



# Discussion

Report GCLC Working Group 3  
Enforcement by the Commission

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(all views are personal)

# Overview



- I. Procedure for fines (Presentation Denis Waelbroeck)
  - A. Compatibility of the EC competition procedure
  - B. Economic side-comments
  - C. Proposed « Grand Reform »
  - D. « Less ambitious » reform
- II. Substance of fining (Presentation Prof Hofstetter)
  - A. Liability for employees and subsidiaries
  - B. Compliance programmes

Conclusion

# I.A. Compatibility of Procedure

- WG 3 Statement: "Current system no longer compatible with right to a fair trial (Art. 6 ECHR)"
- Is this so?
- Characterisation of EC competition law (fines) as criminal (Section C.1 WG Report)
  - Under Community law characterisation: explicitly non-criminal (art 23(5) Reg 1/2003, *Tetra Pak* T-83/91, §235), thus administrative fine
  - Under ECHR case law: there are generally 3 « *Engel* » criteria
    - domestic characterisation is not conclusive, except if criminalisation (« core of criminal law »), but is not ignored
    - also nature of the infringement and severity of the sanction

# I.A. Compatibility of Procedure

- ECHR case law recognises two key differences
  - (1) When charge falls outside « core of criminal law » requirements are not exactly the same, cf *Jussila v Finland* (Grand chamber, 23 November 2006, § 43):
    - « There are clearly 'criminal charges' of different weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of 'criminal charge' [...] has underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for instance [...] competition law [...]. [These cases] differ from the hard core of criminal law; consequently the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: *a contrario*, *Findlay v United Kingdom* [...]) »

# I.A. Compatibility of Procedure

- ECHR case law recognises two key differences
  - (2) Undertakings have fundamental rights, but there are differences between individuals and undertakings, cf with regard to protection of domicile: *Niemietz v Germany*, (16 December 1992, § 31):
    - States « would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 (...); that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case »

# I.A. Compatibility of Procedure

- EC Competition procedures
  - ECHR concept of « criminal charge » autonomous
  - Score under the « *Engel* » criteria (*Engel v Netherlands*, 8 June 1976, § 82)
    - Explicitly « no » for domestic law characterisation
    - Infringements by undertakings
    - Sanctions pecuniary fines which can be high (and possibly other remedies)
  - Community courts considered that the presumption of innocence and the principle of legality apply to EC competition sanctions and confirmed that fundamental rights are respected
  - No specific ECHR case law on EC competition law, indications on national competition law, tax fines

# I.A. Compatibility of Procedure

- Consequences on the procedure as a whole
  - Undertakings have the right to have their case heard by an independent court
  - But, as competition fines are qualified as not criminal, they fall outside « core criminal »
  - Thus system of administrative Commission decisions imposing fines, which are subject to full court review, is in principle compatible
    - Commission decision is not a « first instance » decision
    - Or, decision by independent court not a requirement in first instance

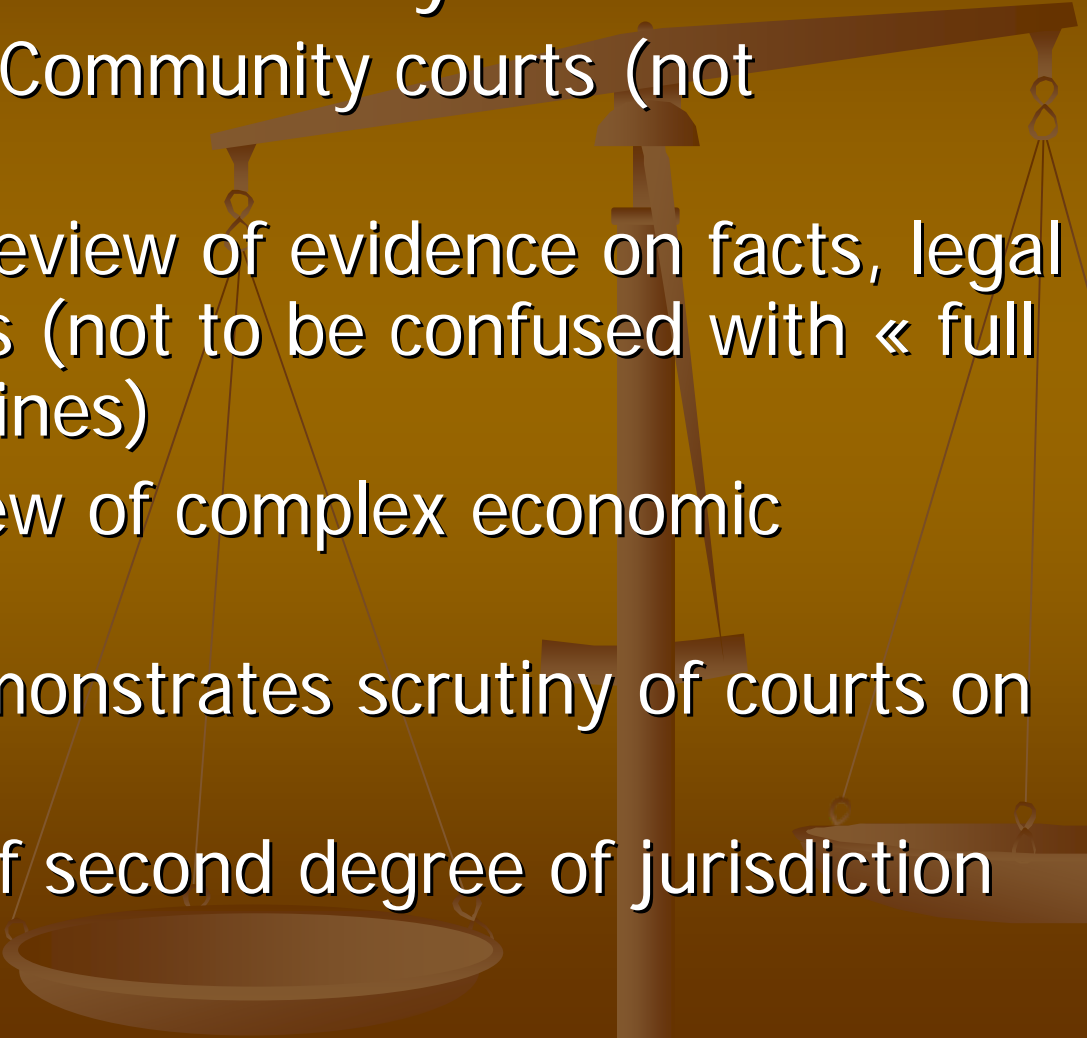
# I.A. Compatibility of Procedure

- Consequences on the procedure as a whole
  - Cf (for tax surcharges) *Bendenoun v France* (14 February 1994 § 46):
    - « As regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (see paragraph 34 above), Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 (...) of the Convention so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision. »

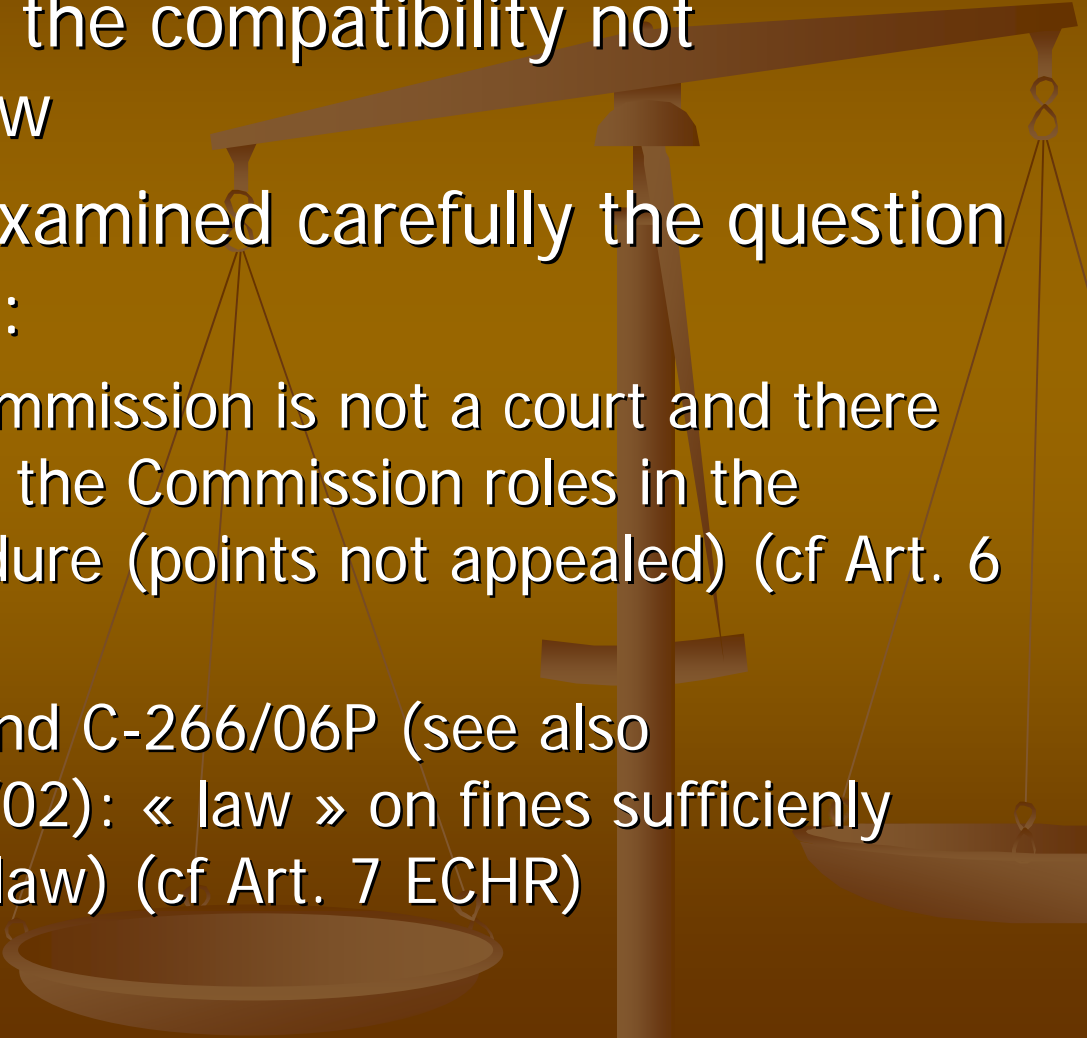
# I.A. Compatibility of Procedure

- Consequences for procedure before the Commission
  - Rights of defence must be fully respected
  - Burden of proof of infringement for the Commission: presumption of innocence
  - Protection against self incrimination (*Orkem* C-347/87, *Mannessmannrohren* T-112/98.), but not right of silence
  - *Ne bis in idem* principle
  - No other objections than raised in Statement of Objections,
  - Access to the file
  - Oral Hearing (not public)
  - Role of Hearing Officer
  - BUT: no objection on the administrative procedure where Commission investigates the case, issues the SO, and adopts the administrative decision with fines

# I.A. Compatibility of Procedure

- Consequences for Community courts
    - Independence of Community courts (not questionable)
    - Full jurisdiction: review of evidence on facts, legal qualification, fines (not to be confused with « full jurisdiction » on fines)
    - More limited review of complex economic assessments
    - Rich case law demonstrates scrutiny of courts on the Commission
    - No requirement of second degree of jurisdiction (appeal)
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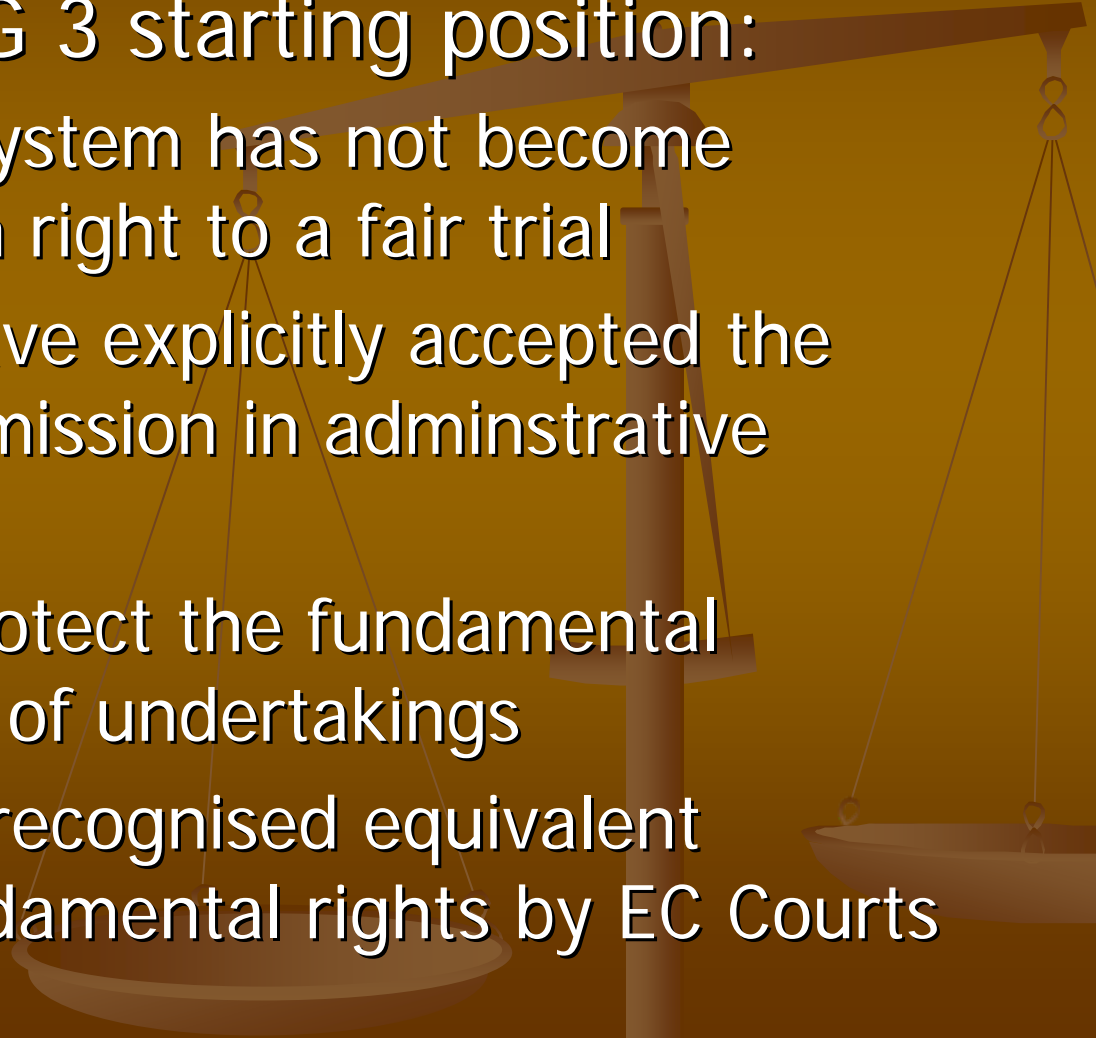
# I.A. Compatibility of Procedure

- WG 3 Conclusion on the compatibility not supported in case law
  - Community courts examined carefully the question in two lines of cases:
    - *Lafarge* T-54/03: Commission is not a court and there are no objections on the Commission roles in the administrative procedure (points not appealed) (cf Art. 6 ECHR)
    - *Degussa* T-279/02 and C-266/06P (see also *Jungbunzlauer* T-43/02): « law » on fines sufficiently clear (includes case law) (cf Art. 7 ECHR)
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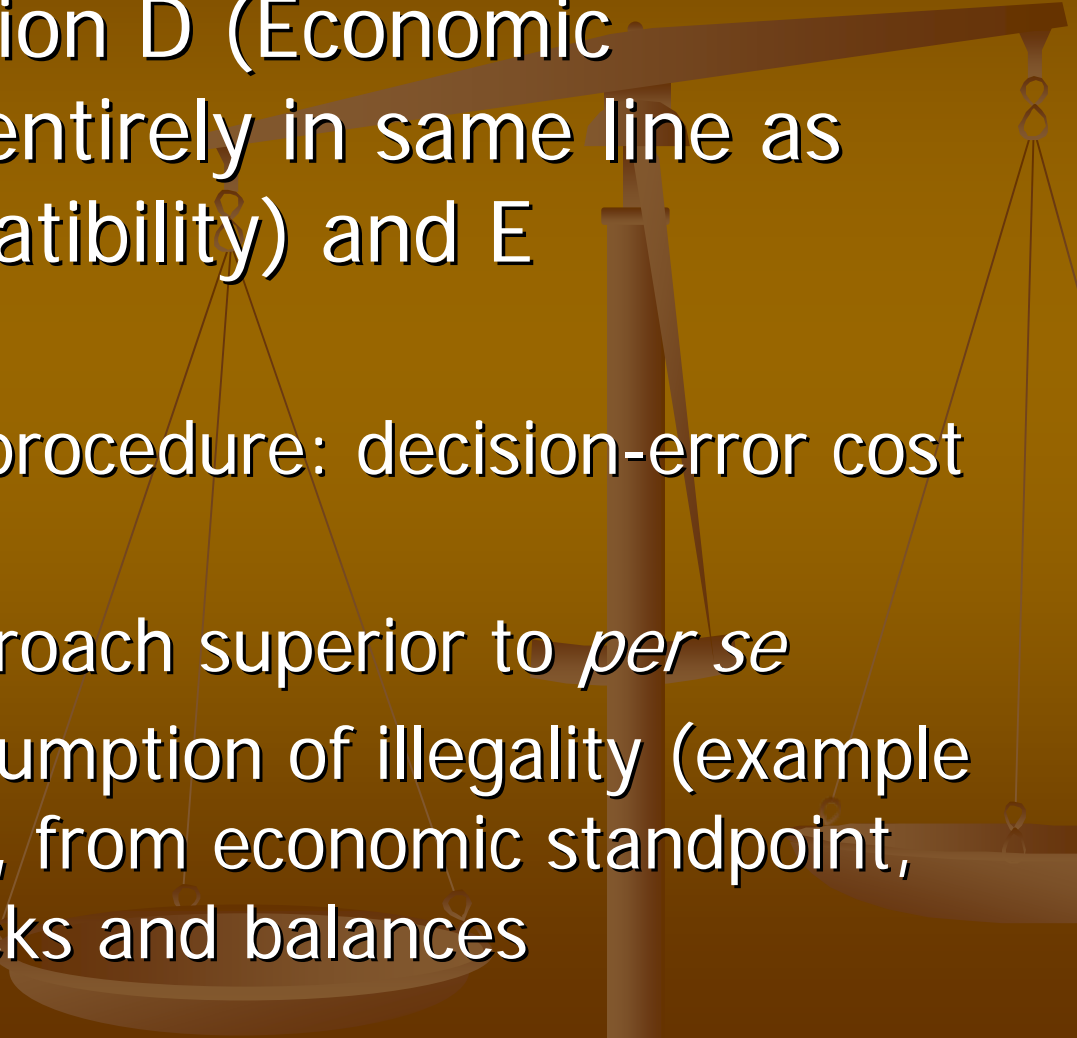
# I.A. Compatibility of Procedure

- ECHR Court has not taken a position
- ECHR Court recognised protection of fundamental rights by EC Courts: *Bosphorus v Ireland* (Grand Chamber, 30 June 2005, § 165):
  - « the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, equivalent [comparable] to that of the Convention system »

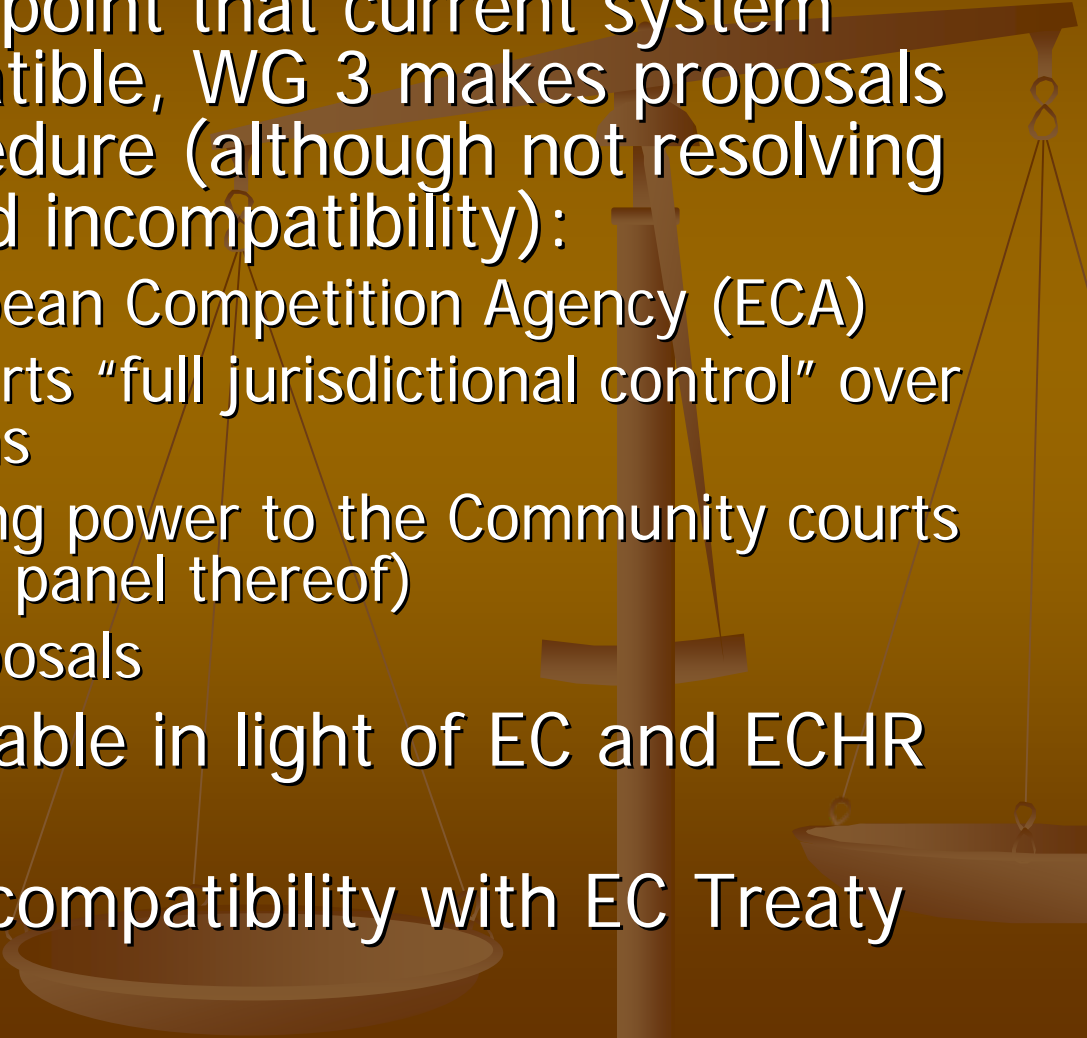
# I.A. Compatibility of Procedure

- Conclusion on WG 3 starting position:
    - No, the current system has not become incompatible with right to a fair trial
    - The EC Courts have explicitly accepted the roles of the Commission in administrative procedure,
    - The EC Courts protect the fundamental procedural rights of undertakings
    - The ECHR Court recognised equivalent protection of fundamental rights by EC Courts
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# I.B. Economic comments

- WG 3 Report Section D (Economic implications) not entirely in same line as Sections C (Compatibility) and E (Proposals):
    - Optimal decision procedure: decision-error cost minimisation
    - Effects based approach superior to *per se*
    - When strong presumption of illegality (example hard core cartels), from economic standpoint, less need for checks and balances
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# I.C. Major WG 3 Proposals

- On basis of starting point that current system would not be compatible, WG 3 makes proposals for changes in procedure (although not resolving fundamental claimed incompatibility):
    - Creation of an European Competition Agency (ECA)
    - Give Community courts “full jurisdictional control” over Commission decisions
    - Grant decision making power to the Community courts directly (or a judicial panel thereof)
    - Less ambitious proposals
  - Starting point debatable in light of EC and ECHR case law
  - Besides, debate on compatibility with EC Treaty
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# I.C. Proposals

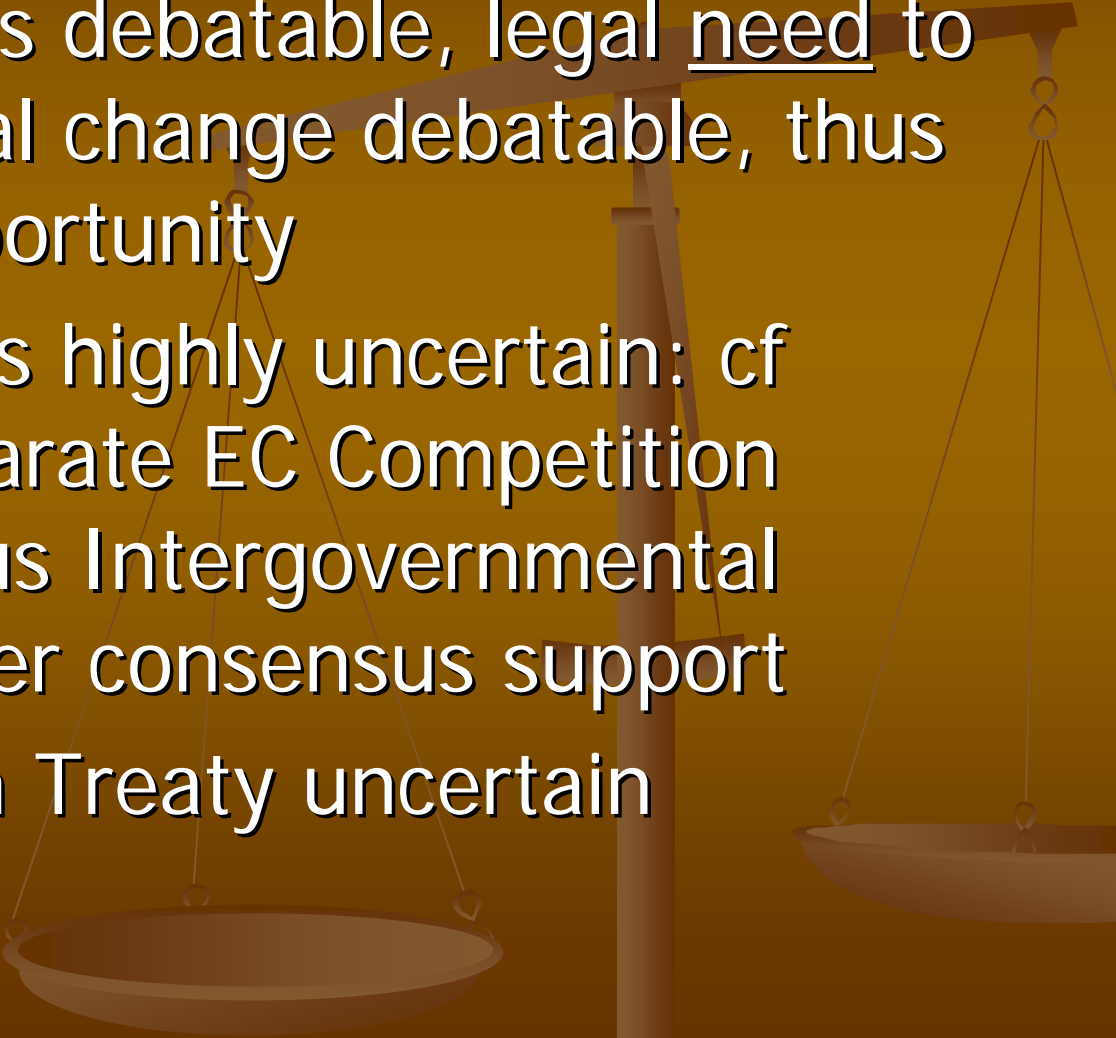
- (1) European Competition Agency (ECA):
    - Independent on the Commission
    - 3 Models (and variants):
      - ECA investigates, Commission decides
      - Commission Services investigate, ECA decides
      - ECA investigates and decides
    - *Meroni* C-9/56 case law: scope for delegation limited
    - WG 3
      - prefers Model 3, but recognised difficulties of compatibility,
      - second choice Model 1a (« OLAF » variant)
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# I.C. Proposals

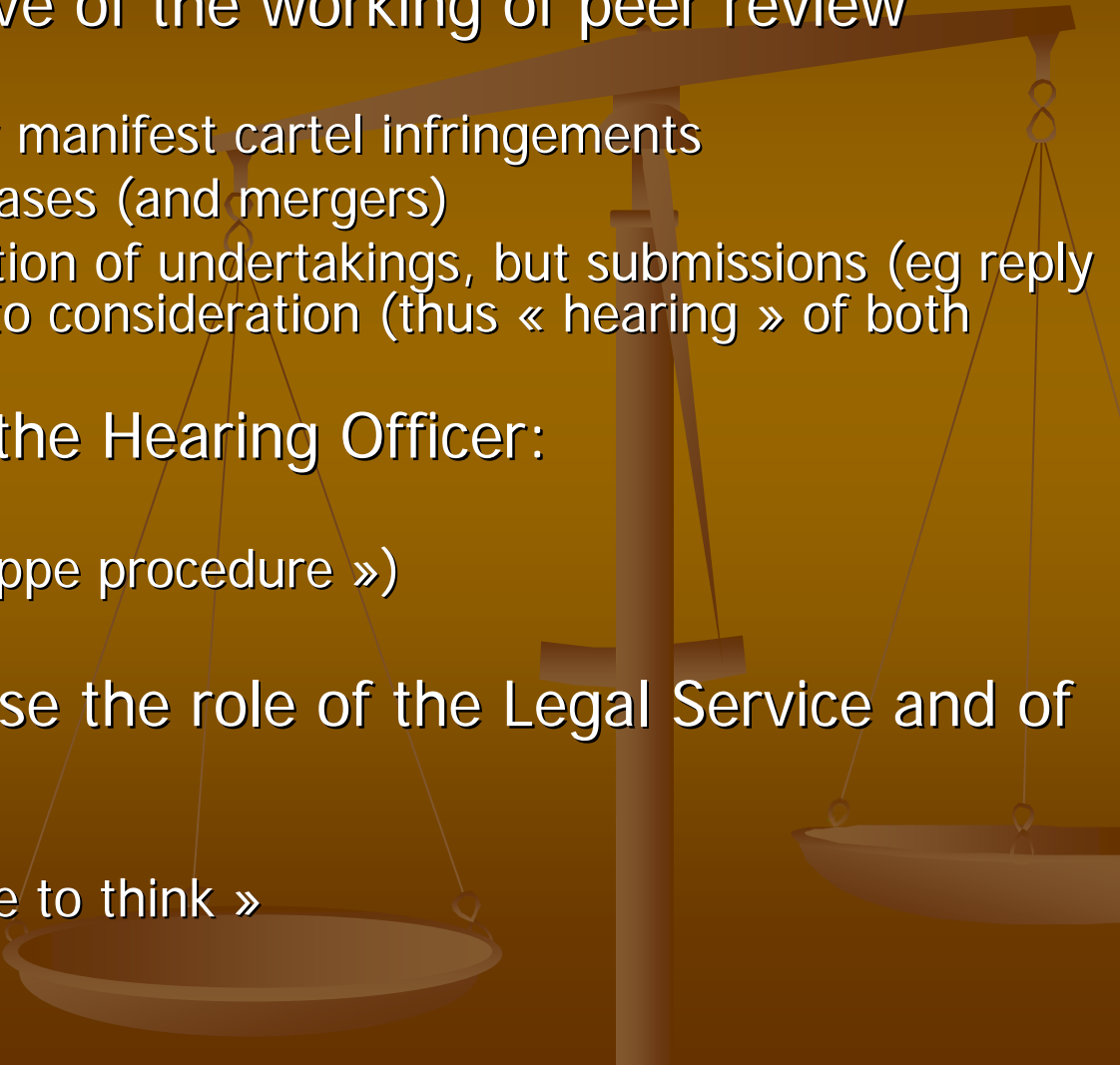


- (2) Give fuller jurisdiction to courts, combined with creation of judicial panel:
  - Court to substitute its assessment instead of the Commission's assessment
  - But: this is already the case for the fines (cf *Viandes Bovines* T-245/03)
- (3) Give adjudicative power to courts combined with judicial panel:
  - Commission to investigate and issue SO
  - Courts to decide.

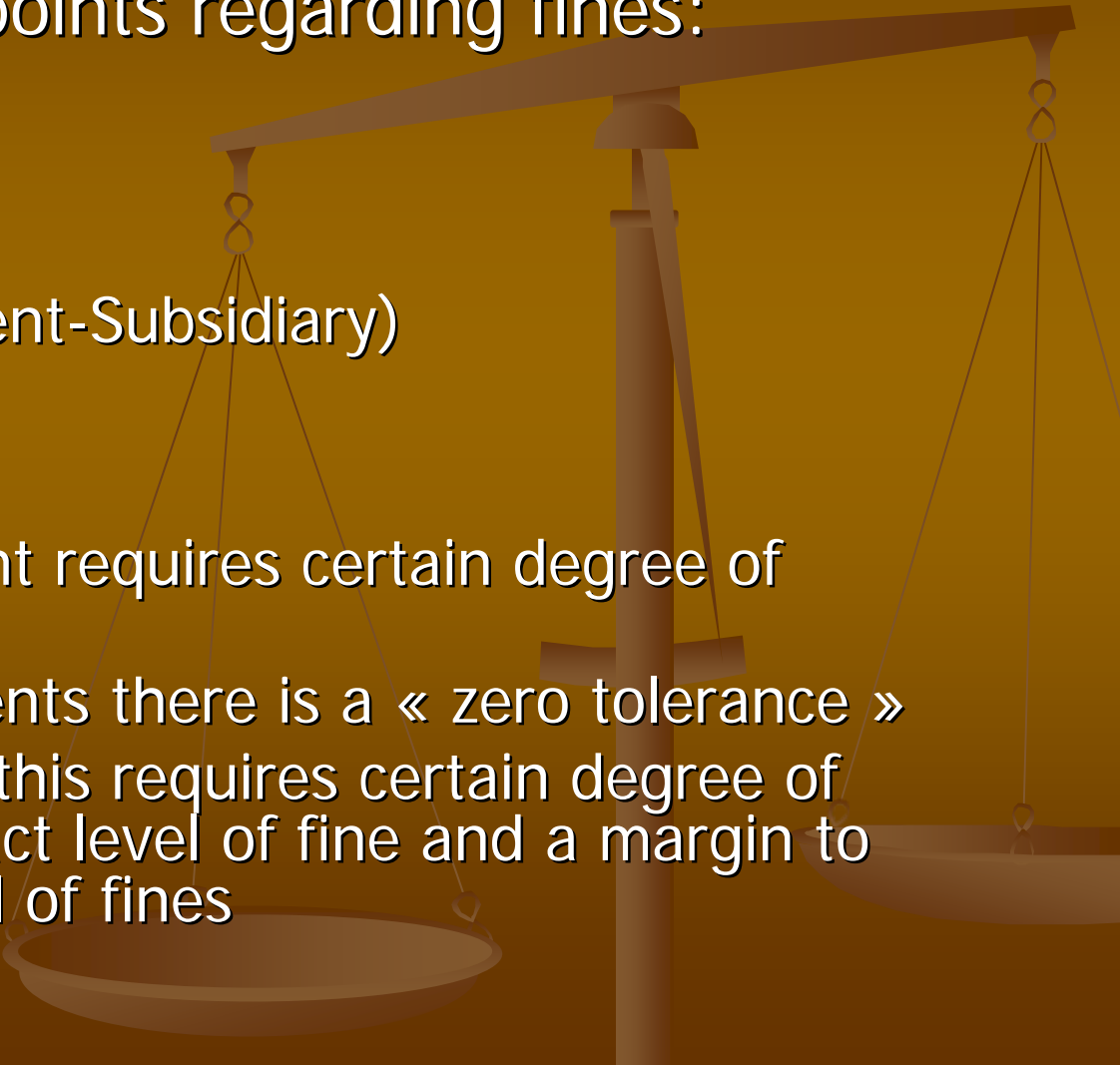
# I.C. Proposals

- As starting point is debatable, legal need to make fundamental change debatable, thus discussion on opportunity
  - Political consensus highly uncertain: cf proposals for separate EC Competition Agency at previous Intergovernmental Conferences, never consensus support
  - Compatibility with Treaty uncertain
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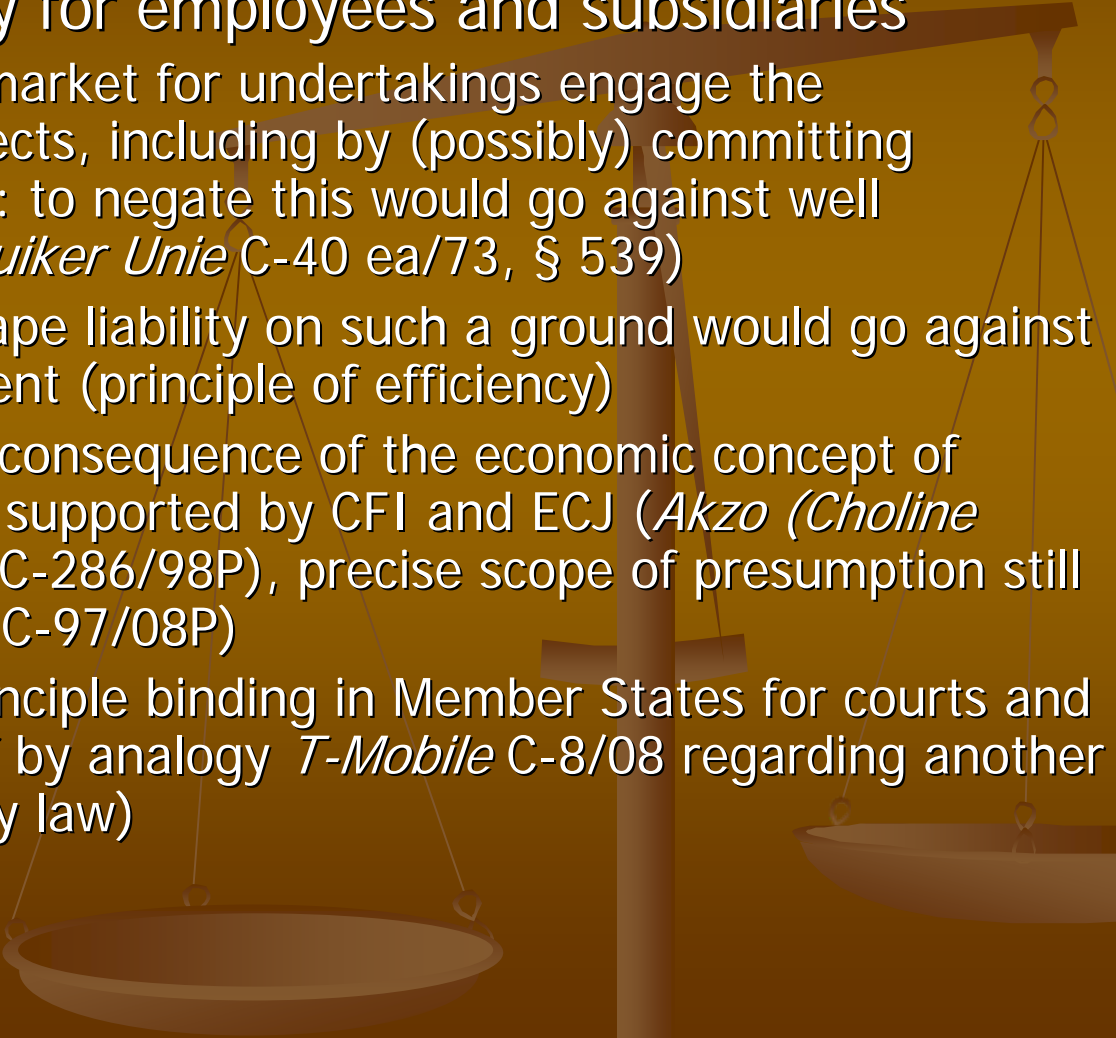
# I.D. More Modest Proposals

- To formalise and improve of the working of peer review panels
    - Added value doubtful for manifest cartel infringements
    - Largely used for abuse cases (and mergers)
    - Not with active participation of undertakings, but submissions (eg reply to SO) properly taken into consideration (thus « hearing » of both sides)
  - To increase the role of the Hearing Officer:
    - Substantive issues
    - Legal Privilege (« enveloppe procedure »)
    - Independence
  - To increase and formalise the role of the Legal Service and of the Chief Economist:
    - More transparent
    - Need to preserve « space to think »
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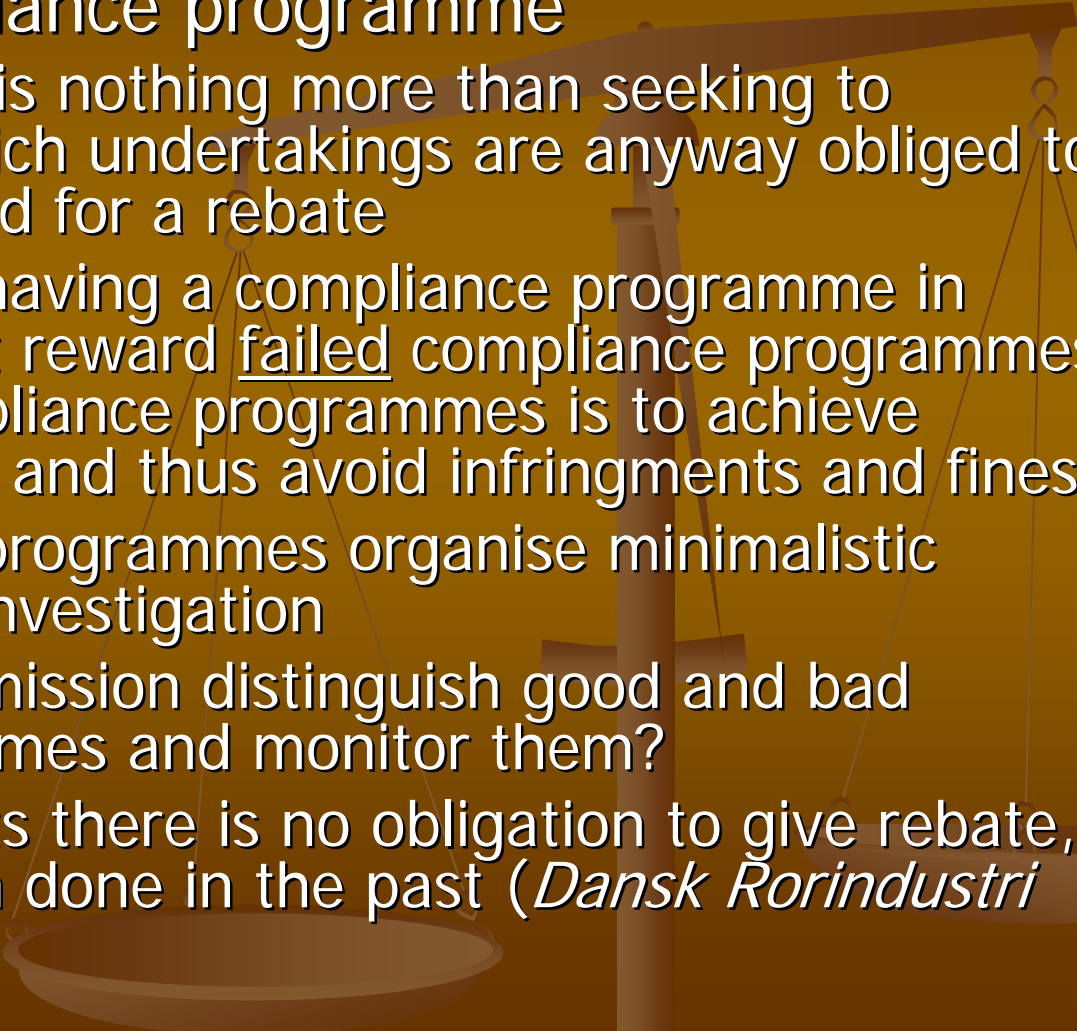
## II. Substance

- Flaws alleged on 5 points regarding fines:
    - « Agency problem »
    - Deterrence
    - Fault
    - Limited liability (Parent-Subsidiary)
    - Fine calculation
  - Generally:
    - Effective enforcement requires certain degree of deterrence
    - For cartel infringements there is a « zero tolerance »
    - Court admitted that this requires certain degree of unpredictability of exact level of fine and a margin to increase overall level of fines
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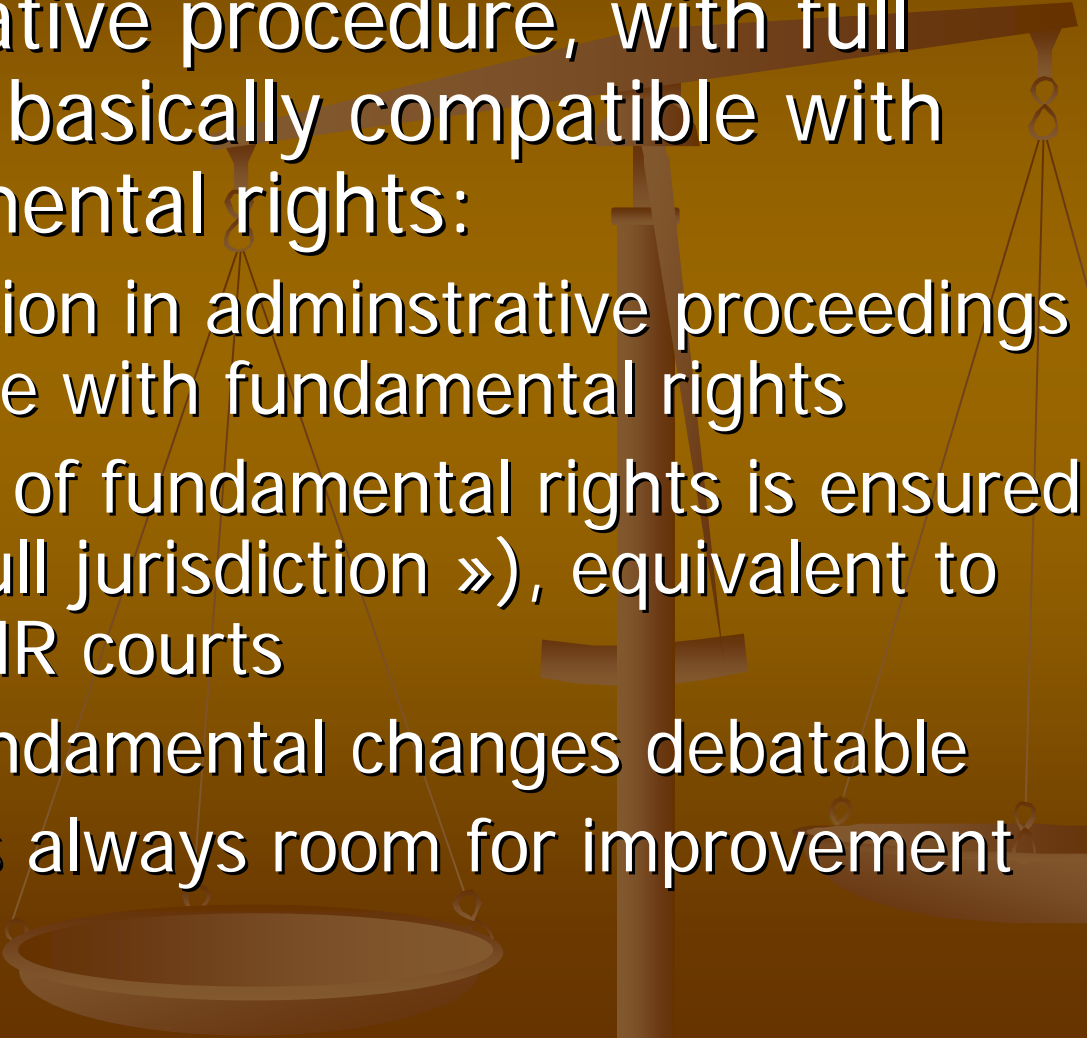
# II. Substance

- A. Contestation of liability for employees and subsidiaries
    - Employees acting on the market for undertakings engage the undertaking in many respects, including by (possibly) committing competition infringements: to negate this would go against well established case law (cf *Suiker Unie* C-40 ea/73, § 539)
    - Allow undertakings to escape liability on such a ground would go against need for proper enforcement (principle of efficiency)
    - Liability for subsidiaries is consequence of the economic concept of undertaking: presumption supported by CFI and ECJ (*Akzo (Choline Chloride)* T-112/05, *Stora* C-286/98P), precise scope of presumption still pending before ECJ (*Akzo* C-97/08P)
    - Such presumption is in principle binding in Member States for courts and competition authorities (cf by analogy *T-Mobile* C-8/08 regarding another presumption of Community law)
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## II. Substance

- B. Rebate for compliance programme
    - Seeking compliance is nothing more than seeking to observe the law, which undertakings are anyway obliged to do, thus not a ground for a rebate
    - A rebate for simply having a compliance programme in place would in effect reward failed compliance programmes (real benefit of compliance programmes is to achieve effective compliance and thus avoid infringements and fines)
    - Certain compliance programmes organise minimalistic cooperation during investigation
    - How could the Commission distinguish good and bad compliance programmes and monitor them?
    - Clear case law admits there is no obligation to give rebate, even if this has been done in the past (*Dansk Rorindustri* C-189/02 P)
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# Conclusion on procedure

- Present administrative procedure, with full judicial review, is basically compatible with respect of fundamental rights:
    - Roles of Commission in administrative proceedings is not incompatible with fundamental rights
    - Proper protection of fundamental rights is ensured by EC courts (« full jurisdiction »), equivalent to protection by ECHR courts
    - Legal need for fundamental changes debatable
    - Of course there is always room for improvement
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# Conclusion on substance

- Alleged « flaws » have already been examined by the case law and and rejected:
    - Need of deterrence stressed
    - Concept of undertaking
    - No requirement to give an attenuating circumstance for « compliance programmes »
    - Case by case scrutiny and review by courts with « full jurisdiction »
    - Tendency in growing number of Member states towards criminalisation of infringements by individuals, without removing liability for fines
    - Thus no urgent need for « radical reform »: debate in terms of opportunity, not in terms of legal requirement
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