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Antitrust Investigations and the Right to Privacy

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Summary

This paper is aimed to discuss the protection of the basic human rights in the sphere of competition law in European Union. It analyses main human rights and procedural guarantees and compares them with the legislation in the competition sphere. In this regard particular attention is paid to the European Convention on Human Rights and principles that it establishes. In the beginning rules established by Articles 6 and 8 of the Convention are analysed. It has been done using legal literature and case law from the European Court of Human Rights in Strasbourg.

Then I made an effort to find out how the due process standards and principle of protection of privacy are established and dealt within the Community law. Since the paper is related first of all to the competition law, I focused on the guarantees, provided in this sphere of the legislation.

I discussed most relevant acting legislation and developments in the case law.

Particular attention is paid to the antitrust and merger sectors. New changes in the legislation are analysed with regard to the growing powers of Commission and undertakings' right to defence.

Two recent cases, the Hoechst and Roquette Freres, which deal with the powers of Commission on the one hand and right to privacy on the other have also been scrutinised.

Finally, a comparison with the U.S. antitrust law has been made. We can see that U.S. have already criminalised competition law and therefore antitrust authorities can use such methods of investigations that are normally used in the criminal cases. Nevertheless, the due process safeguards are built into the U.S. Constitution and therefore have to be respected by the authorities while they are exercising their powers.

In the end, a conclusion whether the investigative powers of the Commission correspond to the basic human rights requirements and to what extent has been made.

Abbreviations

COM	Documents\ Commission of the European Community
DOJ	Antitrust Division of the U.S. Department of Justice
ECHR	The European Convention for the protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
FTC	Federal Trade Commission
FTCA	Federal Trade Commission Act
O.J.	Official Journal
U.S.C.A.	United States Code Annotated

1 Introduction

In choosing my thesis topic I was greatly inspired by the couple of lectures given by Sven Norberg at Lund University during the November 2002.

Thinking about what subject to explore I was attached to procedural matters in competition law. I was particularly impressed by new developments both in the legislative sphere and in the latest rulings from the ECJ and CFI concerning competition law.

What has captured my attention was an interesting question: How do the investigation powers of the Commission comply with the basic Human Rights?

My thesis will be concerned with the competition law on the one side and Human Rights on the other. I would like to investigate how the current and new competition legislation is combined with the main Human Rights issues. It would be interesting to study the powers of the Commission in the investigation process. How far can the Commission go and what methods can it use in its investigations? But how does it comply with main general principles of law, human rights and in particular in effective protection of merging parties' rights of defence and right to privacy? This is the problem I would like to investigate.

This problem is a new one and there is not much material on it yet. But information is increasing every day. There is already much discussion on the Community level as well as inside the Member States. Writing my thesis I will use first of all materials from the Commission (Regulation texts, materials on the website, as well as speeches given by the Commissioners and discussion that is in the press). Also I will use some materials from The European Court of Human Rights in Strasbourg and relevant information regarding the Human Rights issues. I think that comparison of the European Convention on Human Rights and competition legislation could also be of a great help.

First I will give a brief outline of the Human Rights perspective with regard to the required fundamental elements in the legal proceedings. I will give a

short analysis of the relevant articles of the European Convention on Human Rights and Fundamental Freedoms.

Then I am going to test the European competition system, looking first at current acting legislation, then turning to the new changes. I will also scrutinize related cases from the ECJ and CFI. I will be able to come to see how the European system complies with the basic human rights requirements.

The next step will be a comparison with U.S. procedural antitrust law. My decision to turn to U.S. antitrust law can be explained by the fact that the U.S. is the country that actually gave birth to the competition law and is still leading the way in its development.

Therefore it would be very interesting to have a brief look at what is going on in U.S. antitrust law now, especially on the procedural side, and to compare how the same issues are being dealt with in the EU and U.S. systems.

In the end, I will be able to come to some conclusions as to whether Commission powers are up to the Human Rights standards, what the new changes may signify, and to discuss these aspects.

2. European Convention on Human Rights

In talking about human rights in Europe, one should start with the European Convention for the Protection of Human Rights and Fundamental Freedoms from the 4th November 1950 (hereinafter referred to as “ The European Convention of Human Rights”). It establishes the main standards in the sphere of human rights that should be observed by all members of the Convention. All Members of the European Union are Parties to the Convention; therefore it is applicable throughout the whole territory of the EU.

To give a rough overview of the Convention is not a simple task. It sets standards in many different areas of the human life, from private to social and community dimensions.

Since this thesis is intended to deal with Community competition law and basic human rights, we do not have to deal with all principles laid down in the ECHR. We can take only those that are directly applicable to legal protection and private life.

In this case we go deep only into the articles 6 and 8, which deal with such important issues as fair trial, right of access to courts, and respect for peoples’ private life. These imperatives will be described in further detail.

2.1. Article 6 ECHR and “The right to a fair trial in civil and criminal cases”

The main essence of article 6 can be put into one phrase: “The right to a fair trial in civil and criminal cases”.

Article 6 is an omnibus provision which has been described as a “pithy epitome of what constitutes a fair administration of justice.”¹ The rights protected in this article constitute one of the central and most important

¹ J. Cremona, “ The public character of trial and judgment in the jurisprudence of the European Court of Human Rights” in F. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension: Studies in Honour of Gerard J. Wiarda* (Köln, 1990), p. 107.

values in the Convention system. “A fair trial, in civil and criminal cases alike, is a basic element of the notion of the rule of law and part of the common heritage, according to the Preamble of the Contracting States.”² Article 6 (1) applies both to civil and criminal proceedings, while article 6 (2) and 6 (3) are applicable only to criminal proceedings.

2.1.1. Article 6 and criminal proceedings

What is important is that the protection of Article 6 starts from the time when a person is charged with a criminal offence. This is not however, necessarily the moment when “formal charges are first made against a person suspected of having committed an offence”³. Another essential point is that the protection of Art.6 does not depend on the particular features of the system of criminal investigation and prosecution, which may and do vary considerably between the Contracting Parties.⁴

Given that the object of the Article 6 is to protect a person during the criminal process, and since formal charges may not be brought sometimes until a quite advanced stage of an investigation, it was essential to find a standard for the opening of criminal proceedings which would not depend on the actual development of the procedure in a specific case.

The court has defined a “Charge” for the purposes of the article 6 (1) as the “official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.⁵

Article 6 (1) covers the whole proceedings in issue, including appeal proceedings and the determination of sentence.⁶

2.1.2. Article 6 and civil rights and obligations

Thought the definition of civil rights and obligations has proved to be more problematic,⁷ the Court Has adopted very a liberal and far- going

² Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002.

³ Ibid.

⁴ Ibid.

⁵ Eckle v. Germany, Judgment of 15 July 1985. 3\1981\42\67 App. 00008130\78.ECHR Series A, No 51, para. 73 of judgment.

⁶ Ibid. paras 76-77; Philips v. United Kingdom (App00041087/98), Judgment of 5 September 2001.

interpretation of this principle, which also permits its use in cases where private persons are confronted by State authorities which are governed by the administrative law. This point is incredibly important for this paper. After the *Ringeisen* judgment⁸ all subsequent Court's judgments made it clear that the ECHR is for the extension of the protection which is being promoted by the article 6. But lack of clear principles and criteria, the so called lacunae in the Court's judgments, makes it more difficult to enforce this right.

2.2. Right of access to Courts

Right of access to Courts is one of the basic human values. Though it is not mentioned in the Convention, neither in article 6 nor article 8, it has evolved from article 6 and the Court's practice. It is quite clear that without right of access to the court, all other legal rights provided by the ECHR would become worthless. This right was first recognized by the Court in the *Golder* case.⁹ where the Court stated that the detailed fair trial guarantees under Article 6 would be useless if it were impossible to initiate court proceedings in the first place: "in civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts.....The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which

⁷ Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002. p. 145. This right should exist under the national law and should be civil in nature. It is evident that this phrase covers ordinary civil litigation between private individuals, relating, for example, to actions in torts, contracts and family law. It is more difficult to determine whether article 6 should apply also to disputes between individuals and the state concerning rights, which under some systems of law, fall under administrative rather than private law. Whilst this refusal to be tied by national law definitions is no doubt correct, it does give rise to uncertainty as to whether a particular type of dispute is included. Although the Court has, from time to time, appeared to base itself on various elements such as the economic nature of the right concerned, it has never attempted to elaborate universal criteria, comparable to Engel criteria for a criminal offence (look *ibid.*), by which to identify "civil rights and obligations", preferring instead to decide the matter on case – by – case basis. As we can judge from the Court's practice now, the substantive content, character and effects of the right concerned are more decisive.

⁸ *Ringeisen v. Austria*, Judgment of 16 July 1971, App 00002614\65. ECHR Series A, No. 13; (1979-80).

⁹ *Golder v. United Kingdom*, Judgment of 21 February 1975, App. 0000451\70. ECHR Series A, No. 18 (1979-80).

forbids the denial of justice. Article 6 must be read in the light of these principles”.¹⁰

2.3. Fair hearing and its requirements

Just as right of access to a fair trial is one of the primary and most essential legal rights of the person, the right of fair hearing is one of the basic rules as well. Without a fair hearing a right of access to the courts would not matter much. The meaning of fair trial can vary in different legal systems and different states. Therefore, the European Court of Human Rights, fulfilling its activities, has come forward with a number of elements which now are considered to be indispensable elements of the notion of a fair trial:

- procedural equality (*e´galite´ des armes*), which basically means that each party must be afforded a reasonable opportunity to present its case- including its evidence- in conditions that do not place it at a substantial disadvantage vis-à-vis his opponent.¹¹
- An adversarial process and disclosure of evidence to the other party (this principle is connected with the fair trial in general; parties should have knowledge of the facts, presented by the other)
- A reasoned decision
- Effective participation
- An independent and impartial tribunal, established by law. This principle is equally important in criminal and civil procedures.
- Public hearing (publicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice being administered.¹²)
- Public judgments
- Judgment in a reasonable time (“it is looked upon wider than a right under article 5(3) which applies only to persons detained on remand

¹⁰ See: Jacobs and White. *European Convention on Human Rights*, Oxford University Press, 2002 p.149

¹¹ *Dombo Beheer BV v. Netherlands*, Judgment of 27 October 1993. App. 00014448\88. ECHR Series A. No 274-A; (1994) , para 33 of the judgment.

¹² *Pretto and others v. Italy*, Judgment of 8 December 1983, App. 00007984\77. ECHR Series A, No.71; (1984).

on a criminal charge, the scope of article 6(1) is wider, extending to civil and criminal cases alike, and in criminal cases it applies whether the accused is detained or at liberty”.¹³) But European Court of Human Rights has never established what can be considered to be the reasonable length of the proceedings, for it depends on the circumstances of the each case. So, the Court has to decide this problem on a case-by-case basis.

- Presumption of innocence
- Prompt notification of the charges and interpretation
- Defendant should have reasonable time and facilities and legal assistance to run a defense.
- Criminal legislation should never have a retroactive affect
- The right to an appeal (especially in criminal cases, provided by article 2 of Protocol 7)
- The right to silence and the principle against self-incrimination.

Although it is not specifically mentioned in Article 6 of the Convention, the Court has held that the right to silence and the right not to incriminate oneself are generally recognized international standards which “lie at the heart of the notion of a fair criminal procedure under Article 6 (1)”.¹⁴ These rights are closely linked to the principle enshrined in Article 6(2), that a person accused of a crime is innocent until proved guilty according to law.¹⁵ In *Saunders v. UK*¹⁶, the applicant gave information during the investigation of the criminal case, which later was used against him at the trial. The Court

¹³ Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002 p.166

¹⁴ Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002 p.174.

¹⁵ Good example of how the Court has established the principle against self-incrimination could serve the *JB v. Switzerland* case (App. 311827\96), Judgment of 3 May 2001., where the convicted person refused to submit to the Tax authorities documents about his real income, but admitted that he has previously filed documents where he has wrongly declared his income. As a result, three fines where imposed on him. The Court has held that the documents, which the convicted person refused to submit could be seen as such that could incriminate him in the further investigation and therefore the decision about the fines was in breach of the principle of silence and privilege against self-incrimination, included in the right to a fair trial under Article 6 (1).

¹⁶ *Saunders v. U.K.* Judgment of December 17. 1996, No. 24. App. 00019187\91

held that “the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating” and the applicant’s answers were used in the course of the proceedings in a manner which sought to incriminate the applicant”.¹⁷

- Legal methods of investigation. It is now established in all Constitutions of all Member States that police methods of investigation should not breach basic human rights, should not breach articles 6 and 8 of the ECHR.

According to the Court’s case law, it is absolutely wrong to use temptation and pressure in order to get evidence (see *Teixeira de Castro v. Portugal*¹⁸, where the accused was offered money by the police to supply them with heroin).

The same goes for the use of hidden listening devices and obtaining recordings of conversations of suspected persons. (*Khan v. United Kingdom* (App 35294\97) Judgment of 12 May 2000) In this case, use of such devices was not regulated by the domestic law. What will be the judgment if the use of tape recording devices were legal under national law we can only guess, because there is still no such case in the European Court of Human Rights.

2.4. Article 8. The protection of private and family life

This article and the case- law based on it deals with a wide range of issues, from protection of family life, equality between spouses, parenthood and custody matters, housing, to the respect of one’s correspondence and respect for privacy and homes in relation to police searches and investigations.

Since the purpose of this thesis relates to investigations and rights given to the authorities in this process, we will concentrate mostly on them.

Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

¹⁷ Ibid. para 71 and 72 of the judgment.

¹⁸ *Teixeira de Castro v. Portugal* Judgment of 9 June 1998; App 25892\94.

- a. 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.

The right of respect for family life, the right to privacy, and the right of respect for home and correspondence should be interpreted together. Even in the Court's practice they always go beside each other, in pairs (privacy and the home, family life and the home, privacy and correspondence).

It is evident that part one of the article is a general principle, while part 2 sets up a number of limitations which can justify in certain cases interference with private life. It is a general principle that only limitations authorized by the European Convention of Human Rights are permitted and that they should not be used for any other purpose than that for which they have been prescribed.

There is an immense importance in the requirement that restrictions must, in every case, be justified by an express provision of the Convention. The Court adopts a three-track questioning where a State seeks to rely on a limitation in one of the Convention articles. First, it determines whether the interference is in accordance with, or prescribed by, law, then it looks to see whether the aim of the limitation is legitimate in that it fits one of the expressed heads in the particular article, and finally it asks whether the limitation is in all the circumstances necessary in a democratic society¹⁹.

Limitations can be needed in the interests of:

- National security, territorial integrity or public safety
- Prevention of disorder and crime
- Protection of health and morals
- protection of the reputation or rights of others
- preventing the disclosure of confidential information

- maintaining the authority and impartiality of the judiciary.

Crucial to this determination is the proportionality of the intrusion into the private life with the legitimate aim. Only the minimum interference with the right which secures the legitimate aim can be permitted.

“Margin of appreciation” has been set in the *Cossey v. UK* case, where the European Court of Human Rights said : “ fair balance has to be struck between the general interest of the community and the interests of the individual person”.²⁰

2.5. Niemietz v. Germany

The *Niemietz v. Germany* case is a good example of how the European Court of Human Rights established the notion of “private life” and found a balance between what is necessary for society and a private person’s rights: “respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”.²¹

In the *Niemietz case* the main question was concerned searches in law offices and in violation of article 8. The office of Mr.Niemietz, who lived and practiced as a lawyer in Freiburg, Germany, was searched by the investigating authority. Mr.Niemietz was suspected of having some evidence about the unknown Klaus Werner, against whom the Munich public prosecutor’s office (Staatsanwaltschaft) instituted criminal proceedings for the offence of insulting behaviour, contrary to Article 185 of the Criminal Code (more specifically for the distribution of the letters which insulted local authorities). The European Court of Human Rights has looked upon this problem in the light of article 8, using the proportionality test. To my mind, its definition “private life” was given rather broadly: The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life".However, it would be too restrictive to limit the notion to an "inner circle" in which the individual

¹⁹ Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002 p. 201.

²⁰ *Cossey v. UK*. App. 00010843\84. ECHR Series A, No.184.

²¹ *Niemietz v. Germany*, Judgment of 16 December 1992 App. 000131710\88. ECHR Series A, No 251-B. Para 29 of the judgment

may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.

"This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time".²²

On this ground the actions of the German local authority which had conducted the searches were found to violate article 8 of the Convention. This judgment is of particular importance for the future discussion in this thesis, because it sets up standards of what can be considered to be "private life" and how far authorities can really go in fulfilling their investigation powers.

What is interesting, is that the European Court of Human Rights analyses case-law from the European Court of Justice, especially the *Hoechst case*, where the ECJ recognized the need for protection against arbitrary or disproportionate intervention into the private dwellings of natural persons and undertakings as a general principle of Community law.²³

Another outstanding point is that Mr. Niemietz also lodged an application to the Commission of the European Communities and in its report of 29 May 1991 (Article 31), the Commission expressed the unanimous opinion that

²² Ibid. para 29 of the judgment.

there had been a violation of Article 8 of the European Convention on Human Rights.

Analyzing these two decisions we can make a clear conclusion that in principle EU Institutions (we can speak for sure only about the Commission) have the same opinion about the importance of respect for private and family life of natural persons (which can also include by extension of the business life) as the European Court of Human Rights in Strasbourg.

Recent case law of the latest on the right to a fair trial is extensive and has had a significant impact. “For the individuals concerned, a finding of a violation by the Court can lead to criminal proceedings being reopened or, in civil cases, the award of damages. Perhaps more importantly, States all over Europe have amended and improved their legal procedures to comply with the Court’s rulings.”²⁴

²³ Joined cases 46\87 and 227\88 Hoechst v. Commission [1989] ECR 2859 at 2924.

²⁴ Jacobs and White. European Convention on Human Rights, Oxford University Press, 2002 p.170

3. Inspections, protection of private life and right of defense in EU competition law

“It is tempting to understand the progress of European integration as a process of growing centrality of human rights in the European legal order: human rights as being ever more important for the ever closer union”.²⁵

Though today human rights issues are very up to date in the EU, it does not really mean that they have not been developing in many different areas of legislation. Since the particular sphere of my interest is competition law, I will concentrate mostly on the development of the legislation and case law concerning human rights issues in this sphere.

Specific to the legislation in competition law is that it deals only with some, particular aspects of the human rights, like those that were mentioned in the first chapter (right against self incrimination, right to fair hearing, right of access to court). Great importance attach to procedural rights like right of fair hearing, right against self incrimination and right of defense. They very often arise due to the nature of the European Competition law, which deals a lot with inspections and searches, which are being conducted by the Commission.

Basically, during almost every cartel investigation and concerted practices case there are always several inspections or searches carried out by Commission officers. Broad powers of investigations include the authority to require businesses to respond to requests for information and submit to surprise investigations of company premises, popularly known as “dawn raids”.

Need for such actions is incredibly great as has been stated during the lecture given by Sven Norberg at Lund University on the 29th of November 2002. Commission personnel are convinced that companies are very often

²⁵ Armin von Bogdandy. The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union. *Common Market Law Review* 37: 1307–1338, 2000.

unwilling to cooperate with the authorities by admitting that they are conducting unlawful activities and presenting the documents that show this. Though there are some leniency programs, they are not as successful as those in the U.S. for example. Therefore Commissioners are forced to go for searches and investigations.

In the next subparagraph it will be necessary to have a quick look at the legislation that regulates these activities.

3.1. Legislative framework and the development of the human rights protection in EU Competition law

The competition rules in the EC Treaty originated in the Treaty of Rome, which established the European Economic Community. However, the EC Treaty is not the main legislative act in the competition law sphere now. The major role is given to secondary legislation.

Naturally, we should start our analysis with the two main legal documents in the sphere of competition law: Regulation No.17\62 and the Merger Regulation. Though it should be pointed out that both of them are rather old and there are new proposals, consequently Regulation 1\2003 and “The EC Merger Regulation” which are to come into force on the 1st of May 2004, when the new enlargement will take place.

Both of these legislative documents increase the EC Commission’s powers of investigation and enforcement, though they preserve such basic rights as the right to be heard and the right to access to the court. For example, Article 19 of Regulation 17 and Article 27 of Regulation 1\2003, set out the legislative expression of the right to be heard. Each hearing provision requires that a defendant undertaking, or association of undertakings, have the “opportunity of being heard on the matters to which the Commission has taken objection” prior to a decision by that institution in respect to the termination of an infringement, the ordering of interim measures, or the

imposition of a fine or periodic penalty payment.²⁶ These two documents will be scrutinized in more detail.

As to the case law of the European Court of Justice, it has also played huge role in the establishment and recognition of some basic procedural rights. For example, the right to be heard has been stressed in the *Transocean Marine Paint case*.²⁷ The Court recognized the right to a fair hearing as a “general rule” in relation to which the rules under Regulation 99\63 (now regulation 2842\98) were to be regarded “only as a statutory specification”.²⁸ This principle was later repeated by the Court in *Hoffman La Roche* where the Court has stated that “observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments may be imposed, a fundamental principle of Community law...”²⁹

According to the procedure relating to the infringement of EC competition rules, the Commission performs both investigative and decision-making functions. In several cases, parties have argued that it is contrary to Article 6 of the ECHR, which grants to each person the fundamental right to be heard by an independent and impartial tribunal, for one and the same institution to fulfill both these functions.³⁰ “However, the Community Courts have consistently held that this provision does not prevent the Commission, which is not a “tribunal”, from carrying out both investigative and decision-making functions”.³¹ The Courts’ view is that the right of an undertaking to be heard by an independent and impartial tribunal within the meaning of Article 6 of the ECHR is sufficiently covered by the possibility to bring an

²⁶ Calvin P. Jellema. The Redheaded Stepchild of Community Competition Law: The Third Party and its Right to be Heard in Competition Proceedings. Boston University International Law Journal. Fall 2002.

²⁷ Case C- 17\74 *Transocean Marine Paint Association v. Commission*. [1974]ECR 1063 para.15

²⁸ Libor Drabek. A Fair Hearing Before EC Institutions. European review of Private Law 4: 529-563,2001.

²⁹ *Ibid*. See also case C- 85\76 *Hoffmann- La Roche & Co. AG v. Commission* [1979]ECR 461, para9.

³⁰ See: Koen Lenaerts and Ignace Maselis. Procedural Rights and Issues in the Enforcement of articles 81 and 82 of the EC Treaty. Fordham International Law Journal. June, 2001.

³¹ See *ibid*. More precisely, the Community Courts take the view that the general principles of Community law, of which the rights and freedoms enshrined in the ECHR form an integral part, do not prohibit the carrying out of both functions. *Internationale Handelsgesellschaft*, Case C-11\70, [1970] ECR. 1125, at para 4; *Bosman & Others*, Case C- 415\93,[1995] ECR.I-4921,at para 79.

action for annulment under Article 230 of the EC Treaty before the Court of First Instance against a decision of the Commission.

In another case, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanverhuurbedrijven (FNK) v. Commission*,³² the Court has ruled that the Commission should also stick to the principle of reasonable length of the proceedings: “It is a general principle of Community law that the Community Institutions must act within a reasonable time in adopting decisions following administrative procedures relating to competition policy.”³³ In this case it took three years for the applicant to get a decision on a negative clearance application. The Court of First Instance has considered that the Commission failed to comply with the requirements of the Article 6(1) of ECHR, which I analyzed in the first chapter.

In analyzing the particular circumstances of each case, the European Court of Justice often uses the standards that have been set up by the European Court of Human Rights. In *Baustahlgewebe v. Commission*³⁴ in order to establish whether the length of the proceeding was reasonable enough (in this case five years and six month) the ECJ has used the same criteria as set up by the Court in Strasbourg: specific circumstances of each case, importance of the case for the person concerned and the conduct of the applicant and of the competent authorities.³⁵

In this regard, Commission officials state that there are not enough staff in the Commission to cover all the cases and to deal with all notifications at the same time. Therefore they must postpone some of them which are of minor importance. There are notifications that have to wait for decisions for several years, they say.³⁶ “One should take into account that fulfilling the functions of investigator, prosecutor and judge at the same time, the

³² Joined Cases T-213\95 and T-18\96 [1997] ECR II-1739.

³³ Libor Drabek. A Fair Hearing Before EC Institutions. European review of Private Law 4: 529-563,2001.p.549.

³⁴ Case C-185\95, Baustahlgewebe GmbH v. Commission [1998] ECR I- 08417(appeal against Case T-145\89 [1992] ECR II-987).

³⁵ See also Libor Drabek. A Fair Hearing Before EC Institutions. European review of Private Law 4: 529-563,2001.p.550.

³⁶ Letter from Daniel Dittert DG COMP\B-3, tel +32.2.295.41.56. from 19 February 2003

Commission is handling a great number of cases that have been brought to its attention. Being overwhelmed by the cases makes it more difficult to adopt final decisions within a reasonable time”.³⁷

The principle of audi alteram partem, or right to defense, consists of different elements which have to be observed during a fair proceeding. The right to be heard cannot be possible without the right of access to the documents.” Access to file in competition cases is intended to allow the parties under investigation to examine evidence held by the Commission so they are in a position effectively to express their views on the conclusions which the Commission reaches in the statement of objections on the basis of that evidence”..³⁸ Access to the file is thus one of the principal procedural guarantees intended to protect the right of defense and to ensure, in particular, that the right to be heard can be exercised effectively. The first judicial consideration of a claim of access to the Commission file under Regulation 17 occurred in *Consten v. Commission*.³⁹ In this case, the parties to a sole distributorship agreement, which the Commission found to have infringed Article 81(1), sought annulment of that decision, arguing, in part, that the Commission’s failure to disclose the complete file violated their right of defense.⁴⁰ Though the Court did not consider it necessary to communicate the documents itself, it indicated that the disclosure of specific documents can be a indispensable constituent of the proper conduct of proceedings.⁴¹

Later on, the Commission enacted the “Commission Notice on the internal rules of procedure for processing requests for Access to the file in cases,

³⁷ Libor Drabek. A Fair Hearing Before EC Institutions. *European review of Private Law* 4: 529-563,2001.p.549.

³⁸ Koen Lenaerts and Ignace Maselis. Procedural Rights and Issues in the Enforcement of articles 81 and 82 of the EC Treaty. *Fordham International Law Journal*. June, 2001.

³⁹ Joined Cases 56 and 58\64, *Etalissements Consten, S.A.R.L. v. Commission*, 1966 ECR.299.

⁴⁰ Calvin P. Jellema. The Redheaded Stepchild of Community Competition Law: The Third Party and its Right to be Heard in Competition Proceedings. *Boston University International Law Journal*. Fall 2002.

⁴¹ *Ibid*.

pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No. 4064\89.⁴²

Further on, in *Hoffman La Roche v. Commission*,⁴³ the Court stated that the right to be heard was a fundamental rule of Community law, “to be observed in all proceedings in which a sanction may be imposed and required that a defendant be given the opportunity to declare its position on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim”.⁴⁴

Privilege against self-incrimination or the right to remain silent has also been established in the competition sphere. For example, in the *Orkem case*⁴⁵, the Court held that a privilege against self incrimination may be raised in order to protect the right of defense during enforcement proceedings of Articles 85, 86 (new 81, 82) undertaken by the Commission. Therefore it may not force an undertaking to provide it with answers which might involve an admission on its part of an infringement which the Commission is at that stage trying to prove.

“The Court therefore developed the concept of Community privilege, which applies to the directly incriminating questions, asked by the Commission but it does not apply to either documents or indirectly incriminating questions”.⁴⁶

Both, Regulation 17\62 (Article 14) and the Merger Regulation (Article 13) attribute investigative powers to the Commission. The most disputable practice is the so-called “dawn raid inspections”. Commission official can come unannounced, usually at 9 o’clock in the morning, to the any undertaking which is suspected of illegal activities and start a search. They must present a written decision or authorization, of course. The company usually has a limited time to call its lawyers and then the investigation will

⁴² OJ 97\ C23\03 of. 23.01.97.

⁴³ Case 85\76, Hoffman- La Roche & Co. AG. V. Commission, 1979 ECR.461

⁴⁴ Calvin P. Jellema. The Redheaded Stepchild of Community Competition Law: The Third Party and its Right to be Heard in Competition Proceedings. Boston University International Law Journal. Fall 2002.

⁴⁵ C- 374\87 Orkem v. Commission,[1989]ECR 3282,para34.

⁴⁶ See Libor Drabek. A Fair Hearing Before EC Institutions. European review of Private Law 4: 529-563,2001.p.546-547.

start. This kind of investigation has been already subject to the Court's review (*Hoechst case*, which is to be analyzed further).

3.2. Regulation 1\2003 and the growing powers of the Commission

Regulation 1\2003 is a new document, implementing the antitrust provisions of the EC Treaty, Articles 81 and 82 EC.⁴⁷ As Regulation 17\62 was considered to constitute the basic implementation legislation for Articles 81 and 82, which form the core substantive competition rules in the EC Treaty, the new Regulation 1\2003 has now to fulfill this important task. The key objectives of the new regulation are to:

- Free up Commission's resources, because from now there will be fewer notifications and exemptions under article 81(3) and national authorities and courts will have the power to apply this article directly;
- Strengthen the role of Member State competition authorities and courts in the enforcement of articles 81 and 82.
- Establish a network for coordination and information exchange between national authorities and courts and the EU Commission;
- Increase the Commission's powers of investigation and enforcement.

The latter is of the primary interest for further discussion in this paper. Until recently, Commission officials conducting the investigations, could only search any premises, land and means of transport of undertakings.⁴⁸

According to the new Regulation 1\2003, in order to carry out the duties assigned to it, the Commission may conduct all necessary inspections of

⁴⁷ Full name is: Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations 19\65 EEC, (EEC) No. 1017\68, (EEC) NO. 2821\71, (EEC) No. 2988\74, (EEC) No. 4056\86, (EEC) No. 3975\87, (EEC) No. 3976\87, (EEC) No. 1534\91 and (EEC) No. 479\92.

⁴⁸ Regulation 17\62, article 14(1).

undertakings and associations of undertakings.⁴⁹ What is new, and a far-going innovation, the Commission has the right to search also private homes: “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 81 or Article 82 of the Treaty, are being kept in any other premises, and means of transport, including the homes of directors, managers and other members of staff of 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”.⁵⁰

According to the Commission’s official statement, this innovation was necessary because of the fact that businessmen used to take all information about illegal practices home, which made it very difficult (or sometime almost impossible) for the Commission to prove its existence.

Still, a fundamental guarantee of the rights of defense of the undertakings concerned is being kept: the decision shall specify the subject matter and purpose of the investigation, the date on which it is to begin, the penalties for non-cooperation and the right to have the Court of Justice review the decision and it shall be taken only after prior consultation with the national competition authority and authorization from the national judicial authority. A decision requires the business to submit to the investigation. It may simply describe the suspected violation and the general documentation to be examined and merely mention the other required information. The only available defense mentioned therein is the option of a business to consult a legal advisor during the investigation.⁵¹

The question of searching private homes and national courts powers has been already raised in relation to the old Regulation 17\62. Two cases *Hoecht AG v. Commission* and *Roquette Freres SA v. Commission* will be analysed in greater detail.

⁴⁹ Regulation 1\2003, article 20(1).

⁵⁰ Regulation 1\2003, article 21(1).

⁵¹ See: William Snyder. Due Process in the European Economic Community: Rights of businesses During Commission Inspections. University of Toledo Law Review. Summer, 1991.

3.3. The Hoechst case

The Hoechst case is the main human rights case in EU competition law. It can be also called a turning point which deals with the question of whether the Commission is just doing its job or is extending its powers to such an extent that it is in conflict with human rights. It deals in particular with the right of defense and the investigation powers of the Commission. *Hoechst* factually presented the strongest challenge to the Commission's powers. "It is likely to be the judgment most cited in discussions of the related issue of non-cooperation with on-the-spot investigations".⁵²

In January 1987, the Commission decided to carry out investigations of several undertakings, which were suspected of having an agreement or concerted practices concerning price fixing and delivery quotas for PVC and polyethylene products in the Community. One of the suspected undertakings, a German company Hoechst AG, refused to submit any documents to the investigation on the ground that it constituted an unlawful search. On three separate occasions, Commission inspectors were denied entry while Hoechst officials claimed that the inspectors had no legal authority to inspect or seize documents. The Commission responded by setting a periodic penalty payment for each day of non-compliance. Finally, on April 2, 1987, the "surprise" investigation took place at Hoechst offices with the cooperation of Hoechst officials. Afterwards, Hoechst AG brought two actions under the second paragraph of Article 173 of the EEC Treaty for declarations that three Commission decisions were void.

Though the applicant lost the case, the judgment is still very important for the further development of EU law. First of all, it stresses once more that respect for the right of defense constitutes an indispensable part of fundamental rights in accordance with constitutional traditions common to the Member States and the international treaties which are obligatory for the Member States which are Parties to them. The European Convention of

⁵² C- 227/92 P Hoechst v. Commission .O.J.1992 C 167\9.

Human Rights is of particular significance in that regard.⁵³ Particular attention to the right of defense and its fundamental nature has been paid even earlier, in previous Court judgments.⁵⁴ In that case, the ECJ pointed out that “the rights of the defense must be observed in administrative procedures which may lead to the imposition of penalties”.⁵⁵ In the *Hoechst* case, the ECJ ruled that it must be ensured “not only in administrative procedures which may lead to the imposition of penalties but also during preliminary inquiry procedures, such as investigations under Article 14 of Regulation No 17, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable”.⁵⁶

The Court recognized some specific rights of businesses in this context:” legal representation, the confidential nature of attorney – client correspondence, and the right to have legal assistance”.⁵⁷

Although the right to the inviolability of the home was acknowledged to be a common principle for all legal systems of all Member States, it is never the less not the case in regard to the private dwellings of natural persons and undertakings, which have different kinds of protection against intervention by public authorities in different legal systems. Therefore, the protective scope of the Article 8 (1) of the European Convention on Human Rights cannot be extended to business premises.⁵⁸

⁵³ See judgment of 15 May 1986 in Case 222/84 *Johnson v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁵⁴ See judgment of 9 November 1983 in Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 7.

⁵⁵ See *Hoechst* judgment paragraph 15.

⁵⁶ *Hoechst* para 1. See also *Orkem* case.

⁵⁷ The Court treated this question in its judgment in Case 155/79 *AM & S Europe Ltd. V. Commission* [1982] ECR 1575. The court held that the lawyer-client privilege constitutes a general principle of law common to the laws of all member states and consequently forms part of Community law. But the court limited the scope of the privilege to written communications between lawyer and client made for purposes of the client’s defense, and to communications emanating from “independent” lawyers (not bound to the client by an employment relationship) who are entitled to practice their profession in one of the member states. See: William Snyder, *Due Process in the European Economic Community: Rights of businesses During Commission Inspections*. University of Toledo Law Review. Summer, 1991.

⁵⁸ As it is stated in the *Hoechst*, paragraph 18, there is no case-law of the European Court of Human Rights on this subject.

Nonetheless, in all the legal systems of the member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law.⁵⁹

According to the investigating powers of the Commission, the ECJ has stated that they don't go beyond what is necessary. In that regard, the right of the Commission to enter any premises, land and means of transport of undertakings is intended to permit the Commission to obtain evidence of infringements of the competition rules. This right of access would 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.⁶⁰ 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.

But nevertheless, as was stated in the judgment, "the Commission's obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the right of defense of the undertakings concerned".⁶¹

It follows that the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations pertaining to the effectiveness of the investigation. Although the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis

⁵⁹ Ibid. para 2

⁶⁰ Ibid, para 3.

⁶¹ Ibid para 41

of those infringements, it must nonetheless clearly indicate the supposed facts which it intends to investigate.

One can conclude that although Competition Rules and Article 14 of the Regulation No 17 in particular (as it was the case in the *Hoechst* judgment), do confer wide powers of investigation on the Commission, the exercise of those powers is subject to conditions serving to ensure that the rights of the undertakings concerned are respected.

3.4. Roquette Freres

In October 2002, in *Roquette Frères*⁶², the ECJ ruled on an interesting case concerning the scope of review by national courts having jurisdiction to authorize entry and seizure at the business premises of a company, following a Commission request for assistance under Article 14(6) of Regulation 17/62.⁶³ The judgment clarifies the principles established in *Hoechst* on these issues and lists the basic information which the Commission must provide to national courts. The *Roquette* judgment can best be characterized as a continuation of the *Hoechst* reasoning. *Roquette Frères*, a French undertaking was engaged in marketing sodium gluconate and glucono-delta-lactone. The Commission suspected that this undertaking was part of an agreement and/or concerted practices in the fields of sodium gluconate which might constitute an infringement of Article 85 of the EC Treaty. The Commission adopted an investigation decision which stated that in order to make the investigation effective it was necessary that undertaking should not be informed in advance.⁶⁴ The Commission got the authorization from the President of the Tribunal de grande instance de Lille and the investigation took place on the 16 and 17 September 1998.

Roquette Frères appealed the authorization order, stating that the national

⁶² Case C-94/00, *Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes v. Commission*. [2002] ECR PI-09011

⁶³ John Ratliff. Major Events and Policy Issues in EC Competition Law. *International Company and Commercial Law Review*. 2003.

court did not have the possibility to see any of the arguments of the Commission about the necessity of the investigation.

The French Cour de Cassation considered that the Commission, by submitting only a copy of the Article 14(3) decision (which made no reference to the evidence already gathered), and in light of the *Hoechst* judgement, had failed to provide enough information or evidence to enable the Lille Court to make such an assessment, therefore it stopped the proceedings and referred several questions to the ECJ for a preliminary ruling. They basically can be re-formulated into one: Can national courts refuse authorization if it considers that the Commission's grounds are not sufficient or lack sufficient evidence or does the ECJ take the view that the Commission is not required to submit any evidence or information where the Article 14(3) decision lack sufficient reasoning. In this way the Cour de Cassation requested the ECJ to clarify the principles established in *Hoechst*. The ECJ recalled that the protection of business premises against "arbitrary" or disproportionate intervention by public authorities is a general principle of law, as established by the ECJ in *Hoechst* and by the European Court of Human Rights (the latter having ruled that Article 8 of the European Convention of Human Rights on the "protection of the home" may, in some cases, cover business premises⁶⁵). "When acting in response to a Commission request for assistance under Article 14(6), national courts need to reconcile this general principle with the duty under Article 10 EC to cooperate in good faith with the Community institutions and ensure that the Commission's action are effective"⁶⁶.

"The ECJ held that national courts can grant the coercive measures sought only after verifying that these are not "arbitrary" or disproportionate to the subject-matter of the investigation. National courts cannot, however, assess the adequacy of reasons given in an Article 14(3) decision, which falls within the exclusive competence of the European Courts"⁶⁷.

⁶⁴ Roquette v. Commission . para 11 of the judgement.

⁶⁵ Niemietz v. Germany case. See first chapter.

⁶⁶ John Ratliff. Major Events and Policy Issues in EC Competition Law. International Company and Commercial Law Review. 2003

⁶⁷ Ibid.

In order to ensure that coercive measures are not arbitrary, the Commission is required to provide the court with detailed explanations showing the purpose of investigation (which is a fundamental requirement, according to *Hoecht*) and that it possesses solid factual information and evidence, but not also to provide the information and evidence contained in its file or even a description of the nature of this information (for example whether it is a complaint, testimony or documents exchanged between the participants in the suspected cartel).⁶⁸

Dealing with the proportionality test, the national court has to establish that the measures are necessary to carry out the investigation and do not constitute a disproportionate and intolerable interference with human rights. For this purpose, the Commission has to inform the court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, including at least an indication of the market to be affected, the nature of the alleged competition restrictions and an explanation of the supposed degree of involvement of the undertakings concerned. The Commission has also to give an indication as precisely as possible of the evidence sought (but not a list of documents or files), of the matters to which the investigation must relate and the powers conferred on the investigators.⁶⁹

In cases where the Commission requests the national authorities' assistance as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, it has to show that without the coercive measures it would be impossible or very difficult to establish the facts amounting to the infringement.⁷⁰

“National courts are entitled to refuse the coercive measures where they consider that the competition infringement is minimal, the undertaking's involvement is limited or the evidence sought is peripheral, so that the

⁶⁸ See para 47 and 53 of the judgment.

⁶⁹ Para 81- 84 of the judgment. See also C-136/79 *National Panasonic v. Commission* [1980] ECR 2033, paragraphs 26 and 27.

⁷⁰ See para 99 of the judgment.

intervention is manifestly disproportionate and intolerable”⁷¹.

However, before the national court dismisses an application for assistance under Article 14(6) on the ground that the Commission has failed to provide sufficient information, it has to request the additional information needed as rapidly as possible and allow the Commission to provide the information with the shortest delay. The Commission can provide the information to the national court in any form, for example in an Article 14(3) decision, in an Article 14(6) request or in an answer, even given orally, to a court's question. Not until such clarification is forthcoming, or the Commission fails to take any practical steps in response to its request, may the national court refuse to grant the assistance sought on the ground that, in the light of the information available to it, it is unable to hold that the coercive measures envisaged are not arbitrary or disproportionate to the subject matter of those measures.⁷²

This judgment undoubtedly is an elaboration and clarification of the *Hoechst*. It sets up standards for the protection against arbitrary or disproportionate intervention by public authorities in the private activities of legal persons, stresses the role of national judicial bodies, along with the Commission's duty to provide information and the principle of cooperation of both institutions in good faith.

3.5. Merger control in the EU – new rules and case- law

“European merger control has played a key role in maintaining competitive structures in Europe and in fostering the creation of a single market”.⁷³ The purpose of the merger control is to determine whether concentration are compatible with the common market.

⁷¹ John Ratliff. Major Events and Policy Issues in EC Competition Law. International Company and Commercial Law Review. 2003

⁷² See *ibid.*

⁷³ Mario Monti. Europe's Merger Monitor. The Economist. November 9th 2002.

As has been mentioned already in the previous chapter, the main legislative act in the merger sphere is Merger Regulation 1989\97⁷⁴. This was the first European merger control law, and has been in force already 12 years. The main idea of this legislation is to support the competitive process, to guarantee efficiency in production, while at the same time retaining the incentive for enterprises to innovate, and ensuring the optimal allocation of resources. “Europe’s consumers have been the principal beneficiaries of the commission’s enforcement of the regulation, enjoying lower prices and a wider choice of products and services as a result”⁷⁵.

Besides giving the Commission the possibility to monitor concentration developments, and conferring all decision – making powers to the Commission, the Merger Regulation also contains some procedural aspects, including the fact- finding powers and investigation. According to the Article 13, investigative powers of the Commission are pretty much the same as in old Regulation 17\62. In order to carry out an investigation, Commission officials are empowered to examine books and other business records, take or demand copies or extracts from books or business records, ask for oral explanations on the spot, and enter any premises, land and means of transport of undertakings. Their powers are not extended to private homes. Commission officials cannot exercise their powers without producing a written authorization specifying the subject matter and purpose of the investigation, as well as penalties provided by Article 14(1)(d) in case of supplying incomplete or incorrect information.

Though this system has proved to be very efficient and has served its purpose well, like all systems it is in need of constant revision in order to ensure that it can meet and bear up new challenges.

That is why the Commission has made a proposal for a new Merger Regulation, which is going to be the most far-reaching reform of European merger control since the adoption of the Merger Regulation in December

⁷⁴ Council Regulation (EEC) No. 4064\89 of 21 December 1989 on the control of concentrations between undertakings. OJ L 395,30.12.1989, OJ L 257,21.09.1990, with amendments introduced by Council Regulation (EC) No. 1310\97 of 30 June 1997, OJ L 180, p. 1, 09.07.1997

⁷⁵ See Mario Monti. Europe’s Merger Monitor. The Economist. November 9th 2002.

1989. The proposal was published on the 11.12.2002 and is hoped to enter into force on May 1,2004, the same day as the new Regulation 1\2003 will become valid and when the new ten countries will accede to the EU.

The New Merger Regulation will be based on the old one, but with important amendments in several categories:

- jurisdictional;
- substantive (dominance test);
- procedural;

One of the main aims of the new Regulation is an optimisation of the allocation of merger cases between the Commission and national authorities, in line with the principle of subsidiarity. The main point is that according to the New Merger Regulation strict enforcement will not be valid any more. The notification system itself (especially regarding time-limits) will become more flexible. Member States will get more responsibility and Commission more investigation powers. This increase of the Commission's fact-finding powers is in line with investigative powers granted to it under the new Regulation for the enforcement of Articles 81 and 82 adopted by the Council of Ministers on November 2002,⁷⁶ which has been scrutinized above. According to Article 13 of the Proposal, in order to carry out its duties, Commission officials and *other accompanying persons*⁷⁷ shall have the power to enter any premises, land and transport of the undertakings, examine the books and other business records, irrespective of the medium on which they are stored, to obtain copies from such books, *to seal such documents for the period and to the extend necessary for the inspections*⁷⁸, and to *ask personnel of the company for explanations and to record the answers*⁷⁹. But unlike the new Regulation implementing Articles 81 and 82 of the Treaty (especially Articles 17 and 20a thereof), however, the proposed new Merger Regulation does not provide for sector inquiries or home searches. These far-reaching powers are specific to the area of

⁷⁶ Commission adopts comprehensive reform of EU merger control. Brussels, 11 December 2002 Commission Press room. www.europa.eu.int.comp.IP\02\1856 12.03.2003.17:45

⁷⁷ This phrase is a change in the formulation, which is taken from the old Regulation.

⁷⁸ Ibid.

antitrust policy where the detection and prosecution of infringements pursuant to Articles 81 and 82 of the Treaty is central.⁸⁰

“The June 2002 judgment of the Court of First Instance on the bid by Airtours (now My Travel) for First Choice, and its more recent rulings on the French merger between Schneider and Legrand and on the Tetra Laval\Sidel deal, all based on the present Merger Regulation, raise important issues for the merger review process”.⁸¹ The Commission lost these three cases in a row only because of insufficient evidence and lack of economic reasoning.

The lesson to be drawn from these judgments is quite clear- the CFI is now holding the Commission to a very high standard of proof , and this has a clear inference into the way in which the Commission conducts its investigations and drafts its decisions.

Therefore, the Commission will work on the draft regulation in order to significantly improve the system. Besides the above mentioned improvements, such as enhancing the transparency and consistency of the commission’s policy on merger control analysis, it also seeks to improve the commission’s decision- making process, “making sure that investigations of proposed mergers are more thorough, more focused, and – most importantly – more firmly grounded in sound economic reasoning, with due regard for the rights of the merging partners and of third parties”.⁸² Therefore the Commission has to improve its fact-finding and analytical skills, while not disregarding the due process requirements at the same time. However, Mario Monti seems to be very optimistic about this task:” I am also determined to see that due process guarantees are better safeguarded, among other things by giving merging firms the opportunity to confront third parties who object to a merger at an early stage, by granting them earlier access to the commission’s file and, more generally, by offering increased

⁷⁹ Ibid.

⁸⁰ See Explanatory Memorandum for the Proposal for a Council Regulation on the control of concentrations between undertakings (“ The EC Merger regulation”) (presented by the Commission). Brussels,11.12.2002. COM (2002) 711 final. 2002\0296 (CNS).

⁸¹ Mario Monti. Europe’s Merger Monitor. The Economist. November 9th 2002. p. 72.

⁸² Ibid.

resources to the commission's hearing officer, the independent official charged with ensuring that merging companies' rights of defense are respected".⁸³

⁸³ Ibid.

4. Inspections in US antitrust enforcement

The United States is the country that first enacted the antitrust law in general and they are still leading the way in its development. U.S. antitrust legislation has its specific features which make it very dissimilar to the European one. The procedural side of the antitrust law in the U.S. also differs a lot from rest of the world. Comparatively to all other countries in the world, U.S. antitrust authorities have the most far-reaching powers in the investigation and fact finding stage, as well as concerning international enforcement. That is why it would be very useful to make a short comparison with U.S. antitrust law.

4.1. Overview of U.S. antitrust laws

Antitrust law appeared in U.S. in the late 18th and beginning of the 19th century. The very rapid development of the economy, and the rise of cartels created the need for state intrusion in this sphere. Due to the fact that U.S. is a country which belongs to the Common law system, the majority of antitrust law used to be in the case-law.

But it was evidently not enough. The market required new, more efficient regulators.

Today, the main power in this sphere in the U.S. are federal government anti-trust laws. Most states also have antitrust laws, closely paralleling to the federal antitrust laws.⁸⁴

There are three major federal antitrust laws: the Sherman Antitrust Act, the Clayton Act and the Federal Trade Commission Act.⁸⁵

The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes agreements

⁸⁴Antitrust Enforcement and the Consumer
http://www.usdoj.gov/atr/public/div_stats/9142.htm 12.11.2002.14:40

⁸⁵ Ibid.

among competitors to fix prices, rig bids and allocate customers.⁸⁶ The Sherman Act also makes it a crime to monopolize any part of interstate commerce. Sherman Act violations involving agreements between competitors are usually punished as criminal felonies.

The Clayton Act prohibits mergers or acquisitions that are likely to lessen competition. Under the Act, the government challenges those mergers that a careful economic analysis shows are likely to increase prices to consumers. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

The Federal Trade Commission Act prohibits unfair methods of competition in interstate commerce, but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Act.

4.2. Procedural aspects of antitrust enforcement

There are three main ways in which federal antitrust laws are enforced: (i) criminal and civil actions brought by the Antitrust Division of the Department of Justice, (ii) civil enforcement actions brought by the Federal Trade Commission and (iii) lawsuits brought by private parties asserting damage claims. The FTC is given the power to enforce the FTCA as well as the Sherman Act and the Clayton Act. “The FTC has exclusive authority over enforcement section 5 of the FTCA (prohibiting unfair methods of competition and unfair or deceptive acts or practices in or impacting commerce) and shares authority with the other two Acts. The FTC can grant cease and desist orders, injunctive relief, civil penalties for violations of cease and desist orders, and restitution as remedies if it finds a violation”.⁸⁷

The Antitrust Division of the DOJ is authorized to use Civil Investigative Demands to acquire evidence and information necessary for their enforcement of the Sherman Act and it alone is empowered to bring criminal prosecutions under the Sherman Act. The primary targets of

⁸⁶ Ibid.

criminal prosecutions are clear and intentional violations, like the “hard-core” per se violations such as price fixing, bid rigging, and schemes for market allocations.⁸⁸ The Department of Justice pursues its criminal enforcement policy even when foreign companies and individuals are involved.⁸⁹

Where criminal prosecution is not appropriate, the Division may institute a civil action. The actual application of criminal sanctions has increased rapidly within the last decade. In 1997, for example, the Antitrust Division collected \$205 million in criminal fines (500% higher than any previous year in its history), and in 1999 fines on individuals were \$12 million and almost thirty individuals were jailed for antitrust conspiracy with total jail time of almost 9000 days⁹⁰. This increase in criminal fines is attributable to a number of factors, including a number of amendments to the Sherman act, made in 1974⁹¹ and 1990.⁹² Now individual violations can be fined up to \$350,000 and sentenced to up 3 years in federal prison for each offence. Corporations can be fined up to \$10 million for each offence. Under some circumstances the fines can go even higher.

⁸⁷ See: Leyla Marrouk. A Critique of the U.S. and EU Proposals for Improving International Enforcement of Antitrust Law. Columbia Journal of European Law. Winter 2002.

⁸⁸ Philip Areeda, Louis Kaplow. Antitrust analysis: problems, text, cases.- 5th edition. Second printing. ISBN 1-56706-566-X. p.55.

⁸⁹ United States v. Pilkington plc and Pilkington Holdings, Inc. No. Civ94-34TUC(WDB)(D.Ariz filed May, 26,1994) was the first case, where the DOJ challenged challenge anticompetitive conduct that occurred outside the United States and that was intended to affect U.S. exporters. The change represents a renewal of the pre-1988 policy of allowing expansive international antitrust enforcement. See: David A. Harris. United States v. Pilkington PLC and Pilkington Holdings, Inc.: The Expansion of International Antitrust Enforcement by the United States Justice Department. North Carolina Journal of International Law and Commercial Regulation Winter, 1995. See also: European and U.S. Competition Law. <http://www.usdoj.gov\atr\public\speeches\95-02-13.html>.18.05.2003.13.50

⁹⁰ Joshua Julian, Barrister. Morgan, Lewis & Bockius, Brussels. International Law Congress. Compliance Programmes and Good Corporate Governance. Dublin, May 2000 http://www.morganlewis.com/PDFs/824D0D6D-2803-4688-AB16EAD0A2E84CA1_PUBLICATION.PDF 17.10.2002.13:20

⁹¹ Milton Hndler. Antitrust in Transition. Transnational Juris Publications, Inc.1991.p.169.

⁹² Antitrust Amendment Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880 (1990) (codified at 15 U.S.C. §§ 1-3 (1994)).

The Department of Justice uses a number of tools in investigating and prosecuting criminal antitrust violations. Though the Justice Department together with the Federal Trade Commission often pursue its investigations quite informally, without subpoenas or other formal procedures, it has extensive investigatory powers (for example, to require the production of documents, summon witnesses, and compel testimony).

Due to the fact that antitrust enforcement in the U.S. law belongs to the criminal law (because there is criminal punishment provided for it, as described above), authorities also have the possibility to use the criminal methods of investigation. The primary investigative tool in criminal cases is the grand jury subpoena, which governed by the Federal Rules of Criminal Procedure.⁹³ The Department may grant immunity from prosecution to individuals or corporations who provide timely information that is needed to prosecute others for antitrust violations, such as bid rigging or price fixing. Department of Justice is also empowered to issue a “civil investigative demand”. If the addressee refuses to comply, the agency must seek the aid of the court. Once the government or the private party brings a suit, the usual civil litigation procedure applies.⁹⁴

Department of Justice attorneys often work with agents of the Federal Bureau of Investigation (FBI) or other investigative agencies to obtain evidence. In some cases, the Department may use court authorized searches of businesses and secret recordings by informants of telephone calls and meetings.⁹⁵

According to 15 U.S.C.A. §46⁹⁶, the Federal Trade Commission also has the power to gather and compile information concerning and to investigate the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,

⁹³ See also 28 U.S.C. § 1783 (1994) (where service of subpoenas abroad limited to U.S. nationals or residents in a foreign country).

⁹⁴ *Ibid.*

⁹⁵ Antitrust Enforcement and the Consumer.

http://www.usdoj.gov/atr/public/div_stats/9142.htm 20.10.2002.17:45

excepting banks, savings and loan institutions, and its relation to other persons, partnerships, and corporations.

It may also require information or reports from the abovementioned persons, partnerships and corporations in writing.

As the Supreme Court has noted, the investigatory power of the administrative agency: “is analogous to the Criminal Jury, which does not depend on the case or controversy for power to get evidence, but can investigate merely on suspicion the law is being violated, or even because it wants assurance that it is not”.⁹⁷

Nonetheless it is important to remember in that regard that U.S. Constitution has built in due process safeguards concerning the right to be heard, reasonable length of proceedings, access to file and right to defense. When the U.S. government agency exercise their rights they are doing this in the context of the due process requirements.

⁹⁶ U.S.C.A. Title 15. Commerce and Trade. Chapter 2- Federal Trade Commission; Promotion of Export Trade and Prevention of Unfair Methods of Competition. Subchapter 1- Federal Trade Commission. §46. Additional Powers of Commission.

⁹⁷ Morton Salt. 338 U.S.. at.652, 94 L.Ed. at 411.

5. Conclusions

Having discussed and analyzed both human rights perspective and competition laws in the EU and the U.S. we can come to some interesting conclusions.

First of all, to my mind, it should be stressed that basic human rights are respected and protected inside the EU- but to what extend? This remains the question.

After an analysis of the case law of the European Court of Human Rights we can see which principles concerning the legal procedural rights of the parties are established and protected on the general European level.

Since the paper was mostly focused on competition law and especially investigation matters, major attention was paid to competition matters and human rights standards. It should be pointed out that human rights standards in the antitrust area have been established and confirmed in the E.U. through secondary legislation and case law from the European Courts.

Having analyzed the recent cases from the ECJ, and by comparing them with the new legislation in the competition sphere, we can make the conclusion that the wide authority of the Commission to obtain documents and make unannounced inspections of company records has been confirmed. On the other hand, it is evident that these recent rulings record an increased acknowledgment of the due process of law principles that bind the Commission when it is carrying out these procedures. Besides that, the Commission is now required to provide much higher standards of reasoning, economic support and proof in general.

The analyses of the case law can be summarized as follows:

- Undertakings should have certain fundamental rights of defense (due process) that must be respected during Commission investigations. These rights include the right to legal assistance, the rights of attorney – client privilege, the right of protection against arbitrary or disproportionate searches, the right to be informed about the subject matter and purpose of the investigation, and the privilege against self-incrimination.

- In order to carry out a search, the Commission should seek the authorization from the national court or other body, depending on the Member state domestic procedure, which the Commission has a duty to respect. This body has the right to refuse such authorization if the Commission fails to prove its importance and necessity.
- The refusal of an undertaking to allow the Commission to carry out a search is incompatible with the duty of all subjects of Community law to recognize the direct effect of Community acts and their executory natures. Such a duty, does not, however, require a business to allow Commission inspectors to overstep their legal limits.⁹⁸ On the other hand, undertakings have a legal obligation to cooperate by permitting access to the Commission and by producing all relevant files.

As a result, the Commission is expected to pay more attention to and put more prudence into the preparation and execution of future requests for information and on-the-spot investigations.

But still, to my mind, these judgments failed to establish a balance between the powers of the Commission and the defense rights of undertakings during the antitrust investigations. The growth of the powers of the Commission in the investigation process (in particular the power to search private homes) does not go in line with the limitations scrutinized above. Searches in private homes, when they are outside the scope of criminal law, but within the scope of administrative procedures, seem to be weird. This strengthening of the powers of the authority can be regarded as such in conflict with basic human rights requirements. I think this move was done mostly to follow the U.S. example, where antitrust authorities have very broad powers. In U.S. antitrust investigations can be punished as criminal felonies (depending on the particular circumstances of every case), and that is why in their investigations the antitrust authorities can use all methods that are usually used in criminal cases (like taping, recording, searches in

⁹⁸ See: William Snyder. Due Process in the European Economic Community: Rights of businesses During Commission Inspections. University of Toledo Law Review. Summer, 1991.

companies etc). Such things cannot be accepted in the EU under any circumstances.

We can see that the U.S. is much more advanced when it concerns the enforcement of antitrust law, compared to Europe. No doubt, they are regarded as a model for other countries in the world, which in their turn try to follow the example.

The fact that European Commission gets greater powers will naturally become greater and more frequent issue. It will not become that not only because we care about human rights protection and due safeguards in the legal process or because they are fundamental principles of the Community law. It happens mostly because these issues will be raised by the companies that are targets in the investigations and naturally want to find their way out. This is what defendants usually do when you go after them.

It appears that arguments of both sides are fair and justified. Both the Commission and the undertakings seem to be correct and just trying to preserve their rights. Nevertheless, the balance between the powers of the authority and the basic procedural rights of the undertakings still has to be found.

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