Usai A. A prosectorial model can lead to a fairer and more efficient enforcement in cartel cases

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Introduction

This article seeks to further contribute to the ongoing debate among scholars, institutions and practitioners on whether a separation between the prosecutorial and the adjudicative functions which are now both held by the European Commission ("the Commission") could entail a fairer and more efficient enforcement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") in cartel cases. Indeed, as regards fairness, many commentators have been arguing[i] that as the Commission acts as a prosecutor, a judge and jury the system needs to be reformed in order to be fair and therefore to comply with the European Convention of Human Rights' ("ECHR") standards. On the other hand, whilst the current Competition Commissioner Almunia[ii] has been arguing that the system is fair enough and efficient enough and that it does comply with the ECHR's requirements, judge Wahl[iii] pointed out that antitrust enforcement debate should focus on the Commission's dual powers.

[i] See I. Forrester, "Due Process in EC competition cases: a distinguished institution with flawed procedures", (2009) 817 ELR

[ii] See Almunia's speech "Due process and competition enforcement" Available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/449&format=HTML&aged=0&language=EN&guiLanguage=en; See also Almunia's speech "Fair process in EU competition enforcement" available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=HTML&aged=0&language=EN&guiLanguage=en

[iii] See Wahl's speech of 8 October 2010, "Antitrust enforcement debate should focus on the European Commission's dual powers" available at http://www.mlex.com/EU/content.aspx?ID=116110

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This paper will briefly state how the procedure works at the current state of the law, what are the main criticisms and what are the arguments in favour of a big structural reform. Then, in the light of the case law of the General Court ("GC"), of the European Court of Justice ("ECJ") and of the European Court of Human Rights ("ECtHR") it will consider whether the enforcement system is fair within the meaning of the ECHR. It is argued that the undertakings enjoy protection of several fundamental rights and that the system provides for checks and balances within the enforcement proceedings. Nonetheless, there are still some critical points regarding the structure of the enforcement system that should be reformed in order to be able to say that the system is fair enough. In addition, it is argued that the accession of the EU to the ECHR would not necessarily mean that the ECtHR would require the separation of functions as it might happen that the principle of equivalent protection[i] will still apply.

Secondly, this paper will address efficiency. Should it be discovered that there could be concerns as regards fairness, could an eventual reform jeopardize efficiency? Should we be more concerned about fairness or efficiency[ii]? To put it in another way: can a prosecutorial model be more efficient than the current one? The literature is mostly concerned about fairness. Here it is argued that a prosecutorial model can be more efficient than an administrative one. Efficiency means less costs and more benefits. Deterrence can be fostered together with the credibility of the whole system. The possibility of having wrong decisions can be drastically reduced and the risk of bias in the decision-making process completely avoided. Moreover, the length of the proceedings could be reduced as well. The statistics and the case law will show the reasons why this is possible. To put it in another way, it is argued that the Commission should adopt a "non return tactic"

[i] Bosphorus v Ireland, App. No. 45036/98 (ECtHR, 30 June 2005) par 110

[ii] See Fingleton's speech "Due Process should not be in the driving seat" regarding the ongoing debate in the UK on whether merging the two competition authorities and adopting a prosecutorial system available at http://www.mlex.com/EU/content.aspx?ID=122919&print=true

cutting off some of its options.[i] This will certainly create a sense of urgency improving efficiency and make the enforcement in cartel cases better off.

Finally, the paper will take into consideration all the possible solutions of an eventual reform. Here it is argued that the best solution will be the adoption of a prosecutorial system. Such a reform would not entail any amendments of the Treaties, as it would be possible to use what is now Article 103 TFEU. Moreover, a prosecutorial model can lead to a fairer regime (or at least avoid all kind of concerns and discussions regarding fairness) and to an even more efficient system. The UK's government has recently launched a public consultation[ii] taking into consideration the possibility of switching towards a prosecutorial model. The UK's Office of Fair Trading ("OFT") has stated[8] that the eventual adoption of a prosecutorial model in the UK would considerably increase uncertainty for business, raise high transition costs and ineffectiveness. Indeed, preparing the case for a full trial would be a high hurdle for the prosecutor that would have greater caution before bringing action before the tribunal. Moreover, it is assumed that a prosecutorial model would work better in a system where it would be highly likely that the applicants who are not happy with the decision of the now OFT would go on appeal. The aim of this paper is not of going deeply into the UK enforcement system. Even more now that the Government's response to the consultation has stated that there would be no adoption of prosecutorial model. Anyway, as it will be pointed out, in the European system the likelihood of going on appeal is very high, the judicial review works differently from how it works in the UK and moreover the fact that the prosecutor would have to prepare the case for a full trial could allow better cases, diminish costs and the risk of bias and foster efficiency.

1. Fairness

[i] See, inter alia, A. K. Dixit and B.J. Nalebuff, Thinking strategically (Norton 1991)

[ii] See the public consultation "A competition regime for growth: a consultation on options for reform" available at http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf

[8] See "The OFT's response to the government's consultation" available at http://www.oft.gov.uk/shared_oft/consultations/OFT1335.pdf

1.1 How the procedure works

According to the procedure laid down in Reg. 1/2003, the Commission's procedure starts with the Statement of Objections ("SO"), which contains all the elements of facts and law against the alleged anticompetitive agreement. Indeed, the SO is drafted by the members of Directorate General Competition ("DGCOMP") and it is reviewed by the Legal service, an economist, the Director and the Director General and the Cabinet of the Commissioner for Competition. Afterwards, the undertakings, which are the addressees of the SO, can make written replies and have a right to ask for an oral hearing.[i]

Usually, the officials who drafted the SO take part to the hearing together with some of the other officials already involved.[ii] Once that the Hearing takes place, the same officials who wrote the SO write the decision.[iii] At this stage of the proceedings, as regards cartel cases, normally there is no peer review examining the case. Be that as it may, the decision is commented on by the Advisory Committee, which represents the Member States. In the end, it is proposed by the Competition Commissioner to the others. In fact, formally speaking, the final decision is taken by the Commissioners.

1.2. The main criticisms

The International Chamber of Commerce ("ICC")[iv] stated that fairness does matter both when the Commission enforces antitrust laws and when the GC, apparently inadequately, reviews antitrust decisions. The point made is that justice is not only to be done, but also to be seen to be done. This is the reason why due

[i]The hearing allows the addressees of the SO their defense arguments not just on procedure but also on substance but the final report of the HO is only on procedure.

[ii] See J. Temple Lang, "Three possibilities for reform of the procedure of the European Commission in Competition cases under reg. 1/2003, in Carl Baudenbacher (Ed.) "Current Developments in European and International Competition Law" (ICLF 2010) presented at the 17th St.Gallen International Competition Law Forum Helbing Lichtenhahn, Basel 2011, 496 p. Vol. 12

[iii] Ibid.

[iv] See ICC, "Due process in EU antitrust proceedings", 8 March 2010 available at http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/ICC%20EU%20Due%20process%20paper%2008%2003%2010%20FINAL.pdf

process and strong attention to procedural fairness must be imperative. The ICC's paper suggests that Best Practices adopted by the Commission in the current procedures are not enough and that a more radical structural reform is needed to be done in order for the enforcement proceedings to be considered as fair as they should be.

In fact, the main criticisms[i] regarding the alleged lack of fairness in cartel cases proceedings address seven main points:

1. The alleged criminal nature of competition laws;

2. The fact that fines seem to be higher and higher;

3. The fact that the same officials that investigate in the case are supposed to draft the final decision;

4. The fact that the final decision is formally adopted by the 27 commissioners;

5. The alleged marginal role of the Hearing Officer;

6. The risk of bias in the decision-making process;

7. The scope and the intensity of the judicial review carried out by the GC.

Therefore, it is important to go deeper in these points in order to understand whether the Commission procedures can be deemed to be compatible with the right to a fair trial laid down in Art 6 ECHR.[ii] Moreover, it is important to understand what we do mean by "criminal charge", whether the procedure as it is at the present time guarantees a "fair and public hearing within a reasonable time" and whether the Commission is an "independent and impartial tribunal".

1.3. Is it criminal law?

In Adolf v Austria[iii] the ECtHR ruled that "criminal charge" bears an autonomous meaning, independent of the categorizations employed by the legal systems of the single states. "Charge" has a particular meaning within the ECHR. It can be defined as "the official notification given to an individual by the

[i] See note 10 above

[ii] Art 6 ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]"

[iii] Adolf v Austria (1982), series A no. 49, p.12, par. 30

competent authority of an allegation that he has committed a criminal offence".[i] Moreover, the basics for the applicability of the criminal aspect of Art 6 ECHR is based on the criteria outlined in Engel and others v The Netherlands:[ii] (1) the domestic classification; (2) the nature of the offence; (3) the severity of the potential penalty which the person concerned risks incurring.

What seems to be clear from the interpretation of the case law is that the first criterion has a relative weight. Domestic classification will never be decisive. As regards the second criterion, you have to look, inter alia, at the fact whether the legal rule has a punitive or deterrent purpose.[iii] The third criterion is determined by reference to the maximum potential penalty provided for by the relevant law.[iv] In order for Art 6 ECHR to be applicable it would be enough that the offence in question is regarded as criminal from the autonomous point of view of the ECHR or that the offence made the person liable to a sanction which by its nature and degree of severity belongs in general to the criminal sphere.[v] The case law of the ECHR[vi] shows that Art 6 ECHR under its criminal head has been considered to be applicable to competition law too.

In addition, this paper concurs with Wils[vii] on the fact that even if Art 23(5)[viii] of Reg. 1/2003 answers to the question whether antitrust fines are criminal within the meaning of EU law; even the more recent case law[ix] of the ECHR restated what is criminal within the meaning of the ECHR. The factors, which must be taken into consideration, are the Engel criteria. In other words, antitrust proceedings are

[i] See, inter alia, Dewer v Belgium (1980), series A no. 35, p 22, par 42
[ii] Engel and others v The Netherlands (1976), series A no. 22, p 34-35, paras. 82-83
[iii] See Ozturk v Germany (1984), Series A no. 73, par. 53
[iv] Demicoli v Malta (1987), series A no. 123, p 23, par 55
[v] Ozturk v Germany p 21, par 54 and Lutz v Germany (1987), series A no. 123, p 23, par 55
[vi] Société Stenuit v France (1992), Series A no. 232-A
[vii] See W. Wils, "The Increased level of EU Antitrust fines, judicial review, and the European Convention of Human Rights" (2010) 33 World Competition
[viii] The wording of the article provides that antitrust fining decisions "shall not be of a criminal nature"
[ix] Jussila v Finland Application no. 73053/01 (ECtHR, 23 November 2006) paras 30, 31

criminal within the autonomous meaning of the ECHR. The EU courts too have stated it.[i]

1.4. Is it compatible?

Nonetheless, the ECtHR confirmed that there is a difference between the hard-core of criminal law and the soft-core of criminal law and that violations of competition rules fall outside the scope of the hard-core of criminal law and that there might be no such a stringency in the application of Art 6 ECHR guarantees to cases which do not belong to the hard-core of criminal law. For instance, one big difference consists into the compatibility with Art 6 ECHR of criminal fines by the Commission. Indeed, this paper suggests that Wils[ii] is right when he holds that even if the Commission cannot be considered an "independent and impartial tribunal" this does not necessarily mean that the whole system is incompatible with the ECHR.

Reasons of efficiency could tolerate the fact that the penalty is imposed by an administrative body[iii] provided the possibility to challenge the decision made before a judicial body that has full jurisdiction and full guarantees. This paper suggests that there are sufficient efficiency arguments in favour of a prosecutorial model and that, therefore, there is no reason to read the case law of the ECHR as being an argument in favour of the current enforcement system.

1.5. Accession of the EU to the ECHR

Furthermore, it is even more urgent to clarify the abovementioned issues as the EU is supposed to accede to the ECHR.[iv] In fact, negotiations are being held

[i] Joined cases T-1/89 to T-4/89 and T-6/89 to T-15/89 Rhone Poulenc and others v Commission (1991) ECR II-869 at 885, Opinion of AG Vesterdorf; See also Case C-185/95 P Baustahlgewebe v Commission (1998) ECR I-8422, Opinion of AG Léger, par 31

[ii] See W. Wils, "The combination of the investigative and prosecutorial function and the adjudicative function in EC Antitrust Enforcement: a legal and economic analysis" (2004) 27(2) World Competition 201

[iii] Le Compte, Van Leuven and De Meyere v Belgium App no 6878/75; 7238/75 (ECtHR, 23 June 1981), par 51 and Albert Le Compte v Belgium App no. 7290/75; 7496/76 (ECtHR, 10 February 1983), par 29; See also Janosevic v Sweden App. no 34619/97 (ECtHR, 21 May 2003), par 81

[iv] Art 6 TEU

between the ECHR and the EU in order to let the latter join the former. Why would it be necessary for the EU to accede to the ECHR if, as it is known, the sources of fundamental rights are still the Charter of Fundamental Rights of the European Union ("CFREU")[i], the rights of the ECHR[ii] and general principles of EU law? The CFREU does not create any new rights. Will the accession make any differences as regard the protection of fundamental rights? Will the rebuttable presumption of equivalent protection laid down in *Bosphorus v Ireland* judgement still apply?

According to Wils[iii] the main reason for acceding to the ECHR is the fact that it will be possible to bring the Commission or the EU Courts before the ECHR whenever anyone will be able to claim that his or her rights under the ECHR have been breached by the Commission or by the EU Courts when reviewing the Commission's decision. In a certain way, it is already possible to bring this kind of action, but in order to be able to do it you should bring action against the 27 member states collectively. It is easy to understand that it is much more complicated.

Wils stresses that the accession will not necessarily entail that the ECtHR would rule in favour of the separation of the investigative, prosecutorial and adjudicative functions held by the Commission. Firstly, because the fact that the ECtHR created the principle of equivalent protection certainly suggests that the ECtHR does not think that the current system is manifestly incompatible with the; secondly because the CFREU does not create any new rights and the ECHR was already applicable via the general principles of EU law; thirdly because the system seems to comply with the ECHR's case-law requirements; fourthly, because the

[i] Now legally binding as it has the same legal value of the Treaties after the entering into force of the Lisbon Treaty

[ii] According to Art 52(3) CFREU: "in so far as this Charter contains rights which corresponds to rights guaranteed by the ECHR the meaning and scope of these rights shall be the same as those laid down in the ECHR[...]"

[iii] See W. Wils, "EU Antitrust enforcement power and procedural rights and guarantees: the interplay between EU law, National law, the Charter of fundamental rights of the EU and the European Convention on Human Rights" (2011) 34 Concurrences

current enforcement system goes even beyond[i] the protection of fundamental rights as it provides for a oral hearing before the hearing officer and provides for a code of best practices. Moreover, as it has already been pointed out above the system provides for a complex and sophisticated set of checks and balances. Anyway this paper suggests that both the HO and the checks and balances are not enough in order to consider the current system fair.

1.6. Fines

The second main criticism that is usually brought forward by many commentators[ii] who argue that the Commission's procedures are not fair is that the fines imposed by the Commission are higher and higher. Indeed, the press usually emphasizes, especially in cartels cases, the amount of fines, which is imposed upon the undertakings infringing Art 101 TFEU. In a quite recent case[iii] for instance, the applicants rely, inter alia, on the first plea in law alleging the infringement if the right to an independent and impartial tribunal as the fine was imposed by an administrative authority which holds simultaneously powers of investigation and sanction and that Reg. 1/2003 is unlawful in so far as it does not provide for the right to an independent and impartial tribunal.

As regards the second plea in law the parties rely on the alleged infringement of the right of the applicants to a fair hearing since the applicants were not given the opportunity of commenting on the method for calculating the fine; moreover they rely on the alleged lack of reasoning as the Commission did not explain on the basis of which sales the turnover had been calculated; then they allege the infringement of the principle that penalties are personal and, finally they allege the infringement of the principle of non-retroactivity of penalties in so far as the Commission applied the 2006 guidelines on fines retroactively. This entailed a significant and unforeseeable increase in the level of fines. As we can see, the argument of too high fines together with the argument that high fines are

[i] According to Art 52(3) CFREU the EU could provide for more extensive protection, but it is not obliged to do so.

[ii] See note 1 above

[iii] CaseT-56/09 Saint-Gobain Glass France and others v Commission still pending

disproportional can be used to bring action against the Commission. Although arguments of this kind are highly unlikely to succeed, pleas in law of this kind can dramatically jeopardize efficiency.[i]

Moreover the argument of Forrester[ii] who suggests that in competition law cases the fines imposed by the Commission are higher than fines imposed for other corporate offences, which are harmful to society, is immaterial. The harm that anticompetitive practices can cause is well known. Particularly harmful are cartels, which belong to the hardcore of Art 101(1) TFEU. There would be absolutely no point for having lower fines. Forrester is right at least when he points out that the way of reasoning of the Commission when imposing fines is based upon the aim of deterring cartelists from setting up a cartel and punishing them for doing it.

It is also true that this way of reasoning belongs to the logic of criminal law. Nonetheless, the ECtHR has ruled that there are two distinct "branches" of criminal law and that competition law belongs to the non hard-core one. That is why there does not seem to be the case to be concerned about fairness. Moreover, as it has already pointed out by Whish[iii] the fact of having higher fines helps to keep the so called "virtuous circle": high fines have a deterrent effect, high fines create an incentive to blow the whistle, blowing the whistle leads to the discovery of cartels and high fines are imposed on the cartelists other than the whistleblower.

Nonetheless, as regards the fact that fines are higher and higher, it is suggested that Forrester is right. As Wils stresses[iv] fines are higher and higher also because of the inflation, which normally goes on. That is why the nominal value of the fines cannot be a key point. The fines are criminal within the meaning of the ECHR and they must be considered to fall within the non hard-core part of criminal law. That is why it seems to be arguable that fairness and due process are not jeopardized as long as we are speaking about high fines imposed on cartelists. Moreover, it should be borne in mind that it is the percentage of turnover that

[i] See part 2
[ii] See note 1 above
[iii] R. Whish, Competition Law, 6th edition (OUP, 2009) p.259-260
[iv] See note 26 above

matters when the fine is imposed. Therefore, sometimes the fines are much lower than they at first appear.

1.7. The same officials draft the final decision; the final decision is formally taken by the 27 Commissioners and the role of the Hearing Officer

The third big cluster of criticisms that alleges that the Commission procedures are unfair regards the internal system of checks and balances. Indeed, as we all know, the formal procedure[i] begins with the SO which exposes the facts and legal arguments of the case in question. It is drafted by the officials of DGCOMP and it is reviewed by the Legal Service, the Chief Economist, the Director and the Director General and the Cabinet of the Commissioner for Competition. Moreover as it has already been mentioned above, the undertakings have a right to ask for an oral hearing before the Hearing Officer. Once the hearing has been completed the same officials who wrote the SO also draft the final decision. In cartels cases there is no peer review. However the Advisory Committee might comment on it. In the end, the final decision is adopted, formally, by the 27 Commissioners.

It might seem not to be the case of being concerned about fairness. In fact, apparently the Commission has introduced a quite complex and sophisticated system of checks and balances capable of bettering the final outcome of the case and lessening the risks of unfairness. This paper suggests that, as essentially the same officials who wrote the SO draft the final decision too, fairness can be jeopardized. It does not matter that the final decision is taken by the Commissioners. It might seem to be a sufficient guarantee but it is not as it is likely that neither the other 26 Commissioners nor the Commissioner for Competition has looked deeply into the drafted decision.[ii] Even more, in cartel cases there is no peer review. Moreover the presence of the Advisory Committee does not guarantee fairness as it is likely that most members of the Committee have not studied the case in depth. Moreover, the opinion of the Committee is only an opinion and it is not legally binding on the Commission.

[i] See note 31 above

[ii] See note 10 above

One of the most important safeguards for due process seems to be the HO and its role has been created in response to the abovementioned criticism that the same officials act as prosecutor and judge. However, the role of the HO is limited to procedural issues.[i] As pointed out by Temple Lang[ii] in practice this means that he or she must just say whether the undertakings under scrutiny have been given the possibility to reply to a specific argument. Moreover, even if the HO is independent, it can happen in practice that the HO's final report is based on the draft decision and that no changes occur in the meanwhile. Furthermore, it can be certainly suggested that the Legal Service is more important as safeguard than the HO but its role is not as visible from outside.

Furthermore, the ICC[iii] points out that the hearing is not public, that the final decision-makers are not judges and that they do not attend the hearing and the HO does not decide the case. The ICC suggests that the internal debate is not satisfying and that even if the ECtHR has ruled that competition law belongs to the non hard-core branch of criminal law, the normal criminal standard should apply to competition procedures. In other words, the safeguards provided for by the Commission seem to be similar to the approach of Captain Mainwaring.[iv] Indeed, although the final decision is formally taken by the 27 Commissioners, essentially the same officials write the SO and draft the decision. Therefore what is likely to happen in reality is that due process does not seem to be safeguarded and the alleged checks and balances which have been introduced are not enough to claim that the system can be deemed to be fair.

1.8. Judicial review

[i] As it has already been pointed out by Wils many times, the HO is different from the Administrative Law Judge who operates within the FTC in the US system. Apparently, in FTC v Cement Institute, 333 US 683 (1948) the argument that the combination of functions violates fairness has already been raised even if never accepted by the Courts

[ii] See note 10 above

[iii] See note 12 above

[iv] Captain Mainwaring was the main character of "Dad's Army" a British sitcom about the Home Guard during the Second World War broadcasted on BBC from 1968 to 1977. In one of the episodes he said that it is better to do something even if it might be ineffective than doing nothing in order to let it seem that something has been done. It might be considered similar to the approach held by the Prince of Salina in the famous Italian novel by Tomasi di Lampedusa "The Leopard": to change everything in order not to change anything.

There is still a huge debate going on among scholars and practitioners on whether the judicial review as it is now complies with the ECHR's standards or not. For instance, Forrester argues[i] that it does not as the European Courts are too deferent towards the Commission fact-finding and deferent as regards the setting of the fines. Indeed, it must be pointed out that cartels cases are quite different from abuse of dominant position cases and merger cases, in which for sure the Commission exercises a strong discretion as regard complex economic assessments. Anyway, Forrester adds that there have been cases of judicial rigour as well.[ii] Nonetheless, Forrester blames the Courts for not strongly reviewing the Commission's decisions.

On the other hand, Wils[iii] stresses that the system as it is at the present complies with the ECHR's standards even though the Commission is not an independent and impartial tribunal according to the ECHR's case law. There is always the "reasons of efficiency" requirement[iv] and the fact that it is not incompatible for an administrative body to impose sanctions and to adjudicate provided that there is always the possibility to challenge any decision before a judicial body that has full jurisdiction and full guarantees.[v] Obviously, it should be suggested that this view can be justified only as long as competition law is deemed to stay within the soft-core of criminal law.

Thus, the issue is whether the European Courts do have full jurisdiction or not and whether they exercise it. This big issue has not been defined yet and the debate is growing more and more. The ICC for instance, has pointed out that the GC does not exercise extensive review and that therefore it does not have full jurisdiction within the meaning of the ECHR. In facts, under Art 263 TFEU the courts' competence is confined into voiding decisions that are illegal without

[i] See I. Forrester, " A Bush in need of pruning: the luxuriant growth of light judicial review" in Claus-Dieter Ehlermann and Mel Marquis, eds., European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases, Hart Publishing
[ii] Joined case C-89/85, etc. Ahlström Oy and Others v Commission [1993] ECR I-1307
[iii] See note 31 above
[iv] See note 32 above
[v] Ibid.

having the possibility of substituting their own decision to that of the Commission. To put it in another way, what they are allowed to do is just reviewing the manifest errors. The ICC's paper goes on setting out that the GC exercises self restraint when it comes to complex and factual economic assessments and even more, it does not use properly its unlimited jurisdiction on fines.[i]

In addition, even though the ECHR's case-law sets out that in order for an administrative system to be justified you have to look at reasons of efficiency and at the fact that the possibility of bringing action before a judicial body must be guaranteed as long as we stay within the soft-core of criminal law, it seems to be difficult to say the final word on whether the system is compatible or not. Moreover, speaking about EU law, the ECJ[ii] has ruled that the combination of functions which are held by the Commission does not infringe any general principle of EU law as the GC can undertake an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of facts. Furthermore, the GC has unlimited jurisdiction on fines. This is certainly true. The point is whether the GC exercises it or not.

Furthermore, AG Sharpston[iii] stresses that the ECtHR's case law, the validity of the Engels criteria and the difference between the hard-core of criminal law and the soft-core of criminal law set out in *Jussila v Finland*. Indeed she adds that if the combination of functions could be considered as a good criticism from the point of view of the Commission's procedures[iv], in this case the applicant seems to refer only to the alleged inadequacy of the reviewing powers of the GC. According to AG Sharpston's opinion[v] the GC has full jurisdiction as it has the power to "quash in all respects", on questions of fact and law, the decision of the Commission. Moreover, she goes on pointing out that the GC has unlimited

[i] B. Vesterdorf, "The Court of justice and unlimited jurisdiction: what does it mean in practice?", June 2009, GCP
[ii]Case T-25/95 etc Cimenteries and Others v Commission [2000] ECR-II-491, paras 718- 719
[iii]Case C-272/09 P KME Germany and others v Commission, Opinion of AG Sharpston, paras 63-83
[iv]Ibid. par 68
[v]Ibid. par 69

jurisdiction as regards fines and that the GC has exercised it. In another recent case[i], AG Mengozzi confirmed the compatibility of the system with the ECHR's standards.

This paper suggests that even though it is true that the GC does not have the same powers of the Competition Appeal Tribunal ("CAT") in the UK, that is to say that the GC cannot substitute its decision to the Commission's, the ECHR's standards do not require neither that the reviewing Court should raise any pleas on its own motion[ii] nor that the reviewing court conducts an ex-novo trial. In fact, as Wils has pointed out, *Kyprianou v Cyprus*[iii] standards cannot be applied to Competition law[iv] as it concerned the hard-core of criminal law, whilst competition law is still within the soft-core of criminal law. As a result it seems to be arguable that Strasbourg requirement of full review only relates to the scope and the intensity of the review and it does not require the GC to substitute its decision to the Commission's. This argument can also be extrapolated from another case of the ECtHR: the Italian Competition law authority fined Menarini Diagnostics in 2003 for price fixing and market sharing in the market of diagnostics tests for people suffering from diabetes. The abovementioned undertaking argued that that sanction should have been qualified as criminal within the meaning and interpretation of Art 6 ECHR as the Italian Competition Authority could have never been considered as an impartial tribunal. This issue seems to be relevant, mutatis mutandis, also at the EU level. Indeed, the Italian law is modelled upon the competition Treaties provisions.

The ECtHR stated that that fine should have been seen as criminal within the meaning and the interpretation of Art 6 ECHR due to its severe and deterrent purpose. However, the Court dismissed the plea of Menarini Diagnostics because an independent administrative authority can apply a criminal sanction provided

[i]Case C-521/2009 P Elf Aquitaine SA v Commission, Opinion of AG Mengozzi

[ii] Apparently, the ECHR's requirements relates only to the scope and the intensity of judicial review. The ECtHR does not require the GC to substitute its own decision to the Commission's; see also note 32 above

[iii]Kyprianou v Cyprus, application no. 73797/01 (ECtHR, 15 December 2005)

[iv] One of the arguments brought forward by the ICC's paper was the compliance with it

that the undertaking is able to go on appeal before an independent tribunal having full jurisdiction. In this case, the ECtHR found that both the Italian first-instance administrative court and the highest administrative court exercised full jurisdiction. As it seems clear from this case, the ECtHR tends to consider as legitimate that an administrative authority imposes a criminal fine provided that it is possible to go on appeal before an independent judge with full jurisdiction. Furthermore, the ECtHR does not require that judge to be able to substitute the Commission's decision with its own decision.

This paper suggests that as long as the debate regards the requirement of full judicial review, the enforcement system seems to be compatible with art 6 ECHR. Obviously, the EU could provide for the separation of functions but it does not seem to be obliged to do so from the ECHR's perspective as long as we are referring to the requirement of full judicial review. However, it does not seem to be arguable that the enforcement system is incompatible with Art 6 ECHR even though the current system is not optimal. The "reasons of efficiency" requirement is not satisfied.[i]

Moreover, speaking about fairness and due process, the fact that the current judicial review can be considered compatible with the ECHR does not mean that the issues mentioned above regarding the procedures going on within the Commission comply with due process and fairness. An eventual stronger intention of reviewing the Commission's decisions cannot be the answer to the fairness concerns either. In fact, the officials who draft the SO and who draft the final decision are essentially the same, the risk of prosecutorial bias is high, the HO has competences only on procedural issues and the final decision is taken by the 27 Commissioners.

Anyway, as it has been mentioned above, after the EU accession to the ECHR, the ECtHR will probably go on applying the rebuttable presumption of equivalent protection. This is highly likely to happen as it could be used as a kind of non aggression agreement between the European Courts and the ECtHR. That

[i] See part 2

is why the key argument to call for a structural reform of competition enforcement in cartels cases is the efficiency argument.

1.9 Is the system fair?

The question whether the enforcement system in cartels cases as it is at the present is enough fair or not remains. There is a big debate which is still going on between who argues that the system is fair and who firmly believes that it is not at all. A part from the ECHR and the CFREU, the case law of the EU courts points out a cluster of fundamental rights. The aim of this paper is not of focusing on the immense case law regarding the rights of the defense.

Anyway it is worth mentioning that in cases like *Orkem and Solvay v Commission*[i] the ECJ considered whether undertakings could refuse to answer certain questions in a Commission's request for information on the basis that to do so would be self incriminating. There is a limited privilege against self-incrimination but there is no possibility of refusing to hand over documents. In *Mannessmann-Rohrenwerke AG v Commission*[ii] the GC held that there is no absolute right to silence. In *AM and S Europe*[iii], it was established that certain documents are covered by legal professional privilege. The case ruled that in order for a document coming from a lawyer to be protected, the lawyer has to be independent that is to say non-in-house. The principle was restated in *Akzo Nobel v Commission*[iv] where the Court had the possibility of overruling its previous decision, but it decided instead of following the opinion of AG Kokhott. In Polypropylene[v] the principle of presumption of innocence[vi] was recognized. In other words, the system does acknowledge the protection of the fundamental rights to undertakings, which are alleged to breach Art 101 TFEU. Moreover, the

[i] Case 374/87 Orkem v Commission [1989] ECR 3283; Case 27/88 Solvay&Cie v Commission [1989] ECR 3355

[ii] Case T-112/98 Mannessmann-Rohrenwerke AG v Commission [2001] ECR II-729

[iii] Case 155/79 AM and S Europe [1982] ECR 1575

[iv] Case 550/07 Akzo Nobel v Commission [2010] ECR 0000

[v] Polypropylene Cartel, Re OJ [1986] L 230/1

[vi] Many commentators argue that the fundamental right of presumption of innocence is not satisfied as the burden of the proof is upon the undertaking when bringing action against the Commission's decision before the Courts

Commission, in its struggle to overcome all the possible concerns about due process, has provided for a few checks and balances as it has already been mentioned above.

However, can the Commission be considered an "independent tribunal" within the meaning of the ECHR? According to the case law of the EctHR[i] it cannot. Indeed, there would be no argument in favour of the Commission being considered as an independent tribunal. Be that as it may, the right to a fair trial seems to be satisfied even if an administrative body imposes fines provided that the person concerned can bring action before a judicial body with full jurisdiction. Moreover, for reasons of efficiency[ii] a system working in this way is deemed to be justified. We will see whether the efficiency argument works better in favor of the administrative model or of a prosecutorial model.

What is clear, by the way, is that as long as competition law remains within the soft-core criminal law, the ECHR does not require a prosecutorial model. The fact that competition law is deemed to be part of the soft-core criminal law can be supported by the fines being imposed not upon individuals as such but upon legal persons. In any case the large majority of national competition enforcement systems adopt the administrative model. The counter-argument can be that competition law should be considered as being part of the hard-core of criminal law because it is quite different from, for instance, the taxation field. In fact, even in taxation cases, when it is criminal, you have to prosecute.

Furthermore, it might even be the case of introducing penalties on individuals in order to foster efficiency. This would certainly imply the reconsideration of competition law within the hard-core of criminal law. In the end, as regard the comparison with the majority of the national systems, the European legal order is a different and autonomous one and it should aim at better standards and not necessarily follow the ones already used by the Member States. Again, at the present, the Commission cannot be considered as an independent and impartial

[i] See note 10 above
[ii] See note 27 above

tribunal.[i] Nonetheless, the ECHR does not require any separation of functions. Can we say that it is EU law that requires the separation? For instance, the CFREU goes beyond the ECHR standards when protecting the right to a good administration[ii] and when requiring the proportionality of fines.[iii] However, the idea which is suggested here is that neither the right to a good administration or the proportionality of fines would imply the separation of functions under EU law. To put it simply, fines are proportional[iv] and the right to a good administration does not seem to be enough to require a separation of functions.

One stronger argument could be the principle of equality, which is a general principle of EU law. In certain cases[v] where the Commission does not consider the different degree of participation into a cartel of an undertaking, it can be a good point. Even if it does not seem to be enough to say that EU law requires a separation of functions. Moreover, as it has already been mentioned above, it will be likely that the EU accession to the ECHR will not require any separation of functions because it will be likely that the rebuttable presumption laid down in Bosphorus v Ireland will continue to apply. That is how to say that the ECHR provides for a minimum of protection. Obviously the EU could do more, but it does not seem to want to do it. Another strong argument in favour of the fact that the system as it is now is not likely to change is the so called functional approach[vi]: fairness matters only if the lack of a safeguard or a fairer procedure would lead to a different outcome.

This paper suggests that even though neither the ECHR nor EU law requires any kind of separation of functions, the system does not seem to be fair enough. Although a few rights have been introduced, the main problem still remains the

[i] Also Wils agrees. As long as competition law will be in the soft-core of criminal law and as long as the efficiency argument is satisfied the ECHR does not require any separation of functions

[ii] See art 41 CFREU

[iii] See art 49 CFREU

[iv] See note 22 above

[v] Case T-21/05 Halcor Metal Works SA v Commission, OJC82, 2.4.2005, p 36 and see Air Cargo cartel decision where one of the legal pleas raised was the fact that the fine was allegedly no fair if compared to the other cartelists

[vi] See Matthews v Elridge, 424 US 319 (1976)

structure of the enforcement system. The internal debate is not enough and the oral hearing as it is now is not satisfying. The best solution seems to be a prosecutorial system where the investigative, the prosecutorial and the adjudicative functions are separate. More controversial is the question as to whether fairness should outweigh efficiency. Would it be worth changing if efficiency would be jeopardized? Efficiency should prevail, especially in cartels cases. What we should really ask ourselves is whether a prosecutorial model would be more efficient than the current one.

2. Efficiency

In the first part of this paper we have gone deeper into the issue of fairness and we have seen that a prosecutorial model could foster fairness. The enforcement system as it is now does not seem to be fair enough, although a few rights and safeguards have been recognized by the Commission. The main problem still deals with the structure. In addition, the second part of this paper will go deeper into the issue of efficiency. Indeed, in the literature fairness and efficiency are usually considered as two incompatible issues. This paper suggests that they can be comfortable bedfellows and that therefore they should be allowed to live happily ever after. Given the fact that the more radical an eventual structural reform of the enforcement procedures will be, the more effectiveness should be guaranteed. That is to say that, an eventual reform should not entail any loss in the first place.

Even more, an eventual reform should entail further benefits and diminish the current costs that can be eliminated. In another words, the big radical structural reform that this paper suggests should guarantee effectiveness and foster efficiency. Indeed, if we could prove that an adversarial model can be more efficient in cartels enforcement proceedings, the big debate regarding fairness could be read from a different point of view. In fact, as long as the separation of the three functions[i] now held by the Commissions can provide for a more efficient

[i] It could be argued that the fact in itself that the debate keeps going on is jeopardizing efficiency as it increases the already high likelihood of going on appeal and it contributes to diminish

system saving time and money and providing for better outcomes, there would be no reason to go on and speak about fairness and due process in Competition law proceedings. Indeed, if there can be doubts on the fact that a prosecutorial model is more efficient, there are certainly no doubts that it can be fairer.[i]

To begin with, it should be pointed out what efficiency means. Efficiency is always maximized when it is possible to have fewer costs. What do fewer costs mean? It means to save time and money and it means to provide for tools that can reduce the risk of bias, the risk of inaccurate decisions and the risk of having too many cartels, which are not detected or not punished properly. Moreover, fewer costs mean also diminishing the risk of having a non-credible system. Then, efficiency must necessarily mean more benefits. To be more explicit, it means faster proceedings, less costly procedures, more objectively taken decisions, more accurate decisions, and maximizing the number of cartels, which are detected and punished. Efficiency means also fostering deterrence and the credibility of the system. Moreover, the understandable concerns about efficiency should also take into consideration the more efficient way to get to a more efficient enforcement system. In other words, it should be preferred the big structural reform that could be done in the fastest way and in the easiest one. The fastest and the easiest way to reform something in the European Union is reforming without going through the Treaty amendment procedures.[ii]

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deterrence and the credibility of the system. The ECtHR case law seems to confirm this view. If the system remains as it is it will be highly likely that a loss of efficiency will occur. Indeed, although the ECtHR does not seem to concur with that, the undertakings will always been able to raise pleas related to the alleged lack of fairness in order to go on appeal and waste time. The credibility of the whole system and the deterrent effect will decrease significantly. See Alec Burnside, "Mario Monti should not be judge and jury", Financial Times, 21 October 2002, p17; and "Enforcement of competition law in Europe is unjust and must change", The Economist, 18 February 2010

[i] As it has already been pointed out in part 1 of this paper, if on one hand it is true that a few rights are being protected by the current sources of fundamental rights, on the other hand the internal debate and the combination of functions cannot be considered sufficient to stop fairness concerns.

[ii] A reform which would entail Treaties' amendments would not certainly be worthtaking: it would require a long time and everlasting negotiations.

Furthermore, one way to foster efficiency is to act strategically.[i] Sometimes it could be in a player's interest to reduce his own freedom of future action and to create a non-return situation, an emergency situation. For instance, this strategy was taken by Cortés who burned his own ships after his arrival in Mexico. He deliberately eliminated the option of going back to Spain. Without ships to sail back home, Cortés made it clear to his crew that they could either fight and destroy their enemies or perish. No matter that his soldiers were enormously outnumbered. This strategy, that at the beginning scared his army and risked to create an occasion of mutiny, was the best solution to be taken. In fact, Cortés put himself and his crew in a urgent and in a non-return situation. They could not fail. Failure would have certainly meant death. Indeed, they did not fail. They fought and they won. This is to demonstrate that, in order to work out what is best, it is often a good strategy to cut off all the different options that you have but one.

The same strategy was adopted by Polaroid Corporation when it refused to diversify out of the instant photography market. Polaroid committed itself in a life-to-death battle against every kind of likely intruder in the market. Then Kodak entered the market and Polaroid put all its resources into the battle. In this way, Polaroid could regain its previous position on the market and drive out Kodak after winning a billion-dollar lawsuit. It is all about making a threat credible. Another efficient way to do it is to adopt the brinkmanship strategy[ii]. This tactic consists in "deliberately letting the situation get somewhat out if hand, just because its being out of hand maybe intolerable to the other party and force his accommodation".[iii]

The cut-off strategy seems to work properly. Indeed as it has already been pointed out[iv] this kind of strategy was adopted by Cindy Nachson-Schechter. She really wanted to lose weight. She perfectly knew what she had to do: eating less

[i] See A. Dixit and B. Nalebuff. "Thinking Strategically. The Competitive Edge in Business, Politics, and Everyday Life". (New York: W. W. Norton & Company, 1991)

[ii] See T. Schelling, The Strategy of Conflict. (Cambridge, Mass.: Harvard University Press, 1960)

[iii] This can be the case of the fact that in the US system cartelists are strongly encouraged to settle without going before the Courts

[iv] See A. Dixit and B. Nalebuff, "The Art of Strategy: A Game Theorist's Guide to Success in Business and Life", (New York: W. W. Norton & Company, 2008)

and doing more exercise. Nonetheless she was not able to succeed. This is the reason why she accepted the offer of ABC Primetime. The deal was that she had to wear a bikini while being taken some pictures of her in a photographer's studio. ABC Primetime would have destroyed the pictures only if she had lost 15 pounds of weight in the next two months. Otherwise, everybody could have seen the pictures of her wearing a lime-green bikini on ABC Primetime's television, a national TV.

In fact, it is true that it might seem that the more options are available, the better. However, what seems to be clear is the opposite. The fewer the options, the better.[i] In other words, the point is: what is the best enforcement system? What is the best way to detect and punish in an efficient manner a cartel? This is to show that Game Theory can be very helpful in our analysis. In other words, in order to foster efficiency in Antitrust proceedings regarding cartels cases' enforcement, there are good arguments in favour of a separation of the investigative, prosecutorial and adjudicative functions, at the present held by the Commission. It seems to be arguable that if the Commission cut off its adjudicative option leaving it to the Courts, the whole system can be made better off. This is the big structural reform that can provide for a more efficient enforcement system.

This is the background of our legal and economic analysis. However, as it does not seem to be the case of giving things for granted, this paper will examine whether the enforcement system as it is now is efficient and if it could even be more efficient after an eventual switch towards a prosecutorial system. It will look at the length of the proceedings, at how the judicial review works from an efficiency point of view, at how to make more efficient the imposing of a fine, the leniency procedure and the settlement procedure, at the credibility of the system and whether there could really be risks of bias and how these risks can be reduced. In other words, this paper will suggest that a prosecutorial model seems to lead to a more efficient enforcement in cartels cases because deterrence seems to be maximized indeed.

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[i] See note 77 above

2.1. Length of the proceedings[i]

The first cluster of criticisms deals with the length of the proceedings. In fact, as it has already been pointed out, one of the alleged advantages of the current administrative enforcement system is that an administrative system can lead to efficiency because it provides for faster proceedings than it would be in a prosecutorial system where the Commission should prepare its folder and bring action before the Courts. Moreover, according to the statistics and to the problems that are usually dealt with in the national legal systems, one of the main problems regarding the administration of justice is the delays that cases encounter when they get stuck in the Courts.

Furthermore, as it seems to be clear from the statistics[ii] regarding the European Courts, the delays of the cases are mainly at the level of the GC. That is why when the topic of the discussion comes to efficiency of antitrust enforcement, especially in cartels cases, many commentators either they do prefer to avoid dealing with the issue of efficiency because they are more interested in fairness and in due process and they do not seem to be concerned about having an efficient enforcement of Art 101 TFEU or they just point out that an administrative system is more efficient because there are no Courts involved in the decision and therefore the outcome is better off because of the high level of expertise of the officials of the Commission.

What seems to be clear is that there are delays in antitrust proceedings at the level of the GC. In fact, the average[iii] of the length of the proceedings in cartels

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[i] It could be argued that the length of the proceedings both before the Courts and the Commission is problematic also as regards fairness. In Case C-385/07 Der Grüne Punkt – Duales System Deutschland GmbH v Commission, par 177-183 the ECJ reaffirms the right to a reasonable duration of the proceedings before the Courts. Anyway, it pointed out that reasonableness depends on the circumstances of each case. Furthermore, the AG's opinion adopts a functional approach (paras 305-307). To put it in another way, even though it could be argued that reasonableness is not met, the likely outcome of any dispute will be the principle of equivalent protection.

[ii] See DGCOMP's statistics available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

[iii] See D. Gerard, "Judicial review of cartel decisions", in Mario Siragusa and Cesare Rizza, eds., EU Competition Law, Vol. III. Cartel Law: Restrictive Agreements and Practices Between Competitors, Claeys and Casteels, 2007, Chapter 5

cases was of 40 months at the level of the GC and of 35 months at the level of the ECJ between 2000 and 2005. Then, between 2006 and 2010 the average goes significantly up to 54 months at the level of the GC and it goes down to 25.5 months at the level of the ECJ. Moreover, what it seems to be clear from the statistics[i] too is that, as long as regards cartel cases before the GC, the 6% of them was fully annulled between 1995 and 2005, whilst the 16% was fully annulled between 2006 and 2009. However, the 56% of the cases was partially annulled and/or the fines imposed were reduced between 1995 and 2005, whilst the 27% ended up in the same way between 2006 and 2009. The dismissals increased from an average of 38% in the former period of time to the 57% in the latter. As regards the ECJ, between 1995 and 2005 the 20% of the cases were annulled, either fully or partially, whilst the 9% ended up in the same way between 2006 and 2009. The dismissals increased from 80% in the former period to 91% in the latter period.

This data shows two main issues: the first one is, as it has already been suggested, that the delays concentrate at the GC level. Therefore, an eventual reform to make the enforcement better off should take into consideration a solution, which would be able to reduce the delays and make the procedures even faster than they are now. Secondly, they show that a huge percentage of cases go on appeal before the Courts. Obviously, this is not surprising at all. It is desirable that an undertaking, which is not happy with the Commission's decision, brings action against it. However, the easiness through which appeals can be brought and the fact that neither the GC nor the ECJ can substitute the Commission's decision with their own decision, as for instance it happens in the UK[ii], can jeopardize efficiency. In fact, whenever the Commission's decision is fully or partially quashed down by the Courts, everything has to go back to the Commission, which is supposed, take the case under scrutiny again and issue another decision.

Moreover, it is suggested here that as the EU is about to accede to the ECHR and as it will be possible for each undertaking which is not happy with an eventual

[i] Ibid.

[ii] In the UK the Competition Appeal Tribunal (CAT) has full judicial review on the merits and can therefore substitute the Office of Fair Trading's decision with its own decision

Commission's decision imposing a fine for an infringement of Art 101 TFEU to bring action against the Commission before the ECtHR, the whole system will end up with having one more level of judicial review. In other words, an undertaking being fined by a Commission's decision because of its taking part into a cartel will be able to challenge the decision before the GC, before the ECJ and, ultimately, before the ECtHR.

As we know that it is easy to go on appeal and that it is easy to bring arguments alleging an infringement of fundamental rights also because of the current combination of functions held by the Commission, without a structural reform separating the investigative and prosecutorial function from the adjudicative one, there will be more and more pleas alleging the breach of fundamental rights, especially the right to a fair hearing, it will be highly likely an increasing of the already huge length of the proceedings. In other words, this is a likely increasing of inefficiencies.

In any case, whenever the literature takes into consideration the length of the proceedings in cartel cases, it is only the length of the procedures before the Courts that is examined. Indeed this paper argues that also the length of the procedures before the Commission is relevant. However, before speaking about that, it should be pointed out that at the present, the procedure consists of these main stages: after the infringing behavior takes place, the Commission will start its investigations.[i] Once the investigations are deemed to be completed, the Commission will issue the SO and it will start its internal debate consisting into consulting the Legal Service, the Chief Economist, giving the possibility to the undertakings concerned of asking for an oral hearing before the HO. Then, the decision is drafted and the final one is supposed to be taken by the 27 Commissioners. This is how the enforcement system works now and how an administrative enforcement system is supposed to work.

However, what should be borne in mind is that in a hypothetical prosecutorial system, there would be no SO, no oral hearing before the HO, no internal debate

[i] Mostly, when one of the cartelists decides to whistleblow the cartel and apply for leniency

with checks and balances and no draft and final decision. Moreover, there will be no supplementary SOs and remittals from the Court to the Commission. In a prosecutorial model there would just be the Commission acting as a prosecutor concerned about preparing its strong case to be brought before the Court. That is why a prosecutorial model properly adopted could entail more efficiency. It would be possible to save time and, furthermore, it would be highly likely that the number of cases going on appeal will be reduced either because the cases that the Commission will bring will be much stronger or because there will be more settlements as it happens now in the US.[i]

Secondly, as regards the length of the proceedings within the Commission in cartels cases the statistics[ii] speak for themselves. In 2006 it was adopted the second decision of *Alloy Surcharge* case[iii]. The first decision was adopted in 1998; In *Synthetic rubber*[iv], the investigations began between 2002 and 2003. The SO was issued in 2005 and the decision was taken in 2006; In *Steel beams*[v] the infringing behavior took place between 1988 and 1991. In 2003 the ECJ annulled the then CFI judgment. The decision was finally readopted in 2006; In *Fittings*[vi] the investigations started in 2001, the SO was issued in 2005 and the final decision was taken in 2006; In *Bitumen Netherlands*[vii] the investigations started in 2002, the SO was issued in 2004 and the final decision was issued in 2006; In *Acrylic Glass*[viii] the investigations started in 2002, the SO was issued in 2005 and the final decision was issued in 2006; In *Hydrogen Peroxide*[ix] the investigations started in 2003, the SO was adopted in 2005 and the final decision was issued in 2006;

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[i] According to DOJ's statistics 90% of the corporate defendants charged with an antitrust offence have entered into plea agreements and up to the 70% of civil antitrust cases in the US are settled with consent decrees

[ii] See DGCOMP website's section dedicated to cartels available at http://ec.europa.eu/competition/cartels/cases/cases.html

[iii] Commission decision of 20 December 2006

[iv] Commission decision of 29 November 2006

[v] Commission decision of 8 November 2006

[vi] Commission decision of 20 September 2006

[vii] Commission decision of 13 September 2006

[viii] Commission decision of 31 May 2006

[ix] Commission decision of 3 May 2006

As regards 2007 cases, in *Chloroprene rubber*[i] the investigations started in 2003, the SO was issued in 2007 and the final decision was issued after roughly 9 months. In *Flat Glass*[ii], the investigations started in 2005, the SO was issued in March 2007 and the final decision was issued in November 2007; In *Professional Videotapes*[iii] the investigations started in 2002, the SO was issued in March 2007 and the final decision in November 2007; *In Hard Fasteners*[iv] the investigations started in 2001, the first SO was issued in 2004 and the supplementary SO was issued in 2006, whilst the final decision was issued in 2007; In *Elevators and escalators*[v] the inspections started in 2004, the SO was issued in 2005 and the final decision was issued in 2007.

As regards 2008 cases, In *Car Glass*[vi] the investigations started in 2005, the SO was issued in 2007 and the final decision in 2008; In *Bananas*[vii] the investigations started in 2005, the SO was issued in 2007 and the final decision was issued in 2008; in *Alluminium Flouride*[viii] the investigations started in 2005, the SO was issued in 2007 and the final decision in 2008; in *Sodium Chlorate*[ix] the investigations started in 2003, the SO was issued in 2007 and the final decision in 2008; in *Synthetic rubber*[x] the investigations started in 2003, the SO was issued in 2007 and the final decision was issued in 2008. As regards 2009 cases, in *Power Transformers*[xi] the inspections started in 2007, the SO was issued in 2008 and the final decision in 2009; in *Concrete reinforcing bar*, the first decision was adopted in 2002 whilst the second final decision was issued in 2009; in Calcium carbide[xii] the inspections started in 2007, the SO was issued in 2008 and the decision was

[i] Commission decision of 5 December 2007
[ii] Commission decision of 28 November 2007
[iii] Commission decision of 20 November 2007
[iv] Commission decision of 19 September 2007
[v] Commission decision of 21 February 2007
[vi] Commission decision of 12 November 2008
[vii] Commission decision of 15 October 2008
[viii] Commission decision of 25 June 2008
[ix] Commission decision of 11 June 2008
[x] Commission decision of 23 January 2008
[xi] Commission decision of 7 October 2009
[xii] Commission decision of 22 July 2009

issued in 2009; in *Marine hoses*[i] the investigations started in 2007, the SO was issued in 2008 and the final decision in 2009.As regards 2010 cases, in *LCD*[ii] the SO was issued in 2009 and the final decision in 2010; in *Air Cargo*[iii] the SO was issued in 2007 and the final decision was issued in 2010; in *Prestressing steel*[iv] the SO was issued in 2009 and the decision in 2010; in *Bathroom fitting*[v] the SO was issued in 2007 and the decision in 2010; in *Carbonless paper*[vi] the new SO was adopted in 2009 and the final decision in 2010. The first decision was adopted in 2001.

These data show that the average of time from the issuing of the SO to the adoption of the final decision is of a year. If we consider that in an eventual prosecutorial system the phase going from the SO to the adoption of the decision and part of the phase going from the investigations to the SO would be completely eliminated and that there would be no checks and balances within the Commission, the benefits of switching from an administrative model to a prosecutorial model would be in time and money.

2.2 Bias

The second big cluster of criticisms regards the risk of prosecutorial bias.[vii] The issue is whether, realistically speaking, there could be a risk of prosecutorial bias because of the fact that the Commission retains the investigative, the prosecutorial and the adjudicative functions. It would be undesirable indeed if the structure of the current enforcement system would lead to biased decisions. It would certainly mean that the system as it is at the present is not entirely efficient as incorrect decisions would be much more likely. To be honest, there is no evidence that cartel decisions taken by the Commission have been vitiated by

[i] Commission decision of 28 January 2009
[ii] Commission decision of 8 December 2010
[iii] Commission decision of 9 November 2010; Probably the final decision took two years to be taken because what the Commission was doing was trying to work out the right amount of the fine. It is easy to understand that the risk of inefficiencies is high
[iv] Commission decision of 30 June 2010
[v] Commission decision of 23 June 2010
[vi] Commission decision of 23 June 2010
[vii] See note 26 above

prosecutorial bias. Anyway, it is argued that the officials working in DGCOMP are human beings and that as every human beings there could be the risk that a view, once in the officials' thinking cannot be moved away. It is easy to understand that the officials dealing with a case would probably be more likely to be convinced that there is an infringement rather than there is not. If this kind of prosecutorial bias really existed it should be promptly corrected, as the risk of having erroneous decisions would dramatically increase.

It has already been pointed out that there is no evidence that such bias exists. In fact, the claims of the undertakings being accused of infringing competition laws should not be taken into consideration for an accurate analysis of the problem. It has already been emphasized the easiness through which companies usually go on appeal before the Courts. Indeed, the pleas in law alleging infringement of procedural rights are increasing, not only because of more awareness of the importance of procedure in competition law but also because procedural pleas are often the last weapon through which seeking for the annulment or for the reduction of the fine.

Moreover, there could be four sources of prosecutorial bias:[i] confirmation bias, hindsight bias, the desire to justify past efforts, and the desire to show a high level of enforcement activity. As regards the confirmation bias, it should be pointed out that lots of psychologists have discovered that the human way of reasoning is subject to confirmation bias. Again, human beings tend to seek for evidence which confirms rather than challenges their beliefs and to accept more easily the conclusion to syllogism if it corresponds to their beliefs than if it does not. It might sound obvious to state that as the Commission's officials are human beings they are not immune to the risk of bias. As regards the hindsight bias and the desire to justify past efforts, this is the tendency to falsely believe that once outcomes are observed, it will be possible to assume that these outcomes are the only outcomes that could have occurred. Uncertainty is totally underestimated. This can occur to the officials who take part to the decision to open a second phase

[i] Ibid.

investigation or to issue a SO. They can be motivated to avoid discovering that there is no case for a prohibition decision. As regards the desire to show a high level of enforcement activity, it should be emphasized that officials working in DGCOMP might tend to show that they have done everything to accomplish to the task entrusted to them.

It must be pointed out too that without any separation of functions there would be more risks that prosecutorial bias can affect the outcome of the Commission's decision. Obviously, the internal debate and the checks and balances within the Commission can reduce it, but a better solution would certainly be a prosecutorial system. The interests at stake in competition proceedings, especially in cartels cases are too high to take the risk.

2.3 Fines, leniency, and settlements

The third big cluster of criticisms regards the penalties and the fines that can be imposed, the leniency proceedings and the settlements in cartel cases. The best way to foster efficiency is to increase deterrence. What we should ask ourselves is whether an eventual switch towards a prosecutorial model would jeopardize the virtuous circle and therefore diminish deterrence. It has already been pointed out that the fines, which are imposed, are not too high, as many commentators tend to argue. Cartels are nothing but cancers on the open market economy.[i] They should be firmly punished. The huge fines, which are being imposed, cannot be deemed to be non-proportional, as the "crime" of taking part to a cartel deserves a strong message of unlawfulness.

The aim of this paper is not of going deeply into the big issue of whether the European enforcement system should provide for fines imposed upon individuals or whether, even more, there should be a directive designed on the legal basis of the environmental directive, providing for criminal sanctions.[ii] However, what seems to be clear is that the deterrent effect of corporate fines does not seem to be

[i] Speech by Mario Monti of 11 September 2000, "Cartels why and how? Why should we be concerned with cartels and collusive behavior?" available at www.ec.europa.eu/comm/comeptition/speeches

[ii] It would be modelled on what already happens in the environmental field: the Commission can oblige the member states to introduce common penalties for environmental pollution

enough. The problem is not that huge corporate fines have no deterrent effect at all[i] as few commentators try to argue but that there are lots of cartels, which need to be detected and punished. Maybe because the benefits of establishing a cartel still outweighs the cost and the risk of being caught. It could also be the case that the threat of corporate fines needs to be accompanied by individual fines and criminal sanctions like imprisonment. One way of fostering efficiency could be that one.

As regards Leniency, it has already been pointed out that it is part of the virtuous circle and that therefore it increases efficiency, as at the present the majority of the cartels, which are detected and punished by the Commission, are unearthed through the leniency procedure.[ii] Thus, it seems to be clear that an eventual big structural reform of the Commission should never jeopardize the possibility for cartelists of going for leniency. Whatever the structure, either administrative with combination of powers or prosecutorial with the prosecutorial and the adjudicative functions being separate, there seem not to be better way to keep and foster efficiency without leniency procedure. Moreover it seems to be arguable that the adoption of a "Amnesty plus" procedure[iii] and the possibility of getting full immunity from following actions for damages[iv] would certainly better efficiency in enforcement proceedings as they would encourage cartelists to blow the whistle[v].

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[i] See note 1 above

[ii] See the Commission's XXXVth and XXXVIth reports on Competition policy (2005 and 2006) according to which in 2005 out of 5 decisions adopted by the Commission 3 started because of whistleblowers and in 2006 out of 7 decisions 5 started because of the same reason

[iii] The DOJ in the US and the OFT in the UK allow a cooperating undertaking that cannot obtain immunity for the cartel being investigate to obtain immunity as regards a second cartel and reduction in the fines as regards the first cartel

[iv] In Air Cargo Cartel case Lufthansa gets immunity because it blew the whistle. Nonetheless it went on appeal against the decision in order to avoid following actions for damages.

[v] Another way to foster efficiency could be the possibility of reaching a one-stop-shop access for whistleblowers. In fact, cartels by definition are established among undertakings operating in different jurisdictions. Whistleblowers would be much more encouraged to blow the whistle if through soft convergence among different competition systems it were possible to give this possibility. Unfortunately, at the present it is highly unlikely. Firstly, because it seems to be arguable that convergence on procedural issues is even more difficult than on substantive issues;

Coming back to the opportunity of introducing fines upon individuals, it should be provided for the possibility of a leniency procedure suitable for individuals as well as undertakings, otherwise no individual will blow the whistle and therefore efficiency would be dramatically jeopardized. On the other hand, as regards the possibility of introducing a directive providing for criminal measures being adopted by member states, it seems to be arguable that in this way, as the sanctions would be clearly criminal, separation of functions would be compulsory according to ECHR case-law.

As regards the possibility of settling the case[i] this paper concurs with Wils[ii] on the fact that settlements can foster efficiency. There seem not to be any kind of particular concern as regards fairness and due process. Although, it is true that settlements require the undertaking to waive some procedural rights, it is also true that as long as the settlement procedure remains voluntary there must be no concern at all. Speaking about efficiency, it should be pointed out that the possibility of settling the case might entail faster proceedings and lower costs and therefore a stronger deterrent effect, as more cases are likely to be dealt with by the Commission. From an economic point of view, it is clear that the benefits should always outweigh the costs. Indeed, the reward for settling is a reduction of 10% on the fines. Furthermore as Wils points out, in order not to jeopardize the virtuous circle there should not be any right to settle and cases should not be settled at a too early stage.

Therefore, it seems to be arguable that the adoption of a prosecutorial model will not jeopardize efficiency. There will always be the possibility to settle the case. For instance, in the US the majority of cases are settled before going before the courts. Furthermore, in the US the system provides plea-bargains which, to speak in European terms, are a kind of settlements and leniency procedures. Moreover, in a prosecutorial system, there will always be the possibility to settle.

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secondly because convergence implies a comparison between different systems. We do not have enough experience yet.

[i] Art 10 Reg 773/04

[ii] See W. Wils, "The use of settlements in public antitrust enforcement: objectives and principles" (2008) 31(3) World Competition

Efficiency will even be fostered as for instance, in the US the immunity is not only from the decision but also from the prosecution. And, moreover, in a prosecutorial system, the settlement procedure will have to get the "stamp" of the courts. This can foster efficiency as in this way the litigation is avoided and it will be unlikely that the "person" concerned will appeal. At the present, in the EU system, it is always possible to go on appeal.

2.4 Judicial review

It has already been argued that the current enforcement structure leads to inefficiencies as there are big delays at the Courts' level, especially at the GC level and the proceedings before the Commission takes a long time too. Furthermore, it has already been stated that a prosecutorial system and the establishing of a competition law chamber within the GC[i] can reduce the delays and eliminate more than one year of time which is normally the time that it takes to the Commission to adopt the final decision after issuing the SO. It seems to be arguable that a prosecutorial system would lead to fewer costs, as it would eliminate all the internal debate within the Commission.

In addition, the current system can lead to other costly inefficiencies: the fact that the GC cannot substitute its decision for the Commission's as, for instance, it happens in the UK and therefore the risk of a second round of judicial review and the issuing of supplementary SOs in case of annulment. Somebody might also argue that in order to solve this problem it would not be necessary to switch towards a prosecutorial model as we could provide for giving the GC full jurisdiction, not only on the fines, without altering the administrative model. Here it is suggested that this solution would not eliminate the concerns about fairness and due process and, even more, it would not solve the problems of the delays and of the fact that an administrative model seems to be more inefficient for all it has been pointed out above.

[i] The aim of this paper is to take into consideration cartels cases only. However, as cartels are the most dangerous infringement of competition law, it could be arguable that if a prosecutorial model could foster efficiency in cartels cases proceedings, it could lead to the same outcome in Art 102 TFEU and in EUMR cases.

Anyway, one of the key issues of the current system is what happens if the reviewing court finds fault with the decision. At the present, the EU system provides for Courts that can only annul the decision but they cannot themselves take a new one substituting their decision for the Commission's. This problem is brilliantly emphasized in a recent case[i] where even though the Commission had found a single and continuous agreement in the Belgian removals sector, the GC found that the applicant had participated to only part of the practices. Therefore, the GC not being able to substitute its decision for the Commission's has to annul the decision entirely. The likely result will be that the Commission will have to re adopt a new SO and a new decision and a second round of judicial review.

In the UK the Government launched a new public consultation[ii] as it seems to be likely that the OFT and the Competition Commission will merge. Moreover, the consultation left the door open to the adoption of a prosecutorial model in the UK. However, it should be pointed out that at present, the Government's answer to the consultation made clear that there would be n adoption of prosecutorial model in the UK. In the UK, the OFT is an administrative body which takes a decision and imposes a fine. There is always the possibility for the undertaking of going on appeal before the CAT which, differently from the European Courts, can substitute its decision with the OFT's. In this way, it is possible to avoid the re-adoption of annulled decisions by the OFT and an eventual second round of judicial review. That is actually what happens in the EU model.

Another key issue of the current enforcement system is whether the Courts are deferent towards Commission's decisions. It is important to go deeply into this point, because it seems to be that not only the Courts have no full judicial review which contributes to render the system inefficient. But, the Courts are allegedly also deferent towards the Commission's decisions.[iii] In fact, one of the points that could be raised is that if the Courts showed a stronger intention to review the cases, it would not be the case of adopting a prosecutorial model. This paper suggests

[i] Case T 210/2008, Coppens v Commission, par 36
[ii] See note 7 above
[iii] See note 50 above

that the alleged deference of the Courts cannot be solved by not reforming the structure of the enforcement system. It seems to be clear that even if the Courts were not deferent to the Commission's decision, a prosecutorial model where the Courts are given the possibility taking the final decision would be much more efficient for the all abovementioned reasons. To put it in another way, this paper suggests that even though it might be argued that the Courts could do their job better, the answer to this criticism stays in the reform itself. A better job could be done only if a chamber with full review is established within the GC and the Commission acts as a prosecutor before it.

The last but not the least key point to be dealt with is the fact that many commentators argue that a prosecutorial model would not make the whole system better-off as the risks of having judges not trained in competition law is very high. In fact, whilst in the US system the fact that antitrust cases go before the district courts is not likely to jeopardize the outcome of the case because of the strong US antitrust tradition, in the Irish systems, for instance, it could happen that competition cases go before the equivalent of an American district court and that the judge is not trained in competition law. The likely result will be that the case is kind of set aside or not decided properly as the judges will probably prefer to go deeper in murders, sex offences or divorce cases. Indeed, if it could be argued that the US antitrust tradition is strong, the same could not be said regarding the competition law tradition in many European national systems.

As regards the EU system, the risk is that efficiency could be jeopardized because the single market is still an ongoing process and because judges are appointed by the member states. Therefore, the supporters of the administrative model stress that competition authorities and therefore the Commission itself has more expertise whilst the Courts can be composed of judges who are not trained in competition law and that therefore it is impossible to maximize efficiency if switching towards a prosecutorial model.

Nonetheless, it is argued that not only the European Courts have already a few judges that are well trained in Competition law, but also that if it is true that judges

are normally appointed by the member states, Art 255 TFEU provides for a panel which can give opinion on candidates' suitability to perform the duties of judges and Advocates General. This mechanism seems to work very well and could be used in the future to make sure that the judges who are supposed to sit in the specialized competition chamber of the GC are experts in competition law.

Conclusions

The idea suggested by this paper is that the EU should switch towards a prosecutorial model[i] when enforcing cartels cases. The aim of this paper is not of going deeply on the optimal enforcement system in Art 102 TFEU cases or effects cases under art 101 TFEU. Anyway, as cartels are by definition the most dangerous infringements for consumers, it seems to be arguable that if the prosecutorial model leads to a fairer and more efficient enforcement in cartels cases, it can work in the other cases too. To be more explicit, the Commission should only be able to investigate and to act as a prosecutor preparing the file and bringing the case before the GC. Indeed, it seems to be arguable that the best way to achieve that is establishing a new chamber within the GC. This option would certainly reduce the costs and maximizing both fairness and efficiency. The new chamber shall be composed on the model of the now UK's CAT with full review on the facts and therefore with the possibility of adopting the final decision[ii].

It has already been pointed out that the EU's accession to the ECHR is likely to have no effects on the structure of the Commission. Therefore, it is highly likely that the ECtHR will continue the approach lied down in Bosphorus v Ireland as long as the presumption of equivalent protection is not rebutted. Moreover, it seems to be clear that competition law is criminal within the autonomous meaning

[i] The idea of the Commission acting as a prosecutor emerges from the Spaak Report, «Comité intergouvernemental créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères», Mae 120f/56 corrigé (Bruxelles, 21 Avril 1956), par 56

[ii] In facts, it would be pointless just to give the GC the same powers held now by the CAT as efficiency would certainly be bettered but not maximized, whilst the concerns about fairness will remain anyway.

of the ECHR and that therefore it belongs to the soft-core of criminal law.[i] Nonetheless, the GC does have unlimited jurisdiction on fines only. It does not have the powers that the CAT has in the UK of substituting their decision with the Commission's and they allegedly have a deferent approach towards the Commission. Anyway, as it has been mentioned above, the ECHR does not require the reviewing court substituting its decision to the Commission's.

The "for reasons of efficiency" requirement lied down in ECtHR's case-law[ii] does not seem to be satisfied as the second part of this paper shows that there are efficiency arguments in favour of the adoption of a prosecutorial model. Furthermore, the CFREU does not create any new right and that the enforcement system as it is now provides already for the protection of fundamental rights.

Be that as it may, the main big cluster of criticism still deals with the structure. It seems to be hard to say that fairness and due process are satisfied if an administrative body provides for huge fines if a true full judicial review is not guaranteed and if there are no efficiency reasons at all. Indeed, the whole enforcement procedures, the fact that the officials who draft the SO are essentially the same that draft the final decision, the fact that the HO is not the one who takes the final decision and that he or she hears just on procedural matters and the fact that the final decision is taken by the 27 Commissioners are still problematic issues from a fairness and due process perspective.

On the other hand, the fact that the Commission is imposing huge fines on undertakings engaging in cartels does not seem to be either unfair or disproportional. Cartels are harmful to consumers. Cartels can be considered as the evil of antitrust[iii], they are the cancer[iv] of the markets and they are not less

[i] Maybe it should be argued that competition law should be considered criminal as this would increase deterrence because of the penalties that could be imposed and because of the strong moral message that could be sent to society. Anyway, in this case the adoption of a prosecutorial model would be compulsory as competition law would be regarded as belonging to the hard core of criminal law.
[ii] See note 27 above
[iii] See Verizon Communications Inc. v Law Offices of Curtis V Trinko
[iv] See note 117 above

dangerous than thefts. Therefore the huge fines imposed by the Commission cannot be considered unfair. In the US and in some European National jurisdictions fines are imposed on individuals and the laws provide for imprisonment. Moreover it seems to be the case of adopting the same approach in the EU in order to foster efficiency through fostering deterrence. Nonetheless the fact that the European Courts are allegedly too deferent towards the Commission, the ECHR standards does not seem to require separation of functions. There seem to be a full judicial review according to the ECtHR's standards; however there are no efficiency arguments in favour of the combination of functions. Obviously, the EU could provide for higher standards but it is not obliged to do so.

The efficiency arguments in favour of the adoption of a prosecutorial model seem to be even more convincing than the fairness ones. For instance, the Commission can foster efficiency by adopting the non-return tactic of cutting off some of its options. In this case, the Commission should cut off its adjudicative option and leave it to the Courts. Secondly, a prosecutorial model could entail shorter proceedings as the establishment of a specialized chamber within the GC can reduce the workload of the Courts, there will be no re-adoption of Commission's decision and no possible second round of judicial review. Moreover, the proceedings would be shorter because part of the time, which now the Commission takes to issue the final decision, would be eliminated.

In addition, a prosecutorial model would certainly reduce or eliminate the risk of prosecutorial bias. In order not to jeopardize efficiency, the fines should be kept high not to threaten the virtuous circle and maybe fines upon individuals and imprisonment should be introduced. Again, leniency should be fostered maybe providing for immunity from following damages actions and establishing a sort of "amnesty plus" option, as it exists in the US. Then, the possibility of settling the case in a hypothetical prosecutorial system and avoiding litigation can be a concrete tool to get even faster procedures and stronger cases. In the end, the fact that with a prosecutorial model there would not be either the risk of a second

adoption of the decision by the Commission[i] or a second round of judicial review can certainly entail a better system where efficiency is maximized.

The main risk of a prosecutorial model can be that judges are not trained in competition law. This paper suggests that Art 255 TFEU can help in selecting judges who are trained in competition law and that there are already a few judges who are experts in competition law.[ii] Moreover, the idea of establishing a chamber within the GC would entail that the judges sitting there would be experts as the judges sitting in the CAT are[iii]. Furthermore, as it has already been pointed out by many commentators in the literature[iv] it would be better to adopt a prosecutorial system instead of other possible solutions which can be available.[v] Indeed, neither the French system nor the Dutch system would be likely to be suitable for being transposed in the European context. The main reason is that the adoption of a prosecutorial model would entail no amendments of the Treaties. There would be no political consensus to amend the Treaties. And even if there were any, it would be too costly as it would take a long time and the reform would certainly get stuck into never ending negotiation processes. On the other hand, for the adoption of a prosecutorial model it would be enough to use Art 103 TFEU.

Usai A. A prosectorial model can lead to a fairer and more efficient enforcement in cartel cases

This article aims at investigating whether a big structural reform of the powers of the European Commission when enforcing Art. 101 TFEU in cartel cases could entail more fairness and more efficiency. Indeed, after analyzing how the procedure works, the alleged criminal nature of competition fines and the

[i] Indeed there would not be no decision of the Commission at all
[ii] For instance, Forwood and Wahl
[iii] See Judge Forwood's speech of 11 March 2011, "General Court judge pushes for specialised judges in EU competition cases" available at http://www.mlex.com/EU//content.aspx?ID=135241&print=true
[iv] See note 10 above
[v] Ibid.

issues related to judicial review, this paper argues that a prosecutorial model would make the whole system better off"

Key words: Cartels, Prosecutorial Model, Fairness, Efficiency, Public Enforcement