

**AN EVALUATION OF THE RIGHTS OF DEFENSE
DURING ANTITRUST INSPECTIONS
IN THE LIGHT OF THE CASE LAW OF THE ECtHR:
WOULD THE ACCESSION OF THE EUROPEAN UNION
TO THE ECHR BRING ABOUT A SIGNIFICANT CHANGE?**

Working Paper IE Law School

WPLS10-04

29-04-2010

Charlotte Leskinen

Adjunct Professor of Law
Fellow, Center for European Studies/IE
IE Law School
Castellón de la Plana, 8
28006 Madrid
charlotte.elisabeth@ie.edu

Abstract

The Lisbon Treaty provides that the European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This paper aims to establish whether the accession of the European Union to the ECHR would bring about a significant change regarding the protection of rights of defense that undertakings can invoke during inspections conducted in the course of investigations of alleged violations of the EU antitrust rules. The paper will examine the relevance of the case law of the European Court of Human Rights in this context by comparing the protection of the rights of defense granted under European Union law with the case law of the ECtHR. It will then draw some conclusions on the differences between the protection granted under European Union law and the ECHR and will outline the implications of the accession for the level of the protection of fundamental rights.

Keywords

Fundamental rights, rights of defense, antitrust, ECtHR, ECHR, European Union law, self-incrimination, inspection, legal professional privilege.

The publishing of Serie Working Papers IE-Law School is sponsored by Cátedra Jean Monnet-IE
Copyright ©2010 by Charlotte Leskinen, Professor at IE Law School.
This working paper is distributed for purposes of comment and discussion only. It may not be
reproduced without permission of the copyright holder.
Printed at IE Publishing Department, Madrid. Spain.

1. Introduction¹

The Lisbon Treaty, which entered into force on 1 December 2009, provides that the European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.² This raises several interesting questions, such as what will be the competence of the European Court of Human Rights to rule on issues of European Union law and how will the accession influence the policy-making of the European Union institutions and, in particular, the European Commission (hereinafter “the Commission”)? The field of antitrust law is particularly interesting since the Commission has extensive powers of investigation and can conduct inspections in business and private premises in order to investigate suspected antitrust violations. In addition, the fines imposed by the Commission for antitrust violations have significantly increased over the last years.³ Therefore, it is not surprising that undertakings are more frequently invoking violations of their rights of defense in antitrust proceedings. As a result, the significance of fundamental rights in the antitrust law context appears to be increasing and one may ask how the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the ECHR”) would change the possibilities of undertakings invoking breaches of fundamentals rights protected by the ECHR?

Consequently, this paper intends to establish whether the future accession of the European Union to the ECHR would bring about a significant change regarding the protection of the rights of defense that undertakings can invoke during inspections conducted in the course of investigations of alleged violations of the EU antitrust rules. To this aim, the paper will first examine the relevance of the case law of the European Court of Human Rights (hereinafter “the ECtHR”) for European Union Law in general and then for EU competition law, in particular. Second, it will analyze the rights of defense that must be protected during inspections in antitrust cases by comparing the protection granted under European Union law with the case law of the ECtHR on corresponding fundamental rights. Third, the paper will assess the significance of the future accession of the European Union to the ECHR for the protection of the rights of defense in antitrust cases and will draw some conclusions on the differences between the protection granted under European Union law and the ECHR as well as the implications thereof.

¹ A previous version of this paper has been submitted as a research paper at the Complutense University of Madrid.

² Article 6(2) of the Treaty on the European Union (hereinafter “TEU”).

³ On the increase of fines, *cf.*, for instance, FORRESTER, I.S.: “Due Process in EC competition cases: A distinguished institution with flawed procedures”, *E.L. Rev.*, Volume 34, December 2009, p. 817-843, at p. 824-826.

2. Relevance of the case law of the ECtHR

2.1. Position of the case law of the ECtHR in European Union law

Initially, the founding Treaties merely mentioned some fundamental rights, such as the non-discrimination in the field of the free movement of persons. Therefore, only since the adoption of the Treaty of Maastricht and the introduction of Article F [now Article 6(3) TEU] is there an express legal basis for fundamental rights in the Treaties. Pursuant to Article 6(3) TEU, “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. Subsequently, the Treaty of Amsterdam introduced the possibility of imposing sanctions on Member States which did not respect fundamental rights.⁴ The possibility of imposing sanctions was further strengthened by the Treaty of Nice which provided that already the existence of a serious and persistent breach would be sufficient for the European Union to take actions to suspend the voting rights or to impose another type of sanction on the Member State which is about to breach the fundamental rights.⁵

Instead, the protection of fundamental rights has, above all, been developed by the case law of the European Court of Justice (hereinafter “the ECJ”). The first time that the ECJ was requested to rule on a question related to fundamental rights, the Court stated that it lacked competence to rule on the issue because the fundamental rights formed part of the national law of the Member States and the ECJ normally only had jurisdiction over Community law.⁶ Starting with the case *Stauder*⁷ in 1969, the ECJ changed its stance on its competence in the field of the protection of fundamental rights. In that case, the ECJ referred for the first time to fundamental rights contained in the general principles of law and confirmed that it corresponded to it to ensure the respect of these fundamental rights.⁸ Then, in *Internationale Handelsgesellschaft*,⁹ the ECJ developed the case law established *Stauder* by holding that the “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”¹⁰ Consequently, the ECJ held that it was the only one competent to interpret what the general principles of Community law were.

In *Nold*,¹¹ the ECJ confirmed its ruling in *Internationale Handelsgesellschaft*. The Court recalled that “fundamental rights form an integral part of the general principles of law, the

⁴ Article 7 TEU.

⁵ The Treaty of Nice added the first paragraph to Article 7 TEU.

⁶ Case 1/58, *Stork & Cie. V. ECSC High Authority*, [1959] ECR p. 43.

⁷ Case 29/69, *Stauder*, [1969] ECR p. 419.

⁸ Case 29/69, *Stauder*, [1969] ECR p. 419, at § 7.

⁹ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR p. 1125.

¹⁰ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR p. 1125, at § 4.

¹¹ Case 4/73, *Nold KG v. Commission*, [1974] ECR p. 491.

observance of which [the ECJ] ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law".¹² The novelty of this judgment was that the ECJ referred to international treaties for the protection of fundamental rights, thus alluding to their significance as an instrument of reference for the interpretation of fundamental rights in the Community.

The following year, in *Roland Rutili*,¹³ by referring to concrete articles of the ECHR, the ECJ expressly recognized the significance of the ECHR as an instrument of reference for the interpretation of the fundamental rights. In the subsequent years the ECJ has indeed often referred to the ECHR while deciding matters where a breach of those rights has been invoked.¹⁴

In its opinion 2/94,¹⁵ the ECJ affirmed the particular position of the ECHR among the international instrument for the protection of fundamental rights. However, it ruled that the Community did not have competence to accede to the ECHR, as the Community law stood at the date of the opinion.¹⁶ It held that although the respect for human rights constituted a requirement for the legality of Community measures, the accession to the ECHR would entail a substantial change to the Community regime for the protection of human rights in force at the time, as it would imply the insertion of the Community into a distinct international institutional system and the integration of the whole body of the provisions of the Convention into the Community legal order. Such a modification of the regime for the protection of human rights could thus only be implemented through an amendment of the Treaty.¹⁷

As the EU is not yet a member of the Convention, its institutions are not bound by ECHR case law as such.¹⁸ Arguably, this is a truth with modification. According to Article 6(3) TEU, the European Union has to respect fundamental rights as guaranteed by the ECHR and, consequently, it could not ignore the case law of the ECtHR. However, what is lacking is a system of control, *i.e.* as the law stands, it is not possible to hold the European institutions

¹² Case 4/73, *Nold KG v. Commission*, [1974] ECR p. 491, at § 13.

¹³ Case 36/75 *Roland Rutili v. Ministre de l'intérieur*, [1975] ECR p. 1219.

¹⁴ *Cf.* for example Case 136/79 *National Panasonic v. Commission*, [1980] ECR p. 2033 and Case C-112/00 *Schmidberger*, [2003] ECR p. I-5659.

¹⁵ Opinion 2/94 on Accession of the Community to the ECHR, [1996] ECR p. I-1759.

¹⁶ Opinion 2/94 on Accession of the Community to the ECHR, [1996] ECR p. I-1759, at § 36.

¹⁷ Opinion 2/94 on Accession of the Community to the ECHR, [1996] ECR p. I-1759, at § 34-35.

¹⁸ *Cf.* AMEYE, E. M.: "The Interplay between Human Rights and Competition Law in the EU", *E.C.L.R.* 2004, volume 25, issue 6, p. 332-341, at p. 334. The European Commission of Human Rights and the ECtHR had considered that actions brought before the ECtHR against the Community institutions were incompatible *ratione personae* due to the fact that the Communities were not parties to the ECHR. Nevertheless, the ECtHR was competent with regard to actions in which the issue related to the national legislation or measures adopted by the Member State in question when applying Community law. *Cf.* MORTE GÓMEZ, C.: "El papel del Convenio Europeo de Derechos Humanos en el sistema de derechos fundamentales de la Unión Europea" in ÁLVAREZ CONDE, E. and GARRIDO MAYOL, V. (Dir.): "Comentarios a la Constitución Europea Libro II. Los Derechos y Libertades", Valencia, 2004.

liable for breaches of the ECHR since it is not a Contracting Party to the Convention and, therefore, the ECtHR has no jurisdiction over cases involving an alleged breach by a Community institution of a right guaranteed by the ECHR.

Starting with *Stauder*, in which the ECJ referred to the fundamental rights contained in the general principles of Community law, the Court has gradually given increasingly more importance to fundamental rights. First, by referring to the common constitutional traditions of the Member states,¹⁹ and, then, by giving more importance to international treaties for the protection of fundamental rights and, especially, to the ECHR.²⁰ In the next phase, the practice was to expressly refer to concrete articles of the ECHR and taking into consideration the significance of the ECHR for the interpretation of fundamental rights.²¹ In the last years, the ECJ has taken into account the case law of the ECtHR and has even referred to that jurisprudence.²² Consequently, today the case law of the ECtHR appears to be a source of reference also for the ECJ when it is deciding issues of European Union law.

Finally, it should be noted that the Lisbon Treaty has introduced a legal basis for the European Union to accede to the ECHR that expressly states that the “*Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*”.²³ The consequence of the accession of the European Union to the ECHR for the application of fundamental rights in the field of antitrust law will therefore be analyzed in Chapter 4 of this paper.

2.2. Position of the case law of the ECHR in EU competition law

In general, European Union law provides an extensive protection of the rights of defense. The respect of such rights is a fundamental principle and it is, for instance, applied to proceedings against certain persons in which sanctions may be imposed, such as in antitrust cases, as has been confirmed, for instance, in *Hoechst*.²⁴ If the rights of defense in antitrust cases are violated, the decision adopted by the Commission will, nevertheless, only be annulled if it were possible that the outcome would have been another had the Commission not infringed the rights of defense of the undertaking concerned.²⁵

Although there has been a fair amount of antitrust cases in which the applicants have invoked fundamental rights, the European Union Courts have only started to take these issues into

¹⁹ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR p. 1125, at § 4.

²⁰ Case 4/73, *Nold KG v. Commission*, [1974] ECR p. 491, at § 13.

²¹ Case 36/75 *Roland Rutili v. Ministre de l'intérieur*, [1975] ECR p. 1219, at § 32.

²² Cf. DOUGLAS-SCOTT, S.: “A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis”, *C.M.L.R.*, vol. 43, No. 3, June 2006, p. 629-665, at p. 650. Cf. also Case C-94/00 “*Roquette Frères*”, [2002] ECR p. I-9011.

²³ Article 6(2) TEU.

²⁴ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859.

²⁵ Cf. MOITINHO DE ALMEIDA, J.C.: “*La protección de los derechos fundamentales en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*” in RODRÍGUEZ IGLESIAS, G.C. and LIÑÁN NOGUERAS, D. (dir.): “*El derecho comunitario europeo y su aplicación judicial*”, Madrid, 1993.

account after the proclamation of the Charter of Fundamental Rights in Nice. In antitrust cases the courts have rarely considered the fundamental rights defense. The reason why they have not been willing to rely on this defense is possibly due to the fact that it is not possible to bring a claim before the ECtHR against the EU institutions for breaches of fundamental rights.²⁶

Several applicants have, however, tried to bring actions against the European Union institutions before the ECtHR. In *M[1] & Co v. the Federal Republic of Germany*,²⁷ the European Commission of Human Rights declared as inadmissible an application by the undertaking M[1] & Co in which the applicant submitted that in the antitrust case at issue, the ECJ had violated the principle of innocence as guaranteed by Article 6(2) and the right of every accused to defend himself in person laid down in Article 6(3)(c) of the ECHR. The European Commission of Human Rights recalled that it was not competent to examine the proceedings before or decisions of organs of the European Communities, as the European Communities were not a party to the ECHR.²⁸ However, it held that under Article 1 of the ECHR, the Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission is a consequence of domestic law or regulations or of the necessity to comply with international obligations.²⁹

According to the European Commission of Human Rights, the ECHR did not prohibit a Member State from transferring powers to international organizations provided that fundamental rights would receive an equal protection in the international organization. In this context, the European Commission of Human Rights noted that the Community legal system not only secured fundamental rights but also provided for control of their observance. It referred in particular to a joint declaration of the Parliament, the Council and the Commission of the European Communities of 5 April 1977, in which these institutions had stressed that they attached prime importance to the protection of fundamental rights, as derived from, in particular, the constitutions of the Member States and the ECHR. Moreover, it took into consideration the case law of the ECJ according to which the ECJ controls Community acts on the basis of fundamental rights, including those enshrined in the ECHR. Finally, the European Commission of Human Rights held that it would be contrary to the very idea of transferring powers to an international organization to hold the Member States responsible for examining in every case, before issuing a writ of execution for a judgment of the ECJ, whether Article 6 of the ECHR had been respected in the proceedings at the ECJ.³⁰ Nevertheless, in *Matthews*,³¹ the ECtHR examined the compatibility of acts of the Community with the rights guaranteed by the ECHR, although these acts were in fact treaties

²⁶ Cf. AMEYE, E. M.: "The Interplay between Human Rights and Competition Law in the EU", *E.C.L.R.* 2004, volume 25, issue 6, p. 332-341, at p. 333-334.

²⁷ *M[1] & Co v. the Federal Republic of Germany*, Decision of 9 February 1990, Application No. 13258/87.

²⁸ The European Commission of Human Rights had already in 1978 held that an application brought against the European Communities or the Council of the European Communities fell outside its competence *ratione materie* because the European Communities are not a Contracting Party to the ECHR. Cf. *Confédération Française Démocratique du Travail v. the European Communities, alternatively their Member States*, Decision of 10 July 1978, Application No. 8030/77.

²⁹ *M[1] & Co v. the Federal Republic of Germany*, Decision of 9 February 1990, Application No. 13258/87.

³⁰ *M[1] & Co v. the Federal Republic of Germany*, Decision of 9 February 1990, Application No. 13258/87.

³¹ *Matthews v. the United Kingdom*, Judgment of 18 of February 1999, 24833/94 ECHR 1999-I.

within in the Community legal order. The question at issue was, whether the United Kingdom was required to ensure elections to the European Parliament in Gibraltar in spite of the Community character of the elections. The ECtHR again held that acts of the Community could not be challenged before that Court since the Community was not a Contracting Party. However, it stated anew that the ECHR did not exclude the transfer of competences to international organizations provided that the rights guaranteed by the Convention continued to be “secured” and added that the Member States’ responsibility continued after that transfer.³² A. Riley has interpreted this as a raising of the fundamental rights standard which is required of the Community legal order compared to the standard set in *M & Co*. In the latter case, the European Commission of Human Rights required only equivalent protection from the Community legal order whereas in *Matthews* the ECtHR required that the fundamental rights guaranteed by the Convention be secured.³³

The alleged violation of Article 3 of Protocol No. 1 in *Matthews* had its origin in an annex to the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, entered into by the United Kingdom, and the extension to the European Parliament’s competences brought by the Treaty of Maastricht. Neither act could be challenged before the ECJ because they were not acts of the Community. The former was a treaty within the Community legal order and the latter a treaty amending the EEC Treaty. As a consequence, the ECtHR held that the United Kingdom and the other parties to the Treaty of Maastricht were responsible for the consequences of that treaty.³⁴ It also underlined that the “*Convention is intended to guarantee rights that are not theoretical or illusionary but practical and effective*”.³⁵ Furthermore, it noted that the legislation emanating from the Community legislative process affected the population of Gibraltar in the same way as legislation emanating only from the domestic legal order. Hence, the ECtHR held that there was no difference between the European and domestic legislation and, consequently, that the United Kingdom was responsible under Article 1 of the Convention for securing the rights in question regardless of whether the elections were purely domestic or European.³⁶ Since *Matthews* concerned acts for which the Member States were strictly speaking responsible, there is, nevertheless, no reason to assume that the ECtHR would change its position according to which it is not competent to review acts by the EU institutions.

As it is not possible, as long as the European Union has not become a party to the ECHR, to hold the EU institutions liable for their actions before the ECtHR, some applicants have instead tried to bring an action against all the Member States of the European Communities/European Union. For instance, the Confédération Française Démocratique du Travail lodged in 1978 an appeal against the European Communities and alternatively against the Member States jointly and the Member States severally alleging a violation of Articles 11, 13 and 14 of the ECHR. As to the possibility of holding the Member States jointly

³² *Matthews v. the United Kingdom*, Judgment of 18 of February 1999, 24833/94 ECHR 1999-I, at § 32.

³³ Cf. RILEY, A.: “The ECHR implications of the investigation provisions of the draft competition regulation”, *ICQL* vol. 51 January 2002, p. 55-89, at p. 84.

³⁴ *Matthews v. the United Kingdom*, Judgment of 18 of February 1999, 24833/94 ECHR 1999-I, at § 33.

³⁵ *Matthews v. the United Kingdom*, Judgment of 18 of February 1999, 24833/94 ECHR 1999-I, at § 34.

³⁶ *Matthews v. the United Kingdom*, Judgment of 18 of February 1999, 24833/94 ECHR 1999-I, at § 34-35.

responsible, the European Commission of Human Rights declared, on the grounds that the applicant had not defined what it meant by that, that it considered the application directed against the Council of the European Communities and thus outside its jurisdiction *ratione personae*. Similarly, the responsibility of the Member States severally was also outside its competence, since the Member States by taking part in the decision of the Council of the European Communities had not, in the case at issue, exercised their jurisdiction within the meaning of Article 1 of the ECHR.³⁷

In the field of competition law, the applicant in *Senator Lines*³⁸ tried to bring an action against all then 15 Member States on the ground that there had been a violation of its right of access to court. The underlying proceedings of the action involved a decision by the European Commission imposing a fine on the applicant Senator Lines for the infringement of the EC competition rules. Senator Lines challenged the decision before the Court of First Instance (hereinafter “the CFI”) and requested a dispensation from the requirement to provide a bank guarantee that it had to provide if it did not wish to pay the fine before the final decision in the case. The request was rejected both by the CFI and later on appeal by the ECJ. However, during the proceedings that were initiated by Senator Lines before the ECtHR, the European Commission stated that it would not enforce the fine while the proceedings before that Court were pending. Moreover, before the ECtHR gave its judgment, the CFI quashed the fine imposed on Senator Lines.³⁹

The ECtHR did, therefore, not take position on whether Senator Lines could bring the action against all 15 Member States. Instead, it declared the application as inadmissible since by the time of the CFI’s judgment, which was given around six months before the decision on admissibility by the Grand Chamber of the ECtHR, it was clear that Senator Lines could not produce reasonable and convincing evidence that a violation of its rights guaranteed by the ECHR would occur.⁴⁰ It is submitted that the application would in any case have been inadmissible since holding the Member States responsible for a Community act would have violated the principle of independent legal personality of international organizations.⁴¹

Another important question regarding the applicability of the ECHR in antitrust cases is the character of antitrust procedures and sanctions. Article 6(1) of the ECHR establishes as a prerequisite for invoking the rights of defense included in that article that the proceedings

³⁷ *Confédération Française Démocratique du Travail v. the European Communities, alternatively their Member States*, Decision of 10 July 1978, Application No. 8030/77.

³⁸ *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application No. 56672/00.

³⁹ *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application No. 56672/00.

⁴⁰ *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004, Application No. 56672/00.

⁴¹ Cf. PASTOR RIDRUEJO, J.A.: “*La interrelación de los sistemas de protección de los derechos fundamentales*” in ÁLVAREZ CONDE, E. and GARRIDO MAYOL, V. (dir.): “*Comentarios a la Constitución Europea Libro II. Los Derechos y Libertades*”, Valencia, 2004, pp. 1653-1667, at p. 1663.

should be of criminal nature: “*In determination of his civil rights and obligations or 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 [...]*”. The ECtHR has held that the concept of what constitutes a “criminal charge” within the ECHR is an autonomous concept.⁴² For the possible application of the Convention to antitrust proceedings it is therefore without relevance that Art 23(5) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁴³ [now Articles 101 and 102 TFEU] states that the decisions whereby the Commission imposes sanctions for infringements of the competition rules are not criminal to the nature.

In *Engel v. the Netherlands*,⁴⁴ the ECtHR held that although the Convention allows the Contracting States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, they may only designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. However, the Contracting States may not at their discretion classify an offence as disciplinary instead of criminal, as this could undermine the operation of the provisions laid down in Article 6 of the ECHR. The ECtHR has thus jurisdiction under Article 6 to satisfy itself that the disciplinary does not improperly encroach upon the criminal. Moreover, the Court defined criteria for what would constitute a “criminal charge” for the purpose of the Convention. These criteria include the classification of the offence under national law, the nature of the offence and the degree of severity of the penalty.⁴⁵

In another case concerning antitrust proceedings before the French Competition Authority, *Stenuit v. France*,⁴⁶ the European Commission of Human Rights declared that the penalty imposed by that authority was of a criminal nature and there had been a violation of Article 6(1) of the ECHR. Nonetheless, *Stenuit* withdrew its application before the ECtHR gave its judgment in the case.

In the light of the case law, it appears that antitrust proceedings and sanctions imposed as a result of them are criminal for the purpose of the ECHR. The ECJ has also recognized this. In *Hüls*,⁴⁷ it held that given the nature of the infringements at hand (price-fixing and market-sharing) and the nature and degree of severity of the ensuing penalties, the principle of presumption of innocence enshrined in Article 6 of the ECHR was applicable to the procedures relating to infringements of competition rules which might result in the imposition of a fine or a periodic penalty payment.⁴⁸

Nevertheless, in *Mannesmannröhren-Werke*⁴⁹ the CFI stated when deciding whether there was an infringement of Article 6(1) of the ECHR, as alleged by the applicant, that it did not have jurisdiction to apply the ECHR when reviewing an investigation under competition law,

⁴² Cf. *Engel and others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, at § 81.

⁴³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

⁴⁴ *Engel and others v. the Netherlands*, Judgment of 8 June 1976, Series A no. 22

⁴⁵ *Engel and others v. the Netherlands*, Judgment of 8 June 1976, Series A no. 22, at § 81-82.

⁴⁶ *Stenuit v. France*, Decision of 11 July 1989, Application No. 11598/85.

⁴⁷ Case C-199/92P, *Hüls v. Commission* [1999] ECR p. 4287.

⁴⁸ Case C-199/92P, *Hüls v. Commission* [1999] ECR p. 4287, at § 150.

⁴⁹ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729.

since the Convention as such does not form part of Community law. It held, however, that it was settled case law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature and that the ECJ and CFI draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The CFI then stressed the special significance of the ECHR in that respect. Moreover, it referred to Article 6(2) [now Article 6(3)] TEU, which provided that the EU shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.⁵⁰

In addition, it clearly follows from Recital 37 of Regulation 1/2003 that the European Union Courts must respect fundamental rights also in antitrust cases. That recital states that Regulation 1/2003 “*respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles*”. As the Charter basically contains the same rights as the Convention and the European Union Courts have confirmed the significance of the ECHR in interpreting fundamental rights, it is difficult to see how the European Union Courts could ignore to take into account the case law of the ECtHR when they are deciding antitrust cases. As a consequence, also the Commission would be bound to respect the fundamental rights enshrined in the ECHR when conducting inspections in the premises of undertakings or the homes of company directors and executives. However, in practice the role played by the ECHR has been more limited and the next chapter will examine, by analyzing those cases in the light of the case law of the ECtHR, how the European Union Courts have decided some antitrust cases involving alleged violations of fundamental rights.

3. Rights of defense in the context of antitrust inspections

It should also be noted that, in general, only natural persons can invoke the protection of most fundamental rights provided for by the ECHR. Nevertheless, the ECHR extends certain rights such as the right to a fair trial⁵¹ and respect for private and family life, home and correspondence also to undertakings.⁵²

The ECJ, in turn, has held that in antitrust proceedings, the rights of defense of undertakings must be observed already during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.⁵³ The rights of defense which are usually invoked by undertakings include the right not to incriminate oneself, the right to defend oneself in person or through legal assistance of one's own choosing, legal professional privilege, the right to protection of business premises against arbitrary or disproportionate

⁵⁰ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729, at § 59-60.

⁵¹ *Dombo Beheer v. Netherlands*, Judgment of 27 October 1993, Series A 274.

⁵² *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III.

⁵³ Case 85/87, *Dow Benelux v. European Commission*, [1989] ECR p. 3137, at § 26.

interventions, access to the file on which the decision is based and requirements related to the statement of objections.⁵⁴

This paper will analyze the rights of defense that could be invoked during the Commission's surprise inspections in business premises or private homes of directors or executives of undertakings which are suspected of having committed an antitrust violation. The fundamental rights which the undertakings could invoke include the right not to incriminate oneself, the right to defend oneself in person or through legal assistance of one's own choosing and the right to respect of private and family life, home and correspondence.

3.1. Right not to incriminate oneself

3.1.1. Case law of the ECtHR on the right not to incriminate oneself

The right not to incriminate oneself derives from Article 6 of the ECHR, which states: "*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 [...]*".

In *Funke*,⁵⁵ the ECtHR confirmed that Article 6 (1) of the ECHR includes the right against self-incrimination. In the case at hand, French customs officers conducted a search of the house of Mr. Funke and his wife in order to obtain 'particulars of their assets abroad'.⁵⁶ During the search the customs officers asked Mr. Funke to produce statements of and other documents related to his accounts in certain banks abroad. At first, Mr. Funke promised that he would do so but later he changed his mind. This prompted the customs officers to summon him before the Strasbourg police court, which imposed a fine on him and ordered him to produce the documents in question.⁵⁷ After having exhausted all instances of appeal available, Mr. Funke applied to the European Commission of Human Rights claiming, *inter alia*, that his criminal conviction for refusal to produce the documents requested by the customs officers had violated his right to a fair trial, laid down in Article 6(1) ECHR.⁵⁸ According to Mr. Funke, the French authorities had violated his right not to give evidence against himself, a general principle contained in the legal orders of the Contracting States and in the European Convention as well as the International Covenant on Civil and Political Rights.⁵⁹

The ECtHR held that since the customs had been unable or unwilling to procure the relevant documents by some other means, they tried to oblige Mr. Funke to provide himself the evidence of offences that he was suspected of. According to the Court, the special features of

⁵⁴ Cf. MOITINHO DE ALMEIDA, J.C.: "*La protección de los derechos fundamentales en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*" in RODRÍGUEZ IGLESIAS, G.C. and LIÑÁN NOGUERAS, D. (Dir.): "*El derecho comunitario europeo y su aplicación judicial*", Madrid, 1993, p. 97-132, at p. 126.

⁵⁵ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A.

⁵⁶ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at § 7.

⁵⁷ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at § 9-12.

⁵⁸ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at §. 34.

⁵⁹ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at § 41.

customs law could not justify “*an infringement of anyone ‘charged with a criminal offence’, within the autonomous meaning of this expression in Article 6 [...], to remain silent and not to contribute to incriminating himself*”⁶⁰ and, consequently, there had been a breach of Article 6(1) ECHR.

Nevertheless, in 1996 the ECtHR held that the right to silence was not absolute. In the case at issue, *John Murray*,⁶¹ John Murray had been arrested under the Prevention of Terrorism Act 1989 and cautioned by the police that he had a right to remain silent but if he chose to do so, it might be used as evidence against him in court. Moreover, his access to a lawyer was delayed by 48 hours.⁶² Murray submitted that the inferences drawn by the failure to answer police questions or to give evidence and using it in determining his guilt amounted to a violation of the right to silence and the right not to incriminate oneself contrary to paragraphs 1 and 2 of Article 6 of the ECHR.⁶³

The ECtHR stated that “*although not specifically mentioned in Article 6 of the Convention [...], the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of fair procedure under Article 6*”.⁶⁴ By protecting the accused against improper compulsion by authorities, these rights contribute to avoid miscarriages of justice and fulfill the aims of Article 6 of the ECHR.⁶⁵ The Court then held that although it is not permissible to base a conviction solely or mainly on the silence of the accused or on a refusal to answer questions or to give evidence against himself, the right to remain silent and the privilege against self-incrimination cannot and should not prevent that that silence, in situations which clearly call for an explanation from the accused, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The right to silence is thus not absolute but regard should be had to all the circumstances of the case, in particular to the situations where inferences may be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.⁶⁶

Later that year, in *Saunders*,⁶⁷ the ECtHR limited further the scope of the right not to incriminate oneself. Saunders claimed that the use as evidence at his subsequent criminal trial of statements that he had made to the Department of Trade and Industry inspectors during their investigation had deprived him of a fair hearing, what constituted a violation of Article 6(1) of the ECHR. According to Saunders, the right of an individual not to be compelled to contribute incriminating evidence to be used in a prosecution against him was implicit in the right to a fair trial guaranteed by Article 6(1).⁶⁸

⁶⁰ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at § 43.

⁶¹ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I.

⁶² *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 11-12.

⁶³ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 39-40.

⁶⁴ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 45.

⁶⁵ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 45.

⁶⁶ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 47.

⁶⁷ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI.

⁶⁸ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 57-60.

The ECtHR first recalled what it had already stated in *John Murray*, *i.e.* that the right not to incriminate oneself is included in Article 6 of the ECHR. The Court then limited the right not to incriminate oneself in criminal proceedings by excluding materials that may be obtained from the accused through compulsory powers but which exist independent of the will of the accused. These materials include documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissues for the purposes of DNA testing. As the right against self-incrimination aims at respecting the will of an accused to remain silent,⁶⁹ it is only necessary to protect him from providing evidence contrary to that will.

However, the ECtHR held that the right against self-incrimination is not limited to statements of admission of wrong doing or statements that are directly incriminating, but extends to testimony obtained under compulsion which appears on its face to be of non-incriminating nature, for instance, mere information on questions of fact or exculpatory remarks, as it may later be used in criminal proceedings as evidence by the prosecution. It is hence the way in which the evidence obtained through compulsory methods is used in a criminal trial that determines whether it is to be considered as incriminating or not.⁷⁰ Consequently, investigation authorities are allowed to use orders requiring the production of documents, but the accused is not obliged to give explanations about the documents if these explanations could be used against him.

Moreover, the Court held that the complexity of corporate fraud and the vital public interest in investigating of such fraud and the punishment of those responsible could not justify in the case at hand to depart from the basic principles of a fair procedure. Instead, the ECtHR declared that the general requirements of fairness laid down in Article 6 apply to criminal proceedings with respect to all types of criminal offences. According to the Court, it is thus not possible to invoke the public interest in order to justify the use of answers that have been obtained under compulsion in a non-judicial investigation to incriminate the accused during the trial.⁷¹ This finding of the Court is of particular interest with regard to antitrust cases as they tend by their nature to be very complex.

As A. Riley has submitted, in *Saunders*, the ECtHR appears to have limited the extensive protection against self-incrimination provided for in *Funke* (which compassed the protection against any production of incriminating documents by compulsory powers) to testimony.⁷²

3.1.2. Application by the European Union Courts of the right not to incriminate oneself

With regards to antitrust cases, the ECJ accepted in *Orkem*⁷³ that Article 6 of the ECHR may be relied upon by an undertaking subject to an investigation relating to competition law, but stated that neither the wording of that article nor the decisions of the ECtHR indicate that it

⁶⁹ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 68-69.

⁷⁰ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 71.

⁷¹ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 74.

⁷² Cf. RILEY, A.: "Saunders and the power to obtain information in competition law", *E.C.L.R.*, volume 25, No. 3, June 2000, p. 264-281, at p. 274.

⁷³ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 30.

upholds the right not to give evidence against oneself.⁷⁴ The ECJ applied instead the rights of defense that it had held to be a fundamental principle of the Community legal order.⁷⁵ In doing so it concluded that although the Commission has a right to compel an undertaking to provide all necessary information with regard to facts that are known to it and to disclose documents in its possession, it may not compel an undertaking to provide it with answers which might involve an admission of the undertaking of an infringement which is incumbent upon the Commission to prove.⁷⁶ The Court then specified as allowed those questions, which related *e.g.* to factual information on the circumstances in which the meetings of producers were held and the capacity in which the participants attended them. To the contrary, questions related to the purpose of the action taken and the objective pursued by the measures in question would compel the undertaking to acknowledge its participation in an agreement whose object was to fix selling prices.⁷⁷ The latter type of questions was thus held to undermine the undertakings rights of defense.⁷⁸

In the light of the *Orkem* decision, it would hence appear that the Commission has, under European Union law, a right to require undertakings, which are under investigation, to facilitate any information that is purely factual. This includes information as to the dates of meetings, the names of the persons who attended these meetings and the capacity in which they participated in the meetings and the subjects discussed under the meetings. Nonetheless, the Commission must not ask for the objectives pursued by the actions of the undertakings, as this might force the undertakings to incriminate themselves.⁷⁹

The case law in *Orkem* has been confirmed in *PVC*⁸⁰ and *Mannesmannröhren-Werke*⁸¹ as well *SLG Carbon*.⁸² This is remarkable taking into consideration the judgments in *Funke*⁸³ and *Saunders*⁸⁴ given by the ECtHR in the meantime. In *Mannesmannröhren-Werke*⁸⁵ the CFI first confirmed the *Orkem* judgment reasoning that an absolute right to silence would go beyond what is necessary in order to preserve the rights of defense of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty under Article 89 EC [now Article 105 TFEU] to ensure that the rules on competition within the common market are observed. Consequently, a right to silence only exists to the extent that the undertaking would be compelled to provide answers that might involve an admission on

⁷⁴ In this context it is necessary to note that the decision of ECJ in *Orkem* dates from 1989, whereas the judgments of the ECtHR in the cases *Funke* and *Saunders*, which concerned the right against self-incrimination and the right to silence, were given later, in 1993 and 1996 respectively.

⁷⁵ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 30-31.

⁷⁶ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 34-35.

⁷⁷ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 37-38.

⁷⁸ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 41.

⁷⁹ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 37-38.

⁸⁰ Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others v. Commission ("PVC")*, [1999] ECR p. II-932.

⁸¹ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729.

⁸² Case C-301/04 P, *SLG Carbon*, [2006] ECR p. I-5915.

⁸³ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A.

⁸⁴ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI.

⁸⁵ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729.

its part of the existence of an infringement, which is incumbent upon the Commission to prove.⁸⁶

Furthermore, the CFI declared that it was not possible to directly invoke the ECHR before the Community courts.⁸⁷ Nevertheless, it stressed that Community law did recognize as fundamental principles both the rights of defense and the right to fair legal process. It held that the application of those principles in the field of competition law offers protection equivalent to that guaranteed by Article 6 of the ECHR. The undertakings may therefore confine themselves to answering questions of purely factual nature and to producing only pre-existing documents and materials sought. The CFI concluded that this obligation could not constitute a breach of the principle of respect for the rights of defense or impair the right to fair legal process.⁸⁸

In the light of the case law of the European Union Courts, it would thus appear as an undertaking cannot invoke Article 6 of the ECHR in order to refuse to incriminate itself during the Commission's investigation. Instead the undertaking would have to rely on the right of defense and the right to a fair legal process. The Commission must respect the rights of defense and cannot therefore obligate an undertaking to provide answers, which would amount to a confession of a violation that it corresponds to the Commission to prove.⁸⁹ The result of the application of the right of defense by the European Union Courts would hence be comparatively similar to when the ECtHR is applying the right against self-incrimination derived from Article 6 of the ECHR.

However, the protection provided for under the Convention appears to be more extensive under the new *Saunders* line of case law. According to that case law, even mere information on questions of fact could be incriminating, if it is obtained under compulsion, as it might later be used in criminal proceedings as evidence.⁹⁰ This raises the question whether it would be compatible with the case law of the ECtHR, if the Commission were to ask an undertaking questions of factual nature under the threat of imposition of a periodic penalty payment under Article 23(1) (d) of Regulation 1/2003 in the case that the undertaking would refuse to answer the questions. If the Commission would then solely or mainly rely on the information provided by the undertaking, there would appear to be a breach of Article 6 of the ECHR. However, if the Commission were able to prove the infringement even without relying on that information, the questions would seem permissible, as the questions might serve to clarify facts and could in some cases even result in a finding that the undertaking had not taken part in the infringement.

Another interesting finding of the case law of the ECtHR is that it held in *Saunders* that it is not possible to invoke the public interest and complexity of a case to justify a more lax interpretation of the right against self-incrimination.⁹¹ This would appear to impede the possibility of invoking the well-functioning of the internal market as an important public

⁸⁶ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729, at § 65-67.

⁸⁷ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729, at § 75.

⁸⁸ Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR p. II-729, at § 77-78.

⁸⁹ Case C-374/87, *Orkem v. Commission*, [1989] ECR p. 3283, at § 35.

⁹⁰ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 71.

⁹¹ *Saunders v. the United Kingdom*, Judgment of 29 November 1996, Rep. 1996-VI, at § 74.

interest that would justify the European Union Courts unwillingness to recognize the right against self-incrimination in antitrust proceedings. Arguably, it would however still be possible to maintain that the ECtHR case law in *Saunders* and the subsequent *J.B. v. Switzerland*⁹² case concerned natural persons and not legal persons and therefore the criteria for what could justify an encroachment on the right against self-incrimination was stricter in those cases than would be the case when legal persons are concerned.

Finally, it should be considered what the implications of the case law of the ECtHR are for the new powers conferred to the Commission under Article 19 of Regulation 1/2003 to take statements and under Article 20(2) of the Regulation to ask staff members of undertakings questions during inspections. According to Article 19(1), “*in order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation*”. This power may also be used during an inspection. As the person has to consent to be interviewed, the risk of self-incrimination is in practice non-existent.

Article 20(2)(e) in turn allows the Commission to “*ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers*”. If the Commission chooses to interview a member of the staff, the questions would naturally be directed to a natural person, although the real subject of the questioning would be the undertaking, *i.e.* a legal person. As the natural person, at least under European Union law, would not be subject to the imposition of a potential fine, it could be argued that the European Union Courts would not have to take into consideration the case law of the ECtHR with regard to the right against self-incrimination. However, as the natural persons might under certain circumstances be subject to sanctions under national law, when the national competition authorities conduct inspections on behalf of the Commission,⁹³ it is very questionable, if the case law of the ECtHR could be completely ignored.

3.2. Right to defend oneself in person or through legal assistance of one’s own choosing

3.2.1. Case law of the ECtHR on the right to defend oneself in person or through legal assistance of one’s own choosing

The right to defend oneself in person or through legal assistance of one’s own choosing is enshrined in Article 6(3)(c) of the ECHR: “*Everyone charged with a criminal offence has the following minimum rights: [...] to defend himself in person or through legal assistance or, if*

⁹² *J.B. v. Switzerland*, Judgment of 3 of August 2001, no. 31827/96 ECHR 2001-III.

⁹³ W.P.J. WILS has pointed out that in Member States such as the United Kingdom, in which the national law allows the imposition of criminal sanctions on natural persons for infringements of Articles 101 and 102 TFEU, the stricter case law of the ECtHR would be applicable to investigations conducted by national competition authorities that correspond to the Commission’s inspections. *Cf.* WILS, W. P. J.: Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis, *World Competition*, volume 26, issue 4, p. 567-588, at p. 577.

he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require”.

In *S. v. Switzerland*,⁹⁴ the ECtHR held that the right of an accused to communicate with his lawyer out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 (3) (c) of the ECHR. The Court stated that if a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.⁹⁵ The ECtHR further held that a violation of the Convention did not necessarily imply the existence of damage,⁹⁶ *i.e.* there could be a breach of the Convention even though the fact that the accused was deprived of the possibility to freely communicate with his lawyer had not prejudiced him.

In *John Murray*,⁹⁷ the ECtHR also considered whether the denial of access to a lawyer during 48 hours at the initial phase of the detention had violated Article 6 (3) (c) of the ECHR. The Court referred to its *Imbriosca v. Switzerland* Judgment of 24 November 1993 where it had held that Article 6 of the ECHR, and especially paragraph 3, may be relevant before a case is sent to trial if and so far the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The ECtHR then went on to recall that the assistance of a lawyer at the initial stages of police interrogation is not explicitly guaranteed by the ECHR and may be subject to restrictions for a good cause. What is of essence is therefore whether the restriction in the case in question, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. Furthermore, the Court stressed that even a lawfully exercised power of restriction is capable of depriving the accused, in certain circumstances, of a fair procedure.⁹⁸

3.2.2. Application by the European Union Courts of the right to assistance of a lawyer

Although the assistance of a lawyer during the Commission’s inspections is not regulated in Regulation 1/2003, the Commission normally allows undertakings to be assisted by their own legal advisors or by independent lawyers.⁹⁹ This right has been confirmed by the ECJ, for instance, in *Dow Benelux v. European Commission*,¹⁰⁰ in which the Court held that the right to legal representation must be respected as from the preliminary-inquiry stage of the Commission’s investigation. The right to assistance of a lawyer is, however, not absolute. In *National Panasonic*,¹⁰¹ the Commission’s official carried out the inspection without waiting

⁹⁴ *S. v. Switzerland*, Judgment of 28 November 1991, Series A no. 220.

⁹⁵ *S. v. Switzerland*, Judgment of 28 November 1991, Series A no. 220, at § 48.

⁹⁶ *S. v. Switzerland*, Judgment of 28 November 1991, Series A no. 220, at § 50.

⁹⁷ *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I. For more details, *cf.* Section 3.1.1 *supra*.

⁹⁸ *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, at § 62-65.

⁹⁹ *Cf.* ORTIZ BLANCO, L. (ed.): “*European Community Competition Procedure*”, 2nd edition, New York, 2006, at p. 311.

¹⁰⁰ Case 85/87, *Dow Benelux v. European Commission* [1989] ECR p. 3137, at § 27.

¹⁰¹ Case 136/79, *National Panasonic v. Commission*, [1980] ECR p. 2033.

for the undertaking's lawyer to arrive.¹⁰² The ECJ implicitly confirmed that this practice is permissible by holding that there was no breach of Article 8(2) of the ECHR in the case at issue when the Commission conducted the inspection without prior notification.¹⁰³ Nevertheless, the Commission's policy is to allow undertakings a reasonable time to contact an in-house legal advisor or another lawyer. But undertaking must allow the Commission's officials to enter any offices they wish in order to ensure that potential evidence will not be destroyed.¹⁰⁴

The power of the Commission's officials to ask any company employee oral questions during the inspection¹⁰⁵ creates a potential risk for the individual being held liable under national rules in case the national law provides for the possibility of imposing sanctions also on natural persons for the infringement of Articles 101 and 102 TFEU. Therefore, the assistance of a lawyer would appear necessary. Another potential problem is the conflict of interest in case the same lawyer that represents the undertaking also represents an employee. If the employee refuses to provide answers, the undertaking will be held responsible.¹⁰⁶ In addition, if an undertaking solely consisting of a natural person were to be questioned, a possible fine imposed on that undertaking would severely affect that natural person although the real subject of the questioning would strictly speaking be the legal person. As a consequence, a view that the "staff member" is not the real subject of the questioning would not be justified in that case.

A. Riley has pointed out that the ECtHR would, when deciding on a possible breach of a right guaranteed by the Convention during an inspection by the Commission, take into account whether independent observers or qualified expert counsels were present during the inspection. This criterion seemed to be of significant relevance when the ECtHR decided in *Colas Est* that there had been a breach of the inviolability of the domicile.¹⁰⁷ Riley submits that there is a risk that the Commission's officials could take copies of documents covered by the legal professional privilege if a legal advisor is not present during the inspection.¹⁰⁸ In this context it is submitted, however, that the policy of the Commission to allow the undertakings to consult their lawyers and its willingness to wait a reasonable time for the arrival of a legal advisor diminishes this risk. Furthermore, this practice is also in line with the case law of the ECtHR in *John Murray* in which it held that the assistance of a lawyer at the initial stages of police interrogation may be subject to restrictions for a good cause.¹⁰⁹ During an inspection carried out by the Commission, it is arguably a good cause to limit the time, which the Commission is prepared to wait for the arrival of a lawyer, to a reasonable time, since

¹⁰² Case 136/79, *National Panasonic v. Commission*, [1980] ECR p. 2033, at § 6.

¹⁰³ Case 136/79, *National Panasonic v. Commission*, [1980] ECR p. 2033, at § 19-20.

¹⁰⁴ Cf. ORTIZ BLANCO, L. (ed.): "*European Community Competition Procedure*", 2nd edition, New York, 2006, at p. 312.

¹⁰⁵ Cf. Article 20(2)(e) of Regulation 1/2003.

¹⁰⁶ Cf. ORTIZ BLANCO, L. (ed.): "*European Community Competition Procedure*", 2nd edition, New York, 2006, at p. 312.

¹⁰⁷ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III.

¹⁰⁸ Cf. RILEY, A.: "The ECHR implications of the investigation provisions of the draft competition regulation", *ICQL* vol. 51 January 2002, p. 55-89, at p. 77.

¹⁰⁹ *John Murray v. the United Kingdom*, Judgment of 25 January 1996, Rep. 1996-I, at § 63.

undertakings could otherwise obstruct the inspections by instructing their lawyers to delay their arrival to the undertakings' premises.

A further criterion established by the ECtHR when assessing whether the right to legal assistance has been violated is that the accused has been deprived of a fair hearing in the light of the entirety of the proceedings. As the undertaking in antitrust cases will have a possibility to rectify and complete information given by staff members,¹¹⁰ it cannot be held that the undertaking would necessarily have been deprived of a fair hearing even if its lawyer had not been present during the investigation from the beginning.

3.3 Right to respect of private and family life

3.3.1. Case law of the ECtHR on the right to respect of private and family life

Article 8(1) of the ECHR provides for the right to respect for private and family life and home and correspondence: “*Everyone has the right to respect for his private and family life, his home and correspondence*”. However, this right is not unlimited, but Article 8(2) allows for interference by a public authority when “*it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and the freedoms of others*”. Hence, interferences are possible as long as they are in accordance with the law, are necessary in a democratic society and have a legitimate interest. The ECtHR has accepted that the Contracting Parties of the Convention have a margin of appreciation with respect to actions in the area of private and family life, home and correspondence, but that appreciation is subject to the Court's supervision.¹¹¹

Although the right to respect of private and family life would at first sight appear to be a right that only natural persons could invoke with respect to their homes, the ECtHR held in *Niemietz*¹¹² that this right extends also to professional or business activities. By examining whether the conditions laid down in Article 8(2) of the ECHR that justify exceptions to Article 8(1) were fulfilled, the Court concluded that the search of Mr. Niemietz's law office constituted an interference with his rights under Article 8 of the Convention.

First, the ECtHR stated that the notion of “private life” should not be limited only to an “inner circle” in which the individual may live his own personal life as he chooses, but respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. The notion of “private life” should also include activities of professional or business nature since most people have a significant opportunity to develop relationships with the outside world precisely in course of their working lives. The

¹¹⁰ Article 23(1)(d) of Regulation 1/2003.

¹¹¹ Cf. AMEYE, E. M.: “The Interplay between Human Rights and Competition Law in the EU”, *E.C.L.R.* 2004, volume 25, issue 6, p. 332-341, at p. 340.

¹¹² *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B.

Court stressed that it is also not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not.¹¹³

The Court also pointed out that denying the protection of Article 8 on the ground that the measure complained of related only to professional activities could result in an unequal treatment because a person whose professional and non-professional activities were so intermingled that it would not be possible to distinguish between them could claim that right. Then the Court noted that the word "home" had in certain Contracting States, such as Germany, been accepted as extending to business premises. According to the Court, such an interpretation would be fully consistent with the French text, since the word "domicile" has a broader connotation than the word "home" and may extend, for instance, to a professional person's office. Again the Court pointed out that it might not be possible to draw precise distinctions as activities, which relate to a profession or business, could be conducted from a person's private residence and other activities could be carried out in an office or commercial premises. In the same manner as a narrow interpretation of the notion of "private life", a narrow interpretation of the notion "home" could hence cause a risk of unequal treatment.¹¹⁴ The ECtHR concluded that the aim of Article 8 of the ECHR is to protect the individual against arbitrary interference by the public authorities and, therefore, including certain professional or business activities or premises would be consonant with this object. Furthermore, this interpretation would not excessively impede the Contracting States from interfering to the extent permitted by Article 8(2) of the Convention.¹¹⁵

As the ECtHR held in *Klass v. Germany*,¹¹⁶ Article 8(2) of the ECHR is to be narrowly interpreted since it provides for an exception to a right guaranteed by the Convention. In that case the ECtHR stated that powers of secret surveillance of citizens, characterizing as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.¹¹⁷ In *Funke*,¹¹⁸ the ECtHR held that the prevention of capital outflows and tax evasion may make it necessary for the states to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and to prosecute those responsible. However, the relevant legislation and practice must afford adequate and effective safeguards against abuse. The Court paid particular attention to the fact that, at that time, the customs authorities had very wide powers, having the competence *e.g.* to assess the expediency, number, length and scale of inspections. What is more, the lack of any requirement of a judicial warrant rendered the restrictions and conditions provided for in law too lax and full of loopholes. As a result, the interferences with Mr. Funke's rights were not strictly proportionate to the legitimate aim pursued.¹¹⁹

¹¹³ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 29.

¹¹⁴ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 29-31.

¹¹⁵ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 31.

¹¹⁶ *Klass v. Germany*, Judgment of 6 September 1978, Series A no. 28.

¹¹⁷ *Klass v. Germany*, Judgment of 6 September 1978, Series A no. 28, at § 42.

¹¹⁸ For more details of the facts of the case, *cf.* Section 3.1.1.

¹¹⁹ *Funke v. France*, Judgment of 25 February 1993, Series A no. 256-A, at § 56-57.

Of particular interest is the case *Société Colas Est v. France*,¹²⁰ since it involved inspections by the French Competition Authority.¹²¹ Upon suspicions that large construction companies were engaging in certain illegal practices, inspectors from the French Competition Authority carried out simultaneous raids in 56 undertakings without authorization from the undertakings' management and seized several thousand documents. The inspectors entered the undertakings' premises under the provisions of an ordinance that did not require any judicial authorization. They also seized various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts concerned by the investigation.¹²² A fine was imposed on three companies subject to the investigation, which later brought an appeal before the ECtHR. Before the ECtHR the applicant companies claimed that the raids carried out by the inspectors of the French Competition Authority, without any supervision or restrictions, had infringed their right to respect for their home contrary to Article 8 of the ECHR.

The ECtHR noted that the case at issue differed from other cases in that the applicants were legal persons. It then pointed out that the word "domicile" has a broader connotation than the word "home" and may extend, for instance, to a professional person's office or a private person's home that was also the registered office of a company run by him. The Court recalled that the ECHR is a living instrument, which must be interpreted in the light of present-day conditions and held that at that time the right guaranteed by Article 8 of the ECHR might be construed as including the right to respect for an undertaking's registered office, branches or other business premises.¹²³ The Court then concluded that in the case at issue, the measure was in accordance with the law and the aim was legitimate. When examining whether the raids were necessary in a democratic society, the ECtHR reiterated its established case law according to which the Contracting States have a certain margin of appreciation in assessing the need for interference, but it is subject to the Court's supervision. The exceptions contained in Article 8(2) must therefore be interpreted narrowly and the need for them must be convincingly established.¹²⁴

The ECtHR concluded that although the fact that the inspections were conducted in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the impugned interference with the applicant companies' right to respect for their premises, the relevant legislation and practice should, nevertheless, have afforded adequate and effective safeguards against abuse. The Court paid in particular attention to the fact that, at the time of the inspections, the authorities had very wide powers that gave them exclusive competence to determine the expediency, number, length and scale of inspections. Furthermore, there was no warrant issued by a judge prior to the inspections and no police officer was present during the inspections. Even though interference might be more far-reaching where the business premises of a legal person are concerned, in the Court's view, the

¹²⁰ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III.

¹²¹ Department for Competition, Consumer Affairs and Fraud Prevention.

¹²² *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 10-11.

¹²³ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 40-41.

¹²⁴ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 47.

impugned operations in the antitrust field could not be regarded as strictly proportionate to the legitimate aims pursued. Consequently, the ECtHR found that there was a breach of Article 8 of the Convention.¹²⁵

To sum up, the ECtHR has interpreted the concept of “home” extensively, thus including also professional and business activities, and has also extended the right to respect for an undertaking’s registered office, branches or other business premises.¹²⁶ Hence, it is possible also for legal persons to invoke this right. Moreover, in *Colas Est*, the Court has expressly held that, under certain circumstances, the undertakings subject to an investigation in the antitrust field may rely on this right.

3.3.2. Application by the European Union Courts of the right to respect of private and family life

With regard to the right to respect of private and family life, it has first to be noted that this right, laid down in Article 8 of the ECHR, as such does only exist for natural persons under European Union law. Instead, the European Union law provides for protection against arbitrary or disproportionate intervention by public authorities into to the sphere of private activity of any person.¹²⁷ Second, in the field of competition law, a distinction has to be made between the situation under the old Regulation 17 and the situation under the new Regulation 1/2003 because the latter provides, *inter alia*, also for inspections into private premises.

Under Article 14 of the Regulation 17, the Commission could only conduct inspections in business premises of undertakings suspected of antitrust violations. It was also unclear whether it could ask questions during the inspections.¹²⁸ In the light of the decision of the ECJ in *National Panasonic*,¹²⁹ the Commission appeared, however, to be entitled to ask questions concerning the books and business records that were being examined.¹³⁰

The new Regulation 1/2003 includes the powers of inspection contained in Regulation 17 and extends them by, *inter alia*, conferring the Commission the power to conduct inspections also in other than business premises under certain circumstances.¹³¹ Other new powers include the power to seal any business premises and books or records for the period and to the extent necessary for the inspection¹³² and to ask any representative or member of staff of the

¹²⁵ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 48-50.

¹²⁶ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 40.

¹²⁷ *Joined Cases 46/87 and 227/88, Hoechst v. Commission*, [1989] ECR p. 2859, at § 19.

¹²⁸ Cf. ORTIZ BLANCO, L. (ed.): “*European Community Competition Procedure*”, 2nd edition, New York, 2006, at p. 295.

¹²⁹ *Case 136/79, National Panasonic v. Commission*, [1980] ECR p. 2033.

¹³⁰ *Case 136/79, National Panasonic v. Commission*, [1980] ECR p. 2033, at § 15.

¹³¹ Cf. Article 21 of Regulation 1/2003. Article 21 includes the possibility to conduct inspections also in the homes of directors, managers and other members of staff of the undertakings concerned, provided that a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Article 101 or Article 102 TFEU, are being kept in there. The Commission must have a prior authorization from the national judicial authority of the Member State where the inspection is to be conducted.

¹³² Article (20)(2)(d) of Regulation 1/2003.

undertaking for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.¹³³

3.3.2.1. Situation under Regulation 17

While Regulation 17 was in force, the ECJ stated in *National Panasonic*¹³⁴ that Article 8(2) of the ECHR acknowledged that interference by public authorities was permissible to the extent to which it was in accordance with the law and was necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder to crime etc. It then held that the aim of the powers given to the Commission by Article 14 of Regulation 17 was to enable it to carry out its duty under the Treaty of ensuring that the competition rules were applied in the common market. In the Court's view, the exercise of the powers given to the Commission by Regulation 17 therefore contributed to the maintenance of the system of competition intended by the Treaty which undertakings were absolutely bound to comply with and, as a result, the possibility of the Commission conducting investigations without previous notification did not infringe the right guaranteed by Article 8 of the ECHR.¹³⁵ In *Akzo*,¹³⁶ the ECJ confirmed that as long as a decision of the Commission ordering an undertaking to submit to an investigation fulfilled the conditions laid down in Article 14(3) of Regulation 17, it was not contrary to the fundamental principles in Article 8 of the ECHR.¹³⁷

However, in *Hoechst*,¹³⁸ the ECJ modified its position. It observed that, although the existence of the right to the inviolability of the home must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to natural persons, this did not apply to undertakings, since there were not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.¹³⁹

It further declared that even though the ECHR only protects the right of individuals to the respect of private life, it follows from the legal systems of the Member States that any kind of intervention by public authorities into to the sphere of private activity of any person, compassing not only physical/natural persons but also legal persons, must have a legal basis and be justified by law. The intervention cannot hence be neither arbitrary nor disproportionate and has to be considered as a general principle of EC law.¹⁴⁰

The ECJ stated that the wide powers conferred on the Commission's officials to enter any premises, land and means of transport of undertakings and the wide scope of investigations was necessary to obtain evidence of infringements of competition rules. If the Commission's officials could only ask for documents or files which they could identify precisely in advance,

¹³³ Article (20)(2)(e) of Regulation 1/2003.

¹³⁴ Case 136/79, *National Panasonic v. Commission*, [1980] ECR p. 2033.

¹³⁵ Case 136/79, *National Panasonic v. Commission*, [1980] ECR p. 2033, at § 19-20.

¹³⁶ Case 5/85, *Akzo Chemie BV and Akzo Chemie UK Ltd v. Commission*, [1986] ECR p. 2585.

¹³⁷ Case 5/85, *Akzo Chemie BV and Akzo Chemie UK Ltd v. Commission*, [1986] ECR p. 2585, at § 27.

¹³⁸ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859.

¹³⁹ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859, at § 17.

¹⁴⁰ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859, at § 19.

it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate. The correlate to the wide powers is the requirement that the rights of the undertakings concerned must be respected. Therefore, the Commission must specify the subject matter and purpose of the investigation in order to demonstrate that the investigation is justified and to enable the undertakings concerned to assess the scope of their duty to cooperate and to safeguard the rights of defense.¹⁴¹ It may thus be concluded that undertakings were not left without any safeguards even though the ECJ did not recognize the inviolability of their business premises.¹⁴²

In addition, the ECJ noted that there was no case law of the European Court of Human Rights on that subject.¹⁴³ In this context it should be recalled that this is no longer the case. The ECtHR has expressly extended the right guaranteed by Article 8 of the ECHR also to undertakings.¹⁴⁴ In 2002, in *Roquette Frères*,¹⁴⁵ the ECJ itself reiterated that fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures, and that the ECHR has a special significance among the international treaties for the protection of human rights from which the Court draws inspiration.¹⁴⁶ Referring to *Hoechst* it recalled that it had recognized that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law.¹⁴⁷ The ECJ held that for the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case law of the ECtHR subsequent to the *Hoechst* Judgment. The ECJ then referred to the judgments of the ECtHR in *Colas Est* and *Niemietz*, according to which the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises and the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.¹⁴⁸ This is the first time that the ECJ has accepted that the principle of the inviolability of the home is not limited to private dwellings.¹⁴⁹

3.3.2.2. Situation under Regulation 1/2003

Under the new Regulation 1/2003, the situation differs from that under Regulation 17 in that the Commission's officials may now also carry out inspections into other premises than

¹⁴¹ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859, at § 26-29.

¹⁴² On other rights of defence, cf. RILEY, A.: "The ECHR implications of the investigation provisions of the draft competition regulation", *ICQL*, vol. 51, January 2002, p. 55-89, at p. 64-65.

¹⁴³ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR p. 2859, at § 18.

¹⁴⁴ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 41.

¹⁴⁵ Case C-94/00, *Roquette Frères SA v. Commission*, [2002] ECR p. I-9011.

¹⁴⁶ Case C-94/00, *Roquette Frères SA v. Commission*, [2002] ECR p. I-9011, at § 23.

¹⁴⁷ Case C-94/00, *Roquette Frères SA v. Commission*, [2002] ECR p. I-9011, at § 27.

¹⁴⁸ Cf. *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 29-30 and *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 40.

¹⁴⁹ Cf. LIENEMEYER, M. and WAELBROECK, D.: "Case C-94/00, *Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes*, Judgment of the Court of Justice (Full Court) of 22 October 2002", *C.M.L.R.*, volume 40, number 6, December 2003, p. 1481-1497, at p. 1482.

business premises. These other premises include the homes of directors, managers and other members of staff of the undertakings concerned. For inspections in homes a prior authorization from the national judicial authority of the Member State concerned is necessary. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard, in particular, to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorization is requested. The national judge may, nevertheless, not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. Moreover, the lawfulness of the Commission decision is subject to review only by the ECJ.¹⁵⁰

Comparing the case law of the ECJ with that of the ECtHR it appears that, once again, the courts would use different criteria but arrive basically to the same conclusion. In antitrust cases the ECJ applies the rights of defense to undertakings as it has considered that the inviolability of the home is a right, which only extends to natural persons. However, its decision in *Roquette Frères* seems to indicate that it might be willing to give more significance to the case law of the ECtHR when it comes to the inviolability of the home. This would certainly be a welcomed development taking into consideration that when national competition authorities are conducting inspections in cases involving an infringement of Article 101 or 102 TFEU, they would be bound by the case law of the ECtHR, whereas the Commission's inspections could only be subject to the review of the ECJ, which so far has applied different criteria than the ECtHR.

The *Colas Est* Judgment raises, nevertheless, the question whether the Commission's inspections would stand an examination by the ECtHR, if that were possible, which is currently not the case. In *Colas Est*, in deciding that the inspections at issue could not be regarded as strictly proportionate to the legitimate aims pursued, the ECtHR paid attention, in particular, to three criteria. First, it noted the very wide powers of the French competition authorities, including an exclusive competence to determine the expediency, number and length and scale of inspections. Second, it observed that no warrant issued by a judge prior to the inspection was required. Third, it considered the fact that no police officer was present during the inspections.¹⁵¹

In fact, the powers of the French competition authority were very similar to what the Commission's powers of inspection in business premises are. The Commission may decide on *e.g.* the number and scale of the inspections and it does not need a warrant to conduct the inspection in business premises but a Commission Decision ordering the inspection is sufficient. The lawfulness of the Commission's inspection decision is only subject to a posterior legal review by the ECJ.¹⁵² If the inspection carried out by the Commission were to be found unlawful, the evidence that the Commission had obtained during the inspection

¹⁵⁰ Article 21 of Regulation 1/2003.

¹⁵¹ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 48-50.

¹⁵² Article 20(4) of Regulation 1/2003.

would also be considered illegal and the Commission would be barred from basing an infringement decision on such evidence.¹⁵³ Moreover, the Commission's officials are usually not accompanied by an independent observer but at most by officials of national competition authorities. These officials may, however, not be considered as independent observers as their task is to assist the Commission in the inspection.¹⁵⁴ In the light of these facts it would at first look appear that the Commission's inspections would not meet the standards set by the ECtHR in *Colas Est*.

Nonetheless, the facts at issue in *Colas Est* must also be considered. First, the ECtHR recognized that when business premises of legal persons are concerned, interference might be more far-reaching.¹⁵⁵ Second, in the case in question the French officials seized several thousands of documents, including various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts concerned by the investigation.¹⁵⁶ The latter fact would already as such make a similar Commission inspection unlawful, as the Commission's inspection decision must specify the subject matter and the purpose of the inspection in order to be lawful and the Commission must conduct its investigation within those limits. The factors examined in the previous paragraph might arguably also have influenced the ECHR's decision in *Colas Est*. Hence, it is submitted that the Commission's inspections under Article 20 of Regulation 1/2003 might not necessarily be contrary to Article 8 of the ECHR, provided that it fulfils all the conditions laid down in Article 20 and the Commission officials respects the rights of defense of the undertakings.

Another important question is the extended power of the Commission under Regulation 1/2003 to conduct inspections in the homes of directors, managers and other members of staff of the undertakings.¹⁵⁷ As inspections in private premises require a prior judicial warrant, which enables the national court to control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive, and the lawfulness of that decision may later be reviewed by the ECJ, it is submitted that these inspections do not either violate Article 8 of the ECHR. Naturally this is subject to the condition that the Commission's officials exercise their investigating powers in compliance with the requirements laid down in Regulation 1/2003 and attempt to cause as little disturbance as possible in the homes of the persons concerned.

3.4. Right to respect for correspondence

3.4.1. Case law of the ECtHR on the right to respect for correspondence

¹⁵³ Cf. LENAERTS, K. and MASELIS, I.: "Procedural rights and issues in the enforcement of Articles 81 and 82 of the EC Treaty", *Fordham International Law Journal*, 2001, p. 1615-1654, at p. 1623-1624.

¹⁵⁴ Article 20(5) of Regulation 1/2003. Cf. also TEMPLE LANG, J. and RIZZA, C.: "The *Ste Colas Est and Others v. France* case, European Court of Human Rights, Judgment of April 16, 2002", *E.C.L.R.*, volume 23, issue 8, 2002, p. 413-416, at p. 416.

¹⁵⁵ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 49.

¹⁵⁶ *Société Colas Est and Others v. France*, Judgment of 16 April 2002, no. 37971/97 ECHR 2002-III, at § 11.

¹⁵⁷ Article 21 of Regulation 1/2003.

Contrary to the right to respect for private life, the wording of Article 8 does not suggest that the respect for correspondence would encompass only private correspondence. In *Niemietz*, the ECtHR therefore held that it was not necessary to qualify further the correspondence to which the protection provided for in Article 8 extended, as that article makes no such qualification. According to the ECtHR, the warrant issued by the Munich District Court in the case was drawn in broad terms in that it ordered a search for and seizure of documents without any qualification or limitation, revealing the identity of the author of the offensive letter at issue. The search of Mr. Niemietz' law office involved the search of four cabinets concerning clients as well as six individual files and must therefore have covered "correspondence" and materials that can be regarded as such for the purposes of Article 8 of the ECHR.¹⁵⁸ The search thus impinged on professional secrecy to an extent that was disproportionate in the circumstances. Moreover, the Court recalled that where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the ECHR.¹⁵⁹

In *Campbell*,¹⁶⁰ the applicant complained that correspondence to and from his solicitor and the European Commission of Human Rights was opened and read by the prison authorities in breach of Article 8.¹⁶¹ The ECtHR, referring to its judgment in *S. v. Switzerland*, held that it is in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions, which favor full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged.¹⁶²

Moreover, the Court stated that there is no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8 of the ECHR. As a consequence, the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure, which the normal means of detection have failed to disclose. The letter should only be opened and should not be read and suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. Reading a prisoner's mail to and from a lawyer should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information, which would satisfy an objective observer that the privileged channel of communication was being abused.¹⁶³ The case law of the ECtHR thus clearly confirms the existence of a legal professional privilege that may only be limited in exceptional circumstances.

¹⁵⁸ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 32.

¹⁵⁹ *Niemietz v. Germany*, Judgment of 16 December 1992, Series A no. 251-B, at § 37.

¹⁶⁰ *Campbell v. the United Kingdom*, Judgment of 25 March 1992, Series A no. 233.

¹⁶¹ *Campbell v. the United Kingdom*, Judgment of 25 March 1992, Series A no. 233, at § 30.

¹⁶² *S. v. Switzerland*, Judgment of 28 November 1991, Series A no. 220, at § 46.

¹⁶³ *S. v. Switzerland*, Judgment of 28 November 1991, Series A no. 220, at § 48.

3.4.2. Legal professional privilege

In an antitrust case, *AM & S*,¹⁶⁴ the ECJ held that certain communications between lawyer and client are to be considered as confidential. The Court referred to principles and concepts common to the laws of the Member States concerning the observance of confidentiality and, in particular, to the legal professional privilege. It emphasized the importance of the requirement that any person must be able, without a constraint, to consult a lawyer.¹⁶⁵ The ECJ observed that although the principle of protection of written communications between lawyer and client was generally recognized in the legal systems of the Member States, its scope and the criteria for applying it varied. At the time of the judgment, the protection of legal professional privilege was in some Member States based on a recognition of the very nature of the legal profession, in that it contributes towards the maintenance of the rule of law, whereas in other Member States, the same protection was justified by the more specific requirement that the rights of defense must be respected.¹⁶⁶

Nevertheless, common criteria in the Member States afforded the protection of the confidentiality of written communications between lawyer and client provided that two conditions were fulfilled. On the one hand, those communications must be made for the purposes and in the interests of the client's rights of defense and, on the other hand, they must emanate from independent lawyers, *i.e.* lawyers who are not bound to the client by a relationship of employment.¹⁶⁷ The Court therefore held that under these circumstances written communications between lawyer and client were to be protected as confidential also under Community law.

As to the scope of that protection, the Court stated that the protection covered all written communications exchanged after the initiation of the administrative procedure under Regulation 17, which might lead to a decision on the application of Articles 85 and 86 EC [now 101 and 102 TFEU] or to the imposition of a pecuniary sanction on the undertaking. Moreover, it would also be possible to extend the protection to earlier written communications, which have a relationship to the subject matter of that procedure.¹⁶⁸ However, if the client thought it would be in his interests to disclose written communications between him and his lawyer, he could waive the legal professional privilege.¹⁶⁹

If an undertaking wishes to rely on legal professional privilege, it must nonetheless provide the Commission's officials with relevant material that can demonstrate that the communications in question fulfill the requirements of protection. In case of a dispute between the undertaking and the Commission as to the confidentiality of the communications, the dispute has to be solved solely at the Community level.¹⁷⁰

¹⁶⁴ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575.

¹⁶⁵ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 18.

¹⁶⁶ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 19-20.

¹⁶⁷ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 21.

¹⁶⁸ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 23.

¹⁶⁹ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 28.

¹⁷⁰ Case 155/79, *AM & S v. Commission*, [1982] ECR p. 1575, at § 29-30.

Furthermore, in *Hilti*,¹⁷¹ the CFI extended the principle of the protection of written communications between lawyer and client to internal notes which are confined to reporting the text or the content of those communications. The Court emphasized that the way in which the legal advice is reported cannot constitute a hindrance for protecting the confidentiality of communications between lawyer and client.¹⁷²

In 2003, the President of the CFI suggested an even more far-going interpretation in *Akzo Nobel*.¹⁷³ During its investigation at Akzo Nobel's premises, the Commission was informed that certain documents might be covered by the legal professional privilege. As to the first set of documents claimed to contain confidential information, Set A, the Commission placed them in a sealed envelope after not having been able, based on the undertaking's explanation, to reach a conclusion whether the documents should be privileged.¹⁷⁴ With respect to the second set of documents, Set B, including handwritten notes by the General Manager of Akros Chemicals, allegedly drafted during discussions with lower level employees and used for the purpose of preparing a memorandum in the Set A documents, and e-mails between the General Manager of Akros Chemicals and Akzo Nobel's competition law coordinator, the leader of the Commission's investigation team reviewed the documents and held that they were not privileged. Copies of these documents were added to the rest of the file, but not in a sealed envelope.¹⁷⁵

Although the President of the CFI did not definitely decide the issues raised, he found that it appeared that the Set A documents related to facts which were capable of justifying consultation of a lawyer and of being connected either with the investigation at issue or with other investigations which the undertakings concerned were reasonably able to anticipate and in view whereof they intended to draw up a strategy and prepare their defense.¹⁷⁶ As to the Set B documents, the President submitted that as a consequence of the fact that a number of Member States, Belgium and the Netherlands in particular, had adopted rules designed to protect written communications with a lawyer employed by the undertaking on a permanent basis, it was possible that the legal professional privilege would have been extended also to in-house lawyers also in the Community legal order. Such an extension would be subject to the condition that the in-house lawyer would be subject to rules of professional conduct equivalent to those imposed on an independent lawyer.¹⁷⁷

In addition, the President of the CFI found that if the Commission's official were able to cast a cursory glance over the documents concerned, there would be a risk that they would read

¹⁷¹ Case T-30/89, *Hilti v. Commission*, [1990] ECR p. II-163.

¹⁷² Case T-30/89, *Hilti v. Commission*, [1990] ECR p. II-163, at § 18.

¹⁷³ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771.

¹⁷⁴ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771, at § 3-8.

¹⁷⁵ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771, at §. 9-11.

¹⁷⁶ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771, at § 113.

¹⁷⁷ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771, at § 124-127.

information covered by legal professional privilege. By placing copies of the documents in a sealed envelope, without first consulting the documents concerned, that risk would be avoided and the documents could still be used later to resolve the dispute related to whether the documents were privileged or not.¹⁷⁸

However, the ECJ annulled the intermediary order by the CFI due to the lack of urgency.¹⁷⁹ As it did not consider, whether the legal professional privilege had been extended also to in-house lawyers, provided that they were subject to rules of professional conduct equivalent to those imposed on an independent lawyer, the *AM & S* case law appears to still be valid. In the light of the case law of the ECtHR,¹⁸⁰ it could nevertheless be argued that it would only be justified to limit the legal professional privilege to independent lawyers in cases where there are exceptional circumstances that give reason to believe that the privilege is being abused. For instance, if there were reasons to believe that the undertaking subject to the inspections was pressuring its in-house legal counsel to claim that documents drafted by him were covered by the legal professional privilege although this would in fact not be the case, the communication in question should not be considered privileged. Admittedly, there is a risk that being an employee of the undertaking, the in-house counsel might not always be in a position to act otherwise as instructed by his employer and, hence, certain safeguards to the objectivity of the in-house lawyer should be required.

A. Andreangeli has suggested that the test applied in *AM & S* should be replaced with a more flexible test that would permit to consider, whether in the case in question the lawyer would be subject to binding rules which preserve his integrity and independence regardless of his or her relation of employment with the client.¹⁸¹ This would basically be in line with what the president of the CFI suggested in *Akzo Nobel*. It has also been argued that by extending the legal professional privilege to in-house legal advisors, the legal security of the undertakings would be enhanced.¹⁸²

The respect of the legal professional privilege might be more difficult to ensure when the communications in question are not traditional written paper documents, but computer files. In order to respect the legal professional privilege it appears that it would be difficult to make a copy of the whole hard-drive of computers in the premises of the undertakings without encroaching on the privilege. Special care should therefore be taken not to open files that might fall under the legal professional privilege.

¹⁷⁸ Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2003] ECR p. II-4771, at § 138.

¹⁷⁹ Case C-7/04 P(R), *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd v. Commission*, [2004] ECR p. I-8739.

¹⁸⁰ *Campbell v. the United Kingdom*, Judgment of 25 March 1992, Series A no. 233, at § 48.

¹⁸¹ Cf. ANDREANGELI, A.: "The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, to steps back?", *The Competition Law Review*, (2005) 2(1), p. 31-54, at p. 42.

¹⁸² Cf. DARMON, M.: "A propos du règlement 1/2003: quelques réflexions sur la situation des entreprises face au renforcement des pouvoirs de la Commission" in MOURRE, A. (dir.): "Le nouveau droit communautaire de la concurrence, Les droits de la défense face aux pouvoirs de la Commission européenne Paris, 2004, p. 185-208, at p. 204.

4. Implications of the accession of the European Union to the ECtHR for the protection of rights of defense during antitrust inspections

The protection of fundamental rights by the European Union Courts has gradually evolved and, over time, the importance given in its case law to the ECHR has also increased.¹⁸³ In the last years, the ECJ has even referred more frequently to the case law of the ECtHR. As a consequence, the case law of the ECtHR is also a source of reference for the ECJ when it decides cases, which involves violations of fundamental rights.

However, as has been analyzed in this paper, there are certain differences between the ECJ and the ECtHR regarding the interpretation of fundamental rights, in particular, the right against self-incrimination and the right to inviolability of the home. In antitrust cases, the ECJ has thus to a certain degree been unwilling to recognize the right not to incriminate oneself if the respondents are undertakings.¹⁸⁴ Similarly, with regard to the right to inviolability of the home, until *Roquette Frères*, European Union law only recognized this right for natural persons. Nevertheless, even if the ECJ has not always directly recognized that some of the fundamental rights enshrined in the ECHR may be invoked by undertakings being subject of an antitrust investigation, it has still arrived basically to the same conclusion as had it recognized those rights. This is due to the fact that the ECJ recognizes certain rights of defense which undertakings may invoke instead. One may therefore ask, would the accession of the European Union to the ECHR bring about any significant change regarding the possibility of undertakings invoking fundamental rights during antitrust inspections?

The first question that must be asked is would the ECJ be bound by the case law of the ECtHR just like any other national court? Once the European Union has acceded to the ECHR, it would become a Contracting Party to the ECHR and, consequently, it would seem logical that the ECJ would be treated in the same manner as any national supreme or constitutional court, having the same rights and obligations as national courts.¹⁸⁵ However, in practice, it is probable that the ECtHR would be somewhat cautious when scrutinizing matters of European Union law.

Moreover, pursuant the Article 6(2) TEU, the accession of the European Union shall not affect the Union's competences as defined in the Treaties. Thus, the accession of the European Union to the ECHR should not affect the competences of the ECJ either. Since under Article 267 TFEU, the ECJ has competence over the interpretation of European Union

¹⁸³ Cf. DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*", *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665, at p. 650.

¹⁸⁴ Cf. DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*", *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665, at p. 650.

¹⁸⁵ This interpretation has been confirmed by the Vice-Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly at a hearing on the institutional aspects of the European Union's accession to the European Convention on Human Rights, cf. the intervention of Mr Serhiy Holovaty, the Vice-Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, at a hearing on the institutional aspects of the European Union's accession to the European Convention on Human Rights on 18 March 2010, available at http://www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf.

law, it would therefore be necessary to ensure that the ECJ will preserve this monopoly after the accession.¹⁸⁶ Consequently, it is possible that some clarifications will be included in the negotiating directives on the competence of the ECtHR to scrutinize the ECJ's decisions and the relationship between the two courts. The Vice-Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, has confirmed that the ECJ would preserve the primary responsibility for ensuring the respect of fundamental rights in the European Union's legal system and the ECtHR would only exercise an external control of EU acts in order to ensure the minimum common standards guaranteed by the ECHR.¹⁸⁷ This would seem to imply that as long as the ECJ ensures the respect of those minimum standards, the ECtHR would not have any reason to intervene.

But since the ECJ has partially interpreted some of the fundamental rights enshrined in the ECHR differently from the ECtHR, one may ask, will the ECJ be more prone, after the accession of the European Union to the ECHR, to take into consideration the case law on fundamental rights by the ECtHR? As the ECJ would be obliged to ensure that the minimum common standards guaranteed by the ECHR are respected in the European Union, it can be expected that the ECJ would start to follow the case law of the ECtHR more closely and to modify its case law, but only to the extent that it would be necessary in order to comply with the obligations under the ECHR mechanism. In fact, a certain tendency to give more significance to the case law of the ECtHR can already be seen in that the ECJ has started to refer more frequently to it.

Nevertheless, in the field of antitrust, the most important change brought about by the accession of the European Union to the ECHR would be that the acts of the European Union institutions, including the Commission, would be reviewable by the ECtHR on grounds of breaches of the fundamental rights enshrined in the ECHR. This would mean that an external system of control would be put in place with regard to the respect of the fundamental rights guaranteed by the ECHR. As a consequence, if the Commission had breached one of those fundamental rights while conducted an inspection in business premises or private homes of company directors or executives, the undertakings concerned could bring an action before the ECtHR against the Commission, once it had exhausted all EU remedies. This would therefore create an additional remedy for safeguarding the fundamental rights protected by the ECHR, enabling companies to obtain a higher level of protection in those areas where the ECJ has not been willing to fully extend rights normally granted only to natural persons also to undertakings.

In cases involving large fines imposed for antitrust violations it may be expected that, after the accession, undertakings will start bringing actions before the ECtHR always when they

¹⁸⁶ This is also one of the issues that have been discussed during several meetings of JHA Counsellors and national experts that must be addressed in the negotiating directives to be adopted under Article 218 TFEU and in the negotiations for the Accession to the ECHR. Cf. Council of the European Union, Note from the Presidency to the COREPER/Council on the Accession of the European Union to the European Convention on Human Rights, 17 February 2010, available at <http://register.consilium.europa.eu/pdf/en/10/st06/st06582.en10.pdf>.

¹⁸⁷ Cf. the intervention of Mr Serhiy Holovaty, the Vice-Chairperson of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, at a hearing on the institutional aspects of the European Union's accession to the European Convention on Human Rights on 18 March 2010, available at http://www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf.

have reason to believe that an action on the ground of a violation of the fundamental rights guaranteed by the ECHR could be successful. As a result, there is a risk that at the beginning there will be somewhat diverging case law between the ECJ and the ECtHR. However, it is likely that the ECJ would be willing to take into consideration the case law of the ECtHR and start modifying its case law since its unwillingness to do so to date has, at least partly, been motivated by the fact that the ECHR as such does not form part of European Union law.¹⁸⁸ On the other hand, the existing divergences between the case law of the ECJ and the ECtHR mainly concern situations in which the applicants before the ECJ have been undertakings whereas before the ECtHR they have been natural persons. As a consequence, some of the differences may even be justified and there would be no need for the ECJ to modify its case law.

In addition, since the Commission would understandably not be interested in finding itself as a respondent before the ECtHR, it might be willing to adjust some of the practices that it is currently applying when conducting surprise inspections if the ECtHR adopted a strict approach while scrutinizing complaints brought before it by undertakings which have been subject of the inspections. For instance, it might consider extending the legal professional privilege also to documents drafted by in-house lawyers.

In any case, the accession of the European Union to the ECHR is unavoidable as the Lisbon Treaty creates an obligation for the Union to accede to the ECHR so the question is merely how it should be done. Over the time, the protection of fundamental rights granted during inspections related to antitrust violations will therefore increase if the ECtHR is willing to interpret the fundamental rights extensively so as to fully extend the rights also undertakings.

5. Conclusions

The ECJ has often emphasized the significance of the ECHR for the interpretation of fundamental rights and, in recent years, the ECJ has even referred to the case law of the ECtHR. However, it has still shown a certain unwillingness to directly recognize certain fundamental rights in the ECHR, such as the right not to incriminate oneself, in antitrust cases where the respondents were undertakings.¹⁸⁹ This is to a certain degree justified, as the sanctions that can be imposed on legal persons under EU competition law are purely pecuniary and thus the consequences are less severe than when criminal sanctions can be imposed on natural persons.¹⁹⁰ Similarly, the objective of the enforcement of competition law is to ensure the well-functioning of the internal market and, thus, it could justify certain limitations of the rights of undertakings for reasons of the general public interest at stake, provided that there would still be some kind of safeguards for the undertakings in question.

Although the ECJ has not treated undertakings as favorably as the ECtHR has, this does not, however, in general imply that the undertakings involved in antitrust proceedings would not

¹⁸⁸ Cf. Case T-347/94, *Mayr-Melnhof v. Commission*, [1998] ECR p. II-1751, at § 311.

¹⁸⁹ Cf. DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*", *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665, at p. 650.

¹⁹⁰ Admittedly, the increasingly higher level of fines make the pecuniary sanctions more severe than they used to be in the past but still they cannot be compared to prison sentences.

have any fundamental rights. Instead, the European Union Courts have frequently applied the rights of defense and have reached fairly similar conclusions as has the ECtHR in its case law.¹⁹¹ Nevertheless, a few questions still remain about the compatibility of the European Union Courts' case law with regard to fundamental rights of undertakings during inspections in antitrust investigations.

First, the ECtHR extends the protection against self-incrimination even to information that may appear to be of exculpatory or purely factual nature but could be used by the prosecution to prove the case against the accused. In contrast, the European Union Courts have held that factual questions would be permissible even though the replies might result in the establishment of an infringement committed by the accused undertaking, as long as the Commission would not rely solely on the information provided by the undertaking subject to the investigation. The European Union stance would, in principle, seem justified given the importance of a functioning internal market for the well-being of consumers and the economic development of the EU. It should also be noted that the cases in which the ECHR has gone further than the ECJ in the protection against self-incrimination concerned natural persons, not undertakings.

Second, the power of the Commission to direct questions to members of the undertakings' staff or undertakings solely consisting of one natural person could be problematic in cases where these persons could be subject to criminal sanctions under national law. On the whole, different standards applied by Member States regarding the criteria for conducting an inspection on behalf of the Commission or the definition of the legal professional privilege risk resulting in an unequal treatment of the persons in whose premises the inspections are conducted. The power of the Commission to conduct an inspection solely on the basis of its decision whereas an inspection carried out on its behalf in some Member States would require a previous judicial authorization is difficult to conciliate with the fact that the substantive rules that are applicable, *i.e.* Articles 101 and 102 TFEU, are the same. It appears arbitrary that the level of the protection given to the undertakings would vary based on in which country the inspections are conducted.

As inspections are a useful tool for obtaining evidence of the most harmful antitrust violations such as secret cartels, it would appear justified to conduct them in the premises of business undertakings without a previous judicial authorization. As long as the possible limitations of the rights of defense would only apply to legal persons, the importance of ensuring the well-functioning of the internal market would seem to prevail. The situation could, however, be different when the professional and private activities of the persons concerned are intermingled, as the ECtHR held in *Niemietz*. This would be the case when an undertaking solely consists of a natural person. Naturally, a judicial authorization should always be a requirement when private premises are being inspected, as is also currently provided for by Regulation 1/2003. But even in the latter case, the right against self-incrimination or the right to the respect for home or correspondence cannot be given the same status as some other fundamental rights, for instance, the right to life and is, therefore, not absolute. In fact, that is

¹⁹¹ VINCENTS, O. B.: "The Application of EC Competition Law and the European Convention on Human Rights", *E.C.L.R.*, vol. 27, issue 12, 2006, p. 693-699, p. at 699.

why Article 8(2) of the ECHR foresees, under limited circumstances, the possibility of interference in the right to the respect for home or correspondence.

In recent years the ECJ has referred to the ECHR and the case law of the ECtHR more frequently and it has also increasingly followed that case law.¹⁹² S. Douglas-Scott has also noted that the case law of the ECtHR has no *erga omnes* effect but is only binding on the parties to the case. Thus its status as a precedent has been controversial.¹⁹³ Taken into account the recent development of the ECJ's case law it would, nonetheless, appear that the Court would be more inclined to take into account the relevant case law of the ECtHR. In *Roquette Frères*, by referring to the case law of the ECtHR the ECJ thus recognized that the principle of the inviolability of the home was not limited to private dwellings¹⁹⁴ and, consequently, reduced the difference between its case law and the case law of the ECtHR on the right to respect of private and family life.

The accession of the European Union to the ECHR could bring a solution to the somewhat divergent protection of fundamental rights in the EU in that the ECHR would become part of European Union law and the ECJ would be bound to take into account the interpretation of the ECtHR. At first, admittedly, it would be possible that the two courts would give partially divergent decisions regarding the protection of fundamental rights, but over the time the ECJ would probably modify its case law if the ECtHR had started to reach different conclusions on the same issues in deciding actions brought against the Commission on the grounds of violations of fundamental rights. With respect to the fundamental rights that undertakings may invoke during antitrust inspections, the main issue would be to define the extent of the right against self-incrimination and the legal professional privilege, since the other rights of defenses examined in this paper are, in general, afforded almost similar protection by the ECJ as by the ECtHR. What is more, it is probable that this question will be answered soon, since the accession of the European Union to the ECHR will open a new remedy for undertakings to bring an action before the ECtHR against the Commission and it can be expected that the high fines imposed for antitrust violations in recent years will prompt them to try their luck in Strasbourg.

¹⁹² Cf. DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis", *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665, at p. 650. Cf. also Case C-94/00, *Roquette Frères SA v. Commission*, [2002] ECR p. I-9011.

¹⁹³ Cf. DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis", *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665, at p. 651.

¹⁹⁴ Cf. LIENEMEYER, M. and WAELBROECK, D.: "Case C-94/00, *Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes*, Judgment of the Court of Justice (Full Court) of 22 October 2002", *C.M.L.R.*, volume 40, number 6, December 2003, p. 1481-1497, at p. 1482.

Bibliography

ALONSO GARCIA, R. and SARMIENTO, D.: “*La Carta de los Derechos Fundamentales de la Unión Europea. Explicaciones, concordancias, jurisprudencia*”, Cizur Menor, 2006

AMEYE, E.M.: “The Interplay between Human Rights and Competition Law in the EU”, *E.C.L.R.* 2004, volume 25, issue 6, p. 332-341

ANDREANGELI, A.: “The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, to steps back?”, *The Competition Law Review*, (2005) 2(1), p. 31-54

DARMON, M.: “*A propos du règlement 1/2003: quelques réflexions sur la situation des entreprises face au renforcement des pouvoirs de la Commission*” in MOURRE, A. (dir.): “*Le nouveau droit communautaire de la concurrence, Les droits de la défense face aux pouvoirs de la Commission européenne*” Paris, 2004, p. 185-208

DOUGLAS-SCOTT, S.: “A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis”, *C.M.L.R.*, volume 43, number 3, June 2006, p. 629-665

FORRESTER, I.S.: “Due Process in EC competition cases: A distinguished institution with flawed procedures”, *E.L. Rev.*, volume 34, December 2009, p. 817-843

LENAERTS, K. and MASELIS, I.: “Procedural rights and issues in the enforcement of Articles 81 and 82 of the EC Treaty”, *Fordham International Law Journal*, 2001, p. 1615-1654

LIENEMEYER, M. and WAELBROECK, D.: “Case C-94/00, Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes, Judgment of the Court of Justice (Full Court) of 22 October 2002”, *C.M.L.R.*, volume 40, number 6, December 2003, p. 1481-1497

MOITINHO DE ALMEIDA, J.C.: “*La protección de los derechos fundamentales en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*” in RODRÍGUEZ IGLESIAS, G.C. and LIÑÁN NOGUERAS, D. (dir.): “*El derecho comunitario europeo y su aplicación judicial*”, Madrid, 1993

MORTE GÓMEZ, C.: “*El papel del Convenio Europeo de Derechos Humanos en el sistema de derechos fundamentales de la Unión Europea*” in ÁLVAREZ CONDE, E. and GARRIDO MAYOL, V. (Dir.): “*Comentarios a la Constitución Europea Libro II. Los Derechos y Libertades*”, Valencia, 2004

ORTIZ BLANCO, L. (ed.): “*European Community Competition Procedure*”, 2nd edition, New York, 2006

PASTOR RIDRUEJO, J.A.: “*La interrelación de los sistemas de protección de los derechos fundamentales*” in ÁLVAREZ CONDE, E. and GARRIDO MAYOL, V. (dir.): “*Comentarios a la Constitución Europea Libro II. Los Derechos y Libertades*”, Valencia, 2004, p. 1653-1667

RILEY, A.: “Saunders and the power to obtain information in competition law”, *E.C.L.R.*, volume 25, No. 3, June 2000, p. 264-281

RILEY, A.: “The ECHR implications of the investigation provisions of the draft competition regulation”, *ICQL*, vol. 51, January 2002, p. 55-89

TEMPLE LANG, J. and RIZZA, C.: “The *Ste Colas Est and Others v. France* case, European Court of Human Rights, Judgment of April 16, 2002”, *E.C.L.R.*, volume 23, issue 8, 2002, p. 413-416.

VINCENTS, O.B.: “The Application of EC Competition Law and the European Convention on Human Rights”, *E.C.L.R.*, vol. 27, issue 12, 2006, p. 693-699

WILS, W.P.J.: Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis, *World Competition*, volume 26, issue 4, p. 567-588