

# Dawn Raids under Challenge

## A Study of the European Commission's Dawn Raid Practices in Competition Cases from a Fundamental Rights Perspective

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### Abstract

This doctoral dissertation examines the European Commission's dawn raid practices in competition cases from a fundamental rights perspective. In recent years the Commission has adopted a new and more aggressive enforcement policy, which reflects the widespread understanding that cartels and abuse of market power are harmful to the economy and should be punished. Given both the considerable gains to be made through anti-competitive practices and the cartel's nature of secrecy, effective application of the competition rules requires that competition authorities are vested with far-reaching investigatory powers.

At the same time, EU fundamental rights protection has been strengthened through the Lisbon Treaty, and the Commission now has to ensure effective application of the EU competition rules while navigating through an array of fundamental rights, such as the right of the defence and the right to privacy. The doctoral dissertation explores whether it is possible to strike a balance between the interests of ensuring effective dawn raids and adequate fundamental rights protection, or whether the Commission has been handed an impossible task. As the EU Charter of Fundamental Rights requires EU fundamental rights protection to meet or exceed the standard set by the ECHR, the research is based on case-law from both the EU Courts and the European Court of Human Rights.

The research demonstrates that the European Court of Human Rights has adopted a flexible approach towards inspections at business premises; it does not require an ex ante review of inspection decisions and accepts rather intrusive investigatory measures, provided that and as long as the procedural safeguards surrounding such measures are considered adequate. This way, the court manages to strike a balance between efficiency concerns and the rights of undertakings.

As for the EU system, the EU Courts are not providing judicial review to the extent required by the ECHR. While inspection decisions may be challenged, the possibilities to challenge measures taken on their basis, or have those measures suspended, are limited. This discrepancy between EU and ECHR law – which is of seemingly limited nature – may affect the legitimacy of the entire dawn raid procedure as the granting of far-reaching investigatory powers must be counterbalanced by effective judicial control to ensure that measures adopted by the Commission are neither disproportionate nor arbitrary. Absent an effective judicial control of measures taken on the basis of inspection decisions, the procedural safeguards surrounding dawn raids cannot be considered adequate, and it is possible that the powers of the Commission may need to be restricted accordingly.

The research also demonstrates that some of the limitations in the legal professional privilege – such as the exclusion of correspondence with non-EU lawyers or legal advice that lacks connection with the subject-matter of the investigation – do not serve the interests of a proper administration of justice and may therefore be questioned.

**Keywords:** *cartels, competition law, dawn raids, EU law, fundamental rights.*

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To my family – Magnus,  
Gustav, Emelie, Axel and Alice.



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# Abbreviations

AG	Advocate General
COE	Council of Europe
DG COMP	Directorate-General for Competition
DOJ	Department of Justice
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Union
ECN	European Competition Network
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EP	European Parliament
FRA	European Union Agency for Fundamental Rights
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ICN	International Competition Network
ILO	International Labour Organization
IMF	International Monetary Fund
JFTC	Japan Fair Trade Commission
LPP	Legal Professional Privilege
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WTO	World Trade Organization



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PART I  
GENERAL



# 1. Introduction

*La justice sans la force est impuissante, la force sans la justice est tyrannique. Il faut donc mettre ensemble la justice et la force; et pour cela faire que ce qui est juste soit fort ou ce qui est fort soit juste.*

*Blaise Pascal, 1670*

During the period 2010 through 2014, the European Commission (‘the Commission’) imposed fines of nearly nine billion euros on companies engaging in cartel activities found to be in violation of Article 101 of the Treaty on the Functioning of the European Union (‘the TFEU’).<sup>1</sup> This is nearly three times more than the fines imposed between 2000 and 2004, and as much as 16 times more than those imposed during the period 1990 through 1994. This new and more aggressive enforcement policy reflects the widespread understanding that cartels and abuse of market power are harmful to the economy and should be punished. Studies estimate the average gain from price-fixing to be at least ten per cent of the selling prices.<sup>2</sup> Given both the considerable gains to be made through anti-competitive practices and the cartel’s nature of secrecy, an effective application of the competition rules requires that competition authorities are

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<sup>1</sup> See <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>2</sup> As will be further discussed in Section 1.5 below, The United States Sentencing Commission estimates that the average gain from price-fixing is ten per cent of the selling prices, but this estimate is challenged by Connor and Lande who argue that the overcharge is considerably higher than ten per cent. According to a survey published by them in 2008, cartels have caused average overcharges in the range of 31 to 49 per cent and median overcharges in the range of 22 to 25 per cent of affected commerce. See 2011 United States Federal Sentencing Guidelines Manual, Chapter 2, Part R, <http://www.ussc.gov/guidelines-manual/2011/2011-2r11> and Connor and Lande, *Cartel Overcharges and Optimal Cartel Fines*, 3 Issues in Competition Law and Policy, 2203, ABA Section of Antitrust Law, 2008, Chapter 88, and Connor and Lande, *How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines*, Tulane Law Review, vol. 80, 2005, at pp. 1-3, and Connor and Lande, *Cartels as Rational Business Strategy: Crime Pays*, Cardozo Law Review, vol. 34, 2012, p. 427.

vested with far-reaching investigatory powers. Through legislative changes in 2004, the powers of the Commission were increased; now the stakes are higher for those engaging in anti-competitive practices.

At the same time, EU fundamental rights protection has been strengthened through the Lisbon Treaty. Companies targeted by the Commission's investigations will have a legitimate interest in safeguarding these rights, forcing the Commission to ensure an effective application of the EU competition rules while navigating through an array of fundamental rights, such as the right of the defence and the right to privacy. The question is whether it is possible to strike a balance between the interests of ensuring an effective application of the competition rules and adequate fundamental rights protection, or whether the Commission has been handed an impossible task.

## 1.1 Background

Article 2 of the Treaty on European Union ('the TEU') declares that the EU is based on a number of values such as democracy, the rule of law and human rights. Article 3 of the same Treaty sets out the objectives of the Union, declaring that it shall establish an internal market, and work for a sustainable development of Europe based on *inter alia* balanced economic growth, price stability and a highly competitive social market. The pursuit of these objectives is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods and persons, and for competition policy. These provisions are part of the framework of a system that is specific to the EU, and are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the very *raison d'être* of the EU.<sup>3</sup>

The prohibitions against restrictive practices and abuse of dominance laid down in Articles 101 and 102 of the TFEU reflect the EU's competition policy and are designed to ensure effective competition in the internal market. The provisions have formed part of the EU legislation ever since the formation of the EEC in the 1950s, and infringements of these provisions are not only considered liable to cause harm to the economy as a whole, they may also hamper the proper functioning of the internal market.<sup>4</sup> The

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<sup>3</sup> See Opinion 2/13 of 18 December 2014, EU:C:2014:2454, para 172.

<sup>4</sup> See e.g. Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013, OJ/C/167/07.

Commission, which acts as guardian of the Treaties,<sup>5</sup> has been entrusted with the task of ensuring an effective application of Articles 101 and 102 of the TFEU.<sup>6</sup>

While the EU competition rules have remained basically the same since they were first enacted, the rules governing their enforcement have undergone a transformation in recent years. During the formative years of the Union, the role of the Commission's Directorate General for Competition ('DG COMP') was mainly to prioritize policies and to shape and ensure a consistent application of the EU competition rules throughout the Union.<sup>7</sup> As time went by, the Commission eventually saw itself ready to take on another role: that of a diligent enforcer of the EU competition rules, steering its focus away from securing a uniform application of Articles 101 and 102 TFEU towards the curbing of the most hard core competition law infringements.<sup>8</sup> Several steps in this direction had already been taken in the late 1990s, but in 2004, the reformation of the antitrust enforcement rules was fully implemented. The reform, which went by the name 'the Modernization Package' freed up resources and allowed the Commission to focus on the more serious infringements.<sup>9</sup> Today, more cartels are being detected and the

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<sup>5</sup> One of the Commission's functions is to ensure that EU legislation is applied correctly. In this capacity, it is informally known as 'the guardian of the treaties', see e.g. MacLennan, *Decentralized Enforcement of EC Law: Is the European Commission Still the Guardian of the Treaties?*, Proceedings of the Annual Meeting (American Society of International Law) vol. 91, Implementation, Compliance and Effectiveness (APRIL 9-12, 1997), pp. 165-172.

<sup>6</sup> The Commission's tasks and powers relating to the application of Articles 101 and 102 TFEU are laid down in 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 [2003] OJ L/1/1.

<sup>7</sup> For a further discussion on the early days of EU competition law enforcement, see e.g. Craig and de Búrca, *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, Monti, *EU Competition Law from Rome to Lisbon: Social Market Economy*, in Heide-Jørgensen et al (eds), *Aims and Values in Competition Law*, DJØF Publishing, 2013, Patel and Schweitzer, *The Historical Foundations of EU Competition Law*, Oxford University Press, 2013, Warlouzet, *The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere*, EUI Working Paper RSCAS 2010/80, Weitbrecht, *From Freiburg to Chicago and Beyond – The First 50 years of European Competition Law*, *European Competition Law Review*, issue 2, 2008, Jones & Sufrin, *EU Competition Law: Texts, Cases and Materials*, 6<sup>th</sup> edn, 2016.

<sup>8</sup> See e.g. preambles 3 and 4 to 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 [2003] OJ L/1/1.

<sup>9</sup> The Modernization Package abolished the previous notification system according to which undertakings had been obligated to notify agreements that were restrictive of competition, but which fulfilled the criteria for exemption laid down in Article 101(3) of the TFEU. Only those agreements that had been approved by the Commission were valid. Furthermore, the application of the competition rules was decentralized. Today, National courts and competition authorities have the power to fully apply both Articles 101 and 102 TFEU. For

finances imposed for infringements of the EU competition rules consistently reach record levels.<sup>10</sup> This could not have been achieved were it not for the investigatory measures available to the Commission. Among these measures, the most powerful by far is the power to carry out unannounced inspections – so-called *dawn raids*,<sup>11</sup> allowing the Commission to make inspections without prior notice at the premises of undertakings as well as the homes of their employees. The Modernization Package extended the Commission’s investigatory powers in a number of ways, making the Commission’s dawn raids more intrusive, and thus also more effective.

At the same time that the EU competition law enforcement system has undergone a transformation, so has EU fundamental rights protection. Through the Lisbon Treaty, the European Charter of Fundamental Rights (‘the Charter’) has not only been given binding legal force; the legislator has chosen to elevate it to primary law, placing the Charter right at the top of the norm hierarchy together with the Treaties.<sup>12,13</sup> Today, fundamental rights issues feature prominently in EU law.<sup>14</sup>

As will be further explored in this thesis, the strengthening of fundamental rights protection in the EU may have implications for the Commission’s

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further reading on the Modernization Package, see e.g. Cahill and Cooke, *The Modernisation of EU Competition Law Enforcement in the EU*, FIDE 2004 National Reports, Cambridge University Press, 2004, Maher, *Competition Law Modernization: An Evolutionary Tale?*, in Craig and de Búrca (eds), *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, Gerber, *Two Forms of Modernization in European Competition Law*, *Fordham International Law Journal*, vol. 35, issue 5, 2007, Gerber and Cassinis, *The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part I*, 27 *European Competition Law Review*, 10, 2006, Gerber and Cassinis, *The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement Part II*, 27 *European Competition Law Review*, 51, 2006.

<sup>10</sup> See e.g. the statistics published on the Commission’s website; <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

<sup>11</sup> Articles 20 and 21 of Council Regulation 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 [2003] OJ L/1/1.

<sup>12</sup> Article 6 of the TEU.

<sup>13</sup> For further reading on fundamental rights protection after the Lisbon Treaty, see e.g. Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, *Human Rights Law Review*, vol. 11, no. 4, 2011, Peers et al (eds), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, De Vries, Bernitz and Weatherill, *The Protection of Fundamental Rights in the EU After Lisbon*, Hart Publishing, 2015.

<sup>14</sup> In the second edition to the book *The Evolution of EU Law*, a chapter on human rights law and policy was added. De Búrca notes that human rights issues did not feature prominently in EU law at the time the first edition was published (in 1998), but that the picture was a very different one in 2011, and that the absence of a human rights chapter would be a notable omission from a book on the evolution of EU law, Craig and de Búrca (eds), *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, at p. 465.

competition law enforcement, as some of the methods applied by the Commission may be considered to run afoul of applicable fundamental rights. An adaptation of the enforcement system to accommodate the new requirements may in turn influence the effectiveness of the competition law enforcement system. Not only are competition law infringements often very complex arrangements, cartels are also secret by nature and therefore difficult to detect. The task of enforcing the EU competition rules has never been a straightforward one, but the strengthening of fundamental rights has certainly not made it easier for the Commission – which must now carefully manoeuvre its way around an array of different rights when fulfilling its task of ensuring an effective application of the EU competition rules.

One area where the tension between the need for effective competition law enforcement and the protection of fundamental rights becomes particularly apparent is that of dawn raids. The dawn raid is considered to be a prerequisite to successful competition law enforcement, as the threat of unannounced inspections has a deterrent effect,<sup>15</sup> and as evidence gathered during dawn raids is often key to the Commission's investigations.<sup>16</sup> It is the intrusive character of the dawn raid that makes it so powerful, but this intrusiveness also entails an inherent risk that fundamental rights are not properly safeguarded.<sup>17</sup> As noted by the General Court, the dawn raid

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<sup>15</sup> As will be further discussed in Section 3 below, effective deterrence requires that those who might be tempted to take illegal action believe that there is some reasonable probability of them being caught and that, if so, the consequences are likely to be grave. As argued by *Barnett* deterrence only works when the consequences are real. To effectively deter cartels, antitrust enforcers must aggressively and predictably prosecute cartelists and use the full range of weapons in the enforcement arsenal. Or, as *Scordamaglia-Tousis* puts it, the goal of effective deterrence depends on two components: the level of the fines and the likelihood of being caught. The deterrent effects of any antitrust enforcement scheme thus depend upon whether companies actually believe that their practices may be detected by the competition authorities, See *Seven Steps to Better Cartel Enforcement*, Speech made by Thomas O. Barnett, Assistant Attorney General of the Antitrust Division of the US Department of Justice, at the 11<sup>th</sup> Annual Competition Law & Policy Workshop, European Union Institute in Florence Italy, 2 June 2006, Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 12.

<sup>16</sup> Harding and Joshua, *Regulating Cartels in Europe*, Oxford Studies in European Law, 2<sup>nd</sup> edn, 2010, Joshua, *Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?*, [http://ec.europa.eu/competition/speeches/text/sp1995\\_044\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1995_044_en.html), Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014., Sauer, Ortiz Blanco and Jörgens, *Investigation of Cases (III): Inspections*, in Ortiz Blanco (ed.), *EU Competition Procedure*, 3rd edn, 2013, p. 315.

<sup>17</sup> Wils, *Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay Between European and National Legislation and Case-law*, *World Competition*, Vol 29, No 1, March 2006, pp. 3-24.

suggests, by its very nature that an infringement has been committed and may have major repercussions on the situation of the company under suspicion.<sup>18</sup> Furthermore, the fact that large amounts of documents and data are gathered and possibly also shared with other competition authorities or with third parties seeking access to the Commission's files may cause the company, its directors and its employees damage that goes far beyond the boundaries of the competition case, and perhaps also far beyond what is possible to envisage at the time of the inspection.

It is therefore crucial that adequate procedural safeguards are in place for the Commission's dawn raid practices, and that the Commission respects these safeguards. At the same time, one must not forget that the Commission has an obligation to ensure an effective application of the EU competition rules, and this requires rather forceful measures. This thesis seeks to examine whether the Commission can ensure effective competition law enforcement while still respecting applicable fundamental rights, or whether this equation is impossible to solve.

## 1.2 Research questions

The formulation of the research questions is based on three axioms, which also form the basis of the EU policy;

1. Competition legislation and thus also its effective and efficient enforcement are necessary and serve a legitimate purpose.
2. The interests of efficiency and effectiveness should not be allowed to prevail at all times. Fundamental rights and general principles serve as important and necessary procedural safeguards, protecting the individual against abuse or arbitrariness by the authorities.
3. Both natural and legal persons enjoy EU fundamental rights protection, albeit that the rights may not necessarily be invoked with as much force by legal persons as when invoked by natural persons.

Basing the work on these three assumptions, the thesis explores questions about whether it is possible to strike a balance between fundamental rights protection and the need for efficient and effective dawn raids, and whether

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<sup>18</sup> Case T-296/11, *Cementos Portland Valderrivas SA v European Commission*, EU:T:2014:121, para 35.



the Commission's current dawn raid practices respect the fundamental rights granted to individuals under EU law.

These questions cannot be answered without first exploring how far the Commission's powers actually do reach under the current enforcement legislation, and whether the Commission acts within these limits. It will also be necessary to determine the scope of the fundamental rights and the general principles that are affected by the Commission's dawn raid practices, and whether the Commission respects these rights and principles. If not, the thesis will also examine the changes that are needed and whether those changes are likely to influence the effectiveness of the Commission's dawn raid procedures to the extent that it would no longer be possible to ensure effective enforcement of the EU competition rules.

In short: what rights do individuals enjoy in relation to dawn raid inspections, and are these rights reconcilable with the Commission's need for smooth dawn raid operations and the society's interest in effective competition law enforcement?

### 1.3 Scope

In most competition cases, the first formal decision made by the Commission is the decision to make an unannounced inspection – a dawn raid. The power to carry out dawn raids is the most intrusive and most far-reaching investigatory power granted to the Commission. Through the adoption of Council Regulation 1/2003 (Regulation 1/2003),<sup>19</sup> this power has been extended to cover not only the premises of undertakings, but also the private dwellings of employees and company representatives.<sup>20</sup>

A successful dawn raid is often key to a successful cartel investigation.

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<sup>19</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003, pp. 1 - 25.

<sup>20</sup> Article 21 of Regulation 1/2003 provides that 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 TFEU, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

As former head of DG COMP's cartel unit Julian Joshua once stated:

Unless the Commission during the first 'dawn raids' happens to find not only one smoking gun but a whole arsenal it will probably have to drop the case.<sup>21</sup>

Thus, the Commission has both strong and legitimate incentives to ensure the smooth operation of its inspections. As for the targeted companies on the other hand, the measures taken by the Commission officials may have long-lasting and adverse impact on their right of the defence, and any failure on the part of the Commission to respect fundamental rights such as the right to privacy or legal professional privilege, may cause irreparable damage. Furthermore, as the element of surprise is a key aspect of the dawn raid, there is an inherent risk that the company, when receiving the visit from the Commission, is not in a position to safeguard its rights properly. At the same time, extending the scope of fundamental rights to go beyond what is necessary to ensure an adequate level of protection, or, in the alternative, to allow companies to unduly obstruct investigations, may influence the effectiveness of the EU's competition law regime to an extent that exceeds what is actually necessary or desired.

These factors – the crucial link between a successful dawn raid and a successful competition law investigation, the potential harm that can be caused to a company taken by surprise, perhaps not being able to fully overlook the situation or knowing the full extent of its rights or how to exercise them, makes this subject especially interesting from a due process perspective. There are a number of due process issues relating to dawn raids, but in this thesis particular focus will be on the seven areas described below.

### 1.3.1 The right to privacy

As will be further elaborated upon in Chapter 8 below, both the Charter<sup>22</sup> and the European Convention on Human Rights and Fundamental Freedoms ('the ECHR' or 'the Convention')<sup>23</sup> protect individuals from interference with their private and family life, home and correspondence. An unannounced inspection where Commission officials are empowered not only to go through but also to seal off the premises of the targeted company, to search and block computers, mobile phones, etc. will no doubt interfere

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<sup>21</sup> Joshua, *Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?*,

[http://ec.europa.eu/competition/speeches/text/sp1995\\_044\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1995_044_en.html).

<sup>22</sup> Article 7 of the Charter.

<sup>23</sup> Article 8 of the ECHR.

with the targeted company's integrity. The question is whether companies may or should be able to rely on a right to privacy or whether this right is or should be reserved only to natural persons. This thesis is based on the assumption that legal persons are protected, but will examine to what extent Article 7 of the Charter affords protection to companies, and whether the current order ensures a balance between the opposing interests of the Commission and the targeted companies.

### 1.3.2 The need for an ex ante review of inspection decisions

Article 20 of Regulation 1/2003 grants the Commission the powers to decide on dawn raids. It is only when a targeted company opposes the inspection and the Commission requests assistance from national authorities that a judicial authorization may be necessary. The national court may then only verify that the Commission decision is authentic and that the measures are neither arbitrary nor excessive having regard to the subject-matter of the inspection.<sup>24</sup> In the recent case of *Deutsche Bahn*,<sup>25</sup> the companies targeted by the inspection decision challenged this order arguing that the lack of ex ante control constituted an infringement of both the right to privacy under Article 7 of the Charter and the right to an effective legal remedy under Article 47 of the Charter. This thesis will examine the merits of such claim, and discuss the need for or appropriateness of an ex ante control.

### 1.3.3 The subject-matter and purpose of inspections

At the heart of this thesis lie questions regarding the actual scope of the Commission's inspection powers. Article 20 of Regulation 1/2003 grants the Commission powers to enter any premises of the targeted company, to examine and copy books and records, to seal off premises and to ask for explanations on facts or documents relating to the subject-matter of the inspection. At the same time, Article 20 imposes an obligation on targeted companies to submit to the Commission's inspection decisions and to cooperate actively with the Commission during the course of the inspection.

It is self-evident that the Commission has an interest in keeping the scope of these powers as broad as possible to ensure effective enforcement of the competition rules. The more intrusive the dawn raid is, the greater the

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<sup>24</sup> Article 20(8) of Regulation 1/2003.

<sup>25</sup> Joined Cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn and Others v the European Commission*, EU:T:2013:404, on appeal to the ECJ, Case C-583/13 P, EU:C:2015:404.

likelihood of finding incriminating evidence. Furthermore, and as will be discussed in more detail in Chapter 7 below, cartels are becoming ever more sophisticated, using various tools designed to minimize the risk of detection, this necessitates the Commission's use of more forceful investigatory tools.<sup>26</sup> From a company perspective on the other hand, the wider the powers of the Commission, the greater the risk that fundamental rights – such as the right of the defence – are set aside. The thesis will examine the actual scope of the Commission's powers and discuss issues such as the rationale behind the obligation on the part of the Commission to state the subject-matter and purpose of the inspection, the degree of suspicion required in order for the Commission to be able to resort to a dawn raid, and the extent of the review to be performed by the Commission during the inspection. Closely linked to these issues is the matter of the Commission's powers to carry out dawn raids outside the scope of competition cases, such as within the frame of a sector inquiry.

#### 1.3.4 Information and documents to be covered by the inspection

Article 20(4) of Regulation 1/2003 requires the Commission to state in the inspection decision the purpose and subject-matter of its investigation. The same article explicitly limits the duty to answer questions to those related to the subject-matter of the investigation. However, there is no such explicit limitation with regard to the Commission's right to examine or copy books and records (other than that they should be related to the business). Does this mean that the Commission's powers to review and copy documents and files are not restricted, and would such an order be in line with applicable fundamental rights? This, and related issues – such as whether the Commission has or should have a right to review material at its headquarters in Brussels – will be addressed.

#### 1.3.5 Privilege against self-incrimination

As a fundamental principle under both the ECHR and the Charter, no one suspected of a criminal offence should be forced to admit his or her guilt.

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<sup>26</sup> Commission Staff Working Document, Ten Years of Antitrust Enforcement under Regulation 1/2003, Accompanying the Communication from the Commission to the European Parliament and the Council, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM (2014)453. Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

This right, the privilege against self-incrimination, is not expressly laid down in either the Charter or the ECHR, but has been developed through the courts' case-law. The thesis will examine whether competition law infringements are of a criminal nature, and if so, to what extent legal persons, as opposed to natural persons, may invoke the privilege against self-incrimination. If legal persons are protected by the privilege, it will also be necessary to examine the scope of protection afforded under EU law in order to determine whether it is broad and grants a right to silence, or whether it is limited to protecting persons from having to admit guilt. As will be further discussed in Chapter 11, there is also a distinction to be made between having to admit guilt during the course of an interview or an interrogation, and having to hand over incriminating documents to the Commission inspectors. The scope of protection afforded under EU law will be examined and analysed to determine whether the system in place strikes a proper balance between the need for effective competition law enforcement and adequate fundamental rights protection.

### 1.3.6 Legal professional privilege

In a civilized society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure.<sup>27</sup>

These words from Advocate General Warner in the *AM & S* case<sup>28</sup> capture the essence of what constitutes legal professional privilege under EU law. Any person should be able, without constraints, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Thus, if receiving an unexpected visit from the Commission, one should not be afraid that the inspectors make copies of any documents containing legal advice relating to the competition case from one's (external) counsels.

The thesis will examine and assess not only the actual scope of protection under EU law, but also the methods available to ensure that the privilege is respected in practice. As most information is stored electronically nowadays, the Commission has had to adapt its search methods. The techniques now available allow the Commission to go through thousands of documents and to bring image copies of entire servers back to Commission headquarters for

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<sup>27</sup> Opinion of Advocate General Warner in case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1981:9.

<sup>28</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157.

review.<sup>29</sup> Given the rapid technological development, there is a risk that the legal professional privilege is not properly safeguarded.

### 1.3.7 Judicial review of inspection decisions and measures taken on their basis.

As stated earlier, the need for an ex ante review of the Commission's inspection decisions will be analysed. The thesis will also examine the need for and scope of an ex post control of the Commission's decisions and the measures taken on their basis. During the course of an investigation, the Commission may adopt measures that the company wishes to challenge before the General Court. An analysis will be carried out as to whether the company should have a possibility to challenge such measures, and if so, whether there should be a right to an immediate review or whether it is sufficient that the measures are reviewed along with the Commission's decision in the underlying competition case.

These are the issues that will be given special focus in the thesis. In the following, the value of the present research in relation to existing legal scholarship will be discussed followed by a presentation of the rationale behind the two main areas of law covered in this thesis: competition policy and fundamental rights protection.

## 1.4 Potential contribution of the present research to existing legal scholarship

Literature abounds on substantive competition law and policy, but as a rule questions of competition law enforcement have been under-researched. At the same time, legislative developments in the fields of both competition law enforcement and EU fundamental rights protection have been extremely dynamic in recent years. This development and the apparent tension that it has created between the two fields of EU law have not gone unnoticed by either scholars or practitioners. Today, there is a heated and ongoing academic discussion on due process issues related to competition law cases.

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<sup>29</sup> This practice is not regularly exercised by the Commission, but is usually restricted to situations where the selection of documents relevant for the investigation is not yet finished at the envisaged end of the dawn raid. The Commission will then bring a copy of the data set still to be searched. See the Commission's Explanatory Note to an authorization to conduct an inspection in execution of a Commission Decision under Article 20(4) of Council Regulation No 1/2003, at p. 15.

Numerous articles on the topic have been published in legal reviews or through collections of articles in joint publications,<sup>30</sup> and several monographs dealing with due process aspects of competition law proceedings have been published during the last decade. However, although writers such as *Andreangeli*,<sup>31</sup> *Harding* and *Joshua*,<sup>32</sup> *Scordamaglia-Tousis*,<sup>33</sup> *Van Bael*<sup>34</sup> and *Wils*<sup>35</sup>, just to mention a few, all examine and discuss due process aspects of the Commission's inspection procedures in their works, to the best of my knowledge there are no works (or at least not many) solely focusing on these issues and taking a comprehensive approach to the due process aspects of the Commission's inspections.

The initial stage of a competition case is the stage where the potential tension between the need for effective competition law enforcement and adequate fundamental rights protection becomes particularly apparent. It is the intrusive character of the dawn raid that makes it so powerful, but the intrusiveness also entails an apparent risk of fundamental rights infringements. The lack of a comprehensive analysis of the due process aspects related to dawn raids entails the risk that companies become more prone to challenge the Commission's actions on procedural grounds. An in-depth and systematic analysis – not only of the Commission's dawn raid practices, but also of applicable fundamental rights – will add to the present knowledge, and may serve as a basis for framing the Commission's dawn raid procedures in a way that avoids overprotective procedural guarantees

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<sup>30</sup> See e.g. Forrester, *Due Process in European Competition cases: A Distinguished Institution With Flawed Procedures*, *European Law Review*, vol. 34, no. 6, 2009, pp. 817-43, Slater, Thomas and 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 Paper Series, GCLC Working Paper 04/08, Théophile and Simic, *Legal Challenges to Dawn Raid Inspections Under the Principles of EU, French and ECHR Law*, *Journal of Competition Law & Practice*, June 2012, Wahl, *Standard of Review – Comprehensive or Limited?*, in Ehlermann and Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2010, and Wils, *The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights*, *World Competition*, vol. 33, no. 1, March 2010, and 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.

<sup>31</sup> Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008.

<sup>32</sup> Harding and Joshua, *Regulating Cartels in Europe*, *Oxford Studies in European Law*, 2<sup>nd</sup> edn, 2010

<sup>33</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013.

<sup>34</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011.

<sup>35</sup> Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, 2008.

while at the same time ensuring that the Commission's decisions are less contestable on procedural grounds.<sup>36</sup>

## 1.5 The rationale behind the two areas of law

Fundamental rights and competition legislation rest on different legal theoretical grounds. Whereas competition legislation is motivated by a desire to increase consumer welfare and, as far as EU competition policy is concerned, facilitate and maintain market integration, fundamental rights legislation takes its basis in the individual, and in protecting the individual against undue interference by the public. Thus, while competition policy and legislation are based on the idea that effective competition legislation will serve the interests of society, the consumer collective and other communal interests, fundamental rights are based on the idea that individuals should be protected from certain action by the public, and as noted by *Verdirame*, fundamental or human rights are incompatible with theories that see the individual as entirely subordinate to communal interests. For any meaningful idea of these rights to exist, it must be accepted that in some areas individual claims will defeat communal ones.<sup>37</sup> In the following the rationale behind the two areas of law will be discussed in more detail.

### 1.5.1 The rationale behind competition legislation and its enforcement

Our competitors are our friends, and our customers are our enemies.<sup>38</sup>

This quote, which is probably one of the most famous cartel-related quotes, is often cited to reflect the attitude of cartelists towards customers and consumers, and to provide a justification for the significant efforts by

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<sup>36</sup> *Scordamaglia-Tousis* discusses this issue, declaring that a system that grants overprotective procedural guarantees could translate into increased administrative or judicial litigation on procedural grounds. See *Scordamaglia-Tousis*, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 14.

<sup>37</sup> *Verdirane*, *Human Rights in Political and Legal Theory*, in Rodley and Sheeran (eds), *The Routledge Handbook on International Human Rights Law*, Routledge, 2013.

<sup>38</sup> This phrase was first cited by Archer Daniels Midland Vice President Mark Whitacre in a *Fortune* magazine interview in 1996. Precisely the same aphorism was repeated by ADM President James Randall to Ajinomoto managers who were touring ADM's lysine plant in Decatur, Illinois on April 30, 1993. FBI Agent Brian Shepard testified that this phrase was often repeated by several of ADM's managers who were caught on tapes made for the FBI. See Connor, 'Our Customers are our Enemies': *The Lysine Cartel of 1992-1995*, Review of Industrial Organization, vol. 18, issue 1, February 2001.



competition authorities around the world to fight price-fixing and market-sharing arrangements among competitors.<sup>39</sup> There is a widespread understanding that cartels and abuse of market power are harmful to the economy.<sup>40</sup> At EU level, Article 3 of the TEU declares that the EU shall work to promote a highly competitive social economy. Competition policy, according to the Commission, is a vital part of the internal market with the aim to provide everyone in Europe with better quality goods and services at lower prices. The application of rules to make sure that companies compete fairly with each other encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality, the Commission declares.<sup>41</sup>

In their article written a few years ago, *Werden, Hammond and Barnett*, representatives of the US Department of Justice, base their argumentation on the assumption that cartel activity amounts to nothing less than theft: ‘cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition’.<sup>42</sup> The statement is presented as a truth that no longer needs any warrant. Indeed, although not everyone would draw a parallel between cartel behaviour and robbery, few would argue against the proposition that cartels and other unlawful anti-competitive practices are

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<sup>39</sup> See e.g. Hüsichelrath, *How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements*, Journal of European Competition Law & Practice, vol. 1 no. 6, 2010, at p. 528, Connor, ‘Our Customers are our Enemies’: *The Lysine Cartel of 1992-1995*, Review of Industrial Organization, vol. 18, issue 1, February 2001, Connor, *Global Price Fixing: Our Customers are the Enemy*, Kluwer Academic Publishers, 2001, Hammond, *Caught In the Act: Inside an International Cartel*, Speech made at the OECD Competition Committee Working Party No. 3, Paris 18 October, 2005, <http://www.justice.gov/atr/speech/caught-act-inside-international-cartel>.

<sup>40</sup> By 2008, 111 countries had enacted competition laws, which is more than 50 per cent of countries with a population exceeding 80,000 people. 81 of the 111 countries had adopted their competition laws in the past 20 years, signalling the spread of competition law following the collapse of the Soviet Union and the expansion of the European Union, see OECD DAF/COMP/GF/WD(2014)53, *Fighting corruption and promoting competition*, 17 February 2014,

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)53&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)53&docLanguage=En). The standpoint of the OECD is that well-designed competition law, effective enforcement and competition-based economic reform promote growth and employment. The OECD actively encourages governments to tackle anti-competitive practices and fosters market-oriented reform throughout the world, see <http://www.oecd.org/daf/competition/>. The close relationships between trade and investment and competition policy have long been recognized by the WTO. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for trade in goods, see [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey3\\_e.htm#investment](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment).

<sup>41</sup> [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

<sup>42</sup> *Werden, Hammond and Barnett, Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 Antitrust Bulletin 207, 2011.

harmful to the economy. On the contrary, cartels are presumed to produce harmful effects.<sup>43</sup> As *Connor* points out, strict enforcement of laws against cartels is a public policy that is widely supported by economists and legal scholars of all stripes. They may differ as to the causes that give rise to collusive behaviour and as to the likelihood of long-term success, but they are unified in their evaluation of the negative economic effects of cartels.<sup>44</sup>

The Antitrust Damages Directive that was adopted by the European Parliament and the Council in 2014 establishes a rebuttable presumption that cartel infringements result in harm.<sup>45</sup> The Directive states that, depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This rebuttable presumption of harm has been limited to cartels, given that their nature of secrecy increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm. However, this does not mean that other types of infringements are considered harmless. In its Communication on quantifying harm in antitrust damages actions, the Commission declares that infringements of Articles 101 and 102 TFEU cause great harm to the economy as a whole and hamper the proper functioning of the internal market.<sup>46,47</sup>

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<sup>43</sup> See e.g. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ/L/349/1.

<sup>44</sup> Connor, *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation 1996* (May 21, 2009). Available at SSRN: <http://ssrn.com/abstract=1408070>, at p. 8.

<sup>45</sup> Preamble 47 to and Article 17 of the Antitrust Damages Directive; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ/L/349/1.

<sup>46</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013, OJ/C/167/07.

<sup>47</sup> The concept of harm to competition resulting from anti-competitive conduct is related but distinct from the concept of damages suffered by particular victims as a result of that conduct. Harm to competition captures the general harm done to the economy and takes a welfare perspective; it is at the centre of any assessment by a competition agency. On the opposite side, the concept of damages takes a strong individualised perspective which might or might not coincide with the damages to society; it is central in any private damages case brought in front of a national court. While the two theoretical concepts differ to some extent, the methods for quantification are more or less the same and face comparable challenges. When quantifying harm to competition or private damages analytical approaches vary due to industry and infringement characteristics and the information available on the infringement. See <http://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf>.

In the US, the United States Sentencing Commission<sup>48</sup> has issued sentencing guidelines for cartel participation stating that ‘there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing, including bid-rigging, and horizontal market-allocation, can cause serious economic harm’.<sup>49</sup> The US Sentencing Commission estimates that the average gain from price-fixing is ten per cent of the selling prices.<sup>50</sup>

*Connor* and *Lande* challenge this estimation, arguing that the average overcharge is considerably higher than ten per cent. In their survey published in 2008, *Connor* and *Lande* assert that cartels have caused average overcharges<sup>51</sup> in the range of 31 to 49 per cent and median overcharges in the range of 22 to 25 per cent of affected commerce.<sup>52</sup> In 2009, the European Commission commissioned a study on the quantification of antitrust damages.<sup>53</sup> The study referred explicitly to and mainly supported the findings of *Connor* and *Lande*,<sup>54</sup> estimating the median overcharge to be 18 per cent of the cartel price.<sup>55</sup> In 2011, the OECD held a roundtable on

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<sup>48</sup> The United States Sentencing Commission is an independent agency in the judicial branch of the US government. One of its purposes is to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes, see <http://www.ussc.gov/about>.

<sup>49</sup> 2011 United States Federal Sentencing Guidelines Manual, Chapter 2, Part R <http://www.ussc.gov/guidelines-manual/2011/2011-2r11>.

<sup>50</sup> *Ibid.*

<sup>51</sup> The price overcharge is the difference between the actual price charged during the time of the infringement and the hypothetical price that would have occurred but for the anti-competitive practice.

<sup>52</sup> *Connor* and *Lande*, *Cartel Overcharges and Optimal Cartel Fines*, 3 *Issues in Competition Law and Policy*, 2203, ABA Section of Antitrust Law, 2008, Chapter 88, available at SSRN: <http://ssrn.com/abstract=1285455> or <http://dx.doi.org/10.2139/ssrn.1285455>, and *Connor* and *Lande*, *How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines*, *Tulane Law Review*, vol. 80, 2005, at pp. 1-3, and *Connor* and *Lande*, *Cartels as Rational Business Strategy: Crime Pays*, *Cardozo Law Review*, vol. 34, 2012, p. 427.

<sup>53</sup> *Oxera* and *Komninos* (2009), *Quantifying Antitrust Damages. Towards Non-Binding Guidance for Courts*, Study prepared for the European Commission, DG COMP.

<sup>54</sup> *Oxera* examined the dataset underlying the 2008 *Connor* and *Lande* study, as well as an additional 350 observations provided by *Connor* and *Lande* (thus totalling more than 1,000 observations), and tested the sensitivity of the overcharge median and other results by removing a large number of observations that did not meet certain selection criteria (reducing the sample size from over 1,000 to 114). *Oxera* found that in this dataset the median overcharge is 18% of the cartel price—not far from the 20% found by *Connor* and *Lande*. The (mean) average overcharge is around 20%, compared with 23% as a percentage of the cartel price in *Connor* and *Lande*.

<sup>55</sup> *Oxera* and *Komninos* (2009), *Quantifying Antitrust Damages. Towards Non-Binding Guidance for Courts*, Study prepared for the European Commission, DG COMP.

quantification of harm to competition, basing its findings on both these studies.<sup>56,57</sup>

As an example of the actual gains made by cartelists, *Connor* discusses the Lysine cartel, stating that the cartel members reasonably anticipated that the rewards from price-fixing would far outweigh the costs of operating the cartel. According to *Connor*, a top official of the US company Archer Daniels Midland ('ADM') had expressed the expectation that their recently concluded agreement would generate USD 200 million in joint profits annually in a global market for lysine that generated from USD 500 to USD 700 million in annual sales. According to *Connor*, ADM did earn approximately USD 200 million in profits from the cartel over three years through its one-third share of sales in the worldwide lysine market. Direct operating costs of the cartel were modest according to *Connor*.<sup>58</sup>

As noted by the Commission, anti-competitive practices do not result only in price overcharges. *Connor* and *Lande* discuss other factors that make up the 'net-harm to others' caused by cartels. First, they point to the fact that market power can produce allocative inefficiency.<sup>59</sup> Second, cartel activity can lead to so-called umbrella effects, where a cartel permits or causes non-conspiring firms to charge higher prices under the 'umbrella' of its supra-competitive price.<sup>60</sup> A third factor mentioned by *Connor* and *Lande* is the risk that cartel members will be less inclined to innovate or to optimize variety or quality, which in turn results in harm to society.

It is not only cartels that may have negative effects on the economy. As previously noted, the Commission has declared that infringements of Articles 101 and 102 TFEU cause great harm to the economy as a whole and

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<sup>56</sup> <http://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf>.

<sup>57</sup> In 2003, Japan Fair Trade Commission ('the JFTC') carried out a study which showed that, on average, cartel overcharges amounted to 16.5 per cent. See Hawk (ed.), *International Antitrust Law & Policy*, Fordham Corporate Law, 2004, at p. 64.

<sup>58</sup> Connor, *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation 1996* (May 21, 2009). Available at SSRN: <http://ssrn.com/abstract=1408070>, at p. 6.

<sup>59</sup> Represented by the deadweight loss welfare triangle in a standard diagram of monopoly pricing.

<sup>60</sup> In a preliminary ruling in Case C-557/12, *Kone AG et al. vs ÖBB Infrastruktur AG*, EU:C:2014:1317, the Court found that with respect to the amount of damage sustained by a cartel victim, the verifiable causal damage resulting due to the excessive prices of companies which were *not* involved in the cartel is also to be taken into consideration. With this ruling, the ECJ has recognized the possibility to allow compensation to those that have suffered damage due to so-called umbrella pricing.

hamper the proper functioning of the internal market.<sup>61</sup> However, unlike cartel activity, the conduct of dominant firms is seldom categorically condemned. Instead a case-by-case analysis is carried out and the effects of the conduct are evaluated before the conduct is considered to infringe on applicable legislation.<sup>62</sup> This means that although the harmful effects are seldom presumed, an infringement may not be established unless the conduct entails or may entail harmful effects. Article 102 cases have traditionally focused on changes in the market structure rather than on consumer harm.<sup>63</sup> This being said, consumer harm was at the heart of the high-profile *Microsoft* case,<sup>64</sup> and harm to an ‘effective competition structure’ may of course also have severe negative implications for the economy. Through a dominant firm’s exclusionary practices for example, the competitive structure may be affected because actual competitors may be forced to exit the market or are prevented from competing effectively, and because potential competitors may be prevented from entering the market. This may in turn affect the economy and consumers as it may result not only in a lesser variety of products and/or a reduction in quality, but also in higher prices.<sup>65</sup>

From the above, it can be concluded that competition legislation is motivated by the fact that cartels and abuse of dominance produce harmful effects for the economy, and that effective competition policy encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.

### 1.5.2 The rationale behind EU fundamental rights protection

Article 2 of the TEU lays down the values on which the European Union is based. Among them we find respect for the rule of law and for human rights. Today, human rights of the individual, limiting the exercise of public power, are recognized on a universal, regional and national level. In the Western

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<sup>61</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013, OJ/C/167/07, p. 1.

<sup>62</sup> See e.g. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, European Competition Journal, vol. 5, issue 1, 2009, and Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009, OJ/C/45/7.

<sup>63</sup> O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 2<sup>nd</sup> edn, Hart Publishing, 2014.

<sup>64</sup> Case T-201/04, *Microsoft Corp. v Commission of the European Communities*, EU:T:2007:289, e.g. paras 643 - 665.

<sup>65</sup> Oxera and Komninos (2009), *Quantifying Antitrust Damages. Towards Non-Binding Guidance for Courts*, Study prepared for the European Commission, DG COMP.

world, to use the words of *Ehlers*, they are regarded as a ‘matter of course’.<sup>66</sup> This being said, the understanding of human rights as a normal or obvious part of our society goes back only to the end of the Second World War.

### 1.5.2.1 Human rights – A historical background

Human rights as we know them have their roots in seventeenth to eighteenth century Western thought. A number of times throughout history, tyranny has stimulated breakthrough thinking about liberty. This was certainly the case in England with the mid-seventeenth century era of repression, rebellion, and civil war. There was a tremendous outpouring of political pamphlets and tracts, where the writings emerging from *Locke’s* pen are among the most influential.<sup>67</sup> In *Two Treatises of Government*, *Locke* defended the claim that men are by nature free and equal against claims that God had made all people naturally subject to a monarch. According to *Locke*, people have rights, such as the right to life, liberty, and property, and which have a foundation independent of the laws of any particular society. These thoughts were ground-breaking, fostering a new way of thinking about individuals, governments, and the rights that link the two, and paving the way for the revolutions that took place on both sides of the Atlantic in the late eighteenth century.<sup>68,69</sup>

The initial formulations in the American and French Revolutions were followed, as *Hunt* describes it, by a long gap in the history of human rights. Although the notion of constitutionally guaranteed rights of various sorts, such as the political rights of workers, religious minorities and women, continued to gain ground, talk of universally applicable natural rights subsided.<sup>70</sup> However, in the aftermath of the Second World War, the subject of human rights entered a new era. The war had set a new benchmark of barbarity, and the notion of human rights was considered an appropriate means to reconstructing the world society. In June 1945, the Charter of the

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<sup>66</sup> Ehlers, *European Fundamental Rights and Freedoms*, De Gruyter Recht, 2007, at p. 25.

<sup>67</sup> Frohnen and Grasso, *Rethinking Rights; Historical, Political and Philosophical Perspectives*, University of Missouri Press, 2008, pp. 23-26.

<sup>68</sup> Mahoney, *The Challenges of Human Rights: Origin, Development and Significance*, Blackwell Publishing, 2009, p. 1.

<sup>69</sup> The history and origin of human rights can be traced back to the ancient world of Greece and Rome, through the theories of medieval thinkers such as Thomas Aquinas and William of Ockham into the Renaissance and Reformation. For further reading on the earliest origins of human rights, see e.g. Hunt, *Inventing Human Rights: A History*, W. W. Norton, 2007, Mahoney, *The Challenges of Human Rights: Origin, Development and Significance*, Blackwell Publishing, 2009.

<sup>70</sup> Hunt, *Inventing Human Rights: A History*, W. W. Norton, 2007, at p. 176.

United Nations was signed. As is evident from its preamble, the Contracting States were determined to save succeeding generations from the atrocities of war, and saw the Charter of the United Nations as a means of achieving this aim:

We, the people of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have resolved to combine our efforts to accomplish these aims.

Three years later, in 1948, the UN adopted its Universal Declaration of Human Rights.<sup>71</sup> The rationale behind the declaration is that human rights are considered the indispensable means of bringing about and maintaining world peace.<sup>72</sup> The preamble declares that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace. Or as *Mahoney* puts it, 'there is also an argument that acceptance of human rights is the only means to secure justice and to create a better world'.<sup>73</sup> Today, human rights are thus considered a prerequisite to securing justice and to maintaining peace.

When the UN was established, it committed to the idea of a clear separation of policies between the different international organs, and human rights were therefore not effectively integrated into worldwide organizations such as GATT<sup>74</sup> or the IMF. Instead, these institutions gave priority to reciprocal international liberalization and wealth creation. However, over the years this view has changed, and human rights are now considered by many as essential to economic welfare. One legal scholar who promotes such an integrated approach is *Petersmann*. According to him, economic welfare cannot be achieved without legal guarantees for economic liberty, property rights, legal security and open markets as decentralized incentives for savings, investments and division of labour.<sup>75</sup> He points to the fact that even

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<sup>71</sup> UN Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>.

<sup>72</sup> During the negotiations, there was a debate as to whether or not human rights should be explicitly and formally recognized as deriving from a divine creature of human nature. In the end, it was decided to exclude all reference to a divine origin of human rights from the Declaration's opening article. See *Mahoney, The Challenges of Human Rights: Origin, Development and Significance*, Blackwell Publishing, 2009, p. 124.

<sup>73</sup> *Ibid*, p. 125.

<sup>74</sup> Now the WTO.

<sup>75</sup> *Petersmann, Time for Integrating Human Rights into the Law of Worldwide Organizations - Lessons from European Integration Law for Global Integration Law*, New York University School of Law Jean Monnet Working Paper 7/2001, <http://www.jeanmonnetprogram.org/archive/papers/01/012301.html>.

though many less-developed countries are rich in economic, biological and human resources, their lack of legal security and inadequate protection of property rights impede investments, savings, efficient use of resources and economic development.<sup>76</sup> On a similar note, the Secretary General of the UN declared in 2005:

We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed.<sup>77</sup>

Unless all these causes are advanced, none will succeed. Human rights are considered necessary to ensure justice, security and development, and constitute an essential feature in a democratic society. To use the words of *Donnelly*, to the extent that governments protect human rights, they are legitimate.<sup>78</sup>

### 1.5.2.2 Fundamental or human rights?

The previous section discussed the historical background to the concept and evolution of human rights. Yet, the title of this thesis suggests that the research carried out will focus on fundamental rights. It is therefore appropriate to elaborate on the distinction between the two concepts, and how they interrelate. As noted by *Palombella*, expressions such as ‘human rights’ and ‘fundamental rights’ are often considered as equivalent and interchangeable.<sup>79</sup> However, although human rights are often, and should be, considered to be fundamental, it is not correct to treat the two notions as one.

According to the European Union Agency for Fundamental Rights (‘FRA’), the term ‘fundamental rights’ has traditionally been used in a constitutional setting whereas the term ‘human rights’ is used in international law. According to the FRA, the two terms refer to similar substance as can be seen when comparing the content in the Charter with that of the ECHR and the European Social Charter. Although what is stated is correct, it presents only ‘part of the truth’ because it does not explain why the term ‘fundamental rights’ is used in the constitutional setting and ‘human rights’ in international law.

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<sup>76</sup> Ibid.

<sup>77</sup> *In Larger Freedom: Towards Development, Security and Human Rights For All*, Report of the Secretary General of the United Nations, A/59/2005, 21 March 2005.

<sup>78</sup> *Donnelly, Universal Human Rights in Theory and Practice*, Cornell Paperbacks, Cornell University Press, 3<sup>rd</sup> edn, 2013, p. 12.

<sup>79</sup> *Palombella, From Human Rights to Fundamental Rights; Consequences of a Conceptual Distinction*, EUI Working Paper LAW, no. 2006/34, p. 3.



As the FRA indicates, the difference in the two notions lies not necessarily in substance, but rather in form. Whereas international treaties declare that certain rights are inalienable or universal and should be protected, fundamental rights form part of each legal system and its constitutional setting, and, as such, are judicially enforceable. As noted by *Palombella*, human rights are – or at least one prefers that they are – also fundamental rights, as this should suggest that a given society considers the protection of human rights essential. Fundamental rights are thus those rights that are considered as ‘fundamental’ by the society in question. According to *Palombella*, fundamental rights are to be understood as encompassing those selective and substantive criteria which, together with others, enable judgments of ‘validity’.

*Rosas* also makes this distinction, recognizing that the Charter is to be seen as a constitutional rather than international instrument, ‘proclaimed as it was by the Union and for Union purposes’. Its constitutional character, *Rosas* argues, is reflected in the terminology used: it is a Charter on ‘fundamental’ rather than ‘human’ rights.<sup>80</sup> Fundamental rights are thus those rights that are guaranteed by the constitution of the state, or as in the case of the EU, of the Union.<sup>81</sup>

### 1.5.2.3 Legal persons and fundamental rights

Human rights have been described as the rights one has because one is human.<sup>82</sup> Although this statement alludes to the fact that all people are created equal and that people have rights just because they are a human beings, not because they belong to a certain gender, class or ethnicity, it may be argued that companies should not enjoy any human, or fundamental, rights because they have ‘no soul to be damned and no body to be kicked’.<sup>83</sup>

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<sup>80</sup> *Rosas*, *The Charter and Universal Human Rights Instruments*, in Peers et al (eds), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, p. 1685.

<sup>81</sup> See also Jääskinen, *The Place of the EU Charter Within the Tradition of Fundamental and Human Rights*, in Morano-Foadi and Vickers (eds), *Fundamental Rights in EU: A Matter for Two Courts*, Hart Publishing, 2015, pp. 11-13.

<sup>82</sup> See e.g. Donnelly, *Universal Human Rights in Theory and Practice*, Cornell Paperbacks, Cornell University Press, 3<sup>rd</sup> edn, 2013, p. 7.

<sup>83</sup> For a further discussion on this, see e.g. van den Muijsenbergh and Rezai, *Corporations and the European Convention on Human Rights*, *Global Business and Development Law Journal*, vol. 25, 2011, Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, *International and Comparative Law Quarterly*, vol. 64, part 3, 2015, pp 661-696, doi:10.1017/S0020589315000196.

This thesis is based on the assumption that legal persons do enjoy EU fundamental rights protection.<sup>84</sup> However, given the fact that the thesis mainly evolves around the rights of legal persons, it is nonetheless necessary to address the issue of whether rights provided to human beings should be extended to protect corporations and other legal persons.

In most legal systems, companies and other legal persons are protected by rights and freedoms that are regarded as fundamental to individual human beings and the societies in which they live.<sup>85</sup> It is clear from both the wording of the ECHR and the case-law of the Strasbourg court that legal persons do enjoy protection under the Convention, albeit not always to the same extent as natural persons.<sup>86</sup> Article 34 of the ECHR declares that any person, non-governmental organization or group of individuals may lodge a complaint before the Strasbourg court, and as noted by *Emberland*, the case-law of the Strasbourg court indicates that a company can be regarded both as a ‘person’ and as a ‘non-governmental organization’ within the meaning of the provision.<sup>87</sup> Furthermore, Article 1 of Protocol 1 to the ECHR declares that ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions’.<sup>88</sup> The ECJ also offers protection to legal persons and, as will be discussed further throughout this thesis, the ECJ has time and again held that fundamental rights, such as the right to privacy or the right to a fair trial, also extend to legal persons.<sup>89</sup>

And indeed, if human – or fundamental – rights are regarded as a means of securing peace, justice and economic development, then legal persons must be afforded protection. If companies could not enjoy rights such as the right to property or access to justice, this would have severe negative implications for the economy and well-being of the country. As pointed out by *Oliver*, in many instances the fundamental rights of companies need to be recognized and enforced not merely in the companies’ own interest but in the public

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<sup>84</sup> See Section 1.2 above.

<sup>85</sup> *Emberland, Human Rights of Companies; Exploring the Structure of ECHR Protection*, Oxford University Press, 2006, at p. 1.

<sup>86</sup> See e.g. from the Strasbourg court: *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97, and from Luxembourg: Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, and *Commission of the European Communities*, EU:C:2002:603 (*Roquette Frères*).

<sup>87</sup> *Emberland, Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention on Human Rights: The Colas Est SA v France Approach*, *Michigan Journal of International Law*, vol. 25, issue 1, 2003, p. 83.

<sup>88</sup> The Protocol was opened for signature already in 1951.

<sup>89</sup> See e.g. Case C-94/00, *Roquette Frères*, EU:C:2002:603, Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, EU:C:2012:684, Case C-272/09 P, *KME v Commission*, EU:C:2011:810, Case C-389/10 P, *KME v Commission*, EU:C:2011:816, and Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

interest.<sup>90</sup> Both *Oliver* and *van den Muijsenbergh* and *Rezai* take the case of *Yukos* to illustrate why legal persons should enjoy fundamental rights. In *Yukos*,<sup>91</sup> the Russian Federation had launched attacks against the private (but previously state-owned) company Yukos Oil. In October 2003, the owner Khodorokovsky was arrested and a tax-audit was initiated. Contrary to earlier findings, the Russian tax authorities found in December 2003 that Yukos owed € 2.9 billion in back taxes, and ordered the company to pay this amount in two days. Without outwaiting the two-day grace period, the authority had a court issue an order to freeze the assets of the company making it impossible for Yukos to pay the alleged debt. The subsequent court proceedings left a great deal to be desired, and after a disappointing appeal by Yukos the tax authorities moved to enforcement measures, and auctioned off Yukos' assets for a fraction of their value. Yukos was later liquidated. However, before the liquidation, the company had filed an application with the Strasbourg court, which found that the Russian Federation had indeed breached its duty to provide Yukos with a fair trial.<sup>92</sup> The *Yukos* case serves to illustrate the need to protect not only natural, but also legal persons against arbitrary actions by governments, and as pointed out by *Oliver*, the question is not if companies should have rights, but rather how extensive those rights should be.<sup>93</sup>

Furthermore, as was discussed in the previous section, it should not be forgotten that fundamental rights are something other than human rights. Fundamental rights are rights considered as 'fundamental' by the individual society in question, and may thus also include rights not necessarily considered as human rights or reserved for natural persons, but which are nonetheless considered necessary to secure an institutional and judicial structure that ensures a proper allocation of resources, respect for the rule of law, democracy, etc. *Petersmann* argues that economic welfare cannot be achieved without legal guarantees for economic liberty, property rights, legal security and open markets as decentralized incentives for savings, investments and division of labour.<sup>94</sup> These arguments are especially relevant

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<sup>90</sup> Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, *International and Comparative Law Quarterly*, vol. 64, part 3, 2015, pp. 661-696, doi:10.1017/S0020589315000196, p. 662.

<sup>91</sup> *OAO Neftyanaya Kompaniya Yukos v Russia*, judgment of 20 September 2011 and rectified on 17 January 2012, Application no. 14902/04.

<sup>92</sup> *Ibid.*

<sup>93</sup> Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, *International and Comparative Law Quarterly*, vol. 64, part 3, 2015, pp. 661-696, doi:10.1017/S0020589315000196, p. 662.

<sup>94</sup> Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations - Lessons from European Integration Law for Global Integration Law*, New York University School of Law Jean Monnet Working Paper 7/2001, <http://www.jeanmonnetprogram.org/archive/papers/01/012301.html>

with regard to the EU which, according to Article 3 of the TEU, has the explicit objective to establish an internal market and work for the sustainable development of Europe based on, *inter alia*, balanced economic growth and price stability, along with a highly competitive social market economy, all aiming at full employment and social progress. The achievement of these aims may well require an institutional setting where also legal persons do enjoy rights, and where such rights should be considered fundamental.

Having presented the rationale behind competition law enforcement and fundamental rights protection, the time has come to discuss the method applied in this research.

## 1.6 Method

Laws are not just words on a sheet of paper; the crucial question is how those words are interpreted.<sup>95</sup>

More than half a century has passed since the ECJ established that EU law is an autonomous legal order. Initially, and as pointed out by *Pernice*, governments hesitated to give effect to what had been agreed upon in the Treaty of Rome.<sup>96</sup> The ECJ on the other hand took seriously the spirit and intentions of this unprecedented constituent text which had pooled sovereignty beyond the nation state. In *Van Gend en Loos*,<sup>97</sup> it thus acknowledged Community law as a new legal order of international law.<sup>98</sup> Soon thereafter, the ECJ delivered its ruling in *Costa v. Enel*,<sup>99</sup> declaring that the Community legislation was an independent source of law, and that the transfer by the Member States of the rights and obligations arising under the Treaty carried with it a ‘permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail’.<sup>100</sup> In *Francovich*, the ECJ refined the nature of this legal order further by emphasizing that the Union has created its own

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<sup>95</sup> Peers and Prechal, *Scope and Interpretation of Rights and Principles*, in Peers et al (eds), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, at p. 1459.

<sup>96</sup> Pernice, *The Autonomy of the EU Legal Order – Fifty Years After Van Gend*, 50<sup>th</sup> Anniversary of the Judgment in Van Gend en Loos, 1963-2013, Conference Proceedings, Court of Justice of the European Union, Luxembourg, 13 May 2013, [http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac\\_002.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf)

<sup>97</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

<sup>98</sup> The reference to international law was later dropped.

<sup>99</sup> Case 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66.

<sup>100</sup> *Ibid.*

legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply.<sup>101</sup>

The EU legal system is thus a relatively new legal order, distinct from both national law and international public law, to which 28 states have transferred part of their sovereignty and allow the EU rules to prevail over national legislation. Indeed, it is a unique creature among the legal systems of the world, and its special character and own internal logic will necessarily affect the methods of any legal research carried out within its field. Perhaps the most prominent feature of the EU legal system is the fact that it is built on the idea of market integration and that it pursues an integrationist agenda. European integration is considered an objective and, as noted by *Eckes*, the integrationist perspective is the dominant normative standpoint among EU lawyers.<sup>102</sup>

If we turn to the subject of this thesis, it evolves around two different and distinct parts of EU law and the reconciliation of the two – competition law enforcement and fundamental rights protection. The thesis aims at examining whether it is possible to strike a balance between the need for effective competition law investigations and the need to ensure adequate fundamental rights protection and whether the Commission's dawn raid practices, which are governed to a considerable extent by efficiency concerns, respect applicable fundamental rights. The research will be based on applicable legal sources in order to identify the various components of the Commission's dawn raid practices and the role they play in the competition law enforcement system. From there, a due process analysis will be made to ascertain whether the Commission's practices meet the required fundamental rights standard.

To begin with this task, it is necessary to identify the role fundamental rights play within the Union, and the extent to which the EU Courts will have to ensure that EU legislation reflects the standard of the ECHR. As will be further explored in Chapter 4 below, Article 6(3) TEU and Article 52(3) of the Charter align EU fundamental rights protection with the protection provided by the ECHR. Therefore, defining and interpreting the framework for EU fundamental rights protection cannot be done without closely studying the ECHR. Although the EU has not acceded to the ECHR, and although the Convention does not form an integral part of EU legislation,

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<sup>101</sup> Case C-6/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, EU:C:1991:428, para 31.

<sup>102</sup> *Eckes*, *European Legal Method – Moving Away from Integration*, in Neergaard and Nielsen (eds), *European Legal Method – Towards a New European Realism?*, DJØF Publishing, 2013, p. 175.

determining the ECHR standard is necessary in order to determine the scope of protection to be afforded to individuals under EU law. Here, the study will not be a traditional comparative one, but instead be applied to determine how the EU law stands. The question is how this mapping endeavour should be categorized.

There appears to be no methodological ‘*ius commune Europeum*’.<sup>103</sup> In fact, *Van Gestel* and *Micklitz* claim that it is difficult, if not impossible to come up with one generally accepted definition of doctrinal legal research in Europe. According to *Taekema*,<sup>104</sup> the divide between common law and civil law is not visible only in the particularities of the law in practice, but also in differing methodological approaches. *Taekema* acknowledges that some comparative law scholars, such as *Legrand*, consider that the different styles or *mentalités* of the common law and civil law approach are reason to be sceptical of all attempts to integrate law in Europe.<sup>105</sup> According to *Legrand*, the differences between the two legal traditions exceed their similarities. This being said, *Taekema* draws an optimistic, although tentative conclusion about the possibilities of constructing a common European legal method declaring that the paradigm for legal theory is shared by continental and Anglo-American theorists.<sup>106</sup> Furthermore, despite any differences between various European legal traditions, *Van Gestel* and *Micklitz* identify a number of core features that most doctrinal research has in common, among which they deem the three most important ones to be:

- (i) In doctrinal legal research, arguments are derived from authoritative sources, such as existing rules, principles, precedents and scholarly publications;
- (ii) The law somehow represents a system. Through the production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction;

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<sup>103</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 67.

<sup>104</sup> Taekema, *Introduction: The Foundations of a European Method*, *Erasmus Law Review*, vol. 4, issue 1, 2011.

<sup>105</sup> Legrand, *Against a European Civil Code*, *The Modern Law Review*, 1997, MLR 60:1, p. 45.

<sup>106</sup> Taekema, *Introduction: The Foundations of a European Method*, *Erasmus Law Review*, vol. 4, issue 1, 2011.

- (iii) Decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced in such a way that in the end, the system is coherent again.<sup>107</sup>

This work will be based on these three principles, which means that I will search for answers to my research questions among authoritative legal sources. Furthermore, this work will be based on the assumption that the EU legal system is or should be coherent, and that it should therefore provide a solution to any conflict between the apparently diverging interests of effective competition law enforcement and adequate fundamental rights protection. If and to the extent that this should prove impossible, it will be necessary to suggest legislative amendments that allow the system to gain coherence.

In the following, I will briefly expand on the three principles, and will then discuss in more detail the particular methodological challenges facing this project.

- (i) *The arguments presented are derived from authoritative sources*

In a national civil law system, such as the Swedish system, this may cause little concern. However, from an EU law perspective the stance merits a comment. There are several reasons for this, one being that the ECJ sometimes resorts to interpretative methods that some consider tantamount to legal activism.<sup>108</sup> Indeed, EU law is based on the rule of law and has a strict norm hierarchy, drawing a dividing line between primary law (including the Treaties and the Charter) and secondary law (including regulations, directives and decisions).<sup>109</sup> Yet, the legislature sometimes deliberately uses ambiguous or open-ended language to reach a compromise between conflicting Member States, leaving it to the ECJ to fill the vacuum

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<sup>107</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 65.

<sup>108</sup> For a further discussion on judicial activism, see e.g. Dawson, De Witte and Muir, *Judicial Activism at the Court of Justice*, Edward Elgar Publishing, 2013, Lenaerts and Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Papers, AEL 2013/9, Tridimas, *The Court of Justice and Judicial Activism*, 21 *European Law Review* (1996) 199, Temple Lang, *Has the European Court of Justice Been Involved in 'Judicial Legislation'?*, SvJT, 2011, p. 299.

<sup>109</sup> Bernitz and Kjellgren, *Europarättens grunder*, Norstedts Juridik, 5th edn, 2014, at p. 178.

thus created. One way of tackling this problem is by resorting to a teleological interpretation of the legislative text, where the ECJ pays regard to the *raison d'être* of the European Union and the objectives that it pursues when filling the gaps left by the legislator. However, *Tridimas* argues that 'it is not correct to say that, by having regard to the objectives of the Treaty that seeks further integration, the Court oversteps its power as a judicial body'.<sup>110</sup> Another way, as noted by *Lenaerts* and *Gutiérrez-Fons*, is to fill the lacunae through recourse to principles capable of ensuring ideological continuity between EU law and national constitutions. General principles of EU law, notably fundamental rights, constitute the paradigmatic example of the way in which the ECJ has provided concrete and material content for Treaty provisions.<sup>111,112</sup>

There are also other aspects related to the legal sources available that merit a comment or a caveat. In the area of dawn raids, few cases reach the ECJ, and this study will therefore encompass a number of rulings from the General Court. Although it is clear that the General Court's standpoint does not necessarily reflect that of the highest court, the ECJ, it will be used to determine the current status of EU law in the absence of any jurisprudence from the ECJ.

Another important aspect concerns the fact that EU legislation is increasingly turning into a combination of hard and soft law.<sup>113</sup> This is especially true in the field of competition law enforcement where the Commission applies a number of guidances, guidelines, recommendations and other soft law – or, to use the words of *Petit* and *Rato* – sunshine enforcement instruments.<sup>114</sup> These instruments are not formally legally binding, and thereby not necessarily considered as authoritative legal sources. However, as noted by *Temple Lang*, they play an important role in EU competition law enforcement, as the Commission may be found in breach of general principles such as the principles of legitimate expectations

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<sup>110</sup> *Tridimas*, *The Court of Justice and Judicial Activism*, 21 *European Law Review* (1996) 199, p. 210. See also *Temple Lang*, *Has the European Court of Justice Been Involved in 'Judicial Legislation'?*, *SvJT*, 2011, p. 299 at p. 303.

<sup>111</sup> *Lenaerts* and *Gutiérrez-Fons*, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, *EUI Working Papers*, AEL 2013/9, at p. 28.

<sup>112</sup> The interpretative methods of the ECJ and their implications on the method applied will be further discussed in Section 1.6.1.2 below.

<sup>113</sup> *Van Gestel* and *Micklitz*, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in *Neergaard*, *Nielsen* and *Roseberry* (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 67.

<sup>114</sup> *Petit* and *Rato*, *From Hard to Soft Enforcement of EC Competition Law – A Bestiary of 'Sunshine' Enforcement Systems*, *Alternative Enforcement Techniques in EC Competition Law*, 2008.



and legal certainty if deviating from these instruments in individual cases.<sup>115</sup> Any such deviation could also be considered discriminatory and thus a breach of primary EU law.<sup>116</sup> It is therefore not possible to study the antitrust enforcement rules without paying due regard to the various soft law instruments adopted and applied by the Commission.

Furthermore, legal sources tend to vary over time and between jurisdictions, and as *Van Gestel*, *Micklitz* and *Poiares Maduro* point out, there is a growing plurality of legal sources in Europe and elsewhere. The boundaries between national, EU and international law are no longer as sharp as they used to be.<sup>117</sup> Indeed, as will be discussed further in this thesis, the reference in the Charter to the ECHR and the uncertain accession to the Convention have blurred the boundaries between EU law and ECHR law.

Another special feature of EU law that merits a final comment under this section is its hybrid character.<sup>118</sup> Having its roots in the French and German legal systems, EU legislation shows many of the characteristics of continental European law. Like continental European law, it is based on statutes and treaties, but the jurisprudence of the ECJ plays a much more prominent role than in most civil law countries. Furthermore, the plethora of general principles developed and established by the ECJ over the years, may be taken to suggest that the law is not necessarily considered entirely ‘man-made’. To conclude, determining what ‘valid EU law’ is will require careful manoeuvring.

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<sup>115</sup> Temple Lang, *Strengths and Weaknesses of the DG Competition Manual of Procedure*, Journal of Antitrust Enforcement, vol. 1, no. 1, 2013. Temple Lang points to the fact that the Court has consistently held that the Commission is bound by the terms of its own Notices in competition cases, see e.g. 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 v Commission of the European Communities*, EU:C:2005:408, at paras 211-213, and Joined Cases C-75/05 P and C-80/05 P, *Germany v Commission of the European Communities, Kronofrance*, EU:C:2008:482, paras 59-61, and Case 386/10 P, *Chalkor v Commission*, EU:C:2011:815, para 60.

<sup>116</sup> See e.g. 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 v Commission of the European Communities*, EU:C:2005:408, at paras 209-210, Case C-397/03P, *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities*, EU:C:2006:328, para 91, and Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815, para 60.

<sup>117</sup> Van Gestel, Micklitz and Poiares Maduro, *Methodology in the New Legal World*, European University Institute, Florence, EUI Working Paper LAW 2012/2013, at p. 22.

<sup>118</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 67.

(ii) *The law represents a coherent system*

According to *Peczenik*, the task of the scholar is to systematize and interpret valid law.<sup>119</sup> The systematization part is especially relevant to this thesis, as it seeks not only to determine the role of the ECHR in EU law, but also to find and strike a balance between competition legislation and the rules on fundamental rights protection. Fitting the pieces of the EU legal system together and, to use the words of *Micklitz* and *van Gestel*, presenting the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction,<sup>120</sup> constitutes an especially challenging task.

As *Eckes* points out, because of the increasing interlocking of legal orders, the challenge is to understand legal arguments deriving from different contexts and place them in relation to each other. An isolated approach considering only one legal context can no longer identify what the law is for any given situation.<sup>121</sup> Indeed this is true for this thesis which seeks to accommodate both EU and ECHR legislation. In an article on legal order, legal pluralism and fundamental principles, *Izcovitich* takes note of the fact that norms belonging to distinct legal orders (such as EU and ECHR law) can never be in conflict with each other; there cannot be external antinomies, i.e. incompatibilities between legal orders. He declares that there can be no technical antinomy, no legally relevant contradiction, between Italian law and French law, between international law and domestic law, between law and morality.<sup>122</sup> This may be true, but the fact remains that although the EU and the ECHR are separate legal orders, the standard of protection afforded by the ECHR has been integrated into EU law through Article 6(3) TEU and Article 52(3) of the Charter. It is thus not possible to argue that the standard set by the ECHR does not form part of the ‘EU net of principles, rules, meta-rules and exceptions’.

The same applies for the relation between fundamental rights and antitrust enforcement. These two areas are both part of the EU legal system, and they should thus form part of a coherent system. This thesis will explore the relationship between the two areas in order to determine how they interact,

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<sup>119</sup> Peczenik, *A Theory of Legal Doctrine*, Ratio Juris, vol. 14, issue 1, 2001, pp. 75-105.

<sup>120</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 65.

<sup>121</sup> Eckes, *European Legal Method – Moving Away from Integration*, in Neergaard and Nielsen (eds), *European Legal Method – Towards a New European Realism?*, DJØF Publishing, 2013, p. 171.

<sup>122</sup> Itzcovitich, *Legal Order, Legal Pluralism, Fundamental Principles – Europe and its Law in Three Concepts*, European Law Journal, vol. 18, no. 3, May 2012, p. 366.

and whether the legislation in place and the EU Courts' jurisprudence serve to ensure coherence.

(iii) *Decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system*

According to *Van Gestel* and *Micklitz*, this means that deciding in hard cases implies that existing rules will be stretched or even replaced, but always in such a way that in the end the system becomes coherent again.<sup>123</sup> As pointed out by *Itzcovich*, the autonomy and authority of a legal order imply that the order is consistent and complete: there can be no legal contradictions or gaps.<sup>124</sup> In reality, of course, there may be both contradictions and gaps, but all legal orders should aspire to consistency and coherence.

Indeed, as noted by *Gerards*, cases about fundamental rights and fundamental freedoms are often 'hard cases', which frequently demand a choice to be made between important interests or values.<sup>125</sup> This is equally true for cases dealing with fundamental rights and competition policy, such as the respect for one's privacy and the interest of maintaining a well-functioning competition law enforcement system. These cases present the EU Courts with many difficulties, because in deciding these cases, they are not likely to find support in clear, unambiguous statutory texts; instead they will have to reconcile opposing interests in the best way possible.<sup>126</sup> The analysis of the case-law of the EU Courts and the Strasbourg court will seek to establish whether the rulings delivered by the two courts meet this standard and ensure the maintenance of a coherent legal system, or whether they have reached decisions that verge on arbitrariness.

In the following, this chapter presents the methodology applied in more detail.

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<sup>123</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 65.

<sup>124</sup> Itzcovich, *Legal Order, Legal Pluralism, Fundamental Principles – Europe and its Law in Three Concepts*, *European Law Journal*, vol. 18, no. 3, May 2012, p. 365.

<sup>125</sup> Gerards, *Judicial Argumentation in Fundamental Rights Cases – the EU Courts' Challenge*, in Neergaard and Nielsen (eds), *European Legal Method – in a Multi-Level Legal Order*, DJØF publishing, 2012, p.27.

<sup>126</sup> *Ibid.*

## 1.6.1 The role of the courts' case-law

As will be discussed further below, determining how the law stands will require a close study of both ECHR and EU law. Common to these two systems is the prominent role played by their respective courts in interpreting and determining the law. Although both systems stand on treaty or convention texts, it is the courts that give those texts life and meaning. Partly due to the openly framed and often open-ended wordings of the statutory legislation, both courts have developed methods of interpretation that necessitate not only a close study of the treaty/convention texts, but also of the courts' jurisprudence. This has as a consequence that a major part of this study will be devoted to analysing and comparing the case-law of the two courts. This in turn requires an understanding of the interpretative methods applied by them.

### 1.6.1.1 Interpretative methods of the Strasbourg court

In the 1970s the Strasbourg court developed a number of interpretative principles which have come to play an important role in defining and shaping the rights granted under the ECHR.

The Strasbourg court delivered its ruling in *Golder* in 1975.<sup>127</sup> According to *Letsas*, this is one of the most important rulings in the history of the ECHR. *Letsas* argues that it contains not only the first and – as yet most extensive discussion of the Vienna Convention on the Law of Treaties ('the Vienna Convention'), and the relevant rules on interpretation.<sup>128</sup> It is also the first major case where the Strasbourg court had to take a stance on what should be the general theory of interpreting the ECHR, and the relevance of textualism and intentionalism in ECHR interpretation.<sup>129</sup> In a plenary proceeding, the Strasbourg court had to decide on the question of 'unenumerated' rights – that is, rights which are not expressly mentioned in the text but which should nevertheless be read into it. The 'unenumerated'

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<sup>127</sup> *Golder v the United Kingdom*, judgment of 21 February 1975, Application no. 4451/70.

<sup>128</sup> The 1969 Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, at 331. Article 31 of that Convention states that, in accordance with a general rule of interpretation, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [literal interpretation] in their context [contextual interpretation] and in the light of its object and purpose [teleological interpretation]'. As to the supplementary means of interpretation, Article 32 of the 1969 Vienna Convention refers to 'the preparatory work of the treaty and the circumstances of its conclusion'.

<sup>129</sup> Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, *The European Journal of International Law*, vol. 21, no. 3, 2010, at p. 515.

right in *Golder* was that of access to court under Article 6 of the ECHR. The applicant was a prisoner who had been denied the right to consult with a solicitor with the view to taking action for libel in respect of a statement made by a prison officer.<sup>130</sup> The defendant, the United Kingdom, argued that the ECHR did not provide a right of access to court, as such right had not been explicitly provided in the ECHR.<sup>131</sup> The Strasbourg court, however, took another view, declaring that ‘Article 6 (1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term’.<sup>132</sup> The right of access constituted an element which was considered inherent in the right provided by Article 6(1), and this, the Strasbourg court noted, was not an extensive interpretation forcing new obligations on the Contracting States. Instead it was based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the ECHR as well as to general principles of law. This way, the ECtHR allowed the Article to embody a ‘right to a court’, of which the right of access constitutes only one aspect.<sup>133</sup> Thus, by having regard to the object and purpose of the ECHR, the Strasbourg court took the view that it may grant rights that are not explicitly mentioned in the convention text.

The following year, in 1976, the Strasbourg court delivered another landmark ruling in the case of *Engel*, where it established the notion of autonomous concepts.<sup>134</sup> Here, the court had to decide whether a certain offence and the subsequent punishment were criminal or, as the Dutch government argued, disciplinary in nature. The Strasbourg court declared that if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the perpetrator of a ‘mixed’ offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 of the ECHR would be subordinated to the States’ sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the ECHR,

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<sup>130</sup> *Golder v the United Kingdom*, judgment of 21 February 1975, Application no. 4451/70, at para 18.

<sup>131</sup> The text itself thus gave a clear signal of the drafters’ intentions, if they had intended to create such a right, they would have done so explicitly by choosing a different wording, see Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, *The European Journal of International Law*, vol. 21, no. 3, 2010, at p.515.

<sup>132</sup> *Golder v the United Kingdom*, judgment of 21 February 1975, Application no. 4451/70, at para 28.

<sup>133</sup> *Ibid*, para 36.

<sup>134</sup> *Engel and Others v the Netherlands*, judgment of 8 June 1976, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

the court declared.<sup>135</sup> The notion of autonomous concepts was thus developed to counter the perceived circumvention of ECHR guarantees, and to secure an application that was consistent with the purpose and objective of the ECHR.

Two years later, in April 1978, the *Tyrer* ruling was delivered.<sup>136</sup> This time, the Strasbourg court inaugurated the living instrument approach,<sup>137</sup> declaring that the ECHR is a living instrument which must be interpreted in accordance with present-day conditions.<sup>138</sup>

In 1979, yet another ruling of significance for the court's interpretative methods was delivered; *Airey v. Ireland*,<sup>139</sup> establishing the principle of effectiveness. The applicant Mrs Airey wished to seek a decree of judicial separation from her husband on the grounds of his alleged cruelty to her and their children. However, she was not able to find a lawyer to act for her as no legal aid was available to assist her, and as she could not afford to pay the legal fees herself. Mrs Airey eventually turned to the Strasbourg court claiming that the Irish legal system denied her effective access to a court contrary to Article 6 of the ECHR. In response, the Irish government held that there was no breach of Article 6 as there was no bar against Mrs Airey appearing herself before the court to argue her case.<sup>140</sup> To this, the Strasbourg court responded that it did not consider this fact in itself to be conclusive of the matter, as the ECHR was intended to 'guarantee not rights that are theoretical or illusory, but rights that are practical and effective'.<sup>141</sup> The court then concluded that it was not realistic for Mrs Airey to conduct her own case effectively, and established a breach of Article 6(1) of the ECHR.<sup>142</sup>

These are only some of the principles guiding the Strasbourg court's interpretation of the ECHR. However, they all serve to illustrate the fact that the Strasbourg court allows itself to look beyond the literal meaning of the Convention text and sometimes also beyond the intentions of the drafters,

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<sup>135</sup> *Ibid*, para 81.

<sup>136</sup> *Tyrer v the United Kingdom*, judgment of 25 April 1978, Application no. 5856/72.

<sup>137</sup> See Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, *The European Journal of International Law*, vol. 21, No. 3, 2010, at p. 515.

<sup>138</sup> *Tyrer v the United Kingdom*, judgment of 25 April 1978, Application no. 5856/72, para 31.

<sup>139</sup> *Airey v Ireland*, judgment of 9 October 1979, Application no. 6289/73.

<sup>140</sup> *Ibid*, para 24.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*. For a further discussion on the principle of effectiveness, see Jacobs, White and Ovey, *The European Convention on Human Rights*, 5<sup>th</sup> edn, Oxford University Press, 2010, Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, *The European Journal of International Law*, vol. 21, no. 3, 2010.

adapting its interpretation to present-day conditions, making sure that the rights are practical and effective, and seeking coherence by paying regard to the object and purpose of the ECHR.

### 1.6.1.2 Interpretative methods of the EU Courts

Article 19 of the TEU requires the ECJ to ensure that in the interpretation and application of the Treaties ‘the law is observed’, thus pointing the Court beyond the wording of the Treaties, and requiring it to interpret the Treaties so as to guarantee that the European Union is based on the rule of law.<sup>143</sup>

When interpreting the Treaties, the ECJ applies the interpretative methods that are common to many national legal systems and recognized by the Vienna Convention<sup>144</sup> – namely the methods of literal, contextual and teleological interpretation, or as *Poiares Maduro* puts it, ‘text, context and *telos*’.<sup>145</sup> However, as noted by *Lenaerts* and *Gutiérrez-Fons*, even if the ECJ applies generally recognized methods, the fact remains that the ECJ in the light of the autonomy of the EU legal order, may attach a specific normative importance to those methods.<sup>146</sup>

Thus, just like the Strasbourg court, the ECJ applies the notion of autonomous concepts. In *CILFIT*,<sup>147</sup> a case dealing with national courts’ application and interpretation of EU law, the ECJ declared that EU law uses a terminology which is peculiar to it, and that legal concepts do not necessarily have the same meaning in EU law as in the laws of the Member States.<sup>148</sup> When a national judge, or a scholar for that matter, interprets a

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<sup>143</sup> *Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Papers, AEL 2013/9, at p. 3, Beck, *The Legal Reasoning of the Court of Justice of the EU*, Modern Studies in European Law, Hart Publishing, 2012.

<sup>144</sup> See the 1969 Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, at 331. Article 31 of that Convention states that, in accordance with a general rule of interpretation, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [literal interpretation] in their context [contextual interpretation] and in the light of its object and purpose [teleological interpretation]’. As to the supplementary means of interpretation, Article 32 of the 1969 Vienna Convention refers to ‘the preparatory work of the treaty and the circumstances of its conclusion’.

<sup>145</sup> *Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *Journal of European Legal Studies*, vol. 1, no. 2, 2007, p. 4.

<sup>146</sup> *Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Papers, AEL 2013/9, at p. 5.

<sup>147</sup> Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, EU:C:1982:335.

<sup>148</sup> *Ibid.*, para 19.

provision of EU law, he or she will not only have to take into account the fact that EU legislation is drafted in several languages, and where the languages are all equally authentic, he will also have to take into account the fact that a legal concept may have to be interpreted differently than under national legislation.

In *CILFIT* the ECJ also declared that the national judge must pay regard to the fact that every provision of EU law should be placed in its context and interpreted in the light of the provisions of EU law as a whole, in terms of the objectives thereof and to its state of evolution at the date on which the provision is to be applied.<sup>149</sup> The ECJ requires the national court not only to interpret relevant EU provisions in their context and in the light of the objectives of the EU. In order to ensure that the EU legal system remains coherent, the ECJ also applies the ‘living instrument approach’ requiring the national judge to pay regard to the state of evolution of EU law, indicating that this law is not static, but that a certain provision may be interpreted differently at different points in time.

As noted by *Poiarés Maduro*, the autonomous and unique character of the EU legal order has required a constitutional reading of EU law founded on the principles of direct effect and supremacy and complemented with the adoption of concepts such as fundamental rights, implied competences, effectiveness, etc.<sup>150</sup> Thus, the teleological interpretation does not refer exclusively to a purpose-driven interpretation of the relevant rules, but to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.

According to *Lenaerts* and *Gutiérrez Fons*, an EU law provision may be interpreted in the light of the normative context in which it is placed and/or in accordance with the purposes it pursues, in particular where there are certain ambiguities relating to the way in which that provision is drafted. However, these scholars argue, where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of that provision, as this would run counter to the principle of legal certainty and to the principle of inter-institutional balance enshrined in Article 13(2) TEU. Stated simply, ‘the ECJ will never ignore the clear and precise wording of an EU law provision’.<sup>151</sup> This being said, the Court, as did the Strasbourg court in *Golder*,<sup>152</sup> may go beyond the

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<sup>149</sup> *Ibid*, para 20.

<sup>150</sup> *Poiarés Maduro*, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *Journal of European Legal Studies*, vol. 1, no. 2, 2007, p. 5.

<sup>151</sup> *Lenaerts* and *Gutiérrez-Fons*, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, *EUI Working Papers*, AEL 2013/9, at p. 7.

<sup>152</sup> *Golder v the United Kingdom*, judgment of 21 February 1975, Application no. 4451/70.



literal wording of a treaty provision in order to ensure that ‘the law is observed’. In *Chernobyl*<sup>153</sup> for example, the Court had to take a stance on whether the European Parliament (‘the EP’ or ‘the Parliament’) should be allowed to bring action against the adoption of a certain legislative act despite the fact that the institution was not among those enumerated in Article 146 of the Euratom Treaty. The ECJ decided to grant the EP such right, declaring that ‘the absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities’.<sup>154</sup> This ruling shows that the ECJ is willing to see beyond the wording of individual treaty provisions in order to ensure coherence and observance of the law.

Another landmark ruling on this issue is *Les Verts*,<sup>155</sup> which also demonstrates that in so far as possible, the ECJ will interpret the law with a view to filling any normative lacunae, either in primary or secondary EU law, whose persistence would ‘lead to a result contrary both to the spirit of the Treaty ... and to its system’. Like *Chernobyl*, the case of *Les Verts* concerned the lack of explicit reference to the European Parliament in a Treaty Provision. However, this time the Parliament was the defendant and not the applicant. Despite the fact that the EP did not appear in the list of potential defendants laid down in Article 263 TFEU,<sup>156</sup> the Court considered that it had jurisdiction to entertain an action for annulment against acts of the Parliament. The Court justified its ruling by stating that if the Parliament’s actions would be excluded from those which could be contested under Article 263 TFEU, the consequence would be that measures adopted by the Parliament could encroach on the powers of the Member States or of the other EU institutions, or exceed the limits set to the Parliament’s powers, without it being possible to refer them for review to the Court.<sup>157</sup> As *Lenaerts* and *Gutiérrez Fons* point out, a refusal to interpret a provision of EU law because it is obscure, silent or insufficiently clear would run counter to the principle of effective judicial protection – enshrined in Article 19 TEU and Article 47 of the Charter, given that such a refusal would constitute a denial of justice. This, the doctrine of effectiveness or ‘*effet utile*’ developed by the Court is a corollary to the teleological method, and allows the Court, when

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<sup>153</sup> Case C-7/88, *European Parliament v Council of the European Communities*, EU:C:1991:373.

<sup>154</sup> *Ibid*, para 26.

<sup>155</sup> Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, EU:C:1986:166.

<sup>156</sup> Article 173 of the EEC Treaty.

<sup>157</sup> Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, EU:C:1986:166, para 25.

interpreting a provision, to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is a part.<sup>158</sup>

This very brief and summary description of the Court's interpretative methods shows that the Court applies literal, contextual and teleological methods to interpret EU law, and that it strives for effectiveness, consistency and uniformity in its case-law as a means to ensure that the law is observed and the Treaty objectives are attained.

### **1.6.1.3 Interpretative methods of the two courts – Final remarks**

As pointed out earlier, the most significant difference between the two courts' approaches does not lie in the methods of interpretation. Both courts regard their legislative acts as living instruments, and both courts strive not only to ensure that their legal systems are coherent, but also that the rules are applied and interpreted in such way that they reflect and respect the object and purpose of the respective systems. Instead, the great difference lies in the fact that the two systems do not share the same goal. While the ECHR aims at securing respect for human rights, according to the ECJ the main objective, or the *raison d'être*, of the EU legal system is integration. Thus, unlike the Strasbourg court, the ECJ is not a human rights court. This will be discussed more in the following.

## **1.6.2 The legislative framework surrounding competition law enforcement**

The interpretative methods of the two courts necessitate a close study of their case-law. Thanks or due to an often ambiguous or open-ended language in the legislative texts, the two courts play a prominent role in determining or shaping the law. However, research in this field cannot be limited to studying the courts' case-law. The fact remains that the legislations of both the EU and the ECHR stand on treaty and convention texts. In EU law, secondary legislation such as regulations and directives form an important part of EU law, and any research in the field of EU law will thus have to take its basis in the statutory legislation.

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<sup>158</sup> See e.g. Case 292/82, *Firma E. Merck v Hauptzollamt Hamburg-Jonas*, EU:C:1983:335, para 12, and Fennelly, *Legal Interpretation of the Court of Justice*, Fordham International Law Journal, vol. 20, issue 3, 1996, Article 4, at p. 664.

This thesis will take its starting point in the Commission's dawn raid practices. Only when these have been defined and their key components identified is it possible to determine whether they respect applicable fundamental rights. Should such study reveal that applicable fundamental rights are not duly respected, an attempt will be made at determining whether it is possible to adjust the enforcement rules to ensure adequate fundamental rights protection, while still maintaining their efficiency. This requires an examination not only of the legal framework surrounding the Commission's procedures, but also of how the rules are actually applied by the Commission, and how the EU Courts view the Commission's practices.

As for the legal framework surrounding dawn raids, Regulation 1/2003 plays a central role, as does Commission Regulation 773/2004<sup>159</sup> relating to the conduct of proceedings by the Commission in competition law cases. Alongside these legislative instruments are a number of notices and guidelines published by the Commission. Although not technically forming part of the legislative package surrounding the Commission's dawn raid practices, the notices and guidelines reflect the Commission's view on the applicable legislation as well as how the legislation is applied in practice by the Commission. As mentioned in Section 1.6, any deviation by the Commission from these instruments may be contrary to general principles such as those of legal certainty and legitimate expectations. The practical role of the notices and guidelines should therefore not be underestimated.

At this stage it is important to acknowledge the inherent risk that any study of the Commission's dawn raid practices will fail to give a true and comprehensive picture of how the rules are actually applied. Here, the real challenge does not lie in analysing the broader framework surrounding the Commission's dawn raid practices, dealing with questions such as whether or not inspection decisions should be made subject to the approval of a court. Instead, the challenge lies in analysing the Commission's practices during the course of its inspections. As the Commission's inspection decisions are not made public, and many dawn raids never come to the public's attention, the material available will be confined to cases where the targeted companies perceive that the Commission inspectors have failed to respect their rights, and have thus challenged the Commission's measures. These cases may not be representative of the Commission's practices in general. Although they are certainly interesting from a due process perspective, and will help determine the applicable procedural safeguards, they may draw a picture of the Commission's practices that does not necessarily mirror the

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<sup>159</sup> Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Article 81 and 82 of the EC Treaty. Official Journal L 123, 27.04.2004, pp. 18-24.

Commission's standard procedure. At the same time, there is also a risk that some practices which are not in line with the applicable fundamental rights framework will never come to the attention of the public – because companies fail to challenge these measures, be it because they are not aware of their rights or because they decide not to invoke them. To give an example, in 2008, the Commission launched a sector inquiry through dawn raids. This practice was criticized by scholars and practitioners because the Commission had resorted to inspections without suspecting the targeted companies of any wrongdoing,<sup>160</sup> but it was never challenged by the targeted companies. We therefore do not know what the Court's view would be on such a practice.

As for the jurisprudence available, it is not uncommon that companies challenge decisions by the Commission before the General Court, but decide against appealing the General Court's decision. Much of the available case-law therefore consists of rulings from the General Court, and thus do not necessarily reflect the view of the ECJ.

### 1.6.3 EU Fundamental rights protection – Methodological challenges

For a long time, market integration was more or less the sole objective of the EU. Today, this objective by no means holds a monopoly position, but it remains the driving force behind the Union. EU competition policy serves the aim of ensuring market integration, and is thereby given a prominent position within the EU legislative framework. In recent times, fundamental rights – initially not even considered to form part of EU law – have developed and they now hold a strong position. In fact, the rules on competition law and fundamental rights stand on an equal footing, forming part of primary EU law.

From a fundamental rights perspective, this is of course a welcome development. However, from a methodological standpoint it serves as a

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<sup>160</sup> See e.g. Andersson and Legnerfält, *Dawn Raids in Sector Inquiries - Fishing Expeditions in Disguise?*, European Competition Law Review, vol. 29, issue 8, 2008, den Exter, *The Pharmaceutical sector inquiry: "Hamlet" in a Nutshell*, European Journal of Health Law 17, 2010, Forrester, *Ex post Assessment of Regulation 1/2003*, GCP – the Online Magazine for Global Competition Policy, October 2008, Release Two, Olsen and Roy, *The New World of Proactive EC Antitrust Enforcement? Sector inquiries by the European Commission*, Antitrust, Summer 2007, Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 149, DG Competition Stakeholder Study, *Stakeholder Report Lawyers August 2010*, [http://ec.europa.eu/competition/publications/reports/lawyers\\_en.pdf](http://ec.europa.eu/competition/publications/reports/lawyers_en.pdf), at p. 17.

challenge because the two areas should now carry the same weight on the balancing scale, and as EU fundamental rights protection originates from a number of different sources. We know that the role that the ECHR plays in EU law is significant, but it is difficult to define it properly, adding a further dimension to the methodological challenges facing this project. As will be further discussed in Section 4.5 below, the ECHR has entered EU law more or less through the back door. The EU has not yet acceded to the ECHR, and there is therefore no external commitment to abide by the Convention. However, Article 6(3) of the TEU stipulates that the fundamental rights guaranteed by the ECHR shall constitute general principles of EU law, and Article 52(3) of the Charter goes even further, establishing that the Charter standard should meet or exceed the standard provided by the ECHR. This halting system leaves the ECJ as the final arbiter of how the ECHR should be interpreted, and whether the EU standard meets that of the ECHR.

This thesis does not aim to provide a general analysis of the Court's interpretation of the Charter. Instead, it is limited to issues related to the Commission's dawn raid practices, and will deal only with the obligations of the Commission and the Court in relation to these. This project aims at determining the extent to which the ECHR actually allows national (and in this case the EU) courts to take other considerations, such as market integration or competition policy, into account when limiting ECHR rights. To the extent that my study reveals that the EU Courts are willing to go further and accept limitations that are not acceptable under ECHR law in order to ensure the fulfilment of certain goals, such as the goal of ensuring effective competition, I shall conclude that the EU standard as determined by the Court fails to fulfil the obligation in Article 52(3) of the Charter.

In order to carry out the analysis and answer the questions above, it will be necessary to study the Strasbourg court's case-law to determine the extent to which rights are treated as absolute, the circumstances under which limitations are allowed, and how such limitations should be framed to meet the ECHR standard. A key factor in such study is the case selection. The Strasbourg court has been given, if not ample opportunity, at least some opportunity to assess enforcement measures taken by national competition authorities. However, restricting the study to such cases only may provide a limited and not necessarily altogether true picture of the ECHR standard. There may be other cases dealing with inspections from other angles or at a later point in time, amending or expanding previous case-law. In the areas of tax and customs law for example, there are a number of cases dealing with inspections where the powers of the inspectors, the measures taken and the sanctions available resemble those applicable to the Commission's inspections under Article 20 of Regulation 1/2003. The case study will therefore include cases originating from other areas of law, but where the

institutional structures and/or sanctioning systems resemble those of the EU competition law enforcement system. Furthermore, in relation to some issues, such as the privilege against self-incrimination, the jurisprudence of the Strasbourg court is limited to cases that do not necessarily show any similarities with EU competition cases. A study will be carried out of the leading ECHR cases, but it is of course necessary to determine if, and if so to what extent, the court's case-law can be applied to competition law matters.

Another challenge – for both the ECJ and me as a scholar – concerns the issue of how to interpret and apply the Strasbourg court's case-law. The Strasbourg court is known for its casuistic approach where it bases its findings on and limits these findings strictly to the facts of the case. The Strasbourg court has declared that in proceedings originating in an individual application, it has to confine itself as far as possible to an examination of the concrete case before it.<sup>161</sup> Thus, its rulings seldom contain statements of a more general or principled nature. As a consequence, the case-law of the Strasbourg court does not always appear to be consistent, and it may also be difficult to determine how the Strasbourg court has evaluated or weighed the facts in a certain case and whether its conclusions are of a more general nature rather than limited to the situation in the case at hand. Applying the Strasbourg court's jurisprudence to situations which are similar but not identical to the ones adjudicated by the ECJ might prove difficult. To give an example, in the case of *Bernh Larsen Holding*, the Strasbourg court ruled that the Norwegian tax authority's copying of a server was compatible with Article 8 of the ECHR and the right to privacy contained therein. In its ruling, the Strasbourg court noted that any sanctions for refusing to cooperate were exclusively administrative (discretionary tax assessment).<sup>162</sup> What importance should this statement be given? Would the court have come to another conclusion if the sanctions for obstruction had been the same as those available to the Commission in EU cartel cases? This we do not know unless and until such a case is adjudicated by the ECtHR.

The casuistic approach adopted by the Strasbourg court was addressed by Advocate General Trstenjak in the case of *N.S.* where she declared that 'the judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter. This finding,

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<sup>161</sup> *Minelli v Switzerland*, judgment of 25 March 1983, Application no. 8660/79 and *JB v Switzerland*, judgment of 3 May 2001, Application no. 31827/96.

<sup>162</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 43.

admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with the result that it must be taken into consideration in interpreting the Charter'.<sup>163</sup> As will be further discussed in Chapter 4 below, this standpoint may be questioned, but nevertheless points to the hurdles that the ECJ may experience when determining the applicable standard of protection to be afforded under EU law according to Article 52(3) of the Charter.

Furthermore, as was mentioned earlier, the Strasbourg court considers the ECHR to be a 'living instrument', and there is no apparent link between the interpretation of the ECHR and the drafters' original intentions. As discussed in Section 1.6.1.1 above, the Strasbourg court has developed its own labels for the interpretative methods applied, referring to terms such as 'living instruments', 'practical and effective rights', 'autonomous concepts', etc.<sup>164</sup> According to *Letsas*, the Strasbourg court's interpretive ethic has been dismissive of originalism and textualism and has instead favoured the moral reading of the ECHR rights.<sup>165</sup> Or, to use the words of *van den Muijsenbergh* and *Rezai*, 'instead of adhering to a textual method of interpretation which mainly focuses on semantics and wordings, and instead of yielding to the intentions of the Convention's drafters in construing the provisions' scope of applicability, the Court pledges allegiance to the principles of effective and dynamic (or evolutive) interpretation as the two main tools in its value-based teleological quest to ascertain the substance of the Convention's provisions'.<sup>166</sup>

As explained above, in adhering to the principle of dynamic interpretation, the Strasbourg court considers the Convention to be a 'living instrument' to be interpreted in light of 'present-day conditions'. However, as pointed out by *van den Muijsenbergh* and *Rezai*, in the case of *Soci t  Colas*, which will be presented in Section 8.2.3.2 below, the court seems to give the term 'present-day conditions' a meaning which not only covers present societal needs and developments, but also appears to refer to the evolution of the Strasbourg court's own case-law.

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<sup>163</sup> Opinion of Advocate General Trstenjak in Case C-411/10, *N. S. v Secretary of State for the Home Department*, EU:C:2011:611, para 146.

<sup>164</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, pp. 58-59.

<sup>165</sup> Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, *The European Journal of International Law*, vol. 21, no. 3, 2010, at p. 509.

<sup>166</sup> van den Muijsenbergh and Rezai, *Corporations and the European Convention on Human Rights*, *Global Business and Development Law Journal*, vol. 25, 2011, at p. 53.

This can be clarified by quoting the following paragraph (in so far as it is relevant):

The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions. As regards the rights secured to companies by the Convention, it should be pointed out that the Court [in its *Comingersoll* judgment] has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention. Building 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.<sup>167</sup>

The Strasbourg court appears to use the sheer internal dynamics of its own case-law, i.e. its gradual case-by-case extension of the scope of rights to legal persons, as an argument justifying yet another expansion which seeks to include legal persons within the protective ambit of Article 8 of the ECHR. As argued by *van den Muijsenbergh* and *Rezai*, the Strasbourg court appears to imply, through its reference to the *Comingersoll* judgment<sup>168</sup> (which has little relevance with respect to the right of privacy under Article 8 of the ECHR), that since the Strasbourg court has already accepted that legal persons, like human beings, can suffer non-pecuniary damages, it is just a small step further to attribute to them a right to privacy as well. The Strasbourg court's pragmatic interpretive methods add further to the difficulty of fitting the ECHR jurisprudence into the EU system.

A final note on this section concerns any findings of discrepancies between the EU and the ECHR standard. As noted above, any such finding will lead to the conclusion that the Charter standard set in Article 52(3) is not met. However, it is not possible to end there, and declare that a legislative amendment is required to restore the balance and ensure the desired coherence. Instead, the reasons behind any discrepancies will need to be explored to determine whether the ECHR standard is really desirable in such a case or whether the standard set by the EU Courts better serves the aim of maintaining a balance between efficiency and due process concerns, and of ensuring a coherent system. It cannot be assumed that the ECHR standard is the preferable standard at all times.

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<sup>167</sup> *Société Colas Est and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 41.

<sup>168</sup> *Comingersoll S.A. v Portugal*, judgment of 6 April 2000, Application no. 35382/97.



#### 1.6.4 The principle of proportionality

Determining the extent to which the ECJ should or may acknowledge the overall objectives of the Treaties and the need for effective and efficient competition law enforcement cannot be done without also determining how the principle of proportionality is to be applied.

Under both EU and ECHR law, there is a common understanding that very few rights are absolute, but that any limitations should pass a proportionality test. The two courts routinely balance fundamental rights against each other and against conflicting public interests, and they have elevated proportionality to the status of a basic principle of interpretation.<sup>169</sup> Interestingly, neither the EU Treaties nor the ECHR define the exact meaning or application of the principle of proportionality.<sup>170</sup> It will therefore be necessary to study the case-law of both courts to determine how they apply the principle, and if such application is correct and consistent. The study will examine whether the ECJ's application differ from that of the Strasbourg court, and if so, whether the ECJ is still able to offer a standard of protection equal to or exceeding the protection granted by the Strasbourg court.

If any of these questions are answered in the negative it will be necessary to determine how the principle should best be applied to potential clashes between the Commission's dawn raid practices and EU fundamental rights in order to ensure an adequate standard of protection while at the same time safeguarding the public interest of maintaining effective competition law enforcement.

#### 1.6.5 The structure and form of ECJ rulings

The case-law of both the EU Courts and the Strasbourg court play a prominent role in this thesis. The EU Courts shall ensure that the EU level of protection meets or exceeds the ECHR standard. Yet, since the entry into force of the Lisbon Treaty, the Court appears to have more or less ceased to make any references to the ECHR or the jurisprudence of the Strasbourg court.<sup>171</sup> Instead, it refers to the Charter. To give an example, in *Otis*, the

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<sup>169</sup> Tsakyrakis, *Proportionality: An Assault on Human Rights?*, International Journal of Constitutional Law, vol. 7, no. 83, 2009.

<sup>170</sup> However, Article 52(1) of the Charter declares that any limitations to the rights enshrined therein are subject to the principle of proportionality.

<sup>171</sup> In 2013, Professor Grainne de Búrca conducted an analysis of all the cases where the General Court and the ECJ had referred to the Charter or the ECHR since the entry into force

referring Belgian court wished to know whether a certain measure was compatible with Article 47 of the Charter and Article 6(1) of the ECHR. The ECJ declared in a Grand Chamber ruling that Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR, and that therefore it was only necessary to refer to Article 47 of the Charter.<sup>172</sup>

At first glance, this shift from the ECHR to the Charter<sup>173</sup> may seem both rational and satisfactory. The Charter is now the main legal basis for EU fundamental rights protection, and it does not impose a formal obligation on the part of the Court to use a certain interpretative method or structure its ruling in a specified way – the only obligation is to reach a certain goal; that is a level of protection that does not fall short of the ECHR standard. If the Court refers to a relevant ECHR provision, the case-law of the Strasbourg court or even the relevant Charter provision is not a concern (from an Article 52(3) perspective) as long as the outcome of its rulings guarantees adequate protection.

However, this does not mean that such practice is desirable. Contrary to the opinions of the advocate generals which often contain references to both case-law and legal doctrine, the rulings of the ECJ seldom allow the outsider

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of the Lisbon Treaty and until the end of 2012. Her study revealed that the ECJ had referred to the Charter in at least 112 cases. As for any references to the ECHR, there had been a remarkable lack of reference on the part of Court to other relevant sources of human rights law and jurisprudence. Apart from ‘very occasional and increasingly selective’ use of the case-law of the ECHR, there had been virtually no references to other human rights instruments. In her article, *De Búrca* criticizes the Court for its self-referential, formulaic and minimalistic style of reasoning, arguing that it fits poorly with its expanded role and the increasing number of human rights claims. Out of the 112 cases where the Court referred to the Charter, only 18 cases contained a reference to the ECHR (with only ten of these involving some mention or discussion of the ECtHR case-law). See De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, Maastricht Journal of European and Comparative Law, vol. 20, 2013, pp. 174-175. More recently, Krommendijk published a study on the use of the ECtHR case-law by the ECJ. The study was based on 20 interviews with judges, référendaires and Advocate Generals at the ECJ. According to the study, the ECJ now examines and cites the Strasbourg case-law less frequently and extensively than prior to the Lisbon Treaty, See Krommendijk, *The Use of the ECtHR Case Law by the CJEU After Lisbon: The View of the Luxembourg Insiders*, Maastricht Working Papers, Faculty of Law, 2015-6.

<sup>172</sup> Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, EU:C:2012:684, at para 47.

<sup>173</sup> A study carried out by Laurent Scheeck showed that ‘From 1998 to 2005, the ECHR is indeed referred to 7.5 times more often than all the other human rights instruments the ECJ occasionally relies on, including the Charter of fundamental rights, *taken together*.’, Scheeck, *Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks*, Garnet Working Paper: No 23/07, August 2007, p. 12. Cited by De Búrca in *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, Maastricht Journal of European and Comparative Law, vol. 20, 2013, p. 170.

to grasp how or what has inspired the Court to reach its conclusion. *Lasser* describes the rulings of the ECJ as rather brief, terse and magisterial decisions that offer condensed factual descriptions, impersonally clipped and collegial legal reasoning, and ritualized stylistic forms.<sup>174</sup> As *Eckes* points out, speaking with one voice might be an advantage in avoiding chasms between the different nationalities within the Court, but it does not contribute to the clarity or transparency of either the method or the argument.<sup>175</sup>

When it comes to fundamental rights, the Court's rulings do not always allow outsiders to assess whether it has actually paid attention to the rights in question, and if so, how it has interpreted these rights. *Groussot* and *Gill-Pedro* discuss this issue in relation to the case of *ROJ TV*.<sup>176</sup> In this preliminary ruling, the ECJ failed to discuss a possible breach of the freedom of expression. The case concerned a TV company established in Denmark and broadcasting in Germany, and whether a decision prohibiting it from broadcasting in Germany had been compatible with the Television without Frontiers Directive.<sup>177</sup> The Court based its ruling entirely on the directive making no reference to Article 11 of the Charter. It is thus not clear whether the ECJ had failed to pay regard to Article 11 of the Charter or whether it had carried out a proper analysis, but simply decided against mentioning the Charter provision in the ruling.<sup>178</sup> Irrespective of which case applies, the Court is under an obligation to give the national court all the guidance necessary for it to assess the compatibility of the national legislation with EU fundamental rights.<sup>179</sup>

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<sup>174</sup> *Lasser*, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, 2009, at p. 104.

<sup>175</sup> *Eckes*, *European Legal Method – Moving Away from Integration*, in Neergaard and Nielsen (eds), *European Legal Method – Towards a New European Legal Realism?*, DJØF Publishing, 2013.

<sup>176</sup> *Groussot* and *Gill-Pedro*, *Old and New Human Rights in Europe*, in Brems and Gerards (eds), *Shaping Rights in the ECHR*, Cambridge University Press, 2013, at p. 253.

<sup>177</sup> Cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and ROJ TV A/S v Bundesrepublik Deutschland*, EU:C:2010:465. See also *Groussot* and *Gill-Pedro*, *Old and New Human Rights in Europe*, in Brems and Gerards (eds), *Shaping Rights in the ECHR*, Cambridge University Press, 2013, at p. 253.

<sup>178</sup> *De Búrca* discusses the Court's failure to draw on comparative and international legal sources, and lists five possible reasons. One of these possible reasons, which she finds convincing, is that the judges are not uninformed by relevant case-law, but that they simply do not cite the international or foreign sources they have read, or that may have been considered or mentioned by the Advocate General, when writing their judgments. See *De Búrca*, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, *Maastricht Journal of European and Comparative Law*, vol. 20, 2013, p. 178.

<sup>179</sup> See e.g. Case C-159/90, *The Society for the Protection of Unborn Children Ireland v Stephen Grogan and Others*, EU:C:1991:378, para 31, and Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, ECLI:EU:C:2004:18, para 49, Case C-

The fact that the Court fails to make reference to relevant provisions in the ECHR or even the Charter is problematic from a methodological perspective, as it does not allow outsiders to follow the Court's reasoning and determine whether the Court has actually considered relevant provisions and criteria.<sup>180</sup> *De Búrca* questions whether the judicial style and approach of the Court – its self-referential, formulaic and often minimalist style of reasoning – is appropriate given the increasing number of human rights claims, which call for a greater openness on the part of the Court to the use of international and comparative law.<sup>181</sup> Otherwise *De Búrca* claims, there is a risk of a detached, autonomous and potentially insufficiently informed case-law on a growing range of important human rights issues.<sup>182</sup>

This being said, my study will analyse the extent to which the ECJ actually refers to or follows the structure of ECHR provisions such as Article 8. Article 8 of the ECHR sets out a very specific methodology for the Strasbourg court to follow when determining the scope and limitations of the right to privacy. If the ECJ does not follow that structure, it will be necessary to assess whether it is still possible for the ECJ to ensure adequate protection or whether there is a risk that the application of different methods lead to different outcomes and/or different levels of protection.

## 1.7 Delimitations

This work seeks to examine whether the Commission's dawn raid practices respect applicable fundamental rights, and if not, whether it is possible to change the system so that a balance is struck between the apparently diverging interests of efficiency and due process.

The designated scope sets certain boundaries to my thesis. I will dedicate my work to the Commission's practices, leaving the practices of national authorities aside. Furthermore, a competition case goes through a number of

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299/95, *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254, para 15, and Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 25. In these cases, the Court has declared that where national legislation falls within the field of application of EU law, the Court, in a reference for a preliminary ruling, must give the national court all guidance as to interpretation, which is necessary for the national court to be able to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the ECHR — whose observance the Court ensures.

<sup>180</sup> For a further discussion on this, see De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, *Maastricht Journal of European and Comparative Law*, vol. 20, 2013.

<sup>181</sup> *Ibid.*, p. 168.

<sup>182</sup> *Ibid.*, p. 174.

stages from the decision to carry out an inspection to the final ruling by the highest court. This thesis will deal with only one of these stages, the unannounced inspection or the *dawn raid*.

Part of this exercise will be to determine the legal framework surrounding dawn raids and its application by the Commission. This cannot be done without touching upon questions of efficiency as the EU competition law enforcement is driven by concerns of both effectiveness and efficiency. These questions do by necessity involve economic considerations. I wish to stress already at the outset of this thesis that my work does not purport to cover any economic or econometric analyses. Save for the brief discussion in Section 1.5 above on the rationale behind competition legislation and its enforcement, there will be no attempts at measuring costs, deterrence or the like. Instead, I will base my research on applicable legal sources in order to identify the various components of the Commission's dawn raid practices and the role they play in the competition law enforcement system. From there, a due process analysis will be made to establish whether the Commission's practices meet the required fundamental rights standard.

It is also important to note that this thesis will not question the actual need for dawn raids as such or whether there are other equally effective investigative methods that may replace them.

Dawn raids carried out today share few similarities with those carried out only twenty years ago. Today, most evidence come in electronic form, and many companies do not even have physical servers located at their premises. Electronic evidence may even be located outside the EU.<sup>183</sup> A number of legal issues may arise from the Commission's approach to digital evidence gathering. One such issue is whether international treaties, such as the international convention on cybercrime,<sup>184</sup> allows the Commission to access data stored outside the EU.<sup>185</sup> The scope of this thesis is limited to examining competition legislation from a fundamental rights perspective, and will not be extended to questions of data protection, cybercrime or the like.

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<sup>183</sup> See e.g. Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 141, and Polley, *Digital Evidence Gathering in Dawn Raids – A Risk for the Company's Rights of Defense and Fundamental Rights* (April 4, 2013), 20th St. Gallen International Competition Law Forum ICF, 2013. Available at SSRN: <http://ssrn.com/abstract=2355033>.

<sup>184</sup> Council of Europe, Convention on Cybercrime, signed in Budapest on November 23, 2001, entered into force on January 7, 2004.

<sup>185</sup> See e.g. Polley, *Digital Evidence Gathering in Dawn Raids – A Risk for the Company's Rights of Defense and Fundamental Rights* (April 4, 2013), 20th St. Gallen International Competition Law Forum ICF, 2013. Available at SSRN: <http://ssrn.com/abstract=2355033>, at p. 8.

## 1.8 Structure of the thesis

In this chapter, the research question has been introduced, formulated and delimited. The following chapter, Chapter 2, will flesh out the background of the chosen topic and set the scene for the study to be carried out in this thesis.

Having introduced the reader to the potential clash between the need for effective antitrust enforcement and the protection of fundamental rights, the thesis takes the competition rules – substantive rules as well as the rules on their enforcement – as its point of departure. The dawn raid as an investigative method is the main attraction, but only if this practice is placed in a broader setting, describing the aim of the competition rules and the importance of their enforcement, can the reader truly grasp the significance of the tension between the need for effective dawn raids on the one hand and the respect for fundamental rights on the other. Thus, Chapter 3 will begin by discussing the need for effective competition rules and the components that are key to effective antitrust enforcement. This will be followed by a brief exposé of the history of the competition rules, their origin, the motives behind them and their basic structure. From there we will continue to the enforcement rules. How are they structured, what are their key components and which role does the dawn raid play in the enforcement of the competition rules? This will be followed by a more thorough presentation of the rules governing the Commission's dawn raid practices. The aim is to draw a complete picture of the legislative framework surrounding dawn raids, and also to identify the dawn raid's key components.

The next stop will be the fundamental rights framework presented in Chapter 4. Compared to the competition rules, this part of EU legislation has taken giant leaps over the years. In the beginning, fundamental rights were not even considered to form part of EU law. Today, they are placed right at the top of the norm hierarchy. Given this evolution, both time and space will be devoted to presenting the history of fundamental rights, and their position today. I believe this is necessary in order to understand and apply the Court's older case-law to present-day conditions. Some of the Court's older rulings simply cannot be applied today as they were delivered at a time when fundamental rights did not form part of EU law or when the Court felt no other obligation than to 'draw inspiration' from the ECHR.

Enforcement rules are driven by efficiency concerns. Fundamental rights on the other hand are (partially) designed to protect the individual from interference by the public. It is obvious that these two areas will clash, and the question is then how to handle such conflicts. Both ECHR and EU

legislation allow for limitations of fundamental rights. Such limitations are acceptable only if, and to such extent that they are considered proportionate. The principle of proportionality forms the backdrop to all fundamental rights limitations within the EU and ECHR systems and therefore deserves a chapter of its own. In this chapter, Chapter 5, I will explore the role that the principle plays in EU and ECHR law respectively. Its building blocks will be analysed, and I will examine whether it is the same principle that is applied in the two legal systems or whether the principle takes different form and leads to different outcomes in the two systems.

The ECHR standard lays the foundation for EU fundamental rights protection. However, the ECHR standard is not a fixed point that treats all cases alike. Over the years the Strasbourg court has been willing to extend the scope of protection afforded under articles such as Article 6 of the ECHR ensuring the right to a fair trial. This extension has led to a differentiation in the level of protection granted. The rights conferred on individuals under Article 6 of the ECHR are considered to be stronger in criminal cases than in civil cases. To add to the complexity, the ECtHR has gradually extended the notion of ‘criminal charge’ to cover cases that have not traditionally been regarded as criminal. In return, the level of protection is slightly lower than in criminal cases within the so-called core meaning of the term. Labelling competition cases is therefore a prerequisite to determining the level of protection afforded under the ECHR. Thus, Chapter 6 will be devoted to analysing the nature of competition cases and determining whether or not they are criminal under ECHR law.

Having mapped out the legislative framework, the thesis moves on to explore the Commission’s practices from a fundamental rights perspective. How are dawn raids actually carried out at the premises of undertakings? On what grounds are they challenged and does the EU system match the ECHR system?

Chapter 7 provides a general description of the potential clashes between competition law and fundamental rights law, and also discusses the practical implications of any obstruction to the Commission’s inspections. The following chapter, Chapter 8, determines what is required in order for the Commission to carry out a dawn raid. Today, it is the Commission itself that makes the decision to carry out unannounced inspections. The chapter will examine whether such order is in line with the rights to privacy and a fair trial granted under the Charter, and will also examine the requirements relating to the purpose and subject-matter of the Commission’s inspections. How narrowly must these be defined, and what constraints do they put on the inspectors during the dawn raid?

An issue closely related to those addressed in Chapter 8, is the question whether the Commission should be allowed to carry out inspections even where there is no concrete suspicion of wrong-doing, such as for example in sector inquiries. This question will be dedicated a chapter of its own, Chapter 9.

We will then move on to discuss and analyse the measures taken by the Commission once the dawn raid has commenced. Chapter 10 will examine the Commission's powers to review and copy documents or files, whether or not these powers need to be limited to the subject-matter of the investigation, and to what extent the Commission should be allowed to make image copies of files or servers for review back at Commission headquarters in Brussels. This will also trigger questions on the application and scope of rights such as the privilege against self-incrimination and legal professional privilege. Should company representatives be forced to hand over possibly incriminating documents or documents containing legal advice from the company's legal counsels? These questions will be analysed in Chapters 11 and 12 respectively.

Chapter 13 will address the question of access to courts. What possibilities do targeted companies have to obtain interim measures during the course of a dawn raid, and is it possible to challenge inspection decisions and measures taken on their basis before the EU Courts?

Chapters 7 through 10 deal with 'traditional dawn raids' carried out under Article 20 of Regulation 1/2003 at the premises of an undertaking. However, Regulation 1/2003 introduced the possibility for the Commission to perform dawn raids also at other premises, such as the home of a director or employee. Although much of what has been discussed in the previous chapters is also applicable to these dawn raids, they are partly governed by another set of rules, Article 21 of Regulation 1/2003, and may entail other types of fundamental rights issues. Chapter 14 will therefore be devoted to these dawn raids.

In the final chapter, the dots will be connected, as it were. Are the Commission's dawn raid practices in line with the ECHR standard? If not, which amendments are required, and are they really desirable? As this thesis examines whether it is possible to strike a balance between the opposing interests of effective competition law enforcement and adequate fundamental rights protection, it is not sufficient to establish either conformity or discrepancy with the ECHR standard. This research should also examine whether the standard required by the ECHR would be the appropriate standard within the EU legal system or whether a conflicting or diverging (EU) standard better serves the aim of striking a balance between the two



conflicting interests. The final chapter will identify the amendments required to strike such balance and will also discuss how these could best be achieved. Some reflections for the future will also be made. Is it possible to draw any general conclusions that may serve as guidance when new investigatory measures are being explored or new techniques are introduced? These issues will not be dealt with in detail, but rather presented as food for thought and perhaps an area for further research.

## 2. Setting the scene

Legal protection against unjustified searches of private homes by enforcement authorities is generally considered to be one of the principles marking the divide between societies based on the rule of law and other, more repressive, forms of government.

However, it is universally recognised that even in communities ruled by law, such as the European Union, public authorities must be given effective investigative powers in order to pursue suspected infringements.

Opinion of AG Wahl in Case C-583/13P, *Deutsche Bahn*

The previous chapter provided a brief background to and defined the research questions. It pointed to the tension between the Commission's dawn raid practices and the fundamental rights protection to be afforded by the EU institutions. While the previous chapter sketched out this tension, the present chapter aims at drawing a more complete picture of the inherent conflict between the efficiency-driven competition law enforcement system and EU fundamental rights protection, and why the relationship between the two has become so problematic in recent years.

In July 1994, the Commission adopted its decision in the *Cartonboard* case, imposing fines on a number of companies for involvement in a complex and long lasting cartel. In its decision, the Commission noted:

By its very nature, the cartel was a clandestine activity. Considerable efforts were made to conceal its existence and to ensure (not always successfully, however) that incriminating evidence was not kept.<sup>186</sup>

A few years later, the Commission imposed fines on the two airline companies SAS and Maersk Air for participation in a market-sharing cartel. This time, the Commission noted:

The parties knew that their behaviour infringed Article 81 of the Treaty and took action to avoid the Commission becoming aware of the full extent of

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<sup>186</sup> *Cartonboard* (Case IV/C/33.833) Commission Decision 94/601/EC [1994] OJ L243/1, para 116).

their agreements. SAS and Maersk Air also tried to avoid keeping a full written record of the points on which they had agreed:

The parts of the documents that infringe Article 85(1), although they cannot be agreed upon and cannot be put on paper, we presume that because some people will not be present (in the future), these parts will have to be written anyway and be put in escrow in the offices of lawyers from both side[s]<sup>187</sup>

Although the two statements relate to the specific circumstances of the cases at hand, their essence would probably be applicable to most cartels. Cartel activity is clandestine, and cartel members make considerable efforts to conceal or destroy any incriminating evidence. As noted by the Court in *Aalborg Portland*, since the prohibition on restrictive practices and the penalties which infringers may incur are well known, it is normal that the activities involved in those practices and agreements take place in a clandestine fashion; it is common for meetings to be held in secret, frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, this evidence will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.<sup>188</sup>

Yet, despite the secretive nature of cartels and the efforts made not to leave any paper trails, the Commission is known as an aggressive and diligent enforcer of the EU competition rules. During the period 2010 through 2015, 35 cartel cases were decided by the Commission, and fines of more than nine billion euros were imposed.<sup>189</sup>

A key factor behind these figures is the Commission's possibility to carry out dawn raids. Material evidence of serious competition law infringements is crucial, but in practice difficult to locate. The dawn raid has become an important investigative device as it allows Commission officials to search through company premises and private homes without any prior notice. The element of surprise allows the Commission to gather evidence that would otherwise be destroyed or withheld.

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<sup>187</sup> *SAS/Maersk Air* (Case COMP.D.2 37.444) and *Sun-Air v SAS/Maersk Air* (Case COMP.D.2 37.386) Commission Decision 2001/716/EC [2001], OJ L265/15, para 89.

<sup>188</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission of the European Communities*, EU:C:2004:6.

<sup>189</sup> <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. Add to this the fines imposed by the Commission on companies in breach of Article 102 TFEU, and we pass the ten-billion mark.

In 1996, the Commission introduced a so-called leniency programme as part of the EU antitrust enforcement system. By offering cartel members immunity against fines in return for information on existing cartels, the Commission has been able to detect many cartels, and the leniency programme now serves as the direct cause for the conduct of most Commission inspections.<sup>190</sup> This being said, leniency programmes cannot by themselves guarantee effective competition law enforcement. The cartel is by its very nature secret and although leniency programmes may encourage a cartel participant to reveal its existence, that company alone may not necessarily possess enough evidence to allow the Commission to establish the extent to which other companies have participated in the cartel.

Furthermore, and perhaps more importantly, leniency programmes would probably not be very effective were it not for the Commission's possibility to carry out dawn raids. As *Wils* points out;

In the case of a cartel or other collective violation, leniency will work only if one cartel member either believes that the cartel risks being detected and punished without leniency or fears that at least one cartel member may hold such belief.<sup>191</sup>

A leniency programme may thus not become truly effective unless there is a fear of detection, and such fear may not be achieved without effective and efficient investigatory powers. The possibility for the Commission to carry out unannounced inspections therefore serves as a necessary tool in order for it to be able to perform its task and ensure that the provisions of the Treaty are applied.<sup>192</sup>

The dawn raid is, and always has been a frequently employed strategy in competition law investigations. This being said, the inspections carried out today have little in common with dawn raids carried out only 20 years ago. Since the turn of the century the Commission has reshaped its dawn raid procedures, making them more effective, but also more intrusive. For targeted companies, the negative implications may now be more severe but

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<sup>190</sup> See Van Barlingen and Barennes, *The European Commission's 2002 Leniency Notice in practice*, EC Competition Policy Newsletter, no. 3, 2005, p. 6.

<sup>191</sup> Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, 2008, pp 419-420.

<sup>192</sup> Under the US federal system, subpoena powers are the most widely relied on by the FTC staff. However, if a person receiving the subpoena fails to produce the requested evidence, the FTC may request the court to order such production. Any failure to comply with such court order may be deemed as contempt of court and render both fines and imprisonment; see Vakerics, *Antitrust Basics*, Law Journal Press, lawcatalog.com, 2.17 § 2.02[3]. Under the EU system, there is no possibility for imprisonment, and such system would thus be less efficient than the US system.

also of longer duration than was previously the case. There are a number of reasons for this, and the main ones are described in the following.

*First of all*, due to both legislative changes and technical progress, the search itself has become more intrusive. Today, most information is stored electronically, and there is little use in searching through filing cabinets or paper calendars. The Commission officials will therefore also have to use their ‘forensic IT’ to search through computers, mobile phones and other electronic devices. This allows them not only to collect and review significantly larger quantities of documents, but also to retrieve documents that have been deleted. Electronically stored and deleted documents and files contain additional and valuable information such as the date of creation, identities of the sending and receiving parties, date of deletion and date of any alteration. Thus, digital documents and related information are more extensive and informative than the physical documents that may have been retained. Third, it is much easier to examine bulk data in a digital environment due to the existence of certain new tools that facilitate the identification of relevant documents. Furthermore, the dawn raid does not necessarily end when the inspectors leave the premises, as copies of hard drives may be brought back to Brussels for review at the Commission’s premises.<sup>193,194</sup> In addition to this, Regulation 1/2003 has vested the Commission with a range of new powers such as the powers to search through private homes, to seal off premises, and to ask questions on the spot.

*Second*, the stakes have been raised. The Commission has revised its fining policies both as regards the fines imposed for any actual competition law infringements, but also with regard to the fines imposed for any perceived obstruction of its investigations. Previously, the Commission could only impose insignificant fines on companies refusing to submit to or otherwise obstructing its investigations. Through the adoption of Regulation 1/2003, things have changed. The Commission may now impose substantial fines when it perceives that a company is not co-operating during the investigation, and has seized this opportunity on numerous occasions.<sup>195</sup> Anyone hindering the work of the Commission, be it by hiding evidence or exercising the right of the defence, risks having to pay a hefty fine.

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<sup>193</sup> See e.g. Case T-402/13, *Orange v European Commission*, EU:T:2014:991, at p. 73.

<sup>194</sup> See also the Commission’s Explanatory Note to an authorization to conduct an inspection in execution of a Commission Decision under Article 20(4) of Council Regulation No 1/2003, pp. 14-15.

<sup>195</sup> In January 2008, the Commission imposed a € 38 million fine on E.ON Energie for tampering with a Commission seal (decision upheld by the General Court in Case T-141/08). In March 2012, the Commission imposed fines of € 2.5 million for refusing to submit to an inspection by negligently allowing access to a blocked e-mail account and intentionally diverting e-mails to a server (Decision upheld by the General Court in Case T-272/12).

*Third*, there is greater risk that information gathered by one competition authority also reaches other authorities within the EU. The application of the EU competition rules has been decentralized, so information is now frequently exchanged between competition authorities. With the European Competition Network ('the ECN') effectively in place there are formalized procedures for such exchange. Article 26 of the Commission Notice on cooperation within the Network of Competition Authorities<sup>196</sup> ('the ECN Cooperation Notice') states that a key element of the functioning of the network is the power of all authorities to exchange and use information, including documents, statements and digital information, which has been collected by them for the purpose of applying Article 101 or 102 of the TFEU. Article 12 of Regulation 1/2003 empowers the Commission and national competition authorities to exchange information and to use such information in evidence. This in turn implies a greater risk for companies that information gathered by one authority during a dawn raid can also end up in the hands of one or several other competition authorities within the EU.

*Fourth*, through the private enforcement directive,<sup>197</sup> national courts shall have the powers to order disclosure of competition authorities' case files, thereby making it easier for cartel victims to access documents gathered by the Commission and other competition authorities during the course of dawn raids. This is also in line with the trend to ensure greater accessibility to documents held by the EU institutions.

*Finally*, it is now clear that the Commission does not consider the dawn raid device to be limited to competition cases. Over the years, the ECJ has set out the boundaries for the Commission's dawn raid powers declaring that, in order to protect the companies' right of the defence, the Commission should not be allowed to venture out on so-called fishing expeditions and search for evidence without any real suspicion of wrongdoing.<sup>198</sup> However, in 2008, the Commission decided to launch a sector inquiry through dawn raids while stressing that no individual company was suspected of any wrongdoing.<sup>199</sup>

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<sup>196</sup> Commission Notice on cooperation within the Network of European Competition Authorities, Official Journal C101, 27.04.2004, pp. 43-53.

<sup>197</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ/L/349/1.

<sup>198</sup> See e.g. Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>199</sup> In her speech following the dawn raids, then Commissioner Neelie Kroes declared: 'Today's inspections are therefore not targeting companies suspected of wrong-doing. The inspections are just the starting point of a broad inquiry, a starting point that will ensure that

The Commission has thus ventured beyond the limits previously set by the Court.

Given the above, a company that receives an unexpected visit from the Commission will realize that much is at stake, and that its choice of action may have severe implications. At least in theory, the company should be able to exercise its right of the defence if it perceives that the Commission officials are acting beyond their competences. In practice, this may not only be a difficult but also a risky route to take.

To the Commission, the success of the case is often closely linked to or even dependent on the success of the dawn raid. Furthermore, deterrence will only be secured if the Commission is successful in its enforcement of the competition rules, and this requires a system where it does not ‘pay’ to obstruct. The Commission will therefore do anything it can to ensure that the operation runs smoothly, and may regard any objection by the company as obstruction. In addition, as all Union actions shall be deemed lawful until the EU Courts say otherwise, and Regulation 1/2003 imposes an obligation on the target company to submit to the inspection and to cooperate with the inspectors, the company will have to co-operate until the General Court should say otherwise.

With Commission officials on the doorstep, one is left with little room to assess the lawfulness of the Commission’s actions then and there. It is unlikely that the company representatives or counsels actually assisting the inspectors during the dawn raid have any knowledge of whether the company is involved in cartel activity or not, and it will not be until after the dawn raid and after any internal checks that the company may properly assess whether the scope of the inspection was too broad or the suspicions ill-founded. When the inspectors come knocking at the door, the company will in practice have little choice but to cooperate.

The possibility of having the Commission’s practices reviewed by a court adds a further dimension to this issue. Recent case-law suggests that if inspectors are allowed entry to the premises, it may be difficult or even impossible to challenge any measures that they take during the course of the inspection. In the *Nexans* and *Prysmian* cases,<sup>200</sup> the targeted companies challenged the Commission’s decisions to bring certain copies of hard drives back to Brussels, but the General Court declared that no standalone action

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the Commission has immediate access to the information it needs to guide its next steps’. See [http://europa.eu/rapid/press-release\\_SPEECH-08-18\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-08-18_en.htm?locale=en).

<sup>200</sup> Case T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596 and Case T-140/09, *Prysmian and Prysmian Cavi e Sistemi Energia v Commission*, EU:T:2012:596.

was possible, and that the companies would have to await the Commission's final decision in the underlying competition case before they could challenge any measures taken during the course of the inspection. The possibilities for judicial review of the Commission's actions thus appear limited.

Dawn raids are more intrusive today, and documents gathered may be exchanged between competition authorities and disclosed to civil litigants. The possibilities of judicial review are limited and the Commission has adopted an aggressive approach against any perceived obstruction of its investigations. Although a dawn raid has never been a pleasant experience for the targeted company, the potential negative impact has increased significantly in recent years.

The implications of the Commission's dawn raids should also be set against the broader background of the overall application of the EU competition rules, and the fact that the entire enforcement system has been reshaped to ensure a more effective and efficient application of the competition rules. Through the implementation of the Modernization Package in 2004, the Commission was given the opportunity to focus its resources on cartels and other serious competition law infringements – an opportunity that it gladly seized. In 2005, the Commission launched a sector inquiry into European gas and electricity markets. When Commissioner Neelie Kroes<sup>201</sup> later presented the preliminary findings of this inquiry, she made it clear that the Commission would step up its enforcement practices by making the following statement:

You can take this as a gentle word of warning if you like. We are just at the beginning of a period of more intensive antitrust enforcement. I can only encourage everyone to take a close look at their practices. Prevention is always better than cure.<sup>202</sup>

The statement has become seminal, and we now know that indeed she was right – the Commission has taken antitrust enforcement to another level and has embraced the objective of deterrence when imposing sanctions in competition cases. Nowadays huge fines are levied on competition law offenders, and we have witnessed a sharp increase in the amount of fines imposed by the Commission in competition cases.

Another facet of this new approach is the attempt to attach a moral stigma to competition law infringements. In a study of the US antitrust enforcement system, *Sokol* analysed the media coverage of cartel enforcement during the period 1990–2009. The analysis suggested that successful enforcement had

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<sup>201</sup> At the time the EU Commissioner in charge of competition.

<sup>202</sup> [http://europa.eu/rapid/press-release\\_SPEECH-06-92\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-06-92_en.htm?locale=en).



not created sufficient awareness of cartel behaviour among the public. Relative to other types of financial crimes, such as accounting fraud, the public seemed unaware or uninterested in cartel activity – a fact which, according to *Sokol*, had a negative impact on both deterrence and detection. Furthermore, *Sokol* concluded, in the individual cartelists’ cost-benefit calculation, the lack of public awareness of cartels and lack of corresponding moral outrage for cartel crimes reduces the cost of participation in a cartel.<sup>203</sup> Thus, according to *Sokol*, achieving an increased awareness of antitrust enforcement and attaching a moral stigma to cartels and other forms of anti-competitive behaviour may have positive effects on both deterrence and detection. The Commission appears to agree with *Sokol* on this, and in a speech held in March 2005, *Kroes* declared:

When we [DG COMP] break up cartels, it is to stop money being stolen from customers’ pockets.<sup>204</sup>

Cartel activity is described as a form of theft – a criminal behaviour – and not a victimless infringement of a set of administrative rules. Attached to criminal activities is of course also the moral stigma. Indeed, this is along the lines of the US approach where members of the Antitrust Division at the US Department of Justice describe cartels in the following way:

Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition. Cartels, therefore, are not properly redressed with just a liability rule designed to compensate victims. Rather, participation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly.<sup>205</sup>

The ‘zero tolerance’ approach adopted by the Commission has proven to be a success and the officials of DG COMP are extremely diligent in busting major cartels and chasing ‘super dominants’ profiting from their market power. As a result, there is a greater awareness of and respect for the antitrust rules.

However, the aggressive approach is not free from criticism. On the contrary, due process issues are now hotly debated, and the EU system is constantly being challenged by companies and their legal counsels. According to *Scordamaglia-Tousis*, cartel cases rarely deal with material

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<sup>203</sup> Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, *Antitrust Law Journal*, no. 1, 2012, p. 203.

<sup>204</sup> Commissioner Neelie Kroes SPEECH/05/157, *Taking Competition Seriously – Anti-trust Reform in Europe*, 10.03.05.

<sup>205</sup> Werden, Hammond and Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 *Antitrust Bulletin* 207, 2011, at p. 2.

law, but rather with procedural issues.<sup>206</sup> At the root of the criticism lies a perceived imbalance in the EU antitrust enforcement system, and an absence of proper checks and balances. The Commission has been vested with broad decision-making powers; it decides whether to carry out a dawn raid, whether or not to open a formal investigation, whether an infringement has occurred, and also on the imposition of fines. In the view of the critics, not only are these powers too broad, they are not counterbalanced by an efficient judicial review of the Commission's actions.<sup>207</sup>

One aspect which has added fuel to the due process debate is the evolution of EU fundamental rights protection. In December 2009 the Lisbon Treaty entered into force, making further advances regarding fundamental rights in the EU. First, it has paved the way for the EU to accede to the ECHR<sup>208</sup> as the EU has gained legal personality and undertakes to accede to the Convention. No less significantly, the previously non-binding Charter has been given the same legal status as the Treaties, and is now a source of primary EU law. This means that the Union institutions must respect the rights enshrined in the Charter.<sup>209</sup> This has not been lost on companies targeted by the Commission's investigations. At the moment, fundamental rights arguments are more or less successfully invoked in practically all competition law proceedings, and practitioners argue that the legal

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<sup>206</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 1.

<sup>207</sup> See e.g. Aslam and Ramsden, *EC Dawn Raids: A Human Rights Violation?*, *The Competition Law Review*, vol. 5, no. 1, 2008, Calzado and De Stefano, *Rights of the Defence in Cartel Proceedings: Some Ideas for Manageable Improvements*, in Cardonnel, Rosas and Wahl (eds), *Constitutionalizing the EU Judicial System in Honour of Pernilla Lindh*, Hart Publishing, 2012, Forrester, *Due Process in European Competition Cases: A Distinguished Institution With Flawed Procedures*, *European Law Review*, vol. 34, no. 6, 2009, pp. 817-43, Forrester, *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*, *European Law Review*, issue 2, 2011, Messina, *The Protection of the Right to Private Life, Home and Correspondence v the Efficient Enforcement of Competition Law. Is a New EC Court the Right Way Forward?*, 3 *European Competition Journal*, 2007, Nordlander and Harrison, *Are Rights Finally Becoming Fundamental?*, *Antitrust Chronicle*, vol. 12, 2012, Schweitzer, *The European Competition Law Enforcement System and the Evolution of Judicial Review*, in Ehlermann and Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial review in Competition Cases*, Hart Publishing, 2010, Slater, Thomas and 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 Paper Series*, GCLC Working Paper 04/08.

<sup>208</sup> A draft accession agreement has been negotiated but has recently met stiff resistance from the ECJ, see the Court's Opinion 2/13 of 18 December 2014, EU:C:2014:2454.

<sup>209</sup> Article 6 TEU.

safeguards available are inadequate and should be strengthened to match the intrusive investigations and sanctions that companies now face.<sup>210</sup>

This being said, although many are critical of the system, there is a common understanding that the competition rules are important,<sup>211</sup> and that, in order for them to be effective, competition authorities need to be vested with far-reaching investigatory powers. As was discussed in Section 1.5 above, cartels and abuse of market power are considered to harm the economy, and also to hamper the proper functioning of the internal market.<sup>212</sup> Detection and deterrence are both important aspects of effective competition law

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<sup>210</sup> See e.g. Forrester, *Due Process in European Competition Cases: A Distinguished Institution With Flawed Procedures*, *European Law Review*, vol. 34, no. 6, 2009, pp. 817-43, Slater, Thomas and 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 Paper Series, GCLC Working Paper 04/08, Venit, *Human All Too Human; The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82*, in Ehlermann and Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011.

<sup>211</sup> By 2008, 111 countries had enacted competition laws, which is more than 50 per cent of countries with a population exceeding 80,000 people. Eighty-one of the 111 countries had adopted their competition laws in the past 20 years, signalling the spread of competition law following the collapse of the Soviet Union and the expansion of the European Union, see OECD DAF/COMP/GF/WD(2014)53, *Fighting corruption and promoting competition*, 17 February 2014, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)53&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)53&docLanguage=En). The standpoint of the OECD is that well-designed competition law, effective enforcement and competition-based economic reform promote growth and employment. The OECD actively encourages governments to tackle anti-competitive practices and fosters market-oriented reform throughout the world, see <http://www.oecd.org/daf/competition/>. The close relationships between trade and investment and competition policy have long been recognized by the WTO. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for trade in goods, see [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey3\\_e.htm#investment](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment).

<sup>212</sup> See e.g. Preamble 47 to and Article 17 of the Antitrust Damages Directive; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ/L/349/1, Connor and Lande, *Cartel Overcharges and Optimal Cartel Fines*, 3 *Issues in Competition Law and Policy*, 2203, ABA Section of Antitrust Law, 2008, Chapter 88, available at SSRN: <http://ssrn.com/abstract=1285455> or <http://dx.doi.org/10.2139/ssrn.1285455>, and Connor and Lande, *How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines*, *Tulane Law Review*, vol. 80, 2005, at pp. 1-3, and Connor and Lande, *Cartels as Rational Business Strategy: Crime Pays*, *Cardozo Law Review*, vol. 34, 2012, p. 427, Oxera and Komminos, *Quantifying Antitrust Damages. Towards Non-Binding Guidance for Courts*, Study prepared for the European Commission, DG COMP, 2009.

enforcement, and this enforcement cannot be achieved unless the fear of detection is real and the consequences are severe.<sup>213</sup>

Without the possibility to carry out dawn raids, and to offer immunity to those willing to provide information about their cartel participation, few cartels – if any – would be detected. Dawn raids are thus necessary to ensure effective competition law enforcement, and if efficiency concerns should always give way to fundamental rights, there is an apparent risk that the Commission would not be able to fulfil the task handed to it in Regulation 1/2003. Indeed, it may well be that the Commission's new and more aggressive approach against competition law offenders is necessary to ensure a well-functioning competition law enforcement system. As *Scordamaglia-Tousis* points out, a system that grants overprotective procedural guarantees could translate into increased administrative or judicial litigation on procedural grounds, delaying the overall enforcement of the competition rules and increasing enforcement costs.<sup>214</sup>

The question is therefore just how aggressively the rules need to be enforced in order for the legislation to be effective, and if this can be achieved while safeguarding the fundamental rights of companies and individuals targeted through the Commission's enforcement of Articles 101 and 102 of the TFEU.

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<sup>213</sup> For a further and more elaborate discussion on this, see Section 3 below.

<sup>214</sup> *Scordamaglia-Tousis, EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 14.

### 3. Enforcement of the EU competition rules

Today, few question the benefits of effective competition policy. As previously discussed in Section 1.5 above, there is a wide-spread consensus in most democratic societies that measures should be taken to promote competitive markets, and that this in turn requires legislation that monitors, prevents and corrects anti-competitive behaviour.<sup>215</sup>

Controlling competition between companies is an area where the EU is particularly powerful. Not only is competition policy one of the cornerstones of the internal Market, it is also a centre-piece of the Economic Constitution of the EU. EU's antitrust area covers two prohibition provisions set out in the TFEU; Article 101 and its ban on restrictive practices and Article 102 prohibiting abuse of dominance. Equally important to achieving the goal of effective competition throughout the internal market, but more important to this thesis are the rules on their enforcement. The main legislative piece dealing with the application and enforcement of Articles 101 and 102 TFEU is Regulation 1/2003, which lays down the powers of the Commission and the national competition authorities. The preamble stresses the importance of effective enforcement of the competition rules. Expressions such as 'in order to ensure effective enforcement of the competition rules' and 'in order to ensure that the competition rules are applied effectively' are repeated throughout the preamble.

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<sup>215</sup> By 2008, 111 countries had enacted competition laws, which is more than 50 per cent of countries with a population exceeding 80,000 people. Eighty-one of the 111 countries had adopted their competition laws in the past 20 years, signalling the spread of competition law following the collapse of the Soviet Union and the expansion of the European Union, see OECD DAF/COMP/GF/WD(2014)53, *Fighting corruption and promoting competition*, 17 February 2014, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)53&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)53&docLanguage=En). The standpoint of the OECD is that well-designed competition law, effective enforcement and competition-based economic reform promote growth and employment. The OECD actively encourages governments to tackle anti-competitive practices and fosters market-oriented reform throughout the world, see <http://www.oecd.org/daf/competition/>. The close relationships between trade and investment and competition policy have long been recognized by the WTO. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for trade in goods; see [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey3\\_e.htm#investment](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment).

And indeed it is true – without effective enforcement, there is actually little point in adopting competition rules at all. If the rules are not enforced properly, either because the authorities do not have sufficient powers or because they do not avail themselves of the powers provided, there is an inherent risk that companies fail to abide by the rules, out of ignorance or sheer will. Rules that are seldom enforced will not become known to the public to the same extent as those which are frequently applied. Furthermore, anyone prone to knowingly act in breach of the rules will have greater incentives to do so if the competition authorities are unlikely to intervene and the risk of being sanctioned is negligent.

As with legal rules generally, the competition rules also aim at creating incentives that shape the behaviour of all undertakings in the market, including those never found in violation. The most difficult part of quantifying the benefits of antitrust enforcement is that the primary benefits may come from the deterrence of anti-competitive conduct, which is then never observed.<sup>216</sup> The issue of how to create incentives or deterrence has been addressed by many writers. One of them is *Baker*, who points out that consistency and comprehensiveness in enforcement are very important and that ‘enforcement must be frequent and highly visible’. Effective deterrence requires that those who might be tempted to take illegal action believe that there is some reasonable probability of them being caught and that, if this happens, the consequences are likely to be grave.<sup>217</sup> Assistant Attorney General *Barnett* declares that deterrence only works when the consequences are real. To effectively deter cartels, antitrust enforcers must aggressively and predictably prosecute cartelists and use the full range of weapons in the enforcement arsenal.<sup>218</sup> As *Scordamaglia-Tousis* puts it, the goal of effective deterrence depends on two components: the level of the fines and the likelihood of being caught.<sup>219</sup> The deterrent effects of any antitrust enforcement scheme thus depend upon whether companies actually believe that they may be caught.<sup>220</sup>

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<sup>216</sup> Baker, *The Case for Antitrust Enforcement*, Journal of Economic Perspectives, vol. 17, no. 4, 2003, at p. 40.

<sup>217</sup> Baker, *Punishment for Cartel Participation in the US: A Special Model?* In Beaton-Wells and Ezrachi (eds), *Criminalising Cartels – Critical Studies of an International Movement*, Hart Publishing, 2011, at p. 35.

<sup>218</sup> *Seven Steps to Better Cartel Enforcement*, Speech made by Thomas O. Barnett, Assistant Attorney General of the Antitrust Division of the US Department of Justice, at the 11<sup>th</sup> Annual Competition Law & Policy Workshop, European Union Institute in Florence Italy, 2 June 2006, [http://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement#N\\_7\\_](http://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement#N_7_).

<sup>219</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 12.

<sup>220</sup> Baker, *The Case for Antitrust Enforcement*, Journal of Economic Perspectives, vol. 17, no. 4, 2003, at p. 40.

It all boils down to ‘the probability of detection’, something which can be achieved only if enforcement is both frequent and highly visible. The deterrent effect of a system is linked to the overall decisional productivity.<sup>221</sup> This in turn requires that the competition authorities are vested with the necessary investigatory powers, as both frequency and visibility require a high likelihood of success. If competition authorities do not have the powers necessary to collect sufficient evidence, the number of cases pursued will be limited and there is also a risk that many of the cases actually pursued are unsuccessful due to lack of evidence. When it comes to visibility, this lack of success is not very desirable. The competition authorities need to be viewed by the public as diligent and tough enforcers of the competition rules, not as consistent losers. This is acknowledged by *Buccirossi and others* who declare that one policy dimension that affects the probability of detection is the type of investigative powers held by the competition authorities. The stronger the powers, the better the information the authority can gather. *Buccirossi and others* go as far as stating that the existence of a positive relationship between the extent of the investigative powers and the probability of uncovering illegal conduct is quite obvious and that ‘any further consideration is therefore unwarranted’.<sup>222</sup>

The likelihood of success is important also from a resource allocation perspective. Competition authorities cannot be allowed to pursue cases where the likelihood of success is limited. As *Bridges* points out, achieving economic efficiency inevitably involves balancing the benefits associated with enforcement (deterring inappropriate behaviour) with the costs of doing so (the transaction costs associated with enforcement, including litigation costs, the costs of excess enforcement and the costs of disruption associated with the inappropriate enforcement versus legitimate competitive behaviour). The hard questions flow from the need to find the right balance between the benefits of enforcement and the associated costs.<sup>223</sup>

A key component to this equation is again the likelihood of success. When a competition authority receives information about a cartel and takes the decision whether or not to open an investigation, it will not only have to assess the evidence or indicia available at that point, but also the possibilities (and costs) of gathering sufficient evidence to prove its case. In its *Anti-Cartel Enforcement Manual*, the International Competition Network (‘ICN’) discusses the different factors that impinge on the decision to initiate a cartel

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<sup>221</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 12.

<sup>222</sup> Buccirossi et al., *Deterrence in Competition Law*, Discussion Paper no. 285, October 2009, Governance and the Efficiency of Economic Systems, at p. 14.

<sup>223</sup> Bridges, *Evaluating Antitrust Enforcement: Economic Foundations*, in Hawk (ed.), *Annual Proceedings of the Fordham Competition Law Institute*, Juris Publishing Inc., 2009, at p. 457.

investigation, one being the availability or strength of evidence. While there may be a very strong suspicion that a cartel exists in a particular market, it is not worth committing resources to a matter that does not have strong evidence and therefore is not likely to be a successful case in subsequent litigation or appeal.<sup>224</sup> In short, it is not worthwhile adopting competition laws, if the competition authorities are not provided with the investigatory measures necessary to detect any infringements.

*Wils* identifies three types of methods that could conceivably be used to collect intelligence and evidence of violations of Articles 101 and 102 TFEU. First, the authorities could try directly to get hold of the information in the hands of the undertakings by using direct physical force (dawn raids) or covert intrusion. Secondly, they could use compulsion in the form of threatened sanctions for refusal to cooperate in order to make the undertakings provide the relevant information and documentation. Thirdly, instead of using the ‘stick’, the authorities can use a ‘carrot’ and create incentives for companies to cooperate through the introduction of leniency programmes where companies that cooperate may get immunity from or a reduction in their fines.<sup>225</sup> As for the last method, *Wils* acknowledges that although being effective, its success depends on a fear of detection and therefore it does not dispense with the other methods. One cannot use the carrot without the stick.

To conclude, enforcement needs to be frequent, visible and effective in order to be deterrent. Furthermore, in the absence of effective investigatory methods, competition authorities will not be able to pursue any cases, as the costs of enforcing the rules will be higher than the benefits associated with such enforcement. Dawn raids may indeed be an effective means to ensure an efficient and effective application of the EU competition rules. However, in order for the Commission’s dawn raid procedures to fulfil this task, they will have to allow the Commission to gather sufficiently strong evidence to support its cases. If this authority to collect evidence is lacking, the number of cartel cases will decrease and the deterrent effect will be marginal. These conclusions form the backdrop to this study, which will be based on the presumption that dawn raids, depending on how they are framed, may fulfil this task and allow the Commission to gather the evidence needed to prove its case.

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<sup>224</sup> Anti-Cartel Enforcement Manual, Chapter 4, Cartel Case Initiation, Published in May 2007 By the International Competition Network, p. 18.

<sup>225</sup> *Wils, Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, 2008, at p. 2.



In the following, a short historic background to the material competition rules and the rules on their enforcement will be given, followed by a presentation of the enforcement rules now in place.

### 3.1 Historical background to the EU competition rules

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

Those were the opening words of the Schuman declaration presented by the French foreign minister Robert Schuman on 9 May 1950.<sup>226</sup> The declaration proposed the creation of a European Steel and Coal Community where the member states would pool coal and steel production, thereby making war between the historic rivals Germany and France materially impossible. Furthermore, through the creation of a common market for coal and steel production, the founding fathers envisaged the abolition of the barriers to trade, cartels and geographic price discrimination that existed and constituted a real problem at the time.<sup>227</sup>

When the Treaty of Paris, establishing the European Coal and Steel Community, later became a reality it included antitrust provisions that lacked precedents in Europe.<sup>228</sup> The decision-making powers were conferred on a supranational institution – the High Authority – which was not only formally independent of the Member States, but also empowered to regulate in a wide range of commercial practices, from cartels to mergers and other forms of potentially distortive conduct.<sup>229</sup> However, the outcome was not the one envisaged: the High Authority was unable to act without interference from the Member States, and the application of the competition rules came nowhere near what one could expect from reading the Treaty provisions. The competition policy of the Paris Treaty was therefore not a success to be automatically copied into the Treaty of Rome.

The origins of the decision to include detailed competition rules in the Treaty of Rome remain shrouded in history, as the materials documenting

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<sup>226</sup> [http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm).

<sup>227</sup> See e.g. Wigger, *Competition for Competitiveness: The Politics of the Transformation of the EU Competition Regime*, Vrije Universiteit, 2008.

<sup>228</sup> Warlouzet, *The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere*, EUI Working Paper RSCAS 2010/80, at p. 7.

<sup>229</sup> *Ibid.*

the negotiations of the Treaty of Rome have not been published.<sup>230</sup> In January 1958, Articles 85 and 86 (now 101 and 102 of the TFEU) entered into force, placing a ban on agreements and concerted practices restricting competition in (what was then) the common market (and is now the internal market), as well as the abuse of dominance by companies with market power. The aim was to remove and prevent barriers to trade erected by companies and state-owned enterprises. In addition, the Treaty of Rome sought to encourage competition, efficiency, innovation and lower prices in order to optimize the functioning of the single European market.<sup>231</sup>

Article 87 of the Treaty of Rome had left the rules on the implementation of Articles 85 and 86 to a Council regulation that was to be adopted later; it took four years until Regulation 17/62<sup>232</sup> was adopted. The regulation established a leading role, if not a de facto monopoly of the Commission in the overall application of Articles 85 and 86. It also provided for an enforcement structure that is still in place – granting the Commission the roles of investigator, prosecutor and decision-maker controlled by the EU judiciary.<sup>233</sup>

Already at the outset, it was recognized that price-fixing cartels should be the Commission's primary target. In reality however, the Commission did not deal with many such cases during the early years. Instead, it focused its work on finding a correct approach to dealing with often complex and difficult antitrust issues in the course of notification procedures. In a majority of these cases, the procedure resulted in the publishing of a worked-out and detailed exemption decision, providing guidance on the Commission competition policy for a particular market sector or business practice.<sup>234</sup> In fact, DG COMP has been described as a 'slow starter'. In 1995, *McGowan* and *Wilks* declared that it was only during the preceding decade that DG COMP had emerged as one of the principal DGs within the Commission.<sup>235</sup> It was thus after more than thirty years of dealing mainly with notification procedures, and having witnessed the spectacular results from the

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<sup>230</sup> Weitbrecht, *From Freiburg to Chicago and Beyond – The First 50 years of European Competition Law*, *European Competition Law Review*, issue 2, 2008, at p. 82.

<sup>231</sup> Paasman, *Multilateral Rules on Competition Policy: an Overview of the Debate*, ECLAC – Serie Comercio Internacional, no. 4, 2000, at p. 11.

<sup>232</sup> EEC Council Regulation 17/62 implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204-211, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31962R0017>.

<sup>233</sup> Weitbrecht, *From Freiburg to Chicago and Beyond – The First 50 years of European Competition Law*, *European Competition Law Review*, issue 2, 2008, p. 82.

<sup>234</sup> Riley, *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, CEPS Special Report, January 2010, p. 11.

<sup>235</sup> McGowan and Wilks, *The First Supranational Policy in the European Union: Competition Policy*, *European Journal of Political Research*, no. 28, 1995, pp. 141-169.

introduction of sentencing guidelines and leniency programmes by the authorities in the United States, that the Commission decided that the time had come to change its enforcement strategies.

In 1996, the Commission adopted a leniency notice designed to destabilize cartels and divide cartel infringers, by giving companies incentive to incriminate themselves. The adoption of the notice led to a sharp increase in the number of detected cartels.<sup>236</sup> Following a review of the notice, the Commission decided to adopt a new leniency notice in 2002, in which a lower evidence standard was applied and the scope of immunity was extended to undertakings already under investigation by DG COMP. The 2002 Leniency Notice gave a prominent role to inspections; a company that is first to submit evidence enabling the Commission to adopt an inspection decision can benefit from immunity from fines. As a result, most leniency applications now serve as the direct cause for the conduct of Commission inspections, and there has also been a dramatic increase in the number of uncovered cartels.<sup>237</sup>

Not only have we witnessed a sharp increase in the number of uncovered cartels since the adoption of leniency notices; the Commission has also stepped up its fining practices. Inspired by the US's system, the Commission issued fining guidelines in 1998,<sup>238</sup> which resulted in a dramatic increase in the fines imposed. In 2006, the Commission adopted new guidelines,<sup>239</sup> which were accompanied by a press release expressly stating that the

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<sup>236</sup> Ratliff, *EC Cartel Leniency Programme*,

[http://www.wilmerhale.com/files/Publication/515f785c-9663-44d7-bf82-45c19f099fd9/Presentation/PublicationAttachment/465fc5e4-addb-4a49-8bd7-4c4c179962cb/ECLeniency\\_Ratliff\\_Nov2004.pdf](http://www.wilmerhale.com/files/Publication/515f785c-9663-44d7-bf82-45c19f099fd9/Presentation/PublicationAttachment/465fc5e4-addb-4a49-8bd7-4c4c179962cb/ECLeniency_Ratliff_Nov2004.pdf).

<sup>237</sup> See Van Barlingen and Barennes, *The European Commission's 2002 Leniency Notice in Practice*, EC Competition Policy Newsletter, no. 3, 2005, p. 6. According to a paper prepared in December 2014 for the 120<sup>th</sup> meeting of the OECD Working Party No. 3 on Co-operation and Enforcement, the Commission's leniency programme has proved to be an extremely successful tool for uncovering and dismantling cartels. Until the end of 2012, the Commission had received 166 applications for immunity under the 2006 leniency notice. However, although cases based on leniency applications represent the majority of the Commission's cartel cases today, *ex officio* cases still play an important role. From 2005 to the end of 2010, 112 cartel investigations were initiated, out of which more than 1/3 were initiated *ex officio*. See

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en).

<sup>238</sup> Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17/62 and Article 65(5) of the ECSC Treaty, OJ [1998] C 9/3.

<sup>239</sup> Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003.

guidelines were adopted with the view to increasing the deterrent effect of the fines.<sup>240</sup> Neelie Kroes, Commissioner at the time, declared:

These revised Guidelines will better reflect the overall economic significance of the infringement as well as the share of each company involved. The three main changes – the new entry fee, the link between the fine and the duration of the infringement, and the increase for repeat offenders - send three clear signals to companies. Don't break the anti-trust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again. Of course, if the Commission's leniency policy applies, companies should also report the infringement without delay. If companies do not pay attention to these signals, they will pay a very high price.<sup>241</sup>

The same year as the revised guidelines were adopted, the Commission issued three decisions in which the undertakings with the highest fines were sentenced to penalties in the three-digit millions. In the *bleaching chemicals* cartel, Solvay was fined EUR 167 million,<sup>242</sup> in the *methacrylates case*, Arkema was fined EUR 219.1 million,<sup>243</sup> and in the *synthetic rubber case*, Eni received a fine of EUR 272.3 million.<sup>244</sup> This, however, was only the starting point. Since then, the fines imposed by the Commission have increased further. Today, the record fine imposed on a single undertaking is EUR 1.06 billion imposed on Intel Corporation for breach of Article 102 TFEU.<sup>245</sup>

In addition to this new and stricter fining policy, the Commission has become more aggressive in its investigations of suspected competition law infringements, both when it comes to the choice of investigatory methods and the sanctioning of any obstructions to its investigations.<sup>246</sup> In retrospect,

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<sup>240</sup> See [http://europa.eu/rapid/press-release\\_IP-06-857\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-857_en.htm?locale=en).

<sup>241</sup> Ibid.

<sup>242</sup> *Hydrogen peroxide* (Case COMP/F/38.620) Commission Decision 2006/903/EC [2006] OJ L353/54.

<sup>243</sup> *Methacrylates* (Case COMP/F/38.645) Commission Decision C(2006) 2098 final [2006] OJ L322/20.

<sup>244</sup> *Synthetic rubber* (Case COMP/38.628) Commission Decision 2009/C 86/06 [2006] OJ C86/7.

<sup>245</sup> Imposed on Intel Corporation for abuse of dominance, Commission decision of 13 May 2009, COMP/C-3 /37.990 – Intel. Confirmed by the General Court in Case T-286/09, *Intel Corporation Inc. v European Commission*, EU:T:2014:547 (appeal to the ECJ pending). The record fine imposed on Intel is closely followed by the € 1.01 billion fine imposed on Daimler for participation in a price-fixing cartel among truck producers (the total fines imposed on the cartel members amounted to € 2.93 billion). See the Commission's press release: [http://europa.eu/rapid/press-release\\_IP-16-2582\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2582_en.htm).

<sup>246</sup> As concerns choice of methods, the Commission embarked upon a new path when, in 2008 and for the first time, it launched a sector inquiry through dawn raids within the frame of the sector inquiry into the pharmaceutical sector.

the work carried out by the Commission over the years can be described as having gone from shaping the rules to now actively enforcing them.

### 3.2 Enforcement of the EU competition rules

While the introduction of a leniency programme and fining guidelines have certainly helped to reshape the Commission's enforcement of the competition rules, the real changes to the enforcement system were provided by the adoption of Regulation 1/2003.

For more than 40 years, the Commission was the only authority empowered to apply Article 101(3) TFEU,<sup>247</sup> and EU antitrust enforcement was characterized by a centralized notification and authorization system. In practice, this meant that the Commission was the sole public enforcer of the EU antitrust rules. Initially, of course, this had helped to shape EU competition policy and to ensure a consistent application of the EU competition rules.<sup>248</sup> However, it also meant that the Commission was not able to dedicate time and resources to the real threats to competition – hard-core infringements. With ten new members from Eastern Europe standing on the EU's door step, the Commission realized that something had to be done.<sup>249</sup> In the late 1990s a reform of the enforcement system therefore began to take its form, and in 1999 a White Paper was published which advocated the ending of the notification and authorization system.<sup>250</sup> The reactions to the White Paper were positive and in 2003, Regulation 1/2003 was adopted. The regulation entered into force on 1 May 2004.

Through the application of Regulation 1/2003, the notification system was abolished and the application of the competition rules was decentralized – national competition authorities and courts are now also empowered to apply Article 101(3). Today, the prohibitions in Article 101 and 102 TFEU are

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<sup>247</sup> Allowing for exemptions from the prohibition provision in Article 101(1) TFEU.

<sup>248</sup> As *Gerber* notes, it had been a fundamental of competition law thinking that the exclusivity was necessary to provide coherence. Given that the exemptions listed in Article 101(3) TFEU are very broadly framed, there was fear that if exemptions could be granted by other institutions, they might be granted inconsistently and perhaps in ways that favoured domestic interests, *Gerber, Two Forms of Modernization in European Competition Law*, *Fordham International Law Journal*, vol. 35, issue 5, 2007, p. 1239.

<sup>249</sup> See e.g. *Gerber, Two Forms of Modernization in European Competition Law*, *Fordham International Law Journal*, vol. 35, issue 5, 2007, p. 1237, and *Maher, Competition Law Modernization: An Evolutionary Tale?*, in *Craig and de Búrca (eds), The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, p. 718.

<sup>250</sup> See *Wils, Ten Years of Regulation 1/2003: A Retrospective*, *Journal of European Competition Law and Practice*, vol. 4, no. 4, 2013, at p. 294.

thus enforced by the Commission, by the competition authorities of the EU Member States, and through private litigation.

As for the public enforcement at EU level, the Commission acts as an integrated public authority. It investigates suspected infringements of Articles 101 and 102 of the TFEU, but also has the powers to order infringements to be brought to an end and to impose sanctions. Thus, Article 23(2) of Regulation 1/2003 provides that the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 or Article 102 TFEU.

For each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10 per cent of its total turnover in the preceding business year. The term ‘undertaking’ usually refers to the infringer and all companies within the infringer’s company group. Article 23(3) of Regulation 1/2003 provides that, in setting the amount of the fine, both the gravity and the duration of the infringement shall be taken into account.

Today, most cartel investigations originates from a leniency application where the applicant has furnished enough evidence for the Commission to carry out unannounced inspections at the premises of the undertakings suspected of cartel involvement.<sup>251</sup> The decision to carry out an inspection is made by the Commission under the powers of Article 20 of Regulation 1/2003. Before adopting a decision establishing an infringement and imposing fines, the Commission will have to issue a statement of objections to the companies concerned, in which it sets out its preliminary findings. The companies have the opportunity to respond in writing to the allegations set out in the statement of objections, but also at an oral hearing if they so request.<sup>252</sup>

As a matter of internal organization within the Commission, the investigation is conducted by officials of DG COMP, working under the authority of the Commissioner with special responsibility for competition matters (‘the Competition Commissioner’). The decision to issue a statement

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<sup>251</sup> See Van Barlingen and Barennes, *The European Commission’s 2002 Leniency Notice in practice*, EC Competition Policy Newsletter, no. 3, 2005, p. 6, and Commission Staff Working Document Ten Years of Antitrust Enforcement under Regulation 1/2003, accompanying Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014, at p. 8 where the Commission declares that approximately one quarter of cartel cases are initiated *ex officio* whereas around three quarters are triggered by leniency applications.

<sup>252</sup> Article 12 of Regulation 773/2004.

of objections is normally made by the Competition Commissioner, after consultation with the Chief Competition Economist, and the Commission's Legal Service, which operates under the authority of the President of the Commission, and, where appropriate, also after consultation with other Commission services.<sup>253</sup>

The oral hearing is presided over by a Hearing Officer. The Hearing Officer is an official who does not formally belong to DG COMP but who also reports to the Competition Commissioner. The hearing is not attended by any Member of the Commission, but rather by the officials from DG COMP dealing with the case, sometimes by officials from other Commission services, and by officials of the competition authorities of the Member States.

The Commission's final decision is drafted by officials from DG COMP – normally the same officials who conducted the investigation and drafted the statement of objections. This decision is adopted by the Commission, on a proposal of the Competition Commissioner and after consultation with the Legal Service and sometimes other Commission services, as well as the Advisory Committee, composed of representatives of the competition authorities of the EU Member States.<sup>254</sup>

This is the framework for the Commission's enforcement of the EU competition rules. Below is a more in-depth presentation of the procedures surrounding unannounced inspections.

### 3.2.1 Unannounced inspections and the obligation to co-operate

The use of unannounced inspections by the Commission is a powerful tool in finding and eliminating infringements of the EU competition rules, and it allows the Commission to act forcefully on its suspicions. The possibility to carry out inspections had already been put in place with the adoption of Regulation 17/62, but it was not until the adoption of the 2002 Leniency Notice that the Commission's dawn raid activities really went into high gear. The leniency notice has given a prominent role to inspections, as only a

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<sup>253</sup> The Commission's *Antitrust Manual of Procedures, Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU*, [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf).

<sup>254</sup> For further information on the Commission's procedures, see e.g. the Commission's *Antitrust Manual of Procedures, Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU*, [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf).

company that is first to submit evidence enabling the Commission to adopt a decision to carry out an inspection can benefit from immunity from fines.<sup>255</sup> As a result, most leniency applications now serve as the direct cause for the performance of Commission inspections.<sup>256</sup>

The Commission's competence for carrying out unannounced inspections is provided for in Article 20(1) of Regulation 1/2003, which reads:<sup>257</sup>

In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

It is the Commission itself that decides on inspections, and a judicial warrant is not required unless it is necessary to call upon the assistance of a Member State in order to overcome a company's opposition<sup>258</sup> or the inspection will take place at premises other than those of the investigated undertaking (such as the home of a director or employee).<sup>259</sup> Furthermore, as noted by Advocate General Wahl in the case of *Deutsche Bahn*,<sup>260</sup> the internal checks and balances typically provided for when the Commission is to adopt decisions and other legally binding acts do not apply to their full extent for decisions under Articles 20 and 21 of Regulation 1/2003. Indeed, the power to adopt decisions pursuant to those provisions has been entrusted to the Competition Commissioner, who, in turn, has sub-delegated that power to the Director-General of DG COMP. This means that inspection decisions are virtually decided by the staff of DG COMP alone, with other Commission services having little or no role in the decision-making.

When conducting an inspection at the premises of an undertaking, the Commission has two options. It may choose either to carry out its inspection on the basis of a written authorization,<sup>261</sup> or to adopt a formal decision ordering the inspection,<sup>262</sup> depending on the special features of the individual case. If the Commission chooses the first option and conducts the inspection

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<sup>255</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

<sup>256</sup> See Van Barlingen and Barennes, *The European Commission's 2002 Leniency Notice in Practice*, EC Competition Policy Newsletter, no. 3, 2005, p. 6.

<sup>257</sup> 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.

<sup>258</sup> Article 20(6)-(8) of Regulation 1/2003.

<sup>259</sup> Article 21 of Regulation 1/2003.

<sup>260</sup> Opinion of Advocate General Wahl in Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:92, para 61.

<sup>261</sup> Article 20(3) of Regulation 1/2003.

<sup>262</sup> Article 20(4) of Regulation 1/2003.



on the basis of an authorization, the undertaking may refuse to submit to the inspection without threat of financial sanction. If, however, the company agrees to the inspection, it must then cooperate fully, and it may be fined should it fail to do so. Providing incomplete or misleading information are examples of such failure to comply. Should the Commission opt for the second alternative and conduct its inspection on the basis of a formal decision, the company is required from the outset to submit to the inspection and to cooperate fully. This follows from Article 20(4) of Regulation 1/2003, which stipulates that undertakings are required to submit to inspections ordered by the Commission. Failure to do so may result in substantial fines.

The Commission may also conduct an inspection at premises other than those of the undertaking suspected of a competition law infringement, but then only by way of a decision. Regulation 1/2003 introduced Article 21 which stipulates that if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection are being kept at other premises, such as the homes of an employee or director, the Commission may search those premises. There is an important limitation to this right however, as the evidence sought must be relevant to prove a serious violation of Article 101 or 102 TFEU, thus reserving the use of this investigatory tool to cartels and other hard-core infringements of the EU competition rules.

Regardless of whether the Commission opts for an authorization or a formal decision, it shall always specify the purpose and the subject-matter of the inspection.<sup>263</sup> This means that the Commission shall state as precisely as possible what it is looking for and the matters to which the investigation relates.<sup>264</sup> The obligation to provide the purpose and subject-matter of the inspection constitutes a key element of the right of the defence, as otherwise it would not be possible for the company to assess the scope of its duty to cooperate. Nor would it be possible for the Courts to carry out a judicial review of the measures taken by the Commission. Thus, in *Roquette Frères*, the ECJ held that:

It follows that, for the purposes of enabling the competent national court to satisfy itself that the coercive measures sought are not arbitrary, the Commission is required to provide that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of

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<sup>263</sup> Article 20(4) of Regulation 1/2003. See also Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 29, and Case C-94/00, *Roquette Frères*, EU:C:2002:603, at para 47.

<sup>264</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 134.

information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned.<sup>265</sup>

This being said, the statement of reasons may be relatively brief, and as will be discussed further in this thesis, the Court has declared that there is no need for the Commission to specify precisely the relevant market, the exact legal nature of the presumed infringements, or the exact period during which the infringements were allegedly committed.<sup>266</sup>

During the course of the inspection, Article 20(2) of Regulation 1/2003 empowers the inspectors 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; and
- (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.

According to the Commission, the right to examine books and records includes the examination of electronic information and the taking of electronic or paper copies of such information.<sup>267</sup> The Commission has also declared that it has a right under Article 20(2) of Regulation 1/2003 to search the IT environment and all storage media of the company, and that this applies also to private devices and media that are used for professional purposes.<sup>268</sup> The Commission interprets the companies' duty to cooperate as

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<sup>265</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, at para 61.

<sup>266</sup> See Kerse, *EC Antitrust Procedure*, Sweet & Maxwell, 5th edn, 2005, point 3-043, with reference to Case C-94/00, *Roquette Frères*, EU:C:2002:603 and Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379.

<sup>267</sup> 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, as revised per 11 September 2015, para 10.

<sup>268</sup> *Ibid.*

including an obligation to provide appropriate representatives or members of staff to assist the inspectors, not only for explanations on the organization of the undertaking and its IT environment, but also for specific tasks such as the temporary blocking of individual e-mail accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing ‘administrator access rights’-support.<sup>269</sup>

Under Article 20(3) of Regulation 1/2003, the Commission has a duty to give notice of the inspection to the competition authority of the Member State in whose territory the inspection will be conducted. The officials and other accompanying persons authorized or appointed by the competition authority of that Member State are entitled to actively assist the Commission inspectors in carrying out their duties. To this end, they enjoy the same powers under Article 20(2) of 1/2003 as the Commission inspectors.

### 3.2.2 What constitutes obstruction?

As mentioned above, companies are under an obligation to submit to inspections when ordered by way of a decision, and the sanctions for failing to do so may be severe. Any failure by a company to submit to an inspection decision or actively cooperate during the inspection may result either in a separate fine of up to one per cent of the total annual turnover<sup>270</sup> or the Commission may consider the obstruction to constitute an aggravating factor should the company later be fined for breach of Article 101 or 102 TFEU.<sup>271</sup> Further, the Commission may impose a penalty payment of up to five per cent of the average daily turnover to compel a company to submit to an inspection that has been ordered by way of a decision.

Interesting to note is that Regulation 17/62 provided a maximum fine of € 5,000 and a maximum periodic penalty payment of € 1,000 per day. As

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<sup>269</sup> Ibid.

<sup>270</sup> Article 23(1)(c) of Regulation 1/2003. There are a number of reasons why the Commission should opt for this alternative, the most obvious being the risk that the company is later found not to have breached Article 101 or 102 TFEU, in which case the company’s obstruction may go unpunished. Furthermore, the imposition of a procedural fine on an undertaking may act as a greater deterrent than a simple increase of a substantive fine. One example is the recent € 38 million fine imposed on E.ON for the breach of a Commission seal during an inspection, a matter which has received considerable media attention.

<sup>271</sup> See e.g. *Bitumen Nederland* where the Commission considered a refusal of access to justify a ten per cent increase in the basic amount of the fine to be imposed on the obstructing company KWS, European Commission decision of 13 September 2006, COMP/F738.456-Bitumen-NL, paras 340 and 341.

part and parcel of the new competition enforcement policy, the maximum fines have thus increased substantially. In addition, the Commission has adopted an aggressive approach against any perceived obstruction. To give an example, in the press release accompanying the announcement that E.ON had been fined for breaking a Commission seal, *Kroes*, who at the time was Competition Commissioner, declared:

[t]he Commission cannot and will not tolerate attempts by companies to undermine the Commission's fight against cartels and other anti-competitive practices by threatening the integrity and effectiveness of our investigations. Companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to obstruct an inquiry and so avoid a fine. This decision sends a clear message to all companies that it does not pay off to obstruct the Commission's investigation.<sup>272</sup>

Although tampering with a Commission seal is a clear and serious obstruction of a Commission inspection, there are other cases where the perceived obstruction is not that apparent. In an often cited case, *Minoan Lines*,<sup>273</sup> the alleged obstruction was not equally obvious. There, the Commission had made a decision to inspect the premises of the Greek company Minoan Lines SA. When the Commission inspectors turned up at the address mentioned in the decision, the employees being presented with the decision pointed out that the Commission was actually at the offices of ETA, a separate legal entity that had no relationship with Minoan Lines other than being its agent. The employees of ETA did not allow the officials to enter the premises, and it was only after various communications between Commission officials, the Greek Competition Authority and the management of ETA, that ETA subsequently decided to submit to the inspection. In its decision, the General Court held that:

The Commission continues to act lawfully where, having realised that the premises being investigated are not those of the undertaking referred to in the decision, it takes the view that those premises are none the less used by the undertaking initially referred to in the decision for the conduct of its business, given that the company which is based there, whilst being legally distinct from the company to which the decision is addressed, is its representative and sole manager of the affairs to which the investigation related.<sup>274</sup>

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<sup>272</sup> See

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>273</sup> Case T-66/99, *Minoan Lines SA v Commission of the European Communities*, EU:T:2003:337.

<sup>274</sup> *Ibid*, paras 76-77, 83-84, 88.

It is highly questionable whether ETA actually had a legal obligation to submit to the inspection as the addressee of the decision was another legal entity – Minoan Lines SA.

### 3.2.3 Are all refusals to cooperate to be regarded as obstruction?

The Commission has declared that it will act upon obstructions of its investigations. At the same time, a dawn raid and the measures taken during its course may cause irreparable damage to the targeted company if e.g. correspondence protected by legal professional privilege is seized by the authorities. It is therefore necessary to determine the extent to which a company may lawfully object to the Commission's inspections, should the company consider the Commission to be acting outside its competences or taking measures that violate the right of the defence.

As a starting point one must be reminded that Union acts enjoy the presumption of validity, and that their effects will be realized until such time as they are set aside.<sup>275</sup> Hence, all persons subject to Union law are under an obligation to acknowledge that measures adopted by the institutions are fully effective as long as they have not been declared invalid by the EU Courts and to recognize their enforceability unless either of the courts has decided to suspend the effects of the measures challenged.<sup>276</sup> This means that a company that receives an unannounced visit from the Commission acting upon an inspection decision will have to acknowledge that the decision is fully effective until and unless the General Court says otherwise.

In *Hoechst*, the applicant Hoechst AG refused to submit to an inspection ordered by the Commission on the ground that it constituted an unlawful search. Hoechst applied to the ECJ for annulment of the inspection decision and the decision to impose a periodic penalty payment as well as suspension of the dawn raid operation. The ECJ dismissed the application for suspension, after which the inspection was carried out by the Commission and the periodic penalty payment was imposed.

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<sup>275</sup> See e.g. Case 101/78, *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, EU:C:1979:38, para 5, Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 65, as well as Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6<sup>th</sup> edn, Kluwer Law International, 2001, at p. 730, and Türk, *Judicial Review in EU Law*, Elgar European Law, 2010, at p. 298.

<sup>276</sup> Lenaerts et al, *EU Procedural Law*, Oxford EU Law Library, Oxford University Press, 2014, at p. 267.

Hoechst challenged the imposition of a periodic penalty payment arguing that it should be reduced so as not to extend to the period during which the application for interim measures was pending before the Court. Furthermore, Hoechst argued, the definitive amount was disproportionate as the applicant had acted with the sole intent of ensuring a lawful and constitutional investigation procedure. These arguments were not accepted by the Court which noted that Hoechst had not opposed specific measures, but had refused to co-operate in any way in the implementation of the inspection decision. The Court recalled the obligation to acknowledge that all measures adopted by the EU institutions are fully effective until and unless suspended or annulled by the Court. The Court did not see any grounds for reducing the penalty payment and rejected the claim.<sup>277</sup>

However, there are also cases pointing in another direction, implying a right for a company not to obey an inspection decision that runs counter to Regulation 1/2003. In the case of *Dansk Rørindustri*, the Court declared in a Grand Chamber ruling that a refusal to cooperate cannot be regarded as an aggravating circumstance when setting the fine if the company in question is merely exercising its right of the defence.<sup>278</sup> This had also been established in the *Finnboard* case where the Court declared:

An undertaking which, when challenging the Commission's stance, limits its cooperation to that which it is required to provide under Regulation No 17 will not, on that ground, have an increased fine imposed on it.<sup>279</sup>

Thus, if a company limits its cooperation based on the ground that the inspection decision is too vague and that it does not allow the company to exercise its right of the defence, this should at least not be considered an aggravating circumstance if the company is subsequently found guilty of cartel behaviour. However, this presupposes that the Court agrees with the company and finds that the Commission has failed to properly define the purpose and subject-matter of the inspection. If, on the other hand the Court finds nothing wrong with the inspection decision, the Court's ruling in *Hoechst* suggests that the company's refusal amounts to nothing less than obstruction.

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<sup>277</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 65.

<sup>278</sup> 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 v Commission of the European Communities*, EU:C:2005:408, at para 353.

<sup>279</sup> Case C-298/98P, *Metsä-Serla Sales Oy v Commission of the European Communities*, EU:C:2000:634, para 58.

### 3.2.4 Judicial review

The Commission has the powers to decide on dawn raids, but this does not mean that national or EU courts do not have an important role in the context. There are three situations where courts may be involved. First, in certain circumstances, the Commission will have to obtain an authorization from national courts before carrying out a dawn raid (*ex ante*). Second, a company may want to apply for interim measures during the course of the dawn raid. Third, there is a possibility for the undertaking concerned to challenge the decision as such under Article 263 TFEU.

#### 3.2.4.1 *Ex ante* control

As mentioned above, even though the Commission is empowered to decide on dawn raids, it may need a judicial warrant in certain situations. Article 20(6) of Regulation 1/2003 does not allow the Commission to obtain access to premises by force. Thus, if a company opposes an inspection, the Commission cannot enter the premises without the assistance of Member State authorities. The Commission may request assistance as a precautionary measure in order to overcome any opposition from the undertaking, but only in so far as there are grounds for apprehending opposition to the inspection and/or attempts at concealing or disposing of evidence.<sup>280</sup> If a judicial warrant is required under national law, then it must be applied for.

However, the powers of the Member State authorities are not without limits in such situations. Article 20(8) defines the scope of review that a national court may undertake in authorizing the assistance. It entitles the court to verify that the Commission's decision is authentic and that the coercive measures asked for are neither arbitrary nor excessive with regard to the subject-matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 101 and 102 TFEU, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The national court's assessment should thus focus only on the granting of coercive measures, and not on the actual necessity or appropriateness of the Commission's

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<sup>280</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, paras 73 and 74.

performance of a dawn raid. The lawfulness of the Commission decision shall be subject to review only by the EU Courts.<sup>281</sup>

### 3.2.4.2 Interim measures

Few companies would dare take the risk of refusing to submit to an inspection, especially since it is highly unlikely that the Court would annul the inspection decision in its entirety. In the recent *Nexans* case for example,<sup>282</sup> the General Court found that the scope of the inspection decision was too broad as it covered all types of electric cables and not only underwater electric cables. This led the Court to annul the decision in part. However, as part of the inspection decision remained valid, a refusal to let the Commission officials enter the premises would probably have been considered to constitute an unlawful obstruction of the inspection, and the company would have been fined accordingly.<sup>283</sup>

If a company deems that the Commission is acting outside its competences, the safest route to take is either an application to have the inspection suspended according to Article 278 of the TFEU or an application for interim measures under Article 279 of the TFEU. These provisions do not entail a right for the Court to hinder execution, only to suspend it. Furthermore, there is no possibility for ‘standalone actions’ under Article 278 or 279, as actions for suspension or interim relief are only admissible if the applicant is simultaneously challenging a measure in proceedings before the General Court. This means that the undertaking receiving the visit from the Commission cannot just file for suspension of the dawn raid or of any measures taken during its course. Instead the undertaking will have to challenge the inspection decision, and request for it to be annulled while at the same time requesting a suspension of the inspection. Important to note is that this requires that the company is challenging the inspection decision as such, claiming that the Commission is out on a fishing expedition for example.<sup>284</sup>

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<sup>281</sup> This was established in *Roquette Frères* and follows from the Court’s ruling in *Foto Frost*, Case 314/85, EU:C:1987:452, where it declared that national courts have no jurisdiction themselves to declare that measures taken by the EU institutions are invalid.

<sup>282</sup> Case T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596.

<sup>283</sup> In the case of KWS, the General Court assessed the targeted company’s initial refusal to let the inspectors access one of the director’s offices. By denying access to the office in question, the General Court considered that KWS had ‘refused to submit totally to the investigation decision.’ See Case T-357/06, *Koninklijke Wegenbouw Stevin BV v European Commission*, EU:T:2012:596, para 239.

<sup>284</sup> Lenaerts et al, *EU Procedural Law*, Oxford EU Law Library, Oxford University Press, 2014, at p. 568.



However, if the company does not object to the decision as such, but instead wishes to (i) challenge any measures taken during the course of the inspection and (ii) seek an order suspending any such action, this cannot be done unless the Commission takes a formal decision concerning the measure in question. In *Akzo Nobel and Akros v. Commission*,<sup>285</sup> the Commission had disregarded the objections made by the investigated company during the inspection that certain documents were covered by legal professional privilege and thereby also out of reach for the Commission. Instead the Commission had put these documents directly in its case file without first adopting a decision which would give the undertaking proper opportunity to challenge the Commission's position before the General Court and the judge with jurisdiction to make interim orders.<sup>286</sup>

During the hearing, the Commission had argued that the company could have challenged the inspection decision, and that there was thus no need for the Commission to make a separate decision regarding the nature of the documents. This was not accepted by the President of the General Court. He referred to *Dow Benelux*,<sup>287</sup> and declared that an undertaking cannot plead the illegality affecting the investigation procedures as a ground for annulment of the inspection decision.<sup>288</sup> In other terms, the company cannot use any unlawful measures taken during the course of the inspection as a ground for challenging the inspection decision as such. The implementation of the decision does not affect the lawfulness of the decision.<sup>289</sup>

Provided that there is a decision that may be challenged, an application for interim measures and/or suspension must fulfil certain requirements. The applicant must fulfil three cumulative conditions: a prima facie case, an urgent situation and a favourable balancing of interests.<sup>290,291</sup> As for the first condition – the existence of a prima facie case – the main case must have a reasonable chance of succeeding. As the judge hearing the application for interim relief may not prejudge the decision to be made in the main proceeding, the evaluation of whether there is a prima facie case or not will

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<sup>285</sup> Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akros Chemicals v European Commission*, EU:T:2003:287.

<sup>286</sup> *Ibid*, para 146.

<sup>287</sup> Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, para 49.

<sup>288</sup> Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akros Chemicals v European Commission*, EU:T:2003:287, para 146.

<sup>289</sup> Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, at para 49 where the Court declared that the validity of a decision cannot be affected by acts subsequent to its adoption.

<sup>290</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 351.

<sup>291</sup> See also Article 104 (2) of the Rules of Procedure of the General Court.

usually be confined to whether the arguments put forward by the applicant are basically sound or are clearly doomed to fail.<sup>292</sup> In *Union Carbide* the judge made the following remark:

With regard to the other interim measure requested, namely suspension of the operation of the contested decision, the judge hearing the application cannot at this stage rule out the possibility that the pleas of fact and law invoked by the applicant in support of its main action are well founded.<sup>293</sup>

If it is not possible for the judge to rule out the possibility that the pleas are well founded, then he or she will have to continue the examination and ascertain whether or not it is a matter of urgency. Here the judge declared:

It is settled law (see in particular the order in *Gestevisión Telecinco v Commission*, paragraph 27) that the urgent nature of an application for interim measures must be assessed by reference to the need to order interim measures in order to avoid serious and irreparable damage to the party requesting those measures. It is for the party requesting suspension of the operation of a contested decision to adduce the evidence to show that it cannot await the outcome of the main proceedings without suffering damage leading to serious and irreparable consequences.<sup>294</sup>

This requirement on urgency is often the biggest hurdle for the applicant on its route to a successful plea. The Court will examine whether the ultimate annulment of the Commission decision under challenge would make it possible to reverse the situation brought about by the implementation of the challenged Commission decision (in these cases the inspection decision).<sup>295</sup> In practice, the determination of the urgency of the interim measure sought is often decisive.<sup>296</sup>

The urgency requirement is met where the absence of the judgment in the main proceeding threatens to cause the applicant serious and irreparable damage.<sup>297</sup> The damage is irreparable where it will not be eliminated by a judgment in the main proceedings ruling in favour of the applicant. Further, as for the nature of the damage, the EU Courts have drawn a strict line in relation to financial damage,<sup>298</sup> declaring that damages of a purely financial

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<sup>292</sup> Lenaerts et al, *EU Procedural Law*, Oxford EU Law Library, Oxford University Press, 2014, at p. 596.

<sup>293</sup> Case T-322/94 R, *Union Carbide Corporation v Commission of the European Communities*, EU:T:1994:289, at para 29.

<sup>294</sup> *Ibid*, para 30.

<sup>295</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 353.

<sup>296</sup> Lenaerts et al, *EU Procedural Law*, Oxford EU Law Library, Oxford University Press, 2014, at p. 593.

<sup>297</sup> *Ibid* at p. 598.

<sup>298</sup> Türk, *Judicial Review in EU Law*, Elgar European Law, 2010, at p. 309.

nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if they can ultimately be the subject of financial compensation.<sup>299</sup> Examples of cases where the EU Courts have found a threat of serious and irreparable damage are where the contested measure would either involve the disclosure of documents containing business secrets or harm the reputation of the applicant.<sup>300</sup>

In *Akzo Nobel and Akcros v. Commission*, the President of the General Court considered that a breach of professional confidentiality could cause irreparable harm.<sup>301</sup> The Commission had performed a dawn raid during which a dispute had arisen concerning the privileged nature of five different documents. Two documents had been put in a sealed envelope while the remaining three had been immediately put in the Commission's file. The Commission later decided to open the sealed envelope. In its application for suspension of such action, the applicants argued that if the Commission was allowed to read the documents, this would constitute a substantial and irreversible breach of the right to respect for confidentiality. The President of the General Court agreed, declaring that if the Commission was allowed to break the seal, this would dilute the essence of the right to the defence, as the disclosure of such information would cause irremediable harm to the confidence which the litigant placed, in confiding in his lawyer, in the fact that the information would never have to be disclosed.<sup>302</sup>

In *Akzo*, the dispute concerned a limited number of possibly privileged documents. In such a case, it may be relatively easy for the applicant to show the threat of irremediable harm. However, it may not be as easy in a case where the applicant attempts to hinder the execution of a dawn raid that it deems to be based on a decision that is too vague. Surely, an inspection carried out on the basis of a decision that is too vague or too broad in its scope will violate the applicant's right of the defence. There is then an apparent risk that the General Court would not see a threat of serious and irreparable damage if the dawn raid, although based on a decision that is too broad, is carried out in a way that would otherwise be compliant with Regulation 1/2003.

Apart from assessments of urgency and harm, the courts' assessment will also involve a balancing exercise. This practice has no basis in the wording

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<sup>299</sup> Ibid, and Case T-369/03 R, *Arizona Chemical BV and Others v Commission of the European Communities*, EU:T:2004:9, at para 38.

<sup>300</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, at p. 353.

<sup>301</sup> See e.g. Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akcros Chemicals v European Commission*, EU:T:2003:287.

<sup>302</sup> Ibid, para 167.

of Article 278 TFEU. Instead it finds its basis exclusively in the case-law of the EU Courts.<sup>303</sup>

When performing this balancing exercise, the EU Courts will weigh the applicant's interest in having the act suspended against the interest of the other party (here the Commission) in maintaining the challenged measure. The EU Courts will thus not only take account of the potential damage that the applicant may sustain if the measure is allowed to be carried out, but also any potential damage to the public interest if it is suspended, and then decide which interest should be allowed to outweigh the other.<sup>304</sup>

### 3.2.4.3 Article 263 TFEU

Applying for interim measures or suspension of the dawn raid requires the company to challenge the decision as such under Article 263 TFEU. A company may of course avail itself of this right also in the absence of an application for interim measures or suspension. An application for annulment under Article 263 TFEU shall be submitted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence of such notification or publication, of the day on which it came to the knowledge of the latter, as the case may be.

As an addressee of the Commission's inspection decision, the targeted company has standing under Article 263 TFEU and may challenge the decision on one or more of the four grounds listed in the Article:

- (i) lack of competence;
- (ii) infringement of essential procedural requirements;
- (iii) infringements of the Treaty or any rule of law relating to its application, and
- (iv) misuse of powers.

As noted by *Van Bael*, the four grounds are broader than they might appear at first sight. Infringements under (iii) include infringements of general principles such as the principle of proportionality, non-discrimination or the protection of legitimate expectations. Likewise, infringements of particular treaty provisions such as Article 101 and 102 TFEU could be the result of an error of law, an error of fact or a manifest error of assessment.<sup>305</sup>

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<sup>303</sup> Türk, *Judicial Review in EU Law*, Elgar European Law, 2010, at p. 315.

<sup>304</sup> *Ibid.*

<sup>305</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, p. 336.

If the General Court considers an annulment action to be well-founded, it will declare all or parts of the decision void.<sup>306</sup> In *Roquette Frères*, the Court declared that in cases where it has annulled whole or parts of an inspection decision, the Commission will be prevented from using any documents or evidence relating to the decision,<sup>307</sup> which it might have obtained during the course of that investigation. Otherwise, the decision on the infringement, in so far as it is based on such evidence, might be annulled by the EU Courts.<sup>308</sup> However, In the case of *Nexans* it became clear that the General Court does not consider itself to have jurisdiction to order the return of documents unlawfully obtained. In this case, the applicants had requested the General Court to order the Commission to:

- return any documents or evidence which it might have obtained pursuant to the challenged decisions;
- refrain from using, for the purposes of proceedings in respect of an infringement of the competition rules, any documents or evidence which it might have obtained pursuant to the annulled decisions;
- refrain from communicating such documents or evidence to competition authorities in other jurisdictions.<sup>309</sup>

To this the General Court responded that it lacked jurisdiction to issue declaratory judgments or directions,<sup>310</sup> even where they concern the manner in which its judgments are to be complied with.<sup>311</sup> This is in line with the Court’s earlier case-law, and in *Nexans*, the General Court did refer to several Court rulings including the one in the case of *Pevasa and Inpesca v Commission* where the ECJ held that:

[i]n so far as the appellants claim that the Court of First Instance should direct the Commission to take certain measures, the Court of Justice has consistently held (see, most recently, its judgment in Case C-21/94 *Parliament v Council* [1995] ECR I-1827, paragraph 33) that, when exercising judicial review of legality under Article 173 of the Treaty, the Community judicature has no

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<sup>306</sup> Article 264 TFEU.

<sup>307</sup> For the purposes of proceeding in respect of an infringement of the EU competition rules.

<sup>308</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 49 where the Court refers to its earlier rulings in *Hoechst* and *Dow Chemical*.

<sup>309</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 25.

<sup>310</sup> In the context of legality reviews on the basis of Article 230 EC (now Article 263 TFEU).

<sup>311</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 136.

jurisdiction to issue directions, even where they concern the manner in which its judgments are to be complied with.<sup>312</sup>

That the Court lacks jurisdiction to issue directions was also the view taken in the case of *Parliament v. Council*, but in that case the Court added that although it lacked such jurisdiction, the Council was nevertheless under an obligation to put an end within a reasonable period to the infringement it had committed.<sup>313</sup>

To conclude, companies targeted by the Commission's inspection decisions may apply for annulment of the decision under Article 263 of the TFEU. If the Court finds that the action is well founded, it will annul the decision in whole or in part, but will not order the return of documents unlawfully obtained, prohibit the Commission from sharing the information with other authorities, or in any other way direct the Commission's actions. However, the Commission has an obligation to put an end to the infringement it has committed and is prevented from using the information or evidence within the investigation. Should it fail to do so, the EU Courts may then annul the subsequent decision in the underlying competition case in so far as it is based on the evidence in question. This was also what happened in *Deutsche Bahn*, a case that will be further discussed in Sections 8.3.2.2 and 10.3.1 below.<sup>314</sup>

### 3.3 International cooperation and the effects on EU antitrust enforcement

These days, a chapter on the enforcement of the EU competition rules requires a section on international cartel enforcement. In today's global economy cartels often cross the boundaries of jurisdictions. These international cartels tend to be even more complex, broader in scope, larger in terms of affected volumes of commerce, and more harmful to consumers than their domestic counterparts.<sup>315</sup> The development towards 'sophisticated and multinational' cartels has had a number of effects on public enforcement. One such effect is the fact that today, proving the case often

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<sup>312</sup> Joined Cases C-199/94 P and C-200/94 P, *Compañía Internacional de Pesca y Derivados SA (Inpesca) v Commission of the European Communities and Pesquería Vasco-Montañesa SA (Pevasa)*, EU:C:1995:360, para 24.

<sup>313</sup> Case C-21/94, *European Parliament v Council of the European Union*, EU:C:1995:220, para 33.

<sup>314</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

<sup>315</sup> <http://www.justice.gov/atr/speech/international-cartels-intersection-between-fcpa-violations-and-antitrust-violations>.

requires cooperation with other competition authorities. A crucial component of such cooperation is information exchange. According to the Commission, the power of all the competition authorities to exchange and use information is a key element of the functioning of the ECN.<sup>316</sup> On a similar note, the OECD encourages its member countries to support information exchange between competition authorities. The ICN has manuals for the management of information exchange.<sup>317</sup>

In September 2007, Thomas O. Barnett, Assistant Attorney General at the Antitrust Division of the DOJ, made a speech at the Georgetown Law Global Antitrust Enforcement Symposium.<sup>318</sup> Recognizing that cartels remained the 'supreme evil of antitrust', he was pleased to inform the audience that the world was now less safe for cartels. *Barnett* pointed to the fact that many cartels are international, and the typical international cartel consists of a US company and three or four of its competitors that are market leaders in Europe, Asia and throughout the world. Due to the international character of many cartels, cartel enforcement has taken on a global dimension. *Barnett* pointed to the fact that a shared commitment to fighting international cartels had led to the establishment of cooperative relationships among antitrust enforcement agencies around the world. This cooperation, according to *Barnett*, has resulted in enhanced ability to detect, investigate, prosecute and punish cartel offences in the US. *Barnett* also stated that the cooperation among agencies has made it easier to collect evidence to use in prosecuting a cartel once it is detected.

*Barnett* further informed the audience that the Antitrust Division regularly coordinates with antitrust enforcement agencies conducting searches across multiple continents, giving as an example the searches conducted of marine hose suppliers in May 2007.<sup>319</sup> Eight executives from the United Kingdom, France, Italy and Japan were arrested in Houston and San Francisco and charged for their role in a conspiracy to rig bids, fix prices and allocate markets for US sales of marine hoses used to transport oil between tankers and storage facilities and buoys. Simultaneous with those arrests, searches were conducted by agents of the Defense Criminal Investigative Service of the Department of Defense's Office of Inspector General in the United States; in addition, the United Kingdom's Office of Fair Trading and the

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<sup>316</sup> Commission Notice on cooperation within the Network of European Competition Authorities, Official Journal C101, 27.04.2004, pp. 43-53.

<sup>317</sup> *Cooperation Between Competition Agencies in Cartel Investigations*, Report to ICN Annual Conference 2007.

<sup>318</sup> <http://www.justice.gov/atr/speech/global-antitrust-enforcement>.

<sup>319</sup> Press Release, US Department of Justice, Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose (May 2, 2007), available at [http://www.usdoj.gov/atr/public/press\\_releases/2007/223037.htm](http://www.usdoj.gov/atr/public/press_releases/2007/223037.htm).

European Commission executed search warrants in Europe. Moreover, *Barnett* stated, while there remained some limitations, ‘antitrust enforcement agencies can often share evidence that each of us collects either through searches or through voluntary cooperation from leniency applicants or pleading defendants’.<sup>320</sup>

*Lipsky* talks of the three global antitrust tidal waves, the first being the spread of new and strengthened competition laws to many jurisdictions, the second being ‘the formation of numerous bilateral and multilateral relationships between and among new and old agencies, creating a vast mutual-support network linking the thousands of government antitrust enforcement officials around the world’, and the third being the proliferation of new and more powerful enforcement modes.<sup>321</sup>

Thus, while examining the Commission’s dawn raid practices from a fundamental rights perspective it is necessary to consider the fact that some of the evidence gathered during a dawn raid may eventually end up in the hands of national authorities and in jurisdictions where the procedural safeguards may not be of the same standard as those of the EU system.

### 3.4 Enforcement – Concluding remarks

The Commission’s enforcement powers are wide, and need to be wide for the EU competition law system to be effective. Key components to any antitrust system are deterrence and detection, both requiring that the competition authorities have wide investigatory powers. Effective deterrence requires that those who might be tempted to take illegal action believe that there is some reasonable probability of them being caught and that, if so, the consequences are likely to be grave.<sup>322</sup> *Barnett* declared that deterrence only works when the consequences are real. To effectively deter cartels, antitrust enforcers must aggressively and predictably prosecute cartelists and use the full range of weapons in the enforcement arsenal.<sup>323</sup> Or as *Scordamaglia-Tousis* puts it, the goal of effective deterrence depends on two components:

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<sup>320</sup> <http://www.justice.gov/atr/speech/global-antitrust-enforcement>.

<sup>321</sup> *Lipsky, Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, *Antitrust Law Journal*, vol. 75, 2009.

<sup>322</sup> *Baker, Punishment for Cartel Participation in the US: A Special Model?*, In *Beaton-Wells and Ezrachi (eds), Criminalising Cartels – Critical Studies of an International Movement*, Hart Publishing, 2011, at p. 35.

<sup>323</sup> *Seven Steps to Better Cartel Enforcement*, Speech made by Thomas O. Barnett, Assistant Attorney General of the Antitrust Division of the US Department of Justice, at the 11<sup>th</sup> Annual Competition Law & Policy Workshop, European Union Institute in Florence Italy, 2 June 2006, [http://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement#N\\_7\\_](http://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement#N_7_).



the level of the fines and the likelihood of being caught.<sup>324</sup> The deterrent effects of any antitrust enforcement scheme thus depend upon whether companies actually believe that they may be caught.<sup>325</sup>

However, a side-effect of this is that the rights of the targeted companies risk being affected. As Union acts enjoy the presumption of validity, and their effects will be realized until such time as they are set aside by the courts, there is no chance for a company to refuse to submit to a Commission decision without the risk of incurring sanctions. Again, this may be necessary in order to achieve effective competition law enforcement. This being said, as the Commission's powers are far-reaching and the companies are under an obligation to cooperate even in situations where they deem that the Commission is exceeding its powers, close scrutiny must be made of the procedural safeguards surrounding the Commission's actions in competition cases. The following chapter will present the framework for fundamental rights protection in the EU followed by a more detailed presentation of the rights surrounding antitrust proceedings.

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<sup>324</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 12.

<sup>325</sup> Baker, *The Case for Antitrust Enforcement*, *Journal of Economic Perspectives*, vol. 17, no. 4, 2003, at p. 40.

## 4. Fundamental rights in the EU

It is now time to explore the other weight on the balancing scale of this thesis – EU fundamental rights protection. This chapter will serve as a framework for the analysis of the Commission’s dawn raid practices in Chapters 7 through 14 below. First, some historical background to the emergence and development of EU fundamental rights protection will be given, followed by a section on the Charter. Subsequently, the current role of the ECHR in EU fundamental rights protection will be examined in order to illustrate why the Convention and the case-law from the Strasbourg court serve as the point of reference in this thesis. As will be shown in this chapter, the ECHR has entered EU law more or less through the back door leaving the ECJ with the rather difficult task of reconciling its integrationist agenda with ECHR fundamental rights protection. The section dealing with the role of the ECHR in EU law examines how this task should best be carried out. However, this section also serves to illustrate the role of the ECHR in this thesis, and why the standard set by the Convention and the Strasbourg court is used as the point of reference throughout the thesis.

### 4.1 Historical background to EU fundamental rights protection

In the early days of European integration there was a clear dividing line between the different routes taken to achieve lasting peace in Western Europe. The European peace project was standing on two separate but equally important limbs, both seeking greater unity between the Western European states.<sup>326</sup> One was the EEC striving for market integration, the other the Strasbourg based European Council and Court safeguarding human rights protection. However, it soon became apparent that it was not possible to maintain a clear dividing line between the market integration and human rights regimes. As will be further discussed in this chapter, as early as the

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<sup>326</sup> The Treaty of Rome declared in its preamble that the Member States were determined to lay the foundations of an ever closer union among the peoples of Europe and, according to the preamble of the ECHR, the Council of Europe aimed at achieving greater unity among its members.

1960s the ECJ saw itself more or less forced to develop its own human rights jurisdiction and has continued to do so ever since.

The Court's efforts to broaden the scope of EU law to encompass fundamental rights have not always gone hand in hand with legislative measures. During the first decades of European integration, the work was carried out almost entirely by the ECJ, which may be the reason why litigation has played and still continues to play such a prominent role in the development and enforcement of EU fundamental rights.<sup>327</sup>

#### 4.1.1 The emergence of fundamental rights through the Court's case-law

The Treaty of Rome started out as an economic treaty of limited ambitions.<sup>328,329</sup> The establishment of the EEC and the creation of a common market had two objectives. The first was to transform the conditions of trade and manufacture in the European Community. The second, more political goal, saw the EEC as a contribution towards the functional construction of a political Europe and as constituting a step towards the closer unification of Europe.<sup>330</sup>

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<sup>327</sup> For a further discussion on the emergence of fundamental rights in Europe, see e.g. Arold Lorenz, Groussot and Thor Petursson, *The European Human Rights Culture – A Paradox of Human rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, von Bogdandy and Bast (eds), *Principles of European Constitutional Law*, 2<sup>nd</sup> edn, Hart Publishing, 2009, Craig and de Búrca, *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, *Human Rights Law Review*, vol. 11, no. 4, 2011, Maduro and Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, Weiler, *The Transformation of Europe*, *The Yale Law Journal*, vol. 100, no. 8, Symposium: *International Law*, 1991, pp. 2403-2483, Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser Press, Springer, 2013.

<sup>328</sup> Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, *Human Rights Law Review*, vol. 11, no. 4, 2011, p. 647.

<sup>329</sup> Interesting to note is that the earliest plans on European cooperation did include provisions on human rights protection. In 1952, *Le Comité d'études pour la constitution européenne* (CECE) was set up with the purpose of contributing to the process of drafting a constitution for a European political community. The CECE addressed a separate chapter to human rights protection, and the draft treaty that was later presented did envisage the European Community with a strong role in human rights protection. For a further discussion on this, see Craig and de Búrca (eds), *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, pp. 468 to 475.

<sup>330</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_eec\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm).

Given its limited ambitions, the Treaty of Rome did not contain any fundamental rights provisions and it is therefore not surprising that when the Court was first requested to deal with these issues, it actually refused to do so. The case, which concerned the application of the ECSC – a treaty with even more limited scope than the Treaty of Rome – was *Stork & Cie*.<sup>331</sup> When adopting a certain decision, the High Authority had allegedly infringed German constitutional law, and the applicant sought the annulment of the decision based on this ground. In its ruling, the Court declared that it was not empowered to rule on the matter as fundamental rights did not form part of EU law but only of the national laws of the Member States. By excluding these rights from EU law, the Luxembourg judges attempted to avoid a confrontation with the Strasbourg court, and with national constitutional courts.

However, any confrontation was only temporarily avoided. In the 1960s, the ECJ developed the doctrines of supremacy and direct effect, and as it turned out, the development of these two doctrines would force the ECJ to deal with fundamental rights issues. The doctrine of supremacy was first pronounced in the landmark ruling *Costa v. ENEL*.<sup>332</sup> According to this doctrine, any laws of the Member States that conflict with EU law must be ignored by national courts so that the EU law can take effect. The adoption of this doctrine carried the logical consequence that even constitutionally protected norms in the Member States were subordinate to EU legal rules of any type.<sup>333</sup> As for the doctrine of direct effect, this was first established in *Van Gend en Loos*<sup>334</sup> where the Court declared that the preliminary ruling procedure had the aim to secure uniform interpretation of the Treaty by national courts. This, the Court argued, also meant that the Member States had acknowledged that EU law may be invoked by their nationals before national courts. EU law, the Court declared, does not only impose obligations on individuals, it is also intended to confer rights upon them which become part of their legal heritage.<sup>335</sup>

By adopting these two doctrines, empowering EU citizens to invoke EU law before national courts, and requiring of these courts to give EU law

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<sup>331</sup> Case 1/58, *Stork & Cie v ECSC High Authority*, EU:C:1959:4, p. 43.

<sup>332</sup> Case 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66.

<sup>333</sup> McCrudden, *The Future of the EU Charter of Fundamental Rights*, The Jean Monnet Center for International and Regional Economic Law & Justice, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/013001.html>. See also Weiler, *The Transformation of Europe*, The Yale Law Journal, vol. 100, no. 8, Symposium: International Law, 1991, pp. 2403-2483.

<sup>334</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

<sup>335</sup> *Ibid.*

precedence over national legislation, the ECJ soon faced opposition from especially German and Italian courts which did not accept such supremacy. It did not take long before it had become both legally and politically imperative to solve the problem created by the dichotomy between EU law and national constitutions.<sup>336</sup> Facing ever-growing criticism from the Member States, the Court sought for a solution, and the one eventually chosen was to let fundamental rights form part of EU law.<sup>337</sup> Moving away from its stance in *Stork & Cie*, the ECJ now took the view that fundamental rights were not only part of the national legal systems, but were also general principles of EU law. Or, as put by *Lenaerts* and *Gutiérrez-Fons*, in order for European integration to move forward, EU law had to be grounded in the common values of European democracies of which fundamental rights are part and parcel.<sup>338</sup>

In *Max Gutmann* the Court, although not specifically referring to ‘fundamental rights’ or ‘general principles’, quite matter-of-factly applied the principle of *ne bis in idem*, declaring that it could not be ruled out that the two disciplinary proceedings that had been initiated against Mr Gutmann<sup>339</sup> had been started ‘on the basis of the same set of facts known to the Commission at the opening of the earlier proceedings, and founded on the same complaint’.<sup>340</sup> The two decisions made by the Commission were therefore annulled. Four years later, following the Court’s judgment in *Stauder v. City of Ulm*,<sup>341</sup> no doubts remained as to whether fundamental rights formed part of EU law. In that case, the Court declared that the provision at issue contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.<sup>342</sup>

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<sup>336</sup> Cunha Rodrigues, *The Incorporation of Fundamental Rights in the Community Legal Order*, in Maduro and Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Hart Publishing, 2010.

<sup>337</sup> Pernice, *The Right to Effective Judicial Protection and Remedies in the EU*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser Press, Springer, 2013.

<sup>338</sup> Lenaerts and Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in Peers et al (eds) *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, p. 1559.

<sup>339</sup> Mr Gutmann was an official of the European Atomic Energy Community, suspected of having had his camera repaired and private phone calls made at the expense of the Community.

<sup>340</sup> Joined Cases 18 and 35/65, *Max Gutmann v Commission of the European Communities*, EU:C:1967:6.

<sup>341</sup> Case 29/69, *Erich Stauder v Stadt Ulm, Sozialamt*, EU:C:1969:57.

<sup>342</sup> *Ibid*, at para 7.

What *Vajda* describes as ‘the discovery of general principles of Community law’,<sup>343</sup> was developed further by the ECJ in the well-known case of *Internationale Handelsgesellschaft*.<sup>344</sup> The case involved a possible conflict between EU regulations and the German constitution, where the applicant argued that the regulations should be set aside due to their conflict with the German constitution. Applying the doctrine of supremacy, the ECJ dismissed any possibility of setting aside EU law in favour of national constitutions, stating that the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at the fundamental rights as formulated in that State’s constitution.<sup>345</sup> Having declared that EU law takes precedence over national legislation, the Court assessed whether analogous guarantees under EU law had been disregarded. Not only was this question answered in the affirmative; the Court held fundamental rights to form part of the general principles of EU law. It further declared that it was not only obliged to uphold and safeguard these rights. When doing so, it should be guided by the constitutional traditions of the Member States.<sup>346</sup>

The subsequent *Nold* ruling reinforced the stance taken by the Court and added a little more flesh to the bones of its general principles. Here, the ECJ explicitly referred to international treaties which Member States had ratified as guidelines to be followed within the framework of EU law.<sup>347</sup> In safeguarding the fundamental rights, the Court considered itself bound to draw inspiration from the constitutional traditions common to the Member States and the international treaties for the protection of human rights on which the Member States had collaborated or to which they were signatories.<sup>348</sup> Although referring to international treaties, the Court did not explicitly mention the ECHR. It was not until all Member States had ratified the ECHR that the Court made explicit mention of the Convention.<sup>349</sup> Thus, in *Rutili* the Court explicitly acknowledged that it drew inspiration from the ECHR, and even referred to specific provisions of the Convention.<sup>350</sup>

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<sup>343</sup> Vajda, *The Application of the EU Charter of Fundamental Rights: Neither Reckless Nor Timid?*, Edinburgh School of Law Research Paper, 2014/47, Europa Working Paper No 2014/99, November 2014, p. 2.

<sup>344</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

<sup>345</sup> *Ibid.*, at para 3.

<sup>346</sup> *Ibid.*, at para 4.

<sup>347</sup> Case 4/73, *Nold KG v European Commission*, EU:C:1974:51.

<sup>348</sup> *Ibid.*, para 13.

<sup>349</sup> Case 36/75, *Roland Rutili v Ministre de l’intérieur*, EU:C:1975:137, at para 32.

<sup>350</sup> *Ibid.*

In *Wachauf*, the ECJ ruled that its review powers were not limited to acts of the EU institutions, but that they extended to the acts of Member States, provided that such acts fell within areas of EU law.<sup>351</sup> The obligation of Member States to respect and safeguard fundamental rights was once again stressed in the *ERT* case,<sup>352</sup> where the ECJ ruled that Member States are obliged by EU law to respect fundamental rights when they implement it or when they rely on derogations from fundamental Treaty rules, giving the ECHR special significance.<sup>353</sup>

Over the years, the Court has thus gradually incorporated fundamental rights into the EU legal order. By holding that fundamental rights form an integral part of the general principles of EU law, the ECJ has accomplished two things; it has incorporated a central feature of modern constitutions into the corpus of EU law, and strengthened the authority of EU law against potential challenges before national courts in the name of domestic constitutional rights.<sup>354</sup>

#### 4.1.2 Fundamental rights protection through legislative measures

Although not at the same pace, the Court's jurisprudence has been accompanied by legislative measures. Political initiatives by the EU institutions to introduce fundamental rights protection have centred mainly on two possible methods: accession to the ECHR or the adoption of a separate EU bill of rights. Eventually, the Member States opted for both methods as the Lisbon Treaty has not only committed the EU to accede to the ECHR, but has also made the Charter legally binding and has given it the same legal status as the Treaties.<sup>355</sup> However, the way towards a proper bill of rights and ECHR accession has been – and still appears to be – a painstaking expedition. While keeping alive the debate on human rights in the EU, early initiatives to legislate foundered largely through lack of an adequate legal basis for accession to the ECHR, but also due to a lack of

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<sup>351</sup> Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, EU:C:1989:321, para.19.

<sup>352</sup> Case C-260/89, *Ellinki Radiophonia Tileorassi*, EU:C:1991:254.

<sup>353</sup> *Ibid*, para 41.

<sup>354</sup> Kumm, *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*, in Maduro, & Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010.

<sup>355</sup> Article 6 of the TEU. See also Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, Research Paper 00/32, House of Commons Library, at p. 9.

consensus among the Member States on the principle or the form of EU human rights guarantees.<sup>356</sup>

In 1973, the European Parliament ('the EP') adopted a Resolution concerning the protection of the fundamental rights of Member States' citizens when EU law is drafted,<sup>357</sup> and in 1977 it adopted another on the granting of special rights to the citizens of the European Community.<sup>358</sup> The EP issued a declaration of political principle on the definition of fundamental rights in February 1977, which was subsequently adopted by the Council and the Commission.<sup>359</sup> At the Copenhagen European Council in 1978 the Heads of State and Government issued the 'Declaration on Democracy' which confirmed their will:

[t]o ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.<sup>360</sup>

In a 1979 Resolution, the EP urged accession by the EU to the ECHR and envisaged the drafting of a European Charter of Civil Rights. Further Resolutions in 1983 and 1984 emphasized the need to incorporate fundamental human rights into the EU in a constitutional manner, and in 1989 the EP proposed the adoption of a declaration of fundamental rights as part of a 'Constitution' for the EU.<sup>361</sup>

Treaties and amending instruments since the Treaty of Rome have made explicit references to the basis of democratic principles for all Union action. The preamble to the Single European Act of 1986 expressed the determination of the EU Member States 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 ECHR for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter – notably freedom, equality and social justice.

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<sup>356</sup> Ibid.

<sup>357</sup> OJC 26, 4 April 1973.

<sup>358</sup> OJC 299, 16 November 1977.

<sup>359</sup> Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, Research Paper 00/32, House of Commons Library, at p. 3.

<sup>360</sup> Summit Conclusions, 7-8 April 1978.

<sup>361</sup> See OJC 120, 16 May 1989, p.51; OJC 324, 24 December 1990, p.219, and OJC 61, 28 February 1994, p.155.



In November 1993, the Treaty on the European Union entered into force.<sup>362</sup> Article F<sup>363</sup> provided an express reference to the ECHR, stating that the Union:

[s]hall respect fundamental rights, as guaranteed by the European ECHR 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.

Subsequently, the Treaty of Amsterdam introduced the possibility of imposing sanctions on Member States that fail to respect fundamental rights.<sup>364</sup> The possibility of imposing sanctions was further strengthened by the Treaty of Nice, which provided that the very existence of a serious and persistent breach would be sufficient for the EU to take actions to suspend the voting rights or to impose other types of sanctions on the Member State violating fundamental rights.<sup>365</sup>

#### 4.1.3 The Lisbon Treaty

Although fundamental rights have slowly gained their way into EU legislation, any doubts as regards their importance or their place in the hierarchy of the EU legal order were removed in December 2009 when the Lisbon Treaty entered into force. The Lisbon Treaty introduced a number of changes to the Treaties, and strengthened the protection of fundamental rights in several ways. The most significant changes to the legal landscape of human rights protection lie in the amendments to Article 6 of the TEU. This Article now protects fundamental rights under three diverse and complementary perspectives: as general principles of EU law, as defined by the Charter and as protected by the ECHR.

Article 6(1) of the TEU declares that the Charter shall have the same legal value as the Treaties, and Article 6(2) commits the EU to accede to the ECHR. Upon accession, the ECHR jurisprudence will become directly applicable before the European Courts and challenges may be brought before the Strasbourg court for infringements committed by the EU. Article 6(3) confirms general principles as a source for fundamental rights.

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<sup>362</sup> The Treaty on the European Union was signed in Maastricht on 7 February 1992, and entered into force on 1 November 1993, see e.g. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0026>.

<sup>363</sup> Now Article 6(3) TEU.

<sup>364</sup> Article 7 TEU.

<sup>365</sup> The Treaty of Nice added the first paragraph to Article 7 TEU.

As will be further discussed in Section 4.4.1 below, accession to the ECHR is still a question for the future, and the most important change at this stage lies in the altered legal status of the Charter. Since the entry into force of the Lisbon Treaty, the Charter has gained widespread application, and it now operates as the primary source of human rights in the EU.<sup>366</sup>

## 4.2 The Charter – Historical background

Despite earlier Treaty amendments aiming at strengthening fundamental rights protection within the EU, a widespread belief remained that more was needed, and that the Union should have its proper bill of rights. This need was not necessarily perceived as stemming from insufficient levels of protection in legal practice. It was rather at political level that the desire for codification and a strengthened democratic legitimacy was strongest.<sup>367</sup> Consequently, in June 1999, the European Council met in Cologne and decided to draw up a charter for fundamental rights, declaring that protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for its legitimacy.<sup>368</sup> The European Council concluded that the charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States. The charter should also include economic and social rights, as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, and reflect the principles derived from the case-law of the ECJ and the ECtHR.<sup>369</sup>

A convention<sup>370</sup> was convened to deal with the issue of a bill of rights for Europe,<sup>371</sup> and to draw up a draft document in advance of the European

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<sup>366</sup> Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, *Human Rights Law Review*, vol. 11, no. 4, 2011, at p. 645.

<sup>367</sup> See e.g. McCrudden, *The Future of the EU Charter of Fundamental Rights*, The Jean Monnet Center for International and Regional Economic Law & Justice, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/013001.html>, Zetterqvist, *The Charter of Fundamental Rights and the European Res Publica*, in Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, 2011, at p. 6.

<sup>368</sup> European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union.

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[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/l33501\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_en.htm)

<sup>370</sup> The convention was composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament

Council in December 2000. The convention took on the task, but the work did not proceed effortlessly. Even within the praesidium that constituted the convention's leadership, opinions differed on the purpose and value of the charter. Whereas the Member States tended towards a declaratory text that would, at most, be politically binding, the Commission and the EP had the intention to draft a more significant document.<sup>372</sup> Despite these internal conflicts, the convention managed to present a draft bill of rights in June 2000, and the Charter was signed and proclaimed in December 2000 by the EP, the Commission and the European Council. As for the Charter's legal status, the Member States seem to have won the battle – the Charter was not made legally binding.

The Charter is the first formal EU document which in a single text combines the whole range of civil, political, economic and social rights as well as certain 'third generation' rights such as the right to good administration.<sup>373</sup> The Charter's prime objective is not to create new rights, but to make existing rights more visible. Thus, at the proclamation of the Charter, Romano Prodi, who was then President of the European Commission, stated that:

[t]he objective of the Charter is to make it more visible and explicit to EU citizens the fundamental rights they already enjoy at European level.

Despite the rather insignificant role given to the Charter through its declaratory nature, it was definitely not forgotten. In December 2001, the European Council met in Laeken and agreed to convene a convention on the future for Europe. One of its principal tasks was to decide whether the Charter should form part of binding EU legislation, and whether the EU should accede to the ECHR. Another issue on the agenda was the question of whether or not the EU should have its own constitution. With the creation of a constitution for the EU in sight, the idea was that it would not be complete without a bill of rights. As all Member States that had a written constitution also had a catalogue of rights, the EU could hardly settle for less in this

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and national parliaments. Representatives of the European Court of Justice participated as observers. Representatives of the Economic and Social Committee, the Committee of the Regions and social groups as well as experts were invited to give their views.

<sup>371</sup> Zetterqvist, *The Charter of Fundamental Rights and the European Res Publica*, in Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, 2011, at p. 6.

<sup>372</sup> Anderson & Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, EUI Working Paper Law, 2011/08, at p. 2.

<sup>373</sup> Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, 2011, at p. 40.

regard – so the argument went.<sup>374</sup> In July 2003, the convention finished the draft treaty establishing a constitution for Europe and submitted it to the President of the European Council. The draft Treaty incorporated the Charter as part II of the text.

By now, we know that there is no European Constitution, and that for a number of years, the Charter continued to play a rather insignificant role, being undermined by its lack of binding legal force. In fact, although referred to both by the General Court and the Advocate Generals in a number of cases, it was not until six years after its proclamation that the ECJ first made explicit reference to the Charter in the case *Parliament v. Council*.<sup>375</sup> Even after this first reference, the ECJ remained hesitant to refer to the Charter and, in all, only about 15 references were made to the Charter during the years 2000 to 2009.<sup>376</sup>

Taking a closer look at the references actually made, the first mention of the Charter as an instrument comprising rights and principles can be found in the 2002 *max.mobil* judgment.<sup>377</sup> There, the General Court established that Article 41 of the Charter confirms that:

[e]very 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.<sup>378</sup>

Without taking a stand on its legal value, the General Court recognized the role of the Charter in codifying the general principles of law common to the constitutional traditions of the Member States and consolidating the Community *acquis*.

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<sup>374</sup> Zetterqvist, *The Charter of Fundamental Rights and the European Res Publica*, in Di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Springer, 2011, at p. 7.

<sup>375</sup> Case C-540/03, *European Parliament v Council of the European Union*, EU:C:2006:429, para 38.

<sup>376</sup> Lindh, *Europe Cannot Exist Without Human Rights*, *Europarättslig tidskrift*, no 1, 2012, at p. 20, and Morijn, *Judicial References to the Charter of Fundamental Rights: First Experiences and Possible Prospects*, available at [www.fd.uc.pt/igc/pdf/papers/john\\_morjin.pdf](http://www.fd.uc.pt/igc/pdf/papers/john_morjin.pdf).

<sup>377</sup> De Búrca and Aschenbrenner, *European Constitutionalism and the Charter*, in Peers and Ward (eds), *The European Union Charter of Fundamental Rights*, Hart Publishing, 2004, at p. 15.

<sup>378</sup> Case T-54/99, *max. mobil Telekommunikation Service GmbH v Commission of the European Communities*, EU:T:2002:20, para 57.

At other times, the General Court has specifically referred to the non-binding character of the Charter while at the same time recognizing that it:

[d]oes show the importance of the rights it sets out in the Community legal order.<sup>379</sup>

In *Jégo-Quéré*, the General Court declared that the Charter, although not being legally binding, represented a valid instrument capable of enhancing the protection of European citizens against the EU.<sup>380</sup>

Although the EU Courts referred to the Charter on a number of occasions during the first nine years of its existence, such references had to be motivated and were not self-evident.<sup>381</sup> With the Lisbon Treaty everything changed. In the years following its entry into force, the Charter has steadily gained legal importance. According to the Commission's Fifth Annual Report on the Application of the Charter, the EU Courts quoted the Charter in 210 decisions during 2014, compared with 43 in 2011, 87 in 2012 and 114 in 2013.<sup>382</sup> The Charter now operates as the primary source of human rights in the EU.<sup>383</sup>

#### 4.2.1 The Charter – Its scope and contents

The Charter has been drafted in the image of the ECHR, borrowing all the rights from the Convention. As the Charter was intended to assemble rights

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<sup>379</sup> Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International Inc. v Commission of the European Communities*, EU:T:2003:6, para 122.

<sup>380</sup> Case T-177/01, *Jégo-Quéré v Commission*, EU:T:2002:112.

<sup>381</sup> McCrudden, *The Future of the EU Charter of Fundamental Rights*, The Jean Monnet Center for International and Regional Economic Law & Justice, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/013001.html>.

<sup>382</sup> *2014 Annual Report on the Application of the EU Charter of Fundamental Rights*, European Commission – Directorate-General for Justice and Consumers, European Union 2015, at p. 6. *Vajda* notes that these figures should be taken with a pinch of salt given that (i) it is now 'fashionable' to plead a Charter point and (ii) the number of cases where the Charter played a decisive role in the result of the case is smaller. See Vajda, *The Application of the EU Charter of Fundamental Rights: Neither Reckless Nor Timid?*, Edinburgh School of Law Research Paper, 2014/47, Europa Working Paper No 2014/99, November 2014, p. 4.

<sup>383</sup> Interesting to note is that the Strasbourg court did not show the same hesitance towards the Charter. In the case of *Christine Goodwin v the UK* for example, adjudicated already in 2002, the ECtHR explicitly relied on the Charter in order to motivate a departure from its previous case-law. See Application no. 28957/95 at para 100, and Bratza, *The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union: A Process of Mutual Recognition, in the Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser Press, Springer, 2013, at p. 172.

that were previously scattered over a range of sources not limited to the ECHR, but also including other Council of Europe (COE), United Nations (UN) and International Labour Organization (ILO) agreements, it is replete with additional rights. The rights, which total 50, are divided under the following six headings; Human Dignity, Freedoms, Equality, Solidarity, Citizens Rights and Justice.<sup>384</sup>

In addition to the Charter text, there are official explanations to its provisions ('the Explanations'). The Explanations have no binding legal value, but they are a valuable and authoritative tool for the interpretation of the Charter. The legal significance of the Explanations was further confirmed in 2012 when the Charter was amended and Article 52 was given a number of new subparagraphs including Article 52(7) which requires the courts of the Union and the Member States to pay due regard to the Explanations.

The importance of the Explanations is confirmed not only by the Charter's preamble and Article 52(7), but also by the Lisbon Treaty itself. Article 6(1) subparagraph 3 of the TEU provides that (i) the Charter rules shall be interpreted in accordance with the general provisions in Title VII of the Charter, which comprises Article 52(7), and (ii) due regard must be given to the explanations referred to in the Charter. Thus, the guiding force of the Explanations is confirmed three times in EU primary law; in the Preamble and Article 52(7) of the Charter, but also in Article 6(1) of the TEU which is placed prominently among the basic principles and objectives of the EU. As *Weiss* notes, this does not render the Explanations legally binding but grants an authority to them that makes it difficult to deviate from the interpretational hints and approaches contained therein.<sup>385</sup> This has also been recognized by the Court. In *Åkerberg Fransson*, the Court referred in a Grand Chamber ruling to the Explanations and declared that the third subparagraph of Article 6(1) TEU and Article 52(7) required the Court to take the Explanations into consideration when interpreting the Charter provisions.<sup>386</sup>

Unlike many other bills of rights, the Charter is not a freestanding bill of rights with universal scope. Instead, it applies exclusively within the field of EU law. According to Article 51(1) of the Charter, it addresses itself to the

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<sup>384</sup> As noted by *Arold Lorenz, Groussot and Petursson*, this wide conception is a likely reflection of the plurality of sources used by the ECJ in the elaboration of general principles of EU law; *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 162.

<sup>385</sup> *Weiss, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, *European Constitutional Law Review*, vol. 7, issue 1, 2011, p. 71.

<sup>386</sup> Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para 20.

institutions, agencies and bodies of the Union. It also addresses itself to the national authorities of the Member States, but only when they are implementing EU law.<sup>387</sup> Thus, the legal aims and effects of the Charter are to limit and frame the powers of the EU institutions and the effects of EU law, not to expand such powers.

Furthermore, it is worth noting that, save for the rights that are to be treated as absolute, there is no hierarchy of rights in the Charter. All qualified rights stand on equal footing and this means that any conflicts between them need to be solved by striking a balance. In the case of *Sky Österreich*, the Court declared in a Grand Chamber ruling that where several rights and freedoms of the Charter are at issue, the assessment of the possible disproportionate nature of a provision of EU law must be carried out with the view to reconciling the requirements of the protection of those different rights and freedoms and strike a fair balance between them.<sup>388</sup>

#### 4.2.2 Two different standards of protection?

As mentioned above, there are several layers of fundamental rights protection just within the EU legal system. Add to that the concurring fundamental rights protection under the ECHR and other international conventions binding the Member States, as well as any national rules on fundamental rights, and there is an obvious risk of discrepancies in the fundamental rights standards offered to individuals throughout the EU. This risk has been foreseen by the legislator. With the aim to ensure consistency between the Charter and the ECHR, thereby preventing Member States from being subjected to multiple standards of human rights protection when acting within the scope of EU law, Article 52(3) of the Charter stipulates:

In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR 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 ECHR. This provision shall not prevent Union law providing more extensive protection.

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<sup>387</sup> Much has been said about the term ‘implementing EU law’ and whether the term should be given a narrow interpretation. In *Åklagaren v Hans Åkerberg Fransson*, the Court made it clear that the term should be interpreted so as to cover also national authorities’ application of EU law. Thus the Charter may come into play whenever a Member State acts within the scope of EU law. See Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, and Case C-205/15, *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, EU:C:2016:499.

<sup>388</sup> Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, EU:C:2013:28, para 60.

According to the Explanations, this means in particular that the legislator, when laying down or defining limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, without thereby adversely affecting the autonomy of EU law or that of the ECJ. Other sources of EU fundamental rights, such as general principles, may set more far-reaching standards but must never be interpreted or applied so as to fall short of the ECHR standard. Article 52(3) thus leads to the ECHR, indirectly binding the EU by the ECHR as the Convention must always be observed when fundamental rights are restricted in the EU. The rights of the ECHR constitute a floor for EU fundamental rights protection. Article 52(3) not only protects the status quo of the ECHR, but must also be read as a dynamic reference to the ECHR and its additional protocols. Should the ECHR be substantively amended in the future, these amendments will automatically become the new minimum standard of human rights protection in the EU.

The Explanations list the provisions of the Charter which correspond to the ECHR. Among these we find Article 7, which ensures the respect for private and family life and corresponds to Article 8 of the ECHR, Article 17 on the right to property (corresponding to Article 1 of the ECHR protocol 1), Article 48 on the presumption of innocence and the rights of defence (corresponding to Article 6(2) and (3) ECHR), and Article 49 on legality and proportionality of (criminal) offences and penalties (corresponding to Article 7 ECHR). With regard to the right to a fair trial laid down in Article 47(2), (3) of the Charter, this right is also found in Article 6(1) of the ECHR. However, the Charter provision has a scope of application that goes beyond the scope of Article 6(1) ECHR. The limitation in Article 6(1) ECHR to the determination of civil rights and obligations or criminal charges does not apply as regards EU law and its implementation.

Contrary to many other bills of rights, the Charter does not list any rights as absolute. Instead, Article 52(1) of the Charter contains a general limitation clause, indicating that all rights contained in the Charter may be subject to limitation:

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.

Reading Article 52(1) alone suggests that no Charter rights are absolute. However, if read together with Article 52(3), another picture emerges, as the



latter declares that protection under the Charter may never fall short of the protection afforded by the ECHR. As the ECHR contains a limited number of rights that are considered to be absolute, such as the prohibitions against slavery and torture, these rights should thus be considered absolute also under the Charter.

If the ECHR constitutes a floor for EU fundamental rights protection, then the Charter forms the ceiling. A major challenge for the protection of fundamental rights in the EU is that the Member States disagree about the proper standard of protection. Unlike the ECtHR, whose primary task is to ensure that the ECHR and its basic human rights standards are followed, the primary task of the ECJ is to ensure that the Treaties are followed and that an internal market is established and maintained without distortion. There is thus not only a desire on the part of ECJ to establish a minimum standard of fundamental rights protection, but also to achieve a unification of laws and to ensure the effectiveness of the EU legal system.<sup>389</sup> This desire, and its effect on the level of EU fundamental rights protection, became particularly apparent in the case of *Melloni*.<sup>390</sup> Through reference for a preliminary ruling, the Court was asked whether the Spanish Constitutional Court could rely on Article 53 of the Charter and refuse to extradite a certain Mr Melloni to Italy on the ground that he had been sentenced *in absentia* by the Italian courts to ten years' imprisonment without any possibility to challenge such order. The national constitutional legislation did not allow extraditions in such circumstances, but a refusal would be contrary to Framework Decision 2002/584, which required the Member States to execute any European arrest warrant on the basis of the principle of mutual recognition. However, as Article 53 of the Charter states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights as recognized by, *inter alia*, the Member States' constitutions, the Spanish Constitutional Court saw a possibility to rely on the Charter and ignore the provisions of the Framework Decision.

In its ruling, the Court declared that the Framework Decision provided for a right to an effective judicial remedy and to a fair trial in accordance with Articles 47 and 48 of the Charter. This reading of the Charter, the Court declared, was in line with the ECHR and the jurisprudence of the Strasbourg court. Having established that the Framework Decision did respect the requirement of the Charter, and that the Charter standard did not fall short of

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<sup>389</sup> See e.g. Arold Lorenz, Groussot and Thor Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 12, de Boer, *Addressing Rights Divergences Under the Charter: Melloni*, Common Market Law Review, vol. 50, issue 4, 2013, p. 1083:

<sup>390</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107.

the ECHR standard in this respect, the ECJ declared that Article 53 of the Charter should be interpreted as not allowing Member States to refuse to execute an arrest warrant on the ground that such execution would violate national constitutional legislation. The Charter was thus considered to form a ceiling to European fundamental rights protection in this respect, as any other interpretation would have undermined the principle of the primacy of EU law and endangered the principle of mutual trust.<sup>391</sup>

#### 4.2.3 The Charter – Concluding remarks

The EU's main concern has been market-building and regulation. In this it differs from traditional state constitutions and fundamental rights regimes. However, as fundamental rights have taken on a more significant role in the EU, the ECJ has steadily adopted a greater fundamental rights jurisdiction, partly in order to preserve its own status and the supremacy of EU law. However, given the fact that it was the Court and not the legislator that initially took responsibility for developing fundamental rights protection in the EU, EU fundamental rights have evolved in an ad hoc incremental way. Before the adoption of the Charter, there was no clear or conceptual underpinning to the rights protected under EU law. The adoption of a bill of rights for the EU as a first step, and making it legally binding as a second step, is of course of great importance for the protection of fundamental rights in the EU, as there is now a clear legal ground for bringing actions of fundamental rights violations.

The Charter is neither part of a constitution in the traditional nation-state sense, nor an international human rights treaty, even in the regional sense of the ECHR. As a new mechanism for the delivery of rights, it transforms the relationship between the individual and the state through a different type of rights entitlement arising from and embedded in the EU. By making the Charter legally binding there is now not only a requirement that EU law is adopted in conformity with fundamental rights – a matter normally included in the preambles of EU secondary legislation – but also that in its application and transposition, individuals affected by those measures have a chance to challenge them on the basis of a clear and legally binding set of rights to which they are entitled. Although the Charter's application is limited in the sense that it binds the EU Member States only when they act within the field of EU law, its constitutional setting – with the EU principles of direct effect and supremacy – makes it a potentially much more powerful fundamental

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<sup>391</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 58.

rights instrument than the ECHR.<sup>392</sup> As noted by *Bernitz*, the potential power of the Charter is underlined further by the fact that in areas where EU fundamental rights law and ECHR law overlap, the EU Charter is much faster and offers lower courts the opportunity to ask for preliminary references in pending cases.<sup>393</sup>

However, at the same time as the Charter strengthens EU fundamental rights protection and grants the rights enshrined therein a constitutional status, the ECJ has made clear that the Charter should not be used by the Member States to undermine the primary status of EU law and thus endanger the harmonization and unification of laws. Therefore, Member States may not rely on Article 53 of the Charter to enforce national constitutional legislation, should that imply that the principle of mutual trust is set aside. Thus, the Charter forms both the floor and ceiling for EU fundamental rights protection.

### 4.3 Fundamental rights as general principles

Article 6(3) of the TEU declares that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions of the Member States, shall constitute general principles of EU law. Since the early days of European cooperation, an unwritten catalogue of fundamental rights has gradually been incorporated into the constitutional fabric of the EU legal order. It is argued that the creation of an unwritten bill of rights via general principles is the most striking development that the Court has made to the Constitution of Europe.<sup>394</sup> As discussed previously in this chapter, until recently general principles of EU law were the core norms of fundamental rights protection in the EU. However, with the Lisbon Treaty everything changed. Although Article 6(3) of the TEU still refers to general principles

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<sup>392</sup> For a further discussion on the personal scope of the Charter v the ECHR, see *Bernitz*, *The Scope of the Charter and the ECHR*, in de Vries, *Bernitz and Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument; Five Years Old and Growing*, Hart Publishing, 2015, pp. 170-171, and Arold Lorenz, Groussot and Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, pp. 166-172.

<sup>393</sup> *Bernitz*, *The Scope of the Charter and the ECHR*, in de Vries, *Bernitz and Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument; Five Years Old and Growing*, Hart Publishing, 2015, pp. 170-171. *Bernitz* refers to the case of *Åkerberg Fransson*, where the District Court of Haparanda referred the case to the ECJ for a preliminary ruling in December 2010. The ECJ delivered its Grand Chamber ruling in February 2013, which in turn made the Swedish Supreme Court reverse its case-law in a seminal judgment in June 2013. Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

<sup>394</sup> Arold Lorenz, Groussot and Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 172.

of EU law, many of the existing principles have been incorporated into the Charter, and the role of general principles has therefore become less significant.<sup>395</sup> According to *Eckes*, the Court has more or less dropped its earlier ‘general principles’ and ‘source of inspiration’ approach and now refers directly to the Charter instead.<sup>396</sup> *Arold Lorenz, Groussot and Petursson* share *Eckes*’ view and declare that the case-law of the ECJ confirms the status of the Charter as the guiding norm, *leitnormen*.<sup>397</sup>

However, this does not mean that the Court will not resort to general principles in the future. Although general principles are now ancillary to the Charter provisions, Article 6(3) is still there and preserves the importance of general principles. As time passes there may be new rights or principles that deserve protection. As we have witnessed before, the Court may be more flexible than the legislator in adapting to such changes and filling any normative gaps. According to *Lenaerts* and *Gutiérrez-Fons*, the Court would be prevented from relying on the Charter in order to fill such gaps as this would run counter to Article 6(1) of the TEU and 51(2) of the Charter.<sup>398</sup> Although the Charter can serve as a source of inspiration for the discovery of general principles,<sup>399</sup> filling normative gaps is a function reserved for the general principles of EU law. Although their role may have become less visible as a result of the Lisbon Treaty, this may thus change in the future.

#### 4.4 The European Convention on Human Rights

Central to this thesis is the question of the role the ECHR plays in EU fundamental rights protection, and the extent to which the EU Courts will have to consider the ECHR when dealing with fundamental rights issues. As Article 6(2) of the TEU commits the EU to accede to the ECHR, this question should, at least in theory, only be of a temporary nature. Once the

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<sup>395</sup> According to Arold Lorenz, Groussot and Petursson, a little more than half of the Charter’s rights codify general principles of EU law; *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 163.

<sup>396</sup> *Eckes*, *EU Accession to the ECHR: Between Autonomy and Adaptation*, *The Modern Law Review*, vol. 76, no. 2, 2013, p. 258.

<sup>397</sup> *Arold Lorenz, Groussot and Petursson*, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 174.

<sup>398</sup> *Lenaerts and Gutiérrez-Fons*, *The Place of the Charter in the EU Constitutional Edifice*, in Peers et al (eds), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, p. 1559.

<sup>399</sup> See *Lenaerts*, *EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection*, in XXXIV Polish Yearbook of International Law, Wydawnictwo Naukowe Scholar, Warsaw, 2015, p. 142. Reference is made to Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, EU:C:2010:21.

EU has acceded to the ECHR, the ECHR's role in EU law will be clear. However, recent development suggests that the accession may be more distant than previously anticipated, and that the EU's relationship with the ECHR may be left in a state of limbo for many years to come.

#### 4.4.1 EU's accession and the role of the ECHR in EU law

Article 6(2) of the TEU stipulates that the EU shall accede to the ECHR. During the years following the Lisbon Treaty's entry into force, the work towards this end progressed slowly but steadily,<sup>400</sup> and in 2013 a draft accession agreement was finally on the table.<sup>401</sup> The Commission chose to avail itself of the right granted under Article 218(11) TFEU, and submit the draft agreement to the ECJ, requesting the Court to provide its opinion on whether the draft agreement was compatible with the Treaties.

The opinion delivered by the Court on 18 December 2014 ('the Opinion') has been described as a 'sweeping blow'. Or, to use the words of *Krenn*, 'after four years of negotiations, it took the ECJ only a few paragraphs to pick the draft accession agreement into pieces'.<sup>402</sup> Indeed, in the Opinion delivered by a full court<sup>403</sup> just a week before Christmas, the ECJ rejected the legal submissions of the Commission, the Council, the EP, and the 24 Member States that had submitted observations as well as the conditional 'yes' given by Advocate General Kokott.<sup>404</sup> The Court found a number of flaws in the draft agreement and declared that it was not compatible with Article 6(2) TEU.<sup>405</sup> As a result of the Court's adverse opinion, the agreement cannot be adopted unless it is amended in accordance with the Opinion or the Treaties are revised.<sup>406</sup>

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<sup>400</sup> For details on the negotiation procedure, see the Draft Explanatory Report (Appendix V) of the Final report to the CDDH, No. 12–15

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[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008\\_rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008_rev2_EN.pdf).

<sup>402</sup> Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*, German Law Journal, vol. 16, no. 1, 2015, p. 147.

<sup>403</sup> Save for judge Allan Rosas.

<sup>404</sup> Polakiewicz, *The EU's Accession to the European Convention on Human Rights – A Matter of Coherence and Consistency*, in Morano-Foadi and Vickers (eds), *Fundamental Rights in the EU – A Matter for Two Courts*, Hart Publishing, 2015, at p. xvii.

<sup>405</sup> Or with Protocol (No 8) relating to Article 6(2) of the TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

<sup>406</sup> Article 218 TFEU.

As noted by *Douglas-Scott*, the Court found so many obstacles with the draft agreement that it has now rendered accession very difficult.<sup>407</sup> Elaborating in detail on the Opinion and the grounds for rejecting the draft is beyond the scope of this thesis, but as a brief explanation here, the main concerns of the Court centred on the preservation of the specific characteristics of the EU legal system, the co-respondent mechanism and the procedure for prior involvement by the ECJ in cases before the Strasbourg court. The obligation in Article 6(2) TEU to accede to the ECHR is subject to three conditions laid down in Protocol No 8 to the Founding Treaties; the accession agreement must (i) make provision for preserving the specific characteristics of the Union and Union law, (ii) ensure that accession does not affect the competences of the Union or the powers of its institutions, and (iii) ensure that accession does not affect Article 344 TFEU. In its Opinion the Court opted for a strict interpretation of the Protocol, which, to use the words of *Lazovsky* and *Wessel*, in practice turn the three caveats laid down in the Protocol into locks.<sup>408</sup>

As the ECJ considered almost every aspect of the draft agreement to be incompatible with Article 6 of the TEU,<sup>409</sup> major amendments would be required in order to please the Court. Negotiating the draft agreement was an arduous task, and the room for renegotiation is slim. Whether and under what conditions the EU will accede the ECHR thus remains a question for the future. However, putting EU accession to the ECHR in jeopardy is not the only consequence of the Opinion, it will also affect the structure of the fundamental rights protection envisaged by the Lisbon Treaty, leaving it hobbling without one of its three intended limbs. If the EU were to be a Contracting Party to the ECHR, it would be under a legal obligation towards the other Contracting States to adhere to the provisions of the ECHR. A provision such as Article 52(3) of the Charter would then cause no concern as the EU would have a direct obligation to ensure a standard of protection that satisfies the requirements of the ECHR and the Strasbourg court. However, as this is and will not be a reality in the foreseeable future, the role of Article 52(3) becomes more problematic. There is no external obligation on the part of the EU to adhere to the ECHR provisions, and it is thus the ECJ that will interpret the ECHR provisions and be the final arbiter on what the minimum level of protection should be. In the following the implications

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<sup>407</sup> Douglas-Scott, *Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR*, *Europarättslig tidskrift*, no 1, 2016, p. 30.

<sup>408</sup> Lazovsky and Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, *German Law Journal*, no 1, 2015.

<sup>409</sup> And with Protocol No 8 relating to Article 6(2) of the Treaty of the European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Protocol no 8').

of this halting structure, and the current role of the ECHR in EU law will be examined in more detail.

## 4.5 The current role of ECHR law in EU fundamental rights protection

As was stated in Section 4.1.1 above, the ECJ has been willing to accept the rights enshrined in the ECHR as general principles of EU law ever since its ruling in *Rutili*.<sup>410</sup> However, the Court has traditionally seen itself free to use the ECHR as a source of inspiration rather than as a set of binding rules. In *SPUC*,<sup>411</sup> Advocate General Van Gerven noted that the ECJ did not confer direct effect on the provisions of the ECHR but regarded the Convention, together with the constitutional traditions common to the Member States, as the Court's aid in determining the content of the general principles of EU law. This stance, AG Van Gerven noted, enabled the Court, in establishing general principles of EU law, also to take into account the imperatives of the fundamental freedoms and of the EU market organizations, which were intended to bring about the integration of the market.<sup>412</sup>

However, the ECHR may no longer serve only as a source of inspiration to the ECJ, as the protection granted under the ECHR shall form the basis of EU fundamental rights protection under Article 52(3) of the Charter. More or less through the back door, the EU has thus committed itself not only to ensuring a minimum standard of protection, but has also indirectly left it to the ECHR to determine what that standard should be. To use the words of *Groussot and Stavefeldt*, Article 52(3) creates a situation of 'informal accession'.<sup>413</sup> According to *Weiss*, Article 52(3) not only requires harmony between Charter rights and corresponding ECHR rights, but absorbs these rights into the EU legal order.<sup>414</sup> The obligation to observe the standards of fundamental rights protection that flow from ECHR has a constitutional status in the EU.

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<sup>410</sup> Case 36/75, *Roland Rutili v Ministre de l'intérieur*, EU:C:1975:137.

<sup>411</sup> Case C-159/90, *The Society for the Protection of Unborn Children Ireland v Stephen Grogan and Others*, EU:C:1991:378.

<sup>412</sup> Opinion of Advocate General van Gerven in Case C-159/90, *The Society for the Protection of Unborn Children Ireland v Stephen Grogan and Others*, EU:C:1991:249.

<sup>413</sup> Groussot and Stavefeldt, *Accession of the EU to the ECHR: A Legally Complex Situation*, in Nergelius and Kristoffersson (eds), *Human Rights in Contemporary European Law*, Hart Publishing, 2015.

<sup>414</sup> Weiss, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, *European Constitutional Law Review*, vol. 7, issue 1, 2011, p. 67.

Defining or interpreting the framework for EU fundamental rights protection can therefore no longer be done without closely studying the ECHR. Although the EU has not acceded to the ECHR, and although the Convention does not form an integral part of EU legislation, determining the ECHR standard is necessary to determine the scope of protection that shall be afforded under EU law. Such study will no longer be a traditional comparative one, but rather applied to determine how the EU law stands. As pointed out by *Arold Lorenz, Groussot and Petursson*, the commitment to respect the ECHR rights entails a legal duty derived from primary law on the part of all EU institutions, including the ECJ, to respect the relevant ECHR rights. This legal obligation is not contingent on any accession by the EU to the ECHR or on any power of the Council of Europe or the Strasbourg court to impose sanctions on the EU for breach of the ECHR.<sup>415</sup>

Meeting this requirement may not always be unproblematic. To give an example related to this thesis, as long as the EU is not a party to the ECHR, the Commission's dawn raid practices may not be reviewed by the Strasbourg court. Instead, the ECJ will be the final arbiter in determining whether the Commission's practices meet or exceed the ECHR standard, and such exercise will require the ECJ to interpret the provisions of the ECHR. At a first glance, this task may seem as pretty straightforward, but once one has given it a little more thought another picture emerges. There is uncertainty as to how the ECJ should actually interpret the Charter in the light of the ECHR provisions. The lack of a specific reference to the Strasbourg court's case-law in the Charter has raised the question whether the ECJ should or even may take the Strasbourg court's jurisprudence into consideration when determining the standard of EU fundamental rights protection.<sup>416</sup> This in turn leads to questions such as whether the ECJ may continue to apply its traditional interpretative methods when giving the Charter provisions life and meaning, and if and to what extent the Court is still able to pay regard to 'the imperatives of the fundamental freedoms and of the EU market organizations' when interpreting the Charter provisions.

In her view to the Opinion, Advocate General Kokott acknowledges that once the EU has acceded to the ECHR, it will be bound by the case-law of the ECtHR, and that this may indeed produce a certain shift in emphasis, for example in the relationship between the fundamental rights and the fundamental freedoms of the European internal market.<sup>417</sup> According to the AG, such shift will come post accession, which could be taken as an

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<sup>415</sup> *Arold Lorenz, Groussot and Petursson, The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Martinus Nijhoff Publishers, 2013, p. 203.

<sup>416</sup> View of Advocate General Kokott, *Opinion 2/13*, EU:C:2014:2454, para 203.

<sup>417</sup> *Ibid*, para 206.



indication she does not consider the EU Institutions to be bound by the case-law from the Strasbourg court prior to accession. Advocate General Trstenjak on the other hand, declares in the case of *N.S.* that ‘Because the protection granted by the ECHR is constantly developing in the light of its interpretation by the European Court of Human Rights, the reference to the ECHR contained in Article 52(3) of the Charter of Fundamental Rights is to be construed as an essentially dynamic reference which, in principle, covers the case-law of the European Court of Human Rights’.<sup>418</sup> As will be discussed in the following section, the view taken by AG Trstenjak appears the most logical, because otherwise it would not be possible for the Court to ensure at all times a level of protection that meets the ECHR standard.

#### 4.5.1 Interpreting the ECHR in the light of the overall objectives of the European Union?

According to Article 19 of the TEU, the ECJ shall ensure that ‘in the interpretation and application of the Treaties the law is observed’. By now, it is clear that the ECJ considers this task to include an obligation to ensure that the overall objectives of the European Union are protected. *Lenaerts* and *Gutiérrez-Fons* note that the Treaties are imbued with a purpose driven functionalism, leaving the ECJ with little choice but to take into account the objectives pursued by the Treaties.<sup>419</sup> Former Advocate General *Fennelly* declares that the Court considers its task to be to assist in the attainment of the Treaty objectives. By adopting this view, a distinction is made between the judicial role of the ECJ and that of a neutral arbiter played by the normal court in a Member State whose task it is to hold the scales of justice evenly balanced between parties or between the citizens and the state.<sup>420</sup>

What happens when the various objectives do not move in the same direction? Today, the aims and objectives of the Treaties go far beyond those presented in the Treaty of Rome. Although the EU may always have been seen as a peace project with the aim of unifying the former adversaries, few would argue that in the early days of the EEC, its scope of application went beyond issues of market integration. Today, the EU has raised its ambitions and one of its aims is to offer an area of freedom, security and justice

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<sup>418</sup> Opinion of Advocate General Trstenjak in Case C-411/10, *N. S. v Secretary of State for the Home Department*, EU:C:2011:611, para 145.

<sup>419</sup> *Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Papers, AEL 2013/9, at p. 25.

<sup>420</sup> *Fennelly, Legal Interpretation of the Court of Justice*, *Fordham International Law Journal*, vol. 20, issue 3, 1996, Article 4, at p. 672.

without internal frontiers.<sup>421</sup> Another is to combat social exclusion and discrimination.<sup>422</sup> Article 2 of the TEU even declares that the Union is founded on ‘the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. Yet, the driving force behind the EU is still market integration and the establishment and maintenance of an internal market.<sup>423</sup> To this end, the Court acts as ‘an engine for European Integration’,<sup>424</sup> and on occasion has been willing to give the fundamental freedoms priority over fundamental rights.<sup>425</sup> When defining the overall objectives of the Treaties, fundamental freedoms and competition policy hold a prominent place.

The question is whether such an approach would still be possible. Could it be argued that Article 52(3) of the Charter requires the Court to take the ‘overall objectives of the ECHR’ as a benchmark, rather than those of the Treaties when interpreting fundamental rights? To what extent does the ECHR allow the Contracting States a margin of appreciation, and does the Charter allow the ECJ to rely on such a margin when determining the standard of EU fundamental rights protection?

*Weiss* identifies two mutually exclusive ways of interpreting Article 52(3) of the Charter.<sup>426</sup> On the one hand, one could understand Article 52(3) as an interpretational guideline which takes care of ‘interpreting’ in harmony between the Charter and the ECHR. As an interpretational guideline, Article 52(3) might serve to ensure the autonomy of EU human rights law and the human rights methodology of the ECJ. With such an approach, using the ECHR as a guideline, the ECJ would be free to interpret the Charter provisions against the background of the overall objectives of the EU. The other way of interpreting Article 52(3) identified by *Weiss* is to interpret this rule as a material, substantial incorporation of the ECHR provisions into the Charter and, by virtue of Article 6(1) TEU, into primary EU law, in so far as

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<sup>421</sup> Article 3(2) of the TEU.

<sup>422</sup> Article 3(3) of the TEU.

<sup>423</sup> See e.g. Opinion 2/13 of the Court where it declares that the process of integration is the *raison d’être* of the EU itself.

<sup>424</sup> Fennelly, *Legal Interpretation of the Court of Justice*, Fordham International Law Journal, vol. 20, issue 3, 1996, Article 4, at p. 676. See also Craig and de Búrca, *The Evolution of EU Law*, 2<sup>nd</sup> edn, Oxford University Press, 2011, p. 488. According to *de Búrca*, the debate which took place during the drafting of Article 52(3) concerning the relationship between the ECJ and the ECtHR revealed a clear unwillingness to place the ECJ in any kind of formally subordinate position vis-à-vis the Strasbourg court.

<sup>425</sup> See e.g. Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, EU:C:2007:809.

<sup>426</sup> *Weiss*, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, European Constitutional Law Review, vol. 7, issue 1, 2011, p. 69.

its rights are reflected in the Charter. As Article 52(3) refers to both the meaning and the scope of the rights under the ECHR, *Weiss* argues that Article 52(3) goes beyond a mere interpretational guideline. Referring to meaning and scope encompasses the limits and possible justifications for interferences with a right which has become part of the fundamental rights regime of the EU even in the absence of any link to the wording of the corresponding Charter right. Thus, according to *Weiss*, the wording of Article 52(3) of the Charter clearly speaks in favour of an incorporation of ECHR standards.<sup>427</sup>

In order to answer the question of which interpretative method should be applied by the ECJ, any obligation on the part of the ECJ to take the ECtHR's case-law into account when setting the Charter standard could serve as an indication. The Charter itself does not provide an explicit reference to the jurisprudence of the Strasbourg court, despite the many attempts during the drafting of the Charter to include such a reference.<sup>428</sup> This absence has spurred a discussion as to whether the ECJ should or even may pay regard to the case-law of the ECtHR.<sup>429</sup> Given the fact that the Strasbourg court considers the ECHR to be a living instrument, consistency between the Charter and the ECHR can only be secured if the ECJ pays regard not only to the text of the Convention, but also to the case-law of the Strasbourg court. This view is supported not only by the Explanations, but also by the Court's own reasoning in *Elgafaji*,<sup>430</sup> where it declared in a Grand Chamber ruling that:

[w]hile the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal orde[r]<sup>431</sup>

The following year, in 2010, the Court delivered its ruling in *J. McB. v. L.E.*, applying Article 52(3) of the Charter when determining the minimum standard of EU protection. The ECJ went even further than in *Elgafaji* and held that where Charter rights correspond to Articles in the ECHR, the Court would not only have to take the Strasbourg court's case-law 'into

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<sup>427</sup> Weiss, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, *European Constitutional Law Review*, vol. 7, issue 1, 2011, p. 69.

<sup>428</sup> Groussot and Gill-Pedro, *Old and New Human Rights in Europe*, in Brems and Gerards (eds), *Shaping Rights in the ECHR*, Cambridge University Press, 2013, at p. 247.

<sup>429</sup> See e.g. View of Advocate General Kokott, *Opinion 2/13*, EU:C:2014:2454, para 203.

<sup>430</sup> Case C-465/07, *Meki and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94.

<sup>431</sup> Lenaerts and Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, *EUI Working Papers*, AEL 2013/9, at p. 33.

consideration’, but would have to give the Charter provision the same meaning and scope as the ECHR provision, as interpreted by the Strasbourg court.<sup>432</sup> The ECJ then noted that Strasbourg court had already considered a case where the facts were comparable to those in the case of *J. McB. v. L.E.*, and relied on the outcome of the Strasbourg court’s ruling when determining the right to be granted under the Charter.<sup>433</sup>

In *Melloni*, another Grand Chamber ruling delivered by the ECJ in 2013, the Court justified its interpretation of Articles 47 and 48(2) of the Charter through reference to Article 6(1) and (3) of the ECHR and the case-law of Strasbourg court.<sup>434</sup> Through reference for a preliminary ruling, the Court had been requested to answer the question whether a certain Framework Decision precluded the Spanish Constitutional Court from refusing to extradite a person to Italy. If that question was to be answered in the affirmative by the ECJ, the Spanish court wished to know whether such order was in line with the Charter. The ECJ answered both questions in the affirmative, declaring that its interpretation of Articles 47 and 48 of the Charter was in keeping with the scope that had been recognized for the rights guaranteed by Article 6 (1) and (3) of the ECHR by the case-law of the Strasbourg court in the cases of *Medenica v. Switzerland*,<sup>435</sup> *Sejdovic v. Italy*<sup>436</sup> and *Haralampiev v. Bulgaria*.<sup>437</sup>

The Explanations<sup>438</sup> also take this standpoint, declaring that the meaning and the scope of the rights guaranteed under the Charter are determined not only by the text of those instruments, but also by the case-law of the Strasbourg court and by the ECJ. Furthermore, as the Strasbourg court considers the ECHR to be a ‘living instrument which must be interpreted in the light of present-day conditions’,<sup>439</sup> there is an apparent risk that the EU standard might fall short of the ECHR standard, should the ECJ disregard the case-law from Strasbourg. Or, as *Groussot* and *Gill-Pedro* point out: ‘the rights contained in the Convention and interpreted in the case-law of the

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<sup>432</sup> Case C-400/10 PPU, *JMcB v LE*, EU:C:2010:582, para 53.

<sup>433</sup> *Ibid*, paras 53 and 54.

<sup>434</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 50.

<sup>435</sup> *Medenica v Switzerland*, judgment of 14 June 2001, Application no. 20491/92.

<sup>436</sup> *Sejdovic v Italy*, judgment of 1 March 2006, Application no. 56581/00.

<sup>437</sup> *Haralampiev v Bulgaria*, judgment of 24 April 2012, Application no. 29648/03.

<sup>438</sup> The Explanations do not have any legal effect. However, Under Article 52(7) of the Charter, the courts of the Union and the Member States shall pay due regard to the Explanations.

<sup>439</sup> See e.g. *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 41.

Strasbourg Court form an integral part of the meaning, interpretation and scope of the rights guaranteed within the EU legal order'.<sup>440</sup>

In order to ensure consistency between the Charter and the ECHR and to guarantee a minimum protection that meets or exceeds the ECHR standard, the ECJ will thus have to interpret the Charter provisions in the light of the case-law of the Strasbourg court while respecting the aims and objectives of the ECHR. This can be illustrated by an example. The right to privacy is guaranteed under both Article 7 of the Charter and Article 8 of the ECHR. Unlike the Charter provision, the ECHR provision contains an express limitation clause, allowing derogations from the right to privacy under certain, specified circumstances. In order for a derogation to be accepted it must pursue one of the interests listed in the clause. Although the ECtHR has interpreted these interests broadly, the list is exhaustive. Following the logic of Article 52(3), this should prevent the ECJ from paying regard to interests not listed in Article 8 of the ECHR when assessing a possible derogation from the right to privacy under Article 7 of the Charter.

It remains to be seen whether the Court would be willing to set aside any Treaty objectives, and what implications another standpoint may have on EU fundamental rights protection. A parallel can be drawn to international treaties concluded by and thereby also binding upon the EU. In *ATAA* the Court declared that 'by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union'.<sup>441</sup> However, this obligation was not considered absolute, as the Court continued by declaring that when a national court assesses the validity of an EU measure, it must satisfy itself that the EU is bound by the international obligation. Furthermore, the Court declared, it is only possible to examine the validity of EU legislation in the light of an international treaty where the nature and the broad logic of the treaty do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise. Furthermore, on numerous occasions the Court has declared that international treaties binding the EU are ranked between secondary and primary law.<sup>442</sup> In *Kadi*, the Court declared that the primacy of international treaties over secondary EU legislation could not be extended to primary EU law, in particular to the general principles of which

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<sup>440</sup> Groussot and Gill-Pedro, *Old and New Human Rights in Europe*, in Brems and Gerards (eds), *Shaping Rights in the ECHR*, Cambridge University Press, 2013, at p. 247.

<sup>441</sup> Case C-366/10, *ATAA and Others*, EU:C:2011:864, paras 50-56.

<sup>442</sup> Weiss, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon*, *European Constitutional Law Review*, vol. 7, issue 1, 2011, p.72.

fundamental rights form a part.<sup>443,444</sup> The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, the Court declared.<sup>445</sup> On the same note, *Lenaerts* and *Gutiérrez-Fons* take the stand that secondary EU legislation, as far as possible, must be interpreted in a manner that is consistent with international agreements binding the Union.<sup>446</sup> Where an international obligation is incompatible with the constitutional tenets of the EU, the duty of consistent interpretation should not apply. Thus according to these authors, it is only when an international obligation is compatible with the constitutional tenets of the EU that the primacy of the international treaties applies.

This being said – and although Advocate General Kokott agrees with *Lenaerts* and *Gutiérrez-Fons* in that international agreements concluded by the EU are ranked between primary law and other secondary legislation, and that this would be the case should the EU accede to the ECHR – *Kokott* also declares that if the Court were to conclude that the founding Treaties could claim unrestricted precedence over the ECHR, doing so would be to fail to appreciate the special significance of the ECHR for the EU legal order.<sup>447</sup> Referring to the Constitutional status granted to the ECHR through Article 6(1) and (3) of the TEU and Article 52(3) of the Charter, she declares that any possible conflict between a fundamental right protected by the ECHR and a provision of EU primary law cannot be resolved by means of a mere reference to the fact that the ECHR (following accession) ranks below the founding Treaties of the EU. Instead, *Kokott* continues, it follows from Article 6(3) TEU and the first sentence of Article 52(3) of the Charter that the fundamental rights protected by the ECHR are to be taken into account in the interpretation and application of primary EU law, and that a careful

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<sup>443</sup> Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, paras 307-308.

<sup>444</sup> As *Kokott* and *Sobotta* point out, the EU is not a member of the UN and therefore it was not clear whether the EU was at all bound by the UN Security Council measures in question, see *Kokott* and *Sobotta*, *Constitutional Core Values and International Law – Finding the Balance?*, *The European Journal of International Law*, vol. 23, no 4, 2012. This fact was also recognized by the ECJ in *Kadi*. However, the statement relating to any conflict between international treaties and EU primary legislation was based on the assumption that the EU was bound by an obligation to submit to the international treaty in question under Article 300(7) EC (now Article 216(2) of the TFEU). See Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, paras 306-309.

<sup>445</sup> *Ibid*, para 285.

<sup>446</sup> *Lenaerts* and *Gutiérrez-Fons*, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Papers, AEL 2013/9, at p. 30.

<sup>447</sup> View of Advocate General Kokott, *Opinion 2/13*, EU:C:2014:2454, para 202.

balance must always be struck between those fundamental rights and the relevant provisions of primary law. This duty to strike a balance, *Kokott* notes, which may already be inferred from Article 6 of the TEU and Article 52(3) of the Charter, will not be altered in any fundamental respect by the proposed accession of the EU to the ECHR.<sup>448</sup>

Yet, the Court appears not to have followed Advocate General Kokott's line of reasoning. In the Opinion, the Court declares that the interpretation of the fundamental rights provided in the Charter shall be ensured within the framework and the structure and objectives of the EU. The Court also stresses the fact that the pursuit of the objectives set out in Article 3 TEU is entrusted to a series of fundamental provisions such as those providing for free movement and competition policy, and declares that the process of integration is the very *raison d'être* of the EU.<sup>449</sup> According to the Court, fundamental rights, as recognized in particular by the Charter must therefore be interpreted and applied in accordance with the constitutional framework of the EU.<sup>450</sup> Here, the Court declares outright that it will interpret the Charter provisions not only in the light of the EU objectives as such, but also of the provisions ensuring the attainment of those objectives, such as the rules on free movement and competition. The Court will thus continue to act as 'an engine for European Integration' also when applying and interpreting the provisions of the Charter.

#### 4.6 Identifying the role of the ECHR in the EU legal system – Concluding remarks

As long as the EU has not yet acceded to the ECHR, the Convention as such does not form an integral part of EU law, therefore the EU cannot be held externally accountable for any breach of Convention rights. However, through Article 6 of the TEU and the Charter, the EU has committed itself to a certain standard of protection as these provisions stipulate that the ECHR standard shall constitute the minimum standard of protection under EU law. The ECJ has the task of ensuring that this standard is respected. As *Polakiewicz* points out, human rights are based on universal values transcending the various domestic legal orders. The ECHR and Union law share values and principles, and at principle level, there should thus be no contradiction between EU and ECHR human rights law.<sup>451</sup> The Strasbourg

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<sup>448</sup> *Ibid*, paras 204-205.

<sup>449</sup> *Ibid*, at para 172.

<sup>450</sup> *Ibid*, at para 177.

<sup>451</sup> *Polakiewicz, EU law and the ECHR: Will EU accession to the European Convention on Human Rights Square the Circle? Fundamental Rights in Europe: A Matter for Two Courts,*

court has also established a presumption that EU law is compatible with the ECHR.<sup>452</sup>

In the Opinion, the ECJ declared that integration is the *raison d'être* of the EU itself, and that it would interpret the Charter provisions in the light of not only the EU objectives as such, but also the provisions ensuring the attainment of those objectives, such as the rules on free movement and competition. As long as this can be done while at the same time securing the standard offered by the ECHR, there is no problem. In fact, it is desirable because such interpretation would further consistency and coherence in the EU legal system.

It can also be assumed that in most cases, it will be possible to reconcile the various objectives and interests without having to accept a fundamental rights standard that falls short of the ECHR standard – especially since, as will be discussed further in Chapter 5 below, the Strasbourg court generally shows deference to the Contracting States' sovereignty and allows for a wide margin of appreciation. However, should the statement made by the Court in the Opinion imply that it would be willing to accept a lower standard than the one required by the Charter in order to promote market integration, another picture would emerge. The Member States have set the goal for the EU to accede to the ECHR, and Article 6(2) of the TEU now declares that the Union shall<sup>453</sup> accede to the Convention. With this as a standpoint, the

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Oxford Brookes University, 18 January 2013, accessible at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Accession\\_documents/Oxford\\_18\\_January\\_2013\\_versionWeb.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf).

<sup>452</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, judgment of 30 June 2005, Application no. 45036/98, p. 165. In *Bosphorus*, the Strasbourg court declared that EU fundamental rights protection was equivalent to that of the ECHR system. As a consequence, there was a presumption that Ireland, when implementing legal obligations flowing from its EU membership, did not depart from the requirements of the ECHR. The Strasbourg court pointed out that this presumption could be rebutted if, in the circumstances of the case at hand, the court considered that the protection of ECHR rights was '*manifestly* deficient' (emphasis added). In the case at hand, the Strasbourg court declared that 'there was no dysfunction of the mechanisms of control of the observance of Convention rights'. The protection afforded for the applicant's ECHR rights was not manifestly deficient and the presumption was thus not rebutted. This means not only that the Strasbourg court considers EU fundamental rights protection to be equivalent (comparable) to the ECHR standard, in addition the court will intervene only if the protection in a certain case proves to fall far short of the ECHR standard.

<sup>453</sup> According to Erik Wennerström (Director-General for the Swedish National Council for Crime Prevention, previously Principal Legal Adviser with the Ministry for Foreign Affairs of Sweden; observer for the Council of Europe Committee on Public International Law (CAHDI) to the EU accession negotiations since 2010), the wording of Article 6(2) TEU was changed from *may* to *shall* at a late stage of the drafting. The Member States thus took an



EU standard of protection should ideally be at least as high as that of the ECHR. Although the two systems need not be identical, the EU cannot realistically aim at acceding to the ECHR while at the same time accepting a standard of fundamental rights protection that falls short of the ECHR standard.

It may well be that at times the goals of integration and human rights protection are difficult to reconcile. If the Court suggests in its Opinion that it will solve any such conflicts by letting integration prevail at all times, its rulings will become open to criticism. Unlike most other legal systems, the EU is based on an integrationist agenda, and this must of course be reflected in the actions of the EU. At the same time, accession requires compliance with the ECHR, and today, the aspirations and objectives of the EU go far beyond market integration. However, and as will be discussed further in this thesis, although the Court's Opinion could be taken to suggest that it considers its obligations under Article 52(3) to rank below the process of integration, it must not be forgotten that the Court has been the driving force behind the development of fundamental rights in the EU, and that it is through its hands that an unwritten catalogue of fundamental rights has gradually been incorporated into the constitutional fabric of the EU legal order. Furthermore, in so far as the application of the competition rules are concerned, it should be noted that the Court established already in *Hoechst* that Article 14 of Regulation 17/62, the predecessor of Article 20 of Regulation 1/2003, could not be interpreted in such a way as to give results which are incompatible with the General principles of EU law and in particular with fundamental rights.<sup>454</sup>

Furthermore, although the Court does not routinely refer to the ECHR, there are cases such as *Melloni*,<sup>455</sup> *Elgajafi*<sup>456</sup> and *J. McB. v. L.E.*<sup>457</sup> where the Court has made explicit references to both ECHR provisions and cases from the Strasbourg court in order to demonstrate that the EU standard meets or should meet the requirements of the ECHR. However, in *Melloni* such reference was made in answer to a direct question from a national court as to whether the Charter standard did meet the ECHR standard. This case also shows that the Court is willing to set a ceiling for EU fundamental rights protection in order to safeguard the principle of mutual recognition. Indeed,

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explicit stand to commit to accession. Statement made at SCCL seminar held at Stockholm University 6 March 2015.

<sup>454</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 12.

<sup>455</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107.

<sup>456</sup> Case C-465/07, *Meki and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94.

<sup>457</sup> Case C-400/10 PPU, *JMcB v LE*, EU:C:2010:582.

the Court has an important, but difficult task of ensuring integration while at same time safeguarding adequate fundamental rights protection.

This chapter has provided a brief presentation of the evolution and current status of EU fundamental rights protection, and has explained why the ECHR and the case-law from the Strasbourg court serve as a point of reference throughout this thesis. However, although the ECHR standard sets the benchmark, this does not mean that we should refrain from questioning that standard or that we should always accept it as the preferred standard of protection in the EU. This thesis must also assess the standard set by the ECHR – whether the Strasbourg court strikes a correct balance or the standard set would constitute an unjustified hindrance to the Commission’s pursuit of competition law offenders.

Before discussing and analysing the Commission’s dawn raid procedures and their compatibility with EU fundamental rights, we shall examine the method usually applied by both the ECJ and the ECtHR when reconciling conflicting interests in order to strike a balance between opposing rights or between fundamental rights and public interests; the principle of proportionality.

## 5. The principle of proportionality

The previous chapters have set the framework for this thesis, discussing the shape and role of EU competition rules, and describing the framework for EU fundamental rights protection. Before moving on to identifying and examining the potential clashes between these two areas of EU law in relation to dawn raids, this chapter will present the main tool used to settle conflicts between different rights or between public interests and fundamental rights under both EU and ECHR law; the principle of proportionality.

### 5.1 Introduction

Article 6(1) of the ECHR establishes a right to a fair trial, declaring that anyone charged with a criminal offence shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

The wording of the Article suggests that this right is rather straightforward, requiring a positive obligation on the part of the Contracting States. Yet, as we shall see, the Strasbourg court does not consider everyone to be entitled to an oral hearing, and in some instances it does not even require the case to be adjudicated by a tribunal at first instance. How is it that a right, which on paper appears absolute, can be limited in such a way?

Is it in fact the case that rights are not absolute? Do they merely create a strong presumption that the individual interest at stake should be protected from collective encroachment to the greatest extent possible?<sup>458</sup> It appears to be a widely held opinion that very few rights are absolute, or unqualified. Most rights are thus not considered to be fixed points, but are rather seen as principles subject to optimization.<sup>459</sup>

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<sup>458</sup> McHarg, *Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review*, vol. 62, no 5, 1999, p. 683.

<sup>459</sup> See e.g. Webber, *The Negotiable Constitution*, Cambridge University Press, 2009, p. 70.

A common feature of many fundamental rights is that they are construed in an open-ended fashion, acknowledging the right to life or freedom of expression. Obviously, rights drafted in such broad terms cannot be applied without sometimes coming into conflict with other rights or principles. Take the freedom of expression for example. If drafted in broad terms, without any limitations, it would encompass a right to express thoughts that may be insulting to others, violating their right to human dignity. Not only may different rights clash; there is also an inherent tension between fundamental rights and public interests – the right of the individual as opposed to the interest of the public. It is therefore imperative that there is some sort of reconciliation or compromise between diverging interests or rights in order for them to co-exist.<sup>460</sup> Most charters of rights, including the ECHR and the Charter, achieve this aim by making explicit the necessity for a process of limitation. This is often done through limitation clauses that set out the conditions according to which a rights limitation will be assessed. The Charter contains an explicit and general limitation clause in Article 52(1) which reads:

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.

The ECHR does not contain a general limitation clause. Instead, a variety of techniques are employed to limit the scope of the rights and freedoms or to permit restrictions in specified circumstances. Some of the ECHR provisions contain interpretative clauses which indicate that certain activities fall outside the scope of the Article in question. Then there is Article 15 which allows special restrictions on a number of rights and freedoms in time of war or other public emergency threatening the life of the nation.

Other ECHR provisions, such as Articles 8 to 11, explicitly state that the rights enshrined therein are not absolute, and make express provision for restrictions that meet certain qualifying conditions. The rights laid down in these Articles may only be limited in order to protect either the specified public interests listed therein, or the rights and freedoms of others. A further requirement is that any limitation must be necessary in a ‘democratic society’.

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<sup>460</sup> McHarg, *Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review*, vol. 62, no 5, 1999, p. 671.

The ECHR also contains provisions with no express room for derogations or limitations. Contrary to what one may believe, the lack of explicit limitation clauses by no means suggests that these provisions are absolute. Instead, it is the Strasbourg court that determines the scope of protection afforded. This can be illustrated by the case of *Kudla v. Poland* where the Strasbourg court declared in a Grand Chamber ruling that the right to an effective remedy granted by Article 13 of the ECHR was not absolute. The context in which a violation occurs may entail inherent limitations, or, as the Strasbourg court put it:

Admittedly, the protection afforded by Article 13 is not absolute. The context in which an alleged violation – or category of violations – occurs may entail inherent limitations on the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of an ‘effective remedy’ is to be read as meaning ‘a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]’ (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 31, § 69).<sup>461</sup>

Any limitations require a case-by-case assessment as to which interest should be allowed to prevail, the individual or the public. Performing this balancing act or priority assessment is a delicate task. In situations of conflicts, fundamental rights serve the purpose of protecting individuals’ interests from being overridden by considerations of collective utility. At the same time, the system is sanctioning limitations to rights on collective-interest grounds. Those empowered to decide on any derogations will therefore have to tread carefully.<sup>462</sup>

The Charter is explicit as to how this priority assessment should be made. Article 52(1) allows for limitations only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. As for the ECHR, Articles 8 to 11 make any limitations subject to certain qualified requirements, stating that any limitation should serve one of the enumerated purposes, and be necessary in a democratic society. Both the Charter and the ECHR thus require that any limitation of a right should serve a legitimate purpose and be necessary, reflecting the principle of proportionality.

To conclude, under EU and ECHR law, there is a common understanding that very few rights are absolute, but that any limitations should pass some sort of proportionality test. Both the Strasbourg court and the ECJ routinely

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<sup>461</sup> *Kudla v Poland*, judgment of 26 October 2000, Application no. 30210/96, p. 151.

<sup>462</sup> McHarg, *Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review*, vol. 62, no 5, 1999, p. 672.

balance fundamental rights against each other and against conflicting public interests, and as pointed out by *Tsakyarakis*, the two courts have elevated proportionality to the status of a basic principle of interpretation.<sup>463</sup> The questions that follow are thus: what is required in order for a limitation to be considered proportional, and is this standard really desirable?

The relationship between fundamental rights and public interest exceptions is one of the most important issues in contemporary fundamental-rights jurisprudence. Not only is the interpretation given to exceptions a key determinant of the value of rights in practice, but this is also the area where the political or value-laden nature of the choices facing the court is most obvious – it raises questions about the legitimacy of judicial rather than democratic decision-making.<sup>464</sup> The application of the principle of proportionality is in fact considered by some to fully expose judges as lawmakers.<sup>465</sup> Others, such as *Beatty*, argue that the principle of proportionality is an integral and indispensable part of every constitution that subordinates the system of government it creates to the rule of law, and *Cohen-Eliya* and *Porat* describe the principle as ‘infusing coherence into the entire constitutional syste[m]’.<sup>466</sup>

Concern has been expressed as to how, in cases of conflicting rights or interests, judges can generally reach a reasonable and well-reasoned judgment.<sup>467</sup> Is there a neutral, objective methodology which the courts can use or apply to prevent value judgments, in which the political and moral conviction of the judges is implied? Can the principle of proportionality serve this purpose or does its application merely have the opposite effect of exposing judges as law-makers imposing their own values on the parties? This chapter will discuss the principle of proportionality and its application in both EU and ECHR law from a general perspective, setting the scene for a more specific discussion of how the principle is applied with regard to fundamental rights in competition cases.

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<sup>463</sup> Tsakyarakis, *Proportionality: An Assault on Human Rights?*, International Journal of Constitutional Law (ICON), vol. 7, no. 3, 2009, pp. 468-493, at p. 468.

<sup>464</sup> Jacobs, White & Ovey, *The European Convention on Human Rights*, 5<sup>th</sup> edn, Oxford University Press, 2010, p. 309.

<sup>465</sup> See e.g. Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, Faculty Scholarship Series, 2008, Paper 1296, [http://digitalcommons.lawyale.edu/fss\\_papers/1296](http://digitalcommons.lawyale.edu/fss_papers/1296), p. 76, Tsakyarakis, *Proportionality: An Assault on Human Rights?*, International Journal of Constitutional Law (ICON), vol. 7, no. 3, 2009, pp. 468-493.

<sup>466</sup> Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law, Cambridge University Press, 2013, p. 3.

<sup>467</sup> Tsakyarakis, *Proportionality: An Assault on Human Rights?*, International Journal of Constitutional Law (ICON), vol. 7, no. 3, 2009, pp. 468-493.

## 5.2 Rights and exceptions

The principle of proportionality is based on the presumption that rights, or at least some rights, enjoy only partial protection. Or as *Barak* puts it: ‘They cannot be realized to the full extent of their scope as their limitation can be justified’.<sup>468</sup> It is only when a right is circumscribed that a balance needs to be struck between such right and a competing right or public interest. Both EU law and the ECHR allow for derogations to and limitations of most of the rights granted to individuals.

The ECHR acknowledges very few rights as absolute. The Charter contains an express and general limitation clause. Although not explicitly treating any of the rights as absolute, the fact that the ECHR lays the foundation for EU fundamental rights protection means that no derogations are allowed from those Charter rights that have an equivalent in absolute ECHR rights.<sup>469</sup> Consequently, the prohibition against torture laid down in Article 4 of the Charter is absolute, as any derogation would mean that the Charter provides a lower standard of protection than the equivalent Article 3 of the ECHR.

As the scope of this work is limited to discussing rights of undertakings (and their employees) in competition law cases, it will not deal with any of the rights that are considered absolute under the ECHR.<sup>470</sup> Any in-depth

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<sup>468</sup> Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 27.

<sup>469</sup> See Article 52(3) of the Charter.

<sup>470</sup> That is Articles 2, 3, 4 and 7 of the ECHR. However, it should be noted that Article 6 is considered to be a so-called unqualified right, as the public interest should not be allowed to outweigh the right to a fair trial, see e.g. Jacobs, White & Ovey, *The European Convention on Human Rights*, 5th edn, Oxford University Press, 2010, p. 9. However, not only does the ECtHR provide different levels of protection depending on the nature of the case, it also accepts express derogations from the requirements in the article, which are rather detailed. In that sense the rights provided may be limited, and the Strasbourg court has expressly declared that certain constituent elements of the article are not absolute. For example, in the case of *Deweere v Belgium*, it acknowledged that the ‘right to a court’ was subject to implied limitations, and that this right was no more absolute in criminal matters than in civil matters. See *Deweere v Belgium*, judgment of 27 February 1980, Application no. 6903/75, para 49. Likewise, in *John Murray v. the United Kingdom*, the court declared that the right to silence was not absolute, but could be limited. See *John Murray v the United Kingdom*, judgment of 8 February 1996, Application no. 18731/91, para 47. Furthermore, the wording of the article makes room for limitations, as e.g. the requirement to hold a public hearing is subject to express limitations and has also been limited by the Strasbourg court in a number of cases, see e.g. *B. and P. v the United Kingdom*, judgment of 24 April 2001, Applications nos. 36337/97 and 35974/97, para 37. See also the Strasbourg court’s *Guide on Article 6 of the European Convention on Human Rights* where the court declares that although there is a high expectation of publicity in criminal proceedings, it may on occasion be necessary under Article 6 of the ECHR to limit the open and public nature of proceedings in order, for

discussion on the nature of rights has therefore been left aside. Nevertheless, a few words could be said on the matter, as these words will have bearing on the subsequent discussion on the application of the principle of proportionality. If all fundamental rights were absolute, they would have to be very few in number and given a very narrow scope. With the possibility to set limitations, rights may be construed in a more open-ended fashion, and the courts are also able to give the rights a broader interpretation.

An example of this is the Strasbourg court's application of Article 8 of the ECHR. In the case of *Société Colas*, the Strasbourg court declared that the time had come to hold that the rights guaranteed by Article 8 of the ECHR may be construed as including the right to respect for a company's registered office, branches or other business premises.<sup>471</sup> It thus chose to give the notion of 'home' contained in Article 8(1) a very broad interpretation extending the scope of protection also to legal persons. However, Article 8 (2) contains an express limitation clause and, when extending the scope of protection to legal persons, the Strasbourg court also acknowledged that the possibility for Contracting States to interfere with this right may be greater when the rights of legal persons are concerned than in cases concerning the rights of natural persons.

Another example is the Strasbourg court's interpretation of Article 6(1) of the ECHR. The court has chosen to give the notion 'criminal offence' a very broad interpretation, extending its scope of protection to actions and sanctions that have not traditionally been considered to be of a criminal nature. Today, it is clear that also legal persons are protected by the Convention, and that the administrative sanctions imposed on legal persons in competition law and tax proceedings are considered to be of a criminal nature. This in turn has as a consequence that the requirements on procedural safeguards in these matters must be of a certain standard in order not to fall short of the protection granted under the Article.

However, the relatively broad scope of protection afforded under Article 6(1) ECHR has resulted in the Strasbourg court accepting different standards of procedural safeguards depending on the type of criminal proceeding that is under scrutiny. For criminal proceedings within the traditional or core meaning of the term, the possibility to divert from the wording of Article 6(1) is very limited. However, for other types of criminal proceedings, the

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example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice. Both the provision itself and the court thus explicitly acknowledge that certain elements of the article may be balanced against other interests and limited accordingly.

<sup>471</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 41.



court is willing to accept more limited procedural safeguards. To give an example, despite the wording of Article 6(1) requiring decisions to be made by a tribunal, the Strasbourg court accepts that decisions to impose fines in competition cases and tax matters are made by an administrative authority at first instance, provided that they may be appealed to a court with full jurisdiction.<sup>472</sup>

Those arguing that the courts are taking on the role of law-makers when applying the principle of proportionality may have a hard time coming to terms with the Strasbourg court's application of Article 6(1). The court has not only chosen to widen the concept of criminal proceedings to cover cases not traditionally defined as 'criminal', and probably not deemed to be covered by its scope when the ECHR was first drafted. It has also chosen to set another, lower, standard of protection for these 'fringe' rights. A standard that finds no support in the actual wording of the Article.

At the same time, and from a more pragmatic perspective, the ECHR needs to be a living instrument and to adjust itself to an ever-changing reality. The ECHR would lose much of its value if the Strasbourg court could not follow the development of society, and interpret the Convention in the light of contemporary life. As *Letsas* argues, evolutive interpretation simply denotes a process of moral discovery: the Strasbourg court is not expanding or inflating the scope of the ECHR rights by treating the Convention as a living instrument; rather, it discovers what these human rights always meant to protect.<sup>473</sup> Of course, the court should not pick up every trend, but just as it needs to adjust its interpretation of the ECHR to the specific circumstances of each Contracting State, it will have to be able to adjust its interpretation of the ECHR provisions to changes over time. In the case of *Goodwin v. United Kingdom*, the court affirmed its conviction with respect to two important principles of interpretation in a Grand Chamber ruling. The court declared that it should (i) interpret the ECHR in a way that renders its rights practical and effective, not theoretical and illusory, and (ii) maintain a dynamic and evolutive approach.<sup>474</sup> Furthermore, according to *Mahoney*, former Deputy

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<sup>472</sup> See e.g. *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, para 59, and *Janosevic v Sweden*, judgment of 23 July 2002, Application no. 34619/97, para 81.

<sup>473</sup> Letsas, *The ECHR as a Living Instrument: Its Meaning and its Legitimacy*, in Føllesdal, Peters and Ulfstein, *Constituting Europe; The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, 2013, p. 125. Letsas argues that evolutive interpretation, understood as moral reading of the text, does not threaten the legitimacy of the Strasbourg court, but rather that the moral reading is essential to the court's overall legitimacy.

<sup>474</sup> *Christine Goodwin v the United Kingdom*, judgment of 11 July 2002, Application no. 28957/95, at para 74.

Registrar for the Strasbourg court, the special nature of the ECHR compels a flexible and evolutive interpretation of its open-textured terms if the ECHR is to be prevented from becoming progressively ineffective with time.<sup>475,476</sup>

However, accepting that the ECHR is a living instrument or that the rights surrounding individuals in competition law matters are not absolute, does not imply that those rights should be limited without justification. In order not only to guarantee a proper protection of individual rights, but also to ensure legal certainty, any limitations on fundamental rights should be made following a strict methodology. The principle of effective protection of individual rights holds that, given the primary function of both the ECHR and the Charter, rights should be interpreted broadly and any exceptions narrowly. The right is the rule, the limitation the exception. Likewise, the principle of proportionality should limit rights interference to that which is least intrusive in pursuit of a legitimate objective. To justify substantive protection of individual rights above collective goals or giving priority to one right before another, courts must be able to invoke some objective criteria against which to rank their relative importance, such that choices made by defendant states or authorities may clearly be said to be wrong.<sup>477</sup>

The basic requirement in every constitutional democracy is that every limitation of a fundamental right may be traced back to a valid legal norm. A legal provision limiting a fundamental right must constitute part of the legal system's hierarchical structure. Regardless of its distance from the constitution it must ultimately be connected to an authorization found therein.<sup>478</sup> Furthermore, as *Beatty* points out, a limitation is only constitutional if it is proportional.<sup>479</sup> Only when a measure limiting a fundamental right is proportional can we say that the limitation of the fundamental right is valid. The legislature or courts are not invited to limit rights as they see fit.<sup>480</sup> The limitation must serve a proper purpose. The means should be rational and necessary, and the harm to a right must be

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<sup>475</sup> Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Human Rights Law Journal (1990) 57 at p. 65.

<sup>476</sup> For a further discussion on Strasbourg court's interpretative methods, see Section 1.6.1.1 above.

<sup>477</sup> McHarg, *Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review*, vol. 62, no 5, 1999, p. 679.

<sup>478</sup> Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 108.

<sup>479</sup> Beatty, *The Ultimate Rule of Law*, Oxford University Press, 2004, p. 163.

<sup>480</sup> Webber, *The Negotiable Constitution: On the Limitation of Rights*, Cambridge University Press, 2009, p. 149.

proportional to the benefit gained by the limitation. The limitation should thus be in accordance with the principle of proportionality.

### 5.3 The principle of proportionality – Historical background

An eye for an eye. A law must be a rational means to a permissible and desirable aim. A punishment must fit the crime. It is thoroughly unnecessary to use a jackhammer to crack a nut when a nutcracker would do. These are all expressions of the principle of proportionality. In short, the principle means that no public institution should be allowed to interfere with an individual's fundamental rights, unless the institution can show that such interference is justified.

The notion of proportionality is far from new. It can be traced back all the way to ancient Greece and Aristotle's theories on distributive justice, according to which there should be a right relationship between the state and the citizen, adjudicated by the rule of law.<sup>481</sup> From there, Aristotelian thought has continued through history, to Cicero, the Magna Charta and in to the modern, everyday world.<sup>482</sup>

In Europe, or more precisely in Germany and France, the principle of proportionality was developed by the judiciary during the second half of the nineteenth century as a response to the growth of administrative powers and the increased administrative discretion. The principle emerged as a core administrative law principle already in 1794, when the Prussian General Law was enacted and a provision concerning police powers was included with the following wording: 'The office of the police is to take necessary measures for the maintenance of public peace, security and orde[r]'.<sup>483</sup> The provision was later applied to protect the individual against arbitrary and excessive interference by the public.<sup>484</sup> In a notable case, *Kreuzberg*,<sup>485</sup> the Prussian Supreme Administrative Court developed the notion that the state required special permission in order to interfere with a citizen's civil liberties. In the

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<sup>481</sup> Roemer, *Theories of Distributive Justice*, Harvard University Press, 1996.

<sup>482</sup> Engle, *The History of the General Principle of Proportionality: An Overview*, Dartmouth Law Journal, vol. 10, issue 1, 2012.

<sup>483</sup> Article 10 II 17 of the *Allgemeines Landrecht*, ALR.

<sup>484</sup> See e.g. Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law, Cambridge University Press, 2013, pp. 10-11, and Stone Sweet and Mathews, *Proportionality Balancing and Global Constitutionalism*, Yale Faculty Scholarship Series, Paper 14, 2008, at p. 19.

<sup>485</sup> 14 June 1882, Pr OVG, 29, 253.

case at hand the police sought to rely on the above referred provision, but the court held that, to test this reliance, it had to examine whether the force of police measures exceeded what was required by the pursued objective.<sup>486</sup>

At the time, the notion of human rights was still rather unknown. Two world wars later, the situation was quite different. The Universal Declaration of Human Rights was adopted in 1948, and at European level, the ECHR came into force only a few years later. Individuals had been vested with rights.

Today, the principle of proportionality is still applied, but in most cases it can be viewed from another angle. Its basic aim – to secure a balance between public and individual interests – has not changed, but there has been a shift in weights, so to speak. Instead of granting individuals rights that did not previously exist, the principle is now applied to limit the rights that various human rights instruments and constitutions have granted to individuals. The principle of proportionality has become the preferred procedure for managing disputes involving an alleged conflict between two fundamental-rights claims or between a rights provision and a public interest.<sup>487</sup> Or, to use the words of *Stone Sweet* and *Mathews*, ‘proportionality exhibits a viral quality, spreading relatively quickly from one jurisdiction to another’.<sup>488</sup> Although the principle existed long before the adoption of the ECHR and other bills of rights, it is sometimes described as a ‘necessary side-effect’ of implementing the Anglo-American concept of a bill of rights in continental European constitutions.<sup>489</sup>

The principle of proportionality provides a method for limiting rights. Its wording suggests that any limitations should be moderate or proportional, but which steps are actually to be taken when applying this procedure? Which are the building blocks of the proportionality principle, and does the principle really provide a common and structured methodology for dealing

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<sup>486</sup> See e.g. Cohen-Eliya and Porat, *American Balancing and German Proportionality: The Historical Origins*, International Journal of Constitutional Law (ICON), vol. 8, no. 2, 2010, p. 273.

<sup>487</sup> For a further discussion on how the proportionality principle has found its way into a vast number of legal systems throughout the world, see e.g. Beatty, *The Ultimate Rule of Law*, Oxford University Press, 2004, pp. 161-164, Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law, Cambridge University Press, 2013, pp. 10-23, and Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, Faculty Scholarship Series, 2008, Paper 1296, [http://digitalcommons.law.yale.edu/fss\\_papers/1296](http://digitalcommons.law.yale.edu/fss_papers/1296), p. 73.

<sup>488</sup> Stone Sweet and Mathews, *Proportionality Balancing and Global Constitutionalism*, Yale Faculty Scholarship Series, Paper 14, 2008, at p. 28.

<sup>489</sup> Harbo, *The Function of the Proportionality Principle in EU Law*, European Law Journal, vol. 16, no. 2, March 2010, p. 158.

with situations of conflicting rights or where rights clash with public interests?

## 5.4 The building blocks of the principle of proportionality

‘[a]s is generally the case with general principles of law as a legal source, until there is settled case-law on the matter, discussing the concrete content of such a principle can be very much like discussing the shape of a ghost.’<sup>490</sup>

Indeed, this is true also for the principle of proportionality. Although most people – not only lawyers – would say that they know the meaning of the word proportionality, attempting to define when and how to apply such principle is not necessarily an easy task. Looking up the word ‘proportionate’ in dictionary tells us that it means ‘being in a state of proper equilibrium’. This suggests that when applying the principle of proportionality, the judge (or legislator) should strive to find and strike a fair and proper balance between different and competing interests – a proper equilibrium.

Take the right to privacy for example. Both Article 7 of the Charter and Article 8 of the ECHR ensure a right to privacy. However, this right is not absolute. Article 8 of the ECHR contains an express limitation clause, and the right may thus be limited under certain, specified, circumstances. In the sphere of competition law enforcement, companies may have to see their right to privacy limited through dawn raids performed by the competition authorities in the interest of securing effective and efficient competition law enforcement.

According to both EU law and the ECHR, any such intervention needs to be proportionate. The measure shall be necessary and serve a proper purpose. This seems both fair and logical and few would argue against this standpoint. When applying the proportionality principle in such a situation, the court would have to assess the suitability and necessity of the dawn raid and then balance the harm caused to the companies against the gains made by society through the measure.

Another basic precondition is that the question of the appropriate level of sophistication for the principle of proportionality, in its formulation and application, depends on the intensity of control that the legal system in

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<sup>490</sup> Opinion of AG Mazak in Case C-47/07 P, *Masdar (UK) Ltd v Commission of the European Communities*, EU:C:2008:342.

question wishes to exercise.<sup>491</sup> Shall the weights shift as soon as there is a slight imbalance or will they not shift until measures taken by the authorities are manifestly disproportionate? As will be further discussed, both the ECJ and the Strasbourg court have traditionally shown a tendency to exercise self-restraint and perform only a marginal review of measures taken by the Union institutions (EU) or the Contracting States (ECHR), allowing the weights to shift only when a measure taken is manifestly disproportionate. However, before highlighting the effects and implications of such marginal review, the structure of the principle of proportionality will be presented.

As mentioned earlier, the application of the principle of proportionality is rapidly spreading around the world, and is currently applied by courts in Europe, Canada, South Africa and Australia, to name just a few jurisdictions. The fact that the application of the principle is gaining near universal application could suggest that there is a common analytical framework for rights limitations, and that the principle of proportionality provides a very clear and structured methodology for limiting rights. However, it turns out that, in terms of the exact scope and application of the proportionality principle, there appears to be just as many modes of application as there are states or organs applying the principle. There are differences not only in relation to the criteria to be applied but also in how refined the analytical structure should be. While there are of course a number of common denominators, there is no universal structure or methodology followed by courts around the world.

There is thus no ‘check list’ for its application. Some courts tend to perform a very structured and methodological proportionality analysis whereas other courts, including the ECJ and the ECtHR, do not always appear to be equally methodological when determining whether a measure is disproportionate or not. This being said, the most refined, and also most commonly referred, formulation of the principle of proportionality divides it into four different parts, or criteria. These criteria are cumulative and not alternative. Thus, if one criterion is not fulfilled, then the measure is disproportionate, and the limitation of the right cannot be considered justified.

First of all, there should be a legitimate aim or a proper purpose. In some jurisdictions, the objective of the measure limiting the right must be of sufficient importance to warrant the limitation, in others it is sufficient that the measure is legitimate, that is constitutional.<sup>492</sup> Sometimes, this test is not

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<sup>491</sup> See van Gerven, *The Effect of Proportionality on the Actions of the Member States*, in Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, 1999, p. 61.

<sup>492</sup> See e.g. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, Brauch, *The Margin of*

treated as a separate test, but is instead considered to be implicit in the next test, that of suitability.

Secondly, there must be a rational connection between the proper purpose and the chosen means (suitability).

Thirdly, not only should there be a rational connection between the means and the purpose, but the means chosen shall be necessary to achieve the purpose. There should not be any less restrictive means available, and the means opted for should impair the right as little as possible (necessity).

Finally, there must be a proper relation between the benefits gained by the measure in question and the harm caused to the rights of the individual (also called proportionality *stricto sensu*). The benefit from realizing the objective should exceed the harm to the right. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be considered reasonable and demonstrably justified in a free and democratic society.<sup>493</sup> These are the four cornerstones of the principle of proportionality.

#### 5.4.1 Proper purpose

Article 8(2) of the ECHR requires that any limitation on the right to privacy should be 'in accordance with the law' and pursue a legitimate aim, reflecting the need for a proper purpose. However, the fact that there is a legal authorization to limit a fundamental right is not considered sufficient to establish a proper purpose, as legality does not equal legitimacy. In its case-law, the Strasbourg court has established that not only shall the measure have a basis in national legislation, such legislation must be accessible, foreseeable and compatible with the rule of law.<sup>494</sup>

The limitation of a right should always be in pursuit of another end, but not every purpose can thus justify a limitation of a fundamental right. As *Alexy* puts it, a norm can only limit a constitutional right if the norm itself is constitutional. Norms are only limits to fundamental rights if they

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*Appreciation and the Jurisprudence of the European Court of Human rights: Threat to the Rule of Law*, Columbia Journal of European Law, vol. 11, 2005, and Ehlers, *European Fundamental Rights and Freedoms*, De Gruyter Recht, 2007.

<sup>493</sup> See e.g. Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 223, Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law, Cambridge University Press, 2013, p. 2.

<sup>494</sup> See e.g. *Harju v Finland*, judgment of 15 February 2011, Application no. 56716/09, paras 38 and 39.

themselves are compatible with the constitution.<sup>495</sup> According to *Stone Sweet*, the purpose of the measure must at least be ‘constitutionally legitimate’.<sup>496</sup> In short, the measure limiting the fundamental right must be for a purpose that justifies such limitation. It does not mean that the opposing right or interest is necessarily found among constitutional rights, but it must be derived from such a norm.

If the purpose does not justify the limitation, if it is not a proper purpose, then the measure should be struck down without any further examination. Only after the purpose is found to be proper is it possible to continue and examine whether the means chosen to achieve that purpose are proper as well, and whether the relationship between the benefits of realizing the goals envisaged by the measure, and the harm caused to the right in question is proportional.<sup>497</sup>

When determining whether a specific purpose is ‘proper’, and capable of justifying a limitation of a fundamental right, there are two aspects to consider;

- i) the nature of the purpose – is it capable of justifying a limitation, and
- ii) the degree of urgency required in realizing such purpose.

As for the nature of a proper purpose, it can be identified in a number of ways, and sometimes proper purposes are listed in the statutory provisions granting the right in question. Article 8 of the ECHR not only requires a limitation to be ‘in accordance with the law’, it should also further a certain, specified, aim. The rights contained in Article 8 through 11 of the ECHR are all accompanied by specific limitation clauses, explicitly listing the purposes that may justify a limitation of those rights.

For example, Article 8(2) specifies the situations where the right to privacy may be limited, that is when a limitation:

[i]s necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

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<sup>495</sup> Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2002, p.182.

<sup>496</sup> Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, Faculty Scholarship Series, 2008, Paper 1296, [http://digitalcommons.lawyale.edu/fss\\_papers/1296](http://digitalcommons.lawyale.edu/fss_papers/1296), p. 75.

<sup>497</sup> Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012, p. 249.



The prevailing view with regard to these ECHR provisions is that the list of express purposes provided therein is exhaustive, and that no implied purposes should be deduced or added to the list.<sup>498</sup>

As mentioned above, there is also an element of urgency required, according to which we need not only to determine the nature of the purpose, but also the urgency of its realization. In some jurisdictions, such as Germany, this test is carried out at a later stage of the proportionality analysis, that is at the stage of performing the balancing exercise and determining whether the measure is proportional *stricto sensu*. Other jurisdictions, including Canada and South Africa, perform this test at the first stage of the proportionality test.<sup>499</sup>

#### 5.4.2 Suitability

The second stage of the proportionality test is the suitability test. Here, the court must determine whether there is a rational connection between the challenged measure and the proper purpose – that is whether the means chosen to achieve the proper purpose can actually realize or advance the purpose in question. There is no requirement that the means chosen are the only ones available and capable of realizing the purpose in question, or that they fully realize the purpose. A partial realization of the purpose, provided that it is not negligible or marginal, satisfies the suitability test.<sup>500</sup>

#### 5.4.3 Necessity

The third stage of the proportionality analysis is the necessity test, also known as the ‘least restrictive means test’. According to this test, only the measure that is least limiting the right in question will be accepted. A measure should not be allowed to limit a fundamental right more than is necessary to realize the proper purpose. However, while the measure would be struck down if a less intrusive measure exists, this is the case only where the less intrusive measure is equally effective. The necessity test thus means that the use of the measure in question is required only if the purpose cannot be achieved through the use of any other means that would equally satisfy

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<sup>498</sup> Jacobs, White & Ovey, *The European Convention on Human Rights*, 5<sup>th</sup> edn, Oxford University Press, 2010, p. 310.

<sup>499</sup> See e.g. Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012, pp. 245-302.

<sup>500</sup> *Ibid.*, p. 305.

the rational connection test and the level of limitation of the right in question would be lower.<sup>501</sup>

#### 5.4.4 Proportionality *stricto sensu*

The final stage of the proportionality analysis is where the balancing is actually conducted. This part is all about assessing whether one interest should be allowed to prevail over another.

The test of balance fills a completely different function than the test of necessity. While the test of necessity seeks to establish whether the limitation is efficient, thus filtering out cases in which the same result could be achieved through less restrictive means, the test of balance is strongly evaluative. It seeks to determine whether the combination of certain levels of rights-enjoyment combined with the achievement of other interests is acceptable. As *Alexy* points out, the most common case is when the two rights or principles that clash have an equal status in the abstract. The court will have to determine which of these principles or rights will be given a greater weight in the concrete case.<sup>502</sup>

It is not uncommon that courts limit their application of proportionality to the balancing exercise, leaving the other steps of the test aside. The principle of proportionality *stricto sensu* follows from the assumption that principles are optimization requirements relative to what is legally possible. The principles of necessity and suitability serve another purpose and follow from what is factually possible – is it possible to achieve the same purpose using other means?

Although there is a distinction between what is factually or legally possible, any practice whereby courts refrain from asking whether there are other, less restrictive means available, is questionable. Can a measure really be deemed proportionate if there are other, less restrictive means that are equally effective? Irrespective of the answer, it is easy to see that this last part of the proportionality test is by far the most sensitive one, and the one most open to criticism. The separation of powers inherent in the concept of democracy means that law-making should be left to the legislator. The role of the court is to adjudicate – nothing else.

Those critical of the principle of proportionality and its application often argue that the balancing exercise by necessity makes a law-maker out of the

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<sup>501</sup> *Ibid*, p. 317.

<sup>502</sup> *Alexy, A Theory of Constitutional Rights*, Oxford University Press, 2002, p. 51.

judge, as unelected judges get to decide whether particular policies are justified in the interest of the public and whether it is necessary for these interests to defer to individual rights or *vice versa*.<sup>503</sup> According to the critics, decisions may not have the precision that metric balancing produces, as it is not clear what is weighed, how it is weighted and who is (or who should be) doing this weighing exercise. Of course, there is validity in this criticism.<sup>504</sup>

However, it is difficult to see how conflicts of rights or interests could be avoided or how such conflicts could be resolved in any other manner than through a case-by-case analysis. Giving the legislator the exclusive right to weigh one interest against another would create a system which is too blunt and rigid. Nevertheless, the criticism highlights the need for an objective, structured and methodological application of the proportionality principle. The more structured the application, the less room there is for any such concerns. As will be discussed further in this chapter, there are grounds for arguing that, by and large, neither the Strasbourg court nor the ECJ has developed or applied such a strictly ordered version of the proportionality test. Below is a brief presentation of the Strasbourg court's approach when applying the principle of proportionality, followed by a more in-depth analysis of the ECJ's case-law on proportionality.

## 5.5 Proportionality in the ECHR

Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.<sup>505</sup>

Very few ECHR rights are absolute. Most may be subject to limitations – either through express provision in the ECHR or through the hands of the Strasbourg court. Irrespective of the grounds on which a right is limited, the Strasbourg court has identified a common denominator for rights limitations; there must always be a proportionate relationship between the aims pursued by the interference and the right at stake. Indeed, the court has held that the requirement of proportionality is inherent in the ECHR as a whole. Thus, in

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<sup>503</sup> McHarg, *Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, *Modern Law Review*, vol. 62, no 5, 1999, p. 672.

<sup>504</sup> Tsakyrakis, *Proportionality: An Assault on Human Rights?*, *International Journal of Constitutional Law (ICON)*, vol. 7, no. 3, 2009, pp. 468-493, p. 470.

<sup>505</sup> *Soering v United Kingdom*, judgment of 7 July 1989, Application no. 14038/88 (plenary session), p. 89.

*Soering* the court declared that the search for a fair balance between the demands of the general interest of the community and the requirement of the individual's fundamental rights was inherent in the whole of the Convention.<sup>506</sup>

Yet, the ECHR makes no reference to proportionality by that name. Instead, the principle has gained a central role in the application of the Convention through the jurisprudence of the Strasbourg court. The application of the principle can be traced back to the seventies and the Strasbourg court's ruling in *Handyside*.<sup>507</sup>

In this classic case, the court had to rule on an alleged infringement of the right to freedom of expression laid down in Article 10 of the ECHR. Mr Handyside was the owner of the publishing firm 'Stage 1', a firm which had published the 'Little Red Schoolbook' containing passages that were deemed obscene. Consequently, the police had seized a number of copies and Mr Handyside was charged with the offence of having obscene books in his possession. The case wandered through the British legal system, before the Strasbourg court had to deal with the question of how Article 10 of the ECHR should be interpreted. The Strasbourg court declared that freedom of expression constitutes one of the essential functions of a democratic society, and that it is applicable not only to ideas that are favourably received, but also those that offend, shock or disturb the state. Consequently, the court declared:

This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>508</sup>

A few years later, in the case of *Sporrong and Lönnroth v. Sweden*, the Strasbourg court declared that the search for a balance between fundamental rights and the public interest was inherent in the ECHR through the following statement:

[t]he Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, mutatis mutandis, the judgment of 23 July 1968 in the 'Belgian Linguistic' case, Series A no. 6, p. 32, par. 5). The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1).<sup>509</sup>

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<sup>506</sup> Ibid.

<sup>507</sup> *Handyside v United Kingdom*, judgment of 7 December 1976, Application no. 5493/72.

<sup>508</sup> Ibid, para 49.

<sup>509</sup> *Sporrong and Lönnroth v Sweden*, judgment of 23 September 1982, Application no. 7151/75, para 69.

Although the proportionality principle thus forms a centrepiece among the principles governing the rights and freedoms of the ECHR, its application is not as stringent as the one described in the previous section. The four-pronged test is seldom applied in its entirety. Indeed, the Council of Europe has declared that although the doctrine of proportionality is at the heart of the Strasbourg court's investigation into the reasonableness of any restriction, and that the court must always ensure that the rights laid down in the ECHR are not interfered with unnecessarily, the test is applied differently depending on which right is at stake.

The Council of Europe states that the strict approach set out in *Handyside* is appropriate 'where fundamental rights are at stake (such as freedom of expression or intimate aspects of private life) and consists in a four questions test':

1. Is there a pressing social need for some restriction of the Convention?
2. If so, does the particular restriction correspond to this need?
3. If so, is it a proportionate response to that need?
4. In any case, are the reasons presented by the authorities relevant and sufficient?<sup>510</sup>

In other cases the Council of Europe declares, the Strasbourg court uses the phrase 'a reasonable relationship between the means and the aim sought to be realised' or 'a fair balance' between the general and individual interests at stake (such as property rights).<sup>511</sup>

How the Council distinguishes between 'fundamental rights' and other rights is not evident. Furthermore, it is rare for the Strasbourg court to apply the necessity test as separate from the proportionality *stricto sensu* test.<sup>512</sup> One reason for this application of the proportionality principle, may be the structure of Articles 8 through 11, and the limitation clauses contained therein. These articles explicitly allow for derogations that are:

1. in accordance with the law; and
2. necessary in a democratic society in the interests of number of specified aims, such as national security, public safety and the prevention of disorder or crime.

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<sup>510</sup> [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp).

<sup>511</sup> Ibid.

<sup>512</sup> See e.g. the Strasbourg court's reasoning in *Handyside v United Kingdom*, judgment of 7 December 1976, Application no. 5493/72, paras 48-50.

First of all, the construction of the articles implies that, to a certain extent, the priority assessment has already been made by the legislator. The list of interests is considered to be exhaustive and the rights enshrined in Articles 8 through 11 should thus automatically prevail over all interests other than those listed.<sup>513</sup>

As for the meaning of the term ‘necessary in a democratic society’, the Strasbourg court has declared that this term should not be equated with the necessity test presented in Section 5.4.3 above. Thus, in the *Sunday Times* case the court made the following statement:

The Court has noted that, whilst the adjective ‘necessary’, within the meaning of Article 10 (2) (art. 10-2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and that it implies the existence of a ‘pressing social need’ (p. 22, para. 48).<sup>514</sup>

The term necessary is not synonymous with indispensable, but implies the existence of a ‘pressing social need’. As noted by *Gerards*, this requirement seems to concern the weight and importance of the aims pursued: it is not sufficient that the interests served by a limitation of a right are legitimate, they should also be ‘pressing’.<sup>515</sup> In the case of *Robathin v. Austria*, the Strasbourg court made clear that the term ‘necessary in a democratic society’ alluded to a proportionality *stricto sensu* test rather than a less restrictive means test, declaring that:

[w]hether the measure was ‘necessary in a democratic society’, in other words, whether the relationship between the aim sought to be achieved and the means employed can be considered proportionate.<sup>516</sup>

In the case at hand the court had to assess the legality of a search and seizure carried out by Austrian authorities at the premises of a law firm. The test carried out by the Strasbourg court was limited to determining whether there were sufficient procedural safeguards surrounding the search. The actual need to carry out a search or the possibility of other, less restrictive (but equally effective) measures was not discussed by the court. It may well be that no other measures were equally effective and that the court considered this without specific reference to this issue. However, to the outside reader,

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<sup>513</sup> Jacobs, White & Ovey, *The European Convention on Human Rights*, 5<sup>th</sup> edn, Oxford University Press, 2010, p. 310.

<sup>514</sup> *The Sunday Times v the United Kingdom*, judgment of 26 April 1979 (plenary session), Application no. 6538/74, Para 59.

<sup>515</sup> Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, *International Journal of Constitutional Law*, I:CON, vol. 11, no. 2, 2013, p. 467.

<sup>516</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 43.

the court's silence on this issue suggests that a measure may be deemed proportionate even where there are other less restrictive means available.

This being said, it is more likely that the Strasbourg court chose to rely on the discretion of the Austrian state, as it had declared already in *Handyside* that the Contracting State is in principle in a better position to give an opinion on the exact content of the (in that case moral) requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.<sup>517</sup> In the case of *Canal Plus* the court addressed this issue specifically. First it declared that the notion of 'necessity' required the existence of a pressing social need, but also that the measure should be proportionate in relation to the aim pursued, once again implying that the necessity test of Article 8 ECHR includes a proportionality *stricto sensu* test. The court further noted that national authorities have a margin of appreciation when determining whether there are other, less restrictive means available.<sup>518</sup>

Likewise, in the case of *Société Colas*,<sup>519</sup> when determining whether the dawn raids performed by the French competition authorities were 'necessary in a democratic society', the Strasbourg court accepted that Contracting States have a margin of appreciation when it comes to determining the need for interference, at the same time declaring that the exceptions in Article 8(2) should be interpreted narrowly.<sup>520</sup> In the case at hand, the court did not object to the scale of the operations which sought to prevent the concealment or disappearance of evidence, but stated that these measures had to be surrounded by adequate and effective safeguards against abuse. The safeguards available were considered inadequate and the court concluded that the operations were not strictly proportionate to the aims pursued.

The case of *Société Colas* suggests that, although the Contracting States may be granted some margin of appreciation when it comes to the choice of means, the exception to the general rule in Article 8(1) shall be interpreted narrowly and the need for the chosen means must be convincingly

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<sup>517</sup> *Handyside v United Kingdom*, judgment of 7 December 1976, Application no. 5493/72, para 48.

<sup>518</sup> *Société Canal Plus and Others v France*, judgment of 21 December 2010, Application no. 29408/08, para 54.

<sup>519</sup> *Société Colas Est and Others V France*, judgment of 16 April 2002, Application no. 37971/97.

<sup>520</sup> The Strasbourg court declared already in *Handyside* that Article 10 of the ECHR leaves to the Contracting States a margin of appreciation, and that it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity. See *Handyside v United Kingdom*, judgment of 7 December 1976, Application no. 5493/72, paras 48-50.

established.<sup>521</sup> Any operations must be ‘strictly proportionate’ to the aims pursued. As will be discussed below, the standard set by the ECJ appears lower – at least when it comes to assessing measures taken by the EU institutions – as the Court has often required operations not to be manifestly disproportionate.

## 5.6 Proportionality in the EU

The principle of proportionality is a general principle of EU law, underpinning the constitutional order of the European Union. It has even been codified, and is now part of the Treaties. Thus, Article 5(4) of the TEU reads:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Within EU law proportionality is a principle that serves mainly as a framework for decisions to determine whether and/or to what extent rights can be limited by governmental intervention that is motivated by public interests. The proportionality test applies to measures taken at Union as well as at Member State level.

Within the context of competition law, the principle serves a twofold aim. First of all, it may be applied to ensure that any intervention by competition authorities during the course of a competition case is restricted to what is necessary and does not pose a disproportionate burden on the individual targeted by the authority’s investigation.

Second, the principle may also be applied with regard to any sanctions imposed on competition law offenders. As previously mentioned, the expression ‘the punishment must fit the crime’ reflects the principle of proportionality. As for antitrust cases, there seems to be a common understanding among regulators and enforcers that sanctions should be severe to reflect the harm caused to society by cartels and abuse of market power. Below is a brief description of how the principle has made its way into EU law, followed by a discussion on its application by the EU Courts.

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<sup>521</sup> *Société Colas Est and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 47.



## 5.7 The principle of proportionality in the EU – Historical background

As was mentioned earlier, the principle of proportionality is considered to underpin the constitutional order of the Union and is even expressly referred to in the Treaties. However, as with so many other general principles, it has not always held a prominent position in the EU legal system. It was not until 1970, when the Court delivered a preliminary ruling in the seminal case of *Internationale Handelsgesellschaft*, that the principle made its way into the EU legal order.<sup>522</sup> The case concerned the validity of a Council regulation requiring exporters of maize to lodge a deposit guaranteeing that exportation would be effected during the term of the export licence.

In the case at hand, exportation had been only partially effected, and part of the deposit had therefore been declared forfeited. In a referral to the ECJ for a preliminary ruling, the German court wished to ascertain whether such system was contrary to the principle of proportionality. Although the ECJ did not make any explicit reference to the principle, it appears to have applied it, as it stated:

It therefore appears that the requirement of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals.<sup>523</sup>

Since then, the Court has applied the principle on numerous occasions, and in *Schraeder*, it made explicit reference to the principle, stating:

The Court has consistently held that the principle of proportionality is one of the general principles of Community law.<sup>524</sup>

The principle is mainly applied in two different contexts, to review measures undertaken by EU institutions, and to review measures by Member States which limit the fundamental freedoms. The application of the proportionality principle tends to differ based on whether the matters concerns EU legal acts or legal acts of the Member States. In the former case a manifestly disproportionate test is often applied, whereas the Court tends to carry out a

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<sup>522</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.

<sup>523</sup> *Ibid.*, para. 12.

<sup>524</sup> Case 265/87, *Hermann Schraeder HS Kraftfutter GmbH & Co v Hauptzollamt Gronau*, EU:C:1989:303, para. 21.

more intense scrutiny in the latter case, applying a least restrictive means test.<sup>525</sup>

However, this work will analyse only the application of the principle in relation to Union measures. Save for the presentation of the development of the principle in EU law, its application in relation to Member State measures will be left aside as it has no apparent bearing on the subject-matter of the thesis.

Although the case-law on the principle of proportionality is now abundant, it is not necessarily consistent. In some cases, two conditions are said to apply,<sup>526</sup> in others, the Court distinguishes between three conditions (suitability, necessity and absence of disproportionate character).<sup>527</sup> In the case of *Fromançais*, the Court identified two criteria necessary for a measure to be proportionate. First, the ECJ established, the means employed to achieve the aim must correspond to the importance of the aim. Secondly, those means must be necessary for the attainment of the aim. The first criterion may encompass both a suitability test and a proportionality *stricto sensu* test.<sup>528</sup>

In the classic *Hauer* ruling from 1979, the Court had to consider the principle of proportionality in relation to the right to property and the right to freely pursue a trade or profession. There, the applicant had applied to the German authorities for permission to plant vines on a plot of land. Her application was denied and she appealed the decision to the German courts. At the same time, Council Regulation 1162/76 was adopted, imposing a ban on the new planting of vines throughout the EU. The aim of the regulation was to provide a common organization of the wine market in conjunction with a structural improvement in the wine producing sector. The applicant claimed that such a ban infringed fundamental rights such as the right to property and the right to freely pursue a trade or profession, and that the regulation should be set aside. In a preliminary ruling, the ECJ had its say in the matter.

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<sup>525</sup> Weiss, *Is the CJEU Turning into a Human Rights Court?* in Morano-Foadi and Vickers (eds), *Fundamental Rights in EU: A Matter for Two Courts*, Hart Publishing, 2015, p. 73.

<sup>526</sup> See e.g. Case 66/82, *Fromançais v FORMA*, EU:C:1983:42, para. 8.

<sup>527</sup> See e.g. Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others*, EU:C:1990:391, and Opinion of Advocate General van Gerven in Case C-159/90, *The Society for the Protection of Unborn Children Ireland v Stephen Grogan and Others*, EU:C:1991:249.

<sup>528</sup> Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, 1999, p. 38, and Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in Ellis (ed.) *The principle of Proportionality in the Laws of Europe*, Hart Publishing, 1999, p. 139.

The Court acknowledged that the general ban on the planting of vines restricted the use of the property in the meaning of Protocol 1 to the ECHR, but that said provision allowed a state to enforce such laws as it deemed necessary to control the use of property in accordance with the general interest. As all wine producing Member States had restrictive legislation concerning the planting of vines, the fact that the Regulation imposed restrictions on the new planting of vines could not be challenged in principle.<sup>529</sup>

The Court nevertheless found it necessary to examine whether the restrictions introduced by the provisions did in fact correspond to objectives of general interest pursued by the EU or whether they constituted a disproportionate and intolerable interference with the rights of the owner, impinging on the very substance of the right to property.<sup>530</sup>

This, the Court determined, was done by identifying the aim pursued by the disputed regulation and by determining whether a reasonable relationship existed between the measures provided for by the regulation and the aim pursued by the EU in the case at hand.

The plaintiff had argued that the measure was disproportionate and claimed that only a qualitative policy would permit the legislature to restrict the use of vine-growing property, hence claiming that there were in fact less restrictive means available to deal with the problem. The Court did not accept this claim as the Regulation had a dual objective; to raise the quality of the wine produced in the EU, and to deal with permanent production surpluses. The necessity test did thus form part of the assessment whether there existed a reasonable relationship between the measures provided for and the aim pursued.

The measure, despite its sweeping scope, was of a temporary nature and had been introduced to deal immediately with a conjunctural situation characterized by surpluses; at the same time it was preparing permanent structural changes but did not entail any undue limitation on the exercise of the right to property. Instead, it was deemed justified by the objective of general interest pursued by the EU and did not infringe on the substance of the right to property in the form in which it was protected under EU law.

The ruling indicates that a general interest may have to give way to a fundamental right only if it impinges on the very substance of the right in question; this is a rather low threshold allowing the right to be limited to its

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<sup>529</sup> Case 44/79, *Liselotte Hauer and Rheinland-Pfalz*, EU:C:1979:290, para 22.

<sup>530</sup> *Ibid*, para. 23.

essential core. Although this is in line with the wording of Article 52(1) of the Charter, which provides that any limitation of a right must respect the essence of such right, in most cases the application of the principle of proportionality also laid down in that article requires a narrower limitation of the right.

In the case at hand, the right that had been limited was the right to property, a right that ranks rather low in the ‘fundamental rights hierarchy’. It is likely that had the case concerned a right of higher rank, the ECJ would have set a higher threshold. Another striking feature of this ruling is that it does not follow the structured analysis presented in the previous section. Nevertheless, there are examples of cases where the Court or the Advocate Generals have carried out structured proportionality tests.

In the *Irish Abortion Cases*, AG Van Gerven declared that in order for a national rule to be justified, it should not only pursue a proper purpose, it should also be suitable and the least restrictive means available as well as proportionate *stricto sensu*.<sup>531</sup> Furthermore, in *Fedesa*, the Court declared that in order for a measure to be considered proportionate, there must be a legitimate aim, the measure shall be both appropriate and necessary to achieve such aim and the disadvantages caused may not be disproportionate to the aim pursued.<sup>532</sup> This definition of the principle is also found in subsequent rulings such as *Crispoltoni*.<sup>533</sup>

However, although there is judicial support for a more structured analysis and although the Court sometimes follows or at least acknowledges the existence of a strict order, the ECJ often refrains from distinguishing between the different tests. According to *Weiss*, the ECJ rarely tests the adequacy of the measure unless one of the parties raises the issue.<sup>534</sup> *Weiss* also takes note of the fact that Article 52(1) of the Charter, declaring that limitations may be made only if they are necessary and genuinely meet objectives of general interest, does not explicitly mention the proportionality *stricto sensu* test.<sup>535</sup> Instead, the Article declares that any limitation must

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<sup>531</sup> Opinion of AG Van Gerven in Case 159/90, *The Society for the Protection of Unborn Children Ireland v Stephen Grogan and Others*, EU:C:1991:249.

<sup>532</sup> Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others*, EU:C:1990:391, para 13.

<sup>533</sup> Case C-133/93, *Crispoltoni and Others v Fattoria Autonoma Tabbachi and Others*, EU:C:1994:364, para 41.

<sup>534</sup> Weiss, *Is the CJEU Turning into a Human Rights Court?*, in Morano-Foadi and Vickers (eds), *Fundamental Rights in EU: A Matter for Two Courts*, Hart Publishing, 2015, p. 73.

<sup>535</sup> This being said, the Explanations state that no restrictions should constitute, with regard to the aim pursued, a disproportionate or unreasonable interference undermining the very

respect the essence of the right in question. This is something other than a balancing exercise, and, just as in *Hauer*, it suggests that a right may be stripped to its core before a limitation is considered unjustified.

Is it in fact so that the methodology used and the number of criteria applied by the ECJ may depend on the nature and importance of the right in question, or whether it is a Member State or EU institution that has adopted the measure under challenge? Both *Fedesa* and the *Irish Abortion Cases* concerned measures taken by Member States. If so, what is the situation for competition law cases involving claims that the Commission's investigatory measures are disproportionate? Is the Court willing to apply a structured analysis or is the proportionality principle applied in a more opaque fashion? Below is an analysis of a number of cases, mainly concerning dawn raids, where the Court has applied the principle of proportionality to measures taken by the Commission in competition cases.

## 5.8 The principle of proportionality in competition cases

### 5.8.1 National Panasonic

In *National Panasonic v. Commission*,<sup>536</sup> the applicants challenged an inspection decision before the ECJ, arguing that the element of surprise violated their right to privacy. In short, National Panasonic claimed that as a general rule, the Commission should follow a two-stage procedure according to which it should only be allowed to carry out an inspection based on a decision after having attempted to carry out that inspection on the basis of a written authorization. By failing to adhere to such a two-stage procedure, the Commission had committed a violation of both the spirit and the letter of Regulation 17/62. The applicant also argued that by adopting an inspection decision without first having attempted to carry out the inspection on the basis of an authorization, the Commission had failed to respect the principle of proportionality. Only where the situation is very grave, the applicant argued, and where there is the greatest urgency and the need for complete secrecy may the Commission carry out a dawn raid based on a decision rather than an authorization.

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substance of those rights, indicating that a balancing exercise should be done, but also that much is required before the scales are tipped.

<sup>536</sup> Case 136/79, *National Panasonic v Commission of the European Communities*, EU:C:1980:169.

To this, the Court replied that the Commission's choice between an authorization and a decision does not depend on the facts relied upon by the applicant but on the need for an appropriate inquiry, having regard to the special features of the case.<sup>537</sup> Considering that the inspection aimed solely at enabling the Commission to collect the necessary information to appraise whether there was an infringement of the Treaty, it therefore did not appear that the Commission's action was disproportionate to the aim pursued. There was no violation of the principle of proportionality.<sup>538</sup>

Basically, what the Court said was that an inspection with the sole aim of gathering evidence of an infringement of the Treaty is considered to be proportionate *stricto sensu*. Whether the statement regarding the need for an appropriate inquiry implied that the Court had also carried out a suitability and necessity assessment or whether this was included in the assessment of whether the action was disproportionate to the aims pursued is not clear.

## 5.8.2 Hoechst

In the case of *Hoechst*,<sup>539</sup> the Court applied the principle of proportionality in an implicit, but still rather structured fashion.

During the course of a cartel investigation, the Commission decided to carry out dawn raids at the premises of a number of companies including the German PVC producer Hoechst AG. Hoechst refused to submit to the Commission's decision on the ground that the action constituted an unlawful search. The Commission turned to the local authorities, who issued a search warrant in the name of the Commission. The inspection was carried out soon thereafter.

Hoechst challenged the Commission's inspection decision, claiming that the Commission had exceeded its powers of investigation, that the statement of reasons for the decision was inadequate, and lastly that the procedure followed was irregular. Basically, what Hoechst argued was that the inspection amounted to a search contrary to Article 8 of the ECHR and the right to privacy enshrined therein, as no judicial warrant had been issued in advance. In its ruling, the Court stated that the protection under Article 8 ECHR did not extend to companies, and that Hoechst could thus not rely on any right to privacy. However, the Court noted, all the legal systems of the

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<sup>537</sup> Ibid, para 29.

<sup>538</sup> Ibid, para 30.

<sup>539</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337.

Member States required that any intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, protecting individuals against arbitrary or disproportionate intervention.<sup>540</sup>

Without explicitly referring to the principle of proportionality, the Court then performed a rather structured proportionality analysis. It declared that the aim of the investigatory powers granted to the Commission under Regulation 17/62 was to allow the Commission to carry out its duty of ensuring that the rules on competition are applied in the common market – thereby establishing a proper purpose.<sup>541</sup>

The Court then acknowledged that the right to carry out dawn raids was of particular importance as it permitted the Commission to obtain evidence of infringements, thereby establishing suitability. As for the necessity, the Court declared that the right of access implied a power not only to search for documents and information already known to the Commission but also items of information that were not already known or fully identified. Without these powers, the Court declared, 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 attitude.<sup>542</sup> No less restrictive means were thus available.

As for the proportionality *stricto sensu* test, there is no explicit reference to any weighing of interests. However, the balancing exercise is there. First, the Court establishes that the interference is necessary in order to ensure the effectiveness of the EU competition law regime. Next, the Court establishes that although the powers conferred on the Commission are broad, the exercise of those powers is surrounded by a number of procedural safeguards serving to ensure that the rights of the parties are respected. Safeguards include the obligation on the part of the Commission to state the subject-matter and purpose of the inspection, as well as the possibility to use force only upon approval and with the assistance of national authorities.<sup>543</sup> Apparently, these procedural safeguards were deemed to prevent any measures by the Commission from being arbitrary or disproportionate, as the Court concluded that the Commission officials did not exceed their powers.<sup>544</sup>

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<sup>540</sup> Ibid, para 19.

<sup>541</sup> Ibid, para 25.

<sup>542</sup> Ibid, para 27.

<sup>543</sup> Ibid, paras 29 – 32.

<sup>544</sup> Ibid, para 36.

### 5.8.3 Roquette Frères

Another competition case where the powers of the Commission were challenged, and where the Court carried out a proportionality analysis is *Roquette Frères*.<sup>545</sup>

The case came to the ECJ by way of a request for a preliminary ruling from the French courts. Its background was the following. During the course of a cartel investigation, the Commission had decided to perform a dawn raid at the premises of Roquette Frères S.A. As a precautionary measure, it had requested the French authorities to take the necessary steps to ensure that, in the event of opposition, the national authorities would provide the assistance stipulated in Article 14(6) of Regulation 17/62.<sup>546</sup> The French courts had granted that application.

The dawn raid was later performed at the premises of Roquette Frères. The company cooperated during the inspection, but appealed against the authorization order granted by the French court. In its appeal, it claimed that the court should not have granted such authorization without first establishing that there were indeed reasonable grounds for suspecting the existence of anti-competitive practices such as to justify the grant of coercive powers.<sup>547</sup>

The French court chose to stay its proceedings and turn to the ECJ. In its request for a preliminary ruling, it asked the ECJ whether a national court may refuse to grant an authorization if it deems that the information presented by the Commission does not provide grounds for suspecting a violation of the competition rules, or where it has not been presented with the information or evidence in the Commission's file. The question was thus limited to the authorization of coercive measures, and the judicial review to be carried out by the national court to guarantee that such measures are not arbitrary or disproportionate. In its preliminary ruling, the Court first addressed the issue of inspection decisions as such, declaring that the powers conferred on the Commission by Article 14 of Regulation 17/62 were designed to enable the Commission to perform its task of ensuring effective application of the EU competition rules, thereby also ensuring the economic well-being of the EU.<sup>548</sup> Having stated that, the Court had also set out the proper purpose (of dawn raids as such). Secondly, the Court declared, EU law provided a range of procedural guarantees, which together ensured that

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<sup>545</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>546</sup> Now Article 20(8) of Regulation 1/2003.

<sup>547</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 16.

<sup>548</sup> *Ibid*, para 42.



the measures taken by the Commission during the course of a dawn raid were limited to what was necessary in order to pursue the legitimate interests stated above.

Moving on to the application of coercive measures, the Court declared that these were intended solely to enable the Commission officials to exercise the investigatory powers granted under Article 14 of Regulation 17/62. These powers, the Court declared, were circumscribed and protected by various EU guarantees.<sup>549</sup>

The Court then addressed the role of national courts. Here the Court declared that the national courts have the task of ensuring that, in the specific circumstances of each individual case, the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of the investigation.<sup>550</sup> When determining whether a coercive measure is arbitrary, the national court will have to satisfy itself that reasonable grounds exist for suspecting an infringement of the competition rules by the undertaking concerned.<sup>551</sup> As for determining whether a coercive measure is proportionate to the subject-matter of the investigation, this exercise involves establishing whether the coercive measures are appropriate to ensure that the investigation could be carried out.<sup>552</sup>

Just as in the case of *Hoechst*, the ECJ did not follow a strict structure or method when applying the principle of proportionality. However, the elements are there. With regard to the use of coercive measures, the court declared that only where it would be impossible or very difficult to otherwise establish the facts surrounding an infringement may the national court allow for coercive measures as a precautionary measure.

The Court then declared that the proportionality review of coercive measures involves establishing that such measures do not constitute, in relation to the aim pursued by the investigation, a disproportionate and intolerable interference, thus requiring the national court to perform a proportionality *stricto sensu* test. Instead of separating this test from the necessity and suitability tests, the court concluded that the decision to base an inspection on an authorization or a decision should not depend on the seriousness or urgency of the matter, but rather on the need for an appropriate inquiry.

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<sup>549</sup> Ibid, para 47.

<sup>550</sup> Ibid, para 52.

<sup>551</sup> Ibid, para 54.

<sup>552</sup> Ibid, para 71.

In this respect, the Court referred to its previous case-law where it had established that if an inspection decision has the sole aim of enabling the Commission to gather information needed to assess whether the Treaty has been infringed, such decision may not run contrary to the principle of proportionality.<sup>553</sup> Similarly, the Court declared, the decision whether a particular item of information is necessary or not to establish an infringement lies in the hands of the Commission.

Nevertheless, the Court chose to set a threshold and actually put some weights in the balance, declaring that when carrying out the proportionality analysis, certain factors must be taken into account – such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought. Consequently, the Court declared, it must be open to the national court not to grant the coercive measures applied for, 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 intervention appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.<sup>554</sup>

Although acknowledging that a balance must be struck, the Court appears to favour effectiveness over privacy – the national court may refuse to assist only when an intervention appears manifestly disproportionate or intolerable. Put differently, it chooses to grant the Commission a wide margin of appreciation.

## 5.9 The margin of appreciation

As discussed earlier in this chapter, few fundamental rights are absolute. However, there is a common understanding, and most often also a legal requirement, that any exceptions to such rights should be narrowly defined.<sup>555</sup> The application of the principle of proportionality makes sure that a balance is struck between diverging interests, and that only those limitations that are absolutely necessary in order to achieve a public goal or protect a competing right are accepted. Even though some criticize this system for turning judges into law-makers, the majority view appears to be

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<sup>553</sup> *Roquettes Frères*, para 77.

<sup>554</sup> *Ibid*, para 80.

<sup>555</sup> See e.g. Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights Files No. 15, Council of Europe Publishing, 1997.

that such system helps protect or realize fundamental rights to the greatest extent possible, and that it is thus desirable.<sup>556</sup>

Alongside the principle of proportionality is the doctrine of ‘the margin of appreciation’. According to this doctrine, both the EU Courts and the Strasbourg court defer to some extent to judgments taken at national level (in the case of the Strasbourg court) or at Commission level (in the case of the EU Courts). Simply put, when applying the margin of appreciation, the courts refrain from ‘second-guessing’ the judgment of the decision-maker or examining the ‘wisdom’ of a policy or legislation.

The complexity of modern regulation demands specialized knowledge and large sophisticated institutions. In the area of competition law, cartel cases and cases on abuse of dominance are often very complex, and they involve not only questions of law, but also very complex factual technical and economic assessments. When determining whether certain behaviour constitutes an abuse of dominance the Commission will examine actual or potential economic effects, and whether the measure is likely to foreclose competition from ‘as efficient competitors’. This development has led the EU courts to take a step back and defer to the wisdom of the Commission. In theory, this should not be a problem, and should not affect the proportionality of any measures taken by the Commission in competition (and other) cases, as the Commission is bound by the proportionality principle, and should thus exercise self-restraint. However, although the Commission certainly strives to do so in all cases, the lack of efficient judicial control will by necessity affect the application of the equality of arms principle, because one of the parties to the proceeding then determines how the principle of proportionality should be applied. Moreover, if the Commission’s analyses, conclusions and assessments are not scrutinized by the Courts, then there is an inherent risk that the internal checks and balances within the Commission will become too lax.

Deference remains the dominant force in both the EU and Strasbourg systems, and in some areas it will make the notion of proportionality appear to play a merely theoretical role. Even express reference to the principle of proportionality by the courts does not necessarily imply a genuine assessment of the effects that an interference will actually have on the rights of the individual.

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<sup>556</sup> See e.g. Barak, *Proportionality – Constitutional Rights and their Limitations*, Cambridge University Press, 2012 and Harbo, *The Function of Proportionality Analysis in European Law*, Brill Nijhoff, 2015.

The word ‘necessary’ suggests that the rights of the individual can only be interfered with when this is strictly necessary and no more than is absolutely necessary. However, this is not how that expression works in practice. In some situations, the ECJ and the Strasbourg court will exercise judicial self-restraint and leave room for the EU institutions or the Member/Contracting States to evaluate the necessity of any interference with the rights of individuals. The test grants the institution or the Contracting State ample discretion and applies both to the suitability and the necessity aspects of the proportionality test.

Just as with the notion of ‘the principle of proportionality’ there is no universal definition of the notion of ‘the margin of appreciation’. *Arai-Takahashi* gives the following meaning to the term:

The term ‘margin of appreciation’ refers to the latitude the government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties.<sup>557</sup>

There is an apparent dichotomy between such restrained review and assertive scrutiny, and there is a clear correlation between a wide margin of appreciation and a lax standard of judicial review or conversely between a narrow margin and an intensive proportionality appraisal.

In the UK, the courts have a long history of deferring to the wisdom of national decision making bodies, with the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*<sup>558</sup> as landmark ruling. In this case, the court set the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as Wednesbury unreasonableness. The court stated three conditions on which it would intervene to correct a poor administrative decision, including on grounds of its unreasonableness in the special sense. The standard of unreasonableness was later articulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*:

[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.<sup>559</sup>

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<sup>557</sup> Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, p. 2.

<sup>558</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

<sup>559</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 at para. 410, [1984] 3 All ER 935, [1984] 3 WLR 1174, [1985] ICR 14, [1985] AC 374, [1985] IRLR 28, House of Lords.

In the EU and the under the ECHR, the courts are not willing to apply deference to such extreme extent (and with the UK Human Rights Act, also the UK courts have abandoned the unreasonableness test), but are nevertheless willing to exercise self-restraint.

Although in theory the principle of proportionality and the doctrine of the margin of appreciation should be able to work together, it appears that in practice this is difficult. When granting a margin of appreciation, the courts do not necessarily say that the principle of proportionality is inapplicable, just that it is the decision-maker that is suited for applying it. However, in order for the principle of proportionality to be truly effective, it must also be applied at the stage of judicial review. First of all, although the Commission and the ECJ are of course equally bound by the proportionality principle, there is an inherent risk that the more self-restraint the judiciary exercises, the less self-restraint the executive body will exercise. Secondly, one may question whether it is consonant with fundamental principles such as the right to an effective remedy or legitimate expectations to let the authority under challenge assess the appropriateness and legality of its own actions. Furthermore, and more importantly, the procedure before the courts is an adversarial procedure, and the principle of equality of arms should apply. If the applicant is able to show that there has been an interference with its rights, the court should not hide behind the margin of appreciation and refrain from scrutinizing the merits of such claims. As will be discussed in Section 5.9.2, recent rulings suggest that the Commission's margin of appreciation is not as wide as it used to be.

### 5.9.1 The margin of appreciation in Strasbourg

The Strasbourg court often takes the view that the national authorities are better situated to assess whether an interference with an individual's right is necessary when the interests of the individual are balanced with those of the public interests. The decision is then said to be within the 'margin of appreciation' of the Contracting State.

The margin of appreciation granted by the Strasbourg court has been defined in scholarly writing as:

The latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction

or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees.<sup>560</sup>

Less formally, it has been described as 'a room for manoeuvre', 'breathing space', 'elbow room' or 'a doctrine of self-restraint'.<sup>561</sup> In fact, the Strasbourg court is known for having adopted a rather deferential attitude towards the Contracting States, exercising a large dose of judicial self-restraint vis-à-vis decisions taken by national authorities, in particular rulings by national courts. This tendency to perform only a limited review must be seen against the historical background of human rights protection through the ECHR. When the Convention entered into force in 1953, the Contracting States had been permitted to formulate reservations, according to which they themselves were able to determine the scope of their fundamental rights protection. Furthermore, the procedure of individual complaints was by no means accepted throughout the Contracting States. On the contrary, it was made subject to separate declarations of acceptance. Few Contracting States accepted this procedure at an early stage. The UK waited till 1966, and France did not accept complaints by individuals until 1981.<sup>562</sup> This obvious reluctance to accept individual complaints led the Strasbourg court to exercise self-constraint.

As for the actual application of the doctrine, the closer the analysis of the national courts reflects the ECHR and its case-law, the more likely the finding will be that the national courts have remained within the domestic margin of appreciation. There will be less temptation for the Strasbourg court to engage in micro-management and disturb the rulings of the national courts if the national courts are operating domestic remedies with an eye to compliance with ECHR standards and case-law. In other words, the better the operation of domestic remedies is working, the less intense the scrutiny of the Strasbourg court.<sup>563</sup>

However, it is not only the national court's adherence to ECHR standards that determines the scope and application of the margin of appreciation. Consensus among the Contracting States as regards the appropriate level of protection will also influence the Strasbourg court's scrutiny of a state

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<sup>560</sup> Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers, 1996, at p. 13.

<sup>561</sup> Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, *Columbia Journal of European Law*, vol. 11, 2005, pp 113-150.

<sup>562</sup> Ehlers, *European Fundamental Rights and Freedoms*, De Gruyter Recht, 2007, p. 5.

<sup>563</sup> See e.g. Mahoney, *Strasbourg and National Courts: The Strasbourg View*, in Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights: A Strained Relationship?*, Hart Publishing, 2015, at p. 23.

measure. When a European consensus on the meaning or the need for limitations on particular rights is absent, the margin available to governments expands. Conversely, when consensus is present, it is taken to mean that the 'core' meaning of the right is narrowly defined, and the margin for deviation will thus contract.<sup>564</sup> This means that the margin of appreciation may change over time.<sup>565</sup>

The margin accorded to the Contracting States also, or perhaps mainly, depends on the nature and importance of the rights in question. When determining the breadth of the margin of appreciation, the court will weigh the importance of the individual right against the importance of the aim pursued by the restriction. In case of *Autronic AG v. Switzerland*, the Strasbourg court declared in a plenary judgment that supervision would be strict given the importance of the right in question:

The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 26, § 58).<sup>566</sup>

Likewise, in the case of *Özdep v. Turkey*, the Strasbourg court declared that the intensity of its supervision depended on the importance of the right in question.<sup>567</sup> It should thus be the moral principles underlying human rights that determine a state's margin of appreciation, and not the other way around.<sup>568</sup> Similarly, the Strasbourg court has deemed the margin of appreciation to be narrow where matters of personal autonomy are affected by a state action.<sup>569</sup>

In the case of *Harju v. Finland*, the court declared that when it comes to searches, the margin of appreciation needs to be limited in cases where the

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<sup>564</sup> [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp).

<sup>565</sup> See e.g. *Rees v the United Kingdom*, judgment of 17 October 1986, Application no. 9532/81, at para 37.

<sup>566</sup> *Autronic AG v Switzerland*, judgment of 22 May 1990, Application no. 12726/87, para 61.

<sup>567</sup> *Freedom and Democracy Party (Özdep) v Turkey*, judgment of 8 December 1999, Application no. 23885/94, para 44.

<sup>568</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, p. xv.

<sup>569</sup> See e.g. *Dudgeon v the United Kingdom*, judgment of 22 October 1981, Application no. 7525/76, para 49.

search is conducted without a prior judicial authorization. There the Strasbourg court stressed that special vigilance is required on its part when the national authorities are empowered to order and effect searches without a judicial warrant.<sup>570</sup>

Although the *Harju* case concerned the application of Article 8 of the ECHR, the Strasbourg court has usually granted a much narrower margin of appreciation under Articles 5 and 6 – the articles protecting liberty, security and the right to a fair trial – than with regard to Articles 8 through 11 of the ECHR. The standard explanation for this narrower margin is that the two provisions are drafted with greater detail, leaving less room for varying government interpretations and applications. For example, Article 6 does not simply assert a right to a fair trial; it details what is necessary for a fair trial, including the presumption of innocence, the right to be informed of accusations in a language the defendant understands, the right to legal assistance, etc.<sup>571</sup> Instead, the greatest debate and controversy over the margin of appreciation doctrine surrounds its application to Articles 8 through 11, which contain express limitation clauses.

## 5.9.2 The margin of appreciation in Luxembourg

The EU Courts exercise their task of judicial review with varying degrees of intensity. The intensity of assessment can vary not only between different grounds of review, different fields of EU policy, between EU legislation and its application, but also in its temporal dimension.<sup>572</sup> Or, as *de Búrca* states, it becomes apparent that in reaching decisions, the ECJ is influenced not only by what it considers to be the nature and the importance of the interest or right claimed by the applicant, and the nature and importance of the

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<sup>570</sup> The Strasbourg court made the following statement: ‘As to the fourth requirement, the Court reiterates that Article 8 § 2 requires the law in question to be ‘compatible with the rule of law’. In the context of search and seizure, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Notwithstanding the margin of appreciation which the Court recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for (see *Camenzind v Switzerland*, 16 December 1997, § 45, Reports of Judgments and Decisions 1997-VIII).’, *Harju v Finland*, judgment of 15 February 2011, Application no. 56716/09, para 39.

<sup>571</sup> Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human rights: Threat to the Rule of Law*, Columbia Journal of European Law, vol. 11, 2005, pp 120-121.

<sup>572</sup> Türk, *Judicial Review in EU Law*, Elgar European Law, 2010, at p. 145.



objective alleged to be served by the measure, but by the relative expertise, position and overall competence of the Court as contrasted with the decision-making authority in assessing those factors. It becomes apparent that the way the proportionality principle is applied by the Court covers a spectrum ranging from a very deferential approach, to a quite rigorous and searching examination of the justification for a measure which has been challenged.<sup>573</sup>

In the field of competition law, and the review of Commission decisions, the EU Courts are accustomed to applying a margin of appreciation or discretion. Before further discussion, a distinction needs to be made between the margin of appreciation on the one hand and the margin of discretion on the other. These two concepts both imply a limited review, but for different reasons. As for the margin of discretion, this term refers to situations where the authority in question has a certain freedom of choice as to the standards or criteria which govern the decision. The law has left the authority a certain freedom to choose among different possible courses of action according to the authority's own judgment.<sup>574</sup> For example, the Commission decides whether or not to open an investigation. The margin of appreciation on the other hand refers to the assessment of the facts in a certain case, and the Commission's application of the law to those facts.

In fact, when it comes to judicial review in areas where there is room for a margin of discretion or a margin of appreciation, the standard formula applied by the ECJ has traditionally been that review should be limited to examining whether the exercise of such discretion or the assessment made by the Commission has been vitiated by a manifest error, misuse of power or clear excess in the bounds of discretion.<sup>575</sup> As the Court put it in the case of *Jippes*: 'the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate'.<sup>576</sup>

In the early days, the EU Courts chose to perform a much more restricted review, seeking not to second-guess any evaluations made by the EU institutions. Measures would be annulled only if the applicant could show a manifest error or misuse of power. In some areas, this attitude still prevails.

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<sup>573</sup> de Búrca, *The Principle of Proportionality and its Application in EC Law*, Yearbook of European Law, 1993, 105-150, at p. 111.

<sup>574</sup> Wils, *Discretion and Prioritisation in Public Antitrust Enforcement*, World Competition, vol. 34, no. 3, September 2011.

<sup>575</sup> Craig and de Burca, *EU Law*, 5<sup>th</sup> edn, Oxford University Press, 2011, p. 551.

<sup>576</sup> Case C-189/01, *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2001:420, para 83.

However, in other areas, such as competition law, the proportionality test is now applied more rigorously.<sup>577</sup>

The margin of appreciation doctrine affects the approach to the weighing of evidence that is before the court when it applies the proportionality test. Overall, the manifest error test means that there is a particularly demanding requirement on the applicant to prove that there is an equally effective, less restrictive alternative. In the absence of hard empirical or scientific evidence, the applicant faces an uphill struggle.

## 5.10 The principle of proportionality – Concluding remarks

The principle of proportionality is explicitly recognized as a general principle of EU law in Article 5(4) of the TEU. Let us also recall what is stated in Article 52(1) of the Charter:

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.

According to the Charter, which has the same legal status as the Treaties, any limitation on the rights recognized by the Charter should thus be allowed only if and to the extent that it is necessary and if it genuinely meets objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Surely, the application of a manifest error test, where the EU Courts refrain from making a proper assessment as to whether a right has been limited to the least extent necessary – is not consonant with the requirements of the Charter. The courts have a responsibility to scrutinize every argument for limiting a fundamental right, and the very formulation of the Charter makes it clear that the onus of justifying a restriction is on those who advance it. A consistent application of the proportionality test is central to ensuring the proper discharge of this responsibility.

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<sup>577</sup> Craig and de Burca, *EU Law*, 5<sup>th</sup> edn, Oxford University Press, 2011, p. 551. See also the Court's case-law in cases such as Case C-272/09 P, *KME v Commission*, EU:C:2011:810, Case C-389/10 P, *KME v Commission*, EU:C:2011:816, and Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815.

Another concern that has been voiced is that if courts allow the margin of appreciation doctrine to weaken the proportionality test, then their own rulings might be seen less as principled evaluations and more as their own arbitrary preference for the balance to be achieved between different rights and interests.<sup>578</sup> In any event, the EU judiciary would benefit from a system where, when it comes to alleged violations or limitations of fundamental rights, the courts adhere to a stringent, transparent and methodological application of the principle of proportionality to determine whether any interferences are justified. As it is now, when the Court applies the principle of proportionality, it often does so without following a clear and structured method. This is unfortunate, as the lack of apparent structure opens up to arguments that the application of the principle is merely a route to a predetermined destination, and that the Court alleges to embark on a balancing exercise, but that in reality it has already decided what the outcome of such exercise will be. Without a clear and transparent methodology, it is difficult for the Court to fend off such criticism.

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<sup>578</sup> McBride, *Proportionality and the European Convention on Human Rights*, in Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, 1999, p. 35.

## 6. Criminal sanctions

Before examining the Commission's dawn raid procedures in detail, one more issue needs to be addressed: whether infringements of Articles 101 and 102 TFEU and the sanctions imposed are of a criminal nature or merely considered administrative. As will be shown below, the answer to this question will influence the analysis of the Commission's dawn raid procedures. If competition law infringements count as criminal offences, then the standard of protection to be afforded by the Commission and the EU Courts is higher than would otherwise be the case.

### 6.1 Competition law infringements – A criminal offence?

Article 23(5) of Regulation 1/2003 stipulates that the sanctions imposed by the Commission under the Regulation are not of a criminal law nature. The paragraph is placed at the very end of the Article, which may suggest that it is of less importance. However, from a due process perspective, the question whether cartels and abuse of market power are to be considered criminal or not is of great significance. The reason is that where an offence is considered to be of a criminal nature, the procedural safeguards surrounding the matter are higher than would otherwise be the case. Thus, the question whether competition law infringements are criminal and the sanctions imposed on competition law offenders of a criminal nature will determine the extent of the rights provided to companies involved in cartel and abuse of dominance cases.

To give an example, Article 6(1) of the ECHR establishes the right to a fair trial. The Article reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law[.]<sup>579</sup>

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<sup>579</sup> <http://www.hri.org/docs/ECHR50.html#C.Art6>.

Judging from its wording, the rights afforded under Article 6(1) ECHR appear to apply indistinctly to both civil rights cases and criminal cases. However, as previously discussed in Chapter 5, the Strasbourg court has declared that the standard of protection will vary depending on whether or not the charge is criminal. Over the years, this standard has come to ensure different levels of protection depending on whether the procedure in question is of a civil or criminal nature, allowing Contracting States a greater margin of appreciation in civil rights cases. Fundamental procedural rights are thus broader and apply much more strictly when ‘criminal sanctions’ are imposed than when civil remedies or administrative sanctions are provided.<sup>580</sup> Thus, in order to determine the level of protection to be afforded in competition law matters, it is necessary to first define the nature of the procedure under Regulation 1/2003, and the sanctions imposed by the Commission.

Contrary to what Article 23(5) indicates, the sanctions imposed by the Commission do not necessarily fall outside the scope of the notion ‘criminal’ within the meaning of Article 6(1) of the ECHR. In order to ensure a uniform application of the ECHR,<sup>581</sup> the Strasbourg court has refused to let the national legislature define the notion under ECHR law. The Strasbourg court considers the indications furnished by domestic law as to the criminal nature of an offence to have only a relative value, with the notion of ‘criminal’ as conceived under Article 6 of the ECHR being an autonomous concept.<sup>582</sup> This was first established in the seminal case of *Engel v the Netherlands*.<sup>583</sup>

In *Engel*, the applicants had challenged a number of provisions which according to Dutch law fell under military disciplinary law and not criminal

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<sup>580</sup> Treschel notes that although the principle of equality of arms and the right to adversarial proceedings laid down in Article 6 of the ECHR apply indistinctly in civil and criminal cases, there is a slight difference in the application of the Article depending on the nature of the case, and that the Contracting States have greater latitude when dealing with cases concerning civil rights and obligations than they have when dealing with criminal cases; Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p. 85.

<sup>581</sup> In *Engel*, the Strasbourg court declared that if the Contracting States were given the powers to define the notion themselves, there was a risk that they would circumvent the rules in Article 6 by classifying an offence as disciplinary instead of criminal or to prosecute the author of a ‘mixed’ offence on the disciplinary rather than criminal plane. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. See *Engel and Others v the Netherlands*, judgment of 8 June 1976, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para 81.

<sup>582</sup> *Öztürk v Germany*, judgment of 21 February 1984, Application no. 22479/93, at paras 50 and 52.

<sup>583</sup> See *Engel and Others v the Netherlands*, judgment of 8 June 1976, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

law. The Strasbourg court was requested to determine whether a ‘charge’ that the national legislator counted as disciplinary could in fact be of a criminal character under the ECHR. The question was answered in the affirmative by the court, which declared that the notion of criminal was autonomous. The court presented three criteria to be applied when deciding whether an offence is criminal in the sense of Article 6 of the ECHR. These criteria are:

- (i) the classification of the offence in the law of the respondent state,
- (ii) the nature of the offence, and
- (iii) the nature and degree of severity of the penalty that the person concerned risked incurring.<sup>584</sup>

The first is crucial in that if the applicable national law classifies an offence as criminal, it automatically takes the same classification for the purposes of Article 6 too. It is only when the offence is not classified as criminal that a problem arises, and the second and third criteria will come into play. As to the nature of the offence, *Treschel* notes that there does not appear to be any definition of the notion ‘criminal offence’ in case-law, but that a charge is criminal in nature if it concerns a norm which is basically addressed to everyone rather than a limited group of persons and if the sanction imposed pursues a retributive goal.<sup>585</sup> The third criterion concerns the possible punishment. Here, the sanction must be deterrent and punitive and not compensatory. The Strasbourg court tends to consider the nature and severity of the possible, not the actual, punishment. A possible punishment of a modest fine that may be converted into imprisonment for more than a minimal period for non-payment may fall within Article 6, as may a substantial fine that cannot be converted into imprisonment.<sup>586</sup>

The Engel criteria were established already in 1976 and they still apply. However, in a few cases the Strasbourg court has applied a somewhat modified standard. For example, in the case of *Bendenoun v. France*, the Strasbourg court defined criminal measures as follows:

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<sup>584</sup> Ibid, para 82. This basic ruling has been confirmed by the Strasbourg court on many occasions over the years, see e.g. *Campbell and Fell v the United Kingdom*, judgment of 28 June 1984, Applications nos. 7819/77; 7878/77, *Ezeh and Connors v the United Kingdom*, judgment of 9 October 2003, Applications nos. 39665/98 and 40086/98, *AP, MP and TP v Switzerland*, judgment of 29 August 1997, Application no. 19958/92, *EL, RL and JO-L v Switzerland*, judgment of 29 August 1997, Application no. 20919/92, and *Öztürk v Germany*, judgment of 21 February 1984, Application no. 22479/93.

<sup>585</sup> Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p.19.

<sup>586</sup> Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 2nd edn, Oxford University Press, 2009, at p. 208.

- (i) the applicable law must be ‘imposed by a general rule ... and applicable to everyone’,
- (ii) there must be ‘penalties in the event of non-compliance’,
- (iii) the act must be seen as a punishment to deter re-offending, and
- (iv) the penalties/sanctions must be substantial.<sup>587</sup>

In *Engel*, the Court considered the severity of the offence that the person charged risked incurring. It was thus not the actual sanction imposed but rather the maximum sanction available that determined whether or not a matter was criminal. In *Bendenoun*, the Strasbourg court noted that the sanctions imposed were ‘very substantial’, and that this factor taken together with a number of other factors determined the matter as criminal.<sup>588</sup>

Whether the Engel criteria or the criteria set up in *Bendenoun* are applied, there is little doubt today that, for the purpose of the ECHR, the sanctions imposed by the Commission in competition law cases are to be considered criminal in nature. This view was first supported in *Société Stenuit v. France*,<sup>589</sup> where the European Commission of Human Rights considered the criminal head of Article 6 to be applicable to competition law cases.

In a more recent judgment, the ECtHR did actually get the opportunity to consider the question of the compatibility of competition law enforcement regimes with the requirements of the ECHR. The case of *A. Menarini Diagnostics S.R.L. v Italy*<sup>590</sup> concerned the imposition of fines by the Italian Competition Authority, and its compatibility with Article 6 of the ECHR and the right to a fair trial enshrined therein.

Without venturing to deeply into the matter, the case can be described as follows. The medical diagnostics company A. Menarini Diagnostics S.R.L. (AMD) had been fined by the Italian Competition Authority for cartel participation under the Italian Competition Act. The structure of the Italian Competition Act and the penalties available to the Italian Competition Authority bear a striking resemblance to the EU system.

AMD unsuccessfully appealed the decision to the Italian courts, and then turned to Strasbourg complaining about the limited review performed by the courts. The question that the Strasbourg court had to answer was whether the judicial review carried out by the Italian courts fulfilled the requirements in

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<sup>587</sup> *Bendenoun v France*, judgment of 24 February 1994, Application no. 12547/86.

<sup>588</sup> *Ibid*, para 47.

<sup>589</sup> *Société Stenuit v France*, judgment of 27 February 1992, Application no. 11598/85.

<sup>590</sup> *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08.

Article 6(1) of the ECHR. In its ruling, the ECHR confirmed that competition law could be considered penal and subject to the protections afforded by Article 6(1), given the severity and repressive character of the fines imposed. However, as in earlier judgments,<sup>591</sup> the Strasbourg court made a further distinction between hard core criminal cases, requiring the decision at first instance to be made by a tribunal, and criminal cases within the wider meaning of the term. As for the latter category, the court declared that decisions in such cases may be made by an administrative authority at first instance as long as such decision could be appealed to a tribunal with full jurisdiction.<sup>592</sup> Furthermore, the Court rejected AMD's main contention that there had been a breach of Article 6(1). Instead the Strasbourg court considered that the Italian courts – which had declared that they were only empowered to carry out a legality review – had full jurisdiction in competition cases, because they could examine the elements of proof, verify whether the administration used the powers in an appropriate manner,<sup>593</sup> verify the reasonableness and proportionality of the choices within a decision, verify the technical matters,<sup>594</sup> and change the sanction.<sup>595</sup>

Based on the Strasbourg court's ruling in *Menarini*, a few conclusions can be drawn. First of all, the Commission's procedure in Article 101 and 102 TFEU cases is of a criminal law nature. Second, competition cases do not fall within the core meaning of the term 'criminal charge', and therefore the standard of protection required is not as high as if they would have been considered to fall within the core meaning of the term. This means, *inter alia*, that the imposition of fines in cartel cases can be entrusted to the Commission – provided that the companies can challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR.<sup>596</sup>

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<sup>591</sup> See e.g. *Janosevic v Sweden*, judgment of 23 July 2002 and *Bendenoun v France*, judgment of 24 February 1994, Application no. 12547/86.

<sup>592</sup> *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, para 59.

<sup>593</sup> *Ibid*, para 63.

<sup>594</sup> *Ibid*, para 64.

<sup>595</sup> *Ibid*, para 65.

<sup>596</sup> *Öztürk v Germany*, judgment of 21 February 1984, Application no. 22479/93, at para 56, and *Bendenoun v France*, judgment of 24 February 1994, Application no. 12547/86, para 46.



## 6.2 The ECJ's view on the criminal nature of competition cases

Despite the wording of Article 23(5) of Regulation 1/2003, the Court did not await the ruling in *Menarini* before it offered certain procedural guarantees that are normally reserved for criminal cases. Already in *Hüls*<sup>597</sup> – a case concerning alleged cartel activity contrary to Article 101 TFEU – the Court acknowledged that given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence should apply to competition cases that may result in the imposition of fines or periodic penalty payments.<sup>598</sup> The Court even referred to the case-law of the Strasbourg court, and the two cases of *Öztürk*<sup>599</sup> and *Lutz*, where the latter case concerned the application of Article 6 ECHR and the principle of the presumption of innocence.<sup>600</sup> This being said, traditionally the Court has not been willing to refer to competition cases as criminal cases, but rather as administrative.<sup>601</sup>

Just a few months after the Strasbourg court had delivered its ruling in *Menarini*, the ECJ delivered its rulings in the *Chalkor*<sup>602</sup> and *KME* cases,<sup>603</sup> where the parties had challenged the judicial review carried out by the General Court, claiming that it fell short of the standard required by the ECHR. The cases originated from the copper tubes cartel where the Commission had imposed heavy fines on several companies for their participation in cartels on the two markets of copper industrial tubes and copper plumbing tubes respectively. *KME* was fined under both decisions, whereas *Chalkor* was fined only under the copper plumbing tubes decision. Both companies were unsuccessful in their appeals against the decisions to the General Court.

Turning to the ECJ, *KME* and *Chalkor* criticized the General Court's willingness to grant the Commission a margin of discretion when it came to the calculation and imposition of fines – an area where the Commission has traditionally enjoyed a wide margin of discretion, when it comes both to the

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<sup>597</sup> Case C-199/92P, *Hüls AG v European Commission*, EU:C:1999:358.

<sup>598</sup> *Ibid*, at para 150.

<sup>599</sup> *Öztürk v Germany*, judgment of 21 February 1984, Application no. 22479/93.

<sup>600</sup> *Lutz v Germany*, Judgment of 25 August 1987, Application no. 9912/82.

<sup>601</sup> See e.g. Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 15 where the Court discusses the right of the defence in competition cases, stating that 'the right of the defence must be observed in administrative procedures which may lead to the imposition of fines'.

<sup>602</sup> Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815.

<sup>603</sup> Case C-272/09 P, *KME v Commission*, EU:C:2011:810 and Case C-389/10 P, *KME v Commission*, EU:C:2011:816.

choice of factors to be taken into account when calculating fines and the assessment of such factors. The companies argued that the Commission should not enjoy any margin of discretion in this area as the EU Courts have full jurisdiction to review the fines imposed. According to the applicants, the General Court had infringed EU law and the applicants' right to a full and effective judicial review under Article 47 of the Charter by failing to examine their arguments closely and thoroughly, and had deferred, to an excessive and unreasonable extent, to the Commission's discretion.

In her opinion, Advocate General Sharpston simply chose to apply the *Engel* criteria.<sup>604</sup> When doing this, the Advocate General had 'little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights'.<sup>605</sup> The Advocate General based her conclusion on the arguments that 'the prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage'.<sup>606</sup>

The Court was more hesitant in its approach towards the ECHR, making no reference to either the *Engel* criteria or the Convention itself. However, declaring that the principle of effective judicial protection is a general principle of EU law to which expression is now given by Article 47 of the Charter, the Court declared that the General Court should not allow the Commission any margin of discretion when determining the fines to be imposed on members of a cartel. Instead the General Court should carry out a full review, both in law and fact, of the Commission's decision to impose fines. By doing so, the Court implicitly ensured that the General Court's standard of review meets the standard of review required by the Strasbourg court in competition cases, or more generally in criminal cases within the wider meaning of the term.

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<sup>604</sup> Opinion of Advocate General Sharpston in Case C-272/09 P, *KME v European Commission*, EU:C:2011:63, para 63.

<sup>605</sup> *Ibid*, para 64.

<sup>606</sup> *Ibid*.

### 6.3 Conclusion

Infringements of Articles 101 and 102 TFEU fall within the criminal head of Article 6(1) of the ECHR, but do not qualify as ‘core’ criminal cases. Because the Strasbourg court has chosen to gradually broaden the scope of protection afforded under Article 6(1) of the ECHR to offences and sanctions that are not within the core meaning of the term ‘criminal’, it has also had to adjust the requirements in Article 6(1) of the ECHR depending on the nature of the offence. For reasons of efficiency, the prosecution and punishment of offences which are criminal within the wider meaning of Article 6 ECHR can therefore be entrusted to administrative authorities provided that the individuals affected by such decisions are able to challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR.<sup>607</sup>

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<sup>607</sup> *Öztürk v Germany*, judgment of 21 February 1984, Application no. 22479/93, para 56, and *Bendenoun v France*, judgment of 24 February 1994, Application no. 12547/86, para 46.



PART II

THE INSPECTION

IS THERE A CLASH BETWEEN EU AND CONVENTION SYSTEMS?



## 7. General

The previous chapters have highlighted the inherent tension between the need for a well-functioning and effective competition law system and the necessity of safeguarding fundamental rights. In order to lay a proper foundation to the analysis of the Commission's dawn raid practices, the EU antitrust enforcement rules as well as the EU fundamental rights system have been presented. Furthermore, the principle of proportionality has been examined as has the criminal status of the EU antitrust enforcement system.

With this general framework in place, it is time to examine the Commission's dawn raid practices and to determine whether they meet the standard of the ECHR as required by Article 52(3) of the Charter. Part II of the thesis is dedicated to the Commission's practices under Articles 20 and 21 of Regulation 1/2003. Article 20 empowers the Commission to conduct all inspections of undertakings and associations of undertakings that are necessary for the Commission to carry out its duties under the Regulation. The Commission's powers to carry out dawn raids in private homes will be analysed specifically in Chapter 14.

### 7.1 Unannounced inspections – Efficiency v. fundamental rights

It is evident that the power to enter and search through the premises of a company or even the homes of its employees, seal off premises, take copies of documents and ask for explanations on the spot may trigger a number of fundamental rights concerns. This has not gone unnoticed by companies targeted in the Commission's investigations, or the legal counsels for these companies. Over the years, the ECJ has been given ample opportunity to determine where the line should be drawn between the apparently diverging interests of efficient investigations and the protection of fundamental rights.

This part of the thesis addresses some of the fundamental rights issues related to dawn raids. A crucial question is of course whether, and if so to what extent, companies – as opposed to natural persons – may also claim a right to privacy. The ECJ previously took the stance that legal persons could

not rely on Article 8 of the ECHR and the right to privacy enshrined therein. As this issue surely sets the tone and affects the discussion as a whole, it seems as a good starting point for our exposé of the legal landscape surrounding dawn raids.

Another highly debated issue which merits attention concerns the possible need for an ex ante review of inspection decisions and whether such decisions should fall under the purview of the Commission or the courts. Closely related to this is of course the question of the criteria that need to be fulfilled in order for the Commission to carry out an inspection. Should the Commission be allowed to perform dawn raids without suspecting the company/-ies of any real wrongdoing – as in the case of a sector inquiry – or are reasonable grounds required? These issues are triggered prior to the Commission’s inspections, and will be discussed in Chapters 8 and 9.

This part also deals with the scope of the dawn raids actually carried out – both as regards the subject-matter of an inspection and the information/documents that may be reviewed and copied during the inspection. Chapter 10 will examine the types of documents that Commission officials may peruse and copy, and whether the inspectors should be allowed to trawl the companies’ computers and make image copies of entire servers or whether the search should instead be limited to certain search words and be performed strictly at the premises of the company. Other issues concerning the Commission’s rights during the dawn raid concern the scope of protection afforded by the privilege against self-incrimination and the legal professional privilege. These two privileges will be discussed in Chapters 11 and 12 respectively.

There will be a discussion on the possibilities for companies to request a suspension of the dawn raid in cases where these companies believe that the Commission is acting outside its competences. This issue will be addressed in Chapter 13. The question of ex post review also needs to be addressed, as there appear to be opposing views on what rights companies actually do enjoy in this respect. Do companies have a right to an ex post review of inspection decisions and measures taken on their basis? If so, at what point are the courts required to carry out the review and how intensive should this review be? These are issues that will be addressed in Chapter 13.

However, before examining the scope of the Commission’s powers from a fundamental rights perspective, going into the nitty-gritty and discussing whether a company should be able to close the door on inspectors or whether the Commission should be allowed to reroute e-mails or make copies of documents unrelated to the subject-matter of the dawn raid, it is appropriate to draw a picture of what the Commission and companies are actually facing



during an inspection. This will aid in understanding the motive behind the enforcement rules. Only if one knows the hurdles that the Commission officials may have to overcome in their search for evidence of anti-competitive behaviour will it be possible to make a proper assessment of the degree of intrusiveness required in order for the Commission to fulfil its task of safeguarding the EU competition rules.

## 7.2 Just another day at work – What if the targeted company fails to cooperate?

In 2014, the Commission presented a report on the first decade of antitrust enforcement under Regulation 1/2003.<sup>608</sup> In its report, the Commission stresses the vital importance of a properly functioning antitrust enforcement system; it points to the fact that because cartels are secret – hidden in particular from customers – public cartel enforcement is vitally important as otherwise few cartels would come to light. The Staff Working Paper accompanying the report also discusses the search for evidence in cartel cases, revealing that increased awareness of the competition rules has had one downside.<sup>609</sup> Today, companies train their employees on compliance with antitrust rules, and most employees now know what is allowed and what is forbidden; this is of course a positive development. However, this also means that those engaging in cartel activities are well aware of the fact that what they are doing is unlawful. As a result, cartels are becoming ever more sophisticated, using various tools designed to minimize the risk of detection. According to the Commission, this has been demonstrated by recent cartels, involving the use of code words, encrypted documents, dedicated e-mail accounts and/or dedicated phones.<sup>610</sup> There is little or no point in using search terms such as ‘cartel’, ‘secret agreement’ *et alia* these days,<sup>611</sup> and there has also been a significant shift in the type of evidence found and relied upon. Nowadays, the report states, a handwritten ‘smoking gun’ in hard copy form is unlikely to be found on the desk of a company employee.<sup>612</sup> Rather than finding such documents, which a decade ago might have constituted sufficient proof of the cartel, the trend is more towards the

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<sup>608</sup> Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014.

<sup>609</sup> Staff Working Document accompanying the Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014, p. 9.

<sup>610</sup> *Ibid.*

<sup>611</sup> Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

<sup>612</sup> Staff Working Document accompanying the Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014, p. 9.

piecing together of a huge number of documents to establish the infringement.

Furthermore, documents are now almost exclusively in electronic form and the report states that the Commission has responded to this by increasing the IT skills of its inspectors and by developing a specialist forensic IT capability.<sup>613</sup>

Thus, according to the Commission, companies are much more sophisticated in their attempts to conceal their cooperation, and the likelihood of finding a smoking gun is slim. Instead, the Commission must lay a jigsaw puzzle, assembling a huge number of documents in order to prove its case. In the same report, the Commission also points to the fact that cartels are becoming more and more global nowadays, crossing the boundaries of jurisdictions. These international cartels tend to be even more complex, broader in scope, larger in terms of affected volumes of commerce, and more harmful to consumers than their domestic counterparts.<sup>614</sup> Today, it is not uncommon that a cartel consists of different levels or layers with different participants, i.e. separate national, regional and even global levels, all of which are interconnected but where only a few firms actually know about the full magnitude of the cartel. Effective cartel enforcement will therefore often require cooperation between competition authorities around the world. According to the Commission, conducting investigations into suspected cartel behaviour now typically requires in-depth cooperation with major authorities around the globe, and in recent years, there is increasing cooperation during the investigation within the ECN, but also with non-European authorities belonging to the ICN.<sup>615</sup>

For the Commission, securing evidence during the dawn raid is crucial. From a company perspective the incentive to conceal evidence may be strong, especially given the magnitude of the sanctions imposed on cartel offenders. Because cartels are often global, they may be sanctioned in several jurisdictions and any evidence found may be exchanged between authorities in different jurisdictions.<sup>616</sup> It is also fair to assume that persons who have been willing to engage in cartel activity, where secrecy and concealment/destruction of evidence are essential ingredients, may also be more inclined to conceal or destroy evidence during an investigation. Not

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<sup>613</sup> Ibid.

<sup>614</sup> <http://www.justice.gov/atr/speech/international-cartels-intersection-between-fcpa-violations-and-antitrust-violations>.

<sup>615</sup> Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014, at p. 9.

<sup>616</sup> Subject to regulation.

even the existence of proper compliance programmes may be a guarantee that the company cooperates fully. Even though (or perhaps especially when) the company has clear compliance rules and has informed its employees of how to behave during a dawn raid, the individual employee who has engaged in cartel activity may fear not only the actions of the competition authority, but also the reaction from the employer. He or she may thus have a strong incentive to delete e-mails or hide incriminating documents, despite any compliance programmes or dawn raid manuals in place.

In the vast majority of cases, companies are well informed about the rules and do comply with the Commission's decisions without destroying or concealing evidence. Only in rare cases do employees panic and try to conceal evidence, e.g. by bringing it out of the office, shredding it or flushing it down the toilet.<sup>617</sup> Below are examples of cases where employees, either intentionally or accidentally, have jeopardized the Commission's investigations.

In November 2009, the Commission carried out inspections at the premises of three companies belonging to the same company group, all situated in the Czech Republic. During the inspection, the Commission officials requested the IT department to block the e-mail accounts of certain key personnel. This was done on the first day of the inspection, and according to the instructions provided by the inspectors, the blocking of the e-mail accounts should remain in place until further notice. When the inspectors arrived at the premises the following day and tried to log on to the e-mail account of one of the employees, Mr F, they could not do so. As it turned out, his e-mail account had been unblocked by the IT department and he had been given a new password. When the inspectors gathered a log file of the connections made on Mr F's e-mail account, this showed that he had accessed his e-mail account continuously between 2.50 p.m. on day one and 1.05 p.m. on day two.<sup>618</sup> Not only had the IT department unblocked the e-mail account of Mr F; when the inspectors searched the e-mail account of another key employee, Mr A, they noticed that there were no incoming e-mails. The reason for this was that the IT department had rerouted the e-mails from four of the key employees so that the incoming e-mails were no longer forwarded to their inboxes, and instead remained on the server.<sup>619</sup>

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<sup>617</sup> Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

<sup>618</sup> *EPH and Others* (Case COMP/39793) Commission Decision C(2012) 1999 [2012] at para 28. Decision upheld by the General Court in Case T-272/12, *Energetický a průmyslový holding a.s. and EP Investment Advisors s.r.o. v European Commission*, EU:T:2014:995.

<sup>619</sup> *EPH and Others* (Case COMP/39793) Commission Decision C(2012) 1999 [2012] at para 33.

Another example is the case of *Nexans*, where the inspectors requested to search the laptop of one of the employees. It was not until the third day of the inspection that the computer was brought to the office and handed over to the inspectors. Going through the computer that day, the inspectors recovered a number of files that had been deleted since the start of the investigation.<sup>620</sup>

In November 2007, the Commission imposed fines on a number of videotape producers for participation in a price-fixing cartel. One of the cartel participants, Sony, saw its fine increased by 30 per cent due to two incidents that had occurred during the dawn raid: one involving the destruction of documents (an employee was caught shredding documents), the other a refusal to reply to questions.<sup>621</sup>

Two months later, in January 2008, the Commission imposed a € 38 million fine on E.ON Energie for tampering with a Commission seal during an inspection.<sup>622</sup> Three years later, the Commission had once again to deal with the issue of broken seals. In May 2011, it imposed an € 8 million fine on the French company Lyonnaise des Eaux for breach of a seal. The fine was substantially lower than the € 38 million fine imposed on E.ON, as the company had provided ‘constructive assistance’ and had given the Commission more information than it was obliged to offer.<sup>623</sup>

This being said, most companies today are well advised, and choose to submit to the inspections and cooperate fully without attempting to hide or destroy any evidence or tamper with the seals affixed. However, in the few instances where a company representative panics, or the company takes a hostile approach towards the inspectors, such action may damage the Commission’s investigation and the entire case. Irrespective of whether an e-mail account is unblocked accidentally or intentionally, the harm is done and the risk is apparent that crucial evidence can be destroyed. This points to the importance not only of effective procedural safeguards but also of providing the Commission with far-reaching investigatory powers and the possibility to strike down attempts to hide or destroy evidence.

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<sup>620</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 12.

<sup>621</sup> *Professional videotapes* (Case COMP/38.432) Commission Decision 2008/C 57/08 [2008] OJ C57/10.

<sup>622</sup> Commission Decision C(2008)377 final of 30 January 2008 relating to a fine pursuant to Article 23(1)(e) of Council Regulation (EC) No 1/2003 for breach of a seal (Case COMP/B-1/39.326 – E.ON Energie AG). Decision upheld by the General Court in Case T-141/08, *E.ON Energie AG v European Commission*, EU:T:2010:516.

<sup>623</sup> [http://europa.eu/rapid/press-release\\_IP-11-632\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-632_en.htm?locale=en).

In May 2006, a report on obstruction of justice in cartel investigations was presented at the annual conference of the International Competition Network, ICN. According to the report, there was broad consensus that obstruction of cartel investigations is a roadblock to successful cartel enforcement and that in order to protect the integrity of investigations and proceedings, enforcers need to have laws that allow them to punish those who seek to obstruct their investigations. Furthermore, unless the sanctions available were severe, the incentive would be tipped in favour of obstructing investigative efforts, as the perpetrators would then have 'little to lose and everything to gain'.<sup>624</sup>

To conclude, most companies submit to the inspections ordered by the Commission, and cooperate actively with the inspectors during the course of the dawn raid. However, in those cases where a company refuses to submit to an inspection or otherwise fails to cooperate, such action constitutes a 'roadblock' to successful cartel enforcement. Thus, in order to ensure that companies cooperate, the sanctions for failure to do so should be severe.

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<sup>624</sup> International Competition Network, Cartel Working Group, Subgroup 1 – General Framework, *Obstruction of Justice in Cartel Investigations*, Report to the ICN Conference, Cape Town, May 2006, at p. 2.

## 8. Dawn raids – Requirements relating to the inspection decision

This chapter examines the Commission's powers to access company premises and the possibilities of companies to refuse entry where they perceive that the Commission is acting outside its powers. As will be further elaborated in Section 8.1, the possibilities to lawfully refuse entry on such basis are virtually non-existent. This fact emphasizes the importance of clearly defining the Commission's powers in order to avoid situations where the company is obliged to cooperate, even though the Commission is not necessarily acting within the boundaries set by Regulation 1/2003.

The issues addressed in this chapter may be divided into a number of questions, and focus will be on the following:

- (i) Are legal persons – as opposed to natural persons – afforded protection under Article 7 of the Charter?
- (ii) Is an ex-ante review of inspection decisions required under EU or ECHR law?
- (iii) Is the Commission required to have reasonable grounds to suspect an infringement of Article 101 or 102 TFEU before adopting an inspection decision?
- (iv) In what way will the previous handling of a suspected infringement by a national authority affect the Commission's inspection powers?
- (v) Is the Commission allowed to extend the geographic scope of an inspection decision beyond EEA borders?

### 8.1 Are targeted companies under a duty to cooperate at all times?

The powers to perform inspections at company premises are granted to the Commission through Article 20(1) of Regulation 1/2003, which reads:

In order to carry out the duties assigned to it by the Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

Where the dawn raid is carried out on the basis of a formal decision, Article 20(4) imposes an obligation on the company to submit to the inspection and to cooperate with the inspectors. The powers granted to the Commission are wide, but not without limits. Already the wording of Article 20(1) suggests a number of limitations. First of all, the Commission may only carry out an inspection if it serves the purpose of ensuring the application of Article 101 or 102 TFEU. Secondly, the measure must be necessary, reflecting the principle of proportionality, and the requirement that the authority should opt for the least restrictive means available. Further limitations are laid down in Article 20(4), according to which the Commission must, *inter alia*, specify the subject-matter and purpose of the inspection.

There are thus a number of procedural safeguards laid down in the Regulation itself. The Commission may conduct only those investigations which are necessary in order to ensure compliance with Articles 101 and 102 TFEU, and when doing so it shall clearly state the subject-matter and purpose of the investigation in order for the company to be able to assess whether or not the inspection is justified. This may suggest that there is a possibility for a company receiving a visit from the Commission to deny the inspectors access to the premises if one or several of these requirements are not fulfilled, and to appeal the decision to the General Court. From a company perspective, this seems reasonable and even desirable. If the Commission comes knocking on the door with an inspection decision that is too vague, not indicating the suspected infringement, the company does have a legitimate interest in denying access to its premises. From the Commission's perspective however, such right to refuse entry may be devastating to its investigations, as this would enable companies to abuse the right in order to stall the Commission's investigations and destroy or conceal evidence in the meantime. There is thus an apparent tension between the interests of the companies and those of the Commission.

Under EU law, all Union acts are presumed valid and are thus enforceable unless and until the General Court says otherwise.<sup>625</sup> A company that receives a visit from the Commission<sup>626</sup> will therefore have to acknowledge

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<sup>625</sup> See e.g. Case 101/78, *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, EU:C:1979:38, para 5, Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 65, as well as Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6<sup>th</sup> edn, Kluwer Law International, 2001, at p. 730.

<sup>626</sup> Acting upon an inspection decision.

that the decision is fully effective until and unless the General Court suspends the execution of or annuls the decision.

In *Hoechst*, the applicant refused to submit to the inspection ordered by the Commission, claiming that it constituted an unlawful search.<sup>627</sup> The Commission imposed a penalty payment on Hoechst for the refusal to submit to the inspection, which in turn prompted Hoechst to apply to the ECJ for (i) annulment both of the inspection decision and the decision to impose a periodic penalty payment, and (ii) suspension of the operation in question. The applications were dismissed, after which the inspection was carried out and the periodic penalty payment imposed.<sup>628,629</sup>

Hoechst had challenged the imposition of a periodic penalty payment, arguing that it should at least be reduced not to cover the period during which the application for interim measures was pending before the Court. Furthermore, Hoechst had argued, the definitive amount was disproportionate as Hoechst had acted with the sole intent of ensuring a lawful and constitutional investigation procedure. These arguments were not accepted by the Court, which noted that Hoechst had not merely opposed specific measures, but had refused to cooperate in any way in the implementation of the inspection decision.<sup>630</sup> The Court recalled the obligation to acknowledge that all measures adopted by the EU institutions are fully effective until and unless suspended or annulled by the Court. It did not see any grounds for reducing the penalty payment and rejected the claim.<sup>631</sup>

However, there are also cases pointing in another direction, implying a right for a company not to cooperate actively where the decision or the Commission's actions run counter to Regulation 1/2003. In the case of *Dansk Rørindustri*, the Court declared in a Grand Chamber ruling that a refusal to cooperate cannot be regarded as an aggravating circumstance when setting the fine if the company in question is merely exercising its right of the defence.<sup>632</sup> In practice, refusing to cooperate may be a risky route to take, as the Commission has declared that it will come down hard on anyone

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<sup>627</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 3.

<sup>628</sup> Case 46/87 R, *Hoechst AG v Commission of the European Communities*, EU:C:1987:167.

<sup>629</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 5.

<sup>630</sup> *Ibid*, para 63.

<sup>631</sup> *Ibid*, para 65.

<sup>632</sup> 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 v Commission of the European Communities*, EU:C:2005:408, para 353.



obstructing its investigations. When it imposed a € 38 million fine on E.ON. for breaking a seal,<sup>633</sup> Neelie Kroes, Commissioner at the time, declared that the Commission could not and would not tolerate attempts by companies to undermine the Commission's fight against cartels and other anti-competitive practices by threatening the integrity and effectiveness of its investigations. The Commissioner pointed out that 'companies know very well that high fines are at stake in competition cases, and some may consider illegal measures to obstruct an inquiry and so avoid a fine.' Through the decision, the Commission sent a clear message to all companies that 'it does not pay off to obstruct the Commission's investigations'.<sup>634</sup>

Surely, if done intentionally, breaking a seal is a clear form of obstruction that serves no legitimate purpose and which should be sanctioned. However, there are indications that the Commission will consider any objection to its actions as obstruction. In the 2006 Bitumen cartel decision, the Commission chose to increase the fine imposed on KWS by ten per cent, which in this case meant an increase of € 1.7 million. The reason for the increase being that the company had delayed the dawn raid by 47 minutes in order to await external counsels, and that, once the external counsels had arrived, they had refused access to one of the director's offices arguing that the director in question was not responsible for any activities relating to the subject-matter of the inspection decision.

On appeal, the General Court recognized the company's right to seek external advice, but held that it should have allowed the inspectors to enter the premises in order to prevent any destruction of evidence.<sup>635</sup> The General Court acknowledged that the ECJ has held that the mere exercise of the right of the defence shall not constitute a refusal to cooperate within the meaning of the Commission's fining guidelines, and that it is necessary to prevent the rights of the defence from being irretrievably impaired during preliminary inquiry procedures.<sup>636</sup> This being said, the General Court also noted that neither Regulation 1/2003 nor Regulation 773/2004 requires the presence of

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<sup>633</sup> Commission Decision C(2008)377 final of 30 January 2008 relating to a fine pursuant to Article 23(1)(e) of Council Regulation (EC) No 1/2003 for breach of a seal (Case COMP/B-1/39.326 – E.ON Energie AG). Decision upheld by the General Court in Case T-141/08, *E.ON Energie AG v European Commission*, EU:T:2010:516.

<sup>634</sup> [http://europa.eu/rapid/press-release\\_IP-08-108\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-108_en.htm?locale=en).

<sup>635</sup> Case T-357/06, *Koninklijke Wegenbouw Stevin BV v European Commission*, EU:T:2012:596, para 232.

<sup>636</sup> See e.g. 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 v Commission of the European Communities*, EU:C:2005:408, para 353.

a lawyer.<sup>637</sup> While the General Court recognised that lawyers have an important role in defending undertakings' rights already at the stage of the inspection, it also emphasized that the company could have discussed matters with a lawyer over the phone and that the *effet utile* of the Commission's right to carry out unannounced inspections would be lost if the Commission could not enter premises without a lawyer being present. According to the General Court, the inspectors should thus immediately have been given access to the company's entire premises, and it was for the inspectors to decide where to wait for the external counsels. Furthermore, they should have been given the possibility to secure all electronic and telecommunications in order to prevent anyone from contacting outside parties.<sup>638</sup> As the inspectors had been denied this possibility during the first 47 minutes, the appeal was dismissed, and the company had to pay the increased fine. It is also interesting to note how the General Court viewed the initial refusal to let the inspectors access the office of one of the directors. By denying access to the office in question, the General Court considered that KWS had 'refused to submit totally to the investigation decision'.<sup>639</sup>

Let us recall here what the ECJ established in *Dansk Rørindustri*.<sup>640</sup> Exercising the right of the defence cannot be regarded as an aggravating circumstance. However, this appears to be true only if one is successful in one's plea. Of course, a clear obstruction should be punished, but is it equally obvious that someone should be punished if they believe that they are exercising their right of the defence, claiming that the inspectors should await the arrival of an external counsel? In situations like this, the tension between the right of the defence and Commission's legitimate interest in a smooth operation becomes particularly obvious. As noted by the General Court, if the inspectors are not allowed to enter and secure all electronic and telecommunications, their investigation may be jeopardized as the company may then alert other cartel participants or destroy important evidence. On the other hand, companies should be allowed to exercise their rights of the defence. The case of *KWS* shows that a company refusing to submit to a dawn raid or to cooperate during its course will always take a risk, no matter how sure it may be of its rights. Add to this the difficulty for the company, having the inspectors at its door step, to make a quick assessment of the situation, especially if it knows that every minute counts, and that the delay itself constitutes obstruction.

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<sup>637</sup> Case T-357/06, *Koninklijke Wegenbouw Stevin BV v European Commission*, EU:T:2012:596, para 226.

<sup>638</sup> *Ibid*, para 232.

<sup>639</sup> *Ibid*, para 239.

<sup>640</sup> 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 v Commission of the European Communities*, EU:C:2005:408.

A further dimension to this issue is the fact that companies that choose to cooperate with the Commission will receive a reduction in the fine. In the case of *Finnboard v. Commission*,<sup>641</sup> the applicants argued that this practice will effectively encourage companies to incriminate themselves and to render themselves unable to exercise their rights of the defence, or at least, improperly restrict those rights and, conversely, penalize the undertakings which make use of those rights.<sup>642</sup> This line of reasoning was not accepted by the Court which merely noted that a company limiting its cooperation to what is required under Regulation 17/62 will not, on that ground, have an increased fine imposed on it.<sup>643</sup>

In the following, focus will be on the requirements that need to be met before the Commission may access the premises of an undertaking. Regulation 1/2003 gives some indication, but the question is whether there is a more general right to privacy that may be invoked by companies targeted by the Commission's investigations. Article 7 of the Charter and Article 8 of the ECHR both serve the aim of protecting individuals against arbitrary and disproportionate interference by public authorities. Who is protected by these provisions? Natural persons surely, but are companies also allowed to invoke the rights enshrined therein?

## 8.2 A right to privacy?

Article 7 of the Charter states:

Everyone has the right to respect for his or her private and family life, home and communications.

The corresponding Article 8 of the ECHR reads:

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 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.

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<sup>641</sup> Case C-298/98 P, *Metsä-Serla Sales Oy v Commission of the European Communities*, EU:C:2000:634.

<sup>642</sup> *Ibid*, para 54.

<sup>643</sup> *Ibid*, para 58.

The wording of the two provisions suggests that only natural persons are protected by the right to privacy, as the articles contain express references to the notions of ‘home’ and ‘family life’. As will be further discussed in this section, the right to privacy has been gradually broadened under both EU and ECHR law and the two articles now afford protection to legal persons as well.

### 8.2.1 A right to privacy? The view of the EU Courts

In the early case of *National Panasonic*,<sup>644</sup> the ECJ, although hesitantly, did not rule out the possibility that Article 8 of the ECHR also applied to legal persons. In 1979, the Commission, which suspected National Panasonic of anti-competitive practices, had ordered an inspection to be carried out at the company’s UK premises. The inspection was ordered by a formal decision without prior notice to the company, and the Commission’s inspectors appeared at the premises without warning. National Panasonic later challenged the inspection decision on a variety of grounds, the essence of the complaint being that the company had had no warning of the investigation.<sup>645</sup> The failure to give prior warning was characterized by National Panasonic as a breach of fundamental rights and of the principle of proportionality. The fundamental rights invoked were the right to privacy, the right to be heard before an adverse decision is taken, and the right to request a stay of such a decision before it is executed.<sup>646</sup>

As for the right to privacy, and the reference made by National Panasonic to Article 8 of the ECHR, the Court declared that ‘in so far as it applies to legal persons, the rights laid down in Article 8 ECHR are not absolute’.<sup>647</sup> The Court then went on to actually apply Article 8(2) to the circumstances of the case, declaring that the inspections had been carried out in accordance with the law, and were necessary in a democratic society as the powers vested in the Commission through Regulation 17/62 were necessary in order for the Commission to be able to safeguard the application of the EU competition rules.<sup>648</sup> A decade later, the Court took another approach in the classic

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<sup>644</sup> Case 136/79, *National Panasonic v Commission of the European Communities*, EU:C:1980:169.

<sup>645</sup> Opinion of Advocate General Warner in Case 136/79, *National Panasonic v Commission of the European Communities*, EU:C:1980:119.

<sup>646</sup> Case 136/79, *National Panasonic v Commission of the European Communities*, EU:C:1980:169, para 17.

<sup>647</sup> *Ibid*, para 19.

<sup>648</sup> *Ibid*, para 20.

*Hoechst* ruling,<sup>649</sup> declaring that Article 8 of the ECHR did not apply to legal persons.

### **8.2.1.1 Hoechst – No right to privacy for legal persons**

In the case of *Hoechst AG v. the Commission*,<sup>650</sup> the Commission suspected the German PVC producer Hoechst AG of participation in a price-fixing and market-sharing cartel and adopted a decision to inspect its premises. Hoechst refused to submit to the inspection and challenged the Commission's inspection decision, alleging that the dawn raid to be performed by the Commission amounted to a search, and that the Commission lacked the power to perform searches under Regulation 17/62. In any event, Hoechst submitted, searches required a judicial warrant issued in advance.<sup>651</sup>

In its ruling, the Court acknowledged that fundamental rights form an integral part of the general principles of law '[t]he observance of which the Court ensures'.<sup>652</sup> It also declared that the right of the defence must be respected also during preliminary inquiry procedures, including in particular investigations that may be decisive in providing evidence of infringements of the competition rules.<sup>653</sup> The right of the defence was thus not considered to be reserved for the adversary stage of a competition case.

As regards the right to privacy, the Court declared, by making the following statement, that such right did not necessarily extend to legal persons:

Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.<sup>654</sup>

There was no possibility to rely on a principle common to the laws of the Member States. The Court further declared that no other inference was to be

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<sup>649</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*, para 10.

<sup>652</sup> *Ibid.*, para 13.

<sup>653</sup> *Ibid.*, para 15.

<sup>654</sup> *Ibid.*, para 17.

drawn from Article 8(1) of the ECHR, and that there was no case-law from the Strasbourg court dealing with the applicability of Article 8 to undertakings. Thus, for many years it was the view of the Court and thereby also the law, that companies were not protected by a right to privacy.

However, although the ECJ refused to extend the protection afforded under Article 8 of the ECHR to undertakings, or rather to acknowledge that the Article should be interpreted in such a broad sense, this did not mean that Hoechst should be deprived of protection from public intervention. Instead of relying on Article 8 ECHR, the Court chose to rely on the principle of proportionality, assessing whether a measure such as the dawn raid was arbitrary or disproportionate. The Court declared that any intervention by 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. The Court further recognized that the need for protection against arbitrary or disproportionate intervention by public authorities must be recognized as a ‘general principle of Community law’.<sup>655</sup>

In the case at hand, the Court acknowledged that the Commission had indeed been given wide investigatory powers, but also saw the need for such powers in order to let the Commission detect infringements of Articles 101 and 102 TFEU, thus establishing both suitability and a proper purpose. As for the necessity, the Court declared that the right of access implied a power not only to search for documents and information already known to the Commission, but also items of information that were not already known or fully identified. Without these powers, the Court declared, it would be impossible for the Commission to obtain the information necessary to carry out the investigation in cases where the undertakings concerned refused to cooperate or adopted an obstructive attitude.<sup>656</sup> No less restrictive means were thus available. Furthermore, the Court declared that Regulation 17/62 provided a number of procedural safeguards in order to ensure that the Commission respected the rights of the targeted companies. As the Court considered the Commission to have acted within its powers, the measures adopted were found neither arbitrary nor disproportionate.

### **8.2.1.2 Dow Chemical – Still no right to privacy**

Just a few weeks after the Court had delivered its ruling in *Hoechst*, it was once again time to rule on the question of whether a dawn raid performed within the frame of a competition case constituted an infringement of the

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<sup>655</sup> Ibid, para 19.

<sup>656</sup> Ibid, para 27.

fundamental right to the inviolability of the home. Dow Chemical Ibérica SA was suspected of participation in the same cartel as Hoechst and had received an unannounced visit from the Commission in January 1987. Unlike Hoechst, Dow Chemical had submitted to the inspection and cooperated with the inspectors during the dawn raid. However, Dow Chemical later challenged the inspection decision on a number of grounds, including infringement of the fundamental right to the inviolability of the home. Not too surprisingly, the Court reached the same conclusion as it had in *Hoechst*, declaring that such right did not extend to legal persons, but that legal persons were nevertheless protected from arbitrary and disproportionate intervention by the public.<sup>657</sup>

### 8.2.1.3 A right to privacy for legal persons – *Roquette Frères*

It was not until the *Roquette Frères* ruling delivered in 2002, that the Court acknowledged that undertakings could also be afforded a right to privacy.<sup>658</sup> Through a request from the French Court of Cassation, *la Cour de Cassation*, the ECJ was asked to give a preliminary ruling on whether the *Hoechst* judgment prevented a national court from refusing to authorize the use of coercive measures during a dawn raid even where the court considers that it has not been provided with sufficient information or evidence as to provide grounds for suspecting an infringement of Article 101 TFEU.<sup>659</sup>

In its ruling, the Court reiterated the statement made in *Hoechst*, that the need for protection against arbitrary and disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law.<sup>660</sup> However, this time, the Court went further and acknowledged subsequent case law from the Strasbourg court extending the right to privacy to undertakings. In its ruling, the Court declared that regard should be paid to the recent case law from the Strasbourg court, according to which legal persons are protected under Article 8 of the ECHR, but also acknowledging that when professional or business activities or premises are involved, the right of interference established by Article 8(2) might well be more far-reaching than would otherwise be the case.<sup>661</sup>

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<sup>657</sup> Joined Cases 97 to 99/87, *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, paras 15 to 16.

<sup>658</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>659</sup> *Ibid*, para 21.

<sup>660</sup> *Ibid*, para 27.

<sup>661</sup> *Ibid*, para 29.

Thus, through the Court's ruling in *Roquette Frères* it was now clear that the right to privacy afforded under EU law extended also to legal persons, although the protection may not be as strong as when natural persons are invoking the right.

#### **8.2.1.4 Strintzis Lines Shipping**

In the case of *Strintzis Lines Shipping*,<sup>662</sup> concerning suspected tariff fixing contrary to Article 101 TFEU, the ECJ referred both to its ruling in *Roquette Frères* and to the case-law of the Strasbourg court when declaring that natural as well as legal persons are protected from arbitrary and disproportionate intervention by public authorities, and that the right to privacy provided by Article 8 of the ECHR needs to be respected and extends to corporate premises.<sup>663</sup>

#### **8.2.1.5 Article 7 of the Charter – Nexans and Prysmian**

In the two cases of *Nexans*<sup>664</sup> and *Prysmian*,<sup>665</sup> the applicants, both suspected of participation in an electric cable cartel, challenged the Commission's decisions to carry out inspections at their premises. In their applications, they argued that the Commission had been imprecise in its delimitation of the products concerned, and that it was only in certain of the sectors covered by the decisions that the Commission had reasonable grounds to suspect an infringement of the EU competition rules. Prysmian also argued that the Commission had failed to indicate with sufficient precision which unlawful actions the company was suspected of having taken.<sup>666</sup>

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<sup>662</sup> Case C-110/04 P, *Strintzis Lines Shipping SA v Commission of the European Communities*, EU:C:2006:211.

<sup>663</sup> Ibid, paras 32 and 33 where the Court declared *inter alia* that '[I]a protection de la vie privée prévue à l'article 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 (ci-après la «CEDH»), doit être respectée et la protection du domicile est étendue aux locaux commerciaux des sociétés (voir, en ce sens, Cour eur. D. H., arrêt Colas Est e.a.c/France du 16 avril 2002, Recueil des arrêts et décisions 2002-III, § 41, et arrêt Roquette Frères, précité, point 29).'

<sup>664</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596.

<sup>665</sup> Case T-140/09, *Prysmian SpA and Prysmian Cavi et Sistemi Energia Srl v European Commission*, EU:T:2012:597.

<sup>666</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, paras 34-37, and Case T-140/09, *Prysmian SpA and Prysmian Cavi et Sistemi Energia Srl v European Commission*, EU:T:2012:597, paras 29-31.



In its rulings, the General Court made explicit reference to Article 7 of the Charter, declaring that when it comes to determining whether or not an investigation is justified, regard must be had to the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private actions of any person, whether natural or legal. This right to privacy constitutes a general principle of EU law which is also laid down in Article 7 of the Charter, the Court declared.<sup>667</sup>

The General Court went on to say that it may be called upon to review an inspection decision for the purposes of ensuring that it is not arbitrary; that is to say, that it has not been adopted in the absence of facts capable of justifying an inspection.<sup>668</sup> The inspections carried out by the Commission are intended to enable it to gather the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation about which it already possesses certain information. When reviewing an inspection decision, the General Court must therefore satisfy itself that the Commission had reasonable grounds to suspect an infringement of the competition rules when adopting the inspection decision. If there were no reasonable grounds, the General Court concluded that the inspection is arbitrary and thus also contrary to Article 7 of the Charter.<sup>669</sup>

## 8.2.2 The view of the EU Courts – Concluding remarks

The rulings referred to above perfectly illustrate the fact that the EU Courts regard the Treaties as living instruments, and that EU law is constantly in motion. In *Hoechst*, the Court was not willing to acknowledge that legal persons enjoyed a right to privacy, but nevertheless found a way to afford protection from arbitrary intervention by relying on the principle of proportionality. A decade later, things had changed. According to the ECJ, the Strasbourg court had now acknowledged that Article 8 of the ECHR applies also to companies but that the possibility to limit rights under the second sub-paragraph of the Article is greater when it comes to companies than natural persons. Basing its ruling on the jurisprudence of the ECtHR, the ECJ was now willing also to grant protection to legal persons. Yet a

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<sup>667</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 40, and Case T-140/09, *Prysmian SpA and Prysmian Cavi et Sistemi Energia Srl v European Commission*, EU:T:2012:597, para 35.

<sup>668</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 43, and Case T-140/09, *Prysmian SpA and Prysmian Cavi et Sistemi Energia Srl v European Commission*, EU:T:2012:597, para 38.

<sup>669</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 43, and Case T-140/09, *Prysmian SpA and Prysmian Cavi et Sistemi Energia Srl v European Commission*, EU:T:2012:597, para 48.

decade later, the right to privacy is still considered to be enjoyed by both natural and legal persons, but now the EU Courts rely on Article 7 of the Charter rather than Article 8 of the ECHR.

In the following, the limits of protection afforded by the Strasbourg court will be explored in order to determine the standard of protection under ECHR law, and whether the EU and Convention systems afford an equivalent standard of protection.

### 8.2.3 A right to privacy? – The view of the ECtHR

#### 8.2.3.1 Liberal professions and the right to privacy – *Niemietz v. Germany*

In December 1992, the Strasbourg court delivered its ruling in *Niemietz v. Germany*.<sup>670</sup> Some of the doubts as to whether the right to privacy could also extend to business premises were then removed. The case had its origin in Germany and in a search conducted at the premises of a German lawyer, Mr Niemietz.

In December 1985, a letter was sent by fax from the Freiburg post office to Judge Miosga of the Freising District Court. The letter, signed by a Klaus Wegner – ‘possibly a fictitious person’ – criticized the pending proceedings against a certain Mr J who had refused to deduct the church tax from his employees’ salaries. In his letter, Mr Wegner urged Judge Miosga to ‘abandon the path of terrorization’ which he had allegedly embarked upon, and to reach the only decision appropriate in the case – acquittal.<sup>671</sup>

Criminal proceedings were soon initiated against this Mr Wegner for the offence of insulting behaviour. However, attempts to serve a summons on him were unsuccessful. In the context of these proceedings a warrant was issued to search the premises of Mr Niemietz in order to find documents that would reveal Mr Wegner’s identity. The search of Mr Niemietz’ law offices was effected in November 1986. Mr Niemietz unsuccessfully appealed the decision to issue the search warrant all the way up to the German Constitutional Court. Having exhausted all national remedies, he turned to Strasbourg, alleging that the search had violated his right to respect for his home and correspondence, guaranteed by Article 8 of the ECHR.

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<sup>670</sup> *Niemietz v Germany*, judgment of 16 December 1992, Application no. 13710/88.

<sup>671</sup> *Ibid*, para 7.

The submission that the search amounted to an infringement of Article 8 of the ECHR was accepted by the European Commission of Human Rights. It attached particular significance to the confidential relationship that exists between a lawyer and his client, but this line of reasoning was not accepted by the Strasbourg court. According to the ECtHR, the confidential relationship between a lawyer and his client could not serve as a workable criterion for the purposes of delimiting the scope of protection afforded by Article 8, as virtually all professional and business activities may involve matters that are confidential.<sup>672</sup> What the Strasbourg court chose to focus on instead were the notions of ‘private life’ and ‘home’ as the first paragraph of Article 8 of the ECHR reads:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The Strasbourg court saw no reason of principle to exclude activities of a professional or business nature from the notion of ‘private life’ as, in the course of their working lives, the majority of people have significant if not the greatest, opportunity of developing relationships with the outside world.<sup>673</sup> The Strasbourg court declared that it is not always possible to distinguish whether someone’s activities form part of his or her professional life, and considered this to be especially true where someone, such as Mr Niemietz, exercised a liberal profession, as his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know the capacity in which he is acting at a given moment of time.<sup>674</sup>

As regards the notion of ‘home’, the Strasbourg court acknowledged that some Contracting States, including Germany, had extended this notion to cover business premises. The court considered this interpretation to be fully consonant with the French text of the ECHR as the French word ‘domicile’ has a much broader connotation than the word ‘home’, and may extend to a professional person’s office. According to the Strasbourg court, a narrow interpretation of the words ‘home’ and ‘domicile’ could therefore give rise to the same risk of inequality as a narrow interpretation of the notion of ‘private life’.<sup>675</sup>

Another factor was added to the abovementioned general considerations, pertaining to the facts of the case at hand, namely that the search covered correspondence, which is explicitly protected under Article 8 of the ECHR. These factors taken together made the Strasbourg court reach the conclusion

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<sup>672</sup> Ibid, para 28.

<sup>673</sup> Ibid, para 29.

<sup>674</sup> Ibid, para 29.

<sup>675</sup> Ibid, para 30.

that the search of Mr Niemietz' office constituted an interference with his rights under Article 8 of the ECHR.<sup>676</sup>

However, by no means did the matter end there, as Article 8 contains a subparagraph allowing for an interference with the right to privacy under the following circumstances:

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 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.<sup>677</sup>

Three different criteria can be discerned in the above. First, any interference with someone's privacy shall be in accordance with the law. Second, the interference must have a legitimate aim. Third, the interference needs to be necessary in a democratic society. If these three criteria are fulfilled, then the interference is justified and no infringement may be established.

As for the first criterion, the Strasbourg court refrained for a long time from any substantial analysis of its meaning. However, in the cases of *Silver v. United Kingdom*<sup>678</sup> and *Malone v. United Kingdom*,<sup>679</sup> it finally declared that it is not sufficient that the measure is in accordance with domestic law. More is required. The imposition of additional conditions has been explained on the basis that the phrases not only refer back to a state's domestic law but also relate to the 'quality of law requiring it to be compatible with the rule of law that is expressly mentioned in the preamble to the Convention'.<sup>680</sup>

The Strasbourg court has thus established that not only does the requirement that a measure should be in accordance with the law mean that it should have some basis in domestic law. The national legislation should also (i) be accessible to the citizens, (ii) be sufficiently precise to enable them to reasonably foresee the consequences that their actions might entail, and (iii) provide adequate safeguards against arbitrary interference with the right in question.<sup>681,682</sup>

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<sup>676</sup> Ibid, para 33.

<sup>677</sup> Article 8(2) of the ECHR.

<sup>678</sup> *Silver and Others v the United Kingdom*, judgment of 25 March 1983, Applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75 and 7136/75.

<sup>679</sup> *Malone v United Kingdom*, judgment of 2 August 1984, Application no. 8691/79.

<sup>680</sup> Ibid, para 67.

<sup>681</sup> *Kruslin v France*, judgment of 24 April 1990, Application no. 11801/85, para 27.

<sup>682</sup> This final criterion is interesting as it correlates to the requirement that a measure should be necessary in a democratic society. When determining whether a measure is necessary in a

In *Niemietz*, however, the Strasbourg court simply noted that the search had been considered lawful by the national courts as it had been conducted in accordance with Article 103 of the Code of Criminal Procedure.<sup>683</sup> The second criterion was also considered to be fulfilled as the search had pursued aims that were legitimate under Article 8(2) of the ECHR, namely the prevention of crime and the protection of the rights of others (the honour of Judge Miosga).<sup>684</sup> The Strasbourg court then turned its attention to the third criterion, whether the measures taken by the German authorities were necessary in a democratic society. When applying this criterion, the Strasbourg court would establish whether the interference has been (a) attended to by adequate and efficient safeguards against abuse, (b) supported by relevant and sufficient reasons and (c) proportionate to any legitimate aim pursued.<sup>685</sup>

In the case at hand, the court weighed the offence against the measures taken, noting that in Germany, the search of a lawyer's office was not accompanied by any special procedural safeguards, such as the right to an independent observer. However, and even more importantly, the court took into account the materials inspected, and considered that the search impinged on professional secrecy to an extent that appeared disproportionate in the circumstances. The court stressed that, where a lawyer was involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 ECHR. In addition, the court stressed the fact that a search of Mr Niemietz' premises must have been capable of adversely affecting his professional reputation in the eyes of his existing clients and of the public at large.<sup>686</sup> The court therefore concluded that the measures taken did not meet the proportionality *stricto sensu* test, and a breach of Article 8 of the ECHR was thus established.<sup>687</sup>

Had *Niemietz* been the only case dealing with Article 8 of the ECHR and the protection of business premises, it would have been easy for the ECJ to limit the scope of the Article and its right to privacy to cases concerning the search of lawyers' premises or other persons with 'liberal professions' as the ruling in *Niemietz* does not really seem to acknowledge that legal persons are protected by the Article, but rather that the rights of natural persons also

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democratic society, the Strasbourg court often examines whether the safeguards in place are adequate and have been respected by the national authorities.

<sup>683</sup> *Niemietz v Germany*, judgment of 16 December 1992, Application no. 13710/88, para 35.

<sup>684</sup> *Ibid*, para 36.

<sup>685</sup> See e.g. *Bernh Larsen Holding SA and Others v Norway*, Application no. 24117/08, questions to the parties.

<sup>686</sup> *Niemietz v Germany*, judgment of 16 December 1992, Application no. 13710/88, para 37.

<sup>687</sup> *Ibid*, para 38.

extend to their professional activities. However, the subsequent ruling in *Société Colas* leaves no room for such a narrow interpretation.<sup>688</sup>

### **8.2.3.2 Legal persons in general and the right to privacy – *Société Colas Est v. France***

In the case of *Société Colas*, the French Competition Authority had conducted dawn raids at the premises of no less than 56 companies within the framework of an investigation into the conduct of roadwork contractors in local tendering procedures. The dawn raids were carried out under the provisions of applicable French legislation, which did not require any judicial authorization.

During the inspection, the officials from the French Competition Authority seized various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts targeted by the investigation. Further investigations were subsequently carried out on the basis of these contracts and in a decision of 25 October 1989, the Competition Council imposed fines ranging between FRF four and twelve million on the three applicant companies. The decision was upheld by the Paris Court of Appeal. However, the Court of Cassation, *la Cour de Cassation*, quashed the decision on the ground that the calculation of the fine and the assessment of the amounts of the fines made therein had no basis in law. It remitted the case to the Paris Court of Appeal.

At the retrial, relying on Article 8 of the ECHR, the applicants contested the lawfulness of the searches and seizures carried out by the inspectors without any judicial authorization. However, this was unsuccessful, as the Court of Appeal did not consider that there was a violation of Article 8 of the ECHR, and imposed fines ranging between FRF three and six million. The Companies' appeal to the Court of Cassation was equally unsuccessful as the court dismissed the complaint under Article 8 of the ECHR, holding that the '[a]dministrative investigation ... [had] not give[n] rise to any searches or coercive measures'.<sup>689</sup>

This led the applicant companies to turn to Strasbourg. In their application to the Strasbourg court, they relied on Article 8 of the ECHR and contended that the raids carried out by the French Competition Authority, without any supervision or restrictions, had infringed their right to respect for their home.

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<sup>688</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97.

<sup>689</sup> *Ibid*, para 21.

The Strasbourg court noted that the case differed from other cases in that the applicants were legal persons alleging a violation of the right to respect for their ‘home’ under Article 8 of the ECHR. However, as it had done already in *Niemietz*,<sup>690</sup> the court also pointed out that the French term ‘domicile’ has a wider meaning than its English equivalent. Furthermore, and perhaps more importantly, the Strasbourg court declared that the ECHR is a living instrument which must be interpreted in the light of present-day conditions. According to the Strasbourg court, the time had come to hold that in certain circumstances, the rights guaranteed by Article 8 of the ECHR may be construed as including the right to respect for a company’s registered office, branches or other business premises.<sup>691</sup>

As from this point, no doubts remain. Article 8 not only protects natural persons, but may also – at least in certain circumstances – extend to legal persons. This has been confirmed by the court on numerous occasions such as in *Vinci Construction*,<sup>692</sup> where the court declared that, according to well-established case-law, dawn raids carried out at the premises of legal persons are indeed covered by Article 8 of the ECHR.<sup>693</sup>

However, let us recall what the ECJ concluded in *Roquette Frères*,<sup>694</sup> namely that the right does indeed extend to legal persons, but the possibility for public authorities to interfere with this right is greater when it comes to companies than natural persons.<sup>695</sup> A recent case from the Strasbourg court seems to give the ECJ right on this point. The case, *Bernh Larsen Holding*,<sup>696</sup> will be discussed in further detail in Sections 8.3.1.6 and 10.4.1 below, and no presentation of the facts will be made under this section.

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<sup>690</sup> *Niemietz v Germany*, judgment of 16 December 1992, Application no. 13710/88.

<sup>691</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 41.

<sup>692</sup> *Vinci Construction et GTM Génie Civil et Services v France*, Applications nos. 63629/10 and 60567/10.

<sup>693</sup> *Ibid*, at para 63 where the Strasbourg court refers not only to the case of *Société Colas*, but also to a number of other cases including, but not limited to, *Sallinen and Others v Finland*, judgment of 27 September 2005, Application no. 50882/99, *Weber and Saravia v Germany*, judgment of 29 June 2006, Application no. 54934/00, *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01, and *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06.

<sup>694</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>695</sup> *Ibid*, para 29.

<sup>696</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

However, it is worth noting already at this point that in this case, the Strasbourg court made the following statement:

On the other hand, the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual.<sup>697</sup>

Thus, the authorities are granted a wider margin of appreciation when it comes to legal persons than if a case concerns the interference with the privacy of an individual. However, exactly how much wider appears to be a question for the future.

#### 8.2.4 A right to privacy – Concluding remarks

As noted previously in this section, the case-law concerning legal person's right to privacy has evolved over time, and although the courts have not denied legal persons protection from arbitrary or disproportionate intervention by public authorities, it was not until after the turn of the millennium that the ECHR explicitly acknowledged that legal persons enjoyed a right to privacy under Article 8 of the ECHR. By now the right has been firmly established both by the Luxembourg and Strasbourg courts. However, both courts appear to accept that legal persons are granted a somewhat lower standard of protection than natural persons, thereby allowing for flexibility so that the work of the Commission or other competition authorities will not be unduly hampered by applicable fundamental rights protection.

### 8.3 Dawn raids – Any need for ex ante review of inspection decisions?

Having established that Article 7 of the Charter and Article 8 of the ECHR afford protection to legal persons, this section examines whether this right prevents the Commission from carrying out dawn raids without a prior judicial authorization by a court. In several Member States, such as Germany and Sweden, the competition authorities have no powers to adopt inspection decisions.<sup>698</sup> Instead, the adoption of such decisions is left to the courts. At

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<sup>697</sup> Ibid, para 159.

<sup>698</sup> According to the Investigative Powers Report published in October 2012 by the ECN Working Group on Cooperation Issues and Due Process, a court warrant is required in 14 jurisdictions, whereas 13 Member States allow for the competition authority to make the



EU level there is no need for a prior authorization by a court, a fact which has attracted a lot of attention in recent years. Those critical of the EU system argue that an order where the investigating authority decides itself whether it is appropriate and necessary to carry out an inspection runs afoul of Article 7 of the Charter and its corresponding Article 8 of the ECHR.<sup>699</sup>

The *Société Colas* case is interesting not only because it deals with the question of who may benefit from protection under Article 8 of the ECHR, but also because it addresses the issue of the procedural safeguards that need to surround dawn raids, and whether an ex ante review is required. The case will therefore be examined further and the procedural safeguards required will be discussed. The need for prior judicial authorization will be given special attention.

### 8.3.1 Any need for ex-ante review? – The view of the ECtHR

#### 8.3.1.1 Lack of prior judicial warrant – *Société Colas*

As was discussed in Section 8.2.3.2 above, the Strasbourg court established in *Société Colas* that legal persons are protected by the right to privacy. Having taken a stand and declared that legal persons can also be afforded protection, the court examined whether there had been an interference with these rights in the case at hand. The court observed that during the dawn raids, officials from the French Competition Authority had inspected the applicant companies' head offices and branches in order to seize several thousand documents. It further observed that the French government had not disputed the existence of an interference with the applicants' right to privacy, although it had argued that companies could not claim a right to privacy with as much force as an individual in relation to his or her professional or business address.<sup>700</sup>

The court found that there had indeed been an interference with the applicants' right to privacy, and then continued on to assess whether such

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inspection decision. In the UK, court warrants are mostly but not always required. See pages 8 and 9 of the report.

<sup>699</sup> See e.g. Emberland, *Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention on Human Rights: The Colas Est SA v France Approach*, Michigan Journal of International Law, vol. 25, issue 1, 2003.

<sup>700</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 30.

interference was acceptable under Article 8(2) of the ECHR, applying the three criteria that need to be met.<sup>701</sup>

As for the first criterion, that is the requirement that the measure shall be in accordance with the law, the court stressed that this means that the measure should have some basis in domestic law, making no reference to the wider concept of the rule of law. Here, the searches and seizures of documents came within the scope of the powers granted to the inspectors by a French ordinance. The court thus concluded that the dawn raids were ‘in accordance with the law’.<sup>702</sup> The second criterion was also considered fulfilled as the interference by the French authorities was found to be in the interest of both the economic wellbeing of the country and the prevention of crime.<sup>703</sup>

It then remained for the Strasbourg court to determine whether the interference appeared proportionate and could be regarded as necessary to achieve the above-mentioned aims. When assessing the applicability of the third criterion, the ECtHR noted that the dawn raids were carried out simultaneously at the applicant companies’ head offices and branches and that the inspectors entered these premises without judicial authorization in order to obtain and seize numerous documents containing evidence of unlawful agreements. It therefore appeared to the court that the operations at issue and the manner in which they were executed, constituted intrusions into the applicant companies’ ‘homes’. The court acknowledged that the Contracting States have a margin of appreciation in assessing the need for interference – that is, whether there are less restrictive means available – but that this margin of appreciation goes hand in hand with European supervision. Furthermore, the court declared, the exceptions provided for in paragraph 2 of Article 8 should be interpreted narrowly.<sup>704</sup>

Here the Strasbourg court considered that the scale of the operations, carried out in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the impugned interference with the applicant companies’ right to respect for their premises. It thus agreed with the French government that the scale of the operation was necessary to achieve its aim, that is the aim of ensuring the economic well-being of the country and the prevention of crime. This being said, the court also declared that in order for the relevant legislation and practice to meet the criteria set up in Article 8(2)

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<sup>701</sup> Ibid, para 42.

<sup>702</sup> Ibid, para 43.

<sup>703</sup> Ibid, para 44.

<sup>704</sup> Ibid, para 47.

ECHR, and pass the proportionality *stricto sensu* test, they should nevertheless afford adequate and effective safeguards against abuse.<sup>705</sup>

The court did not consider the safeguards surrounding the operations to be adequate. The relevant authorities had very wide powers which, pursuant to the applicable French legislation, gave them exclusive competence to determine the expediency, number, length and scale of the inspections. Moreover, the court noted, the inspections had taken place without any prior warrant being issued by a judge and without a senior police officer being present. The French government had argued that the entitlement to interfere may be more far-reaching when a search is performed at the business premises of a legal person than at the home of a natural person. Although acknowledging that this may be the case, the Strasbourg court still considered, having regard to the manner of the proceedings outlined above, that the operations in the competition field could not be regarded as strictly proportionate to the legitimate aims pursued. In conclusion, as the measures failed to pass the proportionality *stricto sensu* test and were thus not considered necessary in a democratic society, a violation of Article 8 of the ECHR was established.<sup>706</sup>

For a number of reasons, this case is of great significance in determining whether the scope of the Commission's powers and the procedural safeguards under EU law meet the standards set by the Strasbourg court. It has been argued that a system which does not require a search warrant or other judicial authorization will by necessity fail to meet the requirements in Article 8 of the ECHR, basing this conclusion on the Strasbourg court's findings in the *Société Colas* case.<sup>707</sup> By drawing such conclusion a bit too much may be read into this ruling. Indeed, the court does explicitly mention the lack of judicial authorization. However, this does not exclude the possibility that the court made an overall assessment, and would have come to another conclusion had there been other safeguards available, such as the requirement of a court order to obtain a forced entry or an intense ex post review of the authorities' decisions.

In the *Camenzind* case for example, the Strasbourg court did not seem to give the lack of prior judicial authorization that much emphasis.<sup>708</sup> Also the classic *Funke* case suggests that other safeguards may compensate for the

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<sup>705</sup> Ibid, para 48.

<sup>706</sup> Ibid, paras 49-50.

<sup>707</sup> See e.g. Emberland, *Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention on Human Rights: The Colas Est SA v France Approach*, Michigan Journal of International Law, vol. 25, issue 1, 2003.

<sup>708</sup> *Camenzind v Switzerland*, judgment of 16 December 1997, Application no. 136/96.

lack of prior judicial authorization.<sup>709</sup> In the more recent cases of *Bernh Larsen Holding*<sup>710</sup> and *Delta Pekárny*,<sup>711</sup> the Strasbourg court explicitly acknowledges that other procedural safeguards may make up for the lack of prior judicial authorization.

Both *Camenzind* and *Funke* deal with investigations performed at the homes of natural persons, and the scope of these investigations were much narrower than the scope of dawn raids performed within the framework of a competition case. However, the Strasbourg court's reasoning in these two cases cannot be disregarded merely because of the limited scope, and a brief presentation will therefore be given. The cases of *Bernh Larsen Holding* and *Delta Pekárny* on the other hand concern both legal persons and searches of considerable scope.

### **8.3.1.2 The notion of adequate procedural safeguards – Camenzind**

In *Camenzind*,<sup>712</sup> the Swiss Post and Telecommunications Authority suspected Mr Camenzind of owning and using an unauthorized cordless telephone contrary to applicable Swiss legislation. In December 1991, the Authority issued a warrant to search Mr Camenzind's home with the purpose of finding and seizing the telephone. The search was performed in January 1992. Mr Camenzind later challenged the search and requested the Swiss courts to declare it a nullity. The application was dismissed, and in 1995, the Swiss Federal Communications Office imposed a fine of 150 Swiss francs on Mr Camenzind. Mr Camenzind appealed against the decision, but the appeal was dismissed on the ground that the offence in question was time-barred.

Mr Camenzind then turned to Strasbourg, alleging *inter alia* that the search of his home constituted a breach of Article 8 of the ECHR. The Strasbourg court saw no difficulty in declaring that the search amounted to an interference with Mr Camenzind's right to privacy under Article 8(1) of the ECHR.<sup>713</sup> It then went on to consider whether such interference could be justified under Article 8(2). The court accepted that the measures were both in accordance with the law and pursued a legitimate aim. It then remained to establish whether the search had been necessary in a democratic society.

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<sup>709</sup> *Funke v France*, judgment of 25 February 1993, Application no. 10828/84.

<sup>710</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

<sup>711</sup> *Delta Pekárny v The Czech Republic*, judgment of 2 October 2014, Application no. 97/11.

<sup>712</sup> *Camenzind v Switzerland*, judgment of 16 December 1997, Application no. 136/96.

<sup>713</sup> *Ibid*, para 35.

Here the Strasbourg court stressed that the notion of ‘necessity’ implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

As for the question of whether there are any less restrictive means available, the Strasbourg court declared that this should be a question for the national authorities and that Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences.<sup>714</sup> However, it is then for the Strasbourg court to assess whether the reasons adduced to justify such measures are relevant and sufficient and whether the aforementioned proportionality principle has been adhered to. As for proportionality, the court declared that it:

[m]ust firstly ensure that the relevant legislation and practice afford individuals ‘adequate and effective safeguards against abuse’ (ibid.); notwithstanding the margin of appreciation which the Court recognises that the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant.<sup>715</sup>

Thus, the lack of a judicial authorization warranted particular vigilance on the part of the Strasbourg court. However, the absence of an ex ante review alone did not appear sufficient to establish a breach of Article 8 of the ECHR. On the contrary, the Strasbourg court considered there to be sufficient safeguards against abuse as a warrant could only be issued by a limited number of designated senior public servants, the inspections were carried out by officials specially trained for the purposes, it had to be likely that the evidence sought was to be found at the place where the search was conducted, and there were public officers present ensuring that the search did not deviate from its purpose. The Court also took the limited scope of the search into account when reaching the conclusion that there had been no breach of Article 8 ECHR.<sup>716</sup>

It may well be that the Strasbourg court had come to another conclusion if, as in the case of *Société Colas*,<sup>717</sup> the search had covered more than 50 premises, and thousands of documents had been seized. On the other hand, several of the procedural safeguards mentioned by the court do also surround the Commission’s inspections – the ‘warrant’ may only be issued by a

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<sup>714</sup> Ibid, para 45.

<sup>715</sup> Ibid, para 45.

<sup>716</sup> Ibid, para 47.

<sup>717</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97.

limited number of designated senior public servants, the inspections should be carried out by officials specially trained for the purpose, and, although Article 20 of Regulation 1/2003 does not contain an explicit provision to this effect,<sup>718</sup> the fact that the Commission needs to have reasonable grounds to suspect targeted companies of unlawful behaviour implies that it should be likely that the evidence sought is to be found at the premises searched.<sup>719</sup>

### 8.3.1.3 Adequate procedural safeguards – Funke

Like in the *Camenzind* case, the search conducted in *Funke* was also of limited scope.<sup>720</sup> Here, the French citizen Mr Funke was suspected of an offence against French legislation governing financial dealings with foreign countries. In January 1980 he and his wife received a visit from the French customs authorities accompanied by a senior police officer. The customs officers wished to obtain ‘particulars of their assets abroad’.<sup>721</sup> In his application to the Strasbourg court, Mr Funke argued that the search had violated both Article 6 and Article 8 of the ECHR. This section will deal with the applicability of Article 8 only. The French government had conceded that the search performed at Mr Funke’s house amounted to an interference with his right to privacy under Article 8(1) of the ECHR, and the Strasbourg court’s assessment therefore evolved around the applicability of Article 8(2).

Mr Funke contended that the search had not been performed in accordance with the law, giving several arguments in support for this. One argument being that the legislation dealing with the search was contrary to the 1958 Constitution as it did not make house searches and seizures subject to judicial authorization.<sup>722</sup> The Strasbourg court chose not to take a stand as it

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<sup>718</sup> Unlike Article 21 of the same regulation which allows for dawn raids at non-business premises only where there is a reasonable suspicion that books or other records related to the business and the subject-matter of the inspection are being kept at the premises in question.

<sup>719</sup> Unlike Article 21 of Regulation 1/2003, Article 20 does not contain an express reference to the likelihood of finding evidence at the premises searched. However, this must be implied in the article as the Commission may not conduct an inspection unless it has reasonable suspicions against the company in question. In *Hoechst*, the Court declared that Article 14 of Regulation 17/62 (corresponding to Article 20 of Regulation 1/2003) was intended to allow the Commission to obtain evidence of infringements in the places in which such evidence is normally found, that is to say, on the business premises of undertakings. Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 26.

<sup>720</sup> *Funke v France*, judgment of 25 February 1993, Application no. 10828/84.

<sup>721</sup> *Ibid*, para 7.

<sup>722</sup> *Ibid*, para 49.

concluded that the interferences complained of were in any event contrary to Article 8 of the ECHR in other respects.<sup>723</sup>

Having concluded that the search pursued a legitimate aim, the court dealt with the question of judicial authorization under the third tenet of paragraph 2, and its assessment of whether the search had been ‘necessary in a democratic society’. The Strasbourg court recognized that the French customs authorities had very wide powers. Furthermore, and above all, ‘in the absence of any requirement of a judicial warrant, the procedural safeguards in place appeared too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued’.<sup>724</sup> In sum, there had been a breach of Article 8 of the ECHR. The absence of a judicial warrant did thus not constitute an infringement of Article 8 ECHR in itself, but prompted other safeguards to make up for the absence of an ex ante control.

#### **8.3.1.4 Effects on the requirement of an ex post control – Delta Pekárny**

In the recent case of *Delta Pekárny* the Strasbourg court explicitly acknowledged that a dawn raid performed without an ex ante control may still be compatible with Article 8 of the ECHR provided that the procedural safeguards available make up for the lack of a judicial warrant.

The case of *Delta Pekárny* had its origin in a dawn raid performed by the Czech Competition Authority prior to the Czech accession to the EU. In November 2003, the Czech Competition Authority carried out a dawn raid at the premises of Delta Pekárny A.S., a company within the Czech United Bakeries group. The company was suspected of participating in a price-fixing cartel contrary to Article 3 § 1 of the Czech Competition Act.

The dawn raid was not preceded by a court ruling, as the relevant national legislation authorized the competition authority to make inspection decisions. When the inspectors carried out the inspection, Delta Pekárny was presented with an authorization (not a decision) from the competition authority, indicating only that the company was suspected of infringing Article 3 § 1 of the Czech Competition Act through price-fixing in the

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<sup>723</sup> Ibid, para 51.

<sup>724</sup> Ibid, para 57.

market for bakery products.<sup>725</sup> The authorization contained a list of the names of the inspectors that would perform the dawn raid.<sup>726</sup>

During the course of the inspection, the representatives of the Czech Competition Authority soon faced difficulties. Having gone through the e-mail correspondence of the marketing director, Mr K, and taken copies of certain documents, the inspectors wished to proceed to the offices of four other company representatives. Mr K then told the inspectors that he did not know the location of two of the representatives' offices as the company was in the midst of moving. Furthermore, Mr J (one of the targeted representatives) told the inspectors that his office was in another town. Eventually the inspectors gained access to the office of a fourth representative, Mr M, but then realized that his computer had been unplugged and removed. However, in the office of Mr M, the inspectors did instead find the computer of Mr J. When they wished to search the computer, there was an argument as to which e-mails the inspectors should be allowed to peruse. The discussion ended in Mr J shutting down his computer and leaving the premises taking the computer with him. Mr K now had second thoughts about the copies that he had allowed the inspectors to make. He requested two of the seven documents back, claiming that they were of a private nature. The inspectors returned the copies upon his request.<sup>727</sup>

It is fair to assume that the inspectors were not altogether satisfied with the inspection, and the Czech Competition Authority later imposed a CZK 300,000 fine (approx. € 11,500) on Delta Pékárny for having obstructed the authority's search of the premises. The decision was later confirmed by the president of the competition authority who also declared that Article 21 §§ 4 and 5 of the Czech Competition Act, which set out the powers of the authority and imposed a duty on the companies to cooperate, respected and followed the lines of Article 8 of the ECHR.

Delta Pékárny turned to the regional court in Brno, requesting that the decision should be annulled as the competition authority had carried out the inspection without prior judicial approval. The regional court did annul the competition authority's decision to impose fines, but did so on the ground that the decision had not specified the company's failure to cooperate. A new decision to impose fines for obstruction was now made by the competition authority, which this time stated that the company had failed to cooperate by not allowing the inspectors to go through the requested e-mail correspondence and by taking back documents that had initially been

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<sup>725</sup> *Delta Pékárny v The Czech Republic*, judgment of 2 October 2014, Application no. 97/11.

<sup>726</sup> *Ibid*, para 6.

<sup>727</sup> *Ibid*, para 10.



submitted to the inspectors. It was the authority's position that there is a rebuttable presumption that all documents found on commercial premises are of a commercial and not of a private nature.<sup>728</sup> The decision was unsuccessfully challenged before the Czech courts and Delta Pekárny turned to Strasbourg.

Without describing the applicable Czech legislation in detail, it should be noted that the fact that the dawn raid was carried out on the basis of an authorization (rather than a decision) deprived Delta Pekárny of the right to an effective ex post judicial review. In the case before the Czech Administrative Supreme Court, the court had made an analysis based on Article 8 ECHR, but that analysis had dealt only with the powers of the inspectors once the decision to perform a dawn raid had been made. The court had not discussed the necessity of performing the dawn raid. Thus, the ex post judicial review had not involved an assessment of the motive behind the dawn raid or the facts or evidence that the competition authority relied upon when deciding to carry out an inspection at the premises of Delta Pekárny.<sup>729</sup>

The Strasbourg court declared that, in the absence of an ex ante control and where the ex post control of the inspection did not entail an analysis of the necessity to carry out the inspection, the procedural safeguards were not considered adequate.<sup>730</sup> Again, the lack of judicial warrant does not by itself appear sufficient to establish a breach of Article 8 of the ECHR. However, it is apparently an important factor, and a system which does not require prior judicial warrant needs to provide the individual with other effective safeguards against abuse.

The particular importance of a judicial warrant was highlighted also in the recent cases of *Robathin v. Austria*,<sup>731</sup> and *Bernh Larsen Holding*<sup>732</sup> which will both be dealt with in more detail in Chapter 10 as they also address questions regarding the scope of the investigation and the possibility to make copies of hard drives. However, the two cases merit attention already in this chapter as the Strasbourg court discussed the procedural safeguards necessary against any abuse by the investigating authorities.

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<sup>728</sup> Ibid, paras 16 and 17.

<sup>729</sup> Ibid, para 91.

<sup>730</sup> Ibid. The Strasbourg court also stressed the fact that the Czech system did not have a system for destruction of any copies taken by the authorities. Here the ECtHR made explicit reference to the case of *Bernh Larsen Holding*.

<sup>731</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06.

<sup>732</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

### **8.3.1.5 Assessing the procedural safeguards available – Robathin**

Mr Robathin was a practicing lawyer in Vienna suspected not only of theft, but also of fraud and embezzlement. In February 2006, an investigating judge issued a search warrant for Mr Robathin's premises. During the search, the police officers went through his computer system and seized a laptop as well as copies of his computer files. Mr Robathin and the member of the Vienna Bar Association who were present during the search both protested against the measures taken, arguing that they had been excessive. Finding no luck under the Austrian legal system, Mr Robathin turned to Strasbourg.

The findings of the Strasbourg court will not be presented or discussed in their entirety in this section. However, the court did address the need for procedural safeguards against any abuse or arbitrariness, declaring that the elements that had been taken into consideration in comparable cases were, in particular, whether the search was based on a warrant issued by a judge and based on reasonable suspicion; whether the scope of the warrant was reasonably limited; and – where the search of a lawyer's office was concerned – whether the search was carried out in the presence of an independent observer in order to ensure that materials subject to professional secrecy were not removed.<sup>733</sup>

In this case, the warrant had been issued by a judge and we will not know how the court would otherwise have dealt with the issue. However, it is clear from *Robathin* that a number of factors will be taken into account, and that some procedural safeguards are considered to carry more weight than others.

### **8.3.1.6 The nature of the procedural safeguards required – Bernh Larsen Holding**

The case of *Bernh Larsen Holding*<sup>734</sup> concerns measures taken by the Norwegian tax authorities during a tax audit against Bernh Larsen Holding AS ('BLH'). BLH was a company situated in Bergen, Norway. It shared its office space with two other companies, one of them Kver AS. Not only did the companies share office space, they used a common server for their respective information technology systems. Kver was the owner of the server, and BLH rented server capacity. In January 2003, the local tax authorities declared that BLH's accounts for 2001 would be audited. More

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<sup>733</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.

<sup>734</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

than a year later, in March 2004, a meeting was held between the local tax office and BLH, where the tax office demanded that BLH allow the auditors to make an image copy of the entire server. BLH refused to comply with this demand, arguing that it did not own the server, and that the server contained information belonging not only to BLH but also to other companies and persons. BLH and Kver finally agreed to hand over the previous months' back-up copy of the server (containing 112,316 files in 5,560 folders) to the tax authorities in a sealed envelope pending a decision on their complaint.<sup>735</sup> Having worked its way through the Norwegian system, the applicant eventually turned to Strasbourg, arguing that there had been an infringement of Article 8 of the ECHR.

The findings of the Strasbourg court will not be presented or discussed in their entirety in this section. As in *Robathin*,<sup>736</sup> the court did discuss the need for procedural safeguards against any abuse or arbitrariness, and it explicitly acknowledged the fact that the search had not been preceded by a judicial warrant. Despite this, the court was satisfied that:

[t]he interference with the applicant companies' rights to respect for correspondence and home which the contested section 4-10(1) order entailed was subject to important limitations and was accompanied by effective and adequate safeguards against abus[e].<sup>737</sup>

As for the nature of these procedural safeguards, the court referred to the companies' right to complain, the fact that a copy of the backup tape had been placed in a sealed envelope pending the outcome of the appeal, that the applicants had been entitled to be present when the seal was broken and the files were reviewed, and that, once the files had been reviewed, they were deleted, etc.<sup>738</sup> The court also took notice of the fact that the nature of the interference complained of was not of the same seriousness and degree as is ordinarily the case of search and seizure carried out under criminal law.<sup>739</sup> Here the court noted that the consequences of a tax subject's refusal to cooperate were exclusively administrative (discretionary tax assessment). Moreover, the disputed measure had in part been made necessary by the applicant companies' own choice to opt for 'mixed archives' on a shared server, making the task of separation of user areas and identification of documents more difficult for the tax authorities

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<sup>735</sup> Ibid, para 14.

<sup>736</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06.

<sup>737</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 172.

<sup>738</sup> Ibid, paras 165-171.

<sup>739</sup> Ibid, para 173.

The court here referred to the *Société Colas* case,<sup>740</sup> indicating that the interference by the Norwegian tax authorities was less serious than in *Société Colas*.<sup>741</sup> However, cartels are criminalized in France, and no direct parallel may be drawn to the EU system where no custodial sentences may be imposed. In any event, the court's ruling in *Bernh Larsen Holding* definitely speaks in favour of an overall assessment rather than viewing a prior judicial authorization as an absolute requirement.

### 8.3.2 Dawn raids – Any need for ex ante review of inspection decisions? The view of the EU Courts

The EU Courts also take the view that there is no need for a prior judicial authorization as long as there are other procedural safeguards in place.

#### 8.3.2.1 Protection against arbitrary and disproportionate intervention – Hoechst

In the case of *Hoechst AG v. the Commission*,<sup>742</sup> the Commission suspected Hoechst of participation in a price-fixing and market-sharing cartel and adopted a decision to inspect its premises. Hoechst refused to submit to the inspection and challenged the Commission's inspection decision, alleging that the dawn raid to be performed by the Commission amounted to a search, and that the Commission lacked the power to perform searches under Regulation 17/62. In any event, Hoechst submitted, searches should be carried out only on the basis of a judicial warrant issued in advance.<sup>743</sup>

As was discussed already in Section 8.2.1.1 above, the ECJ did not accept the arguments presented by the applicant. Acknowledging that individuals, legal as well as natural, are protected against arbitrary and disproportionate intervention by the public, the Court found that the procedural safeguards in place ensured adequate protection against such interference and dismissed Hoechst's complaint.

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<sup>740</sup> *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97.

<sup>741</sup> The consequences for the tax subject's refusal to cooperate were discretionary tax assessment, see para 43.

<sup>742</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337.

<sup>743</sup> *Ibid*, para 10.

### 8.3.2.2 Overall assessment of procedural safeguards – Deutsche Bahn

This was also the view taken by the EU Courts in the *Deutsche Bahn case*, where both the General Court and the ECJ declared that there is no need for prior judicial authorization provided that there are other effective safeguards in place.<sup>744</sup>

Following a number of dawn raids performed by the Commission at the premises of Deutsche Bahn AG and a number of its subsidiaries during the period March through July 2011, Deutsche Bahn challenged the Commission's investigatory powers and inspection procedures. In a string of appeals, it opposed the Commission's decisions to carry out unannounced inspections at its premises in search for evidence of abuse of dominance.<sup>745</sup> In support of its actions, the company relied on a number of pleas. It argued that the lack of prior judicial authorization – and thereby also prior judicial review – constituted not only an infringement of the company's right to privacy under Article 7 of the Charter, but also a breach of its right to an effective legal remedy contrary to Article 47 of the Charter.

#### *The view of the General Court*

In September 2013, the General Court had its say in the matter, dismissing the applications on all grounds, and fully confirming the legality of the Commission's inspection decisions. As for the requirement of a prior judicial authorization, the General Court declared that this requirement was not absolute, and that other procedural safeguards may compensate for the lack of an ex ante control. It explicitly referred to the case-law of the Strasbourg court,<sup>746</sup> stating that effective ex post control should compensate for the lack of an ex ante control.<sup>747</sup>

The General Court further recognized five types of procedural safeguards provided under Regulation 1/2003, the first being the requirement on the part

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<sup>744</sup> Joined Cases T-289 and 290/11 and T-521/11, *Deutsche Bahn and Others v European Commission*, EU:T:2013:404, paras 66-78, and Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, paras 32-37.

<sup>745</sup> See e.g. Joined Cases T-289 and 290/11 and T-521/11, *Deutsche Bahn and Others v European Commission*, EU:T:2013:404.

<sup>746</sup> The General Court referred to the cases of *Harju v Finland*, judgment of 15 February 2011, Application no. 56716/09, and *Heino v Finland*, judgment of 15 February 2011, Application no. 56720/09.

<sup>747</sup> Joined Cases T-289 and 290/11 and T-521/11, *Deutsche Bahn and Others v European Commission*, EU:T:2013:404, para 66.

of the Commission to provide reasons for its decision, the second the restrictions governing the inspectors during the dawn raid, the third the fact that the Commission may not use any force during inspections, the fourth concerning intervention by national authorities and the fifth and final being the possibility of a subsequent judicial review.<sup>748</sup>

The General Court regarded these safeguards to be protected under the EU system. As for the subsequent judicial review, it declared that the EU Courts may carry out a review in full of the inspection decisions, and that the system thus complied with the Charter and the ECHR.<sup>749</sup>

### *The view of the ECJ*

Deutsche Bahn and its subsidiaries appealed against the General Court's ruling and argued *inter alia* that the General Court had erred in law when it held that the absence of prior judicial authorization may be counterbalanced by a comprehensive post-inspection review.<sup>750</sup> The ECJ did not accept this argument. Referring to cases from the Strasbourg court such as *Harju v. Finland* and *Heino v. Finland*, the Court declared that, despite the allegations to the contrary made by Deutsche Bahn, these rulings expressly acknowledged that the lack of prior judicial authorization may be counterbalanced by effective ex post review covering both questions of fact and law. The key issue, according to the Court, was the intensity of the review – covering all matters of fact and law and providing appropriate remedy if an activity found to be unlawful had taken place – and not the point in time when the review was carried out.<sup>751</sup> As for the EU system, the Court considered the procedural safeguards available and the judicial review exercised by the EU Courts to meet the ECHR standard, and therefore dismissed this ground for appeal.<sup>752</sup>

It was thus the view of the EU Courts that the safeguards available, and especially the possibility of subsequent judicial review of inspection decisions, make up for the lack of an ex ante review. As will be discussed in Chapter 13 below, much indicates that, contrary to the view of the ECJ, the ex post control available under the EU system fails to meet the ECHR standard. If there is no ex ante control and no effective ex post control, is it then still safe to assume that the system in place really ensures adequate

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<sup>748</sup> Ibid, para 74.

<sup>749</sup> Ibid, para 97.

<sup>750</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, para 15.

<sup>751</sup> Ibid, para 41.

<sup>752</sup> Ibid, paras 32-37.

safeguards against abuse and arbitrariness? This will be discussed in further detail in Chapter 13 below.

### 8.3.3 Any need for ex-ante review? Concluding remarks

It is clear from the case-law of the ECJ and the Strasbourg court that neither court considers an ex ante review to form an absolute requirement. A company targeted by an inspection decision may thus not refuse access to its premises on the sole ground that the inspectors have no warrant issued by a judge. However, although the ex ante review is not a requirement, it is apparently an important procedural safeguard and a system which does not require prior judicial warrant therefore needs to provide the individual with other effective safeguards against abuse.

What other safeguards need to be in place in order for the procedure to respect the company's right to privacy? In *Deutsche Bahn*, the General Court acknowledged that one of the safeguards available under the EU system was the obligation on the part of the Commission to state the reasons for its inspection, defining its purpose and subject-matter and thereby allowing the company to assess the scope of its duty to cooperate and to exercise its right of the defence.<sup>753</sup> The following section will discuss the need and importance of this safeguard in more detail.

## 8.4 The scope of the inspection decision – Is the Commission allowed to go fishing?

The previous sections have addressed the issue of whether legal persons, as opposed to natural persons, enjoy a right to privacy under Article 7 of the Charter and Article 8 of the ECHR, and whether or not inspection decisions need to be adopted or authorized by a court. From the cases presented it may be concluded that companies do enjoy a right to privacy under both EU and ECHR law, but that such right may be narrower in scope than the one afforded to natural persons. Neither the Strasbourg court nor the ECJ considers the absence of a judicial warrant in itself to constitute an infringement of the right to privacy. However, both courts consider the absence of ex ante control to warrant other procedural safeguards. In

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<sup>753</sup> Joined Cases T-289 and 290/11 and T-521/11, *Deutsche Bahn and Others v European Commission*, EU:T:2013:404, paras 75 to 77. The General Court's reasoning was later confirmed by the ECJ, see Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, paras 22-29.

*Deutsche Bahn*, the Court identified one such safeguard to be the requirement on the part of the Commission to provide reasons for its decision.<sup>754</sup> Likewise, in *Robathin*, the Strasbourg court took note of the fact that the search was based on reasonable suspicion.<sup>755</sup> These two rulings suggest that a dawn raid should be justified by some degree of suspicion.

This section will examine whether the execution of dawn raids under Regulation 1/2003 requires some degree of suspicion of wrongdoing, and what body of indicia or evidence, if any, the Commission should have in its possession before carrying out a dawn raid. Can a dawn raid which is not based on any actual suspicion of wrongdoing really be considered compatible with the principle of proportionality or the right to privacy contained in Article 7 of the Charter?

#### 8.4.1 Grounds for suspicion – The view of the EU Courts

If the objective of effective and efficient antitrust enforcement should be allowed to prevail at all times, it is likely that the Commission and other competition authorities would be much more aggressive in their enforcement of the competition rules, and that we would witness a sharp increase in the number of dawn raids performed by the Commission. However, this is not the case. Enforcement of the competition rules shall be carried out with due regard to fundamental rights and preamble 37 to Regulation 1/2003 stipulates:

This 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 principles.

One such right is the right of the defence. When it comes to dawn raids, this means *inter alia* that targeted companies have a right to know if they are suspected of any wrongdoing and what such wrongdoing is believed to consist of. Another fundamental right is the right to privacy protecting natural and legal persons from unjustified interference with the right to respect for their home and correspondence.

In the *Hoechst* ruling discussed in Section 8.2.1.1 above, the Court declared that the obligation to specify the subject-matter and purpose of the

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<sup>754</sup> Joined Cases T-289 and 290/11 and T-521/11, *Deutsche Bahn and Others v European Commission*, EU:T:2013:404, para 74.

<sup>755</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.



investigation is a fundamental requirement in order to show that the dawn raid is justified and to enable the targeted companies to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence.<sup>756</sup> This has been confirmed by the Court on numerous occasions and some of these cases will now be examined in more detail.

#### **8.4.1.1 Dow Benelux – Precision in the statement of reasons**

In the case of *Dow Benelux v. the Commission*,<sup>757</sup> the Dutch company Dow Benelux NV had challenged the Commission's inspection decision. In its application, the company relied on three submissions: the defective nature of the statement of reasons, the lack of reasonable or proper evidence as to whether or not the inspection was well-founded, and in the alternative, an infringement of the fundamental right to the inviolability of the home.<sup>758</sup> In its ruling, the Court acknowledged that the duty on the part of the Commission to state the subject-matter and purpose of the inspection in its decision is a fundamental requirement to show that the investigation is justified, but also to enable the targeted company to assess the scope of its duty to cooperate while at the same time safeguarding its right of the defence.<sup>759</sup>

The Court considered that the statement of reasons had been drawn up in 'very general terms' which might well have been more precise. Yet it contained the essential elements prescribed by Article 14(3) of Regulation 17/62 (now Article 20(4) of Regulation 1/2003), referring in particular to information suggesting the existence of agreements or concerted practices between certain suppliers of PVC in the EU concerning prices, quantities and sales targets for those products.<sup>760</sup> The Court thus rejected the applicant's first submission. As for the second submission, the company claimed that the evidence relied on by the Commission either did not constitute reasonable evidence or had been unlawfully obtained. In either case, the applicant argued, the inspection was not justified.<sup>761</sup> It had been established that the decision was based on information obtained during two inspections unrelated to the subject-matter of the challenged decision. The Court acknowledged that the right of the defence prevents the Commission from relying on evidence obtained during another investigation unrelated to the subject-

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<sup>756</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 29.

<sup>757</sup> Case C-85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379.

<sup>758</sup> *Ibid*, para 5.

<sup>759</sup> *Ibid*, para 26.

<sup>760</sup> *Ibid*, para 11.

<sup>761</sup> *Ibid*, para 11.

matter or purpose thereof. However, the Court noted, this does not mean 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 such information indicates the existence of anti-competitive practices.<sup>762</sup> The second submission was thus also rejected.

As for the third submission, the Court reiterated the statement made in *Hoechst*<sup>763</sup> – that Article 8 of the ECHR did not protect legal persons, but that companies should still be protected against arbitrary or disproportionate intervention by public authorities. Here, the Court carried out a proportionality analysis, declaring that the Commission had acted in accordance with Regulation 17/62, and that the legislation in question had the aim to achieve and maintain undistorted competition to the benefit of the public interest, individual undertakings and consumers. The Court acknowledged that the powers vested in the Commission under the regulation were wide, but necessary to achieve the aim sought. Furthermore, the regulation provided for a number of procedural safeguards. The Commission should, *inter alia*, state the subject-matter and purpose of the inspection in order to demonstrate that it is justified and to allow the targeted company to assess the scope of its duty to cooperate and to safeguard its right to the defence.<sup>764</sup> As the Commission was found to have acted within its powers, the Court did not consider the Commission's measures as either arbitrary or disproportionate and thus dismissed the application of *Dow Benelux*.<sup>765</sup>

#### **8.4.1.2 Coercive measures – Roquette Frères**

The case of *Roquette Frères* has been discussed in Section 8.2.1.3 above in relation to the question of whether or not legal persons enjoy a right to privacy. However, in that case the Court also discussed the scope of such right in relation to coercive measures authorized by national authorities.

In September 1998, the Commission issued a decision to search the premises of *Roquette Frères SA*, suspecting the company of cartel participation. Before conducting the dawn raid, the Commission turned to the French Government, requesting it to take the necessary steps to ensure assistance by the national authorities in the event that *Roquette Frères* would oppose the

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<sup>762</sup> *Ibid*, para 19.

<sup>763</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337.

<sup>764</sup> Case C-85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, para 47.

<sup>765</sup> *Ibid*, para 51.

inspection.<sup>766</sup> The *Tribunal de grande instance de Lille* issued an authorization order, and the inspection was carried out. The company challenged the authorization order granted by the French court, arguing that it had issued the order without first establishing that the Commission had reasonable grounds to suspect an infringement of the EU competition rules, and that the granting of coercive measures was therefore not justified.<sup>767</sup>

The Court of Cassation, *la Cour de Cassation*, noted that the court authorizing the coercive measure had not received any information or evidence from the Commission, only a statement that it had information to the effect that Roquette Frères was engaging in anti-competitive practices. The Court of Cassation decided to stay the proceedings and ask the ECJ whether the ruling in *Hoechst* prevents a national court from refusing to grant an authorization, even where it considers that the evidence or information provided is not sufficient to authorize an inspection or, as in the case at hand, no information or evidence has been provided.<sup>768</sup>

As a preliminary, but important point, the Court stated that the Member States, when determining the conditions on which to cooperate with the Commission, are subject to a twofold obligation imposed on them by EU law: they must ensure that the Commission's action is effective, while respecting the various general principles of EU law.<sup>769</sup> Further, the ECJ declared that the national court must limit its review, and only ensure that the coercive measures are not arbitrary and that they are proportionate to the subject-matter of the investigation.<sup>770</sup>

The ECJ then stated that a national court, when verifying that a coercive measure is proportionate to the subject-matter of the investigation, will have to establish that such measure does not constitute a disproportionate or intolerable interference in relation to the aim pursued by the investigation – that is, whether the measure passes the proportionality *stricto sensu* test. The Court then recalled what was established in *National Panasonic*,<sup>771</sup> namely that if the investigation decision has the sole aim of enabling the Commission to gather the information required to assess whether the Treaty

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<sup>766</sup> In accordance with Article 14(6) of Regulation 17/62, now Article 20(8) of Regulation 1/2003.

<sup>767</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 16.

<sup>768</sup> *Ibid*, para 21.

<sup>769</sup> *Ibid*, para 35.

<sup>770</sup> *Ibid*, para 40.

<sup>771</sup> Case 136/79, *National Panasonic v the Commission of the European Communities*, EU:C:1980:169. For a further discussion on what the Court said in *National Panasonic*, see Section 5.8.1 above.

has been infringed, then such a decision is not in itself contrary to the principle of proportionality.

However, the ECJ did not end its discussion here. Instead, it declared that the national court cannot carry out its review of proportionality without regard to factors such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought.<sup>772</sup> Consequently, the Court concluded:

[i]t must be open to the competent national court to refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person, which a search using law-enforcement authorities entails, necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.<sup>773</sup>

As the question referred to the ECJ concerned the use of coercive measures, the ruling is not directly applicable to a situation where the Commission carries out a dawn raid without any assistance from national law enforcement authorities. In fact, this distinction was made by the Court, which declared that the powers conferred on the Commission are limited to authorizing the inspectors to enter the premises while the question before the national court concerns the granting of coercive measures.<sup>774</sup> However, given the fact that companies are under an obligation to actively cooperate with the inspectors, and are made aware of the fact that any failure to do so may result not only in the Commission requiring assistance from national law enforcement authorities, but also in heavy fines, any inspection carried out on the basis of little or no evidence of wrongdoing would constitute a violation of the right to privacy laid down in Article 7 of the Charter.

Interesting to note is that in his opinion, Advocate General Mischo applied the criteria set out in Article 8(1) and (2) of the ECHR to the case at hand, declaring that the ECJ attaches the greatest importance to the case-law of the Strasbourg court.<sup>775</sup> Acknowledging that a dawn raid constitutes an interference with the right to privacy provided in Article 8(1), AG Mischo then applied the criteria in the second subparagraph. According to him, the first criterion was met, as an inspection carried out on the basis of Article 85 of the EC Treaty and Regulation 17/62 constitutes an interference ‘in

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<sup>772</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 79.

<sup>773</sup> *Ibid*, para 80.

<sup>774</sup> *Ibid*, paras 56-59.

<sup>775</sup> Opinion of Advocate General Mischo in Case C-94/00, *Roquette Frères*, EU:C:2001:472, para 33.

accordance with the law'. As for the requirement that the interference should pursue a legitimate aim, the Advocate General saw no difficulty in concluding that an investigation, with a view to establishing the existence of restrictive practices contrary to Article 85(1) of the EC Treaty, pursued a legitimate aim. As for the third requirement – that the interference should be necessary in a democratic society – the AG pinpointed the interests listed in Article 8(2) stating that the criteria to be applied were ‘the economic well-being of the country’, and ‘the prevention of disorder’.<sup>776</sup> He also concluded that in principle, investigations carried out under Regulation 17/62 were necessary within the meaning of Article 8 ECHR, but that the criterion of necessity must be fulfilled in each specific case. Citing *Funke*,<sup>777</sup> the Advocate General further established that although the Contracting States have a margin of appreciation in assessing the need for an interference, this goes hand in hand with European supervision and any exceptions are to be interpreted narrowly.<sup>778</sup> As for the review to be carried out each time the necessity is disputed, the Advocate General noted that it is the duty of the Court of Justice to carry out such a review.

#### **8.4.1.3 Requiring reasonable grounds – France Télécom**

A case that supports the theory that the conclusions drawn by the ECJ in *Roquette Frères* are applicable to dawn raids in general, and not only to the granting of coercive measures, is the case of *France Télécom*.<sup>779</sup> There the General Court declared that in order to establish that an inspection is justified, the Commission is required to show in the inspection decision, in a properly substantiated manner, that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subjected to the inspection is suspected.<sup>780</sup> It is thus only where the Commission can show that it has reasonable grounds to suspect an infringement that the inspection is justified, and thus in accordance with Article 7 of the Charter.

In *France Télécom*, the General Court examined the challenged decision against the criteria above, and declared that although it was couched in general terms, the decision fulfilled the requirements set out in Article 20(4) of Regulation 1/2003. Thus, it appeared from the essential terms of the

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<sup>776</sup> *Ibid*, para 41.

<sup>777</sup> *Funke v France*, judgment of 25 February 1993, Application no. 10828/84.

<sup>778</sup> Opinion of Advocate General Mischo in Case C-94/00, *Roquette Frères*, EU:C:2001:472, para 44.

<sup>779</sup> Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81.

<sup>780</sup> *Ibid*, para 53 where the General Court refers to *Roquette Frères*.

contested decision that it stated the subject-matter and the purpose of the inspection, setting out the essential characteristics of the suspected infringement, identified the market thought to be affected, the nature of the suspected restrictions on competition, explanations as to the applicant's subsidiary's supposed degree of involvement in the infringement, the role which could have been played by the applicant, what was being sought and the matters to which the investigation was to relate, etc. Thus, the applicant's claim was dismissed.

#### **8.4.1.4 The need to define the relevant markets affected – Nexans and Prysmian**

In two recent rulings, the General Court once again had its say in the matter. The two cases, *Prysmian*<sup>781</sup> and *Nexans*<sup>782</sup> both concern the Commission's investigation into a suspected cartel in the electric underwater cable sector.

In January 2009, the Commission performed dawn raids at the premises of a number of cable manufacturers throughout the EU. Among these were companies belonging to the Nexans and Prysmian groups. According to the inspection decisions, the companies were suspected of participation in restrictive practices concerning:

[t]he supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables.<sup>783</sup>

Both Nexans and Prysmian appealed against the inspection decision arguing that the product scope of the decision was overly broad and vague as the Commission had not sufficiently delimited the subject-matter or the purpose of the inspection. According to Nexans, the lack of precision made it impossible for the company to exercise its right of the defence or to distinguish the documents that the Commission were allowed to consult and copy from other documents in the company's possession. This had allowed the Commission to perform a fishing expedition and search the premises of Nexans for documents and useful information for the purposes of detecting possible infringements of the competition rules in the context of all the applicant's activities rather than solely in the context of the sector covered

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<sup>781</sup> Case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission*, EU:T:2012:596.

<sup>782</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596.

<sup>783</sup> *Ibid*, para 3.

by the investigation.<sup>784</sup> Furthermore, the company claimed, it was only in the high voltage underwater cable sector that the Commission had detailed information indicating cartel activity.

In its ruling, the General Court reiterated the statement made by the ECJ in *Hoechst*,<sup>785</sup> declaring that the requirement to specify the subject-matter and purpose of the investigation serves to protect the undertakings' right of the defence and to guarantee that no arbitrary or discriminatory measures are undertaken. Equally important, the General Court reiterated what the ECJ had established already in *Dow Benelux*<sup>786</sup> – that as the obligation to specify the purpose and subject-matter of the inspection serves the aim of ensuring the right of the defence, the scope of the obligation to state the reasons on which the inspection decisions are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation.<sup>787</sup> Here, the objective of ensuring an efficient and effective competition law enforcement is not allowed to trump fundamental rights such as the right of the defence.

This being said, the precision of the decision must also be established in order to respect the targeted company's right of defence. In its ruling, the General Court again made reference to the ECJ's ruling in *Dow Benelux*,<sup>788</sup> where the ECJ had declared that:

Although the Commission is not required to communicate to the addressee of a decision ordering an investigation of all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate.<sup>789</sup>

The General Court continued by making reference to the ECJ's ruling in *Roquette Frères*,<sup>790</sup> stating that the Court must be able to satisfy itself that reasonable grounds exist to suspect the company concerned of an infringement of the competition rules.<sup>791</sup> Although the Commission is not

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<sup>784</sup> Ibid, para 35.

<sup>785</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337.

<sup>786</sup> Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v. Commission of the European Communities*, EU:C:1989:380.

<sup>787</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 42. See also Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380, para 45.

<sup>788</sup> Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380.

<sup>789</sup> Ibid, para 45.

<sup>790</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>791</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 43.

necessarily required to delimit precisely the relevant market, the Commission is nonetheless required to state the essential characteristics of the infringement, indicating, *inter alia*, the market thought to be affected.<sup>792</sup>

Furthermore, the General Court noted, the Commission must:

[i]dentify 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, and to make it possible for the Court of the European Union to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes.<sup>793</sup>

According to the General Court, the company is thus entitled to limit cooperation to its activities in those sectors where the Commission has reasonable grounds for suspecting an infringement of the competition rules.

Having established that the inspection decision did in fact cover all electric cables – from telephone wires to high voltage electric cables – the General Court nevertheless considered that the Commission had fulfilled its requirement to specify the subject-matter. In short, the decision could not be considered too vague or ambiguous, as it was clear from the decision that it covered all electric cables and that the Commission required the applicants to provide information covering all sorts of cables.

However, this did not mean that the appeal was dismissed, as the General Court then went on to discuss the second ground of challenge: that the decision was overly broad. According to the applicants, the high voltage underwater cable sector was the only sector where the Commission had reasonable grounds for suspecting an infringement of the competition rules.<sup>794</sup> Here, the General Court explicitly addressed the issue of 'fishing expeditions'. It declared that in order to determine whether the inspectors undertook such an expedition or not depended on whether the Commission, when it adopted the decision, had reasonable grounds for the purposes of justifying interference in the sphere of the applicant's private activity relating to all electric cables.<sup>795</sup>

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<sup>792</sup> Ibid, paras 43 and 44.

<sup>793</sup> Ibid, para 45.

<sup>794</sup> Ibid, para 60.

<sup>795</sup> Ibid, para 58.



The General Court first observed that the Commission's powers under Article 20 of Regulation 1/2003 would serve no useful purpose if the Commission could do nothing more than ask for documents which it was able to identify with precision in advance. On the contrary, its right to investigate 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 inspection should the undertakings concerned refuse to cooperate or adopt an obstructive attitude.<sup>796</sup>

The exercise of the power to search for various items of information which are not already known or fully identified allows the Commission to examine certain business records of the targeted company, even if it does not know whether they relate to activities covered by that decision, in order to ascertain whether that is so and to prevent the undertaking from hiding evidence which is relevant to the investigation, on the pretext that that evidence is not covered by the investigation.<sup>797</sup> However, while acknowledging that the Commission is not restricted to asking only for or perusing only documents that it may identify in advance, it is required to restrict its searches to activities relating to the sectors indicated in the inspection decision, and once it has found that a certain document does not relate to those activities it must refrain from using that document for the purposes of its investigation. The right to examine is thus broader than the right to copy.

The obligation to refrain from using documents not covered by the decision is necessary, as otherwise, every time the Commission had indicia suggesting that an undertaking has infringed the competition rules in a specific field of its activities, it would be able to carry out an inspection covering all those activities, with the ultimate aim of detecting any infringement of those rules which might have been committed by that undertaking. This, the General Court pointed out, is incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society.<sup>798</sup> Although not explicitly mentioning Article 7 of the Charter, this is a clear reference to that Article as well as to the corresponding Article 8 of the ECHR.

This in turn meant that the Commission was not allowed to adopt an inspection decision covering all electric cables and materials associated with such cables unless it had reasonable grounds to justify an inspection at the

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<sup>796</sup> Ibid, para 62.

<sup>797</sup> Ibid, para 63.

<sup>798</sup> Ibid, para 74.

applicants' premises covering all the applicants' activities in relation to electric cables and the materials associated with such cables.<sup>799</sup>

The General Court did not consider that the Commission had been able to demonstrate that it had reasonable grounds for ordering an inspection relating to all cables. The only sectors where the Commission had been able to demonstrate that it was in possession of enough information were the high voltage underwater and underground cable sectors, and the application for annulment was thus upheld in so far as it concerned other types of cables or materials associated with such other cables.<sup>800</sup>

Thus, in order for the Commission to carry out an inspection, it needs to have reasonable grounds for suspecting an infringement of the competition rules with regard to the activities in question. The Strasbourg court appears to share this view. In *Robathin*, it declared that there need to be safeguards against abuse and arbitrariness. When assessing the adequacy of such safeguards, the Strasbourg court examined '[i]n particular whether the warrant was issued by a judge and *based on reasonable suspicion* (emphasis added); whether the scope of the warrant was reasonably limite[d]'.<sup>801</sup>

#### **8.4.1.5 The obligation to indicate the subject-matter of the investigation – HeidelbergCement**

The case of *HeidelbergCement v. the Commission*,<sup>802</sup> which was adjudicated by the Court as recently as in March 2016, also underlines the need for the Commission to indicate its suspicions with reasonable precision. Although the case relates to Article 18 of Regulation 1/2003 and requests for information, it is of relevance to this thesis as it concerns the Commission's obligation to indicate the subject-matter of its investigation in the request, and thus identify the alleged infringement of the competition rules.<sup>803</sup> The background to the case was the following.

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<sup>799</sup> Ibid, para 76.

<sup>800</sup> Ibid, para 101.

<sup>801</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.

<sup>802</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149.

<sup>803</sup> Ibid, para 20. In his opinion, AG Wahl argued that the principles governing the application of Article 20, and the Commission's obligation to state reasons and to specify the subject-matter and purpose of the investigation should apply *mutatis mutandis* to decisions requesting information under Article 18(3) of Regulation 1/2003, as both types of measures 'pursue the same aim and consist in a fact-gathering exercise. Although not worded in identical terms, the relative resemblance of the two provisions would also seem to support a uniform reading of the two'. See Opinion of AG Wahl in Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2015:694, para 33.

In November 2008 and September 2009, the Commission carried out dawn raids at the premises of a number of companies active in the cement industry, including HeidelbergCement AG ('HC'). The inspections were followed by a number of requests for information under Article 18(2) of Regulation 1/2003, sent to HC on 30 September 2009, 9 February and 27 April 2010. By letter of 16 November 2010, the Commission notified HC that it also intended to adopt a decision requesting information under Article 18(3) of Regulation 1/2003, and forwarded the draft questionnaire to HC. A month later, the Commission notified the company that it had decided to initiate proceedings against it under Article 11(6) of Regulation 1/2003 as well as against seven other companies active in the cement industry for suspected infringements of Article 101 TFEU involving:

[r]estrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anti-competitive practices in the cement market and related product markets.<sup>804</sup>

In March 2011, the Commission adopted the decision under Article 18(3), and required HC to answer the questionnaire attached to the decision. Given the nature and volume of the information required and the seriousness of the suspected infringement, HC was given twelve weeks to answer the first ten sets of questions and two weeks to answer the eleventh set. The company unsuccessfully challenged the decision before the General Court, and later appealed against the General Court's ruling before the ECJ arguing that the court had erred in law when holding that its plea, alleging a failure to state the reasons in the decision at issue, was unfounded and had to be dismissed.<sup>805</sup>

The ECJ declared that, according to settled case-law, Article 296 TFEU requires that the statement of reasons is appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which has adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. As concerns statements of reasons in requests for information, the Court recalled that Article 18(3) defines the essential elements thereof, requiring of the Commission to state the legal basis and the purpose of the request, specify what information that is required, fix the time-limit for submission and indicate the penalties provided as well as the right to have the decision reviewed by a court. Recalling what the Court had established and maintained in a string of rulings, the ECJ then declared that

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<sup>804</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, para 4.

<sup>805</sup> *Ibid*, para 10.

the obligation to state specific reasons is a fundamental requirement designed to show not merely that the request is justified, but also to enable the undertaking concerned to assess the scope of its duty to cooperate whilst at the same time safeguarding its right of the defence.<sup>806</sup>

Referring to its ruling in *SEP*,<sup>807</sup> the Court then declared that the obligation to state the purpose of the request relates to the Commission's obligation to indicate the subject of its investigation and therefore to identify the alleged infringement of the competition rules.<sup>808</sup> In *SEP*, the Court had also established, through reference to the Advocate General's opinion, that a request for information is only considered 'necessary' where the Commission can show a relationship between the alleged infringement and the document requested.<sup>809</sup> However, this is not considered to be enough. The relationship must also be such that the Commission could reasonably suppose, at the time of the request, that the document would help it determine whether the alleged infringement had taken place.<sup>810</sup> A mere connection between the document and the business covered by the inspection decision is thus not sufficient. This was also acknowledged by the Court in *HeidelbergCement*, where it referred to *SEP* and stated that:

[t]he Commission is entitled to require the disclosure of information which may enable it to investigate presumed infringements which justify the conduct of the investigation and are set out in the request for information.<sup>811</sup>

The Court then continued to examine the Commission's decision, noting that it required the disclosure of extremely extensive and detailed information

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<sup>806</sup> Ibid, para 19. The Court refers to its rulings in Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380, Case C-94/00, *Roquette Frères*, EU:C:2002:603, Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030, and Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

<sup>807</sup> Case C-36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1994:205.

<sup>808</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, para 20.

<sup>809</sup> Case C-36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1994:205, para 21.

<sup>810</sup> Opinion of Advocate General Jacobs, Case 36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1993:928, para 21. See also Joined Cases T-458/09 and T-171/10, *Slovak Telecom a.s. v European Commission*, EU:T:2012:145 at para 43, where the General Court declares that the Commission is entitled to require the disclosure only of information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information.

<sup>811</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, paras 23 and 24.

relating to a considerable number of transactions, both domestic and international, in relation to twelve Member States over a period of ten years.<sup>812</sup> The decision, on the other hand, did not disclose, clearly and unequivocally, the suspicions justifying the adoption of the decision. Nor did it make it possible for HC to determine whether the requested information was necessary for the purpose of the investigation.<sup>813</sup>

According to the Court, the statement of reasons thus did not allow HC to determine with sufficient precision either the products to which the investigation related or the suspicions of infringement justifying the adoption of the decision.<sup>814</sup> Although acknowledging that the Commission is not required to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were allegedly committed, an excessively succinct, vague and generic – and in some respects ambiguous – statement of reasons does not fulfil the requirements in Article 18(3) of Regulation 1/2003, especially not at such a late stage of the investigation.<sup>815</sup> Having established this, the Court set aside the judgment of the General Court and annulled the Commission decision in question.

#### **8.4.1.6 Reasonable suspicion – Cementos Portland Valderrivas**

The case of *Cementos Portland Valderrivas v. the Commission*<sup>816</sup> did also relate to the suspected cartel in the European cement industry. Like HC, Cementos Portland Valderrivas SA was suspected of participation in the cartel, and like HC it had received a 94-page request for information under Article 18(3) of Regulation 1/2003.

Cementos Portland Valderrivas challenged the Commission's decision before the General Court, arguing *inter alia* that it was arbitrary as the Commission had not been in possession of evidence pointing to the existence of an infringement at the time of its adoption.<sup>817</sup> According to the applicant, merely stating the putative infringement in the decision was not sufficient, as this would not afford adequate protection against abusive exercise of the Commission's powers. According to the applicant, neither the contested decision nor the context in which it was taken suggested that the

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<sup>812</sup> Ibid, para 27.

<sup>813</sup> Ibid, para 27.

<sup>814</sup> Ibid, para 31.

<sup>815</sup> Ibid, para 39.

<sup>816</sup> Case T-296/11, *Cementos Portland Valderrivas SA v European Commission*, EU:T:2014:121.

<sup>817</sup> Ibid, para 31.

Commission was in possession of the required evidence. Alleging that the Commission had ventured out on a fishing expedition, the applicant requested that the Commission should be ordered to disclose the evidence on which it had relied when adopting the decision under Article 18(3) of Regulation 1/2003.<sup>818</sup>

To this the General Court responded that the Commission should in general not be required to indicate the evidence in its possession already at the preliminary stage of the investigation. Such requirement, the General Court concluded, would upset the balance struck between preserving the effectiveness of the investigation and upholding the defence rights of the undertaking concerned.<sup>819</sup> The General Court further declared that the Commission should nevertheless be in possession of information leading it to consider that Article 101 TFEU may have been infringed before adopting a decision under Article 18(3).<sup>820</sup>

The General Court recalled that the need for protection against arbitrary and disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, is recognised as a general principle of EU law. With a view to observing that general principle, a decision requesting information must be directed at gathering the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possesses certain information, constituting reasonable grounds for suspecting an infringement of the competition rules.<sup>821</sup>

In the present case, the applicant had expressly asked the General Court to order the Commission to produce the evidence in its possession so that the General Court could satisfy itself that the contested decision was not arbitrary. In order to justify such a request, it had relied on the particularly broad scope of the decision, as well as the fact that the Commission had not carried out any inspections at its premises under Article 20(4) of Regulation 1/2003 or sent a request for information under Article 18(2) thereof.<sup>822</sup> Since the applicant had requested the General Court to review the evidence in question, and since it had also put forward certain arguments which could cast doubt on the Commission's grounds when adopting the decision, the

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<sup>818</sup> Ibid, para 31.

<sup>819</sup> Ibid, para 37.

<sup>820</sup> Ibid, para 38.

<sup>821</sup> Ibid, para 40.

<sup>822</sup> As noted in Section 8.4.1.5, HeidelbergCement had been subject to both dawn raids and requests for information prior to the adoption of the contested decision.

General Court considered itself under a duty to examine those grounds and check that they were reasonable.<sup>823</sup>

Here the General Court first declared that, at that stage — that is before the adoption of a decision requesting information — the Commission cannot be required to be in possession of evidence establishing the existence of an infringement. It is enough for such evidence to give rise to a reasonable suspicion as to the commission of a putative infringement. Reviewing the evidence in the Commission's possession, the General Court found that it did actually give rise to reasonable suspicions, and therefore it dismissed the applicant's claim on this ground.

The ruling of the General Court is interesting for a number of reasons. First, and for obvious reasons, the General Court once again makes clear that the Commission does not need to be in possession of evidence establishing an infringement of the EU competition rules when adopting decisions at the early stages of an investigation. However, the Commission is nonetheless required to be in possession of evidence that give rise to reasonable suspicion of an infringement. Second, the EU Courts will only review the evidence in the Commission's possession if the applicant makes such a request and is also able to cast doubt on the reasonableness of the Commission's grounds when adopting the decision.<sup>824</sup> In other cases, the Court will rely on the statements made by the Commission.

#### **8.4.1.7 Implications of acting outside the subject-matter – Deutsche Bahn**

*Deutsche Bahn* illustrates the practical implications of acting outside the subject-matter of the inspection decision and the need for the Commission to be able to show reasonable grounds for its inspections.

Before the launch of a dawn raid at the premises of Deutsche Bahn AG, concerning suspicions that its subsidiary DB Energie GmbH had acted contrary to Article 102 TFEU, the Commission informed its agents of the fact that there was also another complaint against Deutsche Bahn and another of its subsidiaries, DUSS. However, the alleged actions of DUSS were not covered by the inspection decision. During the dawn raid, documents relating to DUSS were collected and while the inspection based

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<sup>823</sup> Case T-296/11, *Cementos Portland Valderrivas SA v European Commission*, EU:T:2014:121, para 42.

<sup>824</sup> This was also the view of the General Court in Case T-402/13, *Orange v European Commission*, EU:T:2014:991. See Section 8.6 below.

on the first decision was still underway, the Commission adopted a second and later also a third inspection decision concerning the suspected actions by DUSS. Deutsche Bahn challenged the inspection decisions before the General Court, but without success. The company then turned to the ECJ. In its ruling, the Court declared that although the efficacy of an inspection requires the Commission to provide the agents responsible for the inspection with all the information that could be useful, such information must relate solely to the subject-matter of the decision.<sup>825</sup> The Court found that the Commission had acted unlawfully during the first inspection when it had collected material that lacked such connection. As a consequence, the Commission was not able to rely on the material collected as a basis for the second and third inspection decisions. The Court thus set aside the judgment of the General Court in so far as it dismissed the actions brought against the two subsequent inspection decisions, and also annulled the two inspection decisions.<sup>826</sup>

#### 8.4.2 Reasonable grounds for suspicion – Against whom?

From the foregoing, it has been established that in order for a dawn raid to be justified, the Commission needs to have reasonable grounds to suspect an infringement of the competition rules when it adopts the inspection decision. However, the question remains whether those suspicions need to be directed against the company targeted by the Commission's investigation or whether it is sufficient that the Commission has reason to believe that the company is in possession of evidence.

Article 20 of Regulation 1/2003 empowers the Commission to conduct the inspections necessary for it to carry out the duties assigned to it under the regulation. In order for an inspection or request for information to be considered necessary, the Commission must, at the time of the adoption of the decision, have reason to believe that it will find evidence that is not only connected to the putative infringement, but will also help the Commission to prove its existence. In most cases, such information is only likely to be found at the premises of those suspected of wrongdoing.

However, in *HeidelbergCement*, Advocate General Wahl declared that as regards requests for information under Article 18(3) the recipient of the request need not necessarily be the company suspected of the

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<sup>825</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, para 62

<sup>826</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.



infringement.<sup>827</sup> In *Roquette Frères* on the other hand, the Court declared that when a national court conducts its review to ensure that there is nothing arbitrary about a coercive measure designed to permit implementation of an investigation ordered by the Commission, it is required, in essence, to satisfy itself that reasonable grounds exist for suspecting an infringement of the competition rules by the undertaking concerned.<sup>828, 829</sup>

Thus, whereas decisions adopted under Article 18 of Regulation 1/2003 need not necessarily be addressed to companies suspected of wrongdoing, the national court may grant coercive measures only when the dawn raid is to take place at the premises of companies suspected of wrongdoing. This does not necessarily mean that the Commission is prevented from carrying out dawn raids at the premises of other companies than those suspected of wrongdoing, only that the use of coercive measures may not be granted in such situations. However, given the fact that the Court has opted for a broad interpretation of Article 101 TFEU and declared that so-called cartel facilitators may also be covered by the Article,<sup>830</sup> it is fair to assume that the use of dawn raids will only be considered necessary (and thus also justified) at the premises of those actually suspected of wrongdoing. This was also confirmed by the General Court in *Nexans* where it referred to *Roquette Frères* and declared that before establishing that an inspection is not arbitrary, the Court must first satisfy itself that reasonable grounds exist for suspecting an infringement of the competition rules by the undertaking concerned.<sup>831</sup>

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<sup>827</sup> Opinion of Advocate General Wahl in Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2015:694, para 73.

<sup>828</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 54.

<sup>829</sup> Article 20(8) of Regulation 1/2003 states that the national judicial authority may ask the Commission about the nature of the involvement of the undertaking concerned.

<sup>830</sup> See the Court's ruling in the case of *AC-Treuhand AG v. European Commission*, Case C-194/14 P, EU:C:2015:717. There, the Court found that AC-Treuhand, a consultancy firm offering management and administrative services, had participated in a cartel in the tin stabilizer sector. According to the Court, AC-Treuhand had played an essential role in the infringement by organizing a number of meetings, collecting and supplying data to the producers of heat stabilizers etc., and was therefore held liable for infringing Article 101 TFEU.

<sup>831</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission* EU:T:2012:596, para 43.

### 8.4.3 The view of the EU Courts – Concluding remarks

It is clear from the foregoing that the Commission needs to have reasonable grounds to suspect an infringement of the competition rules when it adopts an inspection decision, and that those suspicions should be directed at the company targeted by the inspection. In the following section, the case-law of the ECtHR will be examined in order to establish whether reasonable grounds for suspicion are required also under the Convention system.

### 8.4.4 Grounds for suspicion – The view of the ECtHR

The two cases of *Robathin*<sup>832</sup> and *Wieser and Bicos*<sup>833</sup> both address the question of the procedural safeguards that need to surround an inspection, and whether the investigating authority needs to have reasonable grounds to suspect the company of wrongdoing before launching the inspection.

#### 8.4.4.1 Imprecise search warrants – Robathin

Mr Robathin was a practicing lawyer in Vienna suspected of theft, fraud and embezzlement. In February 2006, a search warrant was issued by an investigating judge for Mr Robathin's premises. During the search, the police officers went through his computer system and seized a laptop as well as copies of his computer files. Mr Robathin and the member of the Vienna Bar Association who were both present during the search protested against the measures taken, arguing that they had been excessive, as it would have been possible to limit the search and copy only those files relevant to the investigation.

Following the code of procedure, the Austrian police officers sealed the copied disks and handed them over to the investigating judge. As Mr Robathin had opposed the search of the data, the Review Chamber of the Vienna Regional Criminal Court was called upon to decide whether the disks were to be examined or returned to the applicant.<sup>834</sup> The Review Chamber decided to authorize the examination of all the files.

The case worked its way through the Austrian legal system, and Mr Robathin eventually turned to Strasbourg where he argued that his right

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<sup>832</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06.

<sup>833</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01.

<sup>834</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 12.

to privacy had been infringed by the Austrian authorities. Having established that the search did indeed constitute an interference with the applicant's right to privacy, the Strasbourg court examined whether such interference could be justified under Article 8(2) of the ECHR.

The Strasbourg court did find the measures to be in accordance with the law and to pursue a legitimate aim, namely the prevention of crime. As for the assessment of whether the measures could be deemed necessary in a democratic society, the court declared that a proportionality *stricto sensu* test should be carried out to determine whether the relationship between the aim sought to be achieved and the means chosen were proportionate.<sup>835</sup> Here, the court looked at the procedural safeguards surrounding the search and whether these safeguards provided adequate and effective protection against abuse and arbitrariness.<sup>836</sup>

The court paid attention to elements such as whether the search was based on a warrant issued by a judge and based on reasonable suspicion, and whether the scope of the warrant was reasonably limited. The court also considered the fact that the applicant had a remedy against the examination of the seized data at his disposal, namely a complaint to the Review Chamber. It was for the Review Chamber and not the police to determine which data that could actually be examined. As the search warrant had been couched in very broad terms, the manner in which the Review Chamber exercised its supervisory function was considered to be of particular importance.<sup>837</sup>

The Strasbourg court was not satisfied with the review carried out by the Review Chamber, declaring that it had given only brief and general reasons for authorizing the examination of all the electronic data, failing to address the issue whether it would have been sufficient to search only those disks relating to 'R' and 'G' (the victims of the fraud and embezzlement). Nor had the Review Chamber given any reasons for its finding that a search of the applicant's data was necessary for the investigation. In all, this meant that the Strasbourg court was unable to establish that the search of all the data had been proportionate.<sup>838</sup> A violation of Article 8 of the ECHR was thus established.<sup>839</sup>

In this case, the Strasbourg court declared that where the search warrant is not reasonably limited, but couched in very broad terms, the procedural

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<sup>835</sup> Ibid, para 43.

<sup>836</sup> Ibid, para 43.

<sup>837</sup> Ibid, para 51.

<sup>838</sup> Ibid, para 51.

<sup>839</sup> Ibid, para 52.

safeguards surrounding the inspection must be capable of protecting the applicant against any abuse or arbitrariness.<sup>840</sup> Here the court chose to pay particular attention to the existence of reasonable suspicions when determining whether the procedural safeguards surrounding the search were considered adequate. In the case of *Wieser and Bicos*, the Strasbourg court also stressed their importance.

#### **8.4.4.2 Procedures relating to search and seizure of electronic data – Wieser and Bicos**

Like *Robathin*, the case of *Wieser and Bicos* concerned a search carried out at the premises of an Austrian lawyer.<sup>841</sup> Mr Wieser was a practicing lawyer in Salzburg, but also the sole owner of Bicos Beteiligungen GmbH, which in turn owned the medical company Novamed. As the latter company was suspected of engaging in illegal trade of medications, the Salzburg Regional Court, *Landesgericht*, issued a warrant to search the seat of both Bicos Beteiligungen and Novamed. The two companies had their seats at Mr Wieser's law office.

In October 2000, the search was carried out by eight to ten officers of the Economic Crimes Department of the Salzburg police, and data-securing experts of the Federal Ministry of Interior. One group of officers searched the law office for files concerning Novamed or Bicos in the presence of Mr Wieser and a representative of the Austrian Bar Association. Whenever Mr Wieser objected to an immediate examination of a document seized, the document was sealed and deposited at the Salzburger regional court.<sup>842</sup> The search of the electronic data on the other hand, was not conducted in the presence of Mr Wieser. The representative of the Bar Association, who was informed of the search for electronic data, was only temporarily present during the search. When the data-securing experts terminated the search, they left without drawing up a search report or informing Mr Wieser of the results of the search.<sup>843</sup> However, later that day a data securing report was drawn up according to which no complete copy of the server had been made. Instead the search had been carried out using the names of Bicos and Novamed as well as the names of the other companies suspected of involvement in the illegal trade. A folder named Novamed containing 90 files was found plus one additional file containing one of the search items.

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<sup>840</sup> Ibid, para 47.

<sup>841</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01.

<sup>842</sup> Ibid, para 10.

<sup>843</sup> Ibid, para 11.

All the data were copied to disks. In addition, the deleted items were retrieved and numerous files which corresponded to the search items were found and also copied to disks.

The applicants challenged the measures taken by the investigating authorities before the Austrian courts. Having no success in Austria, they eventually turned to Strasbourg with an application. The application was limited to the search and seizure of electronic data, and the applicants argued that the electronic data had been seized without observing effective procedural guarantees contrary to Article 8 of the ECHR. The fact that the complaint did not concern the search of the business premises led the Strasbourg court to conclude that there had been an interference with the applicants' right to respect for their correspondence. Here the court saw no reason to distinguish between Mr Wieser, a natural person, and the second applicant, a legal person as regards the notion of 'correspondence'.<sup>844</sup>

Having established an interference under Article 8(1) of the ECHR, the Strasbourg court continued its assessment under Article 8(2), declaring that the interference had been in accordance with the law and served a legitimate aim: the prevention of crime. As for the third criterion, that the interference should be necessary in a democratic society, the court noted that the applicants' submissions concentrated on the necessity of the interference, whether the measures were proportionate to the aim pursued and the procedural safeguards adequately complied with. In this respect the Strasbourg court noted that in comparable cases, it had examined whether the domestic law and practice afforded adequate and effective safeguards against abuse and arbitrariness. Elements taken into consideration were in particular whether the search was based on a warrant issued by a judge and based on reasonable suspicion, whether the warrant was reasonably limited, and – where the search was conducted at a lawyer's office – whether it was carried out in the presence of an independent observer.<sup>845</sup>

In the present case, the search of the computer systems had been carried out on the basis of a warrant issued by the investigating judge. The Strasbourg court also found that the search warrant limited the documents or data to be looked for in a reasonable manner, by describing them as any business documents revealing contacts with the suspects in the proceedings concerning illegal trade of medications. The search remained within these limits, since the officers searched for documents or data containing either the word Novamed or Bicos or the names of the other suspects.<sup>846</sup>

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<sup>844</sup> Ibid, para 45.

<sup>845</sup> Ibid, para 57.

<sup>846</sup> Ibid, para 59.

As for the actual search of the electronic data, the Strasbourg court found that the Austrian authorities had not paid regard to the procedural framework in place, and established a violation of Article 8 of the ECHR. This part of the ruling will be examined in more detail in Chapter 10 below. At this point, it is sufficient to conclude that the Strasbourg court considered the existence of reasonable suspicions to be of particular importance.

#### 8.4.5 Grounds for suspicion – Concluding remarks

To conclude, companies do enjoy a right to privacy under Article 7 of the Charter, and although this right may not be as far-reaching when legal persons are concerned as when a search is carried out at the home of natural person, it does apply to the Commission's dawn raids. This in turn means that any interference with the companies' right to privacy must be in accordance with the law, serve a legitimate aim and be necessary in a democratic society.<sup>847</sup>

Dawn raids carried out in accordance with the terms of Regulation 1/2003 are in accordance with the law, and serve a legitimate aim – to ensure effective application of the competition rules. As for the question whether a dawn raid carried out without reasonable grounds for suspicion would be considered necessary in a democratic society, both the ECJ and the Strasbourg court appear to share the view that this question should be answered in the negative. In *Robathin*, the Strasbourg court examined in particular whether the warrant was based on reasonable suspicions,<sup>848</sup> and the ECJ has consistently held that the duty on the part of the Commission to state the subject-matter and purpose of the inspection serves to ensure that the inspection is justified.<sup>849</sup> In *Nexans*, the General Court explicitly stated that the Commission must have reasonable grounds to suspect the infringement stated in the inspection decision, and that a search carried out at the premises of a company with the ultimate aim of detecting any infringement and not just the one indicated in the inspection decision would

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<sup>847</sup> *Ibid*, para 12.

<sup>848</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.

<sup>849</sup> See e.g. Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, para 19, where the Court also refers to its rulings in Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380, Case C-94/00, *Roquette Frères*, EU:C:2002:603, Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030, and Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

be incompatible with the company's right to privacy.<sup>850</sup> This was also the view taken in *France Télécom*,<sup>851</sup> and in *HeidelbergCement* the Court declared that the obligation to state the purpose of the request for information relates to the Commission's obligation to indicate the subject of its investigation and therefore to identify the alleged infringement of the competition rules. It further stated that a request for information is only considered necessary when there is a relationship between the information requested and the alleged infringement, and where the Commission has reason to believe that the information will help it determine whether or not the alleged infringement has taken place.<sup>852</sup> Thus, a dawn raid carried out without reasonable suspicion would fail to meet the standard set by Article 8 of the ECHR and constitute a breach of Article 7 of the Charter.

## 8.5 The geographic scope of the Commission's inspections

In Section 8.4.1.4 above, the *Nexans* case was discussed in relation to the subject-matter of dawn raids and the need for the Commission to have reasonable grounds for suspecting a violation of the competition rules in the business areas covered by the inspection decision. However, the *Nexans* case did also concern the geographical limits to the Commission's powers. In its inspection decision, the Commission had stated that the suspected agreements 'probably have a global reach'.<sup>853</sup>

When *Nexans* challenged the inspection decision before the General Court, it argued *inter alia* that the geographic scope of the decision was overly broad. The General Court dismissed the application in this part, declaring that (i) the decision was sufficiently precise so far as concerned its geographical scope, and (ii) although the Commission's powers were restricted to investigating restrictions or distortions of competition within the internal market, there was nothing to prevent the Commission from examining documents relating to markets outside the EU in order to detect conduct which was liable to affect competition within the internal market.<sup>854</sup>

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<sup>850</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 65.

<sup>851</sup> Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81, para 53 where the General Court refers to *Roquette Frères*.

<sup>852</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, paras 23 and 24.

<sup>853</sup> Case C-37/13 P, *Nexans France SAS and Nexans SA v European Commission*, EU:C:2014:2030, para 5.

<sup>854</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 99.

Nexans appealed this part of the ruling to the ECJ, arguing that the geographic scope of the Commission's dawn raid decision was overly broad and failed to provide a sufficiently precise basis for the inspection – an argument that had thus been rejected by the General Court. The ECJ noted that the Commission is obliged to indicate in its decisions the evidence sought and the matters to which the investigation relate. This fundamental requirement not only justifies the Commission's entry into the company's premises, but also enables the company to assess the scope of its duty to cooperate and to safeguard its rights of defence.<sup>855</sup>

However, as in the cases referred to above, the EU Courts have also accepted that it is not necessary for the Commission to define the relevant market precisely – bearing in mind that unannounced inspections take place at a very early stage of the investigation process. On this basis, the Court rejected Nexans' argument and found that the suspicions relied on by the Commission, as stated in its decision, were sufficiently clear and understandable as regards the geographic dimensions of the suspected infringement.<sup>856</sup>

Nexans had also argued that the Commission should have indicated how projects outside the EU were relevant to the cartel investigation in question. In terms of jurisdiction, the Commission's remit extends only to protecting the EU internal market from distortions of competition. However, the Court declared that it did not follow that the Commission is limited – during its dawn raids – to reviewing business records relating solely to projects which have an effect in the EU. In the current case, the Commission was on the trail of a cartel that 'probably had a global reach'. In this instance, even documents linked to projects located outside the EU were therefore likely to provide relevant information regarding the suspected infringement, for example, relating to the *modus operandi* of the cartel or a possible agreement to divide up the global market.<sup>857</sup> The ECJ dismissed the appeal.

The ruling confirms the Commission's broad discretion to review and seize information relating to non-EU countries during dawn raids, particularly where it suspects that the cartel is global in nature or may be wholly or partially operated from outside the EU. However, the ruling suggests that information is relevant only if it has a bearing on the actions and/or effects inside the EU.

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<sup>855</sup> Case C-37/13 P, *Nexans France SAS and Nexans SA v European Commission*, EU:C:2014:2030, para 34.

<sup>856</sup> *Ibid*, paras 39-41.

<sup>857</sup> *Ibid*, para 40.



## 8.6 The previous handling by national authorities – Any limits to the Commission’s powers?

The recent ruling in the *Orange* case<sup>858</sup> concerned the question whether the previous handling of a competition case by national authorities could serve as a hindrance to the Commission’s powers of inspection.

In 2011, a complaint was lodged with the French Competition Authority against certain measures (allegedly) taken by the French telecom company Orange.<sup>859</sup> After examining the practices complained of, the French Competition Authority adopted a decision in September 2012, where it essentially found that those practices were either not substantiated or did not constitute an abuse of dominance.

In January 2012, the Commission sent out a request for information to Orange under Article 18 of Regulation 1/2003 as it suspected the company of actions contrary to Article 102 TFEU. In June the following year, the Commission adopted an inspection decision under Article 20(4) of the same regulation, and later carried out unannounced inspections at four of the applicant’s sites. Orange challenged the inspection decision before the General Court, seeking its annulment. In support of its action, Orange put forward two pleas in law essentially alleging, first, breach of the principles of proportionality and good administration, and second, that the contested decisions were arbitrary.<sup>860</sup>

As for the first plea in law, Orange disputed the proportionality and necessity of the inspection in so far as the French Competition Authority had already investigated identical allegations and had adopted a decision accepting commitments from Orange without finding any infringement of Article 102 TFEU.<sup>861</sup> Orange claimed that the recourse to an inspection could not be considered proportionate given that the Commission had failed to consult the file of the French Competition Authority. Orange also contended that, even if it were to be accepted that conducting an inspection concerning practices which had already been found to be compatible with EU competition law – and in respect of which the Commission had access to ample information – would be consistent with the principle of proportionality, the Commission could, as a matter of law, do no more than seek additional information.<sup>862</sup> As noted by the General Court, the applicant’s arguments could be understood

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<sup>858</sup> Case T-402/13, *Orange v European Commission*, EU:T:2014:991.

<sup>859</sup> At the time known as France Télécom.

<sup>860</sup> Case T-402/13, *Orange v European Commission*, EU:T:2014:991, para 17.

<sup>861</sup> *Ibid*, para 18.

<sup>862</sup> *Ibid*, para 19.

as disputing the appropriateness of the disputed decision on the ground that the French Competition Authority had already established that there was no infringement of Article 102 TFEU. As the objectives pursued by the inspection decision had already been attained, the decision could not be considered appropriate to achieve those objectives, because it failed to meet three of the four criteria of the proportionality principle, suitability, necessity and proportionality *stricto sensu*.<sup>863</sup>

This line of argumentation was not accepted by the General Court. Instead, it referred to settled case-law according to which the Commission, as a rule, is not to be bound by a decision taken by a national court or authority pursuant to Article 101 or 102 of the TFEU. The General Court noted that in cases such as *Masterfoods*,<sup>864</sup> the ECJ had established that the Commission is at any time entitled to adopt individual decisions under Article 101 and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.<sup>865</sup> The General Court also pointed to the fact that it is apparent, both from the wording of Regulation 1/2003 and from the objectives that it pursues, that it is the Commission alone that can make a finding that there has been no infringement of Article 101 or 102 TFEU.<sup>866</sup> Here the General Court referred to the ECJ's Grand Chamber ruling in *Tele2 Polska*<sup>867</sup> where the Court had declared that the adoption of a 'negative' decision on the merits by a national competition authority would risk jeopardizing the uniform application of the EU competition rules.<sup>868</sup>

In addition, the General Court addressed the issue of whether the failure by the Commission to apply Article 11(6) of Regulation 1/2003 prevented it from opening an investigation at a later stage. This question was also answered in the negative. The General Court recognized that the Commission must have a right to prioritize, and that the non-intervention by the Commission under Article 11(6) could not be taken as acceptance of the merits of the national authority's decision under Article 102 TFEU.<sup>869</sup>

The General Court also addressed the fact that the Commission had not consulted the file of the French Competition Authority before deciding to carry out an unannounced inspection. It took note of the fact that the

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<sup>863</sup> Ibid, para 26.

<sup>864</sup> Case C-344/98, *Masterfoods and HB*, EU:C:2000:689.

<sup>865</sup> Case T-402/13, *Orange v European Commission*, EU:T:2014:991, para 27.

<sup>866</sup> Ibid, para 30.

<sup>867</sup> Case C-375/09, *Tele2 Polska*, EU:C:2011:270.

<sup>868</sup> Case T-402/13, *Orange v European Commission*, EU:T:2014:991, para 30.

<sup>869</sup> Ibid, para 39.

principle of good administration requires the Commission to examine carefully and impartially all the relevant aspects of the individual case, and that the duty of diligence was all the more important in the circumstances at hand, given that the case-law confers discretion on the Commission in implementing Article 20(4) of Regulation 1/2003.<sup>870</sup> Compliance with the obligation to examine all aspects of the case was considered all the more important as the exercise of the inspection powers constitutes a clear interference with the company's right to respect for its privacy, private premises and correspondence.<sup>871</sup> Given this, the General Court concluded that it may indeed appear unfortunate at the very least that the Commission had opted for an inspection without first examining the information gathered by the French Competition Authority.<sup>872</sup>

Although the course of action may have been unfortunate, the General Court did not find the inspection decision to be vitiated by illegality. The reason for this was that the French Competition Authority had not carried out dawn raids at the premises of the applicant, but had merely relied on information voluntarily provided by Orange. The necessity of an appropriate and effective inquiry justified the recourse to an inspection, for that was the only measure enabling the Commission to gather information, which, by its very nature, had perhaps not been voluntarily produced by Orange in the course of the proceedings before the French Competition Authority.<sup>873</sup> The first plea in law was thus rejected by the General Court.<sup>874</sup>

As for the second plea in law, that the inspection was arbitrary, Orange argued that the Commission had not been in possession of reliable indicia against it when deciding to carry out the dawn raid.<sup>875</sup> To this the General Court responded that it should be borne in mind that the administrative procedure is divided into two distinct and successive stages; the investigation stage and the *inter partes* stage. It is not until the beginning of the second stage, when the Commission issues its statement of objections, that the company is informed of all the essential evidence on which the Commission relies, and the company gets access to the file in order to ensure that its right of the defence is respected. If those rights were extended to the investigation stage, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information

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<sup>870</sup> Ibid, para 53.

<sup>871</sup> Ibid, para 54, where the General Court referred to the ECJ's ruling in Case C-110/04 P, *Strintzis Lines Shipping SA v Commission of the European Communities*, EU:C:2006:211.

<sup>872</sup> Ibid, para 55.

<sup>873</sup> Ibid, para 57.

<sup>874</sup> Ibid, para 74.

<sup>875</sup> Ibid, para 75.

known to the Commission, hence also the information that could still be concealed from it.<sup>876</sup> However, the General Court continued, the measures taken during the investigation stage suggest, by their very nature, that an infringement has been committed and may have major repercussions on the situation of the undertaking under suspicion. Thus, the duty on the part of the Commission to specify the subject-matter and purpose of the inspection serves to protect the company's right of the defence already at the investigation stage.

The General Court declared that although the duty to specify the subject-matter and purpose of the inspection is a fundamental requirement designed to safeguard the applicant's right of the defence, and which may thus not be limited due to considerations relating to the effectiveness of the investigation, the Commission cannot be required to indicate the evidence leading it to consider that Article 102 TFEU has possibly been infringed.<sup>877</sup> Such an obligation, the General Court declared, would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.<sup>878,879</sup> However, the General Court stressed, it cannot be inferred from the foregoing that the Commission does not have to be in possession of information suggesting an infringement of Article 102 TFEU before adopting an inspection decision.<sup>880</sup>

The protection against arbitrary or disproportionate intervention by the public is a general principle of EU law, the General Court declared further. When determining whether the Commission's actions are arbitrary or disproportionate, reviewing the evidence/indicia in the Commission's file is not the only method available. On the contrary, the General Court declared, it is only when the applicant has put forward certain arguments liable to cast doubt on the reasonableness of the grounds on which the Commission adopted its decision that the General Court may take the view that it is necessary to carry out such a determination. In other cases, such as the present, it is sufficient to review the statement of reasons to ensure that the inspection was not arbitrary.

Consequently, when the General Court takes the view that the presumed facts which the Commission wishes to investigate and the matters to which

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<sup>876</sup> Ibid, para 78.

<sup>877</sup> Ibid, para 81.

<sup>878</sup> Ibid, paras 80 to 81.

<sup>879</sup> This line of argumentation is recognised from Case T-296/11, *Cementos Portland Valderrivas SA v European Commission*, EU:T:2014:121, where the General Court made exactly the same statement in para 37.

<sup>880</sup> Case T-402/13, *Orange v European Commission*, EU:T:2014:991, para 82.

the inspection must relate are defined sufficiently precisely, it may conclude that an inspection decision was not arbitrary, without it being necessary to check substantively the content of the indicia in the Commission's possession at the date of adoption of the decision. The General Court took the view that this was the case in the present situation, rejecting the second plea and dismissing the application in its entirety.<sup>881</sup>

## 8.7 Requirements relating to inspection decisions – What conclusions may be drawn?

Although the ECJ chose not to acknowledge a right to privacy for undertakings in *Hoechst*, the test actually applied by the Court did not differ much from the test applied under Article 8 of the ECHR. However, there is one important difference between the two approaches. If a person, legal or natural, is considered to enjoy a right, any limitation to such right should be narrowly construed. If on the other hand there is no right, but instead a requirement that any measures taken should not be arbitrary or disproportionate, the leeway granted to the authorities appears to be greater.

This being said, it has now been established in a number of rulings from the EU Courts that the EU accepts a right to privacy also for legal persons. However, although the outcome may not differ, the EU Courts seem to take a somewhat different approach when it comes to assessing whether a certain measure infringes the right to privacy. The way Article 8 of the ECHR is construed, the Strasbourg court must apply a two-tier test; it must first establish whether the measure does in fact interfere with the right to privacy, and then apply the second sub-paragraph, under which it has to work its way through the three criteria laid down therein. This allows an outsider to follow the reasoning of the Strasbourg court.

When the EU Courts apply Article 7 of the Charter, this is not always done in the same structured fashion. In *Nexans* for example, the General Court makes reference to what the Court established already in *Hoechst*,<sup>882</sup> and acknowledges that the need for protection against arbitrary and disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law. It also points out that this principle is now laid

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<sup>881</sup> Ibid, para 94.

<sup>882</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337.

down in Article 7 of the Charter.<sup>883</sup> However, the analysis of the General Court that follows upon this statement does not follow the same strict standard as the application of Article 8 ECHR. Irrespective of how the courts go about their analysis of a company's right to privacy, it is clear, from the case-law of both the ECJ and the Strasbourg court, that companies do enjoy such right, that there are situations which allow for an interference with this right, and that the limitations need not be as narrowly tailored when legal persons are concerned as when natural persons are involved.

Both the Strasbourg court and the EU Courts assess the procedural safeguards available and applied when determining whether an interference with a company's right to privacy should be considered proportionate and thus compatible with Article 7 of the Charter or Article 8 of the ECHR. These safeguards need to be adequate, but there is no strict requirement of prior judicial authorization under either the EU or the ECHR system. However, as the Strasbourg court pointed out in *Camenzind*, and which was also acknowledged by the General Court in *Deutsche Bahn*, the lack of judicial authorization warrants particular vigilance on the part of the court.<sup>884</sup> A system which does not require prior judicial warrant needs to provide other effective safeguards against abuse, and the possibility of an ex post review is required in order to offset the lack of prior judicial authorization.

Another issue that was highlighted in this chapter was the question whether the Commission needs to have any concrete suspicions of wrongdoing at the time it adopts the inspection decision. It is clear from the foregoing that such question is answered in the affirmative both by the EU and Strasbourg courts. The requirement of reasonable grounds for suspicion has been emphasized by the EU Courts on numerous occasions,<sup>885</sup> and was also considered an important procedural safeguard in the ECHR cases of *Robathin*<sup>886</sup> and *Wieser and Bicos*.<sup>887</sup> It is only when the Commission has reason to suspect an infringement that a dawn raid is considered justified and

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<sup>883</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 40.

<sup>884</sup> *Camenzind v Switzerland*, judgment of 16 December 1997, Application no. 136/96, para 45.

<sup>885</sup> From its ruling in *Hoechst* to the recent ruling in *HeidelbergCement*, the ECJ has consistently held that the obligation on the part of the Commission to state the subject-matter and purpose of the investigation in the inspection decision serves the aim of showing that the inspection is justified. For a further elaboration on the degree of suspicion required, see e.g. Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, and Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81.

<sup>886</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06.

<sup>887</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01.

not arbitrary by the EU Courts. Such suspicions should also be directed against the company targeted by the inspection.

As for the question of whether and how the previous handling by national authorities affect the Commission's powers to adopt inspection decisions, the General Court has declared that the proportionality of the Commission's measures will not be affected by any measures taken by national authorities. The Commission, as a rule, is not bound by decisions taken by national authorities pursuant to Article 101 or 102 TFEU.

A final question addressed in this chapter concerns the geographic scope of the Commission's decisions. In *Nexans*,<sup>888</sup> the Commission had adopted an inspection decision allowing it to gather information concerning projects located outside the EU, despite the fact that the remit of the Commission's powers is restricted to the EU. Despite the allegations made by Nexans, the ECJ did not consider such measures to be contrary to the principle of proportionality. Given the fact that the suspected cartel probably had a global reach, the Court considered it likely that information on projects located outside the EU could provide relevant and valuable information regarding the suspected infringement of the EU competition rules. This ruling by the Court, which guarantees the effectiveness of the Commission's investigations, seems to meet the standard set by the ECHR. Where the Commission has reason to believe that a company is infringing the EU competition rules, it should be allowed to search for information providing evidence of such infringement.

To conclude, when it comes to the application of Article 7 of the Charter and the requirements that need to be fulfilled in order for the Commission to carry out an inspection within the frame of a competition case, it appears as if the Charter standard meets the ECHR standard, and there is no indication that the applicable standard constitutes an unjustified hindrance to the Commission's application of the EU competition rules.

However, the line of reasoning presented above – where an inspection is justified only when there are reasonable grounds to suspect a company of wrongdoing – carries the logical consequence that dawn raids within the framework of a sector inquiry should also require some degree of suspicion against the companies targeted by the dawn raids. As will be discussed in the following chapter, the Commission does not appear to share this view.

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<sup>888</sup> Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030.

## 9. Dawn raids in sector inquiries

In January 2008, pharmaceutical companies throughout the EU were taken by surprise as they received unannounced visits from officials of the Commission and national competition authorities. Contrary to what had been the case in previous inspections carried out by the Commission, the dawn raids were not performed within the frame of a competition case, but were actually the starting point of what has later been known as the 'Pharma Sector Inquiry'. According to the Commission, the inquiry was a response to indications that competition in Europe's pharmaceutical markets was not working well, as fewer new medicines were being brought to market, and the entry of generic medicines sometimes seemed to be delayed. The inquiry would look at the reasons for this.<sup>889</sup>

Given the Court's case-law on the requirements that need to be fulfilled in order to carry out dawn raids in competition cases, one might believe that the Commission had concrete suspicions against the companies targeted by the inspections. This was not the case. In the press release following the dawn raids, it was clearly stated that the targeted companies were not suspected of any wrongdoing:

Unlike cartel cases, where the Commission carries out inspections when it has indications that specific companies have committed competition law infringements, these inspections are not aimed at investigating practices of companies which the Commission has already positive indications of wrongdoing. They are just the starting point of this general sector inquiry and aim to ensure that the Commission has immediate access to relevant information that will guide the next steps in the inquiry.<sup>890</sup>

If there is no suspicion of wrongdoing, then the natural question is of course whether sector inquiries are governed by other rules, which do allow for dawn raids even when the Commission does not have reasonable grounds to suspect an infringement, and whether such rules are in line with the Charter and the principle of proportionality. These questions are examined in the present chapter.

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<sup>889</sup> <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>.

<sup>890</sup> [http://europa.eu/rapid/press-release\\_IP-08-49\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-49_en.htm?locale=en).



## 9.1 Sector inquiries – Why and when?

On its website, the Commission describes sector inquiries as investigations carried out by the Commission:

[i]nto sectors of the economy and into types of agreements across various sectors, when it believes that a market is not working as well as it should, and where the Commission also believes that breaches of the competition rules might be a contributory factor.<sup>891</sup>

The powers to perform sector inquiries are not new, but during many years they were seldom applied and even seemed to be on the brink of disuse.<sup>892</sup> However, with the abolition of the notification procedure in 2004, the Commission was able to reallocate resources and take a more proactive role as enforcer of Articles 101 and 102 TFEU. A proactive competition law enforcement, where the Commission initiates ex-officio investigations, has in turn made awareness of factors such as market dynamics and performance, sector particularities and obstacles to competition increasingly important. Sector inquiries allow the Commission to gain important market information.

The legal basis for performing sector inquiries is laid down in Article 17(1) of Regulation 1/2003, which stipulates:

Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors.

The Article also empowers the Commission to send out requests for information and carry out any inspections necessary for the purpose of giving effect to Articles 101 and 102 TFEU. Article 17(2) stipulates that Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

Unlike competition cases, sector inquiries are not considered as direct enforcement of the competition rules. As pointed out by scholars, the provisions empowering the Commission to initiate sector inquiries do not provide any additional ability to impose remedies. If the Commission wishes to take enforcement action, it must follow on with specific proceedings against the relevant alleged infringers under either Article 101 or Article 102

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<sup>891</sup> [http://ec.europa.eu/competition/antitrust/sector\\_inquiries.html](http://ec.europa.eu/competition/antitrust/sector_inquiries.html).

<sup>892</sup> Wood and Baverez, *Sector Inquiries Under EU Competition Law*, Competition Law Insight, 8 February 2005.

of the TFEU.<sup>893,894</sup> *Olsen* and *Roy* describe sector inquiries as a form of ‘phase one’ review in which a market is examined to identify the existence of potential competition concerns, in preparation for enforcement action.

Article 17 comes within the ambit of Article 28(1) of Regulation 1/2003, according to which any information gathered shall be used only for the purpose acquired. Thus, if the Commission later decides to initiate proceedings against certain companies, it will have to gather the information anew. As noted by *Kerse* and *Khan*, the Commission acknowledged this fact in relation to a sector inquiry within the retail banking sector, where it issued the following statement:

On each issue the Commission together with the national competition authorities (NCAs) will identify potential infringements and, where appropriate, open an investigation. All such investigations will be entirely separate from the sector inquiry process and only use evidence gathered on each individual case.<sup>895</sup>

Article 17 explicitly grants the Commission the powers to carry out inspections also within the frame of sector inquiries. However, the rules governing such inspections are the ones laid down in Article 20. Thus the same safeguards apply to dawn raids performed during the course of a sector inquiry as during the course of a competition case. This should mean that the standards set by the ECJ in relation to Article 20 apply also to dawn raids performed within the framework of a sector inquiry. The Commission must state the purpose and subject-matter of the dawn raid in order for the company to assess the scope of its duty to co-operate and to exercise its right of the defence.

Again, let us recall what the ECJ established already in *Dow Chemical* – the obligation to specify the purpose and subject-matter of the inspection serves the aim of ensuring the right of the defence.<sup>896</sup> Furthermore, and as will be discussed further below, in cases such as *Nexans* and *France Télécom*,<sup>897</sup> the General Court has held that in order for an inspection to be justified, the Commission is required to show that it is in possession of information and

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<sup>893</sup> *Ibid*, p. 3.

<sup>894</sup> *Olsen* and *Roy*, *The New World of Proactive Antitrust Enforcement? Sector Inquiries by the European Commission*, *Antitrust*, vol. 21, no. 3, Summer 2007.

<sup>895</sup> *Kerse* and *Khan*, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 98, and Commission Press Release IP/07/14.

<sup>896</sup> *Joined Cases 97/87 to 99/87, Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380, para 45.

<sup>897</sup> *Case T-135/09, Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, and *Case T-340/04, France Télécom SA v Commission of the European Communities*, EU:T:2007:81.

evidence providing reasonable grounds for suspecting the infringement believed to have been committed by the undertaking subjected to the inspection.<sup>898</sup> It is only where the Commission can show that it has reasonable grounds to suspect an infringement that the inspection is justified, and thus in accordance with Article 7 of the Charter.<sup>899</sup>

Given the reasoning above, the logical step to take would be to conclude that the Commission acted outside the powers entrusted by Regulation 1/2003 and in violation of the principle of proportionality when launching the Pharma Sector Inquiry through dawn raids. However, there are three factors that prevent such conclusion from being drawn without further analysis.

The first is the fact that, contrary to what is now the case, the old implementing regulation, Regulation 17/62,<sup>900</sup> did not explicitly allow for dawn raids within the frame of sector inquiries. Article 12 of Regulation 17/62 mentioned only the possibility to send out requests for information. This being said, the fact that it also made reference to Article 14 (which dealt with inspections) and stated that that article should apply correspondingly may have created some confusion as to the scope of the Commission's powers. However, in Article 17 of Regulation 1/2003, there is now an explicit reference to inspections, as the Article stipulates that the Commission is allowed to carry out any inspections necessary for the purpose of giving effect to Articles 101 and 102 TFEU.

The second is the Court's ruling in *National Panasonic* where the Court declared that when the Commission had adopted an inspection decision with the sole aim to enable the Commission to gather the information needed to assess whether the Treaty had been infringed, such a decision was not contrary to the principle of proportionality.<sup>901</sup>

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<sup>898</sup> Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81, para 53.

<sup>899</sup> Furthermore, in *HeidelbergCement* dealing with a request for information under Article 18 of Regulation 1/2003, the Court referred to its ruling in *SEP*, and declared that the obligation to state the purpose of the request relates to the Commission's obligation to indicate the subject of its investigation and therefore to identify the alleged infringement of the competition rules. In *SEP*, the Court had also established, through reference to the Advocate General's opinion, that a request for information is only considered 'necessary' where the Commission can show a relationship between the alleged infringement and the document requested. See Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, and Case C-36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1994:205.

<sup>900</sup> EEC Council Regulation no 17: First Regulation Implementing Articles 85 and 86 of the Treaty.

<sup>901</sup> Case 136/79, *National Panasonic v the Commission of the European Communities*, EU:C:1980:169, paras 29-30.

The third is another ruling from the ECJ which also dates back more than twenty years. In May 1994, the Court delivered its ruling in the case *SEP v. Commission* dealing with the Commission's powers during sector inquiries.<sup>902</sup> This case will be presented in the following section.

## 9.2 Case-law on the scope of the Commission's powers in sector inquiries – SEP

The case concerned an investigation carried out by the Commission with relation to possible restrictive practices in the Dutch gas market. At the time, 50 per cent of the electricity in the Netherlands was generated with natural gas. The state-owned company NV Nederlandse Gasunie held a de facto monopoly in the supply of natural gas. The Dutch electricity producer NV Samenwerkende Elektriciteits-produktiebedrijven, SEP, was one of its customers. In June 1989, SEP concluded an agreement with the Norwegian gas supplier Statoil. While Gasunie continued as SEP's main supplier, it was no longer SEP's sole supplier.

The conclusion of the Statoil agreement caused Gasunie to negotiate and later to conclude a 'cooperation code' with SEP. The Commission soon opened an investigation with a view of determining whether the dealings between Gasunie and SEP were compatible with the Treaty. During the course of the investigation, the Commission requested SEP to disclose not only the cooperation code, but also the Statoil contract. SEP refused to reveal the Statoil contract as it was afraid that the Commission would communicate the contract to Dutch authorities under Article 10 of Regulation 17/62, and that this would in turn mean that persons who directed the commercial policy of Gasunie would learn the terms of business granted by the competitor Statoil.

One of the arguments put forward by SEP was that the Commission was in fact carrying out a sector inquiry and not pursuing a competition case, and that therefore it should have relied on Article 12 (dealing with sector inquiries) rather than Article 11 of Regulation 17/62 (governing requests for information) when requesting the information. This line of argumentation was not accepted by Advocate General Jacobs. Without saying that SEP was right or wrong in its line of argumentation regarding how Articles 12 and 11 should be applied, AG Jacobs saw no reason why the Commission should disguise its investigation in the manner alleged.

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<sup>902</sup> Case C-36/92 P, *Samenwerkende Elektriciteits Produktiebedrijven NV v Commission of the European Communities*, EU:C:1994:205.

According to AG Jacobs:

On the contrary, its powers of investigation under Article 12 of Regulation are, if anything, wider and less fettered than under Article 11.<sup>903</sup>

Although not explicitly acknowledging that the powers are wider and less fettered when requests are sent out under a sector inquiry, AG Jacobs appeared willing to accept such argumentation. And indeed, it is easy to see why. According to the Advocate General, the obligation under Article 11(3) of Regulation 17/62 to state the purpose of the request means ‘of course that it must identify the suspected infringement of the competition rules’.<sup>904</sup> There would not be much point in allowing for sector inquiries if the Commission could only send out requests for information where it has reasonable grounds to suspect an infringement of either Article 101 or 102 TFEU. The question is of course whether AG Jacobs would have been equally willing to accept such argumentation when it comes to dawn raids. Should Article 20 be allowed to be applied differently depending on whether the Commission conducts an inspection within the frame of a sector inquiry or a competition case?

The ECJ did not provide further guidance as to the extent of the Commission’s powers. Instead, it chose to accept AG Jacob’s argumentation and dismissed SEP’s appeal in this regard referring to the reasons stated by the Advocate General.<sup>905</sup> The *SEP* ruling has thus created a state of limbo. The only thing we now know is that if anything the Court considered the powers of inspections to be wider and less fettered when it comes to sector inquiries. The exact boundaries of these powers are still to be defined.

### 9.3 Article 17 and the possibility to carry out inspections

However, it is not only the *SEP* ruling that blurs the lines. The fact that the Modernization reform introduced an explicit reference to inspections in Article 17 of Regulation 1/2003 also creates confusion.

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<sup>903</sup> Opinion of Advocate General Jacobs, Case 36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1993:928.

<sup>904</sup> *Ibid*, para 30.

<sup>905</sup> Case C-36/92 P, *Samenwerkende Elektriciteits Productiebedrijven NV v Commission of the European Communities*, EU:C:1994:205, para 21.

The last sentence of Article 17(1) reads:

In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission is thus explicitly granted the powers to perform inspections within the framework of sector inquiries. The question is of course if this implies that the Commission should be allowed by default to perform inspections whenever a sector inquiry is launched. As will be argued in this section, that question should be answered in the negative. The reasons for this are the following.

First, there is one word in the Article itself that restrains the Commission, namely the word ‘necessary’. We find it not only in Article 17 but also in Article 20(1) of the same regulation, which declares that:

In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

Thus, an inspection, regardless of whether it is performed within the framework of a competition case or a sector inquiry, may not be carried out unless it is necessary. Here we recognize the proportionality principle according to which the means chosen should be the least restrictive ones available and according to which a public intervention should not constitute a disproportionate and intolerable interference in relation to the aim pursued.

As has been discussed in Chapter 8, the ECJ has had numerous occasions to give its view on the necessity of dawn raids. Without providing an extensive analysis of these rulings a second time, a short summary of the rulings will nevertheless be provided.

In *National Panasonic*, the applicant had argued that the principle of proportionality only permitted the Commission to carry out dawn raids based on a decision rather than an authorization, if the situation was very grave and where there was the greatest urgency and need for secrecy.<sup>906</sup> The Court did not accept this line of argumentation. Instead it declared that such decision was to be governed by the need for an appropriate inquiry, and that, where an investigation decision was solely intended to enable the Commission to gather the information needed to assess whether the Treaty had been

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<sup>906</sup> Case 136/79, *National Panasonic v the Commission of the European Communities*, EU:C:1980:169, para 28.

infringed, such a decision was not contrary to the principle of proportionality.<sup>907</sup> This statement alone could be taken as an indication that the Court would accept dawn raids in sector inquiries even when there are no concrete suspicions against the targeted companies.

However, in *Dow Chemical*, the Court addressed the obligation on the part of the Commission to specify the subject-matter and purpose of the investigation. Acknowledging that the investigatory powers are wide, the Court declared that the exercise of such powers should be subject to conditions serving to ensure that the fundamental rights of the undertakings concerned are respected. According to the Court, that obligation is a fundamental requirement in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified, and also to enable the affected undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence.<sup>908</sup>

The principle of proportionality was addressed by the Court also in *Roquette Frères*.<sup>909</sup> There, the ECJ declared that a national court, when verifying whether a coercive measure is proportionate to the subject-matter of the investigation, will have to establish that such measure does not constitute a disproportionate or intolerable interference in relation to the aim pursued by the investigation. The Court then recalled what was established in *National Panasonic*,<sup>910</sup> namely that if the inspection decision has the sole aim of enabling the Commission to gather the information needed to assess whether the Treaty has been infringed, then such a decision is not contrary to the principle of proportionality. However, the ECJ did not end its discussion there. Instead, it moved on to declare that the national court cannot carry out its review of proportionality without regard to factors such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought.<sup>911</sup> Consequently the Court concluded:

[i]t must be open to the competent national court to refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails necessarily appears manifestly

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<sup>907</sup> *Ibid*, paras 29-30.

<sup>908</sup> Case C-85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, para 40.

<sup>909</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>910</sup> Case 136/79, *National Panasonic v the Commission of the European Communities*, EU:C:1980:169.

<sup>911</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, para 79.

disproportionate and intolerable in the light of the objectives pursued by the investigation.<sup>912</sup>

The case of *Roquette Frères* concerned the use of coercive measures and whether such measures were proportionate. Given the fact that companies are under an obligation to submit to inspections, and that failure to cooperate with the inspectors may lead to fines of up to one per cent of the company's annual turnover, and penalty payments up to five per cent of its daily turnover, companies have no choice but to cooperate, even where the Commission officials are not accompanied by national officials empowered to force their way through the doors of the targeted companies. The reasons given by the Court in *Roquette Frères* should be equally valid when determining whether the dawn raid as such is necessary or not.

This stance is supported by the General Court's reasoning in the cases of *Nexans* and *France Télécom*. In *Nexans*, the Commission had carried out an inspection on the basis of a decision which indicated that the applicant, Nexans, was suspected of participation in a cartel in the electric cable sector. Nexans argued that the Commission had overextended the subject-matter and purpose of the inspection and had undertaken a 'fishing expedition' at its premises. According to the applicant, the Commission had only had reasonable grounds to suspect cartel activity in the market for high voltage underwater cables and should therefore have limited its inspection decision accordingly.

The Commission argued that during an inspection, the targeted company is obliged to cooperate with the Commission, not only as regards the subject-matter of the inspection – that is to say, the products or the services to which that decision relates – but also as regards all the activities engaged in by the undertaking at issue. Moreover, the Commission contended that it had had reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables.<sup>913</sup>

The General Court did not accept the Commission's arguments. It did acknowledge that companies may hide evidence on the pretext that it is not covered by the inspection decision, and that the inspectors may thus have to peruse documents without knowing whether they are related to the purpose and subject-matter of the inspection.<sup>914</sup> However, once the inspectors have found that a certain document is not covered by the inspection decision, they have to refrain from using it. If the Commission were not subject to such

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<sup>912</sup> Ibid, para 80.

<sup>913</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 61.

<sup>914</sup> Ibid, para 63.



restriction, in practice it would be able, every time it had indicia suggesting that an undertaking had infringed the competition rules in a specific field of its activities, to carry out an inspection covering all those activities, with the ultimate aim of detecting any infringement of those rules which might have been committed by that undertaking. That, the General Court declared, would be ‘incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society’.<sup>915</sup>

In *France Télécom*, the General Court declared that in order for it to be able to establish that an inspection is justified, the Commission is required to show in the inspection decision, in a properly substantiated manner, that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement believed to have been committed by the undertaking subjected to the inspection.<sup>916</sup> It is thus only where the Commission can show that it has reasonable grounds to suspect an infringement that the inspection is justified, and thus in accordance with Article 7 of the Charter.

Let us also recall here what the Strasbourg court said in the case of *Robathin* discussed in Section 8.3.1.5 above. There the court discussed the need for procedural safeguards against abuse or arbitrariness by the authorities. When determining whether an inspection was surrounded by adequate and effective safeguards, the elements taken into consideration, were ‘[i]n particular whether the search was based on a warrant issued by a judge and based on reasonable suspicion’.<sup>917</sup> Another ECtHR ruling of relevance is *Hentrich v. France*,<sup>918</sup> where the pre-emption of property under a power to prevent tax evasion was seen as unjustified as it had been carried out without any evidence of wrongdoing and where it was effectively intended to warn others against the temptation of tax evasion.

## 9.4 Dawn raids in sector inquiries – Concluding remarks

Given the above, it is difficult to grasp how a dawn raid could be considered arbitrary or disproportionate in a competition case because the extent of the

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<sup>915</sup> Ibid, para 65.

<sup>916</sup> Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81, para 53.

<sup>917</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.

<sup>918</sup> *Hentrich v France*, judgment of 3 July 1997, Application no. 13616/88, para 49.

likely involvement of the undertaking concerned is too limited, but not be considered arbitrary or disproportionate when conducted within the framework of a sector inquiry where there is no suspicion of wrongdoing at all. In the Pharma Sector Inquiry, the Commission was adamant that no company was suspected of any wrongdoing, and the companies targeted had apparently been selected on the basis of a list of 40 criteria where size (having nothing to do with the actions of the company) was one such criterion.

Could it be argued that the weights to be put in the scales are different in a sector inquiry than in a competition case? When determining whether a measure is proportional *stricto sensu*, the court must weigh the interference of the individual against the public interest. If, as in the case of the Pharma Sector Inquiry, the Commission feared that the entire market was affected, and considering the importance of the products in question, would the public interest 'weigh heavier' than in an ordinary competition case? Probably not; there are a number of cartels that have affected major parts of, or even entire markets, and there is no requirement that sector inquiries are performed only in certain sectors or that they should cover the entire market.

Thus, to conclude: yes – in *SEP* the Court acknowledged that if anything, the Commission's powers are wider when it comes to sector inquiries, and yes, Article 17 has introduced an explicit reference to dawn raids. However, the regulation only allows the Commission to carry out inspections which are necessary in order to ensure effective competition law enforcement. Thus, to carry out dawn raids at the premises of a large number of companies, where size rather than degree of involvement in any infringement has been a decisive factor, and where any objection or failure to cooperate may lead to hefty fines, must be contrary both to Regulation 1/2003, Article 7 of the Charter and the principle of proportionality.

If on the other hand, during the course of a sector inquiry, the Commission receives information giving it reasonable grounds for suspecting certain companies of competition law infringements, it should of course be able to resort to a dawn raid, but then within the frame of an investigation directed at that particular company. Furthermore, it could be argued that the Commission should be able to carry out dawn raids on the basis of authorizations in accordance with Article 20(3) of Regulation 1/2003, as companies are not obliged to submit to such inspections and may refuse access without incurring fines for obstruction.

As no company challenged the Commission's actions during the Pharma Sector Inquiry we do not know what the view of the EU Courts is. This is unfortunate. When the Modernization Package was introduced, the Commission declared that it would now be able to conduct sector inquiries

to a much greater extent. This also seemed to be the case, as a number of sector inquiries were launched in the wake of the Modernization reform. However, since the Pharma Sector Inquiry there has only been one sector inquiry, and the Commission's powers thus appears to be on the brink of disuse once again.<sup>919</sup> It would indeed be very unfortunate if the uncertainty regarding the lawfulness of dawn raids is one of the reasons for this.

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<sup>919</sup> [http://ec.europa.eu/competition/antitrust/e-commerce\\_decision\\_en.pdf](http://ec.europa.eu/competition/antitrust/e-commerce_decision_en.pdf).

## 10. Measures taken on the basis of inspection decisions

Establishing that the adoption of an inspection decision has been carried out in accordance with applicable fundamental rights requirements does not imply that there is an end to the due process issues related to dawn raids.

Once the inspection decision has been taken and the Commission inspectors have accessed the premises of the targeted company, a number of questions remain to be answered. What documents may the Commission go through and copy? Will these documents need to be connected to the investigation or can the Commission review and make copies of any documents? Do the staff have any rights when it comes to personal e-mails or other information of a personal nature? To what extent will the company have to cooperate with the inspectors? Article 20(4) of Regulation 1/2003 requires companies to submit to inspections, and actively cooperate, but does such obligation extend beyond the subject-matter of the inspections? Another hot topic is of course whether the Commission can use forensic IT and make image copies of servers or hard drives for review and selection in Brussels rather than at the premises of the targeted company.

This chapter deals with the Commission's powers during the dawn raid in order to determine how far-reaching these powers are or need to be in order to safeguard companies' rights while at the same time securing efficient and meaningful inspections.

### 10.1 A typical dawn raid

Before analysing the measures taken by the Commission, it is appropriate to give a brief description of how a dawn raid may actually be carried out.

These days, the cooperation of leniency applicants is at the heart of many cartel investigations, and a majority of the Commission's cartel cases

originate from such applications.<sup>920</sup> In order to receive total immunity from fines, the leniency applicant must provide the information necessary so that the Commission can launch inspections at the premises of the companies allegedly participating in the cartel.<sup>921</sup> The Commission is thus often provided with the information necessary to adopt an inspection decision, and will not have to actively gather sufficient indicia against the companies concerned. Once the case handlers decide that they have enough evidence, the Commission's Legal Service will have its say in the matter. If it is determined that the Commission has reasonable grounds to suspect a company of anti-competitive practices, an inspection decision will be taken. However, as pointed out by AG Wahl in his opinion in *Deutsche Bahn*, the internal checks and balances typically provided for when the Commission is to adopt decisions or other legally binding acts do not apply to their full extent for decisions under Articles 20 and 21 of Regulation 1/2003, as the power to adopt such decisions has been delegated to the Commissioner in charge of Competition,<sup>922</sup> who in turn has delegated the powers to the Director-General of DG COMP.<sup>923</sup> The inspection decision is therefore virtually decided upon by the staff of DG COMP alone, with other Commission services playing little or no role in the decision-making.<sup>924</sup> This mechanism is in place to permit rapid execution of inspections while minimizing any risks of leaks.<sup>925</sup>

Article 20(4) of Regulation 1/2003 obliges the Commission to consult with national competition authorities before adopting inspection decisions, and today, it is also more or less standard procedure that officials from the national authorities assist the Commission during the inspection.<sup>926</sup> In these situations, Article 20(5) of Regulation 1/2003 grants the officials from the national authorities the same powers as the Commission inspectors.

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<sup>920</sup> See e.g. Carmeliet, *How Lenient is the European Leniency System? An Overview of Current (Dis)incentives to Blow the Whistle*, Jura Falconis Jg. 48, no. 3, 2011-2012, Kecksmar and Keidel, *Shaping the EU Leniency Programme: The Recent Approach by the EU Courts*, Journal of European Competition Law and Practice 2015, doi: 10.1093/jeclap/lpv027, first published online 23 April 2015.

<sup>921</sup> Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006, OJ C/298/17, at para 8.

<sup>922</sup> On the basis of Article 13 of the Rules of Procedure of the Commission (C(2000) 3614) (OJ 2000 L 308, p. 26), as modified most recently by Commission Decision of 9 November 2011 amending its Rules of Procedure (2011/737/EU, Euratom) (OJ 2011 L 296, p. 58).

<sup>923</sup> See, principally, Commission Decisions PV(2004) 1655, SEC(2004) 520/2, and PV(2006) 1763, SEC(2006) 1368.

<sup>924</sup> Opinion of Advocate General Wahl in Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:92, at para 61.

<sup>925</sup> *Ibid*, at para 62.

<sup>926</sup> Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

When the inspectors come knocking at the door, they expect to be let in immediately. The company does have a right to be assisted by a legal counsel, but the presence of a lawyer is not a precondition for the validity of the inspection.<sup>927</sup> In its explanatory note on dawn raids,<sup>928</sup> the Commission declares that the inspectors can enter the premises, notify the persons there of the decision ordering the inspection, and occupy the offices of their choice without having to wait for the undertaking to consult its lawyer. The inspectors will accept only a short delay pending consultation with the lawyer before starting to examine the books and other records related to the business, taking copies or extracts of those documents, sealing business premises and books or records if needed or asking for oral explanations. Any such delay must be kept to the strict minimum.<sup>929</sup>

Article 20(2) of Regulation 1/2003 empowers the inspectors to examine any books and records relating to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. This, the Commission declares in its explanatory note, includes the examination of electronic information and the taking of electronic or paper copies of such information. It is therefore common practice today that the team of inspectors includes IT experts who are trained in electronic search techniques and are capable of using specialist forensic software.<sup>930</sup>

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<sup>927</sup> See e.g. Case T-357/06, *Koninklijke Wegenbouw Stevin BV v European Commission*, EU:T:2012:596, para 232, and 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 11 September 2015, para 6.

<sup>928</sup> 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 11 September 2015.

<sup>929</sup> This right was acknowledged by the General Court in *KWS* where the General Court recognized the company's right to seek external advice, but held that it should have allowed the officials to enter the premises in order to prevent any destruction of evidence. According to the General Court, the inspectors should immediately have been given access to the company's entire premises, and it was for the inspectors to decide where to wait for the external counsels. Furthermore, they should have been given the possibility to secure all electronic and telecommunications in order to prevent anyone from contacting outside companies. As the inspectors had been denied this possibility during the first 47 minutes, the appeal by *KWS* was dismissed, and the company had to pay the increased fine, see Case T-357/06, *Koninklijke Wegenbouw Stevin BV v European Commission*, EU:T:2012:596, para 232.

<sup>930</sup> See e.g. Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, p. 141, and Kellaway and Nuijten, *The Investigation of Cartels*, in Wijckmans and Tuytschaever (eds), *Horizontal Agreements and Cartels in EU Competition Law*, Oxford University Press, 2015, pp. 86-88.

Once inside, the officers will therefore search through the offices of selected employees as well as the IT environment of the company. The latter includes laptops, desktops, tablets, mobile phones, CD-ROMs, DVDs, and USB keys, but also private devices and media that are used for professional reasons (Bring Your Own Device - BYOD) when they are found on the premises.<sup>931</sup> The inspectors will use built-in (keyword) search tools and may also use their own dedicated software ('Forensic IT tools') and/or hardware.<sup>932</sup> The Commission's note explains that at the end of the inspection the Commission will 'cleanse' the Forensic IT tools, with the objective of completely removing the data from the storage device 'in a way that the data cannot be reconstructed by any known technique'. The inspectors may ask to borrow the hardware of the company (hard-disks, CD-ROMs, DVDs, USB-keys, connection cables, scanners, printers, and so on) but cannot be obliged by the company to use this hardware. Hardware provided by the company will not be 'cleansed' by the Commission.

The use of the word 'search' requires further explanation. In the seminal ruling of *Hoechst*, the company challenged the Commission's inspection decision claiming that the dawn raid amounted to a search and that the Commission inspectors had no power to actually search through the premises.<sup>933</sup> In answer to this, the Court declared that the Commission's officials 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, the Court stated, 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.<sup>934</sup> As *Harding* and *Joshua* point out, Commission inspectors may thus not roam around offices at will, searching anywhere and everywhere, but they may say: 'Show us the documents relating to such and such meeting'.<sup>935</sup> In *Hoechst AG* Mischo discussed the extent of the Commission's powers, and declared that in particular, the right of Commission officials to enter any premises or even means of transport, implies that those officials may look at all the objects in those places and

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<sup>931</sup> On 11 September 2015, the Commission published a revised note which now explicitly states that the inspectors may search through private devices (para 10).

<sup>932</sup> 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 11 September 2015, para 10.

<sup>933</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 10.

<sup>934</sup> *Ibid*, para 31.

<sup>935</sup> *Harding and Joshua, Regulating Cartels in Europe*, Oxford Studies in European Law, 2<sup>nd</sup> edn, 2010, pp. 180-181.

demand to be shown anything they designate, as otherwise there would be no purpose in giving them a right of access.<sup>936</sup>

The situation is completely different if the company opposes the inspection, and the Commission requires the assistance of national enforcement authorities under Article 20(6) of Regulation 1/2003. In such case the Commission inspectors may search, without the cooperation of the targeted company, for any information necessary for the investigation with the assistance of the national authorities.<sup>937</sup> Such assistance may also be requested as a precautionary measure in order to overcome any opposition by the company in question.<sup>938</sup> In *Roquette Frères*, the Court declared that coercive measures may be requested on a precautionary basis but only in cases where there are grounds for apprehending opposition to the investigation and/or attempts at concealing or disposing of evidence.<sup>939</sup> However, Regulation 1/2003 does not contain any express limitation to such effect, and according to *Kerse* and *Khan*, the precaution is almost always taken.<sup>940</sup>

According to Article 20(4) of Regulation 1/2003, companies have a duty to submit to inspections ordered by the Commission, and active cooperation is required by the inspectors. Thus, although the Commission may not have a right to roam around the premises, it may ask the company staff to hand over information.<sup>941</sup> This may include making members of staff available to give explanations on the organization of the undertaking and its IT environment and also to carry out specific tasks to facilitate the inspection such as temporarily blocking individual e-mail accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing ‘administrator access rights’ support. The

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<sup>936</sup> Opinion of Advocate General Mischo in Joined Cases 46/87 and 227/88, *Hoechst v Commission of the European Communities*, EU:C:1989:73, para 20.

<sup>937</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 32. See also van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, p. 140.

<sup>938</sup> Article 20(7) of Regulation 1/2003.

<sup>939</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603, at para 74.

<sup>940</sup> *Kerse* and *Khan*, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 294. From a proportionality perspective, it should be assumed that even though national law enforcement authorities are assisting the Commission, the inspectors should only actively search for evidence where the company fails to cooperate.

<sup>941</sup> For a discussion on the ‘duty to find’, see e.g. *Kerse* and *Khan*, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 166, and van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, pp. 142-143.



Commission's note on dawn raids makes it clear that once such actions are taken the undertaking must not interfere in any way with these measures.<sup>942</sup>

The Commission may keep any storage media of the company being examined until the end of the inspection. An average on-site inspection lasts around four days,<sup>943</sup> but the storage media is usually returned earlier, after a forensic copy of the data under investigation has been made. Such a forensic or image copy is an authentic duplicate of (part or all of) the data stored on the original medium. The examination of the authentic duplicate is considered equal to the examination of the original storage medium.<sup>944</sup> If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection, the copy of the data set still to be searched may be collected for continued selection in Brussels at a later time.<sup>945</sup> The Commission's procedure is then to secure the forensic copy by placing it in a sealed envelope, with a copy given to the company. The company will be invited to attend the opening of the sealed envelope at the Commission's premises. The explanatory note also provides the possibility that the sealed envelope may be returned to the company unopened.<sup>946</sup>

If the Commission decides to seal off business premises, books or records, minutes for the process will be recorded. The undertaking has to ensure that affixed seals are not broken until removed again by the inspectors. Separate minutes will be prepared at the time of the seals' removal, which will record the seals' state at that time.<sup>947</sup>

As for the search actually conducted by the inspectors, it will be wide in scope. Cartels are secret, and as those engaged in cartel activity will by necessity attempt to conceal their behaviour, locating any evidence may be a difficult task.<sup>948</sup> The inspectors may therefore carry out a search of the entire

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<sup>942</sup> 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 11 September 2015, para 11.

<sup>943</sup> The duration may be extended by conducting a continuous inspection i.e. verifying additional data at Commission headquarters in Brussels or at company premises at a later stage, interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

<sup>944</sup> 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 11 September 2015, para 12.

<sup>945</sup> *Ibid*, para 14.

<sup>946</sup> *Ibid*, para 14.

<sup>947</sup> *Ibid*, para 19.

<sup>948</sup> See e.g. the Commission's decision in *SAS/Maersk Air* where it declared: 'The parties knew that their behaviour infringed Article 81 of the Treaty and took action to avoid the Commission becoming aware of the full extent of their agreements. SAS and Maersk Air also tried to avoid keeping a full written record of the points on which they had agreed.'. See

office to verify whether there is something of interest. They will start by getting an overview of how the information is stored and organized. The inspectors will then make a selection based on the amount of paper, and will orient their search to certain binders, quickly scan through the less interesting ones and focus on the ones that seem more promising. The same applies to IT searches; the inspectors make a selection of folders and drives which they consider promising. This is done through a random check of these IT resources to gain an understanding of how things are organized and then a narrowing down of the search exercise.<sup>949</sup> The search of both offices and IT environment will thus be wide in the beginning and subsequently narrowed down. It is interesting to note that the company targeted by the inspections will not immediately be informed of the search words/terms used by the Commission during the dawn raid. The motive for not disclosing the search words/terms is that it would then be easy for the company to determine whether the case is a leniency case, an ex officio case, if the Commission has a strong case already, who the whistleblower might be, and, based on this, draw conclusions as to whether or not to cooperate. The inspectors will therefore leave the company in the dark, at least a short while, usually during a few days of the inspection.<sup>950</sup>

In September 2015, the Commission published a revised note in which the concept of ‘technical entirety’ was introduced. This concept means that the inspectors may retrieve the entire sequence of an e-mail, attachment and/or embedded data items. For instance, even if only one e-mail attachment is selected in the investigation, the data exported will comprise the cover e-mail and all the attachments included in that thread. Subsequently, the Commission can choose to isolate any individual component, list it individually, and assign individual reference numbers.

To conclude: in this digital age, the Commission now has both incentive and means to apply intrusive and efficient investigatory methods.

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*SAS/Maersk Air* (Case COMP.D.2 37.444) and *Sun-Air v SAS/Maersk Air* (Case COMP.D.2 37.386) Commission Decision 2001/716/EC [2001], OJ L265/15, para 89.

<sup>949</sup> Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015.

<sup>950</sup> Interview with G. Berger, DG COMP, Unit F-3, 15 September 2015. The Commission’s practice does not preclude ‘company shadowers’ from noting down the search terms used by the inspectors during the review process, and, according to *Kellaway and Nuijten*, the Commission accepts that companies will often wish to do this. See Kellaway and Nuijten, *The Investigation of Cartels*, in Wijckmans and Tuytschaever (eds), *Horizontal Agreements and Cartels in EU Competition Law*, Oxford University Press, 2015, p. 88.

## 10.2 Which information or documents are fair game?

Let us assume that the Commission suspects, and has reasonable grounds to suspect, a company of participation in a classic price-fixing cartel within a certain market and in a certain geographic area. The Commission issues an inspection decision and makes a visit to the company's headquarters in search of evidence. But suppose that the Commission officials go through the computers of all the employees, as suggested in the previous section, and make copies of documents that have no connection with the infringement in question. Would that be acceptable from a fundamental rights perspective?

Article 20(2) of Regulation 1/2003 lays down the powers of the inspectors during the dawn raid, declaring that the inspectors 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.

The wording of the article suggests that the Commission officials are empowered to enter any premises of the targeted company and to examine and take copies from all books and records related to the business. However, when it comes to a duty on the part of the company to take an active part and to answer questions, it is clear from the wording of the article that such obligation may not extend beyond the subject-matter of the inspection. As will be further discussed in this chapter, despite the open-ended wording of Article 20 of Regulation 1/2003, there are also limits as to the documents that may be consulted or copied. This chapter explores these limits further in order to determine their scope.

When analysing the extent of the Commission's powers, a distinction may be drawn between, on the one hand, documents or pieces of information that fall outside the scope of the subject-matter of the inspection, and on the

other, documents or information that do come within the scope of the subject-matter, but which are nevertheless out of reach to the inspectors as they are e.g. protected by legal professional privilege or the privilege against self-incrimination. This chapter examines the Commission's right to review and copy documents and information unrelated to the subject-matter of the inspection. In Chapters 11 and 12, the scope of the legal professional privilege and the privilege against self-incrimination will be analysed.

## 10.3 Implications of the duty to specify the subject-matter and purpose of an inspection

### 10.3.1 The view of the EU Courts

According to Article 20(4) of Regulation 1/2003, a decision by the Commission to carry out an inspection shall specify the subject-matter and purpose of the inspection. In *Hoechst*, the Court declared that this requirement was necessary in order for the undertaking to be able to assess the scope of its duty to cooperate while at the same time safeguarding the rights of the defence, indicating that the duty to cooperate does not extend beyond the subject-matter of the investigation.<sup>951,952</sup>

This leads to the questions of what exactly is meant by the right of the defence in this respect and in what way the scope of the company's duty to cooperate is affected by the wording of the inspection decision. One possible dividing line may be drawn between the right to review and the right to copy documents. Can the company refuse access to documents outside the scope of the subject-matter or only refuse the copying of such documents? In *Nexans*, the applicants claimed that the lack of precision with regard to the subject-matter made it impossible for them to distinguish the documents which the Commission was allowed to *consult* and copy (emphasis added) from other documents.<sup>953</sup> If the applicants in *Nexans* are right, and it is not only the right to copy but also the right to consult documents that is limited by the subject-matter, it must also be questioned whether such order is really desirable or if it unnecessarily hampers the Commission's investigations. As

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<sup>951</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 29.

<sup>952</sup> The duty to state the subject-matter and purpose was also necessary in order for the company to assess whether the inspection was *justified* (emphasis added), see Section 8.4 above.

<sup>953</sup> Case T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596, para 35.

cartels are said to become more and more sophisticated, a wide search may be necessary to detect the evidence required.<sup>954</sup>

There appears to be some disagreement as to the actual scope of the Commission's powers in this respect. It is clear that the Commission considers itself also empowered to review documents not strictly related to the subject-matter of the inspection. This view is endorsed by *Sauer*, *Ortiz Blanco* and *Jörgens* who declare that the only requirement is that the documents/material should relate to the business,<sup>955</sup> basing this argument on the Court's ruling in *AM & S*, where it declared that Regulation 17/62 empowered the Commission to require production of business records, 'that is to say documents concerning the market activities of the undertaking, in particular as regards compliance with those rules'.<sup>956</sup> This is also in line with the wording of Article 20(2)(c) of Regulation 1/2003. *Van Bael* on the other hand, claims that the inspectors' powers are limited to the examination of the documents or business records which are related to the subject-matter of the inspection. However, *Van Bael* also acknowledges that in practice, this limit may be difficult to apply as it is the Commission's task to determine the relevant documents that must be presented for examination.<sup>957</sup>

As for the view of the ECJ, it appears to draw a line somewhere in between the standpoints of *Ortiz Blanco* and *Van Bael*. Ever since the Court delivered its ruling in *Hoechst*, it has consistently held that the right of access under Article 20 of Regulation 1/2003;<sup>958</sup>

[w]ould serve no useful purpose if the Commission's 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 attitude.<sup>959</sup>

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<sup>954</sup> See e.g. Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014, at p. 9, and Wils, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, 2008, at p.137.

<sup>955</sup> *Sauer*, *Ortiz Blanco* and *Jörgens*, *Investigation of Cases (III): Inspections*, in *Ortiz Blanco* (ed.), *EU Competition Procedure*, 3rd edn, 2013, p. 340.

<sup>956</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157, para 16.

<sup>957</sup> *Van Bael*, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, p. 135.

<sup>958</sup> Or, in older cases, Article 14 of Regulation 17/62.

<sup>959</sup> See e.g. Joined Cases 97 to 99/87, *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, para 24, Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337, para 27, and Case

In *Dow Chemical*, the Court declared that, during a dawn raid carried out by way of a decision, the inspectors have 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.<sup>960</sup>

These statements suggest that the powers of the Commission to peruse documents extend beyond the scope of the subject-matter. In *Nexans*, the General Court elaborated further on why the Commission's powers should not be limited strictly to the subject-matter of the inspection, but also made it clear that those powers do have limits. In its ruling the General Court declared that the exercise of the power to search for various items of information which are not already known or fully identified makes it possible for the Commission to examine certain business records of the targeted company, even when the Commission does not know whether they relate to activities covered by the inspection decision. This is in order to ascertain whether the documents are indeed of interest and to prevent the company from hiding evidence which is relevant to the investigation under the pretext that it is not covered by the subject-matter of the investigation.<sup>961</sup> However, the General Court also established that, when the Commission carries out an inspection under Article 20(4) of Regulation 1/2003, it is required to restrict its searches to the activities of the targeted company relating to the sectors indicated in the inspection decision and accordingly, after examination, once it has found that a document or other item of information does not relate to those activities, it should refrain from using that document or item of information for the purposes of its investigation.<sup>962</sup>

If the Commission is allowed to peruse items of information outside the scope of the inspection decision in order to ensure that no evidence is hidden in files unrelated to the subject-matter of the inspection, is it then possible to make a distinction between the inspectors' right to peruse all documents as opposed to the company's duty to provide certain documents? The ECJ has held time and again that the duty to state the subject-matter and purpose of

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T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 62.

<sup>960</sup> Joined Cases 97 to 99/87, *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, para 28.

<sup>961</sup> Case T-135/09, *Nexans SAS France and Nexans SA v Commission*, EU:T:2012:596, para 63.

<sup>962</sup> *Ibid*, paras 63 and 64. As noted by *Kerse* and *Khan*, also the Commission appears to share this view as it has declared that the inspectors '[a]re under an obligation not to examine business records, or to stop examining such records, if they are obviously or in the Commission official's opinion, not related to the subject-matter of the investigation'. See *Kerse* and *Khan*, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 167, where they refer to the Commission's decision in *CSM-NV* [1992] OJ L305/16.

the inspection is ‘necessary in order for the undertaking to be able to assess the scope of its duty to cooperate’.<sup>963</sup> In what ways is the company’s duty to cooperate affected by the wording of the inspection decision, and the scope of its subject-matter?

In *Nexans*, the General Court declared that the applicants should have understood that the inspection decision did not exclude electric cables other than those specifically mentioned in that decision and in principle, the company was required to provide the Commission with all information requested relating to all electric cables and to the material which is normally marketed with those cables or intended for complementary use.<sup>964</sup> On reading the inspection decision, the applicants could understand that any opposition on their part to the Commission obtaining documents relating to those products, or to a request from the Commission asking them to produce such documents, could be penalized under Article 23(1) of Regulation 1/2003.<sup>965</sup> Thus, according to the General Court, the company is under an obligation to provide information relating to the subject-matter of the inspection, and although the Court has declared that the inspectors have 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,<sup>966</sup> they cannot reasonably ask to be provided information about activities that obviously fall outside the scope of the inspection decision. This being said, such restriction would not apply to the obligation to actively facilitate and provide access to the company’s computer systems.

In the recent case of *Deutsche Bahn*,<sup>967</sup> the ECJ elaborated further on questions dealing with the subject-matter of the inspection and the consequences of acting outside the scope of the decision. Here, the Commission had carried out three separate dawn raids against Deutsche Bahn and its subsidiaries. The first, which was carried out in March 2011, had its basis in suspicions against DB Energie GmbH of unjustified preferential treatment towards other subsidiaries within the group. Two weeks later, the Commission adopted a new inspection decision, this time concerning Deutsche Bahn and potential discriminatory practices

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<sup>963</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v the Commission of the European Communities*, EU:C:1989:337, para 29.

<sup>964</sup> Case T-135/09, *Nexans France SAS and Nexans SA v Commission*, EU:T:2012:596, para 54.

<sup>965</sup> *Ibid.*

<sup>966</sup> Joined Cases 97 to 99/87, *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, para 28.

<sup>967</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

implemented by its subsidiary DUSS. In July of that same year, the Commission adopted its third inspection decision – also based on suspicions of anti-competitive behaviour by Deutsche Bahn and DUSS.

When challenging the Commission’s inspection decisions, Deutsche Bahn claimed that the first dawn raid had been carried out with the partial objective of gathering enough evidence to allow the Commission to carry out dawn raids 2 and 3. The General Court did not agree with Deutsche Bahn, and dismissed the application in its entirety.<sup>968</sup> The ECJ, however, was more inclined to accept the arguments put forward by the applicant. It had been established that the Commission had informed its officials about the existence of suspicions concerning DUSS already before the first inspection was carried out. The applicant argued that by doing so, the Commission had knowingly created a risk that the information communicated to its agents concerning the DUSS file would lead them to direct their attention specifically to the documents pertaining to DUSS, even though they did not relate to the subject-matter of the inspection.<sup>969</sup>

In its ruling, the ECJ acknowledged that the requirements on the part of the Commission – not only to state the subject-matter and purpose of the inspection, but also to refrain from using evidence obtained during an inspection for purposes other than those indicated in the decision – are fundamental requirements, and that the right of the defence would be seriously endangered should the Commission fail to respect its obligations in this regard. However, the Court also stressed, this does not mean 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 anti-competitive conduct. Such a bar, the Court concluded, would go beyond what is necessary to safeguard professional secrecy and the rights of the defence, and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the EU competition rules.<sup>970</sup>

With that caveat, the Court declared that the Commission is required to state reasons for its decision ordering an inspection and if that statement of reasons or that decision circumscribes the powers conferred on the

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<sup>968</sup> Joined cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn AG and Others v European Commission*, EU:T:2013:404.

<sup>969</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, at para 51.

<sup>970</sup> *Ibid*, para 59.



Commission's agents, a search may then only be made for those documents coming within the scope of the subject-matter of the inspection.<sup>971</sup>

In the present case, the ECJ observed, it had been established that the Commission had informed its agents immediately before the first inspection that there was another complaint against Deutsche Bahn concerning its subsidiary DUSS. Although the Court acknowledged that the targeted company must provide the inspectors with all information that could be useful for them in understanding the nature and scope of the suspected infringement, all such information must nevertheless relate solely to the subject-matter laid down in the inspection decision.<sup>972</sup> In the present case, the Court concluded, the information regarding DUSS was not part of the general background information. Instead it related to the possible existence of a separate infringement unrelated to the subject-matter of the first inspection decision. Consequently, the lack of reference to the complaint against DUSS in the first inspection decision violated the obligation to state reasons and the rights of the defence of the undertakings concerned.<sup>973</sup>

Having established this, the Court concluded that the first inspection decision was vitiated by irregularity since the inspectors, being in possession of information unrelated to the subject-matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision.<sup>974</sup> In addition to this, the fact that the inspectors had acted outside the scope of the decision during the first dawn raid made the Court annul the second and third inspection decisions, as those inspections had been triggered by information unlawfully gathered during the first inspection.<sup>975</sup>

### 10.3.2 The view of the EU Courts – Concluding remarks

The *Deutsche Bahn* case illustrates the need to properly define the powers of the Commission. In most cases, there may be little or no practical point in carefully circumscribing or determining the scope of the Commission's powers of review. The Commission has a limited amount of time to carry out the inspection and will focus its resources on the offices of the employees suspected of cartel participation or apply search words related to the suspected cartel. Whether the Commission has a right to review documents

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<sup>971</sup> Ibid, para 60.

<sup>972</sup> Ibid, para 62.

<sup>973</sup> Ibid, para 64.

<sup>974</sup> Ibid, para 67.

<sup>975</sup> Ibid, para 65.

or information related to any part of the business or just the subject-matter of the inspection has no practical importance as the Commission will focus its attention on the part of the business related to the subject-matter of the inspection. However, when a dawn raid is carried out with the partial aim of finding information relating to activities other than those covered by the subject-matter of the inspection decision, then the need to properly define the limits of the Commission's powers appears all the more urgent.

To avoid unduly hampering the Commission's investigations, the Commission should have broad powers to peruse documents in search of evidence of the anti-competitive practice covered by the subject-matter of the inspection. However, the right to copy should be and is limited to documents relating to the subject-matter of the inspection. If the Commission stumbles upon information that is unrelated to the subject-matter of the investigation, but which indicates that the company is involved in other unlawful activities, then the Court has declared that the Commission should not be prevented from opening a new investigation. However, the Commission is not allowed to actively search for evidence of infringements other than those covered by the inspection decision. In *Deutsche Bahn*, such measures resulted in the Court annulling the inspection decisions that were adopted on the basis of unlawfully gathered evidence.

However, as has been mentioned already in Section 3.2.4 above, if the Commission acts outside the given limits and copies documents unrelated to the inspection decision, this will not lead to an annulment of that decision, as the validity of the inspection decision is not affected by any unlawful measures taken after its adoption.<sup>976</sup> Furthermore, and as will be discussed in Chapter 13 below, the possibilities to take action and challenge the measures as such are limited. Whether this order is desirable or meets the ECHR standard is further discussed in those chapters.

As for the company's duty to cooperate with the inspectors during the performance of the dawn raid, such duty appears to be only marginally affected by the subject-matter of the inspection decision. The company will have to give access to all information requested by the Commission, although it should not be obliged to actively provide the inspectors with information that is clearly unrelated to the subject-matter of the inspection. Furthermore, Article 20 of Regulation 1/2003 explicitly limits the obligation

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<sup>976</sup> See e.g. Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, para 49, and Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akros Chemicals v European Commission*, EU:T:2003:287, para 146. This was also the case in *Deutsche Bahn*.

to answer factual questions to questions on facts or documents relating to the subject-matter and purpose of the inspection.

### 10.3.3 The view of the ECtHR

While the case-law of the ECJ is mostly concerned with the right of the defence under Article 48 of the Charter – a right closely connected to the right to a fair trial enshrined in Article 47 of the Charter and Article 6 of the ECHR – the Strasbourg court’s case-law on the scope of searches is mostly concerned with Article 8 of the ECHR, and the question whether the interference with the applicants’ right to privacy caused by a wide search could be considered disproportionate or justifiable under Article 8(2) of the ECHR.

#### 10.3.3.1 Scope of the search warrant – Robathin

As discussed in Section 8.4.4.1 the case of *Robathin* concerned the search carried out at the premises of Mr Robathin, a practicing lawyer in Vienna. The search warrant authorized the search and seizure of the following items:

Documents, personal computers and discs, savings books, bank documents, deeds of gift and wills in favour of Dr Heinz Robathin, and any files concerning R. [name of one person] and G. [name of another person].<sup>977</sup>

Messrs R and G were the victims of the suspected crimes.

During the search, the police officers went through the computer system of Mr Robathin, copying all files to disk. They also seized a laptop as well as copies of calendars. Mr Robathin and the member of the Vienna Bar Association, both present during the search, protested against the measures taken and argued that they had been excessive, as it would have been possible to limit the search and copy only those files relevant to the investigation, and that the Austrian authorities had thus not opted for the least restrictive means available.

Following the code of procedure, the Austrian police officers sealed the copied disks and handed them over to the investigating judge. As Mr Robathin had opposed the search of the data, the Review Chamber of the Vienna Regional Criminal Court was called upon to decide whether the disks

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<sup>977</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 8.

copied were to be examined or returned to Mr Robathin.<sup>978</sup> The Review Chamber decided to authorize the examination of all the files,<sup>979</sup> stating that there were grounds for suspecting the offences described in the search warrant, and that the examination of the seized files was necessary in order to investigate the offences.<sup>980</sup>

Mr Robathin appealed against the decision, and the case searched its way through the Austrian legal system. Having exhausted all national remedies, he later turned to Strasbourg, arguing that his right to privacy under Article 8 of the ECHR had been infringed by the Austrian authorities. In its ruling, the Strasbourg court established that the search did indeed constitute an interference with the applicant's right to privacy, and then examined whether such interference could be justified under Article 8(2) of the ECHR.

Here, the Strasbourg court did find the measure to be in accordance with the law and in pursuit of a legitimate aim, namely the prevention of crime.<sup>981</sup> As for the assessment of whether the measures could be deemed necessary in a democratic society, that is whether the relationship between the aim sought to be achieved and the means chosen were proportionate – a proportionality *stricto sensu* test – the court declared that it had looked at the procedural safeguards surrounding the search and whether they provided adequate and effective protection against abuse and arbitrariness.<sup>982</sup> The court referred to earlier rulings,<sup>983</sup> and stated that in comparable cases it had paid attention to elements such as whether the search was based on a warrant issued by a judge and based on reasonable suspicion, and whether the scope of the warrant was reasonably limited. The court noted that in the present case, the warrant had been issued by a judge, and gave details in respect of the alleged acts, the time of their commission and the damage allegedly caused.<sup>984</sup> The court also considered the warrant to be based on reasonable suspicions justifying the search.<sup>985</sup>

As for the actual wording of the search warrant, the Strasbourg court noted that the warrant's contents had been couched in very broad terms. While limiting the search and seizure of files to those concerning Messrs R and G, the warrant authorized – in a general and unlimited manner – the search and

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<sup>978</sup> Ibid, para 12.

<sup>979</sup> Ibid, para 13.

<sup>980</sup> Ibid, para 13.

<sup>981</sup> Ibid, para 42.

<sup>982</sup> Ibid, para 43.

<sup>983</sup> See e.g. *Société Colas Est. and Others v France*, judgment of 16 April 2002, Application no. 37971/97.

<sup>984</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 45.

<sup>985</sup> Ibid, para 46.

seizure of documents, personal computers and disks, savings books, bank documents and deeds of gift and wills in favour of the applicant.<sup>986</sup> However, this fact in itself was not enough to establish an infringement of Article 8(2) of the ECHR. Instead the court went on to consider whether the deficiencies in the limitation of the scope of the search warrant were offset by sufficient procedural safeguards capable of protecting the applicant against any abuse or arbitrariness.<sup>987</sup> Here, the Strasbourg court considered the fact that all the disks were sealed and that the applicant had a remedy against the examination of the seized data at his disposal, namely a complaint to the Review Chamber. It was for the Review Chamber and not the police to determine the data that could actually be examined. As the search warrant had been couched in very broad terms, the manner in which the Review Chamber exercised its supervisory function was considered to be of particular importance.<sup>988</sup>

The Strasbourg court was not satisfied with the review carried out by the Review Chamber, declaring that it had given only brief and rather general reasons when authorizing the examination of all the electronic data, failing in particular to address the issue of whether it would have been sufficient to search only those disks relating to Messrs R and G. Nor had the Review Chamber given any reasons for its finding that a search of the applicant's data was necessary for the investigation. In all, this meant that the Strasbourg court was unable to establish that the search of all the data had been proportionate under the circumstances.<sup>989</sup> Because the facts of the case showed that the alleged criminal activities necessitating a search warrant related solely to the relationship between the applicant and Messrs R and G, the Strasbourg court found that there should be particular reasons to allow for the search of all other data, having regard to the specific circumstances of a law office.<sup>990</sup> As no such reasons were presented, the seizure and examination of all data went beyond what was necessary, and a violation of Article 8 of the ECHR was thus established.<sup>991</sup>

Although the court's reasoning and conclusions appear to a large extent to be of general nature, one cannot disregard the fact that it paid particular regard to the fact that the search had been carried out at a law office. Therefore, drawing any general conclusions may be risky. This being said, it is clear from the ruling that the judicial review needs to be of a certain standard in situations where the search warrant has been couched in broad terms, and

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<sup>986</sup> Ibid, para 47.

<sup>987</sup> Ibid, para 47.

<sup>988</sup> Ibid, para 51.

<sup>989</sup> Ibid, para 51.

<sup>990</sup> Ibid, para 52.

<sup>991</sup> Ibid.

that the reviewing court needs to assess whether the seizure and examination of all documents is necessary and thus proportionate.

### **10.3.3.2 Limitations in the scope of a search warrant – Tamosius**

Another case concerning the scope of search warrants and Article 8 of the ECHR is the case of *Tamosius v. the United Kingdom*,<sup>992</sup> also dealing with a search carried out at a law office. Mr Tamosius was a lawyer and partner of a law firm based in London. One of his clients was under investigation by the Inland Revenue, suspected of tax evasion, and in July 1998, the Inland Revenue sought to execute a search warrant at the premises of Mr Tamosius' law office. As Mr Tamosius claimed that the files which the authorities wished to seize were protected by legal professional privilege, the authorities agreed not to review them.

In September 1999, the Inland Revenue once again obtained an *ex parte* search warrant from the court in order to search Mr Tamosius' law office for documents evidencing offences of serious tax fraud perpetrated by one or more of his clients. The Inland Revenue also suspected that Mr Tamosius might himself have committed such offences, and that he had been involved in the arrangements for the diversion of commission offshore, and had assisted in concealing those arrangements from the Inland Revenue.<sup>993</sup>

The search warrant was executed on 29 September 1999, but no property was initially examined or seized because discussions took place between the parties on issues of legal professional privilege. Mr Tamosius challenged the warrant on the same day and the court required the Inland Revenue to seal any material removed from the premises in opaque bags; the material was not to be inspected until the full hearing. As the first warrant was already due to expire on 30 September, the Inland Revenue obtained a second *ex parte* warrant. The second warrant had identical wording except for the following addition; '[o]bligations touching upon them, in relation to the persons named in the attached schedule, which he has reasonable caus[e]'. The attached schedule contained the names of 35 companies and persons allegedly involved in the suspected tax evasion arrangements.

On 1 October 1999, the second search warrant was executed. Almost 70 documents, files and books were examined and seized. Mr Tamosius turned to the UK courts, but without success. The Divisional Court rejected his

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<sup>992</sup> *Tamosius v the United Kingdom*, Decision of admissibility of 19 September 2002, Application no. 62002/00.

<sup>993</sup> *Ibid.*

arguments that the warrant had failed to give adequate particulars of the materials which could be seized, holding that there was nothing in the applicable statute which required the particularity that Mr Tamosius contended. The validity of the warrant, the UK court declared, depended not upon its particularity but upon there being reasonable suspicion that an offence of serious fraud had been committed and there being reasonable ground for suspecting that evidence was to be found on the premises.

Mr Tamosius then turned to Strasbourg, where the ECtHR acknowledged that the search carried out at his premises amounted to an interference with his rights under Article 8(1) of the ECHR. As for the applicability of Article 8(2), the court noted that it was not disputed that the search had been carried out in accordance with the law, or that it pursued legitimate aims, namely those of preventing crime and disorder and of protecting the economic well-being of the country. The court also observed that the warrant had been issued by a judge who was required by law to be satisfied that there was reasonable ground for suspecting that tax fraud had occurred and that evidence might be found at the premises to be searched.

Mr Tamosius had complained about the fact that the warrant had been granted *ex parte*, but the court saw nothing wrong with this, noting that there may indeed have been good reason not to give forewarning of a proposed search. As for the scope of the search warrant, the court acknowledged that the first warrant related to any items relating to serious tax fraud, but that a second warrant had been issued which included a schedule of 35 companies and individuals listed as being under investigation. It was this second warrant that had been executed, and the Strasbourg court was therefore '[n]ot persuaded that in these circumstances the applicant was denied sufficient indication of the purpose of the search to enable him to assess whether the investigation team acted unlawfully or exceeded their powers'.<sup>994</sup>

The Strasbourg court also noted that the search had been carried out under the supervision of counsel, whose task had been to identify the documents that were covered by legal professional privilege and should not be removed. Given the above, the court concluded that the search had not been disproportionate to the legitimate aims pursued and that adequate safeguards had attached to the procedure. The interference could accordingly be regarded as necessary in a democratic society within the meaning of Article 8(2) of the ECHR. The court even went as far as rejecting the applicant's claims as manifestly ill-founded pursuant to Article 35(3) and (4) of the ECHR.

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<sup>994</sup> Ibid.

### 10.3.3.3 Scope of search warrants in competition cases – Vinci Construction

In October 2007 the French Competition Authority filed an application with the liberty and detention judge (JLD) at the *Tribunal de grande instance de Paris*, requesting authorization to carry out dawn raids at the premises of a number of companies suspected of restrictive practices contrary to Article 101 FEUF and the French Commercial Code.<sup>995</sup> The judge found that there were reasonable grounds to suspect the companies of cartel participation and authorized the inspection. The authorization was restricted in so far that the competition authority was only allowed to search the premises of the companies explicitly mentioned in the authorization and only with regard to their activities in the sector for construction and renovation of health care facilities.<sup>996</sup>

The inspections were carried out and numerous documents and electronic files were seized along with the entire mailboxes of certain employees. The companies challenged the inspections alleging that they had been widespread and indiscriminate as thousands of electronic documents and entire mailboxes had been seized by the authority, many of these documents either lacking any connection with the business covered by the inspection decision, or being protected by legal professional privilege. They also complained that no detailed inventory of the seized items had been drawn up.<sup>997</sup> The French Competition Authority argued that the inspections and seizures had been carried out in accordance with the law and on the basis of the judge's authorization. According to the authority, the applicant companies had been given copies of the seized documents along with a detailed inventory.

The claims by the applicant companies were dismissed by the JLD on the ground that the inspections and seizures in question had complied with the applicable provisions of the Commercial Code and the Code of Criminal Procedure, and with the rights guaranteed by the ECHR.<sup>998</sup> Among other points, the judge held that respect for legal professional privilege did not preclude the seizure of items and documents covered by the privilege. An appeal by the applicants on points of law was dismissed.<sup>999</sup>

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<sup>995</sup> Article L. 450-4 du code de commerce.

<sup>996</sup> *Fr. Établissements de santé*.

<sup>997</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, at para 11.

<sup>998</sup> *Ibid*, para 13.

<sup>999</sup> *Ibid*, para 14.



Relying on Articles 6, 8 and 13 of the ECHR, the applicant companies turned to Strasbourg alleging a violation of their right to an effective remedy, first because they had been unable to lodge a full appeal against the decision authorizing the inspections and seizures, and secondly because they could only challenge the conduct of those operations before the judge who had authorized them, and who did not, in their view, meet the requisite conditions of impartiality. They further complained of a disproportionate interference with their defence rights and with the right to respect for home, private life and correspondence, particularly with regard to the legal professional privilege, taking into account the widespread and indiscriminate nature of the seizures carried out and the lack of a detailed inventory. This section only addresses the scope of the search and seizure under Article 8 of the ECHR. For a discussion on the application of the legal professional privilege or of Article 6 of the ECHR, please see Sections 12.2.4 and 13.2.1.4 below.

As for the allegations concerning the massive and indiscriminate nature of the search and seizures, the court acknowledged that the dawn raids constituted an interference with the rights enshrined in Article 8(1) of the ECHR. However, the interference was considered to pursue legitimate aims and was in accordance with the law. As for the question of its necessity the court declared that an inspection carried out at the applicants' premises with the aim of detecting anti-competitive practices was not in itself disproportionate.<sup>1000</sup> The court then continued to assess whether the safeguards surrounding the inspection were adequate and effective, as opposed to theoretical and illusory, paying particular regard to the large number of documents and files that had been reviewed and copied. In this respect, the court did not accept the arguments put forward by the applicants. On the contrary, it found that the inspectors had made an effort to circumscribe their search and had only seized documents that came within the scope of the search warrant. Furthermore, the court considered that the applicants had been able to identify the documents seized as the inventory was sufficiently precise – indicating the name of the files, their size and their provenance. The court thus dismissed the applicants' complaint in this regard. As for the protection of privileged documents, please see Section 12.2.4 below.

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<sup>1000</sup> Ibid, para 74. The Strasbourg court's reasoning in this respect corresponds to the reasoning of the ECJ in cases such as *National Panasonic* and *Roquette Frères* in which the ECJ has concluded that 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. See Case 136/79, *National Panasonic v Commission of the European Communities*, EU:C:1980:169, paras 29-31, and Case C-94/00, *Roquette Frères*, EU:C:2002:603, at para 77.

#### 10.3.3.4 The view of the ECtHR – Concluding remarks

The Strasbourg court's rulings in the three cases referred to in this section suggests that the court would be willing to accept rather broad searches and seizures in competition law investigations in so far and as long as the search warrant is based on reasonable suspicions and is reasonably limited to the alleged infringement, and provided that the inspectors make an effort to circumscribe their search and only seize documents or files that come within the scope of the search warrant.

Furthermore, the Strasbourg court's rulings in *Vinci Construction* and *Robathin* suggest that the copying of computer files may but does not necessarily constitute an infringement of Article 8 of the ECHR. In the following, we examine if the Commission has and should have a right to make image copies of servers for review back in Brussels, the extent to which this can be done, and whether such practice can be reconciled with the rights enshrined in Articles 6 and 8 of the ECHR.

### 10.4 Bringing it back to Brussels – A formality or a fundamental error?

Closely connected to the issue of how wide a search may be in order to meet applicable fundamental rights standards is the question of whether, as in the cases of *Robathin* and *Wieser and Bicos*, the Commission or other competition authorities should be allowed to make image copies of servers for review back at the authority's premises. This procedure not only raises the question of how wide a search may be. The risk must be taken into account that some of the files copied contain privileged documents or documents covered by professional secrecy, or that some documents not belonging to the subject-matter of the investigation can end up in the hands of other authorities or third parties.

Regulation 1/2003 governs the Commission's procedures and powers during a dawn raid. Although it is true that these powers were amended and extended when the regulation was adopted – the Commission received authority to seal off premises, search private homes and ask for explanations on the spot – it is also true that the list of powers in Article 20(2) shows many similarities with its predecessor – Article 14 of Regulation 17/62.

Still, in practice, the way dawn raids are carried out today bears few similarities with the way they were conducted some thirty years ago when there were few computers and no mobile phones. Despite the differences in

practice, there are only minor amendments to the list of the Commission's powers that reflect these changes. They are found in sub-paragraphs b) and c) according to which the Commission may examine books and business records '*irrespective of the medium on which they are stored*' and '*take or obtain in any form copies of or extracts from such records*' (emphasis added).

Indeed, these apparently minor amendments reveal drastic changes in the Commission's *modus operandi*. Today, most incriminating documents are stored electronically rather than in any filing cabinets. The Commission and other competition authorities around the world have had to adapt their search methods accordingly, and now they use advanced forensic technology in their search for incriminating documents. In paragraph 10 of the Commission's explanatory note to its inspection decisions, it presents the methods applied, declaring that:

The Inspectors can search the IT environment and storage media (laptops, desktops, tablets, mobile phones, CD-ROM, DVD, USB-key and so on) of the undertaking. For this purpose, the Inspectors may not only use any built-in (keyword) search tool, but may also make use of their own dedicated software and/or hardware ('Forensic IT tools'). These Forensic IT tools allow the Commission to copy, search and recover data whilst respecting the integrity of the undertakings' systems and data.<sup>1001</sup>

Not only does the use of Forensic IT tools appear to be common practice today; some competition authorities bring the forensic copies back to the authority for review and selection at their own premises rather than at the premises of the company. In Sweden for example, it has been standard procedure for the Swedish Competition Authority to make an image copy of the server and review the copy back at the Authority's offices. This practice caused a stir among targeted companies, and legislative changes have recently been made according to which the Swedish Competition Authority may no longer bring image copies back to its headquarters without the consent of the targeted company.<sup>1002</sup>

Although the Commission does not routinely bring image copies back to Brussels, the practice is sometimes applied. There is a heated debate whether these practices respect applicable fundamental rights, and a number of cases have been brought before both the Strasbourg court and the EU Courts to

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<sup>1001</sup> Explanatory note to an authorization to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation 1/2003, revised on 11 September 2015, [http://ec.europa.eu/competition/antitrust/legislation/explanatory\\_note.pdf](http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf).

<sup>1002</sup> Chapter 5, Section 6 of the Swedish Competition Act (SFS 2008:579), as amended per 1 January 2016.

deal with this matter. A presentation of the Strasbourg stance will be made first, followed by a presentation and analysis of the EU Courts' rulings.

#### 10.4.1 Bringing it back to Brussels – The view of the ECtHR

##### 10.4.1.1 Collection of electronic data – Wieser and Bicos

The case of *Wieser and Bicos*, which has been presented in detail in Section 8.4.4.2 above, concerned the Austrian authorities' practices when searching and collecting electronic data at the premises of Mr Wieser's law office – also the seat of the two companies Bicos Beteiligungen GmbH, owned by Mr Wieser, and its subsidiary Novamed. The search concerned suspected involvement of the latter company in illegal trade of medications.

The search carried out was divided into a search of physical evidence and a search of electronic data. Whereas the search of the premises and documents stored in the office had been carried out in the presence of both Mr Wieser and a representative of the Austrian Bar Association, Mr Wieser had not been present during the search of electronic data, and the representative of the bar association had been present only part of the time. When the inspectors terminated the search of the IT environment, they left without drawing up a search report or informing Mr Wieser of the results of the search.<sup>1003</sup> Later that day a data securing report was drawn up according to which no complete copy of the server had been made. Instead the search had been carried out using the names of Bicos and Novamed as well as the names of the other companies suspected of involvement in the illegal practices. A folder named Novamed containing ninety files was found plus one additional file containing one of the search items. The inspectors copied all the data to disks. In addition, the deleted items were retrieved and numerous files which corresponded to the search items were found and also copied to disks. The disks were transmitted to the Economic Crimes Department, which printed out all the files contained on the disks. Both the disks and the printouts were then handed over to the investigating judge.<sup>1004</sup>

In their application, Mr Wieser and Bicos complained of the search and seizure of electronic data, and based their claim on Article 8 of the ECHR. The Strasbourg court agreed with the applicants in that the measures taken

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<sup>1003</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01, para 11.

<sup>1004</sup> *Ibid.*, para 14.

by the Austrian authorities constituted an interference with their right to correspondence under Article 8(1) of the ECHR. Having established an interference, the Strasbourg court continued its assessment under Article 8(2), declaring that the interference had been in accordance with the law and served a legitimate aim: the prevention of crime. As for the third criterion – that the interference should be necessary in a democratic society – the court noted that the applicants’ submissions concentrated on the necessity of the interference, whether the measures were proportionate to the aim pursued and whether the procedural safeguards had been adequately complied with. In this respect the Strasbourg court noted that in comparable cases, it had examined whether the domestic law and practice afforded adequate and effective safeguards against abuse and arbitrariness. Elements taken into consideration were in particular whether the search was based on a warrant issued by a judge and based on reasonable suspicion, whether the warrant was reasonably limited, and – where the search was conducted at a lawyer’s office – whether it was carried out in the presence of an independent observer.<sup>1005</sup>

In the present case, the search of the computer systems had been carried out on the basis of a warrant issued by the investigating judge. The Strasbourg court also found that the search warrant limited the documents or data to be looked for in a reasonable manner, by describing them as any business documents revealing contacts with the suspects in the proceedings concerning illegal trade of medications. The search remained within these limits, since the officers searched for documents or data containing either the word Novamed or Bicos or the names of the other suspects.<sup>1006</sup> However, the inspectors had not respected other safeguards provided by the Austrian code of criminal procedure, such as the requirements that (i) the owner of the premises should be present, (ii) a report of the item seized is to be drawn up at the end of the search, and (iii) if the owner objects to the seizure of documents or data carriers, they are to be sealed and put before the investigating judge for a decision as to whether or not they are to be used for the investigation.

In the present case, these safeguards had been complied with as regards the seizure of documents, but not as regards the seizure of electronic data.<sup>1007</sup> Mr Wieser had not been present during the search and the representative of the bar association had mainly been busy supervising the seizure of documents and could not properly exercise his supervisory function as regards the electronic data. Furthermore, the report setting out the search

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<sup>1005</sup> Ibid, para 57.

<sup>1006</sup> Ibid, para 59.

<sup>1007</sup> Ibid, para 62.

criteria that had been applied and describing the files that had been copied and seized was not drawn up at the end of the search, but only later that same day. Moreover, the officers had left the premises without informing Mr Wieser of the results of the search. In conclusion, the Strasbourg court found that the inspectors' failure to comply with some of the procedural safeguards designed to prevent any abuse or arbitrariness and to protect the lawyer's duty of professional secrecy rendered the search and seizure of Mr Wieser's electronic data disproportionate to the legitimate aim pursued.<sup>1008</sup> Furthermore, the Strasbourg court observed that a lawyer's duty of professional secrecy also serves to protect the client. Having regard to the fact that Mr Wieser represented companies whose shares were held by Bicos and that the data seized contained some information subject to professional secrecy, the Strasbourg court saw no reason to come to a different conclusion as regards Bicos and thus established a violation of Article 8 of the ECHR in respect to both applicants. However, it is worth noting that whereas the court held unanimously that Mr Wieser's rights had been violated, the vote was four to three on the violation of Bicos' rights.

#### **10.4.1.2 Collection of electronic data – Bernh Larsen Holding**

The case of *Bernh Larsen Holding*<sup>1009</sup> concerns measures taken by the Norwegian tax authorities during a tax audit. As the facts of the case were presented in detail in Section 8.3.1.6, this section provides only a brief background presentation. During the course of a tax audit, the Norwegian tax authorities demanded that Bernh Larsen Holding (BLH) should submit an image copy of the company server. As BLH shared a server with two other companies, it refused to comply with the demand arguing that the server contained information belonging not only to BLH but also to other companies and persons. In the end, a backup copy of the server, containing 112,316 files in 5,560 folders (of which only a minor part was relevant for the audit) was submitted to the tax authorities in a sealed envelope.<sup>1010</sup>

BLH unsuccessfully challenged the tax authorities' measures before the Norwegian courts. The Norwegian Supreme Court declared that, in the interests of efficiency of the tax audit, access to company archives should be wide at the early stages of a tax audit in order to allow the authority to find all information of significance for tax assessment purposes. According to the

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<sup>1008</sup> Ibid, para 66.

<sup>1009</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

<sup>1010</sup> The backup tape contained all the files stored on the server, but, unlike an image copy, not the computer software or deleted material, see para 48 of the ruling.

court, it must be possible to impose full access to a server if it is organized in a manner where the tax authorities are dependent on indications by the tax subject in order to identify relevant information.<sup>1011</sup> The Supreme Court also ruled on the possibility to bring the backup tape back to the tax authorities for review at their premises. Here the court noted that the applicant was allowed to be present during the review of the copied material,<sup>1012</sup> and that the authority would not be able to review more material at their premises than they would have at the premises of the undertaking. While acknowledging that the risk of abuse is greater if the copied material is taken to the tax office, the Supreme Court did not consider such risk to be so great as to be decisive, and dismissed the appeal.<sup>1013</sup>

Having worked its way through the Norwegian legal system, BLH turned to the Strasbourg court and claimed that the measures taken by the Norwegian authorities had constituted an unjustified interference with its right to privacy under Article 8 of the ECHR. The Strasbourg court immediately established that legal persons may also invoke and rely on Article 8 of the ECHR, and that when the tax authorities ordered BLH to grant the tax auditors access to the server used by the applicant companies and enable them to take copies of all of the data on that server, this constituted an interference with the applicants' 'home' and undoubtedly concerned their 'correspondence' within the meaning of Article 8 of the ECHR.<sup>1014</sup> The court then continued with an assessment as to whether such interference was justified. As for the first criterion – whether the interference was in accordance with the law – the court reiterated its position that the interference should have some basis in domestic law, but should also be compatible with the rule of law.<sup>1015</sup> The parties had argued that this criterion was not fulfilled as they could not have foreseen the authority's decision to order access to and copies of the entire server. This argument was dismissed by the Strasbourg court. Although acknowledging that the tax authority may not require access to archives belonging entirely to another tax subject than

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<sup>1011</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 45.

<sup>1012</sup> Following the Supreme Court's ruling it was later decided that the backup tape should be reviewed together with representatives of the applicant and the other companies affected. As it would be problematic (with respect to the duty of confidentiality) to allow all representatives to view the computer screen during the review, it was decided that the representatives should not have access to the screen or to read printed documents continuously during the inspection. The representatives would therefore be directed to another part of the premises where they could observe the processing but not the documents being reviewed. See para 66 of the ruling.

<sup>1013</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 54.

<sup>1014</sup> *Ibid*, para 106.

<sup>1015</sup> *Ibid*, para 123.

the one targeted by the audit, it considered that when the archives are not clearly separated but ‘mixed’ it must have been reasonably foreseeable that the authority would order access to the entire server.<sup>1016</sup>

As for the second criterion, the applicants had not disputed the government’s submission that the measures had been taken in the interest of the economic well-being of the country and thus pursued a legitimate aim. The court saw no reason for arriving at a different conclusion.<sup>1017</sup>

Moving on to the third and final criterion, the court declared that in determining whether the impugned measure was ‘necessary in a democratic society’, it would consider whether, in the light of the case as a whole, the reasons adduced to justify the measure were relevant and sufficient, and whether it was proportionate to the legitimate aim pursued. In so doing, the Strasbourg court would take into account that national authorities are accorded a certain margin of appreciation, the scope of which will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference.<sup>1018</sup> Here, the Strasbourg court pointed to the fact that the backup copy that had been made by the tax authorities comprised all existing documents on the server. The tape, the court noted, included a large quantity of material that was not relevant for tax assessment purposes, such as private correspondence and other documents belonging to persons working for the companies. According to the Strasbourg court, this factor militated in favour of a strict scrutiny. On the other hand, the court pointed out, the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned natural persons.<sup>1019</sup>

When determining whether the measure was proportionate to the aims pursued, the court took note of the broad scope of the authorities’ demand and the fact that the backup tape contained copies of all existing documents on the server. An important consideration for the court, therefore, was whether the procedure relating to the authorities’ obtaining access to a backup copy of the server was accompanied by effective safeguards against abuse.<sup>1020</sup> Here, the court did consider the interference with the applicants’ right to privacy to be subject to important limitations and the procedural safeguards to be adequate as, *inter alia*, there was a possibility to appeal the authority’s decision, the backup copy was put in a sealed envelope pending

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<sup>1016</sup> Ibid, paras 131 through 133.

<sup>1017</sup> Ibid, paras 135 and 136.

<sup>1018</sup> Ibid, para 158.

<sup>1019</sup> Ibid, para 159.

<sup>1020</sup> Ibid, para 163.



the outcome of such appeal, any documents not related to the tax assessment were to be returned to the companies, and all information had to be deleted or shredded upon completion of the review. The court also noted that the disputed measure had in part been made necessary by the applicant companies' own choice to opt for mixed archives on a shared server, making the task of separation of user areas and identification of documents more difficult for the tax authorities.<sup>1021</sup> It was thus partly considered to be their own fault that the extent of the search had been so wide.

#### 10.4.2 The view of the ECtHR – Concluding remarks

The ruling in *Bernh Larsen Holding* has effectively closed the door on any attempts to rely on Article 8 of the ECHR in order to promote a blanket ban on the making of image copies for review outside the targeted company's premises. In *BLH*, the Strasbourg court was even willing to accept the fact that such copies would include data belonging to companies other than the one targeted by the tax audit. However, it is also clear from the Strasbourg court's rulings that any such practices need to be surrounded by strict procedural safeguards. In the case of *Bernh Larsen Holding*, the safeguards available included the possibility to challenge the measure, the fact that the backup copy was put in a sealed envelope pending the outcome of the appeal, that any excess information had to be returned to the company, and that the information that the authority chose to keep was destroyed once the matter was closed.

One interesting aspect is that the Strasbourg court does not really appear to be concerned with the amount or nature of documents actually seized, but rather the question whether the procedural safeguards surrounding such seizure are adequate. Although it paid regard to some questions, such as whether the warrant was reasonably limited and based on reasonable suspicion in the cases of *Wieser and Bicos* and *Robathin*, it is equally true that the court has been willing to accept the making and review of backup tapes containing all existing documents on the server as long as the procedural safeguards against abuse and arbitrariness were considered adequate. In *Bernh Larsen* the court even stated that considerations of efficiency of the tax audit suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage, and that where the archives were mixed, it could:

[r]easonably have been foreseen that the tax authorities should not have had to rely on the tax subjects' own indications of where to find relevant material,

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<sup>1021</sup> Ibid, para 173.

but should have been able to access all data on the server in order to appraise the matter for themselves.<sup>1022</sup>

Thus, establishing that the competition authority has made image copies containing a large quantity of documents that are unrelated to the case at hand is not sufficient to prove that the measure is disproportionate. Instead, such conclusion will be drawn based on the procedural safeguards available, and on how these safeguards have actually been applied by the courts. In *Robathin*, it appears that certain safeguards were in place, but the Austrian court still performed only a cursory review of the applicant's complaint. Likewise, in *Wieser and Bicos*, the Strasbourg court concluded that the Austrian legal system provided a number of procedural safeguards, but that the Austrian authorities had not respected these safeguards when searching the computer system and seizing electronic copies of certain files.

The cases presented in this section can be divided into two categories. The first category comprises those concerning seizure of data belonging to lawyers who are natural persons pursuing 'a liberal profession', but also under a duty to ensure professional secrecy. The second category includes seizures made at the premises of 'strictly' legal persons. In both *Robathin* and *Wieser and Bicos*, the Strasbourg court established a violation of Article 8 of the ECHR, but much suggests that the court might have come to another conclusion if the search and seizure had taken place somewhere else than in a law office. In both cases, the Strasbourg court took note of the risk that the search and seizure of electronic data could encroach on Messrs Wieser's and Robathin's duty to ensure professional secrecy. As far as the rights of Bicos were concerned, the Strasbourg court based its finding of a violation of Article 8 ECHR on the fact that Mr Wieser represented companies whose shares were held by Bicos and that the data seized contained some information that was subject to professional secrecy.<sup>1023</sup> Thus, the existence of and need to safeguard professional secrecy appears to have formed important components in the courts' finding of a violation.

Furthermore, it is evident that the Strasbourg court limits its role to assessing how the law is actually applied rather than how it stands. There is in principle nothing to say about that, as the court has the task of determining whether there has been an infringement of the ECHR in the particular case. However, in terms of a more general analysis of a legal system, and whether this system ensures proper safeguards against fundamental rights violations, it is not sufficient to take such a casuistic approach. Therefore, for the

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<sup>1022</sup> Ibid, paras 130 through 132.

<sup>1023</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01, para 67.

purpose of this research, it is not sufficient to establish – although the law is framed in a manner that does not necessarily ensure adequate protection of applicable fundamental rights – that the court did interpret the rules in a manner consonant with fundamental rights protection in a particular case. Instead, it is imperative to determine whether the system in place is designed to afford adequate protection.

### 10.4.3 Bringing it back to Brussels – The view of the EU Courts

#### 10.4.3.1 Continued selection in Brussels – Nexans and Prysmian

It is not only the Strasbourg court that has ruled on issues related to the making of image copies. The cases of *Nexans* and *Prysmian*, which were addressed already in Sections 8.2.1.5 and 8.4.1.4 above, also concerned this issue. It is not evident from the Strasbourg court's ruling in *BLH* whether all the safeguards available in that case are required in order for this kind of practice to be considered surrounded by adequate procedural safeguards. As will be explained in Section 13.2.1 below, the possibility of having a subsequent judicial review of the inspection decision and the measures taken on its basis is an absolute requirement. However, it is not equally certain whether the 'sealed envelope procedure' appearing in *BLH* is also considered to be an absolute requirement by the Strasbourg court.

Under the current EU system, it appears that the only possibility for a company to challenge the making of image copies for review in Brussels, and to have such measures suspended, would be if the Commission took a separate decision on this matter; see Chapter 13 below.<sup>1024</sup> When it comes to matters of legal professional privilege, the practice of putting contested documents in sealed envelopes serves as such a decision. Or rather, when the Commission and the undertaking disagree as to whether a certain document is covered by LPP, no formal decision is taken to this effect. Instead, where the parties disagree and the Commission objects to the confidentiality claim, this is considered to constitute a rejection of a request, and the procedure is then to put the document in question in a sealed envelope for review by the General Court.<sup>1025</sup>

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<sup>1024</sup> See Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akros Chemicals v European Commission*, EU:T:2003:287, para 146.

<sup>1025</sup> Case C-155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157. See also Lenaerts et al, *EU Procedural Law*, Oxford EU Law Library, Oxford University Press, 2014, at p. 282.

In the cases of *Nexans* and *Prysmian*, the General Court considered the ‘decision’ to make image copies of company servers to be measures paving the way for the final decision rather than a separate decision producing legally binding effects. In its ruling, the General Court stressed that it is apparent from Article 20(2)(c) and (e) that the taking of copies in any form or extracts from business records constitute measures implementing the inspection decision.

This is interesting for two reasons. First, it appears that many competition authorities do not consider the making of image copies to constitute ‘copying’. Rather, the making of an image copy is seen as an intermediate measure which allows them to search for relevant documents by using special search words. Not until the relevant documents are printed does the authority consider them to be copied. This way, the authority considers itself safe in taking image copies of entire servers without thereby going beyond the scope or subject-matter of the investigation. However, the General Court clearly and explicitly considers the making of image copies as an act falling under Article 20(2)(c) of Regulation 1/2003 – that is taking or obtaining in any form copies of or extracts from books and records. Should this be the case, then it could easily be argued that any copying of entire servers would go far beyond the permitted scope of any dawn raid. Let us recall that in *Deutsche Bahn*, the Court considered the inspection decision to be vitiated by irregularity as the Commission had seized documents falling outside the scope of the inspection as circumscribed by the contested decision.<sup>1026</sup>

Second, it is not only the copying itself that is the problem, but rather the fact that such copies by necessity include documents that fall outside the scope of the dawn raid, contain business secrets or are protected by legal professional privilege. The General Court did acknowledge this fact, and it is also evident from the ruling that *Nexans* claimed that the measures taken had seriously and irreversibly affected their fundamental rights – their right to privacy and the rights of the defence, as the storage media copied contained data of a personal nature, protected by the right to privacy and the confidentiality of correspondence.<sup>1027</sup> Although taking note of this, the General Court criticized the companies for not having challenged the measure on the ground that the documents copied contained correspondence covered by legal professional privilege.<sup>1028</sup> The companies had not made any such claims, and the General Court therefore concluded that the companies

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<sup>1026</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, at para 66.

<sup>1027</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 118.

<sup>1028</sup> *Ibid*, at para 130.

were not taking issue with the Commission for having consulted or copied certain specific protected documents, but rather for having examined them in its own offices in Brussels. It is possible that the General Court would have come to another conclusion had the companies made such claim. However, given the fact that the making of image copies allows the inspectors to bring vast amounts of documents with them without the company being able to go through and pinpoint any specific documents, it would not be possible for the company, at the time of the dawn raid, to make any specific claims with regard to the nature of the documents copied. In a Swedish case that was challenged before Swedish courts, the amount of documents copied by the Swedish Competition Authority would have amounted to 13 truckloads, had the authority chosen to print copies instead of making image copies.<sup>1029</sup>

The General Court further declared that the company could have chosen another option; it could have refused to allow the inspectors to make copies of the documents at issue, awaited the Commission's decision to impose a fine for obstruction under Article 23(1)(c) of Regulation 1/2003, and then challenged that decision. Although it is admittedly an option, it cannot be considered satisfactory. On the plus side, such order would prevent companies from challenging measures with the sole view of obstructing the Commission's investigations. However, the down side is that it is also likely to prevent companies which do believe that their rights of the defence are being infringed from challenging the Commission's measures for fear of being unsuccessful in their plea and then having to pay substantial fines for failure to cooperate. Furthermore, and perhaps more importantly, it cannot be desirable from either a due process or efficiency perspective to encourage companies to refuse to cooperate.

Thus, if companies are to have a real and effective right to review while at the same time ensuring effective application of the competition rules, the Commission should adopt the practice of the sealed envelope procedure also when it comes to matters other than those concerning legal professional privilege. It is difficult to see why the question of LPP should be treated differently than the question of whether the Commission should be able to copy an entire server for review in Brussels. Both questions relate to the companies' right of the defence, and such practice would not unduly hinder the Commission's investigation.

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<sup>1029</sup> Case A 5/10, AstraZeneca AB v Konkurrensverket. See also Simonsson, *Data Mirroring During Dawn Raids: Right to Judicial Review*, in Bernitz, Groussot and Schuylock (eds), *General Principles of EU Law and European Private Law*, Wolters Kluwer, 2013.

#### 10.4.4 Bringing it back to Brussels – Concluding remarks

The lawfulness of bringing copies of hard drives or other storage media back to Brussels has been hotly debated in recent years.<sup>1030</sup> In *Nexans* the General Court had the chance to have its say in the matter, but instead declared that such measures could not be challenged on a standalone basis as they were implementing measures paving the way for the final decision in the underlying competition case. Hence, we do not yet know whether the practice is considered acceptable under EU law. However, the fact that the General Court did not consider the measures taken by the Commission to bring about a distinct change in the legal position of Nexans may serve as an indication that the General Court is unlikely to strike down these practices.<sup>1031</sup>

The question is then of course whether such position would be in line with applicable ECHR standards. As discussed in Section 10.4.2 above, the Strasbourg court has taken a rather flexible approach, and has been willing to accept the making of copy images for review outside company premises. In the case of *Bernh Larsen Holding*, it went as far as accepting such measures even where the copy provided to and reviewed by the tax authorities contained vast amounts of information unrelated to the tax audit, including *inter alia* private correspondence as well as data belonging to third parties. Furthermore, during the actual review of the data collected by the tax authorities, the applicants had not had direct access to the screen or a possibility to read the printed documents continuously during the inspection.<sup>1032</sup>

It is clear from the Strasbourg court's ruling that a combination of factors made the court accept these rather far-reaching measures. First of all, the fact that the applicants were legal persons appears to have played a decisive role. Although accepting that legal persons are protected by Article 8 of the ECHR, the Strasbourg court also declared that interpreting the word 'home' to include the premises of legal persons would not unduly hamper the Contracting States, because they would retain their entitlement to interfere under Article 8(2) of the ECHR, and this right might well be more far-

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<sup>1030</sup> See e.g. Temple Lang, *Legal Problems of Digital Evidence*, Journal of Antitrust Enforcement, 2013, and Polley, *Digital Evidence Gathering in Dawn Raids – A Risk for the Company's Rights of Defense and Fundamental Rights* (April 4, 2013), 20th St. Gallen International Competition Law Forum ICF, 2013.

<sup>1031</sup> Actions for annulment may only be brought under Article 263 TFEU in cases where the challenged measure is considered to produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his or her legal position.

<sup>1032</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 66.

reaching in cases dealing with legal persons.<sup>1033</sup> Furthermore, taking note of the fact that the backup copy had comprised all existing documents on the server and that this militated a strict scrutiny, the court also declared that such scrutiny should be made taking into account the fact that the measure was aimed at legal persons – which meant that a wider margin of appreciation could be applied.<sup>1034</sup>

Second, the Strasbourg court accepted the legislator's view that tax audits complemented the duty of the tax subject to provide accurate information and that review of archives was a necessary means of ensuring efficiency in the checking of the information provided. Therefore, no less restrictive means were available, and the court noted that the powers granted to the Norwegian tax authorities were not unfettered, notably with regard to such matters as the nature of the documents that the authority was entitled to inspect.<sup>1035</sup>

Third, acknowledging that the interference was far-reaching in that a copy of the entire server was made and reviewed, the court considered it necessary to examine whether the inspection had been surrounded by adequate safeguards. The court not only examined the safeguards available, but also whether they had been applied in the present case. The court acknowledged that the applicants had had a right to complain, and when they had availed themselves of this right, the copies were put in a sealed envelope that had not been opened until after the delivery of a final judgment by the Supreme Court.<sup>1036</sup> Furthermore, the authorities had been under a duty to draw up a report and to return irrelevant documents as soon as possible. After the completion of the review, all electronic documents were deleted and all paper documents shredded with immediate effect.<sup>1037</sup> The court noted that the reason why the applicants had been unable to watch the computer screen during the review was because they themselves had opted for mixed archives and wished to maintain confidentiality during the review. Based on all these factors the Strasbourg court reached the conclusion that despite the far-reaching character of the interference, there had been no violation of Article 8 of the ECHR.<sup>1038</sup>

To conclude, the case of *Bernh Larsen Holding* shows that the Strasbourg court is willing to accept far-reaching measures in cases where legal persons are concerned, provided that the safeguards in place are considered effective

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<sup>1033</sup> Ibid, para 104.

<sup>1034</sup> Ibid, para 159.

<sup>1035</sup> Ibid, para 164.

<sup>1036</sup> Ibid, para 169.

<sup>1037</sup> Ibid, para 167.

<sup>1038</sup> Ibid, para 175.

and adequate. One of these safeguards, which appears to have played a rather important role, is the possibility for the parties to lodge complaints against the measures taken by the authorities and that the sealed envelope procedure was then applied pending the outcome of the complaint. As is evident from *Nexans*, companies have limited possibilities under the EU system for judicial review, and it is therefore questionable whether the system in place would be considered to meet the ECHR standard. This issue will be discussed further in Chapter 13, but it should be stressed already at this point that it would indeed be unfortunate if the EU system, by not ensuring access to the EU courts, fails to meet an ECHR standard that otherwise appears to be both flexible and reasonable and where the threshold set by the Strasbourg court can hardly be considered to unduly hamper the work of the Commission.

## 10.5 Measures taken on the basis of inspection decisions – Final remarks

This chapter has discussed the scope of the Commission's powers during the course of its inspections. It is clear from the case-law of the two courts that while the ECJ has approached questions relating to the Commission's investigatory powers during dawn raids from the perspective of the right of the defence, the cases from the Strasbourg court mainly concern the application of Article 8 of the ECHR and the right to privacy.

Despite the different approaches, both courts appear to take a rather flexible view and acknowledge that authorities may need broad, although by no means unfettered, powers to access information and peruse documents. In cases such as *Nexans* and *Deutsche Bahn*, the EU Courts acknowledged that the inherently secret character of cartels and the companies' interests in hiding or withholding evidence of competition law infringements may necessitate rather broad searches for evidence. The ECJ has consistently held that during dawn raids carried out by way of a decision, the inspectors have 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.<sup>1039</sup> In today's digital world the Commission has interpreted this to mean that the company should provide access to its IT environment and may be requested to block or reroute e-mail accounts, disconnect running computers from the network, etc.

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<sup>1039</sup> See e.g. Joined Cases 97 to 99/87, *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, para 28.



As for the ECHR system, the Strasbourg court declared in *Bernh Larsen Holding* that considerations of efficiency suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage, and given the special circumstances of the case, where three companies shared a common server, the court did not find a violation of Article 8 of the ECHR even though the tax authorities had been provided access to the entire server, and where the data reviewed by necessity included vast amounts of data unrelated to the tax audit, including private correspondence to and from employees.<sup>1040</sup> Likewise, in *Robathin* the court did not consider that the deficiencies in the scope of the search warrant were sufficient to establish an infringement of Article 8 of the ECHR, examining whether those deficiencies were offset by adequate safeguards against abuse or arbitrariness.<sup>1041</sup>

Acknowledging the need for broad searches does not mean that the powers are without limits. When it comes to dawn raids, the ECJ requires the Commission to restrict its searches to activities relating to the sectors indicated in the inspection decision, and once it has found that a certain document does not relate to those activities it must refrain from using that document for the purposes of its investigation. In *Deutsche Bahn* the ECJ annulled two inspection decisions that were triggered by information unlawfully collected during another inspection.

Furthermore, and perhaps more importantly, while the right to review may be rather broad and in practice also difficult to limit, the right to copy has clear boundaries. Under EU law, the Commission may only copy documents or other information covered by the subject-matter of the inspection decision. This is an important procedural safeguard and the consequences of not abiding by this rule were highlighted in *Deutsche Bahn*. However, that case also reveals a weakness in the EU system, which will be discussed further in Chapter 13. While the Court struck down inspection decisions 2 and 3, the unlawful measures taken by the Commission did not affect the validity of the first inspection decision, as measures taken after the adoption of a decision may not affect the legality of the decision as such. In principle, no objections may be raised against such order, and in *Deutsche Bahn*, the outcome was both reasonable and balanced – the Commission was allowed to pursue the initial case, but was barred from using the unlawfully collected material in order to adopt new inspection decisions. However, as will be addressed further below, in general the possibilities to challenge measures taken during the course of inspections appear to be very limited. This in turn

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<sup>1040</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 159.

<sup>1041</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 47.

entails a risk that practices that would otherwise be considered to meet the ECHR standard now fails to do so. One such practice is the making of image copies for review and selection outside company premises. As was discussed extensively in the previous section, the Strasbourg court appears to have opted for a very flexible approach when it comes to making copies of company servers and other storage media, allowing the Norwegian tax authority to bring a copy of an entire server to its own premises for review and selection. However, the court's position is conditioned on the existence of adequate procedural safeguards, where the possibility to have a proper judicial review and a sealed envelope procedure appear to be two of the more important safeguards. Neither of these is guaranteed under the EU system.<sup>1042</sup>

The following conclusions may be drawn from what has been discussed in this chapter. First, while it appears necessary to allow the Commission to carry out a rather broad search for information during the course of an inspection, the inspectors are not allowed to actively search for evidence of infringements unrelated to the subject-matter of the inspection. Second, despite the lack of express limitation to this effect in Regulation 1/2003, the ECJ has set rather strict limits as to what material the Commission is allowed to copy to file, requiring that material must relate to the subject-matter of the inspection decision.<sup>1043</sup> Third, as for the making of image copies, much indicates that such practice may well meet the ECHR standard, as the Strasbourg court itself has allowed for rather far-reaching measures in this respect, accepting backup copies containing large quantities of material unrelated to the case at hand, including private correspondence and other documents belonging to persons working for the companies.

However, while the Commission's practices appear both balanced and reasonably restricted, the limited access to courts may nonetheless affect the legitimacy of the Commission's enforcement practices. As stated in Section 10.4.4 above, it would indeed be unfortunate if, despite the Court's efforts to limit the powers of the Commission in a way that (in all other respects) meets the ECHR standard and which also appears to allow for effective application of the competition rules, the system would still fail to meet the rather low threshold set by the Strasbourg court due to the limited access to courts. Whether this is the case will be discussed in further detail in Chapter 13.

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<sup>1042</sup> The Commission applies the sealed envelope procedure, but is not under an express legal obligation to do so.

<sup>1043</sup> Following the reasoning of the Court in *HeidelbergCement* it could be argued that not only should it relate to the suspected infringement; the Commission should also consider that the information is of such nature so as to enable investigation of presumed infringements.

## 11. The privilege against self-incrimination

Anyone who has ever watched an American crime series or movie recognizes the classic line:

You have the right to remain silent. Anything you say or do can and will be held against you in a court of law.

This warning, the ‘Miranda Warning’, is given by police in the United States to criminal suspects before they are interrogated in order to preserve the admissibility of their statements against them in a subsequent criminal proceeding.<sup>1044</sup> The suspects are informed of their constitutional right to remain silent, of their privilege against self-incrimination. No one suspected of a criminal offence should be forced to admit his or her guilt. As will be further discussed below, the privilege against self-incrimination is a composite term which encompasses a right to remain silent as well as a privilege against having to assist in providing evidence against oneself.<sup>1045</sup>

Contrary to other international treaties, such as the United Nations International Covenant on Civil and Political Rights<sup>1046</sup> and the American Convention on Human Rights,<sup>1047</sup> neither the ECHR nor the Charter provides for explicit protection of the privilege. Instead, it has been implicitly read into Article 6 of the ECHR by the Strasbourg court in various judgments on the fairness of criminal trials.<sup>1048</sup> According to *Treschel*, the absence of an ECHR article on the privilege is not an oversight, as it was agreed during the

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<sup>1044</sup> The rule was established in the U.S. Supreme Court case of *Miranda v Arizona*, 384 U.S. 436 (1966).

<sup>1045</sup> Jacobs, White and Ovey, *The European Convention on Human Rights*, 5<sup>th</sup> edn, Oxford University Press 2010, and Treschel and Summers, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006. Published to Oxford Scholarship Online January 2010.

<sup>1046</sup> Adopted and opened for signature, ratification and accession by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force on 23 March 1976, in accordance with Article 49.

<sup>1047</sup> American Convention on Human Rights, Pact of San José, Costa Rica (B-32), Article 8(2)(g).

<sup>1048</sup> Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008.

drafting of Protocol 7 to the ECHR that this right was part of the general fair trial guarantee.<sup>1049</sup>

The privilege against self-incrimination, which according to the Strasbourg court lies at the heart of the notion of a fair criminal procedure, is considered to be reflected in Article 6 of the ECHR and should thus also form part of Articles 47 and 48 of the Charter. The principle may be of relevance in antitrust cases, especially as both the Strasbourg court and the ECJ have now acknowledged that fines imposed in antitrust proceedings are of a criminal nature.<sup>1050</sup> However, already as early as in *Hüls* the ECJ acknowledged that the nature of the infringements and the sanctions imposed in cartel cases were of such consequence that the principle of the presumption of innocence – which is closely linked to the privilege against self-incrimination – should apply.<sup>1051,1052</sup>

The question relevant to this thesis is whether and to what extent the principle affects a targeted company's obligation to co-operate during a dawn raid. Article 20(4) of Regulation 1/2003 imposes an obligation on undertakings to submit to inspections ordered by decision of the Commission. During these inspections, the Commission officials are empowered to make copies of books or other records related to the business of the undertaking and may ask any representative or member of staff for explanations about facts or documents related to the subject-matter of the inspection. This chapter examines whether and to what extent a company may invoke the privilege against self-incrimination and refuse to hand over evidence or answer questions posed by the inspectors.

The chapter is divided into three parts, the first determining the scope of protection under ECHR law, and the second determining the scope of protection currently afforded by the ECJ. Finally, the two standards will be compared to establish whether the EU standard meets or exceeds the ECHR

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<sup>1049</sup> Treschel and Summers, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006. Published to Oxford Scholarship Online January 2010. See also Harris et al, *Law of the European Convention on Human Rights*, 2nd edn, Oxford University Press, 2009, at p. 422.

<sup>1050</sup> See e.g. *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, Case C-272/09 P, *KME v European Commission*, EU:C:2011:810 and Case C-389/10 P, *KME v Commission*, EU:C:2011:816.

<sup>1051</sup> C-199/92 P, *Hüls AG v Commission of the European Communities*, EU:C:1999:358, at para 150.

<sup>1052</sup> As noted by *Jacobs, White and Ovey*, the rights are closely linked to the principle enshrined in Article 6(2) of the ECHR, that a person accused of a crime is innocent until proven guilty according to law. See *The European Convention on Human Rights*, Oxford University Press, 5<sup>th</sup> edn, 2010, at p. 282.

standard, and whether the current standard is desirable or whether it should either be raised or lowered.

## 11.1 The view of the Strasbourg court – Part I

As no explicit reference to the privilege is made in the ECHR text, the principle has been established and defined by the Strasbourg court. It was in 1993 that the privilege made an unexpected and faltering entry into European human rights law through the case of *Funke v. France*.<sup>1053</sup>

### 11.1.1 The birth of the privilege in ECHR law – *Funke v. France*

The case, which was presented in Section 8.3.1.3 above, concerned a search carried out by the French customs authorities at the home of Mr Funke. During the search, the inspectors requested him to provide particulars of his and his wife's assets abroad.<sup>1054,1055</sup> Mr Funke undertook to do so, but later changed his mind.<sup>1056</sup> Two years later, he had still not produced the requested statements, and the customs authorities summoned him before the Strasbourg police court, seeking to have him sentenced to a fine and a further penalty payment of 50 French francs (FRF) per day until such time as he produced the requested documents. They also made an application to have him committed to prison. The court later imposed a fine of FRF 1,200 and ordered him to produce the statements on penalty of FRF 20 per day's delay. Appeals were made by both Mr Funke and the prosecutor. The judgment was upheld by the appeals court, and the pecuniary penalty was increased to FRF 50 per day's delay. An appeal was made to and dismissed by the Court of Cassation.

Having exhausted all domestic remedies, Mr Funke turned to Strasbourg where he claimed *inter alia* that the criminal conviction for refusal to produce the requested documents had violated his right to a fair trial.<sup>1057</sup> Mr Funke argued that his conviction for refusing to submit to the disclosure

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<sup>1053</sup> Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008.

<sup>1054</sup> Or, more precisely, statements for the previous three years of his accounts in certain German and Swiss banks, as well as a statement of his share portfolio at the Deutsche Bank in Kiel.

<sup>1055</sup> *Funke v France*, judgment of 25 February 1993, Application no. 10828/84, at para 7.

<sup>1056</sup> *Ibid*, paras 9 and 10.

<sup>1057</sup> Mr Funke also claimed that the inspections had violated his right to privacy under Article 8 of the ECHR, see Chapter 8 above.

order violated his right not to give evidence against himself, which was a general principle enshrined in the legal orders of the Contracting States, the ECHR and the UN International Covenant on Civil and Political Rights.<sup>1058</sup> The government's actions were all the more unacceptable, Mr Funke argued, as nothing had prevented the authorities from seeking international assistance and obtaining the necessary evidence themselves from the foreign states.<sup>1059</sup>

The French government on its part emphasized the declaratory nature of the French customs and exchange-control regime, which saved taxpayers from having their affairs systematically investigated, but which also imposed duties in return, such as the duty to keep papers concerning their income and property for a certain length of time, and to make these papers available to the authorities upon request. This right of the State to inspect certain documents did not mean that those concerned were obliged to incriminate themselves.<sup>1060</sup>

The court did not agree with the French government. In one short passage it declared that the customs had secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law could not 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. There had accordingly been a breach of Article 6(1) of the ECHR.<sup>1061</sup>

### 11.1.2 The right to remain silent – John Murray v. the United Kingdom

In January 1991, Mr John Murray was arrested by the police on suspicion of conspiracy to murder and unlawful imprisonment of a Mr L. Mr Murray and Mr L were both members of the Provisional Irish Republican Army (IRA), but Mr L had also been providing information on their activities to the Royal Ulster Constabulary. On discovering that Mr L was an informer, the IRA had lured him into a house in Belfast and held him captive there. Mr Murray had

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<sup>1058</sup> *Funke v France*, judgment of 25 February 1993, Application no. 10828/84, at para 41.

<sup>1059</sup> *Ibid.*, at para 41

<sup>1060</sup> *Ibid.*, at para 42

<sup>1061</sup> *Ibid.*, at para 43.

been arrested in that same house, and upon arrest, he was informed of his right to remain silent, but also of the fact that a court or jury might draw such inference from his failure or refusal to account for his presence at the house where he was arrested. Mr Murray chose to remain silent throughout the interrogations and the subsequent court proceedings. He was later convicted of aiding and abetting the unlawful imprisonment of Mr L and sentenced to eight years' imprisonment. The trial judge declared that he drew very strong inferences from the fact that Mr Murray had chosen not to provide any explanation as to his presence in the house or give any other evidence in his own defence when called upon by the court to do so. Mr Murray appealed to the Court of Appeal in Northern Ireland. The court dismissed the appeal.

This led Mr Murray to file an application with the Strasbourg court, alleging a violation of the right to silence and the right not to incriminate oneself as provided in Article 6(1) and (2) of the ECHR. According to Mr Murray, the drawing of incriminating inferences against him amounted to an infringement of the right to silence, the privilege against self-incrimination and the principle that the prosecution bears the burden of proving the case without assistance from the accused. Mr Murray argued that an essential element of the right to silence was that the exercise of the right to remain silent by an accused should not be used as evidence against him in his trial. The fact that the trial judge had drawn very strong inferences from his silence meant that he had been severely penalized for choosing not to speak.<sup>1062</sup>

The Strasbourg court did not agree with Mr Murray. Confining its attention to the facts of the case, the court considered whether the drawing of inferences against the applicant rendered the criminal proceedings against him unfair within the meaning of Article 6 of the ECHR. The court recalled that, although not specifically mentioned in the Article, the right to silence and the right not to incriminate oneself are generally recognized standards which lie at the heart of the notion of fair procedure under Article 6. 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 of Article 6 of the ECHR.<sup>1063</sup>

The court then declared that it had been asked not to give an abstract analysis of the immunities, but to determine whether they are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether

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<sup>1062</sup> *John Murray v the United Kingdom*, judgment of 8 February 1996, Application no. 18731/91, at para 41.

<sup>1063</sup> *Ibid*, at para 45.

informing him in advance that under certain conditions, his silence may be so used, is always to be regarded as ‘improper compulsion’. The court considered it self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence against himself. On the other hand, the court considered it equally self-evident that in situations that clearly call for an explanation, the immunities should not or could not prevent that the accused’s silence be taken into account in the persuasiveness of the evidence adduced by the prosecution.

As for the element of coercion, the court acknowledged that a system which warns the accused that adverse inferences may be drawn from a refusal to provide an explanation to the police for his presence at a crime scene or to testify during a trial, when taken in conjunction with the weight of the case against him, involves a certain level of indirect compulsion. However, since the applicant could not be compelled to speak or to testify, and since the silence did not amount to a criminal offence or contempt of court, this factor alone could not be decisive.<sup>1064</sup> Instead, the ECtHR should concentrate its attention on the role played by the inferences in the proceedings against the applicant and especially his conviction.

In the present case, the proceedings were without a jury, the trier of facts being an experienced judge. In addition to this, there were a number of safeguards designed to limit the extent to which reliance could be placed on inferences. Warnings had to be given to the accused, the prosecutor had first to establish a prima facie case, etc. Here, the body of evidence against the accused had been considered by the court of appeal as a ‘formidable’ case against him. Having regard to the weight of the evidence against Mr Murray, the drawing of strong inferences from his refusal, upon arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and could not be regarded as unfair or unreasonable in the circumstances. The Strasbourg court therefore declared that there had been no violation of the right to silence or the privilege against self-incrimination.<sup>1065</sup>

### 11.1.3 Pre-existing or ‘real’ evidence – Saunders

A few months after the Strasbourg court had delivered its ruling in *John Murray*, it was once again time for it to rule on the privilege, its scope and

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<sup>1064</sup> Ibid, at para 50.

<sup>1065</sup> Ibid, at para 54.



its substance, and again in a Grand Chamber ruling. The background to the case was the following.

In 1986 the Distillers Company PLC was up for sale, and Guinness PLC and Argyll Group PLC were competing to take over the company. Both Guinness's and Argyll's takeover offers included a substantial share exchange element, and accordingly the respective prices at which Guinness and Argyll shares were quoted at the Stock Exchange was a critical factor for both sides. During the course of the bid, the Guinness share price rose dramatically, but once the bid had been declared unconditional, it fell significantly. Allegations and rumours of misconduct during the course of the bid led the Secretary of State for Trade and Industry to appoint inspectors pursuant to the Companies Act. The inspectors were empowered to investigate the affairs of Guinness. They had no judiciary powers, and their function was in essence to conduct an investigation designed to discover whether there were facts which could 'result in others taking action'.<sup>1066</sup>

Guinness's affairs during the bid had been handled by a committee of three directors, including Mr Saunders. During the course of the investigation carried out by the inspectors, Mr Saunders were interviewed on nine different occasions from February through June 1987. Prior to these interviews, in January 1987, the inspectors had informed the Department of Trade and Industry (DTI) that concrete evidence existed of criminal offences having been committed. The DTI instructed the inspectors to carry on with their inquiry and to pass the transcripts on to the Crown Prosecution Service.

In May 1987, the Police were asked to carry out a criminal investigation. Mr Saunders was subsequently charged with numerous offences relating to the artificial inflation of the share price. During the trial against Mr Saunders, the prosecution relied on transcripts from the interviews with the DTI inspectors. Mr Saunders was convicted of twelve counts in respect of conspiracy, false accounting and theft. He received an overall prison sentence of five years. The ruling was appealed, and in his appeal, Mr Saunders argued that the use at the trial of answers given to the DTI inspectors had automatically rendered the criminal proceedings unfair.

In 1988, Mr Saunders lodged an application with the Strasbourg court, complaining that the use at his trial of statements made by him to the DTI inspectors under their compulsory powers deprived him of a fair hearing in violation of Article 6(1) of the ECHR. Mr Saunders argued before the ECtHR that the use of statements made by him under compulsion during the

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<sup>1066</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, at para 47.

investigation should not have been allowed as evidence in the subsequent criminal proceedings. According to him, Article 6(1) of the ECHR contained an implied right of an individual not to be compelled to provide incriminating evidence, which may later be used in a prosecution against him. This principle, Mr Saunders claimed, was closely linked to the presumption of innocence expressly guaranteed by Article 6(2) of the ECHR.

In its ruling, the Strasbourg court first observed that the complaint was confined to the use of statements taken by the DTI inspectors in the subsequent criminal proceedings. The court pointed to the fact that the applicant had not suggested that Article 6(1) should apply to the proceedings conducted by the inspectors of the DTI or that these proceedings themselves involved the determination of a criminal charge. Accordingly, the court noted, the court's sole concern was the use of the statements in the applicant's criminal trial.<sup>1067</sup>

Just as in the case of *John Murray*, the court then recalled that, although not specifically mentioned in the Article, the right to silence and the right not to incriminate oneself are generally recognized standards which lie at the heart of the notion of a fair procedure under Article 6 of the ECHR. Their rationale is the protection against improper compulsion by the authorities and thereby also the avoidance of miscarriage of justice as well as the fulfilment of the aims of Article 6 of the ECHR. The right, the court noted, was closely linked to the presumption of innocence, as it presupposes that the prosecution should prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.<sup>1068</sup>

The consequence of the limited scope of the application and the fact that Mr Saunders did not challenge the interviews as such was that, although the evidence provided by Mr Saunders was oral, the case did not technically concern the right to silence. This may be the reason why the Strasbourg court, after having declared that the freedom against self-incrimination is primarily concerned with respecting the will of an accused to remain silent, declared that the right does not extend to evidence that has an existence independent of the will of the suspect, such as *inter alia* documents acquired pursuant to a warrant – even when this evidence is obtained through the use of compulsory powers.<sup>1069</sup>

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<sup>1067</sup> Ibid, at para 67.

<sup>1068</sup> Ibid, at para 68.

<sup>1069</sup> Ibid, at para 69.

The Strasbourg court then once again commented on the limited scope of the application, stating that the court had only been called upon to decide on the prosecution's use of the statements made by the applicant during the administrative investigation.<sup>1070</sup> This, the court recalled, required it to determine whether (i) the applicant had been subject to compulsion when giving the testimony, and (ii) whether the use of the testimony at the trial had offended the basic principles of Article 6(1) of the ECHR.

As for the question of compulsion, the court noted that the government had not disputed the claim that the applicant was subject to compulsion. The Companies Act obliged the applicant to answer the questions put to him by the inspectors, and a refusal to do so could have led to a finding of contempt of court and the imposition of a fine or a prison sentence of up to two years. However, the government had argued that the right had not been infringed, as nothing said by the applicant during the course of the interviews had been self-incriminating. The Strasbourg court did not accept such argument, stating that the right not to incriminate oneself cannot reasonably be confined to admissions of wrongdoing or to remarks which are directly incriminating. Testimony 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 be deployed later in support of the prosecution of the case, for example to contradict or cast doubt upon other statements by the accused or evidence given by him during the trial or otherwise undermine his credibility.<sup>1071</sup>

Another argument put forward by the government in support of the UK system concerned the complexity of corporate fraud, the vital public interest in the investigation of such fraud and the punishment of those responsible. The government argued that these interests could justify a departure from the privilege against self-incrimination, especially since there were a number of procedural safeguards available. Here, the government mentioned the fact that the inspectors were independent and subject to judicial supervision, that the persons interviewed were allowed to be legally represented and were provided with a transcript of their responses which they could correct or expand, etc. This argument was not accepted by the court, which stated that the general requirements of fairness in Article 6 ECHR, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most basic to the most complex. Nor were the safeguards presented by the government considered adequate, as they did not prevent the use of the statements in

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<sup>1070</sup> Ibid, at para 67.

<sup>1071</sup> Ibid, at para 71.

subsequent criminal proceedings. Accordingly, the court declared that there had been an infringement of Article 6 of the ECHR.<sup>1072</sup>

The ruling in *Saunders* is interesting and bears relevance to the Commission's cartel investigations for a number of reasons.

First of all, and this has not been mentioned in the presentation of the ruling, the court appears willing also to apply the principle to administrative proceedings. When discussing the limited scope of the application and the fact that Mr Saunders had not challenged the interviews as such, but only the use of the statements from those interviews, the court noted that an administrative investigation is capable of involving the determination of a 'criminal charge'. From a competition law enforcement perspective, this statement is of course of great interest. Not only does it imply that the privilege may apply to criminal proceedings not belonging to the core meaning of the term, it could also suggest that not only natural persons, but also undertakings are protected, as the interviews were carried out under Section 432 of the Companies Act to investigate the affairs of Guinness PLC. Add to this the fact that the Strasbourg court declared that the privilege should apply to all types of criminal offences without distinction.<sup>1073</sup>

Second, in *Saunders* the court made a statement, which it would later reiterate in a number of subsequent rulings, limiting the privilege against self-incrimination. According to the court, the privilege against self-incrimination does not extend to the use of material which may be obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspect, such as *inter alia* documents acquired pursuant to a warrant, and breath, blood and urine samples. As far as the Commission's cartel investigations are concerned, this would suggest that material gathered during dawn raids is not protected by the privilege against self-incrimination. On the other hand, it may suggest that the privilege applies to requests for information under Article 18 of Regulation 1/2003 or other obligations to answer questions, orally or in writing.

Third, the court made an interesting statement concerning the protection of non-incriminating or exculpatory evidence. The UK government claimed that the use of the statements from the interviews with Mr Saunders did not infringe the privilege because they did not contain any admission of wrongdoing or remarks which were incriminating. Here the court made it clear that not only incriminating statements are covered by the privilege, as also exculpatory remarks or mere information on questions of fact may later

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<sup>1072</sup> Ibid, paras 74-76.

<sup>1073</sup> Ibid, para 74.

be deployed in criminal proceedings in support of the prosecution of the case. In the present case, Mr Saunders's testimony had been used against him to show the judge and jury that his answers were not truthful, thereby undermining his credibility.<sup>1074</sup> Worth mentioning here is that the Strasbourg court took note of the fact that Mr Saunders's credibility was to be assessed by a jury. Therefore, it cannot be ruled out that the court would have come to another conclusion, had it been required to assess the EU judicial system where no jury is involved. In *John Murray*, the Strasbourg court did pay attention to the fact that there was no jury, but that the trier of facts had been an experienced judge.

A few words should be mentioned about the court's discussion on the DTI inspectors' powers, and whether Article 6(1) should apply to the preparatory investigation. As mentioned earlier, the DTI inspectors had no decision-making powers. They merely paved the way for further action by others. The court referred to its earlier judgment in *Fayed v. the United Kingdom*,<sup>1075</sup> where it had declared that the purpose of the inspections was essentially to ascertain and record facts which could subsequently be used as a basis for action by other competent authorities. Given the limited powers of the inspectors, the court had established in *Fayed* that the investigatory phase should not be subject to the guarantees of a judicial procedure as set forth in Article 6(1), as in practice this would unduly hamper the effective regulation in the public interest of complex financial and commercial activities.<sup>1076</sup> This issue was also dealt with by the Strasbourg court in *IJL and others v. the United Kingdom*,<sup>1077</sup> a Strasbourg case with close ties to *Saunders*. However, no direct parallel may be drawn between these cases and the EU system as the Commission has been vested with both investigatory and adjudicatory powers, and as the information gathered during dawn raids may not be used outside the competition case.<sup>1078</sup>

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<sup>1074</sup> In *Saunders*, the counsel for the prosecution spent three days reading selected parts of the transcripts to the jury, despite objections by the applicant; see paras 31 and 72 of the judgment.

<sup>1075</sup> *Fayed v the United Kingdom*, judgment of 21 September 1990, Application no. 17101/90.

<sup>1076</sup> *Ibid*, para 62.

<sup>1077</sup> *IJL and Others v the United Kingdom*, judgment of 19 September 2000, Applications nos. 29522/95, 30056/96 and 30574/96.

<sup>1078</sup> In *Weh v Austria* the Strasbourg court divided cases concerning the privilege against self-incrimination into two different categories, the first being cases relating to the use of compulsion in pending or anticipated criminal proceedings and the second being cases relating to the use of compulsion outside the context of criminal proceedings, where the information obtained is later used in a criminal case. See *Weh v Austria*, judgment of 8 April 2004, Application no. 38544/97, paras 40-43.

#### 11.1.4 Protection during preparatory investigations – IJL and others v. the United Kingdom

Like *Saunders* the case of *IJL and others v. the United Kingdom* springs from the acquisition by Guinness of Distillers Company. The applicants IJL, GMR and AKP had also been involved in the transaction, interviewed by the DTI and later prosecuted and convicted by the UK authorities. In their applications to the Strasbourg court, they argued not only that the use by the prosecutor of statements made to the DTI had infringed Article 6 of the ECHR, they also contended that the fairness of their trial had been undermined on account of the improper collusion between the DTI inspectors and the prosecuting authorities.<sup>1079</sup> In short, the applicants argued that there had been carefully planned arrangements among the agencies involved, intentionally designed to postpone both the intervention of the police and the formal preferment of criminal charges until the DTI inspectors had gathered enough evidence for the applicants to be charged. This, they claimed, had been done to avoid triggering of the privilege.<sup>1080</sup>

The applicants contended that in effect, the inspectors were determining a criminal charge already at the interview stage, and on that account, the guarantees laid down in Article 6 also should have applied to them during the interviews. The Strasbourg court did not accept that submission. Referring to *Fayed*,<sup>1081</sup> it discussed the nature and purpose of the interviews held by the DTI inspectors, declaring that the functions performed by them were essentially investigative in nature and that they had no powers to adjudicate either in form or substance.<sup>1082</sup> Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative. A requirement that such preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) of the ECHR would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. Instead, applying the principles laid down in *Saunders*, the court declared that any infringement of Article 6 of the ECHR should be assessed from the standpoint of the use made at the trial of the information gathered under compulsion. Again, no direct parallel can be drawn to the EU system given the dual roles of the Commission, and the fact that any material or

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<sup>1079</sup> *IJL and Others v the United Kingdom*, judgment of 19 September 2000, Applications nos. 29522/95, 30056/96 and 30574/96, para 84.

<sup>1080</sup> *Ibid*, para 86.

<sup>1081</sup> *Fayed v the United Kingdom*, judgment of 21 September 1990, Application no. 17101/90.

<sup>1082</sup> *IJL and Others v the United Kingdom*, judgment of 19 September 2000, Applications nos. 29522/95, 30056/96 and 30574/96, at para 100.

information gathered during a dawn raid may be used only for the purpose stated in the inspection decision – that is, the investigation of an infringement which is classified under the ECHR as a criminal offence.

### 11.1.5 Production of incriminating evidence – *JB v. Switzerland*

The case of *JB v. Switzerland* concerns the obligation on the part of a suspect to produce incriminating evidence. The applicant, JB, was a retired ski instructor and mountain guide of Swiss nationality and residing in Switzerland. In 1987, the Swiss tax authorities had consulted the case file of the financial manager P. During this investigation, the authorities took note of the fact that during the period 1979 through 1985, JB had made substantial investments with P and his companies. Further investigation into the matter revealed that JB had not declared these investments or the income resulting therefrom. Tax evasion proceedings were therefore initiated against JB. The tax authorities were convinced that not only had JB failed to declare the investments made with P; in addition, the money invested with P derived from undeclared income. The authorities therefore wanted to know the source of the income (amounting to 238,000 Swiss francs) which JB had invested with P, and requested him to declare the source of this income. JB did not comply with this request.

The tax authorities persisted, and on three occasions, they imposed disciplinary fines on JB for failure to provide the requested information. Nine years later, in November 1996, the applicant and the tax authorities finally reached an agreement which closed various tax and criminal tax proceedings, but which excluded one of the three disciplinary fines imposed on JB, as by then he had filed an application with the ECtHR directed against the court judgment concerning that particular fine. In his application, JB contended a breach of the right to remain silent in criminal proceedings guaranteed by Article 6 of the ECHR as he had been punished for remaining silent.<sup>1083</sup> What the ECtHR thus had to consider was whether or not the imposition of a fine on the applicant for having failed to provide certain information complied with the requirements of Article 6 of the ECHR.<sup>1084</sup>

As in *Saunders*, the Strasbourg court declared that although not specifically mentioned in Article 6 of the ECHR, the right to remain silent and the privilege against self-incrimination are generally recognized standards which lie at the heart of the notion of fair procedure under Article 6(1) of the ECHR. These rights presuppose that the authorities seek to prove their case

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<sup>1083</sup> *JB v Switzerland*, judgment of 3 May 2001, Application no. 31827/96, at para 52.

<sup>1084</sup> *Ibid*, at para 63.

without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the ‘person charged’ with a criminal offence. This immunity contributes to avoiding miscarriages of justice and securing the aims of Article 6.<sup>1085</sup>

The Swiss government argued that the case before the Swiss courts had not been a criminal case, but a *sui generis* case falling outside the scope of Article 6(1) ECHR. The court did not accept this argument, noting that although the proceedings were not expressly classified as either supplementary-tax proceedings or tax-evasion proceedings, the tax authorities could and did impose a fine on JB on account of the criminal offence of tax evasion. JB had had to pay a fine amounting to almost 22,000 Swiss francs, a penalty that was not intended as pecuniary compensation, but was essentially punitive and deterrent in nature. Nor was the fine ‘inconsiderable’. The court thus concluded that the fine was ‘penal’ in character and that Article 6 of the ECHR was applicable under its criminal head.<sup>1086</sup> The court then noted that the tax authorities had been attempting to compel the applicant to submit documents which would have provided information as to his income, and this with a view to the assessment of his taxes. According to the court, the applicant could not have ruled out that, if it had transpired from such documents that he had received additional income which had not been taxed, he might have been charged with the criminal offence of tax evasion.

As for the nature of the information required, the court declared that it did not belong to the category that has an existence independent of the person concerned and which therefore falls outside the scope of the privilege. Nor did the Strasbourg court accept the government’s argument that the applicant had not been obliged to incriminate himself, since the authorities were in fact already in possession of the information in question. It was the persistence with which the authorities attempted to gather the information that left the court unconvinced by the government’s argument. During the period 1987 to 1990, the authorities had found it necessary to request the applicant to submit the information on eight separate occasions. Had they already been in possession of the requested information, they would not have persisted, the court concluded. In light of the foregoing, the Strasbourg court declared that there had been an infringement of the right under Article 6(1) of the ECHR not to incriminate oneself.<sup>1087</sup>

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<sup>1085</sup> *JB v Switzerland*, judgment of 3 May 2001, Application no. 31827/96, at para 64.

<sup>1086</sup> *Ibid*, paras 47-51.

<sup>1087</sup> *Ibid*, at para 71.



## 11.2 The view of the Strasbourg court – Part II

The cases presented up until now have been rather consistent when it comes to the production of physical evidence. The court has divided physical evidence into two categories. The first category is evidence that 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 testing.<sup>1088</sup> This type of evidence, referred to by the court as ‘real evidence’<sup>1089</sup> has not been protected by the privilege against self-incrimination. However, the other category – evidence that does not have an existence independent of the will of the suspect, i.e. where the suspect has to produce and provide the evidence – has consistently been protected by the Strasbourg court. Thus, in *Funke* and *JB v. Switzerland* the court declared that the obligation to produce documents for the tax and customs authorities constituted a breach of Article 6 of the ECHR and the privilege against self-incrimination.

However, the cases of *Jalloh v. Germany* and *O’Halloran and Francis v. the United Kingdom*, two Grand Chamber rulings that will now be presented, both muddy the waters. In *Jalloh* the Strasbourg court declared that ‘real evidence’ may also be protected in certain cases and under certain circumstances. In *O’Halloran and Francis*, dealing with the second category of physical evidence (which has consistently been considered to be covered by the privilege), the court applied the criteria which were set up in *Jalloh* to extend the protection, but this time applied them to limit the scope of protection.

### 11.2.1 Protecting ‘real evidence’ – *Jalloh v. Germany*

The case of *Jalloh* concerned a suspected drug dealer and the methods applied by the German police to obtain evidence of his illegal behaviour. In October 1993, four plain-clothes policemen observed the applicant on at least two occasions, taking a tiny plastic bag out of his mouth and handing it over to another person in exchange for money. The police officers approached Mr Jalloh on the street, whereupon he immediately swallowed the bag. No drugs were found upon Mr Jalloh, but as the officers suspected that he had swallowed the drugs, they got the prosecutor to order that emetics be administered to him to provoke regurgitation of the bag.

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<sup>1088</sup> See e.g. *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, at para 69.

<sup>1089</sup> *O’Halloran and Francis v the United Kingdom*, judgment of 29 June 2007, Applications nos. 5809/02 and 25624/02.

Mr Jalloh refused to take the medication, and was therefore held immobilized by four police officers while a doctor forcibly administered to him the medication which made him regurgitate a plastic bag containing 0.2182 grams of cocaine.

The case went through the German court system and in 2000, Mr Jalloh eventually turned to the Strasbourg court claiming that the methods applied to obtain the evidence against him violated (i) Article 3 of the ECHR and the protection against inhuman and degrading treatment enshrined therein, (ii) Article 6 of the ECHR and the privilege against self-incrimination, and (iii) Article 8 of the ECHR and the right to privacy.

As for the alleged violation of Article 6 of the ECHR, the court declared that the evidence obtained by the German authorities belonged to the category 'real evidence', which up until then had fallen outside the scope of the privilege against self-incrimination. However, the Strasbourg court also noted that the evidence had been obtained in a manner that violated Article 3 of the ECHR, that the degree of force used in this case differed significantly from the degree of compulsion normally required to obtain the types of material referred to in *Saunders*,<sup>1090</sup> and that the procedure was not without risk to the applicant's health. The court therefore declared that the principle against self-incrimination was applicable.<sup>1091</sup>

Having declared that the privilege could also cover 'real evidence' in certain circumstances, the court went on to list a number of factors to be taken into account when determining whether there had been a breach of Article 6 of the ECHR.<sup>1092</sup> These factors were as follows: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and the punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material obtained is put.<sup>1093</sup> The wording of the ruling suggests that the court regarded this list of factors to be exhaustive.

Applying the listed criteria to the facts of the case, the court noted that as for the degree of compulsion, the methods used were so intrusive that they even violated Article 3 of the ECHR. As for the weight of the public interest, on the other hand, the court observed that the national case concerned a street dealer who was offering drugs for sale on a comparatively small scale and who was convicted to a six-month suspended prison sentence. The public

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<sup>1090</sup> *Jalloh v Germany*, judgment of 11 July 2006, Application no. 54810/00, at para 114.

<sup>1091</sup> *Ibid.*, at para 116.

<sup>1092</sup> *Ibid.*, at para 117.

<sup>1093</sup> *Ibid.*, at para 117.

interest in securing the applicant's conviction could not justify the interference with his physical and mental integrity, the measures taken thus did not meet the proportionality *stricto sensu* test. As for the safeguards available, the domestic legislation did provide for certain safeguards, but the facts of the case revealed that they had not been fully respected. As for the final criterion, the court noted that not only had the evidence been used in court; it had also been the decisive evidence in Mr Jalloh's conviction. Given the above, the court concluded that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.<sup>1094</sup>

### 11.2.2 Accepting requirements to produce incriminating information – O'Halloran and Francis v. the United Kingdom

Messrs O'Halloran and Francis were both registered owners of cars that had been caught on speed cameras driving in excess of the speed limit. Both were requested by the police to identify the driver of their car. Failure to comply with the request constituted a criminal offence, and could render a penalty of a fine of £ 1,000 and 3-6 penalty points. While Mr O'Halloran first admitted to being the driver but later sought to exclude his confession from the trial, Mr Francis refused from the outset to reveal the identity of the driver. Both were later convicted – Mr O'Halloran for driving in excess of the speed limit and Mr Francis for refusing to identify the driver caught on the speed camera.

Applications were made to the Strasbourg court where the applicants argued that the procedure before the UK courts and the obligation to reveal the identity of the driver under penalty of fine violated Article 6 of the ECHR and the privilege against self-incrimination. The Strasbourg court commenced by declaring that Article 6 of the ECHR can be applicable to cases of compulsion to give evidence, even in the absence of any other proceedings or where the applicant is acquitted in the underlying procedure. It then continued with an exposé of its case-law from *Funke* to *Jalloh*.

The applicants had argued that the right to remain silent and the right not to incriminate oneself were absolute rights. The court was not willing to accept this argument. It did acknowledge that in all previous cases in which 'direct compulsion' had been applied to require a suspect to provide possibly

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<sup>1094</sup> Ibid, paras 122 and 123.

incriminating information, the court had found a violation of Article 6 of the ECHR. However, the court continued, this did not mean that any direct compulsion would automatically result in a violation of Article 6.<sup>1095</sup> While the right to a fair trial is an unqualified right, the court declared, what constitutes a fair trial cannot be the subject of a single unvarying rule; this must depend on the circumstances of the particular case.<sup>1096</sup>

Having established that the scope of the privilege must be assessed on a case-by-case basis, the court declared that it was to apply the principles laid down in *Jalloh* in order to assess whether the essence of the applicants' right to remain silent and the privilege against self-incrimination had been infringed. The court would thus focus on the nature and degree of compulsion used to obtain the evidence, the existence of any safeguards in the procedure and the use to which any material so obtained was put.<sup>1097</sup> However, among the criteria, we do not find 'the weight of the public interest in the investigation and the punishment of the offence in issue', a criterion listed in *Jalloh*.

The court accepted that the nature of compulsion used to obtain the evidence was direct compulsion, as Messrs O'Halloran and Francis were required to submit the information and any failure to do so could result in the imposition of a fine. However, the court also took notice of the fact that by owning a car, the applicants had subjected themselves to a regulatory regime that had been imposed by the State because the possession and use of cars are recognized to have the potential to cause grave injury. Those who choose to keep and drive cars can therefore be taken to have accepted certain obligations and responsibilities, the court declared. A further aspect of the compulsion applied was the limited nature of the inquiry which the police were authorized to undertake. The relevant national legislation only applied where the driver was alleged to have committed a relevant offence and only 'as to the identity of the driver'. Here the court explicitly distinguished the situation at hand from that of the cases of *Funke* and *JB v. Switzerland* where the applicants had been subjected to statutory powers requiring 'production of papers and documents of any kind relating to the operations of interest to the department'.<sup>1098</sup> Furthermore, the court noted, the penalty for refusing to reveal the identity of the driver was 'moderate and non-custodial'.<sup>1099</sup>

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<sup>1095</sup> *O'Halloran and Francis v the United Kingdom*, judgment of 29 June 2007, Applications nos. 15809/02 and 25624/02, at para 53.

<sup>1096</sup> *Ibid*, at para 53.

<sup>1097</sup> *Ibid*, at para 54.

<sup>1098</sup> *Ibid*, at para 58.

<sup>1099</sup> *Ibid*, at para 58.

The court then examined the safeguards available, noting that no offence was committed if the keeper of the vehicle could show that he did not know and could not with reasonable diligence have known who was the driver of the vehicle. This satisfied the court as it declared that there was no strict liability, and the risk of unreliable admissions was negligible.

As for the last criterion listed by the court, that is the use made of the evidence obtained, the court noted that in Mr O'Halloran's case, it remained for the prosecution to prove the offence beyond reasonable doubt, and the fact that Mr O'Halloran had attempted to withdraw his confession could affect the value of the evidence. Mr O'Halloran had also been free to give evidence and call witnesses. Furthermore, the court noted, the identity of the driver was only one element in the offence of speeding. As for Mr Francis, the court noted that as he had refused to make a statement, it could not be used in the underlying proceedings, and indeed the underlying proceedings had not been pursued.<sup>1100</sup> Given the above, the court concluded that there had been no violation of Article 6 of the ECHR.<sup>1101</sup>

### 11.3 The Strasbourg case-law – Concluding remarks

The right not to incriminate oneself is a composite term encompassing both the right to remain silent and the protection against having to provide incriminating evidence. The court has declared on numerous occasions that the right to remain silent is the 'main right'. In *Saunders*, the court declared that the right not to incriminate oneself is primarily concerned with respecting the will of an accused to remain silent,<sup>1102</sup> and in *Jalloh* it went as far as concluding that it had consistently held that the right to remain silent was the prime concern. This, however, does not mean that the right is without limits. In *John Murray*, the court declared that the question whether or not the drawing of adverse inferences from an accused's silence violates Article 6 must be determined in the light of all the circumstances of the case.

As for the other limb of the right not to incriminate oneself, concerning physical rather than oral evidence, the court made a distinction in *Saunders* between evidence that has an existence independent of the will of the accused and which may be obtained by force, so-called real evidence, and other evidence. Real evidence, the court declared, was not covered by the privilege. The other type was covered, however. Up until the cases of *Jalloh*

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<sup>1100</sup> Ibid, paras 60 to 61.

<sup>1101</sup> Ibid, at para 63.

<sup>1102</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, at para 69

and *O'Halloran and Francis* the Strasbourg court's case-law was rather consistent in following the division between 'real evidence' and evidence which does not have an existence independent of the will of the accused. Protecting the accused from having to actively provide information, be it incriminating or not, the court has allowed national authorities to gather evidence through search warrants, blood samples, urine samples and the like.

In the two Grand Chamber rulings of *Jalloh* and *O'Halloran and Francis*, the court made it clear that any perceived consistency was just that. In *Jalloh*, the court chose to 'extend' the privilege to protect evidence that belonged to the category of real evidence. In *O'Halloran and Francis* on the other hand, the court declared that the protection against having to actively provide information was not absolute. Instead, a case by case analysis should be made where the court would assess the nature and degree of compulsion, the existence of safeguards and the use of the evidence obtained. In *O'Halloran and Francis*, such analysis resulted in the finding that there had been no violation of Article 6 of the ECHR.

The clear statements made in *O'Halloran and Francis* that the right is not absolute and that a case-by-case-analysis is required which should follow a certain structure, appear to be generally applicable. The extension of the privilege made in *Jalloh*, on the other hand, was closely linked to the specific circumstances of the case. There, the evidence was forcibly obtained in a manner that even violated one of the few absolute rights in the ECHR – Article 3 and the protection against torture or inhuman or degrading treatment or punishment. Drawing any general conclusions from the court's ruling, therefore, would not be possible.

Applying the ECtHR's case-law to dawn raids and the practices of the Commission, the following conclusions may be drawn.

A first observation concerns those protected by the privilege. The Strasbourg cases that have been presented all deal with the right of natural persons not to incriminate themselves. It has been argued that the right does not extend to legal persons.<sup>1103</sup> However, the lack of case-law cannot be taken for proof in that direction. In *Saunders* the Strasbourg court appeared willing to apply the provision also to the initial stage of the inquiry, a stage which was restricted to the application of the Companies Act to the activities of Guinness PLC. Moreover, the Strasbourg court also declared that the

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<sup>1103</sup> See e.g. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition, vol. 26, no. 4, 2003, pp 567-588 where Wils distinguishes existing ECHR case-law from EU cartel cases, noting that all the cases tried by the Strasbourg court concerned questions put to natural persons.

principle should apply to criminal proceedings in respect of all types of criminal offences without distinction – from the most complex to the most simple.<sup>1104</sup> A rather bold and all-embracing statement. The cases of *JB v. Switzerland* and *O’Halloran and Francis v. the United Kingdom* both dealt with criminal offences not belonging to the core meaning of the term, and where the only sanctions available for refusing to submit to the requests were pecuniary sanctions. Thus, the privilege applies not only to situations where the accused might face a custodial sanction. Furthermore, following the Strasbourg court’s reasoning in cases such as *Société Colas* and *Menarini*, we know that both Articles 6 and 8 of the ECHR also apply to undertakings, albeit that the rights may not necessarily be invoked with as much force as when invoked by a natural person.<sup>1105</sup> The inclusion of legal persons is endorsed by *Treschel* who states rather succinctly that the privilege can be invoked by legal persons if they are the target of criminal proceedings.<sup>1106</sup>

A second observation concerns the distinction made in *Fayed* and *IJL* between preparatory investigations and trials. In both cases, the Strasbourg court concluded that the requirements in Article 6(1) did not apply to the interviews held by the DTI inspectors. The reason was that the inspectors could not be considered as determining ‘criminal charges’. The interviews were essentially investigative in nature, and the inspectors had no powers to adjudicate in either form or substance. Instead, their task was to ascertain and record facts which might subsequently be used as basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative.<sup>1107</sup> To apply the court’s reasoning to antitrust cases and the Commission’s investigations would not be possible. First, the information gathered during the inspection may only be used by the Commission in that particular case, which is of a criminal nature. It will thus not serve as basis for regulatory or legislative action, but only criminal action. Second, the Commission does have adjudicating powers, both when it comes to imposing fines for obstruction and when it comes to sanctioning the offence as such. It

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<sup>1104</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, at para 74.

<sup>1105</sup> In the case of *Société Colas*, the Strasbourg court acknowledged that the entitlement to interfere may be more far-reaching when a search is performed at the business premises of a legal person rather than at the home of natural person. In *Menarini*, dealing with the intensity and standard of judicial review to be carried out by courts in competition proceedings, the Strasbourg court acknowledged that although the requirements in Article 6 of the ECHR also applies to this type of case, the standard of protection need not be the same as in a criminal case within the core meaning of the term (para 62).

<sup>1106</sup> *Treschel*, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p. 349.

<sup>1107</sup> *Fayed v the United Kingdom*, judgment of 21 September 1990, Application no. 17101/90, para 61.

has also been established by the Strasbourg court that where the investigation is criminal rather than administrative, the privilege against self-incrimination also applies at the early stages.<sup>1108</sup>

A third observation concerns the right to remain silent and the court's declaration in *Saunders* that an obligation to answer factual questions may also violate the privilege against self-incrimination. In *Saunders*, the UK government claimed that the use of the statements from the interviews with Mr Saunders did not infringe the privilege as they did not contain any admission of wrongdoing or remarks which were incriminating. The court did not agree, declaring that exculpatory remarks or mere information on questions of fact may also be deployed later in criminal proceedings in support of the prosecution of the case.

A fourth observation concerns the distinction between real evidence on the one hand and oral or testimonial evidence on the other. It is clear from cases such as *Saunders* and *JB v. Switzerland* that the privilege does not apply to documents acquired pursuant to a warrant, i.e. when it is the investigating authority that has collected the documents or information without the active assistance by the person under investigation. *Ashworth*, *Redmayne* and *Treschel* all appear to agree that it is the means of obtaining evidence rather than its contents that determine whether or not the privilege applies. As for the production of documents, *Treschel* argues that the privilege should not only apply where the authorities suspect that certain documents or pieces of information are in the possession of the targeted person, but also in cases where authorities can identify the documents in question and have secure knowledge of their existence.<sup>1109</sup> This being said, in *Jalloh*, the Strasbourg court showed its willingness to protect evidence that was technically considered as 'real evidence'. However, given the special circumstances of that case, it is difficult to see how the court's extension of the privilege would apply to dawn raids performed within the framework of competition cases. Anyone targeted by the Commission's inspections would therefore have to accept that the Strasbourg court would not raise any objections, at

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<sup>1108</sup> Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008, p. 756. See e.g. *Heaney and McGuinness v Ireland*, judgement of 21 December 2000, Application no. 34720/97. See also *Weh v Austria* where the Strasbourg court divided cases concerning the privilege against self-incrimination into two different categories, the first being cases relating to the use of compulsion in pending or anticipated criminal proceedings and the second being cases relating to the use of compulsion outside the context of criminal proceedings where the information obtained is later used in a criminal case. *Weh v Austria*, judgment of 8 April 2004, Application no. 38544/97, paras 40-43.

<sup>1109</sup> Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p. 354.



least not based on the privilege against self-incrimination, to the Commission's search of premises and collection of evidence.

On the other hand, it may be worthwhile to challenge requests for information made by the Commission under Article 18 of Regulation 1/2003, as these require the companies to actively hand over possibly incriminating evidence to the Commission. Here, a caveat is pointed out by *Treschel*: the privilege covers only assistance from the suspect which could not be substituted by employing direct force.<sup>1110</sup> Indeed, although a request for information could be substituted to some extent by an on-site inspection, companies are often requested to compile and process the requested information before submitting it to the Commission. Until the Strasbourg court's ruling in *O'Halloran and Francis*, it could even be argued that the right of not having to provide information was absolute. We now know that it is not, and that the court will assess any request in accordance with the criteria listed in the two cases of *Jalloh* and *O'Halloran and Francis*. An additional dimension affecting any inclination to invoke the privilege when receiving a request for information is the fact that the alternative course of action – the dawn raid – is unlikely to be considered preferable from a company perspective.

Another question relating to dawn raids is of course the extent to which undertakings may be forced to cooperate and assist the inspectors during the course of the inspection. Having to open the doors and let the inspectors in is one thing, but being obliged to 'cooperate fully and actively' during the inspection is another.<sup>1111</sup> As *Redmayne* puts it; 'the privilege is means and not material based and applies to a certain means of obtaining information, a means that requires cooperation'.<sup>1112</sup> In today's world providing access to the IT environment is almost tantamount to and nothing more than opening the door, and it is reasonable to require this from a company in order to allow for a meaningful inspection. However, it is not equally apparent that company representatives should be required to answer all factual questions posed by the inspectors. The Strasbourg court has been clear in its position that not only incriminating statements are covered by the privilege, just as exculpatory remarks or mere information on questions of fact may later be deployed in criminal proceedings in support of the prosecution of the case.

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<sup>1110</sup> *Ibid.*

<sup>1111</sup> 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 11 September 2015, para 11.

<sup>1112</sup> Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008, p. 759, and Redmayne, *Rethinking the Privilege Against Self-incrimination*, *Oxford Journal of Legal Studies*, vol. 27, no. 2, 2007, pp. 214-215.

*Wils* argues that the right of the Commission under Article 20(2)(e) of Regulation 1/2003 to ask questions of staff members is of no relevance as those staff members may not be subject to any criminal sanctions.<sup>1113</sup> This line of reasoning is built on the presumption that the firms themselves are not protected by the privilege against self-incrimination. As much suggests that companies are afforded protection, any statements made by their representatives should also fall within the privilege.

This being said, while it is true that answers to factual questions may be used to cast doubt on or contradict statements made by a suspect, it is difficult to draw any direct parallel between the measures taken in cases such as *Saunders* and the Commission's procedures under Regulation 1/2003. In *Saunders*, the counsel for the prosecution spent three days reading selected parts of the transcripts to the jury despite objections by the applicant.<sup>1114</sup> The Commission's powers to ask questions during the course of a dawn raid are much more limited, empowering the agents to ask for explanations on facts or documents relating to the subject-matter of the inspection.<sup>1115</sup> Commission officials cannot carry out proper interviews without the consent of the persons interviewed.<sup>1116</sup> As no compulsion is involved when interviews are carried out, the privilege against self-incrimination will not be triggered.<sup>1117</sup>

A final comment relating to the Commission's inspections is the fact that the Commission is not empowered to actually search the premises of the companies targeted by their inspections. As discussed in Section 10.1 above, the Commission may not obtain access by force or oblige the company staff to grant them such access. However, contrary to what one may believe, this should not affect the scope of the privilege, as the Commission may request assistance by national authorities and will then be able to carry out an actual search of the premises.<sup>1118</sup> As for the granting of access to filing cabinets, computers or the like, any cooperation required by the undertaking may thus

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<sup>1113</sup> *Wils*, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, World Competition, vol. 26, no. 4, 2003, p. 570.

<sup>1114</sup> And where Mr Saunders was convicted to five years of imprisonment.

<sup>1115</sup> Article 20(2)(e) of Regulation 1/2003.

<sup>1116</sup> Article 19 of Regulation 1/2003 stipulates that the Commission may interview anyone who consents to be interviewed for the purpose of collecting information relating to the subject-matter of the investigation.

<sup>1117</sup> However, while the case-law of the ECJ highlights the importance of challenging the request for information as such and not await the Commission's decision in the underlying competition case, the General Court declared in *Nexans* that there is no possibility for companies to challenge any questions posed by the Commission during dawn raids on a standalone basis. This is a weakness in the system which will be addressed further in Chapter 13.

<sup>1118</sup> Van Bael, *Due Process in EU Competition Proceedings*, Wolters Kluwer, 2011, pp. 139-141.

be substituted by employing direct force should the company refuse to cooperate.

## 11.4 The EU case-law

The Luxembourg court had to take a stand on the privilege against self-incrimination several years before the question first reached Strasbourg. Already in 1989 the ECJ delivered its ruling in *Orkem*, dealing with the scope of a company's duty to cooperate in cartel investigations.

### 11.4.1 No obligation to admit guilt – Orkem

During the course of a cartel investigation, the Commission had carried out a dawn raid at the premises of Orkem SA.<sup>1119</sup> At a later stage of the investigation, the Commission availed itself of the powers granted through Article 11 of Regulation 17/62, and sent out a request for information under Article 11(2). As Orkem refused to co-operate, the Commission sent out another request, this time by means of a decision under Article 11(5). Orkem challenged the decision on a number of grounds, one being breach of the rights to the defence in so far as the Commission had sought to compel Orkem to give evidence against itself.<sup>1120</sup>

Essentially, what Orkem claimed was that the Commission had used the contested decision to compel the company to incriminate itself by confessing to an infringement of the competition rules and inform against other undertakings. By doing this, Orkem argued, had the Commission infringed the general principle that no one may be compelled to give evidence against themselves. This principle formed part of EU law in so far as it was upheld by the Member States, by the ECHR and also by the UN International Covenant on Civil and Political Rights.<sup>1121</sup>

In considering whether the submission was well founded, the Court commenced by reiterating what it had already established in *National Panasonic*, namely that the aim of the powers given to the Commission under Regulation 17/62 was to enable the Commission to carry out its duty to ensure that the competition rules are applied effectively. The exercise of those powers contributed to the maintenance of the competition system

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<sup>1119</sup> At the time of the inspection, the company name was CdF Chimie SA.

<sup>1120</sup> Case 374/87, *Orkem SA v the Commission of the European Communities*, EU:C:1989:387, para 3.

<sup>1121</sup> *Ibid*, para 18.

intended by the Treaty, a system which undertakings had an absolute duty to comply with.<sup>1122</sup> The preliminary investigation procedure had the sole aim of enabling the Commission to obtain the information necessary to check for the actual existence of competition law infringements, and for this purpose the Commission had been granted wide investigatory powers. As a procedural guarantee, a decision under Article 11(5) could only be taken after the company had failed to submit to a simple request. On the other hand, the Court noted, Regulation 17/62 did not contain any provisions allowing undertakings to evade the investigation on the ground that the results thereof might provide evidence of an infringement. On the contrary, the regulation imposed an obligation on firms to cooperate actively and make available all information relating to the subject-matter of the investigation.<sup>1123</sup>

Finding no right to remain silent expressly embodied in Regulation 17/62, the Court turned to the laws of the Member States. Here, the ECJ concluded that most Member States did in fact have rules protecting against self-incrimination, but that these rules applied to natural persons charged with offences in criminal proceedings. A comparative analysis of national law did not indicate the existence of a principle common to the laws of the Member States which could be relied upon by legal persons in relation to infringements in the economic sphere.<sup>1124</sup> As for the ECHR, the ECJ noted that neither the wording of Article 6 nor the jurisprudence of the ECtHR indicated that the Convention upheld the right not to incriminate oneself. Furthermore, like the laws of the Member States, Article 14 of the UN International Covenant on Civil and Political Rights protected only natural persons in criminal proceedings.<sup>1125</sup>

Having rejected the claims made by Orkem, the Court still found it necessary to determine whether the privilege against self-incrimination formed part of the right of the defence. Here the ECJ referred to its ruling in *Hoechst*, and declared that it is necessary to prevent the rights of a targeted company from being irremediably impaired during preliminary inquiry procedures. Consequently, the Court declared, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected already during the stage of preliminary inquiry.<sup>1126</sup>

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<sup>1122</sup> Ibid, para 19.

<sup>1123</sup> Ibid, para 27.

<sup>1124</sup> Ibid, paras 28 and 29.

<sup>1125</sup> Ibid, paras 30 and 31.

<sup>1126</sup> Ibid, para 33.

Having established this, the Court acknowledged that although the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose, if necessary, such documents relating thereto as are in its possession – even if the documents may be used to establish the existence of anti-competitive conduct on the part of the company or another undertaking, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.<sup>1127</sup> Thus, what the Court said was that in order to ensure effective and efficient competition law enforcement, the Commission needs to be able to request information from the companies under investigation, but may not require them to answer leading questions or to compile information in a way that proves their guilt.

The Court then examined the actual request for information submitted to Orkem. It found that some questions were only intended to secure factual information and were therefore not open to criticism. Other questions, however, related to the purpose of the action taken by Orkem and the objective pursued by such measures. In that respect, the questions sought to compel Orkem to acknowledge its participation in a price-fixing agreement, and were therefore struck by the Court. The decision was thus annulled in those parts.<sup>1128</sup>

#### 11.4.2 Use of the answers provided – LVM

In December 1988, the Commission adopted a decision against 14 PVC producers penalizing them for infringement of Article 101 TFEU. The companies challenged the Commission's decision before the General Court, which later declared the decision non-existent. The ruling was appealed by the Commission, and in February 1992, the ECJ annulled the Commission's decision. Following the ECJ's ruling, the Commission adopted a new decision, known as the PVC II decision. The companies challenged the PVC II decision before the General Court, claiming *inter alia* that the requests for information that they had received from the Commission had infringed the privilege against self-incrimination, and that any evidence obtained through compulsion should be struck. The applicants requested that the PVC II decision be annulled inasmuch as it was based on evidence obtained in breach of the privilege against self-incrimination.<sup>1129</sup> Contrary to

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<sup>1127</sup> Ibid, para 34.

<sup>1128</sup> Ibid, para 38.

<sup>1129</sup> Joined 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, *LVM and Others v European Commission*, EU:C:2002:582, para 261.

Orkem, the applicants did thus not challenge the decision requesting the information, but the final decision in the underlying competition case.

#### 11.4.2.1 The view of the General Court

In its ruling, the General Court took note of the fact that the wording of Regulation 17/62 did not provide room for any right to refuse to comply with an investigative measure on the ground that evidence of competition rules infringements may thereby be obtained. On the contrary, the General Court noted, the regulation placed the undertakings under a duty of active cooperation, which meant that they must be prepared to make any information relating to the object of the inquiry available to the Commission.<sup>1130</sup> Having established this, the General Court nevertheless declared that it was necessary to ascertain whether the right of the defence imposed an implied restriction on the Commission's powers of investigation.

Here, the General Court declared that an absolute right to silence would go beyond what is necessary to preserve the company's right of the defence, and would constitute an unjustified hindrance to the Commission in its task of ensuring effective application of the EU competition rules.<sup>1131</sup> On the other hand, the General Court noted, the Commission should not be allowed to undermine a company's defence rights by compelling it to provide answers that might involve an admission of guilt – something which it was incumbent on the Commission to prove.<sup>1132</sup> Having set the scene for its analysis, the General Court went on to consider the circumstances of the case at hand.

During the course of the investigation, the Commission had sent out requests for information under Article 11(2) of Regulation 17/62, and had later required the undertakings to supply the requested information by way of a decision in accordance with Article 11(5) of the same regulation. As there was no legal obligation to answer the questions sent out under Article 11(2), there was no element of coercion and these questions could not be deemed to infringe the privilege against self-incrimination. As regards the questions contained in the decision, they were identical to those that had previously been annulled by the ECJ in *Orkem*. The General Court thus concluded that they were likewise unlawful.<sup>1133</sup> However, in the case at hand, the applicants had either refused to answer the questions or denied the facts on which they

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<sup>1130</sup> Ibid, at para 444.

<sup>1131</sup> Ibid, at para 448.

<sup>1132</sup> Ibid, at para 449.

<sup>1133</sup> Ibid, at para 451.

were being questioned. In those circumstances, the General Court declared, the illegality of the questions could not affect the legality of the PVC II decision.<sup>1134</sup> In fact, the General Court stated, the applicants had not identified any answer given specifically to those questions, or indicated the use made of those answers by the Commission in the PVC II decision.<sup>1135</sup> The General Court dismissed the plea in its entirety.<sup>1136</sup> The companies appealed the ruling of the General Court to the ECJ.

#### 11.4.2.2 The view of the ECJ

In their appeal to the ECJ, the companies submitted that contrary to the findings of the General Court, their plea not only related to those questions that had remained unanswered, but also to a number of questions that had actually been answered and used as evidence by the Commission.<sup>1137</sup> Furthermore, they argued that the General Court had ruled to the same effect as the judgment in *Orkem*, thereby affording them lesser protection than the standard that had recently been set by the Strasbourg court.<sup>1138</sup>

In its ruling, the Court reiterated the findings of the General Court regarding the scope of the privilege against self-incrimination, stating that Regulation 17/62 did not provide room for any refusal to cooperate or give self-incriminating evidence, but that such right may be implied under the right of the defence, which the Court declared, is a fundamental principle of EU law. The right of the defence, the ECJ noted, prevents the Commission from compelling an undertaking to provide answers that might involve an admission of its own guilt.<sup>1139</sup> According to the ECJ, this meant that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking is in fact equivalent to the admission of an infringement.<sup>1140</sup> Furthermore, the Court took note of the fact that the Strasbourg court had also ruled on the privilege against self-incrimination, but declared that both *Orkem* and the recent case-law from Strasbourg required the existence of an element of coercion as well as the establishment of an actual infringement of the privilege.<sup>1141</sup>

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<sup>1134</sup> Ibid, at para 453.

<sup>1135</sup> Ibid, at para 454.

<sup>1136</sup> Ibid, at para 459.

<sup>1137</sup> Joined 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, *LVM and Others v European Commission*, EU:C:2002:582, para 265.

<sup>1138</sup> Ibid, para 263.

<sup>1139</sup> Ibid, paras 272-273.

<sup>1140</sup> Ibid, para 273.

<sup>1141</sup> Ibid, para 275.

Just like the General Court, the ECJ pointed to the element of coercion, and declared that the requests sent out under Article 11(2) of Regulation 17/62 lacked this element and did thus not infringe the privilege against self-incrimination.<sup>1142</sup> As for the decision requiring information adopted under Article 11(5) of the regulation, the Court noted that the applicants had not indicated any aspects of the answers provided that had been used for the purposes of incrimination. Having established this, the Court concluded that the complaint against the decisions requiring information must also be rejected.<sup>1143</sup>

Contrary to *Orkem*, where the Court declared that the Commission may not compel an undertaking to provide it with answers which might involve an admission of guilt, and where certain questions sent out to Orkem were thus considered to infringe the privilege, this case concerned the validity of the decision in the underlying competition case, and because of that the Court took the view that it was not the questions themselves that were of relevance, but rather whether the Commission had made use of the answers in order to establish guilt. This shows the importance of challenging the Commission's decision to request information – rather than awaiting, as in the case of *LVM*, the Commission's decision in the underlying competition case. Even though the Commission may not have made use of the information collected, it cannot be ruled out that the gathered information has been used indirectly to collect further information, and there is always a risk from a company perspective that the information is exchanged between the competition authorities within the ECN or disclosed to possible cartel victims.

#### 11.4.3 Obligation to produce documents – SGL Carbon

In July 2001, the Commission imposed fines on a number of graphite electrode producers for participation in a global market-sharing and price-fixing cartel. Some of the companies, including SGL Carbon AG ('SGL') applied to the General Court for annulment of the Commission's decision. In its application, SGL argued that it should have received a greater reduction of its fine. The Commission had reduced SGL's fine by 30 per cent because SGL had cooperated during the early stages of the investigation. However, SGL had not really cooperated after the initial contacts in April 1998, and the Commission had had to send out a formal request for information under Article 11(2) of Regulation 17/62, and a reminder in which it reserved the right to adopt a decision under Article 11(5) of said regulation should SGL refuse to submit the requested information. According to the Commission,

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<sup>1142</sup> Ibid, paras 278-280.

<sup>1143</sup> Ibid, para 292.



any cooperation on the part of a company receiving a reduction of the fine must be voluntary, and in particular outside the exercise of any investigatory power.<sup>1144</sup>

SGL did not agree. It argued that it was not required to reply to certain questions in the Commission's request for information, as it would have compelled SGL to incriminate itself. Referring to *Funke* and *Saunders*, SGL argued that there was no legal obligation on its part to submit incriminating information. Still it had chosen to supply full and accurate replies, and the Commission had undervalued its voluntary cooperation. The issue of the existence and scope of the privilege did thus not arise in relation to a refusal to answer questions or to supply information, but in determining whether the company had cooperated beyond its legal obligation, thereby meriting a reduction of the fine.

#### **11.4.3.1 The view of the General Court**

In its ruling, the General Court first declared that the right to remain silent was not absolute. Thus, SGL's contention that it was not required to answer any question could not be recognized. To acknowledge the existence of an absolute right, the General Court declared, would be to go beyond what is necessary in order to preserve the right of the defence, and would constitute an unjustified hindrance to the Commission's performance of its duties under Regulation 17/62.<sup>1145</sup> A right to remain silent, the court continued, could only be recognized in so far as the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement, something which it is incumbent on the Commission to prove.

In order to ensure the effectiveness of the Commission's investigatory powers, companies should be obliged 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. Such obligation, the General Court declared, did not run afoul of either Article 6(1) or 6(2) of the ECHR: the mere obligation to answer purely factual questions and comply with the Commission's requests for documents already in existence could not constitute a breach of the

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<sup>1144</sup> Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, 251/01 and T-252/01, *Tokai Carbon and Others v the Commission of the European Communities*, EU:T:2004:118, para 401.

<sup>1145</sup> *Ibid.*

principle of the rights of the defence or impair the right to a fair legal process.<sup>1146</sup>

The General Court also examined the actual request made by the Commission, and whether the requested information and documentation would involve an admission of guilt. Here, the court noted that the Commission had requested SGL not only to answer purely factual questions, but also to describe the objective of a number of meetings in which SGL participated, the events that transpired in the meetings, and the results/conclusions of those meetings. This request, the General Court declared, was of such kind as to require SGL to admit its participation in an infringement of the EU competition rules.<sup>1147</sup>

However, the General Court did not stop here. It declared that the same applied for the protocols of those meetings, the working documents and the preparatory documents concerning them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning certain price increases. The General Court concluded that because SGL was not required to answer questions of that type, the fact that it had nonetheless provided information on those points must be regarded as voluntary collaboration on the part of the undertaking, and therefore a motivating reason for a reduction in the fine under the Leniency Notice.<sup>1148</sup>

#### **11.4.3.2 The view of the ECJ**

The Commission appealed against the General Court's ruling, submitting that the General Court's findings were vitiated by several errors of law. According to the Commission, it was always entitled to request the production of documents, and such request did not infringe the right of the defence.<sup>1149</sup> The Commission's appeal thus only concerned the production of documents, not the obligation to answer questions that may involve an admission of guilt.

The Court noted that the General Court had found that SGL Carbon had not been legally required to produce documents that might contain an admission of infringement. This finding, the ECJ declared, was vitiated by errors of

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<sup>1146</sup> Ibid, para 406.

<sup>1147</sup> Ibid, para 407.

<sup>1148</sup> Ibid, paras 408-409.

<sup>1149</sup> Case C-301/04 P, *Commission of the European Communities v SGL Carbon AG*, EU:C:2006:432, at para 21.

law.<sup>1150</sup> Here, the Court referred to *Orkem*, and the statement made therein that a company lacks a right to evade the investigation. On the contrary, the company is obligated to actively cooperate with the Commission during the investigation. The ECJ then reiterated the statement that in order to ensure the effectiveness of Regulation 17/62, the Commission was entitled to compel an undertaking, if necessary by a formal decision, to provide all necessary information concerning such facts as may be known to it, and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if such documents may be used to establish an infringement of the competition rules.<sup>1151</sup>

By contrast, the Court declared that the situation was completely different when the Commission seeks to obtain answers by which the undertaking under investigation would be led to admit an infringement which is incumbent upon the Commission to prove.<sup>1152</sup>

The Court then referred to the ‘developments in the case-law of the European Court of Human Rights which the EU judiciary must take into account when interpreting the fundamental rights’.<sup>1153</sup> This, however, did not prompt a revision of the statements of principle made in *Orkem*. The Court declared that it did not follow from the ECtHR’s case-law that the Commission’s powers to require the production of documents from companies suspected of an infringement had been limited.<sup>1154</sup>

Thus, as interpreted by the ECJ, companies under investigation were still considered to be under an obligation to provide the Commission with any documents requested, and such submission would not be contrary to the privilege against self-incrimination as interpreted by the ECJ.

## 11.5 The EU case-law – Conclusion

Despite explicit references to the case-law of the Strasbourg court and cases such as *Funke* and *Saunders*, the ECJ appears to have taken a slightly different route when shaping the EU privilege against self-incrimination. While the Strasbourg court focuses on means rather than content, distinguishing between ‘real evidence’ on the one hand and oral and testimonial evidence on the other, the ECJ has, at least in some cases,

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<sup>1150</sup> Ibid, para 38.

<sup>1151</sup> Ibid, paras 40 and 41.

<sup>1152</sup> Ibid, para 42.

<sup>1153</sup> Ibid, para 44.

<sup>1154</sup> Ibid, para 44.

focused more on content. Thus, in *Orkem* certain questions in the Commission's request for information were struck, as they were considered to require the addressee to provide incriminating information.

The Strasbourg court has protected suspects in most cases from having to actively provide oral or testimonial evidence while allowing authorities to obtain any kind of evidence through search warrants. As for the right to remain silent, although acknowledging that it is not an absolute right, the Strasbourg court has held that the use of answers to factual questions may also constitute an infringement of the privilege. In *Saunders*, the court declared that a testimony obtained under compulsion, and 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 support of the prosecution of the case, for example to contradict or cast doubt upon other statements of the accused or evidence given by the accused during the trial, or otherwise undermine his or her credibility.<sup>1155</sup>

The ECJ, on the other hand, obliges companies to cooperate actively with the Commission, and will only strike down questions if the answer might involve an admission of guilt; the ECJ has declared that it is the Commission which has the burden of proof in competition cases.<sup>1156</sup> In *LVM* the Court upheld the Commission's decision as the applicants had not been able to show that the questions posed had been used by the Commission to establish guilt. Furthermore, the ECJ sees no problem in requesting undertakings to actively hand over documents or information in response to a formal request for information. All this in the interest of ensuring effective application of the competition rules. It is worthwhile noting that the ECJ's ruling in *SGL Carbon* was delivered before both *Jalloh* and *O'Halloran*, during a period when the Strasbourg court's willingness to protect suspects from having to produce evidence still appeared to be absolute.

When the ECJ ruled in *Orkem*, there was no ECHR case-law on the privilege against self-incrimination. Instead, the ECJ sought inspiration from the national laws of the Member States and the UN International Covenant on Civil and Political Rights, declaring that these protected only natural persons charged with criminal offences, and that the privilege against self-incrimination thus did not protect legal persons in competition proceedings.

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<sup>1155</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, at para 71.

<sup>1156</sup> Case 374/87, *Orkem SA v the Commission of the European Communities*, EU:C:1989:387, para 35, and Case C-301/04 P, *Commission of the European Communities v SGL Carbon AG*, EU:C:2006:432, para 42. This being said, the Commission is not empowered to carry out interviews without the consent of the person being interviewed. Thus, the power to compel company staff to answer questions is limited.

In *SGL Carbon*, the Court made no such statement, despite the fact that the case-law of the ECtHR which now existed dealt only with natural persons, and that it would have been easier for the Court to make such an express distinction rather than just declaring that there was nothing in the case-law of the Strasbourg court that required it to rethink its ruling in *Orkem*.

It is also worth noting, as *Treschel* points out, that the privilege covers only assistance from the suspect which could not be substituted by employing direct force.<sup>1157</sup> As was discussed in Section 8.4.1.5, the Commission is only allowed to send out requests for information under Article 18 of Regulation 1/2003 where it has reasonable grounds to suspect an infringement, and the request should be for information that is likely to help the Commission prove an infringement. Although companies are often required to compile and process information before submitting it to the Commission, many requests could actually be substituted by on-site inspections. Furthermore, it could of course be questioned whether an order where the Commission is prevented from compelling undertakings to produce documents or information is desirable. As the Court points out in its rulings; to acknowledge the existence of an absolute right would be to go beyond what is necessary in order to preserve the right of the defence, and would constitute an unjustified hindrance to the Commission's performance of its duties under Regulation 1/2003.

## 11.6 The privilege against self-incrimination – What conclusions may be drawn?

The privilege against self-incrimination is not laid down in any statutory legislation under EU or ECHR law. Instead, it has been developed by the two courts, and although there are differences in how the courts approach the privilege, the standard of protection does not vary that much. It is clear from the Strasbourg court's case-law that protection is aimed at means rather than content.<sup>1158</sup> As a general rule, a suspect has a right to remain silent during the course of criminal proceedings, a right that covers both incriminating and non-incriminating statements. Likewise, when it comes to physical evidence, such evidence is not protected if it is collected by the prosecuting authority under a warrant, but generally protected if it is the suspect that is compelled

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<sup>1157</sup> Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p. 354.

<sup>1158</sup> For a further discussion on this, see Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008, and Redmayne, *Rethinking the Privilege Against Self-incrimination*, *Oxford Journal of Legal Studies*, vol. 27, no. 2, 2007.

to produce the evidence. However, as noted by *Treschel*, the privilege covers only assistance from the suspect which could not be substituted by employing direct force.<sup>1159</sup> Thus, it would not apply to requests for information in situations where the Commission could instead opt for an on-site inspection and collect the information with the aid of national law enforcement authorities.

Furthermore, with *O'Halloran*, it has now been established that the protection against having to produce certain information is not absolute, and that suspects may have to furnish information to the authorities under certain circumstances. In *O'Halloran* the court examined the nature and degree of compulsion used to obtain the evidence, the existence of any safeguards in the procedure and the use to which any material so obtained was put. This being said, the 'O'Halloran exception' would not be directly applicable to a request for information sent out by the Commission under Article 18 of Regulation 1/2003. In *O'Halloran*, the Strasbourg court took notice of the fact that although both the compulsion to reveal the identity of the driver and the underlying offences were 'criminal' in nature (the court used the quotation marks), the compulsion flowed from the fact that all who drive automobiles know that by doing so, they subject themselves to a certain regime because the possession and use of cars are recognized to have the potential to cause grave injury.<sup>1160</sup> Furthermore, the court considered the limited scope of the inquiry. The information requested, the court noted, was markedly more restricted than in the cases of *Funke* and *JB v. Switzerland*, indicating that the court's ruling in those cases remained good law. It is important to note that, unlike in *Menarini* for example, the court did not make a distinction between criminal cases within the core meaning of the term and other criminal charges, as the charges in both *Funke* and *JB v. Switzerland*, to which the court referred, would be defined as 'other criminal charges'. In *Saunders*, the Strasbourg court made clear that general requirements of fairness in Article 6 of the ECHR, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the simplest to the most complex.<sup>1161</sup>

If the Strasbourg court considers means rather than content to be relevant, the situation is the reversed in the EU. The ECJ protects suspects from having to answer incriminating questions – orally or in writing – only.

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<sup>1159</sup> Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, at p. 354.

<sup>1160</sup> *O'Halloran and Francis v the United Kingdom*, judgment of 29 June 2007, Applications nos. 15809/02 and 25624/02, at para 57.

<sup>1161</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, para 74.

Furthermore, the Court excludes physical evidence from the privilege, irrespective of how this evidence comes to be in the hands of the Commission. Thus, in *SGL Carbon*, an obligation to hand over documents which could be used as evidence against the company was not considered to violate the privilege against self-incrimination. A further limitation imposed by the Court is that where the company refrains from challenging the request for information, but later argues that the decision in the underlying competition case shall be annulled due to a violation of the privilege, the Court will not uphold such view simply because the Commission has posed unlawful questions during the investigation. It is only when the Commission has actually made use of the answers to those questions that the decision may be annulled. This standpoint would be in line with the Strasbourg court's ruling in *Saunders*, and it is reasonable that the decision in the underlying competition case is only annulled if it has been based on evidence that has been unlawfully collected. Otherwise, companies could refrain from challenging the request for information, await the final decision, and then have it annulled. However, the Court's case-law underlines the importance of challenging the request for information, as it cannot be ruled out that, even though the Commission refrains from basing its decision on evidence collected contrary to the privilege; such information is nevertheless used indirectly to collect further information, is exchanged between the competition authorities within the ECN or disclosed to possible cartel victims.

It should be noted that the possibility to challenge questions upfront is available only where the Commission has acted under Article 18 of Regulation 1/2003, as the questions are then part of the formal decision. If the inspectors ask unlawful questions during a dawn raid, the questions are instead considered to flow from the decision and thus may not be challenged on a standalone basis.<sup>1162</sup> This order can of course be questioned.

At the same time one cannot disregard the fact that although the ECJ appears to provide a slightly weaker protection than the Strasbourg court, requiring companies to cooperate actively, answer questions of fact and submit the documents or information requested by the Commission, the case-law from the Strasbourg court is limited to natural persons. Even though the ECtHR is often willing to extend protection also to legal persons, such protection is not necessarily equally far-reaching. In *Bernh Larsen Holding*, the Strasbourg court declared that 'the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have

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<sup>1162</sup> See the General Court's reasoning in Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 119.

been the case had it concerned an individual'.<sup>1163</sup> Furthermore, although the court has declared that the privilege applies to all types of criminal proceedings, this does not necessarily mean that its application is identical in all cases. In *O'Halloran and Francis* the court made clear that although the right to a fair trial is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule, and must depend on the circumstances of the particular case.<sup>1164</sup> In *Jalloh*, the circumstances of the case made the court raise the bar – the means applied by the national authorities were not considered to meet the proportionality *stricto sensu* test. In *Menarini* on the other hand, the court declared that the fact that a case falls outside the core meaning of the term 'criminal offence' will not excuse national authorities from the obligation to provide adequate procedural safeguards, but may, nevertheless affect the application of such safeguards.<sup>1165</sup> It is therefore possible that the Strasbourg court would accept the standard set by the ECJ even though the rulings from the Luxembourg court may provide a marginally lower standard than the one established by the Strasbourg court, as the rulings of the Strasbourg court all relate to the rights of natural persons.

And indeed, in order to ensure an effective application of the competition rules, the Commission must be able to carry out dawn raids and make copies of information or documents that may provide evidence of an infringement. This practice is also in line with the ECHR standard, which generally does not protect so-called real evidence. The main difference in the courts' view appears instead to lie in the nature of questions that may be posed by the investigating authorities. However, while it is true that answers to factual questions may be used to cast doubt on or contradict statements made by a suspect, it is difficult to draw any direct parallel between the measures taken in *Saunders* where the counsel for the prosecution spent three days reading selected parts of the transcripts to the jury despite objections by the applicant,<sup>1166</sup> and the Commission's powers in Article 20(2)(e) of Regulation 1/2003.<sup>1167</sup> During the course of a dawn raid, the agents may ask for

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<sup>1163</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 159.

<sup>1164</sup> *O'Halloran and Francis v the United Kingdom*, judgment of 29 June 2007, Applications nos. 15809/02 and 25624/02, at para 53.

<sup>1165</sup> Or as the Strasbourg court put it: «*Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l'article 6, elles peuvent néanmoins influencer les modalités de leur application.*». See *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, para 62.

<sup>1166</sup> And where Mr Saunders was convicted to five years of imprisonment.

<sup>1167</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, paras 31 and 72.



explanations about facts or documents relating to the subject-matter of the inspection,<sup>1168</sup> but they are not allowed to carry out proper interviews without the consent of the persons interviewed.<sup>1169</sup> As no compulsion is involved when interviews are carried out, the privilege against self-incrimination will not be triggered under either EU or ECHR law.<sup>1170</sup>

Given the aforementioned, it can be concluded that the protection afforded by the ECJ strikes an acceptable, if not perfect, balance between the need for effective competition law enforcement and the protection against having to incriminate oneself. The Commission is vested with the necessary powers to collect information and evidence during its dawn raids and may ask for explanations on facts or documents on the spot, but is prevented from carrying out interviews without the consent of those being interviewed. As long as a clear dividing line is drawn between the questions asked under Article 20 and the interviews carried out under Article 19 of Regulation 1/2003, and as long as the persons interviewed are informed of the fact that they are not obliged to answer the questions posed,<sup>1171</sup> this practice would not unduly affect the companies' defence rights. Given this fact, and the fact that the Commission may not request companies to compile information or answer questions where the answer may involve an admission of guilt, the system in place appears to serve both the interests of effective competition law enforcement and adequate fundamental rights protection.

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<sup>1168</sup> Article 20(2)(e) of Regulation 1/2003.

<sup>1169</sup> Article 19 of Regulation 1/2003 stipulates that the Commission may interview anyone who consents to be interviewed for the purpose of collecting information relating to the subject-matter of the investigation.

<sup>1170</sup> However, while the case-law of the ECJ highlights the importance of challenging the request for information as such and not awaiting the Commission's decision in the underlying competition case, the General Court declared in *Nexans* that there is no possibility for companies to challenge any questions posed by the Commission during dawn raids on a standalone basis. This is a weakness in the system which will be addressed further in Chapter 13.

<sup>1171</sup> The importance of this safeguard shall be seen in light of the fact that company representatives may have difficulties knowing which questions are or are not admissible, especially given the fact that any refusal to answer the questions posed under Article 20(2)(e) may be seen as obstruction and can render a significant fine.

## 12. The legal professional privilege

[i]n a civilized society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure.<sup>1172</sup>

These words by Advocate General Warner in the now classic *AM & S* case captures the essence of what constitutes legal professional privilege within the EU. Any person should be able, without constraints, to consult a lawyer, whose profession entails the giving of independent legal advice to all those in need of it. Thus, if receiving an unexpected visit from the Commission, a company should not be afraid that the Commission officials will make copies of documents containing legal advice from the company's external counsels.

This chapter will analyse the scope and content of the protection afforded under EU law in order to determine whether the current order either safeguards applicable rights properly without thereby unduly hampering the enforcement of the competition rules, or instead that the scope of the legal professional privilege has been made unnecessarily broad. Making such assessment requires examination of the rationale behind the privilege. Why is there a privilege and which interests does it aim to protect? Only when the rationale behind the privilege is established is it possible to properly assess the scope and content of the protection afforded under EU law.

### 12.1 The rationale behind the privilege

The wording of AG Warner cited above suggests that the privilege has been established to serve the interests of the client. However, the concept is far from new and has not always been considered from a client perspective. With its roots in common law, the privilege was initially seen from the lawyer's standpoint and aimed at protecting the lawyer's honour or interests.<sup>1173</sup> Lawyers should not be forced to betray a secret with which they

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<sup>1172</sup> Opinion of Advocate General Warner of 20 January 1981 in case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1981:9.

<sup>1173</sup> See e.g. Ho, *Legal Professional Privilege and the Integrity of Legal Representation*, *Legal Ethics*, vol. 9, no. 2, 2006, p. 165, Krauland and Cribb, *The Attorney-Client Privilege in the*

have been entrusted. Over the years, there has been a shift towards the client's perspective, and today, the privilege is generally considered to belong to the client and serves to protect the client's freedom from apprehension in consulting a legal advisor.<sup>1174</sup>

In short, if individuals are to effectively enjoy legal rights, such as the right of the defence, they must be able to find out what these rights are and exercise them.<sup>1175</sup> If the client is not forthright with his or her lawyer for fear of disclosure, and does not reveal all relevant facts, the lawyer will not be able to secure effectively the full measure of the client's rights under the law. The rationale behind the privilege is explained by *Epstein* in the following way:

In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite.<sup>1176</sup>

If a client is concerned that what is told to the lawyer will return to have a subsequent negative effect, necessary information will be withheld and legal advice will be predicated on half-truths.<sup>1177</sup>

As indicated in the previous passage, the legal professional privilege may not only serve to protect the rights of individuals at the stage where an infringement has already been committed. On the contrary, the privilege may also serve the purpose of ensuring compliance with the law. Assuring an open consultation between client and lawyer, means that compliance with

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*United States, An Age-Old Principle Under Modern Pressures*, The Professional Lawyer, American Bar Association, issue 37, 2003, and Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the Cursory Glance*, Fordham International Law Journal, vol. 28, issue 4, 2004, p. 977.

<sup>1174</sup> See e.g. Dennis, *The Law of Evidence*, 5<sup>th</sup> edn, Sweet & Maxwell, 2013, at p. 397, Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, American Bar Association, 2007, at p. 4, Ho, *Legal Professional Privilege and the Integrity of Legal Representation*, Legal Ethics, vol. 9, no. 2, 2006, and Krauland and Cribb, *The Attorney-Client Privilege in the United States, An Age-Old Principle Under Modern Pressures*, The Professional Lawyer, American Bar Association, issue 37, 2003.

<sup>1175</sup> Ho, *Legal Professional Privilege and the Integrity of Legal Representation*, Legal Ethics, vol. 9, no. 2, 2006, p. 171.

<sup>1176</sup> Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, American Bar Association, 2007, at p. 7, citing the federal district court in Massachusetts and its ruling in *United States v United Shoe Mach. Corp.*, 89, F. Supp. 349, 358 (D. Mass. 1950).

<sup>1177</sup> Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, American Bar Association, 2007, p. 5.

the law will be assured.<sup>1178</sup> The belief is that the client will refrain from an act if he is told that it is unlawful. By encouraging candour in before-the-event consultations, the privilege – so it is said – helps keep individuals within the law.<sup>1179</sup>

As pointed out by Advocate General Warner in the case of *AM & S*, most civilized societies protect communications between client and lawyer in one form or other.<sup>1180</sup> In the same case, Advocate General Slynn noted that all Member States recognize that as a general rule, the public interest and the proper administration of justice demand that clients should be able to speak freely, frankly and fully to their lawyers. Whether the privilege is described as the right of the client or the duty of the lawyer, the principle, according to *Slynn*, has nothing to do with the protection or privilege of the lawyer. Instead, *Slynn* argued that the privilege springs not only from the basic need of a person in a civilized society to be able to turn to a lawyer for advice and help, and if proceedings begin, for representation. It also springs from the advantages to a society, which evolves complex legislation extending into all the business affairs of persons, real and legal, that persons should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, and where they run risks.<sup>1181</sup>

*Slynn* referred to the proper administration of justice.<sup>1182</sup> The privilege is often said to serve this purpose. It is thus not necessarily, or only, the rights of the individual that form the basis for or the rationale behind the privilege, but rather the greater interest of ensuring a proper administration of justice. In the leading UK case of *R v Derby Magistrates' Court, ex parte B*, Lord Taylor of Gosforth CJ captured the essence of this theory when he declared that the legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. According to him, it is a fundamental condition on which the administration of justice as a whole rests. It is not for the sake of the applicant alone that the

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<sup>1178</sup> In the UK, two forms of legal professional privilege are recognized: the legal advice privilege and the litigation privilege. While the legal advice privilege protects communications between client and lawyer made in connection with a purpose of obtaining or receiving legal advice from the lawyer, the litigation privilege protects communications made for the dominant purpose of obtaining or receiving legal advice in connection with a litigation that is in existence or is contemplated as a definite prospect. For a further discussion on this, see Dennis, *The Law of Evidence*, 5<sup>th</sup> edn, Sweet & Maxwell, 2013, at p. 396.

<sup>1179</sup> See e.g. Ho, *Legal Professional Privilege and the Integrity of Legal Representation*, *Legal Ethics*, vol. 9, no. 2, 2006, p. 169.

<sup>1180</sup> Opinion of Advocate General Warner in Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1981:9.

<sup>1181</sup> Opinion of Advocate General Slynn in Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:17.

<sup>1182</sup> *Ibid*, p. 1654.

privilege must be upheld. It is in the wider interests of all those thereafter who might otherwise be deterred from telling the whole truth to their solicitors.<sup>1183</sup>

As noted by *Dennis*, there are also considerations of efficiency, as lawyers need full information from their clients if they are to perform their duties effectively with minimum cost and delay. While the state provides machinery for the resolution of legal disputes, this machinery is expensive and time-consuming to run. Since it is ultimately provided at public expense there is a public interest in the establishment of rules, such as the legal professional privilege, which allow these mechanisms to function as cost-effectively as possible.<sup>1184</sup>

Contrary to many other rights or privileges, the legal professional privilege is often considered to provide absolute protection, in the sense that once it applies, it may not be considered outweighed by an opposing interest, such as the interest in making all relevant material available to courts when deciding cases.<sup>1185</sup> The truth-seeking mission of the legal process is of course a major public interest. As pointed out by *Gippini-Fournier*, the value of protecting lawyer-client communication must therefore be one that enhances the welfare of society as a whole in a manner and to an extent that, in the clear majority of cases, compensates for the detrimental effects of non-disclosure on the law-enforcement process. In other words, the utilitarian rationale requires the privilege rule to yield strong collective benefits capable of outweighing the pernicious effects of non-disclosure, and to be instrumental in obtaining those benefits.<sup>1186</sup>

Although the privilege is often considered to provide absolute protection, this does not imply that abuse of the privilege is accepted. In *Öcalan v. Turkey*, the Strasbourg court did not consider the recording of meetings between lawyer and client to constitute an infringement of the ECHR, as these meetings had previously served the purpose of passing on orders from the leader of the Kurdish separatist party (PKK) to other members of the

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<sup>1183</sup> *R v Derby Magistrates' Court, ex parte B* [1996] AC 487, at 508. See also Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glimpse*, Fordham International Law Journal, vol. 28, issue 4, 2004.

<sup>1184</sup> Dennis, *The Law of Evidence*, 5<sup>th</sup> edn, Sweet & Maxwell, 2013, at p. 398.

<sup>1185</sup> See e.g. *R v Derby Magistrates' Court, ex parte B* *R v Derby Magistrates' Court, ex parte B* [1996] AC 487.

<sup>1186</sup> Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glimpse*, Fordham International Law Journal, vol. 28, issue 4, 2004, p. 979.

organization.<sup>1187</sup> Likewise, both the US and the UK allow disclosure of information communicated by the client in an attempt to use the lawyer's services to commit or cover up a crime or fraud.<sup>1188</sup>

With this introduction to the legal professional privilege and its underlying rationale, the time has come to examine the scope of protection afforded under ECHR and EU law respectively.

## 12.2 The Strasbourg court's view on the legal professional privilege

### 12.2.1 Protection of correspondence from the client – Campbell

The case of *Campbell v. the United Kingdom* concerned a prisoner who wished to seek legal advice from his counsel. Mr Campbell had been sentenced to life imprisonment for murder. During his time in prison, several incidents occurred and Mr Campbell wished to seek legal advice concerning a number of issues, including a possible prosecution for an alleged assault on a prison officer as well as potential actions for damages against the Secretary of State.

Being detained in a prison situated a considerable distance from the offices of his solicitor, much of the legal advice was provided by mail. The correspondence between Mr Campbell and his solicitor was opened and scrutinized by the prison officers, which prompted Mr Campbell's solicitor to write to the prison governor and ask that all correspondence between him and his client should pass without interference.<sup>1189</sup> The governor agreed to let any correspondence from the solicitor pass without scrutiny provided that the name of the solicitor's firm and the initials 'ECHR' were placed prominently on the envelope. However, any outgoing correspondence from Mr Campbell remained subject to scrutiny. Mr Campbell challenged the governor's decision without any success. Having exhausted all domestic remedies, he eventually turned to Strasbourg alleging that the interference with his correspondence constituted a violation of Article 8 of the ECHR.

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<sup>1187</sup> *Öcalan v Turkey*, judgment of 18 March 2014, Applications nos. 24069/03, 197/04, 6201/06 and 10464/07.

<sup>1188</sup> For further reading on the loss of privilege under the UK system, see e.g. Dennis, *The Law of Evidence*, 5<sup>th</sup> edn, Sweet & Maxwell, 2013, pp. 411-427. As for the US system, see e.g. Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, American Bar Association, 2007, vol. I, pp. 670-742.

<sup>1189</sup> *Campbell v the United Kingdom*, judgment of 25 March 1992, Application no. 13590/88, para 10.

The Strasbourg court saw no difficulty in declaring that the challenged measures constituted an interference with the right to respect for correspondence under Article 8(1) of the ECHR.<sup>1190</sup> Moving on to the second paragraph of the Article, the Strasbourg court agreed with the UK government and took the view that the interference was both in accordance with the law and served a legitimate aim: to ensure prison security.<sup>1191</sup> However, as for the final criterion – whether the interference was necessary in a democratic society – the Strasbourg court was no longer willing to accept the arguments presented by the UK government.

The court recalled that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is ‘necessary in a democratic society’ regard may be had to the State’s margin of appreciation. Furthermore, the Strasbourg court noted, it had been recognized that some measure of control over prisoners’ correspondence is called for and is not of itself incompatible with the ECHR, taking into account the ordinary and reasonable requirements of imprisonment.

This being said, the court then declared that it was clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason, the court declared, that the lawyer-client relationship is, in principle, privileged.<sup>1192</sup> Here the Strasbourg court referred to the case of *S. v. Switzerland* where it had stressed the importance of a prisoner’s right to communicate with counsel out of earshot of the prison authorities.<sup>1193</sup> In that case it was considered, in the context of Article 6 of the ECHR, that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him, his assistance would lose much of its usefulness, and that this would be contrary to the ECHR which is intended to guarantee rights that are practical and effective.<sup>1194</sup>

Although this case concerned Article 8 of the ECHR and the right to the respect for correspondence enshrined therein, the court thus made it clear that any interference with the correspondence between lawyer and client is in

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<sup>1190</sup> Ibid, paras 32-34.

<sup>1191</sup> Ibid, paras 38 and 41.

<sup>1192</sup> Ibid, para 46.

<sup>1193</sup> *S. v Switzerland*, judgment of 28 November 1991, Application no. 12629/87, para 48.

<sup>1194</sup> *Campbell v the United Kingdom*, judgment of 25 March 1992, Application no. 13590/88, para 46.

violation of Article 6 of the ECHR if it prevents the lawyer from effectively safeguarding the rights of the client.

The UK government had argued that the professional competence and integrity of solicitors could not always be relied on, and that if it were known that all correspondence with solicitors would pass unopened, there existed a risk that those wishing to smuggle forbidden material into or out of prisons would use their lawyers for such purposes. The government therefore considered it wholly proportionate to minimize risks of this kind by opening such letters. The Strasbourg court was not persuaded by the government's submissions, declaring that the possibility to examine correspondence for reasonable cause provided a sufficient safeguard against abuse. It had not been suggested that there was any reason to suspect that the applicant's solicitor failed to comply with the rules of his profession. In sum, the mere possibility of abuse is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship. As the court saw no further room to allow for a margin of appreciation, it found that there was no pressing social need for the opening and reading of the applicant's correspondence with his solicitor and that, accordingly, there had been a breach of Article 8 of the ECHR.

### 12.2.2 The scope of the margin of appreciation – Foxley v. the United Kingdom

Mr Foxley was employed as an ammunition procurement officer by the UK Ministry of Defence. In 1993, he was sentenced to four years' imprisonment on twelve counts of corruption. The court found that Mr Foxley had benefitted from the commission of the offences in the amount of £ 2,092,569.20, and a confiscation order was made against him in the amount of £ 1,503,301.80. Mr Foxley did not comply with the confiscation order, and in September 1996, he was declared bankrupt.

Following an *ex parte* application by the Trustee in Bankruptcy, it was decided that all postal packages addressed to Mr Foxley should be rerouted, automatically and without notice to Mr Foxley, to the Trustee. The application was based on the grounds that useful information in respect of the applicant's assets and liabilities might be forwarded to the applicant's address and lost to the applicant's estate if the order were not made. Between 27 September 1996 and 10 January 1997, a total of 71 letters, including two letters from legal advisers, were re-directed to the Trustee. All letters were copied to file before being forwarded to Mr Foxley.



Mr Foxley unsuccessfully challenged the order before the UK courts. Having exhausted all national remedies, he turned to Strasbourg, arguing that the interception by the Trustee had infringed his right to privacy under Article 8 of the ECHR.<sup>1195</sup> The Strasbourg court established that there had indeed been an interference with Mr Foxley's rights under Article 8. As to whether such interference had been necessary in a democratic society, Mr Foxley argued that the scope of the powers granted to the Trustee was unacceptable, in particular as the Trustee had access to the correspondence with Mr Foxley's legal advisers. In his submission, the applicant argued that the re-direction order could have excluded the re-direction of clearly marked legally privileged materials without thereby impairing the aim of the order.

The Strasbourg court recalled that the notion of necessity implies that the interference should correspond to a pressing social need and, in particular, that it should be proportionate to the legitimate aim pursued. Referring to *Campbell*, the court declared that in determining whether an interference is 'necessary in a democratic society', regard may be had to the State's margin of appreciation. It further observed that in the field under consideration - the concealment of a bankrupt's assets to the detriment of his creditors - the authorities may consider it necessary to have recourse to the interception of correspondence. Nevertheless, the implementation of the measures must be accompanied by adequate and effective safeguards which ensure minimum impairment of the right to respect for the bankrupt's correspondence. This is particularly so where, as in the case at issue, correspondence with the bankrupt's legal advisers may be intercepted. The Strasbourg court noted in this connection that the lawyer-client relationship is, in principle, privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature.<sup>1196</sup> This rather all-embracing statement suggests that all correspondence between client and lawyer is privileged and out of reach for the authorities.

The court realized that in practice it may be difficult to identify from an envelope whether a letter's contents attract legal professional privilege. However, as the government had not challenged the accuracy of the applicant's allegations – that letters from his legal advisers, once opened, were read and copied to file – the court considered that the action taken was not in keeping with the principles of confidentiality and professional privilege attaching to relations between lawyer and client. It further noted that the government had not sought to argue that the privileged channel of communication was being abused; nor had the government invoked any

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<sup>1195</sup> *Foxley v United Kingdom*, judgment of 20 June 2000, Application no. 33274/96, at para 27.

<sup>1196</sup> *Ibid.*, at para 43.

other exceptional circumstances which would serve to justify the interference with reference to their margin of appreciation.

In conclusion, the Strasbourg court found that there was no pressing social need for the opening, reading and copying to file of the applicant's correspondence with his legal advisers and that, accordingly, the interference was not 'necessary in a democratic society' within the meaning of Article 8 of the ECHR.

### 12.2.3 Absence of clear rules governing seizures – Sallinen and others

In the case of *Sallinen and others*, the applicants, Mr Sallinen (member of the Finnish Bar Association) and a number of his clients complained against measures taken by the Finnish Police during a search of Mr Sallinen's law office.

In March 1999, the police conducted a search of those premises based on the suspicion that Mr Sallinen's clients X and Y had committed aggravated debtor's fraud and that Mr Sallinen himself had aided and abetted those offences by drafting certain documents. During the course of the search, the police officers took copies of the hard disks in the office. Two were copied on the spot, and two computers, including the one used by Mr Sallinen, were seized for later disk copying on police premises.<sup>1197</sup> In May 1999, the police certified the return of three of the four hard disks and that they had destroyed any copies thereof. They stated however, that they would retain a copy of the fourth hard disk until the lawfulness of the seizure had been finally decided or until the material could be destroyed for any other reason.<sup>1198</sup>

Mr Sallinen and a number of the applicants challenged the measures taken before the Finnish courts, and the cases sought their way up and down the Finnish judicial system. Eventually, the applicants turned to Strasbourg, arguing that the search and seizure of privileged material had breached Article 8 of the ECHR.<sup>1199</sup>

As for the application of Article 8(1) ECHR, the Strasbourg court declared that the search by the police of the residential and business premises of Mr Sallinen, and the seizure of hard disks there, amounted to an interference

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<sup>1197</sup> *Sallinen and Others v Finland*, judgment of 27 September 2005, Application no. 50882/99, para 12.

<sup>1198</sup> *Ibid*, para 17.

<sup>1199</sup> *Ibid*, para 57.

with the right to respect for his ‘home’ and ‘correspondence’. Furthermore, the court found that the search and seizure amounted to an interference with the other applicants’ right to respect for their ‘correspondence’.<sup>1200</sup> Having established an interference the Strasbourg court continued with an assessment of whether such interference was justified. As for the question whether it had been in accordance with the law, the court declared that the interference complained of had a legal basis in Finnish law. However, the court continued, there were other requirements that emerged from the phrase ‘in accordance with the law’. The notion also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law. When examining the quality of the legal rules in question, the court found that the national legislation was not clear as concerned confidentiality.

The Finnish government argued that in any case, the search and seizure had been carried out for the purposes of investigating a serious offence, and that in their view, a lawyer suspected of a severe crime could not be treated differently from other suspects.<sup>1201</sup> The Strasbourg court was not persuaded by this argument. The hard disks had been searched, copied and seized. They contained information passing between Mr Sallinen and his clients, and these clients had no role in the investigated offence. While three of the seized hard disks were returned to Mr Sallinen, a copy of the fourth hard disk remained with the police for some considerable time. The Court noted that the search and seizure were rather extensive and was struck by the fact that there was no independent or judicial supervision.

Here, the court emphasized that search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a ‘law’ that is particularly precise.<sup>1202</sup> It is essential to have clear, detailed rules on the subject. In the case at hand the court noted that the relationship between the applicable Finnish legislations was somewhat unclear and gave rise to diverging views on the extent of the protection afforded to privileged material in searches and seizures. In sum, the Strasbourg court found that the search and seizure measures were implemented without proper legal safeguards, and even if a general legal basis could be said to exist for the measures provided for in Finnish law, the absence of applicable regulations – specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure – deprived the applicants of the minimum degree of

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<sup>1200</sup> Ibid, para 71.

<sup>1201</sup> Ibid, para 88.

<sup>1202</sup> Ibid, para 90.

protection to which they were entitled under the rule of law in a democratic society.<sup>1203</sup> The interference was thus not found to be in accordance with the law and an infringement of Article 8 of the ECHR was established.

The following case that will be discussed is directly applicable to dawn raids carried out by the Commission, as it deals with the measures taken by the French Competition Authority during a dawn raid, and the subsequent judicial review of the authority's actions.

#### 12.2.4 Legal professional privilege in relation to dawn raids – Vinci Construction

In October 2007 the French Competition Authority filed an application with the liberty and detention judge (JLD) at the *Tribunal de grande instance de Paris*, requesting authorization to carry out dawn raids at the premises of a number of companies suspected of restrictive practices contrary to Article 101 FEUF and French competition legislation.<sup>1204</sup> The judge found that there were reasonable grounds to suspect the companies of cartel participation and authorized the inspection. The authorization was restricted in so far that the competition authority was only allowed to search the premises of the companies explicitly mentioned in the authorization and only with regard to their activities in the sector for construction and renovation of health care facilities.<sup>1205</sup>

The inspections were carried out and numerous documents and electronic files were seized along with the entire mailboxes of certain employees. The companies challenged the inspections, alleging that they had been widespread and indiscriminate as thousands of electronic documents and entire mailboxes had been seized by the authority, and many of these documents either lacked connection with the business covered by the inspection decision, or were protected by legal professional privilege. The companies also complained that no detailed inventory of the seized items had been drawn up.<sup>1206</sup> The French Competition Authority on the other hand argued that the inspections and seizures had been carried out in accordance with the law and on the basis of the judge's authorization. It stated that the applicant companies had been given copies of the seized documents along with a detailed inventory.

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<sup>1203</sup> Ibid, para 92.

<sup>1204</sup> Article L. 450-4 du code de commerce.

<sup>1205</sup> Fr. *Établissements de santé*.

<sup>1206</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, at para 11.

The claims by the applicant companies were dismissed by the JLD on the ground that the inspections and seizures in question had complied with the applicable provisions of the Commercial Code and the Code of Criminal Procedure, and with the rights guaranteed by the ECHR.<sup>1207</sup> Among other points, the judge held that respect for legal professional privilege did not preclude the seizure of items and documents covered by the privilege. An appeal on points of law by the applicants was dismissed.<sup>1208</sup>

Relying on Articles 6, 8 and 13 of the ECHR, the applicant companies turned to Strasbourg, alleging that there had been a violation of their right to an effective remedy – first because they had been unable to lodge a full appeal against the decision authorizing the inspections and seizures, and second because they could only challenge the conduct of those operations before the judge who had authorized them, and in their view, this judge did not meet the requisite conditions of impartiality. They further complained of a disproportionate interference with their defence rights and with the right to respect for home, private life and correspondence, particularly with regard to the legal professional privilege, taking into account the widespread and indiscriminate nature of the seizures carried out and the lack of a detailed inventory. (The discussion of the complaint in this section will address only the application of Article 8 of the ECHR. For a discussion on the application of Article 6 ECHR, please see Section 13.2.1.4 below).

According to the Strasbourg court, the claims regarding the measures taken during the dawn raids should be assessed under Article 8 of the ECHR, as they mainly affected the applicants' right to privacy.<sup>1209</sup> The Strasbourg court considered that both the search and the seizure of electronic data, made up of computer files and the e-mail accounts of certain employees in the applicant companies, amounted to an interference with Article 8 of the ECHR. However, the interference had been 'in accordance with the law', since the inspections and seizures were governed by the Commercial Code and the Code of Criminal Procedure.<sup>1210</sup> Given that the inspections had been carried out to prove the existence of restrictive practices, they also had the legitimate aims of protecting the 'economic well-being of the country' and 'preventing disorder or crime', within the meaning of Article 8 (2) of the ECHR.

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<sup>1207</sup> Ibid, para 13.

<sup>1208</sup> Ibid, para 14.

<sup>1209</sup> Ibid, para 47.

<sup>1210</sup> Ibid, para 72.

The Strasbourg court then examined whether the interference had been proportionate and could be regarded as necessary in a democratic society. It noted that the dawn raids were aimed at seeking evidence of possible anti-competitive practices and thus were not in themselves disproportionate with regard to the requirements of Article 8 of the ECHR.<sup>1211</sup> Furthermore, the court acknowledged that the Contracting States have a margin of appreciation, but that it would nevertheless have to verify whether the defendant state had employed its powers in good faith, with care and in a sound manner. In previous cases dealing with on-site inspections, the court declared, such control had consisted in an assessment of the procedural safeguards available. It then acknowledged that the national order did provide for a number of procedural safeguards,<sup>1212</sup> but found it necessary to assess whether those safeguards had been applied in a manner that was practical and effective rather than theoretical and illusory. The court also recalled that the legal professional privilege was a corollary to the privilege against self-incrimination,<sup>1213</sup> indicating that the protection of correspondence between client and lawyer is linked to the right of the defence.

In assessing the seizures' proportionality in relation to the aim pursued, the Strasbourg court examined, more precisely, whether, on the one hand, the seizures had been 'widespread and indiscriminate' and on the other, whether they had respected the legal professional privilege.<sup>1214</sup> The Strasbourg court considered that the seizures had been neither widespread nor indiscriminate, as the inspectors had strived to restrict their searches to the documents held by those employees working in the business covered by the inspection decision, and as a copy of the seized files and a sufficiently detailed inventory had been handed over to the applicants.

The Strasbourg court noted, however, that the seizures had concerned numerous electronic documents, including the entirety of certain employees' mailboxes, which contained correspondence exchanged with lawyers.<sup>1215</sup> It further noted that the applicant companies had been unable to discuss the appropriateness of the documents being seized, or inspect their content, while the operations were being conducted. As the applicant companies had been unable to object in advance to the seizure of documents that were either covered by legal professional privilege or unrelated to the investigation, they ought to have been allowed an ex post review of its lawfulness, the

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<sup>1211</sup> Ibid, para 74.

<sup>1212</sup> Ibid, para 74.

<sup>1213</sup> Ibid, para 68.

<sup>1214</sup> Ibid, para 75.

<sup>1215</sup> Ibid, para 77.

Strasbourg court concluded.<sup>1216</sup> While they had made use of an appeal to the JLD, as provided by law, the JLD had merely examined the lawfulness of the formal context in which the seizures were conducted, without carrying out the tangible examination which was nevertheless required after it had been acknowledged that the documents contained correspondence with a lawyer. In this regard, the Strasbourg court considered that where a judge was called upon to examine reasoned allegations that specifically identified documents which had been seized – despite being unrelated to the investigation or being covered by legal professional privilege – the judge had an obligation to rule on what would happen to the documents after conducting a detailed examination and a specific review. As this had not been done by the JLD, the Strasbourg court declared that there had been a violation of Article 8 of the ECHR.

In its ruling, the Strasbourg court identified two criteria that need to be met in order for the inspection to be compatible with Article 8 of the ECHR: the seizures must not be ‘widespread or indiscriminate’, and the legal professional privilege must be respected. In order to ensure this, the court introduced the following procedural requirements. If a judge has been called upon to examine reasoned allegations that specifically identified documents were taken, despite being unrelated to the investigation or covered by legal professional privilege, he or she must rule on what should happen to these documents after conducting a detailed examination and a specific review of proportionality, and subsequently order their restitution where appropriate. In the present case, however, after having acknowledged that such documents existed among the seized files, the judge merely assessed the lawfulness of the formal context in which the contested seizures had been carried out, without conducting the specific examination that was required. A breach of Article 8 ECHR was thus established.

### 12.3 The scope of protection afforded under ECHR law – Concluding remarks

The legal professional privilege is generally considered to serve the interest of a proper administration of justice and to ensure that individuals may effectively enjoy their legal rights, such as the right to legal defence. As noted by *Dennis*, the Strasbourg court has made clear its view that confidentiality of communications between the lawyer and client is necessary to guarantee the effectiveness of the right to legal representation.

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<sup>1216</sup> Ibid, para 78.

In cases such as *S. v. Switzerland*<sup>1217</sup> and *Modarca v. Moldavia*,<sup>1218</sup> the court declared that if lawyers were unable to confer with their clients and receive confidential instructions from them, their assistance would lose much of its usefulness. This line of reasoning suggests that the privilege may be enforced under Article 6 of the ECHR. In *Campbell v. the United Kingdom* the court did recognize that any interference with the correspondence between a lawyer and his client is in violation of Article 6 of the ECHR if it prevents the lawyer from effectively safeguarding the rights of his client.<sup>1219</sup> This being said, the Strasbourg court has often applied Article 8 of the ECHR to cases dealing with the legal professional privilege.

This choice has two important implications. First, by applying Article 8 of the ECHR to cases dealing with legal professional privilege, the court is able to ensure a broader scope of protection than it would under Article 6 of the ECHR. This is because the latter article primarily concerns the right to a fair trial and the right for anyone charged with a criminal offence to be legally represented. Relying solely on Article 6 of the ECHR and allowing the privilege to serve the aim of encouraging candour in before-the-event consultations, as a way to ensure compliance with the law, might be stretching the scope too far.

Second, the fact that Article 8 of the ECHR is applied carries the logical consequence that the ECHR does not allow absolute protection from interference with communications between lawyer and client, as Article 8 allows for derogations from the rights provided therein. However, in *Foxley*, the Strasbourg court noted that the lawyer-client relationship is in principle privileged, and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature. This is a rather bold and all-embracing statement suggesting that all correspondence between lawyer and client, whatever its purpose, should be treated as confidential and that interferences with such correspondence would thus not be considered necessary in a democratic society.

However, the recent case of *Öcalan v. Turkey* heads in another direction, or rather points to the fact that no abuse of the right will be tolerated. In

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<sup>1217</sup> *S. v. Switzerland*, judgment of 28 November 1991, Application no. 12629/87.

<sup>1218</sup> *Modarca v. Moldavia*, judgment of 10 May 2007, Application no. 14437/05.

<sup>1219</sup> See also *Modarca v. Moldavia*, judgment of 10 May 2007, Application no. 14437/05, where the court declared in para 87 that one of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected. The court declared that the privilege encourages open and honest communication between clients and lawyers, and that confidential communication with one's lawyer is protected by the ECHR as an important safeguard of one's right to the defence.



*Öcalan*, the leader of the Kurdish separatist organization, PKK had received nearly 700 visits from his lawyers during the period 1999 to 2007. When it was established that the lawyers had been passing on orders from Mr Öcalan to members of the PKK, it was decided that the meetings between Mr Öcalan and his lawyers should be recorded. These measures were challenged by Mr Öcalan, who eventually filed an application with the Strasbourg court. The Strasbourg court did not consider the recordings to violate the ECHR.<sup>1220</sup> The cases of *Campbell* and *Foxley* also address the issue of possible abuse. However, in *Campbell* the Strasbourg court made clear that the mere possibility of abuse is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship, and that any interference by the authorities would fail to meet the proportionality *stricto sensu* test.<sup>1221</sup>

Irrespective of the scope actually afforded by Articles 6 and/or 8 of the ECHR, the case of *Vinci Construction* reveals a weakness in the ECHR system. In *Vinci*, the Strasbourg court was not concerned so much by the fact that the French Competition Authority had actually copied documents covered by the privilege, but rather with the fact that the French courts had not carried out a proper review of those measures and ordered the restitution of any documents protected by the privilege. As pointed out by the president of the General Court in *Akzo*, the mere disclosure of privileged documents may cause irreparable harm.<sup>1222</sup> Thus, ordering the restitution of any documents covered by legal professional privilege would not solve the problem, as the authorities will then already have had time to peruse the documents.

## 12.4 The ECJ's view on legal professional privilege

### 12.4.1 The emergence of the privilege under EU law – AM & S

Similar to so many other rights and privileges afforded under EU law, it has been the ECJ's role to establish and define the scope of the legal professional

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<sup>1220</sup> *Öcalan v Turkey*, judgment of 18 March 2014, Applications nos. 24069/03, 197/04, 6201/06 and 10464/07.

<sup>1221</sup> *Campbell v the United Kingdom*, judgment of 25 March 1992, Application no. 13590/88, para 52.

<sup>1222</sup> Joined Cases T-125/03R and T-253/03R, *Akzo Nobel Chemicals and Akcros Chemicals v European Commission*, EU:T:2003:287, para 166 and 167.

privilege. The privilege was first recognized by the Court in 1982 in the now-classic case of *AM & S*.<sup>1223</sup>

In February 1979, the Commission carried out unannounced inspections at the premises of American Mining & Smelting Europe Ltd ('AM & S'), searching for evidence of a price-fixing and market-sharing cartel. At the conclusion of the inspection, the Commission officials left AM & S with a written request for further specified documents. AM & S refused to make some of these documents available, claiming that they were protected by legal professional privilege. The Commission's answer was to carry out a new dawn raid, and seek access to the documents in question. AM & S refused to cooperate and lodged an application with the ECJ. The application was based on the submission that in all the Member States, written communications between lawyer and client were protected by virtue of a principle common to all those states.

In its ruling, the ECJ did recognize that it must take into account the principles and concepts common to all Member States in respect of the confidentiality of lawyer-client communication. It also acknowledged that written communication between lawyer and client was protected throughout the EU and that it served the requirement that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.<sup>1224</sup> As far as the protection of written communication between client and lawyer was concerned, the Court recognized that although all Member States provided protection, the scope and application of the principle of such protection varied among the Member States. In some Member States the protection against disclosure was based principally on a recognition of the very nature of the legal profession, in as much as it contributed towards the maintenance of the rule of law. In other Member States, the protection was based on a more specific requirement – namely that the rights of the defence must be respected; moreover this right was recognized in the first mentioned states.<sup>1225</sup>

Apart from these differences, the Court was able to establish certain features that were common to the laws of all Member States, namely:

1. Although some Member States did not protect communications with in-house counsels, all Member States recognized that communications with independent lawyers (lawyers that are not

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<sup>1223</sup> Case C-155/79, *AM & S Europe Ltd v the Commission of the European Communities*, EU:C:1982:157.

<sup>1224</sup> *Ibid*, para 18.

<sup>1225</sup> *Ibid*, para 20.

bound to their client by a relationship of employment) should be protected, and

2. as for the nature of the documents deserving protection, all Member States recognized that communications made for the purposes and in the interests of the client's right of the defence should be privileged.<sup>1226</sup>

Thus, the Court concluded, under EU law the legal professional privilege protects communications between a client and an independent lawyer that are made for the purpose and in the interests of the client's right of the defence. This, the Court stated, was also in line with Regulation 17/62 itself, as the regulation aimed at ensuring that the rights of the defence may be exercised in full.<sup>1227</sup> In order to ensure this, the Court concluded, the protection must cover all written communication exchanged after the initiation of the administrative procedure under Regulation 17. However, the Court declared, it must also be possible to extend the protection to earlier communications which have a relationship with the subject-matter of that procedure.<sup>1228</sup> Furthermore, the privilege would only apply to communications with independent lawyers entitled to practice their profession in one of the Member States, regardless of state, but could not be extended beyond that limit.<sup>1229</sup>

Now the right to legal professional privilege had been established at EU level. However, many were dissatisfied with its scope, arguing that it was too narrow, and that communications with in-house lawyers also deserved protection.<sup>1230</sup> The year after the Court's ruling in *AM & S*, the European Company Lawyers Association, ECLA, was established with the explicit aim to promote an expansion of the legal professional privilege.<sup>1231</sup>

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<sup>1226</sup> Ibid, para 21.

<sup>1227</sup> Ibid, para 23.

<sup>1228</sup> Ibid, para 23.

<sup>1229</sup> Ibid, para 26.

<sup>1230</sup> See e.g. Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, Fordham International Law Journal, vol. 9, issue 1, 1985, Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM & S Judgment*, Common Market Law Review, 1983, Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, Fordham International Law Journal, vol. 28, issue 4, 2004, and Goffin, *Le Principe de la Confidentialité*, Cahiers de droit européen, 1982.

<sup>1231</sup> See <http://www.ecla.org/profession/legal-privilege/>.

## 12.4.2 Protection of internal documents – Hilti

Those in favour of an expanded scope won a partial victory when the General Court delivered its ruling in the *Hilti* case in 1990.<sup>1232</sup> There the General Court had to deal with the question whether documents drafted by the company's staff, but which reported on legal advice that had been received from independent lawyers, and which itself was covered by legal professional privilege, should be protected.

Here, the General Court declared that the principle of the protection of lawyer-client communication should not be frustrated on the sole ground that the contents of those communications and the legal advice were reported in documents internal to the undertaking. Thus, the Court concluded, the legal professional privilege should also cover internal notes which were confined to reporting the text or the content of those communications.<sup>1233</sup>

## 12.4.3 In-house counsels and the privilege – Akzo

Although expanding the scope of protection somewhat, the *Hilti* case did not affect the role of in-house lawyers or the protection of their legal advice. Thus, the campaign continued. However, a number of years would pass before the EU Courts were to rule on the issue again. It was not until the *Akzo case*, where the ECJ delivered a Grand Chamber ruling in September 2010, that a ruling came on the matter.

In February 2003, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd received unannounced visits from the Commission and the UK Office of Fair Trading. During the dawn raids, there were diverging views as to whether or not five documents should be covered by legal professional privilege. Two of these documents were copies of the same memorandum (one containing handwritten notes) containing information gathered by the general manager in the course of internal discussions with employees. The inspectors were uncertain whether these documents should be protected by the privilege and put them in a sealed envelope. These documents were referred to as belonging to 'Set A'.

As for the three other documents, belonging to Set B, one contained of handwritten notes made by the general manager of Akcros, which had

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<sup>1232</sup> Case T-30/89, *Hilti Aktiengesellschaft v Commission of the European Communities*, EU:T:1991:70.

<sup>1233</sup> *Ibid*, para 18.

allegedly been written during discussions with employees and used when drafting the memorandum in Set A. The two other documents were e-mails between the general manager of Akcros and Mr S, Akzo Nobel's coordinator for competition law. Mr S was enrolled as an *Advocaat* of the Netherlands Bar and a member of Akzo Nobel's legal department, and was thus employed by the company. After examining the documents belonging to Set B, the inspectors took the view that they were not privileged, made copies of them and placed them with the rest of the file.

This compelled the companies to lodge applications with the General Court and the issue was now a matter for the courts. The applicants claimed that the documents in Set A together with the handwritten notes in Set B formed the written basis of an oral communication between client and outside counsel and that the e-mails belonging to Set B were communications between a lawyer and client for the purposes and in the interest of the latter's right of the defence.<sup>1234</sup>

#### **12.4.3.1 The view of the General Court**

The General Court had to take a stance on whether to broaden the legal professional privilege in two different aspects. The first was whether documents other than correspondence between clients and their outside counsels should be protected. In this case, the disputed documents were said to have been drawn up for the particular purpose of a conference call with an independent lawyer and with the specific aim of obtaining legal advice. The second aspect concerned the possibility of expanding the personal scope of the privilege and protecting correspondence with in-house lawyers who were also members of a Member State bar association. In *AM & S* the Court had explicitly excluded in-house counsels from the scope of protection.

As for the nature of documents to be protected, the General Court proved to be willing to expand the scope of protection. While it recognized that the documents in question did not belong to any of the categories expressly identified in either *AM & S* or *Hilti*, it acknowledged that the principle of confidentiality of written communications between a lawyer and client is an essential corollary to the effective exercise of the right of the defence.<sup>1235</sup> Furthermore, the General Court pointed out, the privilege serves the need to ensure that everyone must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those

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<sup>1234</sup> Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, EU:T:2007:287, para 102.

<sup>1235</sup> *Ibid*, para 120.

in need of it. This principle is closely linked to the concept of the lawyer's role as collaborating in the administration of justice by the courts.<sup>1236</sup>

Having established this, the court also acknowledged that in order for a client to be able to consult a lawyer without constraint and for the lawyer to be able to effectively perform the role of collaborating in the administration of justice and providing legal advice for the purpose of the effective exercise of the right of the defence, it may sometimes be necessary for the client to prepare working documents or summaries. This, the General Court declared, may be particularly necessary in matters concerning a large amount of complex information, as is often the case with procedures regarding Articles 101 and 102 TFEU.

Thus, the General Court declared, documents that have been drawn up exclusively for the purpose of seeking legal advice from a lawyer in his or her exercise of the rights of the defence may be covered by the privilege even though the documents were not created for the purpose of being sent to said lawyer.<sup>1237</sup> In the present case, however, it was not evident from the documents in question that they were to form the basis of a consultation with an independent lawyer, and they were therefore not considered to be covered by legal professional privilege.<sup>1238</sup>

As for the second question, whether in-house lawyers who were also members of an EU bar association should be let in from the cold, the General court was not equally willing to expand the scope of protection. Instead, it referred to the *AM & S* case, where the ECJ had explicitly stated that only communications with independent lawyers should be protected, basing this view on the concept of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence, and in the overriding interests of ensuring the proper administration of justice, such legal assistance as the client needs.

The General Court rejected the applicants' claim that the ECJ, when requiring independence in *AM & S*, had meant that the lawyer must be a member of a bar association rather than lacking a relationship of employment with the client. Nor did the General Court consider that the fact that a number of Member States now accept correspondence with in-house counsels to be protected by the privilege should merit another interpretation of the EU legal professional privilege. Instead, the General Court pointed to the fact that a considerable number of Member States do not allow in-house

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<sup>1236</sup> Ibid, para 121.

<sup>1237</sup> Ibid, para 123.

<sup>1238</sup> Ibid, para 135.

lawyers to be admitted to a bar or law society, and that some Member States, although allowing in-house lawyers to become members of the bar, do not protect communication with such lawyers. The General Court rejected the applicants' claim. The applicants appealed the decision not to expand the personal scope of protection to the ECJ.

#### **12.4.3.2 The view of the ECJ**

The appeal to the ECJ was equally unsuccessful. In a Grand Chamber ruling, the Court stressed the importance of independence, referring to its ruling in *AM & S*. The requirement of independence, the Court stressed, is based on the conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. An in-house lawyer, the Court held, does not enjoy the same degree of independence from his or her employer as an external counsel, even if he or she is member of a bar or law society.<sup>1239</sup> Consequently, the in-house counsel is less able to deal effectively with any conflicts between professional obligations and the aims of the client. The position as an employee prevents the lawyer from ignoring the commercial strategies of his or her employer, which in turn affects the lawyer's ability to exercise professional independence.

In the alternative, the parties had argued that the development of EU law prompted a revision of the scope of protection afforded by the legal professional privilege. According to the applicants, the adoption of Regulation 1/2003 had increased the need for in-house counsels. Although not explicitly stated in the ruling, it is presumed that the parties alluded to the abolition of the notification system and the fact that companies now need to carry out their own assessment as to whether or not a restrictive agreement merits an exemption under Article 101(3) of the TFEU. The Court did not agree with the applicants. Instead, it referred to Recitals 25 and 26 in the preamble to the regulation which state that the detection of infringements is growing ever more difficult and that, in order to ensure effective application of the competition rules, the Commission should also be empowered to enter private homes. Thus, the Court continued, Regulation 1/2003 aimed to reinforce the extent of the Commission's powers of inspection in particular as regards documents which may be subject of such measures. Therefore, the

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<sup>1239</sup> Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, EU:C:2010:512, para 45.

adoption of Regulation 1/2003 could not justify a change in the case-law established in *AM & S*.<sup>1240</sup>

Nor did the Court agree with the applicants' argument that the General Court's ruling concerning the scope of the privilege lowered the level of protection of the right of the defence.<sup>1241</sup> The Court took this argument to mean that the rights of the defence must include the right of freedom of choice as to the lawyer who will provide the legal advice. According to the Court, the right of the defence did not entail such freedom of choice.<sup>1242</sup> To the disappointment of many in-house lawyers, the ECJ was thus not willing to expand the scope of protection to encompass them, irrespective of whether they were members of a bar association.

## 12.5 The scope of protection afforded under EU law – Concluding remarks

Nearly four decades have passed since the ECJ declared that there is indeed a principle of legal professional privilege under EU law, and that this privilege protects communications made between a client and an independent lawyer for the purpose and in the interests of the client's right of the defence.

Over the years, the General Court has chosen to expand the concept slightly. Today, the privilege also covers internal documents summarizing correspondence between the company and its external lawyers as well as documents that have been drawn up exclusively for the purpose of seeking legal advice from a lawyer in his or her exercise of the rights of the defence. However, the eager attempts by in-house lawyers and others to expand the personal scope of protection have proven unsuccessful. The requirement that the lawyer in question should be independent and not bound to the client by an employment relationship still stands. Furthermore, the Court has chosen to limit the scope of protection to correspondence between the company and external lawyers admitted to an EU Member State bar. Thus, to the extent that a client consults with his external lawyer in the US or any other country outside the EU, such correspondence may be reviewed by the Commission during the course of a dawn raid.

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<sup>1240</sup> Ibid, paras 78-87.

<sup>1241</sup> Ibid, para 90.

<sup>1242</sup> Ibid, paras 93-97.



Although it may be difficult to determine the standards of a bar association of a third country, and although the legal advice sought by a lawyer outside the EU will not necessarily deal with matters of EU law, it is difficult to accept this requirement. Indeed, when it comes to suspected infringements of EU competition rules, it is not uncommon that such alleged practices have effects or originates from countries outside the EU, such as the US for example. If the privilege is considered to belong to the client rather than the lawyer, and if its aim is to ensure the client's right of the defence and/or the greater interest of ensuring a proper administration of justice, then it should cover any correspondence with outside lawyers which can have bearing on the case at hand. Otherwise, there is an apparent risk that the client may not be able to properly exercise the right of the defence. The problems created by a limited scope of protection became even more apparent with the ECJ's recent ruling in *Nexans* where the Court confirmed the right of the Commission to review and copy documents related to projects with effects outside the EU.<sup>1243</sup>

## 12.6 Legal professional privilege – What conclusions may be drawn?

While the EU Courts have focused on the scope of protection, determining which types of correspondence or other documents that deserve protection,<sup>1244</sup> and how the notion of a 'lawyer' is to be defined, the Strasbourg court has not carried out a detailed analysis of the types of documents that should be protected or whether the correspondence need to be between a client and an independent legal advisor. However, in *Vinci Construction*, the Strasbourg court did refer to the confidentiality '*qui s'attache aux relations entre un avocet et son client*',<sup>1245</sup> a choice of words that may be taken as an indication that the Strasbourg court would limit the right to cover only correspondence with lawyers who are members of a bar association.

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<sup>1243</sup> Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030. See Section 8.5 above.

<sup>1244</sup> However, as for the nature of documents covered by the privilege, the Strasbourg court appears to take the view that any correspondence between a lawyer and his client should be protected, see e.g. *Foxley v United Kingdom*, judgment of 20 June 2000, Application no. 33274/96, at para 43.

<sup>1245</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10.

Furthermore, while the principle is considered by the Strasbourg court to be a corollary to the privilege against self-incrimination,<sup>1246</sup> the court takes a broader view than does the ECJ on the privilege and on what or who it is supposed to protect. In *Vinci Construction*, it was clear that the Strasbourg court considered that questions of legal professional privilege should be assessed under Article 8 rather than Article 6 of the ECHR.<sup>1247</sup> If the privilege is strictly limited to the right of the defence, such a stance could be questioned. However, as is clear from other rulings, the Strasbourg court does also consider the privilege from the standpoint of the administration of justice, and the interest in ensuring an open and candid communication between client and lawyer. Thus in *Michaud v. France*, it declared that while Article 8 protects the confidentiality of all correspondence between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This, the court declared, is justified by the fact that lawyers are assigned a fundamental role in a democratic society – that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves.<sup>1248</sup>

In the case of *André and Another v. France*, the Strasbourg court acknowledged the connection between the legal professional privilege and the privilege against self-incrimination. There the court declared that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his client. Furthermore, the court continued, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client to avoid self-incrimination, which 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'.<sup>1249</sup> Interesting to note is the fact that the Strasbourg court's reasoning in *André and Another* deviates somewhat from its reasoning in cases dealing exclusively with the privilege against self-incrimination.<sup>1250</sup> In such cases the court has looked at means rather than content, and has

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<sup>1246</sup> See e.g. *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91.

<sup>1247</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 47.

<sup>1248</sup> *Michaud v France*, judgment of 6 December 2012, Application no. 12323/11, para. 118.

<sup>1249</sup> *André and Another v France*, judgment of 24 July 2008, Application no. 18603/03, para 41.

<sup>1250</sup> For a further discussion on this, see Chapter 11.

excluded ‘real evidence’, including documents obtained pursuant to a warrant, from the scope of protection.<sup>1251</sup>

While the Strasbourg court has taken a broader view and declared that both Article 6 and Article 8 of the ECHR may come into play in cases dealing with the legal professional privilege, the EU Courts have chosen a narrower path. This is not surprising, given the fact that there is no statutory legislation providing protection. Instead the EU Courts are charged with providing such protection through the development of a general principle of EU law. When the ECJ was to establish and define the scope of the legal privilege in 1982, there was no case-law from the Strasbourg court and the ECJ chose to frame the privilege upon those features that were common to the laws of all Member States. Thus, the privilege covered only correspondence between client and external lawyers, and stipulated that the lawyer in question must be admitted to an EU Member State bar. In principle, there is nothing to say against the Court adopting this limited approach. Had the Court instead chosen to give the privilege a wider scope, it could easily have been argued that it was resorting to judicial activism. However, whether such limited scope is desirable or not is another matter, and today, a broader view on the privilege could be motivated or even required by the subsequent case-law from the Strasbourg court which appears to afford protection to all correspondence between lawyer and client.<sup>1252</sup> Given the fact that the Strasbourg court often assesses the privilege under Article 8 of the ECHR, the EU Courts may have to apply Article 7 of the Charter in order to ensure that the requirements in Article 52(3) of the Charter are met.

Determining who and what deserves protection will necessarily affect the scope of protection afforded. If it is the lawyer that is protected by the privilege, then a limitation in the scope of protection to correspondence between a client and external counsels is justified. However, if the privilege is rather, or also, considered to have a preventative purpose, ensuring that individuals act within the law, then it could be argued that advice from in-house counsels should also deserve protection.<sup>1253</sup>

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<sup>1251</sup> *André and Another v France*, judgment of 24 July 2008, Application no. 18603/03, para 41.

<sup>1252</sup> See *Foxley v United Kingdom*, judgment of 20 June 2000, Application no. 33274/96, at para 43.

<sup>1253</sup> Although the prevailing view is that the privilege has a preventative effect, writers, such as *Ho* and *Gippini-Fournier*, are not equally convinced that the privilege has such effect. This thesis does not purport or seek to determine the actual effects of the privilege. However, it must be noted that an either/or approach needs to be taken. Either there is no preventative effect, and that part of the rationale behind the privilege is lost, or there is such effect in which

At the same time, the arguments of the ECJ in cases such as *AM & S* and *AKZO* are valid and must not be ignored.<sup>1254</sup> In *AM & S*, the Court declared that the requirement of independence was based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. Thus, any lawyer who is a member of a bar association but is also employed by a client lacks the independence necessary to provide advice 'in the overriding interests of that cause'. This view was confirmed in *Akzo*, where the Court made clear that an in-house counsel who is a member of a bar association is nevertheless employed by the client. Therefore, he or she may not ignore the commercial strategies pursued by the employer, and this in turn affects the ability to exercise professional independence. Furthermore, the Court added, in-house lawyers may be required to carry out other tasks which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between lawyer and employer, the Court declared. It follows, the Court continued, from both the in-house lawyer's economic dependence and the close ties with the employer, that he or she does not enjoy a level of professional independence comparable to that of an external lawyer. Thus, as noted by the ECJ, the advice provided by an in-house counsel may be 'tainted' both by economic dependence and the close ties with the employer, and will not necessarily serve the interests of a proper administration of justice.

This is undeniably a valid argument given the fact that the ECJ considers the privilege to serve the interest of a proper administration of justice, and considering the fact that, the privilege provides absolute protection and therefore necessarily prevails over the truth-seeking mission of the legal process, which is a major public interest. As pointed out by *Gippini-Fournier*, the value of protecting lawyer-client communication must therefore be one that enhances the welfare of society as a whole in a manner and to an extent that, in the clear majority of cases, compensates for the detrimental effects of non-disclosure on the law-enforcement process.<sup>1255</sup> The Court's conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the

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case a broader application of the privilege than the one accepted by the Court may be justified.

<sup>1254</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157 and Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, EU:C:2010:512.

<sup>1255</sup> Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, *Fordham International Law Journal*, vol. 28, issue 4, 2004, p. 979.

overriding interests of that cause, such legal assistance as the client needs, compensates for the detrimental effects of any non-disclosure.

While accepting and even endorsing the ECJ's view that only correspondence with independent lawyers should be protected, there is little or no reason to accept the Court's stance that correspondence between clients and their lawyers who are members of non-EU bars should be excluded from the scope of protection. Clearly, if a company seeks legal advice on competition law matters from its US counsels, such advice should be protected and not be seized or copied by the Commission. This is especially so since the Court itself declared in *Nexans* that, given the global reach of the suspected cartel, the Commission should be able to review documents linked to projects located outside the EU – as they were likely to provide relevant information regarding the suspected infringement.<sup>1256</sup> However, despite the limited scope of protection afforded by the ECJ, it appears that also the Commission takes this view and refrains from making copies of correspondence with non-EU lawyers.

A further limitation in the EU privilege that may be questioned concerns the limitation to correspondence that has a relationship with the subject-matter of the investigation. In *AM & S*, the Court declared that the protection must cover all written communication exchanged after the initiation of the administrative procedure as well as earlier communications which have a relationship with the subject-matter of that procedure.<sup>1257</sup> Although the Commission, when performing a dawn raid, should of course focus on documents having a relationship with the subject-matter of the investigation and may not copy documents or files falling outside its ambit, the review carried out by the Commission will necessarily also cover other documents. If the Commission would then be allowed to peruse correspondence between the company and its external lawyers, where the correspondence lacks connection with the subject-matter of the investigation, this could affect the company's right of the defence in other matters, and generally make the company less willing to confide in its lawyers. Limiting the privilege in this respect therefore does not appear to further a proper administration of justice, and it could also be questioned whether it meets the applicable ECHR standard, as the Strasbourg court apparently takes the view that all correspondence between client and lawyer should be protected.<sup>1258</sup>

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<sup>1256</sup> Case C-37/13 P, *Nexans SA and Nexans France SAS v. the European Commission*, EU:C:2014:2030, paras 40-41.

<sup>1257</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities* EU:C:1982:157, para 23.

<sup>1258</sup> See e.g. *Foxley v United Kingdom*, judgment of 20 June 2000, Application no. 33274/96, at para 43.

A final note on this issue concerns the lack of harmonization and the fact that the privilege takes different shapes in different Member States. In this connection, *Riley* points to the fact that the ECN can contemplate a situation in which information that is privileged in one jurisdiction can be seized in another Member State where the privilege is narrower and then be sent to that first jurisdiction where it can be used in evidence against a defendant undertaking.<sup>1259</sup> Thus, without a common frame for protection throughout the EU, there is the risk that the protection afforded in some Member States or by the EU Courts is of no real value.

To conclude, while a limitation of the privilege to cover only correspondence between a company and its independent counsels seems both rational and logic, it is difficult to see why the privilege should be limited to correspondence covered by the subject-matter of the inspection or to correspondence with lawyers admitted to Member State bars only.

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<sup>1259</sup> Riley, *Developing Due Process in EC Competition Law*, *The Competition Law Review*, vol. 2, issue 1, August 2005, p. 3.

## 13. Access to courts

The previous chapters have revealed that the Strasbourg court is often willing to accept rather far-reaching and intrusive investigatory measures as long as the procedural safeguards surrounding these measures are considered adequate. One such safeguard, which in many situations appears to be considered a prerequisite, concerns access to courts. This chapter examines the possibilities for judicial review granted to the companies targeted by the Commission's inspections. The first part focuses on the possibilities for companies to take action while the dawn raid is still underway, and the second part focuses on the ex post review of inspection decisions and measures taken on their basis.

### 13.1 Interim measures

It is one thing to describe what the Commission may and may not do during the course of a dawn raid. For the company to make sure that the Commission acts within its limits is a completely different matter. There are a number of factors affecting the possibilities for a company to challenge inspection decisions and measures taken during the course of an investigation.

First, there is the element of surprise. Second, there is the threat that any objections to the inspection or measures taken during its course may be regarded by the Commission as obstruction, and thus meriting a fine. Thirdly, and perhaps most importantly is the fact that unless the Commission adopts a formal decision to remove an item or take a certain measure, the possibilities to challenge such actions are limited. During a dawn raid, Commission officials may take measures to which the company objects. They may want to make copies of documents that the company considers protected by legal professional privilege, refuse to wait for external counsel to arrive, ask questions that go beyond the scope of what constitutes 'oral explanations' or the subject-matter of the inspection, etc. The possibilities for the company to challenge such measures and apply for suspension or interim relief vary depending on the nature of the measure.

First of all, it should be recalled that Article 278 TFEU lays down the principle that legal actions do not have suspensory effect, since acts of the EU institutions are presumed to be lawful.<sup>1260</sup> It is therefore only exceptionally that the judge hearing the application may order suspension of operation of an act that is being contested before the General Court or other interim measures.<sup>1261</sup>

Second, the possibility to seek suspension of an action or interim relief under Articles 278 and 279 of the TFEU requires that the company also challenges the measure as such under Article 263 TFEU. Interim relief cannot be approved unless there is also a request for annulment. Thus, if it is not possible to seek annulment of the measure in question, there is no possibility for the company to seek interim relief or suspension.<sup>1262</sup> In the case of *IBM v. Commission*, the Court declared that where acts or decisions adopted by a procedure involve several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.<sup>1263</sup> It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.<sup>1264</sup> In *Cimenteries CBR v. Commission*, the General Court defined challengeable measures as measures whose legal effects are binding on and capable of affecting the interests of the applicant, by having a significant effect on the applicant's legal position.<sup>1265</sup> A decision made during the course of a dawn raid to reject a request for legal professional privilege is considered challengeable, and a company may thus not only challenge the measure before the General Court but also request the General Court to suspend the action under Article 278 TFEU. If on the other hand, the measure is deemed only to pave the way for a final decision in the underlying competition case, no standalone action is available and the company may not seek interim relief or suspension of the measure in question.

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<sup>1260</sup> For a further presentation of Articles 278 and 279 TFEU, see Section 3.2.4.2 above.

<sup>1261</sup> See e.g. Case T-62/06 RENV-R, *Eurallumina SpA v European Commission*, EU:T:2011:261, para 17.

<sup>1262</sup> See Section 3.2.4 above.

<sup>1263</sup> Case C-60/81, *IBM v Commission of the European Communities*, EU:C:1981:264, para 10.

<sup>1264</sup> *Ibid*, para 11.

<sup>1265</sup> Joined Cases T-10-12 and 15/92, *Cimenteries CBR and Others v Commission of the European Communities*, EU:T:1992:123, para 28.



In the case *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, the President of the General Court addressed this issue.<sup>1266</sup> The case concerned an application for interim measures and suspension of certain measures that the Commission was about to take in relation to a dawn raid. Among other things, the Commission had disregarded the objections by the investigated company that certain documents were protected by legal professional privilege and therefore out of reach for the Commission. Instead the inspectors had put these documents directly in their case file without first adopting a second decision (the first being the inspection decision), which would give the undertaking proper opportunity to challenge the Commission's position before the General Court.<sup>1267</sup>

At the oral hearing, the Commission had argued that Akzo Nobel and Akcros Chemicals could have challenged the inspection decision, and that there was thus no need for the Commission to adopt a separate decision regarding the nature of the documents. This was not accepted by the President of the General Court. He referred to cases such as *Dow Benelux*,<sup>1268</sup> and declared that an undertaking cannot plead the illegality affecting the investigation procedures as a ground for annulment of the measure on the basis of which the Commission carried out that investigation.<sup>1269</sup> In other words, the company cannot use any unlawful measures taken during the course of the inspection as a ground for challenging the inspection decision as such. The implementation of the decision does not affect the lawfulness of the decision.<sup>1270</sup>

The fact that a measure is not deemed to produce binding legal effect is problematic not only because it prevents the company from requesting suspension and avoiding possible irreparable damage being caused; it is also problematic because it limits the possibilities for the company to seek judicial review of the Commission's actions and annulment of its decisions. The matter of subsequent judicial review will be discussed in detail in Section 13.2 below. However, already at this point the General Court's statement in the *Akzo Nobel* case may serve to illustrate part of this problem.

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<sup>1266</sup> Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akcros Chemicals v European Commission*, EU:T:2003:287.

<sup>1267</sup> *Ibid.*, para 146.

<sup>1268</sup> Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379.

<sup>1269</sup> Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals and Akcros Chemicals v European Commission*, EU:T:2003:287, para 146.

<sup>1270</sup> Case 85/87, *Dow Benelux v Commission of the European Communities*, EU:C:1989:379, at para 49.

There the General Court declared:

[t]he Court would point out that the opportunity which the undertaking has to bring an action against a final decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.<sup>1271</sup>

In cases of legal professional privilege, the rights of the parties are not considered adequately protected if the parties have to await the final outcome in the underlying competition case, as (i) the Commission may not find an infringement, and (ii) this would not prevent the irreversible consequences resulting from improper disclosure of documents protected by the privilege. Add to this the fact that as long as the General Court has not annulled the measure in question, the Commission may circulate the documents to other competition authorities within the ECN, allowing any damage to spread like ripples on water.

As for the other two issues that may affect the possibilities or incentives to challenge any measures taken by the Commission during a dawn raid, these were also addressed by the President of the General Court in the case of *Akzo Nobel Chemicals and Akros Chemicals v. Commission*.

As regards the element of surprise, the President of the General Court pointed out that it is unrealistic to assume that a company will always have time to challenge measures in time to prevent irreversible harm from being caused. In situations where the Commission declares that it will immediately read documents which the company considers to be privileged, the company, which has just learnt of the inspection decision, will not have an actual or effective possibility to challenge such measure before the General Court, and in particular before the judge with jurisdiction to make interim orders, before the Commission reads the documents in question. In such circumstances, the judge declared, the interests of the undertaking do not seem to be adequately protected by Articles 278 and 279 of the TFEU.<sup>1272</sup>

The President of the General Court also addressed the element of pressure exercised by the Commission officials. Having noted that the applicants'

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<sup>1271</sup> Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities*, EU:T:2007:287, para 47.

<sup>1272</sup> *Ibid*, para 146.

representatives had been firmly opposed to a cursory examination of the documents in question, and that it was only when they were reminded of the possible criminal consequences of obstructing the investigation that they had agreed to allow the leader of the investigation to glance quickly at the documents, the President conceded that it was possible that these warnings were sufficient to vitiate the consent of the applicants' representatives. In any event, the circumstances in which the warnings were formulated did not make it possible to conclude, at that stage, that the applicants gave their unreserved consent to the review of the documents.<sup>1273</sup>

To conclude, the possibilities for a company to act while the inspectors are still at its premises are limited to say the least. There is no possibility to seek interim orders for implementing measures and even in situations where the company may actually seek judicial review, the factual circumstances surrounding dawn raids may prevent the company from doing so in time to prevent any harm. Furthermore, and as pointed out by the President of the General Court, the fear of sanctions for obstruction may force companies to refrain from invoking their rights. Clearly, such order is not satisfactory from a due process perspective, especially given the fact that there is no *ex ante* control of inspection decisions within the EU system.

## 13.2 Ex post review of inspection decisions and measures taken on their basis

As has been discussed in detail above, dawn raids constitute a serious interference with the integrity of targeted companies and their employees. As far as fundamental rights are concerned, it is apparent that this method of searching for evidence may interfere with the right to privacy, and companies have therefore been prone to invoke Article 8 of the ECHR or Article 7 of the Charter in relation to dawn raids. When determining whether or not an interference with a company's right to privacy is justified, the two courts assess the procedural safeguards available. One such safeguard is the availability of an *ex post* review. This section examines the importance and required scope of such right in more detail.

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<sup>1273</sup> Ibid, para 140.

## 13.2.1 Dawn raids and the right to a fair trial – The view of the Strasbourg court

### 13.2.1.1 Review of measures taken during the inspection – *Ravon v. France*

The first case that will be analysed, and which is one of the cases that triggered the debate on Article 6 of the ECHR and its applicability to dawn raids, is the case of *Ravon v. France*.<sup>1274</sup> The French tax authorities suspected the two companies, TMR International Consultant ('TMR') and SCI Rue du Cherche-Midi 66 ('SCI'), of tax evasion. Both companies were controlled by Mr Ravon. In 2000, an investigation was launched against TMR and SCI. During the course of this investigation, the tax authorities requested and received warrants to search the premises of the companies as well as the home of Mr Ravon. The inspections were carried out in July 2000 and documents were seized by the authorities.

Suspecting that the inspections had been vitiated by irregularities, Mr Ravon and the two companies under his control challenged the operations in their entirety before the *Tribunaux de grande instance* of both Paris and Marseille, requesting their annulment.<sup>1275</sup> These two courts were also the courts that had authorized the inspections in the first place. The appeals were considered inadmissible because the courts were not empowered to review the measures taken by the tax authorities once the inspections had been effected.<sup>1276</sup> The only route available to Mr Ravon and his companies was instead the option of a '*pourvoi de cassation*' where the French court of cassation, *la Cour de Cassation*, could review a decision on points of law and procedure. No other judicial remedy was available to Mr Ravon or his companies. In the end, no criminal charges were brought against Mr Ravon or his companies, which in turn meant that it was not possible to obtain a review of the legality of the inspections. Mr Ravon and his companies filed an application with the Strasbourg court arguing that they had been deprived of an effective judicial remedy to challenge the decisions authorizing the inspections. The ECtHR ruled in favour of the applicants and concluded that the right of judicial access:

[i]mplies with respect to premises searches, that the persons sought may obtain an effective judicial review, in fact and law, of the decision authorizing the search and, if any, of the measures taken on its basis; the remedy or

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<sup>1274</sup> *Ravon v France*, judgment of 21 February 2008, Application no. 18497/03.

<sup>1275</sup> *Ibid*, para 8.

<sup>1276</sup> *Ibid*, paras 8-10.

remedies available must allow, in the event irregularities are uncovered, either to prevent the upcoming search or, in the event a search deemed unlawful has already taken place, to provide the relevant party with an appropriate remedy.<sup>1277</sup>

The court also stressed the fact that – contrary to what the government had argued – the requirement of a judicial authorization does not compensate for the lack of an ex post review.<sup>1278</sup> One reason is that, at the time of the ex ante review, the targeted company or person is not yet aware of the procedure, and may thus not invoke its rights.<sup>1279</sup>

The court furthermore pointed to the fact that there was no legal obligation on the part of the investigating authority to inform the companies of their right to have the measures reviewed by the authorizing court while the search was still conducted. In the present case, the applicants had not been informed of such right and the inspection decision did not provide the contact details of the authorizing judge. Nor did the applicable legislation provide the targeted companies or persons with the right to call for legal assistance or any other external contacts.<sup>1280</sup>

The French government had argued that there was a possibility to have an effective ex post review. However, the Strasbourg court did not accept this argument, as it appears that such a review was dependent on a subsequent proceeding against the persons/companies in the underlying tax matter. In the case at hand, no criminal charges were brought against Mr Ravon or his companies. The court thus concluded that neither Mr Ravon nor the companies controlled by him had been entitled to a fair trial, and an infringement of Article 6(1) of the ECHR was established.

Just a few months after the Strasbourg court had delivered its ruling in *Ravon*, the Strasbourg court received applications from three other French companies claiming that they had not been entitled to an effective review of inspections carried out at their premises. This time, the inspections had been carried out within the frame of competition cases.

### **13.2.1.2 Review of inspection decisions – Primagaz**

The French company *Compagnie des gaz de pétrole Primagaz S.A.* ('Primagaz') was suspected of restrictive practices contrary to French

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<sup>1277</sup> Ibid, para 28.

<sup>1278</sup> Ibid, para 30.

<sup>1279</sup> Ibid, para 30.

<sup>1280</sup> Ibid, para 31.

competition legislation and Article 101 TFEU. In June 2005, the civil courts of Lille and Paris authorized the French Competition Authority to carry out a dawn raid at the premises of Primagaz. On 14 June 2005, the inspection was effected. Primagaz appealed the inspection decisions to the French Court of Cassation, *la Cour de Cassation*, claiming that the decisions were contrary to Articles 6(1), 8 and 13 of the ECHR. Two years later, in November 2007, the Court of Cassation dismissed the appeal.

Primagaz then turned to Strasbourg. Relying on the Strasbourg court's ruling in *Ravon*, the company argued that it had not been entitled to a fair trial as the only judicial remedy available was the '*pourvoi en cassation*', where the Court of Cassation may only review decisions on points of law and procedure.

The French government argued that the system introduced in 2008, three years after the dawn raids were carried out, compensated for any former weaknesses in the legal system. According to these new rules, it was possible for companies that had appealed against an inspection decision to the Court of Cassation prior to the new rules' entry into force, and where the Court of Cassation had dismissed such an appeal, to turn to the Court of Appeal with a new appeal. However, there was a catch. This possibility would be granted only if the competition authority's investigation was successful and resulted in an infringement decision against the company/-ies. There was thus no possibility for a standalone action against the inspection decision or the measures taken on the basis of such decision.

The government's line of argumentation was rejected by the Strasbourg court. Instead the court considered that in order for a company to be ensured the right to a fair trial, this possibility should be guaranteed and thus not dependent on a decision in the underlying competition case, and offered within a reasonable period of time. Or, as the court put it:

*Or, la Cour rappelle qu'en plus d'un contrôle en fait et en droit 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.<sup>1281</sup>*

Here, there was still no decision by the competition authority. As three years had passed since the dawn raid was carried out and the possibility of appeal was dependent on a future decision by the French Competition Authority,

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<sup>1281</sup> *Compagnie des Gaz de Pétrole Primagaz v France*, judgment of 21 December 2010, Application no. 29613/08, para 28.

the Strasbourg court established that there was indeed an infringement of Article 6(1) and the right to a fair trial.

### 13.2.1.3 Timely and guaranteed review – Canal Plus

The French Competition Authority appears to have been very active in 2005. Not only did it investigate the activities of Primagaz and its competitors; in February 2005, it decided to look into the activities of companies active in the media sector, and to visit the two media companies Canal Plus S.A. and Sport+ S.A., as the authority suspected them of engaging in restrictive practices and/or abusive conduct contrary to both French competition legislation and Articles 101 and 102 TFEU.

Three months after the dawn raids, in April 2005, the companies turned to the *Tribunal de grande instance de Paris*, which was the court that had authorized the inspections. The applicants complained of the way the dawn raids had been carried out, claiming that the operations had failed to respect Articles 6, 8 and 13 of the ECHR. The applicants sought to have a written report from the inspection<sup>1282</sup> annulled, and some of the seized documents returned. The companies' request was accepted in part. However, any joy over the partial success soon turned into disappointment as the French Competition Authority successfully appealed the decision to the Court of Cassation. In its ruling, the Court of Cassation declared that the system in place did indeed respect the requirements of the ECHR as there is a requirement of prior judicial authorization, and the judge authorizing the inspection is also empowered to intervene during the course of the inspection. Furthermore, there may be a subsequent control by the Court of Cassation.

However, the Court of Cassation pointed out, the lower court judge may not intervene once the inspections have been terminated. In the present case, the companies had not complained of the inspection while it was still being executed, and the lower court judge did thus exceed its powers when accepting the requests made by the companies in April 2005. The decision was therefore annulled by the Court of Cassation. Having exhausted all national remedies, Canal Plus and Sport+ turned to Strasbourg. In their application to the Strasbourg court, the two companies claimed that the French system did not allow them the right to a fair trial, as the only possibility of appealing an inspection decision is through a '*pourvoi en cassation*' where the review is strictly limited to procedural irregularities and points of law.

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<sup>1282</sup> Fr. *le procès-verbal*.

Ruling upon the matter, the Strasbourg court commenced by reiterating its statement in *Ravon*, that when it comes to searches, there must be a possibility of judicial review, covering points of law as well as fact, both of the decision authorizing the search and of the measures taken on the basis of such authorization.<sup>1283</sup> Using this as a basis for its analysis, the court then recognized that in the present case, the only option available to the companies was the ‘*pourvoi en cassation*’ under which the parties could contest only the legality of the inspection decision, and which would not allow an assessment of the underlying facts leading up to such decision. According to the Strasbourg court, again referring to *Ravon*, such review could not be deemed to meet the standards of an effective review under Article 6(1) of the ECHR.<sup>1284</sup>

The Strasbourg court then addressed the new rules in place which extended the possibilities of review. However, as it had concluded in *Primagaz*, these amendments were not considered sufficient in the present case because the two companies would only be able to request a review of the inspection decision if there was an infringement decision in the underlying competition case. There was thus no possibility for standalone action.<sup>1285</sup>

Furthermore, as in *Primagaz*, the court stressed that the possibility of review should not only be certain, such review should also be timely. Just as in *Primagaz*, the companies were still awaiting the competition authority’s final decision in the competition case, and the court concluded that there had indeed been an infringement of Article 6(1) of the ECHR.<sup>1286</sup>

#### **13.2.1.4 Restitution of documents – Vinci Construction**

As the facts of this case were presented in detail in Section 12.2.4 above, this section will provide only a short presentation of the background. In 2008, the French Competition Authority carried out inspections at the premises of a number of companies active in the construction industry, suspecting them of engaging in restrictive practices contrary to Article 101 FEUF and French competition legislation. During the inspections, numerous documents and electronic files were seized along with the entire mailboxes of certain employees. The targeted companies challenged the inspections, alleging that they had been widespread and indiscriminate, as thousands of electronic

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<sup>1283</sup> *Société Canal Plus and Others v France*, judgment of 21 December 2010, Application no. 29408/08, para 36.

<sup>1284</sup> *Ibid*, para 36.

<sup>1285</sup> *Ibid*, para 40.

<sup>1286</sup> *Ibid*, para 45.



documents and entire mailboxes had been seized by the authority – and that many of these documents either lacked connection with the business covered by the inspection decision, or were protected by legal professional privilege. The companies also complained that no detailed inventory of the seized items had been drawn up.<sup>1287</sup> The French Competition Authority argued that the inspections and seizures had been carried out in accordance with the law and on the basis of the judge’s authorization. It stated that the applicant companies had been given copies of the seized documents along with a detailed inventory. The claims by the applicant companies were dismissed by the French courts.

Relying on Articles 6, 8 and 13 of the ECHR, the applicant companies turned to Strasbourg alleging that there had been a violation of their right to an effective remedy, first because they had been unable to lodge a full appeal against the decision authorizing the inspections and seizures, and second because they could challenge the conduct of those operations only before the judge who had authorized them, and who did not, in their view, meet the requisite conditions of impartiality.<sup>1288</sup> They further complained of a disproportionate interference with their defence rights and with the right to respect for home, private life and correspondence, particularly with regard to the legal professional privilege, taking into account the widespread and indiscriminate nature of the seizures carried out and the lack of a detailed inventory. This section will only address the application of Article 6 of the ECHR. For a discussion on Article 8 of the ECHR, see Section 12.2.4 above.

In a very brief passage, the Strasbourg court referred to its rulings in *Canal Plus*, *Primagaz* and *Société Métallurgique Liotard Frères* and declared that in those rulings it had established that the applicable French legislation did not meet the requirements of Article 6(1) of the ECHR, and that it saw no reason to deviate from its previous rulings. There had thus been a violation of said article also in the present case.<sup>1289</sup>

It is interesting to note the Strasbourg court’s explicit statement that where there is no possibility for the undertaking to prevent the seizure of documents which either fall outside the scope of the inspection or are covered by legal professional privilege, there must be a possibility for the targeted company to have a real and effective *à posteriori* review. The court should then either order the restitution of such documents, or, where

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<sup>1287</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, at para 11.

<sup>1288</sup> *Ibid*, para 29.

<sup>1289</sup> *Ibid*, paras 43 and 44.

electronic files are concerned, ensure that they are deleted properly.<sup>1290,1291</sup> As discussed in Section 3.2.4 above, the EU Courts do not consider themselves empowered to direct the Commission's course of action. Thus, in *Nexans*, the General Court referred to earlier rulings of the ECJ and stated that it lacked jurisdiction to issue declaratory judgments or directions even where these concern the manner in which its judgments are to be complied with. Given the Strasbourg court's ruling in *Vinci*, such stance appears questionable from an ECHR perspective.

### **13.2.1.5 Judicial review and Article 8 of the ECHR – Robathin**

The cases referred to above concern the application of Article 6 of the ECHR and the right to a fair trial. However, the possibility to obtain an effective ex post review may also trigger the application of Article 8 of the ECHR as the right to judicial review is considered to be an important procedural safeguard against abuse or arbitrariness by investigating authorities. The case of *Robathin* addresses this issue.

The case, which has been presented in detail in Chapters 8 and 10 above, concerned a search carried out at the office of Mr Robathin, a practicing lawyer suspected of theft, fraud and embezzlement. During the search, the police officers went through his computer system and seized a laptop as well as copies of his computer files. Mr Robathin and a member of the Vienna Bar Association were both present during the search, and protested against the measures taken, arguing that they had been excessive, because it would have been possible to limit the search and make copies only of those files relevant to the investigation. The case made its way through the Austrian legal system and, eventually Mr Robathin turned to Strasbourg, where he argued that his right to privacy had been infringed by the Austrian authorities. Having established that the search did indeed constitute an interference with the applicant's right to privacy, the Strasbourg court examined whether such interference could be justified under Article 8(2) of the ECHR.

Here the Strasbourg court did find the measures to be in accordance with the law and to pursue a legitimate aim, namely the prevention of crime. As for the assessment of whether the measures could be deemed necessary in a democratic society – that is, the court declared, whether the relationship between the aim sought to be achieved and the means chosen were

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<sup>1290</sup> *Fr. [o]u l'assurance de leur parfait effacement.*

<sup>1291</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 78.

proportionate – the court looked at the procedural safeguards surrounding the search and whether they provided adequate and effective protection against abuse and arbitrariness.<sup>1292</sup>

The court paid attention to a number of elements, one of them being the fact that the applicant had had a remedy against the examination of the seized data at his disposal: a complaint to the Review Chamber. It was the Review Chamber and not the police that would determine which data that could actually be examined. As the search warrant had been couched in very broad terms, the manner in which the Review Chamber exercised its supervisory function was considered to be of particular importance.<sup>1293</sup> The Strasbourg court was not satisfied with the review carried out by the Review Chamber, declaring that it had given only brief and general reasons for authorizing the examination of all the electronic data, failing to address the issue whether it would be sufficient to search only those disks relating to the victims of the suspected fraud and embezzlement. Nor had the Review Chamber given any reasons for its finding that a search of the applicant's data was necessary for the investigation. In all, this meant that the Strasbourg court was unable to establish that the search of all the data had been proportionate.<sup>1294</sup> It follows that there had been a violation of Article 8 of the ECHR.<sup>1295</sup> It is evident from *Robathin* that the Strasbourg intends to look not only at the availability of the review, but also at the quality of the review actually carried out.

### 13.2.2 The Strasbourg case-law – Concluding remarks

In a string of rulings all dealing with the right to review under the French legal system, the Strasbourg court has consistently held that companies targeted by dawn raids or other inspections should have a right to review, not only of the inspection decision as such, but also of the measures taken on its basis. The right to judicial review should be guaranteed and thus not dependent on the outcome in the underlying competition or tax case. Furthermore, it should be timely. In *Vinci Construction*, the Strasbourg court explicitly stated that in order for the procedural safeguards surrounding the operations to be considered adequate and effective the judge should order the restitution or deletion of documents either falling outside the scope of the subject-matter of the inspection or being covered by legal professional

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<sup>1292</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 43.

<sup>1293</sup> *Ibid*, para 51.

<sup>1294</sup> *Ibid*, para 51.

<sup>1295</sup> *Ibid*, para 52.

privilege.<sup>1296</sup> It has also been established in this section that the lack of a proper judicial review may not only be challenged on the basis of Article 6 of the ECHR, but may also trigger the application of Article 8 of the ECHR as the procedural safeguards surrounding dawn raids will not be considered adequate in cases where there is no possibility of an effective judicial review.

### 13.2.3 Dawn raids and judicial review – The view of the EU Courts

#### 13.2.3.1 Review of implementing measures – Nexans

The question of judicial review in relation to dawn raids has not only been a matter for the Strasbourg court recently. The General Court has also had its say in the matter. In a judgment delivered in November 2012, the General court gave its view on both the right to judicial review in relation to dawn raids, and the scope of such inspections. The latter question has been discussed in Section 10.3.1 above.

The two companies Nexans S.A. and its wholly-owned subsidiary Nexans France S.A.S. were both active in the electric cable sector. The Commission suspected them of participation in cartel activities, and in January 2009, unannounced inspections were carried out at the premises of Nexans France. On the first day of the inspection, the Commission officials declared that they wished to examine the documents and computers of three of the company's employees, Mr A, Mr B and Mr C. As it turned out, Mr C was away on a business trip, and he had his computer with him. It was not until the third day of the inspection, which was a Friday, that the computer was brought to the office by a colleague of Mr C. Going through the computer that day, the inspectors recovered a number of files that had been deleted since the start of the investigation.<sup>1297</sup>

The inspectors decided to copy several sets of e-mails found in Mr A's and Mr C's computers on to data recording devices ('DRDs'); they then sealed them and had the envelopes signed by a representative of Nexans France. The envelopes were brought back to Brussels. Later, the inspectors also took

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<sup>1296</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 78.

<sup>1297</sup> According to a Commission official, it became apparent during the course of the dawn raid that Mr C was the person at Nexans who was mainly involved in the cartel activity and thus in possession of most evidence.

an image copy of the hard drive of Mr C's computer and brought it back with them to Brussels once the inspection was over – despite the company having explicitly asked the inspectors to go through the hard drive at its premises. The Commission officials also took formal note of the fact that Nexans France disputed the legitimacy of the procedure.

In April 2009, the companies brought action against the Commission's measures requesting the General Court to annul the inspection decision, but also to declare that the decision taken by the Commission during that inspection to copy in their entirety the content of certain computer files, in order to examine them in its offices, was unlawful.<sup>1298,1299</sup> The two applicants submitted that the contested acts had brought about a significant change in their legal position and had seriously and irreversibly affected their fundamental rights – their right to privacy and the right of the defence. They argued that these should therefore be considered to be challengeable measures.<sup>1300</sup> The applicants presented a number of arguments in support of their claim. First, since no provision was made for the challenged measures in the inspection decision, those acts could not constitute implementing measures. Second, the form of a measure is irrelevant as regards the issue of whether it produces binding legal effects. As it was, the applicants were obliged to comply with the contested acts in order to avoid being required to pay an increase in the amount of any fine to which they might be liable or even to avoid other penalties. Those acts, the applicants argued, were therefore similar to requests for information made under Article 18(3) of Regulation 1/2003, a provision which expressly provides that those measures are challengeable. Third, according to the applicants, the contested acts had compromised their ability to defend themselves in competition investigations before other courts. Fourth and lastly, the decision to take copies of several computer files and of the hard drive of Mr C's computer produced legal effects, since those storage media contained data such as e-mails, addresses and so on, which were of a personal nature and protected by the right to privacy and the confidentiality of correspondence.<sup>1301</sup>

Addressing the request for a declaration on the lawfulness of the Commission's measures, the General Court held that acts against which an action for annulment may be brought under Article 230 EC (now Article 263

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<sup>1298</sup> The applicants did also request the General Court to annul the Commission's decision to interview Mr C, and to order the Commission to (i) return any documents or evidence unlawfully obtained and (ii) refrain from communicating such documents or evidence to other competition authorities.

<sup>1299</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 25.

<sup>1300</sup> *Ibid.*, at para 118.

<sup>1301</sup> *Ibid.*, at para 118.

TFEU) are those which produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his or her legal position.<sup>1302</sup> As for the copying of computer files and hard drives for review in Brussels, the General Court did not accept the arguments put forward by the applicants to regard these measures as a distinct, challengeable, decision. Instead, it was the view of the General Court that these measures flowed from the inspection decision. The contested acts were implementing measures of an intermediate nature, designed solely to pave the way for the final decision. Or as the General Court put it:

It is pursuant to the decision ordering the inspection rather than pursuant to another distinct act adopted during the inspection, that those undertakings are required to allow the Commission to copy the documents at issue.<sup>1303</sup>

The General Court also addressed the issue of documents covered by legal professional privilege, for which there is a separate procedure and where a decision by the Commission to reject a request for protection of a certain document may be challenged in a standalone action. However, the General Court noted that in the present case, the applicants were not taking issue with the Commission for consulting or copying certain files, but rather for having examined them at its own premises in Brussels. In view of the foregoing, the Court concluded that the contested acts could not be regarded as actionable measures, and that the legality of those acts could only be examined in the context of an action challenging the final decision adopted by the Commission under Article 81(1) EC (now Article 101(1) TFEU).

Therefore, what the General Court says is that if you want to challenge the inspectors' decision to take DRDs and a copy of a hard drive back to Brussels, the inspected company will have to await the final decision in the underlying competition case, and then challenge the measures taken. However, not only will the company have to wait for the decision before taking action; the company will also have to hope that the Commission imposes a fine so that it can challenge the decision.

### 13.2.4 The view of the EU Courts – Concluding remarks

Article 263 TFEU grants companies targeted by inspection decisions a right to challenge the decision as such, and to ask the EU Courts to have it annulled. As for the possibilities to challenge any measures taken on the basis of inspection decisions, they appear meagre to say the least. The EU

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<sup>1302</sup> Ibid, at para 115.

<sup>1303</sup> Ibid, at para 121.

Courts have consistently held that in order for a measure to be challengeable on a standalone basis, it must produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his legal position. As for measures taken during the course of an inspection which are not considered to produce binding legal effects, the targeted company will instead have to await the final decision in the underlying competition case before being able to take action. The question of whether a certain measure is considered to bring about a distinct change in the applicant's legal position is thus of great practical importance.

In *Akzo Nobel and Akros Chemicals v. Commission*, the General Court made clear that it would not be satisfactory if companies had to await the final decision in the underlying competition case before being able to contest the Commission's view that a certain document was not protected by legal professional privilege as, (i) there was a 'risk' that no fines were imposed, and (ii) this did not prevent the irreversible consequences which would result from improper disclosure:

[t]he Court would point out that the opportunity which the undertaking has to bring an action against a final decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.<sup>1304</sup>

A similar statement had previously been made by the ECJ in *AKZO Chemie v Commission* concerning the release by the Commission of part of its case file to Engineering & Chemical Supplies Ltd ('ECS'), a possible victim of abusive behaviour.<sup>1305</sup> The Commission wished to have comments from ECS and had therefore decided to release certain documents annexed to its statement of objections. Akzo Chemie challenged this decision before the ECJ, arguing that some of the documents contained business secrets and should thus not be revealed. The Commission argued that the application should be declared inadmissible as the communication of documents was merely a physical act which did in no way affect that legal position of Akzo Chemie. Here, the Court did not agree. The Commission had found that the documents did not qualify for confidential treatment, and such measure, the Court established, is definitive in nature and is independent of the decision in

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<sup>1304</sup> Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities*, EU:T:2007:287, para 47.

<sup>1305</sup> Case 53/85, *AKZO Chemie BV and AKZO Chemie Ltd UK v Commission of the European Communities*, EU:C:1986:256, para 20.

the underlying competition case.<sup>1306</sup> The Court then declared that it must be possible for a company to challenge the granting of access to the file directly without having to await the final decision in the underlying competition case.

In the two *Akzo* cases, the rights of the parties were thus not considered adequately protected, should the applicants have had to await the final outcome in the underlying competition case before being able to challenge the Commission's actions as (i) the Commission may not have found an infringement, and (ii) awaiting the final decision would not prevent the irreversible consequences resulting from improper disclosure of documents. In *Nexans* on the other hand, the General Court did not consider the making of server copies for review and selection in Brussels to bring about a distinct change in the legal position of the applicants, this despite their claims that those storage media contained data such as e-mails, addresses and so on, which were of a personal nature and protected by the right to privacy and the confidentiality of correspondence.<sup>1307</sup> The Court thus appears to take a rather restrictive view on what constitutes a challengeable measure.

### 13.3 The right to judicial review – What conclusions may be drawn?

While the previous chapters have not revealed any major discrepancies in the standard of protection afforded under EU or ECHR law, this chapter does do so. Unfortunately, the deficiencies related to the right to judicial review risk having undesired spill-over effects, as the Strasbourg court often appears to condition its approval of the use of enforcement powers – such as the powers to carry out broad searches or to bring image copies back to authority premises – on the availability of an effective judicial review. Thus, if the EU legal system cannot guarantee an effective judicial control, this will not only affect the right to a fair trial under Article 47 of the Charter. The Commission's actions may then also be considered arbitrary and disproportionate thereby violating the companies' right to privacy under Article 7 of the Charter. Thus, absent an effective ex post review, the legitimacy of the entire dawn raid procedure may be questioned.

In this chapter it has been established that in order for the Strasbourg court to declare on-site inspections compatible with Article 6(1) of the ECHR,

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<sup>1306</sup> Ibid.

<sup>1307</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 118.



companies should be assured a timely and guaranteed review of inspection decisions and measures taken on their basis. The case of *Primagaz* may serve to illustrate the court's stance as in that case, the possibilities for review were similar to those in the EU legal system in the sense that an appeal against the measures taken during the inspection was only possible if there was a subsequent infringement decision in the competition case. There the Strasbourg court stated:

*Or, la Cour rappelle qu'en plus d'un contrôle en fait et en droit 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.*<sup>1308</sup>

This short passage of the Strasbourg court's ruling brings to the fore the two weaknesses in the EU system, and its application after the General Court's rulings in *Nexans* and *Prysmian*. First of all, the Strasbourg court declares, the companies must be guaranteed an effective review of the decision. Secondly, they shall be guaranteed such a review within reasonable time. The Strasbourg court explicitly points to the fact that (i) access to legal review is uncertain as it depends not only on a decision in the competition case but also on an appeal against such, and (ii) any possibility to obtain a judicial review will by necessity be delayed by several years. In this case, the inspections were carried out in 2005, and in 2008, there was still no decision by the French Competition Authority.

Given that the Commission's cartel investigations normally take around four years from start to finish,<sup>1309</sup> anyone seeking to challenge the Commission's measures during a dawn raid will have to wait a considerable time, without even knowing if a challenge will ever be possible. Add to that the time of the subsequent proceedings in the General Court and the ECJ, and any damage sustained due to the Commission's actions during the dawn raid will most certainly be time barred by the time the matter finally comes to an end. Furthermore, when it comes to any damage caused in these situations, it is many times difficult to define and value such harm in euros and cents. Surely, this cannot be in line with the Strasbourg court's case-law. There is, however, one important difference between the rulings of the Strasbourg court in *Primagaz* and *Canal Plus* as compared to the General Court's

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<sup>1308</sup> *Compagnie des Gaz de Pétrole Primagaz v France*, judgment of 21 December 2010, Application no. 29613/08, para 28.

<sup>1309</sup> Hüschelrach, Laitenberger and Smuda, *Cartel Enforcement in the European Union: Determinants of the Duration of Investigations*, Centrum für Europäische Wirtschaftsforschung GmbH, Discussion Paper No 12-071, at p. 9. Electronic copy available at: <http://ssrn.com/abstract=2179037>.

rulings in *Nexans* and *Prysmian*. In the cases before the Strasbourg court, the parties challenged the national court's decision to allow the inspection, whereas in the EU cases, it was the measures taken during the dawn raid that required review.

It could therefore be argued that the ECtHR cases are not directly applicable to the EU cases, as they deal with two different parts of the process. However, in *Ravon*, the Strasbourg court not only gave its view on the possibility to obtain a review of the decision to allow for an inspection, but also as regards the measures taken by the authority during the course of such inspection. There, the court established:

*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[t](emphasis added).<sup>1310</sup>*

This statement was also reiterated by the Strasbourg court in both *Primagaz* and *Canal Plus*.<sup>1311</sup> The right to a timely, certain and effective judicial review would, thus also extend to measures taken during the course of a dawn raid.

In *Nexans*, the General Court declared that although the decision to bring image copies back to Brussels was an implementing measure and was thus not challengeable on a standalone basis, there had been another option available; the applicants could have refused to allow the inspectors to make copies of the documents at issue, awaited the Commission's decision to impose a fine for obstruction under Article 23(1)(c) of Regulation 1/2003, and then challenged that decision. Although it is admittedly an option, it cannot be considered satisfactory. On the plus side, such order would prevent companies from challenging measures with the sole purpose of obstructing the Commission's investigations. However, the down side is that it is also likely to prevent companies that do believe that their defence rights are being infringed from challenging the Commission's measures for fear of being unsuccessful in their plea and then having to pay substantial fines for failure to cooperate. Furthermore, and perhaps more importantly, it cannot be desirable from either a due process or efficiency perspective to encourage companies to refuse to cooperate.

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<sup>1310</sup> *Ravon v France*, judgment of 21 February 2008, Application no. 18497/03, para 28.

<sup>1311</sup> *Compagnie des Gaz de Pétrole Primagaz v France*, judgment of 21 December 2010, Application no. 29613/08, para 24 and *Société Canal Plus and Others v France*, judgment of 21 December 2010, Application no. 29408/08, para 36.

A few words should also be mentioned of the Court's powers to direct the Commission's actions, or rather of the absence of such powers. In *Vinci Construction*, the Strasbourg court established that where a national court is asked to examine the lawfulness of a dawn raid, it will have to order either the restitution or deletion of documents or files which fall outside the scope of the inspection or are protected by legal professional privilege.<sup>1312</sup> As noted in Section 3.2.4.3 above, the EU Courts do not consider themselves empowered to direct the Commission's course of action, and in *Nexans*, the General Court declared that it lacked jurisdiction to issue declaratory judgments or directions even where they concern the manner in which its judgments are to be complied with.<sup>1313</sup> Given the Strasbourg court's ruling in *Vinci*, such stance appears questionable from an ECHR perspective.

In view of the aforementioned, it can be concluded that the EU standard of protection does not meet the standard set by the Strasbourg court. Companies do not have a right to a timely or guaranteed review of measures taken during the course of a dawn raid. Nor is there a possibility for the EU Courts to direct the actions of the Commission. However, establishing a discrepancy between the EU and ECHR systems is not enough, as this dissertation seeks not only to determine whether the EU standard meets the ECHR standard, but also where a balance is to be struck between the apparently diverging interests of adequate fundamental rights protection and effective competition law enforcement. The question must therefore be posed whether the Strasbourg court has raised the bar too high and, by requiring a timely and guaranteed review of both inspection decisions and implementing measures, sets a standard that will not allow for effective competition law enforcement.

This question must be analysed against the backdrop of the findings in the previous chapters of this thesis. It is clear from the foregoing that the Strasbourg court has adopted a very flexible approach in this type of cases. It does not require an ex ante review of inspection decisions. Nor does it set any strict limits to the documents and files that may be reviewed by investigating authorities; in *Bernh Larsen Holding* it raised no objections against the tax authorities' copying of entire servers for review at authority premises. This was the case, despite the fact that the server in question contained documents and files belonging to third parties as well as information of a personal character. However, this flexible approach is conditioned upon the existence of an effective judicial control. The

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<sup>1312</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 78.

<sup>1313</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, at para 136.

authorities are granted considerable leeway as long as there is a system in place that ensures an effective ex-post control of the measures taken. And indeed, such system seems to be both satisfactory from a fundamental rights perspective and desirable from a competition law enforcement perspective. Investigating authorities may apply far-reaching investigatory measures as long as there are courts entrusted with the necessary powers to ensure that such measures are neither arbitrary nor disproportionate.

Furthermore, whereas the existence of an effective judicial control is thus an important procedural safeguard in cases concerning the right to privacy – as it serves to counterbalance the measures taken by investigating authorities – it is also important from a fair trial perspective. The Strasbourg court has declared that the judicial review should be both timely and guaranteed, and that it is not acceptable to make any judicial review conditional upon the Commission taking a final decision in the underlying competition case. There are a number of practical aspects that endorse this view. First of all, while a company may immediately challenge questions posed by the Commission on the basis of Article 18 of Regulation 1/2003, questions or requests for documents made during dawn raids may not be challenged until the Commission adopts its decision in the underlying competition case.<sup>1314</sup> From a company perspective it is of course unfortunate that the Commission is able to copy documents to file and keep them there for several years until there is a possibility for the company to challenge the measures taken, especially given the risk that those documents may end up in the file of another competition authority or in the hands of a third party during such period. In addition, if the Commission does not adopt an infringement decision, then there is no possibility for the company to act.

However, while this order may have severe negative implications for the targeted companies, it should be stressed that also the interest of effective competition law enforcement may be negatively affected. In *Deutsche Bahn*, the Court declared that if it finds that there has been an irregularity in the conduct of the investigation, the Commission will be prevented from using, for the purpose of the infringement proceedings, any document or evidence which it might have obtained during the course of that investigation.<sup>1315</sup> This view was taken by the Court already in *Hoechst*, where it refused to suspend the actions of the Commission, declaring that there was no risk for irreparable damage. The Court's stance was motivated by the fact that if the Commission's inspection decision was later found to be unlawful, the

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<sup>1314</sup> Save for situations where the Commission seeks to copy material that is or is claimed to be protected by legal professional privilege.

<sup>1315</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, para 45.

Commission would be prevented from using the evidence it had obtained in the course of the investigation on pain of exposing itself to a risk of annulment of the final decision in the underlying competition case, in so far as such decision was based on the evidence unlawfully obtained.<sup>1316</sup> In practice, this is a far-reaching but necessary sanction, and it must be in the interest of the Commission as well as in the greater interest of ensuring effective (and cost-effective) competition law enforcement, that any such findings are made at an early stage of the investigation, while there is still time to correct any mistakes made by the Commission rather than after the adoption of the final decision in the underlying competition case.

To conclude, this chapter has revealed discrepancies between the standard of protection afforded under the EU and the ECHR systems respectively. As noted above, the ECHR standard should not be considered too high, because it allows the Strasbourg court to adopt a very flexible approach towards the investigative methods adopted by competition authorities. Thus, by setting a rather high threshold with regard to the judicial review to be carried out by the courts, the authorities may be granted considerable leeway in their choice of investigative measures. It would indeed be desirable if the EU system were to be revised accordingly.

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<sup>1316</sup> Case 46/87 R, *Hoechst AG v Commission of the European Communities*, EU:C:1987:167, para 34. See also Kerse and Khan, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 620.

## 14. Dawn raids at non-business premises

The previous chapters have mainly examined dawn raids carried out at the premises of undertakings. Up until the adoption of Regulation 1/2003, the Commission's inspection powers were restricted to such premises, but as the Commission experienced that employees and company representatives sometimes kept relevant documents in their private homes, calls were made for an extension of the investigatory powers.<sup>1317</sup> In response to these calls, the powers of inspection were broadened through the adoption of Regulation 1/2003. Initially it was proposed that the Commission's powers should be extended to cover private homes through an amendment of Article 20, the only additional provision being that a judicial warrant was required for inspections at non-business premises. In the end, a separate article was devoted to these dawn raids.<sup>1318</sup> As noted by *Ortiz Blanco* this indicates both the importance of these new powers and the awareness that they must be strictly circumscribed in order to meet applicable fundamental rights requirements.<sup>1319</sup>

The new powers of the Commission were used for the first time in May 2007 when the Commission, jointly with the UK authorities, carried out inspections of a private home in the UK in their investigation into suspected cartel conduct in the marine hoses sector. However, it appears that the powers are used with caution. According to *Ortiz Blanco*, the Commission had availed itself of the powers on only three occasions up until 2013.<sup>1320</sup>

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<sup>1317</sup> See Preamble 26 to Regulation 1/2003, *Ortiz Blanco* (ed.), *EU Competition Procedure*, 3rd edn, Oxford University Press, 2013, p. 357, and *SAS/Maersk Air* (Case COMP.D.2 37.444) and *Sun-Air v SAS/Maersk Air* (Case COMP.D.2 37.386) Commission Decision 2001/716/EC [2001] OJ L265/15, para 89. The *SAS/Maersk Air* decision reports on a meeting note which recorded a Maersk representative as saying 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'. See also Sauer, *Ortiz Blanco* and Jörgens, *Investigation of Cases (III): Inspections*, in *Ortiz Blanco* (ed.), *EU Competition Procedure*, 3rd edn, Oxford University Press, 2013, p. 357.

<sup>1318</sup> See e.g. Kerse and Khan, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 177, and Sauer, *Ortiz Blanco* and Jörgens, *Investigation of Cases (III): Inspections*, in *Ortiz Blanco* (ed.), *EU Competition Procedure*, 3rd edn, Oxford University Press, 2013, p. 358.

<sup>1319</sup> See Sauer, *Ortiz Blanco* and Jörgens, *Investigation of Cases (III): Inspections*, in *Ortiz Blanco* (ed.), *EU Competition Procedure*, 3rd edn, Oxford University Press, 2013, p. 358.

<sup>1320</sup> *Ibid.*, p. 357.

This chapter is dedicated to examining dawn raids carried out under Article 21 of Regulation 1/2003. Naturally, much of what has previously been discussed applies also to these inspections, and the present chapter thus addresses only those issues specific to dawn raids carried out at non-business premises.

## 14.1 The legal framework surrounding dawn raids in private homes

Article 21 of Regulation 1/2003 empowers the Commission to carry out inspections at other premises, land or means of transport than those provided for in Article 20. However, the use of these powers requires a decision by the Competition Commissioner,<sup>1321</sup> and use is circumscribed by a number of other requirements. First of all, an inspection at non-business premises may only be carried out if the Commission has reasonable grounds to suspect that books or other records related to the business and to the subject-matter of the investigation are kept there. Second, such documents should be relevant to prove a serious violation of either Article 101 or 102 of the TFEU. When adopting the inspection decision, the Commission will not only have to state the subject-matter and purpose of the inspection, the date on which it will begin and the right to have the decision reviewed. It is also required to state the reasons that have led the Commission to conclude that evidence is being kept where the inspection is to take place. Third, the powers entrusted to the Commission in Article 20(2)(d) and (e) have not been copied into Article 21, and the Commission may thus not affix seals or ask for explanations on facts or documents relating to the subject-matter and purpose of the inspection. It is also interesting to note that Regulation 1/2003 does not provide for any sanctions for refusal to cooperate. Thus, there is no reference to Articles 23 or 24, or to any other provision empowering the Commission to impose fines or periodic penalty payments for failure to cooperate.

Two main differences between Articles 20 and 21 concern the degree of involvement by national courts and authorities. Whereas Article 20 requires the Commission to give notice of the inspection decision to the competition authority in the Member State where the raid is to be carried out, Article 21 stipulates that the Commission may not adopt an inspection decision unless it has consulted with the national authority. Furthermore, and more importantly, according to Article 21(3), the Commission must obtain prior approval from national judicial authorities before carrying out the inspection.

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<sup>1321</sup> Ibid, p. 357.

As for the review to be made by the national judicial authority, the wording of Article 21(3) resembles the wording of Article 20(8) although the two articles are not identical. Article 21(3) reflects the special requirements that need to be fulfilled in order for the Commission to carry out an inspection in a private home. Thus, the judicial authority shall verify that the coercive measures are not arbitrary or excessive having regard to the seriousness of the infringement or the importance of the evidence sought, to the involvement of the undertaking concerned, and to the reasonable likelihood that the documents sought after are actually kept at the premises of the inspection. Thus, in theory, the national judicial authority should be able to refuse the granting of an authorization if the documents sought after are not relevant to prove the case or if it is unlikely that they are kept at the premises covered by the inspection decision. Just like Article 20(8), Article 21(3) declares that the national judicial authority may not call into question the necessity for the inspection or demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the ECJ.

The role of the national judicial authorities under Article 20 is somewhat ambiguous. Dawn raids carried out at business premises do not need to pass through the national judicial authorities unless the Commission discovers or anticipates that it will need assistance from national enforcement authorities, and the national court will then rule only on the question whether the coercive measures are proportionate. Should the national court refuse to grant a coercive measure, the Commission is still free to carry out the dawn raid but will then have no possibility to force entry.

When it comes to dawn raids carried out under Article 21, these require prior judicial authorization from national courts. Thus, if the court refuses to grant authorization, there will be no inspection. However, the role of the national court is still limited to assessing whether the granting of coercive measures is arbitrary or excessive. The national judicial authority may not call into question the necessity for the inspection, as the lawfulness of the inspection is only subject to review by the EU Courts, but still has the powers to hinder the inspection's execution if it considers that the Commission has not presented convincing arguments why the evidence is likely to be kept at the premises covered by the inspection decision. Furthermore, the national court may hinder the execution if it considers that the use of coercive measures is arbitrary or excessive given the seriousness of the infringement. As inspections carried out under Article 21 require that the evidence sought is relevant to prove a serious violation of Article 101 or 102 of the TFEU, the review to be carried out by the national authority appears to be more far-reaching than Article 21 initially suggests.



In any event, the procedural safeguards surrounding dawn raids at non-business premises are stricter than those provided for in Article 20 of Regulation 1/2003, and many potential fundamental rights concerns have been minimized through the safeguards provided for in Article 21; inspections require an ex ante review, the inspectors may not ask any questions during the dawn raid, there is no duty to submit to the inspection, and there are no sanctions involved for failure to cooperate. This being said, the Commission may require assistance from law enforcement authorities, and *Khan* and *Kerse* suggest that the EU standard does not necessarily meet the ECHR standard, citing the case of *Keslassy v. France*. It is therefore appropriate to examine this case closer in order to ascertain whether there are any merits to such suggestion.

## 14.2 Inspections in private homes – The view of the Strasbourg court

### 14.2.1 *Keslassy v. France*

The applicant, Mr Keslassy, was a French national who controlled no less than nine private limited companies. By an order of 3 June 1997, the *Tribunal de grande instance de Paris* authorized tax inspectors to carry out surprise inspections at a number of business and residential premises, including the home of the applicant. The order was issued pursuant to the French Code of Tax Procedures and stated that the aim of the searches was to seek evidence that the companies controlled by the applicant had committed tax fraud.<sup>1322</sup> As in inspections carried out under Article 21 of Regulation 1/2003, Mr Keslassy was thus suspected of keeping documents that incriminated the companies.

Mr Keslassy appealed against the order to the Court of Cassation, but the appeal was dismissed. Having exhausted all national remedies, he turned to Strasbourg and complained under Article 8 of the ECHR about the circumstances under which the searches of the residential premises, and in particular his home, had been ordered. According to Mr Keslassy, the requirement of proportionality between the prevention of tax fraud and

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<sup>1322</sup> According to the order, the companies were suspected of having ‘failed to calculate and pay income tax in the industrial and trading profits category, and/or corporation tax and value added tax (VAT), by engaging in purchases and sales for which no invoices had been issued and/or by issuing invoices or documents that did not correspond to genuine transactions and/or by knowingly omitting to make or cause to be made accounting entries or by knowingly causing to be made inaccurate or false entries in the accounting records that are required to be kept by the General Tax Cod[e]’.

respect of individual freedom and the inviolability of the home had not been complied with. In his submission, the search order had been based on two pieces of evidence – an anonymous statement and a letter from an informant – and according to him, these pieces of evidence were insufficient to create a presumption of tax offence that could justify a search of his home.

The Strasbourg court disagreed. Having declared that there was an interference within the meaning of Article 8(1) of the ECHR, and that such interference was both in accordance with the law and pursued legitimate aims,<sup>1323</sup> the court continued to address the issue of whether it was necessary in a democratic society. Here the court referred to its earlier case-law and stated that it had recognized that while States may consider it necessary to have recourse to measures such as house searches in order to obtain physical evidence of offences, the relevant legislation must nevertheless provide adequate and effective safeguards against abuse.

In the case at hand, the national authorities had considered a search necessary to enable the collection of evidence confirming fraud. As for the evidence justifying the search order, the court did not accept Mr Keslassy's submission that the order had been issued on the basis of two documents only. Instead, the court found that the order had been issued on the basis of a number of items of evidence that had come to light during the tax authorities' investigation, suggesting that there was reasonable cause for the inspections. Furthermore, the court found that the judicial authority had been entitled to consider that the search was necessary to enable evidence to be obtained. According to the court, the reasons given for issuing the search order – namely to enable seizure of documentary evidence in both paper and electronic form relating to the presumed fraud – were relevant and sufficient.

As for the conditions in which the searches took place, the court recognized that the French legislation established a number of safeguards. First, the authority must obtain a judicial warrant issued by a judge after verification of the evidence lodged in support of the application. Second, the entire search and seizure had been placed under the authority and supervision of a judge who appointed a senior police officer to be present during the search and to report back to the judge. The judge could also enter the premises in person and order the search to be suspended or halted. There was nothing in the case file suggesting that this procedure was not fully complied with when the warrant was executed. The court therefore dismissed the application as being manifestly ill-founded.

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<sup>1323</sup> The economic well-being of the country and the prevention of crime.

*Kerse* and *Khan* argue that the ruling in *Keslassy* leaves room to question whether Article 21 sufficiently circumscribes the Commission's powers and leaves sufficient autonomy to the national court to ensure compliance with the necessity and proportionality of any interference with fundamental rights. The authors point to the fact that in *Keslassy*, the national court was able to assess the evidence for itself and determine the justification for the interference with the applicant's rights, whereas Article 21 does not appear to permit the national court to assess the sufficiency of the Commission's evidence or otherwise question the necessity of the inspection.<sup>1324</sup>

However, because the inspection may not be carried out without an authorization from the national court, and the national court has the powers to refuse to grant authorization should it consider any coercive measure to be arbitrary or disproportionate, the safeguards available appear to be adequate. It is true that the national court may not request to view specific items of evidence, but the Commission will still have to convince the national court that the undertaking in question is involved in the suspected infringement, and that it is likely that the evidence sought is actually located at the premises indicated in the inspection decision.

### 14.3 Inspections at non-business premises – Concluding remarks

This chapter is brief for two reasons. First and foremost, the procedural safeguards surrounding non-business premises are higher than those surrounding dawn raids at company premises. Dawn raids may not be carried out without an authorization from a national court, and the Commission will have to prove that it is likely that evidence is actually kept at the premises covered by the inspection. Although the Commission may call for assistance by national enforcement authorities, there is no legal obligation on the part of the individual receiving the visit to cooperate with the inspectors, and there are thus no sanctions for failing to do so.

The second reason is of course that much of what has been discussed in the previous chapters is also applicable in these cases, especially since many of the rulings from the Strasbourg court have actually concerned natural persons rather than legal persons.

Thus, as the Commission, when carrying out a dawn raid under Article 21, must not only investigate a serious infringement of Article 101 and 102

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<sup>1324</sup> Kerse and Khan, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 179.

TFEU – leaving no room for fishing expeditions – it must also have reason to believe that evidence is kept at the premises in question. The search should be for the evidence in question and naturally the scope of the inspection must be circumscribed accordingly. Thus what has been discussed in Chapter 8 on the scope of inspection decisions should apply also in this setting. Likewise, Chapters 10, 11 and 12 are applicable in relevant parts.

PART III  
SUMMING UP



## 15. Conclusions

### 15.1 General observations

In Chapter 1 the question was posed whether it is possible to strike a balance between the conflicting interests of adequate fundamental rights protection and effective competition law enforcement, or whether the Commission had been handed an impossible task. The short answer to this question is yes, it is possible to strike a balance.

This does not mean that there is a perfect balance today. Throughout the thesis, a number of concerns have been identified and there are some hurdles to overcome before a balance can be struck. These issues will be addressed in the order presented in Section 1.3 above, starting out with the right to privacy and concluding with the right to judicial review. As will be further discussed in this chapter, the main concerns identified may be divided into two categories: those related to (i) the limited access to courts, or (ii) the scope of the legal professional privilege. While the EU system provides a right to judicial review of inspection decisions, there are only limited possibilities for companies to have measures taken on the basis of such decisions suspended or annulled. Unfortunately, these limitations risk affecting the legitimacy of the entire dawn raid system, as the Commission's powers to adopt intrusive investigatory measures need to be effectively counterbalanced by the courts in order for the system to provide adequate safeguards against abuse or arbitrariness. Absent proper safeguards, many aspects of the Commission's dawn raid procedures – including the lack of an *ex ante* control, the possibility to make image copies of storage media for review at Commission headquarters and the power to require company staff to answer certain questions on the spot – may be struck down.

Furthermore, as regards the legal professional privilege, the Court has declared that this privilege serves the interests of a proper administration of justice. However, some of the limitations set by the Court – such as the exclusion of correspondence with lawyers admitted to non-EU bars and of correspondence with external counsels, but which is unrelated to the subject-matter of the investigation – must be questioned as they do not serve the interest of proper administration of justice and therefore appear to be

unjustified limitations of the companies' right to the defence. These issues will be examined further in the following.

Before going into the specific areas and discussing the extent to which the Commission's practices are in line with applicable fundamental rights standards, some more general remarks should be made. First of all, striking a balance implies that there are two opposing interests that each carry a certain weight. In this case, the opposing interests are the need for effective competition law enforcement and adequate fundamental rights protection. Thus, determining whether the current enforcement system is fair largely depends on two factors: what rights do legal persons actually enjoy, and how severely should we view infringements of Articles 101 and 102 TFEU? If fundamental rights only serve as guiding principles or if legal persons are not protected by applicable fundamental rights, then companies targeted by the Commission's investigations may have to accept far-reaching and intrusive investigatory measures to a different extent than if they were protected by a set of binding rights. On the other hand, if cartels and abuse of market power are to be regarded as infringements of a set of administrative rules rather than as criminal offences, it could instead be argued that applying intrusive investigatory measures would be contrary to the principle of proportionality, and thus of applicable Charter provisions as well, as the public interest in detecting and punishing competition law infringements would not counterbalance the interference caused by an inspection.

As was discussed in the introductory chapter, fundamental rights protection has been elevated to primary EU law through the Lisbon Treaty and these rights now carry a substantial weight in the balancing scale. As for EU competition policy, it forms one of the cornerstones of the EU legal system and the competition rules are structured in such a way as to contribute not only to effective resource allocation, but also to the implementation of the integration process which is the very *raison d'être* of the EU.<sup>1325</sup> As both areas of EU law are now at the top of the norm hierarchy, they carry the same weight in the abstract. It will therefore be up to the courts to determine which of these principles or rights that will be given a greater weight in the concrete case.<sup>1326</sup>

The Court will of course only have to strike a balance if there is a clash. As indicated already in Section 1.2 above, this research is based on the assumption that legal persons do enjoy fundamental rights protection, under both the Charter and the ECHR. This assumption has been confirmed throughout the thesis. In the case of *Société Colas*, the Strasbourg court

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<sup>1325</sup> See Opinion 2/13 of 18 December 2014, EU:C:2014:2454, para 172.

<sup>1326</sup> Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2002, p. 51.



declared that the ECHR is a living instrument and, building on its own dynamic interpretation of the Convention, it established that the time had come to hold that the rights guaranteed by Article 8 of the ECHR may be construed as including the right to respect for a company's registered office, branches or other business premises.<sup>1327</sup> Since then, the Strasbourg court has afforded legal persons protection in a great number of cases, and in *Vinci Construction* it even declared that according to 'well-established case-law' dawn raids carried out at the premises of legal persons are indeed covered by Article 8 of the ECHR.<sup>1328</sup> Establishing that both legal and natural persons should be afforded protection does not necessarily mean that the two groups should be afforded the same level of protection. The Strasbourg court has reiterated, if not always so at least very often, the caveat that the protection afforded under Article 8 of the ECHR may not be as far-reaching when legal persons are concerned as in cases concerning the rights of natural persons. Thus in *Bernh Larsen Holding*, it declared that the extension of protection to legal persons would not unduly hamper the Contracting States, for they would retain their entitlement to 'interfere' to the extent permitted by Article 8(2) ECHR. The court also noted 'that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'.<sup>1329</sup>

By now it has also been established that competition law infringements and the sanctions imposed by the Commission are of a criminal nature albeit that they come within the wider meaning of the notion of criminal offence. As for the application of Article 6 of the ECHR, the Strasbourg court has not made any distinction between legal or natural persons, but the fact that competition law infringements do not belong to the hard core of criminal law implies that the procedural safeguards do not necessarily apply with their full stringency to competition cases; as the Strasbourg court noted in *Menarini*:

*Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l'article 6, elles peuvent néanmoins influencer les modalités de leur application.*<sup>1330</sup>

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<sup>1327</sup> *Société Colas Est and Others v France*, judgment of 16 April 2002, Application no. 37971/97, para 41.

<sup>1328</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 63, where the court declared: 'La Cour rappelle que, selon sa jurisprudence bien établie, des perquisitions ou visites et saisies opérées dans les locaux d'une société commerciale portent atteinte aux droits protégés par l'article 8 de la Convention'.

<sup>1329</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 104.

<sup>1330</sup> *A. Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, para 62.

Thus, although the Commission will have to respect both the right to privacy and the right of the defence during its inspections, the fact that legal persons are involved and that competition law infringements do not come within the core meaning of the term ‘criminal offence’ implies that the scope of protection may be narrower than would otherwise be the case. This in turn prevents any direct parallel from being drawn between ECHR cases dealing with the rights of natural persons and EU competition cases, save where the Strasbourg court has declared that a certain interference with a natural person’s rights is acceptable and in accordance with the ECHR. In such cases it is fair to assume that the Strasbourg court would not raise the bar higher in cases concerning competition law infringements.

Before further analysis is made, it should once again be emphasized that this thesis pursues a quest for balance and that striking a balance between the interests of adequate fundamental rights protection and effective competition law enforcement does not necessarily equate ‘establishing conformity with ECHR law’. Although Article 52(3) of the Charter requires a comparison to be made between the EU and ECHR systems, it is not sufficient to establish either conformity or discrepancy. This research should also examine whether the standard required by the ECHR would be the appropriate standard within the EU legal system or whether a conflicting or diverging (EU) standard better serves the aim of striking a balance between the two conflicting interests. With this being said, the following sections will discuss the results of this research in more detail.

## 15.2 Summary of the findings

### 15.2.1 The right to privacy

As was discussed in the foregoing, legal persons are afforded protection both under Article 7 of the Charter and Article 8 of the ECHR. They enjoy a right to privacy, and this right may not be set aside unless the interference is considered to be necessary in a democratic society. However, legal persons have not always been afforded this right, and the case-law from the European courts presented in Chapter 8 perfectly illustrates two important aspects of the EU and ECHR systems: (i) the interaction between the two courts, and (ii) the fact that European law is in constant motion as both the Strasbourg and Luxembourg courts regard the ECHR and the Treaties as living instruments. In *Hoechst*,<sup>1331</sup> the ECJ was not willing to acknowledge

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<sup>1331</sup> Joined Cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, EU:C:1989:337.

that legal persons enjoy a right to privacy, but nevertheless found a way to protect them from arbitrary intervention by relying on the principle of proportionality. A decade later, things had changed. The ECJ took note of the fact that the Strasbourg court had now acknowledged that Article 8 of the ECHR applies also to companies,<sup>1332</sup> and referring to the jurisprudence of the Strasbourg court, the ECJ was therefore willing to grant protection to legal persons as well. Yet a decade later, legal persons still enjoy a right to privacy, but now the EU Courts rely on Article 7 of the Charter rather than Article 8 of the ECHR when determining the scope of this right.<sup>1333</sup>

However, the right to privacy comes with a caveat. This caveat – that legal and natural persons do not necessarily enjoy the same level of protection – is of great practical importance. By accepting different levels of protection, the two courts have actually managed to allow for an order where (competition) authorities are or at least should be prevented from abusing their powers without necessarily erecting unjustified barriers to the realization of effective (competition) law enforcement. When determining whether authorities have resorted to abuse or arbitrariness in a particular case, it is the scope of protection actually afforded that will determine whether a balance between opposing interests has been struck. Here, the two courts appear to take the view that the procedural safeguards available and applied by the authorities determine whether there is a violation of the right to privacy. Whereas the right to an effective ex post review appears to be a prerequisite, at least under ECHR law, an overall assessment of the other safeguards available will determine whether there has been an arbitrary or disproportionate intervention by the public authorities in the individual case. As discussed in Chapter 1, the Strasbourg court often adopts a casuistic approach, limiting its conclusions to the facts of the specific case at hand. As a result, it is often difficult to draw any general conclusions from the court's rulings. Although the special characteristics of the cases presented in Chapter 8 – such as the fact that both *Robathin* and *Wieser and Bicos* concerned inspections carried out at law offices – certainly had an impact on those rulings, the fairly large number of cases dealing with inspections at company premises coupled with the consistent use by the Strasbourg court of references to earlier case-law, allows these conclusions to be drawn. Companies do enjoy a right to privacy, and although they may not necessarily invoke the right with as much force as natural persons, it should nonetheless protect them from arbitrary or disproportionate intervention by investigating authorities. The proportionality *stricto sensu* test is carried out

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<sup>1332</sup> Case C-94/00, *Roquette Frères*, EU:C:2002:603.

<sup>1333</sup> See e.g. Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596.

through an examination and assessment of the procedural safeguards available and applied in the specific case.

Again, although the Strasbourg court's attitude towards inspections at corporate premises does not necessarily further legal certainty, this flexible approach will allow the courts to adjust the scales in each case to make sure that a proper balance is struck at all times. Unfortunately, and as will be discussed in the following sections, it appears that although the courts strive at upholding a system which is both flexible and just, both the EU Courts and the Strasbourg court sometimes fail to strike a proper balance, leaving this flexible but rather unstructured approach open to criticism.

### 15.2.2 The need for an ex ante review of inspection decisions

In an article written a few years ago, *Venit* criticizes the EU competition law enforcement system as such, accusing the Commission of wearing too many hats. *Venit* points to the fact that it is the Commission, and the Commission alone, that is entrusted with the task of gathering evidence, assessing it, and drawing definite legal conclusions from it, subject only to possible ex post control by the EU courts.<sup>1334</sup> An additional aspect of this order, which was pointed out by Advocate General Wahl in *Deutsche Bahn*,<sup>1335</sup> is that the internal checks and balances typically provided for when the Commission is to adopt legally binding acts do not apply to their full extent for decisions under Article 20 of Regulation 1/2003. Indeed, the power to adopt decisions pursuant to those provisions has been entrusted to the Competition Commissioner, who, in turn, has sub-delegated that power to the Director-General of DG COMP. Inspection decisions are thus made by the staff of DG COMP alone, with other Commission services playing little or no role in the decision-making.<sup>1336</sup>

This order, where most decisions made during the course of a competition case are left to the Commission – and where the adoption of inspection decisions does not even follow the standard routine within the Commission –

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<sup>1334</sup> Venit, *Human All Too Human; The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82*, in Ehlermann and Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011. *Venit* is not the only one to criticize the system, see also e.g. Forrester, *Due Process in European Competition Cases: A Distinguished Institution with Flawed Procedures*, *European Law Review*, vol. 34, no. 6, 2009, pp. 817-43.

<sup>1335</sup> Opinion of Advocate General Wahl in Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:92.

<sup>1336</sup> *Ibid.*, para 61.

will certainly further efficiency, as it reduces the risk for leaks and ensures expedient decision-making. However, it will also render the Commission and its enforcement procedures vulnerable to criticism, especially given the overall structure of the enforcement system and the multiple roles granted to the Commission. *Venit* is certainly not the only one critical of the current order,<sup>1337</sup> and, as noted by *Scordamaglia-Tousis*, although many cartel infringement decisions are challenged, they are rarely challenged on substantive grounds.<sup>1338</sup>

As for the level of protection actually required by law, it was concluded in Section 8.3 that an ex ante review of inspection decisions is not an absolute requirement from either an ECHR or Charter perspective, and that a system where the investigating authority adopts these decisions may be compatible with both the ECHR and the Charter as long as there are other procedural safeguards available that make up for the lack of an ex ante review.<sup>1339</sup> The Strasbourg court has indicated that the lack of prior judicial authorization warrants particular vigilance on the part of the court,<sup>1340</sup> suggesting that the requirements on the procedural safeguards available may be higher than if the inspection is carried out on the basis of a judicial warrant.

The appropriateness of letting the Commission adopt inspection decisions and of the delegated procedure applied by the Commission was discussed by Advocate General Wahl in his Opinion in *Deutsche Bahn*.<sup>1341</sup> According to AG Wahl, it is reasonable that the adoption of inspection decisions is delegated to the Competition Commissioner, so as to permit the rapid execution of inspections while minimizing any risk for leaks.<sup>1342</sup> What AG Wahl states is correct: there is a legitimate interest in ensuring a rapid execution and in minimizing the risk for leaks to ensure that the targeted companies are not made aware of the inspections in advance. However, it is equally true that Regulation 1/2003 requires the Commission to consult with

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<sup>1337</sup> See e.g. Forrester, *Due Process in European Competition Cases: A Distinguished Institution With Flawed Procedures*, *European Law Review*, vol. 34, no. 6, 2009, pp. 817-43, Slater, Thomas and 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 Paper Series, GCLC Working Paper 04/08.

<sup>1338</sup> Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, Wolters Kluwer, 2013, p. 14.

<sup>1339</sup> See e.g. *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

<sup>1340</sup> See e.g. *Camenzind v Switzerland*, judgment of 16 December 1997, Application no. 136/96, para 45, and *Harju v Finland*, judgment of 15 February 2011, Application no. 56716/09, para 39.

<sup>1341</sup> Opinion of Advocate General Wahl in Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:92.

<sup>1342</sup> *Ibid*, para 62.

national authorities before adopting inspection decisions, and it may be questioned whether an ex ante control by a court such as the General Court would increase the risk for leaks further. Nor would it have to unduly delay the execution of dawn raids if strict time limits are introduced.

Still, the value of an ex ante control should not be overestimated. First of all, as time is often of the essence in these cases, the swift review to be carried out by the court at this stage will not necessarily put it in a better position than the Commission to assess whether a dawn raid is justified. What the ex ante control ensures is that the Commission, knowing that it will not be able to carry out a dawn raid without the authorization, will only seek a warrant where it can show that it has reasonable grounds to suspect an infringement. However, the threat of an effective ex post control, where the General Court annuls Commission decisions that run afoul of Regulation 1/2003, may put equal pressure on the Commission.<sup>1343</sup> From a company perspective, it is of course preferable that the judicial control is carried out prior to rather than after the execution of the dawn raid, but an ex ante control will by no means substitute the need for ex post control, and the companies' interests in a 'before-the-event' control may not weigh heavily enough in these cases.

Thus, as long as the other procedural safeguards surrounding inspections effectively make up for the lack of an ex ante control, the system seems both fair and effective. Entrusting these decisions to the Commission also has the benefit of making the system both more efficient and less costly. However, this conclusion is based on the precondition that the procedural safeguards available actually do ensure adequate protection against arbitrary or disproportionate intervention by the authorities. One procedural safeguard that serves this aim is the requirement that the Commission should have grounds to suspect an infringement of the competition rules before resorting to a dawn raid. This safeguard and its application under EU law will be discussed in the following section.

### 15.2.3 The subject-matter and purpose of the inspection

An important factor when determining whether an inspection is justified and thereby compatible with Article 7 of the Charter is the existence of actual suspicions of an infringement.

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<sup>1343</sup> The 'problem' caused by the fact that there is no possibility for standalone actions or interim orders in relation to implementing measures will not be cured by the introduction of an ex ante review.

This issue was discussed in Chapters 8 and 9, where it was established that as companies do enjoy a right to privacy under Article 7 of the Charter, any interference with this right must be in accordance with the law, serve a legitimate aim and be necessary in a democratic society.<sup>1344</sup> Dawn raids carried out in accordance with the terms of Regulation 1/2003 are considered to be in accordance with the law and to serve a legitimate aim – to ensure effective application of the competition rules.<sup>1345</sup> As for the question whether a dawn raid which is carried out without reasonable grounds for suspicion would be considered necessary in a democratic society, both the ECJ and the Strasbourg court appear to share the view that this question should be answered in the negative. In *Robathin*, the Strasbourg court examined in particular whether the warrant was based on reasonable suspicions<sup>1346</sup> and the ECJ has consistently held that the duty on the part of the Commission to state the subject-matter and purpose of the inspection serves to ensure that the inspection is justified.<sup>1347</sup> In *Nexans*, the General Court explicitly stated that the Commission must have reasonable grounds to suspect the infringement stated in the inspection decision, and that a search carried out at the premises of a company with the ultimate aim of detecting any infringement – and not just the one indicated in the inspection decision – would be incompatible with the company’s right to privacy.<sup>1348</sup> This was also the view taken in *France Télécom*,<sup>1349</sup> and in *HeidelbergCement* the Court declared that the obligation to state the purpose of the request for information relates to the Commission’s obligation to indicate the subject-matter of its investigation and therefore to identify the alleged infringement of the competition rules. It further stated that a request for information is only considered necessary when there is a relationship between the information requested and the alleged infringement, and where the

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<sup>1344</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01, para 12.

<sup>1345</sup> As for the legitimate interests listed in Article 8(2) of the ECHR, the Strasbourg court declared in *Vinci Construction* that dawn raids in competition cases serve the aims of ensuring the economic well-being of the country and preventing disorder and crime. See *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10, para 72.

<sup>1346</sup> *Robathin v Austria*, judgment of 3 July 2012, Application no. 30457/06, para 44.

<sup>1347</sup> See e.g. Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, para 19, where the Court also refers to its rulings in Joined Cases 97/87 to 99/87, *Dow Chemical Ibérica and Others v Commission of the European Communities*, EU:C:1989:380, Case C-94/00, *Roquette Frères*, EU:C:2002:603, Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030, and Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

<sup>1348</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596, para 65.

<sup>1349</sup> Case T-340/04, *France Télécom SA v Commission of the European Communities*, EU:T:2007:81, para 53 where the General Court refers to *Roquette Frères*.

Commission has reason to believe that the information will help it determine whether or not the alleged infringement has taken place.<sup>1350</sup>

Thus, a dawn raid carried out without reasonable suspicion would constitute a breach of Article 7 of the Charter and would not meet the applicable ECHR standard. It is only when the Commission has reason to suspect an infringement that a dawn raid is considered justified and not arbitrary or disproportionate. This procedural safeguard serves to strike a proper balance between the opposing interests of adequate fundamental rights protection and effective competition law enforcement. As long as the Commission has reasonable grounds to suspect an infringement, then the Court will consider the use of dawn raids to meet both the suitability, necessity and proportionality *stricto sensu* tests. Therefore, this requirement should not be considered to unduly hamper the work of the Commission.

#### 15.2.4 Information and documents to be covered by the inspection

While a requirement on the part of the Commission to limit its inspections to cases where it actually suspects companies of wrongdoing appears both justified and reasonable, it is not equally apparent that, once the need for an inspection has been established, limitations on the powers to search company premises should be strict. In order for the Commission to be able to find the necessary evidence, it may have to carry out a wide search of a company's premises and of its IT environment. As is apparent from Article 20 of Regulation 1/2003, the Commission is empowered to examine books and other records of the business. The notion of 'business' is defined as the market activities of the undertaking, thus allowing for a rather broad examination.<sup>1351</sup>

However, while this may be necessary in order for the Commission to find the evidence held by the targeted company, it is not necessarily appropriate to grant the Commission equally broad powers to copy or otherwise remove documents or information unrelated to the suspected infringement. Instead, the right to copy should be limited to documents relating to the subject-matter of the inspection. While Article 20(2)(c) does not impose such limitation on the Commission's powers to copy documents falling outside

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<sup>1350</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149, paras 23 and 24.

<sup>1351</sup> See e.g. Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157, para 16.



the scope of the subject-matter, the EU Courts have ruled in favour of this limitation.

Thus in *Deutsche Bahn*, the Court relied on Article 28 of Regulation 1/2003 when declaring that the Commission should not be allowed to seize documents falling outside the subject-matter of the inspection decision. According to this Article, information obtained during the course of an inspection may not be used for purposes other than those indicated in the inspection decision.<sup>1352</sup> According to the Court, Article 28 is not merely aimed at preserving the business secrets of targeted companies, but also their rights of the defence. Thus, although the Commission may have to peruse files not necessarily connected with the subject-matter of the investigation, it should not be allowed to do so with the aim of finding evidence of other infringements than those covered by the inspection decision. Once the inspectors have established that a document or other piece of information is unrelated to the investigation, they shall refrain from copying it or otherwise using it.

The ECJ acknowledged that the requirements on the part of the Commission not only to state the subject-matter and purpose of the inspection, but also to refrain from using evidence obtained for other purposes than those indicated in the inspection decision are fundamental requirements, and that the right of the defence would be seriously endangered should the Commission fail to respect its obligations in this regard. However, the Court also stressed, this requirement does not mean that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happens to obtain during an investigation if that information indicates the existence of other anticompetitive conduct. Such a bar, the Court concluded, would go beyond what is necessary to safeguard professional secrecy and the rights of the defence, and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the EU competition rules.<sup>1353</sup>

With that caveat, the Court declared that the Commission is required to state reasons for its decision ordering an inspection and if that statement of reasons or that decision circumscribes the powers conferred on the Commission's agents, a search may then be made only for those documents coming within the scope of the subject-matter of the inspection.<sup>1354</sup> In the case at hand, the Court found that the Commission had acted unlawfully

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<sup>1352</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, paras 57-59.

<sup>1353</sup> *Ibid.*, at para 59.

<sup>1354</sup> *Ibid.*, at para 60.

when it had collected material that lacked connection with the subject-matter of the inspection. The Commission may thus not actively search for or copy documents that fall outside the scope of the subject-matter of the investigation. This is an appropriate procedural safeguard which, at least in theory, should not be considered to unduly hamper the work of the Commission. However, as has been discussed earlier in this thesis, technical evolution has made it difficult to draw or uphold a clear dividing line between information that is fair game and information that is out of reach for the Commission.

As most information is stored electronically, the Commission has had to develop new search methods, and these methods allow the Commission to collect and review vast amounts of electronic information, including information which is not necessarily connected to the investigation. For these purposes the Commission often makes use of its own dedicated software and/or hardware allowing copying, searching and recovery of data.<sup>1355</sup> During most inspections, the Commission officials go through copies of company storage media at the premises of the targeted company. However, if the selection of documents is not finished at the envisaged end of the on-site inspection, copies of the data still to be searched may be collected for continued selection at Commission headquarters in Brussels. According to the Commission's Explanatory Note, such copy will then be secured and placed in a sealed envelope.<sup>1356</sup>

This practice – to continue the selection of documents outside company premises – falls within a grey zone of making of forensic copies; it constitutes a *de facto* temporary collection of information, but does not necessarily mean that more or unlawful documents will eventually end up in the Commission's case file. As for the applicable ECHR standard, the Strasbourg court has taken a very pragmatic approach to this kind of practice and appears to be concerned solely with the question of which information or documentation will eventually be selected and copied to the case file of the authority. Or, to put it differently, the Strasbourg court does not really appear to be concerned with the amount or nature of documents temporarily seized, but rather with the question of whether the procedural safeguards surrounding such seizure are adequate. Although it pays regard to other questions, such as whether the warrant was reasonably limited and based on reasonable suspicion, it has been willing to accept the making of a back-up tape containing all existing documents on the server as long as the

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<sup>1355</sup> 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 11 September 2015, point 10.

<sup>1356</sup> *Ibid.*, point 14.

procedural safeguards against abuse and arbitrariness were considered adequate. In the case of *Bernh Larsen Holding*, it even stated that considerations of efficiency suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage, and that where the archives were mixed and contained information belonging to third parties, it could '[r]easonably have been foreseen that the tax authorities should not have had to rely on the tax subjects' own indications of where to find relevant material, but should have been able to access all data on the server in order to appraise the matter for themselves'.<sup>1357</sup>

Thus, establishing that the competition authority has made image copies of documents that are unrelated to the case at hand is not sufficient to prove that the measure is arbitrary or disproportionate. Instead, such conclusion will be drawn based on the procedural safeguards available, and on how these safeguards have actually been applied by the national courts. In the case of *Robathin* for example, the Austrian legal system provided for a number of procedural safeguards, but as the Austrian court had failed to respect these safeguards and had performed only a cursory review of the applicant's complaint, an infringement of Article 8 of the ECHR was established.<sup>1358</sup> Likewise, in *Wieser and Bicos*, the Strasbourg court concluded that the Austrian legal system provided a number of procedural safeguards, but that the national authorities had not respected these safeguards when searching the computer system and seizing electronic copies of certain files. An infringement was thus established.<sup>1359</sup>

Again, the Strasbourg court has chosen a pragmatic approach and accepted a standard which is unlikely to erect any unjustified barriers to the Commission's enforcement of the competition rules. However, when it comes to matters dealing with the collection and copying of documents, this flexible and pragmatic approach does not come without risks. Although the Commission inspectors are equally prevented from printing out documents unrelated to the subject-matter at their own headquarters as they are at company premises, the safeguards available to the company are obviously weaker when the information is already in the Commission's possession. Furthermore, if the information is brought to Brussels, it is in practice more difficult for the company to ensure that privileged material or information which is unrelated to the matter or covered by e.g. professional secrecy does

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<sup>1357</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, paras 130 through 132.

<sup>1358</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08.

<sup>1359</sup> *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application no. 74336/01.

not end up in the Commission's case file or in the hands of third parties.<sup>1360</sup> Add to this the limited possibilities for judicial review should the Commission exceed the boundaries of its powers, and it is likely that any harm sustained in such cases may be irreparable.

Thus, although the Commission must also be able to navigate in today's digital world, and although the Strasbourg court has taken a very pragmatic approach to cases dealing with copying of servers and the like, the safeguards surrounding such practices need to be of a certain standard. It would therefore be preferable if the rules surrounding these practices were clearer and stricter in order to minimize the risk that harm may be caused to targeted companies. It cannot be considered sufficient that the Commission itself issues best practices and other 'sunshine enforcement instruments'. With this being said, there is of course an inherent tension between an ever-changing reality and a slow-moving legislative process, and one cannot ignore the risk that a detailed regulation would soon become obsolete or outdated. While any rules will have to be strict, therefore they cannot be too detailed, again leaving it to the Court to strike a balance in the individual case. This further underlines the need for effective access to courts, and, as will be discussed in Section 15.2.7 below, the possibilities of judicial review need to be extended to ensure that the measures taken by the Commission during the course of the investigation may be reviewed properly and in a timely manner.

### 15.2.5 The privilege against self-incrimination

The privilege against self-incrimination is one area where the jurisprudence of the Strasbourg court is restricted to natural persons and where the standard of protection afforded by the Strasbourg court therefore may not necessarily be automatically applied to competition law cases. In fact, in the case of *Orkem*, the ECJ declared that neither the laws of the Member States nor the ECHR could be relied on to establish a right for legal persons not to incriminate themselves. Although acknowledging that legal persons could rely on Article 6 of the ECHR in investigations relating to competition law matters, the ECJ declared that neither the wording of the Article nor the case law of the Strasbourg court indicated that they should be protected by a right not to give evidence against themselves.<sup>1361</sup> Three decades have passed since the *Orkem* ruling and there is still no ruling from the Strasbourg court

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<sup>1360</sup> Especially since Article 28 allows for the exchange of any information collected with other competition authorities within the ECN. See Article 28 of Regulation 1/2003.

<sup>1361</sup> Case 374/87, *Orkem SA v the Commission of the European Communities*, EU:C:1989:387, para 30.

concerning legal persons. This fact does not help make the picture any clearer.

This being said, the ECJ was willing already in *Orkem* to grant legal persons protection from having to admit guilt. The Court referred to its ruling in *Hoechst*, and declared that it is necessary to prevent the rights of a targeted company from being irremediably impaired during preliminary inquiry procedures. In order to ensure effective and efficient competition law enforcement, the Commission should be able to request information from the companies under investigation, but should not require them to answer leading questions or to compile information in a way that proves their guilt.

The Strasbourg court has taken a slightly different approach towards the privilege and protects means rather than content.<sup>1362</sup> As a general rule, a suspect has a right to remain silent, and this right covers both incriminating and non-incriminating statements. Likewise, when it comes to physical evidence, such evidence is not protected if it is collected by the prosecuting authority under a warrant, but is generally protected if it is the suspect that is compelled to produce the evidence.

The ECJ protects suspects from having to answer incriminating questions, orally or in writing, only. Furthermore, it excludes physical evidence, irrespective of how it comes in the hands of the Commission, from the privilege against self-incrimination. Thus, in *SGL Carbon*, an obligation to hand over pre-existing documents which could be used as evidence against the company was not considered to violate the privilege against self-incrimination. A further limitation imposed by the Court is the fact it will not annul an infringement decision simply because the Commission has posed unlawful questions during the investigation. It is only when the Commission has actually made use of the answers to those questions that the decision may be annulled. This standpoint would be in line with the Strasbourg court's ruling in *Saunders*, and it is reasonable that the decision in the underlying competition case is only annulled if it has been based on evidence that has been unlawfully collected. Otherwise, companies could refrain from challenging the request for information, await the final decision, and then have it annulled. However, the Court's case-law underlines the importance of challenging the request for information where such request includes unlawful questions, as it cannot be ruled out that, even though the Commission refrains from basing its decision on evidence collected contrary

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<sup>1362</sup> For a further discussion on this, see Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?*, *Cardozo Law Review*, vol. 30, no. 3, December 2008, and Redmayne, *Rethinking the Privilege Against Self-incrimination*, *Oxford Journal of Legal Studies*, vol. 27, no. 2, 2007.

to the privilege; such information is nevertheless used indirectly to collect further information, is exchanged between the competition authorities within the ECN or disclosed to possible cartel victims.

Although the ECJ appears to provide a slightly weaker protection than the Strasbourg court, requiring companies to cooperate actively, answer questions of fact and submit the documents or information requested by the Commission, one cannot disregard the fact that the case-law from the Strasbourg court is limited to natural persons. Even though the ECtHR is often willing to extend protection also to legal persons, such protection is not necessarily equally far-reaching. In *Bernh Larsen Holding*, the Strasbourg court declared that ‘the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual’.<sup>1363</sup> Furthermore, although the court has declared that the privilege applies to all types of criminal proceedings, this does not necessarily mean that its application is identical in all cases. In *O’Halloran and Francis* the court made clear that although the right to a fair trial is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule, but must depend on the circumstances of the particular case.<sup>1364</sup> In *Jalloh*, the circumstances of the case made the court raise the bar, as the means applied by the national authorities were not considered to meet the proportionality *stricto sensu* test. In *Menarini* on the other hand, the court declared that the fact that a case falls outside the core meaning of the term ‘criminal offence’, will not exonerate national authorities from the obligation to provide adequate procedural safeguards, but may, nevertheless affect the application of such safeguards.<sup>1365</sup> It is therefore possible that the Strasbourg court would accept the standard set by the ECJ even though the rulings from the Luxembourg court may provide a marginally lower standard than the one established in Strasbourg.

And indeed, in order to ensure effective application of the competition rules, the Commission must be able to carry out dawn raids and make copies of information or documents that may provide evidence of an infringement. This practice is also in line with the ECHR standard which generally does

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<sup>1363</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 159.

<sup>1364</sup> *O’Halloran and Francis v the United Kingdom*, judgment of 29 June 2007, Applications nos. 15809/02 and 25624/02, at para 53.

<sup>1365</sup> Or as the Strasbourg court put it: «*Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l’article 6, elles peuvent néanmoins influencer les modalités de leur application.*». See A. *Menarini Diagnostics S.R.L. v Italy*, judgment of 27 September 2011, Application no. 43509/08, para 62.

not protect so-called real evidence. The main difference in the courts' view instead appears to lie in the nature of the questions that may be posed by the investigating authorities. However, as has been observed by the Strasbourg court, while it is true that answers to factual questions may be used to cast doubt on or contradict statements made by a suspect, it is difficult to draw any direct parallel between the measures taken in cases such as *Saunders* and the Commission's procedures under Regulation 1/2003. In *Saunders*, the counsel for the prosecution spent three days reading selected parts of the transcripts to the jury, despite objections by the applicant.<sup>1366</sup> The Commission's powers to ask questions during the course of a dawn raid are laid down in Article 20(2)(e) of Regulation 1/2003,<sup>1367</sup> according to which the agents may ask for explanations on facts or documents relating to the subject-matter of the inspection.<sup>1368</sup> Commission officials are not empowered to carry out proper interviews without the consent of the persons interviewed.<sup>1369</sup> As no compulsion is involved when interviews are carried out under Regulation 1/2003, the privilege against self-incrimination will not be triggered under either EU or ECHR law.<sup>1370</sup>

Given the aforementioned, it can be concluded that – save for the limited possibilities to obtain a judicial review of questions posed during the course of a dawn raid – the protection afforded by the ECJ strikes an acceptable balance between the need for effective competition law enforcement and the protection against having to incriminate oneself. The Commission has the necessary powers to collect evidence during its dawn raids and may ask for explanations on facts or documents on the spot, but is prevented from carrying out interviews without the consent of those being interviewed. As long as a clear dividing line is drawn between the questions asked under Article 20 and the interviews carried out under Article 19 of Regulation 1/2003, and as long as the persons interviewed are informed of the fact that they are not obliged to answer the questions posed,<sup>1371</sup> this practice would

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<sup>1366</sup> And where Mr Saunders was convicted to five years of imprisonment.

<sup>1367</sup> *Saunders v United Kingdom*, judgment of 17 December 1996, Application no. 19187/91, paras 31 and 72.

<sup>1368</sup> Article 20(2)(e) of Regulation 1/2003.

<sup>1369</sup> Article 19 of Regulation 1/2003 stipulates that the Commission may interview anyone who consents to be interviewed for the purpose of collecting information relating to the subject-matter of the investigation.

<sup>1370</sup> However, while the case-law of the ECJ highlights the importance of challenging the request for information as such and not awaiting the Commission's decision in the underlying competition case, the General Court declared in *Nexans* that there is no possibility for companies to challenge any questions posed by the Commission during dawn raids on a standalone basis. This is a weakness in the system which has been addressed further in Chapter 13.

<sup>1371</sup> The importance of this safeguard shall be viewed in light of the fact that company representatives may have difficulties knowing which questions that are admissible, especially

not unduly affect the companies' defence rights. Given this, and given the fact that the Commission may not request companies to compile information or answer questions where the answer may involve an admission of guilt, the system in place appears to serve both the interests of effective competition law enforcement and adequate fundamental rights protection.

### 15.2.6 The legal professional privilege

The legal professional privilege is another area where the two courts have opted for slightly different routes. While the EU Courts have focused on the scope of protection to be afforded, determining the types of correspondence or other documents that deserve protection – and how the notion of a 'lawyer' is to be defined – the Strasbourg court has not carried out a detailed analysis of the types of documents that should be protected or whether the correspondence needs to be between a client and an independent legal advisor. In fact, the Strasbourg court appears to consider all correspondence between client and lawyer to be protected by the privilege. As for any requirements relating to the status of the lawyer, the Strasbourg court did actually refer to the confidentiality '*qui s'attache aux relations entre un avocat et son client*'<sup>1372</sup> in the case of *Vinci Construction*, a choice of words that may be taken to indicate that the right should cover only correspondence with lawyers that are admitted to a bar.

Furthermore, the Strasbourg court takes a slightly broader view than the ECJ on the privilege, assessing its scope not only within the ambit of Article 6 of the ECHR, but also, or mainly, under Article 8 and the right to privacy. In *Vinci Construction*, it was clear that the Strasbourg court considered that questions of legal professional privilege should be assessed under Article 8 rather than Article 6 of the ECHR.<sup>1373</sup> If the privilege is related only to the right of the defence, such a stance could be questioned. However, as is clear from other rulings, the Strasbourg court does consider the privilege from the standpoint of the administration of justice, and the interest in ensuring an open and candid communication between client and lawyer. Thus in *Michaud v. France*, it declared that while Article 8 of the ECHR protects the confidentiality of all correspondence between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This, the court declared, is justified by the fact that lawyers are assigned a

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given the fact that any refusal to answer the questions posed under Article 20(2)(e) may be seen as obstruction and render a significant fine.

<sup>1372</sup> *Vinci Construction et GTM Génie Civil et Services v France*, judgment of 2 April 2015, Applications nos. 63629/10 and 60567/10.

<sup>1373</sup> *Ibid.*, para 47.



fundamental role in a democratic society: that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake.<sup>1374</sup>

In the case of *André and Another v. France*, the Strasbourg court acknowledged the connection between the legal professional privilege and the privilege against self-incrimination. There it declared that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between lawyer and client. Furthermore, the court continued, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client not to incriminate himself, which 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'.<sup>1375</sup>

While the Strasbourg court has taken a broad view and declared that both Article 6 and Article 8 of the ECHR may come into play in cases dealing with the legal professional privilege, the EU Courts have chosen a narrower path. This choice is not surprising given the fact that it has been the EU Courts' task to establish the privilege under EU law, and when this was first done in 1982, there was still no case-law from Strasbourg. Instead the ECJ had to frame the privilege upon those features that were common to the laws of all the Member States. This meant that the privilege came to cover only correspondence between the client and external lawyers, and provided that the lawyer was admitted to an EU Member State bar. In principle, no objections can be made against the Court adopting this limited approach. Had the Court chosen a wider definition, it could easily have been argued that it was resorting to judicial activism. However, whether the limited scope is desirable and still justifiable is another matter.

Determining who and what deserves protection will necessarily influence the scope of protection afforded. It is clear from the ECJ's case-law that it considers the privilege to serve the interest of a proper administration of justice and thus also to ensure that individuals act within the law. Furthermore, the ECJ has chosen to exclude from the privilege any legal advice provided by in-house counsels, and this irrespective of whether the counsels are members of a bar association. It is not clear from the Strasbourg court's case-law whether such a stance is in line with the ECHR standard,

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<sup>1374</sup> *Michaud v France*, judgment of 6 December 2012, Application no. 12323/11, para. 118.

<sup>1375</sup> *André and Another v France*, judgment of 24 July 2008, Application no. 18603/03, para 41.

but the arguments presented by the ECJ to justify the limitation are valid, and may well be accepted. According to the ECJ, the requirement of independence is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.<sup>1376</sup> Thus, a lawyer who – although being admitted to a bar association – is employed by a client, lacks the independence necessary to provide advice 'in the overriding interests of that cause'. Being member of a bar association does not alter the fact that the counsel is employed by the client, and is thereby prevented from ignoring the commercial strategies pursued by the employer. According to the Court, this affects the ability to exercise professional independence. Furthermore, in-house lawyers may be required to carry out other tasks which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between lawyer and employer, the Court declared in *AKZO*.<sup>1377</sup> Thus, an in-house counsel cannot meet the requirement of independence, as any advice provided may be 'tainted' both by economic dependence and the close ties with the employer. It will therefore not necessarily serve the interests of a proper administration of justice.

While any limitation in the privilege to protect only correspondence with independent lawyers must be accepted, there is little or no reason to accept an exclusion of correspondence between clients and independent lawyers who are members of bar associations outside the EU. Clearly, if a company seeks legal advice on competition law matters from its US counsels, such advice should be protected and not be seized or copied by the Commission. This is especially so since the Court itself declared in *Nexans* that, given the global reach of the suspected cartel, the Commission should be able to review documents linked to projects located outside the EU as these were likely to provide relevant information regarding the suspected infringement.<sup>1378</sup> It appears that the Commission also takes this view, and refrains in practice from making copies of correspondence with non-EU lawyers; therefore the Court's stance is of little practical importance.

Another limitation in the EU privilege that needs to be questioned concerns the limitation to correspondence that has a relationship with the subject-matter of the investigation. In *AM & S*, the Court declared that the protection must cover all written communication exchanged after the initiation of the

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<sup>1376</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities* EU:C:1982:157, para 24.

<sup>1377</sup> Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, EU:C:2010:512, para 48.

<sup>1378</sup> Case C-37/13 P, *Nexans SA and Nexans France SAS v European Commission*, EU:C:2014:2030, paras 40-41.

administrative procedure as well as earlier communications which have a relationship with the subject-matter of that procedure.<sup>1379</sup> Although when performing a dawn raid, the Commission should of course focus on documents having a relationship with the subject-matter of the investigation, the review will necessarily cover other documents as well. If the Commission would then be allowed to peruse client-lawyer correspondence lacking connection with the subject-matter of the investigation, this could affect the company's right of the defence, and make the company less willing to confide in its lawyers.<sup>1380</sup> Limiting the privilege in this respect, therefore, does not appear to further a proper administration of justice, and it could also be questioned whether it meets the applicable ECHR standard, as the Strasbourg court apparently takes the view that all correspondence between client and lawyer should be protected.<sup>1381</sup>

To conclude, while a limitation of the privilege to cover only correspondence between a company and its independent counsels seems logical and reasonable, as it furthers the interests of a proper administration of justice, it is difficult to see why the privilege should be limited to correspondence covered by the subject-matter of the investigation or to correspondence with lawyers admitted to Member State Bars only.

### 15.2.7 Judicial review of inspection decisions and measures taken on their basis

The previous sub-sections have established that the Strasbourg court takes a rather flexible and pragmatic approach towards searches carried out at company premises, not requiring any ex ante review of inspection decisions, and allowing for rather broad searches as well as the making of copy-images for review and selection back at authority premises. In the case of *Bernh Larsen Holding*, the Strasbourg court explicitly acknowledged that considerations of efficiency suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage, and that interpreting Article 8 of the ECHR to protect also legal persons would not unduly

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<sup>1379</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities* EU:C:1982:157, para 23.

<sup>1380</sup> Especially since the Commission is not barred from initiating an inquiry in order to verify or supplement information which it happens to obtain during an investigation if that information indicates the existence of other anti-competitive conduct. Thus although the correspondence does not relate to an ongoing investigation, the Commission may later decide to open another investigation.

<sup>1381</sup> see e.g. *Foxley v United Kingdom*, judgment of 20 June 2000, Application no. 33274/96, at para 43.

hamper the Contracting States as they would retain their entitlement to ‘interfere’ to the extent permitted by the Article, and that such right may well be more far-reaching where professional or business premises were involved than would otherwise be the case.<sup>1382</sup> However, this pragmatic, flexible and to some extent arguably lax approach is conditioned upon one thing: the existence of an effective ex post control of any decisions taken by the investigating authorities as well as of any measures taken on their basis. Furthermore, not only does the Strasbourg court require that targeted companies should have a possibility to require a review of decisions or measures taken by the authorities during the course of an inspection, if a company can show that the authority has acted beyond its powers and seized documents that are either outside the scope of the investigation or protected by legal professional privilege, then the court should order the restitution of the documents unlawfully seized.<sup>1383</sup> In other words, the Strasbourg court acknowledges the appropriateness and necessity of far-reaching investigatory measures, but only if the procedural safeguards surrounding those measures are adequate. In the Strasbourg court’s view, the proportionality *stricto sensu* test cannot be met absent the possibility for an effective judicial review of inspection decisions and measures taken on their basis, as in this case there is no effective protection against abuse or arbitrariness.

Thus, while the previous sub-sections have not revealed any major discrepancies in the standard of protection afforded under EU or ECHR law, it is clear that the two legal systems look differently on the importance of access to courts. As discussed in Chapter 13, these differences risk having undesired spill-over effects, given that the Strasbourg court conditions its approval of the use of intrusive investigatory measures on the availability of an effective judicial review. Therefore, if the EU legal system cannot guarantee an effective judicial control, this will not only affect the right to a fair trial under Article 47 of the Charter. Measures taken by the Commission during dawn raids that would otherwise be accepted by the Strasbourg court, would then fail to meet the ECHR standard as they would not be considered to be surrounded by adequate procedural safeguards. Absent an effective ex post review, the legitimacy of the entire dawn raid procedure can be questioned.

Under the EU system, it is possible to challenge the inspection decisions as such, but the possibilities to challenge measures taken on their basis are

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<sup>1382</sup> *Bernh Larsen Holding AS and Others v Norway*, judgment of 14 March 2013, Application no. 24117/08, para 104.

<sup>1383</sup> This provided that the applicant is able to identify the documents not to be covered by the investigation.

meagre, to say the least. No interim measures are available unless one challenges the inspection decision, and there is no possibility for a standalone action against the measures taken by the Commission during the inspection unless they are considered to bring about a distinct change in the legal position of the targeted company. As a consequence, if the Commission acts outside the scope of the inspection decision and decides to make copies of material unrelated to an otherwise lawful inspection decision, in practice there is nothing the company can do to prevent such action from being taken.

This means that companies targeted by the Commission's investigations have little or no possibility to prevent the Commission from adopting measures that may be questionable from a fundamental rights perspective, and if they decide to challenge measures already taken, this cannot be done until the Commission has adopted a final decision in the underlying competition case. If there is no such decision, then there is no possibility for review. However, in the case of *Nexans*, the General Court actually did suggest an alternative route, declaring that Nexans could have obstructed the Commission's investigation, awaited the Commission's decision to impose fines for obstruction and then challenged that decision.<sup>1384</sup> Clearly, although this may be an option, it is not a satisfactory alternative. Encouraging obstruction does not serve the interests of either effective competition law enforcement or the right of the defence. Furthermore, if the Commission is assisted by national law enforcement authorities in accordance with Article 20(8) of Regulation 1/2003, obstruction is not even an option. The possibilities to obtain a review of measures taken during inspections should therefore be extended so that companies are also provided a realistic and effective possibility to challenge the Commission's actions in cases where the Commission adopts new investigative methods, acts outside the scope of the inspection decision, or where the legal situation is not clear.

Against this proposition, it could be argued that an extension of the possibilities for judicial review would open up for an even greater number of challenges on procedural grounds, and that the workload of the General Court would increase to an unreasonable extent – resulting in an even more unwieldy judicial system. However, there is nothing indicating that the sealed envelope procedure applied in cases concerning legal professional privilege has resulted in a flood of legal actions. Quite to the contrary; the number of cases dealing with legal professional privilege are few in number. Furthermore, if companies would (ab)use this possibility as a way to stall or obstruct the Commission's investigations, this could always render an increase in the fines imposed in the underlying competition case. Furthermore, it should not be forgotten that applications to the General Court

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<sup>1384</sup> Case T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596, para 126.

do not automatically have a suspensory effect. If a company challenges a measure taken by the Commission during a dawn raid, this will not prevent the Commission from continuing its investigation, and if the General Court would subsequently accept the arguments by the applicant, in most cases the ruling would be limited to the measure in question. Thus, if the company challenges the seizure of a laptop and the General Court rules in favour of the applicant, the Commission will not have been prevented from continuing its investigation and, if it has not already reviewed the contents of the laptop, it may then always do so at the premises of the company.

In fact, it could be argued that the order currently in place may have more far-reaching negative implications on the competition law enforcement system than the order suggested in this thesis. The ECJ has declared that where an inspection is vitiated by irregularities, the Commission will be prevented from using any document or evidence which it might have obtained during the course of that investigation.<sup>1385</sup> This view was taken already in *Hoechst*, where the Court made clear that if an infringement decision is based on unlawfully obtained evidence, the decision will be annulled in so far as it was based on the evidence in question.<sup>1386</sup> In practice, this is a far-reaching but necessary sanction, which may have devastating effects on the Commission's enforcement practices. Not only will the annulment (in whole or parts) of the infringement decision send the Commission back to square one; it may also influence the deterrent effect of the competition law system as a whole. It must therefore be in the interest of the Commission as well as in the greater interest of ensuring effective (and cost-effective) competition law enforcement, that any findings of irregularities are made at an early stage of the investigation, when there is still time to correct any mistakes made by the Commission, rather than after the adoption of the final decision in the underlying competition case.

A final note on this issue concerns the distinction between those measures that may be challenged on a standalone basis and those that may not. The finding by the General Court that a certain measure does not bring about a distinct change in the legal position of the applicant implies that it has made some sort of assessment of the measure in question before being able to reach this conclusion. The question is then as follows: could this limited assessment not be considered sufficient from a fundamental rights perspective? Is it really necessary for the court to carry out a proper review

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<sup>1385</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, para 45.

<sup>1386</sup> Case 46/87 R, *Hoechst AG v Commission of the European Communities*, EU:C:1987:167, para 34. See also Kerse and Khan, *EU Antitrust Procedure*, 6<sup>th</sup> edn, Sweet & Maxwell, 2012, p. 620.

of the measure in question? The Strasbourg court does not distinguish between different types of measures, and has consistently held that not only must the national courts have the power to review any measures taken on the basis of inspection decisions; the national courts should also perform a proper review of both law and facts when required to do so. This stance appears reasonable given the wide powers granted to the Commission.

As discussed in Section 15.2.4 above, the speed of technological development and the increasingly sophisticated methods applied by cartelists to conceal any unlawful contacts are two factors which force the Commission to constantly adjust and develop its investigatory methods in order to ensure that EU competition law enforcement remains effective. The investigatory tools currently applied are much more intrusive and complex than those applied only a decade ago. This development underlines the need to supervise the Commission's actions, be it through regulation or judicial review. The Commission may well have to introduce and apply new investigatory methods, but there must be a possibility for targeted companies to obtain a judicial review of such methods. This is a requirement under ECHR legislation that cannot be considered to unduly hamper the work of the Commission.

Thus, to conclude, an extension of the EU Courts' power of review is unlikely to stand in the way of effective competition law enforcement. Given the fact that this would eliminate the risk of having to annul infringement decisions due to irregularities during the course of inspections, it could even be argued that broader review powers would promote a more effective application of the competition rules. Furthermore, and perhaps even more importantly, unless the possibilities for judicial review are extended, the system will not be able to afford adequate safeguards against abuse, and many of the measures available to the Commission – such as the possibility to ask questions on the spot or bring image copies of servers or hard drives back to Commission headquarters – will then fail to meet the ECHR standard. Thus, without greater access to courts, the legitimacy of the EU competition law enforcement system may well be questioned.

## 15.3 Connecting the dots

### 15.3.1 Can a balance be struck?

The quest for balance is the main theme of this thesis. This quest is partly motivated by the belief that if a balance is found and struck between the opposing interests of effective competition law enforcement and adequate

fundamental rights protection, this will allow the EU competition law enforcement system to become even more effective as the Commission's actions will be less contestable on procedural grounds. Thus, by ensuring adequate fundamental rights protection, the enforcement system will not only gain further legitimacy, it will also be more effective.

The European Union, as the Court has reiterated time and again, is a unique and autonomous legal order,<sup>1387</sup> and while the EEC may have started out as project of limited ambitions, it has evolved into a European Union spanning a great number of policy areas, from climate, environment and health to external relations and security, justice and migration. Today, the actions of the Union can have a huge impact on citizens and corporations throughout the EU and even beyond its borders. However, with increased power comes increased responsibility. In order to preserve the legitimacy of the European Union, it is therefore paramount that the Union respects the values on which it is based – such as fundamental rights and the rule of law – and that individuals are thereby protected against arbitrary and disproportionate intervention by EU institutions.<sup>1388</sup>

At the same time, there is near-universal consensus that cartels and other hard-core antitrust infringements are harmful to society. Ensuring effective application of the EU competition rules is an important task vested in the Commission. This is further emphasized by the fact that these rules should not only ensure effective resource allocation; they also serve the aim of securing the implementation of the integration process which is the very *raison d'être* of the EU. Thus, although the procedural safeguards available to targeted companies need to be adequate, it is equally important that they are not overprotective and constitute an unjustified hindrance to the Commission's work.

Earlier in this chapter it was established that not only is it possible to strike a balance between the opposing interests – there appears to be an acceptable balance in many of the areas covered by the research. The implementation of the Modernization Package coupled with the introduction of a leniency programme has resulted in a significant increase in the number of cases pursued by the Commission and in the fines imposed on cartelists and companies abusing their market power. It thus appears that the Commission has appropriate tools to detect and sanction cartels and abuse of dominance.

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<sup>1387</sup> For early rulings on the nature and standing of the Community legal order, see e.g. Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1, Case 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66, and Case C-6/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, EU:C:1991:428.

<sup>1388</sup> Article 2 of the TEU.



As for the procedural safeguards available to targeted companies, they are, by and large, if not perfectly designed, at least acceptable. However, Section 15.2 above established that the safety-net surrounding the Commission's dawn raids does not provide full protection, as companies targeted by the Commission's inspections are not granted access to courts to the extent required by the ECHR.

Under EU law, there is a right to have inspection decisions reviewed by the EU Courts, and in that sense the EU system meets the standard set by the Strasbourg court. In fact, the case-law surrounding the Commission's dawn raids indicates that not only are the EU Courts carrying out a strict scrutiny of the Commission's inspection decisions (when requested to do so); they also appear to have raised the bar recently, striking down the decisions adopted by the Commission in cases such as *Nexans*,<sup>1389</sup> *Deutsche Bahn*<sup>1390</sup> and *HeidelbergCement*.<sup>1391</sup> However, as for the safeguards surrounding measures taken on the basis of inspection decisions, it was established in Section 15.2 that these are neither adequate nor consistent. Contrary to the requirements of the ECHR, the EU system does not guarantee a judicial review of the measures taken by the Commission during the course of its dawn raids. Another concern that was raised in the previous section relates to the scope of the legal professional privilege and the Court's decision not to protect correspondence with lawyers admitted to bars outside the EU or containing legal advice unrelated to the subject-matter of the investigation. These limitations in the privilege must be questioned as they do not serve the interests of a proper administration of justice.

It was also concluded in the Section 15.2 that although the deficiencies identified therein were of seemingly limited scope, they may have severe implications on the legitimacy of the entire dawn raid procedure. When applying Article 8 of the ECHR, the Strasbourg court applies the principle of proportionality.<sup>1392</sup> It is clear from the Strasbourg court's case-law that inspections performed within the frame of competition cases are considered to pursue a proper purpose and to meet the suitability criterion. As for the least restrictive means test, the Strasbourg court often leaves it to the national courts to determine whether a rights limitation is efficient, thus relying on their margin of appreciation. What the Strasbourg court focuses on instead is the application of the proportionality *stricto sensu* test. Here the Strasbourg court has established that, although the rights of legal persons do

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<sup>1389</sup> Case T-135/09, *Nexans France SAS and Nexans SA v European Commission*, EU:T:2012:596.

<sup>1390</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404.

<sup>1391</sup> Case C-247/14 P, *HeidelbergCement AG v European Commission*, EU:C:2016:149.

<sup>1392</sup> Albeit according to the structure provided for in Article 8(2) of the ECHR.

not carry the same weight as those of natural persons, they still carry a certain weight and any limitations must therefore be narrowly construed and necessary in a democratic society. In this respect, the Strasbourg court has consistently held that where there is no possibility for judicial review of inspection decisions or measures taken on their basis, the weights in the balancing scale will shift by default and the measure will be deemed disproportionate or arbitrary. Thus, a system which cannot guarantee a timely and effective judicial review will not ensure adequate protection against abuse or arbitrariness.

On the other hand, and as was also established in Section 15.2, in those cases where the Strasbourg court finds that there are effective means to obtain a proper judicial review, it is willing to accept far-reaching and intrusive investigatory measures. This way, the Strasbourg court adopts a both flexible and pragmatic approach, making room for national enforcement systems which are effective, but which are still able to protect individuals against arbitrary and disproportionate intervention by the public. Furthermore, and perhaps more importantly, the Strasbourg court's stance allows enforcement systems to adapt to evolutions in society. As has been acknowledged throughout this thesis, dawn raids carried out only a few decades ago share few similarities with the dawn raids that are now carried out by the Commission. Today, evidence is likely to be found in computers, smart phones or tablets – not in any filing cabinets. Thus, the enforcement agencies have had to adapt their search methods, and given the rapid technological development, they will most likely have to continue adapting these methods to be able to ensure an effective application of the competition rules. The Strasbourg court's approach, to assess the procedural safeguards rather than the measures applied,<sup>1393</sup> will not stand in the way of such adaptations.

Based on the foregoing, it was concluded in Section 15.2 that the ECHR standard manages to strike a balance between the opposing interests of effective competition law enforcement and adequate fundamental rights protection, and that requiring the EU to adhere to the ECHR standard in this respect would not erect unjustified barriers to the work of the Commission. Instead, an adjustment would strengthen the legitimacy of the Commission's practices and the competition law enforcement system as a whole.

Such adjustment would also further the interests of legal certainty, as the current order could be criticized for being inconsistent and therefore failing

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<sup>1393</sup> Provided and as long as the methods applied are not too far-reaching, such as in the case of *Jalloh* where German police had used methods that were contrary to Article 3 of the ECHR in order to secure evidence of drug dealing, see *Jalloh v Germany*, judgment of 11 July 2006, Application no. 54810/00.

to comply with requirements of legal certainty. In *Nexans*, the General Court declared that the decisions to bring image copies back to Brussels for review and selection at Commission headquarters and to interview company staff could not be challenged on a standalone basis, as such measures were implementing measures paving the way for the final decision.<sup>1394</sup> In *Deutsche Bahn* on the other hand, the Court considered itself both able and willing to assess whether there had been an ‘infringement of the rights of the defence due to irregularities vitiating the conduct of the first inspection’.<sup>1395</sup> Likewise, the Court considers the review and copying of privileged material to be a challengeable decision. Although the assessment in *Deutsche Bahn* was required in order for the Court to determine whether the subsequent inspection decisions were lawful, and although the Court has established that the seizure of privileged material constitutes a binding legal act – thereby distinguishing it from measures paving the way for the final decision – the Court’s rulings all point to the fact that it is often difficult to draw a clear dividing line between those measures that are reviewable and those which may not be challenged on a standalone basis. This in turn makes it difficult to guarantee consistency in the Court’s application and interpretation of EU law. To conclude, unless the possibilities for judicial review are extended, the current system will not be able to guarantee adequate procedural safeguards and there is also a risk of inconsistent application of EU law.

In the following, the implications of the deficiencies in the EU standard will be discussed against the broader setting of the EU competition law enforcement system, followed by a discussion about possible ways to bring the EU standard in line with the required ECHR standard.

### 15.3.2 Placing the dawn raid procedure in a broader setting

This research is delimited in scope to the Commission’s dawn raid practices. Yet, the dawn raid is only one part of a competition case, and any findings need to be analysed against the broader setting of the EU competition law enforcement system. The reason for this is of course that the gravity of any deficiencies identified will be affected by the protection afforded under other parts of the enforcement procedure. If all or parts of the procedure are flawed in the sense that individuals are not afforded adequate protection against abuse or arbitrariness, this will further emphasize the importance of dealing with the deficiencies identified in Section 15.2. While an in-depth analysis is beyond the scope of this thesis, a brief discussion is nevertheless

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<sup>1394</sup> Case T-135/09, *Nexans France SAS and Nexans SA v Commission*, EU:T:2012:596.

<sup>1395</sup> Case C-583/13 P, *Deutsche Bahn AG and Others v European Commission*, EU:C:2015:404, paras 50-69.

necessary. Two different aspects are addressed under this heading. First, the institutional setting of the EU competition law enforcement system and the role of the EU courts is discussed. Second, issues related to the decentralised application of the competition rules and the cooperation between competition authorities are briefly addressed.

As for the institutional set-up of competition authorities, there are two basic institutional models that can be distinguished among the authorities throughout the EU. The first is the administrative model, where a single administrative authority investigates cases and takes enforcement decisions subject to judicial control. The administrative model is the prevailing model in the EU, but some Member States, including Sweden, operate a judicial model where an administrative authority carries out the investigation and then brings the case before a court, either for a decision on substance and on sanctions (if any) or in relation to the imposition of sanctions only.<sup>1396</sup>

As noted in Chapter 3, the EU competition law enforcement system belongs to the first category. The system is centralized in the respect that if it is the Commission that investigates a suspected infringement of Article 101 or 102 of the TFEU, then it is the Commission and the Commission alone that is entrusted with the task of gathering evidence, assessing it, and drawing definite legal conclusions from it, subject only to possible ex post control by the EU Courts. While this enforcement structure has the potential advantage of being more efficient, it carries an increased risk that the rights of individuals are not properly safeguarded. When the Commission has the power to impose fines, and where these fines may be increased if the Commission perceives that the targeted company refuses to cooperate or otherwise obstructs the Commission's investigations, this will by necessity affect the companies' incentives to question the Commission's procedures or powers. This order might well be necessary to ensure the required deterrent effect. As noted in Chapter 2, detection and deterrence are two important aspects of effective competition law enforcement which cannot be achieved unless the fear of detection is real and the consequences are severe.<sup>1397</sup> However, with such enforcement structure in place, it is also paramount that the powers of the Commission are effectively counterbalanced by those of the EU Courts. While the EU Courts have been criticized for adopting a deferential attitude towards the Commission's findings in competition cases,

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<sup>1396</sup> For a further discussion on the two models, see e.g. Commission Staff Working Document *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, accompanying the Communication from the European Commission – *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, Com(2014), 453, 9.7.2014, at p. 4.

<sup>1397</sup> For a further and more elaborate discussion on this, see Chapter 3.

recent rulings, such as those in the cases of *KME* and *Chalkor*,<sup>1398</sup> have raised the bar and limited the Commission's room for manoeuvre. Nonetheless, with an administrative system – where the investigating authority is also the decision-making body – it appears all the more important to ensure effective judicial control during all stages of the competition case.

The second aspect that will be discussed in this section concerns the cooperation between competition authorities in the EU and the effects that such cooperation may have in a system where most measures taken during the course of an inspection may be neither suspended nor annulled by the courts.<sup>1399</sup> As noted in Chapter 2, the application of the EU competition rules has been decentralized, and information gathered during the course of investigations is now frequently exchanged between competition authorities within the ECN. According to Article 26 of the ECN Cooperation Notice, a key element of the functioning of the network is the power of all authorities to exchange and use information, including documents, statements and digital information, which has been collected by them for the purpose of applying Article 101 or 102 of the TFEU. Article 12 of Regulation 1/2003 empowers the Commission and national competition authorities to exchange information and to use such information in evidence.<sup>1400</sup> From a competition law enforcement perspective, this is of course a welcome development which renders the system more effective. However, given that the current system cannot ensure adequate procedural safeguards, such exchange of information may have undue negative implications for targeted companies and is highly questionable from an ECHR perspective. As it is now, targeted companies may only challenge certain measures taken by the Commission during the course of dawn raids. As for the rest, no standalone action is available and there is no possibility to obtain interim measures. This means that companies have no possibility to prevent the Commission from disclosing evidence or other information gathered to other competition authorities within the ECN – even if they perceive that the Commission has acted unlawfully when collecting the information. If the Court would later find any irregularities with respect to the dawn raid and the information gathered, such findings would not affect any measures taken by national authorities on the basis of the information received by the Commission. Thus while the Commission may be prevented from using certain information,

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<sup>1398</sup> Case C-272/09 P, *KME v Commission*, EU:C:2011:810, Case C-389/10 P, *KME v Commission*, EU:C:2011:816, and Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815.

<sup>1399</sup> As no standalone action is available, the Commission's measures may not be annulled in time to prevent any information from being disclosed to national competition authorities.

<sup>1400</sup> The obligation in Article 28 of Regulation 1/2003 not to use any information gathered for purposes other than those of the investigation does not apply to the exchange of information carried out under Article 12 of the regulation.

Member State authorities will not necessarily be barred from doing so. Clearly, this order only underlines the importance of bringing the EU standard in line with the ECHR standard.

It is clear from the foregoing that the current order does not provide effective safeguards against abuse or arbitrariness. Given the structure of the EU competition law enforcement system – where the Commission plays such a prominent role, where information is exchanged freely between competition authorities and where any disclosure of privileged material or documents protected by professional secrecy may cause irreparable harm – requiring a proper, timely and effective judicial review of the Commission’s inspection decisions and of any measures taken on their basis can thus not be considered to unduly hinder the Commission’s fulfilment of its tasks under Regulation 1/2003.

### 15.3.3 Striking the balance

It is clear from the foregoing that amendments are necessary, not only to bring the EU system in line with the ECHR standard, but also to strike a balance between the opposing interests of effective competition law enforcement and adequate fundamental rights protection. In Section 15.1, the main concerns raised were the following:

- The scope of the legal professional privilege should be extended to cover all correspondence with independent lawyers, and not only correspondence with lawyers admitted to Member State bars or correspondence connected to the subject-matter of the investigation;
- Companies targeted by the Commission’s inspections should have greater access to courts, and be able to challenge not only inspection decisions, but also the measures taken on their basis.

While this thesis does not purport to present detailed solutions on how to achieve conformity with the ECHR standard, possible ways to reach such result will be discussed.

#### **15.3.3.1 Extending the scope of the legal professional privilege**

When the Court first recognized the confidentiality of written communications between lawyer and client, it chose to limit the scope of protection to correspondence with lawyers who were admitted to Member

State bar associations. The Commission recognised from the outset that such limitation was problematic, and in its thirteenth report on competition policy published in 1984 – two years after the Court’s ruling in *AM & S* – it declared that the Court’s interpretation could raise problems for the relations between independent lawyers admitted to bars of non-Community countries and their clients. The Commission declared that to the extent that legal systems of such third countries afforded professional protection in a non-discriminatory way to all lawyers, including Community lawyers, denial of the benefit of privilege to such third-country lawyers could lead to an undesirable inequality of treatment. In the interest of international equity and to avoid any deterioration of relations between the Community and countries in which the same professional ethics were respected, the Commission suggested that the Community should conclude bilateral international agreements with interested third countries with the aim of extending legal privilege to the lawyers of those countries. These agreements, the Commission noted, would be an addition to the existing Community rules in this domain and would therefore not require an amendment of Regulation 17.<sup>1401</sup>

While the Commission’s reasoning appears to have been motivated mainly by interests of maintaining good external relations, the report is of relevance to this thesis as it suggests ways to extend the scope of the privilege, and also pinpoints an important aspect of such extension: the privilege should only extend to countries where the same professional ethics are respected as in the EU. Such limitation is also justified from an administration of justice perspective. In *AM & S*, the Court declared that the role of the lawyer is to collaborate in the administration of justice and to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.<sup>1402</sup> Although *AM & S* concerned the status of in-house counsels, the requirements of independence and of providing advice in the overriding interest of the administration of justice, are equally applicable to questions dealing with the professional ethics of national bar associations.

However, although the Court once established the privilege as a principle of EU law, it can hardly be expected to rule on which countries that do or do not meet the EU standard. Nor is it desirable that these questions are decided at such a late stage<sup>1403</sup> or on an ad-hoc basis. While no bilateral agreements

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<sup>1401</sup> Thirteenth Report on Competition Policy, p. 78.

<sup>1402</sup> Case 155/79, *AM & S Europe Ltd v Commission of the European Communities*, EU:C:1982:157, para 24.

<sup>1403</sup> That is when there is already an ongoing dispute concerning the legal status of a certain document.

were ever signed, entering into such agreements might be one way to ensure an extension of the privilege. Another and more comprehensive alternative is of course to carry out an inventory and determine the countries that respect professional ethics and where the requirements of the bar associations meet the requisite standard.

In practice, it appears that the Commission refrains from requesting access to correspondence with counsels from certain non-EU jurisdictions, and it could therefore be argued that this problem is theoretical rather than practical.<sup>1404</sup> While the Commission should be commended on having adopted such a stance, it cannot be considered sufficient that the Commission exercises self-restraint or decides on an ad-hoc basis whether or not certain correspondence should be protected. The principle of legitimate expectations requires a clear and consistent application of the privilege. Thus, in the interests both of legal certainty and the proper administration of justice, clearer rules should be in place. As the Commission is currently reviewing Regulation 1/2003,<sup>1405</sup> it seems reasonable to extend the scope of the Regulation to cover the application of the privilege.

Irrespective of whether or not there are any statutory amendments, the Court should not be prevented from extending the scope of the privilege. As the Strasbourg appears to protect all correspondence between client and lawyer, the ECJ may rely on the case law from the Strasbourg court and extend the scope of protection. However, this requires that a question on the scope of the privilege reaches the Court.

### **15.3.3.2 Providing greater access to courts**

It has been established that the possibilities to obtain judicial review and interim measures should be extended in order to align the EU standard with the ECHR standard and ensure adequate protection against abuse or arbitrariness. This section examines whether this can be achieved under the current regulation or if any statutory amendments are required.

According to Article 263 of the TFEU, the Court of Justice shall review the legality of acts of the Commission and other institutions which are intended to produce legal effects vis-à-vis third parties. The Court has interpreted this

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<sup>1404</sup> According to Bellis, the Commission refrains from requesting correspondence with US counsels. Bellis, *Legal Professional Privilege: An Overview of EU and National Case Law*, e-Competitions, no 39467, October 2011.

<sup>1405</sup> See e.g. Communication from the European Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Com(2014), 453, 9.7.2014.



to mean that reviewable acts are those which are intended to bring about a distinct change in the legal position of the applicant, excluding implementing measures from that notion. The question is of course whether Article 263 TFEU allows for a broader interpretation or whether a Treaty amendment is necessary to bring EU law in line with the ECHR standard.

It is clear from the Court's case-law that it considers most measures taken during the course of a dawn raid to flow from the inspection decision and/or to pave the way for the final decision in the underlying competition case, thereby not producing any legal effects themselves. For the Court to take another stance without being able to rely on legislative changes would be problematic as such departure would not be in keeping with the principles of legal certainty and legitimate expectations.

However, Article 19 of the TEU stipulates that the ECJ shall ensure that the law is observed, and Article 52(3) of the Charter declares that the ECHR standard shall be the minimum EU standard.<sup>1406</sup> It could be argued that the Charter and Article 19 of the TEU require the Court to adjust earlier case-law in order to bring EU law in line with the ECHR legislation. This would not be the first time that the Court departs from earlier case-law in this manner. As was discussed in Section 15.2.1, legal persons' right to privacy evolved through the cases of *Hoechst* and *Roquette Frères*. In *Hoechst*, the Court was not willing to acknowledge that legal persons enjoyed a right to privacy as there was still no case-law from Strasbourg supporting such finding. A decade later, things had changed, and basing its ruling on the jurisprudence of the ECtHR, the ECJ was now willing to afford protection to legal persons. As discussed in Section 1.6.1, this dynamic or evolutive interpretation is typical of the ECJ, and with the Charter in place, the ECJ is even required to interpret EU law dynamically to maintain adherence to the ECHR standard. As for the question of access to courts, it is clear from the Strasbourg court's case-law that it considers any restrictions in this respect to constitute infringements of Article 6 and/or 8 of the ECHR, thereby producing legal effects. This means that they may be challenged under Article 263 TFEU without any Treaty amendment.

If implementing measures produce binding legal effects, and may be challenged under Article 263 TFEU, there is automatically a possibility to apply for suspension or other interim measures under Articles 278 and 279 of the TFEU. As discussed in Chapter 13, the filing of a complaint does not stay the execution of the measure in question, and therefore it may be necessary not only to challenge the measure, but also to apply for suspension or other interim measures. However, this option may not always be speedy

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<sup>1406</sup> The now binding effect of the Charter is of course a legislative change.

enough to prevent the Commission from adopting the measure to which the company opposes, and therefore the sealed envelope procedure applied in cases concerning legal professional privilege may be a more suitable option. Not only does it eliminate the risk of any damage being caused, as the Commission is prevented from reviewing the document or information in question until the General Court has had its say in the matter, it would also relieve the applicant of the arduous task of proving serious and irreversible harm. To the extent that the sealed envelope procedure may be applied, this procedure would therefore be preferable.

At the same time as it is necessary to ensure adequate protection against abuse or arbitrariness, it is equally important that any right to challenge implementing measures does not affect the validity of the inspection decision as such. While companies should have a possibility to prevent certain measures from being taken,<sup>1407</sup> the consequences of any annulment or interim measures should not be greater than what is necessary to prevent any damage from being sustained by the targeted company. To go beyond this would lead to a shift in the balance, and the public interest would then be considered to carry a greater weight in the proportionality *stricto sensu* test. Furthermore, any extension of the possibilities for judicial review must also be reasonable, ensuring that the work of the courts is not too cumbersome. This can be achieved while maintaining the ECHR standard. In the case of *Vinci Construction* for example,<sup>1408</sup> the Strasbourg court declared that the national court should order the restitution of documents that were unrelated to the investigation, but it also required the applicants to specify the documents or information that should be excluded, not leaving the national court with the task of reviewing a massive amount of information that may or may not have been related to the investigation. Such limitations, and others necessary to ensure a well-functioning and not too unwieldy judicial system, should of course accompany any extension of the right to judicial review.

#### 15.3.4 A final note

Before bringing this dissertation to its conclusion, a few last words should be said on the subject of striking a balance. The preceding pages, in one way or another, have all revolved around similarities or discrepancies between EU and ECHR law. However, it must not be forgotten that although the ECHR standard has been incorporated into EU law through Article 6 of the TEU

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<sup>1407</sup> Or have them annulled.

<sup>1408</sup> *Vinci Construction et GTM Génie Civil et Services v France*, Applications nos. 63629/10 and 60567/10.

and the Charter, the ECHR and the Charter are still part of two separate legal systems. Thus, while the ECJ has an obligation to observe the requirements in Article 52(3) of the Charter, it also has an obligation under Article 19 of the TEU to ensure that the law is observed and, to, use the words of *Van Gestel* and *Micklitz*, as ‘[t]he law somehow represents a system ... deciding in hard cases implies that existing rules will be stretched or even replaced in such a way that in the end, the system is coherent again’.<sup>1409</sup> Thus, although we have not been able to identify situations where adherence to the ECHR standard would render the EU competition law enforcement system ineffective or unduly hamper the work of the Commission, there may be situations in the future leading to such results. As long as the EU has not acceded to the ECHR, it will be up to the Court to ensure that the EU legal system is coherent and consistent. However, at present it appears that the Strasbourg court takes a very pragmatic and flexible approach, and the Strasbourg standard cannot be considered too high. Thus, at least for the time being, the application of Article 52(3) of the Charter should not influence the EU Courts’ efforts to strike a proper balance between the opposing interests of ensuring effective competition law enforcement and adequate fundamental rights protection.

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<sup>1409</sup> Van Gestel and Micklitz, *Revitalising Doctrinal Legal Research in Europe: What About Methodology?*, in Neergaard, Nielsen and Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation*, DJØF publishing, 2011, p. 65.



## Sammanfattning

Under åren 2010 till och med 2014 utdömde Europeiska kommissionen närmare nio miljarder euro i kartellböter. De utdömda bötesbeloppen är tre gånger högre än vad som utdömdes under perioden 2000 till och med 2004 och så mycket som 16 gånger högre än de böter som utdömdes under perioden 1990 till och med 1994.<sup>1410</sup> De allt högre bötesbeloppen reflekterar inte bara kommissionens nya och mer aggressiva tillämpning av artiklarna 101 och 102 i Fördraget om Europeiska Unionens Funktionssätt ("FEUF"), utan även den idag allmänt rådande uppfattningen att karteller och marknadsmissbruk är skadliga för ekonomin och därför bör bekämpas.<sup>1411</sup>

Konkurrensbegränsningars skadliga verkan<sup>1412</sup> och kartellers hemliga natur är två faktorer som talar för att konkurrensmyndigheterna bör ges långtgående utredningsbefogenheter. Utan effektiva utredningsmetoder är det omöjligt att bedriva en effektiv bekämpning av skadliga konkurrensbegränsningar. Detta har uppmärksammats av lagstiftaren och genom implementeringen av den så kallade moderniseringsreformen i maj 2004 utökades kommissionens utredningsbefogenheter i syfte att göra EU:s konkurrenslagstiftning ännu mer effektiv. För den som deltar i ett kartellsamarbete eller annat konkurrensskadligt beteende har riskerna för upptäckt därmed ökat.

Samtidigt som tillämpningen av konkurrenslagstiftningen har skärpts så har EU:s skydd för grundläggande rättigheter stärkts genom Lissabonfördraget. När fördraget trädde i kraft den 1 december 2009 blev Europeiska unionens stadga om de grundläggande rättigheterna ("Stadgan") inte bara rättsligt bindande; den gavs även samma rättsliga status som fördragen och tillhör numera primärrätten. Stadgan tillförsäkrar enskilda och företag en katalog av olika rättigheter, såsom till exempel rätten till försvar och skyddet för privatliv. Det stärkta rättighetsskyddet innebär att kommissionen måste manövrera med stor försiktighet då den utreder misstänkta överträdelse av artiklarna 101 och 102 FEUF. Medan EU:s konkurrensregler motiveras av effektivitets- och integrationshänsyn, bygger de grundläggande rättigheterna

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<sup>1410</sup> Se <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>1411</sup> Se not 1.

<sup>1412</sup> Härmed avses de konkurrensbegränsningar som är otillåtna.

på tanken att individen skall skyddas från alltför ingripande åtgärder ifrån det allmännas sida. Dessa båda intressen är inte alltid förenliga. Särskilt tydligt blir det i samband med kommissionens gryningsräder. Artikel 20 i Rådets Förordning 1/2003 ("Förordning 1/2003") ger kommissionen rätt att genomföra oanmälda inspektioner hos företag i den mån det är nödvändigt för tillämpningen av artiklarna 101 och 102 FEUF. Den oanmälda inspektionen, eller gryningsräden, är ett oerhört effektivt verktyg i kampen mot otillåtna konkurrensbegränsningar. Det är överraskningsmomentet i kombination med det faktum att kommissionen har givits mycket långtgående befogenheter i samband med inspektionen som gör den så effektiv. Kommissionens företrädare har rätt att bereda sig tillträde till företagets lokaler, granska och kopiera räkenskaper och andra affärshandlingar, försegla samtliga företagslokaler samt ställa frågor till de anställda. De långtgående befogenheterna är en förutsättning för att kunna inhämta nödvändig bevisning, men de bidrar naturligtvis till att göra gryningsräden särskilt känslig ur ett rättighetsperspektiv. Frågan är om det går att uppnå balans mellan behovet av effektiva gryningsräder och skyddet för grundläggande rättigheter, eller om kommissionen har tilldelats en omöjlig uppgift.

## Forskningsfrågorna

Avhandlingens forskningsfrågor har formulerats utifrån tre olika antaganden:

1. EU:s konkurrenslagstiftning och en effektiv tillämpning av denna är nödvändig och tillgodoser ett legitimt intresse.
2. Intresset av att säkerställa en effektiv konkurrenslagstiftning skall inte automatiskt ges företräde framför grundläggande rättigheter.
3. Såväl fysiska som juridiska personer åtnjuter skydd av EU:s grundläggande rättigheter, men den skydds nivå som tillförsäkras juridiska personer kan vara något lägre än det skydd som fysiska personer åtnjuter.

Baserat på dessa antaganden undersöks i avhandlingen huruvida det är möjligt att uppnå balans mellan skyddet för grundläggande rättigheter och behovet av att säkerställa meningsfulla och effektiva gryningsräder samt om kommissionens nuvarande metoder respekterar företagens rättigheter. För att kunna besvara dessa frågor har det varit nödvändigt att fastställa hur långt kommissionens befogenheter sträcker sig och om kommissionen agerar inom

givna ramar. Vidare har det varit nödvändigt att definiera företagens rättigheter och undersöka huruvida kommissionen respekterar dessa rättigheter i samband med de gryningsräder som genomförs i enlighet med Förordning 1/2003. Som framgår nedan visar avhandlingen att företagens rättigheter inte tillvaratas till fullo, och avhandlingen har därför även sökt identifiera de ändringar som är nödvändiga för att uppfylla Stadgans krav samt om dessa ändringar kan genomföras utan att tillämpningen av konkurrenslagstiftningen påverkas i en sådan utsträckning att den ej längre blir effektiv.

I korthet behandlar avhandlingen följande frågor: vilka rättigheter åtnjuter företag i samband med kommissionens gryningsräder och är dessa rättigheter förenliga med kommissionens behov av effektiva inspektioner och samhällets intresse av en effektiv konkurrenslagstiftning? Om inte – är det möjligt att uppnå balans mellan de båda intressena och hur görs det i så fall på bästa sätt?

## Avhandlingens fokus

Inspektionsbeslutet är oftast det första formella beslut som fattas av kommissionen i ett konkurrensärende. Befogenheten att göra oanmälda besök, gryningsräder, är utan tvekan också den mest långtgående utredningsbefogenheten som tilldelats kommissionen. Genom Förordning 1/2003, har kommissionens befogenheter utökats ytterligare. Kommissionen tillåts numera genomföra inspektioner i privata hem och kan även spärra av företagslokaler samt ställa frågor till anställda i samband med gryningsrådets genomförande. Motivet bakom dessa regelförändringar är naturligtvis ett upplevt behov av att göra gryningsrådena och därmed även kommissionens konkurrensutredningar mer effektiva.

För företagen är utvecklingen allt annat än positiv, även ur ett rättighetsperspektiv. Ju mer ingripande gryningsråden tillåts vara, desto större är risken att företagens rättigheter inte respekteras. Vidare måste man beakta det faktum att själva överraskningsmomentet – som är en förutsättning för en effektiv gryningsråd – kan få till effekt att företagen varken ges tid eller möjlighet att till fullo tillvarata sina rättigheter. Gryningsråden aktualiserar därmed en rad rättighetsfrågor och avhandlingen fokuserar på följande:

1. Kan företagen åberopa skyddet för privatliv i Stadgans artikel 7?
2. Skall kommissionens inspektioner föregås av en domstolsprövning eller kan och bör kommissionen tillåtas att självt fatta inspektionsbeslut?

3. Föremålet för och syftet med kommissionens inspektioner – hur snävt måste dessa avgränsas och krävs det misstanke om en överträdelse?
4. Inspektionens omfattning – vilken dokumentation eller annan information skall kommissionen tillåtas granska och/eller kopiera?
5. Skyddet mot självangivelse – kan juridiska personer åberopa detta skydd och vad omfattar det i så fall?
6. Advokatsekretess – är skyddet för korrespondens mellan företag och dessas juridiska rådgivare tillräckligt starkt inom EU-rätten eller bör det stärkas ytterligare?
7. Den rättsliga prövningen av inspektionsbeslut och verkställighetsåtgärder – uppfyller den de krav som Stadgan uppställer?

## Något om metoden

Avhandlingen behandlar två delar av EU-rätten och förhållandet mellan dessa. Såväl EU:s konkurrensregler som regelverket kring grundläggande rättigheter tillhör EU:s primärrätt och i den mån det föreligger konflikt mellan de båda kan således inte något av områdena automatiskt ges företräde framför det andra. Istället krävs att EU-domstolen väger de båda intressena emot varandra och avgör vilket som skall ges företräde i det enskilda fallet.

En ytterligare aspekt av betydelse för metoden är den roll Europakonventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna ("EKMR") har inom EU-rätten. Artikel 6 i Fördraget om Europeiska Unionen ("FEU") stadgar att EU skall ansluta sig till EKMR. Detta har ännu inte skett och EU har därför inte någon skyldighet gentemot andra stater eller organ att uppfylla de krav som konventionen ställer. Däremot har EU självt förbundit sig att göra det. Enligt Stadgans artikel 52(3) skall EU – i den mån en rättighet har en motsvarighet i EKMR – säkerställa att Stadgans skydd motsvarar eller överträffar det skydd som EKMR ger. EKMR:s skyddsnivå utgör således en miniminivå enligt EU-rätten. Det här innebär i sin tur att det inte går att fastställa gällande EU-rätt utan att först fastställa vilket skydd som ges enligt EKMR.

En stor del av avhandlingen ägnas därför åt att analysera rättsfall från de båda domstolarna. Inom såväl EU-rätten som konventionsrätten spelar domstolarna en betydande roll. Bestämmelserna i såväl fördragen som konventionen är allmänt formulerade och kan ofta bli föremål för olika tolkningar. Domstolarna har därför utvecklat en rad tolkningsprinciper. Såväl Strasbourgdomstolen som EU-domstolen anser att lagstiftningen bör



tolkas dynamiskt, det vill säga i ljuset av samhällsutvecklingen och förändringar i rättsuppfattningar.<sup>1413</sup> Vidare har de båda domstolarna slagit fast att bestämmelserna i såväl EU-rätten som konventionsrätten bör ges en autonom tolkning som är oberoende av vilken innebörd som ges åt motsvarande begrepp i de nationella rättssystemen.<sup>1414</sup> Lagstiftningens generella och ibland även otydliga karaktär samt domstolarnas dynamiska och autonoma tolkning av densamma gör det nödvändigt att noga studera rättspraxis vid fastställandet av gällande rätt – såväl inom EU-rätten som inom konventionsrätten.

## Slutsatser

Avhandlingen visar att Strasbourgdomstolen intar en mycket pragmatisk och flexibel hållning gentemot inspektioner i företagslokaler. Domstolen ställer inte något krav på att inspektionsbeslut skall fattas eller godkännas av en domstol. Vidare tillåter Strasbourgdomstolen långtgående utredningsmetoder, dock under förutsättning att och så länge som dessa åtgärder vägs upp av möjligheten till en effektiv rättslig prövning. Härigenom skapas utrymme för nationella rättssystem som både är rättssäkra och effektiva och där det således kan råda balans mellan dessa båda intressen. Avhandlingen visar dock att EU inte erbjuder en rättslig prövning som svarar mot EKMR:s krav och att denna brist i sin tur kan få till följd att flera av de befogenheter som kommissionen tilldelats – och som i övrigt uppfyller EKMR:s krav – därmed måste ifrågasättas.

Nedan behandlas de olika områdena separat varefter följer några avslutande kommentarer.

## Skyddet för privatliv

Som framgår ovan är avhandlingen baserad på antagandet att juridiska personer omfattas av skyddet för privatliv i Stadgans artikel 7 och artikel 8 EKMR. Antagandet baseras på det faktum att såväl Strasbourgdomstolen som EU-domstolen i en rad avgöranden har fastställt just detta.

Avhandlingen visar dock att även om Stadgan och EKMR tillförsäkrar juridiska personer skydd, har Strasbourgdomstolen vid ett flertal tillfällen

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<sup>1413</sup> Danelius, *Mänskliga rättigheter i europeisk praxis: En kommentar till Europakonventionen om de mänskliga rättigheterna*, femte upplagan, Norstedts Juridik, 2015, sid. 55 samt Mål 283/81, *Srl CILFIT och Lanificio di Gavardo SpA mot Ministry of Health*, EU:C:1982:335, para. 20.

<sup>1414</sup> *Ibid.*, sid. 55 samt para. 19.

slagit fast att skyddet inte nödvändigtvis är lika starkt för juridiska personer som för fysiska personer. Härigenom har Strasbourgdomstolen skapat en praxis som tillåter medlemsstaterna att upprätthålla en effektiv (konkurrens)lagstiftning, men som ändå säkerställer att lagstiftningen inte tillämpas på ett sätt som är godtyckligt eller oproportionerligt. Det slås därmed fast i avhandlingen att det går att tillförsäkra enskilda företag ett skydd under Stadgans artikel 7 utan att därmed i allt för stor utsträckning försvåra kommissionens konkurrensutredningar.

### Ex ante-kontroll av inspektionsbeslut

Enligt gällande ordning har kommissionen befogenhet att självt fatta inspektionsbeslut. I avhandlingen har utretts huruvida denna ordning är förenlig med de krav som ställs enligt EKMR och därmed också enligt Stadgan. Forskningen visar att EKMR inte uppställer något krav på att inspektionsbeslut skall fattas eller godkännas av en domstol. Däremot har Strasbourgdomstolen slagit fast att avsaknaden av en ex ante-kontroll måste vägas upp av andra mekanismer (*procedural safeguards*) som skyddar mot godtyckliga eller oproportionerliga åtgärder ifrån myndigheternas sida. En effektiv ex post-kontroll av såväl inspektionsbeslut som åtgärder vidtagna på basis av dessa är en sådan processuell garanti. Av Strasbourgdomstolens praxis framgår att kravet på en effektiv ex post-kontroll är absolut. Ett system som varken kan garantera en effektiv ex ante- eller ex post-kontroll kan inte anses förenligt med EKMR.

### Föremålet för och syftet med kommissionens inspektioner

Artikel 20 i Förordning 1/2003 ger kommissionen befogenhet att genomföra de gryningsrader som är nödvändiga för att säkerställa en effektiv tillämpning av artiklarna 101 och 102 FEUF. Samma artikel ställer som krav att kommissionen i dess inspektionsbeslut skall ange föremålet för och syftet med inspektionen. I avhandlingen har utretts vad som menas härmed och om det krävs misstanke om överträdelse för att kommissionen skall ha rätt att genomföra en gryningsråd. Slutsatsen är att det uppställs ett sådant krav och att kommissionen därmed är förhindrad att genomföra gryningsrader utan skälig misstanke om överträdelse av artikel 101 eller 102 FEUF. Detta krav skyddar företagen mot godtyckliga åtgärder ifrån kommissionens sida och kan därmed inte anses utgöra ett otillbörligt hinder för kommissionen i dess tillämpning av konkurrensreglerna.

## Inspektionens omfattning

Artikel 20(2) i Förordning 1/2003 ger kommissionen befogenhet att granska räkenskaper och andra affärshandlingar samt att ”göra eller erhålla alla former av kopior eller utdrag ur sådana räkenskaper och affärshandlingar”. I avhandlingen har undersökts huruvida denna rätt omfattar all dokumentation/information hos företaget eller om rätten istället är begränsad till eller bör begränsas till att enbart inkludera sådan information som omfattas av föremålet för inspektionen. Slutsatsen är att rätten att granska information är och bör vara relativt långtgående. Karteller är hemliga till sin natur och det finns skäl att anta att de företag som deltar i en kartell eller annan konkurrensbegränsande verksamhet försöker dölja det otillåtna agerandet genom att undanhålla bevisning. Kommissionen bör därför ges möjlighet att åtminstone inledningsvis söka brett. En begränsning av denna rätt riskerar att underminera kommissionens möjligheter att effektivt bekämpa karteller och andra konkurrensbegränsningar och skulle därmed utgöra en onödigt långtgående begränsning av kommissionens befogenheter.

Möjligheten för kommissionen att kopiera eller på annat sätt erhålla bevisning bör dock inte vara lika vid utan skall begränsas till att enbart omfatta sådan bevisning som omfattas av föremålet för inspektionen. Kommissionen bör alltså inte tillåtas att kopiera material som saknar relevans för utredningen ifråga, då en sådan möjlighet skulle strida mot företagets rätt till försvar och skydd för privatliv. EU-domstolen har också fastställt just detta, senast i *Deutsche Bahn*.<sup>1415</sup>

Som ett resultat av de senaste årens tekniska utveckling lagras numera nästan all information digitalt och kommissionen har tvingats att anpassa utredningsmetoderna därefter. Denna utveckling har aktualiserat nya frågor relaterade till rätten att granska och kopiera material. Det är inte längre i aktmappar eller fysiska kalendrar som kommissionen har störst chans att finna bevisning. Vid gryningsräder granskas istället en stor mängd elektronisk information. Detta sker i de flesta fall på plats hos företaget, men i vissa fall väljer kommissionen att kopiera digitalt lagrat material för granskning i kommissionens lokaler. Denna metod innebär inte nödvändigtvis att fler dokument eller mer information tillförs utredningen, men det faktum att en stor mängd material *de facto* kopieras temporärt för genomgång hos kommissionen kan och har också ifrågasatts av företag som

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<sup>1415</sup> Mål C-583/13 P, *Deutsche Bahn AG m. fl. mot Europeiska kommissionen*, EU:C:2015:404.

anser att detta strider mot skyddet mot privatliv och/eller rätten till försvar.<sup>1416</sup>

Av Strasbourgdomstolen praxis framgår dock att denna metod är godtagbar under förutsättning att det finns ett adekvat skydd mot oproportionerligt eller godtyckligt agerande ifrån myndighetens sida. I *Bernh Larsen Holding* accepterade således Strasbourgdomstolen att den norska skattemyndigheten tog kopior av en hel server, som delades med två andra företag och därmed innehöll en stor mängd information som saknade relevans för utredningen, eftersom domstolen ansåg att skyddet mot godtyckligt och oproportionerligt agerande var fullgott.<sup>1417</sup> Vid denna bedömning tillmättes möjligheten till en efterföljande rättslig prövning stor betydelse. Strasbourgdomstolen är beredd att acceptera långtgående utredningsbefogenheter, men endast under förutsättning att dessa vägs upp av möjligheten till en effektivt rättslig prövning.

### Skyddet mot självangivelse

Både EU-rätten och konventionsrätten saknar ett uttryckligt skydd mot självangivelse. Denna princip har istället utvecklats av domstolarna. Den som är misstänkt för brott har rätt att tåga och kan heller inte tvingas att erkänna sig skyldig till brott. Detta är idag en grundläggande princip som anses utgöra del av artikel 6 EKMR. I avhandlingen har analyserats huruvida skyddet kan åberopas av juridiska personer och om det skydd som EU-domstolen medger svarar mot EKMR:s krav.

Strasbourgdomstolens praxis är begränsad till fysiska personer och det kan därmed inte med säkerhet fastställas att även juridiska personer åtnjuter skydd enligt EKMR. Dock uttalade Strasbourgdomstolen i *Saunders* att principen är tillämplig i alla typer av brottmål, från det enklaste till det mest komplexa, vilket torde tala för att även sådana brottmål som avser juridiska personer omfattas av skyddet.<sup>1418</sup> Dock med det allmänna förbehållet att företagens skydd måhända inte är lika starkt som det skydd som fysiska personer åtnjuter.

Strasbourgdomstolen har i ett flertal mål gjort åtskillnad mellan ”fysisk bevisning” (*real evidence*) och annan bevisning. Med fysisk bevisning avses

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<sup>1416</sup> Se Mål T-135/09, *Nexans France och Nexans mot Europeiska kommissionen*, EU:T:2012:596, och *Bernh Larsen Holding AS m. fl. mot Norge*, dom av den 14 mars 2013, Ansökan nr 24117/08.

<sup>1417</sup> *Bernh Larsen Holding AS m. fl. mot Norge*, dom av den 14 mars 2013, Ansökan nr 24117/08.

<sup>1418</sup> *Saunders mot Storbritannien*, dom av den 17 december 1996, Ansökan nr 19187/91.

sådan bevisning som den utredande myndigheten kan få tillgång till utan hjälp av den misstänkte, såsom till exempel fysiska dokument beslagtagna vid en husrannsakan. Övrig bevisning är sådan bevisning som kräver någon form av insats av den misstänkte, till exempel besvarande av frågeformulär, uppgifter lämnade i samband med förhör med mera. Medan den fysiska bevisningen normalt har undantagits ifrån skyddet mot självangivelse, har den övriga bevisningen som regel skyddats av principen. Senare rättspraxis antyder dock att det inte går att dra en klar skiljelinje, men mycket talar för att företag inte kan åberopa skyddet i samband med en gryningsråd, annat än möjligtvis då företagets anställda uppmanas att besvara frågor. Då Förordning 1/2003 fastställer att regelrätta intervjuer inte kan genomföras utan den anställdes samtycke är dock sannolikheten låg att Strasbourgdomstolen skulle invända eftersom skyddet enbart omfattar sådana frågor som måste besvaras under tvång. EU:s konkurrensrätt faller heller inte inom den hårda kärnan av brottmål och rör dessutom juridiska personer som inte erbjuds samma skyddsnivå som fysiska personer, vilket också talar för en flexiblare hållning ifrån Strasbourgdomstolens sida.

## Advokatsekretess

Att en klient i förtroende skall kunna vända sig till advokat och då vara garanterad att vad som anförtros advokaten – skriftligen eller muntligen – inte kommer till utomståendes kännedom, anses vara en grundval i en demokratisk rättsstat. Skälen till detta är flera. För att rättsutredningar och processer skall kunna bygga på ett riktigt material och till fullo tillvarata klientens intressen, måste advokaten erhålla fullständiga uppgifter från klienten. Det kan endast bli fallet om klienten är övertygad om att vad han eller hon anförtror advokaten inte förs vidare utan klientens medgivande. Denna princip, principen om advokatsekretess, fastställdes av EU-domstolen för första gången i målet *AM & S*.<sup>1419</sup> Då hade principen ännu inte erkänts av Strasbourgdomstolen utan EU-domstolen valde istället att utforma den utifrån de principer som var gemensamma för samtliga medlemsstater. Det här innebar att skyddet kom att omfatta korrespondens mellan en klient och dennes oberoende advokat, förutsatt att (i) advokaten var medlem av ett advokatsamfund inom EU och (ii) korrespondensen omfattades av föremålet för utredningen ifråga. Dessa principer gäller fortfarande, men kan idag ifrågasättas.

Om syftet med skyddet är att säkerställa ett välfungerande rättsväsende<sup>1420</sup> – vilket EU-domstolen anser det vara<sup>1421</sup> – är det svårt att motivera de

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<sup>1419</sup> Mål 155/79, *AM & S Europe Ltd mot Europeiska gemenskapernas kommission*, EU:C:1982:157.

<sup>1420</sup> Eng. *Proper administration of justice*.

begränsningar i skyddet som uppställs av EU-domstolen. EKMR uppställer inte några motsvarande begränsningar och att enbart skydda korrespondens med advokater inom EU eller sådan korrespondens som omfattas av föremålet för utredningen kan inte anses främja säkerställandet av ett välfungerande rättsväsende. Dessa begränsningar i skyddet borde således avskaffas, vilket med fördel kan göras med hänvisning till utvecklingen inom konventionsrätten. Skyddet skulle även kunna kodifieras i samband med den översyn av Förordning 1/2003 som just nu genomförs.

### Den rättsliga prövningen av inspektionsbeslut och verkställighetsåtgärder

Som framgår ovan har kommissionen rätt att besluta om inspektioner utan inblandning av EU-domstolen. Dock ger artikel 263 FEUF företagen rätt att föra talan hos tribunalen om ogiltigförklaring av själva inspektionsbeslutet. Mycket talar för att tribunalen tar denna uppgift på allvar och genomför en ingående rättslig prövning. På senare tid har också flera inspektionsbeslut helt eller delvis ogiltigförklarats av tribunalen.<sup>1422</sup> Däremot har företagen idag inte någon möjlighet att föra en separat talan mot så kallade verkställighetsåtgärder eller att få dessa åtgärder inhiherade. Om företaget vill klaga måste detta istället ske i samband med att talan förs mot beslutet i det underliggande konkurrensärendet. Detta innebär att det kan dröja flera år innan företaget ges möjlighet att klaga på de åtgärder som kommissionen vidtar i samband med en gryningsråd och då enbart under förutsättning att kommissionen faktiskt fattar ett beslut som går företaget emot. Denna begränsning i företagens rättigheter svarar inte mot Strasbourgdomstolens krav och är dessutom svår att motivera ur effektivitetshänsyn.

Strasbourgdomstolen har i ett flertal mål slagit fast att företag skall ges möjlighet till rättslig prövning av såväl inspektionsbeslut som åtgärder vidtagna på basis av dessa. Den rättsliga prövningen skall vara garanterad och ske utan dröjsmål samt omfatta såväl sak- som rättsfrågor. För det fall företaget kan visa att myndigheten har beslagtagit dokument som omfattas av advokatsekretess eller faller utanför föremålet för utredningen, skall domstolen tillse att handlingarna återlämnas till klaganden. Vad gäller handlingar som omfattas av advokatsekretess, så tillämpas idag ett

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<sup>1421</sup> Mål 155/79, *AM & S Europe Ltd mot Europeiska gemenskapernas kommission*, EU:C:1982:157.

<sup>1422</sup> Se t.ex. Mål T-135/09, *Nexans France och Nexans mot Europeiska kommissionen*, EU:T:2012:596, Mål C-37/13 P, *Nexans France och Nexans mot Europeiska kommissionen*, EU:C:2014:2030, Mål C-247/14 P, *HeidelbergCement AG mot Europeiska kommissionen*, EU:C:2016:149, samt Mål C-583/13 P, *Deutsche Bahn AG m. fl. mot Europeiska kommissionen*, EU:C:2015:404.

förfarande inom EU som uppfyller Strasbourgdomstolens krav. I övrigt ges inte någon möjlighet att föra separat talan mot de åtgärder som kommissionen vidtar i samband med gryningsrader och tribunalen anser sig heller inte ha behörighet att inom ramen för en prövning av en rättsakts lagenlighet avkunna fastställelse domar. Tribunalen kan därmed inte fastställa följderna av en eventuell ogiltigförklaring.

Denna till synes begränsade diskrepans mellan det EU-rättsliga skyddet och det skydd som ges enligt EKMR är betydligt mer långtgående än vad den ger vid handen. Strasbourgdomstolen har nämligen utvecklat en praxis avseende inspektioner i företagslokaler där domstolen accepterar relativt långtgående utredningsmetoder, dock under förutsättning att den efterföljande rättsliga prövningen uppfyller domstolens krav.

I avhandlingen har konstaterats att EKMR inte uppställer något krav på en ex ante-kontroll, att kommissionen måste ges långtgående befogenheter att granska material på plats, att EKMR tillåter att speglingskopior granskas i kommissionens lokaler, men dessa slutsatser är alla baserade på förutsättningen att den efterföljande domstolsprövningen är effektiv. Ett sådant system – som tillåter långtgående befogenheter så länge utövandet av dessa kan kontrolleras av domstolen – får anses både gynna effektivitet och rättssäkerhet. Så länge EU-rätten inte kan garantera en sådan balans, får det anses tveksamt om de processuella garantier som omgärdar kommissionens gryningsrader når upp till en godtagbar standard.

## Avslutande kommentar

Avhandlingen har sökt svaret på frågan om det går att uppnå balans mellan kravet på effektiva och meningsfulla gryningsrader å ena sidan och skyddet för grundläggande rättigheter å andra sidan. Svaret på denna fråga är att det går att uppnå en sådan balans, men att det EU-rättsliga systemet måste ändras på ett par punkter för att så ska ske.

Skyddet för advokatsekretess har begränsats av EU-domstolen på ett sätt som inte kan anses främja intresset av ett välfungerande rättsväsende, vilket är syftet med skyddet. Dessa begränsningar – skyddet omfattar inte korrespondens med advokater utanför EU eller sådan korrespondens som rör annan rådgivning än vad som är föremål för utredningen – var måhända motiverade när EU-domstolen utvecklade skyddet utifrån de principer som då var gemensamma för medlemsstaterna, men kan inte längre anses motiverade. Idag finns skyddet även inom konventionsrätten och där uppställs inte några sådana begränsningar.

Vidare har konstaterats att möjligheterna till en effektiv rättslig prövning av verkställighetsåtgärder inte uppfyller konventionsrättens krav och att denna begränsning inte heller på annat sätt kan motiveras, inte ens ur effektivitetshänsyn. Idag sker en eventuell rättslig prövning av verkställighetsåtgärder först i samband med prövningen av boten i det underliggande konkurrensärendet. Det innebär att den varken är garanterad eller sker inom rimlig tid. Än viktigare är måhända det faktum att domstolen, om den finner att kommissionen inhämtat bevisning i strid med gällande regler, måste ogiltigförklara beslutet i det underliggande konkurrensärendet i den mån det har fattats med stöd av bevisningen i fråga. En sådan ordning kan inte anses motiverad ur effektivitetshänsyn. Det torde vara bättre att prövningen av kommissionens verkställighetsåtgärder sker redan i samband med gryningsräden medan kommissionen fortfarande har tid att korrigera eventuella misstag.

Frågan är om det går att utöka möjligheterna till rättslig prövning utan lagändring, det vill säga om det är möjligt för EU-domstolen att tolka artikel 263 FEUF på så sätt att även verkställighetsåtgärder omfattas av artikeln. Det framgår av Strasbourgdomstolens praxis att domstolen anser att verkställighetsåtgärder ”förändrar sökandens rättsliga ställning”, vilket enligt EU-domstolen är ett krav för att artikel 263 FEUF skall kunna bli tillämplig.<sup>1423</sup> Det torde därför vara möjligt för EU-domstolen att, med stöd av Strasbourgdomstolens praxis, i framtiden även kunna pröva verkställighetsåtgärder i enlighet med artikel 263 FEUF.

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<sup>1423</sup> Mål T-135/09, *Nexans France och Nexans mot Europeiska kommissionen*, EU:T:2012:596.







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