

Standards of Entrepreneur Rights in Competition Proceedings – a Matter of Administrative or Criminal Law?

by

Małgorzata Król-Bogomilska*

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Abstract

The question of standards of entrepreneur rights in competition proceedings has been for many years considered as one of the most controversial issues. Its importance has been increasing considering that the application of antitrust regulations is often concomitant with a wide-ranging interference with the freedom of economic activity. This interference manifests itself in cases concerning both restrictive practices and the control of concentrations. Valuable source of inspiration for a debate on the need to take into account numerous standards of rights in competition proceedings

* Prof. Małgorzata Król-Bogomilska, Ph.D. Professor at the Faculty of Law and Administration of the University of Warsaw and at the Institute of Law Studies of the Polish Academy of Sciences; Head of the Department of Competition Law at the Institute of Law Studies of the Polish Academy of Sciences. This article is based on a conference paper.

was the dispute over the nature of competition proceedings and fines (the controversy around ‘a criminal law nature’ of competition cases). The jurisprudence of Strasbourg judiciaries explicitly stresses that in the assessment of a case nature due consideration should rather not be given to formal classifications set forth in legal provisions but to the real nature of the case. The ECJ did not share the assumptions adopted by the European Court of Human Rights on the legitimacy of a wide interpretation of the “criminal charge” notion within the meaning of Article 6(1) ECHR. In the present EU jurisprudence on competition law, there have been more and more judgments which deal with standards of rights stemming from the ECHR. In the context of an ever growing severity of penalties, the guarantee function of law has been gaining in importance, and hence the standards to be respected in competition proceedings are of a bigger weight.

Major changes were brought by the entry into force, on 1 December 2009, of the Treaty of Lisbon. The implementation of the concept aiming at an even stronger reinforcement of the position of fundamental rights was sealed by granting the EU Charter of Fundamental Rights of 2000 the binding force by including this Charter into the EU primary law and by defining the basis for the EU accession to the ECHR (Article 6 TEU). The introduction of new rules of judicial cooperation in criminal matters may contribute in future to a better dynamic of the criminalization of the most serious violations of competition law in the EU Member States (Article 83 and following of the TFEU).

Résumé

La problématique des standards en matière de droits des entrepreneurs dans les affaires de concurrence est considérée comme particulièrement controversée depuis des années. Son importance s’accroît en raison du fait que l’application du droit de la concurrence entraîne souvent une ingérence fort poussée dans la liberté d’exercer une activité économique. Celle-ci relève tant des actions concernant les pratiques restreignant la concurrence que le contrôle des concentrations.

Le débat sur la nature des affaires de concurrence et les amendes (querelle regardant la nature criminelle des affaires de concurrence) a été une inspiration importante pour la discussion concernant la nécessité de prendre en considération plusieurs standards des droits dans les procédures de concurrence. Dans la jurisprudence des autorités de Strasbourg, pour évaluer le caractère des affaires, l’accent est sensiblement mis moins sur la classification formelle faite en vertu de textes juridiques que sur la nature réelle de ces affaires. La Cour de Justice ne partage pas la thèse de la Cour européenne des droits de l’homme au sujet du bien fondé d’une interprétation large de la notion d’ « accusation criminelle » au sens de l’art. 6(1) de la Convention européenne des droits de l’homme. La jurisprudence communautaire actuelle en matière de droit de la concurrence voit pourtant s’accroître le nombre d’arrêts qui abordent la question des standards des droits découlant de la Convention européenne des droits de l’homme. La nécessité de garantir les droits fondamentaux est accentuée en particulier en raison de la nature répressive des sanctions appliquées en vertu de la législation communautaire.

L'entrée en vigueur du traité de Lisbonne, le 1^{er} décembre 2009, apportait un changement capital. Celui-ci était lié notamment à la réalisation d'une conception visant à renforcer définitivement la position des droits fondamentaux dans l'Union européenne. La force obligatoire octroyée à la Charte des droits fondamentaux de l'UE de 2000 et son intégration dans le droit primaire de l'UE, ainsi que la définition des fondements de l'adhésion de l'UE à la Convention européenne des droits de l'homme (art. 6 du Traité sur le fonctionnement de l'UE) réalisent cette conception. Puis, la mise en place de principes nouveaux de collaboration dans les affaires pénales peut contribuer à dynamiser à l'avenir le processus de criminalisation des infractions les plus graves au droit de la concurrence dans les Etats membres (art. 83 et suiv. du traité sur le fonctionnement de l'UE).

Classifications and key words: standards of entrepreneur rights; competition proceedings; administrative law; criminal law; fines; judicial cooperation in criminal matters; the criminalisation; hard core cartels.

I. Introduction

The standards of **entrepreneur rights in competition proceedings** has been considered for many years as one of the most **controversial** issues in competition law. Its importance has increased in recent years, taking into account that the application of antitrust regulations is often concomitant with a wide-ranging interference into **the freedom of economic activity**. This interference manifests itself in cases concerning both **restrictive practices** and **control of concentrations**.

The impact of this issue manifests itself in particular by the types of sanctions imposed on entrepreneurs for certain breaches of competition law. In competition proceedings, one may distinguish **three types of sanctions**, which will be discussed in this paper:

- administrative law sanctions,
- civil law sanctions, and
- penal sanctions.

For reasons which will become clear, a major part of the discussion should be focused on penal sanctions. At the same time, in an era when both the number and the value of **penalties** applied in cases of breaches of antitrust law have been increasing, much more significance should be given to those standards of entrepreneur rights which fulfil the legal function of a **guarantee**. It is also of primary importance to ensure the full transparency of the legal process, which needs to make clear the legal basis upon which sanctions are imposed, the method of fixing of their amount, and the definition of rules under which such sanctions are imposed.

The issue concerning the types of standards of entrepreneur rights to be observed in antitrust proceedings should be discussed taking into account **each of the abovementioned types of sanctions**. In fact all three types result in, as has already been said, a wide-ranging interference into the freedom of economic activity.

Considering the above, this issue should be addressed using a specific sequence of scientific methodological inquiry. In the first instance, the discussion should focus on the nature of competition proceedings and their **implications for the definition of the relevant entrepreneur rights**. This phase of inquiry forms the topic of this article.

To start with, it is worthwhile to overview the catalogue of rights which may be used in respect of such entities as **entrepreneurs**, and then to review the catalogue of rights which may and should be applicable in **competition cases**. The discussion concerning the latter should be pursued taking into account the particular specificity of:

- infringements, and
- sanctions.

In the first instance, an analysis needs to be made from the perspective of the definiteness of the infringement. In this respect, the fundamental question to be discussed is whether the use of an open catalogue of restrictive practices in competition law allows for the application of penal sanctions on similar grounds as administrative sanctions. Therefore, the question is whether it is possible to apply penal sanctions for ‘unnamed’ practices, and even more so to practices not recognized by previous antitrust jurisprudence as illegal, or whether the principle of *nullum crimen sine lege* should be used, as in criminal law.

II. The complex nature of competition cases – assessment criteria

In order to define the notion of a ‘competition case’, one needs to identify:

- the object of such case, as well as the types of substantive law norms used as a basis for resolution (concerning both infringements and sanctions);
- the nature of the body with the competence to resolve the case, and the process for appealing from decisions of such body;
- the types of procedures applicable during the relevant proceedings.

In competition proceedings the decisions are taken under competition law, i.e. a set of legal provisions which aim to protect competition on the market against any infringement leading to its restriction and/or causing prejudice to the interests of entrepreneurs and consumers. Competition law is a part

of public administrative law. Competition cases concern either restrictive practices or breaches connected with the concentration of undertakings.

Among the sanctions provided for by the Polish Act of 16 February 2007 on Competition and Consumer Protection¹ (hereafter, the Act) we may list the following:

- **purely administrative sanctions:** (e.g. an order to refrain from a restrictive practice or prohibiting the implementation of an anti-competitive concentration);
- **civil law sanctions** (e.g. the nullity of a legal action which constitutes abuse of dominant position), and
- **penal sanctions** (financial penalties imposed, e.g., for restrictive practices or for concentrations made without the consent of the President of the Office of Competition and Consumer Protection (the Polish national competition authority)).

Competition cases in Poland are conducted by the President of the Office of Competition and Consumer Protection (hereafter, the UOKiK President, retaining use of the Polish acronym). The UOKiK is a central body of government administration appointed by the President of the Council of Ministers. Any appeals from or complaints concerning decisions of the President of the UOKiK are heard by a common pleas court (Regional Court – Court of Competition and Consumer Protection, acting as a court of first instance). Appeals from the rulings of this Court are examined by the Court of Appeals in Warsaw, and relevant cassation appeals by the Supreme Court.

The complex nature of any competition case manifests itself in the hybrid nature of procedural rules and Codes applicable to the procedures used in cases before the President of the UOKiK, i.e.:

- **administrative procedure** – set forth in the Act on Competition and Consumer Protection, and in all matters not covered by the Act, defined by the provisions of the Code of Administrative Procedure;
- **civil procedure** in questions pertaining to evidence, as set forth in the Code of Civil Procedure (hereafter, KPC),
- **criminal procedure** applies to searches (also sometimes called inspections), as defined in the Act on Competition and Consumer Protection, and in all matters not covered by the Act, by the provisions of the Code of Criminal Procedure.

In judicial proceedings initiated by appeal from a decision of the President of UOKiK, cases are settled under the rules of civil procedure, which may lead to the presumption that such litigations are qualified as civil cases. Indeed they are formally defined as civil cases; considered as civil litigations because

¹ Journal of Laws 2007 No. 50, item 331, as amended.

they are heard under the KPC provisions. However, competition cases are also defined as *sensu largo* ‘economic cases,’ which may be examined under separate procedures². This legal state of affairs will be binding only until 3 May 2012³.

III. Dispute over the criminal nature of competition proceedings and fines

1. Nature of fines in the light of the Council regulations

The controversy around the nature of competition proceedings and the fines imposed for infringements of competition law has persisted for several decades, despite the fact that, since the very beginning, this issue was seemingly resolved in two Council regulations: Regulation no. 17/62 implementing Articles 81 and 82 of the EC Treaty⁴, and Regulation no. 4064/89 on the control of concentration between undertakings⁵. Both regulations stated that these decisions ‘shall not be of a criminal law nature’.

The debate, which continues despite the aforementioned resolutions, points to the fact that the question of fines was defined in the abovementioned Council regulations only formally, and that this does not exclude reflections on their real nature⁶. It has been emphasized that such an approach was taken with the aim of avoiding any problems of a constitutional nature which

² See here: T. Ereciński, [in:] T. Ereciński, J. Gudowski, M. Jędrzejewska, *Komentarz do kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze*, vol. I, Warszawa 2004, p. 1052; M. Szydło, Ł. Błaszczak, ‘Sprawa antymonopolowa jako przykład sprawy administracyjnej oraz sprawy gospodarczej’ (2005) 7-8 *Przegląd Sądowy* 138 and following.

³ Article 479¹ § 1 of the KPC provides that the provisions of Section IVa ‘Proceedings in economic cases’ shall be applicable for ‘cases in civil law relations between entrepreneurs pertaining to their economic activity (economic cases)’. The provisions of § 2, point 3 of this Article complement the definition of economic cases and set forth that ‘Within the meaning of this Section, shall also be considered economic cases, those: (...) which belong to the competence of courts under competition protection legislation (...)’. This legal state of affairs shall be binding until 3 May 2012, i.e. until the entry into force of the Act of 6 September 2011 amending the Act on the Code of Civil Procedure and some other acts (*Journal of Laws* 2011 No. 233, item 1381), which will annul separate proceedings for economic cases and, thus, the competition protection cases shall be subject to applicable civil proceedings rules.

⁴ OJ [1962] 13/2004, as amended.

⁵ OJ [1969] L 395/1, as amended.

⁶ See W.P.J. Wils, ‘La Compatibilité de Procédures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l’Homme’ (1996) 3-4 *Cahiers du Droit Européen* 333-334.

might have resulted from recognition of the Commission's powers in 'criminal jurisdiction'.

The debate continues today, after the replacement on 1 May 2004 of the above-cited regulations with new Council regulations which contain analogical provisions stating that decisions which impose fines thereunder shall not be of a criminal law nature. Such an approach is adopted in Article 23(3) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁷ and in Article 14(4) of Regulation 139/2004 on the control of concentrations between undertakings⁸.

2. Practical orientation of the debate

Action for infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

In the jurisprudence, the controversy surrounding the 'criminal law nature' of competition cases emerged in the 1980s. At that stage, the dispute was predominantly **practically oriented**.

The position asserting the criminal law nature of competition cases and assigning a criminal character to fines and procedures applicable in such proceedings was claimed by undertakings in their actions against the decisions of the Commission raised in proceedings before the Court of Justice of the European Union (hereafter, 'the ECJ'), and later on before the Court of First Instance⁹ (hereafter, 'the CFI'). This particularly intense stage of the debate was one of the main topics described in this author's monograph on the penalties in competition law, published in 2001¹⁰.

The essential line of defence adopted by undertakings against the European Commission's decisions imposing fines rested on the assumption that any case in which a fine is imposed by the Commission is in fact of a criminal nature. It was also pointed out that despite the 'criminal nature' of such a case, the liability is decided on by **the Commission**, which is **not a judicial authority**.

⁷ OJ [2003] L 1/1, as amended.

⁸ OJ [2004] L 24/1.

⁹ Created in 1988 (today known as the General Court).

¹⁰ M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym: w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym*, Warszawa 2001, p. 184 and following. In the Polish literature, the topic of the nature of antitrust cases and the legal consequences of their definition is also discussed in the works of K. Kowalik-Bańczyk, *Problematyka ochrony praw podstawowych w unijnych postępowaniach w sprawach z zakresu ochrony konkurencji*, vol. 39, Centrum Europejskie Natolin, 2010, p. 24 and following; and of M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 64 and following.

For the undertakings upon whom fines were imposed, this assumption was the basis for the claim that the fines constituted a **violation by the Commission of Article 6(1)** of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the ECHR). According to Article 6(1) ECHR: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

As stated above, the action for infringement of Article 6 ECHR raised by undertakings against the decisions of the Commission was based on the allegation that ‘the Commission is not a judicial authority’ within the meaning of Article 6. In cases in which fines were imposed, the claim of infringement of Article 6 ECHR rested on the ‘criminal law nature’ of the case.

Actions for infringement of Article 6 ECHR were also lodged in cases in which the Commission solely ordered an undertaking to withdraw from an agreement (e.g. in *Fedetab* case). In this respect, the position supporting the application of Article 6 ECHR rested on the underlying civil law nature of the case¹¹. The Court of Justice shared the opinion that the Commission could not be considered as a judicial authority within the meaning of Article 6 ECHR (as in *Fedetab* and in *Pioneer* cases). However, it concluded that such an argument was irrelevant, as the Commission was bound to respect the procedural guarantees provided for by Community law¹².

Valuable inspirations

The jurisprudence of the Strasbourg courts (the Commission of Human Rights and the European Court of Human Rights; hereafter, the ECtHR) provided a major inspiration for undertakings’ appeals of Commission decisions before EU courts, by stressing the criminal law nature of competition cases. However, ECtHR’s broad interpretation of the notion of ‘criminal charge’ as used in Article 6 ECHR (also covering some administrative law cases) has until now appeared solely in cases concerning proceedings at the national level. Considering that neither the European Communities nor the

¹¹ The civil law nature of such cases is discussed in the context of exemptions granted under Article 81(3) [previous article 85(3)] of the Treaty and under the control of concentrations. D. Waelbroeck, D. Fosselard, ‘Should the decision-making power in EC antitrust procedures be left to an independent judge? – The impact of the European Convention of Human Rights on EC Antitrust procedures’ (1994) 14 *Yearbook of European Law* 114–115. See D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115. See also W.P.J. Wils, ‘La Compatibilité...’, p. 335.

¹² D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115. See also W.P.J. Wils, ‘La Compatibilité...’, p. 339.

EU as such have yet been party to such a case before the ECtHR, the ECtHR cannot be said to have examined directly the question of the conformity of the Community (EU) procedures with the ECHR¹³.

Cases concerning Community procedures, if any, filed in the Commission of Human Rights led to the issuance of a finding that the ECtHR did not possess *ratione personae* competence. Such an argument was used in *M and Co* case, wherein the Commission of Human Rights also took the occasion to comment on the criteria of infringement assessment, stating that ‘the legal system of the European Communities was providing for effective control of the observance of fundamental rights, as they result *inter alia* from the ECHR’¹⁴.

In one of the examined cases, i.e. the *Golder case* (1975), the European Court of Human Rights ruled that the preliminary question should not be whether the dispute settlement authority is a court within the meaning of Article 6(1) ECHR, but whether the nature of the case (civil or criminal) creates ‘the right to a tribunal’ and ‘to a fair trial’. The Court stressed that in the event of an assumption that Article 6(1) ECHR related solely to the judicial proceedings, the signatory States could, without any breach of the Convention, liquidate national courts or deprive them of competence in specific categories of cases and transfer jurisdiction to authorities dependent on the executive power¹⁵.

In the proceedings before the ECJ in the *Orkem* case, Advocate General Darmon, while pointing in his opinion to the criminal law nature of antitrust procedures which are applicable in the European Community and lead to the imposition of fines, quoted the judgment of the European Court of Human Rights in the *Öztürk* case. Nevertheless, later he considered that the assumption of the criminal law nature of the procedure in *Öztürk* case was doubtful¹⁶.

Even the most recent publications still quote the judgment of the European Court of Human Rights of 8 June 1976 in the *Engel* case, in which the Court identified three criteria vital to determining the criminal law nature of

¹³ W. P. J. Wils, ‘Is Criminalisation of EU Competition Law the Answer?’, [in:] R. Zäch, A. Heinemann, A. Kellerhals (eds.), *The Development of Competition Law: Global Perspectives*, Cheltenham 2010, p. 254.

¹⁴ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, p. 118.

¹⁵ See M.A. Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, Warszawa 1998, p. 140 (theses 660 and 661). For more on this subject see also W.P.J. Wils, ‘La Compatibilité...’, p. 339 and following

¹⁶ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 114–115, p. 116. The thesis of the criminal law nature of competition cases is convincingly claimed by Wils, who refers to the judgment in *Öztürk* case. He also quotes the judgments of the European Court of Human Rights in other cases, i.e. *Engel*, *Lutz*, *Bendenoun* (W.P.J. Wils, ‘La Compatibilité...’, pp. 333, 334).

the case: (1) whether or not the provision(s) defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law, disciplinary law, or both concurrently. This, however, provides no more than a starting point; (2) the very nature of the offence, which according to the Court is a factor of great importance; and (3) the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria mentioned above constitute the factors which carry the greatest weight. Moreover, these two criteria are alternative, not cumulative. In order for Article 6 to apply by virtue of the words ‘criminal charge’ it suffices that either the offence in question, by its nature, should be considered ‘criminal’ from the point of view of the Convention, or that the ‘person’ charged is liable to a sanction which, in its nature and degree of severity, belongs in general to the ‘criminal’ sphere. It might be noted that a relative lack of gravity of a penalty does not necessarily divest an offence of its inherently criminal character¹⁷.

The subject literature also tends to refer to the opinion of Advocate General Darmon presented in 1992 in the *Wood Pulp* case¹⁸, in which he equalled fines assessed by the European Commission to criminal punishment and added that: ‘(...) the Commission decision in the field of competition is another matter entirely, particularly where it orders a trader to pay a fine and is therefore manifestly of a penal nature’.

While the *Öztürk* case was not a competition case, in these proceedings the European Court of Human Rights defined helpful criteria for interpretation of the notion of ‘a criminal law case’. In the opinion of the Court, in the first instance the nature of the case should be examined on the basis of **the nature assigned to a given infringement by the national law** of the defendant, i.e. whether, in the light of such law, the definition of a given infringement is derived from criminal law or not. Among other criteria the Court listed, alternatively: **the nature and the degree of possible sanction for the infringement**¹⁹.

The opinion of Advocate General Darmon submitted in the previously mentioned *Orkem* case is widely considered to have caused some doubts within the ECJ as to the validity of its previous case law. Indeed, for the first time the Court of Justice in its judgment decided to leave open the issue whether Article 6 ECHR was applicable to EC antitrust procedures. The ECJ stated that: ‘as for Article 6 ECHR, considering that this article may be invoked

¹⁷ On this subject see also T. K. Giannakopoulos, *Safeguarding Companies’ Rights in Competition and Anti-dumping/Anti-Subsidies Proceedings*, 2nd ed., Alphen aan den Rijn 2011, pp. 21–22.

¹⁸ Opinion of Advocate General Darmon in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 (*Wood Pulp*).

¹⁹ W.P.J. Wils, ‘La Compatibilité...’, p. 332 and following.

by the undertaking in antitrust proceedings, it should be stated that the fact that this provision covers the right not to be forced to testify against oneself neither results from its contents, nor from the jurisprudence of the European Court of Human Rights'. It seems hard to deny that the use of the phrase – 'considering that this article (Article 6 ECHR) may be invoked...' – while it does not amount to an unqualified acceptance, is certainly not an exclusion of the application of Article 6 in antitrust proceedings²⁰.

The judgment of the European Court of Human Rights in the *Öztürk* case was later referred to by Judge Vesterdorf, serving as Advocate General in *Polypropylene* case. When describing the nature of fines imposed under Regulation 17/62, he pointed out that such fines '(...) in fact, notwithstanding what is stated in Article 15(4), have a criminal law character'²¹.

When analysing the possible criminal law nature of the legal means used in accordance with the provisions of Article 81 of the EC Treaty (at present Article 101 TFEU), reference should be had to the opinion of the Commission of Human Rights in the *Stenuit* case, heard as a result of a complaint for infringement of Article 6(1) ECHR. It was filed following the imposition of the fine by the French Minister of Finance and Economy for anti-competitive behaviour. It was alleged in the complaint that the fine was in fact equal to the application of liability of a criminal type. The Commission of Human Rights, pointing to the nature and the severity of the sanction in question, underlined the explicit referral of this case to the principles of criminal law. Moreover, it stressed the resemblance of the function to be fulfilled by the imposed sanction to the preventive function of measures typical for criminal law, i.e. of fines and deprivation of liberty. This statement of the Commission of Human Rights is seen as expressly recognizing that the fine imposed by the Minister of Finance and Economy for anti-competitive actions was equal to the application of criminal liability²².

While referring in these proceedings to the judgments of the European Court of Human Rights in the *Campbell* and *Fell* cases, as well as in *Öztürk* case, the Commission of Human Rights underlined that the ECHR does not reject *per se* the differentiation between criminal law and disciplinary law, nor negate the value of drawing a distinction between these two domains. However, this does not mean that such a classification should be decisive from the point of view of the purposes of the Convention. If the signatory States were able to classify, at their discretion, infringements as either disciplinary measures or as criminal offences, and by so doing were able to determine the applicability of Article 6 ECHR, the provisions of the Convention would

²⁰ D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', p. 116.

²¹ D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', p. 117.

²² D. Waelbroeck, D. Fosselard, 'Should the decision-making power...', pp. 122–123.

in fact lose their practical meaning. As a consequence, the definition of ‘criminal offence’ for the purposes of Article 6 should be based on objective criteria, compliant with the purposes of the Convention. In this respect, when referring to the jurisprudence of the European Court of Human Rights, the Commission of Human Rights underlined the necessity to take into account – when determining the criminal nature of an infringement - the provisions which define such infringement, its nature, as well as the degree of severity of possible sanctions.

The jurisprudence of the Strasbourg courts explicitly stresses that in an assessment of the nature of a case, due consideration should rather not be given to the formal classification set forth in legal provisions, but to the real nature of the case.

In cases in which European antitrust procedures leading to the imposition of fines were applied, the European Court of Human Rights pointed to many features which tended to prove their criminal law nature. It stated that such procedures were applied to undertakings with no particular status; that the fines imposed were deprived of a compensatory nature (and thus became deterring and repressive measures); that the rules defined in Articles 81 and 82 of the EC Treaty (at present Articles 101 and 102 TFEU) were applied preventively; and that the range of possible fines was significant²³.

Reference should also be made to the judgments of the European Court of Human Rights **which justified the application of Article 6 ECHR**, in cases decided under antitrust procedures, **by virtue of their civil law nature**. Such an approach has appeared in cases reviewed arising from proceedings which did not end with the imposition of a fine. Even though the judgments of the European Court of Human Rights in this line of cases refer to national procedures, such decisions should be taken into account when assessing the nature of cases examined by the European Commission under Community law pursuant to the provisions of Article 81 and 82 of the EC Treaty (at present Articles 101 and 102 TFEU)²⁴.

Divergent directions in the jurisprudence of the EU courts

One should stress that even if the ECJ cannot be said to share all the assumptions adopted by the European Court of Human Rights on the legitimacy of a wide interpretation of the notion ‘criminal charge’ within the meaning of Article 6(1) ECHR, nonetheless in the present EU jurisprudence on competition law one encounters more and more judgments which deal

²³ D. Waelbroeck, D. Fosselard, ‘Should the decision-making power...’, pp. 122–123.

²⁴ N. Green, ‘Evidence and proof in EC competition cases’, [in:] P.J. Slot, A. McDonnell (eds.), *Procedure and Enforcement in EC and US competition law*, London 1993, p. 130.

with standards of rights stemming from the ECHR. The need to ensure adequate guarantees of fundamental rights is mainly stressed in the context of the repressive nature of certain sanctions applied under the Community legislation²⁵.

It seems worthwhile to focus on the CFI judgment of 8 October 2008, T-69/04 in the *Schunk GmbH* and *Schunk Kohlenstoff-Technik GmbH* cases, in which the Court analysed the modalities of penalties imposed in the light of Article 7 ECHR. The Court ruled that the principle of legality of sanctions stems from the principle of certainty, which is part of Community law, and thus requires that Community legislation should be clear and precise. At the same time, the Court stated that the percentage method of fixing a penalty ceiling does not violate the principle of legality set forth in Article 7 ECHR²⁶. The same position was taken by the CFI in its judgment of 5 April 2006, T-279/02, in the *Degussa AG* case²⁷. Moreover, in the judgment in *Schunk* case, the CFI listed several previous judgments which referred to the guarantee of rights (with standards stemming from the ECHR)²⁸.

As an example, one may quote the judgment of the ECJ of 7 July 1999, C-199/92 P in the *Hüls AG* case, which assumes that the CFI has not violated the principle of presumption of innocence defined in Article 6(2) ECHR, and goes on to elaborate that the presumption of innocence under Article 6(2) ECHR is one of the fundamental rights which, according to the Court's settled case-law, is reaffirmed in the preamble to the Single European Act and

²⁵ B. Beauchesne, *La protection juridique des Entreprises en Droit Communautaire de la Concurrence*, Paris 1993, p. 189; D. Elles, 'Introduction to the Report on Enforcement of Community Competition Rules', [in:] Slyn Lord of Hadley, S.A. Pappas (eds.), *Procedural Aspects of EC competition law*, Maastricht 1995, p. 16 and following.

²⁶ See M. Król-Bogomilska, 'Sposób określenia wysokości kar we wspólnotowym prawie ochrony konkurencji a zasada z art. 7 Europejskiej Konwencji Praw Człowieka' (2009) 6 *Europejski Przegląd Sądowy* 47 (commentary to the CFI judgment of 8 October 2008 (T-69/04) in *Schunk* case).

²⁷ See OJ [2006] C 131/37. The Court of Justice by its judgment of 22 May 2008, C 266/06 P *Degussa AG v Commission*, rejected the appeal of *Degussa AG* against the CFI in that case (see OJ [2008] C 171/4).

²⁸ The enumerated judgments included, among others, the ECJ judgment of 9 July 1981 in 169/80 *Gondrand Frères* and the *Garancini* case, ECR [1981] 01931; of 18 November 1987 in 137/85 *Maizena* case, ECR [1987] 04587; of 13 February 1996 in C-143/93 *van Es Douane Agenten* case, ECR [1996] I-00431; of 15 May 1986 in 222/84 *Johnston* case, ECR [1986] 1651; of 22 October 2002 in C-94/00 *Roquette Frères* case, ECR [2002] I-09011; the CFI judgment of 20 February 2001 in T-112/98 *Mannesmannröhren-Werke* case, ECR [2001] II-00729; the ECJ judgment of 21 September 2006 in C-167/04 *JCB Service* case, ECR [2006] I-8935; of 7 June 2007 in C-76/06 P *Britannia Alloys & Chemicals* case, ECR [2007] I-04405; of 13 December 1984 in 106/83 *Sermide* case, ECR [1984] 04209; the CFI judgment of 14 May 1998 in T-311/94 *BPB de Eendracht* case, ECR [1998] II-01129; and the CFI judgment of 20 March 2002 in T-23/99 *LR AF* 1998 case, ECR [2002] II-01705.

in Article F(2) of the Treaty on European Union (at present Article 6 TEU), and is protected in the Community legal order.

In its judgment of 8 February 2007, C-3/06, in the *Groupe Danone* case, the ECJ stated that ‘the principle that penal provisions may not have retroactive effect under Article 7(1) ECHR is common to all the legal orders of the Member States and forms an integral part of the general principles of law whose observance is ensured by the Community judicature’. The ECJ ruled that Article 7(1) ECHR in particular enshrines the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*), which would preclude the retroactive application of a new interpretation of a rule establishing an offence. A similar position was taken by the ECJ in its judgment of 28 June 2005, in the *Dansk Rørindustri* case (joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P²⁹).

In its judgment of 8 July 2007, T-99/04, in the *AC-Treuhand AG* case³⁰, the CFI ruled however that the Community judicature had not made an explicit ruling on that question, and that such an interpretation of Article 81(1) EC [at present Art. 101(1) TFEU] is not contrary to the principle of *nullum crimen, nulla poena sine lege*, which need not necessarily have the same scope as when it is applied to a situation covered by criminal law in the strict sense, because the procedure before the Commission under Regulation 17 is merely administrative in nature. Thus, any undertaking which adopted collusive conduct, including consultancy firms not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or at least was in a position to realise, that a sufficiently clear and precise basis could be found in the former decision-making practice of the Commission and in the existing Community case-law for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

In this judgment, the ECJ referred to the principle of *nulla poena sine lege certa* stated in Article 7(1) ECHR, which requires the fine to be predictable to the recipient of the decision. The ECJ quoted also its previous judgments in which it was stated that a penalty provided for under Community law, even where it is not a criminal penalty, cannot be imposed unless it rests on a clear and unambiguous legal basis³¹.

²⁹ ECR [2005] I-05425.

³⁰ ECR [2008] II-010501.

³¹ 117/83 *Könecke*, ECR [1984] 3291, para. 11, and 137/85 *Maizena*, ECR [1987] 4587, para. 15.

3. The scientific, jurisprudential aspect of the dispute

Various positions have been adopted in the discussions concerning the criminal law nature of fines in Community competition law. On one extreme is the radical position **denying** that infringements and fines have **any criminal law nature**. In the middle there exists a moderate position, the proponents of which define competition law sanctions as *sui generis* or *quasi-penal*. And at the other extreme is the opposite position, which expressly underscores the **criminal law nature** of competition law infringements and of the fines applicable under such regulations.

According to the **opponents of the thesis of the criminal law nature** of competition law infringements and relevant fines, not only should their formal classification in legal provisions be considered as decisive in this respect, but in addition their non-criminal nature is further supported by factors such as the attribution of competence to impose fines to a non-judicial authority, the impossibility to change a fine into an arrest, and the lack of records of such sanctions in both national and community registries. They also stress that the obligations resulting from the imposition of fines are writs of execution, and that the coercive execution of such obligations takes place in accordance with the provisions of the civil law procedure applicable in the country in which such execution takes place.

The proponents of the **middle ground position** claim that such sanctions bear some specific penal 'elements' which distinguish them from administrative measures, but also do not conform to those elements of a traditionally 'criminal law' nature. They define such sanctions as 'quasi-penal' or '*sui generis* measures'³². Such a middle ground position is most forcefully argued for by Tiedemann. In his opinion, the determination of such provisions as belonging strictly to criminal law is counter posed by the administrative nature of the procedure leading to the imposition of a fine, the appeal procedures for appealing a fine, and the lack of personal coercion measures in case of the non-payment of the fine³³. At the same time however, the repressive aim of fines imposed for breaches of competition law constitutes an argument, according to Tiedemann, for classifying such fines as a repressive type of law, i.e. as an element of criminal law in the broadest meaning of the term³⁴.

³² G. Grasso, 'Rapport de synthèse sur le système de sanctions administratives des États membres des Communautés Européennes', [in:] *The System of Administrative and Penal Sanctions. Vol II- Summary Reports*, Luxembourg 1995, p. 80.

³³ K. Tiedemann, 'Principes généraux applicables aux sanctions communautaires. Projet de rapport général', [in:] *The System of Administrative and Penal Sanctions.*, p. 19.

³⁴ K. Tiedemann, 'Principes généraux applicables...', p. 19.

It should also be added that the ‘*quasi-penal*’ nature of liability applicable in the competition law enforcement system of the European Union is also mentioned and used as a justification for the provisions of the Recommendation No. R (88)18 of the Committee of Ministers to Member States concerning the liability of enterprises having legal personality for offences committed in the exercise of their activities³⁵.

Some scholars and articles also reveal a radical position, i.e. **recognition of the criminal law nature** of fines used in competition law for cases of restrictive practices. This line of thought is represented, above all, by Wils. When assessing sanctions from a practical point of view, he claims that in practice such penalties are not very different from the fines adjudged by a criminal court. Their aim is not only to stop the infringement, but also to prevent any such infringements in the future. According to him, any fine which is aimed at fulfilling a preventive function must necessarily bear an element of criminal punishment. This element is demonstrated by the possibility to impose a penalty for a breach which has already ceased.³⁶

The argument for a wide interpretation of the term ‘criminal’ has been elaborated on by Wils in his more recent papers. He has underlined the developments in the jurisprudence of the European Court of Human Rights, within the framework of Article 6 of the ECHR, of the autonomous notion of ‘criminal’, which covers administrative proceedings which meet the following conditions:

- the offences are defined by a general rule, applicable to all citizens;
- the rule is linked to penalties in the event of non-compliance;
- the sanctions are intended not as a pecuniary compensation for damage, but essentially as a punishment to deter offenses;
- *and* – the sanctions are severe³⁷.

Harding is considered to be another proponent of the assumption of the criminal law nature of fines in competition law. He sees in them a response to breaches which constitute ‘a form of delinquency’. He also stresses the existence of a model of ‘criminal’ procedure applicable to cases of fine imposition. He claims that even if such fines are not ‘criminal’ from the formal point of view, they are in fact used as punitive measures in order to fulfil a deterrence function. The formal label should not dissimulate their repressive end³⁸.

³⁵ See the Explanatory Memorandum on Re Recommendation No. R (88) 18 of the Committee of Ministers to Member States, concerning the liability of enterprises having legal personality for offences committed in the exercise of their activities (see: www.wcd.coe.int).

³⁶ See W.P.J. Wils, ‘La compatibilité...’, p. 344

³⁷ W.P.J. Wils, ‘Is Criminalisation...’, p. 254.

³⁸ C. Harding, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, Leicester 1993, p. 334.

However, in one of his more recent publications, entitled 'Enforcing European Community rules', Harding makes an assessment of the procedures and sanctions adopted in contemporary competition law and points to a 'quasi-criminal' model, adding that criminal law is being introduced to the Community legal system 'by the backdoor'³⁹. He describes this existing legal state of affairs as an 'uneasy mix of criminal and administrative enforcement'⁴⁰.

The conviction that fines and infringements under competition law are criminal law stems from various sources. The thesis that competition law has an inherent 'criminal law nature' is considered to be a reflection on the nature of infringements which lead to punishment, the rules applicable to define liability for such infringements, the nature of punishments, and the nature of procedures applicable to establish such liability. A major factor in this respect is that the legal systems of some States specifically define selected particularly gross breaches of competition law as offences⁴¹.

It is also stressed in the literature that the criminal law nature of competition law and of relevant sanctions may be supported by the fact that the legal liability for infringements is often based on criminal law principles, such as the significance of wilfulness and negligence giving rise to alleged breaches, and consideration of the various degrees of involvement of undertakings in such breaches. The legal literature on Community competition law also points out the existence of various defences taken from criminal law, such as necessary self-defence or a state of necessity⁴².

When elaborating on the criminal law nature of fines imposed under Regulation 17/62, Wils stresses their non-compensatory character and the fact that their aim is to punish and to prevent further breaches. In his opinion, their penal nature is also supported by the setting of their ceiling amounts⁴³.

The arguments for recognition of the criminal nature of competition law infringements should not be taken to mean that the proponents of such a position share a conviction that the power of the Commission to conduct cases and to impose fines on undertakings should be questioned. Wils stresses that the compliance of the procedures under which the Commission issues its decision to impose fines with the provisions of Article 6 of the ECHR

³⁹ C. Harding, 'Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a "Joint Action" Model', [in:] C. Harding, B. Swart (eds.), *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization*, Aldershot, Brookfield, Singapore, Sydney 1996, pp. 25–26.

⁴⁰ C. Harding, 'Models of Enforcement...', p. 39.

⁴¹ C. Harding, 'Models of Enforcement...', p. 81 and following. On this subject see also J. Maitland-Walker, *Competition Laws in Europe*, Butterworths 1995.

⁴² See also on this subject, M. Wagemann, *Rechtfertigungs und Entschuldigungsgründe im Bussgeldrecht der Europäischen Gemeinschaften*, Heidelberg 1992, p. 87 and following.

⁴³ W.P.J. Wils, 'La compatibilité...', p. 334.

is ensured by the right to appeal a Commission decision to impose a fine to CFI, and the corollary right of this court to overrule such decision⁴⁴. A similar view has been stated by Andreangeli, author of the monograph 'EU Competition Enforcement and Human Rights', published in 2008. She claims that those seeking to counter the argument that the Commission procedures are in violation of the ECHR tend to use, as a counter-argument, the right to appeal to the CFI and, ultimately, to the ECJ. In addition, the ECJ has a specific grant of unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed⁴⁵.

4. Position of the Supreme Court of the Republic of Poland in the TP SA case – judgment of 14 April 2010, ref. no. III SK 1/10

Note should be taken of the judgment of the Polish Supreme Court, in which it refers generally to the nature of financial penalties imposed on undertakings by administrative authorities, including the **UOKiK** President. In the justification of its judgment, the court emphasizes the need to ensure a higher level of judicial protection of the rights of entrepreneurs who are accused by market regulatory bodies of an infringement which carries with it the potential imposition of a painful financial sanction. According to the Court, the Republic of Poland is obliged to ensure the effectiveness of the ECHR provisions in the national legal order of Poland.

The Supreme Court stresses that the Convention standards have for many years been taken into account in its own jurisprudence assessing the application of Polish legislation⁴⁶, in compliance with the assumption that, since Poland joined the Council of Europe, the jurisprudence of the European Court of Human Rights may and should serve the Polish judiciary and jurisprudence as an importance source of interpretation of Polish internal legislation, as such efforts would help to avoid decisions being appealed from Polish courts to the European Court of Human Rights⁴⁷.

In the *TP SA* case, the Supreme Court maintained its position, expressed in its previous jurisprudence, that financial penalties imposed by market

⁴⁴ W. P. J. Wils, 'Is criminalisation...', p. 256.

⁴⁵ On this subject see A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham 2008, p. 23.

⁴⁶ In particular, the Court referred to the following resolutions: dated 10 April 1992, ref. no. I PZP 9/92, and dated 9 January, ref. no. III SPZP 1/07 (*LEX* no. 520369).

⁴⁷ Ruling of the Supreme Court of 11 January 1995, ref. III ARN 75/94, (1995) 9 *OSNAPiUS* item 106.

regulatory bodies are not sanctions of criminal nature. However, considering the position of the European Court of Human Rights, it stressed that in matters in which the entrepreneur is saddled with a financial penalty, the rules of judicial verification of the legality of such a decision should be compliant with the requirements similar to those binding upon a court which would rule in a criminal case. In other words, the case before it – an appeal against the decision of an administrative body imposing a financial penalty on a telecommunications company - should be examined taking into consideration the standards of rights' protection applicable to defendants in criminal proceedings.

IV. A dispute over classification or over standards?

1. The controversy persists, while fines have been growing

Today it can be observed that the catalogue of rights to be respected in the course of competition proceedings is growing in importance. This stems from the increasing number and volume of penalties imposed by competition authorities for breaches of respective national and EU legislation.

According to the most recent data of the European Commission from 7 December 2011⁴⁸ – during the current year, the total amount of fines imposed by the EC for cartel cases totalled EUR 614,053,000. In the previous year, fines amounted to EUR 2,868,676,432. A certain 'record' was hit in 2007, when the total amount of fines charged by the EC in this category of cases totalled EUR 3,313,427,700. Until now, the highest fines were imposed in a case involving a cartel arrangement between four manufacturers of car windshield glass: *Asahi Glass Company, Saint Gobain, Pilkinton and Soliver*. The highest fine in this case, amounting to EUR 896,000,000 was to be paid by Saint Gobain⁴⁹. According to the European Commission, for at least five years these undertakings had mutually arranged product prices, market shares, and the volume of windshield glass supplies to specific car manufacturers⁵⁰.

The tendency to impose higher financial penalties for restrictive arrangements is also observable in Poland, where according to applicable legislation the financial penalty to be imposed for such practices by the UOKiK President may amount to 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed. For example, in a case involving a

⁴⁸ Available at ec.europa.eu/competition.

⁴⁹ Decision of 12 November 2008, COMP/39.125.

⁵⁰ Case pending before the Court, ref. no. T-56/09.

cartel of cement producers, by decision of 8 December 2009, no. DOK-7/09, the entrepreneurs who participated in the cartel were assessed fines in a total amount of PLN 411,586,477⁵¹.

It seems beyond any doubt that, in the context of the ever growing severity of penalties assessed, the rights' guarantee function of the law has been gaining in importance, and hence the standards of rights to be respected in competition proceedings are magnified in importance.

2. Different paths lead to one end

Until now, various paths have been taken in order to arrive at a recognition of the ECHR as the source of such standards. Pursuit of a legal recognition of the criminal law element in competition cases has not been, and should not be mistaken for, the lone path leading to this end.

The importance of the ECHR for European institutions was formally confirmed as early as in the 5 April 1977 Joint Declaration by the European Parliament, the Council, and the Commission on fundamental rights⁵².

The next step on the road was the adoption of the Single European Act of 28 February 1986, the preamble of which designates the ECHR standards as Europe unifying instruments. The actions of the European Community towards the universal respect of human rights were also listed in the Human Rights Declaration, adopted in Luxembourg, on 29 June 1991.

Article 6 of the Treaty on European Union of 1992 expressed the principle of respect by the EU for the rights guaranteed under the ECHR as rights derived from the common constitutional traditions of the EU Member States and the treatment of such rights as general Community law principles.

Major changes were brought about by the entry into force, on 1 December 2009, of the Treaty of Lisbon. This evolution was in particular due to the fact that the European Union gained a separate legal personality. The implementation of the concept aiming at an even stronger reinforcement of the position of fundamental rights within the EU was sealed by:

- granting binding legal force to the EU Charter of Fundamental Rights of 2000 by including this Charter in the EU primary law; and
- defining the basis for EU accession to the ECHR

Article 6(1) TEU stipulates that the EU recognizes that the rights, freedoms and principles defined in **the Charter of Fundamental Rights of the EU** of 7

⁵¹ Case pending before the Court of Competition and Consumer Protection, ref. no. XVII Ama 173/10–178/10.

⁵² OJ [1977] C 103/1.

December 2000, in the meaning adapted accordingly on 12 December 2007 in Strasbourg, should have a binding force equal to the Treaties.

In the first declaration on the provisions of the Treaties (TEU and TFEU), i.e. in the **Declaration on the Charter of Fundamental Rights of the EU**, it is declared that that document has a legally binding force, and confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common to the Member States.

Simultaneously, Article 6(2) TEU states that the EU shall accede to **the European Convention for the Protection of Human Rights and Fundamental Freedoms**. This act will have no impact on the EU competences as defined in the Treaties. Paragraph 3 of this Article lays down the principle that the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and stemming from common constitutional traditions of Member States are part of the EU law as general principles of EU law.

3. New rules of judicial cooperation in criminal matters

It should also be mentioned that, with the entry into force of the Treaty of Lisbon, an essential change has taken place in the foundations of EU legislation. The introduction of this modification may contribute in the future to a better system of classifying criminalisation of the most serious violations of competition law in the EU Member States.

One of the most significant modifications lies in the effect of the amended provisions of the Treaty on the Functioning of the European Union (hereafter, TFEU)⁵³ on the principles of cooperation between EU Member States in criminal matters. The Treaty of Lisbon marks the end of the EU's three pillar structure. Pursuant to the provisions of the TFEU legal acts used as a basis for legislation on judicial cooperation in criminal matters will be **directives** of the European Parliament and of the Council adopted in the ordinary legislative procedure.

The key provisions for definition of the legal bases and rules of cooperation in criminal matters in the EU can be found in Article 83 of the TFEU (in Chapter 4 on judicial cooperation in criminal matters). This Chapter is included under Title V, Part I, and Title V is entitled: 'Area of freedom, security and justice'⁵⁴.

⁵³ OJ [2008] C 115/47 (TFEU consolidated version).

⁵⁴ On this subject see M. Szwarc-Kuczner, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa, 2011, p. 44 and following; M. Wąsek-Wiaderek, 'Unijne i krajowe prawo po Traktacie Lizbońskim – zarys problematyki' (2011) 1–2 *Palestra* 7 and following.

The provisions of Article 83(1) TFEU stipulate that: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’.

These areas of crime include: ‘(...) terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime’.

The TFEU also contains provisions which open the way for further enlargement of the EU institutional powers in criminal matters. Pursuant to Article 83(1), sentence 3 of the TFEU the Council ‘may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph’. In order to adopt such a decision, ‘it shall act unanimously after obtaining the consent of the European Parliament’.

Chapter 4 of the TFEU includes even wider options for legislating on criminal matters; options which omit the requirement of unanimity of the Member States. Article 83(2) TFEU states in this respect: ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76⁵⁵.

The principles set forth in the abovementioned provisions refer to the rules of cooperation in strictly criminal matters. The modifications in question may however exert some influence in the future on the creation of EU legal bases for combating certain of the most serious violations of antitrust law, by stimulating changes in the criminal law of the Member States. It may be hoped that in the near future such modifications of the Treaties will foster the process of criminalisation of the most serious breaches of antitrust law in EU Member States.

In light of the above, it would certainly be advisable to start a wider debate on the subject. In this author’s abovementioned monograph on the

⁵⁵ Article 76 of the TFEU provides that the acts referred to in Chapter 4 – on judicial cooperation in criminal matters – together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted: (a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States.

penalties in competition law published in 2001, it was postulated **to introduce into Polish law the criminalisation of most serious breaches of competition law**, particularly in the case of **hard-core cartels**⁵⁶. The entry into force of the Treaty of Lisbon and the present possibilities of EU bodies to influence criminalisation processes in Member States under Article 83(2) TFEU provides **solid grounds for actions leading to such criminalisation** in a wider group of EU Member States^{57/58}.

IV. Conclusions

Today, European legislation has consistently asserted, in two Council Regulations (1/2003 and 139/2004), that fines laid down therein ‘shall not be of a criminal law nature’. Despite that, there continues to be vigorous debate over the nature of competition cases and of the fines assessed for infringements of competition law.

The controversy surrounding the ‘criminal nature’ of antitrust cases, and sometimes as well of other administrative law cases in the context of the right to a tribunal as set forth in Article 6(1) ECHR, constitutes a valuable impetus for a corollary debate on the need to take into account numerous other standards of rights in competition proceedings conducted by the European Commission, and in administrative competition enforcement proceedings at the national level as well.

Today, regardless of the degree of acceptance of the ‘criminal’ element in competition proceedings and the ‘criminal’ nature of fines or antitrust

⁵⁶ M. Król-Bogomilska, *Kary pieniężne...*, p. 257 and following.

⁵⁷ On this subject, see I. Simonsson, ‘Criminalising Cartels In the EU: Is There a Case for Harmonisation?’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical Studies of an International Regulatory Movement*, Oxford and Portland, Oregon 2011, p. 203 and following; G. Hakopian, ‘Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?’ (2010) 7 *The Competition Law Review* 157 and following.

⁵⁸ Ireland was one of the first countries outside the US to introduce a comprehensive set of criminal sanctions into its civil antitrust regime. Since 1996, all of Ireland’s competition law prohibitions contain both criminal penalties and civil remedies. See P. Massey, J. D. Cooke, ‘Competition Offences in Ireland: The Regime and its Results’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical...*, p. 106. For instance, in the UK criminal responsibility for the cartel offence was introduced by the Enterprise Act 2002. On this subject see J. Joshua, ‘DOA: Can the UK Cartel Offence be Resuscitated’, [in:] C. Beaton-Wells, A. Ezrachi (eds.), *Criminalizing Cartels. Critical...*, p. 129 and following; M. Furse, *The Cartel Offence*, Oxford and Portland, Oregon 2004, p. 27 and following; C. Harding, J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford 2003, p. 260 and following.

sanctions, **there should be no doubt about the need to respect defined standards of entities' rights.**

With the entry into force of the Treaty of Lisbon, the need to refer to the ECHR as to the source of standards of entrepreneur rights in competition proceedings is also beyond any doubt. One of the urgent tasks is thus **to define such standards more precisely** in order to reconcile the principle of the effective protection of competition with the protection of entrepreneurs' rights, so that actions undertaken in favor of a more effective competition protection do not violate the guarantee function of competition law.

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