

Centre for Antitrust and Regulatory Studies

Marta Michałek

Right to Defence in EU Competition Law: The Case of Inspections

Warsaw 2015



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**Right to Defence
in EU Competition Law:
The Case of Inspections**



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University of Warsaw, Faculty of Management**

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Marta M. Michałek

Right to Defence in EU Competition Law: The Case of Inspections

Thèse Acceptée par la Faculté de droit, le 28 août 2015,
sur proposition du Professeur Walter A. Stoffel (premier rapporteur)
et du Professeur Marc Amstutz (second rapporteur)

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Thèse présentée à la Faculté de droit de l'Université de Fribourg (Suisse) par Marta Michałek, pour l'obtention du grade de docteur en droit.

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List of acronyms

- CFI** – Court of First Instance
- CFR** – Charter of Fundamental Rights
- CJEU** – Court of Justice of the EU
- EC** – European Community
- ECJ** – European Court of Justice
- EComHR** – European Commission of Human Rights
- EConHR** – European Convention on Human Rights
- ECtHR** – European Court of Human Rights
- EU** – European Union
- ICCPR** – International Covenant on Civil and Political Rights
- NCAs** – National Competition Authorities
- OJ** – Official Journal of the European Union
- TEU** – Treaty on European Union
- TfEU** – Treaty on the Functioning of the European Union
- UDHR** – UN Universal Declaration of the Human Rights
- UN** – United Nations
- YARS** – Yearbook of Antitrust and Regulatory Studies

Introduction

“It tends to be a frightening experience when – more often than not, early in the morning – European Commission inspectors turn up unannounced at the doors of an undertaking with the intention of searching its premises as part of a dawn raid aimed at determining whether that undertaking is involved in anti-competitive practices¹.”

Unannounced inspections conducted by the Commission, also known as “dawn raids”, are undoubtedly an effective instrument that leads to the detection of competition law infringements² committed by inspected undertakings. Inspections are said to be much more effective if notably carried out without forewarning³ given that this surprise effect usually makes it possible to gather key evidence of the given investigation. For this reason, dawn raids often constitute a significant investigative step leading to the subsequent finding of a competition law infringement and imposition of substantial fines⁴.

Nevertheless, the implementation of these far reaching investigative powers granted to the Commission constitutes a significant intervention into the private sphere of the undertakings concerned regarding their private activities and premises. It has to be stressed that inspections are liable

¹ Opinion of Advocate General (hereafter: “AG”) Kokott of 3 April 2014 in case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para. 1.

² For instance cartels.

³ M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, Yearbook of Antitrust and Regulatory Studies (hereinafter: “YARS”), Vol. 4(5) 2011, p. 58.

⁴ The level of imposed fines has been constantly increasing, mostly in the EU, due to the Commission’s prevailing aim to strengthen deterrence of EU competition law violations. On the increase of fines, see, e.g. I.S. Forrester, *Due Process in EC competition cases: A distinguished institution with flawed procedures*, (2009) 34 ELRev, pp. 824–826.

to interfere with several rights granted to undertakings namely: the right to defence⁵, including the privilege against self-incrimination and legal professional privilege, the principle of proportionality and right to effective judicial protection⁶ as well as with the right to privacy⁷.

The aim of this study is to analyse the selected problems and developments concerning the protection of the undertakings' right to defence in the context of inspections carried out by the European Commission⁸ within competition law proceedings in order to assess the current level of this protection. The assessment is based on the comparison of the current EU legal order and the approach adopted by the Court of Justice of the European Union⁹ with the protection enshrined by the European Convention on Human Rights¹⁰ and the standards set out by the European Court of Human Rights¹¹ in this matter.

The right to defence constitutes one of the most important fundamental rights and components of justice. Originating from natural law, incorporated into positive law, the right to defence, amongst all general principles, has not only been vividly developed by the jurisprudence but also been attracting the particular interest of researchers¹². The role of the courts should indeed be acknowledged since judges, being aware of legislative shortcomings in this field, have brought the right to defence to the top of the hierarchy of norms¹³. The contemporary doctrine, in its turn, emphasises the superiority of the right to defence by describing it as “the guarantee of the guarantees

⁵ Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereafter: the “EConHR”); since inspections are part of proceedings of a criminal or quasi-criminal nature.

⁶ Art. 6 and 13 EConHR (right to an effective remedy).

⁷ Art. 8(1) EConHR.

⁸ Hereinafter: the “Commission”.

⁹ Hereinafter: the “CJEU”. The role of the CJEU in introducing the fundamental rights protection in the EU and the huge importance of the CJEU and its case-law, that has often been an inspiration for the subsequent legislation.

¹⁰ based on liberal concept of rights. But it has to be noted that this act has been limited only to the civil and political rights and freedoms. The EConHR shall be regarded as the “living instrument” not only due to the changes resulting from the protocols, but mainly due to the its interpretation given by the ECtHR. The ECtHR has namely either extended the scope of the rights protected or introduced its application in the situations that were unforeseeable at the time of the EConHR adoption.

¹¹ Hereinafter: the “ECtHR”.

¹² M. Stassinopoulos, *Le droit de la défense devant les autorités administratives*, Libr. générale de droit et de jurisprudence, Paris 1976, p. 49.

¹³ Y. Capdepon, *Essai d'une théorie générale des droits de la défense*, Dalloz 2013, p. 81, N. 129.

of legality¹⁴”, “the minimum of every legal procedure¹⁵” or “the minimum guarantee for access to justice”¹⁶.

Therefore this study starts (Chapter I) with discussion on the right to defence, including the questions of its history, terminology used, particular nature¹⁷, various theories and definitions, and its content as well as related notions¹⁸. It is stressed that there is no one universal and exhaustive definition of the right to defence¹⁹. While no court has yet provided any exhaustive and precise definition of the notion “right to defence”, the doctrinal definitions depend on the field of law in the framework in which they are elaborated etc. In this study the right to defence is defined as a complex fundamental legal principle providing each natural or legal person, whose legal situation has been influenced by an authority with unilateral decision-making power, with a justiciable entitlement to protect his legitimate interests by supporting or challenging the claim made by or against him.

The author argues further that the right to defence is not a simple bundle of procedural guarantees. It constitutes a distinct and autonomous legal norm that may be invoked independently and its “hard core” may vary depending on the nature of the particular field of law and proceedings in which it appears. Thus the actual scope of the right to defence can be different subject to the particular circumstances, *i.e.* in some cases only a few of the rights to the defence’s components may be necessary or much more relevant to protect the interest(s) of the person concerned.

¹⁴ P. Carcelle, G. Mas, *Les principes généraux du droit applicable à la fonction publique*, Revue Administrative, 1958, p. 621.

¹⁵ G. Langrod, *Procédure administrative et droit administratif*, R.I.S.A., 1956, p. 76.

¹⁶ I. Fanlo Cortés, *Justice for the Poor in the Hands of the Lawyers? Some Remarks on Access to Courts and Legal Aid Models*, Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol No. 64/65, p. 57.

¹⁷ Of this fundamental, subjective, inalienable and autonomous right.

¹⁸ Rule of law, procedural justice, right to good administration.

¹⁹ Nevertheless the right to defence is one amongst numerous undefined legal notions. For instance, the confusion regarding the best and exhaustive definition of the “fundamental rights” may be seen also between scholars P. Pescatore, *La protection des droits fondamentaux par le pouvoir judiciaire*, Rapport of the 7th Congress F.I.D.E., p. 1; G. Cohen Jonathan, *La Cour des Communautés européennes et les droits de l’homme*, R. M. C. 1978, p. 74; R. Bernhardt, *Problèmes liés à l’établissement d’un catalogue de droit fondamentaux pour les Communautés Européennes*, study prepared on the Commission’s demand, Bull. C.E. 1979, supplement 4, p. 25.

In this study, concentrating on competition law, the right to defence is regarded as encompassing a number of instruments of both material and procedural nature, *i.e.*, rights²⁰, principles²¹ and privileges²².

Nevertheless, since not all the above components are equally important at all stages of competition law proceedings, only those most related to the preliminary stage – inspections being a part of the investigation, *i.e.* the principle of proportionality, right to privacy²³, legal professional privilege, the privilege against self-incrimination and the right to effective remedy are analysed in detail in the course of the study.

After the analysis of the right to defence, the author moves on to the question of its protection in Europe. The right to defence is present at almost all levels of the legal order. It is the international law and more specifically the international instrument for the protection of human rights that have contributed to the particular development of the right to defence. National constitutions, in their turn, are often inspired by the rights and guarantees introduced in international conventions. It is thus necessary to have a look at the most relevant international systems or legal acts that provide for the protection of the right to defence. The guarantee of the right to defence may be identified in numerous international legal acts. Particularly noteworthy at a universal level are the UN Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and its Protocols. The study will nevertheless concentrate on the regional, *i.e.* European level and thus analyse particularly the European Convention on Human Rights²⁴ and the European Union (with its Charter of Fundamental Rights²⁵).

²⁰ Right to a fair trial and right to effective remedy, right to be heard, right of access to documents.

²¹ Principle of proportionality, principle of legal certainty, *Nulla poena sine lege*, *Ne bis in idem*.

²² Privilege against self-incrimination together with the presumption of innocence and legal professional privilege.

²³ This right is not a traditional component of the right to defence, hence it is indispensable to analyse it due to its importance with regard to the inspections and its interconnection with namely the right to defence.

²⁴ Based on liberal concept of rights. But it has to be noted that this act has been limited only to the civil and political rights and freedoms. The EConHR shall be regarded as the “living instrument” not only due to the changes resulting from the protocols, but mainly due to the its interpretation given by the ECtHR. The ECtHR has namely either extended the scope of the rights protected or introduced its application in the situations that were unforeseeable at the time of the EConHR adoption.

²⁵ Hereinafter: the “CFR”. See more below.

Chapter II includes the question of the extension of the protection of the fundamental rights of legal persons²⁶, discusses the most relevant provisions²⁷ of the EConHR and CFR as well as the significant role of both courts – the European Court of Human Rights and the Court of Justice of the European Union in ensuring the protection of the right to defence. In this regard one should have a closer look at the methods of interpretation of the court in question, in particular the autonomous interpretation specific to the ECtHR. In the part regarding the EU, its history, *i.e.* the transformation from a strictly economic community to a multitask organisation covering also the protection of fundamental rights, is briefly explained and important developments such as the adoption of the Charter of the Fundamental Rights of the European Union and its recognition as a binding document²⁸ as well as the forthcoming accession to the EConHR²⁹ are emphasised.

Next the Commission's powers of inspection are duly analysed in Chapter III. Inspections constitute an effective means of gathering information and detecting the existence of competition law violations³⁰.

Contrary to the request for information³¹, the inspections aim to elicit directly, *i.e.* at the undertakings' business premises, evidence of the most serious competition law infringements, *e.g.* cartels³² and abuses of a dominant position³³. Moreover, in the Commission's opinion, the inspections carried out at the business premises actually have a deterrent effect on the undertakings concerned since they usually lead to immediate termination of

²⁶ See judgment of the ECtHR of 27 February 1992 in case *Sténuît vs France*, Application No. 11598/85. See also report of the European Commission of Human Rights of 30 May 1991 in case *Sténuît*, Application No. 11598/85, and judgment of the ECtHR of 16 April 2002 in case *Société Colas Est and Others. vs France*, Application No. 37971/97.

²⁷ Articles 6, 7 and 13 EConHR and Articles 41, 47 and mostly 48 CFR.

²⁸ Being a part of primary law.

²⁹ Obligation of the EU accession to the EConHR was clearly introduced. Thus Article 6 TEU is said to constitute nowadays the “centerpiece of the EU's human rights framework”. P. Craig, G. De Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press, 2011, p. 363.

³⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-072, p. 144.

³¹ Being written discovery of information and used rather to obtain specific information on contractual arrangements or undertaking's market position.

³² Being called the “supreme evil of antitrust”. See XXXIII Report on European Policy, 2003, para. 717.

³³ L.O. Blanco, *European Community Competition Procedure*, 2nd ed.: Oxford University Press, 2011, No. 8.01, p. 293. See also L. Ritter, W.D. Braun, *European Competition Law: A Practitioner's Guide*, 3rd ed., 2004, pp. 1069–1070.

the illegal conduct of the undertakings concerned³⁴. Therefore, the inspections are of particular importance for the enforcement of competition law³⁵.

The successful enforcement of EU competition law, in particular rules introduced in Articles 101 and 102 TFEU, requires granting to the EU competition authority effective instruments for improving *inter alia* the detection of competition law violations. Thus, Regulation 1/2003 confers extensive powers of investigation upon the Commission. The far reaching Commission powers of inspection are currently specified in Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty³⁶. Each of the powers of inspection stipulated in Article 20³⁷ and 21³⁸ of Regulation 1/2003 is then discussed separately.

³⁴ See XXXIII Report on Competition Policy, 2003, para. 28.

³⁵ See judgment of the European Court of Justice (hereinafter: the “ECJ”) of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission*, para. 26, judgment of the Court of First Instance (hereinafter: the “CFI”) of 11 December 2003 in case T-59/99 *Ventouris Group Enterprises SA vs Commission*, ECR II-5257, para. 121, judgment of the General Court of 11 December 2003 in case T-65/99 *Srintzis Lines Shipping SA vs Commission*, E.C.R. 2003, II-5433, para. 41 and judgment of the CFI of 11 December 2003 in case T-66/99 *Minoan Lines vs Commission*, E.C.R. 2003 II-5515, para. 51. It has to be stressed that while in the main text the author will use solely the terms “General Court”, “Court of Justice” or “Court of Justice of the European Union” regardless the date of the ruling, in the footnotes the names of the EU courts will depend on the date of the ruling. Thus, the terms “Court of first instance” (CFI) or “European Court of Justice” (ECJ) will be used as well.

³⁶ The original name: *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*, Official Journal L 1, 04.01.2003, p. 1–25; Hereinafter: the “Regulation 1/2003”. The power of the Council to adopt Regulations and Directives in order to give effect to the principles of Arts 101 and 102 TFEU derives from Article 103(1) thereof.

³⁷ *I.e.* the powers to:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (e) 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.

³⁸ Power to conduct inspection of “other premises, land and means of transport”, including homes of the staff members of the undertaking concerned.

However if an undertaking refuses to voluntarily undergo the inspection ordered by the Commission's decision, it may be not only forced to comply³⁹, but also fined for obstruction. Notably, in order to better ensure the efficient enforcement of competition law, the Commission was granted the power to impose on the undertaking fines and periodic penalty payments in the circumstances and under conditions stipulated in Articles 23 and 24 of Regulation 1/2003 that are further presented in Chapter IV. As pointed out by Ch. Kerse and N. Khan, "(t)he imposition of fines has long been an important and well-publicised aspect of the Commission's work in enforcing Articles 101 and 102 [TfEU], the significance of which has been heightened by the Commission's increased focus on investigating and punishing serious infringements⁴⁰".

Furthermore, two particular issues illustrating important problems in relation to the protection of the undertakings' right to defence that may arise in the course of inspections, namely so called fishing expeditions⁴¹ and the controversial practice of taking copies of entire storage mediums⁴² for subsequent electronic searches at the Commission's premises⁴³, are subsequently discussed in Chapter V and VI respectively.

Undoubtedly, it is necessary to strike a balance between the public interest to protect sound competition and to punish the violations of competition law and the private interests of undertakings investigated to be granted the legal safeguards enabling them to defend themselves⁴⁴. Hence, in the exercise of its investigative powers, the Commission is obliged to observe the right to defence of the undertaking investigated. Its most important components, being fundamental rights and principles, stem from the the EConHR, the Charter of Fundamental Rights⁴⁵ and the EU general principles⁴⁶.

³⁹ In accordance with Article 20(6) of the Regulation 1/2003.

⁴⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 7-001, p. 387.

⁴¹ *I.e.* inspections conducted without factual or legal basis that are driven merely by an unsubstantiated suspicion of a potential infringement.

⁴² For instance hard drives.

⁴³ Taking away forensic copies of computer hard drives for later review at an authority's premises constitutes an extremely controversial, albeit common, practice related to inspections carried out by competition authorities. See M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, YARS Vol. 2014, 7(10), pp. 129–158.

⁴⁴ R. Whish, *Competition Law*, 6th ed., Oxford Press University, 2006, p. 247.

⁴⁵ That after the entry into force of the Lisbon Treaty became legally binding according to the modified Article 6(1) of the Treaty on European Union.

⁴⁶ W.J.P. Wils, *EU Anti-trust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Right*, (2011) 34(2) *World Competition* 207; see also

In the European Union order the relevant rights and principles⁴⁷ have to some extent been incorporated by the Court of Justice of the European Union as general principles of EU Law⁴⁸, enshrined in Article 6(3) of the Treaty on the European Union⁴⁹ and subsequently codified in the Charter of Fundamental Rights of the European Union. Nevertheless, in order to guarantee full protection, it is necessary that these rights and principles should be moreover applied in conformity with the case law of the ECtHR. Although the CJEU has been making frequent reference to ECtHR case-law, at present, the CJEU is not bound by the interpretation given by the ECtHR. However, ECtHR case law will become binding once the EU accedes to the EConHR, in accordance with Article 6(2) TEU⁵⁰.

As confirmed by the CJEU, it is in particular primordial to prevent the undertakings' right to defence from being "irremediably impaired" during *inter alia* the Commission's inspections⁵¹.

Furthermore, given the actually weak position of the undertakings inspected compared to the far-reaching inspection powers of the competition authorities, it is indispensable that both inspection decisions as well as all the measures undertaken during the inspections are subject to full judicial review exercised by independent courts⁵².

Nevertheless, it may be questionable whether the powers of inspection granted to the Commission are sufficiently balanced by the safeguards conferred upon the undertakings. In order to verify whether the current EU competition law regime guarantees the effective and sufficient protection of their right to defence that is moreover compatible with EConHR standards, its the most important components, *i.e.* principle of proportionality, legal professional privilege, privilege against self-incrimination and principle of effective judicial protection as well as the right to privacy are to be examined

judgment of the ECJ of 12 November 1969 in case 29/69 *Erich Stauder vs City of Ulm*, E.C.R. 1969, 419, para. 7; judgment of the ECJ in case C-4/73 *Nold*, E.C.R. 1974, 491, para. 13 and judgment of the ECJ in case C-7/98 *Krombach*, E.C.R. 2000, I-1935, paras. 25–26.

⁴⁷ Right to privacy, right to fair trial, right to effective judicial protection, principle of proportionality and the privilege against self-incrimination.

⁴⁸ See for instance *Hoechst* judgment, para. 19 and judgment of the ECJ in case C-133/93 *Crispoltoni vs Fattoria Autonoma Tabacchi*, E.C.R. 1994, I-4863, para. 41.

⁴⁹ OJ [2010] C 83/13; Hereinafter: the "TEU".

⁵⁰ "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

⁵¹ See *Hoechst* judgment, paras 14 and 15.

⁵² M. Michalek, *Fishing expeditions...*, pp. 129–158.

in detail. Therefore, the above limitations of the Commission's powers are analysed separately in the following chapters.

Chapter VII deals with the right to privacy. The powers of inspection granted to the European Commission under Article 20 of Regulation 1/2003 are susceptible to interfere with the right to respect for private life and correspondence protected under Article 8 EConHR and Articles 47 and 7 CFR⁵³. Even though the right to privacy constitutes an autonomous right and thus cannot be regarded merely as a component of the right to defence, both rights are interdependent, *i.e.* the respect of the former is of major importance for the protection of the latter. Excessive interference with privacy may namely lead to the unlawful uncovering of evidence against any undertakings inspected as well as hinder the exercise of the undertakings' right to defence and, thus, may restrict the undertakings' impact on the outcome of the investigation conducted by the Commission⁵⁴. Therefore, in the context of this study it is necessary to briefly analyse the principle of protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of legal persons with regard to the protection of undertakings' business premises.

According to the essential legal principle of proportionality, discussed in Chapter VIII, any "interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others"⁵⁵. Actions of public authorities should be deemed disproportional if the aim they pursue can also be achieved by less intrusive means. Therefore, the immense importance of the principle of proportionality in the context of inspections is incontestable.

Legal professional privilege⁵⁶, analysed in Chapter IX, constitutes another important component of the right to defence deriving from

⁵³ K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012, p. 395; A. Jones, B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, 5th ed., Oxford, p. 1039; M. Messina, *The Protection of the Right to Private Life, Home and Correspondence vs the Efficient Enforcement of Competition Law: Is a New EC Competition Court the Right Way Forward?*, *European Competition Journal*, No. 3, 2007, p. 185; E.M. Ameye, *The Interplay between Human Rights and Competition Law in the EU*, (2004) 25 *European Competition Law Review*, p. 340; I. Van Bael, *Due Process in EU Competition Proceedings*, Hague–London–New York 2011, pp. 102, 157.

⁵⁴ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 395.

⁵⁵ M. Bernatt, *Powers of Inspection...*, p. 48.

⁵⁶ Hereafter: the "LPP".

Article 6 EConHR and Article 48(2) CFR. As confirmed by the CJEU, this privilege has to be respected from the preliminary inquiry stage⁵⁷. Indeed, LPP relates mostly to the investigative phase of the competition authorities' enforcement proceedings. It namely limits the Commission's powers of inspection by preventing, first, any documents covered by the LPP from being examined⁵⁸ or seized⁵⁹ by the inspectors⁶⁰ and, second, the premises belonging to undertaking's external lawyer from being inspected by the Commission. Regarding LPP standards as set by the two European international courts, one can notice a degree of variance between LPP as recognised by the European Court of Human Rights and its EU concept.

Chapter X relates to the privilege against self-incrimination ("*nemo tenetur*") that aims at "avoiding miscarriages of justice and securing the aims of Article 6" EConHR⁶¹. However, this privilege which "prevents the prosecution from obtaining evidence by defying the will of the accused not to testify against himself⁶²", plays a significant role within competition law proceedings. It namely constitutes important grounds upon which production and disclosure of documents as well as production of oral explanations required under Article 20(2)e of Regulation 1/2003 during the inspections may be resisted. Like in the case of legal professional privilege, one can identify significant differences between the scopes of the right not to incriminate oneself as set by the two European international courts, namely the European Court of Human Rights and the Court of Justice of the European Union.

Chapter XI discussed the remedies and judicial review. The principle of effective judicial protection, recognised by the CJEU as a general principle and enshrining Articles 6(1) and 13 EConHR, was also introduced in Article 47 CFR. Given the far-reaching inspection powers of the Commission⁶³,

⁵⁷ *Hoehst* judgment, see also B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, YARS, Vol. 2012, 5(6), p. 195.

⁵⁸ Under Article 20(2)b of the Regulation 1/2003.

⁵⁹ Under Article 20(2)c of the Regulation 1/2003.

⁶⁰ Moreover the documents covered by the LLP be requested within a request for information under Article 18 of the Regulation 1/2003.

⁶¹ Judgment of the ECtHR of 3 May 2001 in case *JB vs Switzerland*, Application No. 31827/96, para. 64.

⁶² D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe Strasbourg 2012, p. 61.

⁶³ With controversies arising around some of them.

and the weak position of the undertakings inspected, it is primordial that both inspection decisions as well as all the measures undertaken during the inspections are subject to full judicial review exercised by independent courts. It is argued that even the effective application of the system of internal checks and balances, including the undertakings' procedural safeguards regarding the administrative procedure before the Commission cannot undermine the need for full scrutiny by the General Court, since the full effectiveness of such a system depends namely on the possibility to be granted access to a full judicial review⁶⁴. It is thus necessary to, first, discuss remedies available to undertakings, in order to stress the need for an immediate remedy with regard to the measures undertaken by the Commission in the course of inspections as well as, second, to analyse the scope of judicial review in the EU competition law regime in relation to prior judicial authorisation of the assistance of the police, authorisation of inspections of other premises, judicial review of the decisions imposing fines and periodic penalty payments and judicial review of the inspection's decisions. Even though the *ex post* judicial review of an inspection decision is said to be in principle sufficient to ensure appropriate protection for the fundamental rights of the undertakings concerned⁶⁵, some doubts arise on "whether effective judicial protection with regard to Commission inspections is ensured today under EU Law⁶⁶".

Lastly, Chapter XII presents concluding remarks pointing out the insufficient level of the protection of the right to defence of undertakings during the Commission's inspections and suggests some improvements in order to reinforce the effectiveness of this protection.

⁶⁴ W.J.P. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, World Competition 37, No. 1 (2014), p. 5.

⁶⁵ Judgment of the ECtHR of 7 June 2007 in case *Smirnov vs Russia*, Application No. 71362/01, para. 45 as well as judgment of the ECtHR of 15 February 2011 in case *Harju vs Finland*, Application No. 56716/09, paras 40 and 44, and judgment of the ECtHR of 15 February 2011 in case *Heino vs Finland*, Application No. 56720/09, para. 45; See also Opinion Of AG Kokott in case *Nexans*, para. 85.

⁶⁶ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6, p. 517.

Chapter I

Right to defence

1. Introduction

As Jacques Maritain claims “no declaration of human rights will ever be exhaustive”¹. However, we cannot imagine any modern declaration without the right to defence being listed thereon.

The right to defence constitutes one of the most important fundamental rights and components of justice. Originating from natural law, incorporated into positive law, the right to defence, amongst all general principles, has not only been vividly developed by the jurisprudence but has also attracted the particular interest of researchers². The role of the courts should indeed be acknowledged since judges, being aware of the legislative shortcomings in this field, have brought the right to defence to the top of the hierarchy of norms³. The contemporary doctrine, in its turn, emphasises the superiority of the right to defence by describing it as “the guarantee of the guarantees of legality⁴”, “the minimum of every legal procedure⁵” or “the minimum guarantee for access to justice”⁶.

¹ J. Maritain, *On the Philosophy of Human Rights*, 1949.

² M. Stassinopoulos, *Le droit de la défense devant les autorités administratives*, Libr. générale de droit et de jurisprudence, Paris 1976, p. 49.

³ Y. Capdepon, *Essai d'une théorie générale des droits de la défense*, Dalloz 2013, p. 81, N. 129.

⁴ P. Carcelle, G. Mas, *Les principes généraux du droit applicable à la fonction publique*, Revue Administrative, 1958, p. 621.

⁵ G. Langrod, *Procédure administrative et droit administratif*, R.I.S.A., 1956, p. 76.

⁶ I. Fanlo Cortés, *Justice for the Poor in the Hands of the Lawyers? Some Remarks on Access to Courts and Legal Aid Models*, Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol No. 64/65, p. 57.

2. History

The right to defence is “as old as the world”⁷. Some authors argue that the right to defence first appeared in the Bible⁸ since Adam and Eve were not punished without having been heard⁹. The existence of the right to defence may be found not only in Christian texts (for instance in the *Holy Scripture*¹⁰ including the *Acts of the Apostles*¹¹), but also in ancient literature¹² and in Javanian legends¹³. Even in primitive groups it was unthinkable to condemn somebody without giving him firstly the opportunity to justify himself¹⁴.

We can thus observe that from the very beginning this right was considered inherent to human nature. Its conception as being established by God and innate to the human soul started to be particularly stressed in the XVIII century¹⁵. Subsequently, there were the classical criminal French scholars in XIX century¹⁶ who seem to have played an important role in underlining the necessity of the right to the defence’s protection. They presented this right as “the soul of the accusatory system¹⁷”, a basic element of criminal justice,

⁷ Le droit de la défense “vieux comme le monde”; M. Waline, *Le principe audi alteram partem* [in:] *Livre Jubilaire du Conseil d’Etat du Luxembourg*, 1957, p. 495; M. Stassinopoulos, *Le droit de la défense...*, p. 49.

⁸ M. Stassinopoulos, *Le droit de la défense...*, p. 12 and 50; M. Marghèlos, former President of the French Supreme Court (Cour de Cassation française), in his speech for the defence in 1969.

⁹ He asked them firstly, why they had sinned and only after having presented their explanation, were they punished.

¹⁰ Where the right to defence was proclaimed as a sacred right. Compare for example Jeremiah, 12,1 “You are always righteous, O LORD, when I bring a case before you. Yet I would speak with you about your justice”; Corinthians A, 9, 3: “This is my defence to those who sit in judgment on me”.

¹¹ Acts, 25, 16. “I pointed out to them that Roman law does not convict people without a trial. They must be given an opportunity to confront their accusers and defend themselves.”

¹² Euripides “who could judge without firstly being aware of two versions”.

¹³ Unesco, *Le droit d’être un homme*, 1968, p. 106 based on Babad Tanah Jaui, XVI century’s historian.

¹⁴ M. Stassinopoulos, *Le droit de la défense...*, p. 50–51.

¹⁵ In the judgment of 1723 in case Bentley (dean of Cambridge) was stated that “it’s the law both divine and human that provide to every party the right to defence. God did not decide on the Adam’s fate without first calling upon him to make his defense”. G. Langrod, *Procédure administrative...*, p. 77; See also H.H. Marshall, *Natural Justice*, London 1959, pp. 17–18; E.C.S. Wade, G.G. Phillips, *Constitutional law*, 3rd ed., London 1946, p. 276.

¹⁶ Like F. Hélie, *Traité de l’instruction criminelle*, Plon 1858.

¹⁷ J. Ortolan, *Éléments de droit pénal*, Paris, 1855, No. 2288.

without which the latter could not be real justice, but only an oppression¹⁸. Some of them highlighted the superiority of the individual right to defence over the general social right to repression¹⁹. Nevertheless, it was not long before numerous opinions amongst the civilists could be found on the right to defence being a fundamental²⁰ and immutable²¹ principle. In this context, it is particularly important to note the role of Motulsky in promoting the understanding of the right to defence as a figment of natural law²².

Quite simultaneously the importance of the right to defence started to be affirmed as a universal, immutable, superior and “rationally obvious” trial requirement in the jurisprudence as well²³. For instance, in 1828 the French Supreme Court, stated *expressis verbis* that since defence constitutes “a figment of the natural law²⁴”, no person shall be condemned without being questioned and instructed about his right to defence²⁵.

Therefore, contrary to appearances, the right to defence did not emerge late in case law²⁶ and the jurisprudence dedicated this right independently and directly, *i.e.* without any reference to particular guarantees²⁷.

Nevertheless the right to defence in administrative matters began to be recognised by courts only in the XX century. *Exempli gratia* the French State Council held that the respect of the right to defence is required if measures undertaken against the individual are regarded as a sanction which is sufficiently serious²⁸.

¹⁸ *Ibidem*.

¹⁹ R. Garraud, *Traité théorique et pratique d'instruction criminelle et de la procédure pénale*, VI. III, N. 793.

²⁰ R. Morel, *Traité élémentaire de procédure civile*, Sirey 2nd ed. 1949, N. 426.

²¹ G. Cornu, J. Foyer, *Procédure civile*, 3rd ed. refondue, coll. «Thé- mis. Droit privé», Paris, PUF, 1996 p. 474.

²² H. Motulsky, *Le droit naturel et la pratique jurisprudentielle. Le respect des droits de la défense en procédure civile* [in:] Mélanges P. Roubier, Dalloz, 1961, t. 2.

²³ See also Y. Capdepon, *Essai d'une théorie générale...*, p. 8, N. 7.

²⁴ “Une donnée de droit naturel”.

²⁵ Civ. 7 May 1828, s. 1828. 1. 329. “la défense étant de droit naturel, personne ne doit être condamné sans avoir été interpellé et mis en demeure de se défendre.” See also Y. Capdepon, *Essai d'une théorie générale...*, p. 39, N. 50.

²⁶ Most commentators pointed at a French judgment from 1930, while G. Morange claims that it had appeared in a judgment from 1903; G. Morange, *Le principe des droits de la défense devant l'Administration active*, Dalloz, 1956, p. 121; See also M. Stassinopoulos, *Le droit de la défense...*, p. 50.

²⁷ Y. Capdepon, *Essai d'une théorie générale...*, p. 41, N. 56.

²⁸ Judgment of 5 May 1944 of the French State Council (Conseil d'Etat français), *Dame Trompier-Gravier*, § 12,1: “le respect des “droits de la défense” est exigé, lorsque la mesure prise contre l'administré présente le caractère d'une sanction et que cette sanction est suffisamment grave”.

Subsequently, the right to defence was asserted as a general principle of law in all legal proceedings. Its fundamental value started to be recognised both at an international and national level (national constitutions). Namely this recognition of the right to defence, beyond internal law, mostly in the international conventions seemed to reinforce appreciably its fundamental value. The right to defence was guaranteed by Article 11(1) of the UN Universal Declaration of the Human Rights²⁹ and Article 14 of the International Covenant on Civil and Political Rights³⁰. More specifically, the two most important European sources of the right to defence are the European Convention on Human Rights and Freedoms (with its Protocols)³¹ and the Charter of the Fundamental Rights of the European Union³². With reference to the “constitutional attraction³³” of the right to defence, this led to the placement of the right to defence at the highest level of the hierarchy of norms of domestic law. Nowadays the protection of the right to defence before a judge (irrespective of the criminal, civil or administrative character of proceedings) is introduced in the majority of contemporary legal systems in which it is regarded as one of the basic principles of a democratic state and therefore it is quite often stipulated in national constitutions³⁴.

3. Terminology

One may come across a variety of terms used in relation to the right to defence, this result mainly comes from the inadequacy of the notion and lack of established official terminology.

First of all, the actual absence of the term “right to defence” in the treaties and other important international acts may be easily detected. Neither the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, nor the European Convention for the Protection of Human Rights and Fundamental Freedoms explicitly use

²⁹ Proclaimed on 10 December 1948 in Paris (hereinafter: the “UDHR”).

³⁰ Resolution AG 2200 A (XXI) of 16th December 1966 (hereinafter: the “ICCPR”).

³¹ Signed on 4 November 1950 in Rome (hereinafter: the “EConHR”).

³² Proclaimed in Nice on 7 of December 2000; OJ C 364, 18.12.2000, p. 1 (hereinafter: the “CFR”).

³³ Y. Capdepon, *Essai d'une théorie générale...*, p. 75, N. 122.

³⁴ See e.g. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012, pp. 111–112 and A. Pliakos, *Les droits de la défense et le droit communautaire de la concurrence*, Brussels 1987, s. 46.

this expression³⁵. These three acts merely enumerate procedural guarantees, in general or specific terms and mostly in relation to criminal matters. However, and like in some national laws³⁶, despite the absence of the term, the right to defence is deduced from the spirit and general meaning of the relevant provisions.

The Charter of Fundamental Rights of the EU constitutes one of the rare exceptions in this context since the expression “rights to defence” appeared *expressis verbis* in Article 48(2)³⁷.

With reference to the national legislator’s choice, if ever there is an explicit reference to the notion of the right to defence, the terminology used differs as well. Some examples of a direct and explicit reference to the right to defence may be found in the constitutions of Poland³⁸ and Moldova³⁹. In Italian law, “defence” is described as an inviolable right protected at each level of the proceedings⁴⁰. The “right to defence” does not appear explicitly in the Swiss constitution. The legal act makes reference in Article 29 titled “General procedural guarantees” to only some components of the right to defence, such as the right to be heard⁴¹. In other European constitutions the right to defence is not explicitly mentioned, but it is derived from the general meaning of the relevant provisions⁴².

³⁵ Y. Capdepon, *Essai d'une théorie générale...*, p. 64, N. 105.

³⁶ *E.g.* French law.

³⁷ “Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”

³⁸ See Article 42(2) of the Constitution of 2nd April 1997 of the Republic of Poland. Nevertheless the right to defence was introduced in the framework of the criminal proceedings. “Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court.”

³⁹ See Article 26(1) of the Constitution of 29th July 1994 of the Republic of Moldova. “The right to defence is guaranteed.”

⁴⁰ See Article 24(2) of the Constitution of 22 December 1947 of the Republic of Italy. “Defence is an inviolable right at every stage and instance of legal proceedings.”

⁴¹ Art. 29 General procedural guarantees

1 Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

2 Each party to a case has the right to be heard.

3 Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

In this context also Articles 29a and 30 are important as they guarantee the access to the independent and impartial court.

⁴² See for. ex. Article 24 of the Spanish Constitution of 29 December 1978.

Common law states constitute an interesting example since, instead of “the right to defence”, they adopted a similar conception of protection under the term “due process of law”. The “due process of law” had already been affirmed in the Magna Carta of 1215, and subsequently also transposed into the American legal order, *i.e.* in two amendments to the U.S. Constitution of 17 September 1787⁴³.

In relation to case law, courts have adopted no uniform terminology in relation to the right to defence⁴⁴. Without delving too deeply into details of this part⁴⁵, one may take a look at the European Court of Human Rights⁴⁶ who can serve as a good example. The ECtHR is lavish with various terms, *i.e.* “right to defence⁴⁷”, “the rights of the defence⁴⁸”, “defence

⁴³ Le 5 amendement pour l’Etat fédéral et le 14 amendement applicable aux Etats de l’Union adopté en 1868.

⁴⁴ This phenomenon may be also noticeable / It is also the case in relation to other blurred notions. The courts, for instance the Court of Justice of the European Union very often use interchangeably the following expressions: the “fundamental rights” or “human rights” or “fundamental human rights”. See A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Zakamycze 2005.

⁴⁵ On this issue see the part dedicated to the systems of the right to defence’s protection as established by the EConHR and in the EU (Chapter II).

⁴⁶ Hereinafter: the “ECtHR”.

⁴⁷ See judgment of the ECtHR of 9 October 2008 in case *Moiseyev vs Russia*, Application No. 62936/00, para. 211.

⁴⁸ See judgment of the ECtHR of 27 May 1991 in case *Ciancimino vs Italy*, Application No. 12541/86, DR 70, 103 para. 2; judgement of the ECtHR of 25 March 1998 in case *Kopp vs Switzerland*, Application No. 23224/94, para. 74; judgment of the ECtHR of 25 January 1996 in case *John Murray vs the United Kingdom*, Application No. 18731/91, Rep. 1996-I, paras 66, 68; judgment of the ECtHR of 27 November 2008 in case *Salduz vs Turkey* [GC], Application No. 36391/02, para. 55; judgment of the ECtHR of 11 December 2008 in case *Panovits vs Cyprus*, Application No. 4268/04, para. 72; judgment of the ECtHR of 23 September 2007 in case *Grayson and Barnham vs the United Kingdom*, Application Nos 19955/05 and 15085/06, para. 45; judgment of the ECtHR of 15 June 1992 in case *Lüdi vs Switzerland*, Application No. 12433/86, para. 50 “In short, the rights of the defence were restricted to such an extent that the applicant did not have a fair trial. There was therefore a violation of paragraph 3 (d) in conjunction with paragraph 1 of Article 6...”; judgment of the ECtHR of 27 February 2001 in case *Luca vs Italy*, Application No. 33354/96, para. 40 “examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6...”; judgment of the ECtHR of 20 December 2001 in case *P.S. vs Germany*, Application No. 33900/96, para. 31; judgment of the ECtHR of 2 October 2001 in case *G.B. vs France*, Application No. 44069/98: “the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6(1) and 3 (b) of the Convention taken together.”; judgment of the ECtHR of 5 February 2008 in case *Ramanauskas vs Lithuania* [GC], Application No. 74420/01, para. 69 “that general safe – guards should have been observed, such as

*rights*⁴⁹” or “*right to a defence*⁵⁰”. Although some of them seem to occur more often than others, it is extremely difficult to decide whether the ECtHR varies the terminology on purpose or whether it is done at random, since

equality of arms or the rights of the defence.”; decision of the ECtHR of 17 November 2005 in case *Haas vs Germany*, Application No. 73047/01: “the Court finds that the rights of the defence had not been restricted to an extent incompatible with the guarantees of Article 6 §§ 1 and 3 (d)”; judgment of the ECtHR of 12 May 2005 in case *Öcalan vs Turkey* [GC], Application No. 46221/99, para. 133: “The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, (...) The rights of the defence were thus significantly affected.”; *Moiseyev* judgment, paras 205 i 211; judgment of the ECtHR of 12 May 1986 in case *B. vs France*, Application No. 10291/83, DR47, para. 59 “the right to a hearing, and thus the concrete rights of the defence, have not been weakened in a way that has the result of depriving such rights of any practical effect.”; judgment of the ECtHR of 30 October 1991 in case *Borgers vs Belgium*, Application No. 12005/86, para. 29 “In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 para. 1...”; decision of the ECtHR of 22 January 2002 in case *Oyston vs the United Kingdom*, Application No. 42011/98; judgment of the ECtHR of 30 October 1991 in case *Borgers vs Belgium*, Application No. 12005/86, para. 27: “The Court cannot see the justification for such restrictions on the rights of the defence.”; judgment of the ECtHR of 16 December 1992 in case *Hadjianastassiou vs Greece*, Application No. 12945/87, para. 37. In conclusion, the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of paragraph 3 (b) of Article 6, taken in conjunction with paragraph 1...”; judgment of the ECtHR of 1 March 2006 in case *Sejdovic vs Italy* [GC], Application No. 56581/00, para. 127; judgment of the ECtHR of 26 March 1996 in case *Leutscher vs the Netherlands*, Application No. 17314/90, para. 29 “without his having had an opportunity to exercise the rights of the defence...”.

⁴⁹ Judgment of the ECtHR of 28 March 2002 in case *Birutis and others vs Lithuania*, Application Nos 47698/99 and 48115/99, para. 31 “applicant’s defence rights”; judgment of the ECtHR of 10 March 2009 in case *Bykov vs Russia* [GC], Application No. 4378/02, para. 98; *Salduz* judgment, para. 62; judgment of the ECtHR of 13 January 2009 in case *Rybacki vs Poland*, Application No. 52479/99, paras 60–61 “negatively affected the effective exercise of his defence rights”; judgment of the ECtHR of 15 November 1996 in case *Domenichini vs Italy*, Application No. 15943/90, para. 39; decision of the ECtHR of 27 May 2003 in case *Sofri and others vs Italy*, Application No. 37235/97, para. 1; judgment of the ECtHR of 11 December 1986, in case *Ross vs the United Kingdom*, Application No. 11396/85, DR50, 179 § 99 “compliance with the defence rights of a person accused of a criminal offence.”; judgment of the ECtHR of 25 March 1999 in case *Pelissier and Sassi vs France* [GC], Application No. 25444/94, para. 62; judgment of the ECtHR of 7 December 2000 in case *Zoon vs the Netherlands*, 29202/95, para. 50; *Panovits* judgment, para. 84 “the Court repeats its findings of a violation of the applicant’s rights of defence at the pre-trial stage of the proceedings” and para. 85 “the breach of his rights of defence”.

⁵⁰ Judgment of the ECtHR of 16 November 2006 in case *Zaytsev vs Russia*, Application No. 22644/02, para. 23.

there is neither a clear explanation or rule established nor the context in which a particular term occurs provides a clear answer to this question. There have even been judgements in which in the same paragraph the ECtHR has been used for two different expressions⁵¹.

Nevertheless, the Court of Justice of the European Union⁵² seems to be more single-minded since it predominantly uses the term “rights of the defence⁵³”.

With reference to the doctrine, the terminological disharmony may result namely from the absence of uniform terminology adopted by the international and national legislator as well as by the courts. Since there is no coherence between the scholars, in the doctrinal legal texts one can come across a variety of terms chosen to refer to the right to defence, *inter alia* “rights to defence”, “right to defence⁵⁴”, “right do defend oneself⁵⁵”, “guarantees of defence”, “freedom to defence⁵⁶” or “right to free defence⁵⁷”.

As one can see, often this fundamental is called not a single right, but a group of rights. The plural form “rights to defence” aiming to underline the multiplicity of its components (and the variety of its content), is mostly

⁵¹ See *e.g.* *Moiseyev* judgment, para. 211: “As noted above, the Lefortovo remand centre was managed by the same authority that prosecuted the case against the applicant. Thus, the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent. This flagrant breach of confidentiality of the client-attorney relationship could not but adversely affect the applicant’s **right to defence** and deprive the legal assistance he received of much of its usefulness. It has not been claimed that the application of such a sweeping measure throughout the entire duration of the criminal proceedings was justified by any exceptional circumstances or previous abuses of the privilege. The Court considers that perusal of the documents passed between the applicant and his counsel encroached on **the rights of the defence** in an excessive and arbitrary fashion.” (emphasis added)

⁵² Hereinafter: the “CJEU”.

⁵³ Judgment of the Court of Justice of 18 July 2013 in joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission vs United Kingdom of Great Britain and Northern Ireland*, paras. 25, 139; judgment of the ECJ of 1 October 2009 in case C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd*, paras. 72, 79 “the protection of the rights of defence of the undertakings concerned”; judgment the ECJ of 3 September 2008 in joined Cases C-402/05 P and C-415/05 P, *Kadi* paras. 334, 349, “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected”.

For more see Chapter II “Protection of the right to defence in Europe”.

⁵⁴ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 112.

⁵⁵ F. Defferand, *Le suspect dans le procès pénal*, LGDJ, coll. *Système droit*, 2005, p. 127.

⁵⁶ B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative*, 1978, p. 78.

⁵⁷ B. Schwartz, *La procédure administrative aux Etats-Unis*, RIDC, 1951, p. 25.

present in French-speaking countries⁵⁸ and is said to have been introduced in France in the second half of XIX century⁵⁹.

The adverse choice to use this term in the singular was made by common law culture states that have opted for the notion of the “right to defence” following the example of ancient Latin lawyers.

Furthermore, Y. Capdepon makes an interesting distinction between the “principle of defence” and “guarantees of defence”, arguing that the right to defence may present a legal value solely through its consecration as a principle of law⁶⁰. The natural law origin of the right to defence may only lead to its qualification as a “fundamental principle of procedural law” (which is fully adequate, both in relation to the notion of the “principle of law” as well as that to the fundamental principle). The term “principle” reflects the legal nature of normative support, while “fundamental” reveals its legal value, and hence the role of the right to defence in the hierarchy of norms⁶¹. It is acknowledged that the principle of law is a real legal norm, able therefore to produce an effect of law⁶². According to this scholar, subsequent consecrations of the right to defence as a legal principle attest to the autonomy of this notion with regard to the rules of positive law consisting of procedural guarantees⁶³.

This study will nevertheless use the term “right to defence”. In its author’s opinion the expression “rights to defence” cannot logically give a true view on this legal institution being an autonomous principle of law as well as an independent and complex legal norm, since it always makes one think about a plurality, a set of legal elements. The use of the plural form is thus more problematic as it leads immediately to the question of delimitation: “but actually which rights exactly are being referred to?”. Therefore the best way to reflect the very sense of this standard seems to be the idea of a “right to defence”, as the singular form better suggests the existence of a general principle⁶⁴. This term is also more correct than the expression the

⁵⁸ France, Belgium, Switzerland and only rarely in Italy or Austria.

⁵⁹ In Switzerland the notion “rights to defence” was introduced in 1880 in judgment of ATF 6 163, 170. See J-M. Verniory, *Les droits de la défense dans les phases préliminaires du procès pénal*, Staempfli Editions SA Berne, 2005, p. 5.

⁶⁰ Y. Capdepon, *Essai d’une théorie générale...*, p. 56, N. 90.

⁶¹ *Ibidem*, p. 50, N. 78–79.

⁶² R. Chapus, *Droit administratif général*, L.G.D.J. Collection Précis Domat, 2001, No. 123; J. Boulanger, *Principes généraux du droit et droit positif* [in:] *Mélanges Ripert*, Vol. I, p. 51, No. 2; J. Waline, *Droit administratif*, Dalloz, 2006, No. 319.

⁶³ Y. Capdepon, *Essai d’une théorie générale...*, p. 78, No. 127.

⁶⁴ See also J. Du Jardin, *Préface* [in:] *Justice pénale et procès équitable*, Vol. I, Larcier 2006, p. VIII.

“principle of defence”. A “principle”, which constitutes an abstract notion, is regarded as a rule of conduct, a norm being a reference to important values inspiring the written norms and based on theoretical considerations. Principles, contrary to rights, do not provide a basis for a direct claim⁶⁵. A “right” is more concrete and thus it emphasises in a better way the legal nature, subjective character and justiciability of this genuine norm, being “one of the most powerful prerogatives that a person can set against others and state⁶⁶”.

4. Nature

After having decided on the terminology, it is important to analyse the nature of the right to defence basing on the relevant legal acts, case law and the doctrine.

In the first place the legal nature of the right to defence will be analysed in general, *i.e.* without putting it into the framework of particular proceedings. We will concentrate on the link of the right to defence to natural law and its subjective and fundamental character.

4.1. Natural right

Although attachment of the right to defence to natural law results from the ancient doctrine (as presented above), one may notice that it is reaffirmed nowadays albeit by different modalities⁶⁷. Numerous authors argue that the right to defence exists irrespective of its introduction into positive law⁶⁸. They claim that the right to defence, being an essential principle governing all the procedures and existing outside the text⁶⁹, should not be regarded as a privilege established by the law⁷⁰. The right to defence

⁶⁵ See *Explanations for the Charter of Fundamental Rights of the European Union*, OJ C303/17 2007.

⁶⁶ M.-A. Frison-Roche, *Les droits de la défense en matière pénale* [in:] *Droits et libertés fondamentaux*, 6th ed., Dalloz, pp. 439–457: “l’une des prérogatives les plus puissantes qu’un individu puisse opposer à autrui et à l’Etat”.

⁶⁷ Y. Capdepon, *Essai d’une théorie générale...*, p. 36, No. 43.

⁶⁸ In general Y. Capdepon, *Essai d’une théorie générale...*, Dalloz, 2013.

⁶⁹ G. Piquerez, A. Macaluso, L. Piquerez, *Procédure pénale suisse*, Schulthess, Zurich 2011, par. 1193.

⁷⁰ F. Helie, *Traité de l’instruction criminelle*, para. 614.

as a natural right is “imprescriptible”⁷¹. It cannot be eliminated or removed by positive law. The latter may only organise, *i.e.* put in concrete the legal terms of the former.

The legal naturalists underline that the right to defence is inherent to human nature⁷² and that it belonged to the common conscience even before becoming present in legal science⁷³. They stress that each person must be provided with the possibility to defend him- or herself, however not by means of brutal force but thanks to the force of persuasion which is connected with justice⁷⁴.

According to Motulsky’s analysis, the right to defence is a general principle, described by this scholar as “philosophical”, as opposed to a general “technical” principle. The former constitutes a legal translation of the superior requirements pre-existing as the legal norm, while the latter results from a generalisation of specific positive rules⁷⁵. Undoubtedly the important contribution of Motulsky to the legal theory was making natural law a direct source of the right to defence, without the need to go through the principle of the contradictory⁷⁶.

Nevertheless, one can come across the opinion that deducing the right to defence from the natural legal order is useless. J-M Verniory claims that it is pointless to determine the natural origins of the right to defence since there is no practical interest in deducing the right to defence from natural law⁷⁷. He argues that reference to natural law is relevant only in the case of a lack of the establishment of the principle in positive law. The right to defence is universally recognised and undeniable, therefore the stability of

⁷¹ R. Gerraud, *Traité théorique...*, para. 515.

⁷² “Natural law and natural right derive from the human nature and the world nature, while physical law derives from the nature of space, time, and matter. The right to defence is derived not from the arbitrary power of the omnipotent state.” J.A. Donald, *Natural Law and Natural Rights*, available at <http://jim.com/rights.html>

⁷³ G. Del Vecchio, *La justice. Le vérité. Essais de philosophie juridique et morale*, Paris, Dalloz, 1965, p. 122.

⁷⁴ “Authority ... lives not by its power to command, but by its power to convince” H.S. Laski, *Liberty in the modern State*, 1948, pp. 89–90 after M. Stassinopoulos, *Le droit de la défense...*, p. 52; “As Alkibiades argued, (Xenophon) if the Athenian assembly could decree whatever law it chose, then such laws were “not law, but merely force”. J.A. Donald, *Natural Law...*

⁷⁵ H. Motulsky, *Le droit naturel et la pratique jurisprudentielle...*, p. 175 and subs.; See also Y. Capdepon, *Essai d’une théorie générale...*, p. 39, N. 50.

⁷⁶ H. Motulsky, *Le droit naturel et la pratique jurisprudentielle...*, Vol. 2, N. 12 «c’est le principe du contradictoire qui constitue le corollaire des droits de la défense et non l’inverse».

⁷⁷ J-M. Verniory, *Les droits de la défense...*, pp. 18–19.

this right is already sufficiently and unquestionably assured by numerous international and national legal instruments. Moreover the natural right to defence reflects a principle of general character and thus only by introducing suitable positive legal provisions can one specify its scope, identify its components and provide concrete guarantees of its protection.

This natural law origin of the right to defence had however a direct influence on the legal tool used to establish it in positive law⁷⁸. The autonomy of the source of the right to defence and its direct judicial recognition logically lead to its direct and autonomous legal recognition, *i.e.*, not by reference to particular guarantees, but to the right as such, also in positive law.

4.2. Fundamental right

Since the right to defence is unanimously recognised as a fundamental human right, the meaning of the notion “fundamental” also requires some comment. The concept of fundamental rights is not easy to define. The naturalists’ concept related to the intrinsic values of fundamental rights lacks precision as it affirms it in too abstract manner. Its meaning *sensu largo* would include all public and individual freedoms enjoyed by citizens under the rule of law. But such a concept is formulated incorrectly: if all such freedoms were considered fundamental rights, the basic distinction would be actually pointless⁷⁹. Some link the fundamental character to “an intuition of the human beings irreducibility⁸⁰”.

According to another view fundamental rights designate the rights and freedoms providing positive guarantees that may be proclaimed in the provisions of Constitutions or enrolled in a constant constitutional tradition established by the legislator or by the courts⁸¹.

Pursuant to the further formal concept, based on legal positivism, to determine more precisely what fundamental rights are, it would be useful

⁷⁸ Y. Capdepon, *Essai d'une théorie générale...*, p. 49, N. 76.

⁷⁹ M. Waquet, *La protection des droits fondamentaux en France*, Rapport 7eme Congrès F.I.D.E., Bruxelles 1975, p. 1.

⁸⁰ J. Rivero, *Rapport général introductif* [in:] Acts of Colloque de Strasbourg of 13 and 14 March 1979 *Les droits de l'homme: Droits collectifs ou droits individuels?*, L.G.D.J., 1980, p. 23.

⁸¹ L. Jozeau-Marigne, *Rapport relatif à la sauvegarde des droits fondamentaux des citoyens des Etats membres dans l'élaboration du droit communautaire*, P.E., Document from the Seance 1972–1973, Document No. 297/72 of 28 February 1973, p. 6.

to compare the list and content of such rights in different states⁸² and to compare whether there is a common part. However, the list of fundamental right is changing, lengthening and diversifying with new groups of rights, in particular social rights, requiring the minimum of material security and creating positive obligations for the state to create and provide public services⁸³. It seems though that the civil and political rights (“classic” freedoms inherent in human dignity) constitute the hardcore of fundamental rights.

In the end it seems correct to argue that the fundamentality of a right follows from its constitutional as well as conventional level of protection, which is the case in relation to the right to defence. Therefore fundamental rights constitute a special category to which applies a particular legal regime. They are interchangeable⁸⁴, traditionally classified above other rights and given a special protection⁸⁵. Thus qualification of a right as a fundamental one has huge consequences since this leads to a special enforced legal force resulting from both its constitutional and international protection, albeit in different terms⁸⁶. The right to defence is recognised as a fundamental in almost all contemporary legal orders due to its essential function, *i.e.* the guarantee of legal certainty of a natural or legal person *vis-à-vis* public authorities. This legal certainty requires namely that every repressive competence should be the object of full and independent judicial control. Thus to be enforced correctly and effectively the fundamental rights require the implementation in the legal systems of the precisely determined guarantees⁸⁷.

Furthermore, the jurisprudence acknowledges the fundamentality of the right to defence as well. For instance the French Constitutional Council qualifies the right to defence as a “fundamental right of constitutional character” and “a fundamental principle recognised by the law” in relation to different proceedings⁸⁸. This right is often regarded as linked to the

⁸² That usually may be found mostly in the national constitutions.

⁸³ A. Pliakos, *Les droits de la défense...*, p. 43.

⁸⁴ *Ibidem*, p. 44; P. Pescatore, *Les droits de l'homme et l'intégration européenne*, C.D.E., 1968; G. Cohen Jonathan, *La Cour des Communautés européennes et les droits de l'homme*, R. M. C., 1978.

⁸⁵ J. Rivero, *Les libertés publiques*, I. *Les droits de l'homme*, P.U.F., 3rd ed. 1981.

⁸⁶ Y. Capdepon, *Essai d'une théorie générale...*, p. 75, No. 121.

⁸⁷ Ch. Sasse, *La protection de droits fondamentaux dans la Communauté Européenne*, Mélanges Dehousse, Vol. 2, 1979, p. 299.

⁸⁸ See for ex. Decision of 2 December 1976 of the French Constitutional Council, No. 76-70 DC, Rec. p. 39 (in relation to in criminal proceedings) and Decision of 20 July 1977 of the French Constitutional Council, No. 77-83, Rec., p. 39 (in relation to administrative proceedings). See also Chapter II “Protection of the right to defence in Europe”.

existence of jurisdictional decision since a violation of the right to defence in a procedure leads to the denial of the formal justice of the decision⁸⁹ and as a consequence the decision becoming null and void⁹⁰.

4.3. Subjective right

The right to defence is moreover commonly recognised as a subjective right⁹¹. This category is said to comprise of “the powers or benefits guaranteed by law to a natural or a legal person” or is defined as “individual prerogatives recognised and sanctioned by the objective right that allows its holder to do, require or prohibit something in his own interest or sometimes in that of others⁹²”.

Usually, a legal obligation corresponds to a right constructed as a subjective right, representing an interest legally protected by law (norm, systems of norms, normative order) or a legal power conferred upon a person. Contrary to political rights, subjective rights emphasise an individual (*i.e.* its holder) as subject of the right⁹³. Some argue nevertheless that the right to defence is a special “public subjective right” in order to better adapt this right to administrative proceedings and, more specifically to emphasise that a person (natural or legal) may request a hearing before the administrative authority concerned⁹⁴.

Furthermore, since every natural or legal person is entitled to claim his individual right to defence, in the specific views of other authors, the accent in the right to defence should be put on an obligation to make every claimant able to support or contest his claim before the justice. It constitutes thus not a right granted to litigants, but a duty imposed on a state (its authorities) that has to provide natural and legal persons with the effective legal means in order to enforce their rights and substantial interests. The non-fulfillment of this obligation causes defectiveness within the procedure concerned⁹⁵. Therefore this right is often regarded as linked

⁸⁹ A. Grisel, *Droit administratif suisse*, 1970, p. 179.

⁹⁰ V.H.H. Marshall, *Natural justice*, p. 19.

⁹¹ Nevertheless one may find also a contrary opinion denying the subjective character of the right to defence and claiming that it is a norm of objective character. See for instance C. Ribeyre, *Défense des droits de la défense avant jugement* [in:] *La réforme du Code pénal et du Code de procédure pénale*, Opinion doctorum, Dalloz, 2009 and Y. Capdepon, *Essai d'une théorie générale...*, p. 108, No. 193.

⁹² G. Cornu, *Vocabulaire juridique*, 8th ed., Paris 2000.

⁹³ A. Pliakos, *Les droits de la défense...*, p. 17 footnote 1.

⁹⁴ M. Stassinopoulos, *Le droit de la défense...*, p. 87; A. Pliakos, *Les droits de la défense...*, p. 18.

⁹⁵ Y. Capdepon, *Essai d'une théorie générale...*, p. 108, N. 193 and 194.

to the existence of jurisdictional decision since a violation of the right to defence in the proceedings leads to the denial of the formal justice of the decision⁹⁶ and as a consequence to the decision becoming null and void⁹⁷.

4.4. Procedural importance – from judicial to decisional

Undoubtedly, an affirmation of the importance of the right to defence has been also largely consolidated namely by the advent of procedural law and, more specifically, by the evolution of this concept⁹⁸. Procedural law due to its comparative approach contributed to the highlighting of the real need for common rules and, more specifically, uniform principles in order to impose common values for each type of proceeding. Applicable to any proceeding irrespective of its nature, the right to defence certainly belongs to the “procedural common fund⁹⁹” which, as already stated, is amply confirmed by the presence of the right to defence in all major (contemporary) legal systems¹⁰⁰.

Nevertheless, one has to bear in mind that, depending on the specificities of each legal system, the legal regimes that the right to defence is subject to are not always the same¹⁰¹. Notwithstanding the particularities of each legal system, one may generalise that the right to defence is however recognised in a relatively similar manner in all democratic countries highlighting the need of its protection at the highest level of the hierarchy of norms¹⁰². Moreover, in relation to the personal scope of the right to defence, this right originally applicable only to the individual (human beings), has been commonly recognised as applicable also to legal persons¹⁰³. Although it may not always actually be the case, this right should be guaranteed during all

⁹⁶ A. Grisel, *Droit administratif suisse...*, p. 179.

⁹⁷ V.H.H. Marshall, *Natural Justice...*, p. 19.

⁹⁸ On the evolution on the notion of the procedural law see S. Guinchard, *Droit processuel. Droit fondamentaux du procès*, Dalloz, 6th ed. 2011, N. 1 and subs.

⁹⁹ *Ibidem*, N. 9.

¹⁰⁰ Y. Capdepon, *Essai d'une théorie générale...*, p. 9, N. 8.

¹⁰¹ The «hard core» is universally present but the particular guaranties falling under its scope or the special rules fixing its implementation or application may differ. *E.g.* in some european countries the right to legal assistance is granted already during the investigation, in other only during the proceedings, while in others it is not granted at all. See J. Pradel, *Droit pénal comparé*, Dalloz, 3rd ed. 2008, No. 276.

¹⁰² Y. Capdepon, *Essai d'une théorie générale...*, p. 11, No. 8.

¹⁰³ This aspect will be presented in details afterwards, in Chapter II “Protection of the right to defence in Europe”.

phases of the procedure¹⁰⁴, *i.e.* from the very beginning of proceedings¹⁰⁵ to the final court judgment of the highest instance¹⁰⁶.

Since the application of the right to defence before a judge is incontestable, the presence of this right before the administrative authorities should be regarded as an expansive force of the right to defence in a normative system¹⁰⁷. It is namely the existence of a unilateral decision-making power modifying the substantial legal situation of the person concerned that explains the extension of the rights of the defence to certain non-judicial proceedings governed by *inter alia* administrative law, labour law, contract law or company law¹⁰⁸. Even the implementation of a contractual clause¹⁰⁹ may lead to such consequences¹¹⁰.

Nowadays this phenomenon allows analysis of the right to defence as a condition *sine qua non* in any case of the existence of any unilateral decision-making power that is liable to impair the legal situation of a person over which it is exercised¹¹¹. Therefore, the application of the right to defence does not regard the traditional criterion of being “a party to the proceeding¹¹²” any more, but it depends nowadays on qualification as “a party to a legal act”¹¹³. This shift from the “judicial” to the “decisional”¹¹⁴ is justified since the one who is affected by a unilateral legal act must be able to defend himself. This prerequisite normally leads to an adaptation or a foreclosure of certain specified guarantees of defence. For instance, in the field of labour law, the “processualisation” of the decision-making power of the employer towards his employees was introduced namely due to and on the basis of the principle of the right to defence and led to *inter alia* a statutory enactment of guarantees aiming at granting an employee the opportunity to assert his point of view¹¹⁵.

¹⁰⁴ Also *e.g.* in case of seizure actions carried out in the course of an investigation.

¹⁰⁵ *E.g.* in the criminal cases from the notification of an accusation.

¹⁰⁶ Y. Capdepon, *Essai d'une théorie générale...*, p. 286.

¹⁰⁷ A. Pliakos, *Les droits de la défense...*, p. 47.

¹⁰⁸ J-C. Saint-Pau, *Préface* [in:] Y. Capdepon, *Essai d'une théorie générale...*, p. XV.

¹⁰⁹ For instance the denial of its existence.

¹¹⁰ J-C. Saint-Pau, *Préface*, pp. XV–XVI.

¹¹¹ Y. Capdepon, *Essai d'une théorie générale...*, p. 232, N. 417.

¹¹² According to some authors this criterion “means nothing” (“ne veut rien dire”). See J-C. Saint-Pau, *Préface*, p. XVI.

¹¹³ Which may be for example an act of investigation as the person is affected by the unilateral decision-making power of a police officer or the prosecutor. Y. Capdepon, *Essai d'une théorie générale...*, p. 238, N. 432.

¹¹⁴ Which may nevertheless be criticised by those who deny “judicialisation” of a non-contentious relations.

¹¹⁵ Y. Capdepon, *Essai d'une théorie générale...*, p. 216 N. 388.

4.5. Material or formal right

Finally it should be mentioned that the doctrine, mostly criminal law doctrine, established the differentiation within the right to defence, into formal and material defence¹¹⁶. Formal defence means the exercise of defence by a third party (the defender), while material defence, meaning self-defence, should be understood as the fact to defend oneself in person¹¹⁷.

4.6. Inalienable right

There is no consent on the question of the inalienability of the right to defence. The inviolability of the right as enshrined at a constitutional level also entails that it cannot be renounced¹¹⁸ (and consequently that a lawyer's professional services cannot be relinquished either).

This context reveals the relevance of the question of the obligatory nature of defence at least in criminal trials that have been the subject of vivid debate in many countries. In Italy for instance, the Constitutional Court, handling this issue more specifically concerning the contestation in proceedings with a political background, confirmed a position, broadly represented in legal culture, of the inalienable nature of the right to defence¹¹⁹.

In relation to civil proceedings, the obligatory character of the right to defence remains in principle unchanged, although in some cases the obligation of legal representation may be waived¹²⁰. It might be the case that the litigant waives his right to defence if he accepts the claims and its consequences¹²¹.

¹¹⁶ This differentiation may sometimes occur in relation to the interpretation of Article 6(3) c ECHR, however it is totally absent in the EU regime, including the case law. See K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 69.

¹¹⁷ J-M. Verniory, *Les droits de la défense...*, pp. 7–8; U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der „Waffengleichheit“*, Zurcher Studien zum Verfahrensrecht, Schulthess, 1979, pp. 48–51; N. Schmid, *Handbuch des schweizerischen Strafprozessrechts*, Dike, 2009, paras 476–477; G. Piquerez, A. Macaluso, L. Piquerez, *Procédure pénale suisse*, para. 1193; R. Hauser, E. Schwenk, K. Hartmann, *Schweizerisches Strafprozessrecht*, Helbing Lichtenhahn, Basle 2005, chapter 40, para. 1; J. Aeschlimann, *Einführung in das Strafprozessrecht (Die neuen bernischen Gesetze)*, Bern 1997, para. 512.

¹¹⁸ I. Fanlo Cortés, *Justice for the Poor...*, p. 59.

¹¹⁹ See Corte Cost. 10 Ottobre 1979, n. 125, in *Foro italiano*, 1979, I, pp. 2513–2517.

¹²⁰ See L.P. Comoglio, *Procura (diritto processuale civile)*, Enciclopedia del diritto No. 6 (2000), pp. 1043 ss.; F. Rota: *Il giudice di pace* [in:] Michele Taruffo (ed.), *Le riforme della giustizia civile*, Giappichelli, Turin, 2000, pp. 93 et seq.

¹²¹ Y. Capdepon, *Essai d'une théorie générale...*, p. 454, N. 843.

4.7. Autonomous right

The right to defence is not a mere notion aimed at collecting guarantees under a single legal qualification¹²². It should be regarded as a genuinely independent legal entity being separate from different procedural guarantees.

This distinction was first recognised on a formal plan showing that the legal recognition of the rights of the defence occurred independently of the various procedural guarantees. Directly transposed to positive law from natural law (without the support of any kind of rules of positive law), the right to defence has been affirmed as a principle of law and equipped with a fundamental legal value by the courts at both national and international level. The right to defence has been acknowledged as an autonomous norm guaranteed by *inter alia* procedural law¹²³. Its necessity in all proceedings has become unquestionable¹²⁴ and has led to its recognition as an independent standard of procedural law.

This right providing the entitlement of the party to present and defend his interests and point of view constitutes the most complete guarantee of respect of law¹²⁵. “Justice means contradictory procedure. Without the participation of the interested party, we would have the “kadi justice” who beats his chest and says “it is so”.¹²⁶” One may say that by distinguishing the right to defence and the principle of contradictory as its element, “Motulsky destroyed the last obstacle to autonomy” of the right to defence, making natural law its unique and direct source, completely detached from its various guarantees¹²⁷.

To better illustrate the particularity and the autonomy of the right to defence we may follow the explanation of the distinction between the right to defence (“principle of defence”) and the procedural guarantees (“rights of defence”) made by Yannick Capdepon who suggests a new reading of procedural defence and presents the normative concept of the right to defence. According to this author, in order to bring some normative support, the right to defence should be regarded as a real principle of procedural law. The consecration of the right to defence as a principle

¹²² *Ibidem*, p. 109, N. 196.

¹²³ *Ibidem*, p. 112, No. 199.

¹²⁴ *Ibidem*, p. 110, No. 197.

¹²⁵ M. Stassinopoulos, *Le droit de la défense...*, p. 52.

¹²⁶ G. Kruger, *Veröffentlichungen d. Ver. d. D. Staatsrechtslehren*, Heft 17, p. 232: “Justice signifie procédure contradictoire. Sans la participation de l’intéressé, on aurait la “justice du kadi” (Kadi-Justiz), qui se frappe la poitrine et prononce: “c’est ainsi.”

¹²⁷ Y. Capdepon, *Essai d’une théorie générale...*, p. 40, N. 52.

of law allows the provision of normative support which, by its generality and legal force, leads to the recognition of the necessity of its protection in any proceeding¹²⁸. Contrary to procedural guarantees that all have a different object and legal content, it is possible to assert that the right to defence constitutes a coherent legal norm with a specific and unique object whose normative content is distinct from the one offered by all guarantees.

The above shrewd observation nevertheless requires a reservation. Contrary to Capdepon, who claims that the components of the right to defence are only procedural guarantees, in this study the author argues that not only procedural but also material guarantees (including separate legal principles) fall into the scope of the right to defence.

This is however consistent with the discussed approach that the right to defence is not a simple set of guarantees but an independent legal norm that is autonomous and distinctive from its guarantees, independently of their character. The criterion distinguishing the right of defence from the guarantees is the fact that the latter has to allow an individual “to exercise his defence” or to assert his “rights” or “interests”¹²⁹. The guarantees of defence are therefore determined strictly by reference to their functional criterion, *i.e.* the effectiveness of the defence. Furthermore the procedural guarantees are not of an indefinite and infinite character since they do not have a uniform legal nature or legal status¹³⁰. The guarantees of defence constitute solely a concretisation of a particular aspect of the right to defence.

Therefore, a guarantee of defence can be defined as a legal mechanism whose function is to ensure the effectiveness of the defence, *i.e.* to provide the litigant with an opportunity to support or challenge the claim (before a judge)¹³¹. With reference to their legal nature some of them may be perceived as obligations (guarantees of contradictory procedure and guarantee to have the time necessary for the preparation of defense) or as powers (right to the assistance of a lawyer and the right to prove)¹³². Thus, whereas the existence of the right of the defence can be characterised as independent of the various procedural guarantees, its effectiveness depends exclusively on these specified norms which explains *a priori* their qualification as “guarantees”. This idea of guaranteeing the right to defence constitutes namely the connection between the general rule (the right to defence) and its guarantees. To take a concrete example, the right of legal assistance is not

¹²⁸ *Ibidem*, p. 450, N. 840.

¹²⁹ *Ibidem*, p. 6, N. 5.

¹³⁰ *Ibidem*, p. 120, N. 218.

¹³¹ *Ibidem*, p. 122, N. 224.

¹³² *Ibidem*, p. 451, N. 841.

the “right to defence” as such, however it is one of the guarantees of the right to defence since it allows and ensures the effectiveness of the latter¹³³.

This differentiation may be seen also in relation to the legal consequences of a violation. In procedural law, first, the violation of the right to defence leads to the annulment of the proceedings or a decision, which is not the case in relation to the particular guarantees. On the one hand, a natural or legal person may benefit from a specific guarantee of defence, but his right to defence will not be effectively protected. On the other hand, the right to defence may be respected in spite of an infringement of a specified guarantee of defence.

In this regard, it clearly derives from positive law that in order to declare nullity not only some guarantees of defence have to be affected, but it must be to such an extent that as a result the litigant is deprived of the possibility to defend himself. It is not sufficient only to demonstrate that the litigant could not benefit from a guarantee of defence. A simple violation of a procedural guarantee may not lead to “ignorance” of the right to defence as such. This dual requirement imposes that the sole presumption that violation of a guarantee of defence deprives an individual from the right to defend himself cannot be conclusive¹³⁴. The right to defence is only violated if the guarantee infringed is necessary to ensure the effectiveness of the right to defence. The inability to defend oneself has to be proved as well.

Furthermore, this distinction is also visible in the context of a legitimate violation of the right to defence. This may occur when objectively justified infringement is necessary in order to protect another conflicting interest. Such a situation, however, does not concern a specific procedural guarantee but the general norm – the right to defence. In such circumstances, the legislator has to resolve the conflict between opposing norms by limiting the existence or exercise namely of the guarantee of defence but to the detriment of the right to defence and to the advantage of the antinomial interest. On the one hand, when only taking the guarantees into consideration, any control of the legitimacy of their infringement would be groundless since the legislator is free to modify or to replace a legal norm by another of the same legal value and position. On the other hand, with regard to an infringement of the right to defence, considered to be a fundamental principle, the judge may legitimately deliberate whether the restriction on its guarantee of defence is necessary and proportionate¹³⁵.

¹³³ *Ibidem*, p. 31, N. 34.

¹³⁴ Y. Capdepon, *Essai d'une théorie générale...*, p. 452, No. 842–843.

¹³⁵ *Ibidem*, p. 454, No. 843.

To conclude, this coexistence of the right to defence and guarantees of defence, besides being technically coherent is also reassuring¹³⁶. Firstly, natural law is the direct source of the right to defence that is regarded as a value aimed at the general protection of persons (natural or legal) involved in legal proceedings *sensu largo*. The assertion of the right to defence as a fundamental principle of procedural law confers on the norm the special nature and legal status which is not the case in relation to guarantees of defence, being often technical and occasional translations of the right to defence. These guarantees pertain essentially to positive law in that they are formulated specifically depending on the type of litigation/proceedings. Moreover, the concept of natural law, reflecting only general and core values, would be significantly distorted if all such guarantees were included¹³⁷.

5. Definition

Having explained the nature of the right to defence, we may pass to the question of its definition. It is nevertheless not an easy issue since there is no one universal and exhaustive definition of the right to defence¹³⁸. Moreover, most of the time the definitions proposed are not of a general nature but refer to a particular branch of law for the purposes of which they were prepared. The majority of the doctrine acknowledges the difficulty in formulating a precise technical sense of the notion of the right to defence due to its inadequacy. According to scholars, this term is “ambiguous¹³⁹”, the concept is “not of an obvious clarity¹⁴⁰” that its content “cannot be

¹³⁶ *Ibidem*, p. 455, No. 848 According to this author, for far to oppose any reform of the positive law, this coexistence sets direction and allows to correct the excesses in relation to the protection of the right to defence.

¹³⁷ *Ibidem*, p. 78, No. 127.

¹³⁸ Nevertheless the right to defence is one amongst numerous undefined legal notions. For instance, the confusion regarding the best and exhaustive definition of the “fundamental rights” may be seen also between scholars P. Pescatore, *Les droits de l'homme...*, p. 629; P. Pescatore, *La protection des droits fondamentaux par le pouvoir judiciaire*, Rapport of the 7th Congress F.I.D.E., p. 1; G. Cohen Jonathan, *La Cour des Communautés européennes et les droits de l'homme*, R. M. C., 1978, p. 74; R. Bernhardt, *Problèmes liés à l'établissement d'un catalogue de droit fondamentaux pour les Communautés Européennes*, study prepared on the Commission's demand, Bull. C.E., 1979, supplement 4, p. 25.

¹³⁹ “Ambigu”. L. Cadiet, J. Normand, S. Amrani Mekki, *Théorie générale du procès*, Thémis droit, No. 188.

¹⁴⁰ “N'est pas d'une clarté évidente” J. Pradel, *Droit pénal comparé*, Dalloz, 3rd ed. 2008, No. 272.

found¹⁴¹”, and its contours are “uncertain”¹⁴². Many authors consider the right to defence as a purely procedural right and emphasise the imprecision and lack of clarity of notions of this kind¹⁴³. Prof. Wiederkehr claims that the particularity of judicial law is that all fundamental notions are indecisive and controversial¹⁴⁴. Some authors even question the possibility of elaborating such a definition or suggest creating a definition not by expressing the real meaning of the right to defence, but by emphasising its fundamental importance¹⁴⁵.

Nevertheless the notion of the right to defence may be clarified if it is detached from the traditional concept describing it as “the whole of procedural guarantees”. Being a general legal norm, the right to defence has a precise and specific object and legal content that can clearly distinguish it from procedural guarantees¹⁴⁶. Therefore it is worth analysing what has already been argued in this issue (in legal acts, case law and doctrine) in order to try to propose a definition of the right to defence for the purposes of this study.

5.1. Law

As above-stated the notion “right to defence” is extremely rarely used by the legislator¹⁴⁷ and if it happens, it is mostly in relation to criminal procedure. The legal understanding of the right to defence is often reduced to a simple affirmation of the need of its protection and does not provide any precise definition or clarification regarding its real meaning. It is in particular the case of provisions in constitutions that in general are of a synthetic, vague and allusive character and thus express the terms in an ambiguous way. Constitutions hardly ever provide precise information on procedures or

¹⁴¹ “Introuvable”. G. Giudicelli-Delage, *Droits de la défense* [in:] L. Cadiet (ed.), *Dictionnaire de la justice*, PUF 2004, p. 364.

¹⁴² Y. Capdepon, *Essai d'une théorie générale...*, p. 8, No. 6 after X. Pin, *L'évolution des droits de la défense depuis le Code d'instruction criminelle* [in:] J. Lebois-Happeet, C. Witz (ed.), *200 Jahers Code d'instruction criminelle. Le bicentaire du CIC*, Nomos, coll «S».

¹⁴³ Y. Capdepon, *Essai d'une théorie générale...*, p. 1.

¹⁴⁴ G. Wiederkehr, *La notion de grief et les nullités de forme en procédure civile*, Dalloz, 1984, Chron. 165 “le droit judiciaire présente pour particularité que toutes les notions fondamentales en sont indécisées et controversées.”

¹⁴⁵ Y. Capdepon, *Essai d'une théorie générale...*, p. 8, No. 6.

¹⁴⁶ *Ibidem*, p. 107, No. 191.

¹⁴⁷ For instance in France, no legal act related to the civil procedure or administrative litigation refers to the right to defence.

concrete obligations¹⁴⁸. Some authors claim that constitutional proclamations serve mainly to avoid the regressive interpretation or introduction of such a law, *i.e.* below the level already achieved¹⁴⁹. The textual analysis of legal acts may seem therefore to be actually useless since these texts do not give any concrete explanation of the notion or sufficient guidelines on its nature¹⁵⁰.

5.2. Case law

To the best of the author's knowledge no court has yet provided an exhaustive and precise definition of the notion "right to defence". Furthermore there is not even an exact and exhaustive catalogue of its components since the jurisprudence is not consistent in determining which rules, rights or other guarantees fall under the scope of the right to defence. It is sometimes even alleged that the courts' reasoning is by in large casuistic; this harms its reliability and leads to the lack of confidence.

In fact, observation of the judgments shows that the right to defence in most cases is not analysed as such, but rather in conjunction with one of its precise components (specific provisions) is emphasised in the context of a handled case¹⁵¹.

Taking as an example the French Supreme Court; it stated in relation to the obligation to inform the accused of his right to choose a defender that "this formality is a major part of the right to defence¹⁵²". In the general context of the right to defence, it held only that "defence is a natural right" and therefore "no one can be convicted without having been able to defend himself¹⁵³".

¹⁴⁸ M. Cappelletti, *Nécessité et légitimité de la Justice Constitutionnelle*, Report at Colloque in Aix-en-Provence, R.I.D.C. 1981, p. 638.

¹⁴⁹ A. Pliakos, *Les droits de la défense...*, p. 45.

¹⁵⁰ In the legislation one may find only general references to the right to defence, that are hardly ever linked, explicitly or implicitly, to a particular rule of procedure.

¹⁵¹ See *e.g.* judgment of the ECJ of 23 October 1974 in case 17/74 *Transocean Marine Paint vs Commission*; *Moiseyev* judgment, para. 211; *B. vs France* judgment, para. 59 "the right to a hearing, and thus the concrete rights of the defence, have not be weakened in a way that has the result of depriving such rights of any practical effect."; *G.B. vs France* judgment: "the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (b) of the Convention taken together."

¹⁵² Cour de cassation, Crim. 22 June 1954, Bull. Crim. No. 395 "cette formalité fait partie substantielle du droit de défense".

¹⁵³ Cour de cassation, Civ. 7 May 1828, S. 1828. 329 "la défense étant de droit naturel, personne ne peut être condamné sans avoir été mis en mesure de se défendre".

Although one may expect more precision from the courts, an unquestionable achievement of the jurisprudence to provide some necessary explanations regarding this notion cannot be undermined. The important role of the ECtHR and CJEU in this field will be discussed in Chapter II.

5.3. Doctrine

So far it is only legal doctrine that has provided some generic definition of the right to defence.

Starting with the general perception, this legal principle can be broadly described as a guideline that sets the direction of the development of positive law and which is particularly applied in legal provisions¹⁵⁴ or “an abstract concept that was translated into positive law by a series of specific rights/prerogatives granted to that party to the court¹⁵⁵”. In short, the right to defence may be defined as “a set of guarantees which the litigant possesses to defend his interests in justice¹⁵⁶”. The right to defence is also regarded as constituting “a formal unit consisting of a bundle of protective institutions” that all aim at the full and effective defence of persons concerned (natural or legal)¹⁵⁷.

One can also observe some definitions resulting from the principle to the nature of litigation, stating that the right to defence consists of “fundamental guarantees affording litigants the opportunity to assert their rights freely and contradictorily¹⁵⁸”. This approach is common to numerous representatives of legal doctrine who try to define this notion. The right to defence is regarded as all powers (prerogatives) granted to a person in order to enable him to protect his interests throughout the trial¹⁵⁹, or

¹⁵⁴ J. Boulanger, *Principes généraux...*, p. 51, No. 6.

¹⁵⁵ A. Vanwelkenhuyzen, *Les droits de la défense et l'évolution du procès pénal*, RD pén. 1959-60, p. 834.

¹⁵⁶ J-C. Saint-Pau, *Préface...*, p. XIII “un ensemble de garanties dont le plaideur dispose afin de défendre ses intérêts en justice”.

¹⁵⁷ A. Pliakos, *Les droits de la défense...*, p. 15.

¹⁵⁸ *Lexique des termes juridiques*, Dalloz, ed. 2003, p. 226.

¹⁵⁹ As to criminal law see e.g. T. Garé, *Les droits de la défense en procédure pénale* [in:] *Libertés et droits fondamentaux*, Dalloz, 10th ed. 2004, p. 493, No. 634; M.-A. Frison-Roche, *Les droits de la défense en matière pénale*, p. 413, No. 565; J. Pradel, *Procédure pénale*, No. 398.

“an abstract concept implemented into positive law by a series of specific prerogatives granted to a party in the court¹⁶⁰”

Y. Capdepon, who, as above-mentioned, distinguishes in his thesis the principle of defence and the rights of the defence, defines the former as “norm requiring that every person subject to a unilateral decision-making power is in position to support or contest a claim being object of this power¹⁶¹” and the latter as “all procedural guarantees that allow litigants to be in position to support or contest a claim being object to a unilateral decision-making power”¹⁶².

In the field of criminal procedure the right to defence may mean “all the prerogatives that guarantee the accused the possibility to effectively defend himself in criminal proceedings and that violation of which constitutes a cause of nullity of the proceedings, even if the penalty is not attached to the violation of a legal rule¹⁶³”

In civil procedures the right to defence is described as “all the fundamental guarantees enjoyed by litigants in civil proceedings in order to assert their interests¹⁶⁴”.

Finally, in the very field of competition law, which is the most relevant to this study, the right to defence is defined as procedural guarantees that must have been respected by the competition authority in its implementation of the rules of competition¹⁶⁵. The scope of these guarantees varies depending on the nature and particular competences regarding the competition authority’s obligation to investigate competition law infringements.

Trying to identify a common core, one may notice that most of the definitions present a hypothesis of the right to defence covering, firstly,

¹⁶⁰ A. Vanwelkenhuyzen, *Les droits de la défense et l'évolution du procès pénal*, RD pén. 1959-60, p. 834.

¹⁶¹ Y. Capdepon, *Essai d'une théorie générale...*, p. 455 No. 846; or also as “an objective norm of law requiring that any person subject to the decision-making authority of a judge is in a position to support or challenge the claim made by or against him”. *Ibidem*, p. 109 No. 195.

¹⁶² *Ibidem*, p. 455 No. 847.

¹⁶³ G. Cornu, *Vocabulaire juridique*, Association Henri Capitant, PUF 2002, p. 264: “ensemble des prérogatives qui garantissent à l'inculpé la possibilité d'assurer effectivement sa défense dans le procès pénal et dont violation constitue une cause de nullité de la procédure, même si cette sanction n'est pas attachée à la violation d'une règle légale.”

¹⁶⁴ *Ibidem*, p. 264 “ensemble des garanties fondamentales dont jouissent les plaideurs dans un procès civil pour faire valoir leurs intérêts”.

¹⁶⁵ A. Pliakos, *Les droits de la défense...*, p. 13: “les garanties procédurales devant être reconnues dans la mise en oeuvre des règles de la concurrence communautaire par la Commission”.

“all guarantees” that, secondly, allow “litigants” to, thirdly, “defend their interests”. The common elements are the following:

- 1) **All guarantees** – This part puts a stress on the complexity, completeness and exhaustivity of the right to defence, by highlighting that it covers all elements that contribute to its effective protection. However, a reservation has to be made that the right to defence encompasses not only procedural guarantees but also some material principles.
- 2) **Litigant** – The goal of this element is to emphasize the contradictory nature of the right to defence. As abovementioned due to the enlargement of the scope of the right to defence it concerns not only “a party to legal proceedings” (litigant), but every “party to a legal act” (natural or legal person concerned)¹⁶⁶.
- 3) **Defence of his interests** – Discussing this point we should – in the first place – raise a question regarding the “defence”, *i.e.* try to determine this notion. In its apparent meaning, the “defence” may be simply understood as an action consisting of supporting or challenging something. The word “defence” involves a previous element of an offence, an action undertaken that has harmed interests or influenced the situation of the person concerned¹⁶⁷. For instance in a criminal context, defence constitutes an answer to suspicions emanating from the public authorities regarding the committing of an act which infringes criminal law regulations¹⁶⁸. Nevertheless, defence should be understood more broadly as an act to defend oneself in justice which furthermore explains the need of to protect the right to defence in all branches of law, *e.g.* civil law¹⁶⁹ or administrative law (namely competition law¹⁷⁰). The particularity of this concept in competition law results from the fact that the right to defence basically occurs in special administrative proceedings, in which the charges made reveal the character of criminal law, and only afterwards before the court.

¹⁶⁶ As to criminal law see *e.g.* T. Garé, *Les droits de la défense...*, p. 493, No. 634; M.-A. Frison-Roche, *Les droits de la défense en matière pénale...*, p. 413, No. 565; J. Pradel, *Procédure pénale*, No. 398.

¹⁶⁷ In relation to the general meaning of the word see *Trésor de la langue française: dictionnaire de la langue du XIX^e et du XX^e siècle*, Paris 1978, tome 6: “L’action de défendre quelqu’un ou de se défendre contre une attaque, action de résister.”; H. Müller, *Verteidigung* [in:] *Betätigungsmittelsachen*, Rn. 181, 6: “Ganz allgemein gesehen, ist unter Verteidigung jene Reaktion zu verstehen, die auf einen Angriff folgt und sich zum Ziel setzt, diesen anzuwehren, um das Anggriffene Objekt zu scützen”.

¹⁶⁸ J.-M. Verniory, *Les droits de la défense...*, pp. 18–19.

¹⁶⁹ H. Motulsky, *Droit processuel*, Paris 19763, pp. 147–148.

¹⁷⁰ A. Pliakos, *Les droits de la défense...*

Secondly, we should identify the object of the defence; to be precise what the support or challenge relates to. Many authors suggest that one defends his legitimate interests. Capdepon however argues that the term “interest” is too broad and suggests restricting it to the notion of “claim” in order to create a uniform approach independent of the merits of the dispute. According to this author the object of the right to defence would be thus consisting of supporting or challenging a claim in court¹⁷¹. Nevertheless, such a restrictive interpretation involving only claims in court seems insufficient. Firstly, since the person’s interests, and not claims, constitute the real object of the legal protection; claims merely relate to the protected interests¹⁷² and thus cannot substitute them. Secondly, because in this study it is argued that the protection of the right to defence extends to all steps and levels of proceedings (including administration proceedings, investigation etc.) that take place not only in court.

In this study the right to defence will be defined as **a complex fundamental legal principle providing each natural or legal person, whose legal situation has been influenced by an authority with unilateral decision-making power, with a justiciable entitlement to protect his legitimate interests by supporting or challenging the claim made by or against him.**

6. Content

Each general concept must be subsequently guaranteed by concrete instruments in order to ensure its effectiveness. As already clearly stated, the right to defence consists of numerous components to this end. It is therefore necessary to precisely define the content of the right to defence, namely its constructive elements. Also in this context, the natural vagueness of the term “right to defence” leads *de facto* to the difficulty in determining clearly the precise scope of the notion. Certainly, some guarantees such as the right to be heard are commonly invoked¹⁷³. However, one can notice that the content of the right to defence may be determined differently depending on which author attempts to prepare a list of its components. On the one hand, part of the doctrine adopts an interpretation *sensu stricto* of the right of defence by sticking to a set of purely technical procedural

¹⁷¹ Y. Capdepon, *Essai d'une théorie générale...*, p. 451, No. 840.

¹⁷² And constitutes a mean through with interests of this kind may be protected.

¹⁷³ And nowadays no one restricts the right to defence only to principle of contradictory.

guarantees¹⁷⁴. On the other hand, others adopt a conception *sensu largo* by including, in particular, institutional or organic guarantees, *e.g.*, of a public hearing, the tribunal's impartiality, access to justice or the principle of contradictory¹⁷⁵. Among these authors, some make the distinction between the direct rights of defence and the indirect ones¹⁷⁶.

As already stated the right to defence is not a simple bundle of procedural guarantees. It is a distinct and autonomous legal norm that may be invoked independently whose "hardcore" may vary depending on the nature of the particular field of law and proceedings in which it appears. Thus the actual scope of the right to defence can be different subject to its particular circumstances, *i.e.* in some cases only a few of the right to defence's components may be necessary or much more relevant to protect the interest(s) of the person concerned. For instance, sometimes there is no need to invoke the presumption of innocence.

In the face of the entanglement of numerous guarantees, principles and rights, it seems clear that the real criterion of their attachment to the scope of the right to defence is the actual contribution of such a guarantee, principle or right to the effectiveness of the right to defence¹⁷⁷. In order to constitute a right to defence's component, it must be regarded as an instrument enabling the person concerned to defend himself, *i.e.* to support or challenge the claim submitted to the judge¹⁷⁸.

According to Capdepon only four procedural safeguards actually serve the effectiveness of the general principle of the right to defence: the principle of the contradictory, the requirement for sufficient time to prepare one's defence, the right to a legal assistance and the right to evidence¹⁷⁹.

Pursuant to Stassinopoulos the right to defence traditionally consists of only three elements, *i.e.* the right of the party to have access to his case documents, the right of the party to express his opinion, namely the right

¹⁷⁴ S. Guinchard, C. Chainais, F. Ferrand, *Procédure civile. Droit interne et droit de l'Union européenne*, Précis, Dalloz, 31st ed. 2012. No. 735.

¹⁷⁵ See *e.g.*, G. Bolard, *Les principes directeurs du procès civil. Le droit positif depuis Henri Motulsky*, JCP 1993. I. 3693, No. 15; L. Cadiet, E. Jeuland, *Droit judiciaire privé*, préc., No. 511; G. Wiederkehr, *Droits de la défense et procédure civile*, D. 1978. Chron. 36; M.-A. Frison-Roche, *Généralités sur le principe du contradictoire*, thèse, Paris II 1988, No. 12; N. Fricéro, Ph. Pédrot, *Les droits fondamentaux spécifiques au procès civil [in:] Libertés et droits fondamentaux*, Dalloz, 10th ed. 2004, p. 551, No. 717.

¹⁷⁶ J. Pradel, *Procédure pénale*, Cujas, Nos 399 et 400.

¹⁷⁷ Which helps to identify those which, on the contrary, serve other aims like protection of the very person of the defendant, for example dignity, integrality of a person etc.

¹⁷⁸ Y. Capdepon, *Essai d'une théorie générale...*, p. 451, No. 840.

¹⁷⁹ *Ibidem*, p. 182, N. 321.

to be heard *sensu stricto*, and the obligation of the authority to take into account this opinion¹⁸⁰.

In this study, concentrating on competition law, the right to defence will be regarded as encompassing a number of instruments of both a material and procedural nature, *i.e.*, rights (the right to a fair trial and right to effective remedy, right to be heard, right of access to documents), principles (principle of proportionality, principle of legal certainty, *Nulla poena sine lege*, *Ne bis in idem*) as well as privileges (the privilege against self-incrimination together with the presumption of innocence and legal professional privilege).

Nevertheless, since not all the above components are equally important at all stages of competition law proceedings, only those most related to the preliminary stage – investigation – will be discussed in detail in the course of this study.

7. Related notions

Having chosen the most important elements of the right to defence, we should draw attention to the fact that due to the actual entanglement and interdependence of different legal concepts (including values, principles and rights) some of them are particularly related to the right to defence. Among the concepts regarded as specifically linked to the notion of the right to defence we may identify the rule of law, procedural justice and the right to good administration.

Since the above concepts can often be useful for the interpretation of the right to defence in the field of competition law¹⁸¹ some clarification on these notions as well as on their relation to the right to defence will be provided below.

It has to be moreover noted that some authors also point at the right to a fair trial and the principle of equality of arms in this context. With reference to the right to a fair trial, his interdependence with the notion of the right to defence may be considered in various ways. Some authors claim that these two concepts are simply synonymous as the principle of respect for the right of defence actually expresses everything that contributes

¹⁸⁰ The author argues that the most important is the right to be heard *sensu stricto* to which the two others are only complementary; M. Stassinopoulos, *Le droit de la défense...*, pp. 49–50.

¹⁸¹ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 157.

nowadays to the concept of a fair trial under Article 6 § 1 of the EConHR¹⁸². Others argue the existence of the relationship of dependency between an encompassing concept and an encompassed one. In this study, as mentioned above, the concept of the right to a fair trial is covered by the scope of the right to defence¹⁸³ and the former is regarded as one of the most crucial elements of the latter¹⁸⁴.

In relation to the principle of equal arms, it is commonly considered to be constituted as a part of the right to a fair trial¹⁸⁵ and therefore it does not need to be discussed separately.

7.1. Rule of law

The idea of the rule of law that is often considered to be the foundation of modern states and a necessary element of every democratic state, may be found in Aristotle's works. This concept assumes that every person (including those governing the state and involved in the legislative process) is subject to the law, or in other words that no one is above the law. Notwithstanding the multiplicity of particular theories regarding the rule of law¹⁸⁶, it is commonly agreed that the aim of the rule of law is to

¹⁸² S. Guinchard, C. Chainais, F. Ferrand, *Procédure civile*, No. 710 (This affirmation was not repeated afterwards in subsequent editions).

¹⁸³ Likewise the French Constitutional Council: "le respect des droits de la défense implique (...) l'existence d'une procédure juste et équitable garantissant l'équilibre des droits des parties". See the decision of the French Constitutional Council of 2 February 1995, Rec. 195.

¹⁸⁴ For the opposing opinions, see for instance Y. Capdepon, *Essai d'une théorie générale...*, p. 451, No. 840, who argues that the right to defence is integrated in the broader European concept of the right to a fair trial. See also F. Miatti, *La "due process of law" américaine, quelle traduction française*, Rev. Dr. Int. Dr. Comp. 1997. 110; W. Mastor, *Les juridictions constitutionnelles, gardiennes des droits fondamentaux (contrôle a priori et a posteriori)*, RD pén. Sept. 2011, étude 14, p. 15, No. 5.

¹⁸⁵ See *inter alia* judgment of the ECHR of 17 January 1970 in case *Delcourt vs Belgium*, Application No. 2689/65, paras 28 and 34; and *Borgers* judgment, paras 24 and 26; See also P. Nicolopoulos, *La procédure devant les juridictions répressives et le principe du contradictoire*, RSC, 1989, p. 3; J.P.W. Temminck Tuinstra, *Defence counsel in international criminal law*, University of Amsterdam Press, 2009, p. 147, <http://dare.uva.nl/document/122661>; E. Toma, *The Principle Of Equality Of Arms – Part Of The Right To A Fair Trial*, Union of Jurists of Romania Law Review, Vol. I, Issue 3, Jul.-Sept. 2011, available at <http://www.internationallawreview.eu/fisiere/pdf/06-Elisa-Toma.pdf>

¹⁸⁶ Which also results from linguistic differences as translations of this notion to other languages (like Fr. "état de droit", Ger. "Rechtsstaat", Pl. "Państwo prawa") may be interpret differently.

protect the citizens against the exercise of arbitrary power¹⁸⁷. Therefore the government is also required to exercise its powers under the law, *i.e.* in accordance with legal principles and legitimately established, public and clear rules.

Traditionally we distinguish two concepts of the rule of law, namely formal and substantive.

According to the formal (“thinner”) concept, the rule of law has no substantive content thus there cannot be any requirement in relation to the justice or fairness of established rules¹⁸⁸. The substantive (“thicker”) interpretation goes beyond this and argues that the rule of law is “a substantive legal principle¹⁸⁹” that covers and protects numerous legal principles and individual substantive rights¹⁹⁰ that are derived from or based on this rule¹⁹¹. This substantive concept of the rule of law is strongly connected with the principle of justice which implies fairness and the protection of rights, on the one hand, and the prevention as well as punishment of wrongs, on the other hand.

The rule of law may be defined in various ways. The United Nations has defined the rule of law as referring to “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality

¹⁸⁷ F. Ehm, *The Rule of Law: Concept, Guiding Principle and Framework*, Report from the Seminar *Administrative Discretion and the Rule of Law* (Trieste, Italy 12–15 April 2010), p. 4.

¹⁸⁸ B. Tamanaha, *The Rule of Law for Everyone?*, Current Legal Problems, Vol. 55, 2002.

¹⁸⁹ B.A. Garner (ed.), *Black’s Law Dictionary*, 9th ed., Thomson Reuters, 2009, p. 1448.

¹⁹⁰ M. Stephenson, *Rule of Law as a Goal of Development Policy*, World Bank Research (2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAW/JUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>; See also K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte*, Tübingen 1997, p. 1 et seq. who identifies more than 20 principles, being components of the rule of law such as: equality before the law, basic (human) rights, principle of legal certainty, fair administrative procedures, general duty to legal protection, legal protection towards the public authority, principle of proportionality.

¹⁹¹ P.P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law, 1997, p. 467; See also so called “Radbruch’s Formula”, see for ex. I.B. Flores, K.E. Himma (eds.), *Law, Liberty, and the Rule of Law*, Springer, p. 71 or B. Bix, *Radbruch’s Formula and Conceptual Analysis*, American Journal of Jurisprudence, Vol. 56, 2011, pp. 45–57.

before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”¹⁹².

According to the definition elaborated by the Organisation for Economic Co-operation and Development (OECD) in 2005, “the rule of law is composed of the following separate fundamental elements, which must advance together:

- [1] The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution.
- [2] The law must govern the government.
- [3] An independent and impartial judiciary interprets the law.
- [4] Those who administer the law act consistently, without unfair discrimination.
- [5] The law is transparent and accessible to all, especially the vulnerable in most need of its protection.
- [6] Application of the law is efficient and timely.
- [7] The law protects rights, especially human rights.
- [8] The law can be changed by an established process that is itself transparent, accountable and democratic”¹⁹³.

Pursuant to the World Justice Project, whose definition is based on four universal principles, derived from internationally accepted standards¹⁹⁴, “the rule of law is a system of rules and rights that enables fair and functioning societies; it is the foundation for communities of opportunity and equity”¹⁹⁵.”

One may have the impression that nowadays the rule of law (mainly in its substantive meaning) is omnipresent. This principle applies at both national and international levels. At national level, it is embedded in the

¹⁹² Report of the Secretary-General (Kofi Annan), *The rule of law and transitional justice in conflict and post-conflict societies*, Doc. S/2004/616, 23 August 2004, para. 6.

¹⁹³ *Equal Access to Justice and the Rule of Law*, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention (2005).

¹⁹⁴ The rule of law is a system where the following four universal principles are upheld:

1. individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who serve World Justice Project Rule of Law Index 2014, p. 4 available at http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

¹⁹⁵ W.H. Neukom, founder and CEO, the world justice project; <http://worldjusticeproject.org>

framework of constitutions or their equivalent being the highest law in the national legal order. At international level, the rule of law is explicitly mentioned by numerous international documents¹⁹⁶, including the Universal Declaration of Human Rights¹⁹⁷ and the Treaty of the European Union¹⁹⁸, which affirm that the rule of law constitutes a core of the EU foundations. Furthermore, the rule of law constitutes a prerequisite of membership in many organisations like the Council of Europe, the above-mentioned EU or the NATO.

The concept of the rule of law resulting from the Charter of the United Nations, based on the inherent link between the UN and the international rule of law, includes elements regarding mostly the conduct of “State to State relations”. This approach is confirmed by other UN documents like a UN General Assembly Declaration from 1970 which emphasises in its preamble “the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations¹⁹⁹.” It has to be

¹⁹⁶ *Vienna Declaration of the Council of Europe* of 9 October 1993, para. 6 sentence 1, source: www.coe.int

Preamble consideration 2 of the NATO Treaty of 4 April 1949, source: 34 UNTS 1949, No. 541, p. 243 et seq.; The Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe accepted on 23 November 2000, “The principle of the rule of law”; The European Union (EU) document “Common position of 25 May 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning human rights, democratic principles, the rule of law and good governance in Africa (98/350/CFSP)” states in Article 2 sentence 2 lit. C; *Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention* (2005); Interim Committee of the International Monetary Fund Declaration “Partnership for Sustainable Global Growth”, of 29 September 1996, source: www.imf.org, controlled on 28 March 2010, see para. 2 sentence 2 bullet point 10.; *Warsaw Declaration: Toward a Community of Democracies*, 27 June 2000, source: ILM 39 (2000), p. 1306 et seq.; *Declaration de Bamako*, 3 November 2000, source: www.francophonie.org, controlled on 28 March 2010.; *Delhi Declaration* of 1959 of the International Commission of Jurists (ICJ), Source: www.icj.org, controlled on 28 March 2010; *Charter on Good-Neighbourly Relations, Stability, Security and Cooperation in South-Eastern Europe*, 12 February 2000, Para. 44 source: www.rspcsee.org

¹⁹⁷ Third preamble consideration: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

¹⁹⁸ *Treaty of the European Union* of 7 February 1992 (with amendments), Consolidated Version Official Journal of the European Union, No. C 83, 30.03.2010, p. 13 et seq., Article 2 sentence 1: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

¹⁹⁹ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United*

stressed that the UN General Assembly has accepted a significant number of resolutions regarding the rule of law as the primary subject²⁰⁰.

Undoubtedly the content of the rule of law is extremely broad. Amongst the legal and doctrinal texts as well as case law we may identify *inter alia* the following core elements of the rule of law: legal certainty, separation of powers, independence and impartiality of the judiciary, respect for human rights²⁰¹, non-discrimination and equality before the law, the principle of the state being bound by law and substantive coherence of the legal framework²⁰².

Moreover it has to be stressed that some well-established fundamental rights and principles, such as the right to fair trial, principle *nulla poena sine lege*, principle *ne bis in idem* are namely regarded as derivatives of rule of law.

As we can see both notions, *i.e.* the wider remit of the rule of law and the right to defence are undoubtedly tangled up by some component being common to both of them, like the principle of legal certainty, the right to an independent tribunal, the right to fair trial, the presumption of innocence etc. One may conclude that actually the right to defence falls into the scope of the broader concept of the rule of law.

Nations, 24 October 1970, A/RES/2625(XXV), available at: <http://www.refworld.org/docid/3dda1f104.html>

²⁰⁰ See the series of resolutions on “*Strengthening of the rule of law*” (A/RES/48/132, 20 December 1993; A/RES/49/194, 23 December 1994; A/RES/50/179, 22 December 1995; A/RES/51/96, 12 December 1996; A/RES/52/125, 12 December 1997; A/RES/53/142, 9 December 1998; A/RES/55/99, 4 December 2000 and A/RES/57/221, 18 December 2002) and the series of resolutions on “The rule of law at the national and international levels” (A/RES/61/39, 4 December 2006; A/RES/62/70, 6 December 2007; A/RES/63/128, 11 December 2008 and A/RES/64/116, 16 December 2009). Nevertheless the above acts concentrate on underlining the general importance of the rule of law, rather than on clarifying in an explicit way its content.

²⁰¹ According to the Frithjof Ehm, this regards only the judicial human rights that are the following: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy (*ne bis in idem*), (5) the legal principle that measures should not have retroactive effect as well as the prohibition of analogy, (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty, and (8) the right to a fair trial (Article 6 ECHR) or, in Anglo-American diction, the principle of natural justice. See F. Ehm, *The Rule of Law...*, p. 11; See also The “International Bar Association Rule of Law Resolution” of 30 September 2005, available at: www.ibanet.org

²⁰² See F. Ehm, *The Rule of Law...*, pp. 4 and 8–12.

7.2. Procedural justice

Like in the case of the rule of law, procedural justice is a broader category than the right to defence which undoubtedly falls into the scope of the former²⁰³.

Procedural justice reflects the idea of fairness in all kinds of proceedings²⁰⁴. This concept is of high importance in legal studies, where it mostly relates to the administration of justice and legal proceedings, conducted in a *procedurally fair and transparent manner*²⁰⁵, but it may also apply to a non-legal context²⁰⁶.

In his famous work – “A Theory of Justice^{207”}, John Rawls presents three types of procedural justice, *i.e.* the perfect procedural justice, the imperfect procedural justice and the pure procedural justice. The perfect procedural justice aims, in short, at ensuring the production of certain outcomes in a reliable and consistent manner²⁰⁸. The imperfect procedural justice, on the contrary, strives to establish procedures for the fairness of the outcome, but without ensuring achievement of a particular result²⁰⁹. Finally, the pure procedural justice, without determining what is fair, assumes that the fairness of procedure suffices to produce a fair outcome²¹⁰.

Albeit there is no universal definition of procedural justice, we can argue that it reflects a group of values that are to be respected in a consequent and impartial way in every administrative or judicial proceeding²¹¹.

²⁰³ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 104.

²⁰⁴ Contrary to the distributive justice that relates to fair distributing of resources or to the retributive justice regarding fair punishing of wrongs.

²⁰⁵ A. Lamparello, *Incorporating The Procedural Justice Model Into Federal Sentencing Jurisprudence In The Aftermath Of United States V. Booker: Establishing United States Sentencing Courts*, New York University Journal of Law & Liberty 4/2009, p. 117; See also S. Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 946–53 (2006).

²⁰⁶ Such as in sociology, psychology etc.

²⁰⁷ J. Rawls, *A Theory of Justice*, Oxford: Oxford University Press 1999, pp. 73–75.

²⁰⁸ A. Lamparello, *Incorporating The Procedural Justice...*, p. 117; See also C. Nicole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 Buff. L. Rev. (2005), pp. 65, 104.

²⁰⁹ W. Sadurski, *Law's Legitimacy and 'Democracy-Plus,'* 26 Oxford J. Legal Stud. 377, 2006, pp. 397–399.

²¹⁰ J. Rawls, *A Theory of Justice*, pp. 85–86; See also C.K. Kaufman, *Nature of Justice: John Rawls and Pure Procedural Justice*, Washburn L.J. 19 (1979–1980), p. 197 and W. Nelson, *The Very Idea of Pure Procedural Justice*, Ethics (The University of Chicago Press) Vol. 90, No. 4 (July 1980), pp. 502–511.

²¹¹ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 98.

The concept of procedural justice is based on the assumption that not only content (*i.e.* substantive rules), but also procedure itself may impact on important human rights as well as the interests of those participating in the proceedings and thus the compliance with procedural rules is as significant to the addressee as the final decision itself²¹².

It is acknowledged that “procedural justice strongly influences institutional legitimacy and, through it, the acceptance of institutional decisions²¹³”. Many studies have confirmed the hypothesis that a person concerned “distinguishes between the fairness of the process, and the fairness, or even favourability, of the outcomes²¹⁴” and cares equally about how his case is resolved and about its results²¹⁵.

We shall now have a look at the values contributing to the perception of fairness of the procedure. Amongst the guarantees of a democratic state that are most often said to fall into the scope of procedural justice one can highlight:

- 1) admission of persons concerned to participate in the resolution of his case;
- 2) openness of proceedings by *inter alia* access to the file;
- 3) the impartiality of the deciding authority;
- 4) the fair conduct of proceedings;
- 5) the obligation to justify decisions;
- 6) the possibility to appeal against the issued decision;
- 7) the assurance of judicial control of the decision issued²¹⁶.

²¹² W. Nelson, *The Very Idea...*, p. 506; Z. Kmiecik, *Postępowanie administracyjne w świetle standardów europejskich*, Warsaw 1997, p. 43. See also J. Rawls, *A Theory of Justice*, pp. 83–84 and J.L. Mashaw, *Due Process In The Administrative State*, 1985, pp. 162–163: “We all feel that process matters to us irrespective of result (...) there seems to be something to the intuition that process itself matters.”

²¹³ M. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 (1995) *Denv. U. L. Rev.* 303, note 44, 305; J. Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, Murdoch U. Electronic J. L., June 2002, at para. 28, http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html;

²¹⁴ R.K. Warren, *Public Trust and Procedural Justice*, CT. REV., Fall 2000, at 12–13, available at <http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Warren.pdf>

²¹⁵ J. Thibaut, L. Walker, *Procedural justice*, NJ: Lawrence Erlbaum., Hillsdale 1995; R. Folger, R. Cropanzano, *Organizational justice and human resource management*, CA: Sage, Thousand Oaks 1998; E.A. Lind, T.R. Tyler, *The social psychology of procedural justice*, Plenum., New York 1998; T.R. Tyler, S.L. Blader, *Cooperation in groups: Procedural justice, social identity and behavioral engagement*, Psychology Press, Philadelphia, 2000; T.R. Tyler, R.J. Boeckmann, H.J. Smith, Y.J. Huo, *Social justice in a diverse society*, CO: Westview, Boulder 1997.

²¹⁶ J. Łętowski, *Prawo administracyjne dla każdego*, Warsaw 1995, pp. 171–172.

At a more general level, *exempli gratia*, G.S. Leventhal mentions six general prerequisites of a fair procedure: consistency, bias suppression, accuracy, correctability, representativeness, and ethicality²¹⁷. T. Tyler points out four factors relevant to procedural fairness in the legal system: “the voice factor²¹⁸”, unbiased procedure, treatment of a person concerned with dignity and respect by acknowledging his rights and the needs and concerns of a person concerned being considered by the authority²¹⁹. Furthermore A. Lamparello identifies the following four criteria: similar treatment of similar cases, neutrality and impartiality of the procedures, right to have a voice and representation in the proceedings and the transparency and the openness of the resolution of the case²²⁰.

Finally, in relation to competition law, M. Bernatt, while analysing the concept of procedural fairness in Polish competition law proceedings, concluded that it represents “a set of values that should be ensured in procedural norms and actually implemented in the proceedings in order to improve the fairness of the course of proceedings and allows its positive assessment²²¹”. According to this author the set of values of this kind included in the right to defence are the right to be heard, the right to equal participation, the protection of business secrets and other confidential information as well as the right to appeal and to judicial review²²².

7.3. Right to good administration

The right to good administration is a one of the most important examples of a right aspiring to become a new fundamental. According to some authors its status has already been confirmed by the presence of the right to a good

²¹⁷ G.S. Leventhal, *What should be done with equity theory?* [in:] K.J. Gergen, M.S. Greenberg, R.H. Willis (eds), *Social exchange: Advances in theory and research*, New York: Plenum 1980 after S.L. Blader, T.R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, *Personality And Social Psychology Bulletin*, Vol. 29, No. 6, June 2003, p. 748.

²¹⁸ The possibility to participate and give input when a decision regarding the person concerned is being made.

²¹⁹ T. Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, *Issues of Democracy*, July 2001, p. 20.

²²⁰ A. Lamparello, *Incorporating The Procedural Justice...*, p. 118.

²²¹ M. Bernatt, *Sprawiedliwość proceduralnąw postępowaniu przed organemochrony konkurencji*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warsaw 2011, p. 49.

²²² *Ibidem*, s. 94.

administration in the Charter of Fundamental Rights and Freedoms²²³. The notion of good administration is wide and, moreover, there is no one completed and universal list of its components. On the one hand, one can say that its content depends on a constantly changing standard that reflect actual circumstances and context²²⁴. On the other hand, after many positions have been written²²⁵, numerous courts decisions have been rendered, it may however be possible to identify the “hardcore” of this right, like the right to be heard, the right of access to the file, the right to have an affair handled impartially, fairly and within a reasonable time, the right to effective remedy. Of course, since some of the components are no more than rules of conduct²²⁶ and others have achieved the rank of legally-binding and justiciable obligations²²⁷ (distinguished procedural rights), these elements neither have the same status nor are of equal importance.

A very interesting concept was presented by J.A. Usher²²⁸, who divided, in accordance with the jurisprudence of the Court of Justice of the European Union, the principle of good administration into administrative good

²²³ E. Lanza, *The right to good administration in the European Union. Roots, rationes and enforcement in antitrust case-law*, *Teoria del Diritto e dello Stato* 1-2-3, 2008, p. 482.

²²⁴ M. Stupak, *The Fundamental Right to Good Administration in its New Attire*, *Towards European Constitutionalism* 2011.

²²⁵ H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Oxford 1999; G. Della Cananea, *L'amministrazione europea*, in *Trattato di diritto amministrativo*, edited by S. Cassese, Milano 2000, p. 1587; T. Fortsakis, *Principles Governing Good Administration*, *European Public Law* nr 2/2005, p. 215; A. Jackiewicz, *Prawo do dobrej administracji w świetle Karty Praw Podstawowych*, *Państwo i Prawo* No. 7/2003; J. Świątkiewicz, *Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych)*, *Biuro Rzecznika Praw Obywatelskich*, Warsaw 2007; B. Turno, *Koncepcja legitymacji procesowej strony w jurysdykcyjnym postępowaniu administracyjnym w świetle prawa do dobrej administracji* [in:] P. Wiliński (ed.), *Prawo wobec wyzwań współczesności*, Vol. II, Poznań 2005; A. Wróbel, *Zmierzch (publicznego) prawa podmiotowego? Kilka refleksji na tle orzecznictwa Trybunału Sprawiedliwości Wspólnot Europejskich* [in:] K. Sieniawska (ed.) *Samorządowe Kolegia Odwoławcze jako gwarant prawa do dobrej administracji*, Warsaw 2009; M. Szydło, *Prawo do dobrej administracji jako prawo podstawowe w unijnym porządku prawnym*, *Studia Europejskie* 2004, nr 1; O. Jacot-Guillarmod, *Rights Related to Good Administration of Justice (Article 6)* [in:] R.St.J. Macdonald et al (eds.), *The European System for the Protection of Human Rights*, Dordrecht–Boston–London 1993. See also, judgment of the CFI of 16 December 2004 in case T-410/03 *Hoechst GmbH vs Commission*, E.C.R. 2008, II-4451, point 582.

²²⁶ Requirement of a prompt response from an administrative authority.

²²⁷ For instance, the right of access to the file.

²²⁸ J.A. Usher, *The “Good Administration” of European Community Law*, *Current Legal Problems*, 1985, pp. 269–287 and *General Principles of EC Law*, London–New York 1998, p. 101.

faith²²⁹, consistency²³⁰, diligence²³¹ and communication²³². This division remains actual and in line with European and domestic legislation.

There is no doubt that the right to good administration originates from the abovementioned rule of law which imposes *inter alia* fair and impartial administration procedures.

It is also uncontested that the right to good administration has developed mostly from the jurisprudence of the CJEU²³³. At the very beginning, the principle of good administration was not recognised in the Community's legal system. After more than 50 years of dealing with this issue and trying to properly "shape" the concept of good administration by defining its content²³⁴, the CJEU stated that the right to good administration is

²²⁹ Judgment of the ECJ in case C-293/85 *Commission vs Belgium*, judgment of the ECJ in case C-56/90, *Commission vs United Kingdom*, judgment of the ECJ in case C-8/55 *Fédération Charbonnière de Belgique vs. High Authority*; judgment of the CFI in joined cases T-33/89, and T-74/89 *Blackman vs European Parliament*; judgment of the ECJ in case C-155/85 *Strack vs Parliament*.

²³⁰ Judgment of the ECJ in case C-81/72 *Commission vs Council*, judgment of the ECJ in case C-68/86 *United Kingdom vs Council*, judgment of the ECJ in case C-43/75 *Defrenne vs Sabena*; judgment of the ECJ in case C-188/82 *Thyssen*; judgment of the ECJ in case C-188/83 *Witte vs European Parliament*; judgment of the ECJ in case C-68/86 *United Kingdom vs Council*; judgment of the ECJ in joined cases C-29, 31, 36, 39–47, 50, 51/63 *Usines de la Providence vs High Authority*; judgment of the ECJ in joined cases C-100-103/80 *Pioneer vs Commission*.

²³¹ Judgment of the ECJ in case C-120/73 *Lorenz vs Germany*, judgment of the ECJ in joined cases C-96-102, 104, 105, 108 and 110/82 *IAZ International*; judgment of the ECJ in case C-179/82 *Lucchini*, judgment of the ECJ in case C-61/74 *Santopietro vs Commission*, judgment of the ECJ in case C-19/69 *Richez-Parise*, judgment of the ECJ in case C-103/85 *Usinor vs Commission*, judgment of the ECJ in case C-14/78 *Denkavit vs Commission*, judgment of the CFI in case T-73/89 *Barbi*.

²³² Judgment of the ECJ in case C-49/88 *Al-Jubail Fertilizer vs Commission*, judgment of the ECJ in joined cases C-316/82 and 40/83 *Kohler vs Court of Auditors*, judgment of the ECJ in case C-111/83 *Picciolo vs European Parliament*, judgment of the CFI in case T-156/89 *Mordt*, judgment of the ECJ in case C-322/81 *Michelin vs Commission*, judgment of the ECJ in case C-107/82 *Telefunken vs Commission*, judgment of the ECJ in case C-169/73 *Continental France vs Council*, judgment of the ECJ in case C-144/82 *Detti vs Court of Justice*, judgment of the ECJ in case C-270/82 *Estel vs Commission*, judgment of the ECJ in case C-24/62, *Germany vs Commission*.

²³³ The rights included in the Charter weren't born in that document, but only they became more evident due to its incorporation. See S. Mangiameli, *La Carta dei diritti fondamentali dell'Unione Europea*, Nuovi studi politici, 2/2002, p. 32.

²³⁴ In the general context of the study it has to be underlined that the strengthening of the principles of good administration has been due to the jurisprudence of European Community Courts in four main areas, *i.e.* competition, anti-dumping, customs and State aid policy implementation. See judgment of the ECJ of 15 March 1984 in case C-64/82 *Tradax Graanhandel BV vs Commission*, judgment of the CFI in case T-148/89, *Trefilunion*

a general principle²³⁵. However, since the principle in question “does not in itself confer rights upon individuals”²³⁶, the Court of Justice considers the right not justiciable. In one of its quite recent judgements, in the *Hans-Martin Tillack* case²³⁷, the CJEU, despite having upheld the above statement, acknowledged nevertheless the justiciability of specific rights being components of the principle of good administration²³⁸.

Furthermore, it cannot be neglected that since the proclamation of the CFR on 7th December 2000 the right to good administration figured for the first time in an international catalogue of fundamental rights²³⁹. As one can see the CFR follows the recent tendency to accord the status of fundamental rights’ with procedural rights, by including them with substantive rights and elevating them to a constitutional status²⁴⁰. Nevertheless, the act has a purely

vs Commission, E.C.R. 1995, II-1063, para. 142; judgment of the CFI in case T-147/89 *Société Métallurgique de Normandie vs Commission*, E.C.R. 1995, II-1063 and judgment of the CFI in case T-151/89, *Société des Treillis et Panneaux Soudés vs Commission*, E.C.R. 1995, II-1063, judgment of the ECJ in case C-269/90 *Technische Universität München vs Hauptzollamt München-Mitte*, judgement of the CFI of 21 November 1991 in case T-167/94 *Detlef Noelle vs Council*, judgement of the CFI of 18 September 1995 in case T-305/94 *Limburgse Vinyl Maatschappij NV and others vs Commission*, judgment of CFI of 30 January 2002 in case T-54/99, *Max.mobil vs Commission*. See also E. Lanza, *The right to good administration...*, p. 488.

²³⁵ See for example *Max.mobil* judgment, the first case of indirect jurisprudential application of the Charter of Nice, where the CFI stated: “it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States”.

²³⁶ Judgment of the CFI in case T-196/99 *Area Cova vs Council and Commission*, ECR II-3597, para. 43.

²³⁷ Judgment of the CFI of 4 October 2006 in case T-193/04 *Hans-Martin Tillack vs Commission*.

²³⁸ To be precise, before the CFR, the concept of good administration was referred in judgment as a principle, not as a right. *Hans-Martin Tillack* judgment, para. 127. “In that regard, first, the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals (Case T-196/99 *Area Cova and Others vs Council and Commission* [2001] ECR II-3597, paragraph 43), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), which is not the case here.”

²³⁹ The right does not have its equivalent in the European Convention on Human Rights.

²⁴⁰ See P.H. Nehl, *Principles of Administrative Procedure...*, pp. 15, 17. the author described the right to good administration as consisting of developing procedural and substantive

confirmative and not constructive character²⁴¹. It reaffirms²⁴² already existing fundamental rights²⁴³ (as they result from various sources²⁴⁴) which had not been explicitly protected before²⁴⁵. This has been confirmed as well in the *Explanation of the Article enshrining the right to good administration allegedly to the Treaty establishing a Constitution for Europe*²⁴⁶. The Drafters explained that this Article is based on “the existence of the Union as subject to the rule of law, whose characteristics were developed in the case-law which enshrined, *inter alia*, good administration as a general principle of law”²⁴⁷.

The right was declared namely in article 41²⁴⁸ which states as follows: “Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”.

requirements in line with which modern administration must operate.; see also K. Kanska, *Towards Administrative Human Rights in the EU Impact of the Charter of Fundamental Rights*, European Law Journal No. 3/2004, Vol. 10, p. 310; E. Lanza, *The right to good administration...*, p. 484.

²⁴¹ The CFR is being described as a gifted crystallization of existing fundamental rights contained in other sources, see L. Pech, X. Groussot, *Fundamental Rights Protection in the EU Post Lisbon Treaty*, 14 June 2010, European Issue No. 173 / Fondation Robert Schuman, p. 5.

²⁴² *Ibidem*.

²⁴³ As the rights included in the CFR, even if called “new”, weren’t born in that document, but through it they became more evident. See, K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Zeszyt 39, Warsaw 2010, p. 121 and S. Mangiameli, *La Carta dei diritti fondamentali...*, p. 32.

²⁴⁴ Including the EConHR, national constitutional traditions and international obligations of Member States, the Social Charters of the EU and the Council of Europe as well as the case law of the CJEU and the ECtHR.

²⁴⁵ The Commission’s *Communication on the Charter of Fundamental Rights of the European Union*, Brussels, COM (2000) 559 final, 13 September 2000: the Charter “enshrin[es] certain new rights which already exist but have not yet been explicitly protected as fundamental rights, notwithstanding the values they are intended to protect, such as the right to good administration”.

²⁴⁶ Declaration concerning provisions of the Constitution, Final Act of the Treaty Establishing a Constitution for Europe, Official Journal of the European Union, C-310, XLVII, 14 December 2004.

²⁴⁷ *Ibidem*; See also E. Lanza, *The right to good administration...*, p. 480.

²⁴⁸ Paragraphs 1 and 2, (a) and (b), of Article 41 CFREU (right to good administration) are based on the case-law of the EU Courts recognizing general principles of EU law, whereas paragraph 2, (c) and paragraphs 3 and 4 reproduce Article 296 TFEU, Article 340 TFEU, and Articles 20(2)(d) and 25 TFEU; See W. Wils, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees – The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, World Competition, Vol. 34, No. 2, June 2011, p. 17.

The wording “every person” was chosen instead of “every citizen”²⁴⁹ to underline that this requirement should not be dependent on the nationality of a party to the proceedings and to be applicable not only to natural persons but also to legal ones²⁵⁰, who are often subject to direct EU administration²⁵¹. Thus, what matters in the context of the present study, there is no doubt that the right at stake is fully applicable also to legal persons²⁵².

The right to good administration in its subsequent paragraphs reaffirms the right to be heard, the right of access to the file²⁵³ and the obligation of the administration to give reasons for its decisions. Paragraph 3 declares the right to effective remedy, while paragraph 4 provides for the right to communicate with the institutions of the Union in self-chosen one of the languages of the Treaties²⁵⁴.

Despite the components having been already deduced from other rights, the very way they have been expressed as a general right to good administration is relatively new²⁵⁵ and could even be considered revolutionary²⁵⁶.

Article 41 CFR is said to mainly have a control function, *i.e.* to “discipline” the public administration and to set out the rule governing the relations between a natural or a legal person and the administration in order to prevent the latter from abusing its power²⁵⁷.

One of the main factors connecting this right with the right to defence, is that the right to good administration is considered a defensive²⁵⁸ fundamental

²⁴⁹ As one could expect from the article placed in the chapter titled “Citizen’s rights”.

²⁵⁰ Like undertakings and therefore it plays an important role in the competition proceedings. Wolfgang Weiss underlines the relevancy of the right to good administration, in particular a right to a fair handling, a right to be heard and a right to access files. See W. Weiss, *Human Rights and EU antitrust enforcement: news from Lisbon*, European Competition Law Review 2011, 32(4), p. 193.

²⁵¹ K. Kanska, *Towards Administrative Human Rights...*, p. 308; E. Lanza, *The right to good administration...*, p. 481.

²⁵² Undertakings in the competition proceedings.

²⁵³ The grounds of right to access to the documents are based mostly on antitrust and antidumping proceedings law. See G. Della Cananea, *L’amministrazione europea...*, p. 1590 and W.J.P. Wils, *Settlements of EU Antitrust Investigations – Commitment Decisions under Article 9 of Regulation No. 1/2003*, World Competition, Vol. 29, No. 3, September 2006, p. 12.

²⁵⁴ E. Lanza, *The right to good administration...*, p. 482.

²⁵⁵ A. Wyrozumka, *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie Lizbońskim oraz Protokole polsko-brytyjskiego*, Przegląd Sejmowy 2(85)/2008, p. 26.

²⁵⁶ P. Craig, *The Constitutionalisation of Community Administration*, E.L. Review 2003, p. 840.

²⁵⁷ C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, EJIL 2006, Vol. 17, No. 1, s. 191. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012, p. 147.

right since it provides a person with a right to expect from public institutions a certain standard of behaviours based on the rule of law. This right surely differs from “classic” fundamental rights, such as human dignity or freedom of thought, conscience and religion, because it defends the interest not only by recognition of its existence, but also by the establishment of forms and procedures that are to be respected by the public authorities²⁵⁹

It should be further mentioned that “good administration” may be regarded also as an obstacle to protection of other (classical) fundamental rights. In the opinion of some commentators, it might happen that authorities would successfully²⁶⁰ try to excuse themselves for not having respected a fundamental right by claiming the need of assuring effectiveness of law enforcement²⁶¹. Nevertheless, arguments of administrative efficiency or convenience are hardly sufficient to warrant infringements of fundamental rights. Such attempts to have fundamental rights purely set aside, temporarily suspended or simply diminished for the declared purpose of attaining objectives such as the “*good administration of justice*” or the “*effectiveness of the law*”²⁶² have been highly criticised²⁶³.

²⁵⁸ A. Serio, *Il principio di buona amministrazione nella giurisprudenza comunitaria*, Riv. it. dir. pubbl. Com., 2008, p. 300.

²⁵⁹ E. Lanza, *The right to good administration...*, p. 483.

²⁶⁰ The enforcement of a good administration was recognized as one of the mandatory requirements justifying the restriction of the freedom of persons. See A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Oficyna Wolters Kluwer business Warsaw 2009, p. 137.

²⁶¹ See judgements relating to the application of art. 6 ECHR to the competition proceedings: judgment of the ECJ of 18 September 2003 in case C-338/00 P *Volkswagen*, E.C.R. 2003, I-9189, para. 97; see also judgment of the CFI of 1 July 2008 in case T-276/04 *Compagnie Maritime Belge*, para. 66.

²⁶² *Enforcement by the Commission. The decisional and enforcement structure in antitrust cases and the Commission's fining system*, 02 June 2009\BRUSSELS\DNW\470392.04 (modified version of the report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference “*Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003*” which took place on 11 and 12 June 2009 in Brussels. The report was written by the following: Arianna Andreangeli, Onno Brouwer, Daniel de Feydeau, Ian Forrester, Damien Geradin, Assimakis Komninos, Karl Hofstetter, Yannis Katsoulacos, Christophe Lemaire, Matthew O'Regan, Luis Ortiz Blanco, Donald Slater, Sébastien Thomas, David Ulph, Denis Waelbroeck and Ute Zinsmeister.); D. Slater, S. Thomas, D. Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, The Global Competition Law Centre Working Papers Series, Working Paper 04/08, p. 25.

²⁶³ See the US Supreme Court rulings in *Rasul vs Bush* 542 U.S. 466 (2004); *Boumediene vs Bush* 553 U.S. (2008); *Al Odah vs United States* 542 U.S. 466 (2004); in the EU see the CFI judgments in cases T-229/02 *PKK vs Council*, not yet published; T-256/07 *People's*

In conclusion, comparing to the right to defence, the right to good administration has a narrower scope as it aims to foster the legal position of persons in their relationships with administrative public authorities²⁶⁴ and it can be seen as a particular equivalent of the right to a fair trial. Even though, contrary to the right to defence, the general right to good administration is still not justiciable as such, its most relevant components²⁶⁵, recognised as separate, independent rights, are enforceable²⁶⁶. Thus, without the necessity to refer to the right to good administration in general, one can successfully protect its procedural rights²⁶⁷.

Mojahedin Organization of Iran vs Council, not yet published; T-327/03 *Al Aqsa vs Council*, not yet published; T-47/03, *Sison vs Council*, not yet published; T-228/02, *Organisation des Modjahedines du peuple d'Iran vs Council* [2006] ECR p. II-4665; see also Opinion of Advocate General Maduro in case 402/05 P, *Kadi vs Council and Commission*, not yet published.

²⁶⁴ T. Jurczyk, *Prawa jednostki w orzecznictwie Europejskiego Trybunału Sprawiedliwości*, Oficyna Wolters Kluwer 2009, p. 44.

²⁶⁵ Being often also recognised as the components of the right to defence.

²⁶⁶ The situation is similar as with such fundamental rights as right to life, right to food or to education.

²⁶⁷ J. Wakefield, *The Right to Good Administration*, Kluwer Law 2009, p. 126.

Chapter II

Protection of the right to defence in Europe

1. Multitude of regimes of protection

The issues of the right to defence are present at almost all levels of the legal order. It is international law and more specifically the international instrument for the protection of human rights that have contributed to the particular development of the right to defence. National constitutions, in their turn, are often inspired by the rights and guarantees introduced in international conventions.

Before presenting the most important legal regimes of the right to defence protection, one remark has to be made. The fact that there are several legal sources of fundamental rights – international, European and national, and different types of jurisdiction applying for them, raises the question of their coordination and the relationship between them. While acknowledging the indisputable achievement of enhancing and enlarging fundamental rights protection, one should also be aware of the challenges brought by this multitude of regimes regarding the efficiency of fundamental protection¹ and preservation of legal certainty².

It is thus necessary to have a look at the most relevant international systems or legal acts that provide for the protection of the right to defence. The guarantee of the right to defence may be identified in numerous international legal acts. At the universal level particularly noteworthy are (1.1.) the UN Universal Declaration of Human Rights and (1.2.) the

¹ In the context of combination of different systems that co-exist and overlap.

² L. Wildhaber, *The Coordination of the protection of fundamental rights in Europe*, Speech of 8 September 2005, Geneva, published afterwards in *Zeitschrift für Schweizerisches Recht*, Vol. 124, No. 2/ 2005, p. 44.

International Covenant on Civil and Political Rights and its Protocols. The study will nevertheless concentrate more on the regional, *i.e.* European level and thus analyse mostly (2.) the European Convention on Human Rights and (3.) the European Union (Charter of Fundamental Rights).

1.1. UN Universal Declaration of Human Rights

The undoubtedly huge role of the UN in setting human rights standards dates back to 9 December 1948, the day when the General Assembly unanimously approved the Universal Declaration of Human Rights (UDHR)³. Despite its non-binding character⁴, the UDHR is regarded by some authors as the most important document of the 20th century⁵. It was the first universal legal instrument which clearly recognised and constituted a model for subsequent treaties⁶. It was based on ideas dating from the French and American Revolutions and principles of natural rights.

The right to defence is not stated as an independent (separate) right. Nevertheless Article 11 (1) stipulating the presumption of innocence makes a reference to “the guarantees necessary for his defence”⁷. Moreover the UDHR contains 7 dispositions⁸ regarding the administration of justice,

³ M. Karns, K. Mingst, *The United Nations in the 21st Century*, Westview Press, 1995, p. 175.

⁴ The UDHR was only a General Assembly resolution. Furthermore this character was confirmed *inter alia* by Eleanor Roosevelt, one of editors and the president of the UN Commission of Human Rights responsible for drafting). See R. Cassin, *La déclaration universelle et la mise en oeuvre des droits de l'homme*, recueil des Cours de l'Académie de droit international de la Haye 1951, p. 289 note 2), Nevertheless some of the doctrine argues that the UDHR should be binding as an example of the international customary law. See for ex. J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character* [in:] B. Ramcharan (ed.), *Human Rights: Thirty Years after the Declaration*, La Haye 1979, 21, pp. 36–37; A. Verdross, B. Simma, *Universelles Völkerrecht*, 3rd ed., Berlin 1984.

⁵ L. Henkin, *The Universal Declaration and the U.S. Constitution*, PS: Political Science and Politics 31, No. 3 (September 1998), p. 512.

⁶ J-M. Verniory, *Les droits de la défense dans les phases préliminaires du procès pénal*, Staempfli Editions SA Berne, 2005, pp. 19–20.

⁷ Article 11(1) *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

This expression is said to be introduced by René Cassin in his first draft of the Declaration. See J-M. Verniory, *Les droits de la défense...*, p. 20.

⁸ Article 6 to 12.

including the guarantee of a fair trial⁹. Although the principles were “enunciated in unrestricted terms”¹⁰, the UDHR undoubtedly constituted an extremely important step in the protection of human rights and has been the motivation and initiating point for numerous subsequent international and national acts.

1.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), concluded on 16th December 1966¹¹, should be considered as an extension of the UDHR. This legally binding multilateral treaty¹² provides a more detailed description of the relevant part of the UDHR¹³. Being an international treaty, it is often integrated in national legal orders¹⁴ – its provisions are directly applicable and enjoy priority over national laws¹⁵.

The right to defence is guaranteed by Article 14¹⁶. Paragraph 1 expresses the right to a fair trial, paragraph 2 states the presumption of innocence and

⁹ Art. 10 *Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

¹⁰ N. Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation*, 2nd ed., New York 1958, p. 115.

¹¹ Resolution AG 2200 A (XXI); And submitted for signature on the 19 December 1966.

¹² That has been already ratified by 149 parties.

¹³ Other rights were stipulated in the International Covenant on economic, social and cultural rights, also concluded on 16th December 1966.

¹⁴ See for ex. Switzerland, Poland.

¹⁵ Nevertheless in practice the national courts are more eager to refer to the European Convention on Human Rights on the first place.

¹⁶ Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

paragraph 3 enumerates some of its most important components¹⁷, including the right to be informed and the principle against self-incrimination¹⁸. It has to be stressed that these provisions relate only to criminal matters, excluding for example administrative proceedings.

2. European Convention on Human Rights

The fundamental role of the European Convention of Human Rights and Fundamental Freedoms, signed in Rome on 4th November 1950¹⁹ under the aegis of the Council of Europe²⁰, is indisputable. “Comprising almost all the countries from the Atlantic Ocean to the Ural Mountains, the Convention has succeeded in bringing together a diverse cultural body to agree upon

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3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.

¹⁷ “Minimum guarantees”. Thus the list is not of an exhaustive character.

¹⁸ One should notice that, following the example of Article 6 of the European Convention of Human rights, paragraph 1 itself includes actually all the guaranties from the paragraph 3. See J-M. Verniory, *Les droits de la défense...*, p. 24.

¹⁹ Just 5 years after the end of the Second World War and two years after the conclusion of the UDHR. It entered into force on 3 September 1953.

²⁰ An european organisation created on 5 May 1949 (the London Treaty) by 10 states (Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom) in response to the evil of dictatorship and the massive human rights violations of the World War II and in order to protect democratic principles especially by the maintenance and further realisation of human rights and fundamental freedoms.

common human rights values²¹.” It is assessed as “the greatest achievement of the Council of Europe and the most impressive of all developments in international human rights and humanitarian law²²”.

Also in the context of the protection of the right to defence the EConHR constitutes the crucial point of reference at least in Europe.

With reference to its legal status, the EConHR is an international treaty by which the member States of the Council of Europe have committed themselves to protect and promote the fundamental civil and political rights of every person²³ within their jurisdiction. Thus, the EConHR is said to be not only the first but also the most important multilateral treaty of the Council of Europe²⁴. Based largely on the UDHR in relation to its content²⁵, the EConHR introduced moreover a supranational institutional system of supervision by having established an international judicial organ with jurisdiction to control the fulfillment of the States Parties of their duties, thanks to which the Convention has become an efficient instrument of the protection of human rights. Firstly, the special EConHR enforcement mechanism envisaged two bodies: the European Commission of Human Rights²⁶ (“EComHR”) and the European Court of Human Rights (“ECtHR”). Subsequently, *i.e.* after entry into force of Protocol 11 in 1998, the EComHR was abolished and the ECtHR became the only judicial body. Moreover, the Council of Europe has also been involved since it is in charge of the supervision of the enforcement of judgements²⁷.

²¹ D. Neacșu, *The European Human Rights System and the European Court of Human Rights. Research Guide*, Arthur W. Diamond Law Library, available at http://library.law.columbia.edu/guides/European_Human_Rights_System#The_European_Human_Rights_System_The_European_Convention_on_Human_Rights

²² G. Nicolaou, *Pronouncing on Human Rights* [in:] N. Bhma (ed.), *European Court of Human Rights. 50 years*, Athens Bar Association, Athens 2010, p. 58.

²³ Not only citizens.

²⁴ As confirmed by Article 1 b of the Statute of the Council of Europe, the creation and implementation of a European charter of human rights was one of its first missions. See M. Janis, R. Kay, A. Bradley, *European Human Rights Law – Text and Materials*, 2nd ed., Oxford 2000, p. 16 after J-M. Verniory, *Les droits de la défense...*, p. 33.

²⁵ “The Convention gave effect to certain of the rights stated in the Universal Declaration of Human Rights”.

²⁶ The EComHR had an intermediary role since at the beginning individuals did not have direct access to the ECtHR. Therefore they had to lodge an application to the EComHR which decided whether it is well-founded and may be transferred to the ECtHR for substantive examination.

²⁷ Article 46 EConHR provides for the task of supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment.

Furthermore, the EConHR is applicable at a national level since it has been incorporated into the national legislation of the States Parties²⁸. The national authorities (in particular judicial) are obliged to interpret and apply national law in the light of the EConHR.

It has to be stressed that the EConHR, being a multilateral treaty that constitutes a part of national legal orders of the Parties, differs from typical international agreements since it established two types of obligation – horizontal between the States and vertical regarding the relationship between the State and the individual²⁹. Articles 1 to 18 are directly applicable, including Article 6 which is crucial for the protection of the right to defence.

2.1. Guaranteed rights

The EConHR is based on a liberal concept of rights³⁰. But it has to be noted that this act has been limited only to the civil and political rights and freedoms³¹, recognised by Western legal systems³², including the right to

See L. Caflisch, *La Cour européenne des droits de l'homme: un chantier permanent?*, *Zeitschrift für Schweizerisches Recht* I 2012, p. 159.

²⁸ The lack of such application would lead to the ECtHR finding, in case of an application being lodged, that the State concerned failed to fulfill its obligations in relation to the human rights protection. See also *European Court of Human Rights: The ECHR in 50 questions*, Strasbourg, January 2012, available at www.echr.coe.int, pp. 3–4.

²⁹ C. Mik, *Metodologia interpretacji traktatów z dziedziny ochrony praw człowieka*, *Toruński Rocznik Praw Człowieka i Pokoju*, 1/1992, p. 11.

³⁰ C. Mik, *Teoria obowiązków pozytywnych państw-stron traktatów w dziedzinie praw człowieka (na przykładzie Europejskiej Konwencji Praw Człowieka)* [in:] C. Mik et al. (eds.), *Księga Jubileuszowa profesora Tadeusza Jasudowicza*, Toruń 2004, p. 259; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford 2007, p. 5 (Nevertheless, nowadays due to the enlargement of Contracting Parties and legal culture, we cannot argue any more that the only legal philosophy being related to the EConHR is the American liberal philosophy. A. Wiśniewski, *Uwagi o teorii interpretacji Europejskiej Konwencji Praw Człowieka* [in:] C. Mik, K. Gałka (eds.), *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, TNOiK 2012, p. 25.

³¹ Since during the negotiating and drafting of the EConHR numerous economic and social issues were invoked, the Council of Europe adopted on 18 October 1961 the European Social Charter (completed by additional protocols) dealing with economic and social rights.

³² S.J. Meyer, *The Constitutional Potential of the European Court of Human Rights*, *NUJS Law Review* Vol. 5 2012, No. 2, p. 209; J. Murdoch, R. Reed, *A guide to Human Rights Law in Scotland*, 61 (2001).

life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion and the protection of property. The Convention prohibits, in particular, torture and inhumane or degrading treatment or punishment, the death penalty, slavery and forced labour, arbitrary and unlawful detention as well as discrimination in the enjoyment of the rights and freedoms secured by the Convention³³. The EConHR has subsequently been completed and modified by the Protocols³⁴.

The EConHR shall be regarded as the “living instrument” not only due to the changes resulting from the protocols, but mainly due to the interpretation given by the ECtHR. The ECtHR has namely either extended the scope of the rights protected or introduced its application in the situations that were unforeseeable at the time of the adoption of the EConHR.

2.2. Scope of application

It is clear that the EConHR based on the non-discrimination clause is applicable to all individuals (human beings) irrespective of their nationality, status etc. The question whether legal persons, including those conducting business activities, can benefit from the protection of fundamental rights has been vividly discussed by the doctrine³⁵. Nevertheless in the context of the EConHR this question does not stir up controversies³⁶, even though

³³ See D. Neacșu, *The European Human Rights System...; European Court of Human Rights...*, p. 3.

³⁴ Usually protocols add at least one protected right to the original Convention or modify certain of its provisions. What need to be stressed is that “Protocols which add rights to the Convention are binding only on those States that have signed and ratified them; a State that has merely signed a protocol without ratifying it will not be bound by its provisions”. To date, 14 additional protocols have been adopted. See also *The ECHR in 50 questions*, p. 3.

³⁵ S.M. Helmons, *Les personnes morales et le droit international* [in:] *Les droits de l'homme et les personnes morales*, Brussels 1970, pp. 35–81; S.M. Helmons, *L'applicabilité de la Convention européenne des droits de l'homme aux personnes morales*, JTDE 1996, p. 150; O. De Schutter, *L'accès des personnes morales à la Cour Européen des droits de l'homme* [in:] *Avancés et confins actuels des droits de l'homme aux niveau international, européen et national. Mélanges offerts à Silvio Marcus Helmons*, Brussels 2003, p. 83; M. Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford 2006, p. 2 and the literature referred therein.

³⁶ K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012, p. 297.

the explicit reference to “natural and legal persons” may only be found in Article 1(1) of Protocol 1 of the Convention³⁷. The EConHR, based on the non-discrimination clause, is applicable to “everyone” that should be understood as covering not only all individuals, but also legal persons. This interpretation is enforced by the wording of Article 34 EConHR stating that “(t)he Court may receive applications from any person, non-governmental organisation or group of individuals³⁸”. Moreover, this interpretation has also been confirmed by the approach adopted by the ECtHR in its case-law, including with reference to Article 6 being the most relevant provision for the field of competition law³⁹.

The major case in this context was definitely the *Sténuît*⁴⁰ case, in which the European Commission of Human Rights accepted the application submitted by the undertaking by Sténuît against the French Republic. The facts of the case related to a fine imposed on the undertaking for alleged participation in a cartel. The EComHR held that the right of legal persons had been already acknowledged by the ECtHR⁴¹, nevertheless it made a reservation that some differences between the application of Article 6 EConHR to natural and legal persons may occur⁴². The latter case law of the ECtHR explicitly or implicitly accepted the application of Article 6 EConHR in relation to legal persons being parties to the proceeding regarding the criminal charges *sensu largo*⁴³. The Court even awarded a legal person compensation for moral damages caused by the violation of the EConHR⁴⁴.

³⁷ Article 1(1) of Protocol 1 of 20 March 1952 (entered into force on 18 May 1954). See O. De Schutter, *L'accès des personnes...*, p. 91.

³⁸ See Article 34 EConHR; M. Emberland, *The Human Rights of Companies...*, pp. 4, 68 et seq., 105. See also the judgement of the ECtHR of 24 October 1995 in case *Agrotexim vs Greece*, Application No. 14807/89.

³⁹ M. Emberland, *The Human Rights of Companies...*, pp. 34, 110, 156; judgment of the ECtHR in case *Firestone Tire and Rubber Co and others. vs United Kingdom*, Application No. 5460/72.

⁴⁰ See judgment of the ECtHR of 27 February 1992 in case *Sténuît vs France*, Application No. 11598/85. See also the rapport of the European Commission of Human Right of 30 May 1991 in case *Sténuît*, Application No. 11598/85.

⁴¹ In relation to Articles 9 and 10 EConHR.

⁴² Zob. C. Smits, D. Waelbroeck, *Le droit de concurrence et les droits fondamentaux* [in:] M. Candela Soriano (Ed.), *Les droits de l'homme dans les politiques de l'Union Européenne*, Brussels, Larcier 2006, p. 142.

⁴³ See judgment of the ECtHR of 11 September 2011 in case *Menarini Diagnostics S.R.L. vs Italy*, Application No. 43509/08.

⁴⁴ See judgment of the ECtHR of 6 April 2001 in case *Comingersoll p. Portugalii*, Application No. 35382/97, paras 32–36, O.J. Einarsson, *EC Competition Law and the Right to a Fair Trial* [in:] P. Eeckhout, T. Tridimas (eds), *Yearbook of European Law*, No. 25/2006, p. 582.

In the case of *Société Colas Est and Others. vs France*⁴⁵, regarding violation of Article 8 EConHR by the French competition authority, the ECtHR held that the protection of the rights included in the Convention should also apply to legal persons. Even in cases where the application lodged by a legal person was found inadmissible⁴⁶, the ECtHR never denied the right of such a person to invoke Article 6 EConHR⁴⁷.

2.3. Right to defence

For the purposes of this study, the most relevant provisions in the context of the protection of the right to defence in competition law proceedings are Articles 6, 7 and 13 EConHR. These provisions enshrine various components of the right to defence – the right to a fair trial (Article 6(1))⁴⁸, presumption of innocence (Article 6(2)) which is closely connected with the privilege against self-incrimination⁴⁹, *nulla poena sine lege* (Article 7) and the right to effective remedy (Article 13)⁵⁰.

Article 6 EConHR recognises the right of every person, be it natural or legal, to a fair trial, stating that “(i)n 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”.

The second paragraph of Article 6 EConHR states that “(e)veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

See also judgment of the ECJ of 8 July 1999 in case C-199/92 P *Hüls vs Commission*, E.C.R., 1999, p. I-4287, para. 150; C. Smits, D. Waelbroeck, *Le droit de concurrence...*, p. 138.

⁴⁵ See judgment of the ECtHR of 16 April 2002 in case *Société Colas Est and Others vs France*, Application No. 37971/97.

⁴⁶ See for instance decision of the ECtHR of 12 March 2012 *Société Boygoues Telecom vs France*, Application No. 2324/08.

⁴⁷ K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 299.

⁴⁸ The “complex of guarantees of the fair trial” contained in Article 6 EConHR is a developed and detailed, referring to the tradition of Anglo-Saxon law, where procedural safeguards were always exposed. P. Millet, *The right to good administration in European Law*, PL 2002, No. 47; P. Hofmański, A. Wróbel Komentarz do Art. 6 EKPCz [in:] L. Garlicki, *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz*, Vol. I, Warsaw 2010, p. 246; K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 146.

⁴⁹ J-M. Verniory, *Les droits de la défense...*, p. 37.

⁵⁰ The right to effective remedy is analysed separately in Chapter XI “Remedies and judicial review”.

The third part of this provision contains more specifically rights that are to be guaranteed to every person charged with a criminal offence, including⁵¹ the right:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require⁵²;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court⁵³.

It's interesting that, according to the statistics published by the ECtHR between 1959 and 2011, nearly half of the violations found by the ECtHR related to Article 6 (either to the fairness or to the length of the proceedings)⁵⁴. In 2012 almost a third of the ECtHR judgments stating a violation of the EConHR pertained to Article 6⁵⁵.

As for the application of this provision it should be firstly stressed that Article 6 EConHR may be used at three stages; before the initiation of the court proceedings, during the court proceedings and after the completion of the court proceedings⁵⁶.

⁵¹ Which means that the list is not exhaustive.

⁵² Just to mention, at the beginning Switzerland has made reservation to the Article 6(3) c and e regarding the free legal assistance. Nevertheless the ECtHR in its judgments has regarded this interpretative declaration as non valid, since it found it particularly important for Article 6 to apply in its integrality and without reservation. See *inter alia* judgment of the ECtHR in case *Belilos vs Switzerland*, Application No. 10328/83, A 132 and judgment of the ECtHR in case *Weber vs Switzerland*, Application No. 11034/84, A 177.

⁵³ The first formulation of the guaranties enshrined in Article 6(3) was proposed by the british experts (O. Dowson and M.J.M. Le Quesne) at the Committee of experts' meeting 6th March 1950. See Council of Europe, *Recueil des travaux préparatoires de la Convention européenne des droits de l'homme*, 8th Vol., La Hague–Boston–London 1975, Vol. III, pp. 281 and 285.

⁵⁴ *Overview 1959–2011*, European Court of Human Rights, Strasbourg, February 2012, p. 5 and *The ECHR in 50 questions...*, p. 11.

⁵⁵ *The European Court of Human Rights in Facts & Figures – 2012*, Strasbourg, June 2013, p. 9.

⁵⁶ P. Hofmański, A. Wróbel, *Komentarz do art. 6 EKPC...*, p. 252; K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 146.

Furthermore, this Article undoubtedly applies to competition law proceedings under its civil part. Cartel prohibition constitutes an interference with the undertaking's freedom of association and inspections with the right to privacy⁵⁷. As indicated above it was exactly in relation to Article 6 EConHR that the European Commission of Human Rights⁵⁸ acknowledged that undertakings may benefit from the protection afforded by certain provisions of the EConHR⁵⁹.

Nevertheless, the EComHR considered further that this provision is not only applicable with regards to the civil matter but also that the legal person may claim according to Article 6 EConHR when it was the subject of a "criminal charge".

It is important to emphasise that the applicability of Article 6 EConHR requires the fulfillment of at least one⁶⁰ of the so called *Engel* criteria⁶¹. Thus, according to the ECtHR whether the case should be examined under the criminal limb of this provision depends on:

1. categorisation of an offence as criminal in the national law concerned,
2. the nature of the alleged offence,
3. the nature as well as degree of severity of the possible sanction.

As to the first criterion, a doubtless domestic categorisation of the offence in question as *criminal* automatically brings the case within the scope of Article 6 EConHR under its criminal head and the remaining criteria do not have to be taken into consideration⁶². If it is not so⁶³, one has to simply analyse the second or third condition⁶⁴.

With regard to the second criterion, nature of an alleged offence should be analysed in relation to other offences recognised as criminal in the

⁵⁷ The right to privacy is considered by the ECtHR a civil right. See judgments of the ECtHR of 19 February 1998 in case *Paulsen-Medalen and others vs Sweden*, Application No. 16817/90, paras 38 et al., and of 15 November 2001 in case *Werner vs Poland*, Application No. 26760/95, para. 33.

⁵⁸ Hereinafter: the "EComHR".

⁵⁹ Para. 54.

⁶⁰ The non-cumulative presence of one condition suffices.

⁶¹ See judgment of the ECtHR of 8 June 1976 in case *Engel and others vs the Netherlands*, Application Nos 5100/71, 5100/71 et seq. Series A No. 22, paras 80-85.

⁶² D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe Strasbourg, 2012, p. 17.

⁶³ Like in the case of EU competition law regime since according to Regulation 1/2003 the fines imposed under Article 23 of this act are not of criminal law nature. See Article 23(5) of Regulation 1/2003.

⁶⁴ Judgment *Weber*, paras 32-34.

legal system in question⁶⁵. For instance, the fact that such an offence may concern a large part of the population may serve as a useful indicator of its “criminal” nature⁶⁶.

The third criterion focuses *inter alia* on the scale and the possible degree of severity of the sanction and on whether the function of this sanction is not only of a deterrent but also of a punitive nature⁶⁷.

It is important to stress that if “separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge”, a cumulative approach to the second and third criterion may be applied in order to reach such a conclusion⁶⁸.

In relation to EU competition law, it has to be noted that examination under the criminal head of Article 6 EConHR is justified due to the fulfillment of the third criterion⁶⁹. The Commission imposes sanction under Article 23 of Regulation 1/2003 in order to “punish” undertakings⁷⁰ either for anti-competitive behaviour⁷¹ or for obstructing its investigation⁷² and deter others from violating EU competition rules. Furthermore, fines imposed by the Commission may be very high⁷³ and bring about severe consequences for the undertaking fined.

Therefore, due to the autonomous interpretation of the EConHR and in particular the notion of a “criminal charge⁷⁴”, it has also become

⁶⁵ D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial...*, p. 17.

⁶⁶ Judgment of the ECtHR of 25 March 1992 in case *Campbell and Fell vs the United Kingdom*, para. 101; On the contrary if the offence in question is directed only to a particular group of persons, it would rather be regarded as a disciplinary offence. See judgment of the ECtHR of 27 August 1991 in case *Demicoli vs Malta*, Application No. 13057/87, para. 33.

⁶⁷ Judgment of the ECtHR of 21 February 1984 in case *Öztürk vs Germany*, Application No. 8544/79. See also D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial...*, pp. 20–21.

⁶⁸ See judgment of the ECtHR of 23 November 2006 in case *Jussila vs Finland*, Application No. 73053/01, para. 31, judgment of the ECtHR of 9 October 2003 in case *Ezeh and Connors*, Application Nos 39665/98, 40086/98, para. 86, citing, *inter alia*, judgment of the ECtHR of 24 February 1994 in case *Bendenoun vs France*, Application No. 12547/86, para. 47.

⁶⁹ *Menarini* judgment, paras 42 and 44; decision of the ECtHR of 3 December 2002 in case *Lilly vs France*, Application No. 53892/00, *Öztürk* judgment, para. 54.

⁷⁰ See *e.g.* opinion of Advocate General Sharpston of 10 February 2011 in case C-272/09 *P KME Germany*, para. 64 *et seq.* and the cases there cited, applying the principles of *Engels*, the *Engels* judgment para. 82.

⁷¹ Infringement of Articles 101 and/or 102 TFEU.

⁷² See Article 23(1) of Regulation 1/2003.

⁷³ They may attain 10% of the undertaking’s turnover.

⁷⁴ See the *Engels* criteria established in the judgment of the ECtHR in case *Engels*.

unquestionable that due to the quasi-criminal character of the fines imposed on undertakings infringing competition rules, Article 6 EConHR should also apply to the “repressive⁷⁵” competition law proceedings under its criminal heading.

With further regard to the applicability of Article 6 EConHR under its criminal limb to competition law proceedings, the ECtHR judgment in the *Jussila*⁷⁶ case has to be highlighted as it shows the distinction between different types of criminal charges. The ECtHR stated namely that since “the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of criminal law, for example administrative penalties⁷⁷, (...) competition law⁷⁸”, “(t)here are clearly criminal charges of a different weight⁷⁹”. Consequently, the protection granted under Article 6 EConHR may differ depending on whether the case relates to the criminal charge *sensu stricte* or to the criminal charge *sensu largo*. Competition law does not fall under “traditional categories of criminal law” since it differs from “the hardcore of criminal law⁸⁰”. Therefore, *per analogiam* to the ECtHR findings in the *Jussila* case, the criminal-head guarantees regarding the protection of the right to defence will not necessarily apply with their full stringency to competition cases, including proceedings with regard to the Commission’s competition law enforcement⁸¹. It is noteworthy that, ECtHR is found to be compatible with Article 6 § 1 in that, *e.g.*, criminal penalties are imposed, in the first

⁷⁵ T. Bombois introduced the term “repressive competition law” that relates to proceedings aiming at detecting the violations of Articles 101 and 102 TFEU and imposing fines for those competition law infringement. See T. Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence*, Larcier 2012.

⁷⁶ *Jussila* judgment, paras. 30 and 43. See also judgment of the ECtHR of 12 May 2010 in case *Kammerer vs Austria* App. No. 32435/06, para. 27.

⁷⁷ *Öztürk* judgment.

⁷⁸ *Sténuil* judgment.

⁷⁹ *Jussila* judgment, para. 43.

⁸⁰ *Ibidem*.

⁸¹ *Jussila* judgment, para. 43. W.P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, (2010) 33(1) World Competition 5–29; F. Castillo de la Torre, *Evidence, Proof and Judicial Review in Cartel Cases*, (2009) 32(4) World Competition 567–578, but contra, see A. Riley, *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, CEPS Special Report/January 2010, available at <http://www.ceps.eu>, pp. 11–16. B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 199.

instance, by an administrative or non-judicial body where the case relates to a criminal charge *sensu largo*⁸².

Finally, in the quite recent *Menarini* case, the ECtHR confirmed that the protection afforded by Article 6 EConHR under its criminal heading applies to cases regarding competition law⁸³.

2.4. Role of the ECtHR

The role of the ECtHR as a quasi-constitutional court has been vividly discussed in legal doctrine⁸⁴. Some authors argue that the ECtHR should actually exercise an even more constitutional function by concentrating on “judgments-principles⁸⁵”, *i.e.* deciding on the important issues of the public policy.

Its strong position results however from *inter alia* its capacity to avoid harmful confrontations with the Contracting Parties⁸⁶. The ECtHR has to bear in mind, on the one hand, the current will of the States Parties as well as the subsidiary character in relation to the national system and, on

⁸² Judgment of the ECtHR of 24 February 1994 in case *Bendenoun vs France*, Application No. 12547/86, para. 46 and judgment of the ECtHR of 23 July 2002 in case *Janosevic vs Sweden*, Application No. 34619/97, para. 81, *a contrario*, judgment of the ECtHR of 25 February 1997 in case *Findlay vs the United Kingdom*, Application No. 22107/93.

⁸³ *Menarini judgment*, para. 44; see also: M. Bernatt, *Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)*, (2012) 1 Państwo i Prawo, p. 61.

⁸⁴ J-F. Flauss, *La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle?*, 36 *Revue française de droit constitutionnel* 711 (1999); S. Greer, *The European Convention on Human Rights*, Oxford University Press, 2006; L. Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *Human Rights Law Journal* 161 (2002); R. White, I. Boussiakou, *Separate Opinions in the European Court of Human Rights* 9(1) *Human Rights Law Review* 37 (2009); S.J. Meyer, *The Constitutional Potential of the European Court of Human Rights*, *NUJS Law Review* Vol. 5 2012 No. 2; L. Caflisch, *La Cour européenne des droits de l'homme: un chantier permanent?*, *Zeitschrift für Schweizerisches Recht* I 2012, p. 164; A.S. Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, (2009). Yale Law School Faculty Scholarship Series. Paper 71/2009. http://digitalcommons.law.yale.edu/fss_papers/71

⁸⁵ L. Wildhaber, *A Constitutional Future...*, p. 406.

⁸⁶ R.St.J. Macdonald, *The Margin of Appreciation* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for Protection of Human Rights*, Dordrecht-Boston-London 1993, pp. 57–88, 123; A. Wiśniewski, *Uwagi o teorii interpretacji Europejskiej Konwencji Praw Człowieka* [in:] C. Mik, K. Gałka (eds.), *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, TNOIK 2012, p. 24.

the other hand, “its duty to set universal standards from its unique position as a collective supranational voice of reason and morality⁸⁷”.

It has to be stressed that the ECtHR judgments are often of profound significance not only for the handled case since they may also lead to changes in the approach adopted by national courts and to amendments introduced in the national law of the Contracting Parties – Members of the Council of Europe⁸⁸. Furthermore, the case brought before the ECtHR relates to controversial questions of high importance to the general legal culture of Europe⁸⁹.

Contrary to the national judicial authorities operating within the national legal systems and constitutional structures, the ECtHR does not have to apply the “checks and balances” principles that normally relates to the interrelationship between legislative, executive and judicial powers⁹⁰.

2.5. Methods of interpretation of the EConHR

The issue regarding the interpretation EConHR has become a highly popular subject of scientific research. This question is of a high importance in particular in relation to the legitimisation of the ECtHR⁹¹. Much has already been written on this issue⁹², including the attempts to introduce

⁸⁷ E. Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, New York University Journal of International Law and Politics 1999, Vol. 31, p. 852.

⁸⁸ In Poland for instance to the amendments related to legal acts regarding *inter alia* civil, criminal and administrative procedure, civil law, or tax law. A. Rzepliński, *Europejski Trybunał Praw Człowieka. Historia i działalność*, Prokuratura i Prawo 11 i 12/1995, p. 142.

⁸⁹ A. Wiśniewski points out for instance at the judgement of the ECtHR of 8 July 2004 in case *Vo vs France*, Application No. 53924/00, regarding the protection of unborn child or judgment of the ECtHR of 29 April 2002 in case *Diane Pretty vs United Kingdom*, Application No. 2346/02, regarding the right to euthanasia. See A. Wiśniewski, *Uwagi o teorii interpretacji Europejskiej Konwencji Praw Człowieka* [in:] C. Mik, K. Gałka (eds.), *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, TNOIK 2012, p. 37.

⁹⁰ M. de Bois, *The Fundamental Freedom of the European Court of Human Rights* [in:] R. Lawson, M. De Bois, *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of G. Schermers*, Vol. III, Dordrecht–Boston–London 1994, pp. 44–45; A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 19.

⁹¹ A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review* 5/1999, p. 696; A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 36.

⁹² P. van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague–Boston–London 1998; D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social*

R. Dworkin's theory to the concept as a guideline for interpretation of the EConHR⁹³ or questioning the very possibility of speaking about a "theory" of an interpretation of an international instrument⁹⁴.

Traditionally the EConHR did not contain within itself any provisions (guidelines) indicating how it should be interpreted, in particular which methods of its interpretation should be applied⁹⁵. Therefore, the rich ECtHR case-law constitutes the main source of interpretative guidelines and the "internal⁹⁶" inductive reasoning based on the analysis of the ECtHR jurisprudence is basically used⁹⁷.

The doctrine has identified several methods of interpretation used by the ECtHR. According to some scholars a distinction may be made between the classic methods of interpretation, *i.e.* those stipulated in the Vienna Convention on Treaties Law (literary, systemic and teleological⁹⁸ interpretation) and methods specific to the ECtHR like autonomous

Charter, Strasbourg 1998; F. Matscher, *Methods of Interpretation of the Convention* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for the Protection of Human Rights*, Köln–Berlin–Bonn–München 1990; C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Toruń 1994, s. 226–239; Particular issues or methods: A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004; A. Mowbray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, *Human Rights Law Review* 10/2010, pp. 289–319; J. McBride, *Proportionality and the European Convention on Human Rights* [in:] E. Ellis, *The Principle of Proportionality in the Laws of Europe*, Oxford–Portland 2000, pp. 23–35; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden–Boston 2009; H.Ch. Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague–Boston–London 1996; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp–Oxford–New York 2002; A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

⁹³ G. Letsas, *A Theory of Interpretation...*; A. McHarg, *Reconciling Human Rights...*, p. 671–696.

⁹⁴ A. Wiśniewski, *Uwagi o teorii interpretacji...*, pp. 16, 20–21.

⁹⁵ Recently Article 1 of Protocol 15 has *expressis verbis* introduced the concept of the margin of appreciation to the Convention's preamble. A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 18.

⁹⁶ The external reasoning would be based on other sources like the interpretative methods used for national legal acts (constitutions) applied per analogiam or the theories made by legal philosophers, *inter alia* above-mentioned J. Rawls or R. Dworkin (theory of "hard cases"); See more R. Dworkin, *Law's Empire*, London 1986, s. 255; Such a use of external methods to the EConHR is nevertheless subject to a critic. See for instance M. de Bois, *The Fundamental Freedom...*, p. 41; A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 20.

⁹⁷ *Ibidem*, p. 18.

⁹⁸ Article 31(1) "A treaty shall be interpreted (...) in the light of its object and purpose."

interpretation, dynamic⁹⁹ interpretation (the so called “living instrument approach”), concept of the margin of appreciation¹⁰⁰ or the principles of proportionality or “balancing” method¹⁰¹. Due to these specific methods the ECtHR has namely extended the scope of protection resulting from the EConHR¹⁰².

With reference to the Vienna Convention on Treaties Law, one may find only few references to the provisions of this act regarding classic methods of interpretation¹⁰³ thus they seem to influence the ECtHR only to a very limited extent¹⁰⁴. A rare example might be found in the individual opinion of judge A. Favre in the *Wemhoff* case stating that “(w)hen confronted with texts which, though being drafted in two languages which are equally authoritative, do not exactly coincide, the Court must adopt the meaning of the rule which best corresponds to the purpose and object of the treaty¹⁰⁵”. Nevertheless, in view of some commentators the intentions of the drafters of EConHR as well as the meaning of the text should be taken into consideration while interpreting the Convention. However the ECtHR seems to be relatively consistent in rejecting such interpretative methods as intentionalism or textualism¹⁰⁶, mostly in favour of the “living instrument” approach¹⁰⁷.”

The autonomous interpretation results in awarding a semantic independence to the EConHR autonomous notions that cannot be interpreted through the understanding given to them in the national legal orders of the Contracting Parties¹⁰⁸. Therefore, the meaning of such a conventional notion may significantly differ from its meaning adopted by the courts and authorities of the State concerned. According to George Letsas, any situation of this kind may lead to the exercise by the ECtHR of “ille-

⁹⁹ Evolutive.

¹⁰⁰ G. Letsas, *A Theory of Interpretation...*; A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 27.

¹⁰¹ C. Mik, *Koncepcja normatywna...*, pp. 226–239; B. Cali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, *Human Rights Quarterly* No. 1/2007, pp. 251–270.

¹⁰² A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 37.

¹⁰³ Namely to Articles 31–33 of the Vienna Convention on Treaties Law.

¹⁰⁴ G. Letsas, *A Theory of Interpretation...*, p. 58–59.

¹⁰⁵ The individual opinion of judge A. Favre to judgment of the ECtHR of 27 June 1968 in case *Wemhoff vs Germany*, Application No. 2122/64.

¹⁰⁶ The ECtHR choice as to grant a particular right or not cannot be justified only basing on the EConHR text or its drafters’ intentions since the circumstance (number of CE Member States, variety of legal cultures, new moral issues) between the 50ties of XX and the present have significantly changed.

¹⁰⁷ G. Letsas, *A Theory of Interpretation...*, chapter 3.

¹⁰⁸ A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 23.

gitimate judicial discretion”¹⁰⁹ and thus the Court’s creative activity may raise concerns and some controversies¹¹⁰. It is argued that the interpretive methods actually used by the ECtHR “should not be tantamount to arbitrary interpretation¹¹¹”. However, since the EConHR shall be an “instrument of development and improvement¹¹²”, the ECtHR’s judicial activism¹¹³, likewise its dynamic method of interpretation and treating the EConHR as “living instrument¹¹⁴” are assessed positively by the majority of the doctrine¹¹⁵.

With regard to the margin of appreciation, it has to be stressed that within this concept one may distinguish the substantive margin of appreciation, which occurs when the ECtHR decides whether a particular interference with an EConHR right or freedom is justified, within the structural margin of appreciation¹¹⁶ – *i.e.* the ECtHR’s practice to refrain from stating the violation of the EConHR on the basis that there is no consensus between the Contracting Parties on the legal question at stake.

The concept of the margin of appreciation is in particular vividly criticised as leading to “instances of inflation of rights¹¹⁷” by Letsas, a former Dworkin’s student, who claims that two objective values of political morality – liberalism and legality are to determine the ECtHR interpretation and thus in some cases it is doubtful whether the ECtHR’s interpretation of the EConHR rights conforms to the moral foundations of human rights.

¹⁰⁹ G. Letsas, *A Theory of Interpretation...*, pp. 2, 4, 54 and 55.

¹¹⁰ *Ibidem*, pp. 2 and 4, where authors points at judgment in case *Hatton*, in which the ECtHR held that the right to undisturbed sleep falls into the scope of Article 8 EConHR. See judgments of the ECtHR of 2 October 2001 and 7 August 2003 in case *Hatton vs Great Britain*, Application No. 36022/97.

¹¹¹ K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, German Law Journal Vol. 12 No. 10 2011, p. 1730.

¹¹² *Ibidem*.

¹¹³ Contrary to the judicial restraint concept that forbids to create or even to correct the law (the judge’s decision must lean exclusively on legal provisions and relevant facts), the judicial activism let the judge to consider both the legal and non-legal arguments and consequently to modify the legal norms.

¹¹⁴ Claiming that the EConHR cannot be interpreted from the point of view (aims) presented by the few Contracting Parties in 1950. G. Letsas, *A Theory of Interpretation...*, p. 72–74.

¹¹⁵ J.G. Merrills, *The Development of Internatuonal Law by the European Court of Human Rights*, Manchester 1995, p. 233–242; A. Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review 1/2005, p. 79; A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 22.

¹¹⁶ Known also as consensus justification criticised by Letsas. See G. Letsas, *A Theory of Interpretation...*, p. 5.

¹¹⁷ G. Letsas, *A Theory of Interpretation...*, p. 15.

Nevertheless, Letsas by concentrating only on the uncertainty and lack of coherence¹¹⁸, seems to have missed the essence of this concept consisting of also allowing national authorities some discretion while applying the EConHR at their national level¹¹⁹.

It has to be further stressed that despite some controversies arising over this method¹²⁰, the concept of the Margin of Appreciation has been officially introduced to the Preamble of the EConHR by Protocol 15¹²¹.

It is noteworthy that the application of the above specific methods has allowed the ECtHR namely to extend the scope of protection resulting from the EConHR¹²². This raises the question of the limits of ECtHR interpretation, more specifically of the extent to which the ECtHR may develop European human rights standards instead of limiting itself only to interpretation and application of the EConHR¹²³.

Some authors point at the need to keep the equilibrium of the whole system of the EConHR¹²⁴. Therefore sometimes the ECtHR's self-restraint is necessary to ensure the survival of the system¹²⁵.

Especially since the EConHR does not constitute a self-contained regime, the question of connection and coherence between the Strasbourg system and the general international law system remains important as well¹²⁶.

¹¹⁸ *Ibidem*, pp. 84–92.

¹¹⁹ A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 24 and A. Wiśniewski, *Koncepcja marginesu oceny...*, Gdańsk 2008, pp. 413–423.

¹²⁰ See for instance V. Chirdaris, *Criticizing Strasbourg, Lord Hoffmann, the Limits of Interpretation, the "Margin of Appreciation", and the Problems Faced by the European Court of Human Rights* [in:] N. Bhma (ed.), *European Court of Human Rights. 50 years*, Athens Bar Association, Athens 2010, pp. 141–163.

¹²¹ Art. 1. At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”

¹²² A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 37.

¹²³ *Ibidem*, p. 29.

¹²⁴ *Ibidem*, p. 30.

¹²⁵ M. Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to Social Security Regulations*, *Human Rights Law Journal* Nos. 9–12/2007, p. 331; L. Garlicki, *The methods of interpretation* [in:] F. Melin-Soucramanien (ed.), *L'interprétation constitutionnelle*, Paris 2005, p. 140–152.

¹²⁶ The ECtHR has often to deal with international law issues like territory jurisdiction, states succession, legal character of the interim measures etc. L. Caflich, *International Law*

Last but not least, the use of precedence by the ECtHR also has to be mentioned. The ECtHR often makes reference to its previous decisions. Its precedences are of a *de facto* character and although they are not binding, each time when the ECtHR changes the established jurisprudential direction, it emphasises this fact and gives reasons for it¹²⁷.

Furthemore, it has to be mentioned that some other distinctions with reference to the aspect of judicial activism may be found within the legal doctrine. According to Wiśniewski, on the one hand, the autonomous and evolutive interpretation is related to activism and, on the other hand, textual interpretation and margin of appreciation doctrine regarding the ideology of judicial passivism.

E.M. Hafner-Burton notes that “(j)udges have had diverse preferences about the reach of the court, with some being more activist than others¹²⁸.” Pursuant to J.G. Merrills, representing the descriptive research approach, the judicial activism may result from two types of approach taken by the judge: “tough conservatism”¹²⁹ or benevolent liberalism¹³⁰.

Lastly, with reference to another central question on the relationship¹³¹ between the interpretation methods used by the ECtHR, its case-law shows that the Court chooses a method of interpretation that it considers the most appropriate in relation to the circumstances of the case examined together with the object and the purpose of the EConHR pursuant to criteria of rationality, objectivity and legal logic¹³². It seems that the methods

and European Court of Human Rights, Dialogue Between Judges, 2007, p. 40; See also L. Wildhaber, The Coordination of the protection of fundamental rights in Europe, Speech of 8 September 2005, Geneva, published afterwards in Zeitschrift für Schweizerisches Recht, Vol. 124, No. 2/ 2005, p. 43, who notes that “(w)hat makes the situation particularly tricky is the fact that the different legal sources mentioned are not compartmentalized in the sense that each court would have to apply only the fundamental rights of its own legal system”.

¹²⁷ Judgment of the ECtHR of 27 September 1990 in case *Cassye vs United Kingdom*, Application No. 10843/84, para. 35; See also A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 31; M. Balcerzak, *Precedens w prawie międzynarodowym praw człowieka – zagadnienia wybrane [in:] C. Mik, Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej*, Toruń 2005, pp. 71–91 and M. Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, Toruń 2008.

¹²⁸ E.M. Hafner-Burton, *International Regimes for Human Rights*, Annual Review of Political Science 2012, p. 273.

¹²⁹ When some judges want to break the current liberal trend. J.G. Merrills, *The Development...*, p. 238–240.

¹³⁰ *Ibidem*, p. 242–242.

¹³¹ Which may be priority, exclusion, mutual support or completion.

¹³² C. Mik, *Koncepcja normatywna...*, p. 239.

of interpretation adopted by the ECtHR, instead of forming a coherent system with a clear rule of priority or other norms of competence, constantly compete with each other or even lead to internal conflict¹³³. Some authors argue nevertheless that the principle of fair balance, despite being subject to strong criticism¹³⁴, actually constitutes such a norm of competence that the ECtHR applies in order to resolve the problem with antinomies and tensions appearing by the process of the adjudication¹³⁵.

3. European Union (Charter of Fundamental Rights)

Contrary to the Council of Europe, the EU was not created with the aim of protecting human rights – the establishing treaties were silent in relation to this issue. Nor was this a task of the Court of Justice of the EU. The status granted to human rights in the legal order of, firstly, the European Communities and, subsequently, of the EU, has changed radically since the Communities foundation in the 1950s.

Before concentrating on the issue of human rights in the EU, the history and the organisation of the EU will briefly be discussed.

3.1. EU history

In order to end the conflicts between European neighbours, preserve the peace and facilitate international trade, after the end of World War II European countries started to look for opportunities to unite economically and politically¹³⁶. The first important expression of this will was the publication on 9 May 1950 of the Schuman Plan¹³⁷, which is regarded as

¹³³ As an example one may point out the autonomous interpretation and the concept of the margin of appreciation. See also A. Wiśniewski, *Uwagi o teorii interpretacji...*, p. 33.

¹³⁴ Mostly by philosophers and theoreticians. See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge 1996, pp. 256–259; R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002, pp. 4–11 and 388–425; S. Geer, “Balancing” and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate, *Cambridge Law Journal* No. 2/2004, pp. 416–417 or B. Cali, *Balancing Human Rights?...*, pp. 251–270.

¹³⁵ A. Wiśniewski, *Uwagi o teorii interpretacji...*, pp. 33 and 39; C. Mik, *Koncepcja normatywna...*, p. 239.

¹³⁶ There were a number of visions of such an European Cooperation.

¹³⁷ Drew up by Robert Schuman and Jean Monet.

the very birth of the EU. The second official step was the signature on 18 April 1951 of the Treaty of Paris establishing the European Coal and Steel Community (ECSC).

Subsequently, on 25 March 1957 the Treaties of Rome, establishing the European Economic Community (EEC)¹³⁸ and the European Atomic Energy Community (EAEC)¹³⁹ and the Convention on certain institutions common to the European Communities, were signed by the six founder Member States, *i.e.* Belgium, France, Germany, Italy, Luxembourg and the Netherlands. The first of numerous enlargements took place only on 1 January 1973 when Denmark, Ireland and the United Kingdom joined European Communities¹⁴⁰. The constantly increasing number of Member States as well as the need to cover more areas by the Communities cooperation led to extension of EC competences.

The signature of the Single European Act¹⁴¹, on 28 February 1986, was the first major amendment of the Treaties of Rome that *inter alia* expanded the powers of the European Communities in the fields of a common foreign policy, research and development and the environment. Moreover, due to creating new competencies and providing a reform of EC institutions the Single European Act actually opened the way to stronger political integration as well as economic and monetary union subsequently enshrined in the Treaty of Maastricht and led to the transformation of the Common Market into a single market on 1 January 1993.

Another important step, *i.e.* the signature in Maastricht of the Treaty on European Union¹⁴², resulted in the creation of the European Union¹⁴³ based on three pillars¹⁴⁴, the introduction of EU citizenship, the principle of subsidiarity (art. 5 TUE), the new legislative procedure (co-decision procedure) as well as the launching of economic and monetary union.

¹³⁸ OJ 2012, C 326.

¹³⁹ OJ 2010, C 84.

¹⁴⁰ Other enlargements took place in: 1981 (Greece), 1986 (Spain and Portugal), 1995 (Austria, Finland and Sweden), 2004 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia), 2007 (Bulgaria and Romania) and 2013 (Croatia).

¹⁴¹ It entered into force on 1 July 1987. OJ 1987, L 169.

¹⁴² On 7 February 1992. The Treaty on European Union (hereinafter: the “TEU”) entered into force on 1 November 1993.

¹⁴³ Hereinafter: the “EU”.

¹⁴⁴ The European Communities, Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (JHA).

Bearing in mind the signature of further important acts, *i.e.* the Treaty of Amsterdam¹⁴⁵, the Treaty of Nice¹⁴⁶, which introduced the possibility of creating judicial panels, and the Treaty establishing a Constitution for Europe¹⁴⁷, particular attention should be drawn to the signature of the Lisbon Treaty¹⁴⁸ that provided major changes. Firstly, the European Community ceased to exist separately and became a part of the EU and the three-pillar structure was abandoned¹⁴⁹. The former EC Treaty was granted a new name, *i.e.* the “Treaty on the functioning of the European Union¹⁵⁰”. Furthermore, the EU was endowed with legal personality and consequently acquired a competence to enter into international agreements, in particular the EConHR¹⁵¹.

3.2. Fundamental Rights in the EU

3.2.1. From case law to legislation

The European Union¹⁵² presents a complex constitutional landscape within which the EU struggles to construct and maintain its own culture and identity while respecting simultaneously those of its Member States¹⁵³.

Since one of the most pending Community and then EU objectives has been to remove obstacles to the establishment of the internal market¹⁵⁴, one can notice that so far the EU has placed considerable emphasis on the goal

¹⁴⁵ The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, and Protocol on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol of 2 October 1997.

¹⁴⁶ The Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 26 February 2001.

¹⁴⁷ On 29 October 2004 in Rome. This Treaty did not enter into force since it failed to be ratified by the sufficient number of Member States.

¹⁴⁸ Entered in force on 1 December 2009.

¹⁴⁹ J. Goyder, *European Union Law* [in:] J. Goyder, *EU Distribution Law*, 5th ed., HART Publishing, 2011, p. 1.

¹⁵⁰ Hereinafter: the “TfEU”.

¹⁵¹ See more afterwards in part III 4.

¹⁵² Consisting currently of 28 Member States and 25 official languages.

¹⁵³ A. Sweeney, *Margin of Appreciation’ in the Internal Market: Lessons from the European Court of Human Rights*, (2007) *Legal Issues of Economic Integration* 34(1), p. 27.

¹⁵⁴ M. Tzanou, *Can the balancing of fundamental rights affect fundamental freedoms? Some reflections on recent ECJ case-law on data protection*, EUI Florence, available at: <http://www.eui.eu>.

of safeguarding the coherence of the Common Market, namely by framing a series of harmonised rules and principles required for its functionality. Immense importance has been attributed to so the called “*fundamental freedoms*”, *i.e.* the economic freedoms which constitute the “bearing walls” of the establishment of the Common Market¹⁵⁵. This category consists of: the free movement of goods, free movement of persons (workers), freedom of establishment¹⁵⁶ and free movement of services¹⁵⁷ as well as free movement of capital.

Nevertheless, while the traditional freedoms still play a crucial role within the functioning of the European Union, the EU’s explicit commitment to the fundamentals of a democratic society entails, on the other hand, the duty to respect the basic rights of its citizens. However, the status granted to human rights in the legal order of, firstly, the European Communities and subsequently of the EU, has changed radically since the Communities foundation in the 1950s.

Primarily the EEC concentrated on purely economic aims, mostly the creation of the Common Market. The issue of broadening the integration also into further areas was however not totally absent¹⁵⁸. It is noteworthy that the human rights issue already appeared in the proposal of the European Political Community Treaty, drafted in 1953, that envisaged including the EConHR in the Communities’ law. Nevertheless, due to the France’s rejection of the closely-linked Defence Community Treaty in 1954, the European Political Community Treaty was never adopted¹⁵⁹. Consequently the treaties signed in 1957 (on the European Economic Communities and Euroatom) were deprived of any reference to human rights. Some authors argue nevertheless, that a kind of reference to

¹⁵⁵ See C. Kombos, *Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity*, (2006) *European Public Law* 12, pp. 433, 435. For a general overview see *inter alia* D. Wyatt, A. Dashwood’s, *European Union Law*, 5th ed., Sweet & Maxwell 2006, pp. 535 et seq.; C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, OUP 2004.

¹⁵⁶ Free establishment of nationals of a Member State in the territory of another Member State.

¹⁵⁷ Freedom of nationals of Member States established in one Member State to provide services in another Member State.

¹⁵⁸ See M. Dausès, *The Protection of Fundamental Rights in the Community Legal Order*, *ELRev* 1985, pp. 398–399; P. Pescatore, *The Context and significance of fundamental rights in the law of the European Communities*, *Human Rights Law Journal* No. 2, 1981, p. 295.

¹⁵⁹ P. Craig, G. De Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press 2011, p. 362.

fundamental human rights already existed in the founding Treaties due to the principle of non-discrimination introduced in the field of the free movement of persons¹⁶⁰.

The first formal institutional recognition of human rights concerns by the European Communities, including the CJEU and Member States, took place in the 1970s. In 1973 the European Parliament adopted a Resolution “concerning the protection of the fundamental rights of Member States’ citizens when Community law is drafted¹⁶¹” and in 1977 another one “on the granting of special rights to the citizens of the European Community¹⁶²”. In another Resolution adopted in 1979 the EP envisaged the accession of the European Community to the ECHR as well as the drafting of a European Charter of Civil Rights. Consequently, in April 1979 the European Commission published a Memorandum on “the Communities becoming a signatory of the European Convention on Human Rights” constituting an initial step towards consolidation of the protection of human rights in the European Community¹⁶³.

The subsequent EP Resolutions, in 1983 and 1984, stressed the need to incorporate fundamental human rights in a constitutional manner within the EC which resulted in 1989 in the EP proposition to adopt a declaration regarding fundamental rights as part of a “Constitution” for the EU¹⁶⁴.

Nevertheless, the first direct reference to the fundamental rights in the Treaties appeared in the Preamble to the European Single Act¹⁶⁵. Further significant developments appeared in the 1990s. Firstly, the Treaty of Maastricht introduced an express legal basis for fundamental rights in the TEU. Secondly, the possibility of imposing sanctions on Member States in any case of a violation of fundamental rights¹⁶⁶ was established by

¹⁶⁰ C. Leskinen, *An Evaluation of the Rights of Defence 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, Madrid, 2010, p. 4.

¹⁶¹ OJC 26, 4 April 1973.

¹⁶² OJC 299, 16 November 1977.

¹⁶³ *Bulletin of the European Communities*, supplement, 2/79.

¹⁶⁴ V. Miller, *EU Accession to the European Convention on Human Rights*, SN/IA/5914, Note of 22 March 2011, p. 3 available at www.parliament.uk/briefing-papers/sn05914.pdf

¹⁶⁵ “DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

¹⁶⁶ Article 7 TEU.

the Treaty of Amsterdam¹⁶⁷ and subsequently strengthened by the Treaty of Nice¹⁶⁸.

Furthermore, the idea, drafting and adoption of the Charter of the Fundamental Rights of the European Union¹⁶⁹ constituted an undoubtedly important development.

Finally, after 50 years of existence, the amendments introduced by the Lisbon Treaty stressed the importance of human rights in the EU. Firstly, the CFR was recognised as a primary law of the EU and thus became a binding legal act. Secondly, a competence and obligation of EU accession to the EConHR was clearly introduced. Thus Article 6 TEU is said to nowadays constitute the “centerpiece of the EU’s human rights framework¹⁷⁰”. This provision lists moreover three sources of human rights that apply formally in the EU, *i.e.* the CFR, the EConHR, previously considered by the CJEU as a “special source of inspiration” and the general principles of EU law, originating from the national constitutional traditions common to the Member States, the EConHR and other international treaties that Member States are signatory to, articulated and developed by the CJEU. It is noteworthy that these sources overlap, since numerous CFR provisions and general principles are based on the EConHR.

Meanwhile, human rights concerns have gradually been integrated into various EU policies, for instance in its external relations¹⁷¹. The Commissioner Riding stressed at the conference on the Future of the European Court of Human Rights that “the promotion of fundamental rights is one of the priorities of the Stockholm programme setting the strategic guidelines for developing an area of freedom, security and justice in Europe¹⁷²”. Moreover, on 25 June 2012 the Council of the European Union adopted the first ever Strategic Framework on Human Rights and

¹⁶⁷ Which, under Article 46(d)TEU, granted the CJEU jurisdiction to ensure that current Article 6(2)TEU was observed by the EC/EU institutions.

¹⁶⁸ Suspend the voting rights the Member State which is about to breach the fundamental rights.

¹⁶⁹ Hereinafter: the “CFR”. See more below.

¹⁷⁰ P. Craig, G. De Burca, *EU Law...*, p. 363.

¹⁷¹ [Http://eeas.europa.eu/_human_rights/index_en.htm](http://eeas.europa.eu/_human_rights/index_en.htm)

¹⁷² V. Reding, *Towards a European Area of Fundamental Rights: The EU’s Charter of Fundamental Rights and Accession to the European Convention of Human Rights*, Speech/10/33 presented on 18 February 2010 at High Level Conference on the Future of the European Court of Human Rights Interlaken; available at http://europa.eu/rapid/press-release_SPEECH-10-33_en.htm?locale=en

Democracy¹⁷³, including an action plan for its implementation, in order “to enhance the effectiveness and visibility of EU human rights policy¹⁷⁴”. The principles, objectives and priorities, set up in the Framework were all “designed to improve the effectiveness and consistency of EU policy as a whole in the next ten years”¹⁷⁵. Even though the EU has already had a catalogue of statements regarding human rights and democracy as well as guidelines and other policy guidance, they were mostly focusing either on particular issues or on countries. Thus the Framework is the first unified strategic document in relation to human rights in EU history.

Nevertheless, despite all the unquestionable developments in this area, one should not forget that, contrary to the Council of Europe, the EU’s predominant focus remains on its economic nature related to the functioning of the Common Market and therefore the issues of the protection human rights will always be secondary.

3.2.2. Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union was first solemnly proclaimed by the EU institutions¹⁷⁶ and politically approved by the Member States at the Nice European Council Summit on the 7th of December 2000¹⁷⁷. It was subsequently slightly amended¹⁷⁸ and re-proclaimed in December 2007¹⁷⁹. In 1999–2000 its drawing up resulted from the European Council initiative to “showcase” EU achievements in the field of fundamental rights¹⁸⁰.

¹⁷³ *EU Strategic Framework and Action Plan on Human Rights and Democracy* of 25 June 2012, No. 11855/12, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

¹⁷⁴ C. Ashton, High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission. See Press release No. 11737/12 of 25 June 2012, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131173.pdf

¹⁷⁵ *Ibidem*.

¹⁷⁶ *I.e.* the European Commission, the Council and the European Parliament.

¹⁷⁷ 131. OJ C 364 of 18.12.2000, p. 1. (Actual version OJ C 326/02 of 26.10.2012).

¹⁷⁸ For instance the Lisbon Treaty added 4 additional paragraphs to Article 52.

¹⁷⁹ OJ C 303 of 14.12.2007, p. 1. Actual version OJ C 326/02 of 26.10.2012 More about the CFR: R. Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, European Law Journal No. 4/2002, Vol. 8, p. 492; K. Kańska, *Towards Administrative Human Rights in the EU Impact of the Charter of Fundamental Rights*, European Law Journal No. 3/2004, Vol. 10, p. 296.

¹⁸⁰ P. Craig, G. De Burca, *EU Law...*, p. 394.

At the beginning the legal status of the CFR was left undetermined and it was regarded as only an interinstitutional agreement without general binding power¹⁸¹. This act was said to be solely a “source of knowledge” which emphasised the “importance¹⁸²” of fundamental rights protected by the Community legal order¹⁸³. Nevertheless, this act was binding for EU institutions that had adopted it, including the Commission¹⁸⁴. It is noteworthy that in the Preamble to Regulation 1/2003 it was emphasised that “(t)his Regulation 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 principles¹⁸⁵”. Hence, the Commission was obliged to conduct its investigations in accordance with the right and principles of undertakings stipulated in the CFR¹⁸⁶.

Nevertheless, under the Treaty of Lisbon¹⁸⁷ the CFR became a part of primary law and therefore with the entry into force of this Treaty, *i.e.* on 1st of December 2009, was granted the same legal status as the Treaties¹⁸⁸, *i.e.* a legally binding effect¹⁸⁹. It was stressed that “(t)he EU Charter of

¹⁸¹ Only the EU institutions, being parties to the agreement, were bound by provisions of this act. See also P. Craig, G. De Burca, *EU Law...*, p. 394; B. De Witte, *The Legal Status of the Charter: vital Question on Non-Issue?*, MJ No. 8 2001, p. 81; L. Betten, *The EU Charter of fundamental Rights: A Trojan Horse or a Mouse?*, IJCLIR 2001, p. 151

¹⁸² Judgment of the CFI of 15 January 2003 in joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International et al. vs Commission*, ECR 2003, p. II-1, point 122.

¹⁸³ See the preamble to the CFR and for instance judgment of the ECJ of 27 June 2006 in case C-540/03 *Parliament vs Council* (“family reunification”), ECR 2006, p. I-5769, point 38; judgment of the ECJ of 13 March 2007 in case C-432/05 *Unibet*, E.C.R., 2007, p. I-2271, point 37.

¹⁸⁴ See the statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000.

¹⁸⁵ Recital 37 to the Preamble to Regulation 1/2003.

¹⁸⁶ See Opinion of AG Kokott of 8 December 2005 in case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied vs Commission*, note 59.

¹⁸⁷ OJ C 83 EU of 30.03.2010, p. 389.

¹⁸⁸ What confirms Article 6 of the Treaty of the European Union (hereinafter: the “TEU”); See also the EU case-law *inter alia* judgment of the Court of Justice (GC) of 1 March 2011, in case C-236/09 *Association belge des Consommateurs Test-Achats ASBL*, para. 16 *in fine*: “Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.”

¹⁸⁹ It has to be noted that the United Kingdom, Poland (subsequently joined by the Czech Republic), managed to negotiate a Protocol to the Treaties limiting the impact of the CFR for those Member States. See Protocol No. 30 to the Lisbon Treaty. Article 1 “The Charter does not extend the ability of the Court of Justice of the European Union,

Fundamental Rights applies not only to EU institutions, but also to Member States when they implement EU law¹⁹⁰.” The CFR is considered “a major step forward in terms of political commitment for fundamental rights, of legibility and of legal certainty¹⁹¹” and “the compass for all European Union policies¹⁹²”. EU legislation, actual or future, has to fully respect the Charter of Fundamental Rights. Thus all legislative proposals should be assessed rigorously in the light of fundamental rights.

The CFR¹⁹³, “constituting an important contributor to the further strengthening of the Convention’s system of fundamental rights”¹⁹⁴, is to a major extent a declarator act which confirms the rights enshrined in the EConHR¹⁹⁵ and in the constitutional traditions and international commitments of Member States¹⁹⁶. The mission originally conferred to the European Council was to stress the already existing “obligation to respect fundamental rights¹⁹⁷”. All the rights found in the European Convention on Human Rights were entrenched in the CFR and the meaning and scope of these rights are the same as those laid down by the EConHR. Nevertheless some new rights and innovatory provisions not present in the EConHR have been provided by the CFR. Therefore, according to V. Reding, the CFR represents the most modern codification of fundamental rights in the world¹⁹⁸, which is in many instances more ambitious than the EConHR. The CFR went further and also enshrines additional rights and principles, *inter alia* economic and social rights resulting from the

or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” Nevertheless the Protocols seems to have not much more than declaratory effect since it related only to the extension of the competence that the CJEU already has – to review the compliance with the general principles of the EU of the acts of the Member States within the scope of the law of the EU. See P. Craig, G. De Burca, *EU Law...*, p. 395 and House of Lords Select Committee on the European Union, 10th Report of 2008, No. 5.84–5.111

¹⁹⁰ V. Reding, *Towards a European Area of Fundamental Rights...*

¹⁹¹ *Ibidem*.

¹⁹² *Ibidem*.

¹⁹³ OJ C 364, 18.12.2000, p. 1.

¹⁹⁴ See the Commission Press release of 17 March 2010, Brussels, available at: http://ec.europa.eu/commission_2010-2014/reding/pdf/echr_background.pdf

¹⁹⁵ For example, Articles 47 and 48 CFR reflect the content of Article 6 ECHR. P. Roth, *Ensuring that Effectiveness...*, p. 630.

¹⁹⁶ See “family reunification” judgment, para. 38.

¹⁹⁷ See Conclusions of the Cologne European Council, June 1999

¹⁹⁸ V. Reding, *Towards a European Area of Fundamental Right...*

common constitutional traditions of the EU Member States, the case law of the CJEU and other international instruments. Moreover, the so-called “third generation” fundamental rights, such as data protection, guarantees on bioethics, protection on reproductive human cloning¹⁹⁹ and on good administration²⁰⁰ were additionally introduced to the CFR.

Furthermore, pursuant to some scholars the CFR catalogue of rights is not definitive since “many of the rights enshrined in it are not specifically defined²⁰¹”. Some authors, due to the diversity of rights and their different character, even point at an “inflation” of human rights in the Charter²⁰².

The CFR which traditionally begins with a preamble is divided into 7 chapters, 6 of them grouping different categories of rights²⁰³ and the last one relating to General Provisions Governing the Interpretation and Application of the Charter²⁰⁴.

In relation to the General Provisions Governing the Interpretation and Application of the CFR, it is worth taking a look at some Articles. Firstly, a general derogation clause indicating acceptable restrictions on the CFR rights is contained in Article 52(1) stating that any limitation on the exercise of the CFR rights and freedoms has to, firstly, be provided for by law, secondly, respect the essence of the rights and freedoms in question, thirdly, be in accordance with the principle of proportionality, *i.e.* “be necessary and genuinely meet objectives of general interest recognised by the Union²⁰⁵ or the need to protect the rights and freedoms of others”²⁰⁶.

¹⁹⁹ On the other hand, one should also be aware of the notable omissions *inter alia* in relation to the rights of minorities.

²⁰⁰ See Article 41 CFR.

²⁰¹ K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, European Centre Natolin, nr 39, Warsaw 2010, p. 123. See also A. Young, *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?*, European Public Law No. 2/2005, p. 233. “I. Kamiński notes the diversity and different character of rights contained in the CFR, talking of an “inflation” of human rights in this document”; I.C. Kamiński, *Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa?* [in:] A. Wróbel (ed.), *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, Warsaw 2009, p. 39.

²⁰² I.C. Kamiński, *Karta Praw Podstawowych...*, p. 39.

²⁰³ Title I – *Dignity*, Title II – *Freedoms*, Title III – *Equality*, Title IV – *Solidarity*, Title V – *Citizens’ Rights*, Title VI – *Justice*.

²⁰⁴ See P. Craig, G. De Burca, *EU Law...*, p. 367.

²⁰⁵ Since the crucial general interests are linked to economic objectives, this formulation may be subject to critics as allowing the economic justification of the fundamental rights’ limitations.

²⁰⁶ “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.

Secondly, according to Article 52 (3) CFR, relating specifically to the EConHR, the rights contained in this Charter which correspond to the rights guaranteed by the EConHR, shall have the same meaning and scope as those rights laid down by the said Convention. This provision, aimed at implementing harmony within the European protection of fundamental rights, is, however, semi-imperative, constituting more “floor” than “ceiling”. It provides namely only a minimum standard of protection since the EU is entitled to provide more extensive protection of fundamental rights²⁰⁷. This seems compatible with the CJEU approach to take into consideration guidance enshrined in the relevant ECtHR case law²⁰⁸.

Furthermore, one should note that the CFR in Article 52 (5) distinguishes between rights and principles²⁰⁹. It seems that the aim of this amendment

Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

²⁰⁷ P. Lemmens, *The Relation between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights – Substantive Aspects*, Maastricht Journal of European and Comparative Law No. 8/2001, p. 54. See also judgment of the ECtHR of 18 February 1999 in case *Matthews vs United Kingdom*, Application No. 24833/94; judgment of the ECtHR of 30 June 2005 in case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs Ireland*, Application No. 45036/98; See on the latter A. Hinarejos Parga, *Bosphorus vs Ireland and the protection of fundamental rights in Europe*, European Law Review No. 2/2006, Vol. 31, p. 251.

²⁰⁸ See *inter alia* the judgement of the Court of Justice of 5 October 2010 in case C-400/10 *PPU J.McB vs LE*, para. 53; the judgement of the Court of Justice of 22 December 2010 in case C-279/09 *DEB vs Bundesrepublik Deutschland*, paras 35–52.

²⁰⁹ Article 52 Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law,

introduced to the CFR by the Lisbon Treaty was to establish a kind of traditional distinction between civil and political rights (negatively-oriented) and economic and social rights (positively-oriented and considered non-justiciable)²¹⁰. The legal doctrine has been involved in a vivid discussion as to the actual need of making such a differentiation. Chris Hilson for instance finds that the distinction made in the CFR is “*untenable*”.

Finally, a general non-regression clause²¹¹ was introduced to Article 53 CFR²¹² and a clause prohibiting any abuse leading to excessive limitation or destruction of CFR rights²¹³ was established in Article 54²¹⁴.

Finally, it has to be additionally stressed that the Court of Justice has finally started to refer directly to the CFR²¹⁵. Previously the explicit references to the CFR could only be found in judgments of the General Court (CFI)²¹⁶ and in the opinions of the Advocates General²¹⁷, whereas the

in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

(...)

²¹⁰ P. Craig, G. De Burca, *EU Law...*, p. 398.

²¹¹ Corresponding to Article 53 ECHR.

²¹² Article 53. Level of protection. “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

²¹³ Largely based on Article 17 ECHR

²¹⁴ Article 54 – Prohibition of abuse of rights. “Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.”

²¹⁵ See for instance *Association belge des Consommateurs* judgment, paras 16–17, 30 and 32. Para. 16 “Article 6(2) EU (...) provides that the European Union is to respect fundamental 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, as general principles of Community law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.”; § 32: “Such a provision (...) works against the achievement of the objective of equal treatment between men and women (...) and is incompatible with Articles 21 and 23 of the Charter.”

²¹⁶ Judgment of the CFI of 12 October 2007 in case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH vs Commission* (organic peroxides), E.C.R. 2007, II-4225, points 75–77; judgment of the CFI of 5 April 2006, in case T-279/02 *Degussa AG vs Commission* (methionine cartel), E.C.R. 2006 II-897, point 115.

²¹⁷ Opinion of the Advocate General Kokott of 8 December 2005 in case case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied*

Court of Justice while often referring to the general principles of Community law and provision of the EConHR and its Protocols, had remained silent as to the CFR, even if it handled a prejudicial question directly relating to this aspect²¹⁸.

Since this stance has changed, reference in more than 36 judgments of the Court of Justice have been identified so far²¹⁹, e.g. in the judgment delivered in case C-400/10 PPU *J. McB. vs L. E.*²²⁰, the Court of Justice referred to Articles 7, 24²²¹ and 51(2)²²².

3.3. Role of the Court in introducing the protection of fundamental rights in the EU

“Institutions live longer than people and, if well designed, can therefore accumulate and transfer wisdom from generation to generation²²³”. The huge importance of the CJEU and its case-law, that has often been an inspiration for the subsequent legislation, is indisputable.

Before concentrating on the CJEU’s role in the field of human rights, an overview of its general significance should be presented. One of the major achievements of the CJEU has been the establishment of a number of general and fundamental principles of the EU.

To start with, as early as 1963, while responding to a preliminary question in the *Van Gend en Loos* case²²⁴, the CJEU introduced the first crucial principle, i.e. the principle of the direct effect of Community law

vs Commission, E.C.R. 2006 I-8725, point 59, in which General Kokott stated that “the Charter of Fundamental Rights (...) must be taken into account in cartel proceedings”.

²¹⁸ Judgment of the ECJ of 12 May 2005 in case C-347/03 *ERSA vs Ministero Delle Politiche Agricole e Forestali*, E.C.R. 2005, I-3785, paras 58 and 118–134, alleging violation of Article 17 CFR See P. Roth, *Ensuring that Effectiveness of Enforcement Does Not Prejudice Legal Protection. Rights of Defence. Fundamental Rights Concerns* [in:] C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual: 2006. Enforcement of Prohibition of Cartels*, Oxford–Portland, Oregon 2007, p. 629.

²¹⁹ E.g. see the most recent example judgment of the Court of Justice of 27 March 2014, in case C-265/13 *Emiliano Torralbo Marcos vs Korota SA and Fondo de Garantía Salarial*.

²²⁰ *J. McB.* judgment,

²²¹ Para. 47 “a situation which would not be compatible either with his right to respect for private and family life, established in Article 7 of the Charter and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’), or with the rights of the child, set out in Article 24 of the Charter.” See also paras 50–63.

²²² Para. 59 “Such an outcome might, moreover, infringe Article 51(2) of the Charter.”

²²³ Jean Monnet, Speech to the ECSC Assembly, Strasbourg, 11 September 1952.

²²⁴ Judgment of the ECJ of 5 February 1963 in Case 26/62 *Van Gend en Loos vs Netherlands Inland Revenue Administration*, E.C.R. 1963, p. 3 (Dutch version).

on the Member States. This judgment, which was said to be “a source of and a framework for the principles which have shaped the constitutional structure of the European Union”, led to direct application of EU rules in national legal orders and gave the possibility for natural and legal persons to rely on EU law before the national courts²²⁵.

The second fundamental EU principle was established in the judgment of *Costa vs ENEL*²²⁶ in 1964. The CJEU stressed the primacy of Community law over national law, due to the specific nature and autonomy of the Community legal order that must applied in a uniform manner in all Member States. “The concept of autonomy became a cornerstone of the union legal order²²⁷”. While it is a controversial issue, its contributed substantial contribution to determine the EU law relationship with other legal orders, *i.e.* national and international law is unquestionable and stressed by the doctrine.²²⁸”

In 1991 the CJEU introduced the principle of Member State liability for damage caused to individuals by a violation of Community law committed by that State. Therefore the judgment in question, *i.e.* in the *Francovich* case²²⁹, natural and legal persons are entitled to bring an action for damages against a Member State that has violated EU law.

Furthermore, the CJEU has provided necessary precisions in relation to the EU fundamental freedoms (together with unrestricted competition) being the crucial constructive components of the Common Market. Clarification of their scope, functioning and conditions of application has had a direct consequence on the daily life of natural and legal persons²³⁰.

²²⁵ See I. Pernice, *The autonomy of the EU legal order – fifty years after Van Gend* [in:] *50th anniversary of the judgment in Van Gend en Loos*, conference proceedings of 13 May 2013, Luxembourg 2013, p. 55 “While, after the entry into force of the EEC Treaty, governments hesitated to give effect to what was agreed upon, the ECJ took seriously the spirit and intentions of this unprecedented constituent text.”

²²⁶ Judgment of the ECJ of 15 July 1964 in Case 6/64 *Flaminio Costa vs E.N.E.L.*, E.C.R. 1964, p. 1129.

²²⁷ I. Pernice, *The autonomy of the EU legal order...*, p. 57.

²²⁸ *Ibidem*, p. 57.

²²⁹ Judgment of the ECJ of 19 November 1991 in joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others vs Italian Republic*, E.C.R. 1991, I-5357.

²³⁰ See *inter alia*: For free movement of goods, judgment of the ECJ of 20 February 1979 in case 120/78 *Rewe-Zentral AG vs Bundesmonopolverwaltung für Branntwein* (“Cassis de Dijon”), E.C.R. 1979, p. 649; Freedom of movement of persons, judgment of the ECJ of 31 March 1993 in case C-19/92 *Dieter Kraus vs Land Baden-Württemberg*, E.C.R. 1993, I-1663 and judgment of the ECJ of 15 December 1995 in case C-415/93 *Union royale belge des sociétés de football association ASBL vs Jean-Marc Bosman*, E.C.R. 1995, I-4921; Freedom to provide services, judgment of the ECJ of 2 February 1989 in case

With reference to the field of fundamental rights, initially, *i.e.* in 1950s and 1960s, the CJEU was rejecting litigants' attempts to invoke rights or principles which were recognised only at a national level²³¹, even by at least the majority of Member States, and was refusing to consider them falling into the scope of the EC's legal order²³².

A radical change of the CJEU approach came with its judgment in the *Stauder* case in 1969²³³.

In this case the CJEU namely accepted an argument regarding the fundamental right to human dignity that was alleged to have been violated by the implementation at a national level of an EU provision²³⁴. The CJEU recognised the general principles of EU law, more specifically protection of human rights, by stating that “(t)he provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the court²³⁵.”

Subsequently in the *Internationale Handelsgesellschaft* case, the CJEU went further and held that “respect for fundamental rights forms an integral part of the general principles of Community 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 Community²³⁶.”

The next step comprised of a distinction of sources of the autonomous general principle of the EU law. This happened in the judgment in the *Nold*

186/87 *Ian William Cowan vs Trésor public*, E.C.R. 1989, p. 195, judgment of the ECJ of 28 April 1998 in case C-158/96 *Raymond Kohll vs Union des caisses de maladie*, E.C.R. 1998, I-1931 and judgment of the ECJ of 28 April 1998 in case C-120/95 *Nicolas Decker vs Caisse de maladie des employés privés*, E.C.R. 1998, I-1831.

²³¹ *E.g.* principles of proportionality, natural justice, legitimate expectations.

²³² See *e.g.* judgment of the ECJ in case 1/58 *Stork vs High Authority*, E.C.R. 1959, 17; judgment of the ECJ in cases 36, 37, 38 and 40/59 *Geitling vs High Authority*, ECR 1960, 423; judgment of the ECJ in case 40/64 *Sgarlata and others vs Commission*, E.C.R. 1965, 215.

²³³ Judgment of the ECJ of 12 November 1969 in case 29/69 *Stauder vs City of Ulm*, ECR 1969, 419; It is argued that this change was caused by the discussions having taken place within the Commission and Parliament on the possible undermining of humans right protected by national constitutions in domestic legal orders of Member States. See the F. Dehousse, *Report on the Supremacy of EC law over national law of the Member States*, EurParl Doc 43 (1965–1966), JO 2923/1965, p. 14 and Remarks of W. Hallstein, Eur Parl Debate of 17 June 1965 No. 79, pp. 218–222 (French edition).

²³⁴ Regarding a subsidized butter scheme for welfare recipients.

²³⁵ *Stauder* judgment, para. 7.

²³⁶ Judgment of the ECJ of 17 December 1970 in case 11/70 *Internationale Handelsgesellschaft vs Einfuhr und Vorratstelle für Getreide und Futtermittel*, ECR 1970, p. 1125.

case²³⁷, where the CJEU identified “international treaties for the protection of human rights” and “common national constitutional traditions common to the Member States” as sources for inspiration for the safeguarding of fundamental rights which formed an integral part of the EU general principles²³⁸.

Subsequently, the CJEU started to make direct reference to the European Convention on Human Rights. For instance in relation to the requirement of judicial review the CJEU acknowledged that it “reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms²³⁹” and added that “the principles on which that Convention is based must be taken into consideration in Community law.²⁴⁰”

According to the settled case-law of the CJEU, it is clear nowadays that “fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories” and the EConHR “is of particular significance in that regard²⁴¹”.

²³⁷ Judgment of the ECJ in case 4/73 *Nold vs Commission*, ECR 1974, p. 491.

²³⁸ *Nold* judgment, para. 13; It is worth mentioning that in current codification of the CJEU case law regarding the general principles of law, introduced in Article 6(3) TEU, we may find reference to The EConHR and constitutional Member States traditions, but international human rights treaties are not mentioned. For more see P. Craig, G. De Burca, *EU Law...*, p. 366.

²³⁹ Judgment of the ECJ of 27 November 2001 in Case C-424/99 *Commission of the European Communities vs Republic of Austria*, E.C.R. 200, I-9285, para. 45; judgment of the ECJ of 15 May 1986 in case C-222/84 *Johnston*, E.C.R. 1986, 1651, para. 18; judgment of the ECJ of 3 December 1992 in case C-97/91 *Oleificio Borelli vs Commission*, E.C.R. 1992, I-6313, para. 14, judgment of the ECJ of 22 September 1998 in case C-185/97 *Belinda Jane Coote vs Granada Hospitality Ltd.*, E.C.R. 1998, I-05199, paras 21, 23, judgment of the ECJ of 11 January 2001 in case C-1/99 *Kofisa Italia*, E.C.R. 2001, I-207, para. 46, and judgment of the ECJ of 11 January 2001 in case C-226/99 *Siples*, E.C.R. 2001, I-277, para. 17.

²⁴⁰ Judgment of the ECJ of 15 May 1986 in Case 222/84 *Marguerite Johnston vs Chief Constable of the Royal Ulster Constabulary*, E.C.R. 1986, p. 1651, para. 18; see, *inter alia*, judgment of the ECJ of 6 March 2001 in case C-274/99 P *Connolly vs Commission*, E.C.R. 2001, I-1611, para. 37.

²⁴¹ Judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 2859, and *Johnston* judgment.

3.4. Fundamental rights in relation to the fundamental freedoms

The cases in which the CJEU is called upon to engage in a balancing of seemingly equivalent fundamentals have become more frequent. Therefore it is important to examine the deferential approach that the CJEU presents while having to challenge the question of the conflict of two basic values, namely fundamental human rights and fundamental Common Market freedoms. It is clear that fundamental human rights differ from the other grounds of justification of the obstacles to Common Market freedoms and thus call for special consideration. However it seems hard to conceptualise the rule set by the CJEU when encountering the challenge of the reconciliation of the fundamental rights protection and Common Market freedoms.

Nevertheless, since it is not intended in the context of this study to dwell on the general analysis of all possible tensions arising as the result of fundamental right invocations by Member States in the context of Common Market freedoms, instead of analysing numerous cases in which human rights and Common Market freedoms stood in opposition to each other, only a general reflection based on CJEU case-law relating to this issue will be presented.

Unquestionably, laying down boundaries of jurisdiction of the ECJ in matters of observance of human rights conventions in the course of enforcing Community law is of utmost importance²⁴². Thus, the Court treads very carefully in enforcing EU rule when there is any possibility of a clash with human rights laid down in national constitutions or in the European Convention on Human Rights. One can notice, nevertheless, that in the event of the conflict of values, namely human rights and Common Market freedoms, it is not always the case that the former would justify the infringement of the latter. Although the ECJ recognises and underlines the general supremacy of human rights, each time it carries out the necessity and proportionality test concerning the restraints of the EU freedom in question.

For instance, on the one hand, in the *Schimidberger* case²⁴³ which related to a collision between the freedom of assembly with the free movement of goods guaranteed by the Treaties, the CJEU settled in favour of the fundamental right. After having conducted a detailed analysis of the facts

²⁴² A. Wróbel, *Bosphorus "Solange"?*, Europejski Przegląd Sądowy 2006/6 p. 1.

²⁴³ The judgement of the ECJ of 12 June 2003, C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge vs Republic of Austria*, OJ C 184 of 02.08.2003, p. 1.

at hand, the Court held that the restriction placed upon intra-Community trade was proportionate in the light of the the legitimate objective pursued. On the other hand, in the judgment in the *Laval* case²⁴⁴, despite having quite consistently upheld its earlier standpoint that fundamental rights, such as the right of a trade union to take collective action, may in some circumstances constitute a justified restriction upon a freedom guaranteed by the Treaty²⁴⁵, the ECJ declared the restriction in question unjustified. Based on the results of the Court examination to which extent the protection of the workers has already enforced by the provisions of the adequate directive²⁴⁶, the ECJ decided that the restraint did not meet the prerequisite of indispensability.

This principle of proportionality seems to constitute the main reason for which the Court of Justice ruled differently in the cases presented above.

Ultimately, it is the test of proportionality that is decisive in relation to the balancing of the competing values – those of Member States enshrined in the ECHR and the economic ones established within the EU. With regard to EU law, the Court of Justice confirmed many times that the principle of proportionality is one of the general principles of the EU. By virtue of this principle, “the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued²⁴⁷”.

Nevertheless, one may come across some critical remarks with regard to the approach adopted by the CJEU, arguing that “using [by the Court] the language of prima facie breach or restriction of economic rights suggests that, even if the restriction is ultimately justified, it remains something which is at its heart “wrong”, but tolerated²⁴⁸”.

²⁴⁴ The judgement of the ECJ of 18 December 2007, C-341/05 *Laval un Partneri Ltd vs Svenska Byggnadsarbetareförbundet and Others*, OJ C 51 of 23.02.2008, p. 9.

²⁴⁵ A. Wróbel, *Basic right and fundamental rights – conflict or restrictions?*, Europejski Przegląd Sądowy 2008/2, p. 1.

²⁴⁶ *I.e.* whether the steps taken could be nevertheless found necessary.

²⁴⁷ See for example, judgment of the ECJ of 13 November 1990, in case C-331/88 *The Queen vs Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, para. 13; See also C. Canenbley, M. Rosenthal, *Co-operation between antitrust authorities in – and outside the EU: what does it mean for multinational corporations?*, E.C.L.R. 2005, 26(3), pp. 178–187.

²⁴⁸ C. Brown, *Gloss to the ECJ's judgement of the June 12, 2003, C-112/00*, Common Market Law Review 2003/6, p. 1199.

3.5. Right to good administration

In addition to the general overview of the right to good administration presented in Chapter I²⁴⁹, it is important to discuss here this right more specifically, *i.e.* in the context of competition law.

As already mentioned it is also uncontested that the right to good administration has developed mostly from the jurisprudence of the CJEU²⁵⁰. This right aims to foster the legal position of persons in their relationships with public authorities²⁵¹ and it can be seen as a particular equivalent of the right to a fair trial. It is thus important to analyse the application of this right to the competition proceedings before the Commission.

The importance of Article 41 CFR for competition proceedings has been stressed by the Advocates General. For instance, in her recent Opinion in the *Nexans* case, AG Kokott²⁵² stated that the obligation to state the reasons for a European Union act follows not only from Article 253 TFEU but is also enshrined as part of the right to good administration in Article 41(2) (c) CFR²⁵³.

In another of her opinions, in the *Solvay* case²⁵⁴, she suggested that the Commission thus infringed a fundamental rule of procedure, *i.e.* the right to access to the file, “which is a corollary of the right to good administration”²⁵⁵.

Nevertheless, the CJEU has also made references to this Article while handling competition law cases. Pursuant to the settled case-law of the CJEU relating to the principle of good administration, “where the institutions of the European Union have a power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those

²⁴⁹ See Chapter I section 7.3.

²⁵⁰ The rights included in the Charter weren't born in that document, but only they became more evident due to its incorporation. See S. Mangiameli, *La Carta dei diritti fondamentali dell'Unione Europea*, in *Nuovi studi politici*, 2/2002, p. 32.

²⁵¹ T. Jurczyk, *Prawa jednostki w orzecznictwie Europejskiego Trybunału Sprawiedliwości*, Oficyna Wolters Kluwer 2009, p. 44.

²⁵² It is noteworthy that AG Kokott often refers to the CFR and had made the reference to the CFR before it became mandatory. See *e.g.* Opinion of Advocate General Kokott of 13 December 2007 in case C-413/06P *Bertelsmann AG i Sony Corporation of America vs Independent Music Publishers and Labels Association (Impala), Sony BMG Music Entertainment BV and the Commission*.

²⁵³ Opinion of Advocate General Kokott of 3 April 2014 in case C-37/13 P *Nexans vs Commission*, para. 41.

²⁵⁴ Opinion of Advocate General Kokott of 14 April 2011 in case C-110/10 P *Solvay SA vs Commission*, para. 24.

²⁵⁵ *Solvay* opinion, para. 24.

guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case²⁵⁶". However, it has been stated that this principle does not weaken the Commission in its power to request undertakings to provide "all necessary information", in accordance with Article 18(1) of Regulation 1/2003²⁵⁷.

It is noteworthy that the CJEU usually makes reference to the right to good administration in the context of analysing its components. In the *Compagnie maritime belge* case, the General Court stated that the principle that the Commission has to act within a reasonable time, that is incorporated, as an element of the right to good administration, in Article 41(1) CFR, is to be observed in every EU administrative procedure²⁵⁸.

Furthermore, one may notice that the scope of Article 41 CFR corresponds actually to the settled jurisprudence of the CJEU with regard to the right to defence²⁵⁹. As to the question of the relationship between the right to good administration and the right to defence depending on the circumstance of a case, either the CJEU regards them as complementary principles²⁶⁰ or as concurring concepts. Regarding the first trend, the General Court emphasised that "Article 41 CFR established observance of the right to defence as a fundamental right and as a consubstantial element of the right to good administration²⁶¹.

With regard to the second tendency, the Court of Justice held recently that "while the Commission may not be classified as a "tribunal" within the meaning of Article 6 of the ECHR²⁶², it is nevertheless required during the administrative procedure to respect the fundamental rights of the European

²⁵⁶ Judgment of the General Court of 22 March 2012 in joint Cases T-458/09 and T-171/10, *Slovak Telekom vs Commission*, para. 68; judgment of the ECJ of 21 November 1991 in case C-269/90 *Technische Universität München*, para. 14; judgment of the CFI of 24 January 1992 in case T-44/90 *La Cinq vs Commission*, para. 86; and judgment of the ECJ of 19 July 1995 in case C-149/95 P(R) *Atlantic Container Line and Others vs Commission*, para. 404.

²⁵⁷ *Slovak Telekom* judgment, para. 71.

²⁵⁸ Judgment of the CFI of 1 July 2008 in case T-276/04 *Compagnie maritime belge SA vs Commission*, judgment of the CFI of 13 January 2004 in case T-67/01 *JCB Service vs Commission*, ECR 2004 II-49, paragraph 36.

²⁵⁹ Nevertheless, it has been argued that still the CJEU case-law provided for wider scope of guarantees than the right to good administration as introduced in CFR.

²⁶⁰ Judgment of the CFI of 30 April 2014 in case T-468/08 *Tisza Erőmű kft vs Commission*. The case related to state aid.

²⁶¹ Judgment of the CFI of 27 September 2012 in Case T-343/06 *Shell Petroleum NV vs Commission*, para. 82.

²⁶² See, to that effect, the judgment of the ECJ of 29 October 1980 in joint cases 209/78 to 215/78 and 218/78 *Landewyck and Others vs Commission*, E.C.R. 1980, I-3125,

Union, which include the right to good administration enshrined in Article 41 of the Charter²⁶³". The Court of Justice noted further that it is not the right to an effective remedy provided in Article 47 of the Charter, but the right to good administration which governs the administrative procedure relating to restrictive practices before the Commission²⁶⁴. Pursuant to the Court of Justice, the "requirement of impartiality²⁶⁵ encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned²⁶⁶".

In relation to state aid, the CJEU, while referring to the CFR, seems to rely more on the right to good administration (Article 41) than the right to defence (Article 48). Nevertheless, this logically results from the fact that state aid²⁶⁷ does not fall under the category of repressive competition law and thus those proceedings cannot be regarded in relation to the jurisprudence on Article 6 ECHR regarding *sensu largo* "criminal charge".

3.6. Right to defence

Before the adoption of the CFR, the right to defence, as a fundamental right, belonged to the category of unwritten EU law, *i.e.* general principles of law, established and developed by the CJEU.

The CJEU has emphasised the importance of the respect for fundamental rights, particularly for the right to defence in all procedures involving the application of competition rules laid down in the TFEU, and has tried to specify how the right to defence should be reconciled with the Commission's

paragraph 81, and judgment of the ECJ of 7 June 1983 in joined cases 100/80 to 103/80 *Musique diffusion française and Others vs Commission*, E.C.R. 1983, 158, para. 7.

²⁶³ Judgment of the Court of Justice of 11 July 2013 in Case C-439/11 P *Ziegler SA vs Commission*, para. 154.

²⁶⁴ *Ibidem*. See also the judgments of the Court of Justice of 25 October 2011 in case C-109/10 P *Solvay vs Commission* E.C.R. 2011, I-10329, para. 53, and in case C-110/10 P *Solvay vs Commission*, E.C.R. 2011, I-10439, para. 48.

²⁶⁵ Enshrined in Article 41.

²⁶⁶ *Ziegler* judgment, para. 155; see, by analogy, judgment of the ECJ (GC) of 1 July 2008 in joint cases C-341/06 P and C-342/06 P *Chronopost and La Poste vs UFEX and Others* E.C.R. 2008, I-4777, para. 54, and judgment of the ECJ of 19 February 2009 in case C-308/07 P *Gorostiaga Atxalandabaso vs Parliament*, E.C.R. 2009, I-1059, para. 46.

²⁶⁷ Like control of concentrations.

powers regarding the preliminary stages of inquiry and, in particular, gathering of information²⁶⁸.

The CJEU first acknowledged that the right to defence, constituting a fundamental principle of the legal order of the European Community, must be observed in administrative procedures which may lead to the imposition of penalties²⁶⁹. In the landmark judgment in the *Hoechst* case, the CJEU held further that “it is also necessary to prevent those rights from being irremediably impaired 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 liable²⁷⁰”.

Consequently, although certain components of the right to defence relate only to the contentious proceedings that follow the delivery of the statement of objections, other elements, such as the right to legal representation and the privileged nature of correspondence between lawyer and client must be respected from the preliminary-inquiry stage²⁷¹.

²⁶⁸ Judgment of the CFI of 11 December 2003 in case T-66/99 *Minoan Lines SA*, para. 47, judgment of 9 November 1983 in Case 322/81 *Michelin vs Commission* (1983) ECR 3461, paragraph 7; judgment of the ECJ of 18 October 1989 in case 374/87 *Orkem*, E.C.R. 1989, 3283, judgment of the CFI of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, E.C.R. 2004, II-1181, judgment of the ECJ of 26 June 2006 in case C-301/04P *SGL Carbon*, E.C.R. 2006, I-5915, judgment of the ECJ of 18 May 1982 in case 155/79, *A.M. & S.*, judgement of the CFI of 17 September 2007 joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akros Chemicals vs Commission Ltd*, E.C.R. 2007, 11-3523.

²⁶⁹ *Michelin* judgment, para. 7, judgment of the ECJ of 17 October 1989 in case 85/87 *Dox Benelux vs Commission*, para. 25; judgment of the CFI of 14 May 1998 in case T-308/94 *Cascades vs Commission*, E.C.R. 1998, II-925, para. 39; judgment of the CFI of 14 May 1989 in case T-348/94 *Enso Española*, E.C.R. 1998, II-1875, para. 80; judgment of the CFI of 11 December 2003 in case T-59/99 *Ventouris vs Commission*, E.C.R. 2003, II-5257, paras 117–118; judgment of the CFI of 11 December 2003 in case T-65/99 *Strintzis Lines Shipping vs Commission*, E.C.R. 2003, II-5433, paras 37–38; *Minoan Lines* judgment, paras 47–48; judgment of the ECJ of 15 October 2002 in joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P do C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij e.a. vs Commission*, E.C.R. 2002, I-8375, paras 85–87, 114, 118, 122, 126; judgment of the ECJ of 9 July 2009 in case C-511/06 P *Archer Daniels Midland Co. vs Commission*, available at: www.curia.eu; P.H. Nehl, *Principles of Administrative Procedure...*, pp. 72–73 and K. Kowalik-Bańczyk, *The issues of the protection...*, p. 126.

²⁷⁰ Judgment of the ECJ of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission*, para. 15, *Minoan Lines* judgment, para. 48.

²⁷¹ *Hoechst* judgment, para. 16; *AM&S* judgment.

As indicated by K. Kowalik-Banczyk, in the light of CEJU case-law, the EU right of defence comprises of numerous elements²⁷², namely the right to be heard²⁷³, the right to the protection of privacy²⁷⁴, the privilege against self-incrimination²⁷⁵, legal professional privilege²⁷⁶, the right to

²⁷² Detailed presentation of all components would go beyond the scope of this study which concentrates on the question of the undertakings' right to defence during the inspections. It is unquestionable that not all above elements are relevant at this preliminary stage of the competition proceedings.

²⁷³ Judgment of the ECJ of 23 October 1974 in case 17/74 *Transocean Marine Paint vs Commission*, E.C.R. 1974, 1063; judgment of the ECJ of 13 February 1979 in case 85/76 *Hoffmann-La Roche vs Commission*, E.C.R. 1979, 461; judgment of the ECJ of 26 June 1980 in case 136/79 *National Panasonic vs Commission*, E.C.R. 1980, 2033, para. 21, judgment of the CFI of 14 May 1998 in case T-352/94 *Mo och Domsjö vs Commission*, E.C.R. 1998, II-1989, paras 63, 73–74; judgment of the ECJ of 14 May 2005 in case C-65/02 P *ThyssenKrupp vs Commission*, E.C.R. 2005, I-6773, para. 92; judgment of the ECJ of 25 January 2007 in case C-407/04 P *Dalmine vs Commission*, E.C.R. 2007, I-829, para. 44. More see: J. Schwarze, *European Administrative...*, p. 1324 and literature cited, also p. 1237; P.H. Nehl, *Principles of Administrative Procedure...*, pp. 70–99; T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, 2nd ed., Wolters Kluwer, p. 114.

²⁷⁴ Some authors distinguish within the right to the protection of privacy, the right relating to documents and the right regarding property (“household inviolability”), see T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 94 et al. and K. Kowalik-Bañczyk, *The issues of the protection...*, p. 128.

²⁷⁵ Chiefly the *Orkem* judgment, paras 28–31; the judgment of the CFI of 8 March 1995 in case T-34/93 *Société Générale vs Commission*, E.C.R. 1995, II-545, paras 73–74; *LVM* judgment, paras 445–447, 449; judgment of the ECJ of 25 January 2007 in case C-407/04 P *Dalmine vs Commission*, E.C.R. 2007, I-829, paras 34–35; judgment of the ECJ of 7 January 2004 in joint cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P i C-219/00 P *Aalborg Portland e.a. vs Commission*, E.C.R. 2004, I-123, paras 65, 207–208; cf also recital 23 of the preamble of Regulation 1/2003. See also: T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 100 et al.; O.J. Einarsson, *EC Competition Law...*, p. 562; K. Dekeyser, C. Gaeur, *The New Enforcement System for Articles 81 and 82 and the Rights of Defence* [in:] B.E. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, pp. 558–559; P. Roth, *Ensuring that Effectiveness...*, pp. 639–640; B. Turno, *Prawo odmowy przekazania...*, p. 34.

²⁷⁶ *AM & S* judgment, para. 27; *AKZO Nobel* judgment. D. Waelbroeck, *Le droit de concurrence...*, p. 158; on this subject also see the ECtHR *Campbell* judgment; A. Andreangeli, *Joined cases T-125/03 and 253/03, AKZO Nobel Chemicals Ltd vs Ackros Chemicals Ltd vs Commission, Judgment of 17 September 2007, not yet reported (under appeal)*, EBLR 2008, p. 1141; J. Buhart, *La confidentialité des avis rendus par des juristes d'entreprise exerçant dans l'Union européenne*, JTDE No. 116/2005, pp. 33–39, W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition No. 26/2003, pp. 567–588; J. Fennelly, *Lawyers and Employed Lawyers: the Application of Legal Professional Privilege*, Irish Business Law No. 1/1998, p. 2; J. Carr, *Should In-House Lawyers have Lawyer-Client Privilege?*, International Business Lawyer

appoint a professional representative²⁷⁷, the right of access to the case files²⁷⁸, the right to respect the confidential character of some information and documents²⁷⁹ and the right to use one's own language by the entity accused of infringement^{280, 281}

Consequently it has become unquestionable, in the light of the settled case-law of the CJEU, that in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, *i.e.* competition law

No. 24/1996, p. 522; T. Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, Fordham International Law Journal No. 9/1985–86, p. 1; E. Gippini Fournier, *Legal Professional Privilege in Competition Proceedings before the European Commission: beyond the cursory glance*, Fordham International Law Journal No. 28/2005, p. 967; B. Vesterdorf, *Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues* [in:] B.E. Hawk (ed.), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, p. 701; G. Murphy, *Is it Time to rebrand legal professional privilege in EC Competition Law*, E.C.L.R. No. 3/2009, pp. 125–136. W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford, 2008, p. 19, is critical about the attempts to extend the *legal privilege* to in-house lawyers. See also D. Waelbroeck, *Le droit de concurrence...*, p. 158 ; B. Turno, *Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku CFI z 17.09.2007 r. w połączonych sprawach T-125/03 oraz T-253/03 Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd przeciwko Komisji Wspólnot Europejskich*, Europejski Przegląd Sądowy, No. 6/2008, p. 43.

²⁷⁷ Also known as the right to legal advice. Judgment of the ECJ of 21 September 1989 in joint cases 46/87 and 227/88 *Hoehchst vs Commission*, E.C.R. 1989, 2859, para. 16, judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137, para. 27, and, regarding a natural person – judgment of the ECJ of 17 December 1981 in case 115/80 *Demont vs Commission*, E.C.R. 1981, 3147, para. 11; T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 108 et al.

²⁷⁸ Judgment of the ECJ of 2 October 2003 in case C-194/99 P *Thyssen Stahl vs Commission*, E.C.R. 2003, I-10821, paras 30–31; judgment of the CFI of 15 March 2000 in case T-25/95 *Cimenteries CBR et al vs Commission*, E.C.R. 2000, II-508, para. 142. About history, P.H. Nehl, *Principles of Administrative Procedure...*, pp. 43–69...., treating this right as part of the right to defence. See also: N. Coutrelis, *La pratique de l'accès au dossier en droit communautaire de la concurrence: entre droits de la défense et confidentialité*, *Concurrences* No. 2/2006, pp. 66–78; S. White, *Rights of Defence in Administrative Investigations: Access to File in EC Investigation*, *Review of European Administrative Law* nr 1/2009, pp. 57–69.

²⁷⁹ The *Dalmine* judgment, paras 46–48; judgment of the ECJ of 25.01.2007, Case C-411/04 P *Salzgitter Mannesmann vs Commission*, [2007] ECR I-959, points 40–44; *Pergan Hilfsstoffe* judgment, para. 78; T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 110; R. Carlton, J. Lawrence, M. Mcelece, *Confidentiality and Disclosure in European Commission Antitrust Proceedings – The Case For Clarity*, *European Competition Journal* No. 2/2008, p. 401.

²⁸⁰ T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 186 et al.; J. Schwarze, *European Administrative...*, p. 1212 et al.

²⁸¹ K. Kowalik-Bańczyk, *The issues of the protection...*, p. 126–129.

proceedings relating to any infringement of Article 101 and/or 102 TFEU, observance of the right to defence constitutes a fundamental principle of EU law which must be respected even if the proceedings in question are administrative proceedings²⁸².

Nevertheless, at the same time the CJEU, in its jurisprudence, has stressed that it is important to preserve the effectiveness of competition investigations which are necessary for the Commission in carrying out its role as guardian of the Treaty in relation to competition matters. According to the CJEU, without such a power, it would be impossible for the Commission to obtain the information necessary to carry out an investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude²⁸³.

On the other hand, it has been acknowledged that although EU law confers wide powers of investigation on the Commission, the exercise of those powers is subject to conditions serving to ensure that the rights of the undertakings concerned are respected²⁸⁴.

It follows from the EU jurisprudence that the CJEU seeks to strike a balance between the protection of the undertakings' right to defence and the Commission's powers of investigation.

It is further noteworthy that the CJEU jurisprudence regarding the protection of undertakings' right to defence has subsequently been introduced into EU secondary legislation²⁸⁵.

The adoption of the CFR and its recognition as a legally binding act constituting primary law resulted in providing an additional source of the right to defence that may be nowadays identified also in provisions placed in Title VI "Justice", *i.e.* in Articles 47 and 48 CFR²⁸⁶. In Article 47 CFR certain components of the right to defence were introduced. More specifically, Article 47(1) provides for the right to an effective remedy²⁸⁷, 47(2) the

²⁸² *Shell* judgment, para. 82, *Hoffman-La Roche* judgment, para. 9, and judgment of the ECJ of 2 October 2003 in case C-176/99 P *ARBED vs Commission*, E.C.R. 2003, I-10687, para. 19.

²⁸³ *Hoechst* judgment, para. 27, *Minoan Lines* judgment, para. 52 and *SGL* judgement, para. 47.

²⁸⁴ *Dow Benelux* judgment, para. 39.

²⁸⁵ See for instance Regulation 1/2003 and Regulation 139/2004.

²⁸⁶ It is noteworthy that in Explications to the CFR references are made to particular provision of the ECHR.

²⁸⁷ The right to an effective remedy is analysed separately in Chapter XI "Remedies and judicial review".

right to a fair trial²⁸⁸ and 47(3) the right to legal aid²⁸⁹. Article 48(1) CFR provided for the presumption of innocence while Article 48(2) CFR guarantees the respect of the right to defence.

Paragraph 2 of Article 48 CFR stipulates namely that “(r)espect for the rights of the defence of anyone who has been charged shall be guaranteed”. The wording of this provision, in particular the use of the term “charged”, suggests that this right applies to criminal proceedings. With reference to the Explanations to the CFR, it has been stated that Article 48(2) CFR should correspond only to Article 6(3) EConHR, having strictly criminal context (*a contrario* to Article 6(1) EConHR). Furthermore, its placement in the title “Justice” may suggest that it is not applicable only to the court proceedings and thus cannot be used to assess the investigations undertaken by the Commission. Some authors note that the scope of the right to defence introduced in Article 48(2) is very narrow, being much narrower than the scope enshrined in CJEU case-law on the right to defence²⁹⁰. This stance might be justified by the fact that the CFR introduced a special provision which provides for guarantees in relation to the administrative proceedings that correspond to the scope of the right to defence. It is namely the above-mentioned Article 41, the right to good administration.

Nevertheless, one has to bear in mind the close connection of the CFR with the EConHR, emphasised by the above-mentioned Article 52 CFR according to which the meaning and scope of the rights corresponding to rights guaranteed by the EConHR have to be the same as those laid down by the latter act. It may follow that the ECtHR’s autonomous interpretation of “criminal charge”, based on the Engels criteria, should be applied and thus competition law proceedings leading to the imposition of fines should be covered by this Article. It should be further noted that Article 6 EConHR applies to different stages of proceedings²⁹¹, which also include the preliminary investigation. Therefore, one may argue that Article 48(2)

²⁸⁸ According to Article 47(2), “(e)veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”. One may notice that this provision corresponds to paragraph 1 of Article 41 CFR.

²⁸⁹ “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

²⁹⁰ E. Barbier de La Serre, *Procedural Justice in the European Community Case-Law concerning the Rights of the Defense: Essentialist and Instrumental Trends*, European Public Law 12(2006), p. 231; K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 145.

²⁹¹ Before the initiation of the court proceedings, during the court proceedings and after the completion of the court proceedings. P. Hofmański, A. Wróbel, *Komentarz do art. 6 EKPC...*, s. 252. K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 146.

should follow the same interpretation and be applied to competition law proceedings before the Commission and be related to CJEU case-law with regard to the right to defence in this context²⁹².

Bearing in mind the above discussion on which Article of the CFR should be applied in competition law proceedings, it has to be stressed however that, even after the entry into force of the Treaty of Lisbon²⁹³, the CJEU has still rarely referred to the CFR while considering the right to defence. More usually it deals with this right by referring to its jurisprudence recognising the right to defence as a general principle of EU law and by making reference to Article 6 ECHR which, in accordance with Article 6(3) TEU, both are to be respected within the EU²⁹⁴.

²⁹² K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 146.

²⁹³ *I.e.* obtaining by the CFR status of the EU primary law.

²⁹⁴ *Shell Petroleum* judgment, para. 82. See also *Hoffman-La Roche* judgment, para. 9, and *ARBED* judgment, para. 19.

Chapter III

Commission's powers of inspection

1. Introduction

Inspections constitute an effective means of gathering information and detecting the existence of competition law violations¹. As emphasised by the former Director-General of DG Competition, P. Lowe, the rise of cartel decisions results from a “considerable surge” in the numbers of dawn raids².

Contrary to the request for information, being written discovery of information, that is used rather to obtain specific information on contractual arrangements or an undertaking's market position, the inspections aim to elicit directly, *i.e.* at the undertakings' business premises, the evidence of the most serious competition law infringements, *e.g.* cartels³ and abuses of a dominant position⁴. Therefore, the inspections are of particular importance for competition law enforcement⁵.

¹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-072, p. 144.

² See N. Kroes, *The First Hundred Days*, 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005, International Forum on European Competition Law, Brussels, 7 April 2005, P. Lowe, *What the future for Cartel Enforcement*, Brussels, Speech of 11 February 2003.

³ Being called the “supreme evil of antitrust”. See XXXIII Report on European Policy, 2003, para. 717.

⁴ L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011, No. 8.01, p. 293. See also L. Ritter and W.D. Braun, *European Competition Law: A Practitioner's Guide*, 3rd ed., 2004, pp. 1069–1070.

⁵ See judgment of the ECJ of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission*, para. 26, the judgment of the CFI of 11 December 2003 in case T-59/99 *Ventouris Group Enterprises SA vs Commission*, E.C.R. 1999, II-5257, para. 121, judgment of the General Court of 11 December 2003 in case T-65/99 *Srintzis Lines Shipping SA*

Moreover, in the Commission's opinion, inspections carried out at the business premises actually have a deterrent effect on the undertakings concerned since they usually lead to immediate termination of the illegal conduct of the undertakings concerned⁶.

Before starting to analyse the Commission powers of inspection it has to be stressed that, in order to enable effective enforcement of competition law, the Commission has been empowered by Art. 105(1) TFEU to investigate⁷ alleged violations of Articles 101 and 102 TFEU and to make proposals in order to lead to cessation of the illegal conduct. Moreover, according to Art. 103(1) TFEU the Council is empowered to adopt Regulations and Directives aimed at enforcing the principles of Articles 101 and 102 TFEU.

Therefore, the far reaching Commission powers of inspection are currently specified in Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty⁸. This act, which replaced the former Regulation No 17/62⁹, provides for procedures governing the enforcement of EU competition law¹⁰ and constituted a part of the so called "Modernisation Package¹¹" introducing a substantial

vs Commission, E.C.R. 2003, II-543, para. 41 and the General Court of 11 December 2003 in case T-66/99 *Minoan Lines vs Commission*, E.C.R. 2003 II-5515, para. 51.

⁶ See XXXIII Report on Competition Policy, 2003, para. 28.

⁷ *Ex officio* or on demand of a Member State.

⁸ The original name: *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*, Official Journal L 1, 04.01.2003, p. 1–25; Hereinafter: the "Regulation 1/2003". The power of the Council to adopt Regulations and Directives in order to give effect to the principles of Arts 101 and 102 TFEU derives from Article 103(1) thereof.

⁹ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal 013, 21/02/1962 P. 0204–0211.

¹⁰ L. Garzanti, J. Gudofsky, J. Moffat, *Dawn of new era? Powers of investigation and enforcement under Regulation 1/2003*, *Antitrust Law Journal* Vol. 72/2004, p. 159.

¹¹ Including moreover:

- *Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty*, OJ L 123 of 27.4.2004, pages 18–24, hereinafter: the "Procedural Regulation";
- *Commission Notice on cooperation within the network of competition authorities*, OJ C 101 of 27.4.2004, pages 43–53;
- *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, OJ C 101 of 27.4.2004, pages 54–64;
- *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ C 101 of 27.4.2004, pages 65–77;

reform¹² in this field¹³, including the abolition of the old notification and exemption system¹⁴. Due to this change, in particular the fact that the Commission started to rely much more on own initiated investigations; a more proactive stance regarding competition law enforcement had to be adopted¹⁵ in order to reinforce its powers of investigation.

2. Commission investigations

The investigative process may be initiated at the Commission's own initiative or based on a third party complaint¹⁶ provided that there is a sufficient suspicion¹⁷ of a competition law infringement. The principal

– *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*, OJ C 101 of 27.4.2004, pages 78–80;

– *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ C 101 of 27.4.2004, pages 81–96;

– *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101 of 27.4.2004, pages 97–118;

¹² According to some authors even a “radical” one. See L. Garzanti, J. Gudofsky, J. Moffat, *Dawn of new era?...*, p. 207.

¹³ The reform was based on four main aims, *i.e.* (1) decentralisation of the competition law enforcement by obliging the national competition authorities (hereinafter: the “NCAs”) of the Member States to apply Articles 101 and 102 TFEU to cases in which trade between Member States might have been affected, (2) uniform application of the EU competition rules at all levels (*e.g.* under Article 16 of the Regulation 1/2003, the NCAs became obliged to take decisions consistent with the Commission's decisional practice), (3) introduction of mechanisms of close cooperation between the Commission and national competition authorities and courts and (4) reinforcement of the Commission's powers of investigation and enforcement instruments.

¹⁴ And the introduction of the direct application of Article 101(3) TFEU. The undertaking have no longer formal right to submit a prior notification in order to be granted by the Commission an individual exemptions. In cases where an agreement, that may seem to be anticompetitive, does not fall under the scope of one of the block exemptions, it is for the undertakings to assess individually whether it meet the conditions of an individual exemption provided in Article 101(3) TFEU.

¹⁵ M. Monti, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003.

¹⁶ Brought by any natural or legal person who has a “legitimate interest”. Article 7(2) Regulation 1/2003.

¹⁷ Developed *inter alia* from the observance of the market conditions, the information received from a whistle-blower (leniency application) or from the monitoring of the trade press.

investigative instruments¹⁸ granted to the Commission are requests for information and on-site inspections¹⁹. Since the powers serve different purposes, they may be exercised independently²⁰ and depending on the circumstances of a particular case, an inspection may follow a request for information or *vice versa* a request for information may be used to clarify some information obtained during an inspection²¹.

Under Article 18(1) of Regulation 1/2003 the Commission is entitled, informally²² or formally²³, to “require undertakings and associations of undertakings to provide all necessary information”. While simple requests are not binding²⁴, the decisions are binding and mandatory. Thus, the latter formal act must (1) indicate the legal basis and purpose of the request, (2) specify what information is required and fix the time-limit within which it is to be provided as well as (3) indicate the penalties provided in Articles 23 and 24 for non-compliance and the undertakings’ right to have the decision reviewed by the General Court²⁵.

3. Basic regulation and scope of Commission inspections

The general competence to carry out inspections of undertakings is provided in Article 20 (1) of Regulation 1/2003. It is noteworthy that the scope of legal persons being susceptible to inspection under this provision is

¹⁸ Introduced already in the former Regulation 17/62, albeit strengthened and expanded in the Regulation 1/2003.

¹⁹ The Regulation introduced, moreover, in Article 1 a power to take statements, nevertheless the Commission is entitled to use this tool only through voluntary requests. The Commission can neither adopt a binding decision to compel a statement nor impose penalties for refusal to grant an interview or for supplying incorrect information. Some authors argue that this stance may undermine the reliability of the evidence obtained under this provision. See L. Garzanti, J. Gudofsky, J. Moffat, *Dawn of new era?...*, p. 172.

²⁰ The request for information should not be regarded as the first step to be undertaken before deciding on the carrying out of an inspection. See the ECJ judgement of 26 June 1980 in case *National Panasonic UK vs Commission*, E.C.R. 1980, 2033, para. 13.

²¹ L.O. Blanco, *European Community Competition Procedure...*, No. 8.05, p. 297.

²² By a simple request.

²³ By a decision.

²⁴ *I.e.* no fine may be imposed for refusing to provided information requested informally. Nevertheless, if the undertaking had firstly voluntary agreed to participate and subsequently it supplied incomplete or misleading information, it may be fined under Article 23(1)a.

²⁵ Article 18(3) of the Regulation 1/2003. Commission’s decisions may be subject to review of the General Court, under Article 263 TFEU, *i.e.* the action for annulment.

limited to “undertakings and associations of undertakings”²⁶. Nevertheless, there is no restriction regarding the type of undertakings that the Commission is entitled to investigate. This means that an inspection can be conducted with regard to any undertaking, *i.e.* not only the one under suspicion of infringing competition law, but also to third-party undertakings, being the competitors or suppliers of the undertaking suspected, that may be in possession of the relevant information on an infringement of competition law²⁷. Furthermore, an inspection may serve as an instrument of sector enquires conducted under Article 17 of Regulation 1/2003²⁸. However, the use of this power must remain in accordance with the principle of proportionality, according to which the Commission cannot exercise its powers in an arbitrary or an excessive manner²⁹. Thus, this principle may be regarded as an actual limitation of the scope of undertakings inspected.

4. Types of Commission inspections

As emphasised by the Court of Justice of the European Union³⁰ “the conditions for the exercise of the Commission’s investigative powers vary according to the procedure which the Commission has chosen, the attitude of the undertakings concerned and the intervention of the national authorities³¹”. Therefore, in legal doctrine one may come across the distinction between three types of inspections carried out by the Commission under Article 20 of Regulation 1/2003, based on the level of coercion³².

²⁶ Irrespective of whether the undertaking concerned continue to conduct its business in relation to the relevant goods or services or have ceased this activity. Compare judgment of the ECJ of 21 January 1965 in case 108/63 *Merlini vs High Authority*, E.C.R. 1963/1. See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-074, p. 144.

²⁷ Nevertheless, the Commission rarely uses this possibility. See case *Fides*, OJ 1979, L57/33. In relation to undertakings being third-parties, the Commission rather submits a request for information. L.O. Blanco, *European Community Competition Procedure*, No. 8.05, p. 297.

²⁸ See *e.g.* The Commission press release of 16 January 2008: *Commission launches sector inquiry into pharmaceuticals with unannounced inspections*, IP/08/49.

²⁹ See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-074, p. 145.

On the principle of proportionality as a general limitation of the Commission’s powers of inspection see Chapter VIII “Principle of proportionality”.

³⁰ Hereinafter: the “CJEU”.

³¹ See judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux*, E.C.R. 1989, 3137, para. 41 et seq.

³² D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*,

Firstly, an inspection can be conducted on the basis of a simple written authorisation³³, which an undertaking is not required to comply with³⁴. Thus, the undertaking concerned is entitled to refuse access to its premises for which it cannot be fined³⁵. However, if the undertaking decides to submit to the inspection, it has to fully cooperate with the inspectors³⁶ otherwise the Commission may impose fines amounting to even 1 per cent of the undertaking's total turnover for non-compliance, including failure to produce requested documents or presentation of incomplete records or books or giving incorrect or misleading answers³⁷. It is nevertheless doubtful whether the Commission may seek the enforcement measures under Article 20(6). Such "ordinary inspections" are often announced

2012, Vol. 3, No. 6, 513. Some other authors, after Article 20 of the Regulation 1/2003, divide Commission inspection into two categories, *i.e.* 1) based on the Commission's simple written authorisation and 2) based on the Commission's decision. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-075, p. 145; L.O. Blanco, *European Community Competition Procedure*, No. 8.03, p. 295.

³³ Under Article 20 (3) of Regulation No 1/2003; Such authorisation has to specify "the subject matter and purpose of the inspection and the penalties provided for in Article 23" thereof. Moreover, it should indicate the name of the undertaking(s) under investigation as well as the name of the Commission inspectors authorised to carry out the envisaged inspection. The latter was explicitly required under Article 14(2) of the former Regulation 17/62. Although it has not been repeated by Article 20(3), this requirement is confirmed by the Commission's practice.

See the authorisation form on the Commission's website at: http://ec.europa.eu/competition/antitrust/legislation/inspection_authorisation.pdf

³⁴ See the Commission Answers to Written question No.677/79, OJ 1979 C310/30, in which the Commission confirmed that if no formal decision has been taken, undertakings are not obliged to submit to inspection or to supply information.

³⁵ Nevertheless, such refusal may easily result in the prompt adoption of a formal inspection decision by the Commission, namely by the Competition Commissioner being vested with such power. See *e.g.* the facts of case 5/85 *Akzo Chemie (Netherkands) and Akzo Chemie UK vs Commission*, E.C.R. 1986, 2585. Moreover, the compatibility of this stance with the basic principle of collegiality of the Commission decisions was confirmed by the CJEU since a decision regarding only preparatory inquiry may be adopted through delegation of powers. See the judgment of the ECJ of 23 September 1986 in case 5/85 *Akzo Chemie (Netherkands) and Akzo Chemie UK vs Commission*, para. 38 and *Hoechst* judgment, para. 44.

³⁶ It cannot subsequently try to limit the inspectors' actions etc.

³⁷ Article 23(1) (c) and (d) of Regulation No 1/2003; See *inter alia* decisions of the Commission in cases *Fabbrica Pisana*, OJ 1980 L75/30, and *Fabbrica Sciarra*, OJ 1980 L75/35. See also D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6, 513.

in advance, if there is no risk that alerting the undertaking may result in relevant documents being destroyed. Even though, this is a less intrusive type of inspection³⁸, the Commission is nevertheless obliged to give prior notice to the relevant NCA³⁹ about the envisaged inspection⁴⁰. It is further noteworthy that there is no two-stage procedure with regard to inspections and thus the Commission may start directly with the more coercive type⁴¹.

Secondly and what happens more often, is that an inspection may be ordered by the Commission which is granted a mandatory nature⁴². An inspection decision is adopted, on behalf of the Commission, by the Competition Commissioner in accordance with the delegation procedure⁴³. Such a decision, that should be taken after having consulted the relevant

³⁸ And the Commission may give a prior notice of its arrival to the undertakings concerned.

³⁹ *I.e.* the one of the Member State in whose territory the inspection will be carried out.

⁴⁰ See also judgment of the ECJ in case 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137, para. 33.

⁴¹ Order by a Commission decision. See judgment of the ECJ of 26 June 1980 in case *National Panasonic (UK) vs Commission*, E.C.R. 1980, 2033, paras 8–16, 28–30, judgment of the ECJ in case 85/87 *Dow Benelux vs Commission*, para. 33, and judgment of the ECJ of 2 October 2002, in case C-94/00 *Roquette Frères SA vs Directeur général de la concurrence, de la consommation et de la répression des frauds*, E.C.R. 2002, 9011, para. 77, in which the Court stated that “the Commission’s choice between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. (...) where an investigation decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality”.

⁴² Article 20 (4) of Regulation No 1/2003. The inspection decision may be taken in cases of serious competition law violation when the relevant evidence is not expected to be obtained under other procedures or on voluntary basis. The Commission choice may also depend on the undertaking’s. An inspection decision may for instance result from the fact that the undertaking concerned has failed to provide accurate and exhaustive explanations requested by the Commission in a request for information under Article 19 or refused to submit to a voluntary inspections under 20(3). L.O. Blanco, *European Community Competition Procedure*, No. 8.14, p. 304.

⁴³ This practice has been approved by the CJEU in *inter alia* the following AKZO judgment, para. 29–40, and orders in case 46/87 R *Hoechst vs Commission*, E.C.R. 1978 1549, para. 44–46 and case 85/87 R *Dow Chemical Nederland vs Commission*, E.C.R. 1987, 4367, para. 58.

NCA⁴⁴, must specify the subject matter and purpose of the inspection⁴⁵, the date of its beginning⁴⁶ as well as provide clear information on the possible penalties and fines for non-compliance⁴⁷ and the rights of the concerned undertakings. The Commission is required to draft the inspection decision with particular care and clearly state its reason⁴⁸. Furthermore, the inspection decision may be subject to review by the General Court, independently of whether a final decision on the substantive issue has been taken by the Commission at the conclusion of the investigation⁴⁹. Even though, inspections pursuant to a binding decision may as well be announced to the undertakings concerned, they usually require the element of surprise⁵⁰ and thus are carried out without prior notice⁵¹. The undertaking inspected is obliged to cooperate⁵², which according the General Court, should also

⁴⁴ *I.e.* the one of the Member State in whose territory the Commission envisages to carry out an inspection. This does not have to be done however in a formal way. If necessary and justified by the circumstances at stake, the Commission may for instance inform the NCA simply by telephone. See *Akzo Chemie* judgment.

⁴⁵ That actually set out the limits of the inspection and the inspectors actions. See more on these requirements for the content of the inspection decision in the Chapter V “Fishing expeditions”.

⁴⁶ That should be understood as a date from which the ordered inspection may begin and not as a precise time of its initiation. The carrying out of the inspection within a subsequent reasonable time, *i.e.* couple of days following the date fixed in the decision, does not invalidate the Commission’s powers of inspections. L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011, No. 8.16, p. 306.

⁴⁷ Provided for in Articles 23 and 24 of Regulation No 1/2003.

⁴⁸ Nevertheless, in the light of the case-law of the CJEU, the required degree of details regarding the statement of reasons may vary depending on case at stake. See, for instance, *Roquette Frères* judgment, in which the Court of Justice approved the broad product scope of suspected infringement indicated in the operative part of the inspection decision (paras 88–89). See also, L.O. Blanco, *European Community Competition Procedure*, No. 8.15, p. 304 and Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-043. With reference to the requirement to state the reasons see further Chapter V “Fishing expeditions”.

⁴⁹ What should also be indicate din the inspection decision. On the judicial control of the Commission decisions see Chapter XI “Remedies and judicial review”.

⁵⁰ So called dawn raids.

⁵¹ See for instance decision of the Commission in case *Graphite Electrodes*, OJ 2002 L100/1, para. 33.

⁵² Article 20(4) of the Regulation 1/2003: “Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission”. See also judgment of the ECJ of 18 October 1989 in case *Orkem vs Commission*, E.C.R. 1989, 3283, para. 27, and W.P.J. Wils, *Powers of Investigation and Procedural Rights ang Guarantees in EU Antitrust Enforcements*, World Competition. Law and Economics Review, 2006 Vol. 29, No. 1, 2.

be regarded as a prohibition of causing any obstruction to the inspection⁵³. Although, on the other hand, the undertaking is said to have the right to oppose⁵⁴ as well, it remains unclear how exactly it may successfully exercise it⁵⁵. It seems actually that the undertaking inspected is *de facto* threatened by a real possibility of imposition of significant penalties and fines for obstruction or non-cooperation⁵⁶ and effectively discourages it from trying to oppose even if its rights seem to be violated by the inspectors.

Thirdly, an inspection may be carried out with the assistance of national officials in order to overcome the undertaking's actual opposition or to use a precautionary measure⁵⁷ when "there are grounds for apprehending opposition to the investigation and/or attempts at concealing or disposing of evidence⁵⁸". This opportunity was introduced due to the lack of power of Commission inspectors to forcibly obtain access to the undertaking's premises⁵⁹ even if the inspection had been ordered by a Commission decision⁶⁰. In principle, it is for the Member States to determine autonomously the conditions under which the national authorities afford assistance to Commission officials under condition that the effectiveness

⁵³ See judgment of the CFI of 15 December 2010 in case T-141/08 *E.ON Energie AG vs Commission*, E.C.R. 2010 II-05761.

⁵⁴ See judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn vs Commission*.

⁵⁵ See *Deutsche Bahn* judgement. It is note worthy that undertakings may try to stay the conduct of inspection by appying for interim measures before the General Court under Article 278 TFEU. Nevertheless, it is in practice not possible that the General Court will rule on the issue before the termination of the inspection at stake. See more on interim measures in Chapter XI "Remedies and judicial review".

⁵⁶ See *e.g.* judgment of the General Court of 26 November 2014 in case T-272/12 *Energeticky a prumyslovy and EP Investment Advisors vs Commission*.

⁵⁷ Which is usually the case if such a court authorisation is required in the nation law. This stance was previously confirmed by the CJEU *inter alia* in judgments in cases *Hoechst*, paragraph 32, and *Roquette Frères* judgement, paras 73–74, judgment of the ECJ in case 85/87 *Dow Benelux vs Commission*, para. 43.

⁵⁸ Article 20 (7) of Regulation No 1/2003; See also *Roquette Frères* judgment, para. 74, and judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux*, E.C.R. 1989, 3137, paras 34, 35 43.

⁵⁹ *Hoechst* judgment makes this point clear by stating that the Commission agents acting under a decision ordering an inspection 'have, *inter alia*, the power to have shown to them the documents they request, to enter such premises as they choose, and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking' (para. 31).

⁶⁰ *Dow Benelux* judgment, para. 42.

of the Commission's action and the respect of undertakings' rights are ensured⁶¹. It has to be, however, noted that given its very coercive nature, a special procedural safeguard was provided since this type of inspection may be subject to prior judicial control exercised by the national courts, if national relevant law provides for it⁶². Nevertheless, such control may be regarded as illusory⁶³. Firstly, national judges are denied access to the Commission's investigation file⁶⁴ and, secondly, its scope is limited only to the question of authenticity of the Commission's decision and whether the "coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection"⁶⁵, *i.e.* whether the inspection does not appear "manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation"⁶⁶. The national court cannot ponder over the question of the necessity of the envisaged inspection⁶⁷. However, some authors consider this stance differently and argue that in such a case, a double judicial control of inspection decisions takes place, *i.e.* firstly, the national court rules on proportionality between the coercive measure envisaged and the seriousness of the infringement suspected and secondly the European Courts exercises a full judicial review over the legality of the inspection decision⁶⁸.

⁶¹ *Ibidem*, paras 44 and 45. The latter state that the Commission is required to respect the relevant procedural guarantees laid down by the relevant national law.

⁶² Some authors note that it is a codification of the special right granted to undertakings by the ECJ in judgements in cases *Hoechst* and *Roquette Frères*. L.O. Blanco, *European Community Competition Procedure*, No. 8.04, p. 296.

⁶³ On the standard of judicial review see more in the Chapter XI "Remedies and judicial review".

⁶⁴ Thus they must rely only on explanations provided by the Commission.

⁶⁵ This test was established in *Roquette Frères* judgment, para. 74 and subsequently introduced in Article 20(8) of Regulation No 1/2003.

⁶⁶ *Roquette Frères* judgment, para. 80.

⁶⁷ See *Dow Benelux* judgment, para. 46: the national judicial body "cannot in this respect substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the Court of Justice".

⁶⁸ See K. Dekeyser and C. Gauer, *The New Enforcement System for Articles 81 & 82 and the Rights of Defence* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2005, ch 23, p. 555.

5. Commission's powers of inspection

The expanded Commission powers of inspection⁶⁹ derive from Article 20(2) of Regulation 1/2003 and apply to the same extent to all the types of inspections mentioned above⁷⁰. According to this provision the Commission officials authorised to conduct an inspection are empowered to:

- (a) enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) take or obtain in any form copies of or extracts from such books or records;
- (d) seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (e) 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.

It is noteworthy that the majority of these competences had been already introduced in Article 14 of the former regulation, *i.e.* Regulation No 17/62, being the first regulation implementing Articles 101 and 102 of the TFEU⁷¹. Nevertheless, some extensions as well as codifications of the CJEU case-law developed under the former Regulation were introduced into Regulation 1/2003⁷². As to the new powers one may point out the power to seal premises, which enables the conduct of inspections over the course of several days and the extension of the power to seek explanations also on “facts ... relating to the subject-matter and purpose of the inspection”. Moreover, it should be stressed that under Regulation 1/2003 the “accompanying persons⁷³” have the same status as the Commission's inspectors while conducting inspections.

⁶⁹ Enabling the Commission to focus on the most severe competition law infringements, *i.e.* hard-core cartels and pervasive abuses of a dominant position. See L. Garzanti, J. Gudofsky, J. Moffat, *Dawn of new era?...*, p. 165; See also *Dow Benelux* judgment, paras 37 and 39.

⁷⁰ The sole difference regards the fact that, contrary to two others, undertakings may object to inspections based on simple writing authorisation. L.O. Blanco, *European Community Competition Procedure*, No. 8.29, p. 313.

⁷¹ At that time, 85 and 86 of the Treaty establishing the European Economic Community.

⁷² L.O. Blanco, *European Community Competition Procedure*, No. 8.02, p. 294.

⁷³ This term had not appeared in the former Regulation 17/62.

Besides the Commission's officials, *inter alia* the case *rapporteurs* and other inspectors⁷⁴, some further persons may take part in an inspection. Regulation 1/2003 lacks information on who can be appointed as accompanying persons, but usually it concerns officials from the NCA⁷⁵ or IT experts⁷⁶. Additionally Regulation 1/2003 does not specify the limits of their action. Nevertheless, in practice the accompanying persons take action only at the request and under the instructions of the head of team carrying out the inspection.

Furthermore, Article 21(1) introduced a new Commission power to conduct inspections of "other premises, land and means of transport", including the homes of staff members of the undertaking concerned⁷⁷.

Finally, it is also noteworthy in the context of inspections that Regulation 1/2003 changed the level of procedural fines, punishing any obstruction of the inspection, and the periodic payments that may be imposed by the Commission in order to compel the undertaking to submit to an inspection, that nowadays may amount to 1% of the total turnover of the undertaking concerned in the preceding business year or 5% of the undertaking's daily turnover⁷⁸ respectively. Under Regulation 17/62 the fines for procedural infringements were fixed at the maximal level of EUR 5000⁷⁹, and the periodic payments, fixed at the maximal level of EUR 1000 per day⁸⁰.

5.1. Power to enter any premises, land and means of transport of undertakings and associations of undertakings

The first power constituting a crucial starting point is the power to enter any premises, land and means of transport of undertakings and associations of undertakings. Under this term one should understand that it refers to any premises⁸¹ of the undertaking being highlighted in the inspection decision⁸².

⁷⁴ Their number depends on the scale of the inspection. It may be for instance the case that inspections will take place simultaneously in different Member States and then several inspectors will be required to participate.

⁷⁵ The relevant one as well as any other.

⁷⁶ That are needed to help gaining access to electronic information.

⁷⁷ See in greater detail below.

⁷⁸ Article 24 of Regulation 1/2003.

⁷⁹ Article 15 of Regulation 17/62.

⁸⁰ Article 16 of Regulation 17/62.

⁸¹ As well as any part of such premises.

⁸² Or authorisation.

Pursuant to the Commission⁸³, the stated undertaking's address in the relevant decision does not limit the inspection's geographical scope. Commission inspections are conducted on an *ad personam* basis⁸⁴. It is thus the undertaking's name, and not its address⁸⁵, that should be considered as essential and decisive. Inspectors are entitled to enter all premises belonging⁸⁶ to the undertaking, concerned even if they are located at another address, *i.e.* not the one specified in the decision⁸⁷. Even if this stance may raise some doubts as to legal certainty and the principle of proportionality, it should be stressed that the Commission may not be able to readily identify in advance all premises where relevant documents and other files or evidence that is being sought may be kept. Usually, inspections of premises are conducted based on information provided by the undertaking inspected⁸⁸, nevertheless it would harm the effectiveness of the investigation and the Commission's powers if the inspectors were only allowed to enter the premises named by the undertaking under investigation⁸⁹.

The CJEU emphasised in the *Hoechst* judgment⁹⁰ that "the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings⁹¹". Therefore, an undertaking under inspection cannot lawfully prevent the inspectors from entering to any of its premises by claiming inviolability of its premises⁹². The only exception regards the premises of external lawyers of the undertakings, even if it is suspected that relevant documents are kept there, such premises cannot be inspected due to the

⁸³ See the Commission position expressed in decision of the Commission of 14 October 1994 in case *AKZO Chemicals*, OJ 1994, L294/31, para. 17.

⁸⁴ L.O. Blanco, *European Community Competition Procedure*, No. 8.16, p. 305.

⁸⁵ That serves as a further element indicated in order to better identify the undertaking concerned.

⁸⁶ Owned or rented etc.

⁸⁷ See inspection decision in case *AKZO Chemicals BV*, OJ 1994 L294/31, para. 17, XXIV Report on competition Policy 1994, p. 376–377; See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-112, p. 162; L.O. Blanco, *European Community Competition Procedure*, No. 8.09, p. 299.

⁸⁸ For instance, the inspectors may ask the undertaking's representatives to see the books, business records etc. and, thus, be taken to the premises where these documents are being kept.

⁸⁹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-112, p. 162.

⁹⁰ See *Hoechst* judgment.

⁹¹ *Hoechst* judgment, para. 27.

⁹² *Ibidem*, paras 26–27.

protection of legal professional privilege⁹³. Nevertheless, the inspectors are entitled to enter premises of the undertaking's internal advisers, including any in-house lawyer.

Furthermore, as held in the *Hoechst* ruling, the right stipulated in Article 20(2)a grants the Commission the power to search which is not limited to items that were known or fully identified by the Commission before the inspection. On the contrary, the inspectors are entitled to look for new information and evidence. According to the ECJ, “(w)ithout such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude⁹⁴”.

Commission inspectors are, nevertheless, not entitled under Article 20(2) to forcibly enter the undertaking's premises. For that purpose, Article 20(6) provided that in cases of the undertaking's refusal to let inspectors in, the Commission has to request NCA assistance⁹⁵ in order to enforce the conduct of the envisaged inspection⁹⁶.

In the Commission's view, the inspector's powers are furthermore not limited only to any premises that formally belong to the undertaking concerned. More precisely, every space in which the undertaking's business is being carried out, irrespective of its formal status, should be considered

⁹³ See for instance judgment of the ECJ in cases 155/79 *AM&S vs Commission*, para and judgment of the CFI in case T-30/98 *Hilti vs Commission*, E.C.R.: 1991, II-1439, paras 13 and 14. E. Gippini-Fournier, *Legal Professional Privilege in Competition law proceedings before the European Commission: Beyond the cursory glance* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute (2004), chapter 24, pp. 587–658; B. Vesterdorf, *Legal Professional Privilege and The Privilege Against Self-incrimination in The EC Law: Recent Developments and Current Issues* [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005; J. Temple Lang, *The AM&S judgment* [in:] M. Hoskins, W. Robinson, *A true European – Essays for judge David Edward*, 2003, chapter 12, pp. 153–160; J. Joshua, *Privilege in multi-jurisdictional cartel investigations: Are European courts missing the point*, *Global Competition Review*, February 2004, pp. 39–41; W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, *World Competition* 2003, 26(4); B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, *YARS VOL.* 2012, 5(6), pp. 195–214. More on protection of the LPP see Chapter IX “Legal Professional Privilege”.

⁹⁴ *Hoechst* judgment, para. 27.

⁹⁵ From the wording of this provision results that the NCA is obliged to afford the Commission's inspectors the necessary assistance, e.g. call the police.

⁹⁶ See *Hoechst* judgment, paras 31-32.

as an undertaking's business premises⁹⁷. However, such interpretation *sensu largo* of the Commission powers would weaken the protection of fundamental rights, in particular the right to privacy⁹⁸.

The General Court in the *Minoan Lines* case⁹⁹, seemed to present a more restrictive approach. Although it was agreed that Minoan's offices located on the premises of ETA¹⁰⁰ should be regarded as the premises of the addressee of the inspection decision, this conclusion resulted from the fact that ETA was the representative¹⁰¹, which had full authority to act on behalf of Minoan and to whom Minoan delegated the conduct of its activities¹⁰². The General Court emphasised that "whilst ETA was legally a separate entity from Minoan, in its role as Minoan's representative and sole manager of those of Minoan's affairs which were the subject-matter of the investigation, its identity merged with that of its principal. Consequently, it fell under the same obligation to cooperate as that incumbent on its principal¹⁰³".

In this context, it should be noted that in the case where undertaking's books or other business records are suspected of being kept outside the premises of the undertaking inspected belonging to either natural or legal persons, *e.g.* external accountants, banks or employee homes, the Commission inspector cannot enter these premises basing on the initial inspection decision.

If the Commission wants to examine such documents, it should, firstly, request that the undertaking produces them pursuant to Article 18 of Regulation 1/2003¹⁰⁴. If such a request does not result in a successful outcome, the Commission may adopt a separate inspection decision under Article 21 of the Regulation, by fulfilling the requirements provided therein¹⁰⁵, in order to be entitled to carry out an extended search in other premises¹⁰⁶.

⁹⁷ See the Commission position expressed in *AKZO Chemicals* judgment, para. 17. The office in question belonged to the undertaking's director and was within the premises of a related undertaking.

⁹⁸ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-114, p. 163 who argue that the rights of entry should be narrowly constructed.

⁹⁹ See also *Minoan Lines* judgment of the CFI, subsequently upheld by the Court of Justice in case C-121/04 *Minoan Lines vs Commission*.

¹⁰⁰ Another undertaking.

¹⁰¹ Being another undertaking.

¹⁰² See *Minoan* judgment of the CFI, paras 69–70.

¹⁰³ See *Minoan* judgment of the CFI para. 77.

¹⁰⁴ *I.e.* by a request for information. This solution, less effective but less intrusive, was used mainly before the adoption of the Regulation 1/2003.

¹⁰⁵ For more details see point (f) below.

¹⁰⁶ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-114, p. 163 and L.O. Blanco, *European Community Competition Procedure*, No. 8.31-32, p. 314.

5.2. Power to examine the books and other records related to the business, irrespective of the medium on which they are stored

Article 20(2)b of Regulation 1/2003 confers power on Commission inspectors to examine (1) the books and other records related to the business, (2) irrespective of the medium on which they are stored.

It has been emphasised by the CJEU many times that this power is of particular significance for the preservation of the effectiveness of investigations and constitutes an indispensable instrument for the Commission in carrying out its role as guardian of the Treaty in competition matters. According to the CJEU, “the right of access would serve no useful purpose if Commission officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude¹⁰⁷”.

Firstly, it should be noted the scope of this power is wide since it actually covers all papers, being official or unofficial, provided that they relate to the undertaking’s business¹⁰⁸. According to the Commission this broad term should include *inter alia* various types of business records¹⁰⁹, minutes and notes made during internal or external meetings, any correspondence¹¹⁰, personal memoranda, diaries and photographic materials as well as personal contact details¹¹¹.

The restriction of the Commission’s power over business documents related to the scope of investigation set out in the inspection decision constitutes one of the most important limitations in collecting information

¹⁰⁷ See *Hoechst* judgment, para. 27 and *Ventouris* judgment, para. 122.

¹⁰⁸ See judgment of the ECJ in case 155/79 *AM&S vs Commission*, E.C.R.: 1982, 1575, para. 16 (argument *a contrario*).

¹⁰⁹ Regarding finances (invoices, balance sheets etc.), production, sales or travel. Moreover, minutes and records of the association’s management bodies, correspondence within a trade organisation or internal memoranda and records of meeting between trade organisations were considered as “business records”. See decision of the Commission of 27 October 1982 in case *Fédération Nationale de l’Industrie de la Chaussure de France (FNICF)*, OJ 1982, OJ L319/12.

¹¹⁰ Be it external or internal.

¹¹¹ *E.g.* telephone numbers. Records of telephone and fax numbers’ records are likely to reveal incriminating contacts, *e.g.* with competitors.

from undertakings¹¹². In order to be legally examined and seized a document must be at least indirectly related to the subject-matter of the investigation in question. It is clear that beside the strictly and directly related files, some other documents of a more general nature¹¹³ may also be necessary to understand the undertaking's conduct and to establish whether an infringement in competition law took place¹¹⁴.

It is argued that the business nature of a document may only be determined after a brief examination of the document in question by the inspectors¹¹⁵. If the document is found to be for instance of a private nature, or not falling under the scope of the investigation, as confirmed by the Commission¹¹⁶, the inspectors are allowed neither to examine it in a great detail nor to take a copy of it. This preliminary phase seems to be extremely significant for the effectiveness of the inspection since giving the undertakings full discretion on determining which documents are relevant in the light of the investigation and in consequence may be examined by the inspectors and could result in the possible impediment of the inspection by the undertaking concerned¹¹⁷. On the other hand, it seems that the undertaking cannot actually lawfully prevent inspectors from examining documents that in their opinion do not relate to the investigation¹¹⁸. The only action they may take without bearing a real risk of being fined is to register a protest into the record of the inspection in question¹¹⁹. In order

¹¹² Searching for unrelated documents would lead to conduct of a fishing expeditions. For more on this issue see Chapter V "Fishing expeditions".

¹¹³ *E.g.* regarding the business activities of the undertaking inspected in the relevant sector.

¹¹⁴ L.O. Blanco, *European Community Competition Procedure*, No. 8.37, p. 317.

¹¹⁵ *Ibidem*, No. 8.34, p. 315.

¹¹⁶ See decision of the Commission in case *CSM*, OJ 1992, L305/16 in which the Commission stressed "an obligation not to examine business records, or to stop examining such records, if they are obviously or in the Commission officials' opinion not related to the subject matter of the investigation".

¹¹⁷ L.O. Blanco, *European Community Competition Procedure*, No. 8.37, p. 317.

¹¹⁸ And they have to raise their challenges in the action against the inspection decision and to wait for the General Court ruling delivered in response to it. In case of annulment of the decision (entirely or partially), the documents collected within the annulled part would exclude from the file.

¹¹⁹ L.O. Blanco, *European Community Competition Procedure*, No. 8.38, p. 318. Such protest does not officially constitute a prerequisite of an action for annulment, nevertheless in some case the General Court reproached that the undertakings, having this opportunity to react, failed to register their protest. See for instance the judgment of General Court in case *Nexans* in part regarding the coping of entire hard drive for subsequent search in the Commission offices. Thus, it is highly recommended for the undertakings and their legal advisors to do so.

to eventually prevent the Commission from using the contested document, the undertaking inspected has to raise any challenge to the action against the inspection decision and wait for the General Court ruling delivered in response to it. In any case where the document in question had been obtained unlawfully, it will be excluded from the file¹²⁰.

The only exception existing in this regard relates to documents covered by professional legal privilege, for instance any correspondence between an undertaking and its external lawyer¹²¹. Despite the lack of relevant provision in Regulation 1/2003, the protection of these types of documents as well as its conditions and the so-called “envelope procedure” were established by the CJEU¹²².

According to the Commission the undertaking inspected, within its obligation to cooperate, is obliged to actively provide the inspectors with the documents requested. It means that the sole undertaking’s declaration that “all records are at the inspectors disposal” without providing information on where the requested documents are being kept will not fulfill this requirement. In its decision in the *Fabbrica Pisana* case¹²³, the Commission stated that “the obligation on undertakings to supply all documents required by Commission inspectors must be understood to mean not merely giving access to all files but actually producing the specific documents required¹²⁴”. The undertaking’s obligation to actively cooperate, *i.e.* by “making available to the Commission all information relating to the subject-matter of the investigation”, was moreover confirmed by the CJEU¹²⁵. The limits of such cooperation are set out by the overriding general principles of EU law, for instance fundamental rights¹²⁶. On the other hand, the Commission’s inspection cannot be limited to the documents provided actively by the undertaking concerned. It is obvious, that the inspectors are not required to base relevance solely on the documents being determined by the undertaking, but they are entitled to search further, nevertheless within the scope indicated in the inspection’s decision¹²⁷, for other evidence. It is

¹²⁰ See the *Hoechst* order, para. 34 and *Dow Chemicals Nederland* order, para. 17.

¹²¹ Contrary to the ECtHR case-law, according to the CJEU the internal lawyers, so called in-house lawyers, are not covered by the protection of the LPP. For more details see Chapter IX “Legal professional privilege”.

¹²² See for instance *AM&S* judgment and judgment of the CFI in case T-30/98 *Hilti vs Commission*, E.C.R.: 1991, II-1439, paras 13 and 14.

¹²³ See decision of the Commission’s in case *Fabbrica Pisana*, OJ 1980, L75/30.

¹²⁴ See the *Fabbrica Pisana* decision, para. 33. / IV.10.

¹²⁵ See *Orkem* judgment, para. 27.

¹²⁶ *Orkem* judgment, para. 28.

¹²⁷ On the prohibition of “fishing expeditions” see Chapter V “Fishing expeditions”.

in principle for the Commission¹²⁸ “to decide whether or not a document must be produced to it”¹²⁹. And, therefore, a refusal to make available requested documents may easily result in the imposition of a sanction, *i.e.* a periodic penalty payment¹³⁰.

Much depends however on the wording of the inspectors' request¹³¹. In any case of requests being formulated very precisely, *i.e.* “e-mail form X to Y dated 12 November 2012” or “contract between X and Y signed on 14 December 2012 regarding the purchase of product Z”, the undertaking, firstly, does not have any margin of manoeuvre and, secondly, knows exactly which document should actually be produced. However, in cases of a less precise request, *i.e.* “all correspondence regarding the sale of products Z between 2010 and 2013”, “all documents relating to the sale of products Z in France between 2010 and 2013” or “all business records between 2010 and 2013”, the situation is quite different. Firstly, if the undertaking is willing to hide some facts, it might try, while producing numerous files, not to include some particular incriminating document therein¹³². Secondly, if the undertaking concerned is willing to fully cooperate and effectively provide all documents requested, but is not really aware of committing the infringement for which it is actually suspected, it may actually find it difficult to effectively identify all relevant documents and to fully satisfy the Commission request in the fixed time period. If the latter situation occurs, in order to avoid any difficulties and misunderstanding that may bring about negative consequences for the undertaking, it should immediately inform inspectors about its difficulties and ask for further explanation or more precise instructions. In the light of Article 23(1)c of Regulation 1/2003, it is nevertheless always better and safer to produce too much than too little¹³³. Moreover, the effective and voluntary cooperation of the undertaking inspected by the Commission during the proceedings, including production of all relevant documents for the Commission, might

¹²⁸ Having nevertheless regard to the respect of the undertaking's right to defence, in particular the LLP and privilege against self-incrimination.

¹²⁹ See *AM&S* judgment, para. 17; Nevertheless there are exemption from this stance regarding for instance documents covered by the LPP. See also *Orkem* judgment, para. 15 and *Hoechst* judgment para. 31.

¹³⁰ See decision of the Commission in case *CSM-NV*, OJ 1992, L305/16.

¹³¹ See also See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-120, pp. 167–168.

¹³² And hoping that if the Commission becomes aware of the lack of some files, the undertaking would be able to justify itself by due to the significant volume of documents and difficulties in identifying all relevant documents in short period of time.

¹³³ Since in such case the Commission should not consider that the undertaking intentionally or negligently produced requested documents in incomplete form.

be subsequently regarded as mitigating circumstance while fixing the possible fine for any infringement of competition law and lead to a reduction of the final fine¹³⁴.

Secondly, it is argued that with the XXI century being an electronic age, the Commission's powers of inspection cannot be limited only to the paper documents. In order to maintain their effectiveness, electronically stored information must also be covered by the investigation. Therefore, Article 20(2)b of Regulation 1/2003 emphasises that inspectors are entitled to examine this kind of data regardless of the medium on which they are stored, for instance paperless, digital and storage items, e.g. laptops, mobile phones, CD-ROMs, DVDs, tapes, USB-keys, microfilms, back-up discs etc.

The Commission further stressed in its Explanatory Note that "the Inspectors are entitled to examine any books and records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies or extracts from such books or records. This includes the examination of electronic information and the taking of electronic or paper copies of such information"¹³⁵. Commission inspectors are namely allowed to search the IT environment and all types of storage media of the undertaking inspected¹³⁶. It is within the inspectors' discretion to decide whether such media will be kept by the inspectors until the end of the inspection or whether they will be returned earlier¹³⁷.

This stance moreover implies the undertaking's obligation¹³⁸ to provide for instance so called "administrator access rights" – support, regarding relevant passwords, access to and use of the equipment necessary for examination and copying of the content of certain media¹³⁹ as well as to deal with specific tasks, including temporarily blocking of individual email accounts, removing and re-installing hard drives from computers or

¹³⁴ See the Commission's *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, OJ 2006/C 210/02, point 29.

¹³⁵ See para. 9 of the the Commission's *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003*.

¹³⁶ See para. 10 of the Explanatory Note.

¹³⁷ For instance, after a forensic copy has been made. See para. 12 of the Explanatory Note.

¹³⁸ Being an important element of the undertaking's obligation to cooperate with the Commission.

¹³⁹ Some authors point out at the Commission derivative "right of reasonable access and use of necessary facilities for examination and copying (...) of such records". See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-116, p. 164

temporarily disconnecting running computers from the network¹⁴⁰. This may lead sometimes to contentious situations when the undertaking concerned refuses to provide access to the entire media or IT systems arguing that the data stored therein fall outside the scope of the inspection and therefore the inspectors are not allowed to examine them. The, unfortunately, more and more common practice regarding the copying of entire hard drives in order to search them afterwards in the Commission's offices especially raises doubts as to its necessity in the light of the protection of the undertaking's right to privacy. In order to avoid any possible fishing expeditions, the right to take copies and conduct subsequent searches should be limited only to the documents being selected as related (be it directly or indirectly) to the investigation at stake¹⁴¹.

Undoubtedly, computer materials play, nevertheless, a particularly important role in the more and more paperless business world. Nowadays, inspectors focus not only on looking for evidence in drawers containing paper files, but also on taking advantage of the new search technics, including "high-tech trawls¹⁴²" and "forensic IT tools¹⁴³". Therefore, IT experts¹⁴⁴ are usually included in any inspection team who have their own special software and/or hardware that serves to interrogate e-mailboxes and databases, search for hidden or meta-information and retrieve previously deleted items¹⁴⁵; the latter of which may especially bring out fruitful results and lead to the collection of important evidence¹⁴⁶.

With regard to the inspection's limitation to the undertaking's premises, it has to be stressed that such information may not necessarily be physically kept on the undertaking's premises, but has to be accessible therefrom. If the relevant data, saved within the undertaking's computer system, are stored on the undertaking's server that is located elsewhere, but the undertaking's employees have access to its content from the computers kept on the undertaking's premises, such data are considered to be falling within the

¹⁴⁰ See para. 11 of the Explanatory Note.

¹⁴¹ L.O. Blanco, *European Community Competition Procedure*, No. 8.35, p. 316. For more details see Chapters V "Fishing Expeditions" and VII "Subsequent electronic searches".

¹⁴² Through IT searches.

¹⁴³ See para. 10 of the Explanatory Note. These tools enable the Commission to search, recover and copy data whilst respecting the integrity of the undertakings' systems and data.

¹⁴⁴ Being the "accompanying persons".

¹⁴⁵ The inspectors are nevertheless entitled, upon their request, to use the undertaking's hardware. They cannot be however obliged to use only hardware provided by the undertaking inspected. See para. 11 of the Explanatory Note.

¹⁴⁶ See *e.g.* decision of the Commission in case *Airfreight.*, COMP/39.258.

scope of the inspection¹⁴⁷. Therefore, failure to provide the inspectors with access to such a system will probably be considered either as obstruction or as production of incomplete business records and lead to the imposition of a fine or a penalty on the undertaking inspected¹⁴⁸.

With general reference to the business records, no obligation for the undertaking to retain such data during the specified period of time was introduced in competition law regulation¹⁴⁹. Nevertheless, the CJEU held that, by virtue of a general duty of care, undertakings are actually “required to ensure the proper maintenance of records in their books or files of information enabling details of their activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings”¹⁵⁰. Moreover, if the Commission initiates an enquiry, *e.g.* submits a request for information¹⁵¹, the undertaking concerned is in particular obliged “to act with greater diligence and to take all appropriate measures in order to preserve such [potential] evidence”¹⁵².

It seems nevertheless that reality presents a different picture, *i.e.* if an undertaking has a special policy regarding retention of documents, its aim is rather to destroy any documents that may be legally susceptible¹⁵³. However, the undertaking should bear in mind that destroying documents, especially in an *ad hoc* or premature way, without having reasonable ground for such a practice may look suspicious from the Commission point of view¹⁵⁴. In the light of the relevant case-law, it will be namely for the Commission to consider whether the non-production of certain documents is justified¹⁵⁵. Even if, undertakings may think that if the incriminating documents are missing, the Commission will not be able to gather enough evidence in order to prove any infringement in competition law, such a strategy may be very risky and result in adverse consequences. Depending on the

¹⁴⁷ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-117, p. 165.

¹⁴⁸ L.O. Blanco, *European Community Competition Procedure*, No. 8.35, p. 316.

¹⁴⁹ As it is normally the case for the purposes of for instance tax law.

¹⁵⁰ See judgment of the CFI of 16 December 2003 in joined cases T-5/00 and T-6/00 *FEG & TU vs Commission*, E.C.R. 2003, II-5761, para. 87.

¹⁵¹ Under Article 18 of the Regulation 1/2003.

¹⁵² *Ibidem*.

¹⁵³ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-117, p. 165.

¹⁵⁴ See the ECSC decision *Stahlwerke Rochling Burbach*, OJ 1977, L243/20.

¹⁵⁵ The Commission should decide on the issue after having taken into account the provisions of the relevant legislation and drawn the appropriate conclusions from them. See judgment of the ECSC of 14 December 1962 in joint cases 5/62 to 11/62 and 13/62 to 15/62 *San Michele and others vs High Authority of the European Coal and Steel Community*, E.C.R. 1962, 849, p. 462.

circumstances of the case, the Commission may be nevertheless able to ultimately prove the suspected infringement, by, for instance, gathering the relevant evidence during an inspection of the premises of the undertaking's commercial partners, competitors etc. Moreover, according to the CJEU, the unjustified absence of relevant documents may constitute an aggravating factor in the assessment of the alleged infringement¹⁵⁶.

Finally, any destruction of documents which takes place after the investigation being initiated may be considered as an attempt to destroy the evidence and lead to the imposition of a fine on the undertaking concerned.

5.3. Power to take or obtain in any form copies of or extracts from such books or records

Undoubtedly, the main objective of an inspection is to obtain evidence regarding the suspected infringement in competition law indicated at by the inspection decision¹⁵⁷. The Commission inspectors are therefore entitled to take or obtain in any form copies of or extracts from the undertakings' books or records that they are empowered to examine under Article 20(2)b¹⁵⁸. It is noteworthy that documents and other data copied during an inspection are covered by professional secrecy under Article 28 of Regulation No 1/2003¹⁵⁹.

As a result of the wording of Article 20(2)c undertakings inspected are not obliged to provide the Commission with copies of the relevant documents upon the inspectors request. The inspectors are rather expected to take a pro-active approach, *i.e.* to take copies for themselves. Although such an obligation does not derive from the legislation, in practice undertakings inspected make their photocopying facilities easily available to the inspectors or even make the requested copies themselves¹⁶⁰. The reason therefore is threefold. First, it shows the willingness of the undertaking to cooperate with the Commission. Secondly, it reduces the duration of any

¹⁵⁶ See judgment of the CFI of 14 May 1998 in case T-347/94 *Mary-Melnhof vs Commission*, E.C.R. 1998, II-1751, para. 212. The missing document at stake was the minutes.

¹⁵⁷ L.O. Blanco, *European Community Competition Procedure*, No. 8.47, p. 327.

¹⁵⁸ *I.e.* the documents that relate directly or indirectly to the subject matter and purpose of the inspection.

¹⁵⁹ See the *Explanatory Note*, para. 16. Nevertheless it is in the undertaking interest to indicate clearly to the Commission which documents copied during the inspection contain business secrets and, thus, are of confidential nature and cannot be disclosed to third parties.

¹⁶⁰ If requested by the undertaking, the Commission should reimburse the cost of the copying. See the *Explanatory Note*, para. 15.

inspection¹⁶¹. Otherwise either the inspectors would have to take notes of relevant documents or, more probably, ask for a photocopier and wait for its delivery which would lead to an extension of the duration of the inspection's and further distortion of the undertaking's activities. Thirdly, while making copies, the undertaking inspected is able to verify which documents are central to the Commission's interest and are regarded as relevant by the inspectors as well as to list the documents and simultaneously make an extra copy which may be immediately¹⁶² analysed by the undertaking's lawyers in order to assess the existing risks and to prepare an appropriate defensive strategy¹⁶³.

Nevertheless, the undertaking inspected is subsequently provided with a copy¹⁶⁴ of all the documents and any other data that were copied by the inspectors and is entitled to demand a signed list of the copies and extracts taken by inspectors during inspection¹⁶⁵.

Like in the case of the power to examine the books and other records, it is in principle at the Commission's discretion to decide which data should be copied. Nevertheless, the Commission's choice is limited by the matter-scope and purpose of the inspection, the principle of proportionality as well as legal professional privilege¹⁶⁶. As confirmed many times by the CJEU, the inspectors, while carrying out an unannounced inspection, are entitled to search for, examine and seize only those business records that can be relevant to the proceedings at stake¹⁶⁷.

It was acknowledged by the Commission that if the undertaking inspected considers that the inspectors take copies of documents that are not related to the subject-matter specified in the inspection decision, it may ask the Commission to return the copies in question¹⁶⁸. Nevertheless, the Commission is not obliged to do so. Moreover, according to the Commission's Notice on access to the file¹⁶⁹, "the Commission may collect a number of documents,

¹⁶¹ The undertakings employees that are used to operate the type of photocopying devices used by the undertaking, will skilfully and quickly make the requested copies.

¹⁶² *I.e.* before receiving the Commission's Statement of Objection.

¹⁶³ In any case undertakings are strongly advised to always manage to have its own copy of each document that was copied by the Commission inspectors.

¹⁶⁴ Either in electronic or in paper format.

¹⁶⁵ See the *Explanatory Note*, para. 15.

¹⁶⁶ For more on these issues see the Chapters V "Fishing expeditions", VIII "Principle of proportionality" and IX "Legal professional privilege".

¹⁶⁷ See for instance *Roquette Frères* judgment, para. 48.

¹⁶⁸ See decision of the Commission in case *CSM*.

¹⁶⁹ Commission *Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, OJ 2005, C325/07.

some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question¹⁷⁰. The so-collected irrelevant documents “may” be returned to the undertaking concerned¹⁷¹. Thus, the Commission is free to keep the documents that were obtained unlawfully¹⁷². Furthermore, even if an action for annulment is successfully brought before the General Court, it is not entitled, under current EU law, to order the Commission to return such documents¹⁷³.

Further problems arise if the inspectors make forensic copies of the entire media, e.g. computer hard drives, in order to examine the files subsequently in the Commission offices¹⁷⁴. On the one hand, this solution constitutes a mechanism to shorten the time period of the occupation of the undertaking's premises. On the other hand, it is obvious that by copying the entire drive, the inspectors also make copies of documents falling outside the scope of the inspection or being covered by legal privilege. Thus, the Commission actually seizes data that it is not allowed to. This practice raises moreover doubts in relation to the principle of proportionality¹⁷⁵. Unfortunately, the CJEU avoids making pronouncements on the issue¹⁷⁶.

5.4. Power to seal any business premises and books or records for the period and to the extent necessary for the inspection

Under Article 20(2)d Commission inspectors are empowered “to seal any business premises and books or records for the period and to the extent necessary for the inspection”. This new power¹⁷⁷, regarding the means of

¹⁷⁰ Commission's Notice on access to file, para. 9.

¹⁷¹ And in such case will no longer constitute part of the case's file.

¹⁷² And it seems that the Commission is rather unlikely to return such documents. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-122, p. 169.

¹⁷³ Under Article 266 TFEU it is for the Commission to draw the consequences of the annulment. See judgment of the General Court of 14 November 2012 in case T-135/09 *Nexans vs Commission*.

If undertaking is willing to receive the irrelevant documents from the Commission, and the Commission does not do so spontaneously or following the undertaking's request, the undertaking concerned has to bring an action for failure to act under Article 264 TFEU.

¹⁷⁴ For more on this issue see Chapter VI “Subsequent electronic searches of copied hard drives”.

¹⁷⁵ See judgment of the ECtHR of 3 July 2012 in case *Robathin vs Austria*, Application No. 30457/06.

¹⁷⁶ See *Nexans* judgment.

¹⁷⁷ It has to be stressed that the seal procedure had been used before by the Commission informally or the Commission's inspectors relied on such power conferred on the NCAs

preserving evidence, enables inspectors to conduct inspections over the course of several days. According to the Commission this extension follows from the fact that any inspection cannot be carried out beyond the normal working hours of the undertakings concerned constitutes a limitation of the inspection's duration¹⁷⁸. Previously Commission inspections tended to be carried out mostly over the course of one day and rarely lasted for a couple of days. Any overnight extension brought the risk of losing potentially relevant evidence since EU regulation contained no effective safeguards in this regard and the undertaking inspected had the possibility to remove or destroy any incriminating documents during the night¹⁷⁹.

Nowadays sealing premises, book or records guarantees that relevant documents cannot be secretly removed and therefore the inspection may take more time. However, a limitation was introduced in recital 25 of Regulation 1/2003 that states: "Seals should normally not be affixed for more than 72 hours"¹⁸⁰. It is important to stress that in parallel Article 20(2)d, Article 23(1)e provides for the possibility to impose a fine on the undertaking inspected for breaking or damaging a seal. This constitutes undoubtedly a factor that highly discourages undertakings from attempting to enter a sealed premises.

Similar to the previous provisions, also in the context of power to seal the term "books or records" should also be interpreted as largely, covering computers and/or other electronic devices¹⁸¹ and storage media and furniture where documents are kept (*e.g.* filing cabinets).

Once a seal is fixed, the inspectors will record this in a minute and take a picture of the seal in order to be able to prove any subsequent change in the condition of the seal or breaches, if they occur.

As noted above, any breach or even an undertaking's attempt to tamper with the seal will most probably lead to the imposition of a fine under Article

by the national law. Nevertheless, its formal recognition provided more secure and appropriate basis therefor. See L.O. Blanco, *European Community Competition Procedure* No. 8.02, p. 294; A. Riley, *EC Antitrust Modernisation: the Commission Does Very Nicely-Thank You! Part One: Regulation 1 and the Notification Burden*, ECLR 2003, 604, 608 No. 20.

¹⁷⁸ L.O. Blanco, *European Community Competition Procedure*, No. 8.49, p. 328.

¹⁷⁹ Unless some preventive instruments were introduced in the national legislation and was applied by the relevant NCA.

¹⁸⁰ To the best of my knowledge there has not been any cases yet in which undertaking was complaining that this guidance was not respected by the inspectors.

¹⁸¹ However, if such devices constitute only means of access to data stored elsewhere (for instance on the server), their sealing may not fully prevent the relevant documents from being secretly removed.

23(1)e. The serious nature of the consequences for the undertaking of such non-compliance was demonstrated in a case against E.ON¹⁸², which was the first case dealing with a fine imposed for the breach of a Commission's seal.

The facts of the case related to a Commission's inspection carried out at E.ON's premises during which a seal, affixed to a door at the undertaking's premises where relevant documents had been kept¹⁸³, was disturbed¹⁸⁴. Although the undertaking denied having attempted to open the door¹⁸⁵, a detailed investigation, including the reports of the technical experts presented by both sides and an explanation from the seal manufacturer, strengthened the Commission's suspicion. Consequently, a fine of €38 million was imposed on the undertaking for the breach of the seal¹⁸⁶. In response, E.ON. brought an action for the annulment of the Commission decision which was dismissed by the General Court¹⁸⁷, after having analysed in detail the technical evidence. The General Court held moreover that it was the appellant's responsibility to ensure that the seal remained undisturbed¹⁸⁸. Thus, even supposing that the seal might have been damaged by a detergent used by a cleaner, such a circumstance would not exonerate the undertaking from being negligent.

Subsequently, the undertaking appealed against the ruling of the General Court before the Court of Justice who dismissed the appeal as well¹⁸⁹. E.ON had argued that the Commission failed to prove that the undertaking had intentionally or negligently breached the seal. According to E.ON. the "void" marks which appeared on the seal could result from many other factors, like the age of the seal¹⁹⁰, the use of abrasive cleaning products,

¹⁸² See the following rulings: decision of the Commission in case COMP/39.326 *E.ON Energie*, OJ 2008 C240/6, *E.ON. Energie* judgment of the General Court and judgment of the Court of Justice of 22 November 2012 in case C-89/11 P, *E.ON Energie AG vs Commission*.

¹⁸³ In order to examine them the next day.

¹⁸⁴ Which suggested that the door had been opened. Nevertheless, it was not possible to prove this suspicion nor the removal of documents from the room in question.

¹⁸⁵ And presented various technical hypotheses explaining why the seal might have been disturbed.

¹⁸⁶ Decision of the Commission in *E.ON Energie*.

¹⁸⁷ *E.ON. Energie* judgment of the General Court. The General Court upheld both the decision as well as the amount of the fine fixed by the Commission.

¹⁸⁸ See the *E.ON. Energie* judgment of the General Court, para. 260.

¹⁸⁹ *E.ON Energie* judgment of the Court of Justice.

¹⁹⁰ E.ON. Pointed in particular out at the fact the seal had exceeded its maximum shelf life, and therefore the probative value of the 'VOID' messages on it should be called in question.

humidity, vibration, or incorrect affixing of the seal by the Commission¹⁹¹. The applicant further alleged that it constituted the undue reversion of the burden of proof by the General Court¹⁹². Moreover, the in the undertaking's view, the fine imposed was disproportionate¹⁹³.

The Court of Justice rejected all arguments raised by E.ON. Firstly, it was held that since it was determined by the Commission inspectors, based on the evidence, that the seal had been broken, the General Court¹⁹⁴ was entitled to consider that in order to challenge this fact the undertaking concerned should present contrary evidence. It was emphasised that the Commission would be completely deprived of the effective use of seals, if the undertaking's arguments, challenging the probative value of a seal by only invoking the possibility that "it might have been defective".

With reference to the question of the proportionality of the imposed fine, the Court of Justice underlined the particular seriousness and far-reaching consequences of the infringement consisting of a breach of a seal during the Commission inspection. Thus, the fine imposed is to ensure the deterrent effect of the penalty. The fine in question cannot be regarded as excessive since it represented (only) 0.14% of E.ON Energie's annual turnover¹⁹⁵.

The rulings in the E.ON. case acknowledged the importance of the undertaking's obligation to cooperate with inspectors as well as the very strict approach of the EU Courts in relation to obstructions of Commission inspections, in particular to the breach of a seal, and to preservation of the deterrent effect of fines for non-compliance. Although the burden on proof that the seal was breached "intentionally or negligently" by the undertaking inspected relies on the Commission, it is in practice sufficient for the Commission to demonstrate, *e.g.* by presenting photographic evidence, that

¹⁹¹ See *E.ON. Energie* judgment of the Court of Justice, para. 66 et seq.

¹⁹² As well as breach of the principle of the presumption of innocence and principle *in dubio pro reo*.

¹⁹³ According to E.ON., the fine should have been reduce since (1) the Commission had adduced no evidence to show that the door of the room in question had actually been opened or that documents had been removed and (2) the Commission itself created the situation of uncertainty concerning the condition of the seal at issue, which was liable to mislead and was impossible to clarify after the event (what should be regarded as the attenuating circumstance). See para. 119 et seq. of *E.ON. Energie* judgment of the Court of Justice.

¹⁹⁴ For whom it is to appraise the value of the evidence produced to it.

¹⁹⁵ While the fines imposed by the Commission may represent up to 1% of its total turnover in the preceding business year. See Article 23(1) of the Regulation 1/2003. See paras 126, 130 and 133 of *E.ON. Energie* judgment of the Court of Justice.

the seal was affixed or disturbed in the absence of Commission inspectors¹⁹⁶. The undertaking's liability resulted from the fact the undertaking inspected is obliged to take all precautions in order to prevent the seal from being disturbed or affixed. Thus, once the Commission submits the evidence proving the breach of a seal, it is for the undertaking to rebut it¹⁹⁷. It seems that only in the case of exceptional circumstances, *i.e. force majeure*, the breach of a seal may be exonerated¹⁹⁸.

The subsequent cases in which other fines were imposed on undertakings for breaking the seal confirmed that the Commission is very serious in fining undertakings for this type of obstruction and it will continue to pursue any obstructive conduct of undertakings which occur during inspections¹⁹⁹.

5.5. Power 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

Finally, Article 20(2)e grants the Commission inspectors the “power 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”. It is argued that the main purpose of seeking oral explanations is to facilitate the conduct of inspections and to ensure the better performance of the Commission inspectors²⁰⁰. Therefore it may be regarded as an “ancillary right”²⁰¹. Nevertheless, this power is likely to have far-reaching implications since it may result in the undertaking under inspection actually being compelled to provide oral evidence or, in case of its refusal, being fined for non-compliance.

¹⁹⁶ The undertaking's liability results from the fact the undertaking inspected is obliged to take all precautions in order to prevent the seal being affixed or disturbed.

¹⁹⁷ I.e. the burden of proof is shifted to the undertaking concerned.

¹⁹⁸ See decision of the Commission of 24 May 2011 in case COMP/39.796 *Suez environnement – breach of seal*.

¹⁹⁹ See for instance *Suez environnement* decision, by which the Commission imposed on Suez the fine of €8 for breach of a seal during a dawn raid. In this case the finding of the undertaking's negligence was based on the fact that Suez did not lock the sealed door. See para. 73.

²⁰⁰ L.O. Blanco, *European Community Competition Procedure*, No. 8.50, p. 328.

²⁰¹ *Ibidem*, No. 8.50, p. 328. See also *Dealing with the Commission- Notification, complaints, inspections and fact-finding powers under Articles (81) and (82) of the EEC Treaty*, European commission, Bruxelles / Luxembourg 1997, point 5.6, pp. 39–40.

Even though this power already existed under Regulation 17/62, the wording of the former legislation was very laconic since inspectors were entitled “to ask for oral explanations on the spot”. Therefore, the scope of this power was unclear, *i.e.* raised doubts as to whether inspectors were entitled to ask for whatever information they wanted to or whether the questions asked on the spot were to be restricted for instance to explanations in relation to documents examined and any other questions were to be submitted under an official request for information²⁰². The latter option seemed to be acknowledged by the Commission itself and confirmed by the ECJ in the case against *National Panasonic*²⁰³. The Commission acknowledged that the power to ask questions on the spot should not be regarded as the means to avoid procedural guarantees introduced in relation to the request for information and therefore the inspectors may ask for explanations regarding “specific concrete questions arising out of the books and business records which they examine, which has nothing to do with the power to ask general questions requiring careful consideration and perhaps gathering of information by the firm”²⁰⁴. The explanation required by the inspectors could regard *inter alia* practical matters, such as layout of offices or organisation of files or could arise directly from the content of documents being examined on the spot. Nevertheless, the question as to whether the inspectors are entitled to ask for explanations also regarding in general the ongoing investigation was not dealt with in the *National Panasonic* judgment²⁰⁵.

Regulation 1/2003 provided for needed precision and actually extended the scope set out in the *National Panasonic* case²⁰⁶. Nowadays it is clear that during inspections Commission inspectors are allowed to ask for explanations regarding facts and documents that relate to (1) the subject matter as well as (2) the purpose of the inspection. Some commentators note that the scope of the questions is quite broad since the Commission is likely to have stated the purpose of inspection in very general terms²⁰⁷. Moreover, the questions do not have to relate to the undertaking inspected. It would seem thus

²⁰² See *e.g.* I. Van Bael, *EEC Antitrust Enforcement and Adjudication as seen by Defence Counsel*, *Revue Suisse du Droit International de la Concurrence* 7/1979, p. 15.

²⁰³ See *National Panasonic* judgment that refers to the Commission Rejoinder, p. 2041.

²⁰⁴ See *National Panasonic* judgment, p. 2042, para. 15.

²⁰⁵ L.O. Blanco, *European Community Competition Procedure*, No. 8.51, p. 329.

²⁰⁶ *Ibidem*, No. 8.02, p. 294.

²⁰⁷ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-129, p. 172 who refer for instance to the terms of the inspection decision in case *Roquette Frères*; See *Roquette Frères* judgment, paras 10–11. See also L.O. Blanco, *European Community Competition Procedure*, No. 8.02, p. 294.

that they may concern the facts revealed by the undertaking suspected of participating in the infringement of competition law or a document found during an inspection at the premises of another undertaking, as long as this regards the subject-matter or purpose of inspection. Some authors point out the existing risk of using this power by inspectors for the purposes of conducting interrogation is of too general a character²⁰⁸.

Nevertheless, if Article 20(2)e of Regulation 1/2003 is compared with Article 19(1) thereof²⁰⁹, one can easily notice that a wider term is used to determine the scope of interview in the framework of the power to take statements. Since the information obtained under Article 19 of Regulation 1/2003 may relate to “the subject matter of an investigation”, the questions asked during the inspection under Article 20(1)e should concentrate on the inspection being carried out, *i.e.* circumstance at stake, and not on the investigation in general. However, it seems that facts or documents, to which inspectors questions may be relate, do not have to be disclosed or produced by the undertaking being inspected²¹⁰.

Moreover, it has to be stressed that the undertaking's representative, being questioned during the inspection, is actually granted no time to carefully prepare an answer. Therefore, in accordance with the principle of proportionality, the questions asked by the inspectors on the spot cannot be of such a nature that answering them requires either deep reflection, collecting specific data or even conducting an internal investigation²¹¹. The Commission had already acknowledged in the context of Regulation 17/62 that this “power should not be used to pressure the officials of a firm into making oral admissions which they would not make if they had the time for reflection afforded them by a written request under Article 11 (currently Article 18)²¹²”.

When nevertheless an excessive question is asked, the undertaking's representative cannot be expected to provide immediately exhaustive explanations and thus the Commission is not allowed to impose a fine under Article 23(1)d for providing “an incorrect or misleading answer”.

²⁰⁸ L.O. Blanco, *European Community Competition Procedure*, No. 8.51, p. 329 and L. Jones, B. Sufin, *EC Competition Law*, 2004, p. 1070.

²⁰⁹ “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.”

²¹⁰ L.O. Blanco, *European Community Competition Procedure*, No. 8.51, p. 329.

²¹¹ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-129, p. 172.

²¹² *Dealing with the Commission...*, point 5.6, p. 40.

Fining any undertaking inspected in such circumstances would definitely constitute an abuse of the Commission's powers. In order to prevent such abusive fining Article 23(1)d provides for a procedural safeguard. It namely states that when a member of the undertaking's staff gives "an incorrect, incomplete or misleading answer", the fine may be imposed only if the undertaking concerned fails "to rectify within a time-limit set by the Commission" this defective answer. This special extension allows the undertaking inspected to carry out research after the termination of the inspection in order to provide appropriate explanations. Moreover, pursuant to Article 4(3) of the Procedural Regulation the same safeguard applies when explanations were provided by a staff member who is not authorised to give statements on behalf of the undertaking²¹³. However, recital 4 to the Procedural Regulation states that "The explanations given by a member of staff should remain in the Commission file as recorded during the inspection". This stance is questionable since, even though the initial misleading answer cannot constitute as a basis for imposing a fine on the undertaking inspected under Article 23(1)d, it seems that it may be nevertheless subsequently used by the Commission as evidence in finding an infringement in competition law.

It is noteworthy that the power to ask for oral explanations encompasses moreover a particular risk that the inspectors might try to benefit from the oral answers in order to obtain an incriminating confession regarding involvement in a suspected infringement. The privilege against self-incrimination is of immense importance in this context since it sets the limits of this power. Nevertheless, its scope within EU competition law is limited. As established in Recital 23 of Regulation 1/2003 "(w)hen complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement".

This stance results from the case-law of the CJEU that did not acknowledge the absolute right of undertakings²¹⁴ to remain silent. Even though it's incumbent on the Commission to prove the undertaking's involvement in a violation of competition law and the Commission cannot compel the undertaking to admit it, pursuant to the CJEU, the Commission

²¹³ This provision clearly provides for an obligation of the Commission to set a time limit for rectification.

²¹⁴ Including their employees.

“is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and if necessary such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or against another undertaking, the existence of anticompetitive conduct”²¹⁵.

It has to be further stressed that the inspectors' power to records the answers provided by the undertaking's representatives or staff members was further specified in the Procedural Regulation. Pursuant to Article 4 thereof explanations given in this context may be “recorded in any form”²¹⁶. Subsequently, a copy of any such recording has to be available to the undertaking concerned. This provision is of immense importance for the undertaking since, as stated above, it enables the verification of the explanations provided and, in the case of defective answers, their rectification, amendment or supplement.

It is noteworthy that under the relevant competition law regulations²¹⁷ the responsibility never rests on the individual, *i.e.* representatives or members of the undertaking's staff. Any sanction, be it a fine or periodic penalty, cannot be imposed on natural persons. Only undertakings are liable for the behaviour of individuals during an inspection²¹⁸.

The wording of Article 20(2)e suggests that the Commission is free to choose the addressee of its questions. Nevertheless, since the undertaking

²¹⁵ See *Orkem* judgment, paras 26-41. See the subsequent judgments of the ECJ in cases: 27/88 *Solvay&Cie*, E.C.R. 1989, 3355, paras. 23-37, C-60/92 *Otto BV vs Postbank NV*, E.C.R. 1993 I-05683, paras 11-12, C-301/04P *SGL Carbon*, E.C.R. 2006, I-5915, paras. 42-49 and the judgments of the General Court in cases: T-34/93 *Société Générale*, E.C.R. 1993, II-545, para. 74, T-305/94 *Limburgse Vinyl Maatschappij*, E.C.R. 1999, II-931, para. 448, T-112/98 *Mannesmannröhren-Werke*, E.C.R. 2001, II-729, paras. 65-67, 77-78 and joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, E.C.R. 2004, II-1181, para. 403. See also W.P.J. Wils, *Self-incrimination...*, pp. 574-578; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, pp. 196-197, B. Turno, *Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości* (2009) 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny*, pp. 31-48; M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organemochrony konkurencji*, Warsaw 2011, pp. 187-191. For more detail on the question of privilege against self-incrimination see Chapter X “Privilege against self-incrimination”.

²¹⁶ Article 4(1) of the Procedural Regulation.

²¹⁷ Regulation 1/2003 and Procedural Regulation.

²¹⁸ Nevertheless, national relevant regulations may provide for penalties of criminal or administrative nature for individuals. See, for instance, J.D. Cooke, *General Report* [in:] *The Modernization of EU Competition Law Enforcement in the EU*, FIDE 2004 National Reports, pp. 645-646.

inspected knows best which person is qualified to provide exhaustive explanations, the inspectors may follow the undertaking's recommendations.

In the Commission decision in the case against *Fabbrica Pisana*, the Commission acknowledged that "it is not for the Commission's inspectors to assess or dispute the competence or extent of knowledge of the representatives of the undertakings they are investigating" and therefore the responsibility for designating the appropriate representatives rests on the undertaking inspected²¹⁹. It is in the interest of both sides, *i.e.* the inspectors as well as the undertaking inspected, to provide accurate explanations²²⁰. Thus, the undertakings inspected, being under their duty to actively cooperate, should assign those employees who are of sufficient seniority and who have the best knowledge of the undertaking's business, the task of dealing with the inspectors' questions²²¹.

Moreover, if the questions are addressed to the person nominated by the undertaking, the inspectors may be sure that this member of staff is undoubtedly authorised to provide explanations on behalf of the undertaking inspected²²². Nevertheless, if the name of particular employee appears on a document examined by inspectors, it seems logical that questions related to this document will be asked to the employee concerned²²³.

In the ECJ judgment in the case *Dow Benelux*, the Court decided that undertaking was required to "to provide immediately any explanations which those officials may seek²²⁴". This lack of time for preparation may be questionable from the point of view of the undertaking's right to defence. According to the Explanatory Note, the undertaking inspected may consult its lawyer "before asking for oral explanations"²²⁵. Nevertheless, the time for such consultation must be limited to the strict minimum. Being advised by a lawyer should not lead to an unreasonable delay in providing the explanations by the undertaking's member of staff. Otherwise, it might be regarded by the Commission as an attempt to obstruct the inspection.

²¹⁹ See *Fabbrica Pisana* decision, para. 33 / IV.10.

²²⁰ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-132, p. 173.

²²¹ It is moreover recommendable to identify one person as a central for contacts with the inspectors.

²²² And thus subsequent denial of his authority would be almost impossible. See judgment of the CFI of 17 December 1991 in case T-7/89 *Hercules vs Commission*, E.C.R. 1991, II-1711, paras 102-105, and decision of the Commission in case *Vihol Parker Pen*, OJ 1992, L233/27.

²²³ L.O. Blanco, *European Community Competition Procedure*, No. 8.51, p. 330.

²²⁴ See *Dow Benelux* judgment, para. 47. Emphasis added.

²²⁵ See para. 6.

A refusal to provide explanations requested by the inspector would be seen as opposition to the inspection and may lead to the imposition of fine under Article 23(1)d²²⁶. Nevertheless, when an explanation cannot be immediately provided due to objective reasons²²⁷, the inspectors are expected to agree to more time being granted or to receive the explanations in writing within an agreed short period of time.

Finally, it has been noted that the undertaking cannot challenge the way in which the inspectors exercise this power either in any action against the inspection decision or separately. As clearly stated by the General Court in the case *Nexans*, measures implementing an inspection decision do not constitute actionable decisions and can thus only be challenged in the appeal of the final decision on the infringement, or the decision imposing fines for a failure to cooperate²²⁸. Such a stance should be criticised since it brings about legal uncertainty for undertakings²²⁹.

5.6. Inspections of “other premises”

Under Regulation 17/62 the Commission had no power to search private homes of the undertaking's members of staff. If documents were not kept at the undertaking's premises, the inspectors were powerless²³⁰, unless the undertaking inspected happened to disclose them on a voluntary basis. The Commission's experience showed that in some, mainly relating

²²⁶ There has been also a discussion whether such refusal may be classified as being also covered by Article 24(1)e (refusal “to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4)”), *i.e.* may result in imposition of a periodic penalty. Nevertheless, that due to the fact that there is a special provision regarding oral explanations in Article 23 that is not mentioned within Article 24, application of the latter to refusal to answer the inspectors' question would constitute ungrounded over-interpretation, not to say an abuse. On the discussion see for instance L.O. Blanco, *European Community Competition Procedure* No. 8.53, p. 330 and J.S. Venit, T. Louko, *The Commission's New Power to Question and its implication on Human Rights* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2004, Chapter 26, No. 8, p. 678.

²²⁷ Since the documents or data, necessary to answer the inspectors' question, are not immediately available.

²²⁸ See for instance *Nexans* judgment. See also M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, *YARS*, Vol. 2014, 7(10), pp. 129–158.

²²⁹ For more information see Chapter XI “Remedies and judicial review”.

²³⁰ *I.e.* the Commission could request the documents in the framework of a request for information under Article 11 of the Regulation 17/62 but had no power to carry out an inspection of other premises.

to cartel, cases relevant incriminating documents are kept in the private homes of directors or other employees of the undertakings concerned²³¹. Thus, in order to improve the detection of evidence²³², new powers for the Commission were needed²³³. Initially, the proposal for Regulation 1/2003 introduced the Commission's power to inspect private premises belonging to the undertaking's employees within Article 20 thereof, stating that this extension requires additionally a judicial warrant. Nevertheless, the final version of Regulation 1/2003, subsequently adopted and codified this new power separately in Article 21. According to some authors this fact points at the importance of "one of the most remarkable extensions to the Commission's investigative powers²³⁴".

The Commission power to conduct an inspection of "other premises, land and means of transport²³⁵" constitutes undoubtedly the most intrusive one since it leads to a significant interference with the right to privacy (as enshrined in Article 8 ECHR) of natural persons being employed by the undertaking investigated. Therefore, some strict requirements regarding the use of this power were introduced. Firstly, contrary to inspections of business premises²³⁶, an inspection of other premises can only be

²³¹ See the first sentence of Recital 26 of the Regulation 1/2003: "Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking."

See also decision of the Commission of 18 July 2001 in case COMP.D.2 37.444 – *SAS Maersk Air* and in case COMP.D.2 37.386 – *Sun-Air versus SAS and Maersk Air*, para. 89 citing a record of the project managers' group meeting of 14 August 1998: "[A Maersk Air representative] stated that all material on price agreements, market-sharing agreements and the like had to be destroyed before going home today. Anything that might be needed had to be taken home." (emphasis added).

²³² See A. Jones, B. Sufrin, *EC Competition Law*, 2004, p. 1081.

²³³ See the second sentence of Recital 26 of the Regulation 1/2003: "In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes."

²³⁴ L.O. Blanco, *European Community Competition Procedure*, No. 8.54, p. 331.

²³⁵ This catalogue was taken after Article 20(2)a which authorised the inspectors to "enter any premises, land and means of transport of undertakings and associations of undertakings". Usually, assessing whether a particular place is covered by Article 20(2) a or 21 is not problematic. Even in particular cases, e.g. where documents are kept in a car, the choice of the Article to be applied depends on who is the owner of the mean of transport in question.

²³⁶ An inspection under Article 20 may serve as an instrument of sector inquiries conducted under Article 17 of the Regulation 1/2003. See e.g. The Commission press release of 16 January 2008: *Commission launches sector inquiry into pharmaceuticals with unannounced inspections*, IP/08/49.

carried out in cases regarding any violation of Article 101 or 102 TFEU. Secondly, a formal decision²³⁷ ordering such inspection may be taken by the Commission only “if 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 of the Treaty, are being kept” in other specified places not being the official undertaking’s premises. Therefore the Commission should possess some clear indication showing that relevant documents are kept in the premises belonging to a particular employee. On the other hand, this limitation may however give rise to some doubts in practice, since it is not clear how the term “serious” should be understood. No guidance on the correct interpretation neither may be found in the recitals to Regulation 1/2003 nor has been provided by the CJEU. One can, nevertheless, make reference to the former Commission on the method of setting fines²³⁸, being in force at the time of the adoption of Regulation 1/2003. In these documents the distinction, based on the criterion of gravity, between minor, serious and very serious infringements was specified. On the other hand, one may argue that each case in which an attempt to hide relevant documents, by harbouring them at private premises, has taken place²³⁹ should be regarded as a serious violation²⁴⁰. The latter option is supported by the fact that it is typically in cases against cartels, *i.e.* hardcore competition law infringements, that incriminating documents are being kept at private homes. Fortunately, the Commission has been reasonable in any invocation of Article 21 of Regulation 1/2003.

The hitherto Commission practice shows that this far-reaching power has been used only with regard to any case relating to a serious violation of the competition law rules. Moreover, the first case in which the inspection of a private home took place regarded namely a cartel case²⁴¹.

The inspection decision under Article 21 has to be taken after having consulted the relevant NCA and must (1) indicate the reasons that have led

²³⁷ In this case it is not possible to initiate an inspection basing only on simple written authorisation (contrary to Article 20(3) of the Regulation 1/2003).

²³⁸ See the Commission’s *Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty*, OJ 1998, C 009, pp. 0003–0005.

²³⁹ And it seems that it is typically in cartels cases, *i.e.* the hard-core competition law infringements, that incriminating documents are being kept at private homes.

²⁴⁰ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-140, p. 178.

²⁴¹ See decision of the Commission in case COMP/39.406 *Marine Hoses*, para. 61. On the 2 May 2007 the Commission inspected the the private home of a person being the cartel coordinator.

the Commission to the conclusion of the existence of reasonable suspicion, (2) state the subject matter and purpose of the inspection, (3) fix the date of the commencement of the inspection as well as (4) indicate the undertaking's right to appeal the decision to the General Court²⁴².

Furthermore, due to the very intrusive character of this power, an additional important safeguard has been provided. The Commission is namely obliged to obtain a prior authorisation from the national court in order to execute the inspection decision. Even though there are some slight differences in the wording of Article 21(3), *e.g.* it specifies to a greater extent the aspects that are to be taken under consideration by the national court while pondering the question of proportionality²⁴³, the scope of judicial scrutiny in general terms resembles the one set out under Article 20(8)²⁴⁴. The judicial control is based on the authenticity of the decision as well the question of whether the coercive measure envisaged is neither arbitrary nor excessive in the circumstances at stake²⁴⁵. Thus, although the question of proportionality is taken under consideration, it may only bring about concrete results, *i.e.* the refusal to grant authorisation, if the national court finds that the coercive measure in question is 'arbitrary' or 'excessive'. The national judicial authority may ask²⁴⁶ the Commission for additional explanations if necessary to enable it to assess the proportionality of the measure at stake, but is deprived access to the Commission's file. Finally, like in the case of Article 20(8), the necessity for the inspection cannot be called into question by the national court since only the CJEU has exclusive jurisdiction to decide on the lawfulness of Commission decisions²⁴⁷.

With reference to the conduct of the inspection of other premises, it is notable that the inspectors' powers regarding the inspection of other premises are limited to those specified in Article 20(2)a, b and c, *i.e.*

²⁴² Article 21(2) of the Regulation 1/2003.

²⁴³ On the judicial scrutiny set out under Article 21(3) see more in the Chapter XI "Remedies and judicial review".

²⁴⁴ Required to obtain police assistance in order to force the entry to premises of the undertaking investigated who refuse to submit to the inspection ordered by the Commission's decision.

²⁴⁵ "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 authorisation is requested".

²⁴⁶ Directly or indirectly, through the relevant NCA.

²⁴⁷ Article 21(3) of the Regulation 1/2003.

entering the premises etc., examining the books and records²⁴⁸ and taking or obtaining copies or extracts of them in any form. Hence, the inspectors are not entitled to seal the premises or to ask for explanations from the person concerned²⁴⁹ on the spot. However, Articles 20(5) and 20(6) are applicable *per analogiam*, therefore the inspectors are allowed to ask for the national police's assistance in order to enforce the Commission's decision authorised by the national court.

Furthermore, Articles 21, 23 and 24 of Regulation 1/2003 remain silent on any possible fine to be imposed in any case of obstruction of an inspection of other premises. In principle, obstructive behaviour of an individual concerned cannot be attributed to the undertaking and thus cannot lead to the imposition of a procedural fine on the undertaking concerned. However, it has to be stressed that such behaviour may be imputed to the undertaking afterwards, *i.e.* be regarded as an aggravating factor while fixing the amount of the final fine for any infringement in competition law²⁵⁰.

6. Limitations of the Commission's power of inspection

The successful enforcement of EU competition law, in particular rules introduced in Articles 101 and 102 TFEU, requires granting to the EU competition authority effective instruments improving *inter alia* the detection of competition law violations. Therefore, Regulation 1/2003 confers extensive powers of investigation upon the Commission.

Nevertheless, it is necessary to strike a balance between the public interest to protect sound competition and to punish violations of competition law with the private interests of undertakings under investigation who need to be granted legal safeguards enabling them to defend themselves²⁵¹. Hence, in the exercise of its investigative powers, the Commission is obliged to observe the right to defence of the undertaking investigated. Its most important components, fundamental rights and principles, stem from the

²⁴⁸ irrespective of the medium on which they are stored.

²⁴⁹ Being for instance the undertaking's director or another employee.

²⁵⁰ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-144, p. 180 Nevertheless, it is doubtful whether an inspection obstruction should be regarded as aggravating factor in regard to the substantive infringement.

²⁵¹ R. Whish, *Competition Law*, 6th ed., Oxford Press University, 2006, p. 247.

EConHR, the Charter of Fundamental Rights²⁵² and the EU general principles²⁵³.

In the European Union the relevant rights and principles (right to privacy, right to fair trial, right to effective judicial protection, principle of proportionality and the privilege against self-incrimination) have to some extent been incorporated by the Court of Justice of the European Union as general principles of EU Law²⁵⁴, enshrined in Article 6(3) of the Treaty on the European Union²⁵⁵ and subsequently codified in the Charter of Fundamental Rights of the European Union²⁵⁶. Nevertheless, in order to guarantee full protection, it is necessary that these rights and principles should moreover be applied in conformity with the case law of the European Court of Human Rights²⁵⁷. Although the CJEU has been making frequent reference to ECtHR case-law, at present, the CJEU is not bound by the interpretation given by the ECtHR. However, ECtHR case law will become binding once the EU accedes to the ECHR, in accordance with Article 6(2) TEU²⁵⁸.

As confirmed by the CJEU, it is in particular primordial to prevent the undertakings' right to defence from being "irremediably impaired" during *inter alia* the Commission's inspections²⁵⁹.

Furthermore, given the actual weak position of the undertakings inspected compared to the far-reaching inspection powers of the competition authorities, it is primordial that both inspection decisions as well as all the measures undertaken during the inspections are subject to full judicial review exercised by independent courts²⁶⁰.

²⁵² That after the entry into force of the Lisbon Treaty became legally binding according to the modified Article 6(1) of the Treaty on European Union.

²⁵³ W.J.P. Wils, *EU Anti-trust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Right*, (2011) 34(2) *World Competition* 207; see also e.g., judgment of the ECJ in case 29/69 *Erich Stauder vs City of Ulm*, E.C.R. 1969, 419, para. 7, the judgment of the ECJ in case C-4/73 *Nold*, E.C.R. 1974, 491, para. 13 and judgment of the ECJ in case C-7/98 *Krombach*, E.C.R. 2000, I-1935, paras 25–26.

²⁵⁴ See for instance *Hoechst* judgment, para. 19 and judgment of the ECJ in case C-133/93 *Crispoltoni vs Fattoria Autonoma Tabacchi*, E.C.R. 1994, I-4863, para. 41.

²⁵⁵ OJ [2010] C 83/13; Hereinafter: the "TEU".

²⁵⁶ OJ [2000] C 364/1; Hereinafter: the "CFR".

²⁵⁷ Hereinafter: the "ECtHR".

²⁵⁸ "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

²⁵⁹ See *Hoechst* judgment, paras 14 and 15.

²⁶⁰ M. Michalek, *Fishing expeditions...*, pp. 129–158.

Nevertheless, it may be questionable whether the powers of inspections granted to the Commission are sufficiently balanced by the safeguards conferred upon the undertakings. In order to verify whether the current EU competition law regime guarantees the effective and sufficient protection of their right to defence that is moreover compatible with EConHR standards, its the most important components, *i.e.* the principle of proportionality, legal professional privilege, privilege against self-incrimination and the principle of effective judicial protection as well as the right to privacy which are to be examined in detail. Therefore, the above limitations of the Commission's powers are analysed separately in the following chapters.

Chapter IV

Procedural fines and periodic penalty payments

1. Introduction

If an undertaking refuses to voluntarily undergo an inspection ordered by the Commission's decision, it may be not only be forced to comply¹, but also fined for obstruction. Notably, in order to better ensure an efficient enforcement of competition law, the Commission was granted the power to impose on the undertaking fines and periodic penalty payments in the circumstances and under conditions stipulated in Articles 23 and 24 of Regulation 1/2003. As pointed out by Ch. Kerse and N. Khan, "(t)he imposition of fines has long been an important and well-publicised aspect of the Commission's work in enforcing Articles 101 and 102 [TfEU], the significance of which has been heightened by the Commission's increased focus on investigating and punishing serious infringements²".

The proceedings regarding possible imposition of a procedural fine are distinct from the main proceedings investigated on the possible infringement of Article 101 and 102 TFEU. It has been confirmed by the CJEU that "characterisation of the infringement as a procedural one is not affected by the fact that the Commission has not taken proceedings against the applicants for a breach of substantive law for the purposes of Article 101 TFEU after the inspection at issue³".

With regard to these proceedings, it has been commonly accepted that the fines are imposed in the first instance by the Commission not being a "tribunal" since the Commission's decisions on imposing fines may be

¹ In accordance with Article 20(6) of Regulation 1/2003.

² Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 7-001, p. 387.

³ See judgment of the General Court of 26 November 2014 in case T-272/12, *Energeticky a prumyslovy and EP Investment Advisors vs Commission*, para. 55.

subsequently subject to a full judicial review exercised by the CJEU, being an “independent and impartial tribunal”. Therefore, this system is in line with the requirements enshrined in Article 6 EConHR.

2. Rules regarding imposition of procedural fines and periodic penalty payments

It is noteworthy that Regulation 1/2003 does not operate with the term ‘failure to cooperate’ but indicates specific undertakings’ behaviours that are considered as a procedural infringement.

Under Article 23(1) of Regulation 1/2003, the Commission is entitled to impose on undertakings⁴ fines for, intentional or negligent:

- supplying of incorrect or misleading information or failing to supply information within the required time-limit in response to a request for information⁵,
- producing in an incomplete form the books or other records related to the business required during inspections⁶ or refusing to submit to inspections ordered by a decision⁷;
- giving an incorrect or misleading answer as well as failing or refusing to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision⁸ while being questioned on the spot⁹,
- failing to rectify within a time-limit set by the Commission¹⁰ an incorrect, incomplete or misleading answer given by a member of staff¹¹ during the inspection;
- breaking of seals affixed during the inspection¹² by inspectors or other accompanying persons authorised by the Commission.

⁴ Or associations of undertakings.

⁵ Either simple made pursuant to Article 17 or Article 18(2) of Regulation 1/2003 or made by decision adopted pursuant to Article 17 or Article 18(3) thereof.

⁶ Conducted under Article 20 of Regulation 1/2003.

⁷ Adopted pursuant to Article 20(4) of Regulation 1/2003.

⁸ Adopted pursuant to Article 20(4) of Regulation 1/2003.

⁹ In accordance with Article 20(2)(e) of Regulation 1/2003.

¹⁰ Pursuant to Article 4 of the Procedural Regulation.

¹¹ In accordance with Article 20(2)(e) of Regulation 1/2003.

¹² in accordance with Article 20(2)(d) of Regulation 1/2003.

Furthermore, Article 24 empowers the Commission to impose¹³ periodic penalty payments on undertakings¹⁴ in order to compel them *inter alia* to the supply complete and correct information requested by the Commission's decision¹⁵ or to submit to an inspection ordered by the Commission's decision¹⁶.

When in the course of an inspection an undertaking concerned refuses to submit to an inspection or attempts to obstruct it, the Commission, besides enforcing the inspection by requesting the assistance of the national police, has in principle two ways to punish the undertaking. It may either include the sanction in the final substantive decision terminating the main proceedings or initiate separate proceedings¹⁷ in order to impose a fine for the failure to cooperate¹⁸.

It is noteworthy that in the past fines or other penalties for procedural infringements were imposed in practice quite rarely¹⁹. Previous Commission practice consisted more in fining ultimately the undertaking concerned by raising the level of the final fine rather than penalising the undertaking's obstruction in a separate decision²⁰. Hence, even if at first it seemed that the fine would not be imposed on the undertaking, its obstructive behaviour none the less ends up being punished in the final decision. This tendency probably resulted from the fact that the fines for procedural infringements,

¹³ In the form of decision.

¹⁴ Or associations of undertakings.

¹⁵ taken pursuant to Article 17 or Article 18(3) of Regulation 1/2003.

¹⁶ taken pursuant to Article 20(4) of Regulation 1/2003.

¹⁷ As already noted, independent to the main proceedings during which the procedural infringement occurred.

¹⁸ This solution may be applied if the infringement has been committed by an entity other than the undertaking inspected.

¹⁹ See for instance decision of the Commission of 7 October 1992 in case IV/33.791 *CSM*, OJ 1992, L305/16. K. Stolarski, *Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities*, YARS 2011, 4(5), p. 67.

²⁰ See for instance decision of the Commission of November 2005 in case COMP/38354 *Industrial Bags*, OJ L282/41, or decision of the Commission of 13 September 2006 in case COMP/F/38.456 *Dutch Bitumen* case, OJ L196/40, in which the undertakings' behaviour during the inspections was qualified as aggravating circumstances and the fines for the substantive infringement of competition rules were raised by an additional 10%. By its decision in case *Fittings* (OJ 2007 L283/63) the Commission, for having provided it with misleading information in the framework of reply to the Statement of objections, increased the final fine by 50%. See also judgment of the CFI of 27 September 2012 in case T-357/06 *Koninklijke Wegenbouw Stevin vs Commission*, E.C.R. 2012, II-000. See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 7-030, p. 401, K. Stolarski, *Fines for Failure to Cooperate...*, p. 78.

fixed at the maximum level of EUR 5000²¹, and the periodic payments, fixed at the maximal level of EUR 1000 per day²², under former Regulation 17/62 had been rather symbolic nature²³. Thus, the obstructive behaviour of the undertaking in the course of an inspection could cost much more and lead *de facto* to an increase in the severity of the financial penalty, if it was considered as an aggravating circumstance during the determination of the final fine for the infringement of substantive competition law. And therefore the Commission much more often chose the latter option which on the one hand increased the deterrent effect of the fine, but, on the other hand, may be regarded as an abuse of the Commission's power in any case where the punished behaviour was not directed at perpetuating the substantive infringement in competition law²⁴.

Nevertheless, the situation changed after the adoption of Regulation 1/2003 that significantly changed the level of procedural fines and periodic payments. Nowadays, fines imposed under Article 23(1) of Regulation 1/2003 cannot exceed 1% of the total turnover of the undertaking concerned in the preceding business year and periodic penalty payments imposed under Article 24 of Regulation 1/2003 cannot exceed 5% of the average daily turnover of the undertaking concerned in the preceding business year. Thus the total fine depends now *inter alia* on the revenue generated by the undertaking concerned in past fiscal years.

Undoubtedly this change improved the deterrent effect of procedural penalties, since under the current stance it does not pay anymore for an undertaking involved in an inspection to attempt to obstruct it.

²¹ Article 15 of Regulation 17/62.

²² Article 16 of Regulation 17/62.

²³ For instance, in 1994 the Commission imposed on an undertaking, for having denied Commission inspectors entry to the managements' offices as well as for having provided false information about the existence of its offices in certain cities, a total procedural fine of equivalent of ECU 5 000. See decision of the Commission of 14 October 1994 in case 94/735/EC *Akzo Chemicals BV*. In case *CSM* the of fined imposed for having refused to provide the Commission with the requested documents did not even reach the maximum level, *i.e.* the fine amounted to ECU 3.000. See the *CMS* decision.

²⁴ For instance, in case *Professional Videotape* (OJ 2008 C57/10) instead of separately fining the undertaking for having destruct some documents and refused to answer on-spot-questions during the inspection, the Commission considered this as aggravating circumstances leading to the imposition of higher final fine. On the contrary, the increased of a fine imposed in case *SGL Carbon* seems justified since the undertaking was punished for having warned other cartelists in order to "conceal the existence of the cartel and to keep it in operation". See judgment of the Court of Justice in case C-308/04 P *SGL Carbon vs Commission*, E.C.R. 2006, I-5977, para. 64.

Understandably, some other factors, besides the company's economic strength, determine the amount the fine, *i.e.* the scale, severity and duration²⁵ of the infringement committed or even the possible social response to the imposed penalty²⁶. Even if fines may be imposed regardless of whether the procedural infringement was committed intentionally or not, *i.e.* it has been postulated that only in cases of negligence, the level of the fine should nevertheless reflect also “the level of guilt associated with the infringement²⁷”. The fines need to be proportional to the facts and character of the infringement committed. Thus, before determining and imposing any financial sanction, the Commission is obliged to diligently analyse the all relevant facts of each case and obtain evidence in support of their final evaluation²⁸.

It has to be stressed that undertakings have the right under Article 261 TFEU to bring an action against the Commission's decision which imposes pecuniary sanctions in what constitutes an important safeguard in protecting the undertaking from the abuse of the Commission's powers of inspections²⁹. It is thus important to take a look at some important cases regarding the imposition of procedural fines for the obstruction of inspections.

3. Relevant case-law of the CJEU

3.1. Case *E.ON. Energie*

The first important Commission decision imposing a procedural fine under Regulation 1/2003 was adopted in 2008 in a case against E.ON Energie³⁰. The undertaking was obliged to pay EUR 38 000 000 in what

²⁵ The time during which the undertaking delays the beginning of inspection by refusing to submit it, may be used by the undertaking to hide or destroy as much as incriminating evidence as possible.

²⁶ This issue was addressed recently by EU Commissioner Joaquín Almunia in his speech given at the Revue Concurrences conference: *New Frontiers of Antitrust 2011* in Paris on 11 February 2011, available at <http://europa.eu>, section press releases, reference SPEECH/11/96. K. Stolarski, *Fines for Failure to Cooperate...*, p. 68.

²⁷ K. Stolarski, *Fines for Failure to Cooperate...*, p. 83 and M. Król-Bogomilska, *Kary pieniezne w prawie. antymonopolowym*, Warsaw 2001, p. 90.

²⁸ K. Stolarski, *Fines for Failure to Cooperate...*, p. 69.

²⁹ For more information on the review of the decisions imposing pecuniary sanctions see Chapter XI “Remedies and judicial review”.

³⁰ Decision of the Commission of 30 September 2008 in case COMP/B-1/39.326 *E.ON Energie*.

illustrated a radical change of severity of procedural penalties and hence their deterrent nature. Although the amount of the fine itself was clearly significant, the Commission stressed that it corresponded to 0.14% of the undertakings turnover and thus had been affixed well below the theoretical maximum. It was the first case in which a fine was imposed for breaking a seal which had been fixed by inspectors during the inspection. It was emphasised that such an act constituted a very serious infringement, since the inspectors had stored highly sensitive data in the sealed room that nevertheless was yet to be catalogued, and therefore the Commission was unable to ascertain whether, any documents were missing and if so which ones, *i.e.* were removed by the undertaking.

The Commission's decision was challenged by E.ON. Energie before the CJEU but was nevertheless upheld both by the General Court³¹ as well as, on appeal, by the Court of Justice³².

First, in response to the pleas of the applicant regarding *inter alia* the burden of proof, a number of allegedly erroneous assumptions³³, disregard by the Commission of 'alternative scenarios', a breach of the principle of the presumption of innocence and violation of the principle of proportionality when the fine was set³⁴, the General Court held that the Commission was entitled in law to consider that the seal had been at least negligently broken under the circumstances at stake. It was emphasised that the applicant had been clearly informed of the significance of the seal and the consequences of any breach and thus had been obliged to take all necessary measures to prevent any tampering with the seal.

With reference to the undertaking's allegation that the contested decision was insufficiently reasoned, given the Commission's failure to specify the criteria on which the setting of the fine imposed had been based, in what amounted to a violation of the applicant's right to defence³⁵, the General Court observed that the Commission clearly determined the level of the fine in particular by the seriousness of the infringement as well as the particular circumstances of the case³⁶. The Commission pointed out that it had regarded the fact that this was the very first case to which Article 23(1 (e)

³¹ Judgment of the General Court of 15 December 2010 in case T-141/08 *E.ON Energie*.

³² Judgment of the Court of Justice of 22 November 2012 in case C-89/11 P *E.ON Energie AG vs Commission*.

³³ For instance an erroneous assumption that the seal was affixed properly.

³⁴ *E.ON. Energie* judgment of the General Court, para. 37.

³⁵ *Ibidem*, para, 276.

³⁶ *Ibidem*, para. 278.

of Regulation No 1/2003 had applied³⁷ and that the applicant was aware of the the significant level of fines for a breach of a seal³⁸.

Finally, concerning the principle of proportionality, the General Court, having regard to the particularly serious nature of the infringement in question³⁹ and the fact that the analysis of the circumstances, the conduct of the Commission, the size of the company and “the need to ensure a sufficiently dissuasive effect of the fine” (so that undertaking cannot take the view that it would be advantageous for it to obstruct the inspection by breaking the seal), concluded that the fine imposed on the applicant, which amounts merely to 0.14% of its turnover, is not disproportionate to the infringement⁴⁰.

The General Court stressed that “the mere fact that the seal is broken nullifies its safeguarding effect and is therefore sufficient to constitute the infringement⁴¹”.

The undertaking brought nevertheless an appeal before the Court of Justice, claiming that the General Court unduly reversed the burden of proof and infringed the principle of the presumption of innocence. The appellant claimed in particular that the uncertainty regarding the fitness of the seal used should be attributable to the Commission given that it had exceeded its shelf life and had been wrongly affixed⁴².

The Court of Justice noted however that since the Commission had determined that there had been a breach of the seal based on the body of evidence, the General Court was entitled to conclude that it was for E.ON Energie to adduce evidence challenging that finding.

The Court of Justice agreed with the Commission that “if an undertaking could challenge the probative value of a seal by alleging the simple possibility that it might have been defective, the Commission would be completely

³⁷ *Ibidem*, para. 281.

³⁸ *Ibidem*, para. 282: “Fourthly, it pointed out that, apart from the fact that Regulation No 1/2003 had reinforced the provisions on fines for procedural infringements three years prior to the inspection and that sealings had already taken place in the buildings of the same group a few weeks previously, the applicant was one of the largest European undertakings in the energy sector, which had at its disposal extensive expertise with regard to antitrust law, and its attention had been drawn, at the time of the sealing, to the significant level of fines provided for in the case of a breach of seal”.

³⁹ And the fact that the Commission rightly set out the reasons why the infringement in question is a particularly serious infringement.

⁴⁰ *E.ON. Energie* judgment of the General Court, para. 296.

⁴¹ *Ibidem*, para. 289.

⁴² *E.ON. Energie* judgment of the Court of Justice, para. 67.

deprived of the possibility of using seals⁴³". Thus, such an empty argument, *i.e.* unsupported by any evidence proving a defect in the seal at issue, can never be accepted.

With regard to the allegation regarding errors of law, in particular, a violation of the principle of proportionality in the assessment of the seriousness of the infringement as well as of the amount of the fine, the Court of Justice rejected E.ON. Energie's arguments and held that the applicant "has not put forward any argument demonstrating that the General Court's confirmation of the setting of such an amount of a fine was disproportionate⁴⁴", in particular in relation to the size of the undertaking.

It clearly follows from this case that the undertaking inspected is obliged to take all necessary measures to prevent any tampering with the seal. Thus, the sole fact that the seal is broken suffices to constitute an infringement of the undertaking inspected that has to prove otherwise, by producing convincing evidence.

Apparently, the CJEU decided to adopt a very strict approach from the very first case relating to the procedural fines imposed under Regulation 1/2003, in relation to the obstruction of inspections in order to warn the undertakings that it was no longer advantageous for the undertakings to try to obstruct the Commission's investigations, with the aim of avoiding the Commission being able to establish an infringement of Article 101 or 102 TFEU and impose the final substantive fine.

3.2. Case *Suez Environnement*

In 2011 the Commission adopted another decision when imposing a fine of EUR 8 000 000 on the undertakings, Suez Environnement and its subsidiary Lyonnaise des Eaux France, for the breach of a seal during an inspection. Contrary however to the *E.ON. Energie* case, the undertakings concerned admitted that an employee breached the seal, arguing however, that it had been an unintentional act. Therefore, having stressed the seriousness of the infringement, the Commission, when setting the fine, took into account none the less "the immediate and constructive cooperation of Suez Environnement and LDE", that provided more information than they were obliged to⁴⁵.

⁴³ *Ibidem*, para. 108.

⁴⁴ *Ibidem*, para. 131.

⁴⁵ Press released of 24 May 2011, IP/11/632.

Finally, the most recent judgment of the General Court in a case *Energeticky a prumyslovy*⁴⁶, demonstrated the first case of a fine imposed due to a failure to provide access to electronic documents, should be explored.

3.3. Case *Energeticky*

In November 2009 The Commission ordered and carried out an inspection of the undertakings' premises. The inspectors asked the undertaking to block, by resetting passwords which would only be known to the inspectors, to the e-mail accounts of 4 individuals holding key positions at *Energeticky a prumyslovy Holding* and EP Investment Advisors. The accounts were to remain inaccessible by the persons during the entire duration of the inspection, or at least until the inspectors informed the undertaking that the passwords of the accounts could be changed again. Nevertheless, one of the passwords was subsequently changed by the IT service at the request of one of the individuals concerned. Moreover, another key person, ordered the IT Department to prevent the e-mails addressed to the 4 accounts concerned from arriving in their respective inboxes. This order was applied only to one mailbox and hence the incoming e-mails stayed on the server of an external IT group and were not forwarded to the inbox of one of the key individuals concerned.

In March 2012, after having conducted proceedings⁴⁷ against the undertakings regarding their refusal to submit to an inspection and the fact that the production of required records related to the business was in an incomplete form, the Commission adopted a decision imposing a procedural fine of EUR 2 500 000 under Article 23(1)c on the undertakings concerned⁴⁸.

On 12 June 2012 the undertakings concerned brought an action claiming that the General Court should annul the contested decision or, alternatively, annul the fine imposed on the applicants, or reduce it to a symbolic level, or at the very least, significantly reduce the fine⁴⁹.

⁴⁶ See *Energeticky* judgment.

⁴⁷ Initiated in May 2010.

⁴⁸ Article 1 of decision of the Commission of 28 March 2012 in case COMP/39793 – *EPH and Others* states as follow:

“[*Energeticky*] and [*EPIA*] refused to submit to the inspection carried out at their premises on 24 to 26 November 2009 pursuant to Article 20(4) of Regulation ... No 1/2003 by negligently allowing access to a blocked e-mail account and intentionally diverting e-mails to a server, thereby committing an infringement within the meaning of Article 23(1)(c) of that Regulation”.

⁴⁹ And order the Commission to pay the cost. See *Energeticky* judgment, para. 32.

The applicants pointed at irregularities in the conduct of the inspection that led to the adoption of the contested decision, in violation of essential procedural requirements, in particular, the right to defence and “presumption of innocence” principles. According to the undertakings the Commission, firstly, failed to properly inform relevant individuals of their duties as well as of the consequences of non-compliance and, secondly, was negatively predisposed against the applicants. Moreover, the undertakings alleged that the Commission’s finding about the applicants’ refusal to submit to the inspection was unfounded and disproportionate. Finally, the undertakings argued that the Commission committed an error in law as well as an infringement of the principles of proportionality while determining the fine.

The General Court started by dealing with the applicants allegations that “the Commission did not prove to the requisite legal standard that the circumstances attributed to them resulted in the business records required by the inspectors being produced in incomplete form, so that it cannot be alleged they refused to submit to the inspection⁵⁰”.

It was firstly noted that although it clearly follows from the case-law on Article 23(1)c of Regulation 1/2003 that the Commission has the burden of proving a refusal to submit to an inspection⁵¹, “(t)he mere fact that the inspectors did not obtain, as requested, exclusive access to [the] e-mail account [of] one of the four persons holding key positions and whose account had been ordered to be blocked is sufficient to characterise the incident at issue as a refusal to submit to the inspection⁵²”. Consequently, the Commission had only to prove that it was not exclusively granted access to the data in the blocked e-mail account, and not that those data were manipulated or deleted.

It was further stressed that the finding of the infringement was based upon “direct and objective evidence”, namely the minutes and the ‘log-file’ or e-mail account of one of the key persons, and that the applicant had challenged neither the content of those minutes nor the evidential value of the ‘log-file’⁵³.

The General Court stated that even if the Commission’s practice was different in previous cases during inspections, for instance it recovered files which had been deleted; it meant neither that it is obliged to undertake the same actions in every case nor that it exhibited bias against the applicants⁵⁴.

⁵⁰ *Energeticky* judgment, para. 35.

⁵¹ See for instance *E.ON Energie* judgment of the Court of Justice, para. 71.

⁵² *Energeticky* judgment, para. 38.

⁵³ *Ibidem*, para. 34.

⁵⁴ *Energeticky* judgment, para. 42.

Hence, that Commission was under no obligation to verify when the last backup to the server had taken place in order to determine whether the verification of the content of the account had actually been impeded or whether the requested files might remain intact in a place other than in the e-mail account that had been ordered to be blocked at the beginning of the inspection. The General Court emphasised that the Commission inspectors should have been able to obtain the evidence sought, be it in paper or electronic form, in the places where such evidence is normally to be found, *i.e.* in the circumstances at stake, in the blocked account and the applicant was not entitled to prevent the inspectors from doing so⁵⁵.

With reference to the duty of cooperation in the course of an inspection, the undertaking concerned have to provide, upon the Commission's request, all documents in its possession that relate to the subject-matter of the investigation, even if some of those documents could be subsequently used by the Commission for the purpose of establishing the existence of an infringement⁵⁶. This means that the General Court adopted the view of the Court of Justice that the privilege against self-incrimination does not apply to the production of pre-existing documents⁵⁷.

As to the question of the undertaking's negligence, the General Court pointed out that even if proved that the individual concerned was unaware that his account had been blocked and that an inspection was underway, it is irrelevant since the finding of negligence is based on the omission of the IT manager who "had a duty to promptly inform his subordinates (...) about the inspectors' instructions and to ensure that those instructions were closely followed' and '[h]is failure to do so leads to the conclusion that the infringement was committed by negligence⁵⁸"⁵⁹.

It was recalled that once an authorised person within the undertaking concerned has been correctly notified of an inspection decision, the Commission should be able to carry out the inspection, without being obliged to inform each person concerned of his duties in the circumstances of the case. It is thus for the undertaking concerned "to take all the necessary measures to implement the inspectors' instructions and to ensure that the

⁵⁵ *Ibidem*, para. 41. of judgment of the General Court of 26 October 2010 in case T-23/09 *CNOP and CCG vs Commission*, E.C.R. 2010, 452, para. 69.

⁵⁶ *Energeticky* judgment, para. 53. See judgment of the ECJ of in case 374/87 *Orkem vs Commission*, E.C.R. 3283, para. 27.

⁵⁷ See *SGL Carbon* judgment, para. 44.

⁵⁸ See *EPH and Others* decision, recital 72.

⁵⁹ *Energeticky* judgment, paras 43–44

persons authorised to act on behalf of the undertakings did not impede the implementation of those instructions”⁶⁰.

Next, the General Court passed to the undertakings’ pleas regarding the protection of fundamental rights, notably the right to defence⁶¹ and the presumption of innocence⁶².

The General Court confirmed that it is necessary to prevent the right to defence from being irremediably compromised during the preliminary stage of the administrative procedure given that the measures of inquiry taken by the Commission may be decisive in providing evidence of the unlawful nature of the undertaking’s conduct⁶³.

The General Court pointed out five categories of safeguards provided to the undertakings concerned in the context of inspections regarding: (1) the statement of reasons on which inspection decisions are based, (2) the limits imposed on the Commission during the conduct of inspections, (3) the impossibility for the Commission to carry out an inspection by force, (4) the intervention of national authorities and (5) the existence of *ex post facto* remedies⁶⁴. It was then observed that in the case at stake, the applicants’ allegations of having not been sufficiently informed by the Commission should be analysed in the context of the first two of the above mentioned categories⁶⁵.

Accordingly, it was observed that all the relevant information was communicated to the representative of the applicants when the inspection decision was notified. Given the correct content of the inspection decision⁶⁶ the applicants were clearly informed of the scope of their duty to cooperate

⁶⁰ *Ibidem*, para. 45; see also the *E.ON. Energie* judgment, para. 258.

⁶¹ The applicants argued that their right to defence was infringed due to the insufficient instructions provided by the Commission, since the representatives of the undertakings had not been correctly informed of their obligations during the inspection and of the consequences of non-compliance with them. The two incidents comprising the infringement at issue should be attributed to a lack of care and attention on the part of the Commission’s inspectors.

⁶² The undertakings claimed that, during the administrative procedure, the Commission displayed prejudice against them that resulted in an extremely strict stance taken in the contested decision, which was hence adopted in breach of the principle of the presumption of innocence.

⁶³ Judgment of the General Court of 12 December 2012 in case T-410/09 *Almamet vs Commission*, E.C.R. 2012, 676, paras 26–29.

⁶⁴ *Energeticky* judgment, para. 68. See also judgment of the General Court of 6 September 2013 in joined cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn and Others vs Commission*, E.C.R. 2013, 404, para. 74.

⁶⁵ *Energeticky* judgment, para. 68.

⁶⁶ In particular Article 1 thereof.

in the context of the inspection. The undertakings were *inter alia* required to provide the accounting books and any other business records, irrespective of the form in which they were deposited⁶⁷. Furthermore, Article 3 of the inspection decision provided for sanctions for non-compliance with the obligations stipulated in Article 1 thereof and specified that that a fine could be imposed on the undertakings for a refusal to submit to the inspection, whether intentional or through negligence⁶⁸. Since moreover the explanatory note⁶⁹ was correctly notified to the persons authorised to represent the undertakings concerned, the right to defence was sufficiently safeguarded and the inspectors were under no obligation to recall the persons concerned that infringements could lead to an imposition of a fine⁷⁰.

The General Court rejected the undertakings' argument that since, unlike the affixing of a seal which is commonly visible, the mere blocking of an e-mail account is not apparent as such and thus, for the purposes of the protection of the rights to defence, the Commission had a greater obligation to inform. It was emphasised yet again that "(a)fter receiving the unequivocal instructions from the inspectors, it was for the applicants to implement them⁷¹".

With regard to the breach of the presumption of innocence, the applicants argued that the Commission did not analyse the facts with complete impartiality⁷².

The General Court first observed that the undertaking had misread the relevant points of the statement of objections since they could not be understood as accusing the applicants of being the source of the leaks regarding possible inspection. Second, it was noted that further arguments

⁶⁷ required for the purposes of the checks carried out by the inspectors for the duration of the inspection.

⁶⁸ *Energeticky* judgment, para. 70.

⁶⁹ Which provides for explanations how certain stages of the inspection should be conducted as well as contain useful information for undertakings for the purpose of assessing the extent of their duty of cooperation.

⁷⁰ *Ibidem*, para. 71.

⁷¹ *Ibidem*, para. 74

⁷² *Ibidem*, para. 83: "The applicants claim that, during the administrative procedure, the Commission demonstrated signs of prejudice against them, in particular by denouncing leaks regarding the inspection, announced by the Czech press and allegedly linked to EPH, so that it infringed the principle of the presumption of innocence. They state that the Commission dwelled on certain facts during the inspection and the administrative procedure for no obvious reason. It follows that the Commission was convinced that the applicants were aware of the inspection and had prepared themselves for it, which is contrary to the obligation to analyse the facts with complete impartiality".

of the applicant⁷³ were only an assertion, which is not substantiated by any evidence. Hence, this plea was also rejected.

Due to the rejection of first three pleas the General Court proceeded to the examination of the last one, raised in the alternative, alleging infringement of the principle of proportionality when determining the level of the fine. After having analysed the statement of reasons for the contested decision to impose a fine on the applicants, the General Court rejected the applicants' argument that the Commission failed to explain its reasoning, in particular the circumstances taken under consideration while fixing the level of the fine⁷⁴.

The General Court noted that the Commission, in order to fix the amount of the procedural fine, relied in particular, on the criteria of the gravity and the duration of the infringement⁷⁵. First, the Commission had stressed the importance of imposing a fine with a deterrent effect for the purpose of ensuring that it does not pay off for the undertaking being inspected to falsify e-mails or other documents in order to avoid being fined for any violation of substantive competition law⁷⁶. Furthermore, the Commission had emphasised the particular nature of electronic records, noting that the risk of their manipulation is higher than that regarding paper records⁷⁷. It had been also pointed out that the infringement at issue comprised actually two separate incidents⁷⁸. Finally, the Commission considered that the infringement in question had continued for a significant period of time, with regard to the duration of the inspection⁷⁹. In parallel, the Commission rejected the arguments raised by the undertakings regarding the existence of mitigating circumstances⁸⁰.

With reference to the principle of proportionality, the General Court recalled that this principle requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. Thus, "when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not

⁷³ For instance "that the Commission's alleged bias against the applicants explains why it 'kept insisting during the inspection and the administrative process for no obvious reason'". *Energeticky* judgment, para. 91.

⁷⁴ *Ibidem*, paras 97–100.

⁷⁵ *Ibidem*, para. 97.

⁷⁶ *EPH and Others* decision, recital 83.

⁷⁷ *Ibidem*, recitals 83 and 87.

⁷⁸ *Ibidem*, recital 88.

⁷⁹ *Ibidem*, recital 90.

⁸⁰ *Ibidem*, recitals 83 to 103.

be disproportionate to the aims pursued”⁸¹. Therefore, the fines and other penalties imposed under Regulation 1/2003 must not be disproportionate to the objective of the observance of the rules of competition. More specifically the sanction eventually imposed on an undertaking has to be proportionate to the infringement in competition law that it has committed, assessed as a whole, also with regard to its gravity which is assessed in the light of numerous factors, in relation to which the Commission has a margin of discretion⁸².

In the contested decision the Commission justified why it had found that the infringement at issue was, overall, of a serious nature. It was in particular emphasised that “(t)he Commission was also justified in taking into consideration the need to ensure a sufficient deterrent effect⁸³, so that undertakings cannot take the view that it would be advantageous for them to only partially produce electronic documents in the context of an inspection, in order to prevent the Commission from establishing a breach of substantive law on the basis of such evidence⁸⁴”. Furthermore, the General Court noted that given that electronic files are much quicker and easier to manipulate than paper files, the deterrent effect should be “all the more important in the case of electronic files⁸⁵”.

In any case of the seizure of paper files by the inspectors they remain physically under their control during the inspection. The situation is totally different with regard to electronic files that, even in the presence of Commission inspectors, may be quickly concealed. Thus, inspectors may not even know whether or not they have access to complete and intact electronic data⁸⁶. For instance, in the case at stake, the inspectors, when had been checking the e-mail account that had been to be blocked, did not know that all incoming e-mails had been actually diverted to the external server until the end of the inspection.

According to the General Court, such non-adherence constituted by its very nature a serious infringement of the procedural obligations of the undertakings inspected⁸⁷. Therefore, since the Commission in the circumstance at stake was entitled to impose a fine not exceeding 1% of

⁸¹ *Energeticky* judgment, para. 104, See also *E.ON Energie* judgment para. 286.

⁸² *Energeticky* judgment, para. 105, See also *E.ON Energie* judgment para. 287.

⁸³ See judgment of the ECJ of 7 June 1983 in joined cases 100/80 to 103/80 *Musique diffusion française and Others vs Commission*, E.C.R. 1983, 158, para. 108.

⁸⁴ *Energeticky* judgment, para. 107.

⁸⁵ *Ibidem*, para. 108.

⁸⁶ *Ibidem*.

⁸⁷ *Ibidem*.

the total turnover of the undertakings in the preceding business year⁸⁸, the level of the fine, corresponding only to 0.25% of Energetycky's annual turnover⁸⁹, cannot be regarded as disproportionate.

In response to the applicants argument, that in the *E.ON. Energie* case relating to a much more serious infringement, *i.e.* the breach of a seal, the fine corresponded only to 0.14%, the General Court noted that in the case at stake the fine covered two separate incidents comprising of the infringement, which included a deliberate one⁹⁰.

It was stressed that “(i)n any event, the fact that the Commission in the past imposed fines of a certain level for certain types of infringement does not mean that it is precluded from raising that level within the limits indicated in Regulation No 1/2003, if necessary to ensure the implementation of European Union competition policy. The proper application of the competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy⁹¹”.

Moreover, the General Court agreed with the Commission that the undertakings conduct should not be classified as mitigating circumstance leading to the reduction of the fine. The General Court found that the Commission had taken sufficient account of the undertakings' cooperation⁹².

Before commenting on the content of the judgment, it has to be stressed that this was the first ruling of the CJEU in which the General Court dealt with the question of searching electronic files in the context of a refusal to submit to an inspection.

The General Court confirmed a tough approach was taken by the CJEU in relation to attempts to obstruct the Commission's inspections. As pointed out in the Commission's press release⁹³ this ruling sent a very clear message to undertakings, warning them that any step which undermines the integrity and effectiveness of Commission inspections, including tampering with data stored electronically, is illegal and will lead to the imposition of an appropriate financial sanction. It was further recalled that the undertaking's

⁸⁸ Where they commit procedural infringements.

⁸⁹ The figure for that turnover, *i.e.* EUR 990 700 000, was provided by the undertakings during the administrative procedure.

⁹⁰ *Energeticky* judgment, para. 113.

⁹¹ *Ibidem*, para. 114. See also *Musique Diffusion française* judgment, para. 119.

⁹² *Energeticky* judgment, para. 122

⁹³ *Antitrust: Commission welcomes General Court judgment confirming its inspection powers in the area of electronic searches*, MEMO/14/2181, Brussels, 26 November 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-2181_en.htm

obligation to actively cooperate requires that all information relating to the subject-matter of the investigation is made available to the Commission.

The General Court focused on the gravity of the procedural infringement and rejected all the arguments of the applicants⁹⁴ by which they tried to either justify their conduct or point out the alleged misconduct of the Commission. The General Court strictly agreed with the Commission that once an inspection decision with its explanatory notice is presented to a representative of the undertaking to be inspected, there is an irreversible presumption that its employees have been informed about their rights and duties, so that the inspectors do not have to inform anyone further on this matter. Since it is for the undertaking to provide sufficient information to all its staff, no arguments regarding the inefficiencies of the inspectors in informing the undertaking about its rights and duties will be accepted neither by the Commission nor by the CJEU. Both authorities adopted a zero-tolerance policy and seemed to show no leniency towards the undertakings inspected in this regard although as emphasised by the AG Kokott a dawn raid “*tends to be a frightening experience*”⁹⁵.

What is extremely significant is that the sole fact that attempting to obstruct an inspection is sufficient to lead to a fine under Regulation 1/2003. It has been confirmed that the Commission does not have to prove that the undertaking’s conduct has effectively hindered the effectiveness of inspection, for instance that some documents were actually removed or manipulated. The burden of proof is actually shifted onto the undertaking if it claims otherwise.

4. Further remarks

The Commission has been granted discretion to adjust the level of fines and other penalties within the ceilings permitted by Regulation 1/2003. Nevertheless, the Commission is obliged to observe the principle of proportionality of criminal offences and penalties⁹⁶, enshrined in Article 49(3) CFR. According to this provision, “(t)he severity of penalties must not be disproportionate to the criminal offence”. Since, pursuant to the widely-

⁹⁴ Albeit after having analysed them in detail.

⁹⁵ Opinion of Advocate General (hereafter: AG) Kokott of 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para. 1.

⁹⁶ Which enshrines from “the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities”. See *Explanations relating to the Charter of Fundamental Rights of the European Union*, OJ 2007 C 303/02, Article 52.

held view, in the light of the EConHR fines imposed by the Commission under Regulation 1/2003 relates to a criminal charge, this provision applies also to the competition law proceedings.

In this context it is noteworthy that Regulation No 1/2003 does not require a precise decision concerning the address of premises to be inspected. Therefore, in accordance with the doctrine of the single economic unit, premises of all subsidiaries being directly or indirectly controlled by the undertaking indicated in the decision may be inspected. Consequently, in some circumstances, a too broad application by the Commission of the concept of a single economic unit and thus imposition of a fine or periodic payment not only on the undertaking being a subsidiary but also on its parent undertaking may not be in line with the principle of proportionality. Obviously, the Commission is willing to attribute the responsibility to the parent undertaking since it would lead to increasing the ceiling of the potential fine or period payments⁹⁷. However, the Commission should refrain from abusing the doctrine of “decisive influence” and, consequently, avoid calculating disproportional pecuniary sanctions.

Furthermore, and open to potential criticism, at present there are no guidelines for setting the level of fines of a procedural nature⁹⁸. The greater the severity of the fines imposed, the greater the transparency of the rules and policy followed by the Commission as regards their imposition is required. In this context it is even more important that the Commission states clearly the reasons for its decision, in particular with regard to the determination of the level of the fine imposed. However, it is not understandable why contrary to the case of fines for substantive competition law infringements⁹⁹, no guidelines regarding procedural fines and periodic penalties have been adopted¹⁰⁰. Nevertheless, since the new Competition Commissioner, M. Vestager, emphasised during her hearings at the EP¹⁰¹ that the principle of transparency would be her priority, one may expect that the guidelines relating to the setting of the level of fines of a procedural nature will be adopted during her cadency.

⁹⁷ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 7-006.

⁹⁸ See *Energeticky* judgment, para. 122.

⁹⁹ The Commission's *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003*, OJ [2006] C 06/3.

¹⁰⁰ See *Energeticky* judgment, para. 122.

¹⁰¹ Held on 2nd October 2014. The recording is available at <http://www.elections2014.eu/en/new-commission/hearing/20140918HEA65209>.

5. Conclusions

Proving that an infringement in competition law took place may very often turn out to be extremely difficult given the fact that anticompetitive practices are usually agreed upon and carried out in secret. Therefore, “(i)nspections are a key tool in the fight against cartels as companies rarely voluntarily hand over evidence of anti-competitive practices¹⁰². Undoubtedly, allowing the undertakings discretion on determining the conduct of the inspection, *e.g.* which documents are relevant in the light of the investigation and as a consequence may be examined by the inspectors as well as to which file the inspectors may be granted access could result in possible impediment of the inspection by the undertaking concerned¹⁰³. One cannot however forget that sometimes such an impediment may be justified by the protection of the undertakings’ fundamental rights¹⁰⁴. Nevertheless, if this is not the case and the undertaking inspected either refuses to submit to an inspection ordered by a Commission decision or obstructs it otherwise, the Commission is entitled to impose on the undertakings fines or periodic penalty payments in order to improve the effectiveness of the inspection or to increase the final substantive fine for the infringement in competition law. The use of Article 23(1) is regarded as “the proper approach¹⁰⁵”. The latter option that has been chosen by the Commission more times than the former¹⁰⁶ should be used only if the incident in fact aggravates the substantive infringement and must not be used in order to additionally increase the penalty imposed or to mask the imposition of a procedural fine with regard to the inspection¹⁰⁷. Otherwise, the legal certainty of the undertakings inspected would be undermined.

The strict approach adopted by the CJEU under Regulation 1/2003 has been warmly welcomed by the Commission emphasising that since obstructions to inspections may severely undermine the enforcement of competition law, it is indispensable that the Commission is entitled to impose appropriate and deterrent sanctions on the undertakings committing procedural infringements¹⁰⁸.

¹⁰² Joaquín Almunia, former Vice President of the Commission in charge of competition policy Press release, IP/11/632 Brussels, 24 May 2011.

¹⁰³ L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011, No. 8.37, p. 317.

¹⁰⁴ For instance, the right to privacy or the legal professional privilege.

¹⁰⁵ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 7-031, p. 401.

¹⁰⁶ See for instance decisions of the Commission in cases *Industrial Bags*, *Dutch Bitumen*, *Fittings* and *Koninklijke Wegenbouw Stevin* judgement.

¹⁰⁷ Compare the cases *Professional Videotape* and *SGL Carbon*.

¹⁰⁸ MEMO 14/2181 of 26 November 2014.

Procedural fines and penalties that have both a preventive and deterrent character should be imposed without violating the undertakings' fundamental rights, in particular, the right to defence or the principle of proportionality. Thus, imposing a fine cannot be an automatic solution but should depend on the circumstances at stake. A simple attempt by an undertaking to exercise its right to oppose or protect its right to defence cannot automatically lead to the imposition of financial sanction. It seems nevertheless more and more that the imposition of fines for obstructive behaviour during the inspection is not regarded by the Commission as an "ultimate weapon" of competition law enforcement but rather as a "first aid" instrument which can easily be used by the Commission.

The recent case-law of the CJEU shows that both EU courts have duly examined the circumstances of each case as well as verified the observance of the principle of proportionality in determining the amount of the sanction imposed. Indeed, with the three cases presented above the imposition of fines seems justified. Nevertheless, the strict zero-tolerance policy as to possible misunderstandings or insufficiencies in informing the undertakings about their rights and duties and no leniency regarding the particularity of carrying out the inspection for the undertaking, constituting "a *frightening experience*¹⁰⁹", might be in some circumstances be regarded as abusive and subject to critics.

Furthermore, in the general overview, one has to bear in mind a question that still lacks sufficient clarity. In the *Deutsche Bahn* judgment the General Court held that the risk of imposition of a fine on the undertaking for obstructing an inspection neither constitutes an absolute deterrent nor *de facto* deprives the undertaking of its right to oppose the inspection¹¹⁰. Pursuant to the General Court, fines and periodic penalty payments provided for in Articles 23 and 24 of Regulation 1/2003 may be only imposed if an undertaking either obviously obstructs or abuses its right to oppose. However, it remained unclear what should be understood by "an obvious obstruction" or "an abusive opposition". Unfortunately, there have been no explanations provided so far by the CJEU regarding the limits of the lawful exercise of the undertakings' right to oppose¹¹¹. Hence, due to the lack of any judicial practical guidance in this aspect, attempts to lawfully oppose inspection constitutes in practice a perilous challenge and thus the undertakings inspected are still left in quite a difficult position.

¹⁰⁹ Opinion of AG Kokott in case *Nexans*, para. 1.

¹¹⁰ *Deutsche Bahn* judgment.

¹¹¹ The the Commission's *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003* seems to be insufficient.

Chapter V

Fishing expeditions

1. Introduction

The overall aim of inspections is to ensure that the competition authority utilises an effective measure to detect infringements in competition law. Nevertheless, as already stated, due to the scale of interference with the rights and activities of undertakings, inspections cannot be ordered freely. An unconditional competence to carry out inspections might lead to an arbitrary or disproportionate intervention by public authorities into the private sphere of an undertaking. It might, for instance, result in so called *fishing expeditions*. This term refers to inspections conducted without a factual or legal basis – they are driven merely by an unsubstantiated suspicion of a potential infringement. Fishing expeditions are prohibited since they constitute an abuse of public powers by a competition authority, a realisation which was, *inter alia*, recently confirmed by the General Court¹.

Certain procedural guarantees have been put in place namely in order to avoid such an abuse and, more generally, to balance the far-reaching powers of the competition authorities. Inspections have to be subject to specific requirements regarding, *inter alia*, the existence of a sufficient suspicion of an infringement as well as a precise delineation (determination) of their scope in the prior authorisation of a given investigation, *i.e.* an obligation to specify the purpose and the subject matter of the inspection. These prerequisites should be regarded as a fundamental guarantee against an arbitrary or disproportionate intervention by public authorities. The scope of the inspection, specified in its authorisation, determines the areas of

¹ See judgment of the General Court of 14 November 2012 in case T-135/09 *Nexans vs Commission*.

activities of the investigated undertaking which the inspection relates to. It thus sets limits on the allowed interference of the officials.

As confirmed by the CJEU, the Commission's duty to clearly inform the undertaking concerned of these two points "constitutes a fundamental safeguard to protect the right to defence of the undertakings under investigation².

It is noteworthy that the above obligation is actually encompassed by the general requirement that the inspection decision on the basis of which an inspection takes place must be properly reasoned. Indeed, in cases regarding the possible occurrence of a fishing expedition, the focus is put on the question of whether the statement of reasons for the inspection decision did afford a sufficient basis for such an intervention³.

2. Obligation to state the reasons

The general obligation to state the reasons for a European Union act derives from Article 296 of the Treaty on the functioning of the European Union⁴ and is also introduced, as part of the right to good administration, in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union⁵. In accordance with settled case-law, any EU institution which adopts the measure in question has to disclose in the statement of reasons its reasoning in a clear and unequivocal way in order to provide the person concerned with a justification of the undertaken measures and to enable the EU courts to exercise their power of review⁶. More specifically, *i.e.* for

² See the following judgments of the ECJ: in case 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137, para. 18 and in case 136/79 *National Panasonic vs Commission*, E.C.R. 1980, 2003, paras 26 and 27; Nevertheless, the Commission is not obliged to reveal to the undertaking all the evidence regarding the suspected infringement, that is in the Commission's possession at the time of inspection. See L.O. Blanco, *European Community Competition Procedure*, 2nd ed.: Oxford University Press, 2011, No. 8.11, p. 302 and M. Araujo, *The Respect of Fundamental Rights within the European Network of Competition Authorities* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2004, p. 514.

³ Opinion Of Advocate General Kokott delivered on 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs Commission*, para. 5.

⁴ Hereinafter: the "TFEU".

⁵ Opinion of AG Kokott in case *Nexans*, para. 41.

⁶ See judgment of the ECJ of 2 April 1998 in case C-367/95 P *Commission vs Sytraval and Brink's France*, para. 63; judgment of the ECJ of 10 July 2008 in case C-413/06 P *Bertelsmann and Sony Corporation of America vs Impala*, para. 166; and judgment of the

the purposes of competition law inspections, Article 20(4) of Regulation 1/2003 further clarifies the required content and scope of the obligation to state the reasons for inspection decisions. Pursuant to its second sentence, decisions of this kind have to specify *inter alia* the subject-matter and purpose of the inspection in question. This provision is crucial to ensure that no inspection constitutes a “fishing expedition”, *i.e.* no inspection is carried out by the Commission on a speculative basis and without any concrete suspicions⁷.

As it has been held by the CJEU on many occasions, this special duty to state reasons is a fundamental requirement since it is “designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence⁸”. The right to defence of undertakings would be seriously affected if the Commission would be entitled to rely on evidence obtained during an inspection that was not related to the subject-matter or purpose thereof⁹. Thus, this obligation cannot be limited even for the purpose of ensuring better effectiveness of the Commission’s investigation¹⁰.

As confirmed by CJEU case-law, the Commission is required to indicate, as precisely as possible, (1) what it is searching for and (2) the matters to which the investigation relate¹¹. Nevertheless, while assessing the legal requirements applicable to the statement of reasons for an inspection decision it must be taken into account that unannounced inspections normally take

Court of Justice of 11 July 2013 in case C-439/11 P *Ziegler vs Commission*, para. 115.; See also Opinion of AG Kokott in case *Nexans*, para. 42.

⁷ See in this regard Opinion of Advocate General Mischo in cases 46/87 and 227/88, *Hoechst vs Commission*, para. 206; and Opinion of the AG in case C-109/10 P, *Solvay vs Commission*, para. 138.

⁸ *Hoechst* judgment, para. 29; judgment of the ECJ in case 85/87 *Dow Benelux vs Commission*, para. 8 and 40; judgment of the ECJ of 17 October 1989 in joined cases 97/87 to 99/87 *Dow Chemical Ibérica and Others vs Commission*, E.C.R. 1989, 03165, paras 26 and 45; and judgment of the ECJ in case C-94/00, *Roquette Frères*, para. 47. Similarly, judgment of the ECJ of 15 October 2002 in joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others vs Commission*, E.C.R. 2002, I-08375, para. 299. (This case-law relates to the predecessor provision of Regulation 17, however it is readily transposable to Article 20(4) of the Regulation 1/2003.) See also Opinion of AG Kokott in case *Nexans*, para. 44.

⁹ *Dow Benelux* judgment, para. 18, and *Roquette Frères* judgment, para. 48.

¹⁰ L.O. Blanco, *European Community Competition Procedure*, No. 8.11, p. 301.

¹¹ Judgment of the ECJ in case 136/79, *National Panasonic vs Commission*, paras 26 and 27.

place at a very early stage, *i.e.* within the preliminary investigations¹², when the competition authority understandably lacks the information necessary to make a specific legal assessment¹³. Therefore, as confirmed previously by the CJEU, despite the undertaking's legitimate interest in safeguarding their rights of defence, it is not indispensable that an inspection decision contains precise legal assessments, *i.e.* precisely defines the relevant market, sets out the exact legal nature of the presumed infringement¹⁴ or indicates the period during which the infringement at stake is said to have been committed¹⁵.

The judicial interpretation of the above requirements may be regarded as questionable and may raise some issues. The approach adopted by the judiciary while assessing the legal requirements applicable to the statement of reasons for an inspection decision seems too lenient¹⁶. Taking into account the above-mentioned argument relating to the occurrence of inspections at an early stage of investigation, doctrine postulates, however, that the scope of the inspection should not be indicated too vaguely in order to avoid potential abuses of inspectors' powers¹⁷.

The European judiciary held that the Commission is, however, always obliged to outline as precisely as possible its allegations in an inspection decisions, *i.e.* the presumed facts which the Commission intends to

¹² Before the preparation of the Statement of Objections ; See Commission's *Notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* OJ (2011) C 308, p. 6, para. 50; see also R. Whish, D. Bailey, *Competition Law*, 7th ed., Oxford University Press, p. 285.

¹³ See to this effect in *National Panasonic* judgment, para. 21, as well as Opinion of AG Mischo in *Hoechst* case, para. 174; and Opinion of AG Kokott in case *Solvay*, para. 143; Regarding the question of determination of whether an infringement of Article 101 or 102 TFEU has been committed, see Opinion of AG Mischo in case *Hoechst*, para. 176; Opinion of AG Kokott in case *Solvay*, para. 144 and Opinion Of AG Kokott in case *Nexans*, para. 48.

¹⁴ It is sufficient to indicate the 'essential features' of the suspected infringements. See judgment of the CFI of 8 March 2007 in case T-339/04 *France Télécom SA vs Commission*, paras 58 and 59.

¹⁵ *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; *Dow Chemical Ibérica* judgment, para. 45; and *Roquette Frères* judgment, para. 82; Opinion of AG Kokott in case *Nexans*, para. 49.

¹⁶ L.O. Blanco, *European Community Competition Procedure*, No. 8.11, p. 301; Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-043.

¹⁷ C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, 7th ed., LexisNexis, Warsaw 2013, p. 519.

investigate¹⁸, the evidence sought and the matters to which the investigation must relate¹⁹.

Therefore, from the EU courts approach regarding the requirement to protect the undertakings inspected from arbitrary and disproportionate entries²⁰ into their premises and the concern to safeguard their rights of defence it follows that the focus should actually be shifted to a definition of the infringements of competition law suspected rather than on a precise description of the markets concerned²¹. As for the content of an inspection decision, the General Court held that it has to at least state “essential characteristics of the suspected infringement” and “identify the sectors covered by the alleged infringement”²², albeit it is not indispensable to specify the relevant geographical market²³. The Commission is further required to indicate as precisely as possible the presumed facts which it intends to investigate²⁴ including the evidence sought and the matters to which the investigation must relate²⁵.

In order to prove the existence of a sufficient suspicion, it suffices if the Commission shows “that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement”, nevertheless it “is not required to state the evidence and indicia on which the decision is based²⁶”.

The approach towards documents falling outside the scope of the inspection decision constitutes another important issue connected with the problem of fishing expeditions. With reference to the scope of the search conducted, as above-mentioned, pursuant to settled CJEU case-law, the Commission is not obliged to limit itself to look for and examine only documents which it is able to identify precisely in advance since such

¹⁸ *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; the *Dow Chemical Ibérica* judgment, para. 45; Opinion of AG in case *Solvay*, para. 138.

¹⁹ *Roquette Frères* judgment, para. 83.

²⁰ See in this regard *Hoechst* judgment, para. 19; *Dow Benelux* judgment, para. 30; and *Dow Chemical Ibérica* judgment, para. 16.

²¹ Judgment of the Court of Justice in case *Nexans* 25 June 2014, para. 37 and Opinion of AG Kokott in case *Nexans*, para. 59.

²² *Nexans* judgment in case T-135/09.

²³ Judgment of the Court of Justice of 25 June 2014 in case C-37/13 P *Nexan vs Commission*, where the Court of Justice accepted the description of the relevant geographical market as “probably global”; See Opinion of AG Kokott in case *Nexans*, paras 22 and 45.

²⁴ *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; *Dow Chemical Ibérica* judgment, para. 45; Opinion of AG in *Solvay*, para. 138.

²⁵ *Roquette Frères* judgment, para. 83.

²⁶ *France Télécom* judgment, paras 60 and 123.

a restriction would render nugatory its right of access to documents or files²⁷. On the contrary, the right to carry out unannounced inspections does imply in particular the Commission's power to search for other, *i.e.* not already known or fully identified, sources of information²⁸. Nevertheless, it is obvious that Commission powers are limited strictly to the subject-matter of the investigation in question and, therefore, the inspectors, while carrying out an inspection, are entitled to search for and examine only those business records that may be relevant to the proceedings at stake²⁹.

Therefore, if documents falling outside the scope of the inspection happen to be seized by the Commission, it is paramount that such illegally obtained documents are returned to the undertaking. They cannot remain in the authority's possession.

Unfortunately, undertakings may not always have sufficient legal instruments to successfully execute the return of such documents. Namely, EU law does not provide the EU courts with a power to issue precise instructions in order to determine the consequences of the decision's annulment, for instance order the Commission to return all collected documents in relation to the annulled parts of the inspection decision³⁰. Nevertheless, since documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned, it may be justified to recommend the introduction of such a power.

The need for granting the General Court with the additional power is strengthened by the fact that, pursuant to the Commission Notice on the rules for access to the Commission file³¹, documents found to fall

²⁷ *Roquette Frères* judgment, para. 84. See also *Hoechst* judgment, para. 27; *Dow Benelux* judgment, para. 38; and *Dow Chemical Ibérica* judgment, para. 24.

²⁸ *Ibidem*; See also Opinion of AG Kokott in case *Nexans*, para. 61.

²⁹ See in this regard recital 24 in the preamble to, and Article 4 of, Regulation No 1/2003. See also *National Panasonic* judgment, paragraph 20; judgment of the ECJ in case 155/79, *AM & S vs Commission*, para. 15; *Hoechst* judgment, para. 25; *Dow Benelux* judgment, para. 36; and *Dow Chemical Ibérica* judgment, para. 22; and *Roquette Frères* judgment, paras 45 and 47. This limitation is however not required to be expressly specified in the statement of reasons. See Opinion of AG Kokott in case *Nexans*, para. 62.

³⁰ In *Nexans*, T-135/09. Under Art. 266 TFEU, it is for the Commission to draw the consequences of the decision's annulment. If undertaking is willing to receive the contested documents from the Commission, and the Commission does not do so spontaneously or following the undertaking's request, the undertaking concerned has to bring, for this purpose, an action for failure to act under Article 264 TFEU. See also the judgment of the General Court in case *Nexans*, T-135/09, para. 136.

³¹ *Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, OJ C 325, 22.12.2005, para. 9.

outside the scope of the subject matter of the case “*may*³² be returned to the undertaking from which they have been obtained” and “will no longer constitute part of the file”. It seems that in EU competition law proceedings the irrelevant documents are in practice subsequently returned to the undertaking concerned. Nevertheless, a legal approach that lacks a clear obligation to return the documents that “the Commission had no power in the first place to take”³³, is definitely untenable.

In this context it is worth considering two recent and relevant cases, *i.e.* *Nexans* and *Deutsche Bahn*, regarding the issue of fishing expeditions.

3. Case *Nexans*

The *Nexans* case is also known as the *Power Cable Case*³⁴. In 2009 Commission officials carried out dawn raids at the premises of *Nexans* in France and *Prysmian* in Italy in relation to a suspected cartel in the power cables sector. On 7 April 2009 *Nexans* brought an action before the General Court that delivered its judgment on 14 November 2012.

The challenges raised by *Nexans* related to both the inspection decision as well as to the Commission actions undertaken during the dawn raids³⁵. The undertaking contested namely the scope of the inspection decision which, being overly broad and imprecise both in terms of their product and geographic scope, in practice covered the entirety, *i.e.* all sectors, of its businesses. Therefore the inspection amounted to a *de facto* “fishing expedition”, since the Commission did not have reasonable grounds to suspect an infringement of competition law that would justify the carrying out of a dawn raid in relation to all electrical cables.

In its findings the General Court confirmed that the Commission has no power to conduct fishing expeditions. An inspection must be designed to “gather the necessary documentary evidence to check the actual existence

³² Instead of “must”.

³³ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6, p. 518.

³⁴ Judgment of the General Court of 14 November in case *Nexans* judgment, judgment of the General Court of 14 November 2012 in case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl vs Commission* and judgment of the Court of Justice in case *Nexans*.

³⁵ *Nexans* also contested some inspection measures. Nevertheless this part of applicant’s allegation is analysed in details in Chapter VI relating to the problem of coping of the entirety of digital storage mediums.

and scope of a given factual and legal situation concerning which [the authority] already possesses certain information”. In order to protect the fundamental rights of undertakings, *i.e.* to enable the undertaking concerned to limit its cooperation to those activities in respect of which the Commission has reasonable grounds for suspecting an infringement of competition rules, an inspection decision must at least state the “essential characteristics of the suspected infringement” and “identify the sectors covered by the alleged infringement”.

Moreover, in relation to the sectors covered, the General Court held, after having examined the evidence available to the Commission at the time of the inspection decision, that the Commission had reasonable grounds to order dawn raids regarding only the supply of high voltage underwater and underground electrical cables (and associated materials), in relation to which it had received a leniency application. Therefore it annulled the inspection decision in part related to any other sector of electrical cables.

One has to agree with the AG Kokott emphasising that “(t)he importance of the Court’s judgment in this case, from the point of view of the Commission’s future administrative practice, should not be underestimated³⁶.”

Nevertheless, some insufficiencies regarding the current stance³⁷ were also reflected in the judgment in question. The General Court rejected namely Nexans request to order the Commission to return all documents obtained in relation to the annulled parts of the inspection decisions³⁸. As already mentioned above the General Court is not entitled to issue precise instructions in order to determine the consequences of the decision’s annulment. Nevertheless, this is very questionable. It is indispensable that the court should have the power to ensure that documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned.

Furthermore, it has to be mentioned that in the second part of its challenges, Nexans contested *inter alia* the inspection measures consisting of the removal of forensic copies of computer hard drives for subsequent review at the Commission’s premises. This unfortunately common practice of the competition authorities copying and subsequently examining, not only the selected files related to the scope of the inspection, but the entire content of hard drives may also amount to a fishing expedition³⁹. Unfortunately,

³⁶ Opinion of AG Kokott in case *Nexans*, para. 6.

³⁷ EU procedural rules and the CJEU approach.

³⁸ *I.e.* documents relating to non-high voltage cables.

³⁹ L.O. Blanco, *European Community Competition Procedure*, No. 8.35, p. 316.

the General Court avoided ruling on the legality of such a practice by declaring the challenges inadmissible⁴⁰. According to the General Court the contested Commission acts did not constitute an actionable decision, but were only measures implementing the inspection decision which can only be challenged in the appeal of the final Commission decision on the infringement or the Commission decision imposing a procedural penalty for a failure to cooperate⁴¹.

Nexans subsequently brought an appeal on 24 January 2013 before the Court of Justice claiming *inter alia* that the General Court erred in dismissing their application for the annulment of the inspection decision insofar as it was insufficiently precise, overly broad in its geographic scope and applied to any suspected agreements and/or concerted practices that “probably had a global reach”. In other words, the appellant alleged that the General Court, firstly, failed to observe the requirement to state reasons concerning the geographical scope of the inspection decision and, secondly, erred in failing to investigate whether in fact there had been reasonable grounds for suspecting an infringement on what was probably a global scale⁴². Hence, the legal debate in the appeal proceedings focused on the geographical scope of the inspection decision⁴³.

In the official opinion delivered in March 2014, AG Kokott suggested that the Commission was justified in inspecting also non-European documents within dawn raids of power cable cartellists, including Nexans, since taking into account the early stage at which the inspection decision was adopted, the General Court could not and had no reason to demand such a precise definition of the geographically relevant market.

On 25 June 2014 the Court of Justice delivered its ruling by which it dismissed Nexans’ appeal. The Court of Justice shared the opinion

⁴⁰ *Nexans* judgment of the General Court, paras 119–125 and 132.

⁴¹ The issues of coping the entire hard drives for subsequent electronic searches is analysed in details in Chapter VI “Subsequent electronic searches of copied hard drives”.

⁴² See judgement of the Court of Justice in case *Nexans*, para. 16. The appellant criticised the General Court for not requiring from the Commission a more detailed indication in the decision at issue as regards how the suspected anti-competitive conduct linked to projects situated outside the common market could have had an effect within the European Union or within the EEA, including an indication of the market presumed to be the relevant market, which prejudiced the appellants’ right of defence by preventing them from understanding the exact scope of their obligation to cooperate.

⁴³ The nub of the dispute relates to the question whether the Commission’s reference to the “probably global” reach of the presumed infringements of competition law had sufficiently specified the subject-matter and purpose of the inspections. See Opinion of AG Kokott in case *Nexans*, paras 22, and 45.

of AG Kokott with regard to the geographic scope and stated that the General Court had sufficiently reasoned why it held that the Commission determination of the geographical scope of the inspection, claiming that the suspected cartel “probably ha[s] a global reach”, was correct and justified.

The Court of Justice firstly noted that the Nexans’ action for annulment focused on the range of products covered by the decision at stake and the question of the geographical scope of the suspected infringement was not the focal point of the appellants’ submissions. Thus, to the extent that the grounds of the judgment under appeal concerning the geographical scope of the suspected infringement allowed the interested parties to understand the General Court’s reasoning and provided the Court of Justice with sufficient material for it to exercise its power of review, the General Court cannot be criticised merely because those grounds are brief⁴⁴. According to the relevant provisions⁴⁵, the General Court is not obliged to provide an exhaustive response to all the arguments raised by the parties to the proceedings. On the contrary, its reasoning may be implicit provided that it allows the parties concerned to know the reasons for the General Court’s ruling and “provides the Court of Justice with sufficient material for it to exercise its power of review”.

The Court of Justice stressed that, the General Court examined expressly, albeit briefly, the Nexans’ arguments concerning the vagueness of the geographical scope of the suspected cartel and provided sufficient reasons to conclude that the Commission had described in sufficient detail the scope in question⁴⁶.

As for the plea, that the General Court failed “to have regard to the obligations on the Commission to state the reasons for an inspection decision, first, in that it rejected the appellants’ argument alleging a lack

⁴⁴ See judgment of the Court of Justice of 25 June 2014 in case C-37/13 P *Nexans and Nexans France vs Commission*, para. 23.

⁴⁵ Under Article 36 of the Statute of the Court of Justice, applicable to the General Court by virtue of the first paragraph of Article 53 thereof and Article 81 of the Rules of Procedure of the General Court. See also CJEU case-law, for instance, judgment of the Court of Justice of 11 July 2013 in case C-601/11 P *France vs Commission*, EU C 2013, 465, n.y.r., para. 83, and judgment of the Court of Justice of 18 July 2013 in case C-499/11 P *Dow Chemical and Others vs Commission*, EU.C. 2013, 482, n.y.r., para. 56.

⁴⁶ Para. 25 “It concluded, at paragraph 97 of the judgment under appeal, that, by indicating that the suspected agreements and/or concerted practices ‘probably [had] a global reach’, the Commission had described in sufficient detail the geographical scope of the suspected cartel. Consequently, the General Court considered the geographical scope of the suspected infringement to have been set out with sufficient precision in the decision at issue.”

of precision in the decision at issue concerning the probable global reach of the suspected infringement and, secondly, in that it failed to have regard to the Court's case-law under which the Commission must include in an inspection decision the presumed facts which it intends to investigate", the Court of Justice, firstly, recalled that "the statement of reasons required under Article 296 TFEU for measures of institutions of the European Union must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality⁴⁷". This obligation constitutes, thus a fundamental prerequisite regarding the proportionality of the intervention envisaged, enabling the undertakings inspected to understand the scope of their duty to cooperate and preserving their right to defence⁴⁸.

Nevertheless, this requirement has to be assessed in relation to the circumstances of the particular case, covering *inter alia* the content of the measure at stake, the nature of the reasons given and the interest of the measure's addressees⁴⁹ in obtaining further explanations. The Court of Justice emphasised that, in the light of the context in which Commission's inspections take place⁵⁰ and all the legal rules governing the matter at stake, it is not indispensable for the reasoning to specify all the relevant facts and points of law in order to meet the requirements of Article 296 TFEU⁵¹.

Under relevant legal provisions an inspection decision must indicate, *inter alia*, its subject and its objective. Pursuant to the established case-law of the Court of Justice, the Commission is required neither to communicate to the undertaking being the addressee of an inspection decision all the information regarding the suspected infringement, that has at its disposal, nor to provide a precise legal analysis of the infringements at stake, provided that the presumed facts that are to be investigated are clearly indicated in

⁴⁷ Para. 31; See also judgment of the Court of Justice 14 April 2011 in case C-455/11 P *Solvay vs Commission*, EU. C. 2013, 796, para. 90.

⁴⁸ Para. 34; *Hoechst* judgment, para. 29.

⁴⁹ or other parties to whom it is of direct and individual concern.

⁵⁰ The fact that Articles 4 and 20(1) of Regulation No 1/2003 provide the Commission with inspection powers which aim at enabling it to perform its mission to protect the common market from distortions of competition and to penalise any infringements of the competition rules on that market. Para. 33. See also *Roquette Frères* judgment, para. 42 and the case-law cited therein.

⁵¹ Paras 32–33; *Solvay* judgment para. 91 and the case-law cited therein.

the inspection decision⁵². Since inspections take place at the beginning of an investigation, the Commission lacks at that stage precise information sufficient to make a specific legal assessment. Carrying out an inspection, in order to gather evidence relating to a suspected infringement, should namely enable the Commission to verify the accuracy of its suspicions and the scope of the incidents which in fact have taken place⁵³.

Therefore, the Commission is only obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation must *relate*⁵⁴, nevertheless, as already confirmed by the Court of Justice, it is not required to (1) define in a precise matter the relevant market, (2) to indicate the exact legal nature of the suspected violations in competition law or (3) to set out the period during which those infringements were committed⁵⁵.

Therefore, in the light of the above, the Court of Justice ruled that the General Court was entitled to conclude that the statement of reasons in the challenged decision in relation to the geographical scope of the suspected infringement in competition law was sufficient, and no further details on the type of conduct suspected outside the common market⁵⁶ were required.

What seems to be more controversial was that the Court stated that the Commission was not obliged to limit its inspection to documents relating to the projects which had an effect on the common market. Despite Nexans' allegation that the Commission actually gave itself *carte blanche* to seize documents with no regard for jurisdiction, in the view of the Court of Justice, the General Court correctly held that the Commission is not obliged to limit its investigations only to documents regarding behaviours that produced an effect only within the EU. On the contrary, the Commission is entitled to also examine documents regarding other territories if it does so *in order to detect incidents* that could affect competition on the internal market. According to the Court of Justice, in the case at stake, since the Commission suspected an infringement of probably a global reach, documents relating to incidents taken place outside the EU were likely to provide relevant information on the suspected infringement of EU competition law.

⁵² Para. 35; *Dow Chemical Ibérica* judgment, para. 45.

⁵³ See Opinion of AG Kokott in case *Nexans*, para. 48; See also *Roquette Frères* judgment, para. 55 and the case-law cited therein.

⁵⁴ *Roquette Frères* judgment, para. 83.

⁵⁵ See, to that effect, *Dow Chemical Ibérica* judgment, para. 46, and *Roquette Frères* judgment, para. 82.

⁵⁶ In particular on the effect that this conduct might have on that market or on the type of documents which the Commission was entitled to examine.

With reference to the second part of Nexans' plea; that the General Court failed to examine whether the Commission had reasonable grounds for suspecting that the suspected infringement relating to projects situated outside the EU could have actually produced an effect within the common market, the Court of Justice noted that this allegation had not been raised before the General Court and therefore had to be rejected as "manifestly inadmissible". The Court of Justice recalled that pursuant to settled case-law, allowing an appellant to raise before the Court of Justice a plea in law that had not been raised before the General Court would actually result in bringing before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than the one heard by the General Court⁵⁷.

To sum up this case, the interdiction of fishing expeditions means, in the view of the EU judiciary, that, on the one hand, the Commission is entitled to examine only those product areas for which it has "reasonable grounds" to suspect a competition law infringement but, on the other hand, it retains a broad discretion in relation to the geographic as well as time scope of its investigations.

It should be noted that while the judgment of the General Court might be seen as a kind of victory for undertakings and a defeat for the Commission in justifying its practices, the judgment of the Court of Justice constitutes nevertheless a confirmation of the broad discretion of the Commission to decide on the geographic scope of the inspections and, in particular, the Commission's power to seize information regarding the undertaking's conduct that did not take place in the EU, provided that the Commission suspects the global scale of any alleged infringement or that its coordination has been wholly or partially conducted from outside the EU. According to some authors⁵⁸, this finding leads to the question of whether in the future, in cases where the scope of products potentially involved is uncertain, the Commission will be trying to extend this approach and argue that also examining the documents related to neighbouring product areas may be useful to better understand the illegal conduct in the relevant product area. Nevertheless, due to the strict EU position of the courts with regard to product scope of inspection such a scenario seems improbable and unlikely to succeed.

⁵⁷ Judgments of the Court of Justice of 19 July 2012 in case C-628/10 P *Alliance One International and Standard Commercial Tobacco vs Commission*, in case C-14/11 P *Commission vs Alliance One International and Others*, para. 111, and in case C-58/12 P *Groupe Gascogne vs Commission*, E.C.R. 2013, 770, para. 35.

⁵⁸ A. Nourry, Ch. Duff, *Protecting "out of scope" documents in dawn raids – a mixed bag*, Briefing note – Clifford Chance, June 2014.

Although in the aftermath of this case, it became clear that the Commission needs to demonstrate “reasonable grounds” for suspecting an infringement in order to conduct an inspection in relation to specific product areas, and cannot carry out an inspection beyond the product scope set out in its inspection decision in the hope of finding evidence of a broader or new competition law infringement, it remains nevertheless questionable that the Commission’s discretion in relation to the geographic scope of the inspection is almost unrestricted. One may argue that in order to prevent the abuse of Commission powers and to enable the undertakings to better exercise their right to defence, while determining the scope of an inspection the focus should be put not only on the products concerned but also on the territory involved.

Finally, an important conclusion stemming from this case for undertakings and their legal advisors is that the strategy regarding allegations raised in the court proceedings should be clear and well prepared from the outset. All relevant arguments are to have already been raised before the General Court and sufficient emphasis should be put on them. In the case at stake, Nexans was reproached by the Court of Justice that, firstly, allegations regarding geographic scope had not been “the focal point” of Nexans’ original action before the General Court and, secondly, its claim regarding lack of “reasonable grounds” for the Commission to suspect ex-EU activity had not been brought before the General Court.

4. Case *Deutsche Bahn*

The second relevant case related to Deutsche Bahn⁵⁹. The undertaking unsuccessfully sought relief, *i.e.* brought an action for annulment of three Commission inspection decisions as well as of all measures taken as a result thereof⁶⁰ and asked that the Commission be ordered to return all copies of documents made during the contested inspection.

With reference to the facts, in March 2011, the Commission carried out a dawn raid of various premises of Deutsche Bahn⁶¹, on the grounds of suspected abuse of the undertaking’s dominant position in relation to supply of operators with electric traction by giving preferential rebates to Deutsche Bahn subsidiaries. Nevertheless, prior to the inspection

⁵⁹ Judgment of the General Court in case T-289/11 *Deutsche Bahn vs Commission*.

⁶⁰ Of the inspections which took place on the basis of those contested decisions.

⁶¹ Since the inspection decision of 14 March 2011 covered all Deutsche Bahn subsidiaries.

the Commission officials were notified of the existence of a complaint involving a Deutsche Bahn's subsidiary (DUSS) regarding another suspected competition law infringement, *i.e.* application of discriminatory conditions in the railway transport sector or refusal to access to its terminals. During the inspection, Commission officials uncovered also documents indicating this second possible abuse prohibited by Article 102 TFEU. In order to legally obtain evidence of the new infringement, the Commission immediately adopted⁶² a second inspection decision. Subsequently⁶³, in July 2011, the Commission adopted moreover a third decision, entitling the officials to return to the undertaking's premises to search for further evidence in relation to a possible abuse in all railway transport markets.

Deutsche Bahn challenged the legality of all inspection decisions and claimed the violation of its fundamental rights. It namely contested the fact that the second and third inspections were based on information obtained illegally during the first one. Moreover, pursuant to Deutsche Bahn a judicial authorisation should have been obtained by the Commission in order to ensure that the inspection was subject to prior judicial control.

The General Court delivered its judgment on 6 September 2013. It held, firstly, that no prior court authorisation is mandatory for an inspection to be considered legal as long as the inspection is subject to a comprehensive judicial review. In response to the allegations made by Deutsche Bahn that Article 20 of Regulation 1/2003 granting the Commission the power to carry out the inspections runs afoul of the European Convention on Human Rights⁶⁴ and the Charter of Fundamental Rights⁶⁵, the General Court stated that the rules on inspections set out in Regulation 1/2003 do not violate fundamental rights, since this act provides sufficient protection of the undertaking's right to defence. More specifically, the General Court pointed at five safeguards provided under Regulation 1/2003, *i.e.* (1) the Commission obligation to state the reasons for an inspection decision, in particular, the subject matter and purpose of the inspection⁶⁶, (2) the conditions restricting the way in which an inspection is carried out⁶⁷, *i.e.* the obligation to respect the

⁶² While the official were still at Deutsche Bahn premises.

⁶³ After the end of first and second inspections.

⁶⁴ Hereinafter: the "EConHR".

⁶⁵ Hereinafter: the "CFR".

⁶⁶ In practice, the decision has to provide: a description of the suspected infringement – indicating what market(s) could be affected, the nature of the suspected restrictions of competition, in what way the undertaking is suspected to be involved, and what is being sought.

⁶⁷ Se *Dow Benelux* judgment, para. 39.

undertakings right to privacy, legal professional privilege, the privilege against self-incrimination as well as rules established in the Commission Inspection Explanatory Note⁶⁸, (3) the possibility of exercising fundamental rights by the undertakings concerned during an inspection⁶⁹, (4) the undertaking's right to seek an annulment of the inspection decision and to challenge any irregularity that occurred during the inspection⁷⁰, and finally, (5) the possible surveillance by national authorities of respecting fundamental rights, in cases when due to any opposition to the inspection by the undertaking, the Commission seeks assistance from the national authorities⁷¹.

Moreover, according to the General Court, fines and periodic payments provided for in Article 23 and 24 of Regulation 1/2003 may only be imposed if an undertaking either obviously obstructs or abuses its right to oppose. Therefore, in the opinion of the General Court, the risk of the imposition of a fine on an undertaking for obstructing an inspection neither constitutes an absolute deterrent nor *de facto* deprives the undertaking of its right to oppose the inspection. Unfortunately, the General Court did not clarify what should be understood as “an obvious obstruction” or “an abusive opposition”. Hence, due to the lack of any practical guidance, this judgment may unfortunately be of little practical value to inspected undertakings for which the right to oppose the competition authority inspection constitutes in practice a perilous exercise.

Subsequently, the General Court also dismissed the most relevant⁷² allegation of Deutsche Bahn that the Commission carried out an illegally targeted search, constituting a fishing expedition, since it used the first inspection decision⁷³ to actually find evidence of another potential infringement, albeit in a different sector⁷⁴. The undertaking emphasised that such evidence should not serve as a basis for the further inspection decisions. The General Court held, however, that the Commission was allowed to “kill two birds with one stone”, *i.e.* to promptly adopt a new inspection decision aimed at entitling its officials to legally gather documents concerning a further competition law infringement,

⁶⁸ *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003.*

⁶⁹ Since the undertaking inspected is entitled to consult its external counsel, to examine the inspection decision or to demand to record in minutes that any alleged irregularity arising during the inspection what cannot be regarded as opposing the inspection.

⁷⁰ If contested successfully, the Commission will be unable to use the document(s) obtained as a result of the annulled decision during the inspection in the infringement proceedings.

⁷¹ See Article 20(6) to 20(8) of the Regulation 1/2003.

⁷² For the purposes of this Chapter.

⁷³ In relation to the supply of electric traction.

⁷⁴ The railway transport sector.

not covered by the first decision. The General Court confirmed the approach established in EU case-law⁷⁵ that it is not illegal for the Commission to use as intelligence (as opposed to as evidence) information which it obtains accidentally. In the *Dow Benelux* case, the applicant alleged the lack of proper evidence; namely they contested the fact that the Commission relied on information obtained during earlier investigations, that had a different subject-matter, for the purpose of opening a new investigation on a possible infringement of EU competition law. The ECJ stated that although the information obtained during an inspection cannot be used for purposes other than those indicated in the inspection decision and despite the fact that the undertakings' right to defence, including the protection of professional privacy, "would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof", "it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty"⁷⁶. According to the Court, such an interdiction would go beyond what is necessary in order to protect professional secrecy and the undertakings' right to defence and would therefore constitute an unjustified hindrance to the effectiveness of the Commission's mission to ensure compliance with competition law within the common market as well as to detect and punish infringements of Articles 101 and 102 TFEU.

After having analysed the circumstances of uncovering additional documents, the General Court stated that Deutsche Bahn failed to demonstrate that the Commission officials had been specifically searching for further unrelated documents⁷⁷ and therefore it should be considered that the contested documents were uncovered incidentally during the search for evidence regarding the initial decision. Understandably for the General Court, the Commission should not turn a blind eye to documents potentially pointing at an infringement in competition law, even if they are discovered by accident during an investigation regarding other incriminating conduct.

The General Court's ruling, *i.e.* confirmation of the legality of dawn raids by upholding all three Commission inspection decisions as well as

⁷⁵ Established since *Dow Benelux* judgment.

⁷⁶ *Dow Benelux* judgment, paras 17–19.

⁷⁷ Furthermore, during the inspections Deutsche Bahn never formally objected, by *e.g.* registering its objections in the protocol, to the way they were conducted. The GC reminded that it is the undertaking's legal representatives duty to formally raise objections at the very moment in which an alleged illegal act is committed.

the rejection of Deutsche Bahn arguments regarding any violation of the undertaking's fundamental rights should however be subject to criticism. Even this questionable stance has already been settled in the EU judiciary, one could expect that after the clear interdiction of fishing expeditions stated in the *Nexans* judgment, the General Court will modify its approach regarding the legality of subsequent significant use of "chance discoveries" by the Commission. The General Court's reasoning presented in the *Deutsche Bahn* judgment might be seen as leading to a green light for conducting fishing expeditions and therefore contradict the position it adopted previously in the *Nexans* judgment.

It is thus not surprising that Deutsche Bahn also brought⁷⁸ an appeal against the General Court's judgment⁷⁹ basing *inter alia* on the arguments that the General Court misinterpreted and misapplied the fundamental rights to inviolability of one's premises and to effective judicial review as well as the settled case-law of the European Court of Human Rights. Furthermore, the appellant claimed that, the General Court has incorrectly regarded the unrelated documents as being so-called "chance discoveries" and that the Commission officials were prohibited from using those documents which had been obtained illegally, *i.e.* outside the scope of the investigation. Finally, according to another undertaking's plea, the General Court misapplied the rules regarding the burden of proof.

The Court of Justice in the ruling delivered on 18 July 2015 partially upheld the Deutsche Bahn's appeal⁸⁰. First, the Court of Justice rejected the allegations regarding the right to the inviolability of the home⁸¹ and the right to effective judicial protection. Second, the Court of Justice stated that the Deutsche Bahn's right to defence had been violated due to irregularities vitiating the conduct of the first inspection. The Court of Justice disagreed with the view expressed by the General Court and held that the notification prior to the first inspection of a separate complaint, which did not constitute part of the general background information on the case, was unrelated to the subject-matter of the first inspection decision. Accordingly, the lack of any reference to that complaint in the description of the subject-matter of the first inspection decision infringed the Commission's obligation to state reasons and the Deutsche Bahn's right to defence. Thus, "the first inspection was vitiated by irregularity since the Commission's agents, being previously in possession of information unrelated to the subject-matter of

⁷⁸ On 15 November 2013.

⁷⁹ Case C-583/13 P, *Deutsche Bahn and others vs Commission*.

⁸⁰ Judgment of the Court of Justice in case C-583/13 P, *Deutsche Bahn vs Commission*.

⁸¹ *I.e.* the absence of prior judicial authorisation of the inspection decision.

that inspection, proceeded to seize documents falling outside the scope of the inspection as indicated in the first inspection decision”. Consequently, the Court of Justice set aside the judgment of the General Court in so far as it dismissed the actions brought against the second and third inspection decisions and annulled the above-mentioned inspections decisions as triggered by documents illegally discovered during the first inspection.

The importance of the ruling of the Court of Justice for the protection of undertakings against fishing expeditions is incontestable. Its practical implication is that the Commission is precluded from using any document that was discovered illegally by the inspectors during an inspection as evidence in an infringement decision against the undertaking concerned.

5. Conclusions

The prohibition of fishing expeditions should be regarded as a fundamental and crucial safeguard for the protection of the undertaking’s right to defence, namely preventing any arbitrary or disproportionate intervention by public authorities into the private sphere of undertakings.

Argued over for many years by scholars, the illegality and the ban on fishing expeditions was eventually confirmed by the CJEU. Nevertheless, according to the interpretation presented by the EU courts in the *Nexans* case, the prohibition focused solely on the product scope of inspection. While, in order to carry out an inspection, the Commission is required to state “reasonable grounds” for suspecting an infringement regarding specific product areas, the Commission retains nevertheless broad discretion in relation to the geographic scope of an inspection. It would however be advisable to also introduce some restriction as to the geographic boundaries set out in the inspection decision.

The EU courts are expected to apply a strict interpretation of the requirement of sufficient suspicion⁸² to all relevant scopes of the inspection. To better protect undertakings from inspectors’ abuses and an arbitrary or disproportionate intervention into their matters, an obligation to specify in detail in an inspection decision its purpose⁸³ and extent should encompass all relevant aspects, *i.e.* not only products, but also time and territory⁸⁴.

⁸² Including checking its components (such as prior possession of sufficient evidence).

⁸³ Facts which the authority wishes to establish through the inspection.

⁸⁴ See M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, YARS Vol. 2014, 7(10), pp. 129–158.

Undoubtedly, the task to strike a fair balance between the effectiveness of the Commission's investigations and protection of the undertakings' right to defence in this context is tough and both approaches have their supporters and opponents. On the one hand, due to the specific character of the infringements in competition law, in particular difficulties in uncovering evidence, it is important for competition enforcement to receive benefits from "chance discoveries". Otherwise, the effectiveness of the Commission's powers would be hindered if the competition authority was expected to turn a blind eye to potentially incriminating documents.

On the other hand, as confirmed by the Court of Justice in case *Deutsche Bahn*, the Commission is entitled to only search for evidence related to the scope set out in the inspection decision. It cannot, while conducting an inspection in one case, take the opportunity to look for incriminating documents regarding other possible infringements leading to the initiation of separate proceedings. As confirmed by the Court of Justice the undertakings' right to defence "would be seriously affected if the Commission would be entitled to rely on evidence obtained during an inspection that was not related to the subject-matter or purpose thereof"⁸⁵. Hence, if according to settled case-law, documents falling outside that inspection's scope cannot be used by the Commission as evidence, they should not examine or seize in the first place⁸⁶.

Therefore, each time the EU courts deal with this issue, they should analyse in a strict way whether the contested documents were in fact uncovered only incidentally or whether their discovery resulted from the fact that the inspectors were also carrying out a search beyond the scope of the inspection decision. Granting the Commission too broad a discretion in this matter, *i.e.* too easily accepting the justification that the contested documents constitute solely of "chance discoveries" that cannot be ignored by the competition authority, may lead to abuses, in particular in situations when the Commission uses an inspection decision related to the one infringement to simultaneously concentrate on another distinct strand of illegal conduct or to conduct a fishing expedition.

Finally, some steps need to be taken in order to prevent the questionable practice of copying in entirety digital storage mediums from amounting to fishing expeditions⁸⁷.

⁸⁵ *Dow Benelux* judgment, para. 18, and *Roquette Frères* judgment, para. 48.

⁸⁶ Y. Botteman, J.-F. Guillaudeau, *The General Court's Ruling in Deutsche Bahn: A Review of the European Commission's Dawn Raid Practices and Ways to Challenge Them*, 24 September 2013; available at: <http://www.steptoe.com/publications-9064.html>

⁸⁷ For more details see Chapter VI "Subsequent electronic searches of copied hard drives".

Subsequent electronic searches of copied hard drives

1. Introduction

In an increasingly paperless world, the focus on gathering evidence has actually shifted more and more to a digital one.

Taking away forensic copies of computer hard drives for later review at an authority's premises constitutes an extremely controversial, albeit common, practice related to inspections carried out by competition authorities¹. Even though it may be tempting to reduce the duration of an inspection and minimise disruption of the undertaking's activities, copying large volumes of electronic documents for review in the Commission's offices may result in dangerous consequences for any undertakings inspected. It namely potentially allows the Commission to gain access to documents, which belong to the undertaking, that are irrelevant to the investigation in question or legally privileged, *i.e.* protected by the right to privacy, the confidentiality of correspondence as well as legal professional privilege.

Undoubtedly, this practice is very advantageous to the Commission which nowadays focuses more and more on electronically stored information which may be instrumental for the successful uncovering of evidence. Besides having the possibility to review the copied data at its premises in more comfortable conditions, thanks to the interlude between the moment of taking forensic copies and subsequent data search, the Commission is actually granted more time to better rethink and understand the case in question which means that consequencely it is able to better focus on and detect relevant documents.

¹ See M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, YARS Vol. 2014, 7(10), pp. 129–158.

However, looking at the ECtHR's approach some doubt may arise as to whether the Commission practice is fully in line with Strasbourg jurisprudence.

2. Approach adopted by the ECtHR

In the context of the issue regarding the copying of entire storage media in order to conduct their subsequent search in the authority's offices the ECtHR's judgment in the *Robathin* case² seems to be the most relevant. With brief reference to the facts of this case, during a search carried out³ in the office of the applicant, being an Austrian lawyer⁴ suspected of having violated criminal law⁵, Austrian officials copied all the files from the his computer. The search warrant issued by the investigating judge expressly mentioned "personal computers and discs" as objects being authorised to be searched and seized. Since Mr. Robatin objected to the data being examined, the copied discs were sealed and provided for the national court⁶ that authorised the examination of all the files. After completion of the national proceedings, the applicant brought a complaint before the ECtHR claiming that the search and seizure of all his electronic data constituted a violation of his right to privacy protected under Article 8 ECHR.

The ECtHR emphasised that any seizure amounts to an interference with the right to privacy which has three consequences. First, a sufficient basis for such an action must be established in the relevant legal provisions. Second, the use of this measure must be necessary to achieve the legitimate aim in the circumstances at stake (question of proportionality). Third, the inspected entity must be granted safeguards against arbitrary actions by the authorities.

The ECtHR noted first that in the case at stake the scope and purpose of the inspection warrant had been very broad and thus procedural guarantees and remedies were required in order to counterbalance its scope. The applicant was provided with a remedy, *i.e.* a court scrutinised whether the examination of the seized electronic data was permissible. However,

² Judgment of the ECtHR of 3 July 2012, in case *Robathin vs Austria*, Application No. 30457/06.

³ By police officers of the Austrian Federal Ministry of the Interior.

⁴ The issue regarding the fact that a search of a lawyer's business premises risked impinging on his duty of professional secrecy did not play a decisive role in the ECtHR judgment and thus it won't be additionally analysed in this Chapter.

⁵ *I.e.* of committing aggravated theft, aggravated fraud and embezzlement.

⁶ The Review Chamber (*Ratskammer*).

according to the ECtHR, the review body exercised its supervisory function incorrectly since it only gave very brief and rather general reasons for authorising the search. It also did not consider the issue of proportionality – it neither addressed the question on whether it would be sufficient to search only that data which was limited to the scope of the investigation, nor gave any specific reasons for its finding that a search of all of the applicant’s data was necessary for the investigation.⁷ Nevertheless, a seizure of electronic data raises questions of proportionality. Even if the seizure took place in pursuit of a legitimate goal, it is indispensable to ascertain whether the measure subject to the complaint was “necessary in a democratic society”. In other words, the national court should have assessed whether the relationship between the aim sought to be achieved by way of the inspection and the means employed can be considered proportionate⁸.

Therefore, in the *Robathin* case, the ECtHR found a violation of Article 8 ECHR since the seizure and examination of electronic data had gone beyond what was necessary to achieve the legitimate aim.

Another important aspect that comes into play regards possible application of privilege against self-incrimination to a natural or legal person being actually forced by allowing the copying of all electronic data to provide, albeit indirectly, incriminating documents⁹. In *J.B. vs Switzerland*¹⁰, the tax authority requested the applicant submit all documents concerning the companies in which he had invested money and fined him twice for failing to do this. The ECtHR held that the authority had been *de facto* attempting to compel the applicant to submit documents which would have provided incriminating information and thus had violated the right not to incriminate oneself protected under Article 6 § 1 ECHR¹¹. Furthermore, pursuant to the ECtHR view, expressed *inter alia* in *Funke vs France*¹², if officials are “unable or unwilling” to procure searched documents by other means, they cannot attempt to compel the person inspected to provide by himself the evidence of infringements that he had allegedly committed. Any particular secondary regulation “cannot justify such an infringement of the right of anyone (...) to remain silent and not to contribute to incriminating himself¹³”.

⁷ *Robathin* judgment, paras 4752.

⁸ *Robathin* judgment, paras 42–43. See also M. Michałek, *Fishing expeditions...*, pp. 129–158.

⁹ Judgment of the ECtHR of 3 May 2001 in case *J.B. vs Switzerland*.

¹⁰ *J.B. vs Switzerland* judgment.

¹¹ *Ibidem*, paras 64 to 71.

¹² Judgment of the ECtHR of 25 February 1993 in case *Funke vs France*, Application No. 10828/84.

¹³ See *Funke vs France* judgment, para. 44.

3. Assessment of EU practice

Before considering whether the solutions adopted in the EU are in fact compatible with the requirement of EConHR set out by the ECtHR, *i.e.* the three Robathin requirements and the protection of the privilege against self-incrimination, it is worth noting the unfortunate avoidance of the European judiciary to rule on the merits of this issue¹⁴. For instance in the *Nexans* case, instead of pronouncing on the legality of contested practice, the General Court simply declared the undertaking's challenges inadmissible¹⁵. Thus, it is not possible to compare the ECtHR position directly with the one adopted by the CJEU since the EU judiciary lacks a clear and direct approach in this matter.

According to the ECtHR with reference to the right to privacy, the first issue to consider with respect to the seizure of copies of entire computer hard drives is whether there is a sufficient legal basis for such far-reaching public intervention. In the EU, one can specify here Article 20(2)b and c Regulation 1/2003¹⁶ as well as, as a complementary document, *Commission's Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003*¹⁷. More precisely, pursuant to Article 20(2)b and c Regulation 1/2003, Commission officials authorised to conduct an inspection are empowered to examine the books and other records related to the business, irrespective of their storage medium, and to take or obtain in any form copies of or extracts from such books or records. Paragraphs 9, 10 and 14 of the Explanatory Note entitle the Commission is entitled *inter alia* to take a full image of a server or storage media (such as hard drives) for safekeeping purposes, block individual email accounts and examine storage media.

When it comes to the second criteria of necessity (the question of proportionality), it has to be stressed that the matter and geographic limitation of the inspection is simply not respected by the inspectors in

¹⁴ Judgment of the General Court of 14 November 2012 in case T-135/09 *Nexans vs Commission*.

¹⁵ The General Court, however, noted that an undertaking is entitled to file an action in tort against the Commission if its unlawful act inflicted damage on the undertaking inspected. Unfortunately, the General Court did not precise what should be understood under the notion of "damage" in this context.

¹⁶ Commission officials authorized to conduct an inspection are empowered to examine the books and other records related to the business, irrespective of their storage medium, and to take or obtain in any form copies of or extracts from such books or records.

¹⁷ The Note was revised on 18 March 2013 in order to better adapt the text to the recent developments of the CJEU's case-law. See for instance *Nexans* judgment.

every case of subsequent electronic searches of hard drives that had been copied in their entirety. Taking away forensic copies of entire hard drives is equivalent to the seizure of documents falling outside the investigation, neither being covered by the scope of the investigation nor the inspection decision. For instance, they might relate to other activities of the inspected undertaking. Furthermore, hard drives may contain documents that can never be searched or seized by competition authorities, including documents protected by the right to privacy, confidentiality of correspondence as well as legal professional privilege¹⁸.

One may moreover argue that the risk of making illegal use of data discovered by chance has increased especially in the aftermath of the recent *Deutsche Bahn* judgment. Inspectors may now try to raise the argument that they have used the discovered information only as *intelligence* rather than as evidence.

On the other hand, this measure might also be considered a means to shorten the time frame in which the undertaking's activities are being interrupted by an inspection. The Commission often argues that if it were to firstly assess on site whether the electronic data fall within the scope of the investigation and then be allowed to take only copies of the relevant documents that moreover are not covered by legal professional privilege, such a solution would lead to an unnecessary extension of the inspection. Since the functioning of the undertaking is paralysed during an inspection, some undertakings may indeed prefer letting the inspectors continue the search in the authority's offices rather than having their own premises occupied for a longer period of time. Still, due to a high and real risk of violating the rights of the undertaking, the prolongation of the inspection¹⁹ would constitute a definitely more fair and less intrusive solution than allowing the Commission to seizure documents falling outside the investigation and depriving the undertaking of the possibility to watch over the examination of its data by the Commission on the spot. Therefore, it is crucial that this solution is not imposed arbitrarily by the officials, *i.e.* the inspected undertakings should have an actual choice in this matter.

As to the third requirement of the sufficient safeguards, it has to be stressed that an undoubtedly important, albeit not sufficient, safeguard lies in the inspected undertaking's right to assist (be present) during the subsequent searches of its copied data. Even though the Commission secures

¹⁸ See also M. Michałek, *Fishing expeditions...*, pp. 129–158.

¹⁹ In particular since the Commission is not obliged to indicate the end of inspection in the inspection decision.

forensic copies by placing them in a sealed envelope and is committed to invite the undertaking to attend the opening of the sealed envelope containing the copy of the data at the Commission premises and to assist during its continued search, once all the data, including those covered by the legal professional privilege or related to other areas of undertakings activities (not covered by the inspection decision), are in the Commission's possession, the undertakings concerned cannot be sure that they would not be unlawfully used against them.

Furthermore, in relation to the right to oppose an inspection, it is worth noting that an attempt by the scrutinised undertaking to exercise its right to stop such a measure usually leads to the imposition of a procedural fine²⁰. Even though undertakings are said to be granted the right to oppose²¹, none of the courts have specified the conditions under which they may successfully (that is, without being fined) do so²². Due to the lack of any practical judicial guidance, undertakings inspected are left in a very difficult position²³.

In this context one may point at the *Energeticky a prumyslovy* case²⁴ related to the imposition of a EUR 2.5 million fine for obstruction during the Commission's inspection regarding access to namely electronic documents²⁵. Joaquín Almunia, the former Competition Commissioner, stated in the press release regarding the decision imposing fine that “(c)ompany information is nowadays essentially stored in IT environments like email systems and can be quickly modified or deleted. This decision sends a clear message to all companies that the Commission will not tolerate actions which could undermine the integrity and effectiveness of our investigations by

²⁰ Either immediately or in the framework of the final decision. See judgment of the General Court of 26 November 2014 in case T-272/12 *Energeticky a prumyslovy* and decision of the Commission of 28 March 2012 in case COMP/39793, *Energeticky a průmyslový holding and others*.

²¹ See e.g. judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn*.

²² Even if according to the GC, fines provided for in Art. 23 & 24 Regulation 1/2003 may only be imposed if an undertaking either obviously obstructs or abuses its right to oppose. Unfortunately, the GC has not clarified what should be understood under the term *an obvious obstruction or an abusive opposition*. See *Deutsche Bahn* judgment.

²³ See also M. Michałek, *Fishing expeditions...*, p. 129–158.

²⁴ *Energeticky* judgment; See also decision of the Commission's in *Energeticky* case.

²⁵ The undertaking failed to block an email account and diverted incoming emails, in breach of their obligations to cooperate with Commission officials during such inspections and to disclose all documents relevant to the investigation.

tampering with such information during an inspection²⁶”. Energeticky did not agree with the Commission’s decision and initiated proceedings before the General Court. Given the arguments raised in the appellant’s action²⁷, the General Court was expected to take the opportunity to clarify the inspectors duties in relation to inspections, on the one hand, and, the scope as well as conditions of undertakings right to oppose, on the other hand.

The General Court, that rejected all pleas raised by the undertakings²⁸, confirmed the tough approach of the CJEU that any attempt to obstruct Commission inspections that undermines the integrity and effectiveness of Commission inspections, including tampering with data stored electronically, is illegal and will lead to the imposition of an appropriate financial sanction. It was further recalled that the undertaking’s obligation to actively cooperate requires that all information relating to the subject-matter of the investigation is made available to the Commission. The General Court strictly agreed with the Commission that once an inspection decision with its explanatory notice is presented to a representative of the undertaking to be inspected, it is for the undertaking to provide sufficient information to all its staff. Thus, no arguments regarding inefficiencies of the inspectors in informing the undertaking about its rights and duties will be accepted neither by the Commission nor by the CJEU. What is extremely significant is that the sole fact of attempting to obstruct an inspection is sufficient to lead to a fine under Regulation 1/2003. It has been confirmed that the Commission does not have to prove that the undertaking’s conduct has effectively hindered the effectiveness of inspection, for instance that some documents were actually removed or manipulated. The burden of proof is actually shifted on the undertaking if it claims otherwise²⁹.

Furthermore, contrary to the position of the ECtHR, the CJEU acknowledges only limited and direct protection of the right to remain silent to the legal persons³⁰ and denies application of the privilege against

²⁶ See the European Commission’s press release of 28 March 2012, IP/12/319 *Antitrust: Commission fines Czech energy companies Energetický a průmyslový holding and EP Investment Advisors € 2.5 million for obstruction during inspection*.

²⁷ Regarding *inter alia* irregularities in the conduct of the inspection that led to adoption of the contested decision.

²⁸ See *Energeticky* judgment.

²⁹ For more details about *Energeticky* judgment see Chapter IV “Procedural fines and periodic penalty payments”.

³⁰ *I.e.* prohibits the Commission, by requesting oral explanations, from directly compelling an undertaking to provide it with answers constituting an admission of involvement in the competition law infringement. See judgment of the ECJ of 18 October 1989 in case *Orkem*, para. 35.

self-incrimination in such circumstances. According to the settled case-law of the latter, “the Commission (...) is entitled to compel an undertaking to provide all necessary information concerning such [incriminating] facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct³¹”.

Finally, neither can such a measure be challenged within the action against the inspection decision nor the EU legal order provide for a separate judicial control over the seizure of electronic data.

For instance in the *Nexans* case, the second part of challenge raised by the undertaking related to the measures undertaken by the Commission during the dawn raids. Nexans contested the inspection measures consisting namely of the taking away of forensic copies of computer hard drives for subsequent review at the Commission’s premises. According to the undertaking stored media contained data such as emails, addresses *etc.*, which included those of a personal nature and protected by the right to privacy, the confidentiality of correspondence and legal professional privilege. Nexans argued that measures of this kind should be challengeable since contested acts brought about a significant change in the undertaking’s legal position and have seriously and irreversibly affected its fundamental rights – *i.e.* the right to privacy and the right to defence. Nevertheless, the General Court stated that contested actions do not constitute actionable decisions but are merely measures implementing the inspection decision. Such implementing measures can thus only be challenged in the appeal of the final decision on the infringement, or the decision imposing fines for a failure to cooperate³². Such a stance brings about legal uncertainty for undertakings since it leads to unreasonable delays between the carrying out of inspections and the moment its implementation stands to be reviewed³³. Moreover, it is conditional upon the adoption of a decision finding an infringement or imposing a fine, which may not necessarily happen³⁴.

³¹ *Ibidem*, para. 34.

³² See for instance *Nexans* judgment. See also M. Michałek, *Fishing expeditions...*, pp. 129–158.

³³ Often couple of years after the inspection had been carried out.

³⁴ See judgment of the CFI of 17 September 2007 in joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs Commission*, para. 47; See also D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6, p. 519 and M. Michałek, *Fishing expeditions...*, pp. 129–158.

It is noteworthy that, at EU level, undertakings have nevertheless the possibility to lodge an action in tort against the Commission under Article 268 TFEU – a solution that may be regarded as an immediate remedy. Such an action can further be accompanied by requests for interim measures³⁵ that may include injunctive relief³⁶ as well as provisional damages, if necessary and appropriate to avoid irreparable harm. It has to be however noted that the undertaking has to demonstrate that the actions of the Commission were unlawful and inflicted damage³⁷ on the undertaking inspected and this is what makes this potential remedy not so easily accessible.

However, due to its particular character and especially its serious consequences for the undertaking, seizure of entire discs of electronic data should be considered as an example of acts adopted during inspections “which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position³⁸” and therefore should be able to be the subject of an action for annulment. Like in the case of legal professional privilege, a decision by the competition authority to reject the right to oppose granted to an undertaking, and to consequently take a copy of the entire hard drive for subsequent search at the authority premises, brings about a significant change to that undertaking’s legal position and irreversibly affects its fundamental rights (right to privacy and right to defence). The competition authority enter into the possession of documents that it does not have the right to seize (such as documents covered by legal professional privilege or privilege against self-incrimination). The above denies the undertaking sufficient protection of its right to defence³⁹.

Therefore, in light of the above, it seems that the conditions set out by the ECtHR, in relation to either the right to privacy or to the privilege against self-incrimination, are not fulfilled by the solutions currently adopted in the EU with regard to the controversial practice of taking forensic images of hard drives for continued inspection at the Commission’s premises. Although EU competition law regulation provides a legal basis for this inspection

³⁵ Available under Art. 279 TFEU.

³⁶ In order to prevent further damage occurring. Furthermore, in interim measure cases, unlike cases regarding an annulment of final decisions, the EU judiciary can give precise instructions to the Commission.

³⁷ Unfortunately, the General Court in its judgment in case *Nexans* did not precise what should be understood under the notion of “damage” in this context.

³⁸ See *Akzo Nobel* judgment 2007, paras 46 and 47.

³⁹ See M. Michałek, *Fishing expeditions...*, p. 129–158.

measure, it is a question of necessity (proportionality) and lack of sufficient safeguards for the undertakings concerned as well as of immediate and effective judicial review that might lead to the conclusion of possible violation of Article 8 EConHR.

4. Conclusions

In order to ensure a fully effective protection of the rights of undertakings inspected (*inter alia* right to defence, including the privilege against self-incrimination and right to privacy) it would be advisable to prohibit the current practice common to all competition authorities regarding the copying in entirety of digital storage mediums (such as hard drives) for subsequent review in the competition authority offices since this measure is extremely intrusive and not in line with the principle of proportionality.

Nevertheless due to the reasons of effectivity of Commission investigations such a prohibition seems less probable. Therefore, the use of this coercive measure must be specified by introducing into binding law⁴⁰ relevant provisions which will provide limits to the powers of the authorities and procedural safeguards for undertakings concerned, in order to prevent search for digital evidence from being tantamount to a fishing expedition. Undertakings should be granted a right to decide on the place of the electronic search. More specifically, they should have the choice between letting the inspectors take the copied data to analyse them outside the undertaking's premises, *i.e.* in the Commission offices, or inviting the Commission to carry out the electronic search at the undertaking's premises⁴¹. And the Commission should accept the solution chosen by the undertaking.

Finally, it should be noted that the lack of any clear position of the General Court as to legality of this practice only confirms that undertakings are left in a very difficult position, given (1) the Commission's willingness to fine undertakings that try to exercise their right to oppose and prevent

⁴⁰ Providing for some explanations in this matter in the Commission's Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 is definitely not sufficient due to the far reaching consequences relating to the practice question.

⁴¹ In the special room prepared for the Commission that will be sealed each time during the breaks and over-night in order to ensure that the date will not be manipulated by the undertaking. This option should not have any negative consequences on the Commission's investigation. Nevertheless, it may better protect undertakings' rights.

officials from undertaking controversial measures during an inspection and (2) the actual absence of judicial control at an intermediate stage regarding those measures. On the one hand, the prevention from having images of digital storage mediums copied in their entirety by Commission officials during an inspection will probably lead to the imposition of an immediate fine for obstruction or to a relevant increase of the final fine⁴². On the other hand, allowing inspectors to take such copies and conduct subsequent electronic search at the Commission's premises, violates the undertakings right to defence and to privacy and makes them wait for a final infringement decision, in order to eventually be entitled to raise challenges in relation to the evidence seized unlawfully during the inspection.

Thus, it is expected that the CJEU will eventually take a clear position with regard to this issue.

⁴² See for instance the *Energetycky* decision.

Chapter VII

Right to privacy

1. Introduction

The powers of inspection granted to the European Commission under Article 20 of Regulation 1/2003 are susceptible to interference with the right to respect for private life and correspondence protected under Article 8 ECHR and Articles 47 and 7 CFR¹. Even though the right to privacy constitutes an autonomous right and thus cannot be regarded merely as a component of the right to defence, both rights are interdependent, *i.e.* the respect of the former is of a huge importance for the protection of the latter. Excessive interference with privacy may namely lead to unlawful uncovering of evidence against any undertakings inspected and may hinder the exercise of the undertakings' right to defence and, thus, may restrict the undertakings' impact on the outcome of the investigation conducted by the Commission². Therefore, in the context of this study it is necessary to briefly analyse the principle of protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of legal persons with regard to the protection of undertakings' business

¹ K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012, p. 395; A. Jones, B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, 5th ed., Oxford, p. 1039; M. Messina, *The Protection of the Right to Private Life, Home and Correspondence vs the Efficient Enforcement of Competition Law: Is a New EC Competition Court the Right Way Forward?*, *European Competition Journal*, No. 3, 2007, p. 185; E.M. Ameye, *The Interplay between Human Rights and Competition Law in the EU* (2004) 25 *European Competition Law Review*, p. 340; I. Van Bael, *Due Process in EU Competition Proceedings*, Hague–London–New York 2011, pp. 102, 157.

² K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 395.

premises. After having considered the relevant jurisprudence of the ECtHR and the CJEU, the focus will be shifted to the application and relevance of this right in relation to the Commission's inspections.

2. Standard of protection of the right to privacy set out by the ECtHR

The protection of the home and private life had traditionally been regarded as applicable to natural persons. It was however the judgment in *Niemietz* case³ that started to pave the way to cover legal persons by the scope of Article 8 EConHR. The ECtHR clearly stated that the essential object and purpose of Article 8 EConHR referring to "private life" and "home" should be understood as also covering only the professional premises belonging to a natural person, *i.e.* a lawyer⁴.

Nevertheless, the ECtHR also held that the extension of the protection of Article 8 EConHR to legal persons does not mean that this provision should be applied to these kind of entities in the same way as to natural persons. The ECtHR namely stated *expressis verbis* "that entitlement [of the authority] might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case⁵".

Subsequently, in its judgment in the *Tamosius* case⁶ the ECtHR accepted that in any case of a search conducted in a lawyer's office, the protection granted by Article 8 EConHR covers the lawyer, as a professional⁷. The application of Article 8 EConHR to business premises was further confirmed in the ECtHR's judgment in the *Veeber vs Estonia* case⁸ and in the *Colas Est*⁹ case. From the ruling in the latter case, it clearly follows that Article 8

³ See judgment of the ECtHR of 16 December 1992 in case *Niemietz vs Germany*, Application No. 13710/88.

⁴ The ECtHR emphasised that the exercise of one's profession, *e.g.* lawyer's work, "may form a part and parcel of his person life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".

⁵ See *Niemietz* judgment, para. 31.

⁶ See judgment of the ECtHR of 19 September 2002 in case *Tamosius vs United Kingdom*, Application No. 062002/00, S.T.C. 2002, 1307.

⁷ Instead of protecting only the lawyer's clients whose affairs constituted the object of the inspection.

⁸ See judgment of the ECtHR of 11 November 2002 in case *Veeber vs Estonia*, Application No. 37571/97, E.H.R.R. 2004, 39, p. 6.

⁹ Judgment of the ECtHR of 16 April 2002 in case *Société Colas Est and other vs France*, Application No. 37971/97.

EConHR should be applied with reference to the undertakings' premises in the context of investigations conducted under Regulation 1/2003.

The facts of that case referred to dawn raids carried out simultaneously at the premises of 56 undertakings who were suspected of participating in a construction industry cartel in France. The documents collected during the inspections¹⁰ served as the basis for the infringement decision to impose high fines on the undertakings concerned, including the Colas Est group.

The ECtHR stressed that “the Convention is a living instrument which must be interpreted in the light of present-day conditions¹¹”. Therefore, “(b)uilding on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company’s registered office, branches or other business premises”¹².

Next, the ECtHR considered whether the contested inspections fulfilled the requirements of Article 8 EConHR, *i.e.* were (1) in accordance with the law, (2) with legitimate aim and (3) necessary in a democratic society.

Pursuant to the settled case-law enshrined in the *Amman* case¹³, the more far-reaching interference is, the more precise legislation, defining in particular the limits of the authority powers and interference, must be introduced. The ECtHR held that given the scale of the inspections “the adequate and effective safeguards against abuse” should have been afforded by the relevant law¹⁴. Nevertheless, French legislation lacked such guarantees. Firstly, the French competition authority was granted with exclusive powers to determine the expediency, number, length and scale of inspections and, secondly, the inspections contested were not subject to any prior judicial authorisation and were conducted without the presence of any

¹⁰ Ordered by the decision of the French NCA. At that time no prior judicial authorisation was required in order to allow the inspector to enter the premises and seize the evidence. The procedural rules were subsequently revised and nowadays such prior judicial control is required.

¹¹ The ECtHR referred also to its judgment of 27 September 1990 in case *Cossey vs the United Kingdom*, Application No. 10843/84, Series A No. 184, p. 14, para. 35 *in fine*.

¹² See *Colas Est* judgment, para. 41.

¹³ See judgment of the ECtHR of 16 February 2000 in case *Amman vs Switzerland*, Application No. 27798/95.

¹⁴ *Colas Est* judgment, para. 48; See also judgment of the ECtHR of 25 February 1993 in case *Funke vs France*, Application No. 10828/84, pp. 24–25, § 56, judgment of the ECtHR of 25 February 1993 in case *Crémieux vs France*, Application No. 11471/85, p. 62, § 39 and judgment of the ECtHR of 25 February 1993 in case *Mialhe vs France*, Application No. 12661/87, pp. 89–90, § 37.

senior police officer. “That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned¹⁵, the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued¹⁶”. And thus the ECtHR found the violation of Article 8 EConHR.

The question that remained unclear after the *Colas Est* judgment was whether, in the case of a search, *prior* judicial authorisation is required in order to satisfy the requirement of Article 8 EConHR. On the one hand, in the *Colas Est* case it seemed to be so. Moreover, in other cases regarding very intrusive types of inspections, *i.e.* searches, that were declared justiciable, the prior judicial control resulting in granting a court authorisation effectively took place¹⁷. Nevertheless, the ECtHR did not necessarily focus on the quality of such a control. For instance, in the *Canal Plus* case the ECtHR did not agree with the applicant’s arguments that actually no effective control occurred since granting the inspection authorisation constituted only an empty formality¹⁸.

It is noteworthy, on the other hand, that the lack of prior judicial control was accepted by the ECtHR in the *Camenzind* case¹⁹, in which, no search took place – the inspection conducted was much less invasive²⁰, *i.e.* the inspectors neither touched any object, consulted any documents nor opened any drawers²¹.

Thus, it might seem that the existence of prior authorisation, on the one hand, would be required to conduct a search, but, on the other hand, it is not indispensable to carry out an inspection²².

¹⁵ See also *Niemietz* judgment, p. 34, § 31.

¹⁶ *Colas Est* judgment, para. 49; See also see *Funke* judgment, p. 25, § 57, *Crémieux* judgment, p. 63, § 40 and *Mialhe* judgment, p. 90, § 38.

¹⁷ See judgement of the ECtHR of 30 March 1989 in case *Chappell vs United Kingdom*, Application No. 10461/83, E.H.R.R. 1989, 12, p. 1, judgment of the ECtHR of 8 January 2002 in case *Keslassy vs France*, Application No. 51578/99, and judgment of the ECtHR of 21 December 2010 in case *Canal Plus vs France*, Application No. 29408/08.

¹⁸ The ECtHR noted that the order was reasoned by the judge.

¹⁹ See judgement of the ECtHR of 16 December 1997 in case *Camenzind vs Switzerland*, Application No. 136/1996/755/954, E.H.R.R.: 1997,28, p. 458.

²⁰ The aim of the inspection was to verify compliance of certain equipment in applicant’s home with technical standards.

²¹ *Camenzind* judgment, p. 458, para. 51, *Crémieux* judgment, p. 332.

²² It has to be stressed in the context of this study that the inspections ordered by the Commission’s decision under Article 20(4) of Regulation 1/2003 encompass the power to conduct a search. Thus, it seems that a court’s authorisation should be required.

Eventually, however, the ECtHR clearly expressed its position in the recent judgment in the *Delta Pekárny* case²³. In the case concerning an inspection carried out by the Czech Office for the Protection of Competition as well as the fine imposed on the undertaking for violation of the obligation of to cooperate²⁴. Before the ECtHR the applicant alleged that, first, the inspection had been carried out without prior judicial authorisation and, second, that the procedural safeguards guaranteed to the undertaking had been insufficient. The ECtHR clearly held that the absence of prior judicial authorisation of an inspection does not automatically constitute a violation of Article 8 ECHR. However, if a competition authority is entitled by a particular national legislation to carry out an inspection without prior judicial authorisation, ex-post judicial scrutiny is necessary in order to satisfy the requirements of the ECHR. Hence, pursuant to the ECtHR, the absence of prior judicial authorisation may be compensated by an effective judicial *ex post* control of the impugned inspection, assessing its necessity as well as the course of conduct²⁵. The ECtHR noted that in the case at stake the inspection was neither subject to prior consent nor ordered by an administrative decision that would have been subject to a judicial review²⁶. Pursuant to the ECHR, the Czech courts²⁷ in fact had only reviewed the legality of the challenged inspection, *i.e.* neither the reasons why it had been ordered nor the course of the inspection, the purpose it had pursued nor its scope had been addressed by the courts. Moreover, the question of the necessity and proportionality of the inspection had not been examined at all during the judicial control. The ECtHR noted that such relevant aspects as: the way the Czech Office had assessed the appropriateness of the inspection, the duration of the inspection and its intended scope had not been the subject of a subsequent judicial review

²³ Judgment of the ECtHR of 2 October 2014 in case *Delta Pekárny a.s. vs the Czech Republic*, Application No. 97/11, available (in French) at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146675#{"itemid":\["001-146675"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146675#{).

²⁴ Pursuant to the Czech Office, the undertaking violated its procedural obligations since the CEO of Delta Pekárny had not allow the inspectors to examine some e-mail messages stored in his company laptop and had taken the laptop away, while going on a business journey. Moreover, the CEO was alleged to had arbitrarily taken from the Office inspectors two documents they had uncovered during the inspection. In consequence, the Czech Office imposed a maximum fine admissible under the then valid Competition Act, *i.e.* of CZK 300,000.

²⁵ See para. 87 of *Delta Pekárny* judgment.

²⁶ See para. 86 of *Delta Pekárny* judgment.

²⁷ Regional Court in Brno and the Supreme Administrative Court.

at all²⁸. Thus, the ECtHR stated that none of the national courts had directly reviewed whether the inspection had been lawful²⁹. Furthermore, according to the ECtHR, in the absence of prior judicial authorisation as well as the subsequent judicial review of the necessity of the inspection in question, the procedural guarantees afforded by the national legislation³⁰ were insufficient to prevent possible abuse by the Office³¹.

Therefore, the ECtHR concluded that the subsequent judicial review as well as the procedural guarantees against arbitrary interference with the applicant's right to respect for its home and correspondence were insufficient and found to be in violation of Article 8 EConHR.

Understandably, the question of prior authorisation is thus not the only decisive criterion considered by the ECtHR while deciding on any possible violation of Article 8 EConHR.

Before ruling whether an inspection was justifiable the ECtHR also takes into consideration other requirements set out under Article 8 EConHR. For instance in the *Canal Plus*³² and *Keslassy* cases³³ the ECtHR pointed out at various safeguards provided by the law.

In the *Keslassy* case the ECtHR dismissed the application alleging a violation of Article 8 EConHR. The interference with the applicant's right to respect for his private life and his home was held to be proportionate to the legitimate aims pursued and therefore "necessary in a democratic society" due to "the strict rules governing the issue of warrants for searches of residential premises and the fact that the search of the applicant's home was conducted in accordance with those rules³⁴".

The ECtHR in particular noted that, contrary to the *Funke* case³⁵, the relevant regulation provided a number of safeguards and the entire search

²⁸ The ECtHR stated that the national courts totally failed to address the circumstances and facts that had led the Czech Office to carry out the inspection.

²⁹ See para. 91 of *Delta Pekárny* judgment.

³⁰ *I.e.* the fact that the inspection had been carried out in the presence of the applicant's representatives, the Czech Office had been authorised to seize only copies (not the original documents but copies), and that the inspectors had been bound by a confidentiality obligation.

³¹ See para. 92 of *Delta Pekárny* judgment.

³² See *Canal Plus* judgment.

³³ See *Keslassy* judgment.

³⁴ According to relevant regulation, *i.e.* the Code of Tax Procedure, "(t)he judge shall verify whether there is concrete evidence that the application for authorisation which has been made to him or her is well-founded. The application must contain all the information in the possession of the authority that may serve to justify a search."

³⁵ *Funke* judgment.

and seizure procedure was placed under the authority and supervision of a judge. Moreover, it was emphasised “that in the present case the judge made a reasoned order setting out the matters of fact and law which in his view raised a presumption that fraudulent acts had been committed for which it was necessary to seek evidence”.

Thus, it seems that, in order to have the inspection (search) accepted by the ECtHR, the national court should have access to the case evidence and be entitled to assess independently whether the interference with the rights of a person to be inspected is justified.

3. Approach adopted by the CJEU

Due to the lack of previous ECtHR case law with regard to this aspect the CJEU,³⁶ initially rejected application of Article 8 EConHR to legal persons, in particular undertakings³⁷. For instance, in the judgment in the *Hoechst* case, it was stated that the right to privacy relates to a “man’s personal freedom” and thus the scope of Article 8 EConHR cannot be extended to business premises³⁸. However, the CJEU had already stated in this judgment that “in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention³⁹”. Thus, the CJEU recognised that the need for this protection constitutes a general principle of Community law in the light of which the nature and scope of the Commission’s powers of investigation⁴⁰ should be considered⁴¹.

Nevertheless, given the subsequent rulings of the ECtHR in which it granted the protection of Article 8 EConHR to legal persons as well⁴²,

³⁶ See judgment of the CJEU of 21 September 1989 in joined cases 46/87 and 227/88, *Hoechst AG vs Commission*, para. 18.

³⁷ See judgments of the ECJ of 17 October 1989 in joined cases 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137 and in joined cases 97-99/87 *Dow Chemical Iberica vs Commission*, E.C.R. 1989, 3165.

³⁸ See *Hoechst* judgment, para. 18.

³⁹ *Hoechst* judgment, para. 19.

⁴⁰ Granted under Article 14 of Regulation No 17, corresponding to current Article 20 of Regulation 1/2003.

⁴¹ *Hoechst* judgment, paras 19 and 20, See also *Dow Benelux* judgment, para. 30.

⁴² In particular *Colas Est* judgment.

the CJEU revised its initial approach. The CJEU did not however immediately take into account the ECtHR's developments. The change of the Luxembourg approach occurred only in the judgment in the *Roquette Frères*⁴³ case.

The CJEU acknowledged in this judgment that for the purposes of determining the scope of the principle of protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person in relation to the protection of business premises, the case-law of the ECtHR subsequent to the judgment in *Hoechst* must be taken under consideration. From the Strasbourg jurisprudence follows that, first, the protection afforded by Article 8 ECHR may in certain circumstances be extended to cover business premises⁴⁴ and, second, the right of interference provided for in Article 8(2) ECHR might well be more far-reaching in cases regarding professional or business activities or premises than otherwise would be the case⁴⁵.

Consequently, in response to the preliminary question, the CJEU stated that a national court while deciding on the authorisation of an inspection is obliged to verify whether “the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered⁴⁶”. The national court is in particular required to check whether the Commission has reasonable grounds for suspecting an infringement of competition rules by the undertaking concerned⁴⁷.

The CJEU also pointed at a range of guarantees provided by EU law⁴⁸. First, under Article 20(4) of Regulation 1/2003 the Commission is obliged to state the reasons for the decision ordering an inspection, *i.e.* to specify its subject-matter and purpose. “This is a fundamental requirement, designed to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable the undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their

⁴³ See judgment of the ECJ of 22 October 2002 in case C-94/00 *Roquette Frères SA vs Commission*.

⁴⁴ *Colas Est* judgment, § 41.

⁴⁵ *Niemietz* judgment, § 31.

⁴⁶ *Roquette Frères* judgment, para. 52.

⁴⁷ *Roquette Frères* judgment, para. 54.

⁴⁸ *Roquette Frères* judgment, paras 43–51; See also judgment of the CFI in case T-66/99 *Minoan Lines vs Commission*, E.C.R. 2003, II-5515, paragraph 53; judgment of the CFI of 12 December 2012 in case T-410/09 *Almamet GmbH Handel mit Spänen und Pulvern aus Metall (hereinafter: Almamet) vs Commission*, para. 27.

rights of defence⁴⁹". Moreover, the General Court emphasised that the scope of this obligation "cannot be restricted on the basis of considerations concerning the effectiveness of the investigation⁵⁰". Nevertheless, the Commission is entitled to initiate an inquiry for the purpose of "verifying or supplementing information which it happened to obtain during a previous inspection if that information indicates the existence of conduct contrary to the competition rules⁵¹".

Secondly, an undertaking inspected is entitled to bring an action for annulment against the Commission's decision ordering the inspection before the CJEU. An annulment of the decision in question results in preventing the Commission from using, for the purposes of proceeding regarding the violation of competition rules, any evidence which it might have obtained in the course of that inspection⁵².

Nevertheless, in subsequent judgments the CJEU focused in particular on the non-absolute nature of the protection of the right to privacy. It was recalled that although the protection of private life provided for in Article 8 ECHR must be respected and the protection of the home is extended to the premises of undertakings⁵³, it is also important to safeguard the effectiveness of inspections that constitutes a necessary instrument enabling the Commission to exercise its functions of the "guardian of the Treaties" with regard to the competition law. Hence, the Commission's right of access to the business premises of the undertaking subject to a procedure regarding Articles 101 and 102 TFEU implies the power to search for various items of information which are not already known or fully identified, namely in order to safeguard the usefulness of this right⁵⁴. The General Court recalled that in view of the stage of the administrative procedure at which

⁴⁹ *Almamet* judgment, para. 28. See also *Hoechst* judgment, para. 29; *Roquette Frères* judgment, para. 47; and *Minoan Lines* judgment, para. 54.

⁵⁰ *Almamet* judgment, para. 29.

⁵¹ *Almamet* judgment, para. 30. *Dow Benelux vs Commission*, cited in paragraph 29 above, paragraph 19, and *Limburgse Vinyl Maatschappij and Others vs Commission*, cited in paragraph 25 above, paragraph 301.

⁵² Otherwise the final Commission decision on the infringement will, in so far as it was based on such evidence, be annulled by the CJEU. See *Almamet* judgment, para. 31, *Minoan Lines vs Commission*, cited in paragraph 27 above, paragraph 56 and the case-law cited.

⁵³ *Colas Est* judgment, para. 41, *Roquette Frères judgment*, para. 28 above, paragraph 27; and order of 17 November 2005 in case C-121/04 P *Minoan Lines vs Commission*, not published in the ECR, para. 31.

⁵⁴ Judgment of the General Court of 26 October 2010 in case T-23/09 *CNOP and CCG vs Commission*, E.C.R. 2010, II-05291, para. 40, *Hoechst* judgment, para. 27, and *Minoan Lines* order, para. 36.

inspection decisions are taken, the Commission does not at that time have precise information enabling it to set out the specific legal analysis therein and thus it is not required to do so⁵⁵.

An important development occurred in quite the recent *Almamet* case. In its judgment the General Court, firstly, made reference to the settled case-law, according to which respect for fundamental rights constitutes a condition of the lawfulness of EU acts and any measure incompatible with respect for those rights are unacceptable in the European Union⁵⁶. Thus, any evidence obtained in complete disregard of the procedure regarding its gathering and protecting the undertakings' fundamental rights, including the right to a private life and protection of the home, will not be accepted in the EU. Then the General Court clearly held further that the proper use of that procedure is considered an essential procedural requirement within the meaning of the second paragraph of Article 230 EC which means that its infringement always brings about consequences, even if any harm has been caused by that infringement to the person relying on it⁵⁷.

4. Charter of Fundamental rights of the EU

It has to be stressed that the right to respect for private and family life, being recognised as a general principle of EU law⁵⁸, was introduced in Article 7 CFR. According to the Explanations relating to the Charter of Fundamental Rights⁵⁹ regarding this provision “(t)he rights guaranteed in Article 7 correspond to those guaranteed by Article 8 (EConHR)”. Since, pursuant to Article 52(3) CFR, the meaning and scope of this right are the same as those of the corresponding Article of the EConHR, the limitations that may legitimately be imposed in relation to this right are also the same as those allowed by Article 8 EConHR. Thus, it is indispensable

⁵⁵ *CNOP and CCG* judgment, paras 41–43.

⁵⁶ *Almamet* judgment, para. 39, see also judgment of the ECJ of 3 September 2008 in joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation vs Council and Commission*, E.C.R. 2008, I-6351, para. 284, and judgment of the CFI of 14 October 2009 in case T-390/08 *Bank Melli Iran vs Council*, E.C.R. 2009, II-3967, para. 70.

⁵⁷ *Almamet* judgment, para. 39. see also judgment of the ECJ of 8 July 2004 C-286/95 P *Commission vs ICI*, E.C.R. 2000, I-2341, paras 42 and 52.

⁵⁸ See *Hoechst* judgment, para. 19, judgment of the ECJ in case C-94/00 *Roquette Frères vs Commission*, E.C.R. 2002, I-9011, para. 27, *Dow Benelux* judgement, para. 30 and judgment in case T-135/09 *Nexans France SA and Nexans SAS vs Commission*, para. 40.

⁵⁹ OJ of 14 December 2007, C 303/02.

that the jurisprudence of the ECtHR in relation to this provision is taken under consideration by the CJEU while handling cases concerning possible violation of the right for respect for undertakings' business premises.

5. Compatibility of the EU inspection regime with Article 8 EConHR

Commission inspections, that actually constitute searches, interfere with the right to privacy of the undertakings inspected. Unquestionably, the determination of the scope and possible restrictions of the general principle of protection against arbitrary or disproportionate intervention by public authorities in the private sphere of any person⁶⁰ in relation to the protection of business premises, must be determined with regard to Article 8 EConHR and Article 7 CFR. Therefore, it is indispensable that each interference fulfills in particular the conditions set out by the ECtHR in relation to Article 8 EConHR.

It is doubtless that, when analysing the EU inspections regime in the light of Article 8 EConHR, the first two requirements set out by the ECtHR in the *Colas Est* case, *i.e.* being in accordance with law and pursuing a legitimate aim, are satisfied. Firstly, the legal basis enshrines Article 20 of Regulation 1/2003. Secondly, the inspections are carried out in order to gather evidence, detect infringements of competition law and their ultimate aim is the protection of competition within the Internal Market.

It is however the third requirement of being “necessary in a democratic society” that appears to be problematic since showing that the inspection ordered was the indispensable solution may not always be easy.

The far-reaching Commission powers of inspections result from the need to improve the effectiveness of competition law enforcement and in particular the detection of competition law infringements. It is incontestable that notably in this area and in particular in cases of cartels it is an extremely difficult task for the Commission to uncover evidence of anticompetitive behaviour. The inspections carried out in competition law cases are undoubtedly an effective instrument of competition law enforcement since they constitute an efficient means namely of obtaining key evidence, in particular if carried out without any forewarning⁶¹. Thus, the very existence of such a Commission power may be regarded as necessary. Nevertheless,

⁶⁰ Be it natural or legal.

⁶¹ M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, YARS, Vol. 4(5) 2011, p. 58.

this solution due to its intrusive nature should be used only if the evidence sought cannot be obtained by any other less onerous measures.

Therefore, it is important that this power is not abused and this can only be assessed by analysing the circumstances on a case by case basis. As already mentioned EU competition law provides some safeguards against the abuse of the Commission powers of inspection.

First, the requirement to state the reasons in the inspection decision undoubtedly constitutes an important safeguard, protecting the undertaking from unjustified and disproportionate Commission interference within their private sphere. This protection is moreover strengthened by the undertakings' right to challenge inspection decisions before the General Court, by bringing an action for annulment under Article 263 TFEU. However, one may have serious doubts on whether the question of proportionality is effectively taken into account during the CJEU review. On the one hand, in the 1960s it had already been decided that the CJEU was empowered to determine whether investigative measures taken by the Commission are excessive⁶². On the other hand, despite acknowledging that an inspection decision cannot be contrary to the principle of proportionality⁶³, the General Court held however that "it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules⁶⁴". Consequently, the CJEU seems to simply abstain from contradicting the Commission unless there is a manifest error of assessment⁶⁵.

Another doubt as to the effectiveness of the protection against disproportionate intervention by the Commission in the sphere of private activities of undertakings provided by EU competition law may be raised due to the fact that undertakings action for annulment may only relate to the inspection decision, *i.e.* they are deprived of the right to immediately challenge the measure undertaken by the Commission in the course of an inspection⁶⁶

⁶² Judgment of the ECJ of 14 December 1962 in joined cases 5 to 11 and 13 to 15/62 *San Michele and Others vs Commission*, E.C.R. 1962, 449.

⁶³ *France Télécom* judgment, para. 118.

⁶⁴ *Ibidem*, para. 119.

⁶⁵ If the use of inspections is proved "arbitrary" or "excessive". D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6, p. 518.

⁶⁶ As explained in Chapter XI "Remedies and judicial review", the action for damage that is available to undertakings cannot be regarded as effective remedy in the context of inspections.

which obviously may be of a very intrusive character⁶⁷. Since any attempt to exercise their right to oppose may easily result in the imposition of a procedural fine for non-cooperation or obstruction of an inspection, the undertakings inspected cannot in practice successfully react to protect their right to privacy during the carrying out of inspections. The undertakings inspected notably have to wait until the adoption by the Commission of the final substantive decision which moreover may not necessarily happen⁶⁸.

5.1. Question of prior authorisation

While it may seem that, given the far-reaching Commission's powers of inspection⁶⁹, in the light of ECtHR case-law the prior authorisation of the court may be considered as recommendable, albeit not necessary, in this context⁷⁰, the CJEU does not require *ex ante* control in order to prove the necessity of the envisaged inspection.

The situation may seem to be unproblematic in cases where a court authorisation is required pursuant to Article 20(7) of Regulation 1/2003⁷¹. In such cases the prior judicial control takes place and even though its scope is limited⁷², seems to remain compatible with the EConHR standards since the ECtHR acknowledged that an application of the requirements for Article

⁶⁷ As an example one may point out at taking a copy of the entire hard drive for subsequent search at the Commission's premises.

⁶⁸ See *Akzo Nobel* judgment 2007, para. 47; D. Théophile, I. Simic, *Legal Challenges...*, p. 519.

⁶⁹ Including power to conduct a search, look actively for evidence and ask questions to the undertaking's staff, impose sanctions for obstruction and non-compliance.

⁷⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-109, pp. 160–161; A. Riley, *The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation*, (2002) 51 I.C.L.Q., pp. 55, 77; J. Temple Lang, C. Rizza, *Case Comment: Ste Colas Est vs France*, E.C.L.R. 2002, p. 413; I. Aslam, M. Ramsden, *EC Dawn Raids: A Human Rights Violation?*, *Comp. L. Rev.* 2008, 5(1), pp. 61, 77. Nevertheless, the doctrine's views on this issue are divided. For contrary opinion see: M. Messina, *The Protection of the Right to Private Life, Home and Correspondence vs the Efficient Enforcement of Competition Law: Is a New EC Competition Court the Right Way Forward?*, *European Competition Journal* 2007, 185, p. 193.

⁷¹ It is noteworthy, however, that the judicial authorisation of NCA assistance enabling the Commission to enforce the inspection decision is not required in all Member States. According to the White Paper on modernisation, for instance in Austria, Netherlands, Finland, Sweden and Italy did not introduce such requirement into their legislation. This differentiation results from the principle of the procedural autonomy of Member States.

⁷² As decided in *Roquette Frères* judgment.

8 EConHR to legal persons may differ from the cases regarding natural persons⁷³. According to some authors⁷⁴, the ECtHR has notably accepted restricted control of inspection decisions provided that sufficient safeguards protecting legal persons against arbitrary interference are provided⁷⁵. If so, the judicial control allowed under Article 20(8) of Regulation 1/2003, would be compatible with the standards set out by the ECtHR, even if it implies only a limited scope of this review as well as the lack of opportunity to examine evidence and does not allowed the national court to sufficiently assess the question of necessity.

On the other hand, it may seem from the Strasbourg cases regarding searches that fall within the framework of the prior judicial review the national court should have access to the case evidence and be entitled to assess independently whether the interference with the rights of the person to be inspected is justified. Thus, in the light of this argument, the reviews undertaken under Article 20(8) of Regulation 1/2003 may not be fully in line with the standards set out by the ECtHR.

The approach adopted by the Court of Justice in the *Roquette Frères* judgment⁷⁶ and confirmed in other judgments⁷⁷ is quite lenient. The test of necessity is limited only to the question of whether the coercive measure in question, constituting the intervention in the sphere of the undertaking's private activities, would be "manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation"⁷⁸. The CJEU emphasised that the national court's review cannot go beyond this extent and cannot, in particular, substitute its own assessment of the need for the

⁷³ See *Niemietz* judgment, para. 31.

⁷⁴ M. Emberland, *The Human Rights of Companies*, Oxford University Press, 2006 and M. Emberland, *Protection Against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The Colas Est vs France Approach*, Michigan J. Int. L. 2003, 25, p. 77.

⁷⁵ Even though the standards set out by the CJEU in case *Roquette Frères* in relation to the national courts' review differ from the review carried out by the French court that was accepted by the ECtHR in case *Keslassy*, the circumstances of these two cases were actually not comparable, since in the latter the ECtHR considerations did not relate to business premises, but to the extension of the inspection to home, i.e a private premise.

⁷⁶ *Roquette Frères* judgment, para. 80.

⁷⁷ See *inter alia* the France Télécom judgment, para. 110 in which the General Court reminded that "it is for the national judicial authority seised under Article 20(7) of that regulation to ensure that a Commission decision ordering an inspection is authentic and that the coercive measures envisaged for carrying out the inspection are not arbitrary or excessive having regard to the subject-matter of the inspection."

⁷⁸ *Roquette Frères* judgment, para. 80.

investigations ordered for that of the Commission⁷⁹, since the review of the lawfulness of the Commission decision remains the exclusive competence of the EU courts⁸⁰.

Moreover a national court is deprived of the right to access the Commission file⁸¹ in order to verify the proportionality and necessity of the envisaged intrusive intervention. Furthermore, it seems thus difficult for a national court to be able to in practice lawfully refuse the Commission's request for authorising the envisaged inspection.

Nevertheless, it has to be emphasised that although the ECtHR seems to recommend prior authorisation in order to conduct a search, if the search order is subsequently subject to a full judicial review, the absence of a prior judicial control may eventually be acceptable and would not lead to a violation of Article 8 ECHR. Indeed, the undertaking inspected has the right to challenge every inspection order by a Commission decision by lodging an action for annulment before the General Court⁸².

Therefore, even in less evident cases, *i.e.* where no *ex ante* control had taken place, the above argument regarding the sufficiency of an *ex post* full judicial review may be raised as well.

5.2. Power to inspect other premises

With reference to the Commission's power to inspect other premises, it has to be stressed that, basically, the limitations of the Commission's powers introduced under Article 20 of Regulation 1/2003 regarding protection of undertakings' fundamental rights apply *a fortiori* to Article 21. This was later confirmed by the CJEU. "(T)he general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural

⁷⁹ See *Dow Benelux* judgment, para. 46.

⁸⁰ RF Para. 96: "Review of the adequacy of the reasons given for any Commission decision ordering an investigation, as defined in Article 14(3) of Regulation No 17, falls within the exclusive competence of the Community judicature."

⁸¹ The national judicial authority has to rely exclusively on the on "second hand" information given by the Commission that exclusively decides on the scope and nature of the explanations provided to the national court. J. Schwarze and A. Weitbrecht, *Grundzüge des europäischen Kertellverfahrensrechts*, 2004, para. 4, point 24.

⁸² As to the effectiveness of the review of the inspection decisions see Chapter XI "Remedies and judicial review".

or legal” was *expressis verbis* recognised by the CJEU⁸³. Nevertheless, the CJEU has yet to pronounce directly on whether compliance with the protection of fundamental rights, regarding the requirements of necessity and proportionality of the Commission’s interference under Article 21 of Regulation 1/2003, is ensured in any case of inspection of other premises, in particular whether the Commission’s powers are sufficiently specified and leaves sufficient autonomy with the national court to be able to correctly decide on the Commission request for authorisation⁸⁴.

If *per analogiam* the reasoning described above in relation to the prior control of national courts under Article 20(8) is applied, one should come to the conclusion that despite some insufficiencies with regard to the review undertaken by the relevant national court, the undertaking’s right to lodge an action against the Commission’s inspection decision puts this stance in line with the Strasbourg requirements. Nevertheless, the question that remains is whether due to the more intrusive nature of the inspections carried out at other premises, belonging to natural persons, the level of protection should not be higher and stricter than with the inspection of business premises.

6. Conclusions

According to the ECtHR jurisprudence on Article 8 EConHR, an interference with the right to privacy may be justified if it is (1) in accordance with law, (2) has a legitimate aim and (3) is necessary in a democratic society⁸⁵. The Commission’s inspections undoubtedly satisfy the first two conditions; nevertheless in some cases it may be questionable whether such far-reaching interference is necessary.

The best solution to verify the necessity of an envisaged inspection by the Commission would definitely be to make each inspection decision subject to a prior judicial review. This solution seems to be recommended by the ECtHR. However, no clear response can be provided to the questions on whether the limited scope of the *ex ante* review undertaken by national courts in some circumstances specified under Regulation 1/2003 would be accepted under the requirements enshrined in the EConHR.

⁸³ See judgment of the ECJ of 15 October 2002 in joined cases C-238/99 P etc. *Limburgse Vinyl Maatschappij NV and others vs Commission*, E.C.R. 2002, I-8375, para. 252.

⁸⁴ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-141, p. 178.

⁸⁵ See *Colas Est* judgment.

On the other hand, the Strasbourg court confirmed that the absence of prior judicial authorisation may be compensated by an effective judicial *ex post* control of the challenged inspection, assessing its necessity as well as the course of conduct⁸⁶. It has also been stated that the protection granted to legal persons may be less strict when comparing it to the one granted to natural persons. Therefore, it seems that the insufficiencies or even the absence of the prior control of the inspection decision would not automatically lead to the violation of Article 8 EConHR provided that each inspection decision may be subject to *ex post* full judicial review exercised by the CJEU.

Furthermore, in light of ECtHR case-law, while dealing with cases regarding Article 8 EConHR, the focus should be shifted in particular to the safeguards provided to undertakings inspected by EU law. Undoubtedly, the Commission's obligation to state the reasons and the right of inspected undertakings to challenge the inspection decision by bringing an action for annulment before the General Court under Article 263 TFEU constitutes important guarantees protecting undertakings from unjustified and disproportionate intervention by the Commission into their private sphere. Even though one may have some doubts as to the full effectiveness of these safeguards and some improvements may always be welcome, it seems probable that the current stance may nevertheless satisfy the ECtHR requirements regarding Article 8 EConHR.

⁸⁶ See para. 87 of *Delta Pekáry* judgment.

Chapter VIII

Principle of proportionality

1. Introduction

According to the essential legal principle of proportionality, any “interference by public authorities with the rights and freedoms of private entities is permissible only if it is in accordance with the law and is necessary in a democratic society for the protection of key interests such as public order or the rights and freedoms of others”¹. Actions taken by public authorities should be deemed disproportional if the aim they pursue can also be achieved by less intrusive means.

Therefore, the immense importance of the principle of proportionality in the context of inspections is incontestable.

2. Approach adopted by the ECtHR

Even though there is no direct reference to the principle of proportionality as such in the European Court of Human Rights², the European Court of Human Rights³ has developed an approach highlighting the requirement of proportionality in relation to the protection of fundamental rights. For instance, in the *Société Colas Est and Others vs France*⁴ judgment, related to competition law procedure, the ECtHR confirmed the direct

¹ M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, YARS, Vol. 4(5) 2011, p. 48.

² Hereafter: the “ECtHR”.

³ Hereafter: the “ECtHR”.

⁴ Judgment of the ECtHR of 16 April 2002 in case *Société Colas Est and other vs France*, application No. 37971/97, para. 51.

application of the right to privacy enshrined in Article 8 EConHR⁵ for the purposes of the protection of undertakings against arbitrary and disproportionate inspections carried out by competition authorities⁶. The ECtHR further emphasised that even though the aim to “prevent the disappearance or concealment of evidence of anti-competitive practices” justifies the impugned interference with undertakings’ right to respect for their premises, the relevant legislation and practice must however afford “adequate and effective safeguards against abuse”⁷. Although the ECtHR held in *Niemietz* that entitlement to “interfere” to the extent permitted by paragraph 2 of Article 8 ECHR may be “more far-reaching” where professional or business activities or premises are involved⁸, inspections must nevertheless be “strictly proportionate to the legitimate aims pursued”⁹.

3. Principle of proportionality in the EU

The principle of proportionality is enshrined in Article 5(4) of the TEU which emphasises that the content and form of EU actions shall not exceed what is necessary to achieve the objectives of the Treaties. The CJEU specified further that “the principle of proportionality (...) requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued¹⁰”.

The need for protection against disproportionate intervention by public authorities in the sphere of the private activities of any person, whether

⁵ For more on the right to privacy see Chapter VII “Right to privacy”.

⁶ *Société Colas Est* judgment, paras 48–49 and 51; even though in its literal wording Art.8 EConHR seems to be applicable only to natural persons and private dwellings, its scope has been extended by the ECtHR to legal persons and business premises. See judgment of the ECtHR of 16 December 1992, in case *Niemietz vs Germany*, application No. 13710/88.

⁷ *Société Colas Est* judgment, para. 48.

⁸ See *Niemietz* judgment, para. 31.

⁹ M. Bernatt, *Powers of Inspection...*, p. 50.

¹⁰ See judgment of the ECJ in case C-133/93 *Crispoltoni vs Fattoria Autonoma Tabacchi*, E.C.R. 1994, I-486, para. 41; See also judgment of the ECJ in case C-331/88 *The Queen vs The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others*, E.C.R. 1990, 1-4023, para. 13.

natural or legal, has been emphasised by the CJEU in numerous cases¹¹. It has been held that “any intervention made by the public authorities in the sphere of private activities of any – natural or legal – person, “must have a legal basis and be justified on the grounds laid down by law” and, further, protection against arbitrary or disproportionate intervention must be guaranteed under the law in all the legal systems of the Member States¹².”

The principle of proportionality was also introduced in the CFR, namely in Articles 49(3) and 52(1) thereof. According to the former provision, regarding the principle of proportionality of criminal offences and penalties¹³, “(t)he severity of penalties must not be disproportionate to the criminal offence”. Since, pursuant to the widely-held view¹⁴ and in the light of the EConHR fines imposed by the Commission under Regulation 1/2003 related to a criminal charge, this provision also applies to competition law proceedings.

Article 52(1) provides for limitations of the exercise of fundamental rights. In this context it stipulates that “(s)ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” As confirmed in the Explanation to the CFR, the wording of this paragraph is based on the case-law of the Court of Justice, which held that “(i)t is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community¹⁵ and do not constitute, with regard to the aim

¹¹ Judgment of the ECJ of 21 September 1989 in joined cases 46/87 and 227/88, *Hoechst AG vs Commission*, E.C.R. 1989, 2859, para. 19, para. 19; See also judgment of the ECJ in case C-94/00 *Roquette Frères vs Commission*, E.C.R. 2002, I-9011, para. 27, judgment of the ECJ of 17 October 1989 in joined cases 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137, para. 30, *Minoan Lines SA*, para. 49 and judgment in case T-135/09 *Nexans France SA and Nexans SAS vs Commission*, para. 40.

¹² *Hoechst* judgment, para. 19; (underline added) See also *Roquette Frères* judgment, para. 27, *Dow Benelux* judgment, para. 30 and *Nexans* judgment, para. 40.

¹³ Which enshrines from “the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities”. See *Explanations relating to the Charter of Fundamental Rights of the European Union*, OJ 2007 C 303/02, Article 52.

¹⁴ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 6-033, p. 347.

¹⁵ Pursuant to the Explanations to the CFR, the reference to general interests recognised by the EU covers both the objectives mentioned in Article 3 of the TEU as well as other interests protected by specific provisions of the Treaties, including Article 4(1) of the TEU and Articles 35(3), 36 and 346 of the TFEU.

pursued, disproportionate and unreasonable interference undermining the very substance of those rights¹⁶”.

Unquestionably, the effective enforcement of Articles 101 and 102 TFEU should be regarded as an “objective of general interest recognised by the Union¹⁷”. Thus, this objective may justify an introduction of limitations on the exercise of the rights and freedoms recognised by the CFR provided that it fulfills also further requirements deriving from the principle of proportionality, *i.e.* the necessity.

4. Importance of the principle of proportionality in the context of the Commission’s inspections

Regulation 1/2003 stressed that “(i)n accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively¹⁸”.

It is noteworthy that even if Regulation 17/62 lacked any reference to this principle, the Commission had already emphasised under that act that “(c)ertain important principles must also be respected during the fact-finding stage, in order to ensure that during any subsequent administrative procedure before the Commission, effective protection can be given. In particular, all investigations are subject to the principle of proportionality¹⁹”.

¹⁶ See for instance judgment of the ECJ of 13 April 2000 in case C-292/97 *Kjell Karisson and others vs Commission*, E.C.R. 2000, 202, para. 45.

¹⁷ See for instance judgment of the ECJ of 1 June 1999 in case C-126/97 *Eco Swiss vs Benetton*, E.C.R. 1999, I-3079, para. 36, “[Article 101 TFEU] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [European Union] and, in particular, for the functioning of the internal market”; judgment of the ECJ of 7 January 2004 in joined cases C-204/00 P *etc. Aalborg Portland and Others vs Commission*, E.C.R. 2004, I-123, paras 53 and 54, and opinion of Advocate General Geelhoed of 19 January 2006 in case C-301/04 P *Commission vs SGL Carbon*, E.C.R. 2006, I-5915, para. 67. See also W.P.J. Wils, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees – The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, SSRN-id1759209.

¹⁸ Recital 34 to preamble of Regulation 1/2003.

¹⁹ EC, *Dealing with the Commission Notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*, Brussels–Luxembourg, 1997, p. 21.

Certainly, an inspection has to conform to the principle of proportionality, in particular it must not be “arbitrary or excessive²⁰”.

Therefore the importance of the principle of proportionality with regard to inspections²¹ is incontestable. Reflections of this principle may be identified in numerous issues related to the inspections.

With reference to the right to privacy, each intervention by the public authorities into the private sphere of undertakings has to be proportionate, *i.e.* the Commission may use this intrusive measure only if the evidence sought cannot be obtained in another, less onerous way. The fundamental requirement to state the reasons for each inspection decision should prevent the Commission from having any disproportionate interference with undertakings’ rights. Nevertheless, the CJEU adopted quite a lenient approach with regard to the interoperation of this prerequisite. Emphasising the fact that inspections usually take place at an early stage in the proceedings²² when the Commission lacks sufficient information in order to make a specific legal assessment, the CJEU requires the Commission to indicate as precisely as possible in its inspection decisions the presumed facts which the Commission intends to investigate²³ but not “to state the evidence and indicia on which the decision is based²⁴”. In order to prove correctness, *i.e.* the necessity and proportionality of its decision, and thus legality of the inspection ordered thereby, the Commission has only to actually show “that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement²⁵”.

Although this stance may be subject to critics, it has recently been confirmed by the General Court in a case *Orange*²⁶. With reference to the facts of the case, in 2011 and 2012 the French Competition Authority conducted an investigation against the undertaking²⁷ in relation to a suspected abuse of the dominant position on the market and eventually concluded

²⁰ *Ibidem*, p. 34.

²¹ Ordered under Article 20(4) or 21 of Regulation 1/2003.

²² *I.e.* within preliminary investigation.

²³ *I.e.* the evidence sought and the matters to which the investigation must relate. *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; judgment of the ECJ in joined cases 97/87 to 99/8, *Dow Chemical Ibérica and Others vs Commission*, para. 45; *Roquette Frères* judgment, para. 83, Opinion of AG in case *Solvay*, para. 138.

²⁴ *France Télécom* judgment, paras 60 and 123.

²⁵ *Ibidem*.

²⁶ Judgment of the General Court of 25 November 2014 in case T-402/13 *Orange vs Commission*.

²⁷ Known until 1 July 2013 as France Télécom.

that no competition law infringement²⁸ had taken place. Regardless of the findings of the French Competition Authority, the Commission started a parallel investigation into highly similar practices at Orange and carried out an inspection²⁹ of four of the undertaking's premises. Orange contested the legality of the Commission decisions ordering inspections in the circumstances at stake and brought an action for annulment before the General Court. First of all, Orange disputed the proportionality and necessity of the inspection decisions, due to the fact that the French Competition Authority had already conducted the investigation regarding identical allegations of infringement and concluded that Orange had not violated EU competition law rules. The General Court held however that the decisions taken by a national court or authority under Articles 101 and 102 TFEU are, in principle, not binding upon the Commission who remain entitled to take decisions regarding EU competition law, even if such a decision would conflict with a national one³⁰.

The Court stressed further that the principle *ne bis in idem* had not been violated in the circumstances at hand since this principle protects against the double imposition of a fine for the same anti-competitive conduct. Nevertheless, the adoption of a “negative” decision³¹ finding does not preclude the Commission from initiating its own investigation. Otherwise, the uniform application of Articles 101 and 102 TFEU would be hindered³².

The applicant alleged further that the inspection was disproportionate and violated the principle of good administration since the Commission might have chosen a less onerous, albeit equally effective, measure, namely it might have made a request to the French Competition Authority for more specific information, that should be examined, before deciding to order an inspection³³.

The General Court nevertheless found no violation of the principle of good administration. It was noted that the national competition authority had not carried out any inspection and the information on which its findings had been based was submitted by Orange on a voluntary basis. The General Court went so far that it actually questioned the reliability of the evidence. The General Court stated notably that if the suspected anti-competitive

²⁸ Neither of the French competition law nor of the EU competition law.

²⁹ Between 9 and 13 July 2013.

³⁰ *Orange* judgment, para. 27.

³¹ *I.e.* finding that the competition rules have not been violated.

³² *Orange* judgment, paras 28–31. See also judgment of the Court of Justice of 3 May 2011 in case C-375/09 *Tele2 Polska vs Commission*, E.C.R. 2011, 270, paras 20–30.

³³ *Orange* judgment, para. 42.

conduct of the applicant had been secret, Orange would have not revealed it in the documents provided voluntarily by the undertaking to the French Competition Commission³⁴.

Finally, the applicant argued that the General Court is obliged to verify whether the Commission is in possession of sufficiently reliable and detailed information in order to assess whether the inspection decision was not arbitrary³⁵.

In that regard, the Court recalled that, at the preliminary investigation stage, the Commission is not required to specify the information which led to it contemplating that EU competition rules may have been infringed. Thus, according to the Court the lack of such precision in the inspection decision does not mean that the Commission is not in possession of such information.

The Court stated that, although it is entitled to examine whether the Commission possesses sufficiently reliable information before having adopted the contested inspection decision, this is not the only manner in which to check whether the decision was not arbitrary³⁶. The non-arbitrary nature of the measure may also be deduced for instance, if the explanation of the alleged facts which the Commission intends to investigate is sufficiently precise. The Court observed that, in its inspection decision, the Commission defined in sufficiently precise and detailed terms the nature of the suspected restrictions of competition and clarified how Orange's conduct could fall within the suspected anti-competitive practices³⁷. In these circumstances, the General Court concluded that, based on the reasons underlying the contested decisions, it was able to hold that the inspection decisions were not arbitrary and hence they do not need to examine the information in the Commission's possession on the adoption date of those decisions³⁸.

Consequently, the General Court found that the inspection decisions were not vitiated by illegality³⁹.

This ruling may raise some doubts as to whether, first, the judicial control of proportionality, and in particular the necessity, of the Commission inspection decision should rather be stricter and, second, the Commission should initially use other less onerous investigative tools before ordering an inspection being the most intrusive investigation measure.

³⁴ *Ibidem*, paras 50–55.

³⁵ *Ibidem*, para. 75.

³⁶ *Ibidem*, para. 87.

³⁷ *Ibidem*, paras 88–90.

³⁸ *Ibidem*, para. 91.

³⁹ *Ibidem*, paras 56 and 64.

The principle of proportionality should notably also determine the Commission's choice between an inspection based on simple authorisation or on a decision ordering an inspection. Nevertheless, as held by the CJEU this choice "does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case⁴⁰". A Commission inspection decision should be considered in line with the principle of proportionality even if such a solution has been "solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed⁴¹".

In this context, another quite recent judgment of the General Court, albeit related to the request for information⁴², should be mentioned. The *Cemex and others* case⁴³ focused namely on the question of proportionality and notion of a reasonable suspicion of the occurrence of an infringement.

The undertakings concerned lodged an action for an annulment of the decision requesting information in which they alleged *inter alia* (1) the infringement of Article 18 of Regulation 1/2003 on the grounds that the Commission had exceeded its powers under this article since the information requested was not necessary within the meaning of this provision, (2) breach of the principles of proportionality, of legal certainty and of good administration and (3) a lack of justification of the decision.

In the judgment on 14 March 2014 the General Court rejected the undertakings action, since in its opinion the indication of presumed infringements, even though described in very general terms⁴⁴, contained a minimal degree of clarity and thus was consistent with the requirements of EU law. The General Court held further that at the preliminary investigation stage the Commission is not obliged, before making a request for information, to already have in its possession information sufficient to

⁴⁰ *Roquette Frères* judgment, para. 77. See also judgment of the ECJ of 26 June 1980 in case 136/79 *National Panasonic vs Commission*, E.C.R. 1980, 2033, paras 28 to 30.

⁴¹ *Ibidem*.

⁴² Article 18 of Regulation 1/2003.

⁴³ Judgment of the General Court of 14 March 2014 in case T-292/11 *Cemex and others vs Commission*; The Commission opened proceedings against several cement undertakings relating to presumed infringements consisting of 'restrictions on trade flows in the European Economic Area, within the framework of which, on 30 March 2011 the Commission adopted several decisions regarding the request for information, *i.e.* for response, in a binding format, to a questionnaire relating to the presumptions of infringements.

⁴⁴ Which might well have been made more precise.

establish the existence of an infringement. It suffices therefore if evidence of reasonable suspicion can be aroused of an occurrence of an infringement.

Next, the General Court acknowledged that protection against arbitrary or disproportionate interventions of public authorities into the sphere of private activities of a person⁴⁵ constitutes a general principle of EU law that must also be respected while making a request for information⁴⁶. Nevertheless, from the General Court's point of view, the workload imposed by the Commission was proportionate both in the light of the necessities of the enquiry and the presumed infringements.

Since the institution of a request for information is much less intrusive than an inspection, a less strict interpretation of its prerequisites may be understandable in the circumstances at stake⁴⁷. However, it is recommended that the CJEU adopt a stricter approach in relation to the inspection in order to ensure that this type of investigation power is not used in an excessive way, *i.e.* that it does not violate the principle of proportionality.

Nevertheless, with regard to the reasons given by the Commission, it has to be noted that pursuant to the CJEU if the inspection ordered “is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality⁴⁸”. Moreover, it has been held that “it

⁴⁵ Be it natural or legal.

⁴⁶ As a consequence, such a request must seek to obtain only the necessary documentation aiming at verifying the the factual and legal information in relation to which the Commission already has sufficiently serious evidence consistent with the suspicion of a competition law infringement.

⁴⁷ Nevertheless, any request for information is also subject to principle of proportionality. As stated by the Commission: “(t)he information sought by the Commission must be necessary for the purposes of the investigation. This means that the Commission must reasonably assume, at the time when the request is made, that any document sought will assist it in proving the alleged infringement. In other words, a request that was unrelated to the application of Articles 85 and 86 would be improper. The request must also respect the principle of proportionality. This general principle (which can be found in Article 3B EC as well as in the case law of the Court of Justice) requires the Commission's measures to be proportionate to the objectives pursued. The steps the Commission takes must not only be necessary, they must also be carefully adapted and limited to the purpose for which it is seeking information. A good yardstick is to assess the Commission's measures against the seriousness of the alleged infringement. Any information sought must relate to the case in point. The request must be neither arbitrary nor likely to impair unduly the normal operations of the firm. The legality of a decision requesting information is subject to review by the EU courts”. EC, *Dealing with the Commission Notifications...*, p. 28.

⁴⁸ Judgment of the CFI of 8 March 2007 in case T-339/04 *France Télécom vs Commission*, E.C.R. 2007, II-573, para. 118.

is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules⁴⁹. Consequently, the CJEU seems to simply abstain from contradicting the Commission unless the latter made a manifest error in its assessment⁵⁰.

Furthermore, the question of proportionality may appear in relation to the scale and scope of an inspection as well as the way in which it was conducted. The principle of proportionality is violated if the inspection is carried out in an abusive manner, *e.g.* if *de facto* a fishing expedition is conducted⁵¹ or if the undertakings premises are sealed for a period exceeding what is necessary. Moreover, the controversial Commission practice of taking copies of hard drives in their entirety for subsequent electronic searches at its premises is notably criticised as non-proportional, *i.e.* too intrusive in the light of the Commission goals.

Questions have been raised as to “whether the Commission operates at present within sufficiently ‘strict limits’ under Article 20 of Regulation No 1/2003⁵²”. Bearing in mind the Commission’s sole competence to appreciate the length of inspections⁵³, to assess the scale and number of inspections⁵⁴ and in fact to also decide over the expediency of the inspections⁵⁵, according to some authors, “the Commission inspections regime does not appear to be in line with the obligations deriving from Article 8 ECHR as interpreted by the ECtHR⁵⁶”.

⁴⁹ *France Télécom* judgment, para. 119.

⁵⁰ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6, 518.

⁵¹ See *Nexans* judgment, para. 40, and judgment of the General Court of 14 November 2012 in case T-140/09 *Prysmian et Prysmian Cavi e Sistemi Energia vs Commission*, E.C.R. 2012, 597, para. 35.

⁵² D. Théophile, I. Simic, *Legal Challenges...*, p. 515.

⁵³ Since it is not required under Article 20(4) to indicate an end date of inspection. Thanks to this discretion the Commission can put pressure on the undertaking inspected that the inspection may be resumed if it decides so. See D. Théophile, I. Simic, *Legal Challenges...*, p. 515.

⁵⁴ Moreover Regulation No 1/2003 does not require in the decision the address of premises to be inspected. Therefore, in accordance with the doctrine of the “single economic unit”, premises of all subsidiaries being directly or indirectly controlled by the undertaking indicated in the decision may be inspected.

⁵⁵ Since, in principle there is no prior judicial control (even the one from national court is minimal) and an *ex post* review is very limited. D. Théophile, I. Simic, *Legal Challenges...*, p. 515.

⁵⁶ D. Théophile, I. Simic, *Legal Challenges...*, p. 515.

Moreover, the fact that the Commission is entitled to carry out inspections at a very early stage of proceedings, before the preparation of a Statement of Objections and without any prior notice may also be considered to be interference with the principle of proportionality. Some authors argue that “in the light of the principle of proportionality, an unannounced control should be seen as an exception rather than the rule⁵⁷”. It has been pointed out that, at the preliminary stage, there are no parties to the proceedings yet⁵⁸, the undertakings concerned are not informed about the initiation of explanatory proceedings⁵⁹ and have very limited powers to oppose unfounded inspections⁶⁰, despite the fact that the investigation may result in charges of a criminal character regarding competition law infringement⁶¹.

On the other hand, inspections are often only effective if conducted unexpectedly, notably at the very beginning of the proceedings⁶² and without any prior notification⁶³. The Commission emphasised that once it becomes aware of an illegal competition agreement, it has only a very brief time to react effectively⁶⁴. If the undertaking is forewarned, it has opportunity to either destroy or move incriminating documents to a “safe” location^{65,66}. Hence, arriving by surprise reduces the risk of evidence being destroyed.

While dealing with this issue the CJEU, emphasised that it is “necessary to ensure that observance of the rights of the defence does not impair the effectiveness of investigations to enable the Commission to carry out its role as guardian of the Treaty in competition matters⁶⁷. The Court of Justice recognised that the powers to carry out investigations without previous notification did not constitute an infringement of the fundamental rights

⁵⁷ M. Bernatt, *Powers of Inspection...*, p. 55.

⁵⁸ As objections against precise undertaking are not raised during explanatory proceedings which are not yet proceedings “against”.

⁵⁹ The most often undertakings discover this with the beginning of an inspection.

⁶⁰ Nevertheless some authors regard this as a correct situation – see C. Banasiński, E. Piontek (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2009, p. 840 and K. Różewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warsaw 2011, p. 213.

⁶¹ M. Bernatt, *Powers of Inspection...*, p. 57.

⁶² Within a preliminary stage.

⁶³ C. Banasiński, E. Piontek (eds), *Ustawa...*, s. 840; zob. też K. Różewicz-Ładoń, *Postępowanie...*, s. 213.

⁶⁴ Usually between 4 and 6 weeks. See XXXII Report on Competition Policy (220), para. 32.

⁶⁵ Out of undertaking’s premises.

⁶⁶ See decision of the Commission in case *Graphite Electrodes*, OJ 2002 L100/1, para. 33.

⁶⁷ Judgment of the CFIJ in case T-59/99 *Ventouris vs Commission*, E.C.R. 2003, II-5257, para. 122.

of undertakings, since the aim of the powers given to the Commission by Article 14 of Regulation No 17⁶⁸ was to enable it to carry out its duty under the EC Treaty⁶⁹ by ensuring that the rules on competition were applied in the internal market, to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers and to contribute to the maintenance of the system of competition intended by the Treaty which undertakings are absolutely bound to comply with⁷⁰.”

Therefore, it seems that carrying out an inspection at an early stage of proceedings and with a surprise effect is justified in any case regarding serious infringements of competition law since it constitutes the key to success, *i.e.* the detection of relevant evidence which is actually the main goal of this measure; otherwise, the effectiveness of this power of investigation would be significantly hindered.

It has to be noted however that the Commission practice may be quite different in less serious cases of inspections based on simple authorisation, since, given that such an inspection usually requires the undertaking's consent, no element of surprise is necessary. Thus, the Commission may inform⁷¹ the undertaking concerned in advance about the planned inspection so it has time to prepare for the inspection, *i.e.* gather the relevant documents and have its representatives on the spot ready to meet the inspectors. This solution constitutes an advantage for the Commission since it facilitates the work of the inspectors and reduces the inspection time.

Finally, the Commission is obliged to observe the principle of proportionality while fixing the level of fines or periodic penalties imposed under Articles 23 and 24 of Regulation 1/2003 in response to the obstructive behaviour of the undertaking during an inspection.

First, this means that this power to impose financial sanctions cannot be used freely by the Commission. It has to be not only in accordance with the relevant provisions but also justified by the circumstances of the particular case, *i.e.* it cannot be regarded as a solution disproportionately severe in the light of the allegedly obstructive behaviour of the undertaking during the inspection.

Second, if an imposition is justified and proportionate in the circumstances of the case, the level of the pecuniary sanction fixed by the Commission

⁶⁸ The current Article 20 of Regulation 1/2003.

⁶⁹ Current TFEU.

⁷⁰ Judgment of the General Court of 27 September 2012 in case T-357/06 *Koninklijke Wegenbouw Stevin vs Commission*, E.C.R. 2012 II-000, para. 230, *National Panasonic* judgment, para. 20.

⁷¹ Usually by telephone or by fax.

should be adequate based on the level of disruptiveness caused by the undertaking's behaviour.

Third, in some circumstances, too broad an application by the Commission of the concept of a single economic unit and thus imposition of a fine or periodic payment not only on the undertaking being a subsidiary, but also on its parent undertaking, may not be in line with the principle of proportionality. Obviously, the Commission is willing to attribute the responsibility to the parent undertaking since it would lead to increasing the ceiling of the potential fine or period payments⁷². However, the Commission should refrain from abusing the doctrine of “decisive influence” and, consequently, from calculating disproportional pecuniary sanctions.

5. Conclusions

The principle of proportionality constitutes a supreme guideline limiting the Commission's powers of inspections. It applies to various aspects regarding the Commission's inspections, from the right to privacy, the question of the necessity of the measures undertaken in the course of the inspection to the imposition of procedural financial sanctions on the undertakings inspected.

However, in reality the Commission has been granted “a good deal of discretion” in deciding whether and when to order and carry out an inspection⁷³. The right of the undertakings inspected to challenge the inspection decision before the General Court constitutes an important safeguard protecting them from any abuse committed by the Commission in regard to this aspect. If the contested decision is also held to be unlawful, due to the violation of the principle of proportionality, the Commission will be precluded from using evidence that it acquired during the course of the inspection in any later proceedings.

Nevertheless, in the light of CJEU case-law, even though the need for protection against disproportionate interventions of the authorities into the private sphere of the persons is emphasised, it may seem nonetheless that the EU courts quite often have a tendency to shift the focus rather on ensuring the effectiveness of the inspection⁷⁴. And thus they adopt

⁷² Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 7-006, p. 389.

⁷³ EC, *Dealing with the Commission Notifications...*, p. 34.

⁷⁴ Judgment of the General Court in case T-23/09 *CNOP and CCG vs Commission*, para. 40. See also *Ventouris* judgment, para. 122, and *Koninklijke Wegenbouw Stevin* judgment, para. 230, in which the Court of Justice held that it is “necessary to ensure that observance

too lenient approach regarding the interpretation of the requirement of proportionality, notably in order to protect the former value from being invalidated by the latter one. Even though the ECtHR acknowledges that the level of protection of fundamental rights of legal persons may be less strict than the one set out for natural persons, given the Commission's discretion with regard to the use of its power to conduct inspections, the CJEU is expected to consider more deeply the question of the proportionality of the use of this extremely intrusive means of investigation.

of the rights of the defence does not impair the effectiveness of investigations to enable the Commission to carry out its role as guardian of the Treaty in competition matters”.

Chapter IX

Legal professional privilege

1. Introduction

“The unfettered ability to communicate with a lawyer on a confidential basis is a fundamental right which exists in many legal systems around the world¹”. It is undoubtedly crucial for a client not to be discouraged from telling her/his lawyer the whole truth concerning the case. Otherwise it would constitute a significant restriction both for the lawyer who would not be able to fully and correctly represent and defend the interests of her/his client and for the latter who would be deprived of the efficient right of defence.

Legal professional privilege² constitutes another important component of the right to defence deriving from Article 6 of the European Convention on Human Rights³ and Article 48(2) of the Charter of Fundamental Rights of the European Union⁴. As confirmed by the Court of Justice of the European Union⁵, this privilege has to be respected even from the preliminary inquiry stage⁶. Indeed, LPP relates mostly to the investigative phase of

¹ S. Kim, M. Levitt, *Legal Professional Privilege Under European Union Law – Navigating the Unresolved Questions Following the Akzo Judgment*, Antitrust & Trade Regulation Report, 99 ATRR 565, 11/05/2010, p. 1.

² Hereafter: the “LPP”.

³ Hereafter: the “EConHR”.

⁴ Hereafter: the “CFR”.

⁵ Hereafter: the “CJUE”.

⁶ Judgment of the ECJ of 21 September 1989 in joined cases 46/87 and 227/88 *Hoechst vs Commission*, E.C.R. 1989, 02859, see also B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, Yearbook of Antitrust and Regulatory Studies, Vol. 2012, 5(6), p. 195.

the competition authorities' enforcement proceedings. It namely limits the Commission's powers of inspection by preventing any documents covered by LPP from being examined⁷ or seized⁸ by the inspectors⁹. Furthermore, the premises belonging to an undertaking's external lawyer cannot be inspected by Commission officials.

Regarding LPP standards as set by the two European international courts, one can notice a degree of variance between LPP as recognised by the European Court of Human Rights¹⁰ and its EU concept. This difference of approach will be discussed below. Therefore, before focusing on LPP in the very context of Commission inspections, it is indispensable to firstly analyse the standard of LPP established by the ECtHR and the CJEU in order to verify the compatibility of the EU LPP with the approach adopted by the ECtHR.

2. Standard set out by the ECtHR

Since the role of the ECtHR is to assure the effective and full protection of the rights enshrined in the EConHR¹¹, the LPP concept which follows from Strasbourg case-law, being regarded from the different perspective, is much more generous than its EU version.

The ECtHR handles the issue of legal professional privilege mostly in the context of criminal procedures¹². At the very beginning the protection of lawyer-client correspondence was to be deduced from the right to respect for private life, as the wording of Article 8 EConHR¹³ does not limit the scope

⁷ Under Article 20(2)b of the Regulation 1/2003.

⁸ Under Article 20(2)c of the Regulation 1/2003.

⁹ Moreover the documents covered by the LLP be requested within a request for information under Article 18 of the Regulation 1/2003.

¹⁰ Hereafter: the "ECHR".

¹¹ Contrary to the CJEU, whose mission is also to assure the effective enforcement of the competition law policy and thus to strike a balance between those two antagonists objectives.

¹² J. McBride, *Human rights and criminal procedure The case law of the European Court of Human Rights*, Council of Europe Publishing, Strasbourg 2009, pp. 4–15.

¹³ Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as 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

of the respect for correspondence only to the private sphere¹⁴. Therefore the ECtHR held that it is not even possible to claim inapplicability of Article 8 EConHR on the grounds of the professional nature of the correspondence in question and that there is no necessity to further qualify the extended protection emanated from Article 8 EConHR¹⁵.

In other cases regarding the protection of lawyer-client correspondence, the ECtHR stated clearly that any person who wishes to consult a lawyer should be free to do so under conditions, which favour full and uninhibited discussion. Thus the lawyer-client relationship is considered to be privileged¹⁶.

Any interference of this privilege results in a violation of Article 8 EConHR unless it fulfills the three cumulative conditions of (1) being “in accordance with the law”, (2) having a legitimate aim (or aims) under Article 8 para. 2 and (3) being necessary in a democratic society¹⁷. Moreover the ECtHR also started to make reference to Article 6 EConHR, as it stressed that the right of a person being accused to communicate with his lawyer¹⁸ without the surveillance of a third person is part of the basic requirements of a fair trial in a democratic society¹⁹. Since the EConHR intends to guarantee practical and effective rights it cannot therefore be accepted that a lawyer would be unable to confer with his client without such surveillance or receive confidential instructions from him. Otherwise

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

For more information on Article 8 EConHR see Chapter VII “Right to privacy”.

¹⁴ C. Leskinen, *An Evaluation of the Rights of Defence 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, p. 28.

¹⁵ See, e.g., judgment of the ECtHR of 20 June 1988 in case *Schönenberger and Durmaz vs Switzerland*, Application Nos. 11368/85, 11368/85, Series A No. 137, judgment of the ECtHR of 25 March 1992 in case *Campbell vs the United Kingdom*, Application No. 13590/88, Series A No. 233 and judgment of the ECtHR of 16 December 1992 in case *Niemietz vs Germany*, Series A No. 251, § 32, where the ECtHR held that the search pursued in the Mr. Niemietz’s law office impinged on professional secrecy to disproportionate extent and thus constituted an interference with his rights under Article 8 EConHR.

¹⁶ *Campbell* judgement, para.46 and judgment of the ECtHR of 28 November 1991 in case *S. vs Switzerland*, Application Nos. 12629/87 and 13965/88, Series A No. 220, § 46. Moreover, according to the ECtHR no distinction should be made between different types of lawyer-client correspondence, see § 48.

¹⁷ *Campbell* judgement, para. 34 and judgment of the ECtHR of 24 April 1990 in case *Kruslin vs France*, Application No. 11801/85, Series A No. 176-A, p. 20, para. 26.

¹⁸ Or lawyers, as there is nothing extraordinary in a number of defence counsel collaborating with a view to coordinating their defence strategy, *S. vs Switzerland* judgement, para. 49.

¹⁹ *Ibidem*, para. 48.

her/his assistance would lose much of its usefulness²⁰. Accordingly, the ECtHR definitively confirmed that the protection of professional privilege follows from the right of defence²¹ and that LPP might be limited only in exceptional circumstances²².

The ECHR put the emphasis on the importance of LPP in the context of the notions of *fair trial*, *fair procedure* and *equality of arms* enshrined in Article 6(1) ECHR. It stressed that such “considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties²³”. Consequently the ECtHR stated that legal counsels also do enjoy a “special status” because they should be regarded as intermediaries between the public and the courts; a status which leads to the assurance of the efficient administration of justice²⁴. Therefore the special *need to strike the right balance between the various interests involved, which include the public’s* “right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession” must be taken into account²⁵. In the ECtHR’s view the allegiance to the Bar or Law Society does not constitute a necessary prerequisite of the enjoyment of LPP²⁶ as long as a lawyer, regardless of her/his employment and relationship with the client, is subject to control that aims to ensure her or his professional integrity and independence²⁷.

There is no doubt that the exclusive competences of the competition authorities to determine the expediency, number, length and scale of inspections may sometimes be used disproportionately with regard to the legitimate aims pursued²⁸. This is why the ECtHR was quick to stress

²⁰ *Campbell* judgement, para. 46 and judgment of the ECtHR of 28 June 1984 in case *Campbell and Fell vs the United Kingdom*, Application Nos. 7819/77 and 7878/77, Series A No. 80, paras 111–113, p. 49.

²¹ Which violation was recognised in *S. vs Switzerland* judgement, see para. 51.

²² C. Leskinen, *An Evaluation of the Rights of Defense...*, p. 28.

²³ Judgement of the ECtHR of 12 March 2002 in case *Nikula vs Finland*, Application No. 31611/96, [2004] 38 EHRR 45, para. 49. It does not mean however that defence lawyer’s freedom of expression should be unlimited.

²⁴ See e.g., judgement of the ECtHR of 24 February 1994 in case *Casado Coca vs Spain*, Application No. 15450/89, Ser. A No. 285, [1994] 18 EHRR 1, para. 54 and *Nikula* judgement, para. 45; See also A. Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing 2008, p. 120.

²⁵ *Nikula vs Finland* judgement, para. 46.

²⁶ *Nikula vs Finland* judgement, para. 53.

²⁷ E.g., *Casado Coca vs Spain* judgement, para. 54.

²⁸ See judgment of the ECtHR of 16 April 2020 in case *Soci t  Colas Est and Others vs France*, para. 49, judgment of the ECtHR of 25 February 1993 in case *Funke vs France*,

the importance of the application of Article 6 EConHR in the preliminary investigations²⁹. Nevertheless, the assistance of a lawyer at the initial stages of a police interrogation, which in principle is required in accordance with the concept of fairness enshrined in Article 6 EConHR³⁰, may be, according to the EConHR, subject to restrictions for a good cause³¹. There is thus no strict obligation on the authorities to wait for the lawyer's arrival. However, in the aim to protect LPP, documents from being taken by competition authority officials in the absence of a legal advisor³², the ECtHR requires the presence of independent observers or qualified expert counsels during dawn raids³³.

Therefore, regarding the manner in which an inspection is conducted and in which the materials are inspected and seized, the ECtHR takes under consideration whether there was an effective safeguard against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege and whether the search was supervised by an independent observer who was capable of identifying, independently of the investigation team, the documents that are covered by legal professional privilege. If such conditions are not fulfilled, the ECtHR in principle finds a violation of the EConHR.³⁴

Series A nos. 256-A, para. 57, judgement of the ECtHR of 25 February 1993 in case *Cremieux vs France*, Application No. 11471/85, Series A Nos. 256-B, para. 40, judgement of the ECtHR of 25 February 1993 in case *Mialhe vs France*, Application No. 12661/87, Series A Nos. 256-C, para. 39 and judgement of the ECtHR of 7 June 2007 in case *Smirnov vs Russia*, Application No. 71362/01, para. 48: "Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued".

²⁹ See judgment of the ECtHR of 25 January 1996 in case *John Murray vs the United Kingdom*, Rep. 1996-I, para. 62.

³⁰ *John Murray* judgment, para. 66.

³¹ See *John Murray* judgment, para. 63: "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing"; see also C. Leskinen, *An Evaluation of the Rights of Defense...*, p. 19.

³² A. Riley, *The ECHR implications of the investigation provisions of the draft competition regulation*, ICQL Vol. 51 January 2002, p. 77.

³³ *Société Colas Est* judgment, where the ECtHR found the violation of Article 8 EConHR.

³⁴ *Smirnov* judgement, paras 48–49.

Finally, the EConHR obliges that states indicate with sufficient clarity the scope and manner of the exercise of the authorities' discretion in matters concerning LPP³⁵.

3. Approach adopted by the CJEU

The Commission's powers of investigation are subject to two main sets of limitations, originating from legal professional privilege and the privilege against self-incrimination³⁶.

It has to be noted however that, with reference to EU competition law, LLP can be merely deduced from Article 28 of Regulation 1/2003 and Article 48(2) CFR. Neither the former relating to professional secrecy³⁷ nor the latter regarding the right to defence³⁸ provide any concrete provisions on the scope and correct use of LPP.

Also in the Commission's Explanatory note regarding the conduct of inspections one may only find a general statement that "(t)he documents and the data copied during an inspection will be covered by the provisions of Article 28 of Council Regulation No 1/2003 concerning professional secrecy³⁹".

Therefore, the current standard of protection of legal professional privilege derives from CJEU case-law.

³⁵ The judgement of the ECtHR of 25 March 1998 in case *Kopp vs Switzerland*, Application No. 23224/94, para. 75.

³⁶ W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition, Vol. 26, No. 4, 2003, p. 574.

³⁷ Article 28. Professional secrecy.

"1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14." (emphasis added).

³⁸ Article 48(2): *Respect for the rights of the defence of anyone who has been charged shall be guaranteed*.

³⁹ See point 16 of the *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003*, revised on 18 March 2013.

The first case which raised the Commission's powers to gain access to communications between a lawyer and an undertaking being suspected of anti-competitive behaviour⁴⁰ and which well illustrated the problem of an existing gap in the protection of lawyer-client confidential communications was *A.M. & S. Europe vs Commission*⁴¹. The importance of LPP had already been underlined in the opinion AG Slynn where he argued that "a client should be able to speak freely, frankly and fully to his lawyer⁴²". The Court of Justice recognised in the judgment the protection of confidentiality of certain communications exchanged between a natural or legal person and its lawyer as a general principle of EU law⁴³ and held that protection of written lawyer-client communications is an essential corollary to the right of defence. However such protection entails only documents which were made for the purposes and in the interests of the client's rights of defence⁴⁴ and emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment⁴⁵, who are entitled to practise this profession in one of the Member States.⁴⁶ The protection covers communications from as well as to the lawyer. The Court of Justice specified that LPP covers not only written communications exchanged after the initiation of administrative proceedings by the Commission, but also earlier ones provided that they regard the subject matter of the proceedings in question⁴⁷.

Furthermore, the *A.M. & S.* judgment established the procedure for LPP protection applicable during dawn raids conducted by the Commission. It was

⁴⁰ J. Komárek, *Case Comment – Legal Professional Privilege and the EU's Fight against Money Laundering*, (2008) 27 Civil Justice Quarterly, Electronic copy available at: <http://ssrn.com/abstract=1031721>, p. 2.

⁴¹ Judgment of the ECJ in case 155/79 *Austrian Mining & Smelting (A.M. & S.) Europe vs Commission of the European Communities*, E.C.R. 1982, 1575.

⁴² Opinion of Advocate General Sir Gordon Slynn delivered on 26 January 1982 in case *A.M. & S.*, E.C.R.1982. 11-1575, page 1654.

⁴³ See *A.M. & S.* judgment, para. 24: "Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the Community, as is demonstrated by Article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC".

⁴⁴ ECJ specified that such communications should in principle be exchanged after the initiation of administrative proceedings by the Commission, however but also that it could be extended to *earlier written communications which have a relationship to the subject matter of that procedure*.

⁴⁵ *A.M. & S.* judgment, para. 21.

⁴⁶ Regardless however of the Member State in which the client lives.

⁴⁷ *A.M. & S.* judgment, para. 23.

held that in order to claim LPP over a disputed document, an undertaking is obliged to provide officials with “relevant material of such a nature as to demonstrate that the communications fulfill the conditions for being granted legal protection (...) although it is not bound to reveal the contents of the communications in question⁴⁸”.

Nevertheless, since the Court of Justice decided not to grant protection over the documents containing legal advice emanated from in-house counsel, even those being a member of the Bar of the Law Society⁴⁹, as well as external non-EU lawyers, this landmark, albeit controversial decision was commonly criticised. Commentators mostly took the position that a legal counsel should enjoy the same scope of rights as external lawyers⁵⁰.

The next case, *Hilti*, where the CJEU was to handle issues concerning LPP⁵¹, constituted an important development since the General Court⁵², after having confirmed that this protection constitutes an essential principle⁵³, also extended the objective scope of LPP to the summaries of external advice prepared internally by an undertaking⁵⁴. The General Court held that “the principle of the protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications⁵⁵”.

Another crucial and complex case, *i.e.* the *AKZO Nobel* case, involved both the General Court and the Court of Justice.

In the first instance⁵⁶, the General Court, despite having reaffirmed the importance of LPP as an indispensable component of the undertaking’s right of defence, rejected the applicant’s arguments regarding the occurrence of a sufficient change in the legal landscape since the *A.M. & S.* ruling and did

⁴⁸ *A.M. & S.* judgment, para. 29. This procedure was subsequently clarified by the CFI in the *Akzo Nobel* judgement which is described below.

⁴⁹ *A.M. & S.* judgment, paras 18–21 and 24.

⁵⁰ A. Andreangeli, *EU Competition Enforcement...*, p. 119.

⁵¹ Judgment of the CFI in case T-30/89 *Hilti AG vs Commission*, E.C.R. 1990, II-163.

⁵² The former Court of First Instance.

⁵³ See *Hilti* judgment, para. 11.

⁵⁴ Order of the CFI of the 4th April 1990, case T-30/89 *Hilti AG vs Commission*, ECR [1990] II-163, paras 16–18.

⁵⁵ *Hilti* order, para. 18a.

⁵⁶ Judgement of the CFI of 17 September 2007 in joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals vs Commission Ltd*, [2007] ECR 11-3523, hereafter: the “Akzo Nobel judgment 2007”.

not take a great opportunity to rethink the *A.M. & S.* test⁵⁷. The reasoning of the General Court concentrated on the *negative concept of independence* in the context of the availability of LPP⁵⁸. Instead of emphasising commitment to follow binding rules of professional ethics, the notion of *independence* was defined as the absence of an employment relationship between the lawyer and her/his client⁵⁹. Legal advice provided in full independence emanates from a lawyer being “structurally, hierarchically and functionally a third party in relation to the undertaking receiving that advice⁶⁰”.

What is of significant importance, is that the General Court recognised an additional category of *preparatory documents*⁶¹ as enjoying LPP. Such internal documents drawn up exclusively for the purposes of seeking legal advice from an external independent lawyer in the exercise of the right to defence are protected, even if they were never sent to an external lawyer or even created with the intention of being sent physically to a lawyer⁶². However, the fact that the document in question was prepared for the purpose of the undertaking’s competition law compliance programme, which normally encompasses in scope duties and information going beyond the exercise of the right to defence’s, it is not sufficient to automatically grant LPP to the document.

The General Court held further that the mere fact that the document in question was discussed with a external lawyer does not suffice to cover it by the LPP⁶³.

Regarding the LPP claiming procedure, the CFI stated that the sole fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document unless the undertaking produces relevant material of such a kind as to prove that it is actually protected by LPP⁶⁴. However, a cursory look at the document⁶⁵ very often enables Commission officials

⁵⁷ *I.e.* the test of legal advice provided ‘in full independence’ (*AM & S* judgement, paragraph 24), which is identified as provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice. *Akzo Nobel Judgement* 2007, paras 166–169.

⁵⁸ A. Andreangeli, *EU Competition Enforcement...*, p. 119.

⁵⁹ See A. Andreangeli, *EU Competition Enforcement...*, p. 119.

⁶⁰ See *Akzo Nobel* judgment of the CFI, para. 168.

⁶¹ See *Akzo Nobel* judgment 2007, paras 123 and 127.

⁶² *E.g.* a document prepared for the purpose of seeking legal advice that served as notes during an oral conversation with an external lawyer.

⁶³ *Akzo Nobel* judgement 2007, para. 123.

⁶⁴ *Akzo Noble* Judgement 2007, para. 80.

⁶⁵ At its general layout, heading, title or its other superficial features.

to confirm the accuracy of the legal professional privilege invoked by the undertaking. Nevertheless, the undertaking inspected is not obliged to reveal the contents of disputed materials. Therefore, “the undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view⁶⁶”. If it is willing to, the undertaking may disclose some part of the document in question indicating that it constitutes correspondence with its external lawyer. It may also only give a written description of the document’s content or produce additional documents referring to the document at stake⁶⁷. However, the General Court placed the burden of proof on the undertaking who has to demonstrate sufficient evidence to convince as to the confidential nature of the disputed document⁶⁸. If in the inspectors’ opinion the evidence produced does not prove that the document meets the criteria for being covered by LPP, they may request the undertaking provides them with supplementary evidence. The Commission is also entitled to order the production of the document in question as well as, if necessary, to impose a fine on the undertaking under Article 23(1)c for failing to produce sufficient evidence or for refusal to produce the disputed document and preventing the inspectors from it being examined⁶⁹. The decision on imposing such a penalty may be challenged by the undertaking who receives the fine before the General Court in accordance with Articles 261 and 263 TFEU⁷⁰.

Finally, in any case where the Commission considers that the material presented by the undertaking is not of such a nature as to prove the confidentiality of the documents in question and the undertaking still refuses

⁶⁶ *Akzo Noble* Judgement 2007, paras 80–83.

⁶⁷ See L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011, No. 8.42, p. 320.

⁶⁸ *AM & S* judgement, para. 29. If an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses [current Article 20(4) of Regulation 1/2003], on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must nevertheless provide the Commission’s authorized agents with relevant material of such a nature as to demonstrate that the communications fulfill the conditions for being granted legal protection as defined above, although it is not bound to reveal the contents of the communications in question.”

⁶⁹ *AM & S*, paras 29 to 31.

⁷⁰ The undertakings action for annulment may be moreover accompanied by an application for interim relief under 278 TFEU.

to submit the requested document, the General Court developed rules of conduct, regarding *e.g.* the inspectors' obligation to make a record of the disagreement over the document⁷¹, and established the *sealed envelope procedure*, according to which the Commission officials should place a copy of the disputed document⁷² in a sealed envelope and then in order to resolve the dispute refer the matter to the General Court⁷³. In the view of the General Court this solution enables the Commission to retain a certain control over the documents forming the subject-matter of the investigation without breaching legal professional privilege⁷⁴. Therefore, the sealed envelope procedure contributes to the protection of the undertaking's right to defence and at the same time it eliminates the risk of the disappearance, destruction or manipulation of the disputed documents. The General Court stressed that "(i)n any event⁷⁵ (...) the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance, and, if appropriate, to make an application for interim relief⁷⁶".

Subsequently, while handling the Akzo Nobel's appeal against the General Court's ruling, the Court of Justice⁷⁷ upheld the challenged judgment and thus *inter alia* confirmed that the EU version of LPP does not extend to the advice emanated from the in-house lawyers. The Court of Justice decided to follow the reasoning of the General Court as well as the opinion of the Advocate General and it put the emphasis on the negative determination of LPP⁷⁸.

⁷¹ That has to be signed by both parties, *i.e.* the inspectors and the undertaking. Furthermore, a copy of the record is to be provided to the undertaking.

⁷² However without reading its contents.

⁷³ And if and, if appropriate, allow the undertaking to make an application for interim relief. See the *Akzo Nobel* Judgement 2007, paras 83–85.

⁷⁴ *Ibidem*.

⁷⁵ "(...) where the Commission is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document concerned is covered by LPP"

⁷⁶ *Akzo Nobel* Judgement 2007, para. 85. See also *AM & S* judgment, para. 32.

⁷⁷ Judgement of the Court of Justice of 14 September 2010 in case C-550/07P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs Commission*, hereafter: the "Akzo Nobel judgement 2010"

⁷⁸ See the *Akzo Nobel* 2010 Judgement, para. 45: "As the Advocate General observed in points 60 and 61 of her Opinion, the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrollment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his

According to the Court of Justice “(a)n in-house lawyer, despite his enrollment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client⁷⁹”. Consequently, an in-house lawyer is “not able to ensure a degree of independence comparable to that of an external lawyer⁸⁰.”

It was also reaffirmed by the Court of Justice that internal preparatory documents may be protected by LPP⁸¹ provided that they were prepared exclusively for the purpose of seeking legal advice from an external lawyer in the exercise of the rights to defence. Likewise even internal briefs⁸² merely summarising the content of a protected piece of advice given by an external lawyer are covered by LPP. On the other hand, any internal opinion or commentary was excluded from being protected by the LPP⁸³. Furthermore, given that Regulation No 1/2003 aims to reinforce the extent of the Commission’s powers of inspection⁸⁴ and since in a large number of Member States the in-house lawyers-client correspondence is still excluded from protection under LPP⁸⁵, the Court of Justice saw no need for changes in the concept of LPP and rejected the appellant’s arguments that the rights to defence were undermined by the General Court’s interpretation of the scope of LPP⁸⁶.

Both judgments met criticism from both scholars and practitioners who said that the rulings “disappointed expectations of a more generous reformulation of the condition governing privilege⁸⁷ and of the appreciation of the growing role of in-house lawyers’s⁸⁸.

client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client”.

⁷⁹ *Akzo Nobel* 2010 judgement, para. 45.

⁸⁰ *Akzo Nobel* 2010 judgement, para. 47.

⁸¹ Even if they have not been exchanged with an external lawyer.

⁸² Prepared by an in-house lawyer or other company employee.

⁸³ See S. Kim, M. Levitt, *Legal Professional Privilege...*, p. 1.

⁸⁴ Instead of aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege. See *Akzo Nobel* 2010 judgement, para. 86.

⁸⁵ And “a considerable number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society and, accordingly, do not recognise them as having the same status as lawyers established in private practice”. See *Akzo Nobel* 2010 judgement, para. 72.

⁸⁶ *Akzo Nobel* 2010 judgement, para. 91

⁸⁷ See A. Andreangeli, *EU Competition Enforcement...*, p. 119.

⁸⁸ Especially those who specialise in the competition law as they contribute to the increase of the competition law obligations’ awareness within undertakings. See B. Turno, *Ciag*

In the light of foregoing, one can state that in the EU⁸⁹ LPP, as recognised and elaborated on by the Court of Justice of the European Union⁹⁰, expresses a principle which prohibits the Commission from exercising its powers to take by force communications⁹¹ between a client and its lawyer provided that these documents:

- a) are made for the purpose and are in the interest of the undertaking's right to defence⁹²,
- b) were exchanged in relation to the subject-matter of the Commission's proceedings under Articles 101 or 102 TFEU⁹³
- c) emanate from a qualified lawyer⁹⁴ being entitled to practice her or his profession in one of the EU Member States⁹⁵
- d) emanate from an external, independent lawyer, that is not bound to her or his client by a relationship of employment⁹⁶.

dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku SPI z 17.09.2007 r. w połączonych sprawach: T-125/03 i T-253/03 Akzo Nobel Chemicals Ltd i Ackros Chemicals Ltd. Przeciwko Komisji WE, Europejski Przegląd Sądowy 6/2008, p. 46.

⁸⁹ For the exact scope of the EU version of LPP' and the relevant procedures that apply during dawn raids (including 'the sealed envelope procedure') see: *AM&S* judgment, paras 21–28; *Hilti* judgment, paras 13–16 and 18; judgment of the Court of Justice in case C-550/07, *Akzo Nobel Chemicals and Akros Chemicals Ltd vs Commission*, paras 40–50. See also: Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ [2011] C 308/06, paras 51–58; E. Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance* [in:] B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), pp. 587–658; G. Di Federico, *Case C-550/07P, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs European Commission, Judgement of the European Court of Justice (Grand Chamber) of 14 September 2010*, (2011) 48(2) *Common Market Law Review*, pp. 581–602.

⁹⁰ See the above-mentioned judgements, e.g. *AM&S* judgment, paras 18–27.

⁹¹ Or compel the production of them.

⁹² Thus, internal notes merely reporting the content of communication with external lawyer are privileged as well. See *Hilti* judgment, para. 18.

⁹³ Irrespective whether before or after the initiation of formal proceedings.

⁹⁴ A lawyer being a member of a Bar or Law Society.

⁹⁵ As well as States of EFTA or being parties to the EEA agreement, regardless of the country in which the client operates. Nowadays, the question whether a particular lawyer is entitled to do so is determined by reference to the Council Directive 77/249 on legal services, OJ 1977, L78/17, as amended by the Accession Treaties. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-055, p. 135.

⁹⁶ Definition by B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 196; See also Slaughter and May, *The EU Competition Rules on Cartels. A guide to the enforcement of the rules applicable to cartels in Europe*, May 2012, p. 8 and W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement...*, p. 574.

3.1. In-house lawyers

Under EU competition law, contrary to Strasbourg's concept, in-house lawyers are undoubtedly excluded from claiming LPP, irrespective of whether other above-mentioned conditions are met. Such communication does not remain confidential for the purpose of competition law investigations and thus the Commission may have full access to it⁹⁷ as well as rely on evidence regarding namely in-house lawyers⁹⁸.

It is noteworthy that the current shape of LPP seems to be so restricted that it hardly fits with the classic English LPP formulation which actually distinguishes between two types of LPP, namely the legal advice privilege⁹⁹ and litigation privilege¹⁰⁰. The EU LPP concept is narrower than the one recognised in English law, because, firstly, it differentiates between legal advice emanated from external lawyer and in-house lawyer, secondly, it does not protect communications by third parties and, thirdly, it is confined solely to the litigation privilege. On the other hand, contrary to the English litigation privilege, LPP as established by the CJEU covers communications produced not only for litigation purposes, but more widely for the exercise of the right to defence. Therefore, some authors, especially after the dismissal of the appeal in the *Akzo and Akros* case, suggest relabelling¹⁰¹ EU legal professional privilege with the aim to avoid confusion and to

⁹⁷ Therefore, even though advice from in-house lawyers or from lawyers qualified in non-EU states may qualify as falling under the LPP under national legislation (like in the UK and in Belgium), there is still the risk of the Commission's investigation. See for instance decisions of the Commission in cases *Volkswagen*, OJ 1998, L124/60, paras 198–199 and *Opel*, OJ 2000, L59/1. See also Slaughter and May, *The EU Competition Rules on Cartels...*, p. 8. Moreover The EU position contrasts markedly with the US approach where the protection of lawyer-client privilege and lawyer-work product extends also to in-house counsel. See S. Kim, M. Levitt, *Legal Professional Privilege...*, p. 1.

⁹⁸ The Commission relied on such evidence in at least three following cases (involving imposition of fines): *John Deere*, OJ 1985, L35/58, *London European Sabena*, OJ 1988, L317/47 and *Austrian Banks*, OJ 2004, L56/1, para. 47. See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-050, p. 132 that refers to S. Kim, M. Levitt, *Legal professional privilege...*, pp. 32–36.

⁹⁹ Regarding the protection of lawyer-client communication being sought and given independently and relating to any actual or potential legal proceedings.

¹⁰⁰ Protecting advice (given in documents or other forms) created for the purpose of litigation. It means that this historically first privilege, besides lawyer-client communications, covers also advice given by third parties for the litigation purpose. See the English case *Three Rivers District Council and Others vs Governor and Company of the Bank of England* (No. 6) [2004] 3 W.L.R., paras 1274–1277 ([10] by Lord Scott).

¹⁰¹ And using as a new terminology which will be provided for example independent EU-qualified lawyer-client privilege; see G. Murphy, *It is time to rebrand legal professional*

provide a better understanding of its EU vision¹⁰². Nevertheless, one may have doubts as to whether such relabelling would actually result in even more confusion in the subject.

Despite the constant calls for EU LPP reform, insofar the EU institutions have always denied the need for modification¹⁰³ by also claiming that the protection of undertakings (and in particular the right to defence) guaranteed within the EU is in compliance with the standards set forth by the ECtHR¹⁰⁴. It is noteworthy that an amendment proposed by the Economic and Monetary Committee of the European Parliament to Regulation 1/2003 regarding recognition of in-house privilege as well was rejected by the European Parliament¹⁰⁵.

However, it should be stressed that the President of the General Court in the *Akzo Nobel* case, clearly stated that “(i)t cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis¹⁰⁶”.

The unwillingness to make any changes is however mainly caused by the conflict of two policy objectives, namely the effectiveness of the Commission’s powers of investigation, on the one hand, and on the other hand the undertakings’ fundamental right to have legal assistance of one’s own choosing and thus consult with a lawyer of their choice.

The Commission opposes especially broadening the scope of LPP to include (some) in-house lawyers, by arguing that the degree of independence of an in-house lawyer, which is often to follow his employer’s¹⁰⁷ instructions, is much less than that enjoyed by an external lawyer and thus insufficient.

privilege in EC competition law? An updates lool, (2009) 35(3) Commonwealth Law Bulletin, p. 459–460.

¹⁰² As to new terminology B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 211 and G. Murphy, *It os time to rebrand legal professional privilege...*, p. 459–460.

¹⁰³ See *e.g.* notes 54, 72 above.

¹⁰⁴ See, *e.g.*, = judgment of the Court of Justice in case C-308/04 P *SGL Carbon vs Commission*, E.C.R. 2006, I-5977, judgment if the CFI of 8 July 2008 in case T-99/04 *AC-Treuhand vs Commission*, E.C.R. 2008, II-1501, para. 113. See also N. Kroes, *Antitrust and State Aid Control – The Lessons Learned*, SPEECH/09/408, available at http://europa.eu/rapid/press-release_SPEECH-09-408_en.htm?locale=en, p. 2-5.

¹⁰⁵ With the results of 404 against and 69 for. EP document A5-0229/2001. See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-050, p. 132. See also W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford, 2008, p. 19, who is very critical as to the attempts to extend the LPP to in-house lawyers.

¹⁰⁶ See the order in joined cases T-125/03 and T-253/03 R *Akzo Nobel Chemicals vs Commission*, E.C.R. 2003, II-4771, para. 120–122.

¹⁰⁷ On whom he is financially dependent.

The Commission underlines that an in-house lawyer, even if covered by the protection of privilege by national provisions¹⁰⁸, cannot cope with potential conflicts of interest between his employer's orders and his professional ethical obligations¹⁰⁹.

The above-mentioned arguments can however be rejected as, firstly, the degree of independence of an in-house lawyer towards his employer does not differ a lot from the degree of an external-lawyer's independence towards such an employer being his client, since both types of lawyer are economically and financially dependent¹¹⁰. Secondly, defending client interests "zealously¹¹¹" is the primary duty of any lawyer. All lawyers are very sensitive not to violate ethical obligations as such behaviour normally results in negative consequences¹¹². Moreover, in several EU Member States legal professional privilege extends to in-house counsel as well¹¹³ and it seems that the independence guarantees provided by the national law for in-house lawyers are effective¹¹⁴. Thus, any contrary presumption is groundless¹¹⁵.

¹⁰⁸ That usually are not effective in practice.

¹⁰⁹ See, e.g.: *AM & S* judgment, paras 21–24 and 27; *Akzo and Akcros judgment* 2010, judgment of the General Court of 23 May 2011 in case T-226/10 *Prezes UKE vs Commission*, E.C.R. 2011, I-0000 and opinion of AG Kokott's of 29 April 2010 delivered in case C-550/07 P *Akzo and Akcros*, paras 555–574.

¹¹⁰ Some even claim that in the case of *key-clients* the level of dependency of an external lawyer is higher than of an internal one.

¹¹¹ *Nikula* judgement, paras 54–55.

¹¹² Such as severe fines or disciplinary procedures carried by the Bar or the Law Society, as well as to social-professional exclusion and loss of chances for future admission to the Bar or the Law Society. Moreover there is almost always a degree of lawyer conduct's control, e.g. the supervision of the trial court. See also A. Andreangeli, *EU Competition Enforcement...*, p. 119 and A. Andreangeli, *The Protection of Legal Professional Privilege in EU Law and Impact of the rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back*, *Competition Law Review*, Vol. 2, Issue 1, August 2005, pp. 41–42.

¹¹³ Legal professional privilege covers in-house lawyers in Belgium, Cyprus, Greece (under certain circumstances), Ireland, Latvia (under certain circumstances), Lithuania (under certain circumstances), Malta, the Netherlands (under certain circumstances), Portugal, Spain and UK. J. Holtz, *Legal Professional Privilege in Europe: a Missed Policy Opportunity*, *Journal of European Competition Law & Practice*, 14 June 2013, p. 4.

¹¹⁴ In some Member States, e.g. the UK and the Netherlands, in-house lawyers are simultaneously members of the Bar what results in them being subject to, first, the relevant rule regarding professional ethics and, second, discipline imposed and controlled by the professional body. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-050, p. 132.

¹¹⁵ B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege...*, p. 206.

It also has to be noted that the wording of Article 22(2) of Regulation 1/2003 stating that in cases when the NCA's inspectors conduct an inspection on behalf of the Commission, they should exercise their powers in conformity with their national legal rules. Therefore, if a Member State extended LPP to in-house lawyers, national inspectors cannot examine or seize documents emanating also from an in-house lawyer, even though the Commission has jurisdiction over the case. This stance may lead to significant inconsistencies.

Furthermore, suspicions that documents related to a violation of competition law may be willfully hidden "under the LPP label at the premises of an in-house lawyer are ill-founded"¹¹⁶. The Commission's powers of inspection encompass sufficient legal instruments¹¹⁷ to enable it to prevent or at least to penalise obstructions of this kind¹¹⁸.

Lastly, it has to be stressed that the Commission's approach is at odds with the General Court's view, already demonstrated in some cases¹¹⁹, that the legal advice provided by the Commission's own in-house should be protected¹²⁰.

3.2. Non-EU lawyers

Similarly, the Commission has no reasonable grounds to assume that in principle lawyers' independence in other, *i.e.* non-EU, countries is significantly lower. However, one may argue that, since in some states there may be substantial insufficiencies, setting no territorial limits in the scope of LPP could be dangerous and harmful to correct competition enforcement. Therefore a good solution would be to sign bi- or multi- lateral agreements between the EU (Commission) and the relevant states in this

¹¹⁶ *Ibidem*; See also J.-F. Bellis, *Legal professional privilege: An overview of EU and national case law*, (2011) No. 39467 e-competitions.

¹¹⁷ Besides the procedure of referral of disputed documents to the General Court or Hearing Officer, the Regulation 1/2003 granted Commission the permission to use "coercive measures" including serious penalties for non-compliance (Articles 20(8), 21(3) and 23 Regulation 1/2003). Moreover, in some Member States (*e.g.* UK Competition Act, section 65) obstructions of a competition authority inspection fall into scope of criminal offence and thus may be punished even more severely. For more information see the Global Competition Law Centre's Report from the GCLC's Annual Conference *Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003* which took place on 11 and 12 June 2009 in Brussels.

¹¹⁸ B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege...*, p. 206.

¹¹⁹ See, *e.g.*, judgments of the CFI of 9 June 1998 in case T-10/97 *Carlsen*, E.C.R. 1998, II-00485, and of 7 December 1999 in case T-92/98 *Interporc*, E.C.R. 1999, II-3521.

¹²⁰ See also P. Boylan, *Privilege and in-house lawyers*, (2007) *Competition Law Insight*, 23rd October 2007, p. 16 and B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege...*, p. 205.

matter¹²¹. This change would facilitate and enforce cooperation between the Commission and the national authorities from non-EU states. It may be noticeable in particular in the context of US undertakings operating within the EU market and of the possible impact on US-EU relations. J.S. Venit points at an example of a situation where refusing to grant EU LPP to communications exchanged with a lawyer from for example the USA, would subsequently lead to a refusal to cover documents originating from the EU by American LPP¹²².

Nevertheless, it has to be noted that the Commission has already considered such a solution and in the mid-80s submitted a proposal to the Council regarding negotiating reciprocal agreements resulting in an extension of LPP to independent lawyers from non-EU countries¹²³. Unfortunately, this matter did not proceed any further but it does not mean that this issue cannot be raised again.

What is further definitely extremely significant is that such a limitation constitutes a restriction of the undertaking's right to choose its legal assistance which is one of the essential components of LPP. It is rightly believed that "defence rights can no longer be viewed through an entirely Eurocentric lens¹²⁴" and thus undertakings may also seek legal advice from non-EU lawyers.

Finally, it seems that the extension of LPP has already slowly started to be implemented in the Commission's practice as it quite often pragmatically makes equal non-EU external lawyers and EU external lawyers during its inspections¹²⁵.

3.3. Objective scope and waiver of LPP

Another area that needs reform is the extension of the objective scope of LPP, *i.e.* the inclusion of protection of communications originating from and exchanged within compliance programmes, since by identifying potential problems of competition law and seeking legal advice, they often relate to the exercise of rights to defence. So far the CJEU has refused to grant such

¹²¹ B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege...*, p. 207.

¹²² J.S. Venit, *Modernization and Enforcement – The Need for Convergence: On procedure and Substance* [in:] C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford–Portland, Oregon 2006, p. 338.

¹²³ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-055, p. 135.

¹²⁴ J. Joshua, *It's a privilege. Managing legal privilege in multijurisdictional antitrust investigations*, (2007) *Competition Law Insight*, 11th December 2007, p. 16.

¹²⁵ *Ibidem*, p. 14.

protection to compliance programme documents lacking an express mention of seeking legal advice stating that “(s)uch programmes often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence¹²⁶”. Nevertheless, such an extension is recommended due to the increasing significance and popularity¹²⁷ of such programmes¹²⁸.

The last ambiguity that has to be mentioned regards the question of the waiver of LPP. The CJEU held that protection does not belong to the lawyer but to the undertaking inspected. Thus, “the principle of confidentiality does not prevent a lawyer’s client from disclosing the written communications between them if he considers that it is in his interests to do so¹²⁹”. It is however not clear in which circumstances LPP is waived, in particular, whether such protection can be lost unintentionally¹³⁰. It also remains unclear whether the LPP waiver constitutes a direct consequence of the undertaking’s decision to initiate the leniency programme¹³¹. If it is so, it would mean that an undertaking applying for leniency should also submit to the Commission legal opinions and other documents normally protected by the privilege in question¹³²? However, since such documents cannot be considered direct evidence of anti-competitive behaviour¹³³, this option is commonly criticised¹³⁴.

¹²⁶ See *Akzo Nobel* judgment 2007, paras 127 and 130.

¹²⁷ Supported by the Commission’s efforts (campaigns etc.).

¹²⁸ Commission’s brochure, *Compliance Matters*, November 2011, available at http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf

¹²⁹ See *AM & S* judgment, para. 28.

¹³⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-058, p. 137.

¹³¹ It is for example not the case in the US, where amnesty applications do not include legal documents covered by the LPP. See S.D. Hammond, *Recent Developments Relating to the Antitrust Division’s Corporate Leniency Program*, 5th March 2009, speech at the 23rd Annual, National Institute On White Collar Crime, available at <http://www.justice.gov/atr/public/speeches/244840.htm>

¹³² This question is also linked to another highly discussed issue, *i.e.* the possibility of disclosing leniency material by the competition authority at request made in relation to private civil proceedings. In UK it has, however, been argued that disclosure of leniency applications by the OFT might be refused namely on the grounds of legal professional privilege. Nevertheless, the possibility of the LPP waiver cannot be excluded in criminal cases. See *e.g.* A. Zuckerman, *Civil Procedure*, London, Thomson, 2006, p. 611 and C. Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, *Competition Law Review*, Vol. 7 Issue 2, pp. 181–220 and OFT, *Applications for leniency and no-action in cartel cases OFT’s detailed guidance on the principles and process*, October 2011, pp. 25 and 34.

¹³³ B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 209.

¹³⁴ Still, it has to be stressed that, since persons (natural and legal) are free to incriminate themselves “if in doing so they are exercising their own will”, legal professional privilege

4. Importance of LLP during the Commission's inspections

Since the protection of LPP is assured in both proceedings, *i.e.* judicial before the CJEU¹³⁵ and administrative before the Commission, legal professional privilege constitutes undoubtedly one of the most important limitations of the Commission's powers of inspection.

First, despite the very broad interpretation of the undertaking's premises that the inspectors have a right to enter under Article 20(2)a of Regulation 1/2003, the Commission's officials are not entitled to inspect the premises belonging to the external lawyer of the undertaking inspected due to the protection of legal professional privilege¹³⁶.

Second, in principle the undertaking cannot lawfully prevent the inspectors from examining the documents under Article 20(2)b. The only exception existing in this regard relates to any documents covered by professional legal privilege, for instance the correspondence between an undertaking and its external lawyer¹³⁷.

Likewise, with reference to the Commission's power to take copies¹³⁸, the Commission's discretion to decide which data should be copied is limited *inter alia* by LPP.

does not stand in the way of lawyer-client communications being produced in the framework of leniency, since "the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if it considers that it is in his interest to do so" see the Concurring Opinion of Judge Walsh in *Saunders vs United Kingdom* and *AM&S* judgement, paras 18–28 and W.P.J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, Kluwer Law International 2002, section 3.5.2.

¹³⁵ See Article 43(2) of the Rules of Procedure of the Court of Justice of 29 September 2012, OJ 2012 L 265, and Article 38(2) of the Rules of Procedure of the Court of First Instance (General Court) of the European Communities of 2 May 1991, OJ 1991, L 136.

¹³⁶ See for instance *AM&S* judgment, *Hilti* judgment, paras 13 and 14; E. Gippini-Fournier, *Legal Professional Privilege...*, chapter 24, pp. 587–658; B. Vesterdorf, *Legal Professional Privilege and The Privilege Against Self-incrimination in The EC Law: Recent Developments and Current Issues* [in:] Hawk B.E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005; J. Temple Lang, *The AM&S judgment* [in:] M. Hoskins, W. Robinson, *A true European – Essays for judge David Edward*, 2003, chapter 12, pp. 153–160; J. Joshua, *Privilege in multi-jurisdictional cartel investigations: Are European courts missing the point*, *Global Competition Review*, February 2004, pp. 39–41, W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement...*; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, pp. 195–214.

¹³⁷ Contrary to the ECtHR case-law, according to the CJEU the internal lawyers, so called in-house lawyers, are not covered by the protection of the LPP.

¹³⁸ Article 20(2)c of Regulation 1/2003.

Nevertheless, a particular problem arises if the inspectors make forensic copies of the entire media, e.g. computer hard drives, in order to examine the files subsequently in the Commission offices¹³⁹. It is obvious that by copying the entire drive, the inspectors make copies not only of files falling outside the scope of the inspection but also of documents being covered by legal professional privilege. Thus, by doing so the Commission actually violates LPP. Unfortunately, as already stressed in the previous Chapters, the CJEU is avoiding making any pronouncement on the issue¹⁴⁰.

Despite the lack of relevant provision with this regard in Regulation 1/2003, the protection of those confidential documents and its conditions as well as the so-called “envelope procedure”, applicable in the case disagreement, were, as mentioned above, established by the CJEU¹⁴¹.

The approach of the CJEU was integrated in the Commission’s Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU¹⁴².

According to these guidelines communications between an undertaking and its lawyer are protected by LPP provided that, first, they were made for the purposes of the exercise of the undertaking’s right to defence and, second, they emanate from independent lawyers¹⁴³.

The protection under LPP covers all correspondence exchanged between an undertaking and its external lawyer not only after the initiation of the investigation¹⁴⁴ but also prior to it provided that it relates to the subject matter in question¹⁴⁵. Given that the Commission may make an inquiry, be it formal or informal, before the formal initiation of proceedings, “there should be no discouragement from taking legal advice at the earliest opportunity¹⁴⁶”. For instance, preliminary advice on the status of

¹³⁹ For more on this issue see Chapter VI “Subsequent electronic searches of copied hard drives”.

¹⁴⁰ See judgment of the General Court in case T-135/09 *Nexans vs Commission*.

¹⁴¹ See for instance *AM&S* judgment, *Hilti* judgment, paras 13 and 14 and *Akzo Nobel* judgment 2007, para. 45.

¹⁴² See *Best practices*, Section 2.9. Legal Professional Privilege.

¹⁴³ *Best practices*, point 47.

¹⁴⁴ Sometimes the term “initiation of proceedings” is used in this context. Nevertheless, even if the formal opening of the proceedings takes place after the preliminary investigation, it is obvious that due to an extremely important role of the inspections for the latter, the initiation of proceeding should be understood as the so called “opening of the file”. See L.O. Blanco, *European Community Competition Procedure*, No. 8.41, p. 320.

¹⁴⁵ See *AM & S* judgment, para. 23; Moreover, in *Hoechst* judgment the ECJ stressed the need to protect LPP from the preliminary inquiry stage (para. 16 of the judgment).

¹⁴⁶ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-045, p. 130.

the agreement or practice of the undertaking concerned in the light of competition law relates directly to the subject matter of future proceedings and thus is protected under LPP¹⁴⁷. On the contrary, documents relating to competition law compliance programmes were rejected for protection, since in the opinion of the CJEU the scope of such programmes goes beyond the exclusive exercise of the right to defence¹⁴⁸. Thus, in order to be covered by LPP a document relating to the undertaking's compliance programme has to make a mention of seeking legal advice or a legal consultation¹⁴⁹.

Furthermore, if lawyer-client correspondence is reproduced in internal notes reflecting its content or forwarded by email, those documents are also covered by the protection of LPP¹⁵⁰.

Nevertheless, those notes cannot contain any comment or modification. If such a document "includes an expression of opinion or amendments made by the undertakings employee (including in-house counsel), it is not protected "insofar as the expression of that opinion or those amendments are concerned¹⁵¹".

Legal advice of a general nature is not protected by LPP, however since it does not relate to the subject matter of the inspection, it cannot be examined or seized anyway. Neither this protection depends on the application of Articles 18 or 20 of Regulation 1/2003, nor is its extent limited to the scope indicated at the inspection decision. With reference to the criterion of the "relationship with the subject matter", as some authors argue "it would be inconsistent with the purpose and rationale" of LPP if any legal advice regarding one undertaking's activity could be examined during a Commission investigation relating to another activity.

It has to be highlighted that even though client-lawyer communications form part of the business records of the undertaking under investigation, they remain confidential since, as commonly recognised, each person, be it natural or legal, must be able to freely, *i.e.* without any constraint, consult his/her lawyer¹⁵².

¹⁴⁷ *Ibidem*.

¹⁴⁸ See *Akzo Nobel* judgment 2007, paras 126–127.

¹⁴⁹ For instance a mention of the need to assess whether certain practices are in accordance with competition law or of the possibility of submitting an application for leniency. See *Akzo Nobel* judgment 2007, para. 130.

¹⁵⁰ See *Hilti* judgment in, paras 13–18.

¹⁵¹ See L.O. Blanco, *European Community Competition Procedure*, No. 8.45, p. 325.

¹⁵² *A.M. & S.* judgment, para. 18.

The documents covered by LPP are protected irrespective of the place where they are stored¹⁵³.

It is important to stress that all undertakings, regardless of their legal form, that are subject to the procedures of the Commission may claim protection under LPP¹⁵⁴. As to the requirement of an external independent lawyer, the EU concept in this matter has been explained above. It has to be nevertheless added that most probably no protection would be granted to client-lawyer communications if the lawyer in question is personally involved in¹⁵⁵ the investigated competition law infringement¹⁵⁶. Any protection given in such circumstances would be unjustified¹⁵⁷. Likewise, a communication should not be protected if one of its parties happens to be a lawyer but is not acting as a legal adviser¹⁵⁸.

The undertaking inspected is not bound to disclose the contents of the disputed document. It may for instance submit a redacted version of the documents with the parts covered by LPP being removed. Nevertheless, the burden of proof lies on the undertaking claiming the protection of LPP with regard to a given document. It thus has to provide the Commission with appropriate justification as well as relevant material to substantiate its claims.

Often allowing the inspectors to take a cursory look suffices to prove the confidential nature of the document in question. However, sometimes “(e)ven a cursory glance at the documents may give the Commission valuable insight that would have otherwise been unavailable¹⁵⁹”. Therefore,

¹⁵³ An the premises of the undertaking concerned, its lawyer or even third party. See *Hilti* judgment. However, if such document, claimed to be confidential, is stored at a third party's premises it may raise doubts as to actual confidentiality of the document. Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-047, p. 132.

¹⁵⁴ *Ibidem*, No. 3-047, p. 131.

¹⁵⁵ By for instance assisting his clients in anticompetitive behaviour.

¹⁵⁶ So far there has been no direct CJEU case-law regarding this problem. The indirect indice may be found in the judgment of the ECJ of 26 June 2007 in case C-305/05 *Ordre des barreaux francophones et germanophones and others vs Conseil des ministres*, E.C.R. 2007, I-5305, in which a distinction was made between lawyer's involvement in a transaction and representation of his client in litigation. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-059, p. 138.

¹⁵⁷ *Ibidem*, No. 3-059, p. 138.

¹⁵⁸ *Ibidem*. In such circumstance the protection would be refused also due to the contents of the communications that most probable would not relate to seeking for legal advice.

¹⁵⁹ See L.O. Blanco, *European Community Competition Procedure*, No. 8.44, p. 323 where the author refers to A. Burnside, H. Crossley, *AM&S and Beyond: Legal Professional Privilege in the Wake of Modernization*, Antitrust Reform in Europe: A Year in Practice, 9–11 March 2005, Brussels, International Bar Association (IBA) who suggested entitling

the undertaking inspected is entitled to refuse officials to take even a cursory look under the condition that it presents appropriate reasons justifying why it would be impossible to allow taking such a look without revealing the content of the document¹⁶⁰. Three scenarios may subsequently come into question.

First, if the undertaking in order to support its claim for the protection of LPP manages to provide sufficient reasons, this will prevent the inspectors from examining and copying the contents of the document.

Second, if according to the Commission the material provided by the undertaking does not suffice to prove that the disputed document is protected by LPP in accordance with the existing case-law of the CJEU, but it cannot be excluded that the document may be covered by such protection, the inspectors may place a copy of the document in question in a sealed envelope and bring it to the Commission's premises, for the purpose of a subsequent resolution of the dispute¹⁶¹.

Nevertheless, the Commission will not examine the contents of the disputed document before having adopted a decision rejecting the undertaking's claim regarding LPP which will allow the undertaking concerned to refer the matter directly to the General Court¹⁶². This means that if the undertaking lodges an action for annulment as well as application for interim measures¹⁶³, the sealed envelope will not be opened by the Commission at least until the CJEU will have decided on the application for interim measures and, in the case of an undertaking's success, even until the final judgment regarding the status on the disputed document¹⁶⁴.

Third, in cases where in the inspectors' view the undertaking failed to provide any evidence or explanations in order to prove that the document concerned is covered by LPP but it only invoked clearly unfounded reasons¹⁶⁵ for purposes of justifying such protection, or if it bases itself on manifestly inaccurate factual circumstances, instead of using the procedure of the

an independent third person or institution to review the disputed documents in full in order to decide whether they should be protected by LPP.

¹⁶⁰ *Best practices*, point 49. See also *Akzo* judgment, paras 81 and 82.

¹⁶¹ *Best Practices*, point 50.

¹⁶² The Commission will thus wait until the expiration of the delay for bringing an action against the rejection decision under Article 263 TFEU.

¹⁶³ Since an action for annulment does not have suspensory effect, the undertaking concerned should bring an application for interim relief in order to suspend the operation of the decision rejecting its request for LPP.

¹⁶⁴ *Best Practices*, point 51.

¹⁶⁵ Pursuant to the applicable case-law.

sealed envelope, the Commission will immediately read the contents of the document and take a copy of it¹⁶⁶.

Furthermore, if the inspectors come to the conclusion that the undertaking inspected makes clearly unfounded requests for protection under LPP merely in order to delay the carrying out of the inspection or if it opposes, without providing any objective justification, inspectors taking a cursory look at the documents, the undertaking risks being fined under Article 23(1)c of Regulation 1/2003. The undertaking's refusal to submit the requested document and failure to provide the inspectors with sufficient (in the Commission's view) evidence supporting the confidentiality of the document in question may be regarded as the production of "the required books or other records related to the business in incomplete form". Moreover, obstructive (in the Commission's view) behaviour of the undertaking during the inspection may be regarded as aggravating circumstances and taken into account while calculating the substantial fine imposed on the undertaking in question in the context of a final infringement decision¹⁶⁷. The undertaking concerned is nevertheless entitled to challenge the Commission's decision to impose such a penalty or the final infringement decision before the General Court.

5. Remedy

In the context of LPP, the undertaking inspected is granted an extremely important safeguard. Namely, if the Commission decides that it requires production of the disputed documents under Article 20(4) of Regulation 1/2003¹⁶⁸, the undertaking concerned is entitled to challenge the Commission decision under Article 263 TFEU before the General Court.

It has to be stressed that this possibility for the undertaking to challenge the seizure of a disputed document before the General Court constitutes an exception from the general principle established by the CJEU according to which measures adopted by the Commission during an inspection do not constitute actionable decisions but are merely measures implementing the inspection decision. In the General Court's opinion,

¹⁶⁶ *Best Practices*, point 50.

¹⁶⁷ *Best Practices*, point 52. See also *Akzo Nobel judgment 2007*, para. 89.

¹⁶⁸ It has to be stressed that according to the *Mandate of the Hearing Officer 2011*, before the adoption of the Commission decision, the hearing officer has to deliver a reasoned recommendation as to the status of the disputed document. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-057, p. 136.

“(i)n principle, a provisional measure intended to pave the way for the final decision is not (...) a challengeable act¹⁶⁹”. However, “acts adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position (...) constitute challengeable acts¹⁷⁰”. In the case of *LLP*, *i.e.* when an undertaking relies on this privilege in order to oppose the seizure of a document during an inspection ordered under Regulation 1/2003, a Commission decision rejecting that request should be regarded as producing legal effects for that undertaking, by resulting in a distinct change in its legal position. Namely, it firstly withholds protection provided by EU law from the undertaking concerned and secondly, is definitive in nature as well as independent of any final decision regarding any suspected infringement of Article 101 and 102 TFEU¹⁷¹.

Moreover, such a decision providing a basis for recourse to the General Court may take the form of either a tacit decision, *i.e.* expressed by physically seizing any disputed document for the Commission’s file without placing it in a sealed envelope, or of a formal decision rejecting the privileged status of the document in question¹⁷². It is important to keep in mind that the dispute over LPP cannot however result in an action for the annulment of the inspection decision¹⁷³.

¹⁶⁹ See *Akzo Nobel* judgment 2007, para. 45 See also *Nexans* judgment.

¹⁷⁰ See *Akzo Nobel* judgment 2007, para. 45; judgment of the ECJ of 11 November 1981 in case 60/81 *IBM vs Commission*, E.C.R. 1981, 2639, paras 10 and 11, and judgment of the CFI of 7 June 2006 in joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft vs Commission*, E.C.R. 2006, II-1601, para. 65.

¹⁷¹ See *Akzo Nobel* judgment 2007, paras 46–47, *AM & S* judgment, paragraphs 27 and 29 to 32; see also, by analogy, judgment of the ECJ in case 53/85 *AKZO Chemie vs Commission*, E.C.R. 1986, 1965, paras 18 to 20.

¹⁷² See *Akzo Nobel* judgment 2007 and Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-056, pp. 135–136.

¹⁷³ The lawfulness of the inspection decision is not affected by the acts adopted subsequently, in particular the way in which the inspectors were carrying out the inspection. See judgments of the ECJ in case 85/87 *Dow Benelux vs Commission*, para. 49 and of 8 November 1983 in joined cases 96 to 102, 104, 105, 108 and 110/82 *IAZ vs Commission*, E.C.R. 1983, 3369, para. 16. See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-056, pp. 135–136. For more details see Chapter XI “Remedies and judicial review”.

It has to be noted however that the undertaking has to wait a lengthy period for the final judgment since the proceedings in this matter may last for couple of years¹⁷⁴.

Furthermore, an action for annulment does not result in suspending the operation of the decision rejecting the undertaking's request for LPP. Therefore, in order to prevent the Commission from examining the disputed document before the final CJEU ruling regarding LPP, it is crucial for the undertakings not only to challenge the Commission decision but also to simultaneously apply under Article 278 TFEU for interim relief seeking such a suspension¹⁷⁵.

6. Conclusions

The example of LPP shows that the issue of fundamental rights concerning competition law has always been complex. The willingness to enhance the effectiveness of Commission investigations may lead to interference with the undertakings' right to defence, for instance by excessively limiting the scope of legal professional privilege.

In the context of the legally binding status of CFR and future EU accession to the EConHR it is suggested that the current undertakings' guarantees relating to LPP should be developed and extended. The CJEU should in principle follow the reasoning of the ECtHR and be fully in line with Strasbourg's approach¹⁷⁶. Even if the EU standards concerning LPP are said to be well set, there is no reason to claim that they must remain unchangeable forever (in particular due to the revolutionary nature of the right at stake)¹⁷⁷. Aside from some small changes¹⁷⁸ which hopefully will pave the way to significant developments in the future, the existing practice remains unchanged.

¹⁷⁴ See for instance the case *Akzo Nobel* which lasted from 2003 to 2010.

¹⁷⁵ For more details on actions under 278 TFEU see Chapter XI "Remedies and judicial review".

¹⁷⁶ See A. Andreangeli, *EU Competition Enforcement...*, p. 119; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 204; A. Egger, *EU-Fundamental Rights in the National Legal order: The Obligation of Member States Revisited* [in:] P. Eeckhout, T. Tridimas (eds), *Yearbook of European Law*, OUP 2006, pp. 533 and 552

¹⁷⁷ B. Vesterdorf, *Legal Professional Privilege...*, p. 709; A. Andreangeli, *EU Competition Enforcement...*, p. 119; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 204.

¹⁷⁸ One possible improvement can be the above-mentioned Commission's practice to equal communications from non-EU and EU external lawyers. See point 103 above.

In order to adjust to ECHR standards, the expected modifications of LPP within the EU would require for example the establishing of a more extensive and generous level of lawyer-client confidentiality concerning communications¹⁷⁹.

In particular an expansion of the scope of EU LPP has been suggested so that it would also at least include those in-house lawyers who, while being employed by an undertaking, are members of the Bar or the Law Society¹⁸⁰. Nonetheless, one can come across comments that this would not be enough as, according to the more far-reaching *functional, utilitarian approach*¹⁸¹, the criterion of membership in the Bar should not be decisive for the scope of LPP and therefore all in-house lawyers¹⁸² should be covered by the LPP rule¹⁸³. Furthermore, as the limitation applies only to EU lawyers it seems particularly unfair and *overtly discriminatory*¹⁸⁴; LPP should be granted at least to lawyers who are members of the Bar in non-EU countries¹⁸⁵. It seems moreover important to also cover within the scope of LPP those communications which were prepared, exchanged or originated within competition law compliance programmes¹⁸⁶.

With reference to the idea of some authors arguing in favour of further reinforcement of the Commission's powers of investigation in order to balance the demanded extension of the scope of LPP¹⁸⁷, I do not agree that such an option would contribute to the alleviation of the conflict between effective competition enforcement and the protection of fundamental rights. Each reinforcement of the Commission's powers of investigations, which are already considered too extensive and far-going, would result in an immediate avalanche of critique and postulates to rebalance such change

¹⁷⁹ A. Andreangeli, *EU Competition Enforcement...*, pp. 115–120.

¹⁸⁰ A. Andreangeli, *The Protection...*, pp. 53–54.

¹⁸¹ Which is also represented by the author of the present study.

¹⁸² Irrespective of their membership in the Bar.

¹⁸³ A. Andreangeli, *EU Competition Enforcement...*, pp. 103–109.

¹⁸⁴ R. Whish, *Competition Law*, 6th ed., OUP 2009, p. 268.

¹⁸⁵ Bearing in mind the highly contentious nature of this point, a recommended solution would be to simply adopt more flexible (and less formalistic) approach which assesses the LPP scope based on the circumstances of each case (*i.e.* whether for example the lawyer, within the jurisdiction in which (s)he practises is subject to binding professional ethics rules preserving professional integrity and independence towards the client). See A. Andreangeli, *The protection...*, p. 48 and B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 205.

¹⁸⁶ So not those regarding to the exercise of the right of defence.

¹⁸⁷ See, *e.g.*, B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 211.

with another improvement in the protection of fundamental rights. Thus instead of solving the problem, it would lead to a vicious circle effect.

Having in mind the lack of uniformity in the rules governing LPP between Member States, the suggested modifications could contribute to a strengthening of the legal certainty and the uniformity of lawyer-client communications in the context of competition law proceedings¹⁸⁸ and to better consistency with the concept of LPP emanating from the ECHR interpretation of Article 6(1) EConHR¹⁸⁹.

Nevertheless, it remains difficult to foresee whether changes in the EU concept of LPP would appear and if so, which direction they will take.

¹⁸⁸ Before the Commission as well as within the European Competition Network. See B. Vesterdorf, *Legal Professional Privilege...*, p. 722 and ECLA, *The situation of in-house counsel in member states: comparative tables (2003)*, ECLA Documents, available at <http://www.ecla.org/task-forces/legal-privilege.aspx>

¹⁸⁹ *Inter alia*, the judgement of the ECtHR of 29 January 2002 in case *AB vs Netherlands*, Application No. 37328/97, [2003] 37 EHRR 48, paras 85–86, *Nikula* judgment para. 53 and A. Andreangeli, *EU Competition Enforcement...*, p. 121.

Chapter X

Privilege against self-incrimination

1. Introduction

The privilege against self incrimination (“*nemo tenetur*”) is surely “an indispensable bulwark of the rights of an accused in any modern system of criminal justice¹”. It aims at “avoiding miscarriages of justice and securing the aims of Article 6” EConHR². However, this privilege which “prevents the prosecution from obtaining evidence by defying the will of the accused not to testify against himself³”, plays a significant role within competition law proceedings. It namely constitutes important grounds upon which production and disclosure of documents as well as production of oral explications required under Article 20(2)e of Regulation 1/2003 during the inspections may be resisted.

It is noteworthy that the right to silence may often overlap with the presumption of innocence (right to remain silent) protected under Article 6 §2 of the EConHR. Both are linked since they protect against improper compulsion by the authorities and the reversal of the burden of proof⁴.

¹ P. Gardner, T. Ward, *The Privilege Against Self-Incrimination: In Search of Legal Certainty*, European Human Rights Law Review, 4/2003, p. 388.

² Judgment of the ECtHR of 3 May 2001 in case *JB vs Switzerland*, Application No. 31827/96, para. 64.

³ D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe Strasbourg, 2012, p. 61.

⁴ See judgments of the ECtHR of 8 February 1996 in case *John Murray vs UK*, Application No. 18731/91 and of 5 November 2002 in case *Allan vs UK*, Application No. 48539/99 in which the ECtHR stated that “The right not to incriminate oneself is primarily concerned with respecting the will of the person to remain silent”.

Like in the case of legal professional privilege, one can identify significant differences between the scopes of the right not to incriminate oneself as set by the two European international courts, namely the European Court of Human Rights⁵ and the Court of Justice of the European Union. Therefore, before focusing on the privilege against self-incrimination in the very context of the Commission's inspections, it is indispensable to firstly analyse the two standards, established by the ECtHR and the CJEU, in order to verify the compatibility of the EU approach with the one adopted by the ECtHR.

2. Standard of privilege against self-incrimination set out by the ECtHR

Contrary to for instance Article 14(3) of the International Covenant on Civil and Political Rights, privilege against self-incrimination is not specifically mentioned in Article 6 of the EConHR⁶. However, the issue concerning statements obtained by defying the will of an accused not to testify against himself, especially when they are subsequently deployed in (criminal) proceedings in support of the prosecution case, may be examined by the ECtHR under Article 6 §2 regarding the presumption of innocence⁷ or, which is more often the case, under the first paragraph of Article 6⁸. The ECtHR practice shows also that once the ECtHR ruled on the question of a breach of Article 6(1), it finds that no separate issue that arises is to be considered under Article 6(2) EConHR⁹.

According to the ECtHR the right not to incriminate oneself constitutes a “generally recognised international standard” that “lies at the heart” of the notion of a fair trial stipulated in Article 6(1) EConHR¹⁰ and

⁵ Hereafter: the “ECHR”.

⁶ It is for instance stipulated in Art. 14(3)(g) of the International Covenant on Civil and Political Rights.

⁷ Judgment of the ECtHR of 7 October 1988 in case *Salabiaku vs France*, Application No. 10519/83, paras 26–30.

⁸ Judgment of the ECtHR of 25 February 1993 in case *Funke vs France*, Application No. 10828/84, paras 41–45. D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial...*, p. 62.

⁹ Judgment of the ECtHR of 29 June 2007 in case *O'Halloran and Francis vs United Kingdom*, Application Nos. 15809/02 and 25624/02, [2008] 46 EHRR21, para. 65.

¹⁰ The *Funke* judgment and *John Murray* judgment, para. 45, “Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the *Funke* judgment cited above, loc. cit.). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims

thus its breach gives rise to a violation of the Article in question¹¹. This “autonomous meaning of Article 6 §1¹²” has already been confirmed in numerous cases¹³. The wide *sui generis* interpretation of a “fair trial” by the ECtHR¹⁴ constitutes one of the most important contributions of the ECtHR to the scope of protection granted by the EConHR¹⁵. According to the ECtHR this privilege covers a comprehensive right to refuse to furnish information¹⁶ and aims so “that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused¹⁷”.¹⁸

of Article 6 (art. 6)”. Likewise judgment of the ECtHR of 17 December 1996 in case *Saunders vs United Kingdom*, Application No. 19187/91, para. 68 and *J.B.* judgment, para. 64; P. Gardner, T. Ward, *The Privilege Against Self-Incrimination...*, p. 388.

¹¹ *Funke* judgment; see also P. Gardner, T. Ward, *The Privilege Against Self-Incrimination...*, p. 388.

¹² Judgment of the ECtHR of 20 October 1997 in case *Serves vs France*, Application No. 20225/92, para. 47; judgment of the ECtHR of 8 April 2004 in case *Weh vs Austria*, Application No. 38544/97, para. 54.

¹³ It was the European commission of Human Rights who firstly admitted that Art. 6(1) includes the protection against self-incrimination; see *Saunders* judgment, para. 30; Later, the ECtHR confirmed this approach in numerous decisions. See for instance, judgments in the following cases: *Funke, John Murray, Saunders, J.B., Allan* as well as judgment of the ECtHR of 19 September 2000 in case *I.J.L. and Others vs United Kingdom*, Application Nos. 29522/95, 30056/96 and 30574/96; judgment of the ECtHR of 21 December 2000 in case *Heaney and McGuinness vs Ireland*, Application No. 34720/97; judgment of the ECtHR of 21 December 2000 in case *Quinn vs Ireland*, Application No. 36887/97; judgment of the ECtHR of 25 September 2001 in case *P.G. and J.H. vs United Kingdom*, Application No. 44787/98; judgment of the ECtHR of 8 October 2002 in case *Beckles vs United Kingdom*, Application No. 44652/98.

¹⁴ E.M. Ameye, *The interplay between human rights and competition law in the EU*, European Competition Law Review 2004, 25(6), 337.

¹⁵ P. Gardner, T. Ward, *The Privilege Against Self-Incrimination...*, p. 389.

¹⁶ *Saunders* judgment; see also J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change*, GleissLutz Rechtsanwälte, Stuttgart, 2008, p. 32 and J. Schwarze, *Der Grundrechtsschutz durch den EuGH*, NJW 2005, 3461; *Enforcement By The Commission The Decisional And Enforcement Structure In Antitrust Cases And The Commission's Fining System*, report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference “Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003” which took place on 11 and 12 June 2009 in Brussels, p. 20.

¹⁷ Judgment of the ECtHR of 11 July 2006 in case *Jalloh vs Germany*, Application No. 54810/00, EUGRZ 2007, 150, 161, para. 100.

¹⁸ V. Chirdaris, *Criticizing Strasbourg, Lord Hoffmann, the Limits of Interpretation, the “Margin of Appreciation”, and the Problems Faced by the European Court of Human Rights* [in:]

With particular reference to Article 6(2) EConHR, the presumption of innocence puts the burden of proof on the prosecution. As the ECtHR held in *Servès vs France*, the accused understandably may fear that some of the evidence that he might have been called upon to provide to the investigating authority would have been self-incriminating. Therefore, the accused is permitted to refuse to answer any questions that are likely to steer him in a self-incriminating direction¹⁹. Silence, in itself, cannot be regarded as an indication of guilt, thus a national court cannot conclude that the accused is guilty merely because he chooses to remain silent²⁰. Under the standard required by the ECtHR, a conviction must be substantiated by sufficient evidence²¹ and guilt has to be proved beyond reasonable doubt in order to find the person guilty. Therefore, the refusal to provide incriminating information cannot result in imposition of any sanction on the person concerned²².

The ECtHR confirmed many times that “the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent²³”.

Based on ECtHR case-law, one can distinguish three main hypotheses regarding the defiance in the will of an accused person who does not want to testify²⁴. Firstly, the obligation to testify may be imposed by law with threats of sanction and *in facto* improperly reverses the burden of proof²⁵. The second hypothesis regards the occurrence of physical²⁶ or psychological²⁷

N. Bhma, *European Court of Human Rights. 50 years. A Tribute To Fifty Years Of The European Court Of Human Rights*, Athens Bar Association, Athens 2010, p. 145; J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law...*, p. 32.

¹⁹ *Servès* judgment, para. 47.

²⁰ *Murray* judgment, paras 48 and 50.

²¹ J. McBride, *Human rights and criminal procedure. The case law of the European Court of Human Rights*, Strasbourg, p. 14.

²² T. Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence*, Larcier 2012, p. 159.

²³ See *Weh* judgment, para. 40, *Saunders* judgment, para. 69; *Heaney and McGuinness* judgment, para. 40.

²⁴ D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial...*, p. 62.

²⁵ Since it is for an accused to prove his innocence. See for instance, *Saunders*.

²⁶ *Jalloh* judgment, paras 103–123; judgment of the ECtHR of 15 June 2010 in case *Ashot Harutyunyan*, Application No. 34334/04, paras 58–66.

²⁷ Judgment of the ECtHR of 1 June 2010 in case *Gäfgen vs Germany*, Application No. 22978/05, paras 169–188.

coercion, while the third relates to coercion through trickery, *i.e.* using of covert investigation techniques²⁸.

The ECtHR confirmed that if the information gained may be regarded as having been obtained in defiance of the will of the applicant and if it is subsequently used during the proceedings, the applicant's right to silence and privilege against self-incrimination are impinged and thus Article 6 EConHR is violated²⁹. More specifically, in the judgment in *Weh vs Austria* the ECtHR distinguished two types of cases relating to a violation of the right to silence and the privilege against self-incrimination.

The first category encompasses cases regarding "the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or – in other words – in respect of an offence with which that person has been "charged" within the autonomous meaning of Article 6 § 1³⁰".

The second type consists of "cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution³¹".

Nevertheless, the the right to silence and the right not to incriminate oneself are not absolute³². For instance, pursuant to ECtHR case-law Article 6 § 2 does not prohibit, in principle, the use of presumptions in criminal law³³. Moreover, the right to silence and privilege against self-incrimination relate only to the faculty not to collaborate actively to coercive measures aimed at finding evidence of the committing of the offence³⁴. It should be further noted that those rights are limited to verbal statements and thus apply only to oral evidence (in contrast to real evidence)³⁵. Therefore, "it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but

²⁸ *Allan* judgment, paras 45–53.

²⁹ *Allan* judgment, para. 52.

³⁰ *Weh* judgment, para. 42, *Funke* judgment, p. 22, para. 44; *Heaney and McGuinness*, judgment, paras 55–59; *J.B.* judgment, paras 66–71.

³¹ *Weh* judgment, para. 43, *Saunders* judgment, p. 2064, para. 67, *I.J.L.* judgment, paras 82–83.

³² *John Murray* judgment, para. 47, *Heaney and McGuinness* judgment, para. 47, *Weh* judgment, para. 46.

³³ *Ibidem*, *Salabiaku* judgment, para. 28.

³⁴ T. Bombois, *La protection des droits fondamentaux...*, p. 161, F. Kutry, *Justice pénal et procès équitable*, Bruxelles, Larcier, 2006, p. 283.

³⁵ Hence, are inapplicable where evidence stems from the body of the accused as opposed to vocal expression from the same person. G.M. Pikiş, *Constitutionalism – Human Rights – Separation of Powers: The Cyprus Precedent*, Martinus Nijhoff Publishers, 2006, p. 56.

which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing³⁶.

Hence, it is doubtless that forcing a person to provide oral statements or to produce documents himself constitutes a violation of privilege against self-incrimination.³⁷

Furthermore, it has been acknowledged that the privilege against self-incrimination applies, in principle, to more than just statements directly demonstrating the guilt of the person concerned³⁸. In the *Saunders* case, in which evidence obtained by compulsion within an administrative investigation³⁹ was later used to gain a criminal conviction, it was acknowledged that even statements of an apparently non-incriminating nature may fall within the scope of the privilege against self-incrimination, if they can subsequently be used to contest the credibility of the person concerned⁴⁰. The ECtHR held that the use in separate proceedings of the transcript of the examination into the bankruptcy of the appellant infringed his right not to incriminate himself and consequently prejudiced Saunder's right to a fair trial⁴¹. As stressed by the ECtHR, "bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating". It also protects against the forced disclosure of factual statements, exculpatory remarks or other "testimony obtained under compulsion which appears on its face to be of a non-incriminating nature" but "may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility⁴²". Therefore, the right not to testify includes not only the the right to refuse to provide a complete testimony but also the right not to give answers to particular questions. It

³⁶ *Saunders* judgment, para. 69.

³⁷ T. Bombois, *La protection des droits fondamentaux...*, p. 162.

³⁸ A. Haas, *Principles of Article 5 and 6 of the European Convention on Human Rights*, available at: <http://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia-detention-bail-under-echr.authcheckdam.pdf>

³⁹ Under UK Companies Act that did not recognised any right not to incriminate oneself.

⁴⁰ *Saunders* judgment, para. 71.

⁴¹ A. Aust, *Handbook of International Law*, 2nd ed., Cambridge University Press, 2010, p. 223.

⁴² *Saunders* judgment, para. 71.

therefore gives the person concerned the choice of, first, whether to use this privilege, second, when, and, third, how extensively⁴³.

The ECtHR confirmed thus the general rule according to which statements obtained under compulsory powers cannot be adduced in evidence at any subsequent proceedings. This also concerns the later use of such statements made by the applicant prior to his being charged⁴⁴. Furthermore, such statements cannot have implications on the conduct of the judge in the course of the proceedings⁴⁵ or afterwards^{46, 47}.

Some important precisions were further provided in the judgement delivered in *Jalloh vs Germany*. The ECtHR held that in order to determine whether the right not to incriminate oneself has been violated, the following factors have to be considered: (1) the nature and degree of compulsion used to obtain the evidence, (2) the weight of public interest in the investigation and punishment of the offence at issue⁴⁸, (3) the existence of any relevant safeguards in the procedure as well as (4) the use to which any material so obtained is put⁴⁹.

With regard to the first criterion, the emphasis is put on the type of direct coercive measure used⁵⁰.

The second criterion deals mostly with the question of proportionality, *i.e.* whether the public interest in securing the applicant's conviction could justify recourse to such a grave interference with the person's fundamental

⁴³ I. Nesterova, A. Meikališa, *The Right To Information About The Right To Silence As Eu Procedural Guarantee In Criminal Proceedings And Its Impact On National Legal Systems*, available at https://www.law.muni.cz/sborniky/dny_prava_2012/files/pravoEU/Nesterova_Irena_MeikalisaArija.pdf

⁴⁴ *Saunders* judgment, para. 74.

⁴⁵ The court has to remain independent and impartial.

⁴⁶ In case of an acquittal or discontinuance of proceedings.

⁴⁷ J. McBride, *Human rights and criminal procedure...*, p. 14.

⁴⁸ As well as complexity of the suspected offence. See judgments of the ECtHR of 10 March 2009 in case *Bykov vs Russia*, Application No. 4378/02 and of 21 April 2009 in case *Martinen vs Finland*, Application No. 19235/03.

⁴⁹ *Jalloh* judgment, para. 117, *Bykov* judgment, para. 92. See also *O'Halloran and Francis* judgment, para. 55.

⁵⁰ In the case *Jalloh* it regards an inhuman and degrading treatment violating Article 3 ECHR since "(t)he applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body". (para. 118). See also *Murray* judgment, para. 49 and judgment of the ECtHR of 21 April 2011 in case *Nechiporuk and others vs Ukraine*, Application No. 42310/04, para. 26.

rights⁵¹. Nevertheless, in principle, the argument of the complexity of the offence and the vital public interest in its investigation and the punishment of the responsible person cannot justify “such a marked departure from one of the basic principles of a fair procedure⁵²”.

With reference to possible attempts to justify the use of compulsion, in the landmark *Saunders* case the ECtHR stated that “the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings⁵³”. Pursuant to the judgment in the *Heaney and McGuinness* cases, “(t)he security and public-order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention⁵⁴”.

In the *Funke* case the ECtHR held further “that the security and public order concerns relied on by the government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by Article 6 §1 of the Convention⁵⁵”. Nor can the special features of customs law justify such an infringement of the right 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.⁵⁶

Thirdly, it is indispensable that relevant and sufficient safeguards related to the protection of the right to defence such as the right to effective remedy⁵⁷,

⁵¹ *Jalloh* judgment, para. 119.

⁵² See *Martinen* judgment, para. 74 and *Saunders* judgment, para. 74.

⁵³ *Saunders* judgment, para. 74. See also *Bykov* judgment, para. 93.

⁵⁴ See dissenting opinions of judge Pavlovski to judgment in case *O’Halloran and Francis*, who referred to the judgment of the ECtHR in case *Heaney and McGuinness*, para. 58.

⁵⁵ *Heaney and McGuinness* judgment, para. 58.

⁵⁶ *Funke* judgment, para. 44. Criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. “Such a degree of compulsion in that case was found by the Court to be incompatible with Article 6 (art. 6) since, in effect, it destroyed the very essence of the privilege against self-incrimination”. *Murray* judgment, para. 49.

⁵⁷ See judgment of the ECtHR of 21 February 1984 in case *Öztürk vs Germany*, Application No. 8544/79, para. 56: “Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6)” See, *mutatis mutandis*, judgment of the ECtHR of 27 February 1980 in case *Deweert vs Belgium* judgment, Application No. 6903/75, Series A No. 35, p. 25, § 49, and judgment of the ECtHR of

are granted to the person concerned⁵⁸. Early access to a lawyer constitutes undoubtedly one of the procedural safeguards to which the ECtHR will have particular regard when examining whether the privilege against self-incrimination has been respected during the proceedings⁵⁹. Indeed, according to the case-law of the ECtHR the absence of unhindered contact with a lawyer creates an obstacle to the effective exercise of the right to defence. The fairness of the proceedings is thus in particular vitiated if the authority relies on self-incriminating statements made in the period when the applicant could not benefit from unsupervised legal advice⁶⁰. Therefore, if there are obstacles for a natural or legal person to benefit from legal advice and as a consequence self-incriminating statements are made in the absence of a lawyer, the ECtHR will be likely to find a violation of Article 6 EConHR⁶¹.

Finally, the importance for the conviction of the evidence obtained in this unlawful manner should be taken into consideration. If it constituted the only or key evidence, without which the conviction could not take place, this leads to a more serious breach of the applicant's right not to incriminate himself and to remain silent. If, on the contrary, it was not the sole basis for the applicant's conviction and, moreover, procedural rights were guaranteed to the person concerned, the ECtHR may not find the violation of Article 6 EConHR⁶².

It is also noteworthy that the ECtHR accepted the possibility to waive the privilege against self-incrimination by the person concerned provided that it is voluntary and doubtless⁶³. The latter means that the person

23 June 1981 in case *Le Compte, Van Leuven and De Meyere vs Belgium*, Application Nos. 6878/75 and 7238/75, Series A No. 43, p. 23, first sub-paragraph.

⁵⁸ *O'Halloran and Francis* judgment, para. 59.

⁵⁹ Judgment of the ECtHR of 27 November 2008 in case *Salduz vs Turkey* [GC], Application No. 36391/02, para. 54. See also M.A. Beernaert, *Salduz et le droit à l'assistance d'un avocat dès premiers interrogatoires de police*, Rev. dr. Pénal, 2009, pp. 971 et al.

⁶⁰ Judgment of the ECtHR of 13 January 2009 in case *Rybacki vs Poland*, Application No. 52479/99, para. 61; In which the ECtHR was of the view that there has been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the EConHR.

⁶¹ Judgment of the ECtHR of 8 April 2008 in case *Gradinar vs Moldova*, Application No. 7170/02, para. 111.

⁶² *O'Halloran and Francis* judgment, para. 60.

⁶³ See judgment of the ECtHR of 22 April 2008 in case *Portmann vs Suisse*, Application No. 38455/06, judgment of the ECtHR of 16 June 2009 in case *Shukla vs UK*, Application No. 2526/07. Nevertheless, such waiver occurs rarely. See T. Bombois, *La protection des droits fondamentaux...*, p. 165 and the literature referred to therein: C. Savonet, *Le droit au silence: un droit relatif?*, Revue Trimestrielle des droits de l'Homme 79/2009, p. 772 and M.-A. Beernaert, F. Krenc, *La Cour européenne des drits de l'homme à la recherche*

concerned has to be fully aware of the consequences of such a waiver⁶⁴. The ECtHR specified that this requirement is not fulfilled if the authority merely informed the person of his right to silence⁶⁵. The finding of a valid waiver of the privilege against self-incrimination cannot be accepted if, “being in a rather stressful situation and given the relatively quick sequence of the events”, the person concerned cannot reasonably appreciate without proper notice the consequences of his being questioned⁶⁶.

In the context of this study it is indispensable to focus more on the question of the privilege against self-incrimination in administrative proceedings. In the light of ECtHR case-law, the violation of the privilege against self-incrimination may not occur in the case of using compulsory powers in order to obtain information outside the context of criminal proceedings against the person concerned⁶⁷. In cases regarding possible minor offences relating to traffic rules, one may notice the approach of ECtHR jurisprudence according to which the requirement to answer simple factual questions⁶⁸ does not collide with the privilege against self-incrimination⁶⁹. Indeed, the majority of the Chamber of the ECtHR did not find an infringement in the context of possible criminal proceedings against

d'une conception pragmatique du procès équitable [in:] Les droits de l'homme et l'efficacité de la justice, Larcier, Brussels 2010, p. 242.

⁶⁴ See judgment of the ECtHR of 18 February 2010 in case *Aleksandr Zaichenko vs Russia*, Application No. 39660/02, para. 55: “The Court considers that being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis for his prosecution for a criminal offence of theft. Consequently, the Court is not satisfied that the applicant validly waived the privilege against self-incrimination before or during the drawing of the inspection record”.

⁶⁵ See judgment of the ECtHR of 24 September 2009 in case *Pishchalnikov vs Russia*, Applications No. 7025/04, para. 79.

⁶⁶ *Zaichenko* judgment, para. 55.

⁶⁷ *Weh* judgment, para. 44. See also T. Bombois, *La protection des droits fondamentaux...*, p. 160.

⁶⁸ Like “who had been the driver of the car?”.

⁶⁹ Judgment of the ECtHR of 10 January 2008 in case *Lückhof and Spanner vs Austria*, Application No. 58452/00 and 61920/00, para. 55, *O'Halloran and Francis* judgment, para. 58; *Weh* judgment, paras 53–54. In the *Lückhof* judgment the ECtHR noted that “it follows from the general principles of administrative criminal law (...) that the registered car keeper is not liable to punishment for failure to give information in cases in which such failure is not at least due to his negligence, for instance where he is not in a position to provide the information because the car had been used without his knowledge and consent”. (Para. 56)

the applicant for speeding since they remained remote and hypothetical⁷⁰. Furthermore, in the *O'Halloran* case⁷¹ the ECtHR emphasised that despite the absolute character of the right to a fair trial, its constituent elements “cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case⁷²”. The ECtHR noted more specifically that even though so far in all the cases in which “direct compulsion” had been applied in order to require an actual or potential suspect to provide information that subsequently contributed, or might have contributed, to his conviction, a violation of the applicant’s privilege against self-incrimination, had been found, “it does not, however, follow that any direct compulsion will automatically result in a violation”⁷³. For instance, pursuant to the ECtHR, without a sufficiently concrete link with any criminal proceedings the use of compulsory powers, including the imposition of a fine, in order to obtain possibly incriminating information does not raise an issue with regard to the right to remain silent and the privilege against self-incrimination of the person concerned⁷⁴. With reference to the *Jalloh* criteria, the ECtHR held that, in the case at stake, the information required constituted only one element of the offence⁷⁵ and there was no question that a conviction could arise in the underlying proceedings based solely on that information⁷⁶.

It has to be stressed however, that in the above cases majority decisions were always contested by dissenting opinions of judges arguing that there has been a violation of the applicant’s right to remain silent and his right not to incriminate himself guaranteed by Article 6 § 1 of the Convention⁷⁷.

⁷⁰ *Weh* judgment, para. 56.

⁷¹ Regarding also traffic rules.

⁷² *O'Halloran and Francis* judgment, para. 53. See also A. Andreangeli, *Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties' freedom to contract and to enjoy property*, *The Competition Law Review*, Vol. 6 Issue 2, July 2010, p. 234.

⁷³ See *O'Halloran and Francis* judgment para. 53: “The applicants contended that the right to remain silent and the right not to incriminate oneself are absolute rights and that to apply any form of direct compulsion to require an accused person to make incriminatory statements against his will of itself destroys the very essence of that right. The Court is unable to accept this.”

⁷⁴ *O'Halloran and Francis* judgment, para. 61.

⁷⁵ Namely an offence of speeding.

⁷⁶ *O'Halloran and Francis* judgment, para. 60.

⁷⁷ See joint dissenting opinion of judges Lorenzen, Levits and Hajiyev to the judgment in case *Weh* and two dissenting opinions of judge Pavlovski and of judge Myjer to the judgment in case *O'Halloran and Francis* who found that the essence of the applicants’ right to remain silent and their privilege against self-incrimination had been destroyed. The latter judges agreed that right to remain silent is not absolute but they contested

With reference to the requirement to make a declaration of assets to the tax authorities, pursuant to the ECtHR, even if a penalty is attached to a failure to comply, there are no pending or anticipated criminal proceedings against the person concerned. Thus, the sole fact that the person in question may not have confessed to the truth in order to prevent the tax authorities from uncovering conduct which might possibly lead to a prosecution is not sufficient to disclose any issue under Article 6 § 1 ECHR, in particular to bring the privilege against self-incrimination into play⁷⁸.

Nevertheless, if “direct compulsion” was applied to require a party to provide information which contributed, or might have contributed, to its conviction, the ECtHR would find a violation of the applicant’s privilege against self-incrimination⁷⁹.

In *JB vs Switzerland*, which also related to tax law and to the fines imposed on the applicant for his refusal to produce documents regarding his financial affairs⁸⁰, the ECtHR held that, first, the proceedings concerned a criminal charge and, second, the right not to incriminate had been infringed and thus a violation of Article 6(1) had taken place since the authorities, by imposing fines on the applicant, had tried to compel him to produce documents that would be used to incriminate him⁸¹. The ECtHR emphasised that “(t)he right not to incriminate oneself in particular presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the “person charged”⁸².” This case is of significant importance in the context of this study, since it follows therefrom that, with regard to the proceedings relating to a criminal charge *sensu largo*, the production of records of the person’s business affairs infringes the privilege against self-incrimination if their content may lead to the incrimination of the person concerned.

the assessment of the circumstance of the case in question. According to judge judge Pavlovski: “Of course the majority is right in stating that the right to remain silent is not absolute. There are indeed some jurisdictions which allow self-incriminating evidence to be obtained from the accused under compulsion. However – and I would like to emphasise this fact – this evidence cannot be used for the purposes of prosecuting that defendant”.

⁷⁸ Decision of the ECtHR of 10 September 2002 in case *Allen vs the United Kingdom*, Application No. 76574/01, ECHR 2002-VIII, *Weh* judgment, para. 45 and *Saunders* judgment, para. 67.

⁷⁹ A. Andreangeli, *Between Economic Freedom...*, p. 234

⁸⁰ JB was requested to produce all documents regarding the companies in which he had invested money.

⁸¹ *J.B.* judgment, paras 63–70.

⁸² *J.B.* judgment, para. 64; *Funke* judgment, para. 44; *Murray* judgment, para. 45; *Saunders* judgment paras 68–69; *Serves* judgment para. 46.

Finally, with direct reference to competition law, the ECtHR has recently confirmed that competition law is regarded as criminal in the light of the autonomous interpretation of the EConHR and the protections afforded by Article 6 EConHR should be applied to the repressive⁸³ competition law proceedings⁸⁴. Nevertheless, earlier, in the *Jussila* case, the ECtHR noted that “there are clearly criminal charges of different weight” and made a distinction between the “traditional categories of criminal law” and the (quasi-)criminal charges. Pursuant to the ECtHR, competition law falls outside “the hard core of criminal law” and therefore the “criminal-head guarantees will not necessarily apply with their full stringency” to the protection of the right to defence within the Commission’s proceedings regarding the enforcement of competition law⁸⁵.

Undoubtedly, the full and broad standard of privilege against self-incrimination as set by the ECtHR with regard to the civil part of Article 6 should be applied in its entirety to competition law. Nevertheless, one may expect that the right to remain silent regarded as an important component of Article 6 should also cover the enforcement proceedings relating to competition law, in particular to Commission investigations.

3. Approach on the privilege against self-incrimination adopted by the CJEU

At EU level the privilege against-self incrimination constitutes a judicial creation, established and developed by the CJEU⁸⁶. Nevertheless, it should be noted that in the course of consultations the European Parliament

⁸³ T. Bombois introduced the term “repressive competition law” that relates to proceedings aiming at detecting the violations of Articles 101 and 102 TFEU and imposing fines for those competition law infringement. See T. Bombois, *La protection des droits fondamentaux...*

⁸⁴ *Menarini* judgment.

⁸⁵ W.P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, (2010) 33(1) *World Competition*, pp. 5–29; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, *Yearbook of Antitrust AND Regulatory Studies*, Vol. 2012, 5(6), p. 199; F. Castillo de la Torre, *Evidence, Proof and Judicial Review in Cartel Cases*, (2009) 32(4) *World Competition*, pp. 567–578. On the contrary, see A. Riley, *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, CEPS Special Report/January 2010, pp. 11–16.

⁸⁶ B. Vesterdorf, *Legal Professional Privilege and The Privilege Against Self-incrimination in EC Law: Recent Developments and Current Issues*, *Fordham International Law Journal*, Vol. 28, Issue 4 2004, p. 1180.

regarding the adoption of Regulation 17/62, the Deringer Report proposed introducing into this act a right against self-incrimination and a right protecting lawyer-client confidentiality⁸⁷. However, this proposal was nevertheless rejected and the final version of the Regulation did not contain any such rights.

It has been argued that the stage for explicit acknowledgment of the privilege against self-incrimination in competition investigations had already been set in the judgment in the case against National Panasonic⁸⁸. However, the eventual EU approach in relation to privilege against self-incrimination derives actually from the judgement delivered in 1989 in the *Orkem* case⁸⁹ which related to the Commission's request for information. The undertaking sought for annulment of the Commission's decision, adopted under Article 11 of Regulation 17/62, being an equivalent to the current Article 18(3) of Regulation 1/2003, on the grounds that the production of requested documents would infringe its privilege against self-incrimination protected by Article 6 EConHR. The CJEU nevertheless denied that protection of this privilege applies under Article 6 and held that the right to remain silent may be raised only by individuals accused of a criminal offence⁹⁰. It was stated that the comparative analysis of Member State national laws did not result in finding the existence of such a right of "legal persons in relation to infringements in the economic sphere, in particular infringements of competition law⁹¹". Furthermore, in the CJEU's view it followed that neither from the wording of Article 6 EConHR nor from the case-law of the ECtHR at that time that this Article protects the right not to incriminate oneself. It is, nevertheless, noteworthy that the CJEU handled this case

⁸⁷ See *Rapport fait au nom de la Commission du marche interieur ayant pour objet la consultation demande de l'Assemblee parlementaire europeenne par le Conseil de la Communaute economique europeenne sur un premier reglement d'application des articles 85 et 86 du traitM de la C.E.E.* (Doc. 104/1960-1961), p. 30. For more on the *Deringer Report*, in particular its history and its aftermath see Opinion of Advocate General Darmon of 18 May 1989 in case Case 374/87 *Orkem vs Commission*, E.C.R. 1989, 3283, 3301, paras 90–91. B. Vesterdorf, *Legal Professional Privilege...*, p. 1181.

⁸⁸ Judgment of the ECJ of 26 June 1980 in case 136/79 *National Panasonic*, E.C.R. 1980, 2033, [1980] 3 C.M.L.R. 169, para. 186. B. Vesterdorf, *Legal Professional Privilege...*, p. 1183.

⁸⁹ Judgment of the ECJ of 18 October 1989 in case 374/87 *Orkem*, E.C.R. 1989, 3283.

⁹⁰ The ECJ held that that this right derived from Article 14(3) (g) of the ICCPR. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-032, p. 122 and B. Vesterdorf, *Legal Professional Privilege...*, p. 1191.

⁹¹ *Orkem* judgment, para. 29.

4 years before the delivery of the ECtHR judgment in the *Funke* case⁹² in which the ECtHR presented exactly the opposite view.

The CJEU admitted, however, that certain limitations apply to the Commission's powers of investigations in order to safeguard the undertakings' right to defence being a fundamental principle of the legal order of the European Community⁹³. By referring to the *Hoechst* case, the CJEU recalled that the undertaking's right to defence "must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired 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 liable⁹⁴". The CJEU stressed that the Commission cannot thus compel the undertaking under investigation "to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove⁹⁵". The burden of proof cannot, therefore, be shifted onto the undertaking concerned. Consequently the CJEU found that questions on the implementation of measures regarding the maintenance of price levels satisfactory to all participants of the meetings or on quotas, targets or shares allocated to the producers, were such as to compel the undertaking to acknowledge its participation in the suspected cartel aiming at fixing selling prices⁹⁶.

Nevertheless, although the Commission may not undermine the right to defence of the undertaking concerned, it "is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and if necessary such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or against another undertaking, the existence of anticompetitive conduct⁹⁷". Therefore, questions aimed merely at securing factual information on for instance the circumstance in which meetings had been held were, in the view of the CJEU, not open to criticism⁹⁸.

⁹² And afterwards *Saunders* judgment etc.

⁹³ See judgment of the ECJ of 9 November 1983 in case 322/82 *Michelin vs Commission*, E.C.R. 1983, 3461, para. 7.

⁹⁴ Judgment of the ECJ of 21 September 1989 in joined cases 46/87 and 227/89 *Hoechst*, para. 15; *Orkem* judgment, para. 33.

⁹⁵ *Orkem* judgment, para. 35.

⁹⁶ *Orkem* judgment, paras 38 and 39.

⁹⁷ *Orkem* judgment, para. 34.

⁹⁸ *Orkem* judgment, para. 37.

Hence, the CJEU set the scope of the privilege against self-incrimination as encompassing only a “restricted” right not to incriminate oneself and not covering the right to remain silent⁹⁹.

This approach, which is open to criticism, has been subsequently upheld and developed by the General Court¹⁰⁰ and the Court of Justice¹⁰¹.

For instance, three years later in *Otto vs Postbank* the CJEU provided for further delimitation, holding that undertakings cannot claim the privilege against self-incrimination in the framework of national civil procedures in which Articles 101 and 102 TFEU are applied given that civil proceedings cannot lead¹⁰² to the imposition of a fine by a public authority¹⁰³.

In the *Mannesmannröhren-Werke* case, which followed a series of important judgments of the ECtHR with regard to the privilege against self-incrimination¹⁰⁴, the General Court confirmed that “(t)he mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process¹⁰⁵”.

⁹⁹ B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 197. See also W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, (2003) 26(4) *World Competition*, pp. 574–578; B. Turno, *Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości*, (2009) 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny*, pp. 31–48; M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warsaw 2011, pp. 187–191.

¹⁰⁰ Judgment of the General Court of 8 March 1995 in case T-34/93 *Société Générale vs Commission*, ECR [1993] II-545, para. 74; judgment of the ECJ of 15 October 2002 in Joined Cases C-238/99 P *Limburgse Vinyl Maatschappij NV (LVM) vs Commission*, E.C.R. 2002, I-8375, para. 448; judgment of the CFI of 20 February 2001 in case T-112/98 *Mannesmannröhren-Werke vs Commission*, E.C.R.: II-729, paras 65–67, 77–78; judgment of the General Court of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, ECR [2004] II-1181, para. 403.

¹⁰¹ Judgment of the ECJ of 18 October 1989 in case 27/88 *Solvay&Cie*, E.C.R. 1989, 3355, paras 23–37; judgment of the ECJ of 110 November 1993 in case C-60/92 *Otto BV vs Postbank NV*, E.C.R. 1993, I-05683, paras 11–12; judgment of the Court of Justice of 26 June 2006 in case C-301/04P *SGL Carbon*, E.C.R. 2006, I-5915, paras 42–49.

¹⁰² Either directly or indirectly.

¹⁰³ See *Otto vs Postbank*, judgment, para. 17.

¹⁰⁴ Judgments in cases *Funke*, *Saunders* and *Murray*.

¹⁰⁵ *Mannesmannröhren-Werke* judgment, para. 78. This case took place after the ECtHR judgment in *Saunders*. Apparently the CJEU did not decide to change in principle its approach based on the ECtHR ruling, however by stressing that undertakings may be required to produce the “documents already in existence” it made a reference to materials that have “an existence independent of will of the suspect”.

The General court rejected the applicants arguments based on the ECtHR case-law¹⁰⁶ that “an investigation procedure conducted by the Commission with a view to imposing a penalty for an infringement of competition law also constitutes a criminal charge within the meaning of Article 6 of the Convention” and thus “any measure that intends to compel a person¹⁰⁷ being the subject of an investigation procedure to self-incriminate by undertaking any positive action infringes Article 6(1) EConHR, irrespective of the regulations of national law invoked by the administrative authority that conducts the investigation¹⁰⁸. The General Court stressed that since the EConHR is not a part of EU law, it had no jurisdiction to apply this act when it reviews an investigation under competition law¹⁰⁹.

It was recalled that Regulation 17/62 (being in force at that time) did not contain any right of undertakings, in particular the right to silence, to avoid the application of the investigation measure on the grounds that it might result in providing evidence of an infringement of competition rules committed by the undertaking in question. Thus, the undertakings investigated are obliged to actively cooperate, which means that they must be prepared to provide the Commission with any information relating to the subject-matter of the investigation¹¹⁰. And “in order to ensure the effectiveness of the enforcement of competition law, the Commission is entitled to compel an undertaking to provide all necessary factual information and to produce documents relating thereto, even if they may be used subsequently by the Commission to establish the existence of any anti-competitive conduct of the undertaking concerned”¹¹¹.

The General Court recalled moreover that the addressee of such questions or requests always has the possibility to exercise his right to defence, either later during the administrative procedure or in proceedings before the CJEU, by showing that the facts set out in his statements or the documents produced by him should be regarded differently since they have a different meaning from that ascribed to them by the Commission¹¹².

The CJEU provided some further explanations in the *Limburgse Vinyl Maatschappij* judgment (PVC II). The Court of Justice stated that in

¹⁰⁶ *Öztürk* judgment, para. 56 and *Funke* judgment.

¹⁰⁷ Be it natural or legal.

¹⁰⁸ *Mannesmannröhren-Werke* judgment, paras 35 and 37.

¹⁰⁹ *Mannesmannröhren-Werke* judgment, paras 59 and 75.

¹¹⁰ *Mannesmannröhren-Werke* judgment, paras 62, 63. *Orkem* judgment, para. 27, and *Société Générale* judgment, para. 72.

¹¹¹ *Mannesmannröhren-Werke* judgment, para. 65.

¹¹² *Mannesmannröhren-Werke* judgment, para. 79.

order to set the scope of the protection of the right not to incriminate oneself, it should be determined whether an answer from the undertaking to which the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence¹¹³. The Court of Justice held moreover that “the Community judicature must take into account when interpreting the fundamental rights¹¹⁴” the case-law of the ECtHR subsequent to the *Orkem* judgment. This could be regarded as “the first sign of change¹¹⁵” occurring in the position of the CJEU since the Court of Justice “very explicitly emphasised the relevance of the case-law of the ECtHR for the purpose of interpreting fundamental rights¹¹⁶”. Nevertheless, in spite of acknowledging the significant developments in the jurisprudence of the ECtHR that had adopted a stance much more far-reaching than the one following from the *Orkem* judgment, the Court of Justice held that “both the *Orkem* judgment and the recent case-law of the [ECtHR] require, first, the exercise of coercion against the suspect in order to obtain information from him, and, second, establishment of the existence of an actual interference with the right which they define¹¹⁷”. Concentrating solely on those two conditions and neglecting the other aspects deriving from the approach of the ECtHR¹¹⁸, the Court of Justice still actually ruled in accordance with the strict *Orkem* rule and hence afforded lesser protection to the right not to incriminate oneself than that resulting from Strasbourg’s approach¹¹⁹.

It should be noted that the question of the privilege against self-incrimination arose subsequently in the specific context in the *Tokai Carbon* case. It namely related to the question of the reduction of the fine from which one of the undertakings, namely SGL Carbon AG (“SGL”), should have benefited due to the fact that it had cooperated with the Commission.

¹¹³ *LVM* judgment, para. 273.

¹¹⁴ *LVM* judgment, para. 272.

¹¹⁵ B. Vesterdorf, *Legal Professional Privilege...*, p. 1195.

¹¹⁶ *Ibidem*, p. 1197.

¹¹⁷ *LVM* judgment, para. 275.

¹¹⁸ For instance the findings in the judgment in *Saunders*, para. 69 that the right not to incriminate oneself “cannot reasonably be confined to statements of admission of wrongdoing or to remarks that are directly incriminating” and thus “[t]estimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or *mere information on questions of fact* – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.

¹¹⁹ See *LMV* judgment, para. 263; B. Vesterdorf, *Legal Professional Privilege...*, p. 1196.

More specifically, in response to the Commission request for information, the undertaking provided some information of a self-incriminating nature. SGL emphasised that since truthful answers to some of the Commission's questions led to self-incrimination, the undertaking could have invoked its right not to incriminate itself and thus it was not required to reply to those questions. Instead, however, the undertaking waived its privilege against self-incrimination in order to cooperate with the Commission and therefore the fine imposed on it should have been reduced¹²⁰. Nevertheless, according to the Commission SGL was in any case obliged to answer all the questions. Therefore, the undertaking claimed the Commission undervalued its voluntary cooperation.

The General Court firstly based its findings on the Orkem rule since it stated that “the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process, which offer, in within the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention¹²¹”. It noted however that in addition to “the purely factual questions and the requests to produce documents already in existence”, that, in the General Court's view, cannot interfere with the privilege against self-incrimination, the Commission also requested SGL describe “the object of and what occurred at a number of meetings in which SGL participated and also the results/conclusions of those meetings, when it was clear that the Commission suspected that the object of the meetings was to restrict competition¹²²” as well as to provide “protocols of those meetings, the working documents and the preparatory documents concerning them, the handwritten notes relating to them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects¹²³”.

The General Court held that a request of this nature actually directly required an admission from SGL of its participation in the suspected infringement of EU competition rules¹²⁴.

Therefore, the General Court agreed with the applicant that since SGL was not required to answer the above-mentioned questions, the fact that the undertaking none the less did so, is to be regarded as voluntary

¹²⁰ *Tokai Carbon* judgment, para. 382.

¹²¹ *Ibidem*, para. 406.

¹²² *Ibidem*, para. 407.

¹²³ *Ibidem*, para. 408.

¹²⁴ *Ibidem*, para. 407.

collaboration that justifies a reduction in the fine in accordance with the Leniency Notice¹²⁵. And, hence, the Commission failed to appreciate the importance of SGL's cooperation in that context¹²⁶.

Commentating on this ruling some authors pointed at the fact that the General Court followed the strict approach according to which, first, the Commission "is entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct.¹²⁷", and, secondly, "[the] right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove¹²⁸"¹²⁹.

It has to be emphasised, however, that at the same time the General Court provided for very important precisions which may actually be seen as an extension of the scope of the privilege against self-incrimination. Besides having stated that if the Commission suspects that the undertakings' meetings related to the restriction of competition, the inspectors cannot ask for a description of neither the object and course nor the results or the conclusion of those meetings¹³⁰, the General Court also held that the right not to incriminate oneself covers certain documents, which already existed, related to those meetings (including preparatory documents, handwritten notes, working documents, protocols, conclusions, planning and discussion documents as well as the implemented projects)¹³¹. In any case the undertaking concerned is not required to answer questions or produce documents of that type since they actually require the undertaking to admit its participation in an infringement of competition law¹³².

Nevertheless, the Commission lodged an appeal and asked the Court of Justice to set aside the judgment of the General Court in so far as it reduced to the sum of the fines imposed on SGL¹³³.

¹²⁵ *Ibidem*, para. 409.

¹²⁶ *Ibidem*, para. 411.

¹²⁷ *Ibidem*, para. 403 (citing *Mannesmannrdhren-Werke* judgment, para. 65).

¹²⁸ *Ibidem*, para. 403 (citing *Mannesmannrdhren-Werke* judgment, paras 66–67).

¹²⁹ B. Vesterdorf, *Legal Professional Privilege...*, p. 1199.

¹³⁰ What was further confirmed in the judgment of the General Court of 28 April 2010 in case T-446/05 *Amann & Söhne and Cousin Filterie*, E.C.R. 2010, I-1255, para. 329.

¹³¹ *Tokai Carbon* judgment, para. 408.

¹³² *Tokai Carbon* judgment, para. 329.

¹³³ *SGL* judgment.

The Court of Justice took a step backward by holding that the findings of the General Court that SGL was not required to answer the questions relating to the meetings nor provide certain documents regarding those meetings, were vitiated by errors of law¹³⁴. The Court of Justice made reference to the strict Orkem formula and recalled that an undertaking which is being investigated under Regulation 17 is not granted any right to evade the investigation. On the contrary, the undertaking investigated is obliged to cooperate actively, which “implies that it must make available to the Commission all information relating to the subject-matter of the investigation¹³⁵”. The Court of Justice stressed that in the light of the case-law the Commission’s powers of investigation have not been limited as regards the production of documents in the possession of an undertaking under investigation. Therefore, such an undertaking is obliged, if the Commission requests it, to produce documents that concern the subject-matter of the investigation, even if those documents may be subsequently used by the Commission in order to establish the existence of a competition law infringement¹³⁶.

The Court of Justice found moreover that the reasoning of the General Court misconstrued the scope of Article 11 of Regulation 17/62 and weakened the principle regarding the obligation of undertakings who are subject to a Commission investigation to cooperate¹³⁷. Having stated this, the Court of Justice held that the General Court made an error of law in holding that the conditions for a reduction in the fine under the Leniency Notice were fulfilled.

The ruling should be criticised for blocking a possibly important development in the EU scope of the privilege against self-incrimination and approving the unfortunately common practice of the Commission to ask, *e.g.*, for details regarding meeting with the undertaking under investigation with its competitors¹³⁸.

As a result of the CJEU case-law presented above, the Commission is not entitled to ask leading questions, *i.e.* those that, if answered truthfully, would lead the undertaking to the confession of the infringement¹³⁹. The Commission is nevertheless entitled to ask factual questions and ask for pre-existing documents, even if they may be used subsequently by the

¹³⁴ *Ibidem*, para. 38.

¹³⁵ *Ibidem*, para. 40.

¹³⁶ *Ibidem*, para. 44.

¹³⁷ *Ibidem*, para. 47.

¹³⁸ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-032, p. 123.

¹³⁹ *Ibidem*, No. 3-032, p. 122.

Commission to establish the existence of an infringement of competition law. In practice, however, it may not be easy to determine whether the question asked by the inspectors falls under the Orkem rule¹⁴⁰ and, as a consequence, the undertaking's right not to incriminate oneself may be successfully invoked.

According to the Commission, the CJEU granting a broader scope to the privilege against self-incrimination would significantly jeopardise the Commission's powers of investigation and result in inefficiency of EU antitrust enforcement¹⁴¹. Nevertheless, as noted by Ch. Kerse and N. Khan, "(a)n undertaking cannot be compelled to reply to questions, whether in writing or orally, which would require it to assess its position as regards the application of the competition rules in any response¹⁴²".

4. Waiver of the privilege against self-incrimination and the leniency program

The issue regarding the possibility to waive the privilege against self-incrimination illustrates some particular intricacies within the EU.

First, one should point at the inconsistencies between the General Court and the Court of Justice concerning the scope of the privilege. This dichotomy has serious practical consequences since in any case in which accordingly the General Court would acknowledge that an undertaking has waived its privilege since the information or documents in question were subject to the right not to incriminate oneself and thus the undertaking should benefit from a reduction in its fine given its voluntary cooperation¹⁴³, the Court of Justice would deny that the information and documents concerned were covered by the scope of the privilege, hold thus that no waiver had taken place since the undertaking was obliged to cooperate and as a consequence no mitigating circumstances justifying a reduction of the fine occurred¹⁴⁴.

¹⁴⁰ *Ibidem*.

¹⁴¹ *LVM* judgment, para. 274; *Mannesmannröhren-Werke* judgment, para. 78; *Tokai Carbon* judgment, para. 406. See also B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 198; O.J. Einarsson, *EC Competition Law and the Right to a Fair Trial* [in:] P. Eeckhout, T. Tridimas (eds), *Yearbook of European Law*, OUP 2006, pp. 558–559; J. Callewaert, *The European Convention on Human Rights and European Union: a long way to harmony*, (2009) 6 *European Human Rights Law Review*, p. 775.

¹⁴² See Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, No. 3-032, p. 123.

¹⁴³ *Tokai Carbon* judgment.

¹⁴⁴ *SGL* judgment.

Second, it is noteworthy that if an undertaking voluntarily replied to a question resulting in its self-incrimination, it cannot afterwards claim its right not to incriminate¹⁴⁵. Such a voluntary answer would be regarded as waiver of the privilege. Nevertheless, the CJEU has not specified what should be understood as “voluntary”. If during the questioning of representatives or members of staff of the undertakings in the course of an inspection, the person concerned is threatened by the real risk of imposing a fine on the undertaking inspected for non-cooperation or for providing incomplete information and thus, is stressed and he or she gives answers incriminatory for the undertaking, should this be considered as a voluntary waiver of the privilege against self-incrimination? This situation definitely would not fulfill the conditions of valid waiver set out by the ECtHR according to which such a waiver has to be voluntary and doubtless¹⁴⁶. Being merely informed about the right not to incriminate oneself does not result in the person concerned being fully aware of the consequences of waiving the privilege¹⁴⁷. “Being in a rather stressful situation and given the relatively quick sequence of the events, it [would be] unlikely that the person concerned may reasonably appreciate (...) the consequences of being questioned¹⁴⁸” and thus in such circumstances it cannot be found that the person concerned validly waived the privilege against self-incrimination.

Another important consequence is the fact that if an undertaking none the less supplies information that it was not obliged to, since it was subject to privilege, this “must be regarded as spontaneous cooperation on the undertaking’s part capable of justifying a reduction in the amount of the fine, in application of the Leniency Notice¹⁴⁹”.

This last point leads us to the question of the Leniency programme in the context of the privilege against self-incrimination. Even though this issue goes beyond the main focus of this study, it has to be stressed that the some serious doubts in relation to the respect of the privilege against self-incrimination are raised namely by the European leniency programme. It has been argued that “(f)rom the point of view of criminal law, also the

¹⁴⁵ Judgment of the Court of Justice of 25 January 2007 in case C-393/14 *Dalmine vs Commission*, paragraph 46; *Amann & Söhne and Cousin Filterie* judgment, paras 329 and 332.

¹⁴⁶ See the ECtHR of 22 April 2008 in case *Portmann vs Suisse*, Application No. 38455/06, of 16 June 2009 in case *Shukla vs UK*.

¹⁴⁷ *Pishchalnikov* judgment, para. 79; *Zaichenko* judgment, para. 55.

¹⁴⁸ *Zaichenko* judgment, para. 55.

¹⁴⁹ *Tokai Carbon* judgment, para. 409, judgment of the CFI of 6 December 2005 in case T-48/02 *Brouwerij Haacht vs Commission*, E.C.R. 2005, II-5259, para. 107.

Commission's leniency notice may raise difficult questions in the light of the privilege against self-incrimination¹⁵⁰".

The leniency regime was introduced as a powerful tool to fight against the most serious infringements in competition law, *i.e.* cartels. By offering an opportunity of granting immunity or a reduced fine for an undertaking who admits to their participation in any infringement in competition law and provides relevant evidence, the leniency programme aims at detecting more anti-competitive agreements, on the one hand, and encourages the undertakings to incriminate themselves, on the other hand.

This strong coercive effect of the leniency notice on undertakings cannot be denied. Furthermore, given the high level of fines and procedural financial sanctions that has been regularly increasing, undertakings would actually do anything in order to avoid the imposition of such a penalty. In particular, after the Commission's dawn raid or the initiation of proceedings by the Commission most undertakings fear imposition of a procedural penalty and come to the conclusion that they cannot afford to take the risk of not cooperating with this authority even if such a lack of cooperation would result from the protection of its right to defence. Furthermore, in order to avoid being fined for their anti-competitive behaviour, they feel obliged to enter into a race for immunity or a maximum possible reduction of a fine. This results in the undertaking being *de facto* forced by the current leniency programme to incriminate themselves by confessing to the infringement¹⁵¹.

In this context it is important that an undertaking which has decided to waive its privilege against self-incrimination and provide the Commission with self-incriminating statements may be certain that this action will be regarded as voluntary collaboration on the part of the undertaking which justifies a reduction in the fine under the Leniency Notice. The Commission cannot deny the occurrence of those mitigating circumstances by arguing that that the information in question was not provided voluntarily but in reply to a request for information or to the inspectors' questions¹⁵². As noted

¹⁵⁰ *Enforcement By The Commission The Decisional And Enforcement Structure In Antitrust Cases And The Commission's Fining System*, report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003" which took place on 11 and 12 June 2009 in Brussels, p. 20.

¹⁵¹ M. Karl, M. Mayer, *Competition Cases in the European Union*, Alvarez & Marsal Deutschland GmbH, December 2009, p. 9; J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law...*, p. 35; *Enforcement By The Commission...*, p. 21.

¹⁵² *Tokai Carbon* judgment, para. 410.

by the General Court “the Leniency Notice does not require a voluntary act taken solely on the initiative of the undertaking concerned, but merely requires information which contributes to establishing the existence of the infringement¹⁵³”.

5. Importance of the privilege against self-incrimination during the Commission’s inspections

Passing now to the application of the privilege against self-incrimination in the context of Regulation 1/2003, one should firstly identify the situation when this privilege may be applied. In this context it is important to stress that the EU concept of the right not to incriminate oneself requires the existence of compulsion¹⁵⁴.

Therefore, in the case of statements taken pursuant to Article 19 of Regulation 1/2003, that implies the consent of the person concerned¹⁵⁵, and to simple requests for information made under Article 18(2) of Regulation 1/2003, where the undertaking is not obliged to answer and no fine is provided, the condition defined in *PVC II* is absent.

On the contrary, as for requests for information made by a decision pursuant to Articles 17 or 18(3) of Regulation 1/2003 or to an undertaking’s representatives and members of staff being questioned on the spot during a Commission inspection to Article 20(2)e of Regulation 1/2003, coercion results from the possibility of the imposition of fines under Article 23(1)d and thus a question regarding self-incrimination may arise.

In the context of the inspections, even if explanations are given on site by a natural person¹⁵⁶, *i.e.* representatives and members of staff of the

¹⁵³ *Tokai Carbon* judgment, para. 409 and 410. See the Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, p. 17, point D, paragraph 2, first indent.

¹⁵⁴ *LVM* judgment, para. 275.

¹⁵⁵ Their protection is enhanced by Article 3(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18, which provides that: “[w]here the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No. 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview”.

¹⁵⁶ “representative [s] and member[s] of staff”

undertaking inspected, that could not be personally fined¹⁵⁷, since he or she speaks on behalf of the undertaking on which the pecuniary penalty may be imposed¹⁵⁸, it should doubtless be that those circumstances should fall within the scope of the application of the privilege against self-incrimination.

As indicated above an undertaking inspected may be fined for giving “an incorrect or misleading answer” in response to a question asked under Article 20(2)e. Thus, it has to be further determined when the undertaking inspected may be regarded as having given an “incorrect or misleading answer”¹⁵⁹ through the explanations given by its representative or its member of staff¹⁶⁰.

By transposing the general principle of EU competition law imputing the acts of an employee authorised to act on behalf of the undertaking to the latter in relation to a violation of Articles 101 and/or 102 TFEU¹⁶¹, the misconduct stipulated in Article 23(1)d first indent¹⁶² may be imputable to the undertaking inspected if it has been committed by a person authorised to speak on its behalf. This interpretation is implicitly reflected in Article 4(3) of the Procedural Regulation, that provides the possibility for the undertaking investigated to rectify, amend or supplement the explanations given by a person “who is not or was not authorised (...) to provide explanations on behalf of the undertaking¹⁶³”. It is noteworthy that the

¹⁵⁷ See the *Council Regulation 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*, art. 23(1), O.J. L 1/1, at 16 (2003).

¹⁵⁸ As Bo Vesterdorf, rightly noted 2the wording of Article 23(1) (d), first indent, clearly shows that an undertaking may act or “speak” (and be fined) in this context”. See B. Vesterdorf, *Legal Professional Privilege...*, p. 1212.

¹⁵⁹ Art. 23(1)(d) of Regulation 1/2003.

¹⁶⁰ B. Vesterdorf, *Legal Professional Privilege...*, p. 1212.

¹⁶¹ See judgment of the ECJ of 7 June 1983 in joined cases 100-103/80 *Musique Diffusion Française & Others vs Commission*, E.C.R. 1983, 1825, para. 97: “it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices”. See also the judgment of the CFI of 20 March 2002 in case T-9/99 *HFB & Others vs Commission*, E.C.R. 2002, 11-1487, para. 275.

¹⁶² Art. 23(1)(d) of Regulation 1/2003.

¹⁶³ Commission Regulation on conduct of proceedings, Article 4(3) reads in relevant part: In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff.

wording of this provision suggests that members of staff may be namely authorised to give explanations on behalf of the undertaking¹⁶⁴.

Since statements made by this type of person may be relied upon for the purpose of finding an infringement of Articles 101 and/or 102 TFEU, it seems that the privilege against self-incrimination may be applicable and as a consequence, representatives or staff members of the undertaking inspected questioned under Article 20(2)e are entitled to refrain from making statements incriminating the undertaking¹⁶⁵.

On the other hand, if a person being questioned is not authorised to speak on behalf of the undertaking, it would seem that the right not to incriminate oneself could not be invoked by the undertaking inspected. However, it should be noted that according to Article 4 of the Procedural Regulation the undertaking may rectify, amend or supplement its explanations, if they were provided by a staff member who is not authorised to give statements on behalf of the undertaking¹⁶⁶. It would seem that if such a person gives incriminating answers in response to the inspectors' questions, the undertaking is entitled to subsequently "censure" them and invoke its privilege against self-incrimination. Nevertheless, Recital 4 to the Procedural Regulation states that "(t)he explanations given by a member of staff should remain in the Commission file as recorded during the inspection". This questionable stance seems to state that there is a serious risk that the initial answer may be subsequently used by the Commission as evidence or intelligence in finding an infringement in competition law.

The same risk occurs if a person who is not authorised to give an explanation on the behalf of the undertaking states that he or she waives the undertaking's privilege against self-incrimination. Obviously, this person cannot waive the privilege of the undertaking; such a "fake" waiver is void and cannot be regarded by the Commission as expressing the will of

¹⁶⁴ This wording seems also to mean that the undertaking's "representatives" are normally authorised to speak on behalf of the undertaking. B. Vesterdorf, *Legal Professional Privilege...*, p. 1212–1213.

¹⁶⁵ B. Vesterdorf, *Legal Professional Privilege...*, p. 1214.

Prima facie the same principles seem to apply, *mutatis mutandis*, to the behaviour incriminated by Article 23(1)(d), second and third indents (*i.e.*, when in response to a question asked in accordance with Article 20(2) (e), the undertaking or association of undertakings fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or fails or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4)).

¹⁶⁶ This provision clearly provides for an obligation of the Commission to set a time limit for rectification.

the undertaking inspected. However, as indicated above any incriminating statements will none the less remain in the Commission file.

Of course, one may note that according to the settled case-law of the CJEU information protected by the privilege against self-incrimination cannot be used afterwards by the Commission, hence undertakings should not fear such scenario.

Nevertheless, first, if the original explanations are not be regarded as given by the undertaking, they cannot be considered as leading to self-incrimination and thus cannot be protected by the privilege and, as a consequence, the Commission will not be prevented from using them.

Second, one should bear in mind the controversies over the restricted scope of the privilege as recognised by the CJEU as well as the lack of coherence between the General Court and the Court of Justice. Therefore, information that would normally be protected according to the ECtHR, can be regarded within the EU as not being of such a nature as to be covered by the right not to incriminate oneself and consequently may be used by the Commission¹⁶⁷.

Having stated this, it should be remembered that according to the settled case-law of the CJEU, the principle of the *Orkem* rule; “the Commission may not compel an undertaking [only]¹⁶⁸ to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove¹⁶⁹”.

From the jurisprudence of the CJEU¹⁷⁰ it follows that the EU standard of the privilege against self-incrimination covers only responses to the questions that directly and clearly seek an admission of any infringement regarding to Article 101 and 102 TFEU¹⁷¹. Thus, the undertaking investigated is still obliged to answer “questions of a purely factual nature¹⁷²”. This approach was unfortunately transposed to Regulation No 1/2003, namely Recital 23 of its Preamble, which states that “undertakings cannot be forced to admit that they have committed an infringement, but they are in any event

¹⁶⁷ Or information that would be protected pursuant to the General Court, according to the Court of Justice will not be covered by the right not to incriminate oneself and in consequence may be used by the Commission.

¹⁶⁸ Added by the author.

¹⁶⁹ *Orkem* judgment, para. 35.

¹⁷⁰ See *Orkem* judgment as well as judgments in cases *Mannesmannröhren-Werke* and *LVM* that did not extend the CJEU approach beyond the *Orkem* rule.

¹⁷¹ *Orkem* judgment, para. 35; “(T)he Commission may not compel an undertaking [only] to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.”

¹⁷² *Mannesmannröhren-Werke* judgment, para. 77.

obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement”.

Comparing this stance with the ECtHR position, one can easily notice that the latter category would be protected by the right not to incriminate oneself in the light of the *Saunders* judgment, in which it was held that that privilege against self-incrimination applies not only to statements of admission of wrongdoing or to remarks which are directly incriminating, but also to the forced disclosure of factual statements, exculpatory remarks or other “testimony obtained under compulsion which appears on its face to be of a non-incriminating nature” but may later be deployed in further proceedings in order to, *e.g.*, undermine the credibility of the person concerned¹⁷³. Some authors even argue that in the light of the *Saunders* judgment, the competition authority should be prevented from asking questions “on such subjects as the operation of the business and economics questions¹⁷⁴”. On the other hand, some commentators point at the particular context of the *Saunders* case which differs from proceedings conducted under Regulation 1/2003¹⁷⁵. Thus, in this context it is better recommended to make reference to another judgment of the ECtHR, namely in *J.B. vs Switzerland*. In the light of the latter case, related to a criminal charge *sensu largo*¹⁷⁶, the production of the records of a person’s business affairs infringes the privilege against self-incrimination if their content may lead to incrimination of the person concerned¹⁷⁷.

According to the CJEU, its restricted approach, which allows the Commission to compel undertakings to give answers of a factual nature, that may subsequently serve to establish an infringement of competition law, does not constitute a violation of an undertaking’s right to defence (as enshrined in particular in Article 6 ECtHR), since “there is nothing to prevent the addressee of such questions (...) from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defense, that the facts

¹⁷³ By contradicting or casting doubt upon other his statements or evidence given by him during the proceedings before the court. *Saunders* judgment, para. 71.

¹⁷⁴ A. Riley, *The Modernisation of EU Anti-Cartel Enforcement...*, p. 71.

¹⁷⁵ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-036, p. 128.

¹⁷⁶ The same category to which belongs competition law.

¹⁷⁷ See Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, No. 3-036, p. 125.

set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission¹⁷⁸”.

Nevertheless, this seems not to be so easily feasible in practice. Moreover, bearing in mind Recital 4 of the Procedural Regulation, even if answers given by an unauthorised person are subsequently rectified, their original version will nevertheless remain in the Commission file. This may seriously deteriorate the undertaking's position when, for instance, it later tries to contest the allegations of infringement indicated in the Commission's Statement of Objections.

Definitely, the risk of a violation of the undertakings' right to defence is more real if an interrogation takes place directly during an inspection rather than following a request for information¹⁷⁹. On the spot, the ability of undertakings to invoke their rights is *de facto* limited due to the lack of time to prepare answers and the presence of a constant threat of the imposition of fines under Articles 23 or 24 of Regulation No. 1/2003 for opposing the inspection.

Let us take as an example an undertaking's employee being questioned on the spot who is undoubtedly under stress and fears that his/her refusal to answer some of the inspectors' questions¹⁸⁰ may be regarded as a lack of cooperation on the part of the undertaking inspected and may as a consequence result in the imposition of a penalty on the undertaking under Article 23(1)d for providing “an incorrect or misleading answer”. This person may thus provide at least indirectly some incriminating statements.

Therefore, it is indispensable for the undertaking that its lawyer is present during every questioning which takes place during the inspection in order to, first, allow the representative or member of staff to consult the lawyer in any case of doubt as to whether he/she is obliged to answer a particular question and, second, enable the lawyer to react immediately to any questions that are misleading or that inspectors are not entitled to ask.

It is unquestionable that in competition law investigations, statements or documents are obtained in the course of a procedure leading directly to the determination of a *sensu largo* criminal charge. Undoubtedly, the privilege applies in full to the oral statements provided by the undertaking

¹⁷⁸ *Mannesmannröhren-Werke* judgment, para. 78; See *SGL* judgment, which annulled, on this point, judgment of the CFI in *Tokai Carbon*.

¹⁷⁹ In this case the undertaking has time to answer carefully and not under direct compulsion. Moreover there is at present the possibility to resort to the hearing officer's mediation when the privilege against self-incrimination seems to be impinged.

¹⁸⁰ That are not directly leading to admission of the competition law infringement but may indirectly lead subsequent to the establishment of it.

inspected¹⁸¹, *i.e.* their protection remains absolute as well as unaffected despite for instance the existence of a court order¹⁸². On the contrary, it seems to be less clear whether in the light of Saunders the privilege against self-incrimination would also be extended to pre-existing documents, *i.e.* “not having been created as a result of compulsion¹⁸³”, which are requested by Commission officials during an inspection which was not only ordered by a Commission decision but authorised by a court¹⁸⁴.

The issue regarding the requirement of obtaining a court warrant in order to acquire such pre-existing documents has not been raised before the CJEU yet. However, in the light of the judgment in the *Roquette Frères* case, it seems the CJEU would not rule that before taking a decision requesting the production of such documents the Commission is obliged to obtain a court’s authorisation¹⁸⁵.

As already mentioned the CJEU approach regarding the production of documents seems not to be fully clear and seems the EU courts do not share the same opinion on the issue. On the one hand, pursuant to the General Court¹⁸⁶, the Commission cannot request production of pre-existing documents¹⁸⁷ that would reveal the unlawful purpose of meetings¹⁸⁸. On the other hand, this finding was set aside by the Court of Justice¹⁸⁹ which held that the conclusion of the General Court misconstrues the scope of Article 11 of Regulation 17/63¹⁹⁰ and thus “weakens the principle that undertakings subject to a Commission investigation must cooperate¹⁹¹”. The Court of Justice put emphasis on the fact that from the obligation to cooperate it follows “that the undertaking may not evade requests for production of documents on the ground that by complying with them it would be required to give evidence against itself¹⁹²”.

¹⁸¹ *I.e.* the employees of the undertaking being questioned by the inspectors on site.

¹⁸² See Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, p. 125.

¹⁸³ *Ibidem*, p. 127.

¹⁸⁴ Under for instance Article 20(7) of Regulation 1/2003. See Ch. Kerse, N. Khan..., No. 3-035, p. 125.

¹⁸⁵ See Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, No. 3-035, p. 127.

¹⁸⁶ Judgments of the General Court in cases *Tokai Carbon* and *Amann & Söhne and Cousin Filterie*, para. 329.

¹⁸⁷ Such as preparatory papers, drafts, handwritten notes or minutes.

¹⁸⁸ *Tokai Carbon* judgment, paras 407–408.

¹⁸⁹ *SGL* judgment.

¹⁹⁰ Current Article 18 of Regulation 1/2003.

¹⁹¹ *SGL* judgment, para. 47.

¹⁹² *SGL* judgment, para. 48.

With reference to the Commission, in its Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, it stated only generally in the context of requests for information, that the undertaking investigated is reminded by the Commission of the privilege against providing self-incriminating information as well as the fact that confirmation of the existence of the investigated behaviour may constitute an infringement of Articles 101 and 102 TFEU¹⁹³.

Furthermore, like in the context of legal professional privilege, it has to be noted that the wording of Article 22(2) of Regulation 1/2003 stating that in cases when NCA inspectors conduct an inspection on behalf of the Commission they should exercise their powers in conformity with their national legal rules. Therefore, if national regulation is in accordance with ECtHR case-law, the undertakings are entitled to invoke the right not to incriminate themselves in relation to more questions being asked by national inspectors than it would be in relation to the Commission's officials (even though the Commission has jurisdiction over the case). This stance may lead to significant inconsistencies.

The inconsistencies between the approach adopted by the ECtHR and the CJEU as well as between the EU courts themselves¹⁹⁴, puts the undertakings being inspected in a difficult position. The Commission's power 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" might be used to a very extensive manner and may result in obtaining statements admitting directly or indirectly the guilt of the undertaking. So far the CJEU, besides the notable exception of cases of direct self-incriminating admissions of infringements forced by the Commission, has consistently refused to acknowledge that undertakings inspected have within EU law the right to refuse to cooperate, *i.e.* provide oral statements or produce documents, on the grounds that this would lead to self-incrimination¹⁹⁵. The same approach is adopted by the Commission, which has even imposed fines under Article 23 Regulation 1/2003 on the undertakings for having

¹⁹³ *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, para. 14. OJ C 308, 20.10.2011, p. 6–32.

¹⁹⁴ See case Tokai Carbon/SGL and the subsequent judgment of the General Court in case *Amann & Söhne and Cousin Filterie*.

¹⁹⁵ *Orkem* judgment, paragraph 34, *Solvay* judgment, *Société Générale* judgment, para. 74, *Mannesmannröhren-Werke* judgment, para. 66, *SGL* judgment, paras 40–49.

failed to produce incriminatory documents¹⁹⁶. Nevertheless, as mentioned above, according to ECtHR case-law the refusal to provide incriminating information cannot result in the imposition of any sanction on the person concerned¹⁹⁷.

6. Remedy

Contrary to the case of legal professional privilege, no special remedy has been provided with regard to the privilege against self-incrimination. The undertaking inspected whose employees have been questioned in the course of the inspection is deprived of a separate remedy, *i.e.* the opportunity to immediately apply to the General Court¹⁹⁸. For instance in the recent *Nexans* case, the undertakings tried to challenge, in the action for annulment of the inspection decision, the measures undertaken by the Commission during the dawn raids, including the questioning of an employee on site. The General Court recalled nevertheless that contested Commission acts did not constitute an actionable decision, but were only measures implementing the inspection decision. Thus challenges regarding the violation of the privilege against self-incrimination in the course of the Commission inspection raised in the action for the annulment of the Commission's inspection decision would be declared inadmissible. Such implementing measures can only be challenged in an appeal against the final Commission decision on the infringement or the Commission decision imposing a procedural penalty for a failure to cooperate.

In theory the undertaking inspected is moreover entitled to file an action in tort against the Commission if its unlawful act inflicted damage on the undertaking inspected. Nevertheless, in practice, there is not much chance for any success with this action¹⁹⁹.

¹⁹⁶ See for instance decision of the Commission in case *Fabbrica Pisana*, OJ 1980, L75/30, and *Fabbrica Sciarra*, OJ 1980, L75/35.

¹⁹⁷ T. Bombois, *La protection des droits fondamentaux...*

¹⁹⁸ An undertaking is entitled to file an action in tort against the Commission if its unlawful act inflicted damage on the undertaking inspected. Unfortunately, the General Court did not precise what should be understood under the notion of "damage" in this context.

¹⁹⁹ For more information see Chapter XI "Remedies and judicial review".

7. Conclusions

The serious concern in relation to the privilege against self-incrimination is undoubtedly raised by Article 20(2)e of Regulation No 1/2003 that allows inspectors, while interrogating the staff or representatives of an undertaking inspected, to ask questions in relation not only to the documents uncovered but also to “facts ... relating to the subject-matter and purpose of the inspection”. This power might be used in a very extensive manner and may result in obtaining statements admitting directly or indirectly to the guilt of the undertaking.

The right of undertakings not to be compelled by the Commission to admit their participation in an infringement was acknowledged in the *Orkem* judgment as one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted²⁰⁰.

Nevertheless the scope of EU privilege is very restricted since the protection of the right to silence applies merely to direct self-incriminating admissions and does not cover compelling undertakings to give answers of a factual nature. The CJEU consequently refused to acknowledge the existence of an absolute right to silence, since according to the Court of Justice this would go beyond what is necessary in order to preserve the rights of defence of an undertaking, and would constitute an unjustified hindrance to the Commission’s performance of its duty under Article 105 TFEU to ensure correct observance of the rules regarding competition within the common market²⁰¹. This position of the CJEU concerning the effectiveness of the Commission’s powers of investigation in the context of the privilege against self-incrimination is much too lenient²⁰².

One may thus have serious doubts whether the current EU approach regarding the privilege against self-incrimination is in line with the one presented by the ECtHR. It’s commonly argued that the criminal or quasi-criminal nature of competition law proceedings requires the full application of the privilege against self-incrimination, even if this may lead to potential hindrances to the effectiveness of conducted inspections. The protection afforded by Article 6 EConHR goes appreciably beyond the *Orkem* rule. Article 6 EConHR not only enables persons (natural or legal) who are

²⁰⁰ *LVM* judgment, para. 273, *Orkem* judgment, paras 28, 38 *in fine* and 39.

²⁰¹ *Orkem* judgment, para. 34, and *Solvay* judgment, and *Société Générale* judgment, para. 74, *Mannesmannröhren-Werke* judgment, para. 66.

²⁰² J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law...*, p. 35.

the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information on the objective of anti-competitive practices, but also establishes a right not to incriminate oneself by positive action²⁰³.

The CJEU seems nevertheless to ignore the important developments of the ECtHR and has not adjusted its position. However, once the scope of the privilege against self-incrimination is set by the CJEU, it does not mean that it cannot develop and change, in particular given the evolutionary nature of the right at stake²⁰⁴. Since the principle of the privilege against self-incrimination constitutes a crucial component of the right to defence, as developed in relation to Art. 6 EConHR, it should also apply without any limitation to competition law proceedings, particularly in the European fining procedure²⁰⁵. Thus the CJEU should definitely draw more inspiration from the established case law of the ECtHR in this field²⁰⁶. In particular, in the context of the forthcoming accession to the EConHR the Commission as well as the CJEU should reconsider their approach adopted in relation to the privilege against-self incrimination²⁰⁷.

²⁰³ *A contrario Mannesmannröhren-Werke* judgment, para. 36.

²⁰⁴ B. Vesterdorf, *Legal Professional Privilege and The Privilege Against Self-incrimination in EC Law: Recent Developments and Current Issues*, Fordham International Law Journal, Vol. 28, Issue 4 2004; B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 204.

²⁰⁵ J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law...*, p. 40.

²⁰⁶ M.J. Frese, *The development of general principles for EU competition law enforcement – the protection of legal professional privilege*, European Competition Law Review, 2011, 32(4), p. 200.

²⁰⁷ B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 211.

Chapter XI

Remedies and judicial review

1. Introduction

Given the far-reaching inspection powers of the Commission¹, and the weak position of the undertakings inspected², it is primordial that both inspection decisions as well as all the measures undertaken during inspections are subject to full judicial review exercised by independent courts. It is argued that even an effective application of a system of internal checks and balances, including the undertakings' procedural safeguards regarding the administrative procedure before the Commission cannot undermine the need for full scrutiny by the General Court, since the full effectiveness of such a system depends namely on the possibility of being granted access to a full judicial review³.

It is notably within the proceedings before the competent EU courts⁴, that the Commission is obliged to specify the information on the basis which it justifies the undertaken search of the undertakings premises⁵. The

¹ With controversies arising around some of them.

² As showed in the previous chapters.

³ W.J.P. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, World Competition 37, No. 1 (2014), p. 5.

⁴ And not, e.g., already in the statement of reasons for its inspection decision. See also in this regard judgment of the ECJ in case C-407/04 P *Dalmine vs Commission*, para. 60, in which the Court of Justice recognised the risk that the undertakings concerned might conceal evidence if they were to discover during the first stage of the investigation what information the Commission has in its possession at that time.

⁵ See judgment of the ECJ of 21 September 1989 in joined cases 46/87 and 227/88 *Hoechst vs Commission*, E.C.R. 1989, 2859, para. 41; judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux vs Commission*, paras 9 and 15; judgment of the ECJ in joined cases 97/87 to 99/8, *Dow Chemical Ibérica and Others vs Commission*, paras 45

illegality of a decision authorising an inspection, including its disproportional character, should prevent the Commission from using⁶ any evidence which has been obtained in the course of that investigation. Otherwise, it constitutes grounds for annulment of the final infringement decision by CJEU in so far as it was based on such illegal evidence⁷. Even though such an *ex post* judicial review of an inspection decision is said to be in principle sufficient to ensure appropriate protection for the fundamental rights of the undertakings concerned⁸, some doubts arise as to “whether effective judicial protection with regard to Commission inspections is ensured today under EU Law⁹”.

It is thus necessary to consider further remedies available to undertakings as well as the scope of judicial review in the EU competition law regime.

2. Principle of effective judicial protection

It is indispensable that undertakings inspected are “given the opportunity to seek a comprehensive and effective judicial review of the legality of both the decision ordering that investigation and the individual steps taken during the investigation¹⁰”. It is further necessary that the subsequent judicial control exercised in relation to Commission inspections is in line with EConHR standards.

and 51; and judgment of the ECJ of 2 October 2002, in case C-94/00 *Roquette Frères SA vs Directeur général de la concurrence, de la consommation et de la répression des frauds*, E.C.R. 2002, 9011, paras 60 to 62.

⁶ For the purposes of any competition law proceedings.

⁷ *Roquette Frères* judgment, para. 49; H. Andersson, E. Legnerfalt, *Dawn raids in sector inquiries– fishing expeditions in disguise*, ECLR 2008 29(8), p. 444. See also M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, YARS, Vol. 4(5) 2011, p. 63.

⁸ Judgment of the ECtHR of 7 June 2007 in case *Smirnov vs Russia*, Application No. 71362/01, para. 45 as well as judgment of the ECtHR of 15 February 2011 in case *Harju vs Finland*, Application No. 56716/09, paras 40 and 44, and judgment of the ECtHR of 15 February 2011 in case *Heino vs Finland*, Application No. 56720/09, para. 45; See also Opinion Of Advocate General Kokott delivered on 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para. 85.

⁹ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6, p. 517.

¹⁰ Opinion of AG Kokott of 29 April 2010 in case C-550/07, *Akzo Nobel Chemicals and Akros Chemicals Ltd vs Commission*, para. 43.

The principle of effective judicial protection is enshrined in the EConHR, notably Article 6(1) and 13 thereof. According to the ECtHR approach any decision taken by administrative bodies which is not a “tribunal” under Article 6(1) EConHR must “be subject to subsequent control by a judicial body that has full jurisdiction” over both questions, *i.e.* of fact and of law¹¹. In the ECtHR’s view, full jurisdiction occurs if a court is entitled to, first, examine all the relevant facts of the case, second, what it actually does¹² and, third quash the appealed decision in relation to all factual and legal aspects¹³. Therefore, it is not sufficient, while assessing the legality of the appealed decision, to verify only whether it is compatible with substantive law¹⁴. The court has to be entitled to set aside the impugned decision either entirely or partially, if “procedural requirements of fairness were not met in the proceedings which had led to its adoption¹⁵”. Consequently, the court should also ponder the question as to whether the principle of proportionality was observed by the competition authority¹⁶.

The ECtHR has set the standards of judicial review in a number of its cases¹⁷. Some selected rulings regarded by the author as the most relevant in the context of competition law will be presented hereafter.

¹¹ See judgment of the ECtHR of 10 February 1983 in case *Albert and Le Compte vs Belgium*, Application No. 7299/75, 7496/76, para. 29; judgment of the ECtHR of 20 May 1998 in case *Gautrin and others vs France*, Application No. 21257/93, para. 57; judgment of the ECtHR of 16 December 2008 in case *Frankowicz vs Poland*, Application No. 53025/99, para. 60. In relation to question of judicial control over administrative bodies see: judgment of the ECtHR of 24 February 2004, in case *Bendenoun vs France*, Application No. 12547/86, para. 46; judgment of the ECtHR of 23 October 1995, in case *Umlauf vs Austria*, Application No. 15527/89, para. 37–39; judgment of the ECtHR of 23 October 1995, in case *Schmautzer vs Austria*, Application No. 15523/89, para. 34; judgment of the ECtHR of 21 May 2003 in case *Janosevic vs Sweden*, Application No. 34619/97, para. 81. See moreover L. Drabek, *A Fair Hearing Before EC Institutions*, European Review of Private Law 4/2001, p. 561; K. Lenaerts, J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, CMLR 34/1997, pp. 561–562.

¹² See *Schmautzer* judgment, para. 35.

¹³ *Ibidem*; See *Janosevic* judgment, para. 81.

¹⁴ See judgment of the ECtHR of 4 October 2001, in case *Potocka and others vs Poland*, Application No. 33776/96, para. 55, 58; judgment of the ECtHR of 21 July 2011 in case *Sigma Radio Television Ltd vs Cyprus*, Application No. 32181/04, 35122/05, para. 153–154.

¹⁵ See *Potocka* judgment, para. 55.

¹⁶ M. Bernatt, *Powers of Inspection...*, p. 63.

¹⁷ *Smirnov* judgment, para. 45 as well as *Harju* judgment, paras 40 and 44, and *Heino* judgment, para. 45; ECtHR *Albert and Le Compte* judgment, para. 29; *Gautrin* judgment, para. 57; *Frankowicz* judgment, para. 60. In relation to judicial control over administrative bodies see: *Bendenoun* judgment, para. 46; *Umlauf* judgment, para. 37–39; ECtHR judgment of 23 October 1995, in case *Schmautzer* judgment, Application No. 15523/89,

In the judgment in the *Jussila* case¹⁸, the ECtHR, firstly, recalled that “the autonomous interpretation of the notion of a “criminal charge” based on the Engel criteria has broadened and nowadays also covers cases not strictly belonging to the traditional categories of criminal law, e.g. for example administrative penalties, competition law¹⁹ or penalties imposed by a financial court”. Nevertheless, it was held subsequently that the criminal-head guarantees relating to the “hard core of criminal law²⁰” do not necessarily apply with their full stringency to the above category²¹. Therefore, the conclusion that derives from this ruling is that it is not incompatible with Article 6 EConHR if the quasi-criminal penalties are in the first instance imposed by a competition authority, being an administrative body, provided that they may be subsequently subject to review exercised by a judicial body which has full jurisdiction, *i.e.* is entitled to quash all – legal and factual – aspects of the challenged decision²².

In the *Menarini* case²³, which directly related to the enforcement of competition law, the ECtHR confirmed that the antitrust proceedings are covered by the criminal-head of Article 6 EConHR, and that as long as decisions imposing competition fines may be appealed before a judicial body with full jurisdiction, it is not incompatible with Article 6 EConHR if such a penalty is imposed in the first instance by an administrative authority. This

para. 34; *Janosevic* judgment, para. 81. See also Opinion of AG Kokott in *Nexans*, para. 85. See also M. Michałek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, Yearbook of Antitrust and Regulatory Studies, Vol. 2014, 7(10), pp. 129–158 and M. Bernatt, *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights*, paper presented at the 9th ASCOLA conference “Procedural fairness in competition proceedings” on 27th June 2014 in Warsaw.

¹⁸ Judgment of the ECtHR of 23 November 2006 in case *Jussila vs Finland*, Application No. 73053/01.

¹⁹ Judgment of the ECtHR of 27 February 1992 in case *Société Stenuit vs France*, Series A No. 232-A.

²⁰ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 14.

²¹ *Jussila* judgment, para. 43. See also judgments in cases *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, in which the imposition of criminal penalties, in the first instance, by an administrative or non-judicial body was found compatible with Article 6 § 1, and, *a contrario*, judgment of the ECtHR of 25 February 1997 in case *Findlay vs the United Kingdom*, Application No. 22107/93.

²² See *Jussila* judgment, read together with the earlier judgments to which the judgment refers. W.J.P. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR*, 33 World Competition 2010, 5, pp. 26–28.

²³ Judgment of the ECtHR of 27 September 2011 in case of *Menarini Diagnostics vs Italy*, Application No. 43509/08.

judicial body must have the power to quash in all respects, on questions of fact and law, the decision of the body below. It is indispensable that the judicial authority is not only entitled to examine all factual and legal questions relevant to the case it handles but that it *de facto* does so²⁴.

In the case at stake the ECtHR found that even though according to general statements the jurisdiction of the Italian administrative court was limited, the court's review also covered in practice questions on the facts and thus the Italian judicial authority indeed exercised its full jurisdiction²⁵. Nevertheless, judge Pinto de Albuquerque in his dissenting opinion presented a contrary view. He emphasised that the principle of discretionary power of the administration introduced at that time in the Italian legal order, even if not always applied in practice, is opposed to the conclusion of full jurisdiction²⁶.

With reference to effective judicial control, a closer look should in particular be taken at the ECtHR judgment delivered in the *Ravon* case in relation to the French tax authorities' inspection regime. The ECtHR emphasised therein that the inspection decisions as well as measures taken in their application should be subject to effective judicial control *de facto* and *de iure*²⁷. Moreover, in a subsequent judgment in the *Primagaz* case²⁸, directly regarding competition law, the ECtHR clearly stated that it is indispensable to allow the undertakings inspected to rely on "the certainty (...) to obtain effective judicial review of the contentious measure and within a reasonable time period"²⁹.

²⁴ *Menarini* judgment, paras 38–44 and 58–59.

²⁵ *Menarini* judgment, paras 60–67.

²⁶ *Menarini* judgment, Dissenting Opinion of Judge Pinto de Albuquerque, para. 9.

²⁷ Judgment of the ECtHR of 21 February 2008 *Ravon e.a. vs France*, Application No. 18497/03, para. 28. "Selon la Cour, cela implique en matière de visite domiciliaire que les personnes concernées puissent obtenir un contrôle juridictionnel effectif, en fait comme en droit, de la régularité de la décision prescrivant la visite ainsi que, le cas échéant, des mesures prises sur son fondement; le ou les recours disponibles doivent permettre, en cas de constat d'irrégularité, soit de prévenir la survenance de l'opération, soit, dans l'hypothèse où une opération jugée irrégulière a déjà eu lieu, de fournir à l'intéressé un redressement approprié."

²⁸ Judgment of the ECtHR of 21 December 2010, *Primagaz*, Application No. 29613/08.

²⁹ *Primagaz* judgment, para. 28. "Cependant, elle constate que cette action ne pourra être exercée que si un recours au fond est formé contre la décision de l'Autorité de la concurrence, ce qui rend nécessairement l'accessibilité de cette voie de recours incertaine, compte tenu de l'exigence préalable à la fois d'une décision au fond et d'un recours contre celle-ci. Par ailleurs, la décision au fond de l'Autorité de la concurrence, qui n'est toujours pas rendue à ce jour, n'interviendra donc que plusieurs années après les décisions de 2005. Or, la Cour rappelle qu'en plus d'un contrôle en fait et en droit

This means moreover that proceedings have to be completed within a reasonable time. The criteria of reasonableness depends on the circumstances of a particular case and should be assessed with reference to its complexity, the importance of the case for the applicant and the conduct of the parties concerned³⁰ during the proceedings³¹.

3. Judicial review in EU

The principle of effective judicial protection, recognised by the CJEU as a general principle and enshrined in Articles 6(1) and 13 ECHR, was finally introduced in Article 47 of the Charter of Fundamental Rights of the European Union which stipulates that “(e)veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

This principle applies undoubtedly also to competition law. In the particular context of this study, it is important to stress that, as emphasised by AG Kokott, “undertakings in whose premises the Commission conducts an investigation must be given the opportunity to seek a comprehensive and effective judicial review of the legality of both the decision ordering that investigation and the individual steps taken during the investigation³²”.

To date, competition matters have fallen under the “general” jurisdiction of the General Court³³ and the Court of Justice³⁴. It has been confirmed by the CJEU that the EU courts have “the power to determine whether

de la régularité et du bien-fondé de la décision ayant prescrit la visite, le recours doit également fournir un redressement approprié, ce qui implique nécessairement la certitude, en pratique, d’obtenir un contrôle juridictionnel effectif de la mesure litigieuse et ce, dans un délai raisonnable.” (underline added)

See also J.R. Calzado, G. de Stefan, *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements* [in:] *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Hart Publishing, 2011, p. 424.

³⁰ In the case of competition law proceedings, the undertaking concerned and the Commission.

³¹ R. Whish, *Competition Law*, 6th ed., Oxford Press University, 2006, p. 285.

³² Opinion of AG Kokott in *Akzo Nobel*, para. 43.

³³ That handles the direct actions lodged by undertakings in the first instance.

³⁴ That hears the competition cases on appeal and deals with the references of the Member States’ national courts for preliminary rulings.

measures of investigation taken by the Commission (...) are excessive³⁵.” Nevertheless, it is noteworthy that an interesting debate has been taking place regarding the need to establish a specialised court for competition matters³⁶.

The relevant rules are spread over a number of legal acts, *i.e.* the TFEU, the Statute on the CJEU³⁷, the Rules of Procedure³⁸ of the General Court³⁹ and of the Court of Justice⁴⁰. Furthermore non-binding⁴¹ rules may be found in the Practice Directions⁴² of each court and the Notes for the Guidance of Counsel of the Court of Justice⁴³.

The aim of this Chapter is to analyse the possible remedies granted to the undertakings inspected as well as the standard and scope of the judicial review of the relevant Commission decisions with regard to inspections.

The main direct actions and applications that may be lodged to the CJEU with regard to competition matters are the following:

- Actions against Commission decisions imposing penalties under Article 261 TFEU. The CJEU has unlimited jurisdiction in this respect;
- Actions for annulment of Commission decisions, including inspection decisions, decisions requesting information, decisions rejecting the undertakings’ claims for legal professional privilege and infringement decisions. Under Article 263 TFEU a Commission decision may be challenged on the grounds of a lack of competences, violation of an essential procedural rule, an infringement of the provision of the Treaties or a legal rule regarding its application or misuse of powers;
- Actions under Article 265 TFEU alleging that an EU institution has infringed the TFEU by having failed to adopt an act producing legal effects to the applicant⁴⁴;

³⁵ *Hoechst* judgment, para. 19, judgment of the ECJ of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62 *San Michele and Others vs Commission*, E.C.R. 1962, 449.

³⁶ See for instance *An EU Competition Court*, House of Lords Select Committee on the European Union, April 23, 2007, HL Paper 75; Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 8-001, p. 521, and the discussion during the panel “Judicial review” at the 9th ASCOLA conference “Procedural fairness in competition proceedings” on 27th June 2014 in Warsaw.

³⁷ OJ 2010, C83/210.

³⁸ Updated periodically.

³⁹ The most recent amendments: OJ 2012, L265/1.

⁴⁰ The most recent amendments: OJ 2011, L162/17.

⁴¹ See judgment of the Court of Justice in case C-113/ 09 P(R) *Ziegler vs Commission*, E.C.R. 2010, I-50, para. 33.

⁴² OJ 2011, L180/52.

⁴³ Not published in the OJ. Available at the CJEU’s website, www.europa-curia.eu

⁴⁴ Since this action is not of significant relevance in the context of the Commission’s inspections it will not be discussed below.

- Actions for damages against an EU institution under Article 268 TFEU⁴⁵;
- Applications for interim relief under Articles 278 and 279 TFEU.

Furthermore, in the very context of inspections, Regulation 1/2003 may require the Commission to obtain an authorisation from the relevant national court. First, pursuant to Article 20(6) of Regulation 1/2003, when the Commission asks for the assistance of the police or an equivalent enforcement authority in order to overcome the undertaking's opposition, an authorisation from the relevant national court⁴⁶ may be required if the national law provides for such an obligation⁴⁷.

Secondly, in the case of inspection of "other premises" under to Article 21(1) of Regulation 1/2003, before adopting the decision ordering such an inspection, the Commission is obliged to consult the relevant NCA⁴⁸ and obtain an authorisation from the relevant national court.

Therefore, after having presented firstly the two latter issues, this Chapter will focus on the need of immediate remedy (other than actions for damages), judicial review of the decisions imposing pecuniary penalties and judicial review of the inspection's decisions (including the application for interim measures).

Moreover, the analysis will take under consideration the question of the compatibility of the current EU competition law regime with the requirements for judicial review enshrined in the ECHR and the jurisprudence of the ECtHR. The arguments relating to the incompatibility of the EU judicial system with Article 6 ECHR were raised by applicants

⁴⁵ This jurisdiction seems to be of little relevance in relation to the area of competition law. The first important proceedings regarding seeking for damages in relation to the conduct of the Commission in the enforcement of the EU competition law resulted from the case 145/83 *Adams vs Commission*. To the best of the author's knowledge so far there has been no successful action for damages in the field of antitrust cases. See *inter alia* judgment of the CFI of 21 April 2005 in case T-28/03 *Holcim vs Commission*, E.C.R. 2005, II-1357, and appeal judgment of the ECJ of 19 April 2007 in case C-282/05 P *Holcim vs Commission*, E.C.R. 2007, II-2941, judgment of the CFI of 12 December 2007 in case T-113/04 *Atlantic Container Line vs Commission*, E.C.R. 2007, II-2941, judgment of the CFI of 28 April 2010 in case T-452/05 *Belgian Sewing Thread vs Commission*, E.C.R. 2010, II-1373.

⁴⁶ *I.e.* the one of the Member State in whose territory the Commission envisages to carry out an inspection.

⁴⁷ See Article 20 (7) of the Regulation 1/2003.

⁴⁸ *I.e.* the one of the Member State in whose territory the Commission envisages to carry out an inspection.

and rejected by the CJEU as early as the late 1970s/early 1980s⁴⁹. This question has been moreover vividly debated by the doctrine⁵⁰. First, it became pertinent in the mid-1990s in the context of possible EU accession to the EConHR⁵¹. Then, it reappeared in the second half of 2000s⁵². The reason for the latest renewal of interest was twofold. Firstly, it related to the Lisbon Treaty coming into force, providing for the obligation for the European Union to accede to the EConHR and granting the CFR the status of primary law. Secondly, it concerned the new development of the

⁴⁹ Judgment of the ECJ of 29 October 1980 in joined cases 209 to 215 and 218/78 *Van Landewyck and Others vs Commission*, E.C.R. 1980, 3125, paras 79–81 and at 3160–3161; judgment of 7 June 1983 in joined cases 100-103/80 *Musique Diffusion Française and Others vs Commission* [1983] ECR 1825, paras 6–11, and Opinion of Advocate General Sir Gordon Slynn at 1920; W.J.P. Wils, *The Compatibility with Fundamental Rights...*

⁵⁰ D. Waelbroeck, D. Fosselard, *Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures* [in:] A. Barav, D.A. Wyatt (eds), *1994 Yearbook of European Law*, Clarendon 1995; W.P.J. Wils, *La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme*, Cahiers de droit européen 1996, p. 329; D. Bailey, *The scope of judicial review under Article 81 EC*, *Common Market Law Review* 2004, 41, p. 1327; H. Legal, *Standards of Proof and Standards of Judicial Review in EU Competition Law* [in:] Hawk (ed.), 2005 Fordham Corp L Inst, 2006, Chapter 5, Editorial Comments, *Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights*, C.M.L.R. 2011, 48, p. 1405; J.S. Venit, *Human all to human: The gathering and assessment of evidence and the appropriate standard of proof and judicial review in Commission enforcement proceedings applying Article 81 and 82* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: The evaluation of evidence and its judicial review in competition cases*, available at: <http://eui.eu/Documents/RSCAS/Research/Competition/2009/2009COMPETITIONVenit.pdf>; M. Jaeger, *The standard of review in competition cases involving complex economic assessments: Towards the marginalisation of the marginal review?*, *Oxford Journal of European Competition Law&Practice* 2011, 2(4), p. 295; R. Nazzini, *Administrative enforcement, judicial review and fundamental rights in EU competition law*, C.M.L.R. 2012, 49, p. 971; W.P.J. Wils, *The Compatibility with Fundamental Rights...*, pp. 5–26.

⁵¹ See Request by the Council of the European Union for an Opinion pursuant to Art. 228(6) of the Treaty establishing the European Community, [1994] OJ C174/8. The plans for accession were put on hold the following Opinion 2/94 of the Court of Justice of 28 March 1996, E.C.R. 1996, I-1763, which held that accession required a change of the Treaties. See also W. Wils, *La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme*, (1996) 32 Cahiers de droit européen, p. 329 and D. Waelbroeck, D. Fosselard, *Should the Decision-Making Power...*

⁵² W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 13.

Commission's fining policy which resulted in significantly increasing, within the permitted level, the amount of fines imposed on undertakings⁵³.

On the one hand, it has been argued that in the light of the ECtHR judgments in the *Jussila* and *Menarini* cases, there should be no doubt as to compatibility of the EU competition law regime in which the competition authority exercises the double role of both investigator and decision-maker, with the requirements of the EConHR⁵⁴.

On the other hand, with reference to the particular aspect of review available to undertakings inspected, the critics underline that "the current system for the review of the Commission's implementation of the inspection creates potentially unreasonable delays between the inspection and the moment it stands to be reviewed and is furthermore conditional on the existence of an infringement decision, which may not necessarily be adopted, it seems such a system would be held to infringe the principle of effective judicial protection derived from Article 6 ECHR, as interpreted by the ECtHR⁵⁵."

4. Prior judicial authorisation of the police assistance

The EU regulation did not confer the Commission with power to forcibly execute its inspection decision. Nevertheless, pursuant to Article 20(6) of Regulation 1/2003, if the undertaking concerned opposes an inspection ordered by a Commission decision or if there is a risk of such opposition, the inspectors may seek, through the NCA, the necessary assistance of the police in order to enforce the carrying out of the envisaged inspection.

This solution, on the one hand, compensates the Commission's lack of coercive powers⁵⁶, but, on the other hand, brings about serious consequences for the undertakings concerned since it hinders their right to oppose an inspection. Thus, the EU legislator provided for a special safeguard, *i.e.* the possibility to make such assistance subject to a prior authorisation from the national judicial authority⁵⁷. While, it is for Member States to decide, within their procedural autonomy, whether and when such authorisation

⁵³ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 13. See C. Baudenbacher, *The legacy of Neelie Kroes*, (2010) *Journal of European Competition Law and Practice*, p. 169 and W.J.P. Wils, *The Increased Level...*, pp. 10–12.

⁵⁴ W.J.P. Wils, *The Compatibility with Fundamental Rights...*

⁵⁵ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid...*, p. 519.

⁵⁶ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, p. 176.

⁵⁷ Article 20(7) of Regulation 1/2003.

should be required, the standard and the scope of the judicial review were set out in Article 20(8) of Regulation 1/2003. According to this provision, the national court should verify the authenticity of the decision and ponder over the question of necessity and proportionality, however only to a very restricted extent. Its scope is namely limited only to the question on whether the “coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection”⁵⁸, *i.e.* whether the inspection does not appear “manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation”⁵⁹. Hence, due to its very narrow extent, the review conducted by the national court may even seem to be of illusory character⁶⁰. Such a finding is further supported by the fact that national judges are denied access to the Commission’s investigation file⁶¹.

The national court is (at least) entitled to ask⁶² the Commission for additional explanations, regarding in particular the Commission’s grounds for suspecting an infringement in competition law, its seriousness or the nature of the involvement of the undertaking concerned, for the purpose of assessing the proportionality of the assistance sought. It has been, nevertheless, vividly criticised that the national judicial authority has to rely exclusively on the on “second hand” information given by the Commission that exclusively decides on the scope and nature of the explanations provided to the national court⁶³. Furthermore, the national court cannot call into question the necessity for the inspection since only the CJEU is entitled to rule on the lawfulness of Commission decisions⁶⁴.

Some other authors, however, present a different opinion defending the current stance and argue that if prior authorisation is required, a double judicial control of inspection decisions actually takes place, *i.e.* firstly, the national court rules on proportionality between the coercive measure envisaged and the seriousness of the infringement suspected and, secondly,

⁵⁸ This test was established in the judgment of the ECJ of 2 October 2002, in case C-94/00 *Roquette Frères SA vs Directeur général de la concurrence, de la consommation et de la répression des frauds*, (para. 74) and subsequently introduced in Article 20(8) of Regulation No 1/2003.

⁵⁹ *Roquette Frères* judgment, para. 80.

⁶⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, p. 177.

⁶¹ Thus they must rely only on explanations provided by the Commission. Article 20(8) of the Regulation 1/2003.

⁶² Directly or indirectly, through the relevant NCA.

⁶³ J. Schwarze, A. Weitbrecht, *Grundzüge des europäischen Kartellverfahrensrechts*, 2004, para. 4, point 24.

⁶⁴ Article 20(8) *in fine* of the Regulation 1/2003.

the European Courts exercise the full judicial review of the inspection decision, including the question of its legality and necessity⁶⁵.

Leaving aside the assessment of the current stance, it has to be stressed that this provision is commonly regarded as a codification of the judgment of the Court of Justice in the *Roquette Frères* case⁶⁶. It is, nevertheless, noteworthy, that this standard of the national court's review had already been established for instance in the judgment in the *Dow Benelux* case, in which the Court of Justice clearly held that a "(national) body, whether judicial or otherwise, cannot in this respect substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the Court of Justice. On the other hand, it is within the powers of the national body, after satisfying itself that the decision ordering the investigation is authentic, to consider whether the measures of constraint envisaged are arbitrary or excessive having regard to the subject-matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures⁶⁷".

In the *Roquette Frères* case, after having taken the inspection decision in relation to the undertaking⁶⁸, the Commission asked the French competition authorities, as a precaution, for police assistance and received the appropriate court order authorising its request. *Roquette Frères* lodged an action for annulment of the court order since the court did not establish whether there were reasonable grounds for suspecting an infringement in competition law. The French Supreme Court referred a preliminary question to the Court of Justice asking for clarification regarding the scope of the judicial review and in particular whether a national court is entitled to call into question the merits of the inspection decision taken by the Commission.

According to the Court, the review of the proportionality of the coercive measures envisaged in relation to the Commission's investigation includes establishing that such measures do not constitute a disproportionate and intolerable interference in the light of the aim pursued by the

⁶⁵ See K. Dekeyser, C. Gauer, *The New Enforcement System for Articles 81 & 82 and the Rights of Defence* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2005, ch 23, p. 555.

⁶⁶ See *Roquette Frères* judgment.

⁶⁷ *Dow Benelux* judgment, para. 46.

⁶⁸ Under the former Regulation 17/62.

investigation in question⁶⁹. The national authority should carry out its review of proportionality while taking into consideration factors such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought⁷⁰. Nevertheless, the CJEU emphasised that the national court's review cannot go beyond this extent and cannot, in particular, substitute its own assessment of the need for the investigations ordered for that of the Commission⁷¹, since the review of the lawfulness of the Commission decision remains the exclusive competence of the EU courts⁷².

The Court of Justice remarked that the Commission is required, under EU law, to ensure that the relevant national court "has at its disposal all the information which it needs in order to carry out the review framed by the ECJ". Therefore, the Commission is obliged to specify the essential features of the suspected infringement, evidence sought and the matters to which the investigation must relate⁷³. However, according to the settled case-law⁷⁴, the Commission is not required to "precisely define the relevant market, set out the exact legal nature of the presumed infringements or indicate the period during which those infringements were committed⁷⁵".

It is noteworthy that the information communicated to the relevant national court in order to enable this judicial authority to review the Commission request, does not have to be in any particular form. The Court of Justice held that such necessary information may be included in the inspection decision, in the Commission's request for assistance or even provided orally as an answer to a question asked by the national court⁷⁶.

⁶⁹ See also judgment of the ECJ in case C-331/88 *Fedesa and Others*, E.C.R. 1990, I-4023, para. 13; judgment of the ECJ of 21 February 1991 in joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, E.C.R. 1991, I-415, para. 73; judgment of the ECJ of 13 May 1997 in case C-233/94 *Germany vs Parliament and Council*, E.C.R. 1997, I-2405, para. 57; and judgment of the ECJ 28 April 1998 in case C-200/96 *Metronome Musik*, E.C.R. 1998, I-1953, paras 21 and 26.

⁷⁰ Para. 79.

⁷¹ *Dow Benelux* judgment, para. 46.

⁷² RF Para. 96: "Review of the adequacy of the reasons given for any Commission decision ordering an investigation, as defined in Article 14(3) of Regulation No 17, falls within the exclusive competence of the Community judicature."

⁷³ Paras 81 and 83; See also judgment of the ECJ of 26 June 1980 in case 136/79 *National Panasonic vs Commission*, [1980] ECR 2033, paras 26–27.

⁷⁴ *Dow Benelux* judgment, para. 10.

⁷⁵ Para. 82.

⁷⁶ *Roquette Frères* judgement, paras 98–99.

Nevertheless, even while confirming the Commission obligation to sufficiently inform the national court and while listing in detail the type of information which should be provided to the national court⁷⁷, the Court of Justice focused consistently on the fact that the national judicial body can neither carry out the review going beyond the limits set above nor demand access to the Commission file, nor in particular ask for the evidence on which the Commission bases its suspicions⁷⁸.

In the *Roquette Frères* judgment the Court of Justice presented quite a lenient approach since it ruled that the Commission gave a sufficient account of the features of the suspected cartel, indicated its seriousness and suggested that the cartel was being implemented by secret means and that *Roquette Frères* had participated in the meetings described, thus an inspection was the most appropriate way of gathering evidence of its existence and stated. This all together sufficed, in the Court of Justice's view, to enable the national court in question to assess the need to grant, as a precautionary measure, the authorisation sought⁷⁹. It seems therefore that despite the obligation to provide detailed information; a short description of the infringement suspected, a statement that the inspection is the best means to collect the evidence⁸⁰ as well as general reference to documents sought – that being undertaking's books or business records – will suffice to satisfy the *Roquette Frères* requirements⁸¹.

⁷⁷ Para. 99: “the information supplied by the Commission must in principle include:
 – a description of the essential features of the suspected infringement, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;
 – explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;
 – detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;
 – as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators;
 and
 – in the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.”

⁷⁸ Para. 99.

⁷⁹ Paras 87–89.

⁸⁰ For instance about secret meetings.

⁸¹ Ch. Kerse, N. Khan, *EU Antitrust Procedure...*, No. 3-095, p. 154.

Furthermore, it thus seems quite difficult for the national court to be able in practice to lawfully refuse the Commission's request. It was highlighted by the Court of Justice that if, according to the national court the information provided by the Commission is not sufficient, *i.e.* does not fulfill the requirements which it set out to achieve, it cannot simply dismiss the application. The court in question and the Commission, in accordance with the duty to cooperate, are required to collaborate with each other in order to overcome any problems which arise and to implement collectively the investigation decision ordered by the Commission. Hence, in such circumstances the national court has to inform the Commission, as rapidly as possible,⁸² of any difficulties encountered, where necessary by asking for greater clarification, which it may need to carry out its review⁸³. In accordance with the duty to cooperate, the Commission has to then provide, with the minimum of delay, any additional information requested by the national court⁸⁴. Not until any such clarification is not forthcoming, or the Commission fails to take any practical steps in response to its request, may the national court refuse to grant the requested assistance on the grounds that, in the light of the information available to it, the national court is unable to rule on whether the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of the investigation⁸⁵.

Some doubts may arise whether this stance⁸⁶, that might be regarded as favouring the Commission's powers of enforcement of competition rules *versus* protection of the undertakings' rights, introduces an effective judicial control. Not only the scope of the national court's review is very limited, but it also seems unlikely to attain the refusal requirements set out in the CJEU's test regarding the necessity and proportionality of the measures envisaged. National courts are allowed to refuse to grant the coercive measures applied for by the Commission only in extreme situations, *i.e.* "where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral" that the coercive measure, constituting the intervention in the sphere of the undertaking's private activities, would be "manifestly disproportionate and intolerable in the light of the objectives

⁸² Or the NCA if it has brought the Commission's request before it.

⁸³ That information may also emanate from other sources. See also judgment of the CFI in case T-339/04 *France Télécom vs Commission*, E.C.R. 2007, II-573, para. 110.

⁸⁴ Para. 93.

⁸⁵ Paras 94 and 99.

⁸⁶ Established by the CJEU and subsequently codified in the Regulation 1/2003.

pursued by the investigation”⁸⁷. This test has however been subsequently confirmed in other judgments⁸⁸.

It is noteworthy that the scrutiny of the national court does not itself fulfill the requirement of Article 6(1) EConHR since, under Article 20(8) of Regulation 1/2003, the court is not allowed to carry out the full review in relation to the facts and law and, thus, it cannot intervene rapidly with regard to the lawfulness of the Commission decision⁸⁹. It would thus be recommended that the national court is granted access to the case’s files and additionally that changes are made to the criteria of the proportionality test. Nevertheless, it has to be stressed that the Commission inspection decision may subsequently be subject to a full review exercised by an independent and impartial tribunal, *i.e.* the General Court. Therefore, the requirements of Article 6(1) EConHR with regard to Commission inspection decisions are eventually satisfied.

5. Authorisation of inspections of other premises

The extremely intrusive character of the Commission’s power to carry out inspections of other premises specified in Article 21 of Regulation 1/2003 required simultaneous introduction of a special additional safeguard in this regard. Therefore, Article 21(3) of Regulation 1/2003 provides for the prior judicial review as an indispensable requirement for the conducting of an inspection of this kind. According to the provision in question the Commission is namely obliged to obtain a prior authorisation from the relevant national judicial body in order to execute the inspection decision. If compared with the scope of the judicial scrutiny set out under Article 20(8) one may easily notice that only slight changes appear between the standard of these two reviews.

The judicial control⁹⁰ is based on the authenticity of the decision as well the question on whether the coercive measure envisaged is neither

⁸⁷ *Roquette Frères* judgment, para. 80.

⁸⁸ See *inter alia* the *France Télécom* judgment, para. 110 in which the General Court reminded that “it is for the national judicial authority seised under Article 20(7) of that regulation to ensure that a Commission decision ordering an inspection is authentic and that the coercive measures envisaged for carrying out the inspection are not arbitrary or excessive having regard to the subject-matter of the inspection.”

⁸⁹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-106, p. 159.

⁹⁰ Resembling the one carried out by the national courts under Article 20(8).

arbitrary nor excessive in the circumstances at stake⁹¹. The national court may ask⁹² the Commission for additional explanations necessary to enable it to assess the proportionality of the measure at stake, but is deprived access to the Commission file. Hence, at first glance the judicial control seems to resemble the judicial scrutiny undertaken under Article 20(8). The wording of Article 21(3) of Regulation 1/2003 seems however to provide for more intense scrutiny since this provision specifies to a greater extent the aspects that are to be taken under consideration by the national court while pondering over the question of proportionality⁹³. The national court is obliged, while assessing the proportionality, of the envisaged measure to consider “the seriousness of the suspected infringement, (...) the importance of the evidence sought, (...) the involvement of the undertaking concerned and (...) the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested⁹⁴”.

It has to be noted nevertheless that, first, according to some authors it is not excluded that a national court will in practice examine the request under Articles 20(8) and 21(3) in the same way⁹⁵. Second, despite this specified scope of the review regarding the question of proportionality that should be taken into consideration, it may only bring about concrete results, that being the refusal to grant authorisation, if the coercive measure in question is “arbitrary” or “excessive”, *i.e.* only in extreme situations.

Furthermore, like under Article 20(8) of Regulation 1/2003, the national court cannot “call into question the necessity for the inspection” since only the CJEU is entitled to rule on the lawfulness of the Commission decisions⁹⁶. Therefore, also with reference to this solution it would be recommended that the national court are granted access to the case files and additionally changes are made to the criteria of the proportionality test. Nevertheless, as emphasised with regard to authorisations for police assistance, the Commission inspection decision may subsequently be

⁹¹ “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 authorisation is requested”.

⁹² Directly or indirectly, through the relevant NCA.

⁹³ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-141, p. 178.

⁹⁴ Article 21(3) of the Regulation 1/2003.

⁹⁵ L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011, No. 8.56, p. 333.

⁹⁶ Article 21(3) of the Regulation 1/2003.

subject to a full review exercised by an independent and impartial tribunal, *i.e.* the General Court. Therefore, the requirements of Article 6(1) EConHR with regard to Commission's inspection decisions are eventually satisfied.

6. Need of immediate remedy

In the *Canal Plus* case, the ECtHR clearly stated that even a temporary uncertainty regarding the accessibility of the remedy, *i.e.* the fact that the inspection decision may be only challenged within an appeal against the final infringement decision, which may be adopted by the competition authority even several years after the inspection took place, does not satisfy the requirements of Article 6(1) and leads to a violation of this provision⁹⁷. The Court recalled that in addition to the requirement of having a full review of fact and of law and of then validity of the decision, Article 6(1) further required the certainty of providing an appropriate remedy and of obtaining an effective judicial review within a reasonable time⁹⁸.

Nevertheless, in the framework of competition law proceedings, the undertakings do not benefit from the right to immediate and effective remedy in relation to the conduct of inspections, *i.e.* not all acts that bring about significant legal consequences for the undertaking inspected are open to review under Article 263 TFEU (action for annulment).

It has to be noted that besides the circumstances in which the Commission is obliged under Regulation 1/2003 to act by adopting first a formal decision⁹⁹, there is a number of situations where despite the lack of adopting a formal act, a measure undertaken by the Commission is likely to affect the legal position of its addressee. Such informal acts should also be subject to review by the CJEU under Article 263 TFEU irrespective of their form or title. This stance was confirmed by the CJEU *inter alia* in the *IBM* case¹⁰⁰. The Court of Justice held namely that “(a)ny measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about distinct change in his legal position is an act or decision which may be the object of an action under Article 230 of

⁹⁷ See judgment of the ECtHR of 21 December 2010 *Canal Plus vs France*, application No. 29408/08, para. 40.

⁹⁸ *Ibidem*.

⁹⁹ For instance, in the case of imposition of fines.

¹⁰⁰ See judgment of the ECJ in case 60/81 *IBM vs Commission*, E.C.R. 1981, 2639.

the Treaty (currently 263 TFEU) for a declaration that it is void¹⁰¹". Thus, the focus should be put on the substance of the act in question instead of on its form¹⁰². In practice, such acts may often take the form of a letter¹⁰³.

It is however noteworthy that when an outcome concerning the act is favourable for the undertaking concerned it cannot be regarded as grounds for complaint¹⁰⁴.

The CJEU stressed further that it is crucial to distinguish the final decision from steps that are only intermediate, *i.e.* they pave the way for such an ultimate decision¹⁰⁵. Only a measure that definitely lays down the Commission's position on the conclusion of the procedure and produces legal effects will be reviewable. It follows that a measure adopted in the course of preliminary proceedings can only be subject to review under Article 263 TFEU if it has the legal characteristics indicated above and also constitutes "the culmination of a procedure distinct from that of the final substantive decision¹⁰⁶". As emphasised by the General Court the "(o)nly measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify before completion of the administrative procedure, the admissibility of an action for annulment¹⁰⁷".

¹⁰¹ *IBM* judgment, para. 9. See also judgment of the ECJ of 31 March 1970 in case 22/70 *Commission vs Council (AETR)*, E.C.R. 1971, 263, paras 39–42.

¹⁰² Judgment of the ECJ of 5 December 1963 in joined cases 53&54/63 *Lemmerz Werke vs High Authority*, E.C.R. 1963, 239, or judgment of the ECJ of 17 July 2008 in case C-521/06 P *Athinaiki Techniki vs Commission*, E.C.R. 2008, I-5829 (state aid).

¹⁰³ See *e.g.* judgment of the ECJ of 15 March 1967 in joined cases 8-11/66 *Cimenteries vs Commission*, E.C.R. 1967, 75 (letter informing the undertaking that a preliminary investigation led to the conclusion that the matter fell under Article 101 TFEU), judgment of the CFI of 30 September 2003 in case T-26/01 *Fiocchi Munizioni vs Commission*, E.C.R. 2003, II-395, para. 91 (letter from DG Competition), judgment of the ECJ of 17 January 1980 in case C-792/79 R *Camera Care vs Commission*, E.C.R. 1980, 119.

¹⁰⁴ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-101, p. 570. See *e.g.* judgment of the CFI of 17 September 1992 in case T-138/89 *Nederlandse Bankiersvereniging and Nederlandse Vereniging Van Banken vs Commission*, E.C.R. 1992, II-2181, para. 32, and the judgment of the CFI of 22 March 2000 in joined cases T-125/97 and T-127/97 *Coca-Cola vs Commission*, E.C.R. 2000, II-1733, paras 85–92 (merger case).

¹⁰⁵ Judgment of the ECJ in case 60/81 *IBM vs Commission*, E.C.R.: 1981, 2639, para. 10, judgment of the CFI of 10 July 1990 in case T-64/89 *Automec vs Commission*, E.C.R. 1990, II-367, para. 42, judgment of the CFI of 18 December 1992 in joined cases T-10/92 R etc. *Cimenteries CBR vs Commission*, E.C.R. 1992, II-1571, para. 45.

¹⁰⁶ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-102, p. 570–571. See *IBM* judgment, para. 23, the *Cimenteries CBR* judgment, para. 49.

¹⁰⁷ *Cimenteries CBR* judgment, para. 42.

Based on this approach the CJEU rejected the possibility to challenge under Article 263 TFEU for instance the following acts: the initiation of a procedure, statements of objections¹⁰⁸, letters providing the Commission's reaction for the undertaking's complaints¹⁰⁹, reporting of an investigation prepared by Commission officials¹¹⁰, letters¹¹¹ expressing the Commission's views on whether a document is protected by business secrecy¹¹² or even a decision on access to the file during a Commission investigation¹¹³. In the *Intel* case the CFI dismissed the application for interim measures¹¹⁴ by emphasising that the undertaking's "legal position is neither immediately nor irreversibly affected, since any infringement of Intel's rights would produce effects only upon the adoption of a final decision, against which an action for annulment lies to restore Intel's rights¹¹⁵".

On the other hand, the CJEU accepted as reviewable acts for instance the rejection of a complaint, refusal to hear a third party¹¹⁶ or decision on the transmission to a national court of documents obtained from the undertaking concerned during the investigation¹¹⁷.

In the context of this study the main question is which measures undertaken by the Commission in relation to inspections may alter the legal position of the undertakings concerned and thus be open to challenge?

In principle, the CJEU is reluctant to intervene during the course of a Commission investigation¹¹⁸. Pursuant to the settled case-law of the CJEU, measures adopted by the Commission during an inspection do not constitute actionable decisions but are merely measures implementing

¹⁰⁸ *Cimenteries CBR* judgment.

¹⁰⁹ See judgment of the ECJ of 18 March 1997 in case C-282/95 P *Guérin Automobiles vs Commission*, E.C.R. 1997, I-1503.

¹¹⁰ Judgment of the CFI of 9 June 1997 in case T-9/97 *Elf Atochem vs Commission*, E.C.R. 1997, II-909.

¹¹¹ Sent prior to a Hearing Officer decision on the matter.

¹¹² Judgment of the CFI 2 May 1997 in case T-90/96 *Automobiles Peugeot vs Commission*, E.C.R. 1997, II-663.

¹¹³ The *Cimenteries CBR* judgment, para. 42: "Commission measures refusing access produce in principle only limited effects, characteristic of preparatory measure forming part of a preliminary administrative procedure". See also Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-102-8-103, p. 571-572.

¹¹⁴ In relation to the Commission decision on deadline to submit reply.

¹¹⁵ See the order of the President of the CFI of 27 January 2009 in case T-457/08 R *Intel vs Commission*, E.C.R. 2000, II-12, para. 66.

¹¹⁶ Judgment of the CFI of 27 January 2000 in case T-256/97 *BEUC vs Commission*, E.C.R. 2000, II-101.

¹¹⁷ Judgment of the CFI in case T-164/12 *Alstom vs Commission*.

¹¹⁸ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-103, p. 571.

the inspection decision. In the General Court's opinion, "(i)n principle, a provisional measure intended to pave the way for the final decision is not (...) a challengeable act¹¹⁹". The only exception was recognised with the Commission's refusal to accept that the uncovered information is protected by legal professional privilege¹²⁰. The CJEU confirmed that such an act "adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position (...) constitute challengeable acts¹²¹". The Commission's decision on the rejection of the undertaking's request for legal professional privilege should be regarded as producing legal effects for that undertaking, by resulting in a distinct change in its legal position. Notably, it, first, withholds the protection provided by EU law from the undertaking concerned and, second, is definitive in nature as well as independent of any final decision regarding suspected any infringement of Article 101 and 102 TFEU¹²².

However, other measures undertaken by the Commission during the inspections are not regarded by the CJEU as reviewable acts. For instance, quite recently, in the *Nexans* case, the undertaking contested the inspection measures which entailed taking away forensic copies of computer hard drives for subsequent review at the Commission's premises and the on site questioning of one of the employees¹²³.

Nevertheless, the reasoning applicable by the acts relating to legal professional privilege, *i.e.* regarded exceptionally as challengeable acts, should also be applicable to other measures undertaken during the inspections which violate fundamental rights or fall beyond the scope of an inspection decision.

¹¹⁹ See judgment of the General Court of 17 September 2007, in joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs Commission*, para. 45. See also judgment of the General Court in case T-135/09 *Nexans*, paras 119–125 and 132.

¹²⁰ See *Akzo Nobel* judgment 2007.

¹²¹ See *Akzo Nobel* judgment 2007, para. 45; *IBM* judgment paragraphs 10 and 11, and judgment of the CFI of 7 June 2006 in joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft vs Commission*, E.C.R. 2006, II-1601, para. 65.

¹²² See *Akzo Nobel* judgment 2007, paras 46–47, *AM & S*, paragraphs 27 and 29 to 32; see also, by analogy, judgment of the ECJ in case 53/85 *Akzo Chemie vs Commission*, E.C.R. 1986, 1965, paras 18 to 20.

¹²³ See *Nexans* judgment of the General Court, paras 119–134.

It has to be stressed none the less, that, like in the case of legal professional privilege, a decision by the competition authority to reject the undertaking's right to oppose, and consequently take a copy of the entire hard drive for subsequent search at the authority premises, brings about a significant change to that undertaking's legal position and irreversibly affects its fundamental rights (right to privacy and right to defence)¹²⁴. The Commission enters into the possession of documents that it does not have the right to seize (such as documents covered by legal professional privilege or the privilege against self-incrimination). This denies the undertaking sufficient protection of its right to defence¹²⁵.

If the contested documents, obtained illegally, allowed the Commission to initiate an investigation regarding a new case, it is undeniable that "irreversible consequences" have occurred¹²⁶. It is noteworthy that, even though according to CJEU case-law, the information and documents obtained during an inspection cannot be used for any purpose other than the one expressly specified in the inspection decision. However, the Commission cannot turn a blind eye to the incriminating documents that it came across incidentally. The lack of remedies in this field may encourage the Commission to carry out fishing expeditions aiming at incidental discoveries of evidence concerning a totally new infringement in competition law. This problem was namely highlighted in case *Deutsche Bahn*¹²⁷.

The need for effective remedies is strengthened by the fact that, pursuant to the Commission Notice on the rules for access to the Commission file, documents found to fall outside the scope of the subject matter of the case "may¹²⁸ be returned to the undertaking from which they have been obtained" and "will no longer constitute part of the file¹²⁹". Such an approach is definitely "untenable, as the Commission had no power in the first place to

¹²⁴ For more on the issue regarding taking copies of the entire hard drive for subsequent search at the authority premises see Chapter VI "Subsequent electronic searches of copied hard drives".

¹²⁵ See M. Michałek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, YARS Vol. 2014, 7(10), pp. 129–158.

¹²⁶ *Ibidem*; See also judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn vs Commission*.

¹²⁷ See Chapter V "Fishing expeditions".

¹²⁸ Instead of "have to".

¹²⁹ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, para. 9.

take these documents. The fact that they are nonetheless in its possession does not make the situation any more legal¹³⁰”.

Similarly, the situation when the Commission does not accept the undertaking's privilege against self-incrimination and require it to provide self-incriminating information or oral statements during the inspections would significantly interfere with the undertaking's legal position¹³¹. Nevertheless, challenges regarding violation of the privilege against self-incrimination in the course of the Commission's inspection raised in an action for annulment of the Commission's inspection decision will be declared inadmissible. Such implemented measures can only be challenged in the appeal of the final Commission decision on the infringement or the Commission decision imposing a procedural penalty for a failure to cooperate.

6.1. Action for damages

The argument alleging that this CJEU approach is incompatible with the fundamental rights of undertakings, namely the right to an effective remedy, enshrined in Articles 6 and 13 of the ECHR and Article 47 CFR has actually been dismissed by the CJEU which has pointed out the possibility for an undertaking to lodge an action for damages under Article 340 TFEU¹³². The CJEU held that “it is important to remember that the mere possibility of bringing an action for damages under Articles 268 TFEU and 340 TFEU is sufficient to show character principle reparable such harm, despite the uncertainty in the outcome of this litigation for compensation¹³³”.

Indeed, at EU level, undertakings have the possibility to lodge an action in tort against the Commission under Articles 268 and 340 TFEU if its unlawful act inflicted damage on the undertaking inspected – a solution

¹³⁰ D. Théophile, I. Simic, *Legal Challenges...*, p. 518.

¹³¹ For more on this privilege see Chapter X “Privilege against self-incrimination”.

¹³² See for instance judgment of the CFI of 15 January 2003 in joined cases T-377/00 etc *Philip Morris and others vs Commission*, E.C.R. 2003, II-1, para. 123, which was upheld on appeal by judgment of the ECJ of 12 September 2006 in case C-131/03 P *R.J. Reynolds Tobacco Holdings vs Commission*, E.C.R. 2006, I-7823, para. 83.

¹³³ See, the order of the President of the General Court of 29 July 2011 in case T-292/11 R *Cemex SAB de CV and Others vs European Commission*, para. 41, order of the President of the Court of 14 December 2001 in case C-404/01 P (R) *Commission vs Euroalliages and Others*, E.C.R. I-10367, paras 70 to 75, and order of the President of the Court of 24 April 2009 in case T-52/09 R *Nycomed Danmark vs EMEA*, not published in the ECR, paras 72 and 73.

that may be regarded as an immediate remedy. Such an action can be further accompanied by requests for interim measures¹³⁴ that may include injunctive relief¹³⁵ as well as provisional damages, if it is necessary and appropriate to avoid irreparable harm. It has been confirmed by the CJEU that “even though the applicant is unable to bring an action for annulment of the decision allegedly contained in those letters, it is not denied access to justice since an action for non-contractual liability under Article 268 TFEU and the second paragraph of Article 340 is available if the conduct of the institution in question is of such a nature as to entail liability on the part of the European Union¹³⁶”. Nevertheless, although such an action is “available where a party has suffered harm on account of unlawful conduct by an institution¹³⁷”, it cannot be ignored that an action for damages “is not part of the system of review of the legality of Community acts with legal effects which are binding on, and capable of affecting the interests of the applicant¹³⁸”.

It has to be moreover noted that the undertaking has to demonstrate that the action of the Commission was unlawful and inflicted damage¹³⁹ on the undertaking inspected. Thus this potential remedy is not easily accessible. So far the action for damages has been mostly used, albeit unsuccessfully, by the undertakings rather in the context of an alleged breach of Article 47(2) CFR by the Commission, *i.e.* failure to deal with the case within a reasonable time¹⁴⁰.

¹³⁴ Available under Art. 279 TFEU.

¹³⁵ In order to prevent further damage occurring. Furthermore, in interim measure cases, unlike cases regarding an annulment of final decisions, the EU judicature can give precise instructions to the Commission.

¹³⁶ Order of the General Court of 12 March 2012 in case T-42/11 *Universal Corp. vs Commission*, para. 45, *Reynolds Tobacco* judgment, paras 82 and 83.

¹³⁷ The *R.J. Reynolds Tobacco Holdings* judgment, para. 83.

¹³⁸ *Ibidem*. See also Order of the General Court of 12 March 2012 in case T-42/11 *Universal Corp. vs Commission*, para. 45,

¹³⁹ Unfortunately, the General Court in its judgment in case *Nexans* did not precise what should be understood under the notion of “damage” in this context.

¹⁴⁰ See judgment of the Court of Justice of 26 November 2013 in case C-58/12 P *Groupe Gascogne SA vs Commission*, paras 88–96, judgment of the Court (Grand Chamber) of 26 November 2013 in case C-50/12 P *Kendrion NV vs Commission*, paras 93–101, judgment of the Court (Grand Chamber) of 26 November 2013 in case C-40/12 P *Gascogne Sack Deutschland GmbH vs Commission*, para. 88, judgment of the Court of Justice of 19 June 2014 in case C-243/12 P *FLS Plast A/S vs Commission*, para. 136, judgment of the Court of Justice of 30 April 2014 in case C-238/12 P, *FLSmith & Co. A/S vs Commission*, para. 117.

With reference to Article 278 TFEU, “suspension of the operation of an act or other interim measures may be ordered if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as it must, in order to avoid serious and irreparable harm to the applicant’s interests, be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent¹⁴¹”. Furthermore, it is impossible in practice for undertakings to apply for and obtain immediate interim relief from the General Court in order to effectively prevent the conduct of a Commission inspection¹⁴².

Finally, it has to be stressed that the function of the action for damages under Article 268 and 340 TFEU differs from the goal of the action for annulment under Article 263 TFEU. It is unquestionable that damages that may be granted as the result of an action in tort will never bring about legal consequences of an action for annulment, *e.g.* the annulment of the challenged acts. Only a finding of the illegality of the contested measure, including its disproportional character, can prevent the Commission from using¹⁴³ any evidence which has been obtained thereby. Thus, contrary to the CJEU¹⁴⁴, I argue that action for damages does not constitute an effective remedy with regard to unlawful measures undertaken by the Commission during inspections. Furthermore, as rightly argued the applicant in the *Imperial Chemical Industries* case, protection granted by the EConHR, in particular under Article 6(1) thereof, is not dependent upon having proved the actual harm to the interests of the applicant. Furthermore, a “(b)reach of a primary ECHR obligation can result only in the annulment of the contested decision and not merely in the payment of compensation and interest¹⁴⁵”.

Last but not least, a decision attributed to the improper behaviour of Commission inspectors during an inspection may, in theory, be taken by the CJEU even independently on the finding of the invalidity of the

¹⁴¹ Judgment of the General Court of 7 May 2010 In Case T-410/09 R *Almamet GmbH Handel mit Spänen und Pulvern aus Metall vs Commission*, para. 13, order of the President of the ECJ of 14 October 1996 in case C-268/96 P(R) *SCK and FNK vs Commission*, E.C.R. 1996, I-4971, para. 30.

¹⁴² On interim relief see more herein below in the part regarding *Judicial review of the inspection’s decisions*.

¹⁴³ For the purposes of any competition law proceedings.

¹⁴⁴ According to which the former “action constitutes an effective remedy”. See the *Gascogne Sack Deutschland* judgment, para. 89.

¹⁴⁵ See judgment of the General Court of 25 June 2010 in case T-66/01 *Imperial Chemical Industries Ltd vs Commission*, para. 97.

Commission's act¹⁴⁶. Nevertheless, if the undertaking has suffered losses as a direct result of the actions of the Commission, the best chance for success of such an action for damages occurs after the Commission's actions being firstly annulled by the CJEU¹⁴⁷.

Therefore, in the light of ECtHR case-law¹⁴⁸, it may be highly questionable that undertakings inspected are not granted any special and effective remedy in order to immediately challenge the actions and measures undertaken by the Commission during the inspection. Currently undertakings concerned have to wait until the final infringement decision to have these measures reviewed by the General Court. In the *Dow Benelux* judgment, para. 49, the CJEU held that "the validity of a decision cannot be affected by acts subsequent to its adoption¹⁴⁹". Such a situation in the former French competition regime was condemned by the ECtHR in the *Primagaz* case.

6.2. Compatibility with the requirements set out by the ECtHR

Despite the possibility to bring an action for damages, which as shown does not constitute a correct and appropriate remedy, and apply for interim measures, that in every case will not be granted too late¹⁵⁰, the current stance may raise some serious doubts concerning compatibility with EConHR requirements, in particular regarding certainty of accessibility of the remedy. The lack of a separate and immediate remedy not only leads to unreasonable delays between the carrying out of an inspection and the moment its implementation stands to be reviewed¹⁵¹ but, what has to be particularly emphasised, is also conditional to the adoption of a decision finding infringement, which may not necessarily happen¹⁵².

Therefore, due to the particular character and especially serious consequences for the undertakings inspected, some measures undertaken

¹⁴⁶ See J. Temple Lang, *The Common Market and the Common Law*, 1966, p. 459; See also case 5/85 *AKZO vs Commission*, E.C.R. 1986, 2585, para. 15.

¹⁴⁷ What may happen only in the of the General Court regarding action for annulment against the final infringement decision. See also R. Whish, *Competition Law*, p. 288.

¹⁴⁸ E.g. the *Canal Plus* judgment.

¹⁴⁹ Which thus stand to be examined later on with the infringement decision. The *Dow Benelux* judgment, para. 49.

¹⁵⁰ I.e. will not prevent the Commission to carry out the inspection.

¹⁵¹ Often couple of years after the inspection had been carried out.

¹⁵² See *Akzo Nobel* judgment 2007, para. 47; D. Théophile, I. Simic, *Legal Challenges...*, p. 519.

by Commission officials during inspections, *e.g.* seizure of entire discs of electronic data or not respecting the privilege against self-incrimination, should be considered as an example of actions adopted during inspections “which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position¹⁵³” and therefore should be able to be subject to an action for annulment.

The current approach of the General Court only confirms that undertakings are left in a very difficult position, given (1) the Commission’s willingness to fine undertakings that try to exercise their right to oppose and prevent officials from undertaking the controversial measures during an inspection and (2) the absence of effective¹⁵⁴ judicial control at an intermediate stage regarding those measures.

7. Judicial review of the decisions imposing pecuniary penalties

Article 261 TFEU states *expressis verbis* that the CJEU has unlimited jurisdiction over the penalties provided in the regulations adopted either jointly by the European Parliament and the Council or solely by the Council, pursuant to the provisions of the Treaties. It means that fines and periodic penalties imposed on the undertakings inspected under Articles 23 and 24 of Regulation 1/2003 are subject to full review by the CJEU. The latter act specifies moreover, in Article 31, that the CJEU may cancel, reduce or increase penalties imposed by the Commission’s decision¹⁵⁵.

It is noteworthy that the concept of unlimited jurisdiction derives from French administrative law which introduced the distinction between an appeal of legality¹⁵⁶ and appeal of full jurisdiction¹⁵⁷. The latter notably entitles the administrative court not merely to annul the contested act and refer the case back to the administrative body but also to consider fully

¹⁵³ See *Akzo Nobel* judgment 2007, paras 46 and 47.

¹⁵⁴ Since damages that may be granted as the result of an action in tort under Article 268 and 340 TFEU, will never lead to legal consequences of an action for annulment under Article 263 TFEU, *e.g.* the annulment of the challenged acts.

¹⁵⁵ “The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.” Some authors argue that Article 31 *in fine* of Regulation 1/2003 provides for an exhaustive catalogue of the CJEU competences with regard to fines and periodic penalties.

¹⁵⁶ *Recours de a légalité*.

¹⁵⁷ *Recours de pleine juridiction*.

the matter, *i.e.* to substitute its own assessment for the one presented by the initial decision maker¹⁵⁸.

The scrutiny of the General Court with regard to pecuniary penalties should encompass a review of both factual and legal grounds. If the General Court comes to the conclusion that the Commission has made a factual error in its assessment or that it treated the undertaking in an unequal way, it will adjust the level of the penalty imposed. It is noteworthy nevertheless that the General Court is entitled not only to decrease, but also to increase the level of the penalty¹⁵⁹. However, some authors argue that the powers of review of the General Court are restricted since it cannot impose a penalty where no such one was imposed by the Commission¹⁶⁰. Such additional power would however make no sense, since if there was no pecuniary penalty imposed by the Commission decision, there would not be any proceedings pursuant to Article 261 TFEU.

The question of whether Article 261 TFEU constitutes an autonomous basis for lodging an action is said to be of no practical concern¹⁶¹. Indeed, the undertaking being fined by the Commission usually brings their action under both Articles, *i.e.* 261 and 263 TFEU, even in cases in which they aimed at only a reduction of the fine. It should be further stressed, according to the General Court “unlimited jurisdiction can be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment. The sole effect of Article 229 EC [261 TFEU] is to enlarge the extent of the powers the Community judicature has in the context of the action referred to in Article 230 EC [263 TFEU]. Consequently, an action in which the Community judicature is asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty necessarily comprises or includes a request for the annulment¹⁶², in whole or in part, of that decision¹⁶³”.

It follows from these findings that for instance an action under Article 261 TFEU has to be lodged within the time-limit laid down in Article 263 TFEU¹⁶⁴.

¹⁵⁸ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-065, p. 553.

¹⁵⁹ R. Whish, *Competition Law*, p. 289.

¹⁶⁰ L.O. Blanco, *European Community Competition Procedure*, p. 558.

¹⁶¹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-065, p. 553.

¹⁶² Emphasis added by the author.

¹⁶³ See the order of the Court of First Instance of 9 November 2004 in case T-252/03 *Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) vs Commission*, para. 25.

¹⁶⁴ *I.e.* within two months after the notification of the decision in question.

Based on some case-law of the CJEU, one may argue that in order to exercise unlimited jurisdiction, not only Article 261 TFEU has to be invoked together with Article 263 TFEU but also the court has to first establish that the decision in question is illegal. For instance in the judgment in the BASF case the General Court held *expressis verbis* that “(i)t is possible for the Court to exercise its unlimited jurisdiction (...) only where it has made a finding of illegality affecting the decision, of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary¹⁶⁵”. Nevertheless, this position of the CJEU runs afoul of the very essence of the concept of unlimited jurisdiction that excludes its exercise being “subordinate to a substantive finding of illegality¹⁶⁶”. It seems, however, that the CJEU has in practice rarely exercised “pure” unlimited jurisdiction in relation to fines.

Even though, a dispute before the CJEU is normally based jointly on Articles 261 and 263 TFEU, the strict limitation of unlimited jurisdiction only to pecuniary penalties does not permit the CJEU to go beyond the limits of its powers of review set out for actions for annulment¹⁶⁷. The CJEU is therefore not entitled to recast the decision contested¹⁶⁸, issue any instruction on how the Commission should implement its ruling on annulment¹⁶⁹ or award damages¹⁷⁰.

It is important to stress that although the CJEU does not replace the penalty imposed by the Commission by a legally distinct new one, the exercise of unlimited jurisdiction results in the Commission losing competence

¹⁶⁵ See for instance judgment of the CFI of 15 March 2006 in case T-15/02 *BASF vs Commission*, E.C.R. 2006, II-497, para. 582.

¹⁶⁶ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-067, p. 554.

¹⁶⁷ See e.g. judgment of the CFI of 10 March 1992 in joined cases T-68/89 etc. *Società Italiano Vetro vs Commission*, E.C.R. 1992, II-1403. Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-067, p. 554. For the a bit contrary view according to which Article 261 TFEU and, in particular, Article 31 of Regulation 1/2003, stating that has “unlimited jurisdiction to review decisions”, entitle the CJEU to exercise “full appellate review”, see D.M.B. Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?*, *European Law Review* 2011, Vol. 36.

¹⁶⁸ See e.g. *Società Italiano Vetro* judgment, para. 319, judgment of the ECJ of 3 September 2009 in case C-534/07 P *Prym vs Commission*, E.C.R. 2009, I-7415, para. 86, and judgment of the ECJ of 8 December 2011 in case C-389/10 P *KME Germany vs Commission*, E.C.R. 2011, I-000, para. 120.

¹⁶⁹ See *Nexans* judgment of the General Court in which the Court held that it cannot order the commission to return to the undertaking the documents illegally seized during the inspection.

¹⁷⁰ This powers is stipulated separately under Articles 268 and 340 TFEU.

over the penalty¹⁷¹. The Commission is, thus, precluded from reopening the proceedings and re-fixing a penalty, if the CJEU, after having found an error in calculating the penalty or found its amount inappropriate, sets out clearly the total penalty in question¹⁷². However, if the CJEU “simply annuls a decision on the ground of illegality without itself ruling on the substance of the infringement or on the penalty”, the Commission “may reopen the procedure at the stage at which the illegality was found to have occurred and exercise again its power to impose penalties¹⁷³”.

With reference to the “restrictions” of unlimited jurisdiction it is first important to emphasise that unlimited jurisdiction does not result in a CJEU review of its own motion¹⁷⁴. Since proceedings before the CJEU are *inter partes* it is solely for the applicants¹⁷⁵ to invoke arguments and present support evidence¹⁷⁶. Thus, unlimited jurisdiction covers only issues and arguments raised by the parties (e.g. the CJEU cannot reduce the fine, on the grounds that the infringement was less serious than considered by the Commission, if no arguments as to the gravity of the infringement have been raised by the undertaking concerned)¹⁷⁷.

Furthermore, although the Commission’s Fining Guidelines in calculating reductions *in fines* are not binding for the CJEU, it seems however to follow the approach adopted therein¹⁷⁸. Even the former President of the General Court, Bo Vesterdorf, admitted: “the reality is that, almost without exception, the Court limits itself to performing a control of the legality of

¹⁷¹ Judgment of the ECJ of 15 October 2002 in Joined Cases C-238/99 P *Limburgse Vinyl Maatschappij NV (LVM) vs Commission*, E.C.R. 2002, I-8375, para. 693: “the mere bringing of an action does not entail the definitive transfer to the Community judicature of the power to impose penalties. The Commission finally loses its power once the court has actually exercised its unlimited jurisdiction”.

¹⁷² Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-069, p. 555.

¹⁷³ *LVM* judgment, para. 693.

¹⁷⁴ See *KME Germany* judgment of the Court of Justice, para. 131.

¹⁷⁵ The only exception was established for the public policy’s matters that CJEU should raise *ex officio*. See the judgment of the ECJ in case C-176 P *Stadwerke Schwäbisch Hall and others vs Commission*, E.C.R. 2007, I-170, para. 17.

¹⁷⁶ *KME Germany* judgment of the Court of Justice, para. 131.

¹⁷⁷ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-070, p. 555.

¹⁷⁸ See for instance judgment of the CFI of 12 July 2001 in joined cases T-202/98 etc. *Tate&Lyle vs Commission*, E.C.R. 2001, II-2035, paras 157–165, *Cimenteries* judgment, judgment of the CFI of 8 July 2004 in case T-48/00 *Corus UK vs Commission*, E.C.R. 2004, II-2325, para. 220, judgment of the CFI of 12 December 2007 in joined cases T-101/05 and T-111/05 *BASF and UCB vs Commission*, E.C.R. 2007, II-4949, paras 212–223.

the fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines correctly¹⁷⁹”.

This approach has been vividly criticised in relation to the debate on the sufficiency and compatibility with EConHR standards of judicial review of Commission decisions in competition matters. Reliance on the Commission’s Guidelines is regarded notably as a failure to exercise unlimited jurisdiction over fines¹⁸⁰. Some authors argue that rather than unlimited jurisdiction the CJEU exercises only a review of legality, restricted to checking whether the Commission has applied its Guidelines correctly¹⁸¹. Usually, the General Court makes reference to the Fining Guidelines in its findings, however, it concludes that “in the exercise of its unlimited jurisdiction” it is, for instance, “not appropriate to grant the reduction¹⁸²” sought by the applicant or “there is no cause to call into question the starting amount of the fine imposed on the applicants¹⁸³”. The General Court seemed to have adopted an approach according to which in the absence of an error in the fining decision there is no cause to reconsider the fine contested¹⁸⁴. Furthermore, the General Court dismissed a claim for the reduction of any fine on the grounds of the inability of the applicant to pay it, by stating that such grounds are not in conformity with the requirements set out in the Fining Guidelines and without considering this aspect in the context of its unlimited jurisdiction¹⁸⁵.

Also, in the light of the case-law of the Court of Justice, one can preclude the existence of deference to the Commission’s Fining Guidelines. For instance, in the judgment in the *KME* case the Court of Justice directly endorsed the use by the CJEU of the Fining Guidelines in order to enhanced

¹⁷⁹ B. Vesterdorf, *The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?*, *Antitrust Chronicle* 2009, 6(2), p. 19.

¹⁸⁰ Gerard, *Breaking...*, p. 461, I.S. Forrester, *A Challenge for Europe’s Judges: The Review of fines in competition cases*, *European Law Review* 2011, 185, p. 197.

¹⁸¹ D.M.B. Gerard, *Breaking...*, p. 461.

¹⁸² Judgment of the General Court of 16 June 2011 in joined cases T-204/08 and T-212/08 *Team Relocations vs Commission*, E.C.R. 2011, II-000, para. 110 or judgment of the General Court of 2 February 2012 in case T-77/08 *Dow Chemical Company vs Commission*, E.C.R. 2012, II-000, para. 143.

¹⁸³ Judgment of the General Court 19 May 2010 in case T-25/05 *KME Germany and others vs Commission*, E.C.R. 2010, II-91, para. 92.

¹⁸⁴ See judgment of the General Court of 27 September 2012 in case T-347/06 *Nynas Petroleum vs Commission*, E.C.R. 2012, II-000, para. 118, *Dow Chemical* judgment, para. 181, and judgment of the General Court of 2 February 2012 in case T-83/08 *Denki Kagaku Kogyo Kabushiki Kaisha vs Commission*, E.C.R. II-000, para. 264.

¹⁸⁵ *Team Relocations* judgment, para. 176.

transparency¹⁸⁶. With regard to another case the Court of Justice after having emphasised the respect for “the method used by the Commission to determine the amount of the fine”, it rejected the undertaking’s argument that unlimited jurisdiction implies going beyond the review of the correctness of the application by the Commission of its Fining Guidelines¹⁸⁷. The Court of Justice held that reviewing the conformity of the Commission’s calculation with the Guidelines did not constitute an error made by the General Court¹⁸⁸. Thus, it was left unclear whether unlimited jurisdiction, which entitles the CJEU to substitute its appraisal in relation to the fine for the one presented by the Commission, resulting in an obligation to depart from the latter¹⁸⁹.

Nevertheless, as pointed out by Forrester, “(t)he question the Courts should ask, but do not usually ask, is not whether the Commission erred in applying its Guidelines but whether the punishment imposed on an undertaking corresponded to the individual gravity of misconduct¹⁹⁰”.

On the other hand, the CJEU’s finding of an infringement of the Fining Guidelines by the Commission, may not result in any reduction of the fine initially imposed in the Commission decision¹⁹¹.

It has to be stressed that, as follows from CJEU case-law, the CJEU is rather unwilling to reduce fines or other penalties. Some exceptions relate to cases where the Commission failed to fully prove the infringement indicated in its decision¹⁹² or where its reasoning was defective but insufficient to annul the decision in its entirety¹⁹³.

It has to be noted further that if the CJEU finds that a fine reduction is justified in the case at stake, it does not necessarily applies the criteria enshrined in the Fining Guidelines in order to decide on such a reduction. However, this departure from the approach established in the Fining

¹⁸⁶ *KME* judgment of the Court of Justice, para. 126.

¹⁸⁷ Judgment of the Court of Justice of 8 December 2011 in case C-386/10 P *Chalkor vs Commission*, E.C.R. 2011, I-000, para. 99.

¹⁸⁸ *Chalkor* judgment, para. 77.

¹⁸⁹ *Chalkor* judgment, 0, para. 99.

¹⁹⁰ Forrester, *A Challenge for Europe’s Judges...*, p. 197.

¹⁹¹ See judgment of the CFI of 9 July 2003 in case T-224/00 *Archer Daniels Midland Company vs Commission*, E.C.R. 2003, II-2597, paras 197–206. The ECJ dismissed the undertaking’s appeal by judgment of 18 May 2006 in case C-397/03 *Archer Daniels Midland vs Commission*, E.C.R. 2006, I-4429.

¹⁹² See judgment of the CFI 11 December 2003 in case T-59/99 *Ventouris vs Commission*, E.C.R. 2003, II-5257, para. 219, in which the reduction was based on ground of “equity and proportionality”.

¹⁹³ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-071, p. 556.

Guidelines is not in the favour of undertakings since the CJEU usually grants a much smaller reduction than would result notably from the Guidelines¹⁹⁴. For instance, in the E.ON/GDF case the fine, imposed originally by the Commission of 553 million Euro, was reduced to 320 million Euro whereas in the case when the Fining Guidelines are applied the fine after reduction should amount to 267 million Euro¹⁹⁵.

Finally, sometimes the CJEU seems to expressly refrain from exercising its unlimited jurisdiction. Although the CJEU finds that the challenged decision cannot be fully upheld or should even be annulled in its entirety¹⁹⁶ and sets aside the fine imposed by the Commission, it nevertheless decides to leave to the Commission the implementation of the Court's ruling, including the re-fixing of the fine in accordance with the substantive findings presented in the judgment¹⁹⁷. In the *Toshiba* case, the General Court held even that it is "not able to calculate" the fine itself. Thus, in the Court's view, it was not appropriate for it to exercise unlimited jurisdiction, *i.e.* modify the fine imposed by the Commission decision¹⁹⁸. Such an approach may be subject to criticism since the existence of unlimited jurisdiction implies necessary the competence of the court to freely fix the amount of the fine which it considers appropriate in the circumstances in question¹⁹⁹. As emphasised by Ch. Kerse and N. Khan "(s)uch an approach

¹⁹⁴ For instance according to the CJEU, if the Commission fails to prove the entire duration of the period of infringement, the reduction of fine does not have to be proportionate to the reduction of the former. See judgment of the CFI of 6 July 2000 in case T-62/98 *Volkswagen vs Commission*, E.C.R. 2000, II-2707, para. 347 and upheld by judgment in appeal of the ECJ of 18 September 2003 in case C-338/00 P *Volkswagen vs Commission*, E.C.R. 2003, I-9189, para. 149. *A contrario*, for a rare exception where the reduction of the CJEU was more advantageous for the applicant than it would result from the methodology of Fining Guidelines, see judgment of the General Court of 5 October 2011 in case T-11/06 *Romana Tabacchi vs Commission*, E.C.R. 2011, II-000, para. 284.

¹⁹⁵ Judgment of the General Court of 29 June 2012 in case T-370/09 *GDF Suez vs Commission*, E.C.R. 2012, II-000, paras 460–466.

¹⁹⁶ Judgment of the General Court of 16 June 2011 in case T-210/08 *Verbuizingen Coppens vs Commission*, E.C.R. 2011, II-000.

¹⁹⁷ See *e.g.* judgment of the General Court of 25 October 2011 in case T-348/08 *Aragonesas Industrias y Energia vs Commission*, E.C.R. 2011, II-000, para. 307 and judgment of the General Court of 12 July 2011 in case T-113/07 *Toshiba vs Commission*, E.C.R. 2011, II-000, para. 297, judgment of the General Court of 24 March 2011 in case T-385/06 *Aalberts Industries vs Commission*, E.C.R. 2011, II-000.

¹⁹⁸ *Toshiba* judgment, para. 297. Indeed, a further decision was adopted subsequently by the Commission in which a new amount of fine was fixed in conformity with the suggestions of the General Court.

¹⁹⁹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-077, p. 559.

is arguably another manifestation of the Court's deference towards the Fining Guidelines²⁰⁰".

Indeed, to the best of the author's knowledge, the last judgment in which the CJEU reduced a contested fine was delivered in 1994 and this was simply because it was found to be inappropriate in relation to the gravity of the infringement committed by the applicant²⁰¹. Even though the considerations of the General Court in the *Arkema* case may suggest the exercise of unlimited jurisdiction in its "pure" version, the eventual reduction of the fine was justified by the finding of an error in the challenged Commission's decision²⁰².

It is noteworthy nevertheless that the General Court is entitled not only to reduce, but also to increase the level of the penalty²⁰³.

As to the competence of an increase of the fine imposed by the Commission, one may also notice the reluctance of the CJEU to do so. This issue was relevant in the context of the previous Leniency Notice²⁰⁴ according to which an undertaking could benefit from a reduction due to so called passive "non contest" forms of co-operation with the Commission. If this was the case and subsequently the undertaking in an action lodged before the General Court none the less contested the facts established in the Commission's decision, the Commission was seeking an increase of the initial amount of the fine²⁰⁵. Since the stance has changed²⁰⁶ and these circumstances cannot occur any more this question will not be further analysed.

Another circumstance in which the CJEU happened to increase the fine fixed by the Commission was for the purpose of "restoring a fair balance" between the cartelists, namely Japanese producers and their European counterparts of which the latter had committed more infringements than the former. It was nevertheless surprising that, in order to comply with

²⁰⁰ *Ibidem*, No. 8-078, p. 559.

²⁰¹ See judgment of the CFI of 14 July 1994 in case T-77/92 *Parker Pen vs Commission*, E.C.R. 1994, II-549.

²⁰² See judgment of the General Court of 7 June 2011 in case T-217/06 *Arkema France vs Commission*, E.C.R. 2011, II-000, paras 247–253.

²⁰³ R. Whish, *Competition Law*, p. 289.

²⁰⁴ Leniency Notice 1996.

²⁰⁵ See for instance judgments of the CFI in the following cases: T-354/94 *Stora Kopparbergs Bergslags vs Commission*, E.C.R. 2002, II-843, para. 85, T-66/99 *Minoan Lines vs Commission*, E.C.R. 2003, II-551, T-224/00 *Arhcer Daniels Midland Company vs Commission*, T-236/01 etc. *Tokai Carbon vs Commission*, E.C.R. 2004, II-1181 and judgment of the ECJ in case C-301/04 *P Commission vs SGL*, E.C.R. 2006, I-5915.

²⁰⁶ Neither the Leniency Notice from 2002 nor from 2006 stipulates for such provision.

the principle of equal treatment, instead of reducing the amounts of fines imposed on the Japanese producers, the General Court decided to increase the fines on the European producers²⁰⁷.

In particular, since previously in similar circumstances the General Court did not even consider another possibility other than reducing the fine imposed on the applicant who had committed fewer infringements²⁰⁸.

Some authors argue in this context, that the powers of review of the General Court are restricted since it cannot impose a penalty where no such one was imposed by the Commission²⁰⁹. This argument is however wrong. Such an additional power would however make no sense, since if first there was no pecuniary penalty imposed by the Commission decision, there would not be any proceedings pursuant to Article 261 TFEU.

Passing now, more specifically, to Commission inspections, Articles 261 TFEU and 31 of Regulation 1/2003 grant the undertakings, fined under Articles 23(1)c, d, e²¹⁰ or 24(1)e²¹¹ of Regulation 1/2003²¹², the right to challenge the Commission decision to impose a fine or periodic penalty before the General Court and, on appeal, the Court of Justice. Since the Commission has two options to punish the undertakings for obstructing the inspection or for failing to cooperate, *i.e.* either to include this behaviour as an aggravating circumstance in the final decision on any infringement²¹³ or,

²⁰⁷ See judgment of the CFI of 8 July 2004 in joined cases T-67/00 etc. *JFE Engineering and others vs Commission*, E.C.R. 2004, II-2501, para. 364.

²⁰⁸ *Ventouris* judgment, paras 214–222.

²⁰⁹ L.O. Blanco, *European Community Competition Procedure*, No. 15.17, p. 558.

²¹⁰ For having (c) produced the required books or other records related to the business in incomplete form during inspections under Article 20 or refused to submit to inspections ordered by a decision adopted pursuant to Article 20(4), (d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,
- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4); and (e) broken seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission.

²¹¹ In order to compel them to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

²¹² For more on the fine and periodic penalty payments that may be imposed on the undertakings inspected see Chapter IV “Procedural fines and periodic penalty payments”.

²¹³ See for instance decision of the Commission of 30 November 2005 in case COMP/38354 *Industrial Bags* or decision of the Commission of 13 September 2006 in case COMP/F/38.456 *Dutch Bitumen* in which the fines for the infringement of Article 101 or 102 TFEU were raised by an additional 10% due to procedural infringements.

what happens less often²¹⁴, to adopt a separate decision imposing a direct fine or periodic payment on the undertaking for its conduct during the inspection²¹⁵. It is therefore important to note that the review of the pecuniary penalties relating to the stage of investigation may be either reviewed in the framework of the CJEU' jurisdiction over the Commission's final substantive decisions or independently as an action against the Commission decision on the imposition of such a penalty. Undoubtedly, this entitlement constitutes an important safeguard protecting the undertaking from abuse by the Commission's powers of inspections, in particular from being "punished" for having exercised their right to oppose²¹⁶ or invoked privilege against self-incrimination etc. Nevertheless, two points put doubt on the effectiveness of this guarantee.

First, due to the reasons indicated above, such actions rarely seem to be successful, *i.e.* rarely result in the CJEU setting aside or reducing the pecuniary penalties imposed in such circumstances²¹⁷.

Second, since the proceedings in questions are of a quasi-criminal character and thus as Article 6 EConHR under its criminal heading applies, the challenged Commission decision is to be subject to the review of the full jurisdiction of the court²¹⁸. This requirement not only means that the court in question should have the power to analyse all legal and factual questions and have the power to substitute its own assessment for the one adopted by the decision making-body but that it should also do so in practice. Consequently, the judicial review cannot be limited to the verification whether the appealed decision is compatible with substantive law²¹⁹, *i.e.* the CJEU cannot focus solely on whether the Commission while fixing the level of the penalty at stake has followed its Fining Guidelines or whether it has infringed its rules.

It has to be stressed that the sole restriction to the review exercised by the General Court under Article 261 TFEU and Article 31 of Regulation 1/2003

²¹⁴ K. Stolarski, *Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?*, Yearbook of Antitrust and Regulatory Studies 2011, Vol. 4(5), p. 78.

²¹⁵ *Ibidem*, p. 73.

²¹⁶ If they find that for instance the inspectors in their search go far beyond the scope indicated in the inspection decision.

²¹⁷ See for instance the recent judgment of the General Court of 15 December 2010 in case T-141/08 *E.ON Energie*.

²¹⁸ In particular if the pecuniary penalty regarding the undertaking's conduct during the inspection is included in the final substantive fine imposed by the Commission by its infringement decision.

²¹⁹ See *Potocka* judgment, paras 55, 58; *Sigma Radio Television* judgment, paras 153–154.

is that this control cannot amount to a review of the General Court's own motion. With the notable exception regarding matters of public policy that the CJEU is obliged to raise *ex officio*, raising pleas against the contested decision and adducing evidence in support thereof remain the obligation of applicants²²⁰.

Thus, in theory the combination of the review of legality and the unlimited jurisdiction should meet the standard of full jurisdiction as set out by the ECtHR²²¹. It is noteworthy that Judge Pinto de Albuquerque, in his dissenting opinion in *Menarini*, referred notably to the unlimited jurisdiction provided by Article 31 of Regulation 1/2003 as a model example of full jurisdiction²²².

Nevertheless, the CJEU reluctance in practice to freely assess the amount of an appropriate penalty may be regarded as not being in line with the above requirements established by the ECtHR. Therefore, in the light of CJEU case-law one may unfortunately have some doubt as to whether the CJEU actually exercises full jurisdiction over Commission decisions imposing fines and periodic penalty payments and hence call into question the conformity of EU practice with the standards enshrined in the ECHR.

8. Judicial review of the inspection's decisions

The controversies over Commission powers highlight the need for effective judicial protection. There is no doubt that, in order to determine whether the principle of proportionality was respected, *i.e.* the Commission had sufficient grounds to support the initial suspicion of a serious infringement of competition law and thus to justify the ordered investigative measures,

²²⁰ *Chalkor* judgment, paras 64–66. The Court held in para. 65: 'That requirement, which is procedural in nature, does not conflict with the rule that, in regard to infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded'.

²²¹ See Opinion of Advocate General Sharpston of 10 February 2011 in Case C-272/09 P *KME vs Commission*, not yet reported in ECR, para. 70.

²²² Dissenting Opinion of Judge Pinto de Albuquerque in *Menarini*, para. 8. See also W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 25.

every inspection decision should be subject to *ex post* judicial review²²³. Therefore, even though, in principle, there is no prior judicial control within the EU²²⁴, this stance is unproblematic since a prior court authorisation is not mandatory for an inspection to be considered legal as long as the inspection can be subject to comprehensive judicial review.

Indeed, Commission inspection decisions may be subject to the posterior control exercised by the CJEU²²⁵. The possibility of bringing an action against a Commission decision is introduced *inter alia* by Article 20(4), pursuant to which the inspection decision has to specify “the right to have the decision reviewed by the Court”. The power to exercise judicial review over the actions of EU institutions is conferred on the CJEU by Article 263 TFEU. As confirmed by the case-law of the CJEU, an inspection decision can be challenged through an action for annulment specified in Article 263(4) TFEU²²⁶. Pursuant to this provision the CJEU is entitled to review the legality²²⁷ *inter alia* of the Commission’s acts “intended to produce legal effects vis-à-vis third parties”.

Article 263(4) TFEU also states that “any natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them”. The Commission decision may be challenged on the grounds of a “lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of

²²³ *Roquette Frères* judgment, paras 49 and 50, and – implicitly – *Dow Chemical Ibérica* judgment, para. 52; Opinion of AG Kokott in case *Nexans*, para. 85.

²²⁴ An exception is provided in Art. 20(7) Regulation 1/2003. If an inspection is carried out with the assistance of national officials, due to its very coercive nature, this type of inspection may be subject to prior judicial control by national courts, if national relevant law provides so. Nevertheless, this control is said to be illusory since its scope is limited only to whether the “coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection”, (do not appear “manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation”). This test was established in *Roquette Frères* judgment, (paras 74, 80) and subsequently introduced in Art. 20(8) Regulation 1/2003.

²²⁵ As already stated above, the EU courts have the exclusive jurisdiction as to the question of lawfulness of the Commission’s acts. See for instance judgment of the ECJ of 14 December 2000 in case C-344/98 *Masterfoods*, E.C.R. 2000, I-11369.

²²⁶ See for instance *Ventouris* judgment, para. 126: “an undertaking against which the Commission has ordered an investigation may bring an action against that decision before the Community judicature under the fourth paragraph of Article 173 of the EC Treaty [current Article 263 TFEU]”

²²⁷ Contrary to Article 261 TFEU, Article 263 TFEU does not provide for full judicial review but only for a limited one what has been vividly criticised.

any rule of law relating to their application, or misuse of powers²²⁸". It is noteworthy that despite the distinction in this provision of specific grounds for lodging an action, the CJEU has become quite flexible as an alternative or in addition to each other depending on the circumstances of the case²²⁹. In practice, the ground for illegality is mostly qualified as "infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application"²³⁰.

The action should be brought within 2 months following the notification of the decision²³¹ to the undertaking concerned²³².

With regard to the question of *lucus standi*, undoubtedly the undertakings inspected, being addressees of the inspection decision that concern them directly, are entitled to lodge an action for annulment of that decision. Nevertheless, it has been pointed out by some authors that if a challenged act addressed to one undertaking may influence the competitive relations between the undertaking on the market concerned, this does not suffice to entitle any such undertaking to be considered "directly and individually" concerned by the act in question²³³.

²²⁸ Article 263(2) TFEU.

²²⁹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-085, p. 562.

²³⁰ H.G. Schermers, D. Waelbroeck, *Judicial Protection in the European Union*, 6th ed., 2001, para. 722.

²³¹ There might be some doubts sometimes as to whether the notification took place if e.g. addressee of the decision may have several registered offices or related undertakings. See for instance judgments of the ECJ of 26 November 1985 in case 42/85 *Cockerill-Sambre vs Commission*, E.C.R. 1985, para. 11, and of 15 December 1994 in case C-195/91 *P Bayer vs Commission*, E.C.R. 1994, I-5619, paras 21–23. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-010, p. 525.

²³² The CJEU adopted a very strict approach regarding limitation periods, irrespective of whether the deadline was not respected by the undertaking or by the Commission. See for instance judgment of the CFI of 14 October 2004 in case T-44/02 *Dresdner Bank vs Commission*, in which the CFI took consequences of the fact that the Commission had failed to submit its defence in time. It namely gave judgment by default that were subsequently upheld by the Court of Justice (the case T-44/02 *OP Dresdner Bank vs Commission*, E.C.R. 2006, II-3567. See also judgment of the ECJ of 17 May 2002 in case C-406/01 *Germany vs Commission*, E.C.R. 2002, I-4561, judgment of the Court of Justice of 16 November 2010 in case C-73/10 *P Internationale Fruchtimport Gesellschaft Weichert vs Commission*, E.C.R. 2010, I-11535, judgment of the CFI of 14 November 2008 in case T-45/08 *Transportes Evaristo Molina vs Commission*, E.C.R. 2008, II-265, and on appeal (dismissed) judgment of the Court of Justice of 11 November 2010 in case C-36/09 *P Transportes Evaristo Molina vs Commission*, E.C.R. 2010, I-145.

²³³ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-085, p. 562. See judgment of the ECJ of 10 December 1969 in joined cases 10&18/68 *Società Eridania Zuccherifici vs Commission*, E.C.R. 1969, 459, para. 7. On the contrary if an undertaking is only a competitor

It is namely within the proceedings before the competent EU courts²³⁴, that the Commission is obliged to specify the information on the basis of which it justifies the undertaken search of the undertakings premises²³⁵. The illegality of a decision authorising an inspection, including its disproportional character, should prevent the Commission from using²³⁶ any evidence which has been obtained in the course of that investigation²³⁷. It is crucial in the light of the protection of undertaking's right to defence that, if the challenged inspection decision is annulled by the EU courts, the Commission is prohibited from using, for the purposes of any proceeding regarding an infringement of EU competition rules, any documents or evidence which it has obtained during the investigation in question. Otherwise the final decision on the infringement should be annulled by the CJEU, in so far as it was based on such evidence²³⁸, in particular if as a consequence the Commission lacks sufficient evidence to prove the infringement²³⁹.

of the addressee the contested act or has merely a commercial relationship with that the addressee, this should not suffice to confer standing. See decision on admissibility of the CFI in joined cases T-542/93 *Métropole Télévision vs Commission*, E.C.R. 1996, II-649, decision on admissibility of the CFI in case T-87/92 *Kruidvat vs Commission*, E.C.R. 1996, II-1931 and decision on admissibility of the CFI in case T-170/06 *Alrosa vs Commission*, E.C.R. 2007, II-2601, paras 36–41.

²³⁴ And not, e.g., already in the statement of reasons for its inspection decision. See also in this regard judgment of the ECJ in case C-407/04 P, *Dalmine vs Commission*, E.C.R. 2007, I-829, para. 60, in which the ECJ recognised the risk that the undertakings concerned might conceal evidence if they were to discover during the first stage of the investigation what information the Commission has in its possession at that time.

²³⁵ See *Hoechst* judgment, para. 41; *Dow Benelux* judgment, paras 9 and 15; *Dow Chemical Ibérica* judgment, paras 45 and 51; and *Roquette Frères* judgment, paras 60 to 62.

²³⁶ For the purposes of any competition law proceedings.

²³⁷ This constitutes a safeguard protecting undertaking against fishing expeditions conducted by the Commission.

²³⁸ See *Roquette Freres* judgment, para. 49; *Minoan* judgment, para. 56; *Ventouris* judgment, para. 126, the orders of the President of the ECJ of 26 March 1987 in Case 46/87 R *Hoechst vs Commission* [1987] ECR 1549, paragraph 34, and of 28 October 1987 in case 85/87 R *Dow Chemical Nederland vs Commission* [1987] ECR 4367, paragraph 17; See also H. Andersson, E. Legnerfalt, *Dawn raids in sector inquiries...*, p. 444; M. Bernatt, *Powers of Inspection...*, p. 63.

²³⁹ The whole decision was annulled for lack of sufficient proof in judgment of the ECJ of 20 January 1994 in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and ors vs Commission*, E.C.R. 1993, I-1307; judgment of the CFI of 15 March 2000 in case T-337/94 *Enso-Gutzeit vs Commission*, E.C.R. 1998, II-1571, paras 144, 148–154; *Dresdner Bank* judgment; judgment of the General Court of 13 July 2011 in case T-44/07 *Kaucuk vs Commission*, nyr, paras 59–68; judgment of the General Court of 13 July 2011 in case T-45/07 *Unipetrol vs Commission*, nyr, paras 59–68; judgment of the General Court of 13 July 2011 in case T-53/07 *Trade-*

Nevertheless, it has to be stressed that the challenged decision is valid until the General Court declares otherwise and thus cannot be treated as void by the undertaking that questions its legality²⁴⁰.

8.1. Application for interim measures

It is moreover noteworthy that lodging an action for annulment will not have a suspensory effect itself. However, submitting a separate application under Article 278 TFEU²⁴¹ may result in a stay of execution of the Commission's decision. None the less, it has to be emphasised that it is impossible in practice for an undertaking to apply for and obtain immediate interim relief from the General Court in order to effectively prevent the conducting of the Commission's inspection. Even though, in the case of "an imminent risk of severe and lasting harm²⁴²" to the applicant, interim relief may be granted by the General Court *ex parte*²⁴³, under Article 105(2) of the Rule of Procedure of the General Court, such a procedure still takes at least several days²⁴⁴. Moreover, the Court's power to grant the interim measure *ex parte* is used wholly exceptionally²⁴⁵. Thus, the effectiveness of this application is illusory in the context of inspections. The General Court's decision on this issue is always taken after the termination of the inspection and can never prevent the inspection from being carried out.

Furthermore, the application for interim measures can be submitted only if the main action is already pending before the General Court. Although

Stomil vs Commission, nyr, paras 73–78. It is noteworthy that in other instances decisions regarding cartels were partially annulled due to the fact that the Commission had not taken into account all the evidence brought by the applicant: judgment of the General Court of 16 June 2011 in case T-185/06 *L'Air liquide vs Commission*, nyr, paras 74–83; judgment of the General Court of 16 June 2011 in case T-196/06 *Edison vs Commission*, nyr, paras 87–94.

²⁴⁰ Judgment of the ECJ of 13 February 1979 in case 101/78 *Granaria vs Hoofdporduktschap voor Akkerbouwprodukten*, E.C.R. 1979, 623 and *Hoechst* judgment, para. 64. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-076, p. 146.

²⁴¹ "Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended."

²⁴² R.Whish, *Competition Law*, p. 289.

²⁴³ *I.e.* pending the outcome of the proceedings regarding the granting of interim relief.

²⁴⁴ It is impossible to be granted such a relief within hours. See judgment of the CFI of 10 March 2005 in case T-184/01 *R IMS Health vs Commission*, E.C.R. 2001, II-3193.

²⁴⁵ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-077, p. 559.

this requirement is logical and understandable, it however inevitably retards the preparation and submission of the application under Article 278 TFEU.

It also has to be noted that there are three strict cumulative²⁴⁶ conditions that have to be fulfilled by the undertaking in order to be granted interim relief resulting in the operation of the Commission's inspection decision being suspended pending an appeal before the General Court. Article 104(2) of the Rules of Procedure specifies that an application for interim relief has to "state the subject matter of the dispute, the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for". First, the undertaking has to show that *prima facie* the assessment of the Commission is unlawful. Secondly, the applicant has to prove the necessity and urgency of the interim measure sought to prevent an occurrence of serious and irreparable harm. Thirdly it has to be demonstrated that in order to strike a balance between the interests of both parties the adoption of the measure in question is required²⁴⁷.

This stance has already been confirmed by the CJEU. For instance, in the *IBM* case, it was held that as follows from the settled case-law "the measures cannot be considered unless the factual and legal grounds relied on to obtain them establish a *prima facie* case for granting them. In addition there must be urgency in the sense that it is necessary for the measure to be issued and to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreparable damage to the party seeking them; finally they must be provisional in the sense that they do not prejudice the decision on the substance of the case²⁴⁸".

²⁴⁶ See judgment of the ECJ in case C-268/96 P(R) *SCK and FNK vs Commission*, E.C.R. 1996, I-4971, para. 30, and *Almamet* judgment, para. 13.

²⁴⁷ See order of the President of the CFI of 26 October 2001 in case T-184/01 R *IMS Health Inc vs Commission*, E.C.R. 2001, II-3193, para. 47: "The judge hearing an application for interim measures must, where appropriate, also weigh up the interests involved". See also order of the President of the ECJ of 14 October 1996 in case C-445/00 R *Austria vs Council*, E.C.R. 2001, I-1461, para. 73, and R. Whish, *Competition Law*, p. 289.

²⁴⁸ See order of the President of the ECJ of 7 July 1981 in cases 60&190/81 R *International Business Machines Corp. vs Commission*, E.C.R. 1981, 1857, para. 4. See also order of the President of the ECJ of 30 April 1986 in case 62/86 R *AKZO vs Commission*, E.C.R. 1986, 1503, order of the President of the ECJ of 26 March 1987 in case 46/87 R *Hoechst vs Commission*, E.C.R. 1987, 1549, para. 29, the *Health Inc* order, para. 47, order of the President of the ECJ of 11 May 1989 in joined cases 76/89 R, 77/89 R and 91/89 R *RTE and Others vs Commission*, E.C.R. 1989, 1141, para. 12, order of the President of the ECJ of in case C-149/95 P(R) *Commission vs Atlantic Container Line and Others*, E.C.R. 1995, I-2165, para. 22, and order of the President of 19 July 1995 the ECJ in case C-268/96 P(R) *SCK and FNK vs Commission*, E.C.R. 1996, I-4971, para. 30.

Unquestionably, the undertaking inspected is rather unlikely to fulfill all the above requirements for obtaining the interim relief²⁴⁹. Given that the acts of the EU institutions are presumed to be lawful, in the CJEU's view a suspension of its execution should be granted only "exceptionally²⁵⁰". Furthermore, the CJEU seems to be "particularly reluctant to intervene in the progress of Commission investigations²⁵¹". Undoubtedly, it would be difficult for the undertaking to prove that it would suffer serious and irreparable damage, if the inspection continues. For instance in the famous *Hoechst* case, the Court considered whether the undertaking had demonstrated necessity and urgency and held that no irreparable damage would actually occur if the inspection was carried out²⁵². The President of the CJEU emphasised that if the inspection was carried out on the basis of the Commission's decision that was subsequently annulled by the CJEU²⁵³, this would eventually prevent the Commission from using, in the main proceedings regarding the suspected infringement of Article 101 TFEU, any document which it might have obtained in the course of that investigation. Otherwise, the Commission would risk having its final infringement decision annulled by the CJEU in so far as it was based on such illegal evidence²⁵⁴.

One may nevertheless disagree with this finding. Even if in the case of the annulment of the inspection decision, the documents uncovered and seized by the inspectors cannot be used as evidence in the main proceedings in question, nonetheless, it follows from CJEU case-law²⁵⁵, that they may be used as "intelligence" by the Commission for the purpose of initiating a new investigation.

²⁴⁹ There is no scheme as to the manner and order of examining the above conditions by the judge hearing the application who enjoys a broad discretion in this context.

²⁵⁰ The order of the President of the ECJ of 18 August 1971 in case 45/71 R *GEMA vs Commission*, E.C.R. 1971, 791, the order of the President of the ECJ of 3 April 1974 in case 20/74 R *Kali Chemie AG vs Commission*, E.C.R. 1974, 337, the order of the President of the CFI of 17 December 2009 in case T-396/09 R *Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht vs Commission*, E.C.R. 2009, II-00246, para. 31, the order of the President of the CFI of 9 June 2011 in case T-62/06 RENV R *Eurallumina vs commission*, E.C.R. 2011, II-00167, para. 17.

²⁵¹ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-203, p. 620.

²⁵² The *Hoechst* order, paras 14–15, 32.

²⁵³ In consequence of the *Hoechst's* action for annulment brought under Article 263 TFEU.

²⁵⁴ The *Hoechst* order, para. 34. See also the order of the President of the ECJ in case 85/87 R *Dow Chemical vs Commission*, E.C.R. 1987, 4367.

²⁵⁵ See for instance *Dow Benelux* judgment and *Deutsche Bahn* judgement of the General Court.

Moreover, it seems less probable that the undertaking's arguments may prevail over the Commission's reasoning arguing that in the case of staying the inspection, there is an obvious and real danger of relevant evidence being destroyed or removed by the undertaking²⁵⁶. Although this risk may be reduced by sealing the relevant premises²⁵⁷ until the decision of the General Court, such a solution would be incompatible with the indicative limit of the inspection's duration fixed at 72 hours²⁵⁸. Thus, unfortunately, the undertaking under inspection applying for an interim measure cannot be considered a successful solution²⁵⁹.

8.2. Right to oppose

Another strategy used by an undertaking might consist of trying to exercise its right to oppose, by refusing to submit to the inspection and immediately appealing to the General Court. Nevertheless, this scenario is extremely risky for the undertaking under inspection. Firstly, due to the lack of precisions within CJEU, it remains unclear how the right to oppose may lawfully be exercised. Secondly, opposition may result in the Commission asking for the assistance of the police to be provided by the NCA and consequently the inspection being executed by force. Thirdly, the undertaking would most probably be severely fined by the Commission under Article 24(1)e for having refused to submit to the inspection. However,

²⁵⁶ See judgment of the ECJ of 4 April 1960 in case 31/59 R *Acciaieria e Tubificio di Brescia vs High Authority*, E.C.R. 1960, 98.

²⁵⁷ Under Article 20(2)d.

²⁵⁸ See recital 25 of the Regulation 1/2003.

²⁵⁹ The interim measures suspending the operation of an infringement decision taken by the Commission have been granted by the General Court, nevertheless, to the best of the author's knowledge, it has never taken place in relation to an inspection decision. See for instance the order of the President of the ECJ of 11 May 1989 in joint cases 76,77 and 91/89 R *Magill*, the order of the President of the CFI of 10 March 1995 in case T-395/94 R *Atlantic Container Line AB vs Commission*, the order of the CFI President of 3 June 1996 in case T-41/96 R *Bayer vs Commission*, the order of the President of the CFI of 7 July 1998 in case T-65/98 R *Van den Bergh Foods Ltd vs Commission*. However, more often an application for interim measures are dismissed. See for instance, the order of the President of the General Court of 10 June 2011 in case T-414/10 R *Companhia Previdente vs Commission*, the order of the President of the General Court of 13 April 2011 in case T-413/10 R *Socitrel vs Commission*, the order of the President of the General Court of 12 July 2011 in case T-422/10 R *Emme Holding SpA vs Commission*, the *Almamet* order. In relation to the dismissal of application regarding decision on request for information see for instance: order of the CFI President of 29 July 2011 in case T-292/11 R *Cemex*.

as noted by some authors, even though this strategy will not prevent the envisaged inspection from being conducted, in the case of a successful appeal, the entire inspection would be declared illegal and consequently the Commission will not be allowed to use the evidence obtained in such an unlawful way²⁶⁰. Nevertheless, it is more advisable for the undertakings to submit to the inspection order by a decision, then appeal the inspection decision as soon as possible and make all the necessary reservations in the inspection protocol without trying to block or to obstruct the inspection and as a consequence expose itself for the risk of being fined²⁶¹.

8.3. Action for damages

It is also noteworthy that any Commission misconduct in relation to the inspection contested may further result in bringing an action for damages against the Commission under Article 340 TFEU due to violation of the general principles of the EU. Nevertheless, although such a decision attributing to the Commission improper behaviour of its inspectors during the inspection should not depend on the finding of the invalidity of the Commission decision²⁶², if the undertaking has suffered losses as a direct result of the Commission decision, the best chance for success of such an action for damages occurs only after the Commission decision has been firstly annulled by the CJEU²⁶³.

8.4. Independence of the review of inspection decisions

Proceeding to another relevant aspect of the judicial review of inspection decisions, it is important to stress that in the EU competition law regime a Commission decision ordering an inspection may be subject to judicial review irrespective of the adoption of the final infringement decision concluding the result of the Commission investigation. On the one hand, this constitutes an important guarantee ensuring the undertakings' right to challenge the inspection decision without undue delay. On the other

²⁶⁰ See *Hoechst* order, para. 34, and *Dow Chemicals* order, para. 17.

²⁶¹ Immediately under Articles 23 or 24 of Regulation 1/2003 or afterwards in the final Commission decision (since non-cooperation constitutes an aggravating circumstances leading to the increase of the amount of final fine).

²⁶² See J. Temple Lang, *The Common Market and the Common Law*, 1966, p. 459; See also case 5/85 *AKZO vs Commission*, E.C.R. 1986, 2585, para. 15.

²⁶³ R. Whish, *Competition Law*, p. 288.

hand, this means that if the deadline for challenging the inspection decision expires, its legality cannot be contested within an appeal against the final infringement decision.

This stance was confirmed by the CJEU in its judgment in the *PVC* case²⁶⁴. The General Court recalled that, in order to ensure legal certainty, “a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by Article 173 of the Treaty²⁶⁵ becomes definitive as against him²⁶⁶”²⁶⁷.

In this context, a distinction had to be made between the inspection decision itself and the acts undertaken subsequently, pursuant to that decision.

As stressed above²⁶⁸ the measures undertaken by the inspectors can neither be challenged together with the inspection decision nor separately. The lawfulness of the inspection decision is not affected by the acts adopted subsequently, in particular the way in which the inspectors carried out the inspection²⁶⁹. According to the established case-law of the CJEU, the manner in which Commission investigation procedures, including inspections²⁷⁰, were conducted falls within the scope of the action of annulment of the final decision adopted by the Commission under Article 101(1) TFEU²⁷¹.

²⁶⁴ See judgment of the CFI of 20 April 1999 in joined Cases T-305/94 etc., *Limburgse Vinyl Maatschappij NV and others vs Commission*, E.C.R. 1999, II-931.

²⁶⁵ Currently Article 263 TFEU.

²⁶⁶ *LVM* judgment, para. 409; See also judgment of the ECJ of 30 January 1997 in Case C-178/95 *Wiljo vs Belgian State*, E.C.R. 1997, I-585, para. 19.

²⁶⁷ Nevertheless, couple o times the CJEU seemed to adopt less strict position according to which that “the right to contest a decision to initiate review may not diminish the procedural rights of interested parties by preventing them from challenging the final decision and relying in support of their action on defects at any stage of the procedure leading to that decision”. See judgment of the CFI of 27 November 2003 in case T-190/00 *Regione Siciliana*, E.C.R. 2003, II-5015, para. 47. “The decision to initiate the formal review procedure, even if it produces independent legal effects, is a preparatory step for the final decision which determines the definitive Commission position.” Even though the latter finding related to the state aid, subsequently in the antitrust cases the CFI made reference to the “right to ask for judicial review of the intrinsic lawfulness of the investigation”. See judgment of the CFI in cases T-65/99 *Strintzis Lines Shipping vs Commission*, E.C.R. 2003, II-5433, paras 80–81, and T-66/99 *Minoan Lines vs Commission*, E.C.R. II-5515, para. 93.

²⁶⁸ See the part relating to the need for immediate remedy.

²⁶⁹ See *Dow Benelux* judgment, para. 49 and judgment of the ECJ of 8 November 1983 in joined cases 96 to 102, 104, 105, 108 and 110/82 *IAZ vs Commission* [1983] ECR 3369, para. 16.

²⁷⁰ E.g. an alleged violation of the PASI by the inspectors.

²⁷¹ *LVM* judgment, paras 413-414; *Dow Benelux* judgment, paragraph 49; Opinion of Advocate General Mischo in that case, point 127 *in fine*; order in Case T-9/97 *Elf*

Therefore, undertakings under inspection may immediately challenge only a very narrow scope of the inspection, *i.e.* the legality of the inspection decision. Some authors point out “the difficulty of challenging the legality of inspection decision²⁷²” and argue that “it is only where the decision appears unlawful on its face that an immediate challenge will serve any purpose²⁷³”.

8.5. Standard of judicial review

Passing now to the standard of judicial review of Commission competition decisions, it has to be stressed that contrary to Article 261 TFEU, Article 263 TFEU does not provide for a full judicial review but only for a limited one, *i.e.* the review of legality. This stance has resulted in a vivid debate regarding the adequacy, in the light of the EConHR, of the EU review of Commission decisions regarding competition law²⁷⁴. Some critics have faulted the CJEU for conducting only a limited review as well as for excessively relying on the Commission’s assessment²⁷⁵.

The standard set by the CJEU is that, while dealing with an application for annulment of a decision regarding Article 101 TFEU, the CJEU is obliged to “undertake a comprehensive review of the examination carried out by the Commission²⁷⁶”. The only exception regards cases entailing a “complex economic assessment” in which the review is restricted. The CJEU may namely verify only whether “there has been no misuse of powers”, “the rules on procedure and on the statement of reasons have been complied with”, “the facts have been accurately stated” and “there has

Atochem vs Commission [1997] ECR II-909, paragraph 25), *Nexans* judgment of the General Court, para. 132.

²⁷² What illustrates Roquette case.

²⁷³ See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 3-137, p. 176.

²⁷⁴ D. Waelbroeck, D. Fosselard, *Should the Decision-Making Power...*; W.P.J. Wils, *La compatibilité des...*; Bailey, *The scope of judicial review...*, p. 1327; H. Legal, *Standards of Proof...*, C.M.L.R. Editorial Comments, *Towards a more judicial approach?...*, p. 1405, J.S. Venit, *Human all to human...*; M. Jaeger, *The standard of review in competition cases...*, p. 295; R. Nazzini, *Administrative enforcement...*, p. 971; and W.P.J. Wils, *The Compatibility with Fundamental Rights...*, pp. 5–26.

²⁷⁵ I. Vandenborre, T. Goetz, *EU Competition Law Procedure*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6.

²⁷⁶ See judgment of the CFI of 27 September 2006 in case T-168/01 *GlaxoSmithKline Services vs Commission*, E.C.R. 2006, II-2969, para. 57.

been no manifest error of assessment of those facts²⁷⁷. Some commentators note, however, that the scope of matters regarded as encompassing such a complex assessment has been constantly broadening, covering also *e.g.* technical matters²⁷⁸. Indeed, the General Court confirmed that “insofar as the Commission’s decision is the result of complex technical appreciation, those appraisals are in principle subject to only a limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s²⁷⁹”.

As established by the so called *Tetra Laval formula*, the margin of appraisal granted to the Commission “does not mean that the Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the considerations drawn from it²⁸⁰”. Even if this finding was stated in a merger case, the CJEU confirmed its application to cartel cases²⁸¹.

It has been none the less argued that the possibilities to challenge the appraisal of the Commission are quite often limited due to the discretion that the Commission enjoys²⁸². Some authors even make a distinction between (1) the Commission’s discretion that may limit the scope of judicial scrutiny by granting the Commission the choice of criteria leading to the adoption

²⁷⁷ *Ibidem*. See also judgment of the CFI of 17 September 2007 in case T-201/04 *Microsoft vs Commission*, E.C.R. 2007 II-000, para. 87, judgment of the CFI of 30 March 2000 in case T-65/96 *Kish Glass vs Commission*, E.C.R. 2000, II-1885, para. 64, upheld on appeal by order of the ECJ of 18 October 2001 in case C-241/00 P *Kish Glass vs Commission*, E.C.R. 2001, I-7759; judgment of the ECJ of 11 July 1985 in case 42/84 *Remia and Others vs Commission*, E.C.R. 1985, 2545, para. 34, and judgment of the ECJ of 17 November 1987 in joined cases 142/84 and 156/84 *BAT and Reynolds vs Commission*, E.C.R. 1987, 4487, para. 62.

²⁷⁸ I.S. Forrester, *A bush in need of pruning: The luxuriant growth of light judicial review* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: The evaluation of evidence and its judicial review in competition cases*, Hart Publishing, Oxford–Portland 2010.

²⁷⁹ See *Microsoft* judgment, para. 88.

²⁸⁰ See judgment of the Court of Justice of 20 May 2010 in case C-12/03 P *Commission vs Tetra Laval*, E.C.R. 2005, I-987, para. 39. See also Jeager, *Standard of review...*, p. 295 and N. Wahl, *Standard of review – comprehensive or limited?* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009...*

²⁸¹ *KME* judgment of the Court of Justice, para. 94.

²⁸² L.O. Blanco, *European Community Competition Procedure*, No. 15.17, p. 559.

of the decision, and (2) the Commission's power of appraisal regarding complex economic assessments which may restrict the comprehensive judicial review of the General Court²⁸³. In any case concerning the Commission's discretion the contested Commission decision may be overturned only if the Commission has manifestly erred in its judgment in what would have been decided based on the evidence that has to be persuasive and after having verified the accuracy of the facts concerned and correctness of the conclusions drawn from them. As confirmed by the General Court, "in areas where the Commission has maintained a discretion, for example as regards the starting amount of a fine or the uplift for duration, review of the legality of those assessments is limited to determining the absence of a manifest error of assessment²⁸⁴".

This approach seemed however to be corrected by the Court of Justice in the *KME* case. The Court of Justice held notably that while reviewing the Commission's application of its Fining Guidelines, the CJEU is not allowed to use the Commission's margin of discretion in order to justify a dispensation of an in-depth review with regard to law and facts²⁸⁵. However, as some authors have noted "(a)lthough the judgment arguably marks a change of time by the Court, they do not go further than confirming that the dictum in *Terta Laval* applies to cartel cases as much as it applies to merger cases²⁸⁶. It has been none the less further confirmed by the Court of Justice that the General Court cannot dispense with the exercising of a full review of all legal and factual aspects by pointing at the Commission's margin of discretion²⁸⁷.

²⁸³ D. Bailey, *Scope of Judicial Review...* See also judgment of the CFI in case T-112/99 *Métropole Television vs Commission*, E.C.R. 2001, II-2459, para. 114.

²⁸⁴ Judgment of the General Court of 27 June 2012 in case T-439/07 *Coats Holdings vs Commission*, E.C.R. 2012, II-000, para. 98.

²⁸⁵ *KME* judgment, para. 199. See also M. Bronckers, A. Vallery, *Business as usual after Menarini?*, Mlex Magazine, January–March 2012, p. 44. The the authors view no other Commission discretion than the one relating to "complex economic assessment" has been admitted by the CJEU. This seems nevertheless incorrect given the *Coats Holding* judgment.

²⁸⁶ Moreover the fact that the judgment was delivered by a chamber of five judges may suggest that the issue is not regarded by the CJEU "as making a significant shift in its jurisprudence". See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-093, p. 566.

²⁸⁷ For instance in the application of its Fining Guidelines or of its Leniency Notice. *Chalkor* judgment, para. 62, and judgment of the Court of Justice of 18 July 2013 in Case C-501/11 P *Schindler vs Commission*, not yet reported in ECR, para. 155.

On the other hand, it is argued that the margin of appreciation granted to the Commission in cases regarding competition law does not prevent the CJEU from exercising an effective judicial review²⁸⁸.

Since this question is not of a direct relevance in the cases regarding inspections, it will not be further analysed in this study²⁸⁹. We will focus now specifically on the standard of judicial review of Commission inspection decisions.

In the light of ECtHR case-law, the general principle of the EU legal system providing for the exercise of the dual role of the Commission seems to be in accordance with the requirements set out under Article 6(1) ECHR. Therefore, the key question is whether the General Court exercises full jurisdiction over Commission decisions.

Even though the review of an inspection decision carried out under Article 263 TFEU is limited to the question of the legality of the Commission decision, pursuant to the ECtHR approach, this scrutiny may nevertheless meet the requirement of full jurisdiction if the court in question is entitled (1) to examine all questions of facts and law relevant to the case it handles and (2) to quash the challenged decision in all, *i.e.* legal and factual, aspects²⁹⁰.

Some authors argue nevertheless that it is doubtful whether the CJEU exercise full jurisdiction, *i.e.* regarding both facts and law, over the Commission decision²⁹¹. They point at the formalistic review carried out by the CJEU that may not equate to the control in fact required by the ECtHR²⁹². It has been alleged further that the *ex post* review of Commission decisions ordering inspections is mostly of a formal nature

²⁸⁸ R. Whish, *Competition Law*, p. 288.

²⁸⁹ The issue regarding “complex economic assessment seems not to be relevant in the context of inspections, nevertheless one may point at an indirect relevance. Namely, if the Commission instead of fining the undertaking under Articles 23 or 24 of Regulation 1/2003 for the obstruction of inspection, decided to include this penalty in the final fine regarding the competition law infringement, this aggravating circumstance will increase the basic amount of the fine of additional 10%. Thus, the supplement relating to the inspection depends on the basic amount of the fine. If subsequently such decision is challenged and the CJEU refrain from substituting its assessment as to the basic level of the fine fixed by the Commission due to the argument of “complex economic assessment”, it means that the amount possible reduction granted in relation to the undertaking behaviour during inspection may notably depend on the Commission’s discretion.

²⁹⁰ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 17.

²⁹¹ D. Théophile, I. Simic, *Legal Challenges to Dawn Raid...*

²⁹² Especially, “no control is ever made of the Commission’s interpretation of the indicia which supposedly create suspicions of infringement”. D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections...*, p. 517.

since the General Court verifies only whether the formal requirements of Article 20 (4) have been respected, *i.e.* the decision contained the subject matter and purpose of the inspection²⁹³, the date of its beginning and information on the penalties, pursuant to Articles 23 and 24 of Regulation No. 1/2003, and on the right to have the decision reviewed by the CJEU were highlighted in the contested decision²⁹⁴.

Indeed, the CJEU approach with regard to the review of inspection decisions seems to be lenient. Despite the emphasis put on the importance of a fundamental requirement to state reasons, that are “designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence²⁹⁵”, it has been held by the CJEU that, while assessing the legal requirements applicable to the statement of reasons for an inspection decision it must be taken into account that unannounced inspections normally take place at a very early stage, *i.e.* within the preliminary investigations²⁹⁶, when the competition authority understandably lacks the information necessary to make a specific legal assessment²⁹⁷.

²⁹³ *Hoechst* judgment, paras 40–41 and *Dow Benelux* judgment, paras 7–8.

²⁹⁴ As well as whether the *sensu largo* addressee of the decision actually existed at the date of the inspection.

Nevertheless, in the recent *Nexans* judgement the General Court stressed that “Commission must identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking’s sphere of private activity”; *Nexans* judgment, para. 45.

²⁹⁵ *Hoechst* judgment, para. 29; *Dow Benelux* judgment, para. 8 and 40; *Dow Chemical Ibérica* judgment, paras 26 and 45; and *Roquette Frères* judgment, para. 47. Similarly, *LVM* judgment of the ECJ, para. 299. (This case-law relates to the predecessor provision of Regulation 17, however it is readily transposable to Article 20(4) of the Regulation 1/2003.) See also Opinion of AG Kokott in case *Nexans*, para. 44.

²⁹⁶ Before the preparation of the Statement of Objections; See *Commission notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, OJ (2011) C 308, p. 6, para. 50; see also R. Whish, D. Bailey, *Competition Law*, p. 285.

²⁹⁷ See to this effect in *National Panasonic* judgment, para. 21, as well as Opinion of AG Mischo in *Hoechst* case, para. 174; and Opinion of AG Kokott in case *Solvay*, para. 143; Regarding the question of determination of whether an infringement of Article 101 or 102 TFEU has been committed, see Opinion of AG Mischo in case *Hoechst*, para. 176; Opinion of AG Kokott in case *Solvay*, para. 144 and Opinion Of AG Kokott in case *Nexans*, para. 48.

Therefore, pursuant to the CJEU, despite the undertakings' legitimate interest in safeguarding their rights of defence, it is not indispensable that an inspection decision contains precise legal assessments, *i.e.* precisely define the relevant market, set out the exact legal nature of the presumed infringement²⁹⁸ or indicate the period during which the infringements at stake are said to have been committed²⁹⁹. This approach may be subject to criticism since the highlighting of these points are significant in determining the scope of the inspection. And the Commission powers of inspection are limited to the subject-matter of the investigations and therefore the inspectors while carrying out an unannounced inspection are entitled to search for and examine only those business records that can be relevant to the proceedings at stake³⁰⁰.

However the General Court requires the Commission to indicate as precisely as possible in its inspection decisions the presumed facts which the Commission intends to investigate³⁰¹, *i.e.* the evidence sought and the matters to which the investigation must relate³⁰².

Nevertheless, in order to prove the correctness of its decision and thus the legality of the inspection ordered thereby, the Commission actually only has to show "that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement" and, thus, "is not required to state the evidence and indicia on which the decision is based³⁰³".

Undoubtedly, the one of the most crucial questions controlled by the General Court is whether the Commission was actually in possession of the claimed evidence as well as whether the suspicions based on it were rightful. Some authors alleged however that these issues remain actually outside the

²⁹⁸ It is sufficient to indicate the 'essential features' of the suspected infringements. See *France Télécom* judgment, paras 58 and 59.

²⁹⁹ *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; *Dow Chemical Ibérica* judgment, para. 45; and *Roquette Frères* judgment, para. 82; Opinion of AG Kokott in case *Nexans*, para. 49.

³⁰⁰ See in this regard recital 24 in the preamble to, and Article 4 of, Regulation No 1/2003. See also *National Panasonic* judgment, paragraph 20; judgment of the ECJ in case 155/79, *AM & S vs Commission*, para. 15; *Hoechst* judgment, para. 25; *Dow Benelux* judgment, para. 36; and *Dow Chemical Ibérica* judgment, para. 22; and *Roquette Frères* judgment, para. 42. This limitation is however not required to be expressly specified in the statement of reasons. See Opinion of AG Kokott in case *Nexans*, para. 62.

³⁰¹ *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; *Dow Chemical Ibérica* judgment, para. 45; Opinion of AG in case *Solvay*, para. 138.

³⁰² *Roquette Frères* judgment, para. 83.

³⁰³ *France Télécom* judgment, paras 60 and 123.

scope of the control exercised by the CJEU since the CJEU is not granted access to the Commission file³⁰⁴. This argument is wrong. The CJEU may have access to the relevant evidence. However, this misunderstanding relates to the fact that the CJEU cannot act *ex officio*, but only at the request of the applicant when it comes to reviewing evidence. Thus, in order to have the relevant evidence verified by the General Court the undertaking bringing an action for annulment has to request that the General Court checks the Commission's evidence. Unfortunately, in most cases applicants fail to do so. Nevertheless, the recent example of the *Cementos Portland Valderrivas* case³⁰⁵, showed that the review may also cover the relevant evidence and thus be in line with the requirements of Article 6(1) EConHR.

With reference to other questionable points, serious doubts arise on whether the question of proportionality is effectively taken into account during the CJEU review. Despite acknowledging that an inspection decision cannot be contrary to the principle of proportionality³⁰⁶, the General Court held however that "it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules³⁰⁷". Consequently, the CJEU seems to simply abstain from contradicting the Commission unless there is a manifest error of assessment³⁰⁸.

Furthermore, the CJEU is not entitled to issue any instructions to the Commission regarding the correct implementation of the judgment³⁰⁹. Even though this stance cannot be clearly qualified as incompatible with the

³⁰⁴ See D. Théophile, I. Simic, *Legal Challenges...*, p. 517.

³⁰⁵ See judgment of the General Court of 14 March 2014 in case T-296/11 *Cementos Portland Valderrivas*, paras 24–26 and 41.

³⁰⁶ *France Télécom* judgment, para. 118.

³⁰⁷ *Ibidem*, para. 119.

³⁰⁸ If the use of inspections is proved "arbitrary" or "excessive". D. Théophile, I. Simic, *Legal Challenges...*, p. 518.

³⁰⁹ See *AKZO* judgment, para. 23, judgment of the CFI of 12 January 1995 in case T-102/92 *Viho vs Commission*, E.C.R. 1995, II-17, judgment of the CFI of 15 September 1998 in joined cases T-374/94 etc. *European Night Services and others vs Commission*, E.C.R. 1998, II-3141, para. 53, judgment of the CFI of 30 September 2003 in case T-191/98 *Atlantic Container Line vs Commission*, E.C.R. 2003, II-3275, para. 1643, judgment of the CFI of 12 July 2007 in case T-266/03 *Groupement des cartes bancaires vs Commission*, E.C.R. 2007, II-83, para. 78, judgment of the CFI 27 January 2009 in case T-457/08 R *Intel vs Commission*, E.C.R. 009, II-12, para. 49, order of the President of the ECJ of 5 March 1998 in joined cases C-199/94 P and C-200/94 P *Pevasa and Inpesca vs Commission*, E.C.R. 1995, I-3709, para. 24 and judgment of the CFI of 4 February 2009 in case T-145/06 *Omya vs Commission*, E.C.R. 2009, II-145, para. 23 and *Nexans* judgment of the General Court.

EConHR, it may be regarded as weakening the effectiveness of the CJEU review. As a relevant example one may point at the quite recent judgment of the General Court in the *Nexans* case³¹⁰. In its findings the General Court confirmed that the Commission has no power to conduct fishing expeditions. Nevertheless, the General Court rejected the *Nexans* request to order the Commission to return all documents obtained in relation to the annulled parts of the inspection decisions. The General Court stated that even though it is empowered to annul (entirely or partially) a Commission decision³¹¹, it cannot issue precise instructions in order to determine the consequences of the annulment³¹². It is for the Commission to decide in this matter, *e.g.*, whether it is required to return documents being outside the scope of investigation. This lack of additional power granted to the CJEU should be assessed negatively. Especially in the circumstances at stake it should be obvious that documents which had been obtained illegally are to be excluded from the case file and returned to the undertaking concerned.

The need for empowering the CJEU with the competence in order to show the Commission how the judgment should be implemented is strengthened by the fact that, pursuant to the highly questionable provision of the Commission Notice on the rules for access to the Commission file, documents found to fall outside the scope of the subject matter of the case only “*may*”³¹³ be returned to the undertaking from which they have been obtained” and that they will then “no longer constitute part of the file”³¹⁴.

Finally, as stipulated directly in Article 264 TFEU, “if the action is well founded, the [CJEU] shall declare the act concerned to be void”³¹⁵. With reference to the debate on the scope of the review exercised by the CJEU,

³¹⁰ *Nexans* judgment of the General Court. As to the facts of the case, in 2009 Commission officials carried out dawn raids at the premises of Nexans in France in relation to a suspected cartel in the power cables sector. The Nexans brought an action before the General Court contesting *inter alia* the scope of the inspection decision which, being overly broad and imprecise both in terms of their product and geographic scope, in practice covered the entirety, *i.e.* all sectors, of its businesses. Therefore, pursuant to the applicant, the inspection amounted *de facto* to a “fishing expedition”, since the Commission had not reasonable grounds to suspect an infringement of competition law that would justify the carrying out of a dawn raid in relation to all electrical cables.

³¹¹ And the Commission is obliged to comply with the General Court’s judgment.

³¹² *Nexans* judgment of the General Court, para. 136.

³¹³ Instead of “have to”.

³¹⁴ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, para. 9.

³¹⁵ The provision of the second paragraph according to which the CJEU can, by declaring some of the effects of the act annulled definitive, mitigate some consequences of the

it is noteworthy that under Article 264 TFEU the power of the CJEU is restricted only to annul the scrutinised acts. The EU courts are thus deprived of any possibility to substitute their own assessment for the Commission one, *i.e.* they cannot modify the challenged decision appropriately to their findings³¹⁶. Nevertheless, the possibility to partially annul the contested decisions may bring about significant amendments to the act in question.

As follows from the above, although one may point out some greater or lesser insufficiencies and questionable issues³¹⁷, they place more regard on the approach adopted by the EU courts than on the legal framework of the scrutiny. The current standard and scope of the CJEU review of inspection decisions cannot be regarded as manifestly incompatible with the requirements enshrined in the EConHR and the ECtHR, since the CJEU is entitled (1) to examine all questions of facts and law relevant to the case it handles and (2) to quash the challenged decision in all, *i.e.* legal and factual, aspects and it does so in practice³¹⁸.

9. Conclusions

With regard to the *ex ante* control exercised by national courts in relation to prior judicial authorisation of police assistance (Article 20(6) of Regulation 1/2003) or authorisation of inspections of other premises (Article 20(8) of Regulation 1/2003), it has to be stressed that those scrutinies of a national court do not fulfill in themselves the requirement of Article 6(1) EConHR. However, Commission inspection decisions, reviewed firstly by national courts, may be subsequently subject to a full review exercised by an independent and impartial tribunal, *i.e.* the General Court. Therefore, the requirements of Article 6(1) EConHR with regard to review of these decisions are eventually satisfied.

The situation is different in relation to the the right to immediate and effective remedy regarding the actions undertaken by the Commission in the course of inspections. As discussed above not all acts that bring about

annulment, seem not to be relevant in competition matters. See Ch. Kerse, N. Khan, *EU Antitrust Procedure*, No. 8-154, p. 597.

³¹⁶ See for instance judgment of the CFI of 12 December 2000 in case T-296/97 *Alitalia vs Commission*, E.C.R. 2000, II-3871, para. 170 and judgment of the Court of Justice of 29 June 2010 in case C-441/07 P *Commission vs Alrosa*, E.C.R. 2010, I-5949, para. 67.

³¹⁷ With regard to the question of proportionality or requirements as to the statement of reasons.

³¹⁸ See *Cementos* judgment, paras 24–26 and 41.

significant legal consequences for an undertaking who is being inspected are open to review under Article 263 TFEU. This approach of the CJEU leaves the undertakings concerned in very difficult position. Since the only possibility immediately available, *i.e.* to bring an action for damages does not constitute a correct and appropriate remedy in relation to the measures undertaken by the Commission during the inspections together with the fact that an undertaking's right to challenge such measures is also conditional to the adoption of a final infringement decision. This not only leads to unreasonable delays between the carrying out of an inspection and the moment its implementation stands to be reviewed, but also does not guarantee any certainty of accessibility to a remedy and thus raises some serious doubts as to its compatibility with the EConHR requirements³¹⁹.

With reference to judicial review of pecuniary penalties, in theory, the combination of the review of legality and the unlimited jurisdiction provided by Article 261 TFEU should be regraded as meeting the standard of full jurisdiction as set out by the ECtHR³²⁰. Nevertheless, the fact that the CJEU limits its review to the question of legality, in particular whether the Commission correctly applied its Fining Guidelines, as well as the reluctance of the CJEU to freely assess the amount of an appropriate penalty may be regarded as not being in line with the standards established by the ECtHR.

It derives clearly from the case law of the ECtHR that the finding as to the fulfillment of the requirement of full jurisdiction provided under Article 6 EConHR does not result from the general statements that the judicial authority in question makes with reference to the extent of its review powers. What is decisive in this context is whether full jurisdiction has been *de facto* exercised by the judicial body that reviewed a first-instance decision taken by an administrative authority³²¹.

In this context it should be noted that, similarly to the ECtHR judgment in *Menarini*, in two relevant appeal cases, *i.e.* in *Chalkor* and *Schindler*, the Court of Justice found, irrespective of the introductory statements which the General Court had made as to the extent of its review powers, that the General Court had in fact carried out an in-depth review, in response to all the pleas that had been raised by the applicant, in which it itself assessed the evidence without referring to the Commission's margin of discretion,

³¹⁹ In particular established in the judgments of the ECtHR in case *Canal Plus* and *Primagaz*.

³²⁰ See Opinion of AG Sharpston in case *KME*, para. 70.

³²¹ Judgment of the ECtHR of 21 July 2011 in Case of *Sigma Radio Television Ltd. vs Cyprus*, Application No. 32181/05, para. 155. *Menarini* judgment, paras 60–67. W.J.P. Wils, *The Compatibility with Fundamental Rights...*, pp. 20–21.

stating detailed grounds for its own decision³²². The Court of Justice thus did not find a violation of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights of the EU, which implements in EU law the protection afforded by Article 6(1) ECHR³²³.

Therefore, one has to agree with Prof. Wils who argued that “while it is essential that the General Court in fact exercises full jurisdiction, it is also important that that court is seen to exercise such jurisdiction³²⁴”. Hence, in order to avoid any confusion, it would be advisable for the CJEU to stop making reference to “manifest error”, “discretion” and “complex economic assessments” in the context of the review of the legality of decisions under Article 263 TFEU³²⁵.

Despite some insufficiencies, the *ex post* judicial review of Commission inspection decisions exercised by the EU Courts under Article 263 TFEU may be regarded as complete³²⁶ since the General Court has the power to review all legal and factual questions; nevertheless, it cannot act *ex officio*, but only at the request of the applicant when it comes to reviewing evidence³²⁷. Despite some critical comments³²⁸, the present judicial review regime applying to Commission inspections does not seem to be incompatible with the standards set by the ECtHR.

Nevertheless, this conclusion does not exclude the question on whether some improvements should be further introduced³²⁹. It is in particular recommended that the CJEU is empowered with competence to act upon its own motion as well as to issue precise instructions in order to determine the consequences of the annulment judgments.

³²² *Chalkor* judgment, paras 69–82, and *Schindler* judgment, paras 156–158.

³²³ *Chalkor* judgment, paras 51–52 and 67.

³²⁴ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 22.

³²⁵ W. J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 22. See also C.M.L.R. Editorial Comments.

³²⁶ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, pp. 5–26.

³²⁷ See e.g. *Cementos* judgment, paras 24–26 and 41.

³²⁸ D. Théophile, I. Simic, *Legal Challenges...*, p. 518.

³²⁹ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 16; J. Almunia, *Due Process and competition enforcement*, SPEECH/10/449 (IBA 14th Annual Competition Conference, Florence, 17 September 2010); J. Steenbergen, *Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge* [in:] L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law – A Tribute to Professor M.R. Mok*, Kluwer Law International 1997, 101; C. Baudenbacher, *Switzerland as a Spearhead of Competition Law in Europe?* (2011) *European Law Reporter* 114, p. 118; Charlemagne, *A democratic nightmare*, *The Economist*, 26 Oct. 2013, p. 35; W.J.P. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 *World Competition* 20 (2004).

Conclusions

The presented analysis covered selected problems and developments concerning the protection of the undertakings' right to defence in the context of inspections carried out by the Commission within competition law proceedings and showed that the level of this protection is not sufficient. Numerous insufficiencies existing in this matter were pointed out. The particular problems (indicated below) arise with regard to the undertakings' right to oppose, fishing expeditions and subsequent electronic searches of copied hard drives.

It was moreover confirmed that the protection of the right to defence granted in the EU to undertakings under inspection by the Commission is quite often ensured neither at the same level nor to the same extent¹ as the one enshrined in the case-law of the ECtHR. The divergences are seen in particular in relation to the scope of LPP, privilege against self-incrimination and lack of immediate remedies regarding measures undertaken by the Commission during inspections.

Therefore, it would be highly recommended that several improvements, as suggested hereinafter, are introduced in order to reinforce the protection of the undertakings' right to defence.

Some specific concluding remarks relating to the main issues discussed in this study are presented below:

1. The successful **enforcement of EU competition law**, in particular rules introduced in Articles 101 and 102 TFEU, require the granting of effective instruments to the EU competition authority in order to improve *inter alia* the detection of competition law infringements. However, proving that a competition law infringement took place may very often turn out to be extremely difficult given the fact that anticompetitive practices are usually

¹ The scope of the protection granted within the EU is namely more restricted than the one enshrining from the case-law of the Strasbourg's court.

agreed upon and carried out in secret. Hence, “(i)nspections are a key tool in the fight against cartels as companies rarely voluntarily hand over evidence of anti-competitive practices²” and, as emphasised by the former Director-General of DG Competition, P. Lowe, the rise in cartel decisions has resulted from a “considerable surge” in the number of dawn raids³.

2. Nevertheless, in the exercise of its extensive powers of investigation, conferred by Regulation 1/2003, the Commission is obliged to observe the right to defence of the undertakings investigated. It has been emphasised by the CJEU in its landmark judgment in the *Hoechst* case that “it is also necessary to prevent [the right to defence] from being irretrievably impaired 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 liable⁴”.

3. It is however questionable whether the powers of inspections granted to the Commission are sufficiently balanced by the safeguards conferred upon the undertakings. Despite some improvements⁵, the legal position of undertakings subject to a Commission inspection remains weak and thus needs to be strengthened. It is necessary that both – law and practice – afford further effective safeguards against the possible abuse and arbitrary behaviours of any EU competition authority exercising its extensive inspection powers.

4. With reference to **procedural fines and periodic penalty payments**, since obstruction of inspections may severely undermine the enforcement of competition law, the Commission should unquestionably be entitled to impose appropriate sanctions, having both a preventive and deterrent character, on the undertakings that have committed procedural infringements⁶. Nevertheless, sometimes impediments of inspections may be justified by the protection

² Joaquín Almunia, former Vice President of the Commission in charge of competition policy Press release, IP/11/632 Brussels, 24 May 2011.

³ See N. Kroes, *The First Hundred Days*, 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005, International Forum on European Competition Law, Brussels, 7 April 2005, P. Lowe, *What the future for Cartel Enforcement*, Brussels, Speech of 11 February 2003.

⁴ Judgment of the ECJ of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission*, para. 15, and judgment of the CFI in case T-66/99 *Minoan Lines vs Commission*, E.C.R. II-5515, para. 48.

⁵ E.g. prohibition of fishing expeditions expressly stated by the General Court in its judgment of 14 November 2012 in case T-135/09 *Nexans vs Commission*.

⁶ MEMO 14/2181 of 26 November 2014.

of the undertakings' fundamental rights⁷. Thus, imposing a financial sanction cannot be an automatic solution but should depend on the circumstances at stake; it should be an "ultimate weapon" of competition law enforcement and not a "first aid" instrument easily used by the Commission. Given the Commission's apparent willingness to sanction undertakings for their non-cooperative behaviour in the course of inspections, there might be a risk that any undertaking's attempt to exercise its right to oppose may easily lead to the imposition of a financial sanction.

Although it has been clearly held by the CJEU⁸ that the undertakings cannot be sanctioned for having lawfully exercised their **right to oppose**, but only for having abused it or for having obviously obstructed the inspection, unfortunately, so far there has been no explanation provided by the CJEU regarding the limits of the lawful exercise of the undertakings' right to oppose⁹. Hence, due to the lack of any judicial practical guidance in this aspect and the severe approach adopted by the Commission and the EU courts, in particular the zero-tolerance policy regarding the undertakings' excuses, undertakings under inspection are still left in quite a difficult position since each attempt to lawfully oppose an inspection constitutes in practice a perilous challenge. Thus, the CJEU is expected to provide some clarification with regard to the undertakings' right to defence.

Furthermore, if the Commission decides to punish the undertaking under inspection for its obstructive behaviour, the imposition of a separate fine under Article 23(1) of Regulation 1/2003 or a periodic penalty payment under Article 24 thereof should be regarded as "the proper approach¹⁰". Another option (which is more commonly chosen by the Commission), consisting of an increase in the final substantive fine for the competition law infringement¹¹ should be used exceptionally, *i.e.* only if the incident has in fact aggravated the substantive infringement, and must not be used in

⁷ For instance, the right to privacy or the legal professional privilege.

⁸ See for instance judgment of the ECJ of 28 June 2005 in joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others vs Commission*, E.C.R. 2005, I-05425, para. 353, and judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn vs Commission*, n.y.r.

⁹ Commission's *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003* seems to be insufficient.

¹⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 7-031, p. 401.

¹¹ See for instance decision of the Commission of November 2005 in case COMP/38354 *Industrial Bags*, OJ L282/41, decision of the Commission of 13 September 2006 in case COMP/F/38.456 *Dutch Bitumen case*, OJ L196/40, in case *Fittings*, OJ 2007 L283/63,

order to additionally increase the penalty imposed or to mask the fact of imposing a procedural fine with regard to the inspection¹². Otherwise, the legal certainty of the undertakings under inspection would be undermined.

5. With regard to the issue of **fishing expeditions**, their prohibition should be regarded as a fundamental and crucial safeguard for the protection of an undertaking's right to defence that prevents any arbitrary or disproportionate intervention by public authorities into the private sphere of undertakings. Argued over for many years by scholars, the illegality and the ban on fishing expeditions was finally confirmed by the CJEU. Nevertheless, according to the interpretation presented by the EU courts in the *Nexans* case, the prohibition focused solely on the product scope of inspection. While, in order to carry out an inspection, the Commission is required to state "reasonable grounds" for suspecting an infringement regarding specific product areas, the Commission nevertheless retains broad discretion in relation to the geographic scope of an inspection. It is however strongly recommended that some restriction as to the geographic boundaries set out in the inspection decision also are introduced.

The EU courts are expected to apply a strict interpretation of the requirement of sufficient suspicion¹³ to all the relevant scopes of an inspection. To better protect undertakings from any abuse by inspectors and any arbitrary or disproportionate intervention into their matters, an obligation to specify in detail in an inspection decision its purpose¹⁴ and extent should encompass all relevant aspects, *i.e.* not only products, but also time and territory¹⁵.

6. Undoubtedly, the task to strike a fair balance between the effectiveness of Commission investigations and the protection of an undertakings' right to defence is though and both approaches have their supporters and opponents.

On the one hand, due to the specific character of competition law infringements, in particular difficulties in uncovering the evidence, it is

and judgment of the CFI in case T-357/06 *Koninklijke Wegenbouw Stevin vs Commission*, E.C.R. 2012, II-000.

¹² Compare the case *Professional Videotape*, OJ 2008 C57/10, and judgment of the Court of Justice in case C-308/04 P *SGL Carbon vs Commission*, E.C.R. 2006, I-5977.

¹³ Including checking its components (such as prior possession of sufficient evidence).

¹⁴ Facts which the authority wishes to establish through the inspection.

¹⁵ See M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, YARS Vol. 2014, 7(10), pp. 129–158.

important for competition enforcement to take advantage of “**chance discoveries**”. Otherwise, the effectiveness of the Commission’s powers would be hindered if the competition authority was expected to turn a blind eye to potentially incriminating documents.

On the other hand, the Commission is only entitled to search for evidence related to the scope set out in the inspection decision. It cannot, while conducting an inspection in one case, take the opportunity to look for incriminating documents regarding other possible infringements and leading to the initiation of separate proceedings. As confirmed by the Court of Justice the undertakings’ right to defence “would be seriously affected if the Commission would be entitled to rely on evidence obtained during an inspection that was not related to the subject-matter or purpose thereof¹⁶”. Hence, if according to settled case-law documents falling outside the scope of the inspection cannot be used by the Commission as evidence, they should not be examined or seized in the first place¹⁷.

Therefore, each time the EU courts deal with this issue, they should strictly analyse whether the contested documents were in fact uncovered only incidentally or whether their discovery resulted from the fact that the inspectors were additionally carrying out a search beyond the scope of the inspection decision. Granting the Commission a too broad discretion in this matter, *i.e.* too easily accepting the justification that contested documents constitute solely “chance discoveries” which could not be ignored by the competition authority, may lead to abuses, in particular to situations when the Commission uses an inspection decision related to the one infringement to simultaneously concentrate on another distinct strand of illegal conduct or to conduct a fishing expedition.

7. Furthermore, the current practice regarding the copying of entire digital storage mediums (such as hard drives) for subsequent review at Commission premises is too intrusive, not in line with the principle of proportionality, and does not ensure sufficient protection of the fundamental rights of undertakings¹⁸. If it cannot be totally prohibited, its use should at

¹⁶ Judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux vs Commission*, para. 18, and judgment of the Court of Justice of 2 October 2002, in case C-94/00 *Roquette Frères SA vs Directeur général de la concurrence, de la consommation et de la répression des frauds*, E.C.R. 2002, 9011, para. 48.

¹⁷ Y. Botteman, J.-F. Guillardau, *The General Court’s Ruling in Deutsche Bahn: A Review of the European Commission’s Dawn Raid Practices and Ways to Challenge Them*, September 24, 2013; available at: <http://www.stepto.com/publications-9064.html>

¹⁸ *Inter alia* right to defense, right to privacy and privilege against self-incrimination.

least be restricted only to exceptional situations¹⁹. The practice should be used only if the undertaking concerned clearly agrees to limit the protection of its rights and allow the inspectors to undertake this measure. More specifically, the undertaking concerned should be granted the right to choose between letting the inspectors take the copied data to the Commission's offices or inviting the Commission to carry out the electronic search at the undertaking's premises. Moreover, the use of this coercive measure must be specified within binding law²⁰, *i.e.* relevant provisions which will provide for limits of the authorities' powers and procedural safeguards for the undertakings concerned, in order to prevent subsequent searches of digital evidence from being tantamount to a fishing expedition, have to be introduced into Regulation 1/2003. Furthermore, the EU judiciary is expected to eventually take clear position on the question of the lawfulness of this practice.

8. With regard to the **right to privacy**, pursuant to the jurisprudence of the ECtHR on Article 8 ECHR, an interference with the right to privacy may be justified if it (1) is in accordance with law, (2) has a legitimate aim and (3) is necessary in a democratic society²¹. Commission inspections undoubtedly satisfy the two first conditions; nevertheless in some cases it may be questionable whether such far-reaching interference is necessary.

Definitely, the best solution to verify the necessity of an inspection envisaged by the Commission would be to make each inspection decision subject to prior judicial review. This solution seems to have been recommended by the ECtHR. However, no clear response can be provided to questions on whether the limited scope of the *ex ante* review undertaken by national courts in some circumstances specified under Regulation 1/2003 would be accepted under the requirements enshrined in the ECHR.

On the other hand, the Strasbourg's court confirmed that the absence of prior judicial authorisation may be compensated by an effective judicial *ex post* control of the challenged inspection, assessing its necessity as well as

¹⁹ In conformity with the *Robathin* requirements, *i.e.* search of all electronic data should be justified by particular prevailing reasons and be proportionate to the circumstances at stake. See judgment of the ECtHR of 3 July 2012, in case *Robathin vs Austria*, Application No. 30457/06, paras 50–52.

²⁰ Providing for some explanations in this matter in the Commission's Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 is definitely not sufficient due to the far reaching consequences relating to the practice question.

²¹ See judgment of the ECtHR of 16 April 2002 in case *Soci t  Colas Est and other vs France*, Application No. 37971/97.

the course of conduct²². It has also been stated that the protection granted to legal persons may be less strict when compared to the one granted to natural persons. Therefore, it seems that the insufficiencies or even the absence of the prior control of the inspection decision would not automatically lead to a violation of Article 8 EConHR provided that each inspection decision may be subject to *ex post* full judicial review exercised by the CJEU.

Furthermore, in the light of ECtHR case-law, while dealing with cases regarding Article 8 EConHR, the focus should be shifted in particular to the safeguards provided to undertakings inspected under EU law. Undoubtedly, the Commission's obligation to state the reasons and the rights of undertakings under inspection to challenge the inspection decision by bringing an action for annulment before the General Court under Article 263 TFEU constitutes important guarantees protecting undertakings from unjustified and disproportionate intervention by the Commission in their private sphere. Even though one may have some doubt as to the full effectiveness of these safeguards and some improvements may always be welcome, it seems probable that the current stance may nevertheless satisfy the ECtHR requirements regarding Article 8 EConHR.

9. The principle of proportionality constitutes a supreme guideline limiting the Commission's powers of inspection. It applies to various aspects regarding Commission inspections, from the right to privacy, the question of necessity of the measures undertaken in the course of the inspection to the imposition of procedural financial sanctions on the undertakings inspected.

However, in reality the Commission has been granted "a good deal of discretion" in deciding whether and when to order and carry out an inspection²³. The right of the undertakings inspected to challenge the inspection decision before the General Court constitutes an important safeguard offering protection from any abuse committed by the Commission in the aspect. If the contested decision is held to be unlawful, due also to a violation of the principle of proportionality, the Commission will be precluded from using evidence that it acquired during the course of the inspection in any later proceedings.

Nevertheless, in the light of CJEU case-law, even though the need for protection against disproportionate interventions of the authorities in the private sphere of a person is emphasised, it may seem none the less that the EU courts quite often have the tendency to shift the focus rather on

²² See para. 87 of *Delta Pekárny* judgment.

²³ EC, *Dealing with the Commission Notifications...*, p. 34.

ensuring the effectiveness of inspections²⁴. And thus they adopt a lenient approach regarding the interpretation of the requirement of proportionality, notably in order to protect the former value from being invalidated by the latter one. Even though the ECtHR acknowledged that the level of protection of fundamental rights of legal persons may be less strict than the one set out for natural persons, given the Commission's discretion with regard to the use of its power to conduct inspections, the CJEU is expected to consider more deeply the question of the proportionality of the use of this extremely intrusive measure of investigation.

10. The example of **LPP** shows that the issue of fundamental rights in competition law has always been complex. The willingness to enhance the effectiveness of Commission investigations may lead to interference with the undertakings' right to defence, for instance by excessively limiting the scope of legal professional privilege.

In the context of the legally binding status of the CFR and the future EU accession to the ECHR it is suggested that current guarantees for undertakings relating to LPP should be developed and extended. The CJEU should in principle follow the reasoning of the ECtHR and be fully in line with the Strasbourg approach²⁵. Even if EU standards concerning LPP are said to be well set, there is no reason to claim that they must remain unchangeable forever (in particular due to the revolutionary nature of the right at stake)²⁶. Besides some small changes²⁷ which hopefully will pave

²⁴ Judgment of the General Court in case T-23/09 *CNOP and CCG vs Commission*, para. 40; See also *Ventouris* judgment, para. 122, and *Koninklijke Wegenbouw Stevin* judgment, para. 230, in which the Court of Justice held that it is "necessary to ensure that observance of the rights of the defence does not impair the effectiveness of investigations to enable the Commission to carry out its role as guardian of the Treaty in competition matters".

²⁵ See A. Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing 2008, p. 119; B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, Yearbook of Antitrust AND Regulatory Studies, Vol. 2012, 5(6), p. 204; A. Egger, *EU-Fundamental Rights in the National Legal order: The Obligation of Member States Revisited* [in:] P. Eeckhout, T. Tridimas (eds), *Yearbook of European Law*, OUP 2006, pp. 533 and 552.

²⁶ B. Vesterdorf, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues* [in:] B.E. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, p. 709; B. Turno, A. Zawlocka-Turno, *Legal Professional Privilege...*, p. 204.

²⁷ One possible improvement can be the above-mentioned Commission's practice to equal communications from non-Eu and EU external lawyers. See point 103 above.

the way to significant developments in the future, the existing practice remains unchanged.

In order to adjust to ECtHR standards, the expected modifications of LPP within the EU would require for example establishing at a more extensive and generous level the confidentiality of lawyer-client communications²⁸.

It is in particular suggested that the scope of EU LPP is expanded so that it would at least also includes those in-house lawyers who, while being employed by an undertaking, are members of the Bar or the Law Society²⁹. Nonetheless, one can come across comments that this would not be enough as, according to the more far-reaching *functional, utilitarian approach*³⁰, the criterion of membership to the Bar should not be decisive for the scope of LPP and therefore all in-house lawyers³¹ should be covered by the LPP rule³².

Furthermore, as the limitation which applies only EU lawyers seems particularly unfair and *overtly discriminatory*³³, LPP should at least be granted to lawyers who are members of the Bar in non-EU countries³⁴.

It seems moreover important to also cover within the scope of LPP those communications which were prepared, exchanged or originated within competition law compliance programmes³⁵.

11. Although the right of undertakings not to be compelled by the Commission to admit their participation in an infringement was acknowledged in the *Orkem* judgment³⁶ as one of the general principles of Community law, it has to be noted that the scope of the EU **privilege against self-incrimination** is very restricted. Namely, the protection of the

²⁸ A. Andreangeli, *EU Competition Enforcement...*, pp. 115–120.

²⁹ A. Andreangeli, *The Protection...*, pp. 53–54.

³⁰ Which is also represented by the author of the present study.

³¹ Irrespective of their membership in the Bar.

³² A. Andreangeli, *EU Competition Enforcement...*, pp. 103–109.

³³ R. Whish, *Competition Law*, 6th ed., OUP 2009, p. 268.

³⁴ Bearing in mind the highly contentious nature of this point, a recommended solution would be to simply adopt more flexible (and less formalistic) approach which assesses the LPP scope based on the circumstances of each case (*i.e.* whether for example the lawyer, within the jurisdiction in which (s)he practises is subject to binding professional ethics rules preserving professional integrity and independence towards the client). See A. Andreangeli, *The protection...*, p. 48 and B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 205.

³⁵ So not those regarding to the exercise of the right of defence.

³⁶ Judgment of the ECJ of 18 October 1989, in case *Orkem*, paras 28, 38 *in fine* and 39 and judgment of the ECJ of 18 September 1995 in case T-54/99 *Limburgse Vinyl Maatschappij NV and others vs Commission*, para. 273.

right to silence applies merely to direct self-incriminating admissions and does not cover compelling undertakings to give answers of a factual nature. The CJEU consequently refused to acknowledge the existence of an absolute right to silence³⁷. Its approach focusing mainly on the effectiveness of the Commission's powers of investigation in the context of the privilege against self-incrimination may be subject to criticism. It is commonly argued that the criminal or quasi-criminal nature of competition law proceedings requires the full application of the privilege against self-incrimination, even if this may lead to potential hindrances to the effectiveness of conducted inspections. The protection afforded by Article 6 EConHR goes appreciably beyond the *Orkem* rule and it should also apply without any limitation to competition law proceedings, in particular in the European fining procedure³⁸. Thus, one may have serious doubts as to whether the current EU approach regarding the privilege against self-incrimination is in line with the one presented by the ECtHR. The CJEU should definitely draw more inspiration from the established case law of the ECtHR in this field³⁹.

12. Given the actually weak position of undertakings inspected compared to the far-reaching inspection powers of the competition authorities, it is primordial that both inspection decisions as well as all the measures undertaken during the inspections are subject to full judicial review exercised by independent courts⁴⁰.

13. With regard to the **prior judicial control** exercised by the national courts under Articles 20(8) and 21 of Regulation 1/2003, undoubtedly this scrutiny does not in itself fulfill the requirement of Article 6(1) EConHR

³⁷ Since according to the Court of Justice this would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty under Article 105 TFEU to ensure the correct observation of the rules regarding competition within the common market. See *Orkem* judgment, para. 34, judgment of the ECJ of 18 October 1989 in case 27/88 *Solvay&Cie*, E.C.R. 1989, 3355, judgment of the General Court of 8 March 1995 in case T-34/93 *Société Générale vs Commission*, E.C.R. 1993, II-545, para. 74, and judgment of the CFI of 20 February 2001 in case T-112/98 *Mannesmannröhren-Werke vs Commission*, E.C.R. 2001, II-729, para. 66.

³⁸ J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change*, GleissLutz Rechtsanwälte, Stuttgart, 2008, p. 40.

³⁹ M.J. Frese, *The development of general principles for EU competition law enforcement – the protection of legal professional privilege*, *European Competition Law Review*, 2011, 32(4), p. 200.

⁴⁰ Marta Michalek, *Fishing expeditions...*, YARS 2014, pp. 129–158.

given that, under both provisions, the national court is not allowed to carry out a full review in relation to facts and law and it cannot “call into question the necessity for the inspection”; only the CJEU is entitled to rule on the lawfulness of Commission decisions⁴¹.

Since such a prior supervisory function is of particular importance⁴², it would be recommended that the national court is granted access to the case file⁴³ as well as to change the criteria of the proportionality test⁴⁴. Nevertheless, it has to be stressed that the Commission’s inspection decisions in both cases may subsequently be subject to full review exercised by an independent and impartial tribunal, *i.e.* the General Court. Therefore, the requirements of Article 6(1) EConHR with regard to Commission inspection decisions are eventually satisfied.

14. It is strongly recommended that a **separate immediate remedy in relation to all measures undertaken by the Commission in the course of inspections** is introduced or that the undertakings are entitled to challenge those measures within the action against the inspection decision. In the *Canal Plus* case, the ECtHR clearly stated that even a temporary uncertainty regarding the accessibility of the remedy, *i.e.* the fact that the inspection decision may only be challenged within an appeal against the final infringement decision, which may be adopted by the competition authority even several years after the inspection took place, does not satisfy the requirements of Article 6(1) EConHR and leads to a violation of this provision⁴⁵.

Therefore, due to the particular character and especially serious consequences for the undertakings under inspection, some measures undertaken by Commission officials during inspections, *e.g.* the seizure of entire hard drives with electronic data or not respecting the privilege against self-incrimination, should be considered as an example of acts adopted during inspections “which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change

⁴¹ Article 21(3) of the Regulation 1/2003.

⁴² *Robathin* judgment, para. 51.

⁴³ Instead of being obliged to take arguments raised by competition authorities for granted and automatically authorise any inspection requested. M. Michałek, *Fishing expeditions...*, pp. 129–158.

⁴⁴ So that the court may assess whether an inspection does not go beyond what is necessary to achieve its legitimate aim. See *Robathin* judgment, para. 43.

⁴⁵ See judgment of the ECtHR of 21 December 2010 *Canal Plus vs France*, Application No. 29408/08, para. 40.

in his legal position⁴⁶” and therefore should be challengeable by lodging an action for annulment.

Despite the possibility to bring an action for damages, which, however, does not constitute a correct and appropriate remedy⁴⁷, or to apply for interim measures, that, nevertheless, in every case will be granted too late⁴⁸, the current stance may raise some serious doubts as to its compatibility with the EConHR requirements, in particular regarding certainty of accessibility of the remedy. The lack of separate and immediate remedy not only lead to unreasonable delays between the carrying out of an inspection and the moment its implementation stands to be reviewed⁴⁹ but, what has to be particularly emphasised, is that it is also conditional to the adoption of a decision finding an infringement, which may not necessarily happen⁵⁰.

15. Undoubtedly, the right to bring an action against the Commission’s decision imposing pecuniary sanctions constitutes an important safeguard in protecting undertakings from the abuse of the Commission’s powers of inspection, in particular from being “punished” for having exercised their right to oppose⁵¹ or invoked the privilege against self-incrimination etc. Nevertheless, one may have some doubt as to whether that kind of decision is subject to the review of the full jurisdiction of the court⁵².

The judicial review cannot be limited to the verification of whether the appealed decision is compatible with substantive law⁵³, *i.e.* the CJEU cannot focus solely on whether the Commission while fixing the amount of

⁴⁶ See judgment of the CFI of 17 September 2007 in joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akros Chemicals vs Commission Ltd*, [2007] ECR 11-3523, paras 46 and 47.

⁴⁷ Thus, contrary to the CJEU, the author argue that action for damages does not constitute an effective remedy with regard to unlawful measures undertaken by the Commission during inspections.

⁴⁸ *I.e.* will not prevent the Commission to carry out the inspection.

⁴⁹ Often couple of years after the inspection had been carried out.

⁵⁰ See *Akzo Nobel* judgment 2007, para. 47; D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6, p. 519.

⁵¹ If they find that for instance the inspectors in their search go far beyond the scope indicated in the inspection decision.

⁵² In particular if the pecuniary penalty regarding the undertaking’s conduct during the inspection is included in the final substantive fine imposed by the Commission by its infringement decision.

⁵³ See judgment of the ECtHR of 4 October 2001 in case *Potocka and others vs Poland*, application No. 33776/96, paras 55, 58, and judgment of the ECtHR 21 July 2011 in case *Sigma Radio Television Ltd vs Cyprus*, Application No. 32181/04, 35122/05, paras 153–154.

the penalty at stake has followed its Fining Guidelines or whether it has infringed its rules. On the contrary, the CJEU should not only analyse all legal and factual questions as well as have the power to substitute its own assessment for the one adopted by the decision-making body, but that it should also do so in practice. However, the reluctance of the CJEU to freely assess the amount of an appropriate penalty may be regarded as not being in line with the requirements established by the ECtHR.

16. Before passing to the *ex post* scrutiny of inspection decisions, some insufficiencies regarding the effectiveness of the above mentioned application for **interim measures** should be highlighted. Firstly, it is impossible in practice for an undertaking to apply for and obtain immediate interim relief from the General Court in order to effectively prevent the conduct of a Commission inspection. Secondly, it seems extremely difficult to fulfill the strict criteria of Article 278 TFEU. Thus, applying by the undertaking under inspection for an interim measure cannot be considered a successful solution⁵⁴.

The importance of the possibility to stay the conducting of an inspection is none the less highlighted by the fact that even if in the case of the subsequent annulment of the inspection decision, the documents uncovered and seized by the inspectors cannot be used as evidence in the main proceedings in question, however, as follows from CJEU case-law⁵⁵, they still may be used as “intelligence” by the Commission for the purpose of initiating a new investigation.

⁵⁴ The interim measures suspending the operation of an infringement decision taken by the Commission have been granted by the General Court, nevertheless, to the best of the author’s knowledge, it has never taken place in relation to an inspection decision. See for instance the order of the ECJ President of 11 May 1989 in joint cases 76/77 and 91/89 R *Magill*, the order of the CFI President of 10 March 1995 in case T-395/94 R *Atlantic Container Line AB vs Commission*, the order of the CFI President of 3 June 1996 in case T-41/96 R *Bayer vs Commission*, the order of the CFI President of 7 July 1998 in case T-65/98 R *Van den Bergh Foods Ltd vs Commission*. However, more often an application for interim measures are dismissed. See for instance, the order of the President of the General Court of 10 June 2011 in case T-414/10 R *Companhia Previdente vs Commission*, the order of the President of the General Court of 13 April 2011 in case T-413/10 R *Socitrel vs Commission*, the order of the President of the General Court of 12 July 2011 in case T-422/10 R *Emme Holding SpA vs Commission*, the *Almamet* order. In relation to the dismissal of application regarding decision on request for information see for instance: order of the CFI President of 29 July 2011 in case T-292/11 R *Cemex*.

⁵⁵ See for instance *Dow Benelux* judgment and judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn vs Commission*.

17. As for the **judicial review of the inspection decisions**, it derives clearly from the case law of the ECtHR that the finding as to the fulfilment of the requirement of full jurisdiction provided under Article 6 EConHR does not solely result from the general statements that the judicial authority in question makes with reference to the extent of its review powers. What is decisive in this context is whether full jurisdiction has been *de facto* exercised by the judicial body that reviewed a first-instance decision taken by an administrative authority⁵⁶.

Having said this, it should be noted that despite some insufficiencies and criticism that the CJEU approach with regard to the review of inspection decisions seems to be lenient, the *ex post* judicial review of these types of the Commission decisions exercised by the EU courts under Article 263 TFEU may be regarded as complete⁵⁷ since the General Court has the power to review all legal and factual questions. Another important question is, nevertheless, whether the CJEU *de facto* does so.

It has been argued that the CJEU approach with regard to the review of inspection decisions is not strict enough. In spite of emphasising the importance of a fundamental requirement to state reasons⁵⁸, the CJEU focused notably on the fact that unannounced inspections normally take place at a very early stage, *i.e.* within the preliminary investigations⁵⁹, when the competition authority understandably lacks the information necessary

⁵⁶ *Sigma Radio Television* judgment para. 155, judgment of the ECtHR of 11 September 2011 in case *Menarini Diagnostics S.R.L. vs Italy*, Application No. 43509/08, paras 60–67, and W.J.P. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, *World Competition* 37, No. 1 (2014), pp. 20–21.

⁵⁷ Since the General Court has the power to review all legal and factual questions. W.J.P. Wils, *The Compatibility with Fundamental Rights...*, pp. 5–26.

⁵⁸ That is “designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence. *Hoehst* judgment, para. 29; *Dow Benelux* judgment, paras 8 and 40; judgment of the ECJ in joint cases 97/87 to 99/87, *Dow Chemical Ibérica and Others vs Commission*, paras 26 and 45; and *Roquette Frères* judgment, para. 47. Similarly, *LVM* judgment of the ECJ, para. 299. (This case-law relates to the predecessor provision of Regulation 17, however it is readily transposable to Article 20(4) of the Regulation 1/2003.) See also Opinion Of Advocate General Kokott delivered on 3 April 2014 in Case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, para. 44.

⁵⁹ Before the preparation of the Statement of Objections; See *Commission notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, OJ (2011) C 308, p. 6, para. 50; see also R. Whish, D. Bailey, *Competition Law*, p. 285.

to make a specific legal assessment⁶⁰. Therefore, pursuant to the CJEU, despite the undertakings' legitimate interest in safeguarding their right of defence, it is not indispensable that an inspection decision contains precise legal assessments, *i.e.* precisely defines the relevant product and geographic market, sets out the exact legal nature of the presumed infringement⁶¹ or indicates the period during which the infringement at stake is said to have been committed⁶². This approach adopted by the EU courts may be subject to criticism since the raising of these points significantly determines the scope of the inspection.

Unfortunately, in order to prove the correctness of its decision and thus the legality of the inspection ordered thereby, the Commission currently only has to show "that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement" and, thus, "is not required to state the evidence and indicia on which the decision is based⁶³".

One may have further doubts on whether the question of proportionality is effectively taken into account during the CJEU review. In spite of acknowledging that an inspection decision cannot be contrary to the principle of proportionality⁶⁴, the General Court held, however, that "it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules⁶⁵". Consequently, the CJEU seems to simply abstain from contradicting the Commission unless there is a manifest error of assessment⁶⁶.

⁶⁰ See to this effect in judgment of the ECJ in case 136/79, *National Panasonic vs Commission*, para. 21, as well as Opinion of Advocate General Mischo in cases 46/87 and 227/88, *Hoechst vs Commission*, para. 174; and Opinion of AG Kokott in case *Solvay*, para. 143; Regarding the question of determination of whether an infringement of Article 101 or 102 TFEU has been committed, see Opinion of AG Mischo in case *Hoechst*, para. 176; Opinion of AG Kokott in case C-109/10 P *Solvay vs Commission*, para. 144 and Opinion Of AG Kokott in case *Nexans*, para. 48.

⁶¹ It is sufficient to indicate the 'essential features' of the suspected infringements. See judgment the CFI of 8 March 2007, in case T-339/04, *France Télécom SA vs Commission*, paras 58 and 59.

⁶² *Hoechst* judgment, para. 41; *Dow Benelux* judgment, para. 10; *Dow Chemical Ibérica* judgment, para. 45; and *Roquette Frères* judgment, para. 82; Opinion of AG Kokott in case *Nexans*, para. 49.

⁶³ *France Télécom* judgment, paras 60 and 123.

⁶⁴ *Ibidem*, para. 118.

⁶⁵ *Ibidem*, para. 119.

⁶⁶ If the use of inspections is proved "arbitrary" or "excessive". D. Théophile, I. Simic, *Legal Challenges...*, p. 518.

On the other hand, one may identify the cases regarding the Commission's power of investigation in which the General Court duly examined all relevant factual and legal questions⁶⁷. It seems thus that the allegations towards the scrutiny of the CJEU do not regard the legal framework of the review itself but rather the approach adopted by the EU courts.

All in all, despite some significant or less serious insufficiencies and doubts, the overall current regime of judicial review in relation to Commission inspections does not however seem to be manifestly incompatible with the standards set by the ECtHR. Nevertheless, this conclusion does not exclude the need to introduce some improvements⁶⁸ that could strengthen the current position of undertakings vis-à-vis the extensive Commission's powers. In the context of the judicial control it is in particular recommended to empower the CJEU with competence to act upon its own motion as well as to issue precise instructions in order to determine the consequences of any annulment judgments.

18. Last but not least, given the forthcoming **accession of the EU to the EConHR** the answer to the question on whether this step would significantly change, *i.e.* improve the legal position of the undertakings facing EU competition law proceedings, should be mentioned in the context of this study. Even though the CJEU has already very explicitly emphasised the relevance of the case-law of the ECtHR for the purpose of interpreting fundamental rights⁶⁹ and after the introduction of the CFR the jurisprudence of the ECtHR has become directly relevant to the application of fundamental rights provided for by the CFR, in particular the right to defence⁷⁰, the accession will bring about significant changes. First, the EConHR will become part of EU primary law, instead of constituting

⁶⁷ See *Cementos* judgment, paras 24–26 and 41.

⁶⁸ W.J.P. Wils, *The Compatibility with Fundamental Rights...*, p. 16; J. Almunia, *Due Process and competition enforcement*, SPEECH/10/449 (IBA 14th Annual Competition Conference, Florence, 17 Sep. 2010); J. Steenbergen, *Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge* [in:] L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law – A Tribute to Professor M.R. Mok* (Kluwer Law International 1997), p. 101; C. Baudenbacher, *Switzerland as a Spearhead of Competition Law in Europe?* (2011) *European Law Reporter* 114 at 118; Charlemagne, *A democratic nightmare*, *The Economist*, 26 Oct. 2013, p. 35; and W.J.P. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 *World Competition* 20 (2004).

⁶⁹ See *LVM* judgment, para. 274

⁷⁰ Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012, No. 3-006, p. 109.

just a source of EU general principles and the case-law of the ECtHR will become directly applicable to EU institutions, including the CJEU⁷¹. Moreover, the undertakings that claim to have their fundamental rights, including the right to defence, violated, will be granted another instance, *i.e.* after the judgment delivered by the Court of Justice it would be further possible to bring an application before the ECtHR in Strasbourg. The ECtHR will hence become the supreme instance in relation to cases regarding violations of the fundamental rights protected by the EConHR. Therefore, given some divergences between the approaches adopted by the ECtHR and the CJEU⁷², accession to the EConHR will definitely lead to the extension of the scope of the protection of the undertakings' right to defence.

⁷¹ B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege...*, p. 199, J.P. Costa, *The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice*, Lecture at KCL, 7th October 2008, available at http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf, p. 6.

⁷² For instance in relation to the scope of the legal professional privilege.

Bibliography

I. Literature

1. J. Aeschlimann, *Einführung in das Strafprozessrecht (Die neuen bernischen Gesetze)*, Bern 1997.
2. R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002.
3. R. Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, European Law Journal No. 4/2002, Vol. 8.
4. E.M. Ameye, *The Interplay between Human Rights and Competition Law in the EU* (2004) 25 European Competition Law Review.
5. H. Andersson, E. Legnerfalt, *Dawn raids in sector inquiries – fishing expeditions in disguise*, ECLR 2008 29(8).
6. A. Andreangeli, *Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties' freedom to contract and to enjoy property*, The Competition Law Review, Vol. 6 Issue 2, July 2010.
7. A. Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing 2008.
8. A. Andreangeli, *The Protection of Legal Professional Privilege in EU Law and Impact of the rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back*, Competition Law Review, Vol. 2, Issue 1, August 2005.
9. A. Andreangeli, *Joined cases T-125/03 and 253/03, AKZO Nobel Chemicals Ltd vs Ackros Chemicals Ltd vs Commission, Judgment of 17 September 2007, not yet reported (under appeal)*, EBLR 2008, p. 1141.
10. K. Annan, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, Doc. S/2004/616, 23 August 2004.
11. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp–Oxford–New York 2002.

12. M. Araujo, *The Respect of Fundamental Rights within the European Network of Competition Authorities* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2004.
13. I. Aslam, M. Ramsden, *EC Dawn Raids: A Human Rights Violation?*, *Comp. L. Rev.* 2008, 5(1).
14. A. Aust, *Handbook of International Law*, 2nd ed., Cambridge University Press, 2010.
15. I. Van Bael, *Due Process in EU Competition Proceedings*, Hague–London–New York 2011.
16. I. Van Bael, *EEC Antitrust Enforcement and Adjudication as seen by Defence Counsel*, *Revue Suisse du Droit International de la Concurrence* 7/1979.
17. D. Bailey, *The scope of judicial review under Article 81 EC*, *Common Market Law Review* 2004, 41, p. 1327.
18. M. Balcerzak, *Precedens w prawie międzynarodowym praw człowieka – zagadnienia wybrane* [in:] C. Mik, *Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej*, Toruń 2005, pp. 71–91.
19. M. Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka*, Toruń 2008.
20. C. Banasiński, E. Piontek (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2009.
21. E. Barbier de La Serre, *Procedural Justice in the European Community Case-Law concerning the Rights of the Defense: Essentialist and Instrumental Trends*, *European Public Law* 12(2006), pp. 225–250.
22. C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, OUP 2004.
23. C. Baudenbacher, *Switzerland as a Spearhead of Competition Law in Europe?* (2011) *European Law Reporter* 114.
24. C. Baudenbacher, *The legacy of Neelie Kroes* (2010) *Journal of European Competition Law and Practice*.
25. M.-A. Beernaert, *Salduz et le droit à l'assistance d'un avocat dès premiers interrogatoires de police*, *Rev. dr. Pénal*, 2009.
26. M.-A. Beernaert, F. Krenc, *La Cour européenne des drits de l'homme à la recherche d'une conception pragmatique du procès équitable* [in:] *Les droits de l'homme et l'efficacité de la justice*, Larcier, Brussels 2010.
27. J.-F. Bellis, *Legal professional privilege: An overview of EU and national case law*, (2011) No. 39467 e-competitions.
28. E. Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, *New York University Journal of International Law and Politics* 1999, Vol. 31.
29. M. Bernatt, *Powers of Inspection of the Polish Competition Authority. Question of Proportionality*, *Yearbook of Antitrust and Regulatory Studies (hereinafter: YARS)*, Vol. 4(5) 2011.
30. M. Bernatt, *Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)*, (2012) 1 Państwo i Prawo.

31. M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warsaw 2011.
32. M. Bernatt, *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights*, paper presented at the 9th ASCOLA conference “Procedural fairness in competition proceedings” on 27th June 2014 in Warsaw.
33. R. Bernhardt, *Problèmes liés à l’établissement d’un catalogue de droit fondamentaux pour les Communautés Européennes*, study prepared on the Commission’s demand, Bull. C.E. 1979, supplement 4.
34. L. Betten, *The EU Charter of fundamental Rights: A Trojan Horse or a Mouse?*, IJCLLIR 2001.
35. S. Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, (2006), pp. 946–953.
36. B. Bix, *Radbruch’s Formula and Conceptual Analysis*, American Journal of Jurisprudence, Vol. 56, 2011, pp. 45–57.
37. L.O. Blanco, *European Community Competition Procedure*, 2nd ed., Oxford University Press, 2011.
38. M. de Bois, *The Fundamental Freedom of the European Court of Human Rights* [in:] R. Lawson, M. De Bois, *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of G. Schermers*, Vol. III, Dordrecht–Boston–London 1994.
39. G. Bolard, *Les principes directeurs du procès civil. Le droit positif depuis Henri Motulsky*, JCP 1993. I. 3693.
40. T. Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence*, Larcier 2012.
41. M. Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to Social Security Regulations*, Human Rights Law Journal, Nos. 9–12 / 2007.
42. Y. Botteman, J.-F. Guillaudeau, *The General Court’s Ruling in Deutsche Bahn: A Review of the European Commission’s Dawn Raid Practices and Ways to Challenge Them*, 24 September 2013; available at: <http://www.steptoe.com/publications-9064.html>.
43. J. Boulanger, *Principes généraux du droit et droit positif* [in:] *Mélanges Ripert*, Vol. I.
44. M. Bronckers, A. Vallery, *Business as usual after Menarini?*, Mlex Magazine, January–March 2012.
45. C. Brown, *Gloss to the ECJ’s judgement of the June 12, 2003, C-112/00*, Common Market Law Review 2003/6.
46. J. Buhart, *La confidentialité des avis rendus par des juristes d’entreprise exerçant dans l’Union européenne*, JTDE No. 116/2005.
47. A. Burnside, H. Crossley, *AM&S and Beyond: Legal Professional Privilege in the Wake of Modernization*, Antitrust Reform in Europe: A Year in Practice, 9–11 March 2005, Brussels.

48. L. Cadiet, E. Jeuland, *Droit judiciaire privé*, préc., No. 511.
49. L. Cadiet, J. Normand, S. Amrani Mekki, *Théorie générale du procès*, Thémis droit.
50. L. Caflisch, *International Law and European Court of Human Rights*, Dialogue Between Judges, 2007.
51. L. Caflisch, *La Cour européenne des droits de l'homme: un chantier permanent?*, Zeitschrift für Schweizerisches Recht I 2012.
52. B. Cali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, Human Rights Quarterly No. 1/2007, pp. 251–270.
53. J. Callewaert, *The European Convention on Human Rights and European Union: a long way to harmony*, (2009) 6 European Human Rights Law Review.
54. J.R. Calzado, G. de Stefan, *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements* [in:] *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Hart Publishing, 2011.
55. J. Carr, *Should In-House Lawyers have Lawyer-Client Privilege?*, International Business Lawyer No. 24/1996.
56. G. Della Cananea, *L'amministrazione europea*, in *Trattato di diritto amministrativo*, edited by S. Cassese, Milano 2000.
57. C. Canenbley, M. Rosenthal, *Co-operation between antitrust authorities in – and outside the EU: what does it mean for multinational corporations?*, E.C.L.R. 2005, 26(3), pp. 178–187.
58. Y. Capdepon, *Essai d'une théorie générale des droits de la défense*, Dalloz 2013.
59. M. Cappelletti, *Nécessité et légitimité de la Justice Constitutionnelle*, Report at Colloque in Aix-en-Provence, R.I.D.C. 1981.
60. P. Carcelle, G. Mas, *Les principes généraux du droit applicable à la fonction publique*, Revue Administrative, 1958.
61. R. Carlton, J. Lawrence, M. Mcelece, *Confidentiality and Disclosure in European Commission Antitrust Proceedings – The Case For Clarity*, European Competition Journal No. 2/2008.
62. R. Cassin, *La déclaration universelle et la mise en oeuvre des droits de l'homme*, recueil des Cours de l'Académie de droit international de la Haye 1951.
63. F. Castillo de la Torre, *Evidence, Proof and Judicial Review in Cartel Cases*, (2009) 32(4) *World Competition* pp. 567–578.
64. C. Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, Competition Law Review, Vol. 7 Issue 2, pp. 181–220.
65. R. Chapus, *Droit administratif général*, L.G.D.J. Collection Précis Domat, 2001.
66. Charlemagne, *A democratic nightmare*, The Economist, 26 Oct. 2013.
67. V. Chirdaris, *Criticizing Strasbourg, Lord Hoffmann, the Limits of Interpretation, the "Margin of Appreciation", and the Problems Faced by the European Court of Human Rights* [in:] N. Bhma (ed.), *European Court of Human Rights. 50 years.*, Athens Bar Association, Athens 2010, pp. 141–163.
68. J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden–Boston 2009.

69. T. Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, Fordham International Law Journal No. 9/1985–86.
70. G. Cohen Jonathan, *La Cour des Communautés européennes et les droits de l'homme*, R. M. C. 1978.
71. L.P. Comoglio, *Procura (diritto processuale civile)*, Enciclopedia del diritto No. 6 (2000).
72. J.D. Cooke, *General Report* [in:] *The Modernization of EU Competition Law Enforcement in the EU*, FIDE 2004 National Reports.
73. G. Cornu, J. Foyer, *Procédure civile*, 3rd ed. refondue, coll. “Thémis. Droit privé”, PUF, Paris 1996.
74. G. Cornu, *Vocabulaire juridique*, 8th ed., Paris 2000 and Association Henri Capitant, PUF 2002.
75. J.P. Costa, *The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice*, Lecture at KCL, 7th October 2008, available at http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf.
76. N. Coutrelis, *La pratique de l'accès au dossier en droit communautaire de la concurrence: entre droits de la défense et confidentialité*, Concurrences No. 2/2006, pp. 66–78.
77. P.P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law, 1997.
78. P. Craig, *The Constitutionalisation of Community Administration*, E. L. Review 2003.
79. P. Craig, G. De Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press 2011.
80. EC, *Dealing with the Commission – Notification, complaints, inspections and fact-finding powers under Articles (81) and (82) of the EEC Treaty*, European commission, Bruxelles–Luxembourg 1997.
81. M. Dausès, *The Protection of Fundamental Rights in the Community Legal Order*, ELRev 1985, pp. 398–399.
82. F. Defferand, *Le suspect dans le procès pénal*, LGDJ, coll. *Système droit*, 2005.
83. F. Dehousse, *Report on the Supremacy of EC law over national law of the Member States*, EurParl Doc 43 (1965-66), JO 2923/1965.
84. K. Dekeyser, C. Gaeur, *The New Enforcement System for Articles 81 and 82 and the Rights of Defence*, [in:] B.E. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005.
85. G. Del Vecchio, *La justice. Le vérité. Essais de philosophie juridique et morale*, Dalloz, Paris 1965.
86. P. van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Hague–Boston–London 1998.
87. J.A. Donald, *Natural Law and Natural Rights*, available at <http://jim.com/rights.html>.

88. L. Drabek, *A Fair Hearing Before EC Institutions*, *European Review of Private Law* 4/2001.
89. J. Du Jardin, *Préface* [in:] *Justice pénale et procès équitable*, Vol. I, Larcier 2006.
90. R. Dworkin, *Law's Empire*, London 1986.
91. K. Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, *German Law Journal* Vol. 12, No. 10 2011.
92. Editorial Comments, *Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights*, C.M.L.R. 2011, 48.
93. A. Egger, *EU-Fundamental Rights in the National Legal order: The Obligation of Member States Revisited* [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook of European Law*, OUP 2006.
94. F. Ehm, *The Rule of Law: Concept, Guiding Principle and Framework*, Report from the Seminar *Administrative Discretion and the Rule of Law* (Trieste, Italy 12–15 April 2010).
95. O.J. Einarsson, *EC Competition Law and the Right to a Fair Trial* [in:] P. Eeckhout, T. Tridimas (red.), *Yearbook of European Law*, No. 25/2006.
96. M. Emberland, *Protection Against Unwarranted Searches and Seizures of Corporate Premises under Article 8 of the European Convention on Human Rights: The Colas Est vs France Approach*, *Michigan J. Int. L.* 2003, 25.
97. M. Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford 2006.
98. I. Fanlo Cortés, *Justice for the Poor in the Hands of the Lawyers? Some Remarks on Access to Courts and Legal Aid Models*, *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* No. 64/65.
99. G. Di Federico, *Case C-550/07P, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs European Commission, Judgement of the European Court of Justice (Grand Chamber) of 14 September 2010*, (2011) 48(2) *Common Market Law Review*, pp. 581–602.
100. J. Fennelly, *Lawyers and Employed Lawyers: the Application of Legal Professional Privilege*, *Irish Business Law* No. 1/1998, p. 2;
101. J-F Flauss, *La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle?*, 36 *Revue française de droit constitutionnel* 711 (1999).
102. I.B. Flores, K.E. Himma (eds.), *Law, Liberty, and the Rule of Law*, Springer.
103. R. Folger, R. Cropanzano, *Organizational justice and human resource management*, Thousand Oaks, 1998 CA: Sage.
104. M. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 (1995) *Denv. U. L. Rev.* 303.
105. I.S. Forrester, *A bush in need of pruning: The luxuriant growth of light judicial review* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: The evaluation of evidence and its judicial review in competition cases*, Hart Publishing, Oxford–Portland 2010.

106. I.S. Forrester, *A Challenge for Europe's Judges: The Review of fines in competition cases*, *European Law Review* 2011, 185.
107. I.S. Forrester, *Due Process in EC competition cases: A distinguished institution with flawed procedures*, (2009) 34 *ELRev*.
108. T. Fortsakis, *Principles Governing Good Administration*, *European Public Law*, No. 2/2005.
109. A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobod rynku wewnętrznego Wspólnoty Europejskiej*, Oficyna Wolters Kluwer business Warsaw 2009.
110. M.J. Frese, *The development of general principles for EU competition law enforcement – the protection of legal professional privilege*, *European Competition Law Review*, 2011, 32(4).
111. N. Fricéro, Ph. Pédrot, *Les droits fondamentaux spécifiques au procès civil* [in:] *Libertés et droits fondamentaux*, Dalloz, 10th ed. 2004.
112. M.-A. Frison-Roche, *Les droits de la défense en matière pénale* [in:] *Droits et libertés fondamentaux*, 6th ed., Dalloz.
113. M.-A. Frison-Roche, *Généralités sur le principe du contradictoire*, thèse, Paris II 1988.
114. P. Gardner, T. Ward, *The Privilege Against Self-Incrimination: In Search of Legal Certainty*, *European Human Rights Law Review*, 4/2003.
115. T. Garé, *Les droits de la défense en procédure pénale* [in:] *Libertés et droits fondamentaux*, Dalloz, 10th ed. 2004.
116. L. Garlicki, *The methods of interpretation* [in:] F. Melin-Soucramanien (ed.), *L'interprétation constitutionnelle*, Paris 2005.
117. B.A. Garner (ed.), *Black's Law Dictionary*, 9th ed., Thomson Reuters, 2009.
118. D.M.B. Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?*, *European Law Review* 2011, Vol. 36.
119. R. Garraud, *Traité théorique et pratique d'instruction criminelle et de la procédure pénale*.
120. L. Garzanti, J. Gudofsky, J. Moffat, *Dawn of new era? Powers of investigation and enforcement under Regulation 1/2003*, *Antitrust Law Journal* Vol. 72/2004.
121. S. Geer, "Balancing" and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate, *Cambridge Law Journal* No. 2/2004.
122. T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, 2nd ed., Wolters Kluwer.
123. E. Gippini Fournier, *Legal Professional Privilege in Competition Proceedings before the European Commission: beyond the cursory Glance*, *Fordham International Law Journal* No. 28/2005.
124. G. Giudicelli-Delage, *Droits de la défense* [in:] L. Cadiet (ed.), *Dictionnaire de la justice*, PUF 2004.
125. D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg 1998.
126. J. Goyder, *European Union Law* [in:] J. Goyder, *EU Distribution Law*, 5th ed., HART Publishing, 2011.

127. S. Greer, *The European Convention on Human Rights*, Oxford University Press, 2006.
128. A. Grisel, *Droit administratif suisse*, 1970.
129. S. Guinchard, *Droit processuel. Droit fondamentaux du procès*, Dalloz, 6th ed. 2011.
130. S. Guinchard, C. Chainais, F. Ferrand, *Procédure civile. Droit interne et droit de l'Union européenne*, Précis, Dalloz, 31 Edn. 2012.
131. A. Haas, *Principles of Article 5 and 6 of the European Convention on Human Rights*, available at: <http://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia-detention-bail-under-echr.authcheckdam.pdf>.
132. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge 1996.
133. E.M. Hafner-Burton, *International Regimes for Human Rights*, Annual Review of Political Science 2012.
134. S.D. Hammond, *Recent Developments Relating to the Antitrust Division's Corporate Leniency Program*, 5th March 2009, speech at the 23rd Annual, National Institute On White Collar Crime, available at <http://www.justice.gov/atr/public/speeches/244840.htm>.
135. C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, EJIL 2006, Vol. 17, No. 1.
136. R. Hauser, E. Schweri, K. Hartmann, *Schweizerisches Strafprozessrecht*, Helbing Lichtenhahn, Basle 2005.
137. F. Hélie, *Traité de l'instruction criminelle*, Plon 1858.
138. S.M. Helmons, *L'applicabilité de la Convention européenne des droits de l'homme aux personnes morales*, JTDE 1996.
139. S.M. Helmons, *Les personnes morales et le droit international* [in:] *Les droits de l'homme et les personnes morales*, Brussels 1970.
140. L. Henkin, *The Universal Declaration and the U.S. Constitution*, PS: Political Science and Politics 31, No. 3 (September 1998).
141. A. Hinarejos Parga, *Bosphorus vs Ireland and the protection of fundamental rights in Europe*, European Law Review No. 2/2006, Vol. 31.
142. P. Hofmański, A. Wróbel, Komentarz do Art. 6 EKPCz [in:] L. Garlicki, *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz*, Vol. I, Warsaw 2010.
143. J. Holtz, *Legal Professional Privilege in Europe: a Missed Policy Opportunity*, Journal of European Competition Law & Practice, 14 June 2013.
144. J. Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, Murdoch U. Electronic J. L., June 2002, available at: http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html.
145. J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character* [in:] B. Ramcharan (ed.), *Human Rights: Thirty Years after the Declaration*, La Haye 1979.
146. A. Jackiewicz, *Prawo do dobrej administracji w świetle Karty Praw Podstawowych*, Państwo i Prawo No. 7/2003.

147. B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative*, 1978.
148. O. Jacot-Guillarmod, *Rights Related to Good Administration of Justice (Article 6)* [in:] R.St.J. Macdonald et al (eds), *The European System for the Protection of Human Rights*, Dordrecht–Boston–London 1993.
149. M. Janis, R. Kay, A. Bradley, *European Human Rights Law – Text and Materials*, 2nd ed., Oxford 2000.
150. M. Jaeger, *The standard of review in competition cases involving complex economic assessments: Towards the marginalisation of the marginal review?*, *Oxford Journal of European Competition Law & Practice* 2011, 2(4).
151. A. Jones, B. Sufrin, *EU Competition Law. Text, Cases, and Materials*, 5th ed., Oxford.
152. J. Joshua, *It's a privilege. Managing legal privilege in multijurisdictional antitrust investigations*, (2007) *Competition Law Insight*, 11th December 2007.
153. J. Joshua, *Privilege in multi-jurisdictional cartel investigations: Are European courts missing the point*, *Global Competition Review*, February 2004.
154. L. Jozeau-Marigne, *Rapport relatif à la sauvegarde des droits fondamentaux des citoyens des Etats membres dans l'élaboration du droit communautaire*, P.E., Document from the Seance 1972–1973, Document No. 297/72 of 28 February 1973.
155. T. Jurczyk, *Prawa jednostki w orzecznictwie Europejskiego Trybunału Sprawiedliwości*, Oficyna Wolters Kluwer 2009.
156. I.C. Kamiński, *Karta Praw Podstawowych jako połączenie praw i zasad – strukturalna wada czy szansa?* [in:] A. Wróbel (ed.), *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, Warsaw 2009.
157. K. Kanska, *Towards Administrative Human Rights in the EU Impact of the Charter of Fundamental Rights*, *European Law Journal* No. 3/2004, Vol. 10.
158. M. Karl, M. Mayer, *Competition Cases in the european union*, Alvarez & Marsal Deutschland GmbH, December 2009.
159. M. Karns, K. Mingst, *The United Nations in the 21st Century*, Westview Press, 1995.
160. C.K. Kaufman, *Nature of Justice: John Rawls and Pure Procedural Justice*, Washburn L.J. 19 (1979–1980).
161. Ch. Kerse, N. Khan, *EU Antitrust Procedure*, 6th ed., Sweet & Maxwell, 2012.
162. S. Kim, M. Levitt, *Legal Professional Privilege Under European Union Law – Navigating the Unresolved Questions Following the Akzo Judgment*, *Antitrust & Trade Regulation Report*, 99 ATRR 565, 11/05/2010.
163. Z. Kmiecik, *Postępowanie administracyjne w świetle standardów europejskich*, Warsaw 1997.
164. U. Kohlbacher, *Verteidigung und Verteidigungsrechte unter dem Aspekt der „Waffengleichheit“*, *Zurcher Studien zum Verfahrensrecht*, Schulthess, 1979.
165. J. Komárek, *Case Comment – Legal Professional Privilege and the EU's Fight against Money Laundering*, (2008) 27 *Civil Justice Quarterly*, Electronic copy available at: <http://ssrn.com/abstract=1031721>.

166. C. Kombos, *Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity*, (2006) European Public Law 12.
167. C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, 7th ed., LexisNexis, Warsaw 2013.
168. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. Wkierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Wolters Kluwer business, Warsaw 2012.
169. K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Centrum Europejskie Natolin, Zeszyt 39, Warszawa 2010.
170. N. Kroes, *The First Hundred Days*, 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005, International Forum on European Competition Law, Brussels, 7 April 2005.
171. M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warsaw 2001.
172. G. Kruger, *Veröffentlichungen d. Ver. d. D. Staatsrechtslehren*, Heft 17.
173. F. Kuty, *Justice pénal et procès équitable*, Bruxelles, Larcier, 2006.
174. A. Lamparello, *Incorporating The Procedural Justice Model Into Federal Sentencing Jurisprudence In The Aftermath Of United States V. Booker: Establishing United States Sentencing Courts*, New York University Journal of Law & Liberty 4/2009.
175. G. Langrod, *Procédure administrative et droit administratif*, R.I.S.A., 1956.
176. E. Lanza, *The right to good administration in the European Union. Roots, rationes and enforcement in antitrust case-law*, Teoria del Diritto e dello Stato 1-2-3, 2008.
177. H.S. Laski, *Liberty in the modern State*, 1948.
178. H. Legal, *Standards of Proof and Standards of Judicial Review in EU Competition Law* [in:] B.E. Hawk (ed.), 2005 Fordham Corp L Inst, 2006, Chapter 5.
179. P. Lemmens, *The Relation between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights – Substantive Aspects*, Maastricht Journal of European and Comparative Law No. 8/2001.
180. K. Lenaerts, J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, CMLR 34/1997.
181. C. Leskinen, *An Evaluation of the Rights of Defence 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, Madrid, 2010.
182. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford 2007.
183. *Lexique des termes juridiques*, Dalloz, Edn. 2003.
184. E.A. Lind, T.R. Tyler, *The social psychology of procedural justice*, New York 1998, Plenum.
185. P. Lowe, *What the future for Cartel Enforcement*, Brussels, Speech of 11 February 2003.
186. J. Łętowski, *Prawo administracyjne dla każdego*, Warsaw 1995.

187. R.St.J. Macdonald, *The Margin of Appreciation* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for Protection of Human Rights*, Dordrecht–Boston–London 1993.
188. S. Mangiameli, *La Carta dei diritti fondamentali dell'Unione Europea*, Nuovi Studi Politici, 2/2002.
189. J. Maratain, *On the Philosophy of Human Rights*, 1949.
190. H.H. Marshall, *Natural Justice*, London 1959.
191. J.L. Mashaw, *Due Process In The Administrative State*, 1985.
192. W. Mastor, *Les juridictions constitutionnelles, gardiennes des droits fondamentaux (contrôle a priori et a posteriori)*, RD pén. Sept. 2011, étude 14.
193. F. Matscher, *Methods of Interpretation of the Convention* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for the Protection of Human Rights*, Köln–Berlin–Bonn–München 1990.
194. J. McBride, *Human rights and criminal procedure. The case law of the European Court of Human Rights*, Strasbourg.
195. J. McBride, *Proportionality and the European Convention on Human Rights* [in:] E. Ellis, *The Principle of Proportionality in the Laws of Europe*, Oxford–Portland 2000, pp. 23–35.
196. A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review* 5/1999.
197. J.G. Merrills, *The Development of Internatuonal Law by the European Court of Human Rights*, Manchester 1995.
198. M. Messina, *The Protection of the Right to Private Life, Home and Correspondence vs the Efficient Enforcement of Competition Law: Is a New EC Competition Court the Right Way Forward?*, *European Competition Journal*, No. 3, 2007.
199. S.J. Meyer, *The Constitutional Potential of the European Court of Human Rights*, *NUJS Law Review* Vol. 5 2012.
200. F. Miatti, *La “due process of law” américaine, quelle traduction française*, *Rev. Dr. Int. Dr. Comp.* 1997.
201. M. Michalek, *Fishing expeditions and subsequent electronic searches in the light of the principle of proportionality of inspections in competition law cases in Europe*, *YARS* Vol. 2014, 7(10), pp. 129–158.
202. C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Toruń 1994.
203. C. Mik, *Metodologia interpretacji traktatów z dziedziny ochrony praw człowieka*, *Toruński Rocznik Praw Człowieka i Pokoju*, 1/1992.
204. C. Mik, *Teoria obowiązków pozytywnych państw-stron traktatów w dziedzinie praw człowieka (na przykładzie Europejskiej Konwencji Praw Człowieka)* [in:] C. Mik et al. (eds), *Księga Jubileuszowa profesora Tadeusza Jasudowicza*, Toruń 2004.
205. P. Millet, *The right to good administration in European Law*, *PL* 2002, No. 47.
206. V. Miller, *EU Accession to the European Convention on Human Rights*, *SN/IA/5914*, Note of 22 March 2011, p. 3 available at www.parliament.uk/briefing-papers/sn05914.pdf.

207. M. Monti, *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003.
208. G. Morange, *Le principe des droits de la défense devant l'Administration active*, Dalloz, 1956.
209. R. Morel, *Traité élémentaire de procédure civile*, Sirey 2nd ed., 1949.
210. H. Motulsky, *Le droit naturel et la pratique jurisprudentielle. Le respect des droits de la défense en procédure civile* [in:] Mélanges P. Roubier, Dalloz, 1961, Vol. 2.
211. A. Mowbray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, Human Rights Law Review 10/2010, pp. 289–319.
212. A. Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review 1/2005.
213. A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004.
214. H. Müller, *Verteidigung* [in:] *Betäubungsmittelsachen*, Rn. 181.
215. J. Murdoch, R. Reed, *A guide to Human Rights Law in Scotland*, 61 (2001).
216. G. Murphy, *Is it Time to rebrand legal professional privilege in EC Competition Law*, E.C.L.R. No. 3/2009, pp. 125–136.
217. R. Nazzini, *Administrative enforcement, judicial review and fundamental rights in EU competition law*, C.M.L.R. 2012, 49.
218. D. Neacsu, *The European Human Rights System and the European Court of Human Rights. Research Guide*, Arthur W. Diamond Law Library, available at http://library.law.columbia.edu/guides/European_Human_Rights_System/#The_European_Human_Rights_System._The_European_Convention_on_Human_Rights.
219. C. Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 Buff. L. Rev. (2005).
220. H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Oxford 1999.
221. W. Nelson, *The Very Idea of Pure Procedural Justice*, Ethics (The University of Chicago Press) Vol. 90, No. 4 (July 1980).
222. I. Nesterova, Ā. Meikališa, *The Right To Information About The Right To Silence As Eu Procedural Guarantee In Criminal Proceedings And Its Impact On National Legal Systems*, available at https://www.law.muni.cz/sborniky/dny_prava_2012/files/pravoEU/NesterovaIrena_MeikalisaArija.pdf
223. G. Nicolaou, *Pronouncing on Human Rights* [in:] N. Bhma (ed.), *European Court of Human Rights. 50 years.*, Athens Bar Association, Athens 2010.
224. P. Nicolopoulos, *La procédure devant les juridictions répressives et le principe du contradictoire*, RSC, 1989.
225. A. Nourry, Ch. Duff, *Protecting “out of scope” documents in dawn raids – a mixed bag*, Briefing note – Clifford Chance, June 2014.
226. J. Ortolan, *Éléments de droit pénal*, Paris 1855.

227. L. Pech, X. Groussot, *Fundamental Rights Protection in the EU Post Lisbon Treaty*, 14 June 2010 / European Issue No. 173 / Fondation Robert Schuman.
228. I. Pernice, *The autonomy of the EU legal order – fifty years after Van Gend* [in:] *50th Anniversary of the Judgment in Van Gend en Loos*, conference proceedings of 13 May 2013, Luxembourg 2013.
229. P. Pescatore, *La protection des droits fondamentaux par le pouvoir judiciaire, Rapport of the 7th Congress F.I.D.E.*
230. P. Pescatore, *Les droits de l'homme et l'integration européenne*, C.D.E., 1968.
231. P. Pescatore, *The Context and significance of fundamental rights in the law of the European Communities*, Human Rights Law Journal No. 2, 1981.
232. G.M. Pikiş, *Constitutionalism – Human Rights – Separation of Powers: The Cyprus Precedent*, Martinus Nijhoff Publishers, 2006.
233. X. Pin, *L'évolution des droits de la défense depuis le Code d'instruction criminelle* [in:] J. Lebois-Happeet, C. Witz (eds), *200 Jahers Code d'instruction criminelle. Le bicentenaire du CIC*, Nomos, coll «S».
234. G. Piquerez, A. Macaluso, L. Piquerez, *Procédure pénale suisse*, Schulthess, Zurich 2011.
235. A. Pliakos, *Les droits de la défense et le droit communautaire de la concurrence*, Brussels 1987.
236. J. Pradel, *Droit pénal comparé*, Dalloz, 3rd ed. 2008.
237. J. Rawls, *A Theory of Justice*, Oxford University Press, Oxford 1999.
238. V. Reding, *Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention of Human Rights*, Speech/10/33 presented on 18 February 2010 at High Level Conference on the Future of the European Court of Human Rights Interlaken; available at http://europa.eu/rapid/press-release_SPEECH-10-33_en.htm?locale=en.
239. C. Ribeyre, *Défense des droits de la défense avant jugement* [in:] *La réforme du Code pénal et du Code de procédure pénale*, Opinion doctorum, Dalloz, 2009.
240. A. Riley, *EC Antitrust Modernisation: the Commission Does Very Nicely – Thank You! Part One: Regulation 1 and the Notification Burden*, ECLR 2003.
241. A. Riley, *The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation*, (2002) 51 I.C.L.Q.
242. A. Riley, *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, CEPS Special Report/January 2010, available at <http://www.ceps.eu>.
243. L. Ritter, W.D. Braun, *European Competition Law: A Practitioner's Guide*, 3rd ed. 2004.
244. J. Rivero, *Les libertés publiques*, I. *Les droits de l'homme*, P.U.F., 3rd ed. 1981.
245. J. Rivero, *Rapport général introductif* [in:] Acts of Colloque de Strasbourg of 13 and 14 March 1979 *Les droits de l'homme: Droits collectifs ou droits individuels?*, L.G.D.J. 1980.
246. N. Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation*, 2nd ed., New York 1958.

247. F. Rota: *Il giudice di pace* [in:] M. Taruffo (ed.), *Le riforme della giustizia civile*, Giappichelli, Turin 2000.
248. P. Roth, *Ensuring that Effectiveness of Enforcement Does Not Prejudice Legal Protection. Rights of Defence. Fundamental Rights Concerns* [in:] C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual: 2006. Enforcement of Prohibition of Cartels*, Oxford–Portland, Oregon 2007.
249. K. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warsaw 2011.
250. A. Rzepliński, *Europejski Trybunał Praw Człowieka. Historia i działalność*, Prokuratura i Prawo 11 i 12/1995.
251. W. Sadurski, *Law's Legitimacy and 'Democracy-Plus,'* 26 Oxford J. Legal Stud. 377, 2006.
252. J-C. Saint-Pau, *Préface* [in:] Y. Capdepon, *Essai d'une théorie générale des droits de la défense*, Dalloz 2013.
253. Ch. Sasse, *La protection de droits fondamentaux dans la Communauté Européenne*, Mélanges Dehousse, Vol. 2, 1979.
254. C. Savonet, *Le droit au silence: un droit relatif?*, Revue Trimestrielle des droits de l'Homme 79/2009.
255. H.G. Schermers, D. Waelbroeck, *Judicial Protection in the European Union*, 6th ed., 2001.
256. N. Schmid, *Handbuch des schweizerischen Strafprozessrechts*, Dike, 2009.
257. O. De Schutter, *L'accès des personnes morales à la Cour Européen des droits de l'homme* [in:] *Avancés et confins actuels des droits de l'homme aux niveau international, européen et national. Mélanges offerts à Silvio Marcus Helmons*, Brussels 2003.
258. B. Schwartz, *La procédure administrative aux Etats-Unis*, RIDC, 1951.
259. J. Schwarze, *Der Grundrechtsschutz durch den EuGH*, NJW 2005, 3461.
260. J. Schwarze, R. Bechtold, W. Bosch, *Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change*, GleissLutz Rechtsanwälte, Stuttgart 2008.
261. J. Schwarze, A. Weitbrecht, *Grundzüge des europäischen Kertellverfahrensrechts*, 2004.
262. A. Serio, *Il principio di buona amministrazione nella giurisprudenza comunitaria*, in Riv. it. dir. pubbl. Com., 2008.
263. D. Slater, S. Thomas, D. Waelbroeck, *Competition law proceedings before the european commission and the right to a fair trial: no need for reform?*, The Global Competition Law Centre Working Papers Series, Working Paper 04/08.
264. Slaughter and May, *The EU Competition Rules on Cartels. A guide to the enforcement of the rules applicable to cartels in Europe*, May 2012.
265. C. Smits, D. Waelbroeck, *Le droit de concurrence et les droits fondamentaux* [in:] M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union Européenne*, Larcier, Brussels 2006.

266. K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte*, Tübingen 1997.
267. M. Stassinopoulos, *Le droit de la défense devant les autorités administratives*, Libr. générale de droit et de jurisprudence, Paris 1976.
268. J. Steenberg, *Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge* [in:] L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law – A Tribute to Professor M.R. Mok*, Kluwer Law International 1997.
269. M. Stephenson, *Rule of Law as a Goal of Development Policy*, World Bank Research (2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>;
270. K. Stolarski, *Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities*, YARS, Vol. 2011, 4(5).
271. M. Stupak, *The Fundamental Right to Good Administration in its New Attire, Towards European Constitutionalism* 2011.
272. A. Sweeney, *'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights*, (2007) *Legal Issues of Economic Integration* 34(1).
273. A.S. Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, (2009). Yale Law School Faculty Scholarship Series. Paper 71/2009. http://digitalcommons.law.yale.edu/fss_papers/71.
274. M. Szydło, *Prawo do dobrej administracji jako prawo podstawowe w unijnym porządku prawnym*, *Studia Europejskie* 2004, nr 1.
275. J. Świątkiewicz, *Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych)*, Biuro Rzecznika Praw Obywatelskich, Warsaw 2007.
276. B. Tamanaha, *The Rule of Law for Everyone?*, *Current Legal Problems*, Vol. 55, 2002.
277. J.P.W. Temminck Tuinstra, *Defence counsel in international criminal law*, University of Amsterdam Press, 2009, available at: <http://dare.uva.nl/document/122661>.
278. J. Temple Lang, *The AM&S judgment* [in:] M. Hoskins, W. Robinson, *A true European – Essays for judge David Edward*, 2003, chapter 12.
279. J. Temple Lang, *The Common Market and the Common Law*, 1966.
280. J. Temple Lang, C. Rizza, *Case Comment: Ste Colas Est vs France*, *E.C.L.R.* 2002.
281. D. Théophile, I. Simic, *Legal Challenges to Dawn Raid Inspections under the Principles of EU, French and ECHR Law*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 6.
282. J. Thibaut, L. Walker, *Procedural justice*, Hillsdale, 1995 NJ: Lawrence Erlbaum.

283. E. Toma, *The Principle Of Equality Of Arms – Part Of The Right To A Fair Trial*, Union of Jurists of Romania Law Review, Vol. I, Issue 3, Jul.–Sept. 2011, available at <http://www.internationallawreview.eu/fisiere/pdf/06-Elisa-Toma.pdf>.
284. *Trésor de la langue française: dictionnaire de la langue du XIX^e et du XX^e siècle*, Vol. 6, Paris 1978.
285. B. Turno, *Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku CFI z 17.09.2007 r. w połączonych sprawach T-125/03 oraz T-253/03 Akzo Nobel Chemicals Ltd i Akros Chemicals Ltd przeciwko Komisji Wspólnot Europejskich*, Europejski Przegląd Sądowy, No. 6/2008.
286. B. Turno, *Koncepcja legitymacji procesowej strony w jurysdykcyjnym postępowaniu administracyjnym w świetle prawa do dobrej administracji* [in:] P. Wiliński (ed.), *Prawo wobec wyzwań współczesności*, Vol. II, Poznań 2005.
287. B. Turno, *Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości (2009)* 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny*, pp. 31–48.
288. B. Turno, A. Zawłocka-Turno, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?*, YARS, Vol. 2012, 5(6).
289. T.R. Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, Issues of Democracy, July 2001.
290. T.R. Tyler, S.L. Blader, *Cooperation in groups: Procedural justice, social identity and behavioral engagement*, Psychology Press, Philadelphia 2000.
291. T.R. Tyler, R.J. Boeckmann, H.J. Smith, Y.J. Huo, *Social justice in a diverse society*, Boulder, 1997, CO: Westview.
292. M. Tzanou, *Can the balancing of fundamental rights affect fundamental freedoms? Some reflections on recent ECJ case-law on data protection*, EUI Florence, available at: <http://www.eui.eu>.
293. Unesco, *Le droit d'être un homme*, 1968.
294. J.A. Usher, *The "Good Administration" of European Community Law*, Current Legal Problems, 1985 and General Principles of EC Law, London–New York 1998.
295. I. Van Bael, *Due Process in EU Competition Proceedings*, Hague–London–New York 2011.
296. I. Vandenborre, T. Goetz, *EU Competition Law Procedure*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 6.
297. A. Vanwelkenhuyzen, *Les droits de la défense et l'évolution du procès pénal*, RD pén. 1959-60.
298. A. Verdross, B. Simma, *Universelles Völkerrecht*, 3rd ed., Berlin 1984.
299. J.S. Venit, *Human all to human: The gathering and assessment of evidence and the appropriate standard of proof and judicial review in Commission enforcement proceedings applying Article 81 and 82* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: The evaluation of evidence and*

- its judicial review in competition cases*, available at: <http://eui.eu/Documents/RSCAS/Research/Competition/2009/2009COMPETITIONVenit.pdf>.
300. J.S. Venit, *Modernization and Enforcement – The Need for Convergence: On procedure and Substance* [in:] C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford–Portland, Oregon 2006.
 301. J.S. Venit, T. Louko, *The Commission’s New Power to Question and its implication on Human Rights* [in:] B.E. Hawk (ed.), *International Antitrust Law & Policy*, Annual Proceedings of the Fordham Institute, 2004, Chapter 26.
 302. J.-M. Verniory, *Les droits de la défense dans les phases préliminaires du procès pénal*, Staempfli Editions SA, Berne 2005.
 303. B. Vesterdorf, *Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues* [in:] B.E. Hawk (ed.), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, and *Fordham International Law Journal*, Vol. 28, Issue 4 2004.
 304. B. Vesterdorf, *The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?*, *Antitrust Chronicle* 2009, 6(2).
 305. D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe Strasbourg, 2012.
 306. E.C.S. Wade, G.G. Phillips, *Constitutional law*, 3rd ed., London 1946.
 307. D. Waelbroeck, D. Fosselard, *Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures* [in:] A. Barav, D.A. Wyatt (eds), *1994 Yearbook of European Law*, Clarendon 1995.
 308. N. Wahl, *Standard of review – comprehensive or limited?* [in:] C.-D. Ehlermann, M. Marquis (eds), *European Competition Law Annual 2009: The evaluation of evidence and its judicial review in competition cases*, Hart Publishing, Oxford–Portland 2010.
 309. J. Wakefield, *The Right to Good Administration*, Kluwer Law 2009.
 310. J. Waline, *Droit administratif*, Dalloz, 2006.
 311. M. Waline, *Le principe audi alteram partem* [in:] *Livre Jubilaire du Conseil d’Etat du Luxembourg*, 1957.
 312. R.K. Warren, *Public Trust and Procedural Justice*, CT. REV., Fall 2000, at 12–13, available at <http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Warren.pdf>.
 313. M. Waquet, *La protection des droits fondamentaux en France*, Rapport 7eme Congrès F.I.D.E., Bruxelles 1975.
 314. W. Weiss, *Human Rights and EU antitrust enforcement: news from Lisbon*, *European Competition Law Review* 2011, 32(4).
 315. R. Whish, *Competition Law*, 6th ed., Oxford Press University, 2006.
 316. R. Whish, D. Bailey, *Competition Law*, 7th ed., Oxford University Press.
 317. R. White, I. Boussiakou, *Separate Opinions in the European Court of Human Rights* 9(1) *Human Rights Law Review* 37 (2009).

318. S. White, *Rights of Defence in Administrative Investigations: Access to File in EC Investigation*, Review of European Administrative Law nr 1/2009, pp. 57–69.
319. G. Wiederkehr, *Droits de la défense et procédure civile*, D. 1978. Chron. 36.
320. G. Wiederkehr, *La notion de grief et les nullités de forme en procédure civile*, Dalloz 1984.
321. L. Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 Human Rights Law Journal 161 (2002).
322. L. Wildhaber, *The Coordination of the protection of fundamental rights in Europe*, Speech of 8 September 2005, Geneva, published afterwards in *Zeitschrift für Schweizerisches Recht*, Vol. 124, No. 2/ 2005.
323. W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford, 2008.
324. W.J.P. Wils, *EU Antitrust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Right*, (2011) 34(2) World Competition 207.
325. W. Wils, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees – The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, World Competition, Vol. 34, No. 2, June 2011.
326. W. Wils, *La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme*, (1996) 32 Cahiers de droit européen.
327. W.P.J. Wils, *Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcements*, World Competition. Law and Economics Review, 2006 Vol. 29, No. 1, 2.
328. W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition No. 26/2003, pp. 567–588.
329. W.J.P. Wils, *Settlements of EU Antitrust Investigations – Commitment Decisions under Article 9 of Regulation No 1/2003*, World Competition, Vol. 29, No. 3, September 2006.
330. W.J.P. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 World Competition 20 (2004).
331. W.J.P. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, World Competition 37, No. 1 (2014).
332. W.P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, (2010) 33(1) World Competition, pp. 5–29.
333. W.P.J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, Kluwer Law International 2002.
334. A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

335. A. Wiśniewski, *Uwagi o teorii interpretacji Europejskiej Konwencji Praw Człowieka* [in:] C. Mik, K. Gałka (eds), *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, TNOIK 2012.
336. B. De Witte, *The Legal Status of the Charter: vital Question on Non-Issue?*, MJ No. 8 2001.
337. A. Wróbel, *Basic right and fundamental rights – conflict or restrictions?*, Europejski Przegląd Sądowy 2008/2, p. 1.
338. A. Wróbel, *Bosphorus “Solange”?*, Europejski Przegląd Sądowy 2006/6 p. 1.
339. A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Zakamycze 2005.
340. A. Wróbel, *Zmierzch (publicznego) prawa podmiotowego? Kilka refleksji na tle orzecznictwa Trybunału Sprawiedliwości Wspólnot Europejskich* [in:] K. Sieniawska (ed.), *Samorządowe Kolegia Odwoławcze jako gwarant prawa do dobrej administracji*, Warsaw 2009.
341. D. Wyatt, A. Dashwood's, *European Union Law*, 5th ed., Sweet & Maxwell 2006.
342. A. Wyrozumka, *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie Lizbońskim oraz Protokołu polsko-brytyjskiego*, Przegląd Sejmowy 2(85)/2008.
343. A. Young, *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community Law?*, European Public Law No. 2/2005.
344. H.Ch. Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague–Boston–London 1996.
345. A. Zuckerman, *Civil Procedure*, Thomson, London 2006.

II. Legal acts

1. UN Universal Declaration of the Human Rights of 10 December 1948.
2. European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.
3. Treaty of Rome establishing the European Economic Community (EEC) of 25 March 1957 (after 1 December 2009: Treaty on the Functioning of the European Union), Official Journal of the European Union (hereinafter: OJ), 2012, C 326.
4. Treaty of Rome establishing the European Atomic Energy Community (EAEC) of 25 March 1957, OJ 2010, C 84.
5. International Covenant on Civil and Political Rights, Resolution AG 2200 A (XXI) of 16 December 1966.
6. Single European Act of 28 February 1986, OJ 1987, L 169.
7. Rules of Procedure of the Court of First Instance (General Court) of the European Communities of 2 May 1991, OJ 1991, L 136.
8. Treaty on the European Union of 7 February 1992, OJ 2010, C 83.

9. Vienna Declaration of the Council of Europe of 9 October 1993.
10. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ 1997, C 340.
11. Charter of the Fundamental Rights of the European Union of 7 December 2000, OJ 2012 C 326.
12. Explanations for the Charter of Fundamentals Rights of the European Union, OJ C303/17 2007.
13. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 26 February 2001, OJ 2001, C 80.
14. 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, Official Journal L 1, 04.01.2003, pp. 1–25.
15. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18.
16. Final Act of the Treaty Establishing a Constitution for Europe, OJ 2004, C-310, XLVII, 14 December 2004.
17. EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005.
18. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community of 13 December 2007, OJ 2007, C 306.
19. Rules of Procedure of the Court of Justice of 29 September 2012, OJ 2012 L 265.

III. Case-law of the ECtHR

1. Opinion of judge A. Favre to the judgment of the ECtHR of 27 June 1968 in case *Wemhoff vs Germany*, Application No. 2122/64.
2. Judgment of the ECHR of 17 January 1970 in case *Delcourt vs Belgium*, Application No. 2689/65.
3. Judgment of the ECtHR of 8 June 1976 in case *Engel and others vs the Netherlands*, Application Nos. 5100/71, 5100/71 et seq. Series A No. 22.
4. Judgment of the ECtHR in case *Firestone Tire and Rubber Co and others vs United Kingdom*, Application No. 5460/72.
5. Judgment of the ECtHR of 27 February 1980 in case *Deweert vs Belgium* judgment, Application No. 6903/75.
6. Judgment of the ECtHR of 23 June 1981 in case *Le Compte, Van Leuven and De Meyere vs Belgium*, Application Nos. 6878/75 and 7238/75.
7. Judgment of the ECtHR of 10 February 1983 in case *Albert and Le Compte vs Belgium*, Application No. 7299/75, 7496/76.

8. Judgment of the ECtHR of 21 February 1984 in case *Öztürk vs Germany*, Application No. 8544/79.
9. Judgment of the ECtHR of 28 June 1984 in case *Campbell and Fell vs the United Kingdom*, Application Nos. 7819/77 and 7878/77
10. Judgment of the ECtHR of 12 May 1986 in case *B. vs France*, Application No. 10291/83.
11. Judgment of the ECtHR in case *Belilos vs Switzerland*, Application No. 10328/83.
12. Judgment of the ECtHR in case *Weber vs Switzerland*, Application No. 11034/84.
13. Judgment of the ECtHR of 11 December 1986, in case *Ross vs the United Kingdom*, Application No. 11396/85.
14. Judgment of the ECtHR of 20 June 1988 in case *Schönenberger and Durmaz vs Switzerland*, Application Nos. 11368/85, 11368/85.
15. Judgment of the ECtHR of 7 October 1988 in case *Salabiaku vs France*, Application No. 10519/83.
16. Judgment of the ECtHR of 30 March 1989 in case *Chappell vs United Kingdom*, Application No. 10461/83.
17. Judgment of the ECtHR of 24 April 1990 in case *Kruslin vs France*, Application No. 11801/85.
18. Judgment of the ECtHR of 27 September 1990 in case *Cassye vs United Kingdom*, Application No. 10843/84.
19. Judgment of the ECtHR of 27 May 1991 in case *Ciancimino vs Italy*, Application No. 12541/86.
20. Rapport of the European Commission of Human Right of 30 May 1991 in case *Sténuit*, Application No. 11598/85.
21. Judgment of the ECtHR of 27 August 1991 in case *Demicoli vs Malta*, Application No. 13057/87.
22. Judgment of the ECtHR of 30 October 1991 in case *Borgers vs Belgium*, Application No. 12005/86.
23. Judgment of the ECtHR of 28 November 1991 in case *S. vs Switzerland*, Application Nos. 12629/87 and 13965/88.
24. Judgment of the ECtHR of 25 March 1992 in case *Campbell vs the United Kingdom*, Application No. 13590/88.
25. Judgment of the ECtHR of 27 February 1992 in case *Sténuit vs France*, Application No. 11598/85.
26. Judgment of the ECtHR of 25 March 1992 in case *Campbell and Fell vs the United Kingdom*, Application No. 13590/88.
27. Judgment of the ECtHR of 15 June 1992 in case *Lüdi vs Switzerland*, Application No. 12433/86.
28. Judgment of the ECtHR of 16 December 1992 in case *Hadjianastassiou vs Greece*, Application No. 12945/87.
29. Judgment of the ECtHR of 16 December 1992 in case *Niemietz vs Germany*, Application No. 13710/88.

30. Judgment of the ECtHR of 25 February 1993 in case *Funke vs France*, Application No. 10828/84.
31. Judgment of the ECtHR of 25 February 1993 in case *Crémieux vs France*, Application No. 11471/85.
32. Judgment of the ECtHR of 25 February 1993 in case *Miaillhe vs France*, Application No. 12661/87.
33. Judgment of the ECtHR of 24 February 1994 in case *Bendenoun vs France*, Application No. 12547/86.
34. Judgement of the ECtHR of 24 February 1994 in case *Casado Coca vs Spain*, Application No. 15450/89.
35. Judgment of the ECtHR of 23 October 1995, in case *Schmautzer vs Austria*, Application No. 15523/89.
36. Judgement of the ECtHR of 24 October 1995 in case *Agrotexim vs Greece*, Application No. 14807/89.
37. Judgment of the ECtHR of 25 January 1996 in case *John Murray vs the United Kingdom*, Application No. 18731/91.
38. Judgment of the ECtHR of 26 March 1996 in case *Leutscher vs the Netherlands*, Application No. 17314/90.
39. Judgment of the ECtHR of 15 November 1996 in case *Domenichini vs Italy*, Application No. 15943/90.
40. Judgment of the ECtHR of 17 December 1996 in case *Saunders vs United Kingdom*, Application No. 19187/91.
41. Concurring Opinion of Judge Walsh in *Saunders vs United Kingdom*, Application No. 19187/91.
42. Judgment of the ECtHR of 25 February 1997 in case *Findlay vs the United Kingdom*, Application No. 22107/93.
43. Judgment of the ECtHR of 20 October 1997 in case *Serves vs France*, Application No. 20225/92.
44. Judgement of the ECtHR of 16 December 1997 in case *Camenzind vs Switzerland*, Application No. 136/1996/755/954.
45. Judgment of the ECtHR of 19 February 1998 in case *Paulsen-Medalen and others vs Sweden*, Application No. 16817/90.
46. Judgement of the ECtHR of 25 March 1998 in case *Kopp vs Switzerland*, Application No. 23224/94.
47. Judgment of the ECtHR of 20 May 1998 in case *Gautrin and others vs France*, Application No. 21257/93.
48. Judgment of the ECtHR of 18 February 1999 in case *Mathews vs United Kingdom*, Application No. 24833/94.
49. Judgment of the ECtHR of 25 March 1999 in case *Pelissier and Sassi vs France* [GC], Application No. 25444/94.
50. Judgment of the ECtHR of 16 February 2000 in case *Amman vs Switzerland*, Application No. 27798/95.
51. Judgment of the ECtHR of 19 September 2000 in case *I.J.L. and Others vs United Kingdom*, Application Nos. 29522/95, 30056/96 and 30574/96.

52. Judgment of the ECtHR of 7 December 2000 in case *Zoon vs the Netherlands*, 29202/95.
53. Judgment of the ECtHR of 21 December 2000 in case *Heaney and McGuinness vs Ireland*, Application No. 34720/97.
54. Judgment of the ECtHR of 21 December 2000 in case *Quinn vs Ireland*, Application No. 36887/97.
55. Judgment of the ECtHR of 27 February 2001 in case *Luca vs Italy*, Application No. 33354/96.
56. Judgment of the ECtHR of 6 April 2001 in case *Comingersoll p. Portugalii*, Application No. 35382/97.
57. Judgment of the ECtHR of 3 May 2001 in case *J.B. vs Switzerland*, Application No. 31827/96.
58. Judgment of the ECtHR of 25 September 2001 in case *P.G. and J.H. vs United Kingdom*, Application No. 44787/98.
59. Judgments of the ECtHR of 2 October 2001 and 7 August 2003 in case *Hatton vs Great Britain*, Application No. 36022/97.
60. Judgment of the ECtHR of 2 October 2001 in case *G.B. vs France*, Application No. 44069/98.
61. Judgment of the ECtHR of 15 November 2001 in case *Werner vs Poland*, Application No. 26760/95.
62. Judgment of the ECtHR of 20 December 2001 in case *P.S. vs Germany*, Application No. 33900/96.
63. Judgment of the ECtHR of 8 January 2002 in case *Keslassy vs France*, Application No. 51578/99.
64. Decision of the ECtHR of 22 January 2002 in case *Oyston vs the United Kingdom*, Application No. 42011/98.
65. Judgement of the ECtHR of 29 January 2002 in case *AB vs Netherlands*, Application No. 37328/97.
66. Judgement of the ECtHR of 12 March 2002 in case *Nikula vs Finland*, Application No. 31611/96.
67. Judgment of the ECtHR of 28 March 2002 in case *Birutis and others vs Lithuania*, Application Nos 47698/99 and 48115/99.
68. Judgment of the ECtHR of 16 April 2002 in case *Société Colas Est and Others. vs France*, Application No. 37971/97.
69. Judgment of the ECtHR of 29 April 2002 in case *Diane Pretty vs United Kingdom*, Application No. 2346/02.
70. Judgment of the ECtHR of 23 July 2002 in case *Janosevic vs Sweden*, Application No. 34619/97.
71. Decision of the ECtHR of 10 September 2002 in case *Allen vs the United Kingdom*, Application No. 76574/01.
72. Judgment of the ECtHR of 19 September 2002 in case *Tamosius vs United Kingdom*, Application No. 062002/00.
73. Judgment of the ECtHR of 8 October 2002 in case *Beckles vs United Kingdom*, Application No. 44652/98.

74. Judgment of the ECtHR of 5 November 2002 in case *Allan vs UK*, Application No. 48539/99.
75. Judgment of the ECtHR of 11 November 2002 in case *Veeber vs Estonia*, Application No. 37571/97.
76. Decision of the ECtHR of 3 December 2002 in case *Lilly vs France*, Application No. 53892/00.
77. Judgment of the ECtHR of 21 May 2003, in case *Janosevic vs Sweden*, Application No. 34619/97.
78. Decision of the ECtHR of 27 May 2003 in case *Sofri and others vs Italy*, Application No. 37235/97.
79. Judgment of the ECtHR of 9 October 2003 in case *Ezeh and Connors*, Application Nos. 39665/98, 40086/98.
80. Judgment of the ECtHR of 8 April 2004 in case *Weh vs Austria*, Application No. 38544/97.
81. Judgement of the ECtHR of 8 July 2004 in case *Vo vs France*, Application No. 53924/00.
82. Judgment of the ECtHR of 12 May 2005 in case *Öcalan vs Turkey* [GC], Application No. 46221/99.
83. Judgment of the ECtHR of 30 June 2005 in case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs Ireland*, Application No. 45036/98.
84. Decision of the ECtHR of 17 November 2005 in case *Haas vs Germany*, Application No. 73047/01.
85. Judgment of the ECtHR of 1 March 2006 in case *Sejdovic vs Italy* [GC], Application No. 56581/00.
86. Judgment of the ECtHR of 16 November 2006 in case *Zaytsev vs Russia*, Application No. 22644/02.
87. Judgment of the ECtHR of 23 November 2006 in case *Jussila vs Finland*, Application No. 73053/01.
88. Judgment of the ECtHR of 7 June 2007 in case *Smirnov vs Russia*, Application No. 71362/01.
89. Judgment of the ECtHR of 29 June 2007 in case *O'Halloran and Francis vs United Kingdom*, Application Nos. 15809/02 and 25624/02.
90. Judgment of the ECtHR of 23 September 2007 in case *Grayson and Barnham vs the United Kingdom*, Application Nos. 19955/05 and 15085/06.
91. Judgment of the ECtHR of 10 January 2008 in case *Lückhof and Spanner vs Austria*, Application Nos. 58452/00 and 61920/00.
92. Judgment of the ECtHR of 5 February 2008 in case *Ramanauskas vs Lithuania* [GC], Application No. 74420/01.
93. Judgment of the ECtHR of 21 February 2008 *Ravon e.a. vs France*, Application No. 18497/03.
94. Judgment of the ECtHR of 8 April 2008 in case *Gradinar vs Moldova*, Application No. 7170/02.
95. Judgment of the ECtHR of 22 April 2008 in case *Portmann vs Suisse*, Application No. 38455/06.

96. Judgment of the ECtHR of 9 October 2008 in case *Moiseyev vs Russia*, Application No. 62936/00.
97. Judgment of the ECtHR of 27 November 2008 in case *Salduz vs Turkey* [GC], Application No. 36391/02.
98. Judgment of the ECtHR of 11 December 2008 in case *Panovits vs Cyprus*, Application No. 4268/04.
99. Judgment of the ECtHR of 16 December 2008 in case *Frankowicz vs Poland*, Application No. 53025/99.
100. Judgment of the ECtHR of 13 January 2009 in case *Rybacki vs Poland*, Application No. 52479/99.
101. Judgment of the ECtHR of 10 March 2009 in case *Bykov vs Russia* [GC], Application No. 4378/02.
102. Judgment of the ECtHR of 21 April 2009 in case *Marttinen vs Finland*, Application No. 19235/03.
103. Judgment of the ECtHR of 16 June 2009 in case *Shukla vs UK*, Application No. 2526/07.
104. Judgment of the ECtHR of 24 September 2009 in case *Pishchalnikov vs Russia*, Application No. 7025/04.
105. Judgment of the ECtHR of 18 February 2010 in case *Aleksandr Zaichenko vs Russia*, Application No. 39660/02.
106. Judgment of the ECtHR of 12 May 2010 in case *Kammerer vs Austria*, Application No. 32435/06.
107. Judgment of the ECtHR of 1 June 2010 in case *Gäfgen vs Germany*, Application No. 22978/05.
108. Judgment of the ECtHR of 15 June 2010 in case *Ashot Harutyunyan*, Application No. 34334/04.
109. Judgment of the ECtHR of 21 December 2010 in case *Canal Plus vs France*, Application No. 29408/08.
110. Judgment of the ECtHR of 21 December 2010, *Primagaz*, Application No. 29613/08.
111. Judgment of the ECtHR of 15 February 2011 in case *Harju vs Finland*, Application No. 56716/09.
112. Judgment of the ECtHR of 15 February 2011 in case *Heino vs Finland*, Application No. 56720/09.
113. Judgment of the ECtHR of 21 April 2011 in case *Nechiporuk and others vs Ukraine*, Application No. 42310/04.
114. Judgment of the ECtHR of 21 July 2011 in case *Sigma Radio Television Ltd vs Cyprus*, Application No. 32181/05.
115. Judgment of the ECtHR of 11 September 2011 in case *Menarini Diagnostics S.R.L. vs Italy*, Application No. 43509/08.
116. Dissenting Opinion of Judge Pinto de Albuquerque in *Menarini Diagnostics S.R.L. vs Italy*, Application No. 43509/08.
117. Decision of the ECtHR of 12 March 2012 *Société Boygoues Telecom vs France*, Application No. 2324/08.

118. Judgment of the ECtHR of 3 July 2012 in case *Robathin vs Austria*, Application No. 30457/06.
 119. Judgment of the ECtHR of 2 October 2014 in case *Delta Pekarny a.s. vs Czech Republic*, Application No. 97/11.
- (All documents are available at: <http://hudoc.echr.coe.int>)

IV. Case-law of the CJEU

1. Judgment of the ECJ of 16 July 1956 in case 8/55 *Fédération Charbonnière de Belgique vs High Authority*, European Court Reports (E.C.R.) 1955, 291.
2. Judgment of the ECJ of 4 February 1959 in case 1/58 *Stork vs High Authority*, E.C.R. 1959.
3. Judgment of the ECJ of 4 April 1960 in case 31/59 R *Acciaieria e Tubificio di Brescia vs High Authority*, E.C.R. 1960, 98.
4. Judgment of the ECJ of 15 July 1960 in joined cases 36, 37, 38 and 40/59 *Geitling vs High Authority*, E.C.R. 1960, 857.
5. Judgment of the ECSC of 14 December 1962 in joint cases 5/62 to 11/62 and 13/62 to 15/62 *San Michele and others vs High Authority of the European Coal and Steel Community*, E.C.R. 1962, 849.
6. Judgment of the ECJ of 5 February 1963 in Case 26/62 *Van Gend en Loos vs Netherlands Inland Revenue Administration*, E.C.R. 1963, 1.
7. Judgment of the ECJ of 4 July 1963 in case 24/62, *Germany vs Commission*, E.C.R. 1963, 131.
8. Judgment of the ECJ of 5 December 1963 in joined cases 53 and 54/63 *Lemmerz Werke vs High Authority*, E.C.R. 1963, 239.
9. Judgment of the ECJ of 15 July 1964 in case 6/64 *Flaminio Costa vs E.N.E.L.*, E.C.R. 1964, 585.
10. Judgment of the ECJ of 21 January 1965 in case 108/63 *Merlini vs High Authority*, E.C.R. 1965, 1.
11. Judgment of the ECJ of 1 April 1965 in case 40/64 *Sgarlata and others vs Commission*, E.C.R. 1965, 279.
12. Judgment of the ECJ of 7 June 1966 in joined cases 29, 31, 36, 39–47, 50, 51/63 *Usines de la Providence vs High Authority*, E.C.R. 1966, 199.
13. Judgment of the ECJ of 15 March 1967 in joined cases 8–11/66 *Cimenteries vs Commission*, E.C.R. 1967, 75.
14. Judgment of the ECJ of 12 November 1969 in case 29/69 *Erich Stauder vs City of Ulm*, E.C.R. 1969, 419.
15. Judgment of the ECJ of 10 December 1969 in joined cases 10&18/68 *Società Eridania Zuccherifici vs Commission*, E.C.R. 1969, 459.
16. Judgment of the ECJ of 28 May 1970 in case 19/69 *Richez-Parise*, E.C.R. 1970, 325.

17. Judgment of the ECJ of 31 March 1970 in case 22/70 *Commission vs Council (AETR)*, E.C.R. 1971, 263.
18. Order of the President of the ECJ of 18 August 1971 in case 45/71 R *GEMA vs Commission*, E.C.R. 1971, 791.
19. Judgment of the ECJ of 5 June 1973 in case 81/72 *Commission vs Council*, E.C.R. 1973, 575.
20. Judgment of the ECJ of 11 December 1973 in case 120/73 *Lorenz vs Germany*, E.C.R. 1973, 1471.
21. Judgment of the ECJ of 14 May 1974 in case 4/73 *Nold*, E.C.R. 1974, 491.
22. Order of the President of the ECJ of 3 April 1974 in case 20/74 R *Kali Chemie AG vs Commission*, E.C.R. 1974, 337.
23. Judgement of the ECJ of 23 October 1974 in case 17/74 *Transocean Marine Paint vs Commission*, E.C.R. 1974, 1063.
24. Judgment of the ECJ of 4 February 1975 in case 169/73 *Continental France vs Council*, E.C.R. 1975, 117.
25. Judgment of the ECJ of 15 April 1975 in case 61/74 *Santopietro vs Commission*, E.C.R. 1975, 483.
26. Judgment of the ECJ of 8 April 1976 in case 43/75 *Defrenne vs Sabena*, E.C.R. 1976, 455.
27. Judgment of the ECJ of 5 December 1978 in case 14/78 *Denkavit vs Commission*, E.C.R. 1978, 2497.
28. Judgment of the ECJ of 13 February 1979 in case 85/76 *Hoffmann-La Roche vs Commission*, E.C.R. 1979, 461.
29. Judgment of the ECJ of 13 February 1979 in case 101/78 *Granaria vs Hoofd-porduktenschap voor Akkerbouwprodukten*, E.C.R. 1979, 623
30. Judgment of the ECJ of 20 February 1979 in case 120/78 *Rewe-Zentral AG vs Bundesmonopolverwaltung für Branntwein* ("Cassis de Dijon"), E.C.R. 1979, 649.
31. Judgment of the ECJ of 17 January 1980 in case 792/79 R *Camera Care vs Commission*, E.C.R. 1980, 119.
32. Judgment of the ECJ of 26 June 1980 in case 136/79 *National Panasonic vs Commission*, E.C.R. 1980, 2033.
33. Judgment of the ECJ of 29 October 1980 in joined cases 209 to 2015 and 218/78 *Van Landewyck and Others vs Commission*, E.C.R. 1980, 3125.
34. Order of the President of the ECJ of 7 July 1981 in cases 60 and 190/81 R *International Business Machines Corp. vs Commission*, E.C.R. 1981, 1857.
35. Judgment of the ECJ of 11 November 1981 in case 60/81 *IBM vs Commission*, E.C.R. 1981, 2639.
36. Judgment of the ECJ of 17 December 1981 in case 115/80 *Demont vs Commission*, E.C.R. 1981, 3147.
37. Opinion of Advocate General Sir Gordon Slynn delivered on 26 January 1982 in case A.M.&S., E.C.R. 1982, 11-1575.

38. Judgment of the ECJ of 18 May 1982 in case 155/79 *Austrian Mining & Smelting (A.M. & S.) Europe vs Commission of the European Communities*, E.C.R. 1982, 1575.
39. Judgment of the ECJ of 7 June 1983 in joined cases 100/80 to 103/80 *Musique diffusion française and Others vs Commission*, E.C.R. 1983, 1825.
40. Judgment of the ECJ 7 June 1983 in joined cases 100-103/80 *Pioneer vs Commission*, E.C.R. 1983, 1825.
41. Judgment of the ECJ of 14 July 1983 in case 144/82 *Detti vs Court of Justice*, E.C.R. 1983, 2421.
42. Judgment of the ECJ of 19 October 1983 in case 179/82 *Lucchini vs Commission*, E.C.R. 1983, 3083.
43. Judgment of the ECJ of 25 October 1983 in case 107/82 *Telefunken vs Commission*, E.C.R. 1983, 3151.
44. Judgment of the ECJ of 8 November 1983 in joined cases 96–102, 104, 105, 108 and 110/82 *IAZ International*, E.C.R. 1983, 3369.
45. Judgment of the ECJ 9 November 1983 in case 322/81 in case *Michelin vs Commission*, E.C.R. 1983, 3461.
46. Judgment of the ECJ of 16 November 1983 in case 188/82 *Thyssen*, E.C.R. 1983, 3721.
47. Judgment of the ECJ of 15 March 1984 in case 64/82 *Tradax Graanhandel BV vs Commission*, E.C.R. 1984, 1359.
48. Judgment of the ECJ of 29 February 1984 in case 270/82 *Estel vs Commission*, E.C.R. 1984, 1195.
49. Judgment of the ECJ of 9 February 1984 in joined cases 316/82 and 40/83 *Kohler vs Court of Auditors*, E.C.R. 1984, 641.
50. Judgment of the ECJ 30 May 1984 in case 111/83 *Picciolo vs European Parliament*, E.C.R. 1984, 2323.
51. Judgment of the ECJ of 9 October 1984 in case 188/83 *Witte vs European Parliament*, E.C.R. 1984, 3465.
52. Judgment of the ECJ of 11 July 1985 in case 42/84 *Remia and Others vs Commission*, E.C.R. 1985, 2545.
53. Judgment of the ECJ of 26 November 1985 in case 42/85 *Cockerill-Sambre vs Commission*, E.C.R. 1985, 3749.
54. Order of the President of the ECJ of 30 April 1986 in case 62/86 R *AKZO vs Commission*, E.C.R. 1986, 1503.
55. Judgment of the ECJ of 15 May 1986 in case 222/84 *Marguerite Johnston vs Chief Constable of the Royal Ulster Constabulary*, E.C.R. 1986.
56. Judgment of the ECJ of 23 September 1986 in case 5/85 *Akzo Chemie (Netherlands) and Akzo Chemie UK vs Commission*, E.C.R. 1986, 2585.
57. Judgment of the ECJ of 27 November 1986 in case 155/85 *Strack vs Parliament*, E.C.R. 1986, 3561.
58. Order of the President of the ECJ of 26 March 1987 in case 46/87 R *Hoechst vs Commission*, E.C.R. 1978 1549.

59. Order of the President of the ECJ of 28 October 1987 in case 85/87 R *Dow Chemical Nederland vs Commission*, E.C.R. 1987, 4367.
60. Judgment of the ECJ of 17 November 1987 in joined cases 142/84 and 156/84 *BAT and Reynolds vs Commission*, E.C.R. 1987, 4487.
61. Judgment of the ECJ of 2 February 1988 in case 293/85 *Commission vs Belgium*, E.C.R. 1988, 305.
62. Judgment of the ECJ of 14 July 1988 in case 103/85 *Usinor vs Commission*, E.C.R. 1988, 4131.
63. Judgment of the ECJ of 2 February 1988 in case 293/85 *Commission vs Belgium*, E.C.R. 1988, 305
64. Judgment of the ECJ of 23 February 1988 in case 68/86 *United Kingdom vs Council*.
65. Judgment of the ECJ of 21 February 1989 in case 186/87 *Ian William Cowan vs Trésor public*, E.C.R. 1989.
66. Opinion of Advocate General Mischo of 29 February 1989 in cases 46/87 and 227/88, *Hoechst vs Commission*, E.C.R. 1989, 73.
67. Order of the President of the ECJ of 11 May 1989 in joined cases 76/89 R, 77/89 R and 91/89 R *RTE and Others vs Commission*, E.C.R. 1989, 1141.
68. Order of the President of the ECJ of 11 May 1989 in joint cases 76,77 and 91/89 R *Magill*, E.C.R. 1989, 1141.
69. Judgment of the CFI of 14 May 1989 in case T-348/94 *Enso Española*, E.C.R. 1998, II-1875.
70. Opinion of Advocate General Darmon of 18 May 1989 in case Case 374/87 *Orkem vs Commission*, E.C.R. 1989, 3283, 3301.
71. Judgment of the ECJ of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission*, E.C.R. 1989, 2859.
72. Judgment of the ECJ of 17 October 1989 in case 85/87 *Dow Benelux vs Commission*, E.C.R. 1989, 3137.
73. Judgment of the ECJ of 17 October 1989 in joined cases 97/87 to 99/87 *Dow Chemical Ibérica and Others vs Commission*, E.C.R. 1989, 03165.
74. Judgment of the ECJ of 18 October 1989 in case 27/88 *Solvay&Cie vs Commission*, E.C.R. 1989, 3355.
75. Judgment of the ECJ of 18 October 1989 in case 374/87 *Orkem vs Commission*, E.C.R. 1989, 3283.
76. Order of the President of the CFI of 4 April 1990 in case T-30/89 *Hilti vs Commission*, E.C.R. 1991, II-1439.
77. Judgment of the CFI of 10 July 1990 in case T-64/89 *Automec vs Commission*, E.C.R. 1990, II-367.
78. Judgment of the CFI of 8 November 1990 in case T-73/89 *Barbi vs Commission*, E.C.R. 1990, II-619.
79. Judgment of the ECJ of 13 November 1990, in case C-331/88 *The Queen vs Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others*, E.C.R. 1990, 1-4023.

80. Judgment of the ECJ of 21 February 1991 in joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, E.C.R. 1991, I-415.
81. Judgment of the ECJ of 27 June 1991 in case C-49/88 *Al-Jubail Fertilizer vs Commission*.
82. Judgment of the CFI of 27 June 1991 in case T-156/89 *Mordt vs Court of Justice*, E.C.R. 1991, II-407.
83. Judgment of the ECJ of 19 November 1991 in joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others vs Italian Republic*, E.C.R. 1991, I-5357.
84. Judgment of the ECJ of 21 November 1991 in case C-269/90 *Technische Universität München vs Hauptzollamt München-Mitte*, E.C.R. 1991, I-5469.
85. Judgment of the CFI of 17 December 1991 in case T-7/89 *Hercules vs Commission*, E.C.R. 1991, II-1711.
86. Judgment of the CFI of 24 January 1992 in case T-44/90 *La Cinq vs Commission*, E.C.R. 1992, II-1.
87. Judgment of the CFI of 10 March 1992 in joined cases T-68/89 etc. *Società Italiano Vetro vs Commission*, E.C.R. 1992, II-1403.
88. Judgment of the CFI of 17 September 1992 in case T-138/89 *Nederlandse Bankiersvereniging and Nederlandse Vereniging Van Banken vs Commission*, E.C.R. 1992, II-2181.
89. Judgment of the ECJ of 3 December 1992 in case C-97/91 *Oleificio Borelli vs Commission*, E.C.R. 1992, I-6313.
90. Judgment of the CFI of 18 December 1992 in joined cases T-10/92 R etc. *Cimenteries CBR vs Commission*, E.C.R. 1992, II-1571.
91. Judgment of the ECJ of 31 March 1993 in case C-19/92 *Dieter Kraus vs Land Baden-Württemberg*, E.C.R. 1993, I-1663.
92. Judgment of the ECJ of 14 July 1993 in case C- 56/90, *Commission vs United Kingdom*, E.C.R. 1993, I-4109.
93. Judgment of the CFI of 15 July 1993 in joined cases T-33/89 and T-74/89 *David Blackman vs European Parliament*, E.C.R. 1993, II-837.
94. Judgment of the ECJ of 10 November 1993 in case C-60/92 *Otto BV vs Postbank NV*, E.C.R. 1993 I-05683.
95. Judgment of the ECJ of 20 January 1994 in joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and ors vs Commission*, E.C.R. 1993, I-1307.
96. Judgment of the CFI of 14 July 1994 in case T-77/92 *Parker Pen vs Commission*, E.C.R. 1994, II-549.
97. Judgment of the ECJ of 5 October 1994 in case C-133/93 *Crispoltoni vs Fattoria Autonoma Tabacchi*, E.C.R. 1994, I-4863.
98. Judgment of the ECJ of 15 December 1994 in case C-195/91 P *Bayer vs Commission*, E.C.R. 1994, I-5619.
99. Judgment of the CFI of 12 January 1995 in case T-102/92 *Viho vs Commission*, E.C.R. 1995, II-17.

100. Judgment of the CFI of 8 March 1995 in case T-34/93 *Société Générale vs Commission*, E.C.R. 1995, II-545.
101. Order of the President of the CFI of 10 March 1995 in case T-395/94 R *Atlantic Container Line AB vs Commission*.
102. Judgment of the CFI of 6 April 1995 in case T-147/89 *Société Métallurgique de Normandie vs Commission*, E.C.R. 1995, II-1063.
103. Judgment of the CFI of 6 April 1995 in case T-148/89, *Tréfilunion vs Commission*, E.C.R. 1995, II-1063.
104. Judgment of the CFI of 6 April 1995 in case T-151/89, *Société des Treillis et Panneaux Soudés vs Commission*, E.C.R. 1995, II-1063.
105. Order of the President of the ECJ of 19 July 1995 in case C-268/96 P(R) *SCK and FNK vs Commission*, E.C.R. 1996, I-4971.
106. Order of the President of the ECJ of 19 July 1995 in case C-149/95 P(R) *Atlantic Container Line and Others vs Commission*, E.C.R. 1995, I-2165.
107. Judgment of the CFI of 18 September 1995 in case T-167/94 *Detlef Noelle vs Council*, E.C.R. 1997, II-2379.
108. Judgment of the CFI of 18 September 1995 in case T-305/94 *Limburgse Vinyl Maatschappij NV and others vs Commission*, E.C.R. 1999, II-931.
109. Judgment of the ECJ of 15 December 1995 in case C-415/93 *Union royale belge des sociétés de football association ASBL vs Jean-Marc Bosman*, E.C.R. 1995, I-4921.
110. Opinion 2/94 of the Court of Justice of 28 March 1996, E.C.R. 1996, I-1763.
111. Order of the President of the CFI of 3 June 1996 in case T-41/96 R *Bayer vs Commission*, E.C.R. 1996, II-381.
112. Decision on admissibility of the CFI of 11 July 1996 in joined cases T-542/93 *Métropole Télévision vs Commission*, E.C.R. 1996, II-649.
113. Order of the President of the ECJ of 14 October 1996 in case C-268/96 P(R) *SCK and FNK vs Commission*, E.C.R. 1996, I-4971.
114. Order of the President of the ECJ of 14 October 1996 in case C-445/00 R *Austria vs Council*, E.C.R. 2001, I-1461.
115. Decision on admissibility of the CFI of 12 December 1996 in case T-87/92 *Kruidvat vs Commission*, E.C.R. 1996, II-1931.
116. Judgment of the ECJ of 30 January 1997 in Case C-178/95 *Wiljo vs Belgian State*, E.C.R. 1997, I-585.
117. Judgment of the ECJ of 18 March 1997 in case C-282/95 P *Guérin Automobiles vs Commission*, E.C.R. 1997, I-1503.
118. Judgment of the CFI 2 May 1997 in case T-90/96 *Automobiles Peugeot vs Commission*, E.C.R. 1997, II-663.
119. Judgment of the ECJ of 13 May 1997 in case C-233/94 *Germany vs Parliament and Council*, E.C.R. 1997, I-2405.
120. Judgment of the CFI of 9 June 1997 in case T-9/97 *Elf Atochem vs Commission*, E.C.R. 1997, II-909.
121. Order of the President of the ECJ of 5 March 1998 in joined cases C-199/94 P and C-200/94 P *Pevasa and Inpesca vs Commission*, E.C.R. 1995, I-3709.

122. Judgment of the ECJ of 2 April 1998 in case C-367/95 P *Commission vs Sytraval and Brink's France*.
123. Judgment of the ECJ 28 April 1998 in case C-200/96 *Metronome Musik*, E.C.R. 1998, I-1953.
124. Judgment of the ECJ of 28 April 1998 in case C-120/95 *Nicolas Decker vs Caisse de maladie des employés privés*, ECR 1998, I-1831.
125. Judgment of the ECJ of 28 April 1998 in case C-158/96 *Raymond Kohll vs Union des caisses de maladie*, E.C.R. 1998, I-1931.
126. Judgment of the CFI of 14 May 1998 in case T-308/94 *Cascades vs Commission*, E.C.R. 1998, II-925.
127. Judgment of the CFI of 14 May 1998 in case T-347/94 *Mary-Melnhof vs Commission*, E.C.R. 1998, II-1751.
128. Judgment of the CFI of 14 May 1998 in case T-352/94 *Mo och Domsjö vs Commission*, E.C.R. 1998, II-1989.
129. Judgment of the CFI of 14 May 1998 in case T-354/94 *Stora Kopparbergs Berglags vs Commission*, E.C.R. 2002, II-843.
130. Judgment of the CFI of 9 June 1998 in case T-10/97 *Carlsen*, E.C.R. 1998, II-00485.
131. Order of the President of the CFI of 7 July 1998 in case T-65/98 R *Van den Bergh Foods Ltd vs Commission*, E.C.R. 2003, II-4653.
132. Judgment of the CFI of 15 September 1998 in joined cases T-374/94 etc. *European Night Services and others vs Commission*, E.C.R. 1998, II-3141.
133. Judgment of the ECJ of 22 September 1998 in case C-185/97 *Belinda Jane Coote vs Granada Hospitality Ltd.*, E.C.R. 1998, I-05199.
134. Judgment of the ECJ of 1 June 1999 in case C-126/97 *Eco Swiss vs Benetton*, E.C.R. 1999, I-3079.
135. Judgment of the ECJ of 8 July 1999 in case C-199/92 P *Hüls vs Commission*, E.C.R. 1999, I-4287.
136. Judgment of the CFI of 7 December 1999 in case T-92/98 *Interporc vs Commission*, E.C.R. 1999, II-3521.
137. Judgment of the CFI of 27 January 2000 in case T-256/97 *BEUC vs Commission*, E.C.R. 2000, II-101.
138. Judgment of the CFI of 15 March 2000 in case T-337/94 *Enso-Gutzeit vs Commission*, E.C.R. 1998, II-1571.
139. Judgment of the CFI of 15 March 2000 in case T-25/95 *Cimenteries CBR et al vs Commission*, E.C.R. 2000, II-508.
140. Judgment of the CFI of 22 March 2000 in joined cases T-125/97 and T-127/97 *Coca-Cola vs Commission*, E.C.R. 2000, II-1733.
141. Judgment of the ECJ of 28 March 2000 in case C-7/98 *Krombach vs Commission*, E.C.R. 2000, I-1935.
142. Judgment of the CFI of 30 March 2000 in case T-65/96 *Kish Glass v Commission*, E.C.R. 2000, II-1885.
143. Judgment of the ECJ of 13 April 2000 in case C-292/97 *Kjell Karisson and others vs Commission*, E.C.R. 2000, 202.

144. Judgment of the CFI of 6 July 2000 in case T-62/98 *Volkswagen vs Commission*, E.C.R. 2000, II-2707.
145. Judgment of the CFI of 12 December 2000 in case T-296/97 *Alitalia vs Commission*, E.C.R. 2000, II-3871.
146. Judgment of the ECJ of 14 December 2000 in case C-344/98 *Masterfoods vs Commission*, E.C.R. 2000, I-11369.
147. Judgment of the ECJ of 11 January 2001 in case C-1/99 *Kofisa Italia vs Commission*, E.C.R. 2001, I-207.
148. Judgment of the ECJ of 11 January 2001 in case C-226/99 *Siples vs Commission*, E.C.R. 2001, I-277.
149. Judgment of the CFI of 20 February 2001 in case T-112/98 *Mannesmannröhren-Werke vs Commission*, E.C.R. 2001, II-729.
150. Judgment of the ECJ of 6 March 2001 in case C-274/99 P *Connolly vs Commission*, E.C.R. 2001, I-1611.
151. Judgment of the CFI of 12 July 2001 in joined cases T-202/98 etc. *Tate&Lyle vs Commission*, E.C.R. 2001, II-2035.
152. Order of the ECJ of 18 October 2001 in case C-241/00 P *Kish Glass vs Commission*, E.C.R. 2001, I-7759.
153. Order of the President of the CFI of 26 October 2001 in case T-184/01 R *IMS Health Inc vs Commission*, E.C.R. 2001, II-3193.
154. Judgment of the ECJ of 27 November 2001 in Case C-424/99 *Commission vs Republic of Austria*, E.C.R. 2001, I-9285.
155. Judgment of the CFI of 6 December 2001 in case T-196/99 *Area Cova vs Council and Commission*, ECR II-3597.
156. Order of the President of the Court of 14 December 2001 in case C-404/01 P (R) *Commission vs Euroalliances and Others*, E.C.R. I-10367.
157. Judgment of CFI of 30 January 2002 in case T-54/99 *Max.mobil vs Commission*, E.C.R. 2002, II-313.
158. Judgment of the CFI of 20 March 2002 in case T-9/99 *HFB & Others vs Commission*, E.C.R. 2002, 11-1487.
159. Judgment of the ECJ of 17 May 2002 in case C-406/01 *Germany vs Commission*, E.C.R. 2002, I-4561.
160. Judgment of the ECJ of 2 October 2002, in case C-94/00 *Roquette Frères SA vs Directeur général de la concurrence, de la consommation et de la répression des frauds*, E.C.R. 2002, 9011.
161. Judgment of the ECJ of 15 October 2002 in joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P do C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij e.a. vs Commission*, E.C.R. 2002, I-8375.
162. Judgment of the CFI of 15 January 2003 in joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International et al. vs Commission*, ECR 2003, p. II-1.
163. Judgement of the ECJ of 12 June 2003 in case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge vs Republic of Austria*, E.C.R. 2003, I-5659.

164. Judgment of the CFI of 9 July 2003 in case T-224/00 *Archer Daniels Midland Company vs Commission*, E.C.R. 2003, II-2597.
165. Judgment of the ECJ of 18 September 2003 in case C-338/00 P *Volkswagen*, E.C.R. 2003, I-9189.
166. Judgment of the CFI of 30 September 2003 in case T-191/98 *Atlantic Container Line vs Commission*, E.C.R. 2003, II-3275.
167. Judgment of the CFI of 30 September 2003 in case T-26/01 *Fiocchi Munizioni vs Commission*, E.C.R. 2003, II-395.
168. Judgment of the ECJ of 2 October 2003 in case C-176/99 P *ARBED vs Commission*, E.C.R. 2003, I-10687.
169. Judgment of the ECJ of 2 October 2003 in case C-194/99 P *Thyssen Stahl vs Commission*, E.C.R. 2003, I-10821.
170. Judgment of the CFI of 27 November 2003 in case T-190/00 *Regione Siciliana*, E.C.R. 2003, II-5015.
171. Judgment of the CFI of 11 December 2003 in case T- 59/99 *Ventouris Group Enterprises SA vs Commission*, ECR II-5257.
172. Judgment of the CFI of 11 December 2003 in case T-65/99 *Strintzis Lines Shipping SA vs Commission*, E.C.R. 2003, II-5433.
173. Judgment of the CFI of 16 December 2003 in joined cases T-5/00 and T-6/00 *FEG & TU vs Commission*, E.C.R. 2003, II-5761.
174. Judgment of the ECJ of 7 January 2004 in joint cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P i C-219/00 P *Aalborg Portland e.a. vs Commission*, E.C.R. 2004, I-123.
175. Judgment of the CFI of 13 January 2004 in case T-67/01 *JCB Service vs Commission*, ECR 2004, II-49.
176. Judgment of the CFI of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, E.C.R. 2004, II-1181.
177. Judgment of the ECJ of 8 July 2004 C-286/95 P *Commission vs ICI*, E.C.R. 2000, I-2341.
178. Judgment of the CFI of 8 July 2004 in case T-48/00 *Corus UK vs Commission*, E.C.R. 2004, II-2325.
179. Judgment of the CFI of 8 July 2004 in joined cases T-67/00 etc. *JFE Engineering and others vs Commission*, E.C.R. 2004, II-2501.
180. Judgment of the CFI of 14 October 2004 in case T-44/02 OP *Dresdner Bank vs Commission*, E.C.R. 2006, II-3567.
181. Order of the President of the CFI of 9 November 2004 in case T-252/03 *Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) vs Commission*, E.C.R. 2004, II-3795.
182. Judgment of the CFI of 16 December 2004 in case T-410/03 *Hoechst GmbH vs Commission*, E.C.R. 2008, II-4451.
183. Judgment of the CFI of 15 February 2005 in case T-229/02 *PKK vs Council*, E.C.R. 2005, II-539.
184. Judgment of the CFI of 21 April 2005 in case T-28/03 *Holcim vs Commission*, E.C.R. 2005, II-1357.

185. Judgment of the ECJ of 12 May 2005 in case C-347/03 *ERSA vs Ministero Delle Politiche Agricole e Forestali*, E.C.R. 2005, I-3785.
186. Judgment of the ECJ of 14 May 2005 in case C-65/02 P *ThyssenKrupp vs Commission*, E.C.R. 2005, I-6773.
187. Judgment of the ECJ of 28 June 2005 in joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others vs Commission*, E.C.R. 2005, I-05425.
188. Order of the President of the ECJ of 17 November 2005 in case C-121/04 *Minoan Lines vs Commission*, E.C.R. 2005, 695.
189. Judgment of the CFI of 6 December 2005 in case T-48/02 *Brouwerij Haacht vs commission*, E.C.R. 2005, II-5259.
190. Opinion of AG Kokott of 8 December 2005 in case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied vs Commission*, E.C.R. 2005, 751.
191. Opinion of Advocate General Geelhoed of 19 January 2006 in case C-301/04 P *Commission vs SGL Carbon*, E.C.R. 2006, I-5915.
192. Judgment of the CFI of 15 March 2006 in case T-15/02 *BASF vs Commission*, E.C.R. 2006, II-497.
193. Judgment of the CFI of 5 April 2006, in case T-279/02 *Degussa AG vs Commission* (methionine cartel), E.C.R. 2006 II-897.
194. Judgment of the ECJ of 18 May 2006 in case C-397/03 *Archer Daniels Midland vs Commission*, E.C.R. 2006, I-4429.
195. Judgment of the CFI of 7 June 2006 in joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft vs Commission*, E.C.R. 2006, II-1601.
196. Judgment of the ECJ of 26 June 2006 in case C-301/04P *Commission vs SGL Carbon*, E.C.R. 2006, I-5915.
197. Judgment of the ECJ of 27 June 2006 in case C-540/03 *Parliament vs Council* ("family reunification"), E.C.R. 2006, p. I-5769.
198. Judgment of the ECJ of 12 September 2006 in case C-131/03 P *R.J. Reynolds Tobacco Holdings vs Commission*, E.C.R. 2006, I-7823.
199. Judgment of the CFI of 27 September 2006 in case T-168/01 *GlaxoSmithKline Services vs Commission*, E.C.R. 2006, II-2969.
200. Judgment of the CFI of 4 October 2006 in case T-193/04 *Hans-Martin Tillack vs Commission*, E.C.R. 2006, II-3995.
201. Judgment of the CFI of 12 December 2006 in case T-228/02, *Organisation des Modjahedines du peuple d'Iran vs Council*, E.C.R. 2006, II-4665.
202. Decision on admissibility of the CFI in case T-170/06 *Alrosa vs Commission*, E.C.R. 2007, II-2601.
203. Judgment of the ECJ of 25 January 2007 in case C-407/04 P *Dalmine vs Commission*, E.C.R. 2007, I-829.
204. Judgment of the CFI of 8 March 2007 in case T-339/04 *France Télécom SA vs Commission*, E.C.R. 2007, II-521

205. Judgment of the ECJ of 13 March 2007 in case C-432/05 *Unibet vs Commission*, E.C.R. 2007, I-2271.
206. Judgment of the ECJ of 19 April 2007 in case C-282/05 P *Holcim vs Commission*, E.C.R. 2007, II-2941.
207. Judgment of the ECJ of 26 June 2007 in case C-305/05 *Ordre des barreaux francophones et germanophones and others vs Conseil des ministres*, E.C.R. 2007, I-5305.
208. Judgment of the CFI of 11 July 2007 in case T-47/03 *Sison vs Council*, E.C.R. 2007, II-73.
209. Judgment of the CFI of 11 July 2007 in case T-327/03 *Al Aqsa vs Council*, E.C.R. 2007, II- 79.
210. Judgment of the CFI of 12 July 2007 in case T-266/03 *Groupement des cartes bancaires vs Commission*, E.C.R. 2007, II-83.
211. Judgement of the CFI of 17 September 2007 joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akros Chemicals vs Commission Ltd*, E.C.R. 2007, 11-3523.
212. Judgment of the CFI of 17 September 2007 in case T-201/04 *Microsoft vs Commission*, E.C.R. 2007 II-000.
213. Judgment of the CFI of 12 October 2007 in case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH vs Commission* (organic peroxides), E.C.R. 2007, II-4225.
214. Opinion of Advocate General Kokott of 13 December 2007 in case C-413/06 P *Bertelsmann AG i Sony Corporation of America vs Independent Music Publishers and Labels Association (Impala), Sony BMG Music Entertainment BV and the Commission*, E.C.R. 2008, I-4951.
215. Judgment of the CFI of 12 December 2007 in case T-113/04 *Atlantic Container Line vs Commission*, E.C.R.2007, II-2941.
216. Judgment of the CFI of 12 December 2007 in joined cases T- 101/05 and T-111/05 *BASF and UCB vs Commission*, E.C.R. 2007, II-4949.
217. Judgment of the ECJ of 18 December 2007 in case C-341/05 *Laval un Partneri Ltd vs Svenska Byggnadsarbetareförbundet and Others*, E.C.R. 2007, I-11767.
218. Opinion of Advocate General Maduro in case C-402/05 P, *Kadi vs Council and Commission*, E.C.R. 2008, I-6351.
219. Judgment of the CFI of 1 July 2008 in case T-276/04 *Compagnie Maritime Belge SA vs Commission*, E.C.R. 2008, II-1277.
220. Judgment of the ECJ (GC) of 1 July 2008 in joined cases C-341/06 P and C-342/06 P *Chronopost and La Poste vs UFEX and Others* E.C.R. 2008, I-4777.
221. Judgment if the CFI of 8 July 2008 in case T-99/04 *AC-Treuhand vs Commission*, E.C.R. 2008, II-1501.
222. Judgment of the ECJ of 10 July 2008 in case C-413/06 P *Bertelsmann and Sony Corporation of America vs Impala*, E.C.R. 2008, I-4951.
223. Judgment of the ECJ of 17 July 2008 in case C-521/06 P *Athinaiiki Techniki vs Commission*, E.C.R. 2008, I-5829.

224. Judgment the ECJ of 3 September 2008 in joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation vs Council and Commission*, E.C.R. 2008, I-6351.
225. Judgment of the CFI of 14 November 2008 in case T-45/08 *Transportes Evaristo Molina vs Commission*, E.C.R. 2008, II-265.
226. Judgment of the CFI in case T-256/07 *People's Mojahedin Organization of Iran vs Council*, E.C.R. 2008, II-3019.
227. Order of the President of the CFI of 27 January 2009 in case T-457/08 R *Intel vs Commission*, E.C.R. 2009, II-12.
228. Judgment of the CFI of 4 February 2009 in case T-145/06 *Omya vs Commission*, E.C.R. 2009, II-145.
229. Judgment of the ECJ of 19 February 2009 in case C-308/07 P *Gorostiaga Atxalandabaso vs Parliament*, E.C.R. 2009, I-1059.
230. Order of the President of the Court of 24 April 2009 in case T-52/09 R *Nycomed Danmark vs EMEA*, E.C.R. 2009, II-8133.
231. Judgment of the ECJ of 9 July 2009 in case C-511/06 P *Archer Daniels Midland Co. vs Commission*, E.C.R. 2009, I-5843.
232. Judgment of the ECJ of 3 September 2009 in case C-534/07 P *Prym vs Commission*, E.C.R. 2009, I-7415.
233. Judgment of the ECJ of 1 October 2009 in case C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd*, E.C.R. 2009, I-9147.
234. Judgment of the CFI of 14 October 2009 in case T-390/08 *Bank Melli Iran vs Council*, E.C.R. 2009, II-3967.
235. Order of the President of the CFI of 17 December 2009 in case T-396/09 R *Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht vs Commission*, E.C.R. 2009, II-00246.
236. Judgment of the General Court of 28 April 2010 in case T-446/05 *Amann & Söhne and Cousin Filterie vs Commission*, E.C.R. 2010, I-1255.
237. Judgment of the CFI of 28 April 2010 in case T-452/05 *Belgian Sewing Thread vs Commission*, E.C.R. 2010, II-1373.
238. Opinion of AG Kokott's opinion of 29 April 2010 in case C-550/07 P *Akzo and Akros*, E.C.R. 2010, I-229.
239. Judgment of the Court of Justice of 20 May 2010 in case C-12/03 P *Commission vs Tetra Laval*, E.C.R. 2005, I-987.
240. Judgment of the General Court 19 May 2010 in case T-25/05 *KME Germany and others vs Commission*, E.C.R. 2010, II-91.
241. Judgment of the General Court of 25 June 2010 in case T-66/01 *Imperial Chemical Industries Ltd vs Commission*.
242. Judgment of the Court of Justice of 29 June 2010 in case C-441/07 P *Commission vs Alrosa*, E.C.R. 2010, I-5949.
243. Judgement of the Court of Justice of 14 September 2010 in case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs Commission*, E.C.R. 2010, I-8301.

244. Judgement of the Court of Justice of 5 October 2010 in case C-400/10 PPU *J.McB vs LE*, E.C.R. 2010, I-8965.
245. Judgment of the General Court of 26 October 2010 in case T-23/09 *CNOP and CCG vs Commission*, E.C.R. 2010, 452.
246. Judgment of the Court of Justice of 11 November 2010 in case C-36/09 P *Transportes Evaristo Molina vs Commission*, E.C.R. 2010, I-145.
247. Judgment of the of the Court of Justice of 16 November 2010 in case C-73/10 P *Internationale Fruchtimport Gesellschaft Weichert vs Commission*, E.C.R. 2010, I-11535.
248. Judgment of the CFI of 15 December 2010 in case T-141/08 *E.ON Energie AG vs Commission*, E.C.R. 2010 II-05761.
249. Judgement of the Court of Justice of 22 December 2010 in case C-279/09 *DEB vs Bundesrepublik Deutschland*, E.C.R. 2010, I-13849.
250. Opinion of Advocate General Sharpston of 10 February 2011 in case C-272/09 P *KME Germany*, E.C.R. 2011, I-12789.
251. Judgment of the Court of Justice (GC) of 1 March 2011 in case C-236/09 *Association belge des Consommateurs Test-Achats (ASBL)*, E.C.R. 2011, I-773.
252. Judgment of the General Court of 24 March 2011 in case T-385/06 *Aalberts Industries vs Commission*, E.C.R. 2011, II-000.
253. Opinion of Advocate General Kokott in case C-110/10 P *Solvay SA vs Commission*, E.C.R. 2011, I-10439.
254. Order of the President of the General Court of 13 April 2011 in case T-413/10 R *Socitrel vs Commission*, E.C.R. 2011, II-112.
255. Judgment of the Court of Justice 14 April 2011 in case C-455/11 P *Solvay vs Commission*, n.y.r.
256. Judgment of the Court of Justice of 3 May 2011 in case C-375/09 *Tele2 Polska vs Commission*, E.C.R. 2011, 270.
257. Judgment of the General Court of 23 May 2011 in case T-226/10 *Prezes UKE vs Commission*, E.C.R. 2011, I-0000.
258. Judgment of the General Court of 7 June 2011 in case T- 217/06 *Arkema France vs Commission*, E.C.R. 2011, II-000.
259. Order of the President of the CFI of 9 June 2011 in case T-62/06 RENV R *Eurallumina vs Commission*, E.C.R. 2011, II-00167.
260. Order of the President of the General Court of 10 June 2011 in case T-414/10 R *Companhia Previdente vs Commission*, E.C.R. 2011, II-173.
261. Judgment of the General Court of 16 June 2011 in case T-185/06 *L’Air liquide vs Commission*, E.C.R. 2011, II-2809.
262. Judgment of the General Court of 16 June 2011 in case T-196/06 *Edison vs Commission*, E.C.R. 2011, II-3149.
263. Judgment of the General Court of 16 June 2011 in joined cases T-204/08 and T-212/08 *Team Relocations vs Commission*, E.C.R. 2011, II-000.
264. Judgment of the General Court of 16 June 2011 in case T-210/08 *Verbuizingen Coppens vs Commission*, E.C.R. 2011, II-000.

265. Judgment of the General Court of 12 July 2011 in case T-113/07 *Toshiba vs Commission*, E.C.R. 2011, II-000.
266. Order of the President of the General Court of 12 July 2011 in case T-422/10 R *Emme Holding SpA vs Commission*, E.C.R. 2011, II-222.
267. Judgment of the General Court of 13 July 2011 in case T-44/07 *Kaucuk vs Commission*, E.C.R. 2011, II-4601.
268. Judgment of the General Court of 13 July 2011 in case T-45/07 *Unipetrol vs Commission*, E.C.R. 2011, II-4629.
269. Judgment of the General Court of 13 July 2011 in case T-53/07 *Trade-Stomil vs Commission*, E.C.R. 2011, II-4657.
270. Order of the President of the General Court of 29 July 2011 in case T-292/11 R *Cemex SAB de CV and Others vs European Commission*, E.C.R. 2011, II-243.
271. Judgment of the General Court of 5 October 2011 in case T-11/06 *Romana Tabacchi vs Commission*, E.C.R. 2011, II-000.
272. Judgment of the General Court of 25 October 2011 in case T-348/08 *Aragonesas Industrias y Energia vs Commission*, E.C.R. 2011, II-000.
273. Judgment of the Court of Justice of 25 October 2011 in case C-109/10 P *Solvay vs Commission* E.C.R. 2011, I-10329.
274. Judgment of the Court of Justice of 25 October 2011 in case C-110/10 P *Solvay vs Commission*, E.C.R. 2011, I-10439.
275. Judgment of the ECJ of 8 December 2011 in case C-389/10 P *KME Germany vs Commission*, E.C.R. 2011, I-000.
276. Judgment of the General Court of 2 February 2012 in case T-77/08 *Dow Chemical Company vs Commission*, E.C.R. 2012, II-000.
277. Judgment of the General Court of 2 February 2012 in case T-83/08 *Denki Kagaku Kogyo Kabushiki Kaisha vs Commission*, E.C.R. II-000.
278. Order of the General Court of 12 March 2012 in case T-42/11 *Universal Corp. vs Commission*, n.y.r.
279. Judgment of the General Court of 22 March 2012 in joint Cases T-458/09 and T-171/10, *Slovak Telekom vs Commission*, n.y.r.
280. Judgment of the General Court of 27 June 2012 in case T-439/07 *Coats Holdings vs Commission*, E.C.R. 2012, II-000.
281. Judgment of the General Court of 29 June 2012 in case T-370/09 *GDF Suez vs Commission*, E.C.R. 2012, II-000.
282. Judgment of the Court of Justice of 19 July 2012 in case C-628/10 P *Alliance One International and Standard Commercial Tobacco vs Commission*, E.C.R. 2013, 770.
283. Judgment of the Court of Justice of 19 July 2012 in case C-14/11 P *Commission vs Alliance One International and Others*, E.C.R. 2013, 770.
284. Judgment of the Court of Justice of 19 July 2012 in case C-58/12 P *Groupe Gascogne vs Commission*, E.C.R. 2013, 770.
285. Judgment of the CFI of 27 September 2012 in case T-343/06 *Shell Petroleum NV vs Commission*, n.y.r.

286. Judgment of the General Court of 27 September 2012 in case T-347/06 *Nynas Petroleum vs Commission*, E.C.R. 2012, II-000.
287. Judgment of the CFI of 27 September 2012 in case T-357/06 *Koninklijke Wegenbouw Stevin vs Commission*, E.C.R. 2012, II-000.
288. Judgment of the General Court of 14 November 2012 in case T-135/09 *Nexans vs Commission*, n.y.r.
289. Judgment of the General Court of 14 November 2012 in case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl vs Commission*, n.y.r.
290. Judgment of the Court of Justice of 22 November 2012 in case C-89/11 P *E.ON Energie AG vs Commission*, n.y.r.
291. Judgment of the General Court of 12 December 2012 in case T-410/09 *Almamet GmbH Handel mit Spänen und Pulvern aus Metall vs Commission*, E.C.R. 2012, 676.
292. Judgment of the Court of Justice of 11 July 2013 in case C-439/11 P *Ziegler SA vs Commission*, E.C.R. 2010, I-50.
293. Judgment of the Court of Justice of 11 July 2013 in case C-601/11 P *France vs Commission*, n.y.r.
294. Judgment of the Court of Justice of 18 July 2013 in joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission vs United Kingdom of Great Britain and Northern Ireland*, n.y.r.
295. Judgment of the Court of Justice of 18 July 2013 in case C-499/11 P *Dow Chemical and Others vs Commission*, n.y.r.
296. Judgment of the Court of Justice of 18 July 2013 in Case C-501/11 P *Schindler vs Commission*, n.y.r.
297. Judgment of the General Court of 6 September 2013 in case T-289/11 *Deutsche Bahn vs Commission*, n.y.r.
298. Judgment of the Court (GC) of 26 November 2013 in case C-40/12 P *Gascogne Sack Deutschland GmbH vs Commission*, n.y.r.
299. Judgment of the Court (GC) of 26 November 2013 in case C-50/12 P *Kendrion NV vs Commission*, n.y.r.
300. Judgment of the Court of Justice of 26 November 2013 in case C-58/12 P *Groupe Gascogne SA vs Commission*, n.y.r.
301. Judgment of the General Court of 14 March 2014 in case T-292/11 *Cemex and others vs Commission*, n.y.r.
302. Judgment of the General Court of 14 March 2014 in case T-296/11 *Cementos Portland Valderrivas vs Commission*, n.y.r.
303. Judgment of the Court of Justice of 27 March 2014 in case C-265/13 *Emiliano Torralbo Marcos vs Korota SA and Fondo de Garantía Salarial vs Commission*, n.y.r.
304. Opinion of Advocate General Kokott of 3 April 2014 in case C-37/13 P *Nexans SA and Nexans France SAS vs European Commission*, n.y.r.
305. Judgment of the CFI of 30 April 2014 in case T-468/08 *Tisza Erőmű kft vs Commission*, n.y.r.
306. Judgment of the Court of Justice of 30 April 2014 in case C-238/12 P *FLSmidth & Co. A/S vs Commission*, n.y.r.

307. Judgment of the Court of Justice of 19 June 2014 in case C-243/12 P *FLS Plast A/S vs Commission*, n.y.r.
 308. Judgment of the Court of Justice of 25 June 2014 in case C-37/13 P *Nexans and Nexans France vs Commission*, n.y.r.
 309. Judgment of the General Court of 25 November 2014 in case T-402/13 *Orange vs Commission*, n.y.r.
 310. Judgment of the General Court of 26 November 2014 in case T-272/12 *Energeticky a prumyslovy and EP Investment Advisors vs Commission*, n.y.r.
 311. Judgment of the Court of Justice of 18 June 2015 in case C-583/13 P *Deutsche Bahn vs Commission*, n.y.r.
- (All documents are available at: www.curia.europa.eu)

V. Case-law of the Commission

1. Decision of 20 October 1979 in case *Fabbrica Pisana*, 80/334/EEC, OJ 1980, L75/30.
2. Decision of 20 December 1979 in case *Fabbrica Lastre di Vetro Pietro Sciarra*, 80/335/EEC, OJ 1980, L75/35.
3. Decision of 27 October 1982 in case IV/AF.528 *Fédération Nationale de l'Industrie de la Chaussure de France* (FNICF), 82/756/EEC, OJ 1982, L319/12.
4. Decision of 14 December 1984 in case *John Deere*, 85/79/EEC, OJ 1985, L35/58.
5. Decision of 7 October 1992 in case IV/33.791 *CSM*, 92/500/EEC, OJ 1992, L305/16.
6. Decision of 14 October 1994 in case *AKZO Chemicals*, 94/735/EC, OJ 1994, L294/31.
7. Decision of 28 January 1998 in case *Volkswagen*, OJ 1998, L124/60.
8. Decision of 4 November 1988 in case IV/32.318 *London European Sabena*, 88/589/EEC, OJ 1988, L317/47.
9. Decision of 20 September 2000 in case COMP/36.653 *Opel (Netherlands)*, 2001/146/EC, OJ 2001, L59/1.
10. Decision of 18 July 2001 in case COMP.D.2 37.444 *SAS Maersk Air*, 2001/716/EC, OJ 2001, L265/15.
11. Decision of 18 July 2001 in case COMP.D.2 37.386 *Sun-Air versus SAS and Maersk Air*, 2001/716/EC, OJ 2001, L 265/15.
12. Decision of 18 July 2001 in case COMP/E-1 36.490 *Graphite Electrodes*, 2002/271/EC, OJ 2002, L100/1.
13. Decision of 11 June 2002 in case COMP/36.571/D-1 *Austrian Banks*, 2004/138/EC, OJ 2004, L56/1.
14. Decision of 30 November 2005 in case COMP/38.354 *Industrial Bags*, 2007/686/EC, OJ L282/41.
15. Decision of 13 September 2006 in case COMP/F/38.456 *Dutch Bitumen*, 2007/534/EC, OJ L196/40.

16. Decision of 20 November 2007 in case COMP/38.432 *Professional Videotape*, OJ 2008 C57/10.
17. Decision of 27 October 2007 in case COMP/F 1/38.121 *Fittings*, OJ 2007, L283/63.
18. Decision of 30 September 2008 in case COMP/B-1/39.326 *E.ON Energie*, OJ 2008 C240/06.
19. Decision of 28 January 2009 in case COMP/39.406 *Marine Hoses*, OJ 2009, C 168/06.
20. Decision of 24 May 2011 in case COMP/39.796 *Suez environnement*, OJ 2011, C 251/03.
21. Decision of 28 March 2012 in case COMP/39.793 *EPH and Others*, OJ 2012, C 316/08.

VI. Others

1. Judgment of the French Supreme Court (Cour de cassation), Civ. 7 May 1828, p. 1828.
2. Judgment of 5 May 1944 of the French State Council (Conseil d'Etat francais), *Dame Tromprier-Gravier*.
3. Speech of Jean Monnet o the ECSC Assembly, Strasbourg, 11 September 1952.
4. Cour de cassation (FR), Crim. 22 June 1954, Bull. Crim. No. 395.
5. *Delhi Declaration* of 1959 of the International Commission of Jurists (ICJ), available at: www.icj.org.
6. *Rapport fait au nom de la Commission du marche interieurayant pour objet la consultation demande de l'Assemble parlementaire europeenne par le Conseil de la Communaute economique europeenne sur un premier rglement d'application des articles 85 et 86 du traité de la C.E.E.* (Doc. 104/1960-1961).
7. UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), available at: <http://www.refworld.org/docid/3dda1f104.html>.
8. EP Resolution concerning the protection of the fundamental rights of Member States' citizens when Community law is drafted, OJC 26, 4 April 1973.
9. Decision of 2 December 1976 of the French Constitutional Council, No. 76-70 DC, Rec. p. 39.
10. Decision of 20 July 1977 of the French Constitutional Council, No. 77-83, Rec. p. 39.
11. EP Resolution on the granting of special rights to the citizens of the European Community, OJC 299, 16 November 1977.
12. Commission's Memorandum on the Communities becoming a signatory of the European Convention on Human Rights, *Bulletin of the European Communities*, supplement 2/79.

13. Commission Answers to Written question No. 677/79, OJ 1979 C310/30.
14. Corte Cost. 10 Octobre 1979, n. 125, in *Foro italiano*, 1979, I, pp. 2513–2517.
15. UN General Assembly resolutions on “*Strengthening of the rule of law*” (A/RES/48/132, 20 December 1993; A/RES/49/194, 23 December 1994; A/RES/50/179, 22 December 1995; A/RES/51/96, 12 December 1996; A/RES/52/125, 12 December 1997; A/RES/53/142, 9 December 1998; A/RES/55/99, 4 December 2000 and A/RES/57/221, 18 December 2002).
16. Request by the Council of the European Union for an Opinion pursuant to Art. 228(6) of the Treaty establishing the European Community, [1994] OJ C174/8.
17. Decision of the French Constitutional Council of 2 February 1995, Rec. 195.
18. Interim Committee of the International Monetary Fund Declaration “*Partnership for Sustainable Global Growth*” of 29 September 1996.
19. *Common position of 25 May 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning human rights, democratic principles, the rule of law and good governance in Africa* (98/350/CFSP), EU document.
20. Commission’s *Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty*, OJ 1998, C 009, pp. 0003–0005.
21. Conclusions of the Cologne European Council, June 1999.
22. *Charter on Good-Neighbourly Relations, Stability, Security and Cooperation in South-Eastern Europe*, 12 February 2000, available at: www.rspcsee.org.
23. *Warsaw Declaration: Toward a Community of Democracies*, 27 June 2000, ILM 39 (2000).
24. Commission’s *Communication on the Charter of Fundamental Rights of the European Union*, Brussels, COM (2000) 559 final 13 September 2000.
25. Statement of the President of the European Commission, Romano Prodi, at the Nice European Council on 7 December 2000.
26. XXXIII Report on Competition Policy, 2003.
27. Commission’s *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003*, OJ 2006, C 06/3.
28. Judgment of the US Supreme Court in case *Al Odah vs United States* 542 U.S. 466 (2004).
29. Judgment of the US Supreme Court in case *Rasul vs Bush* 542 U.S. 466 (2004).
30. *Three Rivers District Council and Others vs Governor and Company of the Bank of England* (No. 6) [2004] 3 W.L.R.
31. *Equal Access to Justice and the Rule of Law*, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention (2005).
32. Commission *Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, OJ 2005, C325/07.
33. *International Bar Association Rule of Law Resolution* of 30 September 2005, available at: www.ibanet.org.

34. Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, OJ C 325, 22 December 2005.
35. Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006/C 210/02.
36. UN General Assembly resolutions on "The rule of law at the national and international levels" (A/RES/61/39, 4 December 2006; A/RES/62/70, 6 December 2007; A/RES/63/128, 11 December 2008 and A/RES/64/116, 16 December 2009).
37. *An EU Competition Court*, House of Lords Select Committee on the European Union, April 23, 2007, HL Paper 75.
38. Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe accepted on 23 November 2007, *The principle of the rule of law*.
39. Commission press release of 16 January 2008: *Commission launches sector inquiry into pharmaceuticals with unannounced inspections*, IP/08/49.
40. Judgment of the US Supreme Court in case *Boumediene vs Bush* 553 U.S. (2008).
41. House of Lords Select Committee on the European Union, 10th Report of 2008.
42. *Enforcement by the Commission. The decisional and enforcement structure in antitrust cases and the Commission's fining system*, 02 June 2009\BRUSSELS\DNW\470392.04 (modified version of the report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003", 11 and 12 June 2009, Brussels.
43. Speech of N. Kroes, *Antitrust and State Aid Control – The Lessons Learned*, SPEECH/09/408, available at http://europa.eu/rapid/press-release_SPEECH-09-408_en.htm?locale=en.
44. Commission Press release of 17 March 2010, Brussels, available at: http://ec.europa.eu/commission_2010-2014/redirecting/pdf/echr_background.pdf.
45. Speech of the EU Commissioner Joaquín Almunia, *Due Process and competition enforcement*, SPEECH/10/449, IBA 14th Annual Competition Conference, Florence, 17 September 2010.
46. Speech of the EU Commissioner Joaquín Almunia at the Revue Concurrences conference: *New Frontiers of Antitrust 2011* in Paris on 11 February 2011, available at <http://europa.eu>, section press releases, reference SPEECH/11/96.
47. Commission's Press released of 24 May 2011, IP/11/632.
48. OFT, *Applications for leniency and no-action in cartel cases OFT's detailed guidance on the principles and process*, October 2011.
49. Commission's brochure, *Compliance Matters*, November 2011, available at http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf.

50. Commission's *Notice on the Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, OJ 2011, C 308.
51. *European Court of Human Rights: The ECHR in 50 questions*, Strasbourg, January 2012, available at www.echr.coe.int.
52. *Overview 1959–2011*, European Court of Human Rights, Strasbourg, February 2012, available at www.echr.coe.int.
53. Commission's press release of 28 March 2012, IP/12/319 *Antitrust: Commission fines Czech energy companies Energetický a průmyslový holding and EP Investment Advisors € 2.5 million for obstruction during inspection*.
54. *EU Strategic Framework and Action Plan on Human Rights and Democracy* of 25 June 2012, No. 11855/12. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.
55. EU Press release No. 11737/12 of 25 June 2012, Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131173.pdf.
56. *The European Court of Human Rights in Facts & Figures – 2012*, Strasbourg, June 2013, available at www.echr.coe.int.
57. Commission's *Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003*, 18 March 2013.
58. *World Justice Project Rule of Law Index 2014*, available at http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf.
59. Recording of the hearings at the EP of the Competition Commissioner M. Vestager of 2 October 2014, available at <http://www.elections2014.eu/en/new-commission/hearing/20140918HEA65209>.
60. *Antitrust: Commission welcomes General Court judgment confirming its inspection powers in the area of electronic searches*, MEMO/14/2181, Brussels, 26 November 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-2181_en.htm.

Previous publications of the CARS Publishing Programme

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Rajmund Molski, *Prawne i ekonomiczne aspekty polityki promowania narodowych czempionów* [*Legal and Economic Aspects of the Policy of Promoting of National Champions*], Warszawa 2015.

internetowy Kwartalnik Antymonopolowy i Regulacyjny 2015, numery 1–5.

Konrad Stolarski, *Zakaz nadużywania pozycji dominującej na rynkach telekomunikacyjnych w prawie Unii Europejskiej* [*Prohibition of Abuse of Dominant Position on the Telecommunications Markets*], Warszawa 2015.

Yearbook of Antitrust and Regulatory Studies, Vol. 2015, 8(11).

Yearbook of Antitrust and Regulatory Studies, Vol. 2014, 7(10).

internetowy Kwartalnik Antymonopolowy i Regulacyjny, 2014, numery 1–9.

Telecommunications Regulation in Poland. Edited by Stanisław Piątek, Warsaw 2013.

Yearbook of Antitrust and Regulatory Studies, Vol. 2013, 7(9).

Mateusz Chołodecki, *Kontrola sądowa decyzji Prezesa Urzędu Komunikacji Elektronicznej* [*Judicial Control of Decisions of the President of the Office for Electronic Communications*], Warszawa 2013.

Yearbook of Antitrust and Regulatory Studies, Vol. 2013, 6(8).

Polish Airports in the European Union – Competitive Challenges, Regulatory Requirements and Development Perspectives. Edited by Filip Czernicki and Tadeusz Skoczny, Warsaw 2013.

Agata Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję* [*Public and Private Enforcement of Prohibitions of Anticompetitive Practices*], Warszawa 2013.

Antoni Bolecki, *Wymiana informacji między konkurentami w ocenie organów konkurencji* [*Exchange of Information Among Competitors in the Assessment of Competition Protection Authorities*], Warszawa 2013.

internetowy Kwartalnik Antymonopolowy i Regulacyjny, 2013, numery 1–8.

Yearbook of Antitrust and Regulatory Studies, Vol. 2012, 5(7).

Tadeusz Skoczny, *Zgody szczególne w prawie kontroli koncentracji* [*Special Clearances in the Law on Merger Control*], Warszawa 2012.

Yearbook of Antitrust and Regulatory Studies, Vol. 2012, 5(6).

internetowy Kwartalnik Antymonopolowy i Regulacyjny, 2012, numery 1–6.

Stanisław Piątek, *Sieci szerokopasmowe w polityce telekomunikacyjnej* [*Broadband Networks in the Telecommunications Policy*], Warszawa 2011.

Maciej Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural Fairness in the Proceedings before the Competition Authority*], Warszawa 2011.

Ewelina D. Sage, *European Audiovisual Sector: Where business meets society's needs*, Warsaw 2011.

Yearbook of Antitrust and Regulatory Studies, Vol. 2011, 4(5).

Yearbook of Antitrust and Regulatory Studies, Vol. 2011, 4(4).

Usługi portów lotniczych w Unii Europejskiej i Polsce II – wybrane zagadnienia [*Airports Services in the European Union and in Poland II – Selected Problems*]. Praca zbiorowa pod red. Filipa Czernickiego i Tadeusza Skoczego, Warszawa 2011.

Yearbook of Antitrust and Regulatory Studies, Vol. 2010, 3(3).

Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe [*Airport Services in the European Union and Poland – Competition Law and Airports Regulations*]. Praca zbiorowa pod red. Filipa Czernickiego i Tadeusza Skoczego, Warszawa 2010.

Maciej Bernatt, *Spoleczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy* [*Corporate Social Responsibility. Constitutional and International Perspective*], Warsaw 2010.

Yearbook of Antitrust and Regulatory Studies, Vol. 2013, 6(7).

Yearbook of Antitrust and Regulatory Studies, Vol. 2009, 2(2).

Sprawa Microsoft – stadium, przypadku. Prawo konkurencji na rynkach nowych technologii [*Microsoft – Case Study. Competition Law on the New Technology Markets*]. Pod redakcją Dawida Miąsika, Tadeusza Skoczego, Małgorzaty Surdek, Warszawa 2008.

Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce [*Block Exemptions from the Prohibition of Restrictive Agreements in the EC and Poland*]. Pod redakcją Agaty Jurkowskiej i Tadeusza Skoczego, Warszawa 2008.

Yearbook of Antitrust and Regulatory Studies, Vol. 2008, 1(1).

Stanisław Piątek, *Regulacja rynków telekomunikacyjnych* [*Regulation of Telecommunications Markets*], Warszawa 2007.



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From the book reviews:

Ms. Marta Michatek's study discusses in a comprehensive manner a part of the proceedings before the European Commission – consisting of carrying out an inspection – and its compliance with the requirements of the right to defence. The use by the Author of a very rich literature, in French and English, as well as taking into account the Polish literature, deserves special respect. The Author also used to a very wide and comprehensive extent the case-law of the two European courts: the European Court of Human Rights and the Court of Justice of the European Union. She took into account all relevant jurisprudential guidelines, including those that were delivered in the recent months (like the case *Deutsche Bahn*). Due to the high scientific level of the study and its important practical implications I recommend with all the conviction the work of Ms. Marta Michatek to be published. The very careful editorial and linguistic elaboration of the doctorate should enable its swift publication. The fact that the work will be published in English will allow this study to achieve universal scope, what definitely constitutes an advantage, not only for the Author, but also for the publishing house deciding on its publication.

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The text constitutes a doctoral thesis, written under my guidance and submitted to the Faculty of Law of the University of Fribourg. The Faculty has accepted the thesis, upon my proposal and the proposal of Prof. Marc. Amstutz, on 28th August 2015. The text satisfies in every respect the requirements for a doctoral thesis at the Faculty of Law of the University of Fribourg. I recommend the text for publication in the collection of the Centre for Antitrust and Regulation (CARS).

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