

Mathieu le Soudeer, *Droit antitrust de l'Union européenne et droits fondamentaux des entreprises*. Brussels: Bruylant, 2019. 986 pages. ISBN: 9782802761792. EUR 175.

The European Commission plays a key role in the public enforcement of Articles 101 and 102 TFEU. To ensure the effective application of those provisions, EU law has entrusted it with

far-reaching investigation, inspection and sanctioning powers. When making use of those powers, however, the Commission does not operate in a legal vacuum. A wide variety of EU legal guarantees, ranging from general principles of EU law over fundamental human rights acknowledged by the EU Charter of Fundamental Rights to legislatively enshrined particular rights of defence granted to businesses confronted by the Commission, have been in place to limit the Commission's discretion in this context.

The EU legal guarantees in place not only limit the Commission's arbitrary decision-making to the benefit of businesses (undertakings) under investigation, yet also have a decisive impact on how public enforcement procedures are to be structured at the EU level. Legal scholarship has long identified those features of the Commission's public enforcement system. What was missing somewhat in the literature was a monograph bringing all those legal challenges together in a coherent way and offering a state-of-the-art overview of how exactly the Commission public enforcement procedures have been modified. Luckily, le Soudeur's work now offers such a fully developed overview in a clear, well-structured and easy-to-navigate way. Bringing together cases usually studied in isolation from each other, the monograph is highly relevant not only for French scholars, but for everyone interested in the public enforcement of Articles 101 and 102 TFEU.

This weighty monograph, which constitutes the published version of a doctoral thesis defended by the author, undertakes to offer the first full account written in French regarding the impact of EU legal guarantees on Commission public enforcement procedures in the contexts of Articles 101 and 102 TFEU. Despite the slightly misleading title (fundamental rights of undertakings) seeming to indicate that this would be a volume focused on the fundamental rights of defence of undertakings in EU competition law, (as this notion is usually used in that way), the author makes clear in his introduction that his understanding of "fundamental rights" is much broader. According to the author, the "droits fondamentaux des entreprises" notion refers to the whole of general principles, human rights and rights of the defence recognized by the ECJ, the Charter or the ECHR, EU primary law or EU secondary legislation (pp. 57–61). Together, these different rights condition, limit and restructure the Commission's enforcement procedures, requiring effective enforcement considerations to be balanced with legal protection requirements.

Throughout his monograph, the author takes as a starting point the ECJ case law, striking this balance between effectiveness and legal protection. Following the French academic tradition, the case law analysis is divided into two main parts, each composed of two titles comprising two chapters before offering some general conclusions.

The first part (*La modulation du contrôle des droits fondamentaux orientée par l'impératif d'efficacité des procédures*) summarizes the legal guarantees put in place throughout the Commission's enforcement procedures. The author submits that those guarantees have been made subservient to the overall goal of effective enforcement. At the same time, these legal guarantees have also come to determine the outlook of those procedures. The first title of this part reconsiders the emergence of legal guarantees in the classic infringement procedure (*procédure classique*). In the first chapter of that title, the author gives a thorough assessment of how the Courts shaped the right not to incriminate oneself and legal professional privilege, access to the file and the right to be heard. Well aware of the limited scope of those rights, the author particularly analyses the way the Courts have interpreted them. In the second chapter of this title, the author offers an overview of how those defence rights became ingrained in a fundamental rights' rhetoric. Moving beyond the classic infringement procedure, the second title analyses the so-called alternative procedures (commitment and settlement procedures, as well as private damages actions). The first chapter of the second title predominantly revisits the commitment procedure. The author there rightly concludes that there are gaps in the judicial review, both of decisions not to proceed with commitments and of actual commitment decisions. The second chapter of that title focuses on the complaint procedure and actions for damages and their relationship to public enforcement as well as access to Commission files under transparency Regulation 1049/2001. Bringing together a wealth of case law in domains not usually treated together, the author succeeds in showing that, despite the acknowledgement

of the existence of legal guarantees framed as fundamental rights, effectiveness conditions more often than not tend to trump those rights in concrete disputes.

The second part (*Le renforcement du contrôle juridictionnel influencé par les droits fondamentaux*) shifts the reader's attention to the scope and format of judicial review by the ECJ of Commission decisions. The first title zooms in on the fundamental right to a fair trial as conceived in Article 6 ECHR and its applicability to Commission procedures. Analysing the well-known quasi-criminal cases falling under that provision in a most nuanced manner, the author shows in the first chapter how fair trial considerations have come to play an ever more important role in general EU judicial review debates. In the second chapter, the full jurisdiction tolerated in EU law when reviewing fines is revisited. Particularly interesting in that context is the author's analysis of the relationship between full jurisdiction over fines and the legality review prescribed by Article 263 TFEU. Concluding that the full review of fining decisions always remains within the shadow of the classic – reinforced – review of legality in actions for annulment, the author seems to advocate (implicitly) a more autonomous role for this type of review. The second title of the second part is devoted to other fundamental rights and their impact on the ways in which Commission-led Articles 101 and 102 enforcement is structured. The author focuses in both chapters of this title on how the presumption of innocence and similar considerations come into play in the application of the parental liability presumption and the determination of the fine. In the second chapter of that title, the author also pays particular attention to the lack of willingness by the Court to be more specific on the joint and several liability of related legal persons qualifying as a single undertaking being imposed a fine. Pinpointing the gaps in the case law, the author clearly shows the limits of the ECJ's case law in that regard.

Offering an impressive analysis of a notable amount of EU Courts' cases, this book is a useful work of reference, bringing together different strands of case law for the benefit of those looking for a global overview of the EU Courts' case law regarding the scope of Commission-led public enforcement of Articles 101 and 102 TFEU. Having said that, however, the book also suffers from two (minor) flaws. First, the book's focus as a case law reference work means that the author is less critical and constructive of the EU Courts than he could be. Le Soudeer does analyse the different cases critically and points out where the Court did not go as far as it could have. The author has indeed chosen to stick to a rigidly positivist analysis. That in itself is not problematic at all, yet he also seems to argue in favour of some modifications to the procedural and judicial review frameworks in place without explicitly stating so. It could have been useful had those implicit critiques made more explicit and integrated in a separate conclusion/chapter. What is missing, therefore, is a somewhat more explicit general assessment as to how effectiveness and legal protection should/could be streamlined more in the future, beyond what the Court says. Second, and relatedly, not all (English-language) academic sources have been included as references. It is striking that some ground-breaking English-language literature on EU competition law and fundamental rights (most notably Andreangeli's 2008 monograph) are missing from the list of references. Similarly, more recent English publications on the subject-matter have not been included in the work. Although it is nowhere stated that the author tries to be exhaustive, taking on English-language monographs on exactly the same subject-matter would have allowed readers to better understand whether and to what extent the author takes a different position from the ones previously taken in effectiveness/legal protection debates.

All in all, le Soudeer has written a most welcome and impressive work. I have no doubts whatsoever that it will prove highly useful as a starting point for to anyone engaged in research on the case law striking a balance between effective enforcement and legal protection within the context of Articles 101 and 102 TFEU.

Pieter Van Cleynenbreugel  
Liège