

# Fundamental rights and judicial remedies in EU competition law.

Tim Ward QC

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- Do fundamental rights give rise to useful remedies in competition law?
  - Do fundamental rights require a more intensive form of judicial review?

## The CJEU is keen on fundamental rights:

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- C-60/00 *Carpenter*;
- C-144/04 *Mangold*;
- C-34/09 *Ruiz Zambrano*;
- C-92/09 *Volker*.

# M

## ... but not always in competition law:

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Privilege against self  
incrimination:

- extends only to answers that involve an admission;
- does not apply to existing documents.

C-301/04 P *Commission v SGL Carbon* [2006]  
ECR I-5915, para 48.

## Contrast ECtHR:

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- *Saunders v United Kingdom* (1997) 23 EHRR 313.
- *Funke v France* (1993) 16 EHRR 297.
- *JB v Switzerland*, 31827/96.

## Do fundamental rights make a difference in competition cases?

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- “Rights of defence” are part of the general principles of EU law; eg C-109/10 P *Solvay*, para 52.
- Those general principles “reflect” the ECHR.
- The Charter “reaffirms” those rights: T-214/06 *ICI*, para 283.
- TFEU Art 6: new prominence.

# Charter

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- Art 41(2)(a): right to be heard.
- Art 47: effective judicial protection.
- Art 48(2): right to defence.
- Art 52(3): EU law may exceed protection in ECHR.
- No reason to go beyond the ECHR in competition law: C-109/10P *Solvay*, AG Kokott.

# M

## Eg: T-214/06 *ICI*, 5 June 2012

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- 8 yrs from first request for info to judgment of GC.
- right to determination within a reasonable time a general principle of EU law, reaffirmed by Art 47 of the Charter,
- Principle of reasonable time applicable to competition administrative proceedings,
- Could lead to a reduction in the fine,
- no breach on the facts.



# M

## Sufficiency of review by EU Courts

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### Article 6 ECHR:

- Competition penalties are “criminal”: *Jussila v Finland*, 23 Nov 2006, para 43.
- Administrative decision making or a criminal charge must be subject to control by a body with “full jurisdiction”.

# M

## Case C-12/03 P *Tetra Laval* [2005] ECR I-987, [39]:

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“[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the [EU] Courts will refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”

# The criticisms

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- Commission investigates and prosecutes.
- Deference by Court to Commission on complex economic assessment.
- No full review of merits under Art 263.

# M

## *Menarini v Italy* 43509/08, 27.9.11

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- M found guilty of price-fixing – fined €5m.
- Admin Tribunal rejected challenge, noting its limited review powers:
  - Can check whether the decision is logical, appropriate, rational, supported by a proper statement of reasons;
  - BUT cannot substitute its own evaluation on the substance.

## *Menarini* - ECHR

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- Penalty was criminal Art 6, but procedure may differ from criminal in “strict sense”.
- But Italian review was adequate: courts looked at M’s allegations of fact and law; were able to verify if the administration made appropriate use of its powers, and to assess the appropriateness of the fine.
- Dissent: Admin Tribunal could not substitute its own view of the facts.

## *Views on Menarini*

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- Alexander Italianer, Director General, DG Comp:

*"This is a welcome development which confirms the legitimacy of administrative systems... [and] corroborates the case law of the European Court of Justice which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Art.6 ECHR..."*

- Judge Bjorgvinsson: ECtHR "would be very careful, not to take decisions which upset the dispute settlement procedures of the European Union" as they are a "matter of judicial policy".

## C-272/09P *KME*, 8 Dec 11.

- Challenge to fine where “unlimited jurisdiction”.
- Reaffirms *Tetra Laval*, but:

“the Courts cannot use the Commission’s margin of discretion ... as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.”

# M

## E-15/10 *Posten Norge*, 18 April 2012, EFTA Court:

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- €12m fine abuse of dominance.
- Not a criminal charge of “minor weight”.
- Margin of appreciation in economic matters, but not “beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.”



## A practical constraint?

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- Pending cases before GC:
  - 2007: 1154
  - 2011: 1308
  
- Ave duration of comp cases:
  - 2007: 42.6 mos
  - 2011: 50.5 mos

# M

## Standard of review: challenge to an investigation

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- *Primagaz v France* (29613/08) search and seizure of docs in a competition investigation.
- Appeal at the time of the search confined to errors of law, but no review of the factual basis.
- Full appeal only after the authority had imposed its final decision on the merits.
- Breach of Art 6: not effective judicial review within a reasonable time.

## Case C-94/00 *Roquette Frères*:

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When the Commission seeks a warrant, the national court:

- may not question the necessity for the inspection, or
- demand to see the information on the Commission's file;
- very limited proportionality review.

# Thank You

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