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I Don't Trust Your Judgment: The European Convention on Human Rights Meets the European Union on New Grounds?

Michael R. Ribble*

I. SETTING THE STAGE

In June 2009, the European Court of Human Rights (“ECHR”) handed down a decision against the French Banking Commission (“FBC”) for a violation of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”).¹ The applicant, a French investment company, alleged that the FBC failed to act as an independent tribunal during its proceedings as required by the Convention.² The ECHR’s decision was in some ways surprising but was consistent with its broad view of businesses’ rights under the Convention.³ The full impetus of the decision, though, is not readily apparent until it is considered in light of the human-rights movement in Europe.

Human-rights enforcement in Europe began after the conclusion of World War II, when the Convention was ratified by ten countries in the Council of Europe.⁴ After the Convention was passed, the human-rights movement continued to expand, and now forty-seven countries are

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1. *See generally* Dubus S.A. v. France, App. No. 5242/04 (2009), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (type “Dubus S.A.” in the Case Title line).

2. *See id.* ¶ 45.

3. MICHAEL DOV GOLDBABER, A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 176 (Rutgers University Press 2007).

4. *See* Human Rights Education Association, History, http://www.hrea.org/index.php?base_id=143 (last visited Jan. 5, 2010); Council of Europe Website, History, <http://www.echr.coe.int/library/COLENCedh.html>

signatories to the Convention.⁵ Moreover, the introduction of the European Union (“EU”) in 1993 created additional enforcement regimes that recognized the existence of fundamental human rights.⁶

The EU, like the ECHR, has grown considerably, including citizens from twenty-seven countries.⁷ Each EU member state is also a party to the Convention.⁸ However, while the EU has considered the Convention to be a valid source of human-rights law, the EU itself is not bound by it.⁹ On December 1, 2009, the Treaty of Lisbon (“Treaty”) became effective, under which the EU will accede to the Convention and the ECHR.¹⁰ This accession presumably will subject the EU and its institutions to the laws and jurisdiction of the ECHR, to which they have not been subject in the past.¹¹

Against the backdrop of accession, *Dubus S.A. v. France* may be an important precedent with respect to possible applications lodged against EU institutions. In particular, the facts and reasoning of *Dubus* appear applicable to certain EU institutions. After accession, such institutions could find themselves subject to ECHR proceedings.

This Comment will first discuss the background of and the application process under the ECHR. Next, the *Dubus* decision will be analyzed to provide a basis for comparison in Part IV. Further, this Comment will outline the pre- and post-EU-accession difficulties concerning the European Court of Justice (“ECJ”) and the ECHR. Finally, in light of *Dubus* and accession, this Comment compares, in Part IV, the FBC with the EU Commission on Competition (“ECC”) in antitrust proceedings, and suggests that similarities in procedure and sanctions are possible grounds for ECC liability under the Convention.

5. Council of Europe Website (List of Countries), <http://www.coe.int/aboutCoe/index.asp?page=47paysleurope&l=en> (last visited Feb. 3, 2010).

6. See e.g. European Commission Website, External Relations, http://ec.europa.eu/external_relations/human_rights/index_en.htm (last visited Feb. 3, 2010).

7. European Commission Website, External Relations-*Who*, http://ec.europa.eu/external_relations/peace_security/who_en.htm (last visited Feb. 3, 2010).

8. See MICHAEL DOV GOLDHABER, *A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 176-77* (Rutgers University Press 2007).

9. *Id.*

10. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. VI § 2, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF>; see also Lisbon-Treaty.org-Ratification, <http://www.lisbon-treaty.org/wcm/ratification.html>.

11. See GOLDHABER, *supra* note 8, at 176-77.

A. *Background: The European Court of Human Rights*

The original incarnation of the ECHR, the Court of Human Rights, was established in 1959, six years after the ratification of the Convention in 1953.¹² The ECHR's current form was adopted in 1998 and replaced the previous enforcement mechanisms.¹³ The Convention is an international treaty ratified by all member states of the Council of Europe¹⁴ and is meant to serve as Europe's equivalent of the United Nations Universal Declaration of Human Rights (UDHR).¹⁵ As such, each state, by ratifying the Convention, agrees to uphold certain fundamental human rights outlined therein.¹⁶ The ECHR has the authority to impose binding judgments against member states for violations of the Convention.¹⁷ Once a final judgment is entered, the Committee of Ministers of the Council of Europe is then responsible for supervising the execution of the judgment as it applies to both parties.¹⁸ For example, the Committee of Ministers will ensure that any monetary award is actually paid and that each party adheres to the judgment's stipulations.¹⁹

B. *European Court of Human Rights: Standing and Procedure*

1. Standing Under the ECHR

While the Convention tends to follow the dictates of the UDHR, its articles suggest a broader view of human rights, particularly with respect to who may apply to the ECHR for relief.²⁰ While the Convention's

12. See European Court of Human Rights Website, Facts and Figures 1, <http://www.echr.coe.int/NR/rdonlyres/ACF07093-1937-49AF-8BE6-36FE0FEE1759/0/FactsAndFiguresENG10ansNov.pdf> (last visited Feb. 3, 2010) [hereinafter ECHR Facts and Figures].

13. See *id.*

14. For a full list of the member states in the Council of Europe see *id.* at 12-13. See also Council of Europe Website (List of Countries), <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (last visited Jan. 2, 2010).

15. See European Convention on Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

16. See ECHR Facts and Figures, *supra* note 12, at 1.

17. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at arts. 32 and 46.

18. See *id.*

19. ECHR Facts and Figures, *supra* note 12, at 3.

20. Compare European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at 4 (indicating that "individual" applications alleging violations of the Convention include any person, *non-governmental organization* or group of individuals), with Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d

definition of “individual applicants” appears more inclusive than the UDHR, for the purposes of submitting an application to the ECHR, the requirements are essentially the same for all individual applicants.²¹

The ECHR accepts individual applications (both domestic and abroad) filed within six months of a final state judgment that allege: (1) a violation of the Convention or one of its Protocols (not a general complaint about a law); (2) a violation by one of the member states, which occurred *within* the jurisdiction of the state; and (3) an attempt by the applicant to exhaust all remedies within the state.²² Furthermore, an individual applicant must claim to have been personally and directly the victim of the alleged Convention violation.²³ As such, an individual may not lodge an application on behalf of others, except when he or she is acting as the official representative for a clearly identified group.²⁴ Finally, the complainant must raise the issue of a Convention violation during member-state proceedings.²⁵ Thus, the ECHR does not serve as the court of first instance for violations of the Convention.²⁶ Rather, the alleged violation will be heard by multiple tribunals or courts (usually ending with the state high court) before reaching the ECHR.²⁷

2. Procedural Posture of Individual Applications

After an individual has exhausted all remedies within the state, an application may be lodged with the ECHR.²⁸ Once received, the application may be reviewed by a committee of three judges, a chamber of seven judges, or a Grand Chamber of seventeen judges.²⁹ The threshold determination for any application before the ECHR is admissibility.³⁰ However, the court may find the application

Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) arts. 1-30 (focusing on individual “human beings”).

21. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 34.

22. European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 35. See also, European Court of Human Rights Website, Questions and Answers, http://www.echr.coe.int/NR/rdonlyres/37C26BF0-EE46-437E-B810-EA900D18D49B/0/ENG_Questions_and_Answers.pdf 3-4 (last visited Jan. 2, 2010) [hereinafter ECHR Questions and Answers].

23. ECHR Questions and Answers, *supra* note 22, at 4.

24. *Id.*

25. *Id.*

26. European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 35 § 1.

27. ECHR Questions and Answers, *supra* note 22, at 4.

28. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 35(1).

29. See *id.* at art. 27 § 1.

30. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at arts. 28-29. See also ECHR Questions and Answers, *supra* note 22, at 5.

inadmissible at any time during the proceedings.³¹ Admissibility will be based upon the requirements listed in the Convention.³²

A committee of three may declare an application inadmissible by a unanimous vote where no further examination is required, and such a declaration is final.³³ If a committee of three does not reach a decision, a chamber of seven will consider both the admissibility and merits of the application,³⁴ though the issue of admissibility is considered separately.³⁵ If admissibility is established, the chamber will attempt to foster a friendly settlement between the parties.³⁶ Only when parties fail to reach an agreement will the chamber make a determination on the matter, and such a determination is generally final.³⁷ However, in exceptional circumstances, one of the parties may request that the case be referred to the Grand Chamber.³⁸ In that case, a five-judge panel will determine whether the case presents a sufficiently important question regarding the interpretation of the Convention or one of its Protocols, or “a serious issue of general importance.”³⁹ If the panel accepts the referral, the Grand Chamber will make a judgment on the case that is final.⁴⁰ Similarly, if a chamber of seven considers the issues of the case to be sufficiently important or controversial, they may relinquish jurisdiction in favor of the Grand Chamber before rendering a decision, unless one of the parties objects.⁴¹

Any final judgment rendered by the ECHR is considered binding.⁴² The court, however, is not the mechanism for enforcement.⁴³ Rather, the Committee of Ministers of the Council of Europe is responsible for enforcing ECHR judgments.⁴⁴ Generally, judgments are only in the form of monetary damages or just satisfaction.⁴⁵ Moreover, the ECHR does not have the authority to overrule state-court decisions or to annul state

31. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 35 § 4.

32. See *id.* at art. 35.

33. See *id.* at art. 28.

34. See *id.* at art. 29 § 1.

35. See *id.* at art. 29 § 3.

36. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 38 § 2.

37. See *id.* at arts. 43 and 44.

38. See *id.* at art. 43 § 1.

39. See *id.* at art. 43 § 2.

40. See *id.* at arts. 43 § 3 and 44.

41. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 30.

42. See *id.* at art. 46.

43. See *id.*

44. See *id.*

45. See *id.* at art. 41; see also ECHR Questions and Answers, *supra* note 22, at 5.

laws.⁴⁶ Therefore, an individual may receive a damage award from the ECHR but still have to meet the stipulations of a state-court decision.⁴⁷ Despite the possible limitations on remedies, the ECHR remains an avenue of relief when other options are foreclosed. Dubus exercised this option when its appeal to the French high court failed.

II. DUBUS S.A. V. FRANCE

A. *Facts and Procedure*

Dubus S.A. is a financial company headquartered in Lille, France, that specializes in executing trade orders for third parties.⁴⁸ In 1997 the inspector (“MR”) for the FBC opened an investigation against Dubus.⁴⁹ As a result, Dubus changed its administrative and accounting procedures, and a subsequent audit showed no anomalies.⁵⁰

In February and March of 2000, inspector MR again investigated Dubus.⁵¹ As a result of the investigation, the General Secretariat of the FBC issued a letter to Dubus, outlining regulatory offenses regarding Dubus’s “minimum capital investment providers.”⁵² A draft inspection report was sent as well.⁵³ Dubus’s chairman of the board of directors responded to the allegations that August.⁵⁴ Inspector MR then filed his final inspection report,⁵⁵ in light of which the FBC decided to initiate disciplinary proceedings against Dubus.⁵⁶ The president of the FBC notified Dubus of the commission’s decision in November.⁵⁷ In the letter, the president outlined multiple regulatory offenses found in inspector MR’s report.⁵⁸ The same day, the chairman of the FBC sent a letter to Dubus outlining two additional complaints.⁵⁹ Dubus responded to all of the complaints in a letter to the FBC General Secretariat in December.⁶⁰ On June 1, 2001, the General Secretariat submitted reply comments to Dubus and invited the company to appear before the FBC

46. See ECHR Questions and Answers, *supra* note 22, at 6.

47. See *id.* at 6.

48. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 5.

49. See *id.* ¶ 6.

50. See *id.*

51. See *id.* ¶ 7.

52. See *id.* ¶ 8.

53. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 9.

54. See *id.* ¶ 10.

55. See *id.* ¶ 11.

56. See *id.* ¶ 12.

57. See *id.* ¶ 13.

58. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 13.

59. See *id.* ¶ 14.

60. See *id.* ¶ 15.

in July and submit any further comments.⁶¹ Subsequently, Dubus submitted comments challenging the propriety of the disciplinary proceedings under Article 6 Section 1⁶² of the Convention and criticizing the overlap between various FBC functions and procedures.⁶³

Regardless, the FBC reached a decision in October 2001 and issued Dubus an official reprimand, which was delivered by the Secretariat General.⁶⁴ Dubus then appealed the FBC decision to the French Council of State.⁶⁵ In 2003, the Council of State denied Dubus's appeal, finding that sufficient safeguards were afforded to the defendant under the Convention.⁶⁶ As a result, Dubus lodged an application with the ECHR in January 2004.⁶⁷

B. *The ECHR Decision*

1. Threshold Inquiry

Dubus's application to the ECHR was considered by a chamber of seven judges.⁶⁸ As an initial matter, the chamber considered whether Article 6⁶⁹ of the Convention was applicable to the FBC proceedings.⁷⁰ First, the court noted that the Convention had applied to similarly situated French administrative authorities, such as the Competition Council.⁷¹ Second, the court found that the FBC sanctions could be construed as "criminal charges" under the Convention.⁷² In making this finding, the court applied the three factors outlined in *Engel and Others v. Netherlands*: (1) the legal definition of a crime under domestic law; (2) the nature of the offense; and (3) the degree of severity of the sanction to the firm.⁷³ The court focused its analysis on the third factor,

61. *See id.* ¶ 16.

62. *See* European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 6 § 1. In particular, art 6 § 1 reads: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

63. *See id.* ¶ 17.

64. *See Dubus*, App. No. 5242/04, *supra* note 1, ¶ 18.

65. *See id.* ¶ 19.

66. *See id.* ¶ 20.

67. *See id.* ¶ 1.

68. *See id.*

69. *See* text of art. 6 § 1 accompanying note 62.

70. *See Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 33-38.

71. *See id.* ¶ 35.

72. *See id.* ¶ 36.

73. *See id.*; *see* *Engel and Others v. Netherlands*, 22 Eur. Ct. H.R. (Ser. A) ¶¶ 82-85, available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (type "Engel" in the Case Title line).

noting that the French statute allowed for severe penalties against Dubus.⁷⁴ Moreover, the degree of severity is measured by the sanctions allowed — not the ones ultimately imposed.⁷⁵ Therefore, the severity of the sanctions against Dubus warranted a finding of criminal charges.⁷⁶ Finally, the court determined that based upon *Sramek v. Austria*, the FBC fell into the category of a “tribunal” under the Convention.⁷⁷ The court’s initial findings simply stated that Article 6 Section 1 of the Convention was implicated in *Dubus*.⁷⁸ The court then considered the merits of Dubus’s claim.⁷⁹

2. The Merits

In its application to the ECHR, Dubus argued that the FBC disciplinary proceedings violated Article 6 Section 1 of the Convention.⁸⁰ Specifically, Dubus alleged that it had not received a fair hearing by an independent and impartial tribunal.⁸¹ In support of its application, Dubus questioned the lack of distinction between the FBC’s indictment, investigation, and trial functions.⁸² For example, the General Secretariat participated in issuing the administrative warnings, sending the reply brief as part of the judicial proceedings, and sat as the rapporteur in the court proceedings.⁸³ Thus, an inference existed that the General Secretariat was a party to the deliberations on Dubus’s case.⁸⁴ Dubus essentially argued that the case was prejudged.⁸⁵

The chamber of seven noted that whether the FBC was an impartial tribunal depended upon the subjective interests of the judge and objective considerations of the proceedings.⁸⁶ However, the court focused on the objective considerations because Dubus failed to argue that the FBC judge was subjectively partial.⁸⁷ Therefore, the court considered all

74. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 37.

75. See *id.*

76. See *id.* ¶ 38.

77. See *id.*; see also *Sramek v. Austria*, 84-I Eur Ct HR (ser A) § 36 (1984), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (type “Sramek” in the Case Title line).

78. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 38.

79. See *id.* ¶ 53.

80. See *id.* ¶ 45.

81. See *id.* ¶¶ 46-49.

82. See *id.*

83. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 46-49.

84. See *id.*

85. See *id.*

86. See *id.* ¶ 14.

87. See *id.* ¶ 53.

aspects of the proceedings to determine whether the FBC could render an unbiased decision about disciplinary actions.⁸⁸

The court concluded that the General Secretariat's role in both the investigative and disciplinary aspects of the proceedings raised a reasonable doubt that the FBC was an independent and impartial tribunal.⁸⁹ The court noted the entire chain of events leading to the FBC's sanction, particularly the ambiguity of the General Secretariat's role.⁹⁰ The court also noted that the governing documents for the composition and powers of the various bodies within the FBC were vague.⁹¹ Thus, the French government's argument that the General Secretariat was an independent actor in the FBC was not persuasive.⁹² The court reasoned that the conflation of roles within the FBC reasonably could lead Dubus to believe that the same individuals acted as prosecutor and judge in the proceedings.⁹³ Finally, the court indicated that the FBC had the burden of erasing any impression during its proceedings that a party's guilt had been assumed from the beginning, and in Dubus's case the FBC fell short.⁹⁴

C. *Implications of Dubus*

Viewed against the backdrop of the current European legal landscape,⁹⁵ *Dubus* may have far-reaching implications. First, by accepting Dubus's application, the ECHR adopted a rather sympathetic view of business rights by finding that Dubus met the Article 6 Section 1 threshold requirements.⁹⁶ For example, in determining that the monetary damages against Dubus rendered the proceedings criminal, the court applied a relatively subjective test.⁹⁷ The court noted that at a certain point such sanctions became criminal; however, the ECHR failed to illustrate at what point monetary damages become punitive.⁹⁸ Thus, it appears that the ECHR will use some level of discretion in making such

88. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 55-60.

89. See *id.* ¶ 61.

90. See *id.* ¶¶ 55-60.

91. See *id.* ¶ 56.

92. See *id.* ¶ 61.

93. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 60.

94. See *id.* ¶¶ 60-61.

95. In particular, focusing on the Treaty of Lisbon and EU accession to the ECHR.

96. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 36-37; see European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 6; see also *Sramek v. Austria*, *supra* note 77, § 36; see also *Engel and Others v. Netherlands*, *supra* note 73, at 82-85.

97. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 36-37.

98. See *id.* ¶¶ 37-38.

determinations.⁹⁹ Future litigants, analogous to *Dubus*, may find the court receptive to arguments concerning the threshold requirements for Article 6 Section 1 of the Convention to apply.

Second, the ECHR's analysis of impartiality may affect agencies other than the FBC. Agencies in France and other European countries likely have procedures or functions similar to the FBC's.¹⁰⁰ For example, the EU Competition Commission's procedures in antitrust cases appear similar to the FBC's in that they fail to clearly delineate investigative and judicial functions within the agency.¹⁰¹ Furthermore, current applications on the ECJ and ECHR dockets feature arguments similar to those advanced in *Dubus*.¹⁰²

Finally, *Dubus* has the potential to become binding precedent not only on the members of the Council of Europe but also on the EU.¹⁰³ Since its inception, the Convention has applied to all signatories of the Council of Europe, which includes all member states of the EU.¹⁰⁴ However, the EU itself is not a signatory.¹⁰⁵ But on December 1, 2009, the Treaty of Lisbon became effective.¹⁰⁶ One provision of the Treaty declares that the EU will accede to the ECHR.¹⁰⁷ The ECHR, therefore, should garner authority in the EU concerning human rights.¹⁰⁸

99. See *id.* ¶¶ 36-38.

100. See *id.* ¶ 35 (noting that other French administrative authorities' sanctions rendered their proceedings criminal as well).

101. This is discussed later in the comment, and it is argued that they are analogous, but generally compare Commission Regulation 773/2004, 2004 O.J. (L123) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:123:0018:0024:EN:PDF> [hereinafter Commission Regulation 773/2004], with Banque de France Fact Sheet, available at <http://www.banque-france.fr/gb/supervi/telechar/com banc061204.pdf> [hereinafter FBC Fact Sheet].

102. See Charles Forelle, Report on Business, *Intel says EU fine violated rights*, WALL ST. J., Jul. 23, 2009, at 1.

103. See Peter van Dijk, Commentary at the European Commission for Democracy Through Law, *On the Accession of the European Union/European Community to the European Convention on Human Rights* ¶ 6 (Oct. 12, 2007), [http://www.venice.coe.int/docs/2007/CDL\(2007\)096-e.pdf](http://www.venice.coe.int/docs/2007/CDL(2007)096-e.pdf) [hereinafter Van Dijk Commentary].

104. See GOLDHABER, *supra* note 8, at 176-77.

105. See *id.*

106. See Lisbon-Treaty.org-Ratification, <http://www.lisbon-treaty.org/wcm/ratification.html> (last visited Sept. 18, 2010).

107. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at art. VI § 2.

108. See Van Dijk Commentary, *supra* note 103, ¶ 14.

III. EU ACCESSION

A. *Brief History of EU Courts and the ECHR*

Because the EU is not a signatory to the Convention, it traditionally has not considered itself bound by ECHR decisions.¹⁰⁹ Each member state of the EU, though, is bound by EU obligations and also by the Convention.¹¹⁰ In this regard, member states of the EU are in a precarious situation where they are bound to abide by both EU law and the Convention.¹¹¹ It is possible, for example, that a state could implement an EU regulation and simultaneously violate the Convention.¹¹² Such a scenario has yet to occur.¹¹³

Still, in cases concerning the Community law of the EU, the ECJ has interpreted the Convention to resolve a number of cases, and the ECJ's analysis has led to inconsistencies between the two courts.¹¹⁴ Thus, although the ECJ generally follows the ECHR's lead,¹¹⁵ a system of dual interpretations of the Convention has arisen.¹¹⁶

The ECHR has taken the view that cases concerning EU law should comport with the Convention, but the ECHR usually will defer to the EU's protection of human rights unless the ECHR finds such protection to be "manifestly deficient."¹¹⁷ The ECHR tends to give broad discretion to the ECJ, as the level of protection for human rights needs to be "comparable," not identical.¹¹⁸ But such deference does not mean that the ECHR will find itself unable to review decisions concerning EU law with respect to human rights under the Convention.¹¹⁹

In *Senator Lines GmbH v. Austria*, the ECHR narrowly avoided a confrontation with the EU courts.¹²⁰ In *Senator Lines*, the ECHR was tasked with determining whether an EU Commission's antitrust

109. See GOLDHABER, *supra* note 8, at 176-77.

110. See Van Dijk Commentary, *supra* note 103, ¶¶ 10-11.

111. See *id.*

112. See *id.*

113. See *infra* note 119; this situation has come close.

114. See GOLDHABER, *supra* note 8, at 176-77.

115. See Justice John L. Murray, *Speech: Fundamental Rights in the European Community Legal Order*, 32 *FORDHAM INT'L L.J.* 531, 538 (2009).

116. See GOLDHABER, *supra* note 8, at 176-77.

117. *Bosphorus v. Ireland*, 42 *Eur. Ct. H.R.* 1, ¶ 156 (2005), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (type "Bosphorus" in the Case Title line).

118. *Id.* ¶ 155.

119. See *id.* ¶¶ 156-57.

120. See GOLDHABER, *supra* note 8, at 176-77. See generally *Senator Lines GmbH v. Austria*, App. No. 56672/00 13, available at http://www.menschenrechte.ac.at/orig/04_2/Senator_EU_ZE.pdf.

proceedings violated the Convention.¹²¹ Before the ECHR rendered a decision, the European Court of First Instance rescinded the monetary sanctions against the applicant, Senator Lines, thus stripping it of the injury requirement in the ECHR proceedings.¹²² Therefore, the issue of which court is the final arbiter of the Convention remains unresolved.¹²³

B. Conflicts in Convention Interpretation: ECJ v. ECHR

While the ECJ generally will follow ECHR decisions,¹²⁴ it has diverged from the ECHR on a number of issues.¹²⁵ For example, the ECJ generally has narrowly construed the rights of businesses under Article Six and Article Eight of the Convention.¹²⁶ The ECHR, conversely, has recognized broader rights for businesses.¹²⁷ For example, the ECJ has found that Article Six of the Convention offers no protection against giving evidence against oneself,¹²⁸ whereas the ECHR has recognized such rights and extended them to discovery requests.¹²⁹ Furthermore, the ECJ has been more willing to uphold government raids of businesses under Article Eight,¹³⁰ whereas the ECHR has reached the opposite conclusion.¹³¹ With the EU's accession to the Convention through Treaty of Lisbon ("Treaty"), however, such divergences in interpretation may be reconciled.¹³²

121. See GOLDHABER, *supra* note 8, at 176-77. See generally *Senator Lines*, App. No. 56672/00 13, *supra* note 120.

122. See GOLDHABER, *supra* note 8, at 176-77. See generally *Senator Lines*, App. No. 56672/00 13, *supra* note 120.

123. See GOLDHABER, *supra* note 8, at 176-77. See generally *Senator Lines*, App. No. 56672/00 13, *supra* note 120.

124. See Justice John L. Murray, Speech, *supra* note 115, at 538.

125. See GOLDHABER, *supra* note 8, at 177.

126. See *id.*

127. See *id.*

128. See Case 374/87, *Orkem v. Comm'n*, 1989 E.C.R. 3283 ¶¶ 29-30, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0374:EN:HTML>.

129. See *Funke v. France*, 256-A Eur. Ct. H.R. (ser. A) ¶ 44 (1993), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (type "Funke" in the Case Title line).

130. See GOLDHABER, *supra* note 8, at 177. Article Eight provides that "everyone has the right to respect for his private . . . life, his home, and his correspondences." Again, under the Convention, "everyone" applies also to businesses; see also *European Convention on Human Rights and Fundamental Freedoms*, *supra* note 15, at art. 8.

131. See GOLDHABER, *supra* note 8, at 177.

132. See Murray, *supra* note 115, at 547.

C. *Accession as a Means of Reconciliation?*

One prominent theme of the Treaty, with respect to accession, is open dialogue between the EU, ECJ, and ECHR.¹³³ The ECJ's current deference to the ECHR in most matters suggests strong ties already, and if the EU signs the Convention, those ties presumably will become stronger. In particular, the Treaty refers to "the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention."¹³⁴

The Treaty also indicates that the EU's policy on human rights will be guided by the Convention. The Treaty's preamble states that "pursuant to Article 6(3) of the Treaty on European Union, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union's law as general principles."¹³⁵ Such language may provide headway in simplifying the relationship between the EU, the ECJ and the ECHR.¹³⁶ However, the Treaty likely will not eradicate tension between the ECJ and the ECHR.¹³⁷

ECHR decisions applying the Convention have involved state actors only, and provide guidance for state actors.¹³⁸ However, the EU is an international organization with powers delegated by member states.¹³⁹ It is unclear to what extent the differences between state actors and international organizations will affect the ECHR and Convention interpretation. In particular, one commentator has suggested that the ECHR's focus on state actors and their concerns may not currently provide sufficient guidance to the EU and its institutions about correct Convention interpretation.¹⁴⁰ Thus, ECHR jurisprudence, formed to guide state actors, may be interpreted differently by the ECJ because the ECJ is part of the EU, an international organization.¹⁴¹ Therefore, dialogue between the courts, and certain other steps, such as delegating an EU judge to sit in ECHR deliberations, may be important to foster

133. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at Decl. on art. VI § 2 of the Treaty on European Union.

134. *Id.*

135. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at Protocol on Asylum for Nationals of the Union.

136. See Murray, *supra* note 115, at 547.

137. See *id.*

138. See Van Dijk Commentary, *supra* note 103, ¶ 14.

139. See *id.*

140. See *id.* ¶¶ 5 and 14.

141. See *id.* ¶ 14.

uniformity and clarification in Convention interpretation.¹⁴² Specifically, having an EU judge participate in ECHR cases concerning the EU may help alleviate stress between different interpretations of the Convention as it relates to EU law.

A further source of divergence between the ECJ and the ECHR may concern a provision in the Treaty of Lisbon that gives legal status to the EU's own instrument concerning human rights, the Charter of Fundamental Rights ("the Charter").¹⁴³ The Charter outlines fundamental and human rights, some of which are not included in the Convention.¹⁴⁴ Additionally, some Charter provisions that tend to follow the Convention actually diverge from it slightly.¹⁴⁵ However, such divergences may be resolved simply by applying the reasoning in *Bosphorus*.¹⁴⁶ The ECHR would give the ECJ discretion to apply the Charter as long as it closely matched the Convention, and would only accept an application if a Charter provision offered insufficient protection of fundamental human rights under the Convention.¹⁴⁷ However, if the EU is to actually accede to and be bound by the Convention, an argument exists that relevant Charter provisions should at least mirror the Convention in application.¹⁴⁸ Because both the Charter and the Convention address the same rights, applying concurrent provisions identically would be less ambiguous and leave less room for confusion or divergence between the ECJ and the ECHR.¹⁴⁹

In light of the Charter and accession, the ECJ and the ECHR may witness a convergence of their case law but simultaneously confront new potential sources of divergence. Ultimately, from the wording of the Treaty of Lisbon, the level of conformity likely will depend upon the actions of the EU in actually acceding to the Convention.¹⁵⁰

142. *See id.* Van Dijk also indicated that another possibility is allowing for the ECHR to issue advisory opinions to the ECJ.

143. *See* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at art. VI § 1.

144. *See* Charter of Fundamental Rights of the European Union, pmbi., 2000 O.J. (C 364) 1 (explaining that the protections therein were derived from state constitutions, the Treaty of the EU, the Convention, and case law of the ECJ, among other sources).

145. For example, the Charter describes the right to marriage in more neutral terms, which negates the language "men and women" in the Convention. *Compare* European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 12, with Charter of Fundamental Rights of the European Union, *supra* note 144, at art. 9.

146. *See* Van Dijk Commentary, *supra* note 103, ¶ 16. *See also* *Bosphorus*, *supra* note 117, ¶ 156.

147. *See* Van Dijk Commentary, *supra* note 103, ¶ 16.

148. *See id.* ¶ 27.

149. *See id.*

150. *See* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at art. 188N § 8.

D. Potential Issues in EU Accession and ECHR Authority

Recently, Protocol 14 to the Convention was ratified by all member states in the Council of Europe.¹⁵¹ Protocol 14 states that “[t]he European Union may accede to this Convention.”¹⁵² By ratifying Protocol 14, the Council of Europe took an important step to allow the EU to accede to the Convention because previously the Convention restricted membership to states.¹⁵³ Still, despite the unambiguous wording in Protocol 14, a number of potential hurdles to accession exist.

The first hurdle exists because, while the Treaty stipulates that the EU will accede to the Convention, the actual accession requires ratification by each member state in the EU.¹⁵⁴ The Treaty further restricts EU accession by incorporating a protocol for “preserving the specific characteristics of the Union and Union law. . . .”¹⁵⁵ In particular, this protocol includes the possibility of the EU participating in the controlling body of the Convention, and the way in which non-member proceedings will be addressed to the EU or its member states.¹⁵⁶ Additionally, Article 2 of the protocol states that the accession will not “affect the competences of the [European] Union or the power of its institutions.”¹⁵⁷ This provision poses an interesting question: what will affect the power of EU institutions? Without an additional explanation, it is unclear whether an adverse ruling by the ECHR would inhibit an EU institution’s power. If the ECJ is an EU institution,¹⁵⁸ then accession almost certainly would affect the ECJ’s power in some manner.¹⁵⁹

The second potential hurdle to EU accession is that the above protocol incorporated by the Treaty may conflict with the Convention. Specifically, Article 57 of the Convention allows for signatories to make reservations for specific laws that do not conform with the

151. See Chart of Signatures and Ratifications, Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, E.T.S. 194, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=&DF=&CL=ENG>.

152. Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, E.T.S. 194, at art. 17 § 2, available at <http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm>.

153. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, at art. 59.

154. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at art. 188N § 8.

155. *Id.* at Protocol To Art. 6 § 2 of the Treaty on European Union on the Accession of the Union art 1.

156. See *id.* at art. 1 (a)-(b).

157. See *id.* at art. 2.

158. See EU Commission website, http://europa.eu/institutions/inst/index_en.htm (including the ECJ as one of the EU’s institutions).

159. See Van Dijk Commentary, *supra* note 103, ¶¶ 14-15.

Convention.¹⁶⁰ However, reservations may not be *general* in nature.¹⁶¹ By stating that accession will not affect the Union or its institutions' powers, the Treaty appears to provide a general reservation for inconsistencies between EU law and the Convention.¹⁶² Therefore, under Article 57 of the Convention, the EU should attempt to outline with specificity which laws conflict with the Convention and may be reserved by the EU. Declaring all inconsistencies in favor of EU laws and powers would seem to defeat the purpose of acceding to the Convention, and would directly conflict with Article 57.

A final setback is that the EU is not a sovereign state.¹⁶³ Its accession to the Convention might entail additional and unique difficulties that other signatories, namely sovereign states, did not encounter.¹⁶⁴ For example, the EU has established a body of law that spans twenty-seven countries.¹⁶⁵ Such widespread influence is one reason to seek uniformity through accession. But such widespread influence also indicates that accession must be carefully constructed. Therefore, the EU and the Council of Europe should ensure that their interests are clearly stated and understood.

In sum, the EU accession likely will occur, though precisely when is unclear, as both the EU and Council of Europe have expressed a desire to have the EU as a signatory. However, the terms on which the EU accedes appear uncertain and likely will be the result of negotiations amongst the EU member states and between the EU and the Council of Europe.

IV. THE EUROPEAN COMMISSION ON COMPETITION UNDER *DUBUS*

Assuming that the EU accedes, EU institutions may fall under the ambit of the ECHR's jurisdiction.¹⁶⁶ If the ECHR gains jurisdiction over the EU and its institutions, the outcome and reasoning in *Dubus* likely will be applicable.¹⁶⁷ Therefore, EU institutions that operate similarly to the FBC may be susceptible to an application lodged with the ECHR under Article 6 of the Convention. One such institution is the European Commission on Competition ("ECC").

160. See European Convention on Human Rights and Fundamental Freedoms, *supra* note 15, ¶ 57.

161. See *id.*

162. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *supra* note 10, at Protocol to arts. 6 § 2, art. 2.

163. See generally Europa Official EU Portal, Key Facts and Figures, http://europa.eu/abc/keyfigures/index_en.htm.

164. See Van Dijk Commentary, *supra* note 103, ¶ 14.

165. See Europa Official EU Portal, Key Facts and Figures, *supra* note 163.

166. Van Dijk Commentary, *supra* note 103, ¶¶ 14-15.

167. *Id.*

A. *ECC v. FBC: A Comparison*

While the ECC and FBC serve different purposes, their powers and operations are analogous.¹⁶⁸ For example, both organizations operate to ensure that companies and associations comply with existing law.¹⁶⁹ To fulfill their purposes, the ECC and FBC have received extensive powers.¹⁷⁰

One power that the ECC and FBC wield is the right to investigate companies for alleged violations,¹⁷¹ though the extent and means of the investigations can differ.¹⁷² A second power common to both institutions is the power to create a judicial body whose decisions are subject to review by a higher court.¹⁷³ Any decision by the ECC may be appealed to the ECJ, and any decision by the FBC may be appealed to the Conseil d'Etat.¹⁷⁴ Moreover, the accompanying regulations for both institutions indicate that the ECC and FBC serve only as administrative courts.¹⁷⁵ By characterizing the institutions as merely administrative courts, ECC and FBC regulations purport to limit jurisdiction to non-criminal adjudications.¹⁷⁶ The scope of ECC and FBC judgments includes various remedies, such as reprimands, injunctions, and fines; but specific

168. Compare FBC Fact Sheet, *supra* note 101, at 5; with Council Regulation (EC) No. 1/2003, 2003 O.J. (L1) 1, Implementation of Articles 81 and 82 of the EC Treaty, art. 1, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R0001&model=guichett [hereinafter Council Regulation 1/2003].

169. Compare FBC Fact Sheet, *supra* note 101, at 5 (indicating that the FBC enforces French banking regulations); with Council Regulation 1/2003, *supra* note 168, at art. 1 (the ECC enforces EU antitrust laws among others).

170. See, e.g., FBC Fact Sheet, *supra* note 101, at 4-7; Council Regulation 1/2003, *supra* note 168, at arts. 19, 20, and 27.

171. See FBC Fact Sheet, *supra* note 101, at 4; Council Regulation 1/2003, *supra* note 168, at arts. 19, 20, and 27.

172. Compare *id.* Though it is outside the scope of this article, the ECC's investigative techniques, including dawn raids and raids of managers' homes, may violate the Convention as well. See GOLDHABER, *supra* note 8, at 176-77 (indicating that the ECHR traditionally has afforded greater protection to businesses especially concerning the right to privacy).

173. See FBC Fact Sheet, *supra* note 101, at 4; Council Regulation 1/2003, *supra* note 168, at art. 20.

174. See Council Regulation 1/2003, *supra* note 169, at art. 20; FBC Fact Sheet, *supra* note 101, at 4.

175. See Council Regulation 1/2003, *supra* note 169, at art. 23; FBC Fact Sheet, *supra* note 101, at 3.

176. Compare FBC Fact Sheet, *supra* note 101, at 3; with Council Regulation 1/2003, *supra* note 168, at art. 23.

remedies can differ in form and magnitude.¹⁷⁷ Finally, the ECC and FBC share the characteristic of transparency—or lack thereof.¹⁷⁸

While the ECC and FBC derive their powers from legislation and regulations, the application of their powers is not readily apparent.¹⁷⁹ In particular, both institutions' investigative and judicial powers are not clearly distinguished.¹⁸⁰ In *Dubus*, the ECHR reasoned that the Secretariat General's role in the actual decision was unclear, and may well have extended beyond an investigative function.¹⁸¹ Similarly, the regulations and guidelines for the ECC fail to separate investigators from final arbiters on a given case.¹⁸² Because many cases are opened against companies based on information obtained by investigators, the lack of a crisp line distinguishing investigators from judges may suggest that a given company was prejudged.¹⁸³

B. *The Case for an Article 6 Violation*

If the ECHR accepts an application against the ECC alleging a violation of Article 6 Section 1 of the Convention, it likely will follow the reasoning in *Dubus*. Under a *Dubus*-like analysis, the same factors that rendered the FBC liable, namely vagueness of its functions and the appearance of partiality, could also apply to the ECC.¹⁸⁴

1. *Dubus* in Application

The ECC supports the slogan, "making markets work better."¹⁸⁵ However, this slogan, like the ECC's operations, leaves to the imagination exactly how the ECC actually adjudicates claims against companies. Under *Dubus*, the ECC first must show that it does not fall under the threshold application requirements of the Convention, then that it has provided a fair and impartial tribunal per Article 6 Section 1 of the Convention.¹⁸⁶ The ECC likely will fail with both arguments. The threshold requirements under the Convention, as stated in *Dubus*, ask

177. Compare FBC Fact Sheet, *supra* note 101, at 6-7; with Council Regulation 1/2003, *supra* note 168, at art. 23.

178. *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 59-61.

179. See generally FBC Fact Sheet, *supra* note 101, at 5-6; Council Regulation 1/2003, *supra* note 168, at arts. 19, 20, 23, and 27.

180. See generally FBC Fact Sheet, *supra* note 101, at 5-6; Council Regulation 1/2003, *supra* note 168, at arts. 19, 20, 23, and 27.

181. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 60-61.

182. See Council Regulation 1/2003, *supra* note 168, at arts. 19, 20, 23, and 27.

183. See Council Regulation 1/2003, *supra* note 168, at pmb. 17 and art 11.

184. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 60-61.

185. ECC Website, http://ec.europa.eu/competition/index_en.html.

186. *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 36-8 and 59-61.

whether the ECC operates as a tribunal, and whether it conducts criminal proceedings.¹⁸⁷

a. Tribunal analysis

In determining whether the ECC is a tribunal under the Convention, the ECHR likely will use the test outlined in *Sramek v. Austria*.¹⁸⁸ In *Sramek*, the ECHR reasoned that under the Convention, a tribunal in the “substantive sense” is a judicial body whose “function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.”¹⁸⁹

The *Sramek* court also indicated that the Regional Authority in question constituted a tribunal “established by law” because the Austrian government passed an act providing the Authority’s creation.¹⁹⁰ Similarly, when the ECC renders decisions, it acts within its statutorily prescribed power and applies EU law.¹⁹¹ Therefore, based solely on *Sramek*, the ECHR likely could consider the ECC a tribunal. Furthermore, because the ECC shares many characteristics with the FBC,¹⁹² a finding that the ECC is a tribunal under the Convention would not depart from the findings in *Dubus*.¹⁹³

b. Criminal adjudications analysis

Next, the court must determine whether ECC decisions are criminal in nature.¹⁹⁴ Drawing on *Dubus* and *Engel and Others v. Netherlands*,¹⁹⁵ the ECHR likely will find that the ECC conducts criminal proceedings. Three factors support such a finding.

The first factor is the severity of the sanction against the defendant. If the ECHR follows the *Dubus* court in focusing on the severity of the sanction against the defendant, then the ECC proceedings should be considered criminal.¹⁹⁶ For example, the ECC is empowered to fine a company up to ten percent of the preceding year’s total turnover.¹⁹⁷ For some companies, ten percent of their yearly turnover equals billions of

187. *See id.*

188. *See Sramek v. Austria*, *supra* note 77, ¶ 36.

189. *Id.*

190. *Id.*

191. *See Generally* Council Regulation 1/2003, *supra* note 168, at pmb. 22-37.

192. *Compare* FBC Fact Sheet, *supra* note 101, at 5; *with* Council Regulation 1/2003, *supra* note 168, at art. 1.

193. *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 38.

194. *See id.* ¶¶ 36-37.

195. *See Engel and Others*, 22 Eur. Ct. H.R. (Ser. A), *supra* note 73, ¶¶ 82-5.

196. *See id.* ¶¶ 37-38.

197. *See* Council Regulation 1/2003, *supra* note 168, at art. 23 § 2.

dollars or Euros.¹⁹⁸ By comparison, the FBC's fine in *Dubus* was 50,000 Euros, but it was still found to reach the level of a criminal proceeding.¹⁹⁹ Furthermore, ECC's discretion to fine a defendant less than the full ten percent is irrelevant because the ECHR takes into consideration the maximum fine allowed when determining whether a proceeding is criminal in nature.²⁰⁰

The second factor concerns other punitive measures against a defendant. Under Article 2 Section 2 of the ECC's regulations, the ECC may publicize the initiation of proceedings against a company.²⁰¹ In *Dubus*, the court considered both monetary fines and the possible negative effects on companies as a result of the FBC proceedings.²⁰² The *Dubus* court noted that FBC proceedings were public and could severely impact a company.²⁰³ Likewise, the ECHR would probably view the ECC's publication of proceedings against a company as a punitive measure.

The third factor concerns the way in which ECC regulations characterize ECC proceedings. Even though the ECC antitrust regulations explicitly state that ECC proceedings are *not* criminal in nature,²⁰⁴ for the purposes of the Convention the ECHR likely will construe them as such. For example, the FBC regulations state that the banking commission serves only as an administrative court; however, both the ECHR and the Conseil d'Etat in France have characterized FBC proceedings as criminal.²⁰⁵

The ECHR should be able to apply the *Dubus* analysis to conclude that the ECC is a tribunal under the Convention and that it conducts criminal proceedings. Furthermore, the ECHR may find that the ECC does not act in an independent and impartial capacity as required under Article 6 Section 1 of the Convention.

c. The Article 6 violation

The *Dubus* court noted two failures by the FBC which supported an inference of partiality.²⁰⁶ First, FBC regulations were too vague and did

198. See, e.g., Case COMP/C-3/37.990—Intel. Comm'n Decision (May 13, 2009) ch. IX § 3.2, available at http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf.

199. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 37.

200. See *id.*

201. See Commission Regulation 773/2004, *supra* note 101, at art. 2 § 2.

202. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 37.

203. *Id.*

204. See Council Regulation 1/2003, *supra* note 169, at art. 23 § 5.

205. See FBC Fact Sheet, *supra* note 101, at 3; *Dubus*, App. No. 5242/04, *supra* note 1, ¶ 37.

206. See *Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 56, 59-61.

not clearly outline the commission's separate functions.²⁰⁷ Second, the General Secretariat's role in the actual decision was unclear.²⁰⁸ Thus, it was not apparent where the investigative function ended and the judicial function began.²⁰⁹ The ECC suffers from this problem, as well.²¹⁰

Whether the ECC is an impartial tribunal rests on subjective and objective considerations.²¹¹ Although the ECHR did not have a reason to examine the subjective views of the FBC judge in *Dubus*, it noted that a defendant could allege subjective partiality.²¹² The court further noted, however, that an allegation of subjective partiality is difficult to maintain because a presumption exists that judges are impartial.²¹³ Therefore, ECC liability likely will hinge on objective considerations surrounding the entire ECC proceedings.²¹⁴ As the *Dubus* court noted, appearances of impartiality are crucial to a well functioning legal system.²¹⁵ Therefore, the tribunal has the burden of erasing any specter of partiality.²¹⁶

ECC regulations and guidelines provide information on the existing law and sanctions but are not indicative of the separate functions within the ECC.²¹⁷ Rather, the regulations state that the "commission" investigates suspected violations of EU law and reaches a decision.²¹⁸ In particular, ECC regulations tend to focus on the ECC's ability to investigate alleged violations EU law, but they are silent on the ECC's decision-making process or judicial function.²¹⁹ Moreover, ECC opinions fail to show a separation between its investigators and judges.²²⁰ Intel Corporation²²¹ is a good example because the ECC decision spans 518 pages, of which the ECC's procedure receives five.²²² And like the regulations, the five-page procedural section describes mainly investigative functions performed by the "commission" and fails to

207. *See id.* ¶ 56.

208. *See id.* ¶¶ 59-61.

209. *See id.*

210. *See generally* Commission Regulation 773/2004, *supra* note 101.

211. *See Dubus*, App. No. 5242/04, *supra* note 1, ¶ 53.

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.* at 53-54.

216. *See Dubus*, App. No. 5242/04, *supra* note 1, ¶ 60.

217. *See generally* Commission Regulation 773/2004, *supra* note 101; Council Regulation 1/2003, *supra* note 168.

218. *See* Commission Regulation 773/2004, *supra* note 101, at ch. 3, arts. 1-11.

219. *See* Commission Regulation 773/2004, *supra* note 101, at chs. 1-3.

220. *See, e.g.*, Case COMP/C-3/37.990—Intel. Comm'n Decision (May 13, 2009), *supra* note 198, at ch. II.

221. *See, e.g.*, Case COMP/C-3/37.990—Intel. Comm'n Decision (May 13, 2009), *supra* note 198.

222. *See id.*

describe any semblance of a judicial process.²²³ By comparison, the ECC's operations appear less clear than those of the FBC.²²⁴ FBC guidelines at least partially detail the General Secretariat's duties, which, in theory, are distinct from the judicial process.²²⁵ The ECC, however, makes no attempt to describe separate functions; rather, it seems the term "commission" is to serve that purpose.²²⁶ To claim that the ECC operations adequately remove any specter of partiality for a defendant company runs counter to the decision in *Dubus*. Therefore, a defendant company, as in *Dubus*, may have a persuasive argument that the same individuals who investigated the case were the same as those who decided it.²²⁷

The ECC can argue that its decisions are independent and impartial because each decision is first submitted to a separate committee for discussion.²²⁸ But this argument may fail. First, the committee does not bind the ECC but merely provides input.²²⁹ Second, the ECC chairs the committee.²³⁰ Thus, any inference of partiality likely will be imputed to the committee, as well.

V. CONCLUSION

The breadth of *Dubus*' applicability depends on many factors. For instance, how the EU actually accedes to the Convention may affect how far the ECHR's jurisdiction reaches. However, if EU institutions become subject to the ECHR, then companies may find a new avenue for redress under the reasoning of *Dubus*. The ECC shares many characteristics with the FBC and, therefore, may be liable under Article 6 of the Convention. After accession, the ECC may be forced to reconsider its operations and to provide a tribunal that can separate judgment from investigation.

223. *See id.*

224. Compare FBC Fact Sheet, *supra* note 101; with Council Regulation 1/2003, *supra* note 168, Implementation of Articles 81 and 82 of the EC Treaty. *See also Dubus*, App. No. 5242/04, *supra* note 1, ¶¶ 1-18.

225. *See* FBC Fact Sheet, *supra* note 101, at 5-6.

226. *See* Commission Regulation 773/2004, *supra* note 101, at ch. 3. *See also* Case COMP/C-3/37.990—Intel. Comm'n Decision (May 13, 2009), *supra* note 198, at ch. 2.

227. *See Dubus*, App. No. 5242/04, *supra* note 1, ¶ 60.

228. *See* Commission Regulation 773/2004, *supra* note 101, at art. 14.

229. *See id.*

230. *See id.*