DIGITALISATION IN EU COMPETITION LAW AND THE SWEDISH PRINCIPLE OF TRANSPARENCY

ANNEGRET ENGEL & XAVIER GROUSSOT*

The procedural and institutional rights granted by the EU Charter of Fundamental Rights have an important impact at national level in the application and interpretation of competition law by national courts and national authorities. In Sweden, the situation is particularly fascinating since the principle of openness – which affords a maximum standard of human right protection – may conflict with the procedural and institutional rights of the Charter, i.e. Articles 41, 47 and 53 of the Charter. The application of the Charter by the public procurement authority is also of interest here. Arguably, the principle of openness as defined by Swedish law should be respected in light of the procedural and institutional rights granted by the EU Charter.

1 BACKGROUND

Fundamental rights as enshrined under the EU Charter not only bind EU institutions, but also national authorities in their application of EU laws under the Treaties,[1] and thus have a direct influence on enforcement procedures in competition laws at national level. For the impact of the procedural and institutional dimensions of Charter rights at national level, it is important to note that there is national procedural autonomy within the EU. Such national procedural autonomy is subject to the principles of equivalence, effectiveness, and effective judicial protection. According to Article 19(1) TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.
In Sweden, none of the four fundamental laws refer to the EU Charter. Similarly, EU primary law is not explicitly mentioned, however, Chapter 11, section 14 and Chapter 12, section 10 of the Instrument of Government specify that if a rule of fundamental law or 'other superior statute' conflicts with a provision of national law the latter shall not be applied. However, what is the impact of Chapter VI of the EU Charter on Swedish competition law? This special issue and the contributions therein will attempt to provide an answer to that.

With a particular focus on the principle of openness/transparency, the Swedish example will provide the starting point of this issue, as it plays a much greater role in the Nordic region than in other EU Member States.[2] It is common knowledge that Sweden has also played an important role in the litigation of the principle of transparency at EU level. But what is the scope of this principle in EU law and does it conflict with its EU version enshrined in Articles 41 and 47 of the EU Charter? And if it does, is it possible to

* Annegret Engel is Associate Professor in EU law and Xavier Groussot is Professor in EU law. Both authors work at Lund University.
[1] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:280.
[2] Eg Liane Colonna, 'Reconciling Privacy by Design with the Principle of Transparency' in Ulf Bernitz et al (eds), *General Principles of EU Law and the Digital Legal Order* (Kluwer Law International 2020) 405-422. See also Sacha Prechal and M E De Leeuw, 'Transparency: A General Principle of EU Law?' in Ulf Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 204-229.

accommodate its application through the interpretation of the horizontal clauses of the Charter (Chapter VII of Charter)?

In general, the Courts demand complete openness of the legislative process in terms of ensuring complete access to the relevant documents even of the ongoing procedures,[3] a position which is in line with the increased transparency requirements concerning general policy choices. Complete access to the documents concerning relevant administrative procedures remains also the principle.[4] Such an approach relates mainly to the ended administrative procedures, as it is explicitly recognized that documents relating to ongoing administrative procedures merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures and affecting the quality of the general decision.[5]

However, the CJEU has accepted a restriction of transparency when other fundamental values, such as the protection of personal data or the right to fair trial, could be undermined due to the publication of the relevant documents. In particular, the CJEU interpreted the relevant exceptions in the light of more specific rules contained in the Personal Data Protection Regulation,[6] the State Aid Regulation,[7] and its own Rules of Procedure.[8] It is worth mentioning that although the Court did not base the relevant reasoning in the above-mentioned judgments on the principle of *lex specialis derogat legi generalis*, it clearly emerges from the case law that the Regulation cannot deprive these specific access rules of their 'effectiveness'.[9]

In an ESO-report ('*Grundlag i Gungning*') conducted by Carl Fredrik Bergström and Mikael Ruotsi, it is considered that he principle of openness is weakened by EU law.[10] The report concludes that there is a clear need of modern Swedish research in this field.[11] This special issue offers precisely that by using the impact of the EU Charter in the field of competition law and by looking at the specific issue of access to the file in competition cases. It can be contended that this national principle – which affords a maximum protection in terms of fundamental rights – should be respected in light of the procedural and institutional rights granted by the EU Charter.

In this project, we have considered that the EU Charter can strongly impact the procedural and institutional dimensions of EU competition law and the application of the digital market regulations.[12] During the last years, we have seen an increase of this impact in

---

[3] Eg Joined cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* EU:C:2008:374; and Case C-280/11 P *Council of the European Union v Access Info Europe* EU:C:2013:671.
[4] Case C-506/08 P *Kingdom of Sweden v European Commission and My Travel Group plc.* EU:C:2011:496.
[5] Case C-506/08 P *Sweden/My Travel and Commission* EU:C:2011:107, Opinion of AG Kokott paras 65-69.
[6] Case C-28/08 P *European Commission v The Bavarian Lager Co Ltd.* EU:C:2010:378.
[7] Case C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH* EU:C:2010:376.
[8] Joined cases C-514/07 P, C-528/07 P, C-532/07 P *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission, Association de la presse internationale ASBL (API) v European Commission, and European Commission v Association de la presse internationale ASBL (API)* EU:C:2010:541.
[9] Gaëtane Goddin, 'Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?' (2011) 2(1) Journal of European Competition Law & Practice 22.
[10] Carl–Fredrik Bergström and Mikael Ruotsi, *Grundlag i gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen* (Elanders Sverige AB 2018) 165. The ESO-report only refers very sporadically to competition law.
[11] ibid 165-181.
[12] See in general as to the impact of EU Fundamental Rights in national law and EU law, Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006).

competition law cases notably with the use of the principle of good administration (Article 41 EU Charter), effective judicial protection (Article 47 EU Charter), proportionality of fines (Article 49 EU Charter) and *ne bis in idem* (Article 50 EU Charter). Many of the contributions of this special issue discuss in detail the most recent cases on this matter.

In addition to the previous approach, we have also considered that the national law of the Member Stats (such as transparency laws but also privacy laws) may impact on the application of the EU Charter. This two-way traffic interaction is codified in EU law by Article 53 of the EU Charter but also Article 4(2) TEU on national constitutional identity. And in contrast to the previous approach, the case law – both national and EU cases – is here only in *statu nacendi*.

A crucial case concerning Bulgaria is now pending before the CJEU (Case C-619/23). This case is discussed in this special issue and concerns the interpretation of Article 4(2) TEU in competition law matters. One of the key questions asked by the national court in the preliminary reference made to the CJEU is whether Article 4(2) TEU should be interpreted as meaning that, when an inspection is conducted by the national competition authority, a person who is asked to provide access to a data carrier is entitled to refuse access to content which forms part of his or her private correspondence, given that the inviolability of private correspondence is guaranteed by the Member State's constitution and that the grounds for restricting the right to freedom and confidentiality of correspondence and other communications, enshrined in the constitution itself, are not in place.

Hopefully, this special issue will open the path to more research in this field, particularly concerning the potential impact of national constitutional law on the application of EU competition and the EU Charter.

2 OVERVIEW OF CONTRIBUTIONS

Vilhelm Persson starts off by looking at the principle of transparency with regard to the Swedish Competition Authority, with particular focus on access to public records and personal files. He then goes on to analyse the requirements for confidentiality as enshrined in the Swedish constitution, thus limiting the authority's discretional powers. In addition, the author comparatively analyses the situation in Sweden with that under EU law and discusses examples of some companies and courts relying on the latter, which provides for a more extensive right to access to documents, in order to bring an action for competition law damages. Vilhelm argues that only in the reverse situation – a document being confidential under EU law but not so under Swedish law – would there be a direct conflict and thus a problem with the primacy of EU law.

In her article on the legal professional privilege, Helene Andersson discusses confidentiality between a lawyer and their client in competition law cases. She analyses the scope and content of the right by looking at both ECHR and EU case law. The author argues that the legal professional privilege constitutes a key element in protecting the proper administration of justice, procedural efficiency, as well as the respect for fundamental rights, such as the right to defence and the right to privacy. Helene concludes that the Commission's approach is too narrow in scope and does not meet the ECHR standard in that it only protects the right to defence. With particular reference to more recent legislation in

digitalisation, such as the Digital Markets Act, the author encourages the Commission to revise its current approach in the interest of those companies target by the investigations.

Joakim Nergelius discusses in his article the three concepts of Drittwirkung, transparency, and personal integrity in the light of digitalisation and the extent of which they are all affected by the introduction of the EU Charter of Fundamental Lights. He analyses these principles with particular reference to ECHR and EU case law, finding that the respect for fundamental rights and national constitutional values is crucial for the integrity of the European courts and their interaction with national courts. The author further argues that for the CJEU to strengthen its own position in EU law and the enforcement fundamental rights it must also collaborate with the European Court of Human Rights, thus highlighting in his conclusion the importance of the three principles of Drittwirkung, transparency and personal integrity for this process.

In her article on the preliminary investigation phase, Riina Autio discusses the balancing of conflicting interests in the review of large data sets in light of digitalisation, fundamental rights and the principle of openness. With reference to national examples from Sweden and Finland, the author analyses the relevant EU legislation and case law, including Regulation 1/2003 and Directive 2019/1 as well as the still pending *Ronos* case, C-619/23. The latter, she argues, will force the CJEU to comment on the issue of national identity, which, in this case, is linked to higher safeguards of confidentiality than under EU law or the ECHR. Riina concludes that a better understanding of the different links between national, European, and international legislation and agreements is needed in order to achieve better outcomes in developing new investigative tools and best practices in the digital era.

In their twin articles on access to information in DMA proceedings, Lena Hornkohl and Julia Helminger respectively analyse transparency from an EU law and national law perspective (Austria and Germany, as contradictory systems). In particular, the authors discuss access to the file for gatekeepers, undertakings or associations of undertakings – as opposed to the requirement to protect business secrets – as important procedural guarantees for private enforcement under the DMA. In addition, the DMA imposes obligations for publication of certain information, which guarantees wider general transparency vis-à-vis third parties. However, the authors argue that these transparency requirements under the DMA remain limited and therefore have to be considered in the broader scheme of other legislation at EU and (at times fragmented) national level, which the DMA has some material overlap with in order to ensure the widest possible access to information.

Magnus Strand then discusses rights and remedies in his article on private enforcement mechanisms under the DMA as compared to the traditional competition law framework under Articles 101 and 102 TFEU. For this, the author uses the van Gerven model, analysing the existence of a right, a remedy and procedure. He argues that any private law remedies available to victims of infringement under Articles 101 and 102 TFEU should also be available to victims of infringement under the DMA, taking into account the principles of equivalence and effectiveness for the compatibility between national and EU laws. Magnus concludes that private law enforcement has in the past become increasingly important for the traditional system of competition law and thus will also have to be the case for the DMA if the latter were to integrate in that system.

The final article in this special issue, written by Cristina Teleki, is discussing the relationship between EU competition law and fundamental rights as an evolving

concept – from an initial operational (right to a fair trial) to an informative (right to privacy and data protection) and most recently to a foundational relationship. She argues that the latter requires substantive and institutional cooperation. As for the principle of transparency, the author highlights that this functions as an enabler and magnifier in this development, thus allowing for increased clarity and legal certainty about the relevant rules and regulations. Cristina concludes by stressing that other fundamental rights enshrined under the EU Charter will also have to be integrated into the foundational relationship, such as the freedom of thought or the right to a healthy environment.

LIST OF REFERENCES

Bergström CF and Ruotsi M, *Grundlag i gungning? En ESO-rapport om EU och den svenska offentlighetsprincipen* (Elanders Sverige AB 2018)

Colonna L, 'Reconciling Privacy by Design with the Principle of Transparency' in Bernitz U et al (eds), *General Principles of EU Law and the Digital Legal Order* (Kluwer Law International 2020)

Goddin G, 'Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?' (2011) 2(1) Journal of European Competition Law & Practice 22
DOI: https://doi.org/10.1093/jeclap/lpq071

Groussot X, *General Principles of Community Law* (Europa Law Publishing 2006)

Prechal S and De Leeuw M E, 'Transparency: A General Principle of EU Law?' in Ulf Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008)