

# “Human Rights” Protection for Corporate Antitrust Defendants: Are We Not Going Overboard?

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.....Pervasiveness of **businesses claims of violations of rights of defence** in competition/ antitrust proceedings [essential procedural requirements of due process (burden of proof/ presumption of innocence, right to be heard/right to oral hearing) are not met].....

Nowadays, this argument is made by defendants' in every single case



For example regarding decision 13 may 2009, case  
COMP-C-3/37.900- INTEL (later T-286/09, GCJ of  
12 June 2014)

INTEL claims several times that its due process  
rights according to the Charter of Fundamental  
Rights of the EU and ECHR have been violated



# This has deep implications for competition law enforcement:

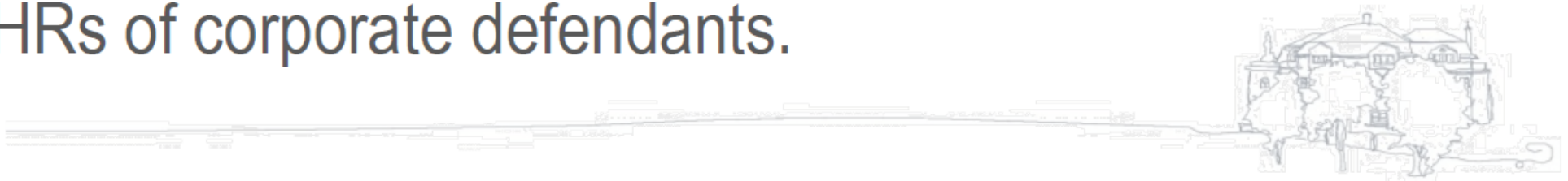
- ✓ Heightens responsibilities of enforcers (EU Commission, NCAs) by increasing the guarantees they need to provide defendants with
- ✓ Make enforcement more difficult, diminishing the effectiveness of competition/antitrust law, with negative effects in consumer & social welfare

Paradoxically, the argument being used by defendants is controversial as it can be questioned **how far we should go in extending due procedural fairness rights to corporate organizations?**

## It also affects HRs protection law:

- ✓ Infests the docket of HRs protection courts and tribunals with cases dealing with corporate HRs protection (which are incentivized to challenge competition law fines, even if only to win time)
- ✓ A significant amount of resources would be needed to deal with complex competition cases and an expansion of the HRs courts expertise on the area would be needed

Excessive and disproportionate protection of due process HRs of corporate defendants.





In our view this development has been **regrettable** and we should **reassess** the situation putting it in right terms before moving forward

- ✓ It does not make sense to talk about HRs of corporations, and for these claims to flood competition law enforcement practice
- ✓ Instead it makes sense to reframe the issue as a discussion of the **proper procedures to be followed in competition law enforcement, protection of corporate interests and prevention of abuses of public power**



# Opinion AG Ruiz-Jarabo Colomer of 17.10.02 (C-338/00P Volkswagen v. Commission) [2003] ECR I-9189

¶66 “In general... the body of safeguards developed in the field of criminal law, which has a protagonists the penalizing State, on the one hand, and the individual charged with an offence on the other, is not transferred en bloc to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power...”

## Cont ¶66

” In the case of free competition, those parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct. I therefore, consider it important that the procedural rules be adapted to the specific field of competition law”.





# Agenda

- ✓ Where are we?
- ✓ How did we get here?
- ✓ Does it make sense?
- ✓ Where should we go from here? Can anything be done?



## Where are we now?

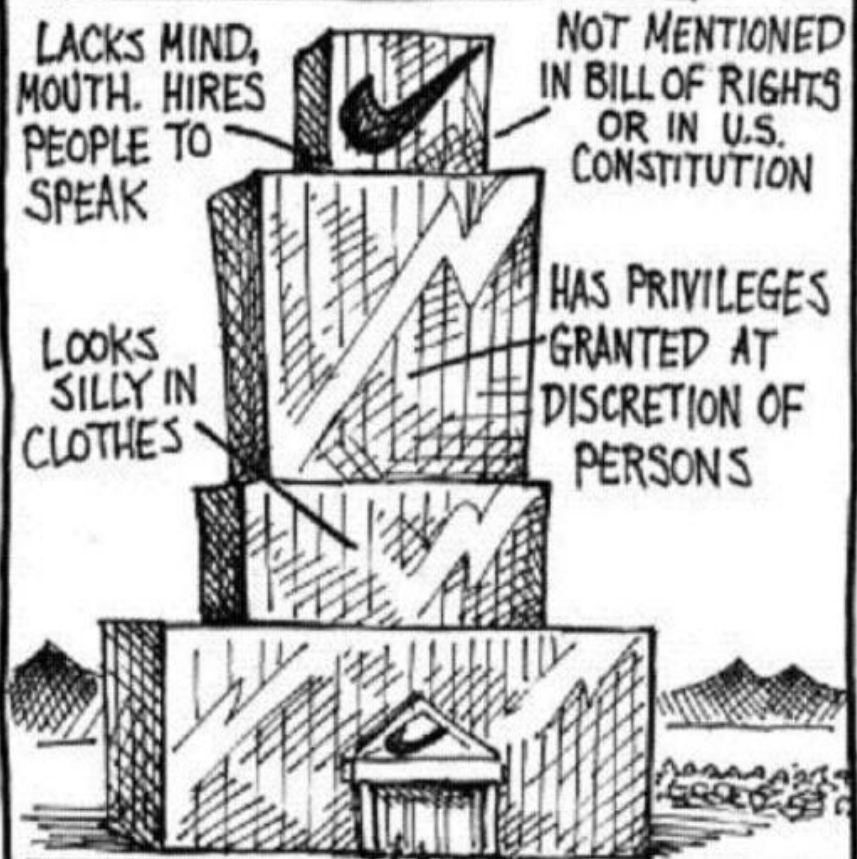
- ✓ Uncritical extension of HRs protection to corporate organizations in different contexts (there is a general discussion on the issue, not specific to competition law, GREAR 2010)
- ✓ In antitrust/competition law enforcement, due process rights of corporate defendants have become a contested and hot topic argument in every case



# Person



# Not a Person



COMMONLY KNOWN AS A "CORPORATION"

M. WUERKER

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## How did we get here?

- ✓ There has not been a well-thought and designed strategy for the extension of HRs to corporations (DAN-COHEN 1986 talks about a **`grotesque' anthropomorphism**)
- ✓ It has occurred following a **'siloistic' approach** in specific cases (in which good administration motives were cloaked as HRs claims)
- ✓ Case-law and literature deal with the technicalities of HRs protection, adapting them to modern settings, without checking if the extension was really justified and made sense
- ✓ Only partial & vague questioning of corporate protective stretch (MacCulloch, Shiner, Wils).



## Does it make sense? (i)

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- ✓ There are **not moral and philosophical grounds** for the extension of HRs to corporate organizations
- ✓ The recognition of HRs is rooted in **human condition**, in the vulnerability of life and integrity of human beings, to ensure individuals live with dignity and to shield individuals from abuses committed by the public powers
- ✓ That is particularly the case of due process rights devised as a **protection for natural human beings when criminally prosecuted and punished** (extended limitedly to non-criminal investigations and sanctions)





## Does it make sense? (ii)

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- ✓ Due process rights now include a bundle of **procedural guarantees** (presumption of innocence, equality of arms, full access to evidence, right to a fair hearing, right against self-incrimination and right not to suffer undue delays) to assure the integrity of the trial and include also rights concerning **evidence** and **standard of review** of government's decisions
- ✓ They are still grounded on **individual citizens weakness and need to protection against potential coercion or abuses of mighty governmental powers**: unbalance of powers and severe consequences for individuals



## Does it make sense? (iii)

- ✓ Corporate organizations do not face the same situation of individuals, they are **fictional entities**: Neither the power unbalance nor the severity of consequences apply to them (*rectius* to the same extent)
- ✓ Corporate organizations face only economic or financial consequences and this (though they may be relevant...) has little to do with the protection of individuals' freedom and dignity: **Corporations are not moral agents**, disembodied entities only have **legal rights** (inherently different from HRs)



**Constitutional  
Rights Are for People  
NOT  
CORPORATIONS**

**I refuse  
to believe  
corporations  
are people  
until Texas  
executes one.**



## Does it make sense? (& iv)

- ✓ Despite ECtHR flexible approach (that has recognized corporate HRs), it has also considered the **singularity of corporations** (f.e., by piercing the veil and allowing shareholders instead to claim HRs violations)
- ✓ Recognition of rights to corporations cannot be symmetrical to human beings, needs to be **qualified and tailored to the context and procedures** in which they can be claimed
- ✓ Fairness and due process in administrative proceedings require providing **a sound regulatory framework with a strong system of judicial review**, relaxing the procedural guarantees required when individuals are involved (HRs)

## Where should we go from here? Can anything be done? (i)

- ✓ ECtHR caselaw provides grounds (*Jussila, Menarini*) for reconsidering the extent & intensity of due-process guarantees in competition law cases to align them with the standards applicable to administrative decisions (ie *limited/lighter judicial review*):
  - ✓ Corporate defendants should not have HRs (*supra*)
  - ✓ Given these are not hard-core criminal cases
  - ✓ Given that the enforcement administrative procedure is sound
  - ✓ Due to the administrative discretion inspiring these decisions, judicial review of their legality is enough (not full right to appeal on the merits) with remedies in case of success



## Where should we go from here? Can anything be done? (ii)

- ✓ Specificities of corporate organizations are considered in competition law enforcement (f.e. “group privilege” and “parental liability”) and that approach should also inform the adaptation/design of fair process guarantees.
- ✓ Tailoring of enforcement safeguards to administrative nature of competition law and corporate condition of defendants should be guided by ensuring effectiveness of competition rules/prohibitions:
  - Lenient procedural guarantees
  - Lower standard of proof





## Where should we go from here? Can anything be done? (&iii)

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- ✓ Competition law enforcement is a difficult task involving problems in fact-finding (evidence) and complex assessments
- ✓ Too strict requirements and standard of proof would endanger its effectiveness
- ✓ Reduced effectiveness of competition law would damage market system (and, at the end, the very same firms that the excesses of corporate HRs aims to protect)
- ✓ Need to avoid a 'toothless' competition watchdog (*corporate HRs pliers* being used to pull its teeth)



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# THANK YOU FOR YOUR ATTENTION



*"The corporation was very lonely, because people  
thought it was different from them."*

