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Albert Sanchez-Graells
School of Law, University of Leicester
&
Francisco Marcos
IE Law School

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Albert Sanchez-Graells & Francisco Marcos[1]

I. INTRODUCTION

Despite having originally been recognized with the clear and limited purpose of protecting the individual from State abuses (and, incidentally, from violations by other individuals where their rights may clash), the human rights recognized in the European Convention on Human Rights ("ECHR") have been, to a significant degree, extended to protect corporate entities. As the European Court of Human Rights ("ECtHR") put it, the assumption underlying such a protective stretch is that the dynamic nature of the ECHR (i.e. its perception as a "living instrument'") and an unspecified set of present-day conditions support a very flexible interpretation of the ECHR with the teleological aim of making corporations the beneficiaries of an array of "human rights."

It is important to stress that, in our view, the extension of such protection has not been derived from a clearly defined strategy or conscious decision to actually grant such protection to corporations; rather, the patchy developments in this area have usually derived from a compartmentalized or "siloistic" approach to the analysis of specific problems in given cases. Under the very specific circumstances of those cases, good administration considerations—or, to some extent, the will to limit public administrative intervention in the context of enforcement of economic law—were usually the real underpinning rationale for the decisions reached by the Courts confronted with "corporate human rights" claims (mainly, the ECtHR and the Court of Justice of the European Union ("CJEU")). Unfortunately, these were cloaked under human rights rhetoric.

Such creeping extensions of corporate human rights protection have resulted in a broader trend where there seems to be a full assimilation between individual human rights (and human rights of groups and associations concerned with the promotion of activities mainly centered in the individual) and corporate human rights (or rights of corporate entities, including or particularly concerned with those engaged in for-profit and economic activities). In our view, the creation of such momentum for corporate human rights has been accidental—and unfortunate.

II. THE CREATION OF CORPORATE HUMAN RIGHTS IN COMPETITION LAW ENFORCEMENT

In particular, the creation of such corporate human rights is obvious in the area of due process guarantees and, possibly even more so, in the area of competition law enforcement. Such a development has been largely undesirable and, consequently, should be reversed or at least minimized for the reasons that we develop more fully in a paper to be presented in the

[1] Dr. Albert Sanchez-Graells is a Senior Lecturer at the University of Leicester's School of Law; Dr. Francisco Marcos is a Professor at the IE Law School and Visiting Fellow at George Washington Law School.

forthcoming ASCOLA conference[2] and that we will briefly summarize here. Some of our arguments have been presented in a milder formulation by others (such as MacCulloch) or in the past (by Sanchez-Graells), but we now consider that such intermediate or mild criticisms to the creation and extension of corporate human rights are problematic because they may derive from the assumption that, in the absence of human rights protection, corporate defendants may not have resort to any other devices to prevent abuses of power committed by the competition authorities.

However, a realistic approach towards the system for the enforcement of competition law (at least in the European Union and in other developed jurisdictions) and the administrative procedures underpinning this system clearly shows that this is not the case. Competition enforcement procedures do provide corporate defendants with a sufficient degree of protection of their core interests and include systems of checks and balances (including judicial review) that prevent (at least most) instances of abuse of public power. Therefore, such intermediate positions may need reviewing, at least answering a more definitive answer to the extent question: How weak should corporate human rights protection be, if, indeed, it is at all justified? In order to address this general point, critical re-assessments such as those recently provided by Grear in her argument for a re-humanization or re-embodiment of human rights serve as an interesting reference point. From a legal perspective sound theoretical justifications were provided by Dan Cohen in the United States more than two decades ago.

For reasons we cannot fully explore here, it seems reasonable to consider that corporations cannot suffer coercion by public powers in the same condition as if they were individuals and, thus, corporate defendants deserve a different, more reduced protection. Indeed, from the perspective of both the need for protection, and the need to counterbalance public power and its exercise, we submit that creating corporate human rights lacks a plausible and sufficient justification. If an alternative justification is sought in the concept of due process as a value in itself (i.e. not as a human right), we acknowledge that there may be more scope to find justification in the need to design sound administrative procedures that ensure high levels of good administration in the management of investigations and, especially, in the decision-making processes involved in the enforcement of economic law (and competition law in particular). But we would still disagree that these needs for regulatory quality produce a need for corporate human rights.

Therefore, in a nutshell and from a pragmatic perspective, our concerns and arguments against the creation, consolidation, and inflation of corporate human rights in the area of competition law enforcement (and more generally) revolve around the effectiveness of both the system for the enforcement of competition law and, possibly more importantly, the enforcement and protection of human rights themselves.

III. CORPORATE HUMAN RIGHTS AS A WEAKENING OF COMPETITION LAW ENFORCEMENT

It should be stressed that the effectiveness of competition law requires competition authorities to investigate those actions that might infringe articles 101 or 102 TFEU (or their

[2] A copy is *available at* http://ssrn.com/abstract=2389715.

domestic equivalents) and, for them to do so effectively, these authorities need to be empowered to sanction those undertakings that are proven to have done so. Their decisions in punishing violations of those rules are crucial in deterring future anticompetitive actions. In conducting their tasks, competition authorities face both the difficulties of finding information and evidence of anticompetitive actions, and the need to carry out complex economic assessments, but they are experienced and well prepared to do so.

Given that neither the fact-finding exercise, nor the analysis of the facts, by competition authorities are crystal-clear tasks, introducing the full-set of guarantees and safeguards required by due process in criminal proceedings in favor of corporations subject to antitrust investigation would obstruct the conduct of competition authorities' investigation and assessment tasks. In order to allow investigations to proceed quickly and smoothly, lenient procedural guarantees should be applied.

In this same vein, given the difficulties faced in finding 100 percent definitive evidence that a violation has occurred (as the wording of the prohibitions themselves clearly reveals) a lower standard of proof may be required. Several interpretations and assessments can be made of the same facts, and for that reason, the scrutiny of competition authorities' investigation procedures and decisions should be limited to a requirement that they construct a sound and rigorous case concerning the behavior subject to investigation and sufficiently justify that it falls within the scope of articles 101 or 102 TFEU (or their equivalent).

The ECtHR has acknowledged the need to provide the necessary deference to such judgments that imply "classic exercise of administrative discretion" or, in other words "the issues to be determined [require] a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims." Therefore, subjecting competition law enforcement to excessively demanding standards of proof, or to compliance with excessive (and unnecessary) protections of corporate human rights, would end up diminishing the effectiveness of competition law enforcement.

Moreover, and from a clearly normative perspective, it seems to be worth stressing that the enforcement of competition law is clearly seen as a mechanism mainly aimed at either preventing or correcting (as quickly as possible) distortions and restrictions of competition in the markets. Such enforcement has, as its objective, allowing market mechanisms to continue working properly, with an intermediate objective towards achieving allocative and dynamic efficiency, and, ultimately, becoming a tool to protect welfare and promote innovation.

This fundamental normative element in the design of competition law enforcement has some clear implications. On the one hand, it requires that competition law enforcement be as speedy and flexible as possible. That this emphasis is already present is clearly seen in the design of enforcement mechanisms that tend to benefit corporate defendants willing to accept guilt or to cooperate with the competition authorities, such as the leniency and settlement mechanisms in place in most jurisdictions (and, clearly, in the European Union).

On the flip side, it might also be necessary to develop more mechanisms to minimize the risk of appeal and, consequently, suspension of their effects, to the appropriate level, thus continuing to ensure speedy enforcement decisions are adopted by competition authorities (following already sufficiently sound administrative procedures) and giving those decisions

almost immediate effectiveness. Creating a too broad and generous basis for challenge or appeal on the basis of protecting corporate human rights would be a significant element creating a reduced effectiveness of competition law enforcement—even if the decisions were eventually upheld and implemented (or, in clearer terms, time is actually gold in the implementation of enforcement decisions aimed at restoring competitive market situations, since a belated execution of the measures—possibly of those other than the imposition of fines, but also those to some extent—may render them ineffective or even inadequate in a changed market and competitive setting). Therefore, eliminating one tier of potential challenges and appeals both in terms of legal basis and available jurisdictional fora, by preventing corporate human rights litigation in the area of competition law, would contribute to strengthen the effectiveness of the system.

Finally, in order to contextualize these prior considerations, it may be worth stressing that competition laws are one of the main regulatory instruments for the protection of the market economy itself. Only properly functioning markets can bring about the benefits of the free market paradigm, and preventing competition distortions is clearly beneficial for consumer protection (through preventing welfare losses) and consumer interests. But, even if consumer welfare is not recognized as the ultimate valid normative standard, and a total or social welfare approach more lenient towards corporate manufacturers or suppliers is adopted, competition laws still remain one of the fundamental safeguards of the free market economy.

From this perspective, it seems evident that an excessive protection of corporate defendants in competition enforcement procedures by an overgrowth of corporate human rights (and, more specifically, due process rights) is a self-defeating strategy. In these cases, the attribution of those rights to corporate defendants can only handcuff the already limited—in terms of actual human and other resources—enforcement powers of competition authorities and, in the end, result in a diminished effectiveness of a system unable to properly protect social welfare in the market economy.

In somewhat comic terms, it could be represented as a system where the human rights pliers would be used to pull out the teeth of the competition watchdog—which would simply result in a toothless competition law system unable to bite corporations engaged in anticompetitive behavior. This should be seen as an undesirable outcome, given the very strong public interest element implicit in competition law enforcement.

IV. AND AN ADDED POTENTIAL LOSS OF EFFECTIVENESS OF HUMAN RIGHTS PROTECTION ITSELF

Moreover, it is important to stress that granting full corporate human rights may create problems not only regarding competition law enforcement, but also in connection with the enforcement of proper human rights themselves, as the amount of litigation that could derive from the consolidation of such development does not seem to be negligible. As the ECtHR already clarified in some instances where it was confronted with significant threads of increased litigation (and following an implicit "floodgates argument") the ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." Therefore, a preference for the investment of all available resources in the protection of those human rights with a clearer and sounder justification (i.e. those of individuals) over a diversion towards the protection of lower ranking corporate rights should be stressed.

Indeed, there seems to be no good reason to promote permissive rules and standards oriented towards a stronger protection of corporate human rights in competition law cases. Undertakings having been fined for breaches of competition law will always have a very strong financial incentive to challenge those fines before the relevant courts (i.e. both the ECtHR and, potentially, the CJEU) or, at least, to win some time by resorting to this additional review procedure. Therefore, there are high incentives for an excessive recourse to—if not an abuse of—procedures for corporate human rights protection on the basis of spurious claims of insufficient corporate human rights protection in competition law cases. As a matter of system design, then, restrictions on the actual opportunities to bring an action before the ECtHR and the CJEU on the basis of human rights' protection arguments seems a proportionate and desirable counterbalance to such perverse incentives.

Moreover, and possibly from a more prosaic but also relevant perspective, the ECtHR (and the CJEU to some more limited extent, as it is already competent to hear challenges against enforcement decisions in competition law matters) should be aware of the potentially significant impact of these cases in their workload and the significant amount of resources needed to deal with such complex cases. Furthermore, at least the ECtHR would need to significantly expand its expertise in the area of competition law (and, more generally, of economic regulation) in order to properly appraise the applications submitted for its protection under the ECHR—and this could be disproportionate to protect the "theoretical" due process rights of corporate defendants.

V. A SKETCH OF A PROPOSAL TO HALT AND REVERSE THE CURRENT TREND

Therefore, given the very weak justification for the creation of corporate human rights, along with their potential impact to weaken both competition law and human rights enforcement, this trend towards their recognition and expansion should be halted and reversed. We advocate for the suppression of corporate human rights in the area of competition law enforcement, and more generally.

That is not to say that all due process arguments should be dismissed, nor that enforcement procedures do not require improvement. Granted, in the field of the enforcement of economic law, administrative law procedures should be sound and there should clearly be a strong system of judicial review in place but, in our view, corporations should not have access to broader constitutional or human rights protections, and any perceived shortcomings in the design and application of enforcement procedures should remain within the sphere of regulatory reform.

In the end, the design of economic law enforcement mechanisms should be concerned with providing a workably sound framework, but should not strive to the same level of guarantees that are designed for criminal law investigations against the individual person. The fact that corporations are the majoritarian (if not de facto exclusive) type of defendant in cases involving the enforcement of economic law seems to be an additional reason to justify the relaxation of these mechanisms in terms of procedural guarantees as compared to procedures where individuals are involved.