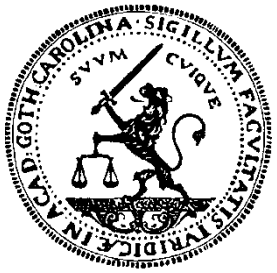

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The Principle of *Ne Bis In Idem:*
Human Rights and the Enforcement of European Union Competition Law

Master thesis
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Contents

Summary

This paper addresses how the principle of *ne bis in idem* relates to the enforcement of EU competition law. Regulation 1/2003 came into force in 2004 and with this the enforcement system of EU competition law that had been in place for over 40 years was fundamentally reformed. Under the new modernized enforcement system of the EU competition rules, national competition authorities (NCAs) and national courts in the Member States share the power with the Commission to apply EU competition law.

Regulation 1/2003 does not include rules on how the jurisdiction should be divided between the Commission, NCAs and national courts when applying the EU competition rules. As the Commission, NCAs and national courts all remains competent to deal with every infringement of the EU competition rules, the European Competition Network (ECN) was set up as a forum where the work of enforcing the EU competition rules could be divided between the Commission and the authorities in the Member States.

The objective of the ECN is that each case that involves the application of EU competition law should be dealt by a single authority. However, there are no binding rules to guarantee that this will always be the case. Instead, the system of enforcement under Regulation 1/2003 allows for parallel or consecutive infringement proceedings and sanctions under the EU competition rules by more than one authority in the same case.

As undertakings in the EU can be prosecuted more than once for the same anti-competitive behavior, the right of not being tried more than once for the same offence; the principle of *ne bis in idem*, is at risk of being violated. The principle of *ne bis in idem* is a fundamental human right guaranteed under all the different sources of human rights law recognized by the EU.

The EU has reaffirmed its dedication to protecting human rights in the past several years. Since the Lisbon Treaty came into force in 2009, the EU formally recognizes three different sources of human rights law: The Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles as they result from the constitutional traditions common to the Member States. The protection of human rights in the Union legal order should therefore be far reaching.

The increased protection of human rights in the EU means that when rules such as the enforcement rules of EU competition law are reformed, the protection of human rights need to be taken into account. The European Court of Justice (ECJ) also needs to assure that it provides for the widest protection of human rights possible by not interpreting the scope of human rights less extensively than the European Court of Human Rights (ECtHR).

Sammanfattning

Denna uppsats behandlar frågan om hur EU:s konkurrensrätt förhåller sig till rättsprincipen *ne bis in idem.* I och med att Förordning 1/2003 trädde i kraft 2004 så ändrades reglerna om tillämpning av EU:s konkurrensregler i grunden. I det nya moderniserade tillämpningssystemet på konkurrensrättens område så delar Kommissionen behörigheten att tillämpa EU:s konkurrensregler med nationella konkurrensmyndigheter och domstolar.

Förordning 1/2003 omfattar inte regler som delar upp jurisdiktionen att tillämpa EU:s konkurrensregler mellan Kommissionen och nationella konkurrensmyndigheter och domstolar. Eftersom Kommissionen och nationella konkurrensmyndigheter och domstolar alla är behöriga att tillämpa EU:s konkurrensregler så skapade man ett nätverk, European Competition Network (ECN), vilket fungerar som ett forum där Kommissionen och nationella myndigheter kan fördela arbetet med att tillämpa EU:s konkurrensregler mellan sig.

ECN:s arbetar utifrån att varje mål som rör tillämpning av EU:s konkurrensregler endast ska utredas av en myndighet. Det finns emellertid inga bindande regler som försäkrar att så alltid är fallet. I det tillämpningssystem som regleras av Förordning 1/2003 kan en och samma överträdelse av EU:s konkurrensregler utredas och straffas av fler än en myndighet.

Det faktum att företag i EU kan straffas mer än en gång för samma överträdelse kan innebära ett brott mot rätten att inte lagföras mer än en gång för samma brott (rättsprincipen *ne bis in idem).* Rättsprincipen *ne bis in idem* utgör en grundläggande mänsklig rättighet som står med i alla de rättsakter om mänskliga rättigheter som erkänns av EU.

EU har förstärkt sitt skydd för mänskliga rättigheter under senare år. Sedan Lissabonfördraget trädde ikraft 2009 så erkänner EU formellt tre olika rättskällor om mänskliga rättigheter: Europeiska unionens stadga om de grundläggande rättigheterna, Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna samt allmänna principer såsom de följer av medlemsstaternas gemensamma konstitutionella traditioner. Skyddet för mänskliga rättigheter i Unionsrätten bör därför kunna anses omfattande.

EU:s förstärkta skydd för mänskliga rättigheter innebär att lagstiftningsreformer såsom reformen av det EU-rättsliga tillämpningssystemet på konkurrensrättens område måste ta skyddet för mänskliga rättigheter i beaktning. Europeiska unionens domstol måste ge ett så omfattande skydd som möjligt genom att inte tolka mänskliga rättigheter snävare än vad Europeiska domstolen för de mänskliga rättigheterna gör.

Preface

I chose the principle of *ne bis in idem* in EU competition law as the topic of my paper because I knew it was a relevant and current topic in EU law. But, I did not know how current it would prove to be. Only a few days before this paper was due, the European Court of Justice laid down an important and long awaited judgment in a case that I had chosen to analyze, Case C‑17/10, *Toshiba Corporation and Others*. This gave me the opportunity to incorporate the judgment in my paper and served to clarify and also complicate some of the questions I have asked in my paper. It was an exciting end to my time as a law student and an important reminder of the ever-evolving nature of law.

I would like to thank my supervisor at Lund University Faculty of Law, Professor Xavier Groussot for his help and insight. I would also like to thank Sabrina Harris for diligently editing my English for which I am ever grateful.

Stockholm, February 2012

Carl Lundeholm

Abbreviations

5-year report	Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003
5-year report staff working paper	Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003
CFI	Court of First Instance
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CJEU	The Court of Justice of the European Union
C.L. Rev.	The Competition Law Review
Commission	The European Commission
C.M.L. Rev.	Common Market Law Review
EC	The European Community
EEC	The European Economic Community
Charter	the Charter of Fundamental Rights of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The European Court of Justice
E.C.L. Rev.	European Constitutional Law Review
ECN	The European Competition Network
E.Com.L. Rev.	European Competition Law Review
ECtHR	The European Court of Human Rights
E.C.R.	European Court Reports
E.L. Rev.	European Law Review
E.P.L.	European Public Law
E.T.	Europarättslig Tidskrift
EU	The European Union

Explanations	Explanations relating to the Charter of Fundamental rights
H.R.L. Rev.	Human Rights Law Review
L.I.E.I.	Legal Issues of Economic Integration
NCA	National Competition Authority
Network Notice	Commission Notice on cooperation within the Network of Competition Authorities
Notice on co-operation with national courts	Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC
OJ	The Official Journal of the European Union
Protocol No. 7	Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
Regulation 17/62	Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
Rev. I.D.P.	Revue internationale de droit pénal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U.L. Rev.	Utrecht Law Review
W.C.L.E. Rev.	World Competition Law and Economic Review
White Paper	White Paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty

1 Introduction

The European Union (EU) began as the European Economic Community (EEC) devoted to economic integration and the creation of a common market. Since then, the EU has developed into a political union no longer concerned only with economic integration. The EU now has a legal order that covers areas of law that have serious implications for fundamental human rights, such as co-operation in criminal matters.

As a consequence, the EU has reaffirmed its dedication to protecting fundamental human rights over the past several years. In 1993, the Maastricht Treaty amended the founding Treaties of the Union by adding a provision explicitly assuring the protection of fundamental rights. The Lisbon Treaty came into force in 2009 and provided the Union with its own legally binding Charter of Fundamental Rights (The Charter) and in the coming years, the Union is obligated to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The protection of fundamental human rights has implications in almost all areas of EU law. In the field of EU competition law, the Commission has had the power to fine and sanction undertakings, in a way that is considered equal to criminal sanctions, since 1962. In 2004 the enforcement system of EU competition law underwent a major reform where the power to enforce and apply the EU competition rules was decentralized. This reform gave national authorities the power to apply the EU competition rules in full.

1.1 Research questions and purpose

The reform of the EU competition enforcement rules has implications for the protection of fundamental rights. In particular, the principle of *ne bis in idem*, which bars the possibility of a defendant being prosecuted more than one time on the basis of the same facts or offence, is arguably at risk of being violated under the new system. This has led to a scholarly debate in recent years about the compatibility of the modernized system of EU competition law enforcement and the principle of *ne bis in idem.*

However, the extent to which the enhanced status of human rights law in the EU legal order has affected the principle of *ne bis in idem* in the field of EU competition law has not been thoroughly examined. Therefore, the purpose of this paper is to attempt to fill this lacuna through an in depth study of the principle of *ne bis in idem* in EU competition law by drawing parallels to the evolution of human rights law in the EU legal system as a whole. In other words:

What, if any, are the effects of the enhanced status of human rights in the EU legal order on the system of enforcement of the EU competition rules and specifically the principle of ne bis in idem*?*

In order to answer this question a series of other questions will also be addressed. First, what is the status of human rights in the EU legal order? Second, to what extent was the protection of human rights taken into account when modernizing the enforcement system of EU competition law? Third, does the modernized enforcement system of EU competition law allow for multiple proceedings in the same case, and hence for possible violations of the principle of *ne bis in idem*? Lastly, to what extent is the principle of *ne bis in idem* guaranteed in EU competition law?

1.2 Material and methodology

The methodology applied in this paper is based on a traditional legal dogmatic approach which consists of analyzing the state of law on the basis of recognized legal sources.

The focus of the study is EU law and I have attempted to clarify the state of EU law through a study of primary and secondary legislation along with official documents on interpretation and application of EU law issued by the EU institutions. Pre-legislative documents, such as White Papers, are also examined. The case law of the European Court of Justice (ECJ) is an important source of law in the EU legal order. The paper therefore includes a jurisprudential analysis of relevant case law of the ECJ.

Article 6(3) TEU states that fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) constitute general principles of Union law. The paper therefore also includes an analysis of provisions of the ECHR and a jurisprudential analysis of relevant case law of the European Court of Human Rights (ECtHR).

A wide array of academic books and articles has also been consulted for guidance in the interpretation of the different sources of law referred to above. Academic writings have also been used to highlight the legal debate surrounding the subject of *ne bis in idem* in competition law proceedings.

1.2.1 Terminology

Due to the arcane nature of legal jargon, it is necessary to make some comments with regards to the terminology used in the paper. The Lisbon Treaty, which entered into force on 1 December 2009, changed the numbering of many of the Treaty articles. The most important changes to take note of in the area of competition law are Article 81 EC which is now article 101 TFEU and Article 82 EC which is now Article 102 TFEU. Also

some key concepts have changed names. For example, “the common market” is since the entry into force of the Lisbon treaty referred to “the internal market”. In this essay the Lisbon numbering of articles is used, also when referring to earlier points in time when the corresponding article had a different number. The articles are then introduced as “what is now Article 101 TFEU …”. The reason for this is that the articles have changed numbering many times over the course of the history of the EU.

A key term in competition law proceedings is “undertaking”. In EU law the term generally refers to public and private enterprises, such as companies and organizations.

Throughout the essay the abbreviation *CJEU* is used to indicate the Court of Justice of the European Union which, according to the institutional set-up of the Lisbon treaty, encompasses the EU judiciary in its entirety: the European Court of Justice, the General Court and the Specialized Courts (currently, only the Civil Service Tribunal). The abbreviation *ECJ* is correspondingly only referring to the European Court of Justice, the highest court in the EU judiciary.

A final note also of the terminology used when referring to human rights. The Charter refers to “fundamental rights” while the ECHR refer to “human rights”. Because most of the rights and principles in the two documents correspond with one another, the terms “human rights” and “fundamental rights” are used interchangeably throughout this paper to refer to the same concept. With regards to the principle of *ne bis in idem*, in common law legal systems the equivalent principle is often called “double jeopardy”. In this paper only the term *ne bis in idem* is used.

1.3 Limitations

EU competition law is a very extensive field of EU law. So, it is beyond the scope of this paper to provide a thorough description of all aspects of EU competition law and therefore only the basic provisions and concepts are explained. Instead, the focus of this paper is the enforcement system of EU competition law.

Two extensive sources of human rights are dealt with in the paper: The Charter and the ECHR. All rights and principles guaranteed are not dealt with as this paper is not extensive enough for a more thorough study of these rights and principles. Instead, the paper concentrates the general legal status of the different sources of human rights law in the EU.

One fundamental principle present in the different sources of human rights law is dealt with in detail, the principle of *ne bis in idem.* The scope and understanding of the principle has been the subject of entire books and all aspects of the principle cannot be dealt with a relatively limited paper such as this one. I have instead chosen to focus on how the principle has been

understood in EU competition law proceedings and more specifically how the principle has evolved in the key judgments of the European Court of Justice (ECJ) in this area. The aspect of the principle of *ne bis in idem* in competition law proceedings that involve countries outside of the EU is not dealt with in this paper.

1.4 Outline

Chapter two of this paper is devoted to a general overview of the enforcement system of the EU competition rules that was in force before the system was modernized in 2004. The chapter shows what deficiencies the old system of enforcement suffered from and why the reform process was initiated.

Chapter three gives an overview of the modernized system of enforcement that was introduced in 2004 under Regulation 1/2003. The key elements of Regulation 1/2003 are explained together with the rules that exist on case allocation between the different authorities in charge with enforcing EU competition law in the EU.

Chapter four describes the history and current status of human rights law in the Union legal order. The different recognized sources of human rights law in the EU are also introduced.

Chapter five describes the principle of *ne bis in idem*, the rationales behind the principle and in what sources of EU law the principle is present.

Chapter six includes a study of the relevant case law from the ECJ and the ECtHR regarding the interpretation of the principle of *ne bis in idem* in competition law proceedings. The scholarly debate that has surrounded the issue is also briefly summarized.

In chapter seven, the main research questions introduced above are addressed one by one including analysis and conclusions. The chapter ends with general conclusions on the effects of human rights on the enforcement of EU competition law and in particular the principle of *ne bis in idem*.

2 Enforcement of EU competition law - Background

In 1962, the European Economic Community (EEC) sought to enforce the competition rules in the founding Treaties within its six Member States. The national competition laws of the Member States were not only diverging, inconsistent and in some cases non-existent, but it was also generally thought that the Member States lacked the administrative structures necessary for an efficient decentralized system of enforcement of the EEC competition rules.[1]

Therefore, in order to achieve uniform and coherent interpretation and implementation of the EEC competition rules, Regulation 17/62[2] was implemented which created an enforcement system of EEC competition law with the Commission as the sole body in the EEC with jurisdiction to apply the central Treaty provisions on competition.[3] By the time Regulation 17/62 was replaced by Regulation 1/2003 in 2004, Regulation 17/62 had been in force almost unchanged for more than 40 years.

2.1 Enforcement under Regulation 17/62

Under Regulation 17/62 undertakings in the Member States were given the possibility of notifying the Commission about agreements and practices that might have possible adverse effects on competition in the Community. There were several different notification procedures in place that all served the purpose of granting undertakings an official certification from the Commission that the notified agreement, practice or behavior was compatible with the EEC competition rules.[4]

Under Article 2 of Regulation 17/62, undertakings were able to apply for a negative clearance from the Commission. The negative clearance procedure gave the Commission the ability to issue an official statement saying that based on the facts available to the Commission from the application, it was not necessary to take action against the agreement, decision or practice. The negative clearance covered what is now Article 101 TFEU (restrictive

[1] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, pp 7-8.
[2] *Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty* (OJ P 13, 21.2.1962, p. 204)
[3] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, pp 7-8.
[4] Roth QC, Peter and Rose, Vivien (editors). *Bellamy & Child: European Community Law of Competition*. 6th ed, 2008, p 1183.

agreements or practices) as well as what is now Article 102 TFEU (abuse of dominant position).[5]

The mechanism that is perhaps most closely associated with Regulation 17/62 is Article 9. Under this provision, the Commission had a monopoly over the power to grant individual exemptions according to the criteria set out in Article 101(3) TFEU.[6] Normally agreements or practices that fall within the scope of Article 101(1) TFEU, and are therefore considered restrictive to competition, are unlawful. However, Article 101(3) TFEU provides an exception to this rule and states that the prohibition set out in the first paragraph may be declared inapplicable for an agreement, decision or concerted practice, or category thereof, under certain conditions stated in Article 101(3) TFEU.

The general incentive to notify the Commission of an agreement was that the undertakings were protected from fines with regards to the notified agreement or practice while the Commission was processing the notification application. The Commission also had the power to declare that the exemption, if granted, would apply retroactively back to the date of notification. If an undertaking failed to notify the Commission of an agreement, the only consequence was the loss of the possibility to get an individual exemption. Individual exemption decisions only lasted for a specified time period and required undertakings to reapply upon expiry.[7]

The majority of notified agreements to the Commission did not receive a formal individual exemption decision. Rather, as will be discussed later, the Commission issued an informal so called comfort letter implying that it would close the file and take no further action. Undertakings could also receive a discomfort letter which meant that the agreement was most likely considered to be unlawful, without benefiting from the exemption in 101(3), but the Commission did not consider it to be important enough to warrant any further action.[8]

If the Commission found that a notified agreement or practice fell under the prohibition in Article 101(1) TFEU without benefiting from the exemption in 101(3), infringement proceedings could be brought before the CJEU. Ultimately such proceedings could result in fines or other remedies being imposed on the notifying undertaking.[9]

The system of individual exemptions allowed for the Commission to develop a policy towards certain types of agreements.[10] In addition to the

[5] Roth QC, Peter and Rose, Vivien (editors). *Bellamy & Child: European Community Law of Competition*. 6th ed, 2008, p 1184.
[6] Whish, Richard. *Competition law*, 6th ed, 2009, p 162.
[7] Roth QC, Peter and Rose, Vivien (editors). *Bellamy & Child: European Community Law of Competition*. 6th ed, 2008, p 1184.
[8] *Ibid.*, p 1186.
[9] Van Bael, Ivo and Bellis, Jean-François. *Competition Law of the European Community*. 5th ed, 2010, p 957.
[10] Whish, Richard. *Competition law*, 6th ed, 2009, p 162.

system of individual exemptions, block exemptions were issued which covered categories of agreements. Block exemptions are still in practice today and are normally issued by the Commission in the form of a regulation. Under Regulation 17/62 an agreement that fell within the scope of a block exemption was considered to be valid without first having to be notified and approved by the Commission.[11]

2.1.1 Deficiencies and the need for reform

The Commission had jurisdiction over agreements and practices in the Community that were considered to "restrict competition" and "affect trade between Member States" according to article 101 and 102 TFEU. Otherwise, the National Competition Authorities (NCAs) had jurisdiction. The Commission and the ECJ chose to interpret these criteria broadly which meant that almost all agreements of commercial relevance had to be notified to the Commission in order not to be considered null and void according to Article 101(2) TFEU.[12]

The Commission soon became overburdened with notifications and did not have enough staff do deal with the very large volume of applications for individual exemptions. This caused long delays and large expenses not only for the Commission, but also for undertakings, which had to spend considerable time and resources on collecting data for the tedious notification procedures.[13]

The practice of issuing comfort and discomfort letters was introduced as a way of easing the administrative burden of granting formal individual exemptions. Formal individual exemption decisions were therefore very rare and during the entire lifespan of Regulation 17/62 only about 225 individual exemption decisions were issued.[14]

Ultimately the Commission developed a practice of simply not investigating notified cases that did not at first glance show sufficient "community interest".[15] Even with these measures being taken to help improve the situation, the system still proved unsatisfactory and undertakings often had to wait several years before obtaining a formal or informal decision from the Commission.[16]

During the 1990s the Commission, as a final measure to deal with its overwhelming workload, published a series of official Notices[17] where it

[11] Whish, Richard. *Competition law*, 6th ed, 2009, p 164.
[12] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 9.
[13] Whish, Richard. *Competition law*, 6th ed, 2009, p 162.
[14] *Ibid.*, p 10.
[15] *Ibid.*, 2009, p 11.
[16] *Ibid*.
[17] *Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty* (1993) and *Notice on cooperation between national courts and*

offered to support and work together with NCAs and national courts in enforcing the Union's competition rules. This first attempt at decentralizing the enforcement system proved to be a failure. By the end of the 1999 when the Commission released a White Paper[18] on reforming the enforcement system under Regulation 17/62 it was widely agreed that a reform was urgently needed.[19]

2.2 The reform process - The White Paper

In the White Paper the Commission recognized the historic importance of Regulation 17/62 as it had helped establish a "culture of competition" in Europe at a time when competition law was unknown in many parts of the continent.[20] Still, the Commission acknowledged that the system of enforcement under Regulation 17/62 had become insufficient to the needs of what was now the European Community (EC). By 1999, the EC had grown from only six Member States at its infancy to 15, and several more countries were waiting on its doorstep. The conclusion was that Regulation 17/62 no longer worked as an effective supervisor of competition in the common market.[21]

The White Paper clearly defined the objectives of the enforcement system overhaul:

- *Ensuring effective supervision*: Under the system in place the Commission was overloaded with administrative work of minor importance that prevented it from investigating agreements and practices with serious effects on competition.
- *Decentralizing the application of the competition rules*: With the prospect of a Community with more than twenty Member States, the application of the competition rules had to be decentralized. In many cases national authorities were thought to be better placed to deal with infringements of the EC competition rules also when the infringements had effects outside the territory of the Member State.
- *Simplifying administration*: The system of prior notification to the Commission was deemed unnecessary. A move towards an *ex post* control of agreements and practices that actually do infringe on the competition rules was considered more efficient.
- *Easing the constraints on undertakings while at the same time providing a sufficient degree of legal certainty*: The Commission

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the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty (1997).

[18] *White Paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty, Commission program no 99/027 of 28 April 1999* (OJ C 132, 12.5.1999, p. 1), "the White Paper".

[19] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 12.

[20] *The White Paper*, para. 4.

[21] *Ibid.*, para. 9.

> was aware of the costs incurred on undertakings as a result of the tedious notification procedures, but acknowledged that a system without formal approval by the Commission should not compromise legal certainty. A balance would be achieved by providing clearly defined rules allowing the undertakings themselves to assess their agreements and practices while at the same time ensuring consistency in enforcement by the Commission, NCAs and national courts.[22]

Several different options for modernizing the enforcement system were proposed in the White Paper and many of the ideas proposed correspond with the outcome of the reform process which was Regulation 1/2003.

[22] *The White Paper*, para. 41-51.

3 Enforcement of EU competition law - Modernization

When Regulation 1/2003[23] came into force on 1 May 2004 replacing Regulation 17/62 in its entirety, it changed the system of enforcement of the EC competition rules radically, including but not limited to the abolishment of the notification procedures to the Commission and the creation of a system of parallel competencies between the Commission, NCAs and National Courts. This shift of enforcement regime is often referred to "modernization" and will be discussed below.

3.1 Regulation 1/2003 – Key elements

Article 1 of Regulation 1/2003 states that agreements, decisions and concerted practices that fall under Article 101(1) TFEU and that do not satisfy the exemption criteria in 101(3) TFEU are prohibited, without any prior decision to that effect being required. The same rule applies to abuses of dominant position under Article 102 TFEU.

A major change under Regulation 1/2003 is that an undertaking can no longer notify the Commission of an agreement in order to get an official certification that the agreement fulfills the criteria for exemption in Article 101(3) TFEU. Effectively this means that undertakings, most likely with the help of legal expertise, now have to make their own self-assessment of whether the criteria for exemption are fulfilled or not.[24] Article 10 of Regulation 1/2003 states that the Commission can still, on its own initiative, find that the exemption criteria in article 101(3) TFEU are fulfilled in a certain case. This possibility has however not been used by the Commission since the introduction of the new system.[25]

The system of block exemptions of categories of agreements that would otherwise fall within the prohibition in Article 101(1) TFEU is still in place. Block exemptions provide legal certainty for undertakings in many cases. The rule still stands that a court cannot declare an agreement invalid if it is covered by a block exemption.[26]

A key aspect of the modernized enforcement system under Regulation 1/2003 is that NCAs and national courts now have the power to apply the

[23] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (OJ L 1, 4.1.2003, p. 1).
[24] Whish, Richard. *Competition law*, 6th ed, 2009, p 163.
[25] *The 5-year report*, para. 15.
[26] Whish, Richard. *Competition law*, 6th ed, 2009, p 164.

EU competition rules. Article 4 – 6 of Regulation 1/2003 gives the Commission, the NCAs and national courts parallel competence to apply article 101 TFEU and 102 TFEU in full.

Regulation 1/2003 also regulates the relationship between Articles 101 and 102 TFEU and national competition laws in the Member States. Article 3(1) of Regulation 1/2003 states that when NCAs or national courts apply national competition law to agreements or behavior that may affect trade between Member States, they must also apply Articles 101 and 102 TFEU in parallel.

Further, Article 3(2) states that when NCAs or national courts apply national competition law to agreements, decisions or concerted practices that may affect trade between Member States, the outcome may not lead to the prohibition of agreements, decisions or concerted practices that would have been allowed under Article 101 TFEU. This is sometimes referred to as the "convergence rule".[27] With regards to unilateral conduct, such as abuse of dominant position under Article 102 TFEU, the Member States can maintain stricter laws than what is provided for in Union law.

The fact that NCAs and national courts now have the power to apply Union competition law is often referred to as the "decentralization" of the enforcement system. However, the Commission still maintains full parallel competence in applying Union competition law and plays an important role in ensuring uniform application throughout the Union. And as some commentators have pointed out, perhaps "communitarisation" of the enforcement system is therefore a more fitting term than "decentralization".[28]

3.1.1 Co-operation and the European Competition Network

The parallel competence to apply the EU competition rules shared between NCAs, national courts and the Commission under Regulation 1/2003 means that the workload must somehow be divided among the different bodies. It was for this purpose that the European Competition Network (ECN) was set up. The rules governing co-operation within the ECN are set out in

[27] For a more in-depth discussion on the implications of the convergence rule see for example Faull, Jonathan and Nikpay, Ali (editors). *The EC Law of Competition*. 2nd ed, 2007, pp 100-102 or Roth QC, Peter and Rose, Vivien (editors). *Bellamy & Child: European Community Law of Competition*. 6th ed, 2008, pp 1407 - 1409.
[28] Faull, Jonathan and Nikpay, Ali (editors). *The EC Law of Competition*. 2nd ed, 2007, p 89.

Regulation 1/2003, the Network Notice[29] and the Notice on co-operation with national courts[30].

Article 11(3) of Regulation 1/2003 states that NCAs must inform the Commission before they initiate the first formal investigative measure under Article 101 or 102 TFEU. Reporting to other NCAs is optional, but in practice information is easily distributed electronically within the ECN through a common intranet. Also, there exists a common understanding of what information needs to be provided and to whom.[31]

Article 11(4) provides that the Commission also must be informed before an NCA adopts a decision requiring that an infringement is brought to an end or when an NCA applies a block exemption.

Article 11(6) of Regulation 1/2003 is another key provision, which states that if the Commission initiates proceedings for the adoption of a decision under EU competition rules, NCAs are relieved of their competence to apply Article 101 and 102 TFEU. The opposite is not true, as it follows from the same article that the Commission can initiate proceedings after consulting the NCA already dealing with the same case.

Article 11(6) has sometimes been interpreted to be a provision in Regulation 1/2003 that regulates the jurisdiction between the Commission and the NCAs. [32] There is no equivalent rule for jurisdiction between NCAs, so in theory each NCA has the jurisdiction to investigate any agreement or practice that may affect trade between Member States, regardless of where the agreement or practice was concluded or implemented.[33]

Under the heading of "Uniform application of Community competition law", Article 16 of Regulation 1/2003 states that NCAs and national courts may not adopt decisions that would run counter to a decision already adopted by the Commission in the same case. Article 16 thereby explicitly provides for the possibility of subsequent decisions in the same case. However, the application of the provision is limited by Article 11(6) which relieves national authorities of their competence to apply Article 101 and 102 TFEU when the Commission initiates proceedings in a case.

The Network Notice sets out rules on how the NCAs should co-operate in the ECN. Regulation 1/2003 only contains a general provision in Article 13 that states when more than one NCA is taking action against the same

[29] *Commission Notice on cooperation within the Network of Competition Authorities* (OJ C 101, 27.04.2004, p. 43).
[30] *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (OJ C 101, 27.04.2004, p. 54).
[31] Brammer, Silke. *Concurrent Jurisdiction Under Regulation 1/2003 and the Number of Case Allocation*. C.M.L. REV. 2005, vol. 42 issue 5, pp 1392 – 1393.
[32] Sutton, Alastair , Lianos, Ioannis and Kokoris, Ioannis (editors). *The reform of EC competition law: new challenges*. 2010, p 57.
[33] *Ibid.*

agreement or practice the fact that another NCA is dealing with the same case should be enough for the other NCAs not to take action. The same applies for the Commission. Article 13 also states that if a case has already been dealt with by an NCA or the Commission then other NCAs should reject any complaints that relate to that same case.

Rules on the co-operation between national courts are set out in the Notice on co-operation with national courts. There are also provisions in Regulation 1/2003 that deal with this, for example Article 15 which states that national courts can ask the Commission for information on how to interpret the Union competition rules.

3.1.2 Case (re)allocation in the ECN

As already said, the jurisdiction over the Union competition rules is shared between the Commission, NCAs and national courts under Regulation 1/2003. The Regulation does not, however, contain binding legal rules for the allocation of cases. Legal scholars have pointed out that this stems from the fact that the Commission's desire to avoid a mechanical system of case allocation. [34] Instead, the rules on case allocation in the ECN are set out in the Network Notice and are only indicative.[35]

According to Recital 18 of Regulation 1/2003, the objective of the allocation of cases is that a single authority should handle each case. The allocation rules in the Network notice are therefore based on the idea that in most cases the authority that first receives a complaint and initiates an investigation will remain in charge of the case. Only in rare cases will re-allocation occur according to the criteria set out in the Network Notice. When re-allocation does take place, it should be "a quick and efficient process".[36]

The rules on case allocation in the Network Notice rules are constructed to decide what authority is considered to be "well placed" to deal with a certain case. The usage of the term "well placed" as opposed to "best placed", which was first suggested, meant to add flexibility to the system and also hints at the possibility of several authorities being equally suited to handle a case in a given situation.[37]

The Network Notice sets out three cumulative conditions under which an authority is considered to be well placed to deal with a case:

[34] Sutton, Alastair , Lianos, Ioannis and Kokoris, Ioannis (editors). *The reform of EC competition law: new challenges*. 2010, p 58.
[35] *Ibid*.
[36] *The Network Notice*, para. 6 – 7.
[37] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 156.

"1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;

3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement."[38]

These three criteria have been summarized under the concept of "the three E's" which refers to effect, end and evidence.[39]

With regards to the question of whether one or many NCAs will be considered well placed to deal with a case, the Network Notice states that if an agreement or practice affects competition mainly within the territory of one Member State then the NCA of that Member State is considered best place to deal with that infringement.[40] If, on the other hand, an infringement involves two Member States, the NCA of the Member State that can sufficiently bring the entire infringement to an end will be considered the NCA that is well placed for the case. This has been interpreted to mean that this will be the case when both the undertakings concerned are on the territory of one Member State.[41]

If, however, an agreement or practice has substantial effects on competition in several Member States and the action of just one NCA would not be sufficient to bring the entire infringement to an end, then the Network Notice designates that action by several NCAs may be taken in parallel and if this should occur, one of them can be designated as lead authority.[42]

The Commission is considered to be particularly well placed for a case if one or several agreements or practices affect competition in more than three Member States, if a case is closely linked to other provisions of Union law that are exclusively applied by the Commission, or if the Union interest requires that the Commission adopts a decision on the matter in order for the proper development of Union competition policy.[43]

Regulation 1/2003 does not harmonize the national procedural rules in competition cases nor the nature of the sanctions that can be imposed on undertakings. It follows from this that the legal position of undertakings can

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[38] *The Network Notice,* para. 8.
[39] Smits, René. *The European Competition Network: Selected Aspects.* L.I.E.I. 2005, vol. 32 issue 2, p. 179.
[40] *The Network Notice,* para. 10.
[41] *Ibid.*, para. 11; Roth QC, Peter and Rose, Vivien (editors). *Bellamy & Child: European Community Law of Competition*. 6th ed, 2008, p 1189.
[42] *The Network Notice,* para. 12 – 13.
[43] *Ibid.*, para. 14 - 15.

be greatly affected when their cases are re-allocated from one jurisdiction to another.[44]

Even though re-allocation can have significant consequences on the legal position of undertakings, there is no official re-allocation decision when the ECN decides which body is best placed to deal with a case. The question of whether the "decisions" on case re-allocation can be challenged before the Union courts in an action for infringement has been the subject of extensive scholarly debate. [45] Based on the case law of the CJEU it is now generally thought that the re-allocation of a case does not constitute a legal decision in the sense that it could be the subject of judicial review before the Union courts.[46]

3.2 Evaluation of the reform - The 5-year report

Article 44 of Regulation 1/2003 states that five years from the day the regulation came into force the Commission must submit a report to the European Parliament and the Council on the functioning of the regulation. The Commission must also assess whether it is appropriate to propose a revision of the regulation based on this report.

Accordingly, in April of 2009, the Commission released a 5-year report[47] and an accompanying 5-year report staff working paper[48]. Part of the preparatory work for the report included a public consultation where undertakings and other stakeholders submitted their input. The public consultation dealt in particular with whether or not Regulation 1/2003 had been effective in practice and to what extent it had achieved its goal of making enforcement of EU competition law more efficient by reducing costs for undertakings as well as NCAs.[49]

The Commission concluded in the 5-year report that the transition from the old system of notification and individual exemption under Regulation 17/62 to the new system under Regulation 1/2003 had been "remarkably smooth in

[44] Andreangeli, Arianna. *The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings.* E.L. Rev. 2006, 31(3), p 346.
[45] See for example Brammer, Silke. *Concurrent Jurisdiction Under Regulation 1/2003 and the Number of Case Allocation*. C.M.L. REV. 2005, vol. 42 issue 5, p 1423 and Andreangeli, Arianna. *The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings*. E.L. Rev. 2006, 31(3), p 352 – 353.
[46] *Ibid*.
[47] *Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003* (COM(2009) 206 final, 29.4.2009).
[48] *Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003* (SEC(2009) 574 final, 29.4.2009).
[49] Van Bael, Ivo and Bellis, Jean-François. *Competition Law of the European Community*. 5th ed, 2010, p 970.

practice". [50] No major difficulties with the new system were reported by the Commission, NCAs, undertakings nor the business or legal communities.[51]

The Commission also reported that modernization had been a success in the sense that it allowed for the Commission to focus its resources on substantive issues instead of being bogged down with administrative tasks of minor importance.[52]

Another conclusion reached was that the flexible and pragmatic arrangements within the ECN worked well in practice. According to the report, there were very few discussions on case-allocation within the network and when they did occur they were resolved quickly.[53] The public consultation had shown that the legal and business community had "dropped its initial fears" and calls for binding case-allocation criteria were now "isolated".[54]

Overall the Commission found that even though some minor deficiencies with the new system had been reported, the general assessment was that modernization had been a success and no amendments to the rules were needed.[55]

The next section will address human rights in the EU in preparation for further discussion on the principle of *ne bis in idem* in EU competition law and the extent to which human rights were taken into consideration during the development and implementation of this regulation.

[50] *The 5-year report*, para. 7.
[51] *Ibid.*, para. 7.
[52] *Ibid.*, para. 8.
[53] *Ibid.*, para. 25.
[54] *5-year report staff working paper*, para. 214.
[55] *The 5-year report*, para. 43.

4 The evolution and status of human rights in the EU

4.1 The history of human rights in the EU

Even though Article 2 TEU proclaims that the Union is founded on the respect for human rights, the protection for fundamental rights was not integrated into the Union legal order until relatively recently. During the first years of the EEC, the focus was only on creating a common market and the efforts for integration were of an economic nature only. It was not until the 1970s that the EEC began to formally recognize fundamental values and human rights as a part of the great European integration project.[56]

The original Treaties did not mention the protection of human rights as an objective of the Community or that fundamental rights constituted one of its sources of law. Instead it was the European Court of Justice (ECJ) that gradually introduced fundamental rights into the legal order through its case law.[57]

The first cases where the ECJ recognized arguments brought by applicants based on references to human rights were in *Stauder* and *Handelsgesellschaft.*[58] In *Handelsgesellschaft* the court held that fundamental rights inspired by the Member States common constitutional traditions had to "be ensured within the framework of the structure and objectives of the Community".[59]

The historical explanation to why the ECJ was suddenly willing to interpret the Treaties to implicitly contain protection of human rights is believed to be based on the necessity of protecting human rights in order for those Member States with human rights provisions in their own constitutions to accept the supremacy of Community law. For example, member States like Germany and Italy still had recent memories of World War II and had introduced extensive protection for human rights in their constitutions and the ECHR had entered into force in 1953. Considering the importance placed upon the protection of fundamental rights by the Member States it

[56] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 364.
[57] Lenaerts, Koen et al. *European Union Law*. 3rd ed, 2011, p 826.
[58] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 364; Case 29/69, *Stauder v City of Ulm*, E.C.R. [1969] 419 and Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, E.C.R. [1970] 1125.
[59] Case 11/70, *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125, para. 4.

would have been impossible for the Community legal order not to provide for similar protection.[60]

When the Maastricht Treaty (TEU) came into force in 1993 it was the first time that the Treaties contained a provision explicitly referring to the protection of fundamental rights as expressed in the ECHR and the common constitutional traditions of the Member States. In practice, this explicit reference did not do more than confirm what had already been established by the case law of the ECJ because the ECJ had developed its protection of fundamental rights over several years prior to the Maastricht Treaty guided by the ECHR as well as the constitutional traditions of the Member States.[61] These rights were further explicated in the Treaty of Lisbon.

4.2 The sources of human rights law in the EU

The Treaty of Lisbon introduced many important changes in the field of human rights law in the EU when it came into force in 2009. Article 6 TEU now states that the Union recognizes three formal sources of human rights law: The Charter of Fundamental Rights of the European Union (The Charter), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and general principles as they result from the constitutional traditions common to the Member States.

4.2.1 The Charter

Before the drafting of the Charter of Fundamental Rights of the European Union, the Union lacked a legal catalogue of human rights of its own. Many politicians and scholars around Europe argued for the need of such a catalogue. It was not until 1999 at the Cologne European Council that a Convention was set up with the task of drawing up a Charter of Fundamental Rights for the Union. The Council, the Commission and the European Parliament finally proclaimed the Charter in Nice on 7 December 2000.[62]

When the Cologne European Council in 1999 mandated that a Charter of fundamental rights should be drawn up, it was not to formulate new rights within the Union legal order but rather to further solidify the already existing obligation of the Union to respect fundamental rights. The Conclusions of the Cologne European Council indicated that the ECHR, the common constitutional traditions of the Member States as well as the European Social Charter and the Community Charter of Fundamental Social

[60] Dashwood, Alan et al. *Wyatt and Dashwood's European Union Law*. 6th ed, 2011, pp 338 – 339.
[61] Lenaerts, Koen et al. *European Union Law*. 3rd ed, 2011, p 828.
[62] *Ibid.*, p 830.

Rights of Workers should be the basis for the Charter. The Charter has therefore sometimes been referred to as a "creative distillation" of rights from different European and international agreements and national constitutions.[63]

The Charter is divided into seven chapters or titles. The first six titles consist of different categories of rights and are named accordingly: Title I - Dignity, Title II - Freedoms, Title III – Equality, Title IV – Solidarity, Title V – Citizens' Rights and Title VI – Justice. Title VII contains general provisions on the interpretation and application of the Charter.

The legal status of the Charter remained unclear following its proclamation due to the failed ratification of the Constitutional Treaty. The Constitutional Treaty had foreseen the Charter being fully incorporated in the Treaties, but since the Constitutional Treaty was never ratified, the Charter continued to lack legal force.[64] Even though the Charter was not formally binding it was considered an authoritative source of fundamental rights for the Union and became a source of law frequently referred to in the rulings of the CJEU.[65]

4.2.1.1 The legal status of the Charter

When the Lisbon Treaty came into force in December of 2009, the Charter finally acquired binding force. The Charter was not incorporated directly into the Treaties as the Constitutional Treaty had intended, but Article 6(1) TEU explicitly states that the Charter has the same legal value as the Treaties.

It is believed that by not incorporating the Charter into the Treaties, the appearance of a Constitution was deliberately avoided. The Charter still has the legal quality as a Constitutional document for the Union, and since it is in a sense independent from the Treaties it can be argued that it can be used as more general reference for human rights.[66]

During the Lisbon Treaty negotiations, two Member States, Poland and the United Kingdom (UK), did not accept the binding force of the Charter in full. Therefore, Protocol (No. 30) attached to the Lisbon Treaty states that the CJEU may not find the actions or legislation by Poland or the UK inconsistent with the Charter and nor may any national court of Poland or

[63] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 395.
[64] *Ibid.*, p 394.
[65] This is the view of Koen Lenaerts (Judge of the ECJ) et al. in *European Union Law*. 3rd ed, 2011, p 832; however, as some scholars have pointed out, it took six years after its proclamation before the Charter was explicitly cited in a case before the ECJ: case C-540/03, *European Parliament v Council*, E.C.R [2006] I-5769 para. 38; Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, p 651.
[66] Pernice, Ingolf. *The Treaty of Lisbon and Fundamental Rights*. Walter Hallstein-Institut Paper 7/08, Humboldt University, Berlin. 2008, p 241.

the UK. It is also stated that Title IV[67] of the Charter does not create justiciable rights for those two Member States unless their national law provides for it.[68] The Czech Republic has also joined Poland and the UK with a similar derogative arrangement.[69]

As stated before, it is Title VII of the Charter that deals with the interpretation and application of the Charter. Article 51(1) states that the Charter is addressed to the Union institutions and bodies and the Member States only when they *implement* Union law. Strictly speaking this should mean that it is only when a Member State implements a directive or implements a provision of a regulation that the Charter is applicable, but not when a citizen of that Member State excises a right that stems directly from the Treaties, for example.[70]

The other sources of EU human rights law are thought to apply whenever the institutions or the Member States *act within the scope* of Union law. It is not clear if this theoretical division of application between the Charter and the other sources of human rights law will be upheld in practice by the CJEU. The fact that the explanations to the Charter states that the Charter is binding for the Member States when they *act within the scope* of Union law points towards that it is not a division that will be strictly upheld by the CJEU.[71]

Article 52(1) of the Charter regulates how the rights guaranteed under the Charter can be limited. It follows that any limitation must be "provided for by law" and must respect "the essence" of the right and freedoms recognized in the Charter. Limitations are also subject to the principle of proportionality. It has been pointed out that at least prior to the coming into force of the Charter there is nothing in the case law of the CJEU that indicates what the scope of permitted limitations under this provision might be.[72]

4.2.1.2 The division between rights and principles

The Charter makes a distinction between rights and principles. The established definition of a right is that an individual can rely on a right when requesting judicial review of a legislative, executive or administrative norm

[67] Title IV is named "Solidarity" and contains mostly rights related to the work force and labor market as well as social rights.
[68] Protocol (no 30), annexed to the TEU and the TFEU, *on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*, articles 1 – 2.
[69] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 394; Declaration 53, annexed to the TEU and the TFEU, *Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union.*
[70] Dashwood, Alan et al. *Wyatt and Dashwood's European Union Law*. 6th ed, 2011, p 383.
[71] *Ibid*.
[72] Peers, Steve and Ward, Angela (editors). *The European Union Charter of Fundamental Rights*. 2004, p 155.

before a court.[73] This should be the case for provisions in the Charter that are considered rights.

If instead a provision in the Charter is considered to be a principle, then Article 52(5) of the Charter states:

> *"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."*

Article 52(5) may have consequences for judicial review because it appears that principles cannot be relied on by individuals before a court. The divide between rights and principles in the Charter was the result of concern that some Member States had regarding the implications of some far reaching rights stated in the Charter, especially social and economic ones. During the drafting of the Charter, the European Commission distinguished between rights, which could be pleaded directly before courts, and rights in the form of principles, which were only mandatory for authorities when exercising their powers.[74]

The Charter does not specify which provisions constitute principles and which ones constitute rights. But, the Convention tasked with drafting the Charter also issued a document titled "Explanations relating to the Charter of Fundamental rights"[75] (the Explanations) and these Explanations provide some guidance in interpreting which provisions are principles and which ones are rights.[76] At the time of the drafting of the Charter it was thought that the ECJ would clarify this, which should still be the case.[77]

4.2.2 The ECHR

The relationship between the EU and the ECHR has been the subject of much debate in EU law. Before the Lisbon Treaty, the ECJ was officially of the opinion that the Community did not have the competence to accede to the ECHR under the current Treaties.[78]

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[73] Craig, Paul. *The Lisbon Treaty Law: Politics, and Treaty Reform*. 2010, p 216.
[74] *Ibid.*
[75] *Explanations relating to the Charter of Fundamental rights* (OJ C 303, 14.12.2007, p. 17).
[76] Craig, Paul. *The Lisbon Treaty Law: Politics, and Treaty Reform*. 2010, p 217.
[77] For a more thorough discussion on the implications of the divide between rights and principles, see Craig, Paul. *The Lisbon Treaty Law: Politics, and Treaty Reform*. 2010, pp 216 – 221.
[78] Opinion 2/94 of the Court of 28 March 1996 (*Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*) (OJ C 180, 22.6.1996, p. 1).

This legal issue was resolved with the Lisbon Treaty which came into force on 1 December 2009. Under the Lisbon Treaty, Article 6(2) TEU states that the Union *shall* accede to the ECHR and that the accession shall not affect the Union's competences as defined in the Treaties. The EU therefore does not only have the legal power to accede to the ECHR, but an obligation to do so. There is not a set time limit for when the Union has to accede to the ECHR, but it is the intention of the so called Stockholm Program that it should be done rapidly.[79]

The main arguments for the Union acceding to the ECHR are that it improves the external accountability of the Union. Prior to accession individuals cannot bring EU institutions before the European Court of Human Rights (ECtHR) on the basis of breaches of the ECHR, it can only do so if the relevant provision has been implemented by a Member State who is a party to the Convention.[80]

The Union's accession to the ECHR will also help in avoiding a double standard on the part of the Union, since the Union requires all Member States to be parties to the ECHR whilst so far the Union itself is not. It would also help alleviate the risk of the conflicting interpretation of fundamental rights by the ECtHR and the Court of Justice of the European Union (CJEU). When the Union does accede to the ECHR it will also symbolically underscore the Union's dedication to upholding human rights.[81]

The Union's accession to the ECHR will be a complicated and long process. Article 218 TFEU sets out a complex procedure when the EU enters into agreements with international organizations and third countries. This procedure along with the many challenging technicalities of accession leaves many to believe that the Union is still a long way from acceding to the ECHR.[82]

4.2.2.1 The legal status of the ECHR and the relationship to the Charter

Article 52(3) of the Charter provides that:

> *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

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[79] Craig, Paul. *The Lisbon Treaty Law: Politics, and Treaty Reform*. 2010, p 201.
[80] Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, p 659.
[81] *Ibid.*
[82] See for example Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, p 661. In the article, published on 4 December 2011, the author writes that *"it is to be stressed that, at the time of writing, the EU is a long way from the final stages of accession"*.

Article 52(3) of the Charter applies insofar as the Charter contains rights that correspond to rights guaranteed by the ECHR. Through this article the ECHR is incorporated into the Charter, and thereby into primary EU law, but only to the extent that the rights in the Charter correspond to rights in the ECHR. Article 52(3) of the Charter states that the Union can provide more extensive protection than what is provided for in the ECHR, which means that the ECHR provides for a minimum guarantee protection in the EU legal order.[83] This is true also prior the Union's accession to the ECHR.

Because the rights in the ECHR are only incorporated into EU law insofar as they correspond to rights in the Charter, it is important to somehow identify which these corresponding rights actually are. The Charter does not make this clear. However, the non-binding Explanations to the Charter mentioned earlier provide for helpful guidance in determining what rights in the Charter correspond to rights in the ECHR.[84] Further, Article 52(7) of the Charter states that the Explanations must be taken into account when the courts of the EU and of the Member States interpret the Charter. Article 6(1) TEU also states that the Charter must be interpreted with due regard to the Explanations.

The Explanations on Article 52(3) of the Charter states that the reference to the ECHR covers both the Convention as well as the Protocols to it and that the rights in the ECHR are to be interpreted not only with regards to the text of the provisions, but also with regards to the case law of the ECtHR.[85] The fact that the case law of the ECtHR is to be taken into account when interpreting the rights has been confirmed by the ECJ.[86]

The relationship between the Charter and the ECHR is tied to another key issue with the Union's accession to the ECHR, which is preserving the autonomy of the EU legal system. Article 6(2) TEU expressly provides that the accession "shall not affect the Union's competences as defined in the Treaties" and Protocol (no 8) attached to the Lisbon Treaty states that the agreement relating to accession must "make provision for preserving the specific characteristics of the Union and Union law" and that the accession "shall not affect the competences of the Union or the powers of its institutions".[87]

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[83] Weiß, Wolfgang. *Human Rights and EU antitrust enforcement: news from Lisbon*. E.Com.L. Rev. 2011, 32(4), p 188.
[84] *Ibid.*
[85] *The explanations,* p 33.
[86] Wils, Wouter P.J. *EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law the Charter of Fundamental Rights of the EU and the European Convention On Human Rights*. W.C.L.E. Rev. 2011, vol. 34 issue 2, p 200, referring to Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, [2010] E.C.R. 0, para. 35.
[87] Protocol (no 8), annexed to the TEU and the TFEU, *Relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, articles 1 – 2.

Up until the Union accedes to the ECHR the relationship between with the ECtHR and the Union will continue to be governed by the case law of the ECtHR. The most important case in this field is *Bosphorus.*[88]

In *Bosphorus* the ECtHR held that the ECHR did not prohibit the parties to the Convention from transferring sovereign power to a supranational international organization such as the EU, even though the organization is not by itself a party to the ECHR.

Usually the ECtHR has held that the parties to the Convention are responsible for their actions even when the actions are consequences of complying with international legal obligations. In *Bosphorus,* Ireland had committed a possible violation of the ECHR by impounding an aircraft which was an action that stemmed from a legal obligation stated in an EC regulation. The ECtHR ruled that as long as the action is taken in compliance with legal obligations that come from an organization that is considered to protect fundamental rights in a manner which can be considered equivalent to the ECHR, then such action shall be considered justified.[89]

The following excerpt from the judgment summarizes the court's standpoint:

> *"If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization."*[90]

Only when the protection of the rights in the ECHR is considered "manifestly deficient" will this presumption be rebutted.[91] This is often called the "*Bosphorus* presumption" and has been the subject of much criticism. It is not entirely clear whether the presumption will still hold after the Union accedes to the ECHR, as it could undermine the scope of judicial review of the EU legal order by the ECtHR.[92]

4.2.3 Constitutional traditions common to the Member States

It is understood from Article 6(3) TEU that the ECHR and fundamental rights as they result from the constitutional traditions common to the Member States make up general principles of Union law. Although both the

[88] Case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, (Appl. No. 45036/98), Judgment of 30 June 2005.
[89] *Ibid.*, para. 152- 155.
[90] *Ibid.*, para. 156.
[91] *Ibid.*
[92] Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, pp 667 - 668.

CJEU and the Treaties give great symbolic weight to the common constitutional traditions of the Member States, national constitutional provisions have only rarely been draw upon in the case law of the Union courts.[93]

The constitutional traditions of the Member States make up a very incoherent source of fundamental rights. As the constitutional traditions and practices differ so greatly between the Member States, it is therefore up to the ECJ to subjectively decide if a particular right is a part of the common constitutional traditions or not and to what extent that right is to be respected.[94]

The lack of coherence in the constitutional traditions of the Member States is thought to be the explanation to why the ECJ rarely cites any specific constitutional provision when it has drawn from the constitutional traditions of the Member States. It can also help explain why the ECHR is a more frequently cited source, as the Convention makes a source of law that all Member States have agreed upon as parties to the ECHR.[95]

4.2.3.1 The legal status of the common constitutional traditions

One could question if there still exists a need for a reference to the common constitutional traditions of the Member States as a source of fundamental rights now that the Charter is binding and the Union is about to accede to the ECHR. However, the reference to the common constitutional traditions of the Member States in Article 6(3) TEU opens up for the possibility for the CJEU to recognize and enforce rights that are not present in the Charter or in the ECHR. It also makes it possible for the CJEU to give rights and principles in the Charter that are in some ways limited in their scope due to Protocol (No. 8) or other limitations clauses, such as the divide between rights and principles, a wider scope than they otherwise would have . In that sense the Charter could be seen as subsidiary and complementary to the Charter.[96]

The coming case law of the CJEU will show what the importance of the common constitutional traditions as a source of human rights in the EU is now that the Lisbon Treaty has entered into force. The fact that it is still a recognized source of human rights law in the Union points towards on effort on behalf of the Union to ensure the widest protection of fundamental rights

[93] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 369.
[94] Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, p 670.
[95] Craig, Paul and de Búrca, Gráinne. *EU Law: Text, cases, and materials*. 5th ed, 2011, p 369.
[96] Douglas-Scott, Sionaidh. *The European Union and Human Rights after the Treaty of Lisbon*. H.R.L. Rev. 2011, vol. 11 issue 4, p 671.

possible, including protection of the principle *ne bis in idem* which will be discussed next.

5 The principle of *ne bis in idem*

Ne bis in idem is a fundamental principle of law. It translates literally from Latin as "not twice in the same". In its essence, it restricts the possibility of a defendant being prosecuted more than one time on the basis of the same facts or offence. It is a principle with a long legal history and can be dated all the way to ancient Greece and Demosthenes who proclaimed that “the laws forbid the same man to be tried twice on the same issue”.[97]

The principle of *ne bis in idem* is a universally recognized legal principle present in most domestic legal systems as well as in several international agreements. Historically, the application of the principle has been limited to criminal proceedings within one jurisdiction. There is no general rule in international law that protects from double prosecution in multiple jurisdictions.[98]

5.1 Rationale for the principle

The underlying rationales for the principle of *ne bis in idem* are many and varied. They differ between different legal systems and traditions. Generally the principle is thought to stem from a natural requirement of equity and justice that one should not punished more than once for the same crime. It would also run counter to many of the objectives of sanctions such as deterrence, punishment and compensation not to uphold the principle of *ne bis in idem*.[99]

The principle can be thought of as a precondition for a fair trial as well as a guarantee for legal certainty.[100] *Ne bis in idem* is an important part of the concept of rule of law, which requires that a state which initiates proceedings against its subjects also respect the outcome of such proceedings. The respect of *res judicata* (the finality of judgments) forms the foundation of a legitimate state and without the principle of *ne bis in idem* it would be undermined.[101]

There is also an economic rationale behind the principle as it helps ensure efficient law enforcement. With the respect of *ne bis in idem* comes an

[97] Van Bockel, Bas. *The Ne Bis In Idem Principle in EU Law*. 2010, p 2.
[98] Vervaele, John A.E. *The transnational ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights*. U.L. Rev. 2005, vol. 1 issue 2, p 100.
[99] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 355.
[100] Van Bockel, Bas. *The Ne Bis In Idem Principle in EU Law*. 2010, p 26.
[101] *Ibid.*, p 27.

incentive for efficient prosecution and coordination, as there is only one opportunity to try a case. It also helps minimize costs because there can only be one prosecution.[102]

In the Union legal order there is also the particular rationale of ensuring that the freedoms of the internal market are not restricted in a way that hinders European integration. The possibility of multiple prosecutions within the EU would surely impede the creation of the internal market.

5.2 *Ne bis in idem* in the EU legal order

The principle of *ne bis in idem* is recognized in the different sources of EU human rights law. It is present in the ECHR, the Charter and also in the Schengen *acquis*. It is present in practically all national legal orders of the Member States and usually as a constitutional human right.[103] In the case of Sweden the principle is stated in the Swedish Code of Judicial Procedure.[104]

5.2.1 The Charter

Article 50 of the Charter, under Title VI – Justice, constitutes the principle of *ne bis in idem*:

> *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*

From the wording of Article 50 of the Charter it is not entirely clear what exactly is the scope of application of the provision. It fails to specify what constitutes an acquittal or conviction and if "the law" refers to Union law, national law or both.[105] Also the provision explicitly states that it only applies in criminal proceedings. It will be the responsibility of the ECJ to rule on the interpretation of the principle in its case law, as further discussed below.

Article 52(3) of the Charter states that to the extent the Charter contains rights which correspond to rights in the ECHR, the meaning and scope of those rights shall be the same as in the ECHR. This should be understood to mean that the principle of *ne bis in idem* cannot be interpreted more strictly and provide a less extensive protection than what is provided for in the ECHR.

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[102] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 356.
[103] Wasmeier, Martin. *The principle of ne bis in idem*. Rev. I.D.P., 2006/1, vol. 77, p 121.
[104] *The Swedish Code of Judicial Procedure (Rättegångsbalken)* Chapter 17 on Judgments and decisions, Article 11(3) states *"A question thus determined may not be adjudicated again"*.
[105] Van Bockel, Bas. *The Ne Bis In Idem Principle in EU Law*. 2010, p 18.

5.2.2 The ECHR

Article 4(1) of Protocol No. 7 to the ECHR makes up the principle of *ne bis in idem*, in Protocol No. 7 called the right not to be tried or punished twice:

> *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

Protocol No. 7 was added to the ECHR long after the signing of the original Convention and was first open for signatures on November 22 1984. The protocol has not yet been ratified by all EU member states.[106] The practical implications of this is somewhat limited by the fact that the CJEU holds the ECHR to constitute general principles of Union law and some have made the argument that through the membership in the EU those countries who have not ratified Protocol No. 7 are still bound by it to the extent the CJEU recognizes the principle.[107]

From the wording of Article 4 of Protocol No. 7 it appears that the principle is limited to the domestic sphere, as it states that one should not be tried or punished "under the jurisdiction of the same State".[108]

5.2.3 The Schengen acquis

With the Treaty of Amsterdam in 1997 the Schengen *acquis* was fully incorporated into EU law after originally having been an international agreement among several Member States. The principle of *ne bis in idem* is normally confined to domestic legal proceedings but, the CISA[109] provides for a transnational *ne bis in idem* principle that applies between different Member States.[110] Article 54 of the CISA:

> *"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*

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[106] To date Belgium, Germany and the Netherlands have signed the protocol but not yet ratified it, the UK has not signed it; Council of Europe. *Treaty Office - Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. 2012. http://www.conventions.coe.int (2012-01-31).
[107] Van Bockel, Bas. *The Ne Bis In Idem Principle in EU Law*. 2010, p 15.
[108] Wasmeier, Martin. *The principle of ne bis in idem*. Rev. I.D.P., 2006/1, vol. 77, p 122.
[109] *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders* (O J L 239, 22/09/2000 P. 19).
[110] Wasmeier, Martin. *The principle of ne bis in idem*. Rev. I.D.P., 2006/1, vol. 77, p 122.

The Schengen *acquis* aims to ensure the free movement of persons within the Union by abolishing internal border checks. The Schengen rules also call for increased cross-border enforcement of criminal law. Article 54 of the CISA tries to offset the risk of persons being criminally prosecuted and punished by several different Member States. In this case the rationale for protecting the principle of *ne bis in idem* is particularly clear with regards to ensuring the free movement of persons.[111]

[111] Van Bockel, Bas. *The Ne Bis In Idem Principle in EU Law*. 2010, pp 20 – 21.

6 *Ne Bis In Idem* in EU Competition Law

The principle of *ne bis in idem* comes from the field of criminal law and has historically only been applied in a single jurisdiction. In case law of the ECJ, however, it has been established that the principle also applies in the context of EU competition law.

Even since Regulation 17/62 the Union has had the power to sanction undertakings infringing on the EC competition rules. It was in proceedings dealing with punitive administrative sanctioning, such as fining for infringements of the competition rules, that the ECJ, historically lacking jurisdiction in criminal matters, first introduced the principle of *ne bis in idem* principle in the Union legal order.[112]

Below, a number of important cases that deal with the principle of *ne bis in idem* in competition law proceedings will be introduced. These cases do not by any mean constitute all the relevant cases in this field but they are representative of the interpretation and evolution of the principle *ne bis in idem* in EU competition law proceedings.

6.1 Case law prior to modernization

6.1.1 Walt Wilhelm

The first case where the ECJ first looked at the issue of parallel proceedings under the EC competition rules and the principle of *ne bis in idem* was in the 1969 judgment *Walt Wilhelm.*[113] The ECJ was asked in a preliminary ruling if a NCA can apply national competition rules and fine an infringement that has already been tried and fined by the Commission under the EC competition rules, or if the risk of double sanctions renders this impossible.

The ECJ considered the possibility of parallel proceedings to be acceptable as the national and the community proceedings pursued "different ends". Further, if two consecutive sanctions were to be imposed then "a general requirement of natural justice […] demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed. In any case […] no means of avoiding such a possibility is to be found in the general principles of community law".[114]

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[112] Vervaele, John A.E. *The transnational ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights*. U.L. Rev. 2005, vol. 1 issue 2, p 106.
[113] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, [1969] E.C.R. 1.
[114] *Ibid.*, para. 11.

Since the Commission had a monopoly on enforcing the EC competition rules in cases that affected trade between Member States at the time, the Court concluded:

> *"Whereas Article 85 [now Article 101 TFEU] regards [cartels] in the light of obstacles which may result for trade between member states, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context."*[115]

With the enforcement system under Regulation 17/62 in mind, one can understand the ECJ's reasoning that EC competition law and national competition laws pursued different ends and in that sense protected different legal interests.[116]

Even though there was no explicit reference to the principle of *ne bis in idem* in the *Walt Wilhem ruling* some scholars believe that the ECJ did recognize the importance of the principle but chose not to apply it in this case with regards to the system of division of jurisdiction between Member States and the Commission. [117] Instead the court referred to "natural justice" since they felt they needed to provide at least some relief to undertakings subject to parallel proceedings.[118]

Even though the CJEU's understanding of the principle of *ne bis in idem* has evolved over the years, the general principles set out in *Walt Wilhelm* have been applied rather consistently since the judgment in 1969.[119]

6.1.2 PVC II

Walt Wilhelm dealt with a situation where the Commission and an NCA fined one and the same infringement based on Union law and national respectively. In *PVC II* the court was asked to rule on a situation where a number of undertakings had been prosecuted for one and the same infringement twice by the Commission, the second time because the Commission's first decision had been annulled for procedural reasons.[120]

During the events leading up to the case, a number of producers of polyvinylchloride (PVC) had been penalized by the Commission for infringing the EC competition rules in what was referred to as the "PVC I decision". The PVC I decision was later annulled by the ECJ for procedural

[115] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, [1969] E.C.R. 1, para. 3.
[116] Louis, Frédéric and Accardo, Gabriele. *Ne Bis in Idem, part "bis"*. W.C.L.E. Rev. 2011, vol. 34 No. 1, p 101.
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*, p 102.
[120] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and others v Commission (PVC II)*, [2002] E.C.R. I-8375.

reasons (the Commission had failed to authenticate the decision in accordance with its own Rules of Procedure).[121]

A few months later the Commission adopted a new decision on the same grounds where same producers of PVC were fined the same amounts again only this time the Commission adopted the decision in accordance with the Rules of Procedure, the "PVC II decision". The PVC II decision was then challenged before the ECJ on the grounds that it infringed on the principle of *ne bis in idem.*

The Ruling in *PVC II* has been interpreted by many as the first general recognition of the applicability of *ne bis in idem* the field of Union competition law:[122]

> *"[T]he principle of non bis in idem, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision."*[123]

In *PVC II* the ECJ came to the conclusion that the principle of *ne bis in idem* does not prohibit the adoption of a second decision when the first decision is annulled for procedural reasons, as the annulment the first decision does not amount to an acquittal:

> *"[The principle of ne bis in idem] does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an `acquittal' within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them."*[124]

It has been argued that from the reasoning in *PVC II* one can conclude that if the first decision had been annulled due to a lack of evidence, then the administrative procedure leading up to the decision would have been considered a "trial" and the annulment of the first decision would have been considered an "acquittal" within the meaning Article 4(1) of Protocol No. 7 to the ECHR, as well as Article 50 of the Charter. The Commission would

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[121] Case C-137/92 P, *Commission v BASF and Others (PVC I)*, [1994] E.C.R. I-2555.
[122] This is one of the first cases where the principle of *ne bis in idem* was recognized in competition law proceedings, but the recognition of *ne bis in idem* as a fundamental principle of Union law in general can be traced back as far as 1967; Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 360 - 361.
[123] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and others v Commission (PVC II)*, [2002] E.C.R. I-8375, para. 59.
[124] *Ibid.*, para. 62.

probably then have been barred from adopting a second decision since that would amount to a violation of the principle of *ne bis in idem.*[125]

6.1.3 Franz Fischer v Austria

As in the *PVC II* case, the CJEU have often referred to the principle of *ne bis in idem* as stated in Article 4(1) of Protocol No. 7 to the ECHR. Even though the Union courts are not bound by the case law of the ECtHR, it is clear that the CJEU has developed its understanding of the principle of *ne bis in idem* with regard to the case law of the ECtHR. It is because of this that the ECtHR's judgment in *Franz Fischer v Austria* is interesting even though it is a criminal case and not competition law.[126]

In *Franz Fischer v Austria* the applicant had fatally injured a cyclist while driving under the influence. He was sentenced by an Austrian administrative authority under the national Road Traffic Act to a fine and a number of days in prison. When an Austrian criminal court a few months later convicted him for the same act under the Criminal Code for causing death by negligence, the applicant complained that this second conviction violated the principle of *ne bis in idem* as stated in Article 4 of Protocol No. 7 to the ECHR.

In its judgment the ECtHR pointed out that Article 4 of Protocol No. 7 to the ECHR does not refer to the same offence but "to trial and punishment 'again' for an offence for which the applicant has already been finally acquitted or convicted". Therefore, even if the applicant was convicted to two different offenses in this case, the court concluded that the principle of *ne bis in idem* is still violated if the two offenses have "the same essential elements".[127]

In this case the two offenses were not considered to differ in their essential elements and the principle of *ne bis in idem* had therefore been violated. Further, the ECtHR said that the principle of *ne bis in idem* in Article 4 of Protocol No. 7 to the ECHR is not only limited to being punished twice for the same offense, but also extends to the right of not being *prosecuted* twice for two offences whose essential elements overlap. The Austrian Government had put forward the argument that the reduction of time in the second sentence by the time already served in the first sentence meant that there was no violation of the principle. This argument was rejected by the ECtHR and the reduction of the second prison term did not alter the court's finding that the applicant was tried twice for essentially the same offence.[128]

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[125] Wils, Wouter P.J. *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis*. W.C.L.E. Rev. 2003, vol. 26 No. 2, p 142.
[126] Case *Franz Fischer v. Austria*, (Appl. No. 37950/97), Judgment of 29 May 2001.
[127] *Ibid.*, para. 25.
[128] *Ibid.*, para. 29 – 30.

6.1.4 Aalborg Portland A/S

Aalborg Portland A/S was a case in which the Commission had investigated a set of agreements concluded by a number of cement producers in different Member States including several Italian undertakings. Some of the Italian undertakings involved had been fined by the Commission under the EC competition rules as well as by Italian competition authorities under national law for what was arguably the same set of agreements and therefore invoked the principle of *ne bis in idem*.[129]

In its judgment the ECJ laid out the court ruled that the application of the principle of *ne bis in idem* is subject to three conditions:

> *"As regards observance of the principle ne bis in idem, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset."*[130]

The outcome of *Aalborg Portland A/S* was that the ECJ did not consider there to be an infringement of the principle of *ne bis in idem.* The Court did not consider the condition "identity of the facts", which means that the facts taken into account in the two decisions were considered to be the same, to be fulfilled since the sanctions carried out on the Union level were based on facts not taken into account in the national decision.[131] It has been pointed out that this conclusion could be reached only because the Commission had decided not to pursue the objections it had relating to national cartels, even though the national cartels had in fact been the subject of parallel investigation.[132] Because the Commission did not sanction the national cartels, and the Italian authorities did, there was no identity of facts in the court's view.

6.2 The scholarly debate surrounding the old case law and modernization

As a part of the scholarly debate on EU competition law, questions have been raised regarding the compatibility of the modernized enforcement system of EU competition law under Regulation 1/2003 with the case law on the principle of *ne bis in idem.*

[129] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, [2004] E.C.R. I-123.
[130] *Ibid.*, para. 338.
[131] *Ibid.*, para. 340.
[132] Louis, Frédéric and Accardo, Gabriele. *Ne Bis in Idem, part "bis"*. W.C.L.E. Rev. 2011, vol. 34 No. 1, p 102.

In *Walt Wilhelm* the ECJ based its conclusions on the notion that national competition law and EC competition law "pursue different ends". This may have been true in 1969, but today EU competition law exists in a completely different reality. National competition laws in the Member States have to a very large extent converged with EU competition law. Today many national competition rules are almost exact copies of Articles 101 and 102 TFEU.[133]

Further, Article 3(1) of Regulation 1/2003 obliges national courts and NCAs to apply EU competition law in parallel with national competition law when investigating and prosecuting agreements and behaviors that may affect trade between Member States. The convergence rule in Article 3(2) restricts national competition laws from prohibiting agreements and practices that are allowed under the EU competition rules.

Some scholars have therefore questioned if the *Walt Wilhelm* doctrine is still valid and if one can still argue that national competition law and EU competition law "pursue different ends".[134]

It is also questionable if the old case law of the ECJ is reconcilable with the case law of the ECtHR. In *Franz Fischer v Austria* the ECtHR clearly rejected the accounting principle, whereby the second sanction is reduced by the amount of the first one, established in *Walt Wilhelm.*

The ECtHR found in *Franz Fischer v Austria* that the principle of *ne bis in idem* does not only prohibit double punishment, but also double prosecution for two offenses whose essential elements overlap. Therefore, the reduction of the second sanction does not alter the finding that there has been a violation of *ne bis in idem.* Considering the convergence of national competition law with EU competition law that has taken place, some scholars believe it would be difficult to argue that consecutive proceedings under national law and EU competition law do not cover essentially the same elements.[135]

The possibility of multiple infringement proceedings in the same case under Regulation 1/2003, and its implications with regards to the principle of *ne bis in idem,* has led several scholars to suggest that Regulation 1/2003 should have included an explicit ban on multiple prosecutions.[136]

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[133] Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 375.
[134] See for example Molin, Kristoffer. *Ne bis in idem och den decentraliserade konkurrensrätten*. E.T. 2011, nr. 2, p 303 and Brammer, Silke. *Cooperation between National Competition Agencies in the Enforcement of EC Competition Law*, 2009, p 375.
[135] Wils, Wouter P.J. *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis*. W.C.L.E. Rev. 2003, vol. 26 No. 2, p 143.
[136] See for example Di Federico, Giacomo. *EU Competition Law and the Principle of Ne Bis in Idem*. E.P.L. 2011/17, No. 2, p 242 and Wils, Wouter P.J. *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis*. W.C.L.E. Rev. 2003, vol. 26 No. 2, p 146.

6.3 Case law after modernization

6.3.1 Zolotukhin v Russia

In February of 2009 the ECtHR delivered an important judgment in *Zolotukhin v Russia* concerning the interpretation of the principle of *ne bis in idem* in Article 4(1) of Protocol No. 7 to the ECHR.[137] The judgment had little to do with competition law, and is arguably unrelated to the modernization of the enforcement rules of EU competition law. It has nonetheless important implications for the understanding of *ne bis in idem* in EU competition law.

In *Zolotukhin v Russia,* the applicant had acted disorderly while being held at a police station. This led the present police officers to conclude that the applicant had committed the administrative offence of "minor disorderly acts". While the report for this offence was being drafted, the applicant was verbally abusive towards the officer writing the report, threatened him with physical violence and said he would kill him.

Later the same day a District Court found the applicant guilty under the National Code of Administrative Offences for swearing in a public place and not responding to reprimands, which amounted to the administrative offence "minor disorderly act". A few days later a criminal case was opened against the applicant and he was eventually sentenced under the National Criminal Code for the offence "disorderly acts" for the same events as had been the basis of the administrative offence after which the question of a possible violation of *ne bis in idem* was raised.

As the ECtHR set out to determine whether the two offences the applicant had been convicted of were the same, the Court acknowledged that in the case law of the ECtHR there existed several approaches to deciding when two offences are considered the same within the meaning of Article 4(1) of Protocol No. 7.[138] The ECtHR summarized the different approaches in the case law of the Court, the latest being the "essential elements" doctrine introduced in *Franz Fischer v Austria.*

The ECtHR then held that the existence of a variety of approaches to the interpretation of what constitutes the same offence led to legal uncertainty and the Court was therefore "called upon to provide a harmonized interpretation of the notion of the 'same offence' – the *idem* element of the *non bis in idem* principle – for the purposes of Article 4 of Protocol No. 7".[139]

After performing a short analysis of the how the principle of *ne bis in in idem* was phrased and interpreted in different international instruments, such

[137] Case *Sergey Zolotukhin v. Russia,* (Appl. No. 14939/03), Judgment of 10 February 2009.
[138] *Ibid.*, para. 70.
[139] *Ibid.*, para. 78.

as Article 50 of the Charter and Article 54 of the CISA, the ECtHR concluded that an approach "which emphasizes the legal characterization of the two offences is too restrictive on the rights of the individual".[140] The ECtHR concluded:

> *"[T]he Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same."*[141]

The criterion to be applied in establishing *idem* was thus identity of facts. In the case of *Zolotukhin v Russia,* the ECtHR found that the administrative offence of "minor disorderly acts" amounted to a penal procedure within the meaning of Article 4(1) of Protocol No. 7 and after this first conviction had become final the applicant was charged for the criminal offence "disorderly acts" referring to precisely the same conduct as the previous conviction. The two offences were held to have arisen from the same facts and the second conviction therefore constituted a violation of the principle of *ne bis in idem.*[142]

6.3.2 Toshiba Corporation

As described above, there has been a legal scholarly debate in Europe concerning the modernized enforcement system of EU competition law under Regulation 1/2003 and its compatibility the existing case law from the ECJ and the ECtHR on the principle of *ne bis in idem.*

In January of 2010 a Czech Regional Court lodged a reference for a preliminary ruling with the ECJ explicitly asking how certain provisions of Regulation 1/2003 relate to the principle of *ne bis in idem.*[143] Many scholars have expressed hopes for that this case, *Toshiba Corporation,* will provide clarity on some of the issues of parallel proceedings under Regulation 1/2003 and the interpretation of the principle of *ne bis in idem.*[144]

6.3.2.1 The Opinion of the Advocate General

The Opinion of Advocate General Kokott in *Toshiba Corporation* was delivered on 8 September 2011.[145] The Opinions of the Advocate Generals are not binding for the Court, but can often be interpreted as a first hint of

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[140] Case *Sergey Zolotukhin v. Russia,* (Appl. No. 14939/03), Judgment of 10 February 2009, para. 81.
[141] *Ibid.*, para. 82.
[142] *Ibid.*, para. 120 – 122.
[143] Case C‑17/10, *Toshiba Corporation and Others,* not yet published.
[144] See for example Molin, Kristoffer. *Ne bis in idem och den decentraliserade konkurrensrätten*. E.T. 2011, nr. 2, p 308, Di Federico, Giacomo. *EU Competition Law and the Principle of Ne Bis in Idem*. E.P.L. 2011/17, No. 2, p 257 and Louis, Frédéric and Accardo, Gabriele. *Ne Bis in Idem, part "bis"*. W.C.L.E. Rev. 2011, vol. 34 No. 1, p 112.
[145] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others,* not yet published.

what direction the ECJ might take and is therefore of great value. Opinions of the Advocate Generals are often considerably more thorough than the judgments that follow. This case is no different, which is why the Opinion of Advocate General Kokott in *Toshiba Corporation* is analyzed to a greater extent in this paper even though the ECJ delivered its judgment in this case on 14 February 2012.

Toshiba Corporation involved an international cartel on the market for gas-insulated switchgear, consisting of a number of European and Japanese undertakings in the electrical engineering sector. Several of the undertakings participating in the cartel had been fined millions of Euros at the EU level by the European Commission and at the national level by, among other, the Czech Authority for the Protection of Competition (the Czech NCA).

It is important to note than in this case the Czech NCA applied only national competition law and only took into account the cartel's effects in the territory of the Czech Republic during a period prior to 1 May 2004, the date of the Czech Republic's accession to the European Union. The proceedings, in which the infringement was found, however, took place long after 1 May 2004. At the time the Czech NCA initiated its proceedings, the Commission had already initiated its own proceedings under Regulation 1/2003. The Czech NCA's decision to fine the undertakings was taken after the Commission's decision to fine.[146]

The question was therefore if the Czech NCA's initiation of proceedings and fining of the involved undertakings was lawful. To answer this, the Czech Regional Court put forward two questions to the ECJ, which can be summarized as follows:[147]

1) *Regulation 1/2003 gives NCAs the shared power with the Commission to apply EU competition law in cases that affect trade between member states. Which law, national competition law or EU competition law, is applicable in relation to cross-border anti-competitive practices which were engaged in as a continuous infringement in part before and in part after the date of accession of the Czech Republic to the EU?*

2) *How are the respective competences delimited between NCAs and the Commission in the ECN with regards to Regulation 1/2003 (in particular Article 11(6)), the Network Notice and the principle of ne bis in idem under Article 50 of the Charter?*

The Advocate General's answer to the first question was that Article 3(1) of Regulation 1/2003, and thereby Article 81 EC (now Article 101 TFEU), is not applicable in Member States to periods prior to the date of accession. This applies also in the context of prosecutions constituting a single and continuous infringement that was capable of producing effects in the

[146] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 3.
[147] *Ibid.*, para. 31 – 33.

territory of the Member State concerned both before and after the date of accession.[148]

With regards to the second question, the Advocate General divided this into two parts. Article 11(6) of Regulation 1/2003 states that NCAs are relieved of their competence to apply EU competition rules when the Commission initiates proceedings, the first part of the second question dealt with if NCAs are also relieved of their competence to apply national competition law after the Commission initiates proceedings.

In relation to this first part of the second question, the Advocate General reiterated that Article 16(2) of Regulation 1/2003 states that NCAs and national courts may not adopt decisions that would run counter to a decision already adopted by the Commission in the same case. The Advocate General interpreted this to mean that NCAs may adopt a decision under national competition law in a case after the Commission has already given a decision in the same case, as long as the NCAs decision doesn't run counter to the Commission's decision.[149]

The general conclusion to the first part of the second question was therefore that NCAs are not permanently and definitively relieved of their power to apply national competition law where the Commission initiates proceedings for the adoption of a decision. On the contrary, once the Commission has concluded its proceedings NCAs may adopt their own decision, within the limits of the principle of *ne bis in idem.*[150] What these limits consist of is the subject of the second part of the question.

The second part of the second question relates to the scope of protection guaranteed by the principle of *ne bis in idem* that, as evidenced by the case law of the ECJ and the ECtHR, is to a large extent decided upon by the definition of *idem;* what constitutes the same offence, or in the case of competition proceedings, the same anti-competitive conduct.

The Advocate General reiterated in answering the second part of the second question of the *Toshiba Corporation* case that in *PVC II,* and hence in the field of completion law, the principle of *ne bis in idem* has been interpreted as precluding "an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalized or declared not liable by a previous unappealable decision". In finding what constitutes *idem* the ECJ has applied the three fold criteria set out in *Aalborg Portland A/S*: identity of the facts, unity of offender and unity of the legal interest protected.[151]

[148] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 68.
[149] *Ibid.*, para. 85.
[150] *Ibid.*, para. 91.
[151] *Ibid.*, para. 112 – 114.

The Advocate General brought attention to the fact that the third criterion, unity of the legal interest protected, has not been applied by the ECJ when interpreting the principle of *ne bis in idem* in other areas of law than competition law. When interpreting Article 54 of the CISA, for example, the Court has explicitly considered the criterion of unity of the legal interest protected to be irrelevant. The ECJ held in *Van Esbroeck* that the only relevant criterion is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances that are inextricably linked together.[152]

Advocate General Kokott was of the opinion that interpreting and applying the *ne bis in idem* principle differently depending on the area of law concerned would be detrimental to the unity of the EU legal order. Considering the importance of the *ne bis in idem* principle in EU law, its content should not be substantially different depending on which area of law is concerned. The scope of Article 50 of the Charter should therefore be the same in all areas of EU law.[153] The Advocate General held that identical facts or facts which are substantially the same should be the only relevant criterion in finding the existence of idem:

> *"[F]or the purposes of determining idem within the meaning of the ne bis in idem principle, account is to be taken only of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together. In other words, the two cases must concern identical facts or facts which are substantially the same."*[154]

The Advocate General further held that the territory and period of time in which a cartel produces or may produce effects are essential components of the facts. In the case of Toshiba Corporation it had been established that the Commission's decision did not cover any anti-competitive consequences of the cartel in the territory of the Czech Republic prior to 1 May 2004, and the decision by the Czech NCA applied only in relation to that territory and that period. Accordingly, while both decisions had as their subject-matter infringements committed by the same cartel, the two decisions were otherwise based on different facts.[155]

The Advocate General was thereby able to conclude that since the Commission's decision and the decision by the Czech NCA did not relate to the same material acts, understood as the same anti-competitive consequences in the same territory, the Czech NCA did not violate the principle of *ne bis in idem* when adopting its decision.[156]

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[152] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 116, referring to Case C-436/04, *Van Esbroeck*, [2006] E.C.R. I-2333, para. 32 - 36.
[153] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 117.
[154] *Ibid.*, para. 124.
[155] *Ibid.*, para. 145.
[156] *Ibid.*, para. 146.

6.3.2.2 The Judgment of the ECJ

The ECJ delivered its Grand Chamber judgment in *Toshiba Corporation* on 14 February 2012.[157] The ECJ agreed with the Advocate General that the answer to the first question must be that Article 3(1) of Regulation 1/2003, and thereby Article 81 EC (now Article 101 TFEU), is not applicable in Member States to periods prior to the date of accession. Procedural rules, such as Article 11(6) of Regulation 1/2003, are however applicable from 1 May 2004 onwards in all the Member States, including proceedings which concern situations arising before that date.[158]

The ECJ also shared the Advocate General's interpretation of Article 11(6) of Regulation 1/2003. The provision is to be understood as barring national authorities from initiating proceedings in a case under national competition law while the Commission is investigating the same case, but not from applying national competition law once the Commission has reached a decision in the case.[159]

The ECJ did not, however, follow Advocate General Kokott's Opinion with regards to the interpretation of *ne bis in idem* in competition law proceedings. The ECJ does not appear to have agreed that there was a need to align its case law on the principle of *ne bis in idem* in competition law proceedings with its case law on Article 54 of the CISA. Instead, the ECJ held that in competition law cases the application of the principle of *ne bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected, as established *Aalborg Portland A/S.*[160]

When establishing if the condition "identity of facts" is fulfilled, the ECJ stated that the anti-competitive conduct "must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect".[161]

Therefore, in *Toshiba Corporation* it was established that the Commission's decision did not cover any anti-competitive consequences of the cartel in the territory of the Czech Republic prior to 1 May 2004, and the decision by the Czech NCA applied only in relation to that territory and that period. The ECJ therefore concluded that one of the conditions for the application of the principle of *ne bis in idem* was not fulfilled, namely identity of the facts.[162] The ECJ therefore held that there had been no violation of the principle of *ne bis in idem.* The implications of this judgment will be discussed further in the section below.

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[157] Judgment of the Court, delivered on 14 February 2012 in Case C-17/10, *Toshiba Corporation and Others*, not yet published.
[158] Case C‑17/10, *Toshiba Corporation and Others*, not yet published, para. 67 and 70.
[159] *Ibid.*, para. 79.
[160] *Ibid.*, para. 97.
[161] *Ibid.*, para. 99
[162] *Ibid.*, para. 98.

7 Analysis and conclusions

In this last section, the main research questions introduced in the first section will be addressed one by one.

7.1 The status of human rights in the EU

When considering the current status of human rights law in the EU, it is important to analyze the sources of human rights law as has been done above. Historically, the protection for human rights was introduced by the ECJ in the Court's case law. The founding Treaties have contained a provision explicitly promising the protection of fundamental rights since the 1993 Maastricht Treaty. It is clear that the EU has further enhanced its dedication to fundamental human rights over the past several years. The Union's dedication to fundamental rights became unequivocal with the Lisbon Treaty, as Article 6 TEU now states that the Union recognizes three formal sources of human rights law: The Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles as they result from the constitutional traditions common to the Member States.

In reviewing the legal status of these three sources of human rights law, it becomes clear that they amount to a far-reaching protection of human rights in the EU. The main source of human rights law, the Charter, is now legally binding and has the same legal value as the Treaties.

The second most important source, the rights guaranteed under the ECHR, provide for a minimum guarantee protection of human rights in the EU legal order insofar as the Charter contains rights that correspond to rights guaranteed by the ECHR, as stated in Article 52(3) of the Charter. The Union is also obligated to accede to the ECHR as an independent party in the next few years. The EU's accession to the ECHR will symbolically underscore the Union's dedication to protecting human rights. A more practical consequence will be that the Union will become externally accountable for violations of human rights.

The final source of EU human rights law is general principles as they result from the constitutional traditions common to the Member States. Recognition of these rights means that the CJEU will be able to enforce fundamental rights that are either not present or in other ways limited in the Charter and the ECHR. This might help off-set limitations of the Charter such as the division between rights and principles.

All in all, it is difficult to know exactly how the different sources of human rights law will relate to one another and what types of conflicts of interpretation might arise. However, it can be concluded that the CJEU has

an extensive arsenal of human rights law to draw upon which allows the Union Courts to provide for far reaching protection of human rights in the EU. In that sense there are no doubts about the EU's dedication to protecting human rights and the fact that human rights form part of the foundation of the European Union legal order.

7.2 Human rights and the reform of the enforcement system of EU competition law

An important part of analyzing how the modernized enforcement system of the EU competition law relates to human rights is to see to what extent the protection of human rights was taken into account when the system was reformed.

The reasons behind the reform are clear and were not based upon concerns for human rights and in particular the principle of *ne bis in idem*. The old enforcement system under Regulation 17/62 had begun to deteriorate; the formal practice of issuing exemption decisions had been replaced with informal comfort letters and discomfort letters. Ultimately cases notified to the Commission were only investigated if they at first glance showed sufficient "community interest". It often took several years before undertakings were able to obtain a formal or informal clearance from the Commission.

Worse, because the Commission was overburdened with administrative tasks of minor importance it was unable to deal with cartels and other abusive behavior of greater importance. Regulation 1/2003 later acknowledged this as a reason for modernizing the system:

> *"The system of notification [Regulation 17/62] involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings."*[163]

As mentioned above, the White Paper formed the basis for the reform process. In it, references were made to economic gains and the completion of the internal market as the main imperatives for reforming the system of enforcement under Regulation 17/62. Because the European Community was about to expand, the system of notification to the Commission was clearly unsustainable.

The decision to decentralize, or communitarize as some have called it, was in this sense simply means to an end. The Commission did not necessarily want to give the power to apply the EU competition rules to national authorities, but felt it had to do so. The implications that a decentralized

[163] *Regulation 1/2003*, recital 3.

system of enforcement might have for the protection of human rights do not appear to have been a major concern in the reform.

The Commission did reflect on the risks of a decentralized system in the White Paper, but only in relation to the risk of *contradictory* decisions by more than one NCA, which could compromise the uniform interpretation of EU law. [164] No explicit considerations were taken to the fact that multiple decisions in the same case might by *itself* constitute a risk of fundamental rights being violated, and more specifically the principle of *ne bis in idem.*

Even though Recital 37 of Regulation 1/2003 states vaguely that the regulation respects fundamental rights, the White Paper, which in many ways formed the basis for the reform, lacked an extensive discussion on the implications of the reform on fundamental rights. Consideration appears only to have been taken to assuring the uniform application of EU law and a sufficient degree of legal certainty for undertakings.

When reviewing the reform of the EU competition law enforcement rules it is clear that the goal of the reform was to create an efficient enforcement system. Assuring that the reformed enforcement system was in compliance with fundamental rights was secondary at best to this goal.

The White Paper only represents the start of the legislative process that eventually led to the enactment of Regulation 1/2003. One cannot conclude that the issue of human rights was not raised during the legislative process only on the basis of the White Paper. However, the White Paper shows why the reform process was initiated and what issues the Commission felt needed to be addressed. The outcome of the reform process, Regulation 1/2003, is the strongest indicator of that the protection of human rights was not fully taken into account since the modernized system of enforcement allows for possible violations of the fundamental principle of *ne bis in idem*, as will be further discussed below.

Five years after Regulation 1/2003 came into force, the Commission acknowledged in the 5-year report that parallel proceedings under Regulation 1/2003 could potentially amount to a violation the principle of *ne bis in idem*.[165] In the 5-year report the Commission also claimed that the ECN working groups discuss the issue of sanctions and *ne bis in idem* on a regular basis.[166]

Even though the legal community had as awareness of the implications of modernization on the principle of *ne bis in idem* for several years, as evidenced by the scholarly legal debate, the issue was not raised by the Commission in the White Paper probably because it was thought to be an issue better dealt with by the Union Courts.

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[164] *The White Paper*, para. 47.
[165] *5-year report staff working paper*, para. 223
[166] *Ibid.*, para. 248.

7.3 Multiple proceedings under Regulation 1/2003

The principle of *ne bis in idem* is phrased differently in different legal orders. Regardless of how the principle is phrased or interpreted, the existence of two legal proceedings regarding the same subject matter is a necessary requirement for its application. In relation to the modernized enforcement system of EU competition law, this means that the principle of *ne bis in idem* is only at risk of being violated to the extent the system allows for multiple proceedings in the same case.

Under Regulation 1/2003 the Commission, NCAs and national courts have parallel competence to apply article 101 TFEU and 102 TFEU. It follows from Article 3(1) of the regulation that when national courts or NCAs apply national competition law to agreements or behavior that may affect trade between Member States, they shall also apply Articles 101 and 102 TFEU.

Article 11(6) of Regulation 1/2003 relieves NCAs of their competence to apply Article 101 and 102 TFEU when the Commission initiates proceedings in the same case. Article 16(2) of Regulation 1/2003 explicitly provides for the possibility of subsequent decisions under Article 101 and 102 TFEU by NCAs and national courts also after the Commission has reached a decision in the same case.

These two seemingly contradictory provisions were interpreted in *Toshiba Corporation* to mean that the initiation of proceedings by the Commission only bars NCAs from applying national law during the reminder of the Commission's proceedings, not after the Commission has reached a decision. From the ECJ's judgment in *Toshiba Corporation* it appears to mean that NCAs are not only able to apply national competition law after the Commission has reached a decision in the same case, but also *Union* competition law.[167]

This means that Article 11(6) of Regulation 1/2003 is not a provision that indefinitely takes away the power from NCAs to apply national competition law or EU competition law when the Commission initiates proceedings in the same case. Instead, Article 11(6) of Regulation 1/2003 is only a provision that obligates NCAs to bring their proceedings to a halt while the Commission is investigating the same case.

There is no equivalent provision to Article 11(6) in Regulation 1/2003 that deals with multiple proceedings in the same case by more than one NCA. In theory, each NCA has the jurisdiction to investigate and fine any agreement

[167] Case C‑17/10, *Toshiba Corporation and Others*, not yet published, para. 86: *"Since those authorities remain authorized [under Article 16(2)] to apply EU law after the Commission has taken a decision, they must a fortiori be permitted to apply their national law, provided they comply with the requirements of EU law, in application of Article 3 of Regulation No 1/2003."*

or practice that may affect trade between Member States under the EU competition rules, regardless of where the agreement or practice was concluded or implemented.

Recital 18 of Regulation 1/2003 states that the objective of case allocation in the ECN is that each case should be handled by a single authority. Still, there are no binding rules to guarantee that this will always be the case. The rules on case allocation set out in the Network Notice are only indicative and built on the idea that in most cases the authority that first receives a complaint and initiates an investigation will be considered "well placed" to remain in charge of the case.

There are provisions in the Network Notice that explicitly designate parallel action by two or three NCA's. For example, Article 12 of the Network Notice suggests parallel action when an agreement or practice has substantial effects on competition in several Member States and the action of just one NCA would not be sufficient to bring the entire infringement to an end. In those cases the best solution is thought to be the NCAs acting in parallel, each one with regards to its respective territory.

It is clear that parallel or consecutive proceedings in the same case are possible in the modernized enforcement system of EU competition law under Regulation 1/2003. In some cases, parallel action is even suggested.

Multiple infringement proceedings in the same case means greater costs for both the undertakings and competition authorities involved. This is the economic rationale behind the principle of *ne bis in idem* and even though there are no binding rules to that effect, there is a strong economic incentive for the competition authorities in the ECN to avoid multiple proceedings in the same case. To what extent multiple proceedings can be avoided depends on how well the competition authorities co-operate, voluntarily, in the ECN and it has not always been avoided, as will be discussed in the next section.

7.3.1 When multiple proceedings have in fact occurred

It has been established in the previous section that since the enforcement regime under Regulation 1/2003 lacks binding rules on division of jurisdiction and case allocation within the ECN, parallel or consecutive proceedings in the same case are possible. Still, there are strong incentives to avoid this. Therefore, the obvious question is if multiple proceedings in the same case occur in practice, or if it is only a theoretical possibility.

As mentioned above, the 5-year report on Regulation 1/2003 concluded that modernization had been a success. The flexible and pragmatic arrangements within the ECN were said to work well in practice. Case re-allocation in the ECN rarely occurred and when it did, it was done without difficulties. The Commission also reported that parallel proceedings among the members of

the ECN were rare and that the vast majority of NCAs had not acted in parallel either with other NCAs or the Commission. The Commission could only report one instance of parallel action in relation to the same infringement.[168]

The reported situation described an instance when both the German NCA and Belgian NCA had investigated the same infringement and both imposed fines. The Belgian court reportedly proceeded with the belief that it was able to fine the infringement a second time without the principle of *ne bis in idem* being violated, because the Belgian decision only took into account the effects of the infringement on Belgian territory while the German decision only took into account the effects in the German territory. In the 5-year report the Commission wrote that this could have been an opportunity for the ECJ to clarify questions relating to the principle of *ne bis in idem,* and the definition of *idem,* but that neither the Belgian nor the German decisions were appealed.[169]

The opportunity for the ECJ to clarify its interpretation of the principle of *ne bis in idem* instead came in *Toshiba Corporation.* The case mentioned in the 5-year report dealt with consecutive proceedings by several NCAs. *Toshiba Corporation* dealt with proceedings by an NCA after the adoption of a decision by the Commission in the same case. From these two cases one can conclude that multiple proceedings in the same case are not only a theoretical possibility, but occur in practice under Regulation 1/2003, either by several NCAs or by the Commission and one or more NCAs. It is, however, important to stress that multiple proceedings in the same case remain rare.

According to the Commission, multiple proceedings has not been a great issue in practice and the Commission wrote in the 5-year report that few people in the legal and business community today demand that binding case-allocation criteria should be introduced in the ECN.[170] In the scholarly debate on the enforcement of EU competition law and the principle of *ne bis in idem,* however, several scholars have suggest that Regulation 1/2003 should have included an explicit ban on multiple prosecutions to prevent any chance of multiple proceedings in the same case.[171]

[168] *5-year report staff working paper,* para. 223, with reference to Decision of the German Bundeskartellamt in case B 11-23/05 and Decision of Belgian Competition Council of 4 April 2008.
[169] *5-year report staff working paper,* para. 223.
[170] *Ibid.*, para. 214.
[171] See for example Di Federico, Giacomo. *EU Competition Law and the Principle of Ne Bis in Idem*. E.P.L. 2011/17, No. 2, p 242 and Wils, Wouter P.J. *The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis.* W.C.L.E. Rev. 2003, vol. 26 No. 2, p 146.

7.4 The principle of *ne bis in idem* in EU competition law

The principle of *ne bis in idem* is guaranteed in the Charter, the ECHR as well as is in practically all national legal orders of the Member States. It is thereby recognized in all sources of human rights law in the Union legal order.

It is clear from the case law of the ECJ that the principle applies also in EU competition law proceedings. The ECJ's ruling in *PVC II* has been interpreted by many as the first general recognition of the applicability of *ne bis in idem* the field of Union competition law. The principle is derived from criminal law but applies in competition law proceedings mainly because fines imposed under the EU competition rules are considered similar to criminal sanctions.

In most legal orders the principle only applies within one country. Article 4(1) of Protocol No. 7 to the ECHR for example only refers to procedures within one state. But, Article 54 of the CISA is an example of the *ne bis in idem* principle applying between different Member States.

As the Charter has now acquired binding force, Article 50 of the Charter will be applied by the CJEU when interpreting the principle of *ne bis in idem* in competition law proceedings. Article 50 of the Charter explicitly refers to proceedings "within the Union" and its application is thereby not constricted to one Member State.

In *Toshiba Corporation* the Commission objected to the applicability of the Charter, because Article 51(1) of the Charter states that it only applies in relation to the *implementation* of EU law. Since the Czech NCA relied only on national competition law in its decision, the Commission argued that it was not bound by the Charter. The Advocate General was of the opinion that since 1 May 2004 the Czech NCA has been able to impose fines and conduct proceedings under the competition rules only in so far as Regulation No 1/2003, interpreted and applied in the light of the fundamental rights of the EU, leaves it scope to do so. This is an opinion that the Advocate General held to be true also when national competition law is being applied.[172]

Hence, there are no doubts to the applicability of the principle of *ne bis in idem* in EU competition law proceedings. What restrictions the principle puts on the enforcement system of EU competition law is decided on how the ECJ has interpreted the principle, which will be reviewed below.

[172] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 103 – 105.

7.4.1 The evolution and status of the case law

When reviewing the case law of the ECJ on the interpretation of the *ne bis in idem* in competition law proceedings, one finds that the evolution of the Court's interpretation of the principle runs parallel to the evolution of human rights in the EU legal order as a whole.

In *Walt Wilhelm* the ECJ did not make any explicit reference to the principle of *ne bis in idem* nor to any other fundamental human right. The ECJ did state that there is nothing in the general principles of community law preventing the possibility of subsequent sanctioning.[173] Article 6(3) TEU now recognizes the ECHR and the constitutional traditions common to the Member States to constitute general principles of Union law, but it is unclear whether it was those general principles the ECJ was referring to back in 1969.

The reference to "natural justice" in *Walt Wilhelm* appears out of date considering that today an equivalent statement probably would have been phrased according to established human rights concepts and terminology. *Walt Wilhelm* is an early example of how the ECJ introduced the protection of fundamental rights into the Union legal order, long before the Treaties contained any provision of the sort.

The judgment in *PCV II* was delivered in 2002 almost two years after the Charter had been solemnly proclaimed by the Union institutions. Still, the Charter was not was not explicitly referred to in the judgment of the Court, like Protocol No. 7 to the ECHR was. The Charter lacked legal force at the time, but so did Protocol No. 7, at least in relation to the Union, because not all Member States had ratified the protocol and the Union was not a party to the Convention. As already has been mentioned, it was not until 2006 that the ECJ explicitly referred to the Charter for the first time in a ruling. The *PVC II* judgment shows how important the ECtHR has been for the ECJ in developing human rights law in the EU.

It is important to note that even though the ECtHR has been very instrumental in shaping the ECJ's understanding of human rights, fundamental rights have also been developed independently of the ECtHR in the Union legal order. In *Franz Fischer v Austria* the ECtHR clearly rejected the accounting principle, whereby the second sanction is reduced by the amount of the first one, as established by the ECJ in *Walt Wilhelm.* Yet, the principles established in *Walt Wilhelm* have been upheld by the ECJ in judgments after *Franz Fischer v Austria.*

In *Franz Fischer v Austria* the ECtHR interpreted the principle of *ne bis in idem* to mean that one has the right not to be prosecuted twice for two different offences whose essential elements overlap. *Franz Fischer v Austria* was not referred to by the ECJ in *Aalborg Portland A/S.* Instead the

[173] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt*, [1969] E.C.R. 1, para. 11.

ECJ developed its own understanding of the principle of *ne bis in idem,* independently of the ECtHR, when it held that application of the principle was subject to the three conditions identity of the facts, the unity of offender and unity of the legal interest protected.

In *Zolotukhin v Russia* the ECtHR parted from the "essential elements" doctrine established in *Franz Fischer v Austria* and instead held that the only relevant criterion in establishing the existence of *idem* was identity of facts. Interestingly enough, the ECtHR made an explicit reference to the case law of the ECJ and aligned its own interpretation of the principle of *ne bis in idem* with the ECJ's interpretation the principle in Article 54 of the CISA.[174]

In her Opinion in *Toshiba Corporation,* Advocate General Kokott stated that the case law of the ECJ on the interpretation of the principle of *ne bis in idem* in competition law proceedings should be aligned with the ECtHR's ruling in *Zolotukhin v Russia.* The ECJ would thereby interpret the principle of *ne bis in idem* in competition law proceedings in the same way as the principle has been interpreted in Article 54 of the CISA. According to this interpretation, the only relevant criterion in finding the existence of idem is identity of facts. In its judgment in *Toshiba Corporation,* the ECJ did not follow the Advocate General's Opinion and instead upheld its previous case law.

This means that the case law of the ECJ on the principle of *ne bis in idem* in competition law proceedings has not changed since Regulation 1/2003 came into force.

In conclusion, as the case law stands today, the principle of *ne bis in idem* in EU competition law proceedings is to be interpreted as follows: As was established in *PVC II*, the principle "precludes an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision."[175] The definition of *idem;* what constitutes the same the same anti-competitive conduct, is subject to the threefold condition established in *Aalborg*

[174] Case *Sergey Zolotukhin v. Russia*, (Appl. No. 14939/03), Judgment of 10 February 2009, para. 84: *"The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together."* This statement was to a large extent modeled on the ECJ's judgment in Case C-436/04, *Van Esbroeck*, [2006] E.C.R. I-2333, para. 36: *"In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together."*

[175] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV and others v Commission (PVC II),* [2002] E.C.R. I-8375, para. 59.

Portland A/S: identity of the facts, unity of offender and unity of the legal interest protected.[176]

7.4.2 Implications of Toshiba Corporation

The ECJ's ruling in *Toshiba Corporation* has the consequence that the case law on the principle of *ne bis in idem* in competition law proceedings has not changed with Regulation 1/2003. The ruling can also be interpreted as a general approval of the modernized system of enforcement whereby parallel or consecutive proceedings in the same case are possible.

As has been discussed in the previous section, the evolution of the case law of the ECJ on the interpretation of *ne bis in idem* in competition law proceedings runs parallel to the evolution of human rights in the EU legal order as a whole.

The general status of human rights law in the EU legal order will continue to have consequences for the case law of the ECJ. For example, Article 6(2) TEU, which states that the Union is obligated to accede to the ECHR. The Union's accession to the ECHR as an independent party will help alleviate the risk of conflicting interpretation of fundamental rights by the ECtHR and the ECJ. For the purpose of coherence, conflicting interpretation needs to be avoided also before the Union accedes to the ECHR.

As stated in Article 52(3) of the Charter, the ECHR provides for a minimum guarantee protection of human rights in the EU legal order, insofar as the Charter contains rights that correspond to rights guaranteed by the ECHR. This is true, even though the EU has not yet acceded to the ECHR. The consequence of this is that the ECJ cannot interpret the principle of *ne bis in idem* less extensively than what the ECtHR does, insofar as the principle of *ne bis in idem* in Article 50 of the Charter corresponds to the principle of *ne bis in idem* in Article 4(1) of Protocol No. 7 to the ECHR.

As explained earlier, the Explanations to the Charter are not binding but provide for helpful guidance in determining what rights in the Charter correspond to rights in the ECHR. The Explanations on Article 50 of the Charter refer to Article 4 of Protocol No. 7 to the ECHR. The Explanations point out that Article 50 of the Charter applies not only within the jurisdiction of one state, but also between the jurisdictions of several Member States. Because Article 4 of Protocol No. 7 to the ECHR explicitly applies only within the jurisdiction of one state, the Explanations appear to imply that Article 50 of the Charter has the same meaning and scope as Article 4 of Protocol No. 7 to the ECHR only when the principle is applied within one Member State.[177]

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[176] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, [2004] E.C.R. I-123, para. 338.
[177] *The explanations*, p 31: *"As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the*

It seems very unlikely that the fundamental principle of *ne bis in idem* would be interpreted differently by the CJEU in cases confined to one Member State than in cases involving several Member States. In the field of competition law, for example, EU competition law is applied when an agreement, practice or behavior may affect trade between Member States. This can also be the case also when an infringement is limited to the territory of only one Member State. It would be detrimental to the coherence and uniformity of EU law if the Union Courts were to apply the principle of *ne bis in idem* differently in situations involving one Member State from how they apply the principle in situations that involve several Member States.

Therefore the Explanations should be interpreted as a confirmation of the similarity between Article 50 of the Charter and Article 4 of Protocol No. 7 to the ECHR, rather than evidence of the differences between the two provisions. Advocate General Kokott also stressed Article 50 of the Charter's close proximity to Article 4 of Protocol No. 7 to the ECHR in her Opinion in *Toshiba Corporation.*[178] Article 50 of the Charter should therefore be interpreted as corresponding to Article 4(1) of Protocol No. 7 to the ECHR within the meaning of Article 52(3) of the Charter.

The Explanations on Article 52(3) of the Charter state that the reference to the ECHR covers both the Convention as well as the Protocols to it, and that the rights in the ECHR are to be interpreted not only with regards to the text of the provisions, but also with regards to the case law of the ECtHR.[179] This means that the ECJ needs to align its case law on the principle of *ne bis in idem* with that of the ECtHR in order not to provide for less extensive protection that what is provided for in the ECHR.

In *Toshiba Corporation* the Advocate General suggested that the interpretation of *idem* in *Zolotukhin v Russia* should apply also when interpreting the principle of *ne bis in idem* in EU competition law proceedings under Article 50 of the Charter. In *Zolotukhin v Russia* the ECtHR assured a harmonized interpretation of "same offence" or *idem* in Article 4(1) of Protocol No. 7 to the ECHR as it held that two offences will be considered the same only if they arise from identical facts or facts which are substantially the same. The Advocate General's suggestion was rejected by ECJ which instead held that the finding of *idem* will continue to be subject to the threefold condition identity of the facts, unity of offender and unity of the legal interest protected.

In the situation in *Toshiba Corporation* the ECJ did not consider that the condition "identity of facts" was fulfilled. The facts that make up the

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guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR."

[178] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 119.

[179] *The explanations*, p 33.

"identity of facts" were further understood as "the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect".[180] Since the condition "identity of facts" is applied also by the ECtHR, the outcome of *Toshiba Corporation* would most likely have been the same also if the ECtHR's interpretation of *ne bis in idem* would have been applied.

However, since the ECJ applies three conditions for the finding of *idem,* while the ECtHR only applies one, identity of facts as established in *Zolotukhin v Russia*, the ECJ provides for less extensive protection than what is provided for under the ECHR. This is not allowed under Article 52(3) of the Charter which states that provisions in the Charter that correspond to rights guaranteed by the ECHR shall have the same meaning and scope as the corresponding right in the ECHR. The Charter can only provide for more extensive protection, not less extensive. Advocate General Kokott argued in a similar way in her Opinion in *Toshiba Corporation.*[181]

From the threefold condition identity of the facts, unity of offender and unity of the legal interest protected applied by the ECJ, it is arguably only the third condition "unity of the legal interest protected" that substantially differ from the ECtHR's sole condition of "identity of facts".

It is not clear from the judgment in *Toshiba Corporation* if the ECJ would uphold the notion that national competition law and EU competition law "protect different legal interests". In *Toshiba Corporation* the ECJ referred to its 1969 ruling *Walt Wilhelm* and upheld that "competition rules at European and at national level view restrictions on competition from different angles […] and their areas of application do not coincide", and that Regulation 1/2003 had not changed this.[182] This points to the possibility that the ECJ might still be of the opinion that national competition law and EU competition law protect different legal interests.

This would mean that a decision to fine an undertaking under national competition law, adopted after a decision under EU competition law has already been adopted in the same case, would be barred under Article 4(1) of Protocol No. 7 to the ECHR to the extent the two decisions concerned the same facts. The same decision would not be barred under Article 50 of the Charter as the condition "unity of the legal interest protected" would not be fulfilled.

[180] Case C‑17/10, *Toshiba Corporation and Others*, not yet published, para. 99
[181] Opinion of Advocate-General Kokott, delivered on 8 September 2011 in Case C‑17/10, *Toshiba Corporation and Others*, para. 123.
[182] Case C‑17/10, *Toshiba Corporation and Others*, not yet published, para. 81 - 82.

7.5 The effects of human rights on the enforcement of EU competition law - Conclusions

As this paper has made clear, the EU has reaffirmed its dedication to protecting fundamental human rights over the past years. Human rights now form part of the foundation of the European Union legal order. The practical consequences of this materialize themselves in several ways.

The enactment of Regulation 1/2003 constituted a major reform of the enforcement rules of EU competition law. The enforcement of EU competition law involves punitive administrative sanctions equal to those in criminal law. The goal of the reform was to create an efficient enforcement system. Assuring that the reformed enforcement system was in compliance with fundamental rights was secondary to this goal at best.

It is generally true that the implications of new legislation on fundamental rights might be better dealt with by the Union Courts than in political debates. However, this doesn't change the fact that the Union is no longer devoted only to economic integration and the creation of the internal market, but has moved into areas with great implications on human rights. The Union therefore has to take into account human rights considerations when reforming and passing legislation just as much as economic considerations. It is clear that this was not the case in the reform of the enforcement rules of EU competition law. As been established, Regulation 1/2003 allows for parallel or consecutive proceedings in the same case. Regulation 1/2003 only makes a vague reference to the protection of fundamental rights in Recital 37, but otherwise fails to address how the enforcement system of EU competition law assures the respect for human rights in the EU. Regulation 1/2003 should therefore be amended with provisions clarifying how the enforcement system assures the protection of fundamental rights and there should be binding rules that make parallel or consecutive proceedings in the same case impossible in situations that clearly violate the ECJ's understanding of the principle of *ne bis in idem.*

For the EU legislators, or anyone for that matter, to be able to make valid assessments of the impact legislation might have on fundamental rights, for example what restrictions the principle of *ne bis in idem* puts on the enforcement system of EU competition law, there needs to be clarity on the status and interpretation of fundamental rights in the Union legal order. The EU is about to accede to the ECHR and the case law of the ECJ therefore needs to be aligned with the case law of the ECtHR in order not to provide for less extensive, or conflicting, protection that what is provided for under the ECHR. To the extent that rights in the Charter correspond to rights in the ECHR, the alignment of ECJ's case law with that of the ECtHR is not only preferred but an obligation. Also, after the EU's accession to the ECHR as an independent party, the EU can be held accountable for violations of human rights before the ECtHR.

In the field of EU competition law this means that the ECJ cannot uphold a stricter interpretation of the principle of *ne bis in idem* in Article 50 of the Charter than the interpretation of the corresponding principle in Article 4(1) of Protocol No. 7 to the ECHR by the ECtHR. For the sake of assuring legal certainty and coherence it is also necessary for the Union Courts to apply a uniform interpretation of the principle of *ne bis in idem* in all areas of EU law. Conflicting interpretation of a fundamental principle like *ne bis in idem* unquestionably runs counter to the EU's commitment to human rights.

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