsible for the formulation of Community decisions in competition cases (and anti-

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[4] Whish "Competition Law" 3rd edition p 286
[5] Van Bael and Bellis "Competition Law of the EEC"p 282
[6] House of Lords Select Committee the European Communities, 1st Report Session 1993-4(HL Paper 7)

dumping) leaving DGIV to perform, after delivery of the Statement of Objections, only its present role of prosecutions."[7]

In the House of Lords Select Committee initial comments on the need to review the powers of the Commission pointed to "...renewed anxiety about the extent to which the Commission's combination of administrative and judicial functions has endangered "fairness of enforcement" in competition matters".[8]

The evidence given by experts in the competition field in the House of Lords Select Committee ultimately concluded in favour of maintaining the status quo. The role of the Court of First Instance and the existence of judicial control was central to this conclusion. Michael Reynolds of Allan and Overy solicitors in his evidence stated that the proposal of the introduction of an independent element into Commission enforcement proceedings was of less merit due to the establishment of the Court of First Instance.[9] He felt that the Court has had a supervisory influence on the enforcement process by providing a greater element of judicial control. Further, he felt that that an independent review body might be no less political than the Commission and would result in protracted proceedings.

Control by the judiciary was also relied upon by the then Director General of DG IV, Dr. Ehlermann. He stated that the importance of facts in the investigatory process and prosecution functions could not be separated without the risk that the prosecution would find certain facts missing and be forced to launch further investigations. It is submitted that there is an element of self-protectionism in such a view. Community law is littered with cases where the Court has annulled decisions of the Commission on the basis of incorrect facts and analysis; for example in the *Continental Can case*[10] and *Societa Italiano Vetro Spa*[11], to mention only two. This occurs where no separation of power exists!

Dr. Ehlerman, in defending the status quo stated that the separation of functions would not improve the quality of the Statement of Objections or of the Decision. He also felt that it

[7] 6th Report 1988-89 Merger Control pp110-112

[8] ibid at paras 4,6

[9] Article 17 of Regulation 17/62 grants the Court of Justice unlimited jurisdiction within the meaning of Article 172 EEC to review decisions of the Commission. This role has now been assumed by the Court of First Instance.

[10] Case 6/72 *Europemballage Corpn and Continental Can Co. Inc v Commission* [1973] ECR 215

[11] Cases T 68,77,78/89 *Societa Italiano Vetro Spa & Others v. Commission* [1992] II-ECR 1403

would not make best use of limited resources. If more resources were to be made available, he believed that they would be best used not by separating the Commission's powers, but by having large teams for complex cases as is the case in the Merger Task Force. Further, Dr. Ehlerman felt that should a system with separate investigation functions exist, the ability of the Commission to acquire information may be more difficult. This can be appreciated as an area of legitimate concern for the Commission. However the interests of the Commission and its fact finding powers are separate from those of the individual undertaking whose concerns are that these functions are merged. The concern of many lawyers and their clients is expressed by Mr. David Vaughn QC in his evidence to the Select Committee. "I would see a major need for a division between the inspector who comes round your offices and the case handler."

On the central issue of the separation of powers, the Monopolies and Mergers Commission in its evidence to the Select Committee felt that the plurality of roles within the Commission was unproblematic. They stated that whilst the separation of powers existed in the United Kingdom competition enforcement system, it was not a fundamental pre-requisite for a system of enforcement. The German system of competition which does not have separation of powers was cited as an example of an effective and fair system.[12]

The Court of First Instance itself, when considering the issue of the separation of powers in 1992[13] concluded that it was not a breach of procedural rules for the same officials to be involved through successive stages of the investigatory process.

After scrutinising the evidence of the expert witnesses, the Select Committee came to the conclusion that the involvement of the same officials throughout the stages of the investigation is not wrong in principle provided that the proceedings are fair and transparent and that there should be the possibility of independent judicial control to guarantee it "...the strong administrative and policy content in the enforcement of the competition rules makes it

[12] It is interesting to note that the Bundeskartellamt of the Federal Republic of Germany in its evidence felt that the EC system should be reformed and that an independent competition commission should be set up.
[13] Case T-11/89 *Shell v Commission* [1992] ECR 757

right and inevitable that the function of enforcement should be principally entrusted with the Commission".[14]

A number of proposals were put forward by the experts who submitted comments to the Select Committee. One that was put forward and has since been implemented in some measure is the enhancement of the role of the Hearing Officer. In his evidence to the Committee, Mr Alan Cooper of the Department of Trade and Industry suggested that there was scope for enhancing the status of the Hearing Officer so that his or her view "is something which other officials will tremble at".

The position of the Hearing Officer was introduced in 1982 in an attempt to make oral hearings more objective. The intention of the Commission was to create a role from within its ranks to oversee the examination of evidence. This would have the effect of separating the officials involved in the investigatory process from the process of the hearing of the case. It would introduce an element of objectivity (although not independence) in the enforcement process.

The post is as an officer of the Commission with a unique position that enables him or her to refer the observations made directly to the head of DG IV, the division of the Commission that deals with competition policy. Oral hearings take place after the Commission has issued a statement of objections against an undertaking alleging breach of Articles 85 or 86. Regulation 99/63[15] provides that the undertakings concerned can submit their views to the Commission. Essentially the role of the Hearing Officer under the old terms of reference was threefold. First he or she was responsible for the preparation of the oral hearing. Thereafter he or she conducted the hearing itself. This permitted the Hearing Officer to decide whether fresh documents may be produced, who should be heard and whether persons should be heard separately or with other persons. Finally the Hearing Officer prepared a report of the hearing containing its detail and his or her opinion of the case. This report would then be submitted to the Commissioner for competition. The report remains confidential.

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[14] Select Committee Report p.37 para 105

[15] O.J.Sp.Ed.1963, No. 2268/63,p.47

The new terms of reference of the Hearing Officer were formulated in 1994[16]. The role has been extended to cover the whole of the Commission's administrative procedure. This was one of the main recommendations of the House of Lords Select Committee in its report in 1993. The new role also regulates the nature of documents that can be the subject of scrutiny of the Commission and interested parties.[17]

The enhancement of the role of the Hearing Officer is a welcome development in that it extends his or her competency across the range of procedures and will provide a greater element of objectivity in the process of enforcement as the Hearing Officer is involved only at this stage and for this express purpose. It should not however be forgotten that the Hearing Officer is not an independent actor and therefore does not introduce any real separation of powers into the enforcement process that remains exclusively in the hands of the Commission, of which he or she is an official. Greater enhancement of the role therefore, whilst being a progressive step, does not resolve the underlying issue i.e. that the Commission in competition law enforcement enjoys powers which exceed those which are to be found in the majority of similar systems of justice in the member states of the Community. According to Marc Van Der Woude:[18]

"In any event it is legally impossible to make hearing officers truly independent. They remain Commission officials and the Commission ultimately bears the responsibility for their decisions. Only a revision of the EC Treaty would enable the creation of a really independent hearing officer...As long as the Commission combines and is compelled to combine the functions of prosecutor and judge, it can only look for means which soften the subjective angles of its unilateral powers. In this imperfect procedural context, the new terms of reference offer a major contribution to objectivity."

From this brief account of recent debate on the issue of the concentration of powers in the hands of the Commission it appears that two main issues for discussion are raised. Firstly, as mentioned earlier, many commentators are content with the role of the Commission as they feel that the Court of First Instance has assumed an increasingly interventionist role and can

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[16] O.J.1994 L 330/67

[17] Chapter Six contains an analysis of these new powers.

[18] "Hearing Officers and EC Antitrust Procedures;The Art Of Making Subjective Procedures More Objective" CMLRev. 33 531

check the powers of the Commission. The second issue is the assumption that the lack of separation of powers within the system is acceptable provided safeguards exist to ensure impartiality. These two issues are linked as part of the safeguard to ensure impartiality in issue two is the provision of judicial control through the Courts. However issue two also raises the question of fundamental human rights as guaranteed under Article 6 of the European Convention of Human Rights. These two issues will be discussed in turn.

3.3 The Role of the Court of Justice and the Court of First Instance in the Enforcement Process

The Court of First Instance was introduced in the Single European Act 1986 s.11. Section 11 empowered the Council to attach a court of first instance to the Court of Justice. The Decision to do so was taken on 24 Oct 1988. The role of the Court of First Instance in competition proceedings is effectively the same as that of the Court of Justice. It decides on actions brought by natural or legal persons against the Commission under Articles 175 and 173. It can decide whether the Commission lacks competence in any area, whether it has infringed an essential procedural requirement, whether it has infringed the Treaty of Rome or any rule of law relating to its application and finally whether it has misused its powers. The one issue upon which neither the Court of Justice nor the Court of Justice can decide is the substance of the case. This remains exclusively in the hands of the Commission. The role of the Court is limited to "...verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers".[19]

Great hopes existed for the Court of First Instance when it was first introduced. Many commentators felt that the new Court would show a greater desire to scrutinise the work of the Commission. The Council in the Decision setting up the Court of First Instance stated that

[19] Case 42/84 *REMIA & Others v Commission* [1985] ECR 2545

in respect of issues that required scrutiny of complex facts the new Court " will improve the judicial protection of individual interests".[20]

There is no doubt that the Court of First Instance has assumed a much greater interventionist role in the consideration of cases before it particularly in relation to economic assessmcnt and findings of facts. In a number of cases the Court has undertaken thorough reviews of the Commission's procedures and has been sharply critical of a number of them. An example of these critical reviews can be seen in the *PVC* cases.[21] In these cases the Commission had imposed fines totalling 23.5 million ECU on companies alleged to have been involved in a cartel in the PVC market. On scrutinising the findings of the Commission, the Court found a number of procedural irregularities. Alterations had been made to the decision after its adoption by the Commission and prior to its notification to the parties. Further, there had been a failure to adopt the decision in the language of the Dutch and Italian defendants. The adoption of the decision had been delegated to the Commissioner responsible for competition whereas the whole Commission should have adopted it. Finally it had been signed by the competition Commissioner after his mandate had expired! The Court decided that the effect of these numerous and serious irregularities was to render the Commission decision non-existent. "The Court is obliged to conclude that, by virtue of the particularly serious and manifest defects which it exhibits, the Commission "measure" ... is non-existent."[22] [23]

Another example of the scrutiny of the Court can be seen in the *Italian Flat Glass* cases.[24] This case concerned applications by three Italian flat glass manufacturers to annul a Commission decision fining them for breach of both Articles 85 and 86. In their investigations the Court examined the facts in minute detail. Prior to the oral hearing the

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[20] no. 8 Recitals

[21] *Cases T - 79, 84-86, 89, 91-92, 96, 98, 102, 104/89, BASF AG and Others v Commission* [1992] ECR II-315

[22] ibid at para 100

[23] On appeal to Court of Justice Case C-137/92 *Commission v BASF and Others* [1994] ECR I-2555 the Court took the view that the defects were not so serious as to render the decision non-existent. The Court held that to conclude that a decision is non-existent, with potentially serious consequences, should be "reserved for quite extreme situations". The Court did, however, agree that the decision was tainted by sufficient irregularity for it to be annulled. The Court did therefore concur with the findings of the CFI that the Commission had infringed essential procedural requirements, but differed in its determination of the gravity of those infringements. The Court did not define the nature of irregularities "of such obvious gravity" in the adoption of a decision that they would render that decision so flawed as to merit it being declared non-existent rather than annulled.

[24] Case T-68/89 *Societa Italiano Vetro Spa & Others v Commission* [1992]11- ECR 1403

Judge-Rapporteur chaired an informal meeting of the parties with the purpose of establishing a single common file of documents essential to the case. This file was also to include all the statistics required for an understanding of the flat glass market. To this end the Commission was required to submit the originals of all the documents upon which they had relied in the case. The parties were then asked to agree the Judge-Rapporteur's report. On close examination the of the original documents used as evidence by the Commission it became clear that when the evidence had been communicated to the undertakings, certain passages of relevance to the case had been omitted or in some cases deliberately deleted (the passages in question did not refer to business secrets). On discovering these irregularities, the Court undertook a thorough investigation of the evidence used by the Commission to come to its decision. It effectively acted as an independent tribunal. It concluded that not one of the eight separate allegations made by the Commission on the basis of fact had been wholly substantiated.

This greater scrutiny does seem to suggest that the Court of First Instance is assuming a more interventionist role than that previously adopted by the Court of Justice. The Court of First Instance has attracted many admirers. At the Select Committee of the House of Lords the Joint Working Party on Competition Law of the Bars and Law Societies of the UK declared their "...great admiration for the work of the Court of First Instance...We consider that this has been a development of great importance in the judicial protection of individual rights".[25]

It appears that this more interventionist role on the part of the Court of First Instance does go some way to allay the fear of abuse inherent in any system where clear separation of powers does not exist. This is not however a universal view. Brent[26]writing a critique on the issue stated: "It is tempting to conclude...that control by the Court of Justice of the Commission's use of evidence is more effective than that exercised in the past by the Court of Justice". He feels that there is a danger of exaggerating the novelty of the judgements of the Court of First Instance as the Court of Justice has itself undertaken factual investigations on a number of

[25] House of Lords Select Committee at p63
[26] International and Comparative Law Quarterly vol 44 April 1995

occasions. The example he uses is *Woodpulp II.*[27] On this basis he concludes that the Court of First Instance is not unique in assuming an investigatory role on the facts.

It is submitted that it is unimportant which court assumes such a role. The fact that the assumption that such a role has developed is a positive step towards introducing an element of independent analysis in competition proceedings. The crucial issue is whether the more interventionist role of the Courts has caused the Commission to review its practices - thus providing greater protection for the right of the undertaking concerned to enjoy a fair hearing. It appears however that the Commission has failed to react to the enhanced role of the Court of First Instance by reviewing its procedures. In the Commission's 22nd Report on Competition Policy the Commission, commenting on the *Italian Flat Glass* case made no references to the blatant errors and tampering with evidence that the Court concluded had taken place by the Commission. Instead it merely referred to lessons to be learned from the Court's judgement which concluded that Article 86 can be infringed by a collective dominant position. The only actual reference to the evidence in the case was somewhat obtuse: "There is another lesson to be learned..., namely the extreme importance of documentary evidence and the way it is presented in a competition decision".[28] In the House of Lords Select Committee the Joint Working Party of the UK Bars and Law Societies commented, "That the enforcement agency can make such a remark beggars belief".[29]

3.4 The Classification of Competition Proceedings

It appears from these comments made by the Commission that it has failed to respond to the enhanced role assumed by the Courts. There are a number of explanations for this. One central issue is that of the classification of the nature of competition procedures. The Courts have been reluctant to establish whether competition law (which was traditionally seen as administrative in its nature) has a penal element to it. If the Court had grasped this issue and pronounced that a penal element does exist in competition proceedings, then the burden of

[27] Case 89/85 *A.Ahlstrom Oy v Commission* [1993] 4 CMLR 407
[28] European Commission 22nd Report on Competition Policy para 321
[29] House of Lords Select Committee at p 85

proof placed on the Commission to establish a case would be much more onerous. This would act as a considerable check on the Commission and the role of the Court in the fact finding investigation would become central to proceeding with a case. In addition to this, by classifying competition proceedings as criminal in their nature, parties could effectively invoke Article 6 ECHR to dispute the plurality of roles of the Commission.

The issue of the criminal nature of competition proceedings has attracted comment. In *Polypropylene* Advocate General Vesterdorf commented on the tension between "the procedural framework of the cases, consisting of an administrative procedure followed by a judicial review of legality, and the substance of the case, which all broadly exhibit the characteristics of a criminal law case". He went on to conclude that "any reasonable doubt must be for the benefit of the applicants".[30]

The Court of First Instance did not expressly endorse these views in their decision in the case. In *Woodpulp II* Advocate General Darmon stated that decisions in competition law were "manifestly of a penal nature".[31] Again the Court of Justice failed to endorse this view in its judgement.

Therefore neither the Commission, the applicants nor the Court knows what level of proof is required in competition proceedings. Brent comments[32] that " this reluctance to come to terms with the criminal or quasi-criminal nature of competition law has given the Commission excessive latitude in procedure, an area in which the Court of First Instance's judgements have been disappointing".

3.5 Article 6 of the European Convention on Human Rights

The status of the Convention in Community law is discussed in detail in Chapter One of this work. The Convention was formally recognised as a source of Community law by Article F of the Treaty of European Union. Article 6(1) of the Convention states: "In the determination of his civil rights and obligations or any criminal charge made against him, everyone is

[30] *Re Polypropylene Cartel* [1991] ECR 869
[31] Case 89/85[1993] 4 CMLR 407at p539
[32] International and Comparative Law Quarterly vol 44 April 1995 at p263

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

As can be seen from Article 6, the issue of whether proceedings are criminal in nature is crucial to the application of that Article.

In *Societe Stenuit v. France*[33] the European Commission of Human Rights concluded that proceedings under French competition law, which were classed under French law as administrative, were in fact criminal and therefore fell within Article 6(1). The rationale behind the decision was that the fine imposed upon the applicant under French law was designed as a deterrent to those intending to prevent or distort free competition in the market. The legislation therefore affected the general interests of society normally protected by criminal law. This, according to the Court, rendered the proceedings criminal in nature. This decision appears similar to the views of Advocates General Darmon and Vesterdorf mentioned earlier. Brent in his critique of the current system states that the failure to classify competition proceedings as criminal in nature undermines the general principle of the right to a fair hearing.

"It has left the Commission in competition cases under an uncertain (and in some respects lax) procedural control subject to justified criticism. It again reflects the failure of the Court to come to terms with the criminal nature of competition proceedings, and hence the need for procedural propriety to be observed at every stage." [34]

The question of whether the Commission is an "independent and impartial tribunal" under Article 6 has been raised in a number of competition law cases. In *Musique Diffusion Francaise* [35] the applicants argued that the Commission, in making its decision acted as prosecutor and judge, in violation of Article 6(1) of ECHR. They argued also that the system set up by the Community under Regulation 17/62 violated the Convention in its distribution of powers in the enforcement procedure. In his opinion in the case Advocate General Slynn agreed that fundamental rights as set out in the Convention do form an integral part of the

[33] [1992] 14 EHRR 509
[34] ICLQ Vol 44
[35] Cases 100-103/80 [1983] ECR 1825

general principles of Community law that must be observed in competition cases. However he went on to state that the Commission's functions in investigating competition cases under Regulation 17/62 are not subject to the provisions of Article 6(1) as the Commission cannot be classed as a tribunal.

"The procedure before the Commission in such cases is not judicial but administrative...when discharging its functions in such cases, the Commission is not to be classed as a tribunal within the meaning of Article 6 ECHR...This does not mean that the Commission is exempt from the requirement to behave fairly: it does mean that there is no substance in the argument that the procedure in such cases fails to comply with Article 6(1) of the ECHR."

In the judgement of the Court of Justice the reasoning of Advocate General Sly was followed. The Court gave greater detail of the administrative procedure before the Commission which they stated guarantees that the Commission observes the fundamental principle of Community law, which requires that the right to a fair hearing be observed in all proceedings, even those of an administrative nature. The Court found that this requirement is satisfied by the procedure under Regulation 17/62 under which the Commission must notify its objections to the undertakings concerned, give the right to reply and grant an oral hearing. Under the terms of Article 4 of Regulation 99/63 the Commission may, in its decision, deal only with those objections raised against undertakings in respect of which they have been given the opportunity of making known their views. Thus the Court found that the Commission was not a tribunal under Article 6 ECHR, but that the right to a fair hearing , which is a fundamental principle of Community law is guaranteed under the procedures in Regulations 17/62 and 99/63.

In *FEDATAB*[36] the question of whether the Commission acts as a tribunal within the meaning of Article 6 was again raised. In this case the Court of Justice observed that one of the criteria for the existence of a tribunal laid down by the European Court of Human Rights in *Ringeisen*[37] is the independence of the tribunal from the executive. According to the Court:

[36] Cases 209-218/78 [1980] ECR 3125
[37] [1979-80] 1 EHRR 455

"Since the executive power is in fact vested in it, it is at least doubtful whether, not being independent of that power, it can constitute a tribunal within the above mentioned sense."

In the House of Lords Select Committee when the issue of separation of powers and Article 6 ECHR was addressed, the view expressed was that the "independent and impartial tribunal" in Article 6 constituted the Court of Justice and the Court of First Instance in competition proceedings.

In the *Polypropylene* cases Advocate General Vesterdorf again stated that Article 6 ECHR does not apply to the Commission as it is not a tribunal within the meaning of the Convention. He stated: "Article 6 of the Convention ...can provide no specific underpinning for the call for the Commission's work to be organised in a certain way".

If, as the House of Lords Select Committee found, the Court of First Instance and the Court of Justice are the "tribunal" in Article 6, do they possess the requisite characteristics to satisfy the Convention? In *Alber & Le Compte* [38] the Court of Human Rights stated:

"the Convention calls for at least one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not do so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide a guarantee of Article 6."

The Court further elaborated on the meaning of "full jurisdiction" stating that the tribunal must have the power to rectify factual errors as well as deciding issues of law. The roles of the Courts of Justice and First Instance under Article 173 do not at first glance satisfy this requirement. Their powers are essentially to review the decision of the Commission. However the recent trend of the Court of Justice to scrutinise cases in detail and rectify factual errors may be a move towards its acquisition of the powers of "full jurisdiction" as mentioned above. This, as the House of Lords Select Committee stated is to be welcomed as a greater protection of individual rights on the issue of a fair hearing. However it also leads to accusations of abuse of powers on the part of the Courts as clearly Article 173 does not grant them the powers currently enjoyed by the Commission under Regulations 17/62 and 99/63.

[38] [1993] EHRR 16

In conclusion it is evident that the Court of Justice is faced with a dilemma. If the system of Community competition law is to satisfy the requirements of Article 6 ECHR then the Court of First Instance must assume a greater role in the enforcement process than that provided at present. To do this would require amending Regulation 17/62. Recent case law suggests that both the Community courts have begun to assume such a role. Only by legislating in this area and increasing the powers of the Courts to fully examine the merits of the case and rectify factual errors will the Commission take notice and pay greater attention to procedural fairness.

An alternative course of action would be for the Community courts to accept that competition proceedings are quasi criminal in nature. This would have the effect of tightening the conduct of the Commission in their investigations by introducing the more onerous burden of proof and procedural safeguards required in criminal proceedings. Therefore although the Commission does not fall within Article 6 ECHR, it would still conform to the safeguards contained therein.

It is submitted that this is an area that requires attention. The principles contained in the European Convention will rapidly become assimilated into the body of Community law. Failure to act will mean increasing recourse to litigation on these issues. This uncertainty undermines confidence in the fundamental right to a fair hearing in competition law proceedings.

Chapter Four

The Investigative Powers of the Commission and Issues of Fundamental Rights.

4.1 Powers of Investigation

The incorporation of fundamental rights into the Commission's enforcement procedures has been an issue of particular scrutiny in relation to its powers of investigation. These powers are granted to the Commission under Article 14 of Regulation 17/62.[1]

This provision grants the Commission authority to undertake all necessary investigations including the examination of books and other business records, taking copies of books and business records, asking for oral explanations on the spot and entering any premises, land or vehicle belonging to the undertaking.[2] Officials authorised by the Commission to act in relation to these powers are entitled to exercise them on production of an authorisation in writing, specifying the subject matter and purpose of the investigation and the penalties for failure to supply or supplying incomplete books and other business records. Undertakings are obliged to submit to investigations ordered by a decision of the Commission. Prior to the investigation, the Commission must inform the relevant authority in the host state and identify the officials concerned.[3] The domestic authorities are obliged to lend every assistance to the Commission officials, especially where the undertaking concerned is opposing the investigation.[4]

There are two methods of investigation. The first is voluntary and carried out with the agreement of the undertaking concerned, the second is mandatory to which the undertaking is obliged to submit. If the Commission considers it necessary it will

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[1] OJ Sp.Ed.1962,No.204/62,p.87
[2] Regulation 17/62 Article 14(1)
[3] Article 14(2) and (3)
[4] Article 14 (4), (5) and (6).

proceed directly to the mandatory stage bypassing voluntary investigation. This is illustrated in the case of *National Panasonic*[5] where the Court held that the Commission enjoyed a wide discretion as to the nature of the investigation (i.e. whether voluntary or mandatory) and did not need to justify its action.

Recourse by the Commission to what has become commonly known as "dawn raids"[6] whereby Commission officials, or officials of the Member State empowered by the Commission attend the office of the undertaking without prior notice has raised concerns over fundamental rights. In recent years there has been a marked increase in the number of decisions under Article 14(3) (whereby the Commission issues a decision to investigate without prior warning). Until 1979 the Commission used its powers to issue decisions under Article 14(3) very rarely. Decisions only tended to be taken where there had been a refusal to co-operate on a voluntary basis. Between 1979 and 1983 67 investigations were made, almost all without prior warning. In 1989 alone 19 such investigations took place. Joshua[7] puts this increase down to several factors. Firstly he perceives a tendency on the part of undertakings and their legal advisors to resist any investigation into their activities as they know that voluntary requests have no obligatory effect. The second reason is best taken from Joshua:

"...the most serious violations will be the best concealed. Since the fines of almost seven million ECU in Pioneer one can safely assume that most cartel participants have no desire to be caught. The days when price fixing and market sharing agreements were innocently notified - if they ever existed - are past".

The third ground is a factual one. As many decisions of the Commission have been annulled[8] or cancelled,[9] or had fines reduced[10]due to factual deficiencies in the

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[5] Case 136/79 [1980] ECR 2033

[6] "which, since the Commission prefers to find the building open do not take place at dawn..." Weatherill, Cases and Materials on EC law at p 399

[7] "The Element of Surprise; EEC Competition Investigation under Article 14(3) of Regulation 17/62"(1983) 8 EL Rev 3

[8] Case 6/72 *Continental Can v. Commission* [1975] ECR 495

[9] Case 73/74 *Papier Peints v. Commission* [1975] ECR 1491

[10] Case 85/76 *Hoffman La Roche v. Commission* [1979]ECR 461

Commission's case, the onus is on them to produce adequate evidence to justify and defend their decisions.

Other factors that would be taken into account when deciding whether to embark on a surprise investigation would include the secrecy of the investigations and the past conduct of the undertaking. Further, "It can in general be said that the suspected infringement will be of a type that would normally attract a heavy fine. Heroic measures would normally be inappropriate in a case of minor importance".[11]

For Joshua then the dawn raid is required to extract information which firms would not volunteer and to ensure that Commission decisions are based on accurate information. It would appear therefore that the dawn raid is a necessary evil in the murky world of corporate dealings.

Some writers have criticised the Commission for its conduct in mandatory investigations. Korah[12] discusses the action of the Commission in response to an undertakings failure to submit documents voluntarily under Article 14(3). Should a fine be imposed immediately, or a decision issued to produce those further documents that the Commission finds relevant to the investigation although the undertaking itself had not envisaged them being required? In Korah's discussion of the decision in *FNICF* [13] where such a fine was imposed, she states:

"By acting strongly and imposing a fine, the Commission may have deterred undertakings and associations from submitting voluntarily to inspection by mandate in future. Lawyers may advise that the undertaking should formally refuse to submit voluntarily, but at the same time inform the inspectors that if they request any documents within the terms of their mandate they are likely to be produced. If a problem arises over some particular group of documents the inspectors would then have to obtain a formal decision giving the undertaking time to consider its position and decide to appeal to Luxembourg."

The problem here again is that often in investigations time is of the essence. In seeking to obtain a decision to require production of documents the undertaking is

[11] Joshua opp cit at page 45
[12] "Inspections under the EEC Competition rules; Dangers of Voluntary Submission." 4 BLR 23
[13] OJ 1982 L319/12

given notice and can delay production of those documents by challenging the decision. This could be fatal to the investigation and would also delay the suspension of activities breaching Articles 85 and 86.

The major issue in relation to the investigative powers of the Commission appears to be the balancing of issues of natural justice and the rights of the undertakings subject to investigation, and the need on the part of the Commission to produce accurate information detailing the behaviour of the undertaking to ensure that if a breach of Articles 85 and 86 has taken place any decision to suspend such activities will be safe from challenge. It should be noted also that as in any criminal investigation, (and it is submitted that competition policy shares the characteristics of such proceedings as discussed in Chapter Three) third parties may also be suffering loss caused by the undertaking's alleged breach of the competition rules. These issues must be balanced against the rights of the undertaking under investigation.

4.2 Issues of Natural Justice

The question of dawn raids and issues of natural justice have been discussed by the Court in a series of cases,[14] most recently in *Hoechst v. Commission.*[15] Here the

[14] Case 136/79 *National Panasonic Ltd v. Commission* [1980] ECR 2033. This was the first case to come before the Court in which the compatability of the "dawn raid" under Article 14 and issues of fundamental rights were considered. The applicants, National Panasonic, claimed that by failing to communicate to it the decision to investigate its offices by carrying out a "dawn raid", the Commission had infringed its fundamental rights. The particular rights which the applicants alleged had been infringed included the right to receive advance notification of the intention to apply a decision regarding it, the right to be heard before a decision adversely affecting it is taken and the right to use the opportunity under Article 185 of the Treaty to request a stay of execution. In particular the applicants relied upon Article 8(1) ECHR whereby "everyone has the right to respect for his private and family life, his home and correspondence". They claimed that these guarantees must be provided *mutatis mutandis* also to legal persons.
The Court confirmed its decision in Case 4/73 *Nold* [1974] ECR 491 at p.507 in which it stated that fundamental rights form an integral part of the general principles of Community law. However it went on to state that whilst the provisions of Article 8(1) ECHR do provide rights which must be protected under Community law, the provisions of Article 8(2) acknowlege that inteference with those rights is permissable to the extent to which it "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others".
The Court found that the function of the rules in Regulation 17/62 is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. It held:

applicants refused admission to Commission officials who wished to search their premises arguing that they were entitled to exclude them until a search warrant had been obtained through the national procedures. The Commission eventually gained admission this way but went on to fine the applicants for failure to comply under Article 14(3). The applicants challenged the decision on the grounds of the wide scope of the powers of investigation enjoyed by the Commission. The Court stated that in interpreting Article 14, particular regard had to be accorded to the rights of the defence. It held that some rights of the defence, particularly those relating to legal representation and the status of privilege applying to lawyer and client had to be recognised and respected at the preliminary stage of the investigation. However, balanced against this was the Court's recognition of the pivotal importance of the Commission's investigative powers in the enforcement process, particularly the need to secure access where undertakings were refusing to comply with their enquiries.
The Court held:

"That right of access would secure no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to co-operate or adopted an obstructive attitude."

The Court stated that if the Commission's entry is opposed, the entry cannot be forced. The Commission officials must request permission from the national courts. However the national courts must grant the warrant to facilitate the effectiveness of the Commission's actions. The effect is therefore purely procedural. The Commission

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"The exercise of the powers given to the Commission by Regulation No 17 contributes to the maintenance of the system of competition intended by the Treaty which undertakings are absolutely bound to comply with. In these circumstances, it does not therefore appear that Regulation No 17, by giving the Commission the powers to carry out investigations without previous notification, infringes the right invoked by the applicant."
Therefore the Court, whilst acknowleging that the principles of Article 8 were applicable to an investigation by the Commission, found that the exception in Article 8(2) justified the action taken by the Commission under Regulation 17/62.

[15] Case 46/87 [1989] ECR 2859

requires a national warrant; but the national courts are obliged to grant it. According to Vincenzi[16] the decision in *Hoechst* is

"...an uncomfortable compromise between the fundamental principles of national law and the need for effective Commission powers. In such cases there is an inevitable conflict between the need to give adequate notice to the person or body concerned of the purpose of the search (under Article 14(3)) on the one hand and, on the other, the difficulty of knowing precisely what is in the hands of the suspected undertaking and ensuring that it remains there when the officials arrive."

The Court did however state that in the exercise of the Commission's powers, the Court has the power to determine whether methods of investigation taken by the Commission under the ECSC Treaty are excessive.[17]This presumably would be applicable to the powers of investigation under Regulation 17/62.

In *Hoechst* the Court discussed the application of fundamental rights in Community law. It restated its commitment to upholding general principles and fundamental rights. The applicants based their case on the fundamental right to the inviolability of the home. On this point the Court stated:

" ... it should be observed that, although the existence of such a right must be recognised in the Community legal order as a principle common to the laws of the Member states in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergencies between the legal systems of the Member states in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities."

Therefore the Court concluded that the right to the inviolability of the home applies only to domestic situations as this is the protection granted in most member states. The application to business premises can be legitimately denied as member states have no consistent pattern of laws granting such protection.

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16 "Law of the European Community"p.281

17 see Cases 5-11 and 13-15/62 *San Michele and Others v Commission* [1962] ECR 449

4.3 Article 8(1) ECHR

In addition to the use of Community general principles to support their case, the applicants in *Hoechst* also relied on Article 8(1) of the European Convention on Human Rights. This provides" Everyone has the right to respect for his private and family life, his home and his correspondence".

It must however be read in conjunction with Article 8(2) which states:

"there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Again the Court held that Article 8(1) does not extend to business premises, and that any such protection could only be afforded in as much as it forms part of the general principles of Community law. As already stated, no general principle relating to protection of business premises was held to apply other than that which to safeguard due process under law. On this point the Court stated:

"None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal; must have a legal basis and be justified on the grounds laid down by law, and consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law."

However in the recent case of *Neimietz v. Germany*[18] before the European Court of Human Rights, the Court stated that Article 8(1) ECHR was not limited in application to a persons home and private life but that it embraced "certain professional or business activities or premises consonant with the object and purpose of Article 8(1)". In the *Niemietz* case the applicant was a lawyer whose offices (which were premises in which he also lived) were searched by the German police pursuant to a search warrant

[18][1993] 16 EHRR

issued in the Munich District Court. The warrant ordered the search in order to obtain information that would reveal the identity and possible whereabouts of a third party who was the subject of a criminal investigation by the state. The applicant complained *inter alia* that the search had violated his right to respect for home and correspondence as guaranteed by Article 8. The Court decided unanimously in his favour. In its investigation of the relevant domestic law the Court established that under Article 13(1) of the Basic Law (Grundgesetz) of the Federal Republic, the inviolability of the home is guaranteed. This provision has been consistently interpreted by the German courts to include business premises.

The Court went on to discuss the case law of the European Court of Justice. It scrutinised the *Hoechst* decision, in which Article 8(1) ECHR was held to be restricted to personal freedom and could not be extended to business premises. In the opinion of the Court it was pointed out that on several occasions in the past[19]the Court had determined that activities of a professional nature may fall within the notions of "private life" and "correspondence" under Article 8(1) of the Convention. In both the *Malone* and *Klass* cases[20] the Court held that telephone tapping poses a threat to privacy in terms of physical intrusion into a person's private life, even if business communications were involved.

In *Chappell v. United Kingdom*[21] the Court held that personal searches and searches of premises or property may also breach Article 8(1) where business premises are concerned. In Chappell an Anton Piller[22] order had been issued by the High Court. The applicant, a video tape dealer, was being sued for breach of copyright by the plaintiffs who obtained the order against him to search for pirate videos. The order was executed in the defendant's offices and home (as he lived upstairs) by five private persons acting for the plaintiffs, including their solicitor. At the same time, as pre-

[19] *Klass and Others v. Germany* [1978] 2 EHRR at para 41 and *Malone v. UK* [1985] 7 EHRR 14 para 64

[20] opp cit

[21] [1990] 12 EHRR 1

[22] An Anton Piller order is one by which the High Court may, without hearing the defendent, authorise the plaintiff in civil proceedings to search the defendent's premises to seize property that is the subject of court proceedings to prevent its disappearance.

arranged, eleven policemen executed a search warrant for obscene videos. The Court held unanimously that although there had been an interference with the applicants private life and home in the sense of Article 8(1), the grant and terms of the Anton Piller order issued in thc case, and its manner of execution, could be justified, in terms of Article 8(2), as being necessary for "the protection of the rights of others".

In *Niemietz* the Court in its decision recognised that the division between personal and professional activities is often blurred and cannot be distinguished without close scrutiny.

"The scope of the right to respect for private life is such that it secures the individual a sphere within which he can freely pursue the development and fulfilment of his personality...Whether or not such matters have to be considered as relating to a persons private sphere, as opposed to public life, depends upon the relevant features of the activities."

In *Niemietz* the Court decided that the premises concerned, despite being business premises, could benefit from the protection provided for private life and home under Article 8(1) of the Convention.

However, as in the Chappell case before, the Court went on to find that the search of the lawyers' office was justified on the grounds included in Article 8(2) and was therefore valid under national law.

It is difficult to assess the impact of *Niemietz* on the investigative procedure of the Commission. Both *Chappell* and *Niemietz* shared the feature that the applicant lived and worked in the same premises. Such a situation is unlikely to arise in competition proceedings against major undertakings. Therefore *Niemietz* can be distinguished from *Hoescht* in this respect.

The Court in *Niemietz* does appear to be open to an appreciation of the blurring of the private/public distinction in relation to Article 8(1). What is unclear is whether this applies specifically to the role of the lawyer who as the court stated enjoys a unique position of confidence with the client to which the public is excluded. This would correspond with lawyer/client privilege but here protects the lawyer in the pursuit of

his professional activities that the Court found involved the exercise of "domestic authority" in his offices.

What is clear from the case law of the European Court of Human Rights is that even if the Court is prepared to apply the protection granted under Article 8(1) to a limited category of business situations, invariably any breach of the protection granted has been found to be justified by the Court under Article 8(2). Therefore one can conclude that if the Commission in its powers of investigation was held to be subject to Article 8(1) ECHR, then the action could be justified under Article 8(2). The conclusion that the Commission is subject to Article 8(1) would refocus attention on the procedures adopted by the Commission, i.e. that they are necessary and proportionate as stated in Article 8(2). Beyond this requirement it would appear that the Commission would be justified in its actions in its investigations under Article 8(2). This view is shared by Professor Arnull[23] in his discussion of the Court's Opinion 2/94 in which the Court declared that the Community lacked legal competency to accede to the Convention. According to Professor Arnull, if the Community were to accede to the Convention and protection under Article 8(1) applied, invariably Article 8(2) would also be applicable in competition law cases. Referring to the Court's ruling in *Hoescht* he commented: "Given the derogation laid down in Article 8(2) of the Convention, it may be doubted whether the practical result would have been much different even if the Court had accepted that Article 8(1) was applicable".

In conclusion it appears that any authority with investigative powers will be the subject of fierce criticism on the grounds of civil liberties. In any democratic society balancing individual rights and those of other parties will be controversial. The investigative powers granted to the Commission under Regulation 17/62 are essential to the enforcement of competition law. As the European Court of Justice stated in *Hoechst*, in the exercise of Article 14 particular regard must be accorded to the rights of the defence, especially those relating to legal representation and lawyer/client

[23] "Opinion 2/94 and its implications for the future constitution of the Union" CELS Occasional Paper No. 1 p.9

privilege. With these safeguards of individual rights then the investigative powers granted to the Commission are fundamental to the effective enforcement of competition policy.

This dilemma of the balancing of economic rights against fundamental human rights sits at the centre of this discussion. Whilst the economic goals of the Community take precedence over fundamental human rights this dilemma will persist. As discussed in Chapter One, the Community must establish its true direction, whether as an economic community expanding to embrace new members, or as a mature economic community developing social and political common policy. In establishing its future direction it must provide certainty for the citizens of the Union in respect of their fundamental rights.

However no legal system exists in which the rights guaranteed under the constitution are absolute. It is the balancing of fundamental rights that is the crucial feature of modern western democracies. Thus the guarantees contained in Article 8(1) of the Convention are not absolute but are subject to the provisions of Article 8(2) which contains a comprehensive list of justifications for breach of Article 8(1). However it is wrong to assume that accession to the Convention by the Community would have little impact as in the majority of Community law cases where Article 8(1) could be invoked derogation under Article 8(2) would apply. It is the status of the fundamental right and the ability to invoke the right with certainty which is crucial to the parties involved and the protection of their interests. Accession to the Convention is essential to provide consistent guarantees to all Community citizens that their fundamental rights will be protected within the areas of competency of the Community.

Chapter Five

Legal and Professional Privilege

5.1 Professional Secrecy

This chapter will examine the development of legal and professional privilege as a general principle in EC competition policy and Community law in general.

Article 20 of Regulation 17/62 is entitled "Professional Secrecy". It imposes on the Commission and the competent authorities of the member states an obligation not to disclose information acquired by them as a result of the application of the Regulation that is "of the kind covered by the obligation of professional secrecy."[1]

The concept of professional secrecy as outlined in Regulation 17/62 is not identical to what is known as legal professional privilege in English law. The English concept of privilege consists of:

> "...communication passing between lawyer and client conveying legal advice relating to the conduct of on-going litigation which may not be given in evidence or disclosed by the client and, without the client's consent, may not be given in evidence or disclosed by the legal advisor."[2]

As long ago as 1833 in *Greenough v Gaskell*[3] it was established that the privilege does not extend only to situations in which litigation is contemplated, but applies to all communications between client and legal advisor.

The privilege referred to in Article 20 as professional secrecy is a reference to the concept known in French law as "le secret professionel." This is a wide concept that applies not only to lawyers but to anyone whose occupation leads him or her to be entrusted with confidential information. This would include members of the medical profession and government

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[1] Regulation 17/62 Article 20(2)
[2] Cross and Taper on Evidence at p470
[3] [1833]1 My&K 98

officials. The protection provide under Article 20 is therefore wider than the concept in English law.

The crucial issue however is that under English protection for legal privilege would apply in competition law investigations, but there is no such protection in Article 14 of Regulation 17/62. Article 14 provides that:

"In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings...To this end the officials authorised by the Commission are empowered (a) to examine the books and other business records:(b) to take copies of or extracts from the books and business records..."

There is no mention of "le secret professionel" in relation to Article 14. Therefore it appears from the 1962 Regulation that no protection of lawyer/client communications was intended to be afforded in the investigatory powers of the Commission.

It appears that in the early years of the implementation of Articles 85 and 86 the absence of any reference to such protection under Article 14 posed no particular problems.[4] However after the accession of the new member states in 1973, the subject became one of increased attention.

5.2 The History of the Debate

In 1976 the Consultative Committee of the Bars and Law Societies of the EC (the CCBE) published a report entitled "The Professional Secret, Confidentiality and Legal Privilege in the Nine Member States of the EC" (also known as the "Edward Report " after its author.) The Report concluded that the differences between the laws of the various countries were, "differences of approach or method (made necessary by their fundamentally different legal systems) rather than differences of result."

[4] According to evidence given by the Commission to the Court in its submission in Case 155/79 *AM&S Europe Ltd v. Commission* [1982] ECR 1575

In 1977 two members of the Legal Service of the Commission, Dr. Ehlerman and Dr. Oldekop, wrote a paper for the following year's Congress of the FIDE. They outlined the extent of legal privilege in all the member states, largely agreeing with the earlier Edward Report. Thereafter they discussed the legislative history of legal privilege in the EC context. Privilege was a topic for deliberation during the debate by the European Parliament on the adoption of Regulation 17/62. The Parliament produced the "Deringer Report" in which they made recommendations in favour of adoption of professional privilege in Article 14 but this recommendation was not followed by the Council. Dr. Ehlerman stated that the renewed attention to the absence of privilege in Article 14 after the accession of the new member states was due to the extensive protection of professional privilege in both the UK and Ireland where protection extends to both independent and in-house lawyers. He concluded that

"Considering the legal situation in the member-states it seems justified to assume that there exists a general principle of law, applicable in Community law as part of the "law" in the sense of Article 164 EEC...which, within certain limits, assures the professional privilege, also in administrative proceedings."

On the issue of in house lawyers who are excluded from privilege protection in some member states he comments

"...in the context of of a comprehensive and balanced solution of all the issues involved, there seems to be no reason to treat salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline."

The debate continued in 1978 when the Commission gave its official response to a question put down by M. Couste in the Parliament.[5] The Commission reiterated the absence of privilege protection under Article 14, but stated that

"...the Commission, wishing to act fairly, follows the rules in the competition law of certain member states and is willing not to use as evidence of infringements of the Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence of the firm or association of firms concerned. When the Commission comes across such papers it

[5] Written Question no. 63/78

does not copy them. Subject to review by the Court of Justice, it is for the Commission to determine the nature of a given paper."

5.3 *AM&S Ltd Europe v Commission*

The issue of legal professional privilege was finally addressed by the Court in *AM&S Europe Ltd. v. Commission.*[6]

AM&S, a company based in the United Kingdom, sought the annulment of a Commission decision under Article 173 EC requiring the Commission to produce for examination certain documents that it claimed were protected by legal privilege. The disputed Decision was based on Article 14(3) Regulation 17/62.

In the first Opinion of Advocate General Warner the history of the debate of the professional privilege issue was outlined. He went on to discuss the views of the UK and French governments who presented opinions in the case.

The UK position was that if the Court was to decide that there was no principle of Community law on the issue of professional privilege, the solution might lie in holding that in the absence of any relevant Community law, the provisions of the national law of each member state should be applied in relation to documents found in that member state. According to the UK government this solution would ensure that the expectations of those who obtained legal advice in each member state were not disappointed. Therefore the same rights could be invoked against the EC authorities as against the national authorities. In support of this the UK cited *Commission v. Italy.*[7]

Advocate General Warner rejected this view on the basis that in the Preamble to Regulation 17 there is repeated reference to the need for Articles 85 and 86 to be applied in a uniform manner and specifically so in the Commission's powers to undertake investigations.

In the opposing camp the French government denied the existence of a principle of legal privilege in relation to Article 14. This denial was based on two grounds:

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[6] see footnote 4 supra

[7] Case 267/78 [1980] ECR 31

a) that there was no express provision of EC law imposing such a restriction and

b) that the relevant laws of the member states were too disparate for any general principle to be derived from them.

Advocate General Warner stated that although the first point is correct, it is not a bar to the development of general principles of EC law. He remarked

"The Court, however, has never regarded the absence of an express provision as precluding it from holding that a general principle of law could affect the application of Community legislation. Were it otherwise, Community law would admit for example, of no principle of proportionality, of no protection for legitimate expectations, of no right to be heard (unless expressly provided for) and of no guarantee of fundamental human rights."

On the second ground of objection made by the French, Advocate General Warner stated that if a general principle can be extracted from the laws of the member states "...it matters not if its conceptual origin, the methods whereby it has been developed or even the scope of its application in detail, differ from member state to member state."

AG.Warner agreed with the CCBE's Edward Report on the status of legal professional privilege in the member states as stated earlier. He disagreed with the submission of *AM&S* (the applicant) and the CCBE that the right to confidential communication between lawyer and client was a fundamental human right. This proposition he believed can be rejected on the grounds that there is no mention of such protection in the European Convention on Human Rights or in the constitution of any member state. He also pointed out that the right can be overridden or modified by the appropriately worded statute as can be seen in the case of England, France and Belgium.

The second Opinion in the case was delivered by Advocate- General Slynn. He summarised his examination of the issue by stating that "The essential enquiry is, first, whether there is a principle of Community law existing independently of the Regulation, and secondly, whether the Regulation does, on proper construction restrict the application of that principle."

He felt that unanimity of laws across the member states was not essential in the development of general principles of EC law. He used the example of the *Transocean Marine Paint*[8] case where it was accepted that the right to be heard existed even though the rule "audi alteram partem" existed only in some member states.

He went on to agree with the personal opinions of Drs Ehlerman and Oldekop that protection should be afforded under Article 14 in some circumstances by virtue of the existence of a general principle of EC law.

AG Slynn went on to discuss the issue of in-house lawyers. AG Warner had felt that in-house lawyers were not covered by the general principle of privilege as they operated effectively as employees and were therefore not independent and may not be subject to the rules of professional bodies due to their status as in- house lawyers. In some of the member states full time employment is incompatible with the full professional status of a lawyer (in Belgium, France, Italy and Luxembourg). In other member states the employed lawyer remains subject to professional discipline and ethics (as in the UK and Ireland).

On this topic Drs Ehlerman and Oldekop differed from AG Warner. They stated "...there seems to be no reason to treat salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline."

AG Slynn agreed with this view. He pointed out that an independent lawyer may act exclusively for one client for long periods of time. To differentiate therefore between the in-house lawyer and the independent lawyer would be patently unfair (always with the proviso that the in-house lawyer is professionally qualified and subject to rules of professional discipline). Indeed AG Slynn intimates that to hold otherwise is almost offensive:

"I would reject any suggestion that lawyers...who are employed full-time by the Community institutions, by government departments, or in the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the rule."

[8] Case 17/74 [1974] 1063

The decision in *AM&S* confirms the opinions of the Advocates General as to the existence of a general principle of privilege in lawyer/client communications. This principle therefore applies to Article 14 of Regulation 17 (indeed it should also apply to Article 11 Regulation 17 which is also silent on the issue of privilege). It also laid out the extent to which the privilege applies.

"... to ensure that the rights of the defence may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights. In those circumstances, such protection must, if is to be effective, be recognised as covering all written communications exchanged after the initiation of the administrative procedure under Regulation 17 that may lead to a decision of the application of Articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking. It must also be possible to extend it to earlier written communications which have a relationship to the subject matter of that procedure."

5.4 The Position of the In-House Lawyer

However the decision of the Court limited privilege to the client and the independent lawyer, excluding the in-house lawyer who is bound to his client by the relationship of employment. On these grounds the Commission decision requiring the production of documents falling in the privileged category was held to be void.

In the later case of *Hilti AG v. Commission*[9] the issue of privilege was again discussed. The case involved the application of privilege to documents containing legal advice. These documents were internal to the undertaking reporting the content of legal advice received from independent legal advisors. They took the form of internal notes distributed within the undertaking and prepared by the undertaking so that the legal advice received from independent lawyers could be considered by managerial staff.

The Court held that such documents should be privileged as to hold otherwise would be to frustrate the protection afforded to lawyer /client communications.

Such protection will only apply to internal notes that are confined to reporting the text or the content of those communications.

[9] Case T-30/89A [1990] 4 CMLR 602

On the question of who should adjudicate claims of privilege, the Court held in *AM&S* that it (or now the CFI) should assume this role. The Court felt that it was preferable for the Commission not to select documentation in the interests of confidentiality. Therefore in any case of dispute over which documentation is privileged, the Commission must take a formal decision requiring its production. This Decision can then be appealed to the CFI under Article 173 who will adjudicate the case.

The Commission, in its 12th Report on Competition Policy, made a number of comments clarifying its interpretation of the *AM&S* case. They confirmed the extent of privileged documents i.e. "...all written communications exchanged after the initiation of administrative enquiries and all earlier written communications which have a relationship to the subject matter of those enquiries." They also confirmed the exclusion of in- house lawyers' communications from this protection.

Indeed the Commission has maintained this view due to its obvious utility in competition law infringement enquiries. In the case of *John Deere*[10], the Commission relied on memoranda of in-house counsel to establish the intentional nature of the infringement and therefore imposed a heavier fine. It has however relaxed its position on independent lawyers from outside the EC who were excluded from privilege along with in-house lawyers in *AM&S.* Such a policy of exclusion was blatantly discriminatory. Appreciating this, the Commission in its 13th Report on Competition Policy No. 78 extended legal privilege to independent lawyers from outside the EC by way of bilateral agreements on the basis of reciprocity. It did so "...in the interests of international equity and to avoid any deterioration of relations between the Community and countries in which the professional ethics are respected..." The legal mechanism for such negotiations is a mandate from the Council to the Commission enabling it to negotiate agreements in accordance with Article 228 and based on the legislative powers granted by Article 87 of the EEC Treaty. There are two categories of foreign independent lawyers; those from jurisdictions where rules on the protection of legal papers exist and are applied to communications with lawyers entitled to practise in a member state ("Community lawyers") and those from jurisdictions where communications with Community lawyers are

[10] (1985) OJ L 35/85

not protected. The first group of countries includes the USA and most EFTA countries. The Community would conclude agreements confirming and safeguarding the position of Community lawyers and extending protection in the Community to lawyers of the other jurisdiction. The Community would propose to conclude agreements with jurisdictions in the second group based on the principles of reciprocity and equal treatment.

For such agreements to be concluded successfully, two conditions must be fulfilled: firstly the foreign independent lawyers must have an independent status and be subject to rules of professional ethics and conduct similar to those which prevail in the Community and, secondly, the foreign state involved must guarantee reciprocity by protecting the confidentiality of communications with independent Community lawyers. As established in *AM&S* all in house lawyers would be excluded from protection.[11] Since these proposals were made in 1985 very little progress has been made on the issue of extending privilege to non EC lawyers. No reference was made to non EC lawyers in *Hilti* mainly because the issue did not arise. The situation remains currently unresolved.

The exclusion of in house-lawyers from protection is an area of legitimate concern. As AG Slynn observed in *AM&S,* such exclusion undermines the professionalism of lawyers in many employment positions, particularly in the public sector. Of course AG Slynn would want the protection extended only to lawyers who are members of professional bodies. The rationale of the Court appears to be that the employment relationship interferes with the independence of the in- house lawyer. The exclusion from protection is therefore not wholly based on the membership or otherwise of a professional body imposing their rules and ethics.

[11] see further Faull "The Enforcement of Competition Policy in the European Communituy: A Mature System" (1991) Fordham Corp. L. Inst. ed.Hawk 139 at p 151

5.5 Proposals for Reform

After *AM&S* it was expected that the Commission would make a concession in favour of in-house lawyers.[12]In response to criticism of the exclusion of in house lawyers in that case, the Commission issued a statement explaining its position.[13]

The Commission rejected the idea that it might exercise administrative discretion by extending privilege in practice between undertakings and those in-house lawyers who were members of professional bodies and qualified to practise independently. It felt that to do so would create differences in the conduct of competition investigations between the legal systems of the various member states and would be contrary to the ratio decidendi in *AM&S.* Further, the Commission stated that if it were to renounce the exercise of power of investigation conferred upon it by Regulation 17/62, (and upheld by the Court in AM&S), it would be an infringement of the Treaty. The conclusion of the Commission was therefore that for any concession to be made to in-house lawyers on the question of privilege, Community legislation would be required, rather than the exercise of the Commission's administrative discretion. Any such legislation could be ruled out in the absence of Community wide uniformity in the status and treatment of in-house lawyers.

This statement was subjected to scrutiny Jonathan Faull,[14] himself at that time working for the Commission in the Directorate General IV.

Faull takes issue with the Commission's view of why an administrative action whereby it refrained from exercising certain powers (i.e. examination of communication between in-house lawyers and their clients) would constitute a breach of the Treaty. Two issues arise here. Firstly, the Treaty provides that by virtue of Article 89 the Commission *shall* investigate cases of suspected infringement by the Commission. Secondly, under Article 14 of Regulation 17/62 the Commission *may* undertake all necessary investigations and to this end officials are empowered to examine and copy books and records.

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[12] as assumed by Boyd (1982) 7 EL Rev 493
[13] Bull ECD 6-1983 pt.2.1.6.
[14] (1983) 8 EL Rev. 411

Therefore it appears that there is an obligation to investigate under Article 89, but Regulation 17 allows an element of discretion.

In *AM&S* the Court held that protection would be granted to documents falling within the confidentiality category (i.e. those which constituted communication between independent, professionally qualified lawyers subject to professional body control). Documents outside this category (i.e. communications with in-house lawyers) fall fully within Article 14(1). This allows the Commission to require production of documents that it deems necessary to pursue its investigations. Can it therefore refrain from requiring production of documents when it deems it to be unnecessary?

The Commission does not feel that such discretion exists. Faull disagrees, albeit on different grounds. Technically a complainant could seek judicial review of a Commission decision not to seek documents that it is empowered to obtain.[15] Even if the issue of such a judicial review is set aside, Faull argues that "...it cannot be the Commission's general contention that all the powers conferred on it by legislation in pursuance of a Treaty objective must be exercised in full and at all times, for if that were so administrative discretion and flexibility would be utterly discarded."

However Faull believes that in cases where the Treaty lays down an objective (Article 3(f)), precise rules for the attainment of that objective (Articles 85 and 86), an obligation on the part of the Commission to enforce those rules (Articles 89 and 155), and provides for the enactment of legislation to give effect to those rules (Article 87), the legislation adopted i.e. Article 14(1) Regulation 17, obliges the Commission to use fully the means provided. In these circumstances Faull believes that any discretion that the Commission might otherwise have had is eliminated. Any concession to in-house lawyers on this rationale would infringe Articles 87 and 155 as implemented by Regulation 17.

The Commission also rejected the suggestion of a legislative amendment of Regulation 17 to include in-house lawyers. It did so on the grounds of the absence of uniformity as to the status of in-house lawyers amongst member states. This is logical and fair although Faull believes

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[15] under Article 173 EEC to bring an annulment of a Commission decision. In Case 26/76 *Metro v. Commission* [1975] ECR 1875 the Court held that had locus standi under Article 173 to bring a case.

that the real solution would be for the Council to adopt legislation to harmonise the status of in-house lawyers throughout the EC. Writing in 1983 Faull could not appreciate the change in approach to harmonisation adopted by the Council and the Commission. In the 1970s the momentum towards harmonisation led to the implementation of directives covering various professional groups.[16] The lawyers Directive 77/249 granted limited freedom to lawyers under Article 59 to pursue professional activities in member states and provide services. The Directive does not apply to those exercising the freedoms conferred by Articles 48 or 52. It would therefore be of no assistance to the in-house lawyer whose rights are derived from the status as a worker under Article 48.[17]

Since the 1970s there has been a move away from the extremely complex implementation of harmonisation directives towards a system of mutual recognition. This can be seen in Directive 89/48 which deals with the mutual recognition of higher education diplomas. Directive 89/48 applies to regulated professions. It applies to lawyers who qualify as workers under Article 48 and to self-employed lawyers under the provisions of Article 52. It therefore benefits both in-house and independent lawyers where, in the member state in question, the profession is regulated. Beyond the matters covered by the Directive, both in-house and independent lawyers remain subject to the non-discriminatory rules, (including those on the status of the in-house lawyer), applied in the host state.

In the absence of protection the undertaking must pay attention to their communications with in-house legal staff ensuring that there is nothing to compromise the undertaking should an investigation be ordered by the Commission. Sensitive material and advice must be handled by independent lawyers even though the in-house lawyers maybe subject to the same disciplines and membership of the same professional body as the independent lawyer.

In conclusion it can be observed that the establishment of legal and professional privilege is now fully established as a general principle of Community law. Its development follows a similar route to that already examined in the general principles covered in this work. However

[16] for example the doctors directives 75/362 EEC and 75/363

[17] Article 48 provides for freedom of movement of workers to accept offers of employment made in the member states as an employee

the problem exposed by the failure to protect in-house lawyers leaves an important gap in the application of the principle. It appears that the absence of uniformity in the status of in-house lawyers combined with the retreat of the Community from attempts at harmonisation will result in the continued denial of legal professional privilege to communications between in-house lawyers and their clients/employers.

Chapter Six

Issues of Confidentiality

6.1 Legislative Provision

The confidentiality of information that is the subject of an investigation under the provisions of Regulation 17 is one that raises a conflict between two general principles of Community law, that of the right of interested parties to have access to the Commission's file, and the right of interested parties to be protected from disclosure of confidential information.

Confidentiality is of primary importance in the field of competition policy. Undertakings under investigation do not want details of their agreements to become public knowledge. Similarly undertakings would not want a dominant firm about whom they had complained to the Commission to discover the source of the complaint for genuine fear of reprisals.[1] However the Commission has a duty under Article 19 (1) and (2) to hear all interested parties and this will inevitably lead to some situations where information must be divulged which was gathered from one source to facilitate prosecution of a case against another firm.

The EC treaty and secondary legislation contain four provisions for protection against the disclosure of confidential information.

Regulation 17/62. Under Article 19 of the Regulation which covers the hearing of the parties and of third persons, subsection 3 states:

"Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. *Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.*"[2]

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[1] Case T- 65/89 *BPB Industries plc v Commission* where the Court stated at para 33 that the Commission is not obliged to disclose documents to a dominant firm which would reveal the identity of the complainant.

[2] italics added

Article 20 deals specifically with professional secrecy. Article 20(1) provides that information obtained in the course of an investigation must only be used for the purpose of the relevant request or investigation. Under subsection 2 it states:

"Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member states, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and *of the kind covered by the obligation of professional secrecy."*

Article 21 is concerned with the publication of decisions. Under subsection 2 it states: "The publication shall state the names of the parties and the main content of the decisions; *it shall have regard to the legitimate interest of undertakings in the protection of their business secrets."*

Article 214 of the EC Treaty provides more general protection of confidential information. It states:

"The members of the institutions of the Community , the members of committees, and officials and other servants of the Community shall be required, even after their duties have ceased, *not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."*

6.2 The Scope of Professional Secrets

In the Twelfth Report on Competition Policy the Commission first formulated the rules of which types of documents it considered to be confidential. These are

"(i) documents or parts thereof containing other undertaking's business secrets
(ii) internal Commission documents, such as notes, drafts or other working papers
(iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality."

The Court has however never stated precisely which types of information are covered by the obligation of professional secrecy. In a number of continental systems the obligation may arise by virtue of the relationship in which the information is transferred rather than the character of the information itself. The concept of the secret professionel is similar to legal privilege in English and Scots law, although in some countries it extends beyond the lawyer-client relationship.

In the United Kingdom various degrees of protection of secrets is granted by, *inter alia,* The Official Secrets Act, the law of contract, the law relating to breach of confidence and the rules of evidence, for example as they apply in the case of legal professional privilege. In 1975 the CCBE in the Edward Report[3] studied the different rules of professional secrets in the legal systems of the seven counties who at the time made up the Community. In France, Belgium and Luxembourg, the professional secret is one that is of an intimate moral or material character.[4] However the question of whether an item of information is a secret is a question of fact in each case. In these countries the obligation of professional secrecy applies even where the facts can be known by others. It appears from the Edward Report that the national laws stress the professional relationship rather than the nature of the secret involved. This is not strictly the case under Community law. It appears that the concept is wider and covers all information received by Commission officials in the course of their duties whether or not the parties request that it be treated as confidential. According to Kerse:[5]

"...there is a case for saying that the obligation of professional secrecy covers all information received by the Commission in the exercise of its functions under the Competition Rules, and in particular Regulation 17 and the other implementing regulations, with the exception of material which is in the public domain."

6.3 Business Secrets

Under Article 20(2) of Regulation 17 express provision is made for business secrets. Business secrets can be identified as a more restrictive category of secrets compared to the more

[3] "The Professional Secret, Confidentiality, and Legal Professional Privilege in the Nine Member States of the European Community" (1975), by D.A.O.Edward QC.
[4] "tout ce qui a un caractere intime que le client a un interet moral et material a ne reveler"ibid at para 24
[5] EC Antitrust Procedure 3rd Edition p 307

general professional secret. The term covers protection of confidential know-how and other technical information.[6] According to Kerse[7]

"The Commission has taken the view that whilst a competitor's prices and other trading conditions can often be found out by inquiry or own customer feedback, accurate information on quantities sold and market share is normally considered a trade secret which confers legitimate competitive advantages and thus not to be revealed or shared with competitors."

In *Hoffman La Roche*[8] sales figures, estimates of market shares and business forecasts were held to merit protection as a business secret. Information given to banks, professional advisors and tax authorities should also remain confidential and be protected from disclosure to third parties.

Article 20(2) is stated expressly to be "without prejudice to the provisions of Articles 19 and 21". Article 19 covers the right to be heard and Article 21 covers the publication of decisions. It is clear therefore from the wording of Regulation 17 that some circumstances may arise where the Commission may disclose information that falls within the category of professional secrets where the public interest is at stake. "The obligation of professional secrecy is not intended to frustrate the enforcement of the Treaty."[9] The Commission must therefore balance the interests of the undertakings concerned and those of complainants and third parties when considering disclosure of professional secrets. Business secrets however enjoy a more privileged position which will be discussed later in this chapter.

6.4 Article 20(1) Limiting the Use of Information to the Investigation Underway.

Article 20(1) limits the use of the information acquired by the Commission, or by the national courts acting pursuant to Regulation 17, so that it may not be used for purposes other than the

[6] see *Boussois/Interpane* [1984] CMLR 124. Here the Commission considered certain unpatented know-how to be secrets where the know-how package as a whole was not readily available or in the public domain, although some parts were known.
[7] EC Antitrust Procedure 3rd Edition p308
[8] Case 85/76 [1979] ECR 461
[9] Kerse ibid at p309

particular investigation underway.[10] In *Direccion General de Defensa de la Competencia v Asociacion Espanola de Banca Privada*[11] the Court was asked to rule on the legitimacy of the use by national competition authorities of information received from the Commission pursuant to its requests for information under Article 11 of Regulation 17 or supplied in requests or notifications under Articles 2,4 and 5. The Court held that Article 20(1) prohibited authorities holding information from using it for a purpose other than that for which it had been required. In *SEP v. Commission*[12] the Court stated that competent competition authorities may not disclose information to government departments responsible for State businesses that compete with the undertaking concerned. The use of the information must respect the legal context for which it had been acquired. Undertakings should however be cautious about disclosing business secrets on a voluntary basis prior to the decision to initiate an investigation as such information will not be protected under Article 20(1). Such information could be used for purposes other than the investigation that has been initiated. Such information could not of course be disclosed if it satisfies the requirements of Article 20(2).

6.5 Disclosure of Professional Secrets to the Commission in the Course of the Investigation.

As discussed in Chapter Four the powers of investigation of the Commission under Article 14 are extensive. Under Article 14(1), for the purposes of the investigation, the Commission has the powers *inter alia* to examine the books and business records of the undertaking under investigation. According to Joshua,[13] an official of DG IV, the power to examine business records is "wide enough to cover all documents relating to the commercial activities of the company".

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[10] However, the Court of Justice in Case 85/87 *Dow Benelux v Commission* [1989] ECR 3150, at para19, has ruled that the Commission may choose to initiate an investigation to verify or add to information obtained during a prior investigation

[11] Case C67/91 [1992] ECR I- 4785

[12] Case T-39/90 [1991] ECR 1497

[13] "The Element of Surprise: EEC Competition Investigation under Article 14(3) of Regulation 17" (1983) 8 E.L.Rev at p.11

In *AM&S* [14] business records were said to refer to "documents concerning the market activities of the undertaking". All documents related to the business of an undertaking are therefore open to inspection. In Commission Decision *FIDES,*[15] the Commission stated that it can examine any documents, even those containing business secrets; "business secrets cannot be invoked against Commission officials acting pursuant to Article 14 of Regulation 17".

As already stated, Article 20 imposes on the Commission a legal obligation not to disclose professional secrets. This covers all confidential information acquired by the Commission in the exercise of its duties and includes business secrets disclosed during an investigation. As a result of this guarantee of protection against disclosure by the Commission to other parties, undertakings cannot refuse to supply documents containing business secrets during investigation.

Protection against disclosure of business secrets does not therefore extend to the investigatory stage of the proceedings. This has been challenged by various parties on a number of occasions.

In Commission Decision FNICF[16] it was argued that documents containing confidential information should not be disclosed to the Commission during an investigation. The Commission rejected this stating that "undertakings may invoke the confidentiality of such documents only within the framework of Article 20 of Regulation 17".

In 1976, the Law Society and the Senate of the Inns of Court and the Bar proposed that Articles 11, 12 and 14 of Regulation 17 should contain a right to refuse to supply information if:

"the documents, or part of the documents, or the information requested, would disclose technical or commercial secrets, the disclosure of which to any source (even with the protection of Article 20) would cause great harm to the business, and the Commission has failed to show that they are sufficiently material to justify disclosure."[17]

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[14] Case 155/79,[1982] ECR 1575 at p.1610

[15] O.J. 1979

[16] L319/12;O.J.1982 ; [1983] 1 C.M.L.R.575 at p 580

[17] Unpublished Memorandum by the Law Reform Committees of the Council of the Law Society and the Senate of the Inns of Court on the Investigatory Procedures of the Commission under Articles 11,12 13 and 14 of Regulation No. 17, March 1976, figure 25(c).

The rationale behind the Commission's powers to examine all documents including those containing business secrets at the investigatory stage is to permit access by the Commission to the maximum range of materials to facilitate an informed opinion whether to proceed with the investigation and upon which grounds. Lavoie[18] separates the Commissions proceedings into two. The investigatory stage is a fact finding exercise and is therefore of an administrative nature and no contradictory procedure is involved. Therefore the Commission should have access to all documents. The second stage begins from the point at which the Commission issues the formal statement of objections. Hereafter "the procedure, whilst remaining administrative, progresses to a more adversarial stage where the Commission is acting quasi- judicially". Consequently protection should be effective from this stage. The situation in relation to business secrets is analogous to that of the right to be heard. The Commission is not required to give parties the opportunity to be heard during the investigatory process. However the rule of *audi alteram partem* applies once a statement of objections has been issued and applies throughout the proceedings thereafter.

As already discussed in Chapter Four, the investigative powers of the Commission are subject to some limitations. In *Hoechst*[19] the Court stated that the investigative powers of the Commission "cannot be interpreted in such a way as to give rise to results which are incompatible with the general principles of Community law and in particular with fundamental rights". Therefore documents that fall into this category are protected from disclosure to the Commission during the investigatory process. This category of documents covers those which fall within legal and professional privilege as discussed in Chapter Five. It does not extend to the protection of disclosure of business secrets.

One method of ensuring the protection of business secrets would be to elevate the confidentiality of business secrets into a general principle of Community law by examination of the status of the rule in the legal systems of other member states. This process was again discussed in Chapter Five in relation to legal and professional privilege. It appears that the adoption of confidentiality of business secrets as a general principle granting protection

[18] Chantal Lavioe "The Investigative Powers of the Commission with respect to Business Secrets under Community Competition Rules" E.L.Rev. 1992 vol 17 20.

[19] Joined Cases 46/87 and 227/88, *Hoechst A.G. v Commission* [1982] E.C.R. 2859 at para 12

during the investigatory process is unlikely. This is because provision exists under Article 20 to protect the secrets from disclosure to other undertakings. Further is has not been established that any more protection than this is required, i.e. that disclosure to the Commission at the investigative stage would have any detrimental effect to the undertaking. According to Lavoie:

"The purpose of protecting business secrets is mainly to prevent competitors (or the "owner" of the business secret) from gaining access to the information; the interest of the Commission in gaining access to the business secret is to obtain evidence. Such purpose is not imperilled by supplying business secrets to officials of the Commission who respect procedural requirements and who are further bound by an obligation of professional secrecy...provided the business secret is otherwise and thereafter sufficiently protected against disclosure to other parties once it is given to the Commission for examination."

This contrasts with the position of lawyer-client privilege. Disclosure to the Commission at the investigatory stage of such material could be prejudicial to the rights of defence of the undertaking under investigation. Such material could be used as the basis of proceedings by the Commission and would therefore adversely effect the undertaking's right of defence.

The question of which documents the Commission can request in the course of the investigation is covered under Article 14(1). It extends only to documents that are deemed to be "necessary". However it is the Commission who determines whether any particular document is necessary. In *AM&S*[20] the Court stated "... it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it".

In *Orkem*[21] the Court stated that the undertaking must co-operate with the Commission and provide it with "all information relating to the subject matter of the investigation."

If the Commission required the inspection of unnecessary documents, in addition to breaching Article 14(1), they would also infringe the principle of proportionality that has the status of a general principle of Community law.[22]

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[20] Case 155/79 [1982] ECR 1575

[21] Case 374/87 *Orkem S.A. v. Commission* [1989] E.C.R. 3283

[22] under the principle of proportionality a public authority may not impose obligations on a citizen or an undertaking except to the extent that they are strictly necessary in the public interest to attain the purpose of the

In addition to the requirement of proportionality, the Commission is further constrained by the requirement under Articles 14 (2) and (3) that the decision ordering the investigation states the subject matter and purpose of the investigation. "It must clearly indicate the presumed facts which it intends to investigate."[23] The intention of the legislation is to prevent the Commission embarking on a "fishing" exercise. However the subject matter of the investigation and its purpose need only be stated in general terms. The identification of the subject matter need not be precise in relation to the document or class of documents requested. This practice is logical as the Commission, whilst not on a "fishing" exercise, may not be able to identify precisely the nature of the documents involved in the alleged breach of Articles 85 and 86.

6.6 Protection of Professional Secrets after the Investigative Proceedings.

After the investigative process is completed the Commission will issue a statement of objections. This procedure is designed to give the parties concerned the right to be heard as stipulated in Article 19. Under Article 4 of Regulation 99/63[24] the Commission's decision can only rely on the objections raised against the undertaking "in respect of which they have been afforded the opportunity of making known their views". Post - investigation protection of professional secrets is provided for in Article 20(2) Regulation 17. The protection of professional secrets includes business secrets.[25] However the obligation on the Commission not to disclose professional secrets is not absolute but is subject to Articles 19 and 21 where it is stated that the Commission "shall have regard to the legitimate interest of undertakings in the protection of their business secrets". This would appear to imply that in some circumstances the importance of protecting some classes of rights, for example the rights of defence and third party rights conflicting interests may justify an exception to the protection

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measure. It was expressly incorporated into Community law in *Internationale Handelsgesellschaft* Case 11/70 [1970] ECR 1125

[23] Case C-67/91, [1992] ECR-I 4785 at para 42

[24] O.J.Special Edition 1963-64 p47 the "Hearing Regulation"

[25] Case 53/85 *AKZO Chemie BV v. Commission* [1986] ECR 1965

of professional secrets. According to Lavoie,[26] "The important issue, as the wording of Article 20(2) confirms, is to allow an interpretation of the obligation of professional secrecy which will not deprive other parties of their fundamental rights".

In *AKZO*[27] the issue of the special status of business secrets which form part of professional secrets was addressed. The case was one in which the Court was asked to rule whether a third party had the right to have access to documents containing business secrets.

The Commission had issued a statement of objections to AKZO alleging infringements of Article 86 EC. The statement of objections was issued with a number of annexes. The same statement of objections was also sent to the third party complainant who subsequently requested the annexes in order to submit observations pursuant to Article 19.[28] AKZO objected to the disclosure. The Commission proceeded to provide the third party with access to the annexes after it had deleted the passages which in its opinion contained business secrets. AKZO brought the proceedings under Article 173 EC before the Court to declare the decision ordering disclosure void.

The Court stated in its decision that professional secrets are protected against disclosure under Article 20(2). This provision is to be balanced against the right of the complainant to be heard and also the rights of a third party with sufficient interest. However the Court went on to distinguish between the protection afforded to the standard professional secret, and the special category of business secrets. "Business secrets are afforded very special protection."[29] This protection afforded to business secrets and not the lesser professional secret is in the form of the procedure to be adopted by the Commission. The task of deciding whether documents contain business secrets remains with the Commission. However before acting on its decision to disclose information, it must give the supplier of the information the opportunity to bring an action before the Court if it wishes to contest the decision. In *AKZO* the Commission had supplied the documents to the third party complainant before informing

[26] EL Rev. 1992 vol.17 p.20
[27] Case 53/85
[28] which provides that concerned parties and third parties who can show sufficient interest be heard.
[29] Case 53/85 at para 28

AKZO, thus preventing them from challenging the decision prior to the disclosure to the complainant. The Court therefore declared the Commission's decision void.

The decision in *AKZO* therefore means that where there is a dispute between an undertaking and the Commission over information that the undertakings claims to be a business secret, the Commission must reach a formal decision on the issue that can then be challenged by the Court of First Instance. This must take place before any disclosure is made to third parties. This procedure is similar to that adopted in the case of legal professional privilege as discussed in Chapter Five.

The protection afforded the business secret is complete. A complainant cannot after *AKZO* be provided with documents that the undertaking under investigation claims contains business secrets. The balancing of rights in Articles 19 and 21 do not apply in the case of business secrets. This has been reiterated by the Court in subsequent case law.[30] In the recent *ICI* judgement[31] the Court of First Instance decided that similar procedures to those laid down in *AKZO* should apply in cartel cases where one accused undertaking requests access to documents containing business secrets of another undertaking accused of participating in the same cartel.

According to Joshua,[32] the *AKZO* judgement "imposes a strict procedural and formal requirement irrespective of the merits of the claim for secrecy. Whether the Commission acted reasonably or in good faith was not considered".

It must be noted that the concern as to the probity of the actions of the Commission is of little comfort to the undertaking under investigation whose business secrets have been revealed to a third party without it having the opportunity to challenge their disclosure as was the case prior to the decision in *AKZO*.

Joshua points out that by affording special protection to business secrets it is acting beyond any express provision to be found in Regulation 17. He states that "Some less than altruistic

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[30] see Joined Cases 142 & 156/84 *BAT & Reynolds* [1987] ECR 4487 at point 21.
[31] Case T-36/89, ICI, judgment of the CFI of 29 June 1995, not yet reported
[32] "Information in EEC Competition Law Proceedings" (1986) 11 E.L.Rev.409 at p. 422

firms may see the *AKZO* judgement as a golden opportunity to delay further the Commission's already protracted proceedings under Regulation 17".[33]

Lavoie, on the other hand in response to Joshua's criticism of the *AKZO* decision believes that the total ban on disclosure of business secrets is justified to protect genuine business secrets even if it means that some of the secrets are not ultimately justified. She states: "...the assessment by the Commission of whether a document contains business secrets or not must respect procedural requirements that will provide its supplier with a possibility for judicial review before harmful and improper disclosure is effected".[34]

The prohibition against disclosure of business secrets in *AKZO* appears to be absolute. The Court was not prepared to accept that business secrets could be disclosed subject to conditions. Advocate General Lenz did accept a limited exception. This would occur where it would be impossible to determine whether or not there has been an infringement without such disclosure. Other than this all business secrets which the Commission wishes to disclose must be subject to the checking procedure described in *AKZO.*

6.7 The Position of Defendant Undertakings.

The prohibition against disclosure of business secrets laid down in *AKZO* extended to complainants. The position of the defendant undertaking was not addressed. If the Commission refuses to disclose documents to the undertaking under investigation the undertaking would be unable to exercise their full rights of defence because some documents have not been made available to them. In *Vitamins*[35] the Court stated that the rule against disclosure as contained in Article 20(2) must be balanced against the right to be heard as contained in Article 19. It did not allow the Commission

"to use, to the detriment of the undertaking involved...facts, circumstances or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking's opportunity to make known effectively its views on the truth or implications of

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[33] ibid at p.428
[34] EL Rev. 1992 vol 17 p20
[35] [1988] O.J.L309/34

those circumstances on those or again on the conclusion drawn by the Commission from them."[36]

This balancing operation between effective enforcement of the confidentiality rules and the right to a fair hearing poses considerable problems for the Commission. If there are unable to communicate business secrets to the undertaking accused of infringing the competition rules due to the prohibition contained in Article 20(2), then they may be unable to proceed with enforcement of the competition rules as they will be unable to provide the undertaking concerned with the right to be heard under Article 19 as they will not have had access to the relevant information upon which they can respond.

The Commission stated in its Eighteenth Report on Competition Policy[37] that the

"recognition of extensive protection of confidential information is, however, subject to an important exception justified by the public interest in the enforcement of the EEC competition rules. The confidential nature of documents does not preclude their disclosure where an infringement has occurred."

In the Twentieth Competition Report[38] the Commission stated its position on the access of defendant undertakings to the file on their case where the file contained business secrets. Where business secrets are contained in the file then access to that file must be restricted to exclude such parts of the file whose disclosure may adversely affect the supplier of the information. Consequently, where a file contains business secrets, the Commission may prepare a non-confidential summary of the file containing all the essential facts upon which the Commission intends to rely. Alternatively the Commission may provide only such part of the document that does not contain the business secret.

[36] ibid at para14
[37] at point 43
[38] at point 106-107

6.8 The House of Lords Select Committee

The issue of confidentiality was addressed in the House of Lords Select Committee in the Enforcement of Community Competition Rules in 1993.[39] The Joint Working Party on Competition Law of the Bars and Law Societies of the United Kingdom ("the Joint Working Party") in giving evidence to the Select Committee were critical of the Commission in its handling of the conflict between access to the Commission's file and confidentiality. They found that claims of confidentiality in respect of some documents were unfounded and that information was no longer truly confidential by the time the Commission took action. "However, in any event there can be no doubt that the rights of the defence are a far superior right to the rights of confidentiality...and problems of confidentiality in a particular case can never justify the failure to provide the full rights of defence."

The Joint Working Party went onto propose that the Hearing Officer should be given jurisdiction to deal with disputes over the rights of defence in the course of proceedings. They pointed out that this was particularly necessary as the Court of First Instance could only act on an appeal against a final decision of the Commission.

The Joint Working Party identified one of the main problems in relation to the issue of confidentiality and access to file as the failure of the Commission to take a consistent view of what actually constitutes professional secrets. Mr Nicholas Forwood QC said that further problems were created due to the fact that lawyers and officials from different backgrounds within Europe had differing expectations as to what access to the file should mean. He criticised the Commission for failure to adequately clarify its practice resulting in significant variation in the level of disclosure accorded by Commission rapporteurs in different cases under investigation.

Dr Ehlerman, speaking for the Commission assured the Committee that the Commission was committed to the rights of the defence. He believed that the Commission was "obliged to provide to the companies concerned documents that are manifestly exculpatory in relation to the allegations raised by the Commission". He admitted however that there had been errors,

[39] Session 1993-1994, 1st Report, 7 Dec. 1993, London, HMSO.

most notably in the *Italian Flat Glass* case[40] and that procedural improvements could be made. He recommended that the mandate of the Hearing Officer should be enlarged so that he was available as a kind of ombudsman in case of difficult conflicts between access and protection of confidentiality. He further recommended that there should be a notice setting out the rules to avoid misunderstandings.

6.9 The Revised Role of the Hearing Officer and Issues of Professional Secrecy

In 1994 the Commission, partly in response to the findings of the Select Committee,extended the role of the Hearing Officer to the whole of the administrative procedure of the Commission.[41] Under the same decision the Hearing Officer was also granted decisional powers. Article 5 paragraphs 1 and 2 of the decision granting these powers to the Hearing Officer authorises him[42] to decide whether certain documents in the Commission's file should be disclosed in order to ensure the proper exercise of the right to be heard. Article 5 paragraphs 3 and 4 lays down the procedure that the Hearing Officer must follow when he intends to grant access to documents that may constitute business secrets. Before taking any decision, the Hearing Officer should inform the undertaking whose interests are at stake, of his intention and his reasons for granting access. The decision should be reasoned and specify the date when the disclosure is to take place. The date must not be less than one week from the date of the notification. During this period the undertaking concerned can lodge an appeal against the decision under Article 173 EC before the decision is implemented. This procedure corresponds to that developed by the Court in *AKZO* and *ICI*.[43]

In the Twenty Third Statement on Competition the Commission confirms the procedure in the new terms of reference of the Hearing Officer. It states that the Hearing Officer should decide which items of information supplied by a firm and contained in the Commission's file can be communicated to other firms or published. It reiterates the established exception that

[40] Case T-68/89 *Societa Italiano Vetro Spa and others v Commission* [1992] 11 ECR 1403
[41] O.J.1994 L 330/67
[42] To date the Commission has appointed three hearing officers all of whom have been men, reference is therefore made to the Hearing Officer as a man.
[43] although the *ICI* decision was delivered after the new terms of reference of the Hearing Officer.

publication of business secrets is necessary in cases where such secrets constitute the evidence upon which the Commission has to rely in order to prove an infringement.

The new procedure is unusual in that it grants to the Hearing Officer in the area of business secrets the power to take a decision on behalf of the Commission that the interested undertaking can challenge directly before the Court of First Instance. This is not the situation in his other decision making powers. This can be explained by the acceptance of the Court in *AKZO* that the Commissioner in charge of competition matters may be authorised to take decisions ordering a surprise inspection within the meaning of Article 14(3) of Regulation 17. It considered that such decisions do not relate to issues of principles but were restricted to management issues.

It would appear therefore that the procedures developed through the case law of the Court in *AKZO* and *ICI* do provide protection to the undertaking concerned about disclosure of business secrets. This, combined with the new terms of reference of the Hearing Officer provide consistency of application and essential objectivity in this field. According to Van der Woude:[44]

"As long as the Commission combines and is compelled to combine the functions of prosecutor and judge, it can only look for means which soften the subjective angle of its unilateral powers. In this imperfect procedural context, the new terms of reference offer a major contribution to objectivity."

6.10 Article 214

To conclude this discussion of issues of confidentiality in competition proceedings it is necessary to briefly analyse the protection contained in Article 214 EC. This Article imposes upon officials of the Community institutions the obligation not to disclose any information that may fall into the category of professional secrets. The *Stanley Adams*[45] case illustrates the scope of this protection. Adams was employed by the Swiss pharmaceutical company

[44] "Hearing Officers and EC Antitrust Procedures;the Art of Making Subjective Procedures more Objective."CMLR 33 1996 531-546.
[45] Case 145/83 [1985] ECR 3539

Hoffman-La Roche. He had approached the Commission and requested confidentiality before providing documents to the Commission that indicated that Hoffman-La Roche were acting in breach of competition law. The Commission subsequently brought proceedings against Hoffman-La Roche. They were found guilty and fined. The company discovered, partly as a result of documents supplied to them by the Commission that Adams was the informant. He was arrested by the Swiss police for economic espionage. His wife committed suicide and he suffered financial ruin. After his release he sued the Commission for damages under Article 215. This provides that the Commission may be liable in damages for the wrongful disclosure of information under Article 214. The Court held that the Commission was bound by a duty of confidentiality and that it had violated this. In particular it found that the Commission had failed in its duty by not warning Adams that Hoffman-La Roche was planning to prosecute him. However, it held that Adams had contributed to his loss (as he returned to Switzerland knowing that he risked arrest) and it decided that liability should be apportioned equally between him and the Commission. The Commission was therefore ordered to compensate him to the extent of one half of the damage suffered. The actual sums involved were £200,000 for mental anguish and economic loss plus £176,000 costs.

Conclusion

The new terms of reference for the Hearing Officer in 1994 are a considerable development in the procedures involved in the confidentiality of information in competition proceedings. It is submitted that an exhaustive list of what actually constitutes a business secret is difficult in a system whose members each have differing rules on confidentiality. As already stated, the area of professional secrecy does not present well as a case for the elucidation of a general principle of law. This is essentially because provision is already made in the Treaty for protection, and further that protection cannot be absolute as the protection of confidentiality conflicts with the fundamental principle of the right to be heard which ultimately will take priority. The checking procedure developed in *AKZO* and *ICI* combined with the extension of the jurisdiction of the Hearing Officer to adjudicate on questions where the confidentiality of

documents is being questioned presents a considerable improvement in the procedures enforcing competition policy.

Conclusion

Chapter One of this work concludes with the suggestion that in order that human rights be applied uniformly throughout the member states, the Community must accede to the Convention. As the Court has recognised that the Community does not have competency to acede under the existing Treaty, amendment of the Treaty is required to facilitate accession. Herein lies the crucial issue for the future of the Community - and the development of the body of Community law. The European political climate in the 1990's is moving away from the promotion of greater political integration. The early ideals of a United States of Europe founded on monetary union and full political and legal citizenship appears, even to the Europe enthusiast, increasingly outdated in todays political and economic climate. Milward[1] suggests that Europe post Maastricht will endure a "natural dissolution" characterised by the "reassertion of national diversity". The reasons for this are numerous. The collapse of the Communist regimes of Eastern Europe has opened the possibility of wider trading links reducing the need for interdependence in Community member states. The political structure of Europe has changed. In 1989 there were 39 nation states, in 1992 that figure had risen to 54. Rather than Europe forming a discrete and closely knit continent of established member states the idea of a Europe of multiple identities has become increasingly popular.

In addition to the political climate in Europe moving away from closer integration, there exists hostility towards the Community and its institutions for their perceived lack of accountability. According to Lodge,[2] in the immediate future "there must be an increase in the efficiency, effectiveness, accountability and openness of the institutions to enhance their capacity to act in a coherent manner internally and externally".

This she states is an "overriding imperative".

Herein lies the dilemma for the Union. On the one hand the institutions and for the purposes of this study, the Commission, must conform to standards of greater effectiveness to inspire

[1] Milward and Soerenson "Interdependence or Integration?A National Choice" in "The Frontier of National Sovereignty" 1993 Routledge

[2] "Towards a political union?" in Lodge, The European Community and the Challenge of the Future. 1993, Pinter

increased confidence in the operation of the Community system in the member states. On the other hand, to facilitate the changes required to enhance the effectiveness of the Community, member states must be prepared to grant additional powers to the Community institutions. This has not been forthcoming. In fact any transfer of power to Community institutions appears to become more remote with the passage of time. The crucial factor in this is that the member states (in the form of the European Council) still control the Community and are unlikely to concede any further powers to its institutions. According to Ward[3] "The enduring power of the Council is the overriding reason for the present demise of the Community".

The political will to change this constitutional impasse does not exist at the present time. Therefore the institutions of the Community are damned for failure to provide effective remedies (as can be seen in the case of the Court and the application of ECHR to Community law), yet Treaty amendment is unlikely to be approved to facilitate the provision of such remedies [4] As long as this situation persists, the Court will be unable to develop a consistent and uniform application of human rights.

This conclusion appears to indicate a general sentiment of disappointment in the application of general principles in the field of competition law enforcement. This is not the case. In a number of the areas examined in this work, solutions have been found by the development of general principles by the Court of Justice. Many improvements have been introduced without recourse to legislative amendment. This can be seen in the issue of confidentiality and the checking procedures introduced in *AKZO*.[5] This is also the case for parties in competition proceedings being granted the right to be heard. Here the Court has developed and pursued a policy of granting parties the right to seek judicial review of decisions of the Commission. There still exists however the need to relax the strict conditions provided under Article 173 EC. This would ensure that third parties could be confident in their ability to seek review of a Commission decision that effects them. This would however require Treaty amendment.

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[3] "A Critical Introduction to European Law"

[4] The issue of constitutional amendment will be discussed at the forthcoming Inter Governmental Conference between the member states of the Union in June 1997.

[5] Case 53/85 [1986] ECR 1965

The issue of the plurality of the roles of the Commission in competition law enforcement is, it is submitted, one that can be addressed without Treaty amendment. The Court, by pronouncing that a penal element does exist in competition law proceedings would force a more onerous burden of proof onto the Commission in its decisions in this area. This would bring Article 6 ECHR firmly into the picture and would require the Commission to separate its roles in the enforcement process. Creation of an independent fact finding body would facilitate this development. Such a change would require amendment of Regulation 17/62, but not the Treaty itself.

The issue of legal and professional privilege is one which calls for immediate reform. The wholly inequitable and unjustified exclusion from protection of communications between clients and in-house lawyers should be remedied. This is not an area that requires any legislative amendment. It is incumbent upon the Court, who developed the general principle from the body of laws of the member states, to amend this exclusion.

The Treaty of Rome was a framework Treaty. The Court of Justice has in the last forty years sought to supplement that framework with a body of general principles inspired by the legal systems of the Community member states. In the field of competition law enforcement, the application of these general principles has improved the fairness of proceedings and the accessibility of justice. At the same time the Court has been sensitive to the need for the Commission to retain adequate powers to fulfill its enforcement role. This can be seen in he investigative powers of the Commission where numerous challenges by applicants in the Court have been rebuffed. The Court has retained these powers as they are essential for the effective operation of the Commission's role.

Improvements to the existing system are required. The Court must change its position on in-house lawyers. It should identify the criminal law element of competition proceedings, forcing the Commission to fulfill its fact finding role with increased rigour. Alternatively a separate fact-finding body should be established. This would ensure that the separation of powers within the enforcement process is observed. The grounds for challenging a Commission decision under Article 173, although generously interpreted in competition law proceedings should be relaxed to ensure that parties have the right to be heard by the Court.

The final recommendation is for the accession of the Community to the Convention. This would ensure uniform application of human rights law throughout the member states in areas of Community competence. Such a development would force a debate about the ultimate objectives of the Community and the status of and relationship between economic rights and human rights. Political realism in February 1997 suggests that such a debate is unlikely to take place in the immediate future.

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