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## The impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom

THOMAS PERROUD\*

*The first part of this article deals with the applicability of Article 6 (the fair trial procedure) to competition law enforcement in ECHR law and in domestic laws. The proceedings before competition authorities are clearly within the scope of Article 6(1) ECHR in its criminal aspect. However the jurisprudence of the ECt HR leaves countries a certain amount of discretion in the implementation of the fair trial requirement: They can apply it at the first stage or they can cure any possible defect of the first instance proceedings by providing a correct appeal to a tribunal with full jurisdiction. This discretion is used differently in the two countries under study, England and France. French Courts try to strike a balance between the requirements that have to be complied with at the first stage and those that can be cured by a correct appeal. English Courts appear to offer more flexibility on the crucial point of impartiality. Indeed the main problem in both countries seems to be the combination in one body of the prosecution, judge, and jury functions. Lastly the factors that could have an impact in both countries for the strengthening of procedural safeguards are considered in some detail. It is argued that human rights issues should not be construed as a burden but rather as part of a compliance strategy.*

### 1. INTRODUCTION

France and the United Kingdom have two distinct historical traditions. Consequently, the arrangements for the operation of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (ECHR) and the European Union<sup>2</sup> (EU) have some differences and also similarities. Both Treaties pursue different objectives: Whereas the ECHR aims at establishing a community of rights based on the rule of law, the European Union intends among other things to 'eliminate barriers between countries and enhance the creation of a single market'.<sup>3</sup>

National legislations and national institutions have been set up in both countries to implement these provisions. In particular, both France and the UK have created authorities to enforce competition law through the sanction of anticompetitive practices, namely the prohibition of agreements<sup>4</sup> and the abuse of a dominant position.<sup>5</sup> The competition authorities in both countries wield considerable sanctioning powers and can impose substantial fines: The French *Conseil de la concurrence*<sup>6</sup> issued a record 534 million fine to mobile phone operators (Orange, SFR, Bouygues Telecom),<sup>7</sup> and for its part the Office of

<sup>1</sup>This Treaty was drawn up within the Council of Europe and entered into force in September 1953.

<sup>2</sup>This Treaty was set up first in 1957 with the Treaty of Rome and in 1993 with the Maastricht Treaty on European Union. The UK joined the EU on 1 January 1973 together with Denmark and Ireland. The EU comprises three pillars: The European Community, the Common Foreign and Security Policy and the Justice and Home Affairs. The EU therefore has many goals, one of which being, through the EC, the making of a single market. Two EC policies aim at establishing this single market: The four freedoms (free movement of goods, free movement of services, free movement of persons, and free movement of capital) and the competition policy. This article deals with one of the policies of the EC but perhaps one of the most influential on Member States' economies, the competition policy. Moreover we will not deal with merger control that raises different legal questions.

<sup>3</sup>Maier M. Dabbah, *EC and UK Competition Law*, Cambridge University Press, 2004, at page 9.

<sup>4</sup>See Article 81 EC.

<sup>5</sup>See Article 82 EC.

<sup>6</sup>Hereafter Competition Council, French equivalent of the Office of Fair Trading (OFT).

<sup>7</sup>*Amende record pour entente illicite entre les trois principaux operateurs de telephonie mobile (Record fine for an illicit collusion between three of the main mobile operators)*, Le Monde, 1 December 2005.

Fair Trading (OFT) made British Airways pay a \$121.5m penalty in a price fixing investigation.<sup>8</sup> This is obviously much more than the fines issued by criminal courts which observe strict procedural rules.<sup>9</sup>

Given the substantial amount of the fines imposed by competition authorities in England and France, it seems legitimate to ask for respect by these authorities of some minimum standards of procedural rights. The ECHR has attracted considerable attention in both countries but in different ways. In England the main debate seems to be the definition of the concept of public authority whereas in France it is mainly the right to a fair trial that has had dramatic consequences for Courts<sup>10</sup> and competition authorities.

Therefore it is necessary to understand the differences of impact of the ECHR in England and France. But it is also interesting to understand the situation in England as to the effect of Article 6 for competition law enforcement. When contrasted, the situation is indeed ambiguous. Lastly we would like to study the different factors that could influence the future impact of Article 6 in the UK and France: The Lisbon Treaty, and possibly the taking into account of human rights as part of a strategy to secure compliance.<sup>11</sup>

## 2. THE APPLICABILITY OF ARTICLE 6 ECHR TO COMPETITION LAW ENFORCEMENT

### (A) THE SCOPE OF ARTICLE 6

The right to a fair trial applies only to cases involving the determination of civil rights and obligations or to criminal charges. The European Court of Human Rights (ECt HR) has an autonomous<sup>12</sup> conception of these notions that are independent of national definitions. Moreover the ECt HR held that Article 6(1) requirements should be construed in a substantive manner: The right to a fair trial does not apply only where a judicial procedure is concerned before a Court, but whenever a case involves the determination of civil rights and obligations or a criminal charge. As the Strasbourg Court puts it: Article 6(1) covers 'all proceedings the result of which is decisive'<sup>13</sup> for private rights and obligations or criminal charges.

#### I. IN THE DETERMINATION OF CIVIL RIGHTS AND OBLIGATIONS

The proceedings before competition authorities do not fall under the notion of civil rights and obligations therefore we will not study this concept at length.<sup>14</sup> For Article 6(1)

<sup>8</sup>See OFT website: <http://www.of.gov.uk/news/press/2007/113-07>.

<sup>9</sup>As a comparison a report by the Home Office in 2002 states that 'In total, magistrates' courts of England and Wales imposed some 1,011,000 fines. The average fine was £143' (Home Office, Fine enforcement in magistrates' courts, at page 1).

<sup>10</sup>The ECHR has entailed a complete change in the structure of the *Conseil d'Etat*, the French Administrative Supreme Court in at least one respect. It forced a change of the role of the *Commissaire du gouvernement* (or Government Commissioner) because it was customary for the Government Commissioner to attend the deliberations of the judging committee. France was condemned for this by the ECt HR (*Kress v. France* - 39594/98 [2001] ECHR 386 (7 June 2001)).

<sup>11</sup>K. Yeung, *Securing Compliance, A principled Approach*, Hart Publishing, 2004.

<sup>12</sup>The European Convention of Human Rights (hereafter ECHR) is a treaty and therefore some terms are given special or autonomous meaning in accordance with Article 31 (4) of the Vienna Convention. The ECt HR has repeatedly contended that Article 6 concepts are to be given an autonomous meaning. The Court will 'look behind the appearances and investigate the realities of the procedure in question' (*Deweert v Belgium* (1980) 2 EHRR 439 paragraph 44). Therefore the terms 'criminal charge' (*Engel and others v Netherlands* (n°2) (1976) 1 EHRR 706 paragraph 81), 'civil rights and obligations' (*König v Germany* (1978) 2 EHRR 170 §88, *House of Lords in R (on the application of Alconbury Development Ltd) v Secretary of State for Environment, Transport and the Regions* (2001) UKHL 23), 'tribunal' (*Belilos v Switzerland* (1988) 10 EHRR 466 §64) have been given an autonomous meanings. The ECt HR tries to go beyond appearances to grasp the reality of the situation (see *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 691).

<sup>13</sup>*Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR I, ECt HR, at paragraph 44.

<sup>14</sup>A prominent writer, Wouter P.J. Wils, argues that merger control could fall under the notion of civil rights (see Wouter P.J. Wils, *La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des*

ECHR to apply three conditions must be met: There needs to be a dispute and a determination on civil rights and obligations.

First there needs to be a dispute. This requirement is absent from the English version of the text and only present in the French one,<sup>15</sup> but there is no doubt that a dispute or a disagreement is needed over a right that can be, at least on reasonable grounds, recognised under domestic law.<sup>16</sup> The ECt HR defined some characters of the term dispute (or ‘contestation’): ‘This word should not be construed too technically and (...) should be given a substantive rather than a formal meaning’.<sup>17</sup> It must be genuine and serious,<sup>18</sup> and there must be a direct link between the dispute and the right in question, the dispute being not only on the actual existence of a right but also on its scope, the manner in which the right may be exercised, and the possibility of concern for matters of both facts and law.<sup>19</sup>

In addition, the proceedings must involve the determination ‘of his civil rights and obligations’. This requirement means that the outcome of the proceedings must be directly decisive for the determination of the rights in question, a ‘tenuous connection or remote consequences do not suffice’.<sup>20</sup>

Finally, the determination must involve civil rights and obligations. The Court has not made any systematic definition of the notion. It is nonetheless clear that it is the character of the right at stake that is relevant rather than ‘the status of the parties, the nature of the legislation which governs the manner in which the dispute is to be determined and the character of the authority which has jurisdiction in the matter’.<sup>21</sup> Moreover, there are some clues that must be considered: The character of the right or obligation at issue,<sup>22</sup> any consensus that can be gleaned from national laws (taking into account any ‘uniform European notion’ as to the nature of the right)<sup>23</sup>, and the classification of the right or obligation in domestic law.<sup>24</sup> Some writers contend that an important criterion is the pecuniary nature of the right infringed or more precisely the consequences of the proceedings for the right in question.<sup>25</sup> It encompasses private law as it is concerned with the rights and obligations of private persons in their relations. As far as disciplinary

droits de l’homme, Cahiers de droit européen, [1996] Vol. 32, n° 3-4, at pages 329-354). However we excluded the analysis of merger control from our study because it raises different questions. As to the applicability of Article 6 (1) ECHR to merger control procedures the problem has been raised neither in England nor in France before the Courts. As to the EU level the ECJ has not been willing to respond to this particular question. The case law shows that Article 6 (1) is applicable to merger control proceedings but the ECJ does not say under which aspect, criminal or civil (see CFI, *Schneider Electric v Commission (Competition)* [2007] EUCEJ T-351/03 (11 July 2007), especially at paragraphs 181 to 189).

<sup>15</sup> The French text says: « Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle ».

<sup>16</sup> *H v Belgium* (1987) 10 EHRR 339. See Lord Lester of Herne Hill, David Pannick, ed(s), Human Rights Law & Practice, Second Edition, London, LexisNexis UK, 2004, paragraph 4.6.3.

<sup>17</sup> *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, paragraph 45.

<sup>18</sup> « Genuine » might exclude hypothetical or moot cases and « serious » excludes cases of minimal interference with the civil right: *Helmerv Sweden* (1991) 15 EHRR 285 and *Oerlemans v Netherlands* (1991) 15 EHRR 561.

<sup>19</sup> Human Rights Law and Practice, paragraph 4.6.4, The Law of Human Rights, paragraph 11.161.

<sup>20</sup> *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 5 EHRR 183 paragraph 47.

<sup>21</sup> See *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293 paragraph 39.

<sup>22</sup> See for example: *König v Germany* (1978) 2 EHRR 170 paragraph 90.

<sup>23</sup> See *Feldbrugge v Netherlands* (1986) 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448.

<sup>24</sup> See *König v Germany*, paragraph 89.

<sup>25</sup> F. Sudre, Convention européenne des droits de l’homme, Droit à un procès équitable, J.-Cl Europe, n° 22 et J.-F. Renucci, Traité de droit européen des droits de l’homme, LGDJ, 2007, at page 356. See also Human Rights Law & Practice n° 4.6.10 and the relevant case law: see for example *Ortenberg v Austria* (1994) 19 EHRR 524 paragraph 28.

proceedings are concerned they do not necessarily involve the determination of civil rights and obligations.<sup>26</sup> The determination must infringe on an existing civil right in order for Article 6 to apply (the right to continue in professional practice<sup>27</sup> for example). Competition law is not concerned with civil rights and obligations.<sup>28</sup> It is rather agencies like the Financial Services Authority (FSA) that can be concerned provided the sanction is not so high as to lose its civil nature and fall within the criminal charge aspect of Article 6.<sup>29</sup>

## II. IN THE DETERMINATION OF CRIMINAL CHARGES

The most important aspect of Article 6(1) for our purpose is the determination of the criminal charge aspect as competition law penalties fall under this definition. Here the Strasbourg Court uses three criteria to identify this concept, namely: The classification of the proceedings in domestic law, the nature of the offence itself, and the severity of the penalty which may be imposed.<sup>30</sup>

The reasoning of the Court is as follows: If the offence is not classified as criminal under domestic law, then the ECt HR will use it only 'as a starting point'<sup>31</sup> to determine whether the offence is criminal in character in the light of the last two alternative criteria.<sup>32</sup> The indications the Court has used to assess the criminal character of an offence under the second criterion are: Whether the legal rule is addressed exclusively to a specific group or is of generally binding character;<sup>33</sup> whether there is a punitive or deterrent element to the process;<sup>34</sup> whether the imposition of any penalty is dependent upon a finding of culpability;<sup>35</sup> and how comparable procedures are classified in other Council of Europe Member States.<sup>36</sup> The last criterion, the severity of the penalty, is very often decisive in the classification of an offence as criminal: Imprisonment<sup>37</sup> will most of the time lead to defining the proceedings as criminal but will also lead to large financial penalties.<sup>38</sup>

Finally, Article 6 only applies to the proceedings by which a charge is finally determined,<sup>39</sup> which affects the situation of the suspect. The Court puts it in *Deweever v*

<sup>26</sup>For a seminal analysis of the definition of the concept of discipline see A. Guinchard, Human Rights in Financial Services: the Boundaries between Discipline and Crime [2007] EJCCLC] 177 and B. Harris, Law and Practice of Disciplinary and Regulatory Proceedings, Barry Rose Law Publishers Ltd, London, 2002, 3rd edition, at page 25.

<sup>27</sup>*Albert and Le Compte v Belgium* (1983) 5 EHRR 533 paragraph 25 and *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 paragraph 48.

<sup>28</sup>However merger control could as Wouter P.J. Wils argues in an article (op. cit., footnote n°15).

<sup>29</sup>As we will show below the severity of the sanction is an important criterion. The relevant case law assessing the civil nature of the proceedings before the Financial Services Authority is for the ECt HR (*Didier v. France*, dec.n°58188/00, ECHR 2002-VII) and for the UK (*Fleurose v Securities & Futures Authority Ltd & Anor* [2001] EWHC Admin 1085 (21st December, 2001)). See also the conclusions of A. Guinchard's article, op. cit., at page 202.

<sup>30</sup>*Engel v Netherlands* (1976) 1 EHRR 647, paragraph 82. The second and third criteria are alternative and not cumulative (see *Lutz v Germany* (1998) 10 EHRR 182, paragraph 55; *Garyfallou Aebe v Greece* (1999) 28 EHRR 344, paragraph 33).

<sup>31</sup>*Engel v Netherlands* (1976) 1 EHRR 647, paragraph 82.

<sup>32</sup>If the Court cannot reach a clear conclusion it can use a cumulative approach (see *Lauko v. Slovakia* - 26138/95 [1998] ECHR 82 (2 September 1998), paragraph 57).

<sup>33</sup>*Weber v Switzerland* (1990) 12 EHRR 508, paragraph 33; *Demicoli v Malta* (1991) 14 EHRR 47, paragraph 32; *Benham v United Kingdom* (1996) 22 EHRR 293, paragraph 56.

<sup>34</sup>*Oztürk v Germany* (1984) 6 EHRR 409, paragraph 53; *Lutz v Germany* (1987) 10 EHRR 182; *Bendenoun v France* (1994) 18 EHRR 54, paragraph 47; *Maaouia v France* (2001) 33 EHRR 42.

<sup>35</sup>*Benham v United Kingdom* (1996) 22 EHRR 293, paragraph 56; *Aerts v Belgium* (1998) 29 EHRR 50.

<sup>36</sup>*Oztürk v Germany* (1984) 6 EHRR 409, paragraph 53.

<sup>37</sup>The Court held that 'In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental' (*Engel and others v the Netherlands* (1976) 1 EHRR 647, 679 paragraph 82).

<sup>38</sup>See for example *Janosevic v. Sweden* - 34619/97 [2002] ECHR 618 (23 July 2002), at paragraph 69.

<sup>39</sup>Human Rights Law and practice, op. cit., n°4.6.15.

*Belgium* as ‘The Commission has adopted a test (...), namely whether ‘the situation of the [suspect] has been substantially affected’’.<sup>40</sup>

Most of competition law penalties are therefore to be considered as criminal charges for the purpose of Article 6. This has been explicitly admitted by the European Court itself in cases involving competition law matters,<sup>41</sup> by UK,<sup>42</sup> French Courts<sup>43</sup> and the European Court of Justice (ECJ).<sup>44</sup>

## (B) THE RECEPTION IN DOMESTIC LAWS

### I. THE DIFFERENCE OF APPROACH: DUALISM/MONISM

The applicability of the Convention raises different questions in England and France because of a different legal background. Indeed these two countries have a different legal structure in relation to international law: England is among dualist countries (with Ireland)<sup>45</sup> whereas France is a monist country (together with the Netherlands,<sup>46</sup> Spain,<sup>47</sup> Portugal,<sup>48</sup> Greece<sup>49</sup> and Poland<sup>50</sup>). This distinction, which must not be construed too sharply,<sup>51</sup> means that in dualist countries such as the UK and Ireland international law is not directly applicable and is not superior to statutes. For example the Irish Constitution provides that ‘No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas’.<sup>52</sup> It is the same situation in the UK where it is a general principle that ‘a treaty is not part of [domestic] law unless and until it has been incorporated into the law by legislation’.<sup>53</sup> Therefore, it is a basic principle of the common law that an international convention cannot override the intentions of Parliament as expressed in legislation.<sup>54</sup> It is a consequence of the doctrine of the supremacy of Parliament or ‘Parliamentary sovereignty’ which means that Parliament is legislatively supreme.<sup>55</sup> One of the corollaries of such a doctrine is that the legislative powers of Parliament are unlimited.

<sup>40</sup>See for example *Neumeister v Austria* (1968) 1 EHRR 91 at paragraph 19.

<sup>41</sup>Several decisions of the ECt HR deem Article 6 (1) applicable to competition law proceedings. There is a case concerning the French Ministry for Economy about an anticompetitive agreement (see *Société Stenuit v. France* [1992] ECHR 34) and a case concerning the Finland Competition Office (*The Fortum Corporation v. Finland* - 32559/96 [2003] ECHR 367 (15 July 2003), at paragraphs 36 and 37), here the issue was not contested. There are also several cases concerning the Swedish Competition Authority which are of great interest because they entailed a review of the legislative provisions governing judicial review of certain administrative decisions (see paragraph 26 of *Swedish Transport Workers Union v. Sweden* [2006] ECHR 761).

<sup>42</sup>*Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications* [2002] CAT 1 (15 January 2002), at paragraph 98.

<sup>43</sup>*CA Paris*, 15 juin 1999, *SA Canal Plus*, JCP G 2000, II, 10254, note J.-C. Fourgoux; Cass. com., 5 oct. 1999, *Campeon Bernard SGE*, JCP G 2000, II, 10255, note E. Cadou; Cass. com. 9 oct. 2001, *SA Unibéton*, JCP G 2001, IV, 2870).

<sup>44</sup>*CFI, Enso Espanola SA v Commission of the European Communities. (Competition)* [1998] EUECJ T-348/94 (14 May 1998), at paragraphs 37, 38; ECJ, *Baustahlgevebe GmbH v Commission of the European Communities*, 17 December 1998, Case C-185/95 P, (1998) ECR p. I-08417; ECJ, 8 July 1999, *Montecatini SpA v Commission of the European Communities*, Case C-235/92 P, (1999) ECR p. I-04539.

<sup>45</sup>See Article 29, 6 of the 1 July 1937 Constitution.

<sup>46</sup>See Article 94 of the 17 February 1983 Constitution.

<sup>47</sup>See Article 96 of the 27 December 1978 Constitution.

<sup>48</sup>See Article 8 of the 2 April 1976 even if the Constitution does not say anything about the primacy of international law over statutes.

<sup>49</sup>Article 28 of the Constitution.

<sup>50</sup>Article 91 of the Constitution.

<sup>51</sup>Among dualist countries some deny direct applicability and primacy to international treaties (United Kingdom and Ireland) and some admit the direct applicability but deny primacy (Germany and Italy). In the last instance international treaties do not prevail over ordinary statutes because they are incorporated by an act of Parliament: They simply have the same status as ordinary statutes.

<sup>52</sup>Pursuant to Article 29 (6) of the Irish Constitution.

<sup>53</sup>*J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL at 500C per Lord Oliver of Aylmerton.

<sup>54</sup>*R v Lyons* [2002] UKHL 44 at paragraphs 27–28, and paragraphs 39–40.

<sup>55</sup>Or as Rt. Hon. Lord Woolf of Barnes puts it: ‘The supremacy of the Parliament in its legislative capacity’ (*Droit Public – English Style* [1995] Public Law 57). In *Mortensen v Peters* ([1906] 14 SLT 227) Lord Justice General said very clearly ‘for us an Act of Parliament duly passed by Lords and Commons and assented by the King, is supreme, and we are bound to give effect to its terms’. In even clearer terms Ungood-Thomas J stated: ‘What the statute in itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law’ (see *Cheney v Conn* [1968] 1 All ER 779 and also *R v Secretary for the Home Department, ex parte Thakrar* [1974] QB 684).

As a consequence, international law is not superior to statutes, which contradicts one of the key principles of international law contained in the Vienna convention on the Law of treaties.<sup>56</sup> The Courts try however to interpret statutes in order to avoid any contradiction with international treaties but if there is a clear contradiction then the Courts cannot make a treaty prevail over a statute. This general rule is not applicable to European Community Law, which has a special legal status. The ECJ has repeatedly held that EC law forms a 'new legal order of international law'<sup>57</sup> which 'became an integral part of the legal systems of the Member States and which their courts are bound to apply'.<sup>58</sup> As a consequence, EC law prevails over municipal laws or a bill of rights of a Member State's Constitution. The ECJ ruled: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing by its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means'.<sup>59</sup>

But because EC law was incorporated in the UK's domestic law by the European Community Act 1972, the House of Lords appears to have accepted that membership of the Communities and the EC Act 1972 have altered the rules on legislative supremacy where there is inconsistency between Community law and domestic law.<sup>60</sup>

The situation in the UK is completely different from that which prevails in France, which is a monist country. France recognises not only direct applicability of international treaties, but also these treaties prevail over statutes. Pursuant to Article 55 of the French Constitution treaties that are regularly ratified and published are superior to statutes<sup>62</sup> provided they are executed by the other party. This position was ratified by the Courts be they administrative or civil. *The Cour de cassation*<sup>61</sup> held in 1975 that international law was superior to statutes. The Administrative Supreme Court, however, took longer to acknowledge this. It first held that international law was superior to administrative acts.<sup>63</sup> The problem the Court had was with statutes. Although the Courts had no problem asserting the superiority of Treaties over anterior statutes (acts passed before the entry into

<sup>56</sup>This principle is summarized in the saying « pacta sunt servanda » and contained in Articles 26 and 27 of the Vienna Convention which provide: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith' (Article 26) and 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' (Article 27).

<sup>57</sup>*NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EUECJ R-26/62.

<sup>58</sup>*Costa v Enel* [1964] ECR 585.

<sup>59</sup>*Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

<sup>60</sup>See *House of Lords, R v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] 2 AC 85.

<sup>61</sup>It is the French Civil Supreme Court. In order to be easily understood we will use the term State's Council to refer to the *Conseil d'Etat*, the French Administrative Supreme Court. However the term *Cour de cassation* will be used because it does not have any translation in English, it is the French civil Supreme Court. It is sometimes referred to in some English cases. These two Courts have the highest authority in France and are in charge of interpreting the law.

<sup>62</sup>*Cour de cassation, Ch. Mixte, 24 May 1975, Société des cafés Jacques Vabre.*

<sup>63</sup>*Conseil d'Etat, Ass., 30 May 1952, Dame Kirkwood.*

force of the treaty) it was harder for them to assert the superiority of international law over posterior statutes. In 1968 the *Conseil d'Etat* held that statutes prevailed over international law.<sup>64</sup> Consequently an administrative act taken for the execution of a statute could not be struck down by an administrative judge.<sup>65</sup> It was not until 1989 that the Administrative Supreme Court decided to depart from its previous case law.<sup>66</sup> From this case on, international treaties are treated as superior to statutes be they anterior or posterior to the entry into force of the Treaty. The last restriction is that according to both Supreme Courts international conventions are not superior to the Constitution.<sup>67</sup>

## II. THE CONSEQUENCE OF THIS LEGAL BACKGROUND FOR THE APPLICATION OF ARTICLE 6(1) ECHR

This legal background explains the different problems for the applicability of the ECHR in domestic laws.

The acceptance of the individual right of petition on 14 January 1966 led to the incorporation of the Convention for it led to a situation where the ECt HR became a de facto supreme constitutional court of the UK. With the right of petition the number of cases brought to the ECt HR grew rapidly in areas having 'a powerful impact (...) upon the UK's constitutional and legal system'.<sup>68</sup> The numerous judgments where the UK was found in breach of the convention made the situation very difficult. The Convention could not be invoked in a trial and therefore UK Courts could not interpret statutes in a way compatible with the Convention. However, domestic courts tried to interpret ambiguous statutory provisions compatibly with the Convention. Nevertheless, they were unable to do so in cases where statutes conferred broad discretion on administrative authorities when they interfered with their rights. 'This is because a statute conferring broad discretionary powers was regarded as unambiguous, and the Convention as irrelevant, in construing the purpose of the statute. For the courts to require ministers to comply with the Convention in performing their public functions would involve a violation of the constitutional separation of powers, by incorporating the Convention through the back door when Parliament had refused to do so through the front door'.<sup>69</sup>

The continuing and growing gap between the Convention and domestic law made it urgent to incorporate the Convention and explains the campaign to 'bring rights home'<sup>70</sup> leading to the Human Rights Act in 1998.<sup>71</sup> The HRA 1998 contains a general principle of interpretation to avoid direct contradiction between a statute and the Convention. These principles are in substance the obligation of the Court to read primary and subordinate legislation in a way that is compatible with the Convention,<sup>72</sup> and the prohibition on the Courts to strike down legislation where this legislation is clearly incompatible with the

<sup>64</sup>Conseil d'Etat, Section, 1 May 1968, Syndicat général des fabricants de semoules de France.

<sup>65</sup>This doctrine was known as the 'legislative screen', ie the statute was making a screen between the Treaty and the administrative act.

<sup>66</sup>Conseil d'Etat, 20 octobre 1989, Nicolo.

<sup>67</sup>Cour de cassation, Ass. Plén., 2 June 2000, Mademoiselle Fraisse; Conseil d'Etat, 30 October 2000, Sarran, Levacher et autres.

<sup>68</sup>Human Rights Law and Practice, paragraph 1.28. For an account of the cases brought to the ECt HR see paragraph 1.29.

<sup>69</sup>Human Rights Law and Practice, paragraph 1.32.

<sup>70</sup>For an account of this campaign see Human Rights Law and Practice, op. cit., 1.38 on. See also Human rights, constitutional law and the development of the English legal system, selected essays, Lord Irvine of Lairg, Oxford, Hart, 2003, especially part 1; The Law of Human Rights, op. cit., paragraph 1.61.

<sup>71</sup>The HRA was enacted on 9 November 1998, and the substance of the HRA 1998 was brought into force on 2 October 2000.

<sup>72</sup>HRA 1998, Section 3 (1).



convention. The Courts may however make a declaration of incompatibility<sup>73</sup> encouraging Government and Parliament to amend such legislation. Finally public authorities must act in a way which is compatible with the Convention.<sup>74</sup>

Competition authorities, being public authorities,<sup>75</sup> must act in a way which is compatible with the Convention. Moreover, competition authorities are considered tribunal for the purpose of Article 6(1) ECHR; the case-law takes this fact for granted and does not even discuss it.<sup>76</sup>

Once the HRA was passed there was no problem in the UK deciding the applicability of the Convention to the competition authority.

In France the situation is different, but it is interesting to note that the debate focuses on the same problem: How can a national Court leave primary legislation unapplied? In France, Courts have been long to recognize the applicability of Convention rights, but not for the same reasons as the UK. The applicability of the Convention in general did not raise many problems except in the field of the fair trial requirement. The conditions provided for by Article 6 were not easily deemed applicable to administrative procedure. Concerning Article 6, the State Council did not accept at first that administrative law could be concerned with 'civil rights' or with 'criminal charges'. Literally speaking, and since the Blanco<sup>77</sup> landmark case, French administrative law has been built in opposition to civil law which was 'established to regulate relations between individuals'.<sup>78</sup> In addition, administrative penalties were not considered criminal charges.<sup>79</sup> The departure from precedent was made in 1999 with the Didier case.<sup>80</sup> The Civil Supreme court held that Article 6 was applicable to the proceedings before the Financial Services Commission and the Competition Authority.<sup>81</sup>

At this stage we know that Article 6(1) ECHR is applicable to the proceedings before competition authorities. It is now important to assess the extent of this application to competition law enforcement.

<sup>73</sup>HRA 1998 Section 4 (2). This declaration does not affect the validity of the provision nor will it be binding on the parties in the proceedings. In French Law the Courts cannot either strike down legislation, they just leave the statute unapplied and they apply the Convention directly. This is another consequence of the fact that France is a monist country. In the UK on the contrary the Courts could not do this because they cannot apply directly the Convention.

<sup>74</sup>HRA 1998 Section 6 (1).

<sup>75</sup>Cases take this fact for granted and do not reason on this point: See *Office of Fair Trading v The Officers Club Ltd & Anor* [2005] EWHC 1080 (Ch) (26 May 2005), paragraph 89; *Office of Fair Trading v not named* [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 13. There is also a case concerning OFCOM where it is clear in the reasoning that it is considered as a public authority: *Office of Communications & Anor v Floe Telecom Ltd* [2006] EWCA Civ 768 (15 June 2006), paragraph 39.

<sup>76</sup>See *Office of Fair Trading v not named* [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 6.

<sup>77</sup>*Tribunal des conflits*, 8 February 1873, Blanco, Rec. 1er supplt 61.

<sup>78</sup>*Tribunal des conflits*, 8 février 1873, Blanco, Rec. 1er supplt 61, concl. David.

<sup>79</sup>We can find the same difficulty of the judges to understand the autonomous meaning of these concept in the UK in some cases where the Court answers the question about the question of the standard of proof: See *Napp Pharmaceutical Holdings Ltd & Ors v Ofcom* [2002] CAT 1 (15 January 2002), paragraph 92; *Argos Ltd & Anor v Office of Fair Trading* [2004] CAT 24 (14 December 2004), paragraph 158; *JJB Sports Plc v OFT* [2004] CAT 17 (1 October 2004), paragraph 165.

<sup>80</sup>*Conseil d'Etat, Ass.*, 3 December 1999, Didier.

<sup>81</sup>The first decision concerns the *Commission des opérations de bourse* (hereafter COB, the regulatory authority in charge of the regulation of financial operations equivalent of the English FSA) in *Cour de cassation, Ass. Plén.*, 5 February 1999, COB v Oury. The second concerns the Competition Council in *Cour de cassation, ch. Comm.*, 5 October 1999, SNC Campenon Bernard SGE. These decisions were following a few judgements by the Court of Appeal that held that Article 6 was applicable to the proceedings before regulatory authorities (12 January 1994, *Métrologie internationale* n° 93/10408, *Fraiberger* n° 93/10407, *Haddad* n° 93/10407). The Paris Court of Appeal then applied Article 6 to the Competition Commission (*1re ch., sect. Conc.*, 6 juillet 1994, B.O.C.C.R.F., B.O.S.P. n° 12, Friday 29 July 1994, at page 299).

## (C) THE APPLICATION OF ARTICLE 6 ECHR TO COMPETITION LAW ENFORCEMENT

Is it necessary to apply Article 6(1) ECHR entirely to the proceedings before competition authorities?

According to the ECt HR the proceedings before competition authorities do not have to comply entirely with Article 6(1). The landmark case in this respect is *Le Compte, Van Leuven and De Meyere v Belgium*. In this case the ECt HR recognizes that ‘Demands of flexibility and efficiency (...) may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect’.<sup>82</sup> In other words recourse to administrative agencies which do not fully comply with Article 6 is possible.<sup>83</sup>

What the Article requires however is a right to challenge the decision before a judicial body with full jurisdiction providing the guarantees of Article 6(1).<sup>84</sup> If such an appeal is provided, there will be no violation of the Article because the ECt HR ‘must consider the proceedings as a whole including the decision of the appellate court’.<sup>85</sup> The consequence is that if the procedure before the competition authority fully complies with Article 6 then no right of appeal is guaranteed by the convention.

What is important here is to understand what ‘full jurisdiction’ means. The reviewing body ‘must have jurisdiction to examine all questions of fact and law relevant to the dispute before it’.<sup>86</sup> It also includes ‘the power to quash in all respects, on questions of fact and law, the decision of the body below’.<sup>87</sup> As regards competition matters the creation of appeal tribunals like the CAT, which reviews the case entirely, can cure the defects of the first instance proceedings.<sup>88</sup>

In conclusion, the fair trial requirements are applicable to the procedure before competition authorities. Nevertheless any default may be ‘cured’ by a correct appeal. It is therefore up to the Parliament or the Judge to impose the respect of Article 6 at either stage of the procedure.

<sup>82</sup>*Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, ECt HR, paragraph 51.

<sup>83</sup>The ECt HR also permits the non application of Article 6 in other circumstances: the justiciable can waive his right to a fair trial (this is especially the case in arbitration cases (see *Colozza and Rubinat v Italy* (1985) 7 EHRR 516)) or in settlement cases. Nevertheless the waiver must be unequivocal (*Poitrimol v France* (1993) 18 EHRR 130, §31) and must not be tainted by constraint (see *Colozza*, paragraph 54).

<sup>84</sup>*Albert and Le Compte v Belgium* (1983) 5 EHRR 533, paragraph 29; see also *Helle v Finland* (1998) 26 EHRR 159. The case law is constant.

<sup>85</sup>*Edwards v United Kingdom* (1992) 15 EHRR 417, paragraph 34.

<sup>86</sup>See *Le Compte, Van Leuven and De Meyere*, cited above, paragraph 51(b); *Fischer v Austria* (1995) 20 EHRR 349, paragraph 29; and *Terra Woningen v Netherlands* (1996) 24 EHRR 456, at paragraph 52.

<sup>87</sup>*Schmautzer v Austria* (1995) 21 EHRR 511, paragraph 36.

<sup>88</sup>The CAT has wide powers to determine most appeals under the Competition Act on their merits and may confirm or set aside all or part of the decision, remit the matter to the OFT (or the regulator), impose, revoke, or vary the amount of any penalty, give such directions or take such other steps as the OFT (or sectoral regulator) could have given or taken, or make any other decision which the OFT (or the sectoral regulator) could have made (see schedule 8 Sections 46 (5) and 48 (4), 3, (2) and CAT website : <http://www.catribunal.org.uk/about/default.asp#function>).

### 3. THE CONSEQUENCES OF THE APPLICATION OF ARTICLE 6 ON COMPETITION LAW ENFORCEMENT

#### (A) THE PROTECTIONS GRANTED BY ARTICLE 6

##### I. THE PROVISIONS THAT DO NOT RAISE MUCH PROBLEM

Indeed many of the Article 6 provisions do not raise many issues for the purpose of competition law enforcement.

##### RIGHTS OF THE PARTIES AS REGARDS THE PROCEEDINGS

First, the right of access to a court<sup>89</sup> is a fundamental principle of the law and ‘one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’.<sup>90</sup> This right is also a Common law presumption.<sup>91</sup> The ECt HR provides that the access must be effective, which could require the provision of legal aid to an indigent person in a particular case.<sup>92</sup> Any limitation must be legally certain, pursue a legitimate aim, comply with the principle of proportionality, and should not impair the essence of the right. This provision should not make any problem given the fact that companies involved in competition law proceedings are seldom ‘indigent’. Nevertheless, the HRA had an impact on the regulation of the financial markets: When Parliament created the Financial Services and Markets Tribunal<sup>93</sup> it provided for legal aid. However, no legal aid is provided for the Competition Appeal Tribunal and this could prove to be an infringement of Article 6 if it deprived someone of his rights to a fair trial. In France as the Competition Council’s decisions are reviewed by an ordinary court, the Paris Court of Appeal, legal aid is provided.

The ECHR also provides for a right to a fair hearing, which includes a hearing in one’s presence,<sup>94</sup> equality of arms,<sup>95</sup> rules of evidence (prohibiting evidence obtained unfairly for example)<sup>96</sup>, freedom from self-incrimination,<sup>97</sup> and a reasoned judgment.<sup>98</sup> This aspect does not raise any problem as the OFT provides for oral representations by the parties under

<sup>89</sup>This right was first recognized by the ECt HR in *Golder v United Kingdom* (1975) 1 EHRR 524. The Court held that ‘it would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court’ (paragraph 35).

<sup>90</sup>*Golder v. United Kingdom* - 4451/70 [1975] ECHR 1 (21 February 1975), at paragraph 34.

<sup>91</sup>*Pys Granite Company Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286.

<sup>92</sup>Legal Aid is compulsory only if someone is charged with a criminal offence (see ECHR Article 6 paragraph 3). As far as civil proceedings are concerned legal aid is one of the means available to the State to achieve the effective right of access to a Court: ‘The institution of a legal aid scheme (...) constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court’s function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 (1)’ (see *Airey v Ireland* (1979) 2 EHRR 305, paragraph 26).

<sup>93</sup>Financial Services and Markets Act 2000, Section 134 (1). The draft bill did not provide for legal aid. The First Report of the Joint Committee on Financial Services and Markets shows that the risk of incompatibility with the ECHR as regards costs before the tribunal (paragraphs 211, 212, 213) entailed a change in the bill and the provision for legal assistance before the Tribunal (such a solution was actively wished by Clifford Chance and Herbert Smith (Q 237)).

<sup>94</sup>See in a case where criminal proceedings are involved: *Ekbatalani v Sweden* (1988) 13 EHRR 504. This right implies not the defendant’s physical presence, the ability to hear and follow the proceedings, to understand the evidence and argument, to instruct lawyers, and to give evidence.

<sup>95</sup>See, for example, *Neumeister v Austria* (1968) 1 EHRR 91, paragraph 22; *Delcourt v Belgium* (1970) 1 EHRR 355, paragraph 28; *Dombo Beheer v Netherlands* (1993) 18 EHRR 213, paragraph 33; *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1, paragraph 53; *Komaniacký v Slovakia* 4 June 2002, paragraph 45. In essence this right implies that the accused has not a substantial disadvantage to present his/her case.

<sup>96</sup>*Schenck v Switzerland* (1988) 13 EHRR 242, paragraphs 46-48.

<sup>97</sup>*Funke v France* (1993) 16 EHRR 297: ‘The special features of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right of anyone ‘charged with a criminal offence’, within the autonomous meaning of this expression in Article 6 (Article. 6), to remain silent and not to contribute to incriminating himself’ (paragraph 44).

<sup>98</sup>*Helle v Finland* (1998) 26 EHRR 159.

investigation.<sup>99</sup> It is also the case before the CAT<sup>100</sup> and the Competition Council. As regards the freedom from self-incrimination, in *Office of Fair Trading v not named*,<sup>101</sup> Justice Morison argues that it is all about the way the question is put:

If a question were improperly asked, for example 'do you admit that you have been guilty of price fixing?' and the answer 'yes' was given, then the defendants would be entitled to seek relief from the courts to prevent the OFT from relying on that answer in making their determination. Answering and not answering questions does not deprive the defendants of legal redress if the questions asked extend beyond 'purely factual' matters. Thus, the rights of the defendants are fully protected in the event of any abuse of the power to ask questions. The aim of the requirement is to facilitate the investigation; the rights against self-incrimination are not offended; and the defendants' position is fully protected by law.

Finally, the right to a reasoned judgment does not raise any problem as both the OFT and CAT judgments are fully reasoned.<sup>102</sup> For a long time in France it was not compulsory to give reasons for administrative decisions. Since the 11 July 1979 Act, the Administration has to give reasons when it takes an 'unfavourable' act like a sanction for example. Competition law decisions fall within this category.

In addition the ECHR provides a right to a public hearing, which also includes a right to an oral hearing. The right to an oral hearing is provided for by the OFT<sup>103</sup> and the CAT.<sup>104</sup> The right to a public hearing is also provided for before the CAT but the tribunal can restrict this right if it considers that some information is to remain confidential.<sup>105</sup> The hearings of the French Competition Council<sup>106</sup> are not public but the right to an oral hearing is provided both before the Competition council and also the Paris Court of Appeal that reviews its decisions.<sup>107</sup>

The public pronouncement of the judgment contributes to the right to a fair trial as it conveys the public's scrutiny of the affair. This requirement imposes the publicity of the judgment but not the oral pronouncement of the judgment in open court.<sup>108</sup> It can be

<sup>99</sup>OFT, Under investigation?, at page 16.

<sup>100</sup>The CA 1998 even provides for a pre-hearing (Schedule 8, Section 8 and 9).

<sup>101</sup>*Office of Fair Trading v not named* [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 12.

<sup>102</sup>The CA 1998 only provides for the giving of reason for interim measures (Section 35 (4)) but the study of the decisions shows that they are fully reasoned. The decision of the CAT must contain the reasons (Schedule 8, Section 4, (2), (b), (i)).

<sup>103</sup>See OFT, Under Investigation, at page 15: Oral representations. We will also allow a business an opportunity to make oral representations at a meeting with us if the business has indicated in its written representations that it wishes to do so. Many judgments mention the date of the oral hearing before the OFT. It is even possible to make a PowerPoint presentation (*Argos Ltd & Anor v Office of Fair Trading* [2004] CAT 24 (14 December 2004), paragraph 34). See also an example of parties waiving their right to an oral hearing before the CAT (*Floe Telecom Ltd v Office of Communications* [2006] CAT 18 (31 August 2006), paragraph 4).

<sup>104</sup>Schedule 8, Section 9 of the CA 1998.

<sup>105</sup>See The Competition Appeal Tribunal Rules 2003, Section 50: 'The hearing of any appeal, review or claim for damages shall be in public except as to any part where the Tribunal is satisfied that it will be considering information which is, in its opinion, information of the kind referred to in paragraph 1 (2) of Schedule 4 to the 2002 Act'. This refers to 'commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates'. In ECHR law a party may waive its right to a public hearing provided that the waiver is unequivocal and there is no important public interest consideration that calls for the public to have the opportunity to be present (*Hilkansson v Sweden* (1990) 13 EHRR 1, paragraph 66, applied also in *Purger v Austria* (1997) 25 EHRR 105, paragraph 58).

<sup>106</sup>See *Cour de cassation*, comm., 5 October 1999, *Société Campenon Bernard*, n° 97-15.617.

<sup>107</sup>See Article L. 463-7 Code de commerce.

<sup>108</sup>See *Preto v Italy* (1983) 6 EHRR 182, paragraph 26, *Axen v Germany* (1983) 6 EHRR 195, paragraphs 29-32; *Werner v Austria* (1997) 26 EHRR 310, paragraphs 56 to 59. Although the ECt HR has not ruled specifically on the point as to whether publicity on a website meets the requirements of Article 6 to a public pronouncement of a judgment it appears that the Strasbourg Court very often uses this means to study domestic decisions (see for example *Meftah and others v. France*, 26 July 2002, paragraph 26).

complied with by all the means to make the judgment available to the public. The practice by the OFT and the CAT to publish decisions on a website seems correct.<sup>109</sup> Decisions of the French Competition Commission are also published on the Internet and in an official publication.<sup>110</sup>

Moreover the ECHR provides for the right to a hearing within a reasonable time. This condition protects parties against excessive delays. However this requirement does not raise many problems as competition authorities usually adjudicate within a short period of time.<sup>111</sup>

Finally the ECHR imposes that the accused be informed as to the accusation. This aspect raises no particular issue as OFT<sup>112</sup> and Competition Council<sup>113</sup> guidelines clearly show that people under investigations are informed.

#### THE PROVISIONS CONCERNING THE TRIBUNAL

First the tribunal has to be independent. The ECt HR has consistently held that in order to establish whether a tribunal is independent, 'regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence'.<sup>114</sup> Independent means independent of the executive, of the parties, and of Parliament. This requirement is easily met by Competition authorities as well as reviewing bodies<sup>115</sup> in England and France. It is not the place here to enter into the debate on the degree and the reality of their independence. Suffice it to say that they enjoy a reasonable amount of independence, reasonable enough to explain that this aspect has never been used to challenge their decisions before a Court of law.

Furthermore, the ECHR provides for the right to a tribunal. For the purposes of Article 6(1) a tribunal is characterised by its judicial function. The tribunal must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. It must determine matters within its competence on the basis of rules of law; and its decisions must be legally binding rather than merely advisory. This requirement is interpreted by the ECt HR taking into account all the proceedings before the competition authority and the reviewing body. The Strasbourg Court will see if as a whole the accused had a right to a tribunal. This requirement is not overly problematic given the role of the CAT. However, if the accused can only have his decision reviewed by way of judicial review, it may raise a problem. It has been argued that the Wednesbury test could impair the right to a tribunal as it is such a high one to meet.<sup>116</sup>

<sup>109</sup>The French Civil Supreme Court held that parties had no right to a public pronouncement of the judgment before the competition council (*Cour de cassation, comm.*, 5 October 1999, *Société Campenon Bernard*, n° 97-15.617).

<sup>110</sup>The name of this official publication is: *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes*.

<sup>111</sup>The OFT guidance contains strict time limits as regards the different stages of the enforcement process but the overall investigation time may vary. In the last annual account of the CAT the duration of the cases were between 45 months and 2 months.

<sup>112</sup>OFT, Under Investigation? At page 16. The picture shows that undertakings are informed at stage 4.

<sup>113</sup>See website: [http://www.conseil-concurrence.fr/user/standard.php?id\\_rub=42](http://www.conseil-concurrence.fr/user/standard.php?id_rub=42).

<sup>114</sup>*Langborger v. Sweden* - 11179/84 [1989] ECHR 11 (22 June 1989), at paragraph 32.

<sup>115</sup>For the latest developments relating to the independence of regulators in England see House of Lords, Select Committee on Constitution Sixth Report, Chapter 7: Relationships with Ministers - Independence and Accountability.

<sup>116</sup>See Stephen Richard, The impact of Article 6 of the ECHR on Judicial review [1999] JR 106. The very restrictive Wednesbury approach resulted in the Court of Human Rights deciding that the applicants had been denied an effective remedy in breach of Article 13 (see *Smith and Grady v United Kingdom* [1999] IRLR 734). In this case the Court of Appeal, applying the Wednesbury test, decided that it was lawful to dismiss servicemen because they were homosexual (see *R v Ministry of Defence, ex p Smith* [1996] QB 517). As Sam Hamilton argues the view of the Court on judicial review is not clear. The ECt HR has held that it is 'valid in some cases and invalid in others, depending on the circumstances of the case'.

Finally the ECHR demands that the tribunal be established by law. This requirement is intended to ensure that the judicial organisation in a democratic society should not depend upon the discretion of the executive, but should be regulated by law emanating from Parliament setting out the basic framework concerning the courts' organisation. This provision does not raise any issues as both agencies in England and France are established by Acts of Parliament.<sup>117</sup>

The provisions listed above do not raise many problems. We are now going to analyse the provision that raises the main issue: the right to an impartial tribunal established by law.

## II. THE MAIN PROBLEMS: THE RIGHT TO AN IMPARTIAL TRIBUNAL AND THE PRESUMPTION OF INNOCENCE

The main problems come (and came from in France) with the right to an impartial tribunal. A last requirement is the presumption of innocence.

### THE REQUIREMENTS UNDER ECHR LAW

Impartiality,<sup>118</sup> for the purpose of Article 6, denotes an absence of prejudice or bias. It comes from the English saying 'justice should not only be done but should manifestly and undoubtedly be seen to be done'.<sup>119</sup> Impartiality is to be examined on the basis of both a subjective test of the personal conviction of a particular judge in a given case, and an objective test of whether the judge offered guarantees sufficient to exclude legitimate doubt.<sup>120</sup> The ECt HR gives great importance to this principle because 'what is at stake is the confidence which the courts in a democratic society must inspire in the public'.<sup>121</sup>

In addition to impartiality a tribunal for the purpose of Article 6(1) ECHR should apply minimum standards of fairness namely the presumption of innocence. The presumption means that the burden of proof lies in the hands of the competition authority,<sup>122</sup> but this principle does not prevent it from using the presumptions of responsibility used in competition law. In numerous cases the CAT held that 'the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case and to overcome the presumption of innocence to which the undertaking is entitled'.<sup>123</sup> Therefore the test to be applied in cases where penalties are involved is the civil standard taking account of the gravity of what is alleged.<sup>124</sup> Presumption of innocence requires a certain amount of evidence to overcome this presumption. As CAT held in *Napp*, 'It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be'.<sup>125</sup>

(The HRA and the regulation of utilities (1999) 10(3) Utilities Law Review 115). It is also the view of Lord Lester of Herne Hill (The impact of the European Human Rights Law (1996) JR 21 at paragraph 15).

<sup>117</sup>In England the OFT is a non-ministerial government department established by statute in 1973. In France the Competition Council was established by statute in 1986 (Ordonnance n°86-1243 dated 1 December 1986 on the freedom of prices and competition).

<sup>118</sup>Impartiality is part of the principle of natural justice and is entrenched in English law. It is also recognised in French law but not in the meaning of the convention as we will show.

<sup>119</sup>See *R v Sussex Justices ex p McCarthy* [1924] 1 KB 256, 259.

<sup>120</sup>See *Fey v Austria* [1993] 16 EHRR 387, paragraph 28.

<sup>121</sup>See *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 33, paragraph 58.

<sup>122</sup>See *Napp v Director General of Fair Trading* [2002] CAT 1 at paragraph 99, hereafter '*Napp*'.

<sup>123</sup>See *JJB and Allsports v. Office of Fair Trading* [2004] CAT 17, at paragraph 204.

<sup>124</sup>See *Office of Fair Trading v W. Austin & Sons & Ors* [2005] CAT 25 (6 July 2005), paragraph 116.

<sup>125</sup>'*Napp*' at paragraph 109.

Given the ECt HR case law<sup>126</sup> judges and governments have the choice to impose the respect of the fair trial requirement at the first stage before the competition authority or after. The comparative study of these two countries shows clearly two different situations: France has chosen to draw the line between the requirements that are applicable at the first stage, while the UK tends to privilege the respect of the fair trial by a correct appeal (this is at least the position of the judge). The position of the English Parliament is nevertheless ambiguous. As a whole we want to show that the situation in England is ambiguous and that judges seem embarrassed.

#### (B) THE SITUATION IN ENGLAND AND FRANCE

##### I. THE FRENCH CHOICE: DRAWING THE LINE BETWEEN THE REQUIREMENTS THAT ARE APPLICABLE TO THE PROCEEDINGS BEFORE COMPETITION AUTHORITIES AND THOSE THAT CAN BE CURED BY A CORRECT APPEAL

###### THE PRINCIPLE OF IMPARTIALITY OF THE STATUS OF THE RAPPORTEUR

To understand the debate that has taken place in France it is necessary to remember that the principle of separation of powers is deeply entrenched in the legal culture of this country. This principle is stated in the 1789 Declaration on human and citizens' rights and goes back to the thoughts of the Enlightenment era, and especially the work of Montesquieu.<sup>127</sup> Article 16 of this Declaration provides that a society where the separation of power is not determined has no Constitution.<sup>128</sup> M. Troper has explained in his thesis<sup>129</sup> that in the French doctrine each power should be specialized in a particular function without participating in another function. Even if this principle is proclaimed it has never been implemented in a strict way. The principle is nevertheless strong in the French legal culture and when Parliament began to create regulatory authorities combining the powers to regulate, implement, and enforce the regulation many prominent authors criticized it. Especially, the sanctioning (or enforcement) power was heavily criticized because it was thought that only a court of law could have such a power. The Constitutional Council held that the sanctioning power was constitutional, while strictly limiting the use of this power in the respect of principles inspired by criminal law:<sup>130</sup> First administrative sanctions cannot contain a deprivation of liberty, and second the principles of legality, necessity, proportionality shall apply. The decisions of the Constitutional council entailed a 'criminalization' of the regime of administrative sanctions.

As regards the procedural principles contained in the ECHR French courts have tried to draw the line between the requirements of Article 6 that have to be complied with at the first stage and those that can be cured by a correct appeal.

The main problem in France has involved cases where one body combines the role of investigator, prosecutor, and judge.

<sup>126</sup>See the developments above.

<sup>127</sup>It is interesting to quote him all the more as it is his study of the English system that helped him theorize this principle: 'There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals' *The spirit of laws*, transl. by T. Nugent, revised by J.V. Prichard, 1914 by G. Bell & Sons, Ltd., London).

<sup>128</sup>« Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution ».

<sup>129</sup>M. Troper, *La séparation des pouvoirs et l'histoire constitutionnelle française*, LGDJ, 1973.

<sup>130</sup>Décision n° 89-260 du 28 juillet 1989, *Loi relative à la sécurité et à la transparence du marché financier*, paragraph 6 (Security and transparency of the financial market Act).

I will focus here on the problem of the combination of functions inside the regulators of prosecutor and jury. In this respect the main difficulty was the role of the '*rapporteur*' inside the Competition Council. What is the exact function of the '*rapporteur*'? S/He is designated by the President of the Competition Council to investigate the alleged anticompetitive practices. After the adversarial discussion of his/her report during the hearings of the undertakings he/she also sits during the deliberations of the Council even if he/she had no entitlement to vote.<sup>131</sup> This article introduced confusion between the functions of prosecutor and jury. The '*rapporteur*' who investigates is under an obligation to collect both incriminating and exonerating evidence, but there had been voices to argue that '*rapporteurs*' behave in fact like prosecuting judges only trying to prove guilt.<sup>132</sup> Others have shown how sometimes they departed orally from their written statements of objection.<sup>133</sup>

Litigants have tried to challenge the role of the '*rapporteur*' on the basis of Article 6 but the Court of Appeal has for a long time considered that this fact alone could not justify the quashing of the decision because this decision was reviewed by a court with full jurisdiction.<sup>134</sup> The Civil Supreme Court was more embarrassed: In its annual report for 1992 it argued that the sitting of the '*rapporteur*' during the deliberations of the Council allowing him/her to speak 'does not appear in harmony with the adversarial principle or the equality of arms principle'.

In the early 90s there was a contradiction of the Courts between their case law in which they accepted the participation of the '*rapporteur*' in the deliberation and the speeches of the judges in their discourse. The first blow was struck by the *Cour de cassation* in a case concerning the COB<sup>135</sup> in the *Oury* case.<sup>136</sup> The Court held that the '*rapporteur*' could not participate in the deliberations.<sup>137</sup> It was very likely that the solution was to be extended to the Competition Council. It was done first by the Paris Court of Appeal<sup>138</sup> which held that the participation of the '*rapporteur*' in the deliberations is in contradiction with Article 6 ECHR. The Civil Supreme Court finally decided that this participation was unlawful.<sup>139</sup>

#### OTHER CONSEQUENCES OF ARTICLE 6 ECHR

Article 6 ECHR also helps regulating the way competition and regulatory authorities begin their own-initiative investigations. When they begin their investigations competition authorities should not give the impression that the case has already been judged. The statement of objection must not appear as a prejudgment. As a consequence the internal organization of the Competition council has been changed: The persons who sit to decide own-initiative investigations are different from the ones who sit to judge the merits of the

<sup>131</sup> Article L. 463-7 Commerce Code

<sup>132</sup> Ch. Gavalda et C. Lucas de Leyssac, Commentary on the 1 December 1986 Ordonnance, *Revue concurrence consommation*, n° spéc. n° 144.

<sup>133</sup> G. Canivet, L'obligation du procès équitable et les règles du contradictoire dans les procédures de sanction en matière de concurrence, *Rev. conc., consom.*, juill./août 1995, at page 37. See also E. Claudel, Présence du rapporteur au délibéré du conseil de la concurrence, note sous *Cour de cassation, Com.*, 5 October 1999, *Campeon Bernard*, *RTD Com.* 2000 at page 249.

<sup>134</sup> 26 April 1994, *Sté pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et interprètes*, *BOCC* 18 May 1994, at page 182.

<sup>135</sup> French equivalent of the FSA, which sanctions market abuses.

<sup>136</sup> *Ass. Plén.*, 5 February 1999.

<sup>137</sup> For an English account of this decision by the *Court of Appeal Fleurose v Securities & Futures Authority Ltd. & Anor* [2001] *EWCA Civ* 2015 (21 December 2001), paragraph 11.

<sup>138</sup> *SA Canal Plus*, 15 June 1999, *BOCCRF*, n°14, 25 August 1999, at page 439.

<sup>139</sup> 5 October 1999, *Société Campeon Bernard*.



case. The Court of Appeal held that the ‘*rapporteur*’ could participate in the decision on own-initiative investigations.<sup>140</sup>

Similarly the Competition council has also changed its internal organization to further the respect of Article 6 ECHR with regard to interim measures. The Council decided that persons who had sat to adjudicate on interim measures could not sit to adjudicate on the merits of the case.<sup>141</sup> In doing so the Competition council anticipated a decision of the Civil Supreme Court holding that the Council had infringed the impartiality principle by adjudicating on the merits of the case with the same persons sitting in the division adjudicating on interim measures.<sup>142</sup>

This solution could not be applied to commitment procedures as it has recently been held that they do not involve a determination of a criminal charge.<sup>143</sup>

## II. THE SITUATION IN ENGLAND: THE LAW AS IT STANDS IS CLEAR BUT THERE ARE SIGNS OF AMBIGUITY

### THE LAW AS IT STANDS UP TO NOW

The situation under the law as it stands is clear. Article 6 ECHR applies to the proceedings before competition and regulatory authorities, but not entirely. The CAT has held in *Napp* that ‘the fact that these proceedings may be classified as ‘criminal’ for the purposes of the ECHR gives *Napp* the protection of Article 6, and in particular the right to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ (Article 6(1)), to the presumption of innocence (Article 6(2)), and to the minimum rights envisaged by Article 6 (3) including the right ‘to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’ (Article 6(3)(d)).’<sup>144</sup> In addition, in the context of civil rights proceedings LJ Schiemann held that ‘clearly the proceedings had to be fair’ which means the ‘SFA had to inform Mr Fleurose in good time of the nature of the charges, that he must have adequate time and facilities to prepare his defence, a proper opportunity to give and call evidence and question those witnesses called against him’. This applies a fortiori to criminal proceedings involved in competition law enforcement. In conclusion on this point minimum standards of fairness should apply in the proceedings before competition authorities.

Three other Article 6 requirements apply at this stage: The presumption of innocence, the right against self-incrimination,<sup>145</sup> and the right to a fair trial.<sup>146</sup>

A last consequence of the application of Article 6 is that the means used by competition authorities that infringe on an ECHR right have to be proportionate.<sup>147</sup> It has to be noted in this respect that with the HRA the proportionality principle became an independent

<sup>140</sup> *Cour d'appel de Paris*, 27 November 2001, *SA Caisse nationale du crédit agricole et a.*, BOCCRF 31 January 2002.

<sup>141</sup> Annual Report 2000, t. I, at page 4.

<sup>142</sup> See *Cour de cassation, Commercial Division*, 9 October 2001, *Sté Béton travaux et a.*, no Y 98-21.987, BOCCRF 31 December, Bull. civ. IV, no 160.

<sup>143</sup> See *Paris Court of Appeal*, 6 November 2007, *Société Canal 9 SAS*.

<sup>144</sup> See *Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications* [2002] CAT 1 (15 January 2002), paragraph 99.

<sup>145</sup> See *Office of Fair Trading v not named* [2003] EWHC 1042 (Comm) (14 May 2003), paragraph 6.

<sup>146</sup> See *Office of communications & Anor v Floe Telecom Ltd* [2006] EWCA Civ 768 (15 June 2006), paragraph 43.

<sup>147</sup> *Office of Fair Trading v not named* [2003] EWHC 1042 (Comm) (14 May 2003). However this is a general principle of EC law.

ground for judicial review.<sup>148</sup> This fact, according to Tony Prosser,<sup>149</sup> ‘may encourage the Courts to take a more interventionist approach in reviewing regulatory decisions in the future’.

However, any defects in fairness of these proceedings will be cured by a correct appeal. This explains why the Courts have never quashed a decision of a competition authority on this ground. The CAT held: ‘It follows, in our judgment, that the Tribunal has full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director’s Guidance. Indeed, it seems to us that, in view of Article 6(1) ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision’.<sup>150</sup>

#### A POSSIBLE AMBIGUITY?

The law as it stands is therefore clear up to now. However it is possible to feel a certain ambiguity in some judgments. In the *Napp* judgment the CAT held that: ‘We also accept that there is force in the argument that the administrative procedure before the Director does not in itself comply with Article 6(1), notably because the Director himself combines the roles of investigator, prosecutor and decision maker’.<sup>151</sup> The ambiguity is reinforced by a recent willingness of Parliament to ensure the fairness of the proceedings. First this can be shown with the reform of the FSA, and second by the current concerns of the Select Committee of the Constitution.

The reform of the FSA has shown a will to expand the protection granted by Article 6 to the first stage proceedings. This example is interesting to study as FSA’s powers are very close to those of competition authorities.<sup>152</sup> According to the Joint Parliamentary Committee on Financial Services and Market, ‘The main focus of comment on the draft Bill has been on the disciplinary process. There has been a perception that the FSA internal procedures may lack fairness and transparency, or be unduly costly and burdensome, and also that the FSA will be able to act as ‘prosecutor, judge and jury’’.<sup>153</sup> As a consequence these functions were separated: A Regulatory Decisions Committee (RDC) responsible for reaching decisions on disciplinary matters was created, the members of the RDC being independent from the FSA. RDC’s conclusions are intimated to the FSA’s Enforcement Committee, which takes the final decision. This gives effect to the requirement of Section 395 FSMA 2000 that such decisions must be made by persons independent of those who investigated the matters.<sup>154</sup>

This system was set up because of a strong belief that the initial design of the process, which did not provide for this separation, lacked fairness because the FSA acted as both prosecutor and judge. This separation ‘intends that the judicial function of deciding on breaches and penalties will be separated from its prosecution function’.<sup>155</sup> The Parliamentary

<sup>148</sup>See Lord Nolan in *Alconbury* [2001] UKHL 23; [2001] 2 All ER 929 (9th May, 2001), paragraph 151.

<sup>149</sup>Tony Prosser, Il sistema dei ricorsi contro le autorità di regolazione nel Regno Unito, Seminar of the Università degli studi di Milano – Bicocca Il ruolo del giudice di fronte alle decisioni amministrative per il funzionamento dei mercati.

<sup>150</sup>*Napp Pharmaceutical Holdings Ltd & Ors v Office of Communications* [2002] CAT 1 (15 January 2002), paragraph 499. This position can also be found at common law (*Lloyd v McMahon* [1987] 2 WLR 821, at pages 4 and 5).

<sup>151</sup>At paragraph 137 of the judgment.

<sup>152</sup>Apart from the disciplinary powers of the FSA.

<sup>153</sup>At paragraph 147.

<sup>154</sup>See I. MacNeil, An Introduction to the Law on Financial Investment, Oxford, Hart Publishing, at page 84.

<sup>155</sup>G. Staple, Financial Services and the Human Rights Act, in *The Human Rights Act and the Criminal Justice and Regulatory Process*.

concern is also expressed by the Select Committee on the Constitution.<sup>156</sup> Other writers express a feeling that Courts would be willing to impose a greater standard of fairness before competition authorities. In a recent article, Aidan Robertson, Maya Lester and Sarah Love concluded by saying, 'there are some indications that a more intrusive standard of judicial review of competition decisions may be developed. This is particularly likely in reviews for incompatibility with (...) the ECHR, are likely to result in a more intrusive review of a regulator's decision, on grounds of proportionality'.<sup>157</sup>

#### 4. FUTURE POSSIBLE DEVELOPMENTS

##### (A) THE POSSIBLE CONSEQUENCES OF THE ENTRY INTO FORCE OF THE LISBON TREATY

Is the Lisbon Treaty likely to change the current situation at English law and reinforce procedural safeguards before competition authorities? The Lisbon Treaty integrates to EU law two important human rights texts: The Charter of Fundamental Rights of the European Union (the Charter)<sup>158</sup> and the ECHR.

The Charter also provides fair trial rights and is binding on Member States when they are implementing EU law.<sup>159</sup> The Charter is thus applicable when a competition authority applies EU competition law. The UK and Poland have signed Protocol 7 that gives an interpretation of the Charter. Article 1(1) of the Protocol provides that the Charter does not extend the ability of the ECJ or any UK or Polish court to find the laws and practices of the UK or Poland inconsistent with the Charter, and Article 2 provides that the Charter does not create new rights. This protocol would not prevent the Courts from possibly expanding Article 6(1) ECHR rights as it is contained in domestic law.

In general, the Constitution Committee argues that the Charter 'would be less of a radical step than at first it may appear'.<sup>160</sup> At EU level it may be a powerful drive to 'Article-6-proof' antitrust proceedings.<sup>161</sup> Indeed UK and French concerns about the combination of prosecutor-judge and jury functions of competition authorities are echoed at EU level<sup>162</sup> as it had been in the US during the 1940s.<sup>163</sup>

The Lisbon Treaty also allows the EU to become a signatory of the ECHR. But the Constitution Committee concludes 'the European Union's accession to the European Convention on Human Rights should have no impact on national law'.<sup>164</sup>

<sup>156</sup>See minutes of evidence, memorandum by Professor Tony Prosser: 'What is important is that there is a degree of internal separation of powers where issues are particularly sensitive'.

<sup>157</sup>Judicial Review of Competition and State Aid Decisions, ECLR (2007) 28 (10), 553-562.

<sup>158</sup>Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF>

<sup>159</sup>Article 51 (1).

<sup>160</sup>European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, paragraph 67.

<sup>161</sup>See E. M. Ameye, The interplay between Human Rights and Competition Law in the EU, ECLR, 2004, 25 (6), 332-341 ; A. Andreangeli, Toward an EU Competition Court: "Article-6-proofing" antitrust proceedings before the Commission, World Competition, 2007, 30 (4), at pages 595-622.

<sup>162</sup>Ibid.; Wouter P.J. Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A legal and Economic Analysis, World Competition 27 (2) 201-224, 2004; Wouter P.J. Wils, Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law, World Competition, March 2006, Vol. 29 Issue, Number 1 at pages 3-24.

<sup>163</sup>See Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure, 1941, at page 43.

<sup>164</sup>At paragraph 78.

(B) THE FUTURE ATTITUDE OF ENGLISH COURTS WILL BE INFLUENCED BY THEIR DEFERENCE<sup>165</sup> TO LEGISLATIVE AND EXECUTIVE CHOICES

This deference would mean that it is not the Courts that will impose the respect of Article 6(1) ECHR to the first instance proceedings. This deference is a corollary to the concept of margin of appreciation developed by the ECt HR<sup>166</sup> and UK Courts 'have developed their own autonomous concept of deference'.<sup>167</sup> As Lord Cooke of Thorndon puts it, 'there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention'.<sup>168</sup>

(C) THE NECESSITY TO STRIKE A BALANCE BETWEEN PROCEDURAL SAFEGUARDS AND THE EFFICIENCY OF ENFORCEMENT PROCEDURES

One of the concerns of the Courts is that expanding HRA rights would undermine the efficiency of the enforcement process. But are there not more problems in not applying the impartiality principle? The UK Parliament clearly answered yes to this question in relation to the FSA. This concern was also shared in the United States. The 1941 report on Administrative Procedure stresses this point: 'Procedure at this stage must be framed (...) in such a way as to give convincing assurance (...) that the deciding body (...) is not motivated by any desire to deal with the parties or their interest otherwise than in a manner which is an objective appraisal of the facts and the furtherance of the public duty'.<sup>169</sup> Thus the report recommends the separation of the adjudicating function<sup>170</sup> from other functions. We will try to defend this idea using three sets of arguments based on constitutional values, the quality of the decision, and compliance.

I. ARGUMENTS BASED ON CONSTITUTIONAL VALUES

K. Yeung has tried to show the importance of constitutional values to secure compliance. She argues: 'In liberal democratic societies, punishment is legitimated not by persuasion (...) but by a finding of guilt determined in accordance with the requirements of procedural fairness'.<sup>171</sup> Procedural rights, 'by confirming that due consideration has been given to any representation made by interested parties, enhance public confidence in the decision-making process'.<sup>172</sup> This argument should be taken into account as regulators usually lack legitimacy being independent from Ministers which are accountable to Parliament. As C. Veljanovski puts it: 'The flaws in the present system arise from the wide discretion given to the regulators to make determinations and negotiate compliance with the utilities within a system which has little regard for due process and accountability'.<sup>173</sup>

<sup>165</sup>See P. Craig, The Courts, the Human Rights Act and Judicial Review, LQR 2001, 117 (oct), 589-603.

<sup>166</sup>See for example *Handyside v United Kingdom* (1979) 1 EHRR 737, paragraph 48.

<sup>167</sup>See P. Craig, op. cit..

<sup>168</sup>*Regina v. Director of Public Prosecutions, ex parte Kebilene and Others* [2000] 2 A.C. 326.

<sup>169</sup>At page 43.

<sup>170</sup>At page 55.

<sup>171</sup>K. Yeung, *Securing Compliance - A Principled Approach*, (2004) Hart Publishing, Oxford.

<sup>172</sup>K. Yeung, op. cit., at page 44.

<sup>173</sup>C. Veljanovski, 'The power of the regulator' in *But Who will Regulate the Regulators?*; (1993), London, Adam Smith Institute, at page 25.

## II. ARGUMENTS CONCERNING THE QUALITY OF THE DECISION

Bentham was the first to study the relationship between procedure and outcome. 'Procedures are there to produce accurate outcomes'<sup>174</sup> or rectitude as Bentham said. The purpose of the legal process is indeed to apply the law accurately. That is why unfairness in the design of procedures could lead to an unsatisfactory decision.

As Wouter Wils shows in an article, the combination of investigative, prosecutorial, and adjudicative functions may entail a risk of prosecutorial bias. This is a particularly voiced criticism at EC level.<sup>175</sup> Wouter Wils identifies three possible sources of prosecutorial bias: Confirmation bias, hindsight bias, and the desire to justify past efforts and the desire to show high level of enforcement activity. Establishing internal checks and balances can reduce this risk.

Moreover an impartial and public process permits reaching a better decision. As M. P. Schinkel argues in a recent article entitled *Forensic Economics in Competition Law Enforcement* procedural fairness enhances the quality of forensic economic analysis as it reduces the scope for factors other than substantive to influence decision-making.<sup>176</sup>

## III. PROCEDURAL HUMAN RIGHTS AS PART OF A COMPLIANCE STRATEGY

The decision reached after a fair process would be better complied with. As F. Montag shows, the defects of the procedure before the European Commission led to a 'lack of acceptance' and are illustrated by the fact that 'hardly any decisions imposing significant fines escape being challenged'.<sup>177</sup> This criticism is particularly acute in relation to merger control. The lack of fairness led to heavy criticisms from the House of Lords Select Committee on the European Union during the consultation of the European Commission on the Green Paper reviewing the Merger Regulation.<sup>178</sup> The conclusions of the report stress that 'efforts should focus (...) on improving the internal checks and balances in the ECMR regime. The concerns about due process are best addressed by enhancing the procedural safeguards in the current system. The Commission should divide responsibility for the consideration of cases in Phase I and Phase II'.<sup>179</sup>

Acceptance of the decision is essential to regulators and explains why according to us procedural human rights should be considered part of a compliance strategy. The problem of the French choice is that as the Courts imposed the respect of procedural rights there has been no reflection on the way these rights could enhance acceptability and compliance with decisions.

The literature on compliance does not pay much attention to human rights issues. Attention of writers has focused on the necessary conversation between the regulator and the community it regulated,<sup>180</sup> on the different styles of enforcement process from the

<sup>174</sup>D.J. Galligan, *Due Process and Fair Procedures*, A study of Administrative Procedure, Clarendon Press, Oxford, 1996, at page 10.

<sup>175</sup>See for example A. Winckler, *Some Comments on Procedure and Remedies under EC Merger Control Rules: Something Rotten in the Kingdom of the EC Merger Control?* (2003) 26 *World Competition* 219, at pages 231-232.

<sup>176</sup>*Journal of Competition Law and Economics*, (2007) 4 (1), at page 14.

<sup>177</sup>The Case for a Radical Reform of the Infringement Procedure under Regulation 17, E.C.L.R. 1996, 17 (8), at page 430.

<sup>178</sup>Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6, 11.12.2001.

<sup>179</sup>Paragraphs 248 and 255 of the report.

<sup>180</sup>See J. Black, *Talking about Regulation*, 1998, Public Law 97.

compliance approach to the sanctioning approach,<sup>181</sup> or the persuasive and insistent strategy,<sup>182</sup> or the difference between the American approach (adversarial, legalistic) and the English approach, more flexible and discretionary.<sup>183</sup> Similarly theories of enforcement like responsive regulation<sup>184</sup> prescribe the strategies regulator should adopt to secure compliance based on the model of the enforcement pyramid. The most recent theories like 'really responsive regulation' stress that regulators should be 'responsive not only to the attitude of the regulated firm but also to the operating and cognitive frameworks of firms; the institutional environment and performance of the regulatory regime; the different logics of regulatory tools and strategies; and to changes in each of these elements'.<sup>185</sup>

This is very important as it shows that the enforcement process should also be thought as a continuance of regulation. There is no reason why the dialogue, the conversation regulators have with the community they regulate, should stop at the enforcement stage.

Impartiality and fair procedure should therefore be the core of a compliance strategy in a regulatory environment because it allows this participation to the enforcement process that is part of the continuing dialogue the regulator has with the community it regulates.

To show the importance of human rights procedural safeguards in the compliance strategy it is necessary to use the social psychology studies that have emphasized the importance of procedural legitimacy. The conclusions of these studies show that the acceptance of an institution's decision is not only derived from the result of the decision, the sanction, but from one's conception of the institution. What is interesting in these studies is that an unfavourable decision can nevertheless be accepted as legitimate provided the procedure appears fair. Tom R. Tyler's studies on procedural justice show that people tend to accept a decision because they think it has been taken following a fair procedure. Tyler's conclusions show that 'the legitimacy of both local and national legal institutions, and the willingness to accept their decisions, are influenced by views about the fairness of their decision-making procedures'.<sup>186</sup> The use of fair procedure is a key element in building trust and willingness to comply with the decisions.<sup>187</sup>

## 5. CONCLUSION

This study has shown three things. Even though Article 6(1) ECHR is applicable to competition law enforcement, the two countries enjoy a certain amount of discretion as to the stage at which they want to apply it. In this respect France and the UK differ in the way they consider impartiality. The combination of functions is prohibited in France whereas UK Courts do not seem to be willing to intervene. Yet, taken as a whole the situation in England is not very clear and there are signs that an evolution could occur. Even if Courts tend not to intervene too much, Parliament seems to be very concerned about this problem.<sup>188</sup> Finally we tried to make a case for a way to think the integration of human rights issues into a compliance strategy.

<sup>181</sup>K. Hawkins, *Environment and enforcement*, 1984.

<sup>182</sup>B. Hutter, *Compliance: Regulation and Environment*, Oxford, Oxford University Press.

<sup>183</sup>D. Vogel, *National styles of regulation: Environmental Policy in Great Britain and the United States*, Ithaca, Cornell University Press.

<sup>184</sup>I. Ayres and J. Braithwaite, *Responsive Regulation*, 1992.

<sup>185</sup>Robert Baldwin and Julia Black, *Really Responsive Regulation* (2008) 71 (1) 59-94.

<sup>186</sup>Tom R. Tyler and Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, *Law & Society Review*, Vol. 25, No. 3 (1991), at pages 621-630, at page 621.

<sup>187</sup>Tom R. Tyler, *Does the American Public Accept the Rule of Law - The Findings of Psychological Research on Deference to Authority*, *DePaul Law Review* 661 (2006-2007), at page 665.

<sup>188</sup>See the reform of the FSA, the concerns of the House of Lords Select Committee on the Constitution (above) and of House of Lords Select Committee on the European Union (see above its concerns about merger control procedures).