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**Regulation 1/2003:  
General Principles &  
Investigation and Fact-Finding  
Powers.**

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# Preface

In my MEA Programme 2003-2004, I took special interest of competition law and the function of the Community competition rules in practice. In our competition class, under supervision of Prof. Hans Henrik Lidgard, we had a special lecture and seminar, with Sven Norberg on the Commission's investigation power and the new Regulation 1/2003. This gave me very good inspiration for my subject and research.

I want to thank my excellent tutor, Prof. Katarina Olsson, for very good inspiration and assistance with my thesis. I also want to thank Prof. Henrik Norinder, for moral and technical support in writing my thesis.

I also must thank my wonderful family, Gestur, Tara Mist & Mikael, for quality time during my writing, providing me good support and last but not least a good understanding.

*“Ég vil þakka ykkur kæra fjölskylda fyrir að veita mér góðan stuðning og átt þrátt fyrir mikla vinnu og þolinmæði, góðar og skemmtilegar stundir saman.”*

# Abbreviations

ECJ	European Court of Justice
CFI	Court of First Instance
ECSC	Treaties of the European Communities
NCA	National Competition Authorities
OJ	Official Journal of the European Communities
EC Treaty	European Community Treaty (Treaty of Rome)
CMLR	Common Market Law Report
ELREV	European Law Review
ELJ	European Law Journal
ECHR	European Convention on Human Rights

# 1 Introduction

*Regulation 17/62* has served its role within the Community for 40 years.<sup>1</sup> New and modernised enforcement system is now introduced with *Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*.<sup>2</sup> The experience has shown that the Commission is dealing with more serious and international infringements. Protection of public interests of economic sphere is vital for the Community and the Commission must be responsible for that role.<sup>3</sup> The Commission has acquired extended powers to request and collect clear and precise evidence of infringements. The Commission plays the role of the investigator and the decision-maker in the competition proceedings.<sup>4</sup> Such role has led to theoretical debates if the enforcement system is “manifestly of a penal nature.” It is not debatable that the enforcement system in the *Regulation 1* is administrative procedure and must obey the rules the Community provides.

There is no comprehensive legislation on the procedural rights of private parties to be respected throughout the administrative process. Unwritten general principles of law ensure that the legality of administrative proceedings is observed and that the legality of the decisions adopted. This has been the task of the Community Courts in their review in legality of measures and decisions.<sup>5</sup> The jurisprudence of the Community Courts has recognized the existence of “Community law principle of good administration.” It is recognized, that good administration is justifiable and creates enforceable obligations on the Commission, even in the absence of specific procedural rights of the citizen.<sup>6</sup>

## 1.1 Purpose

The purpose is to establish the application of general principles and fundamental rights in preliminary investigation proceedings and what powers the Commission has to request and collect evidence during

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<sup>1</sup> Council Regulation 17, [1959-62], OJ Spec. Ed. 87

<sup>2</sup> Council Regulation 1/2003 EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ 2003 L 1/1

<sup>3</sup> Braakman, August J., *The Application of the Modernised rules implementing Articles 81 and 82 EC Treaty in injunction proceedings: Problems and Solutions*. Fordham Corporate Law Institute. (Juris Publishing. 2001) p. 160

<sup>4</sup> Paulist, Emil. *Checks and balances in the EU Antitrust enforcement system*. Fordham Corporate Law Institute 2002., p. 381

<sup>5</sup> Leanerts, Koen and Vanhamme, Jan, *Procedural Rights of Private Parties in The Community Administrative Process*. CMLR 34, 551-557 (Kluwer Law International 1997), p. 531.

<sup>6</sup> Kańska, Klara, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights*, ELJournal, Vol. 10, No.3. May 2004, p. 296-326. (Blackwell Publishing. 2004), p 305

preliminary stage in the enforcement system in *Regulation 1*. During preliminary investigation, the undertakings have the right of defence and *Regulation 1* acknowledges this right. To achieve this purpose it is important to review case law from Community Courts and analyse the Courts jurisprudence. The *Regulation 1* has recently come into force, 1 May 2004, and therefore no case law found on its application. Case law used is based on provisions and principles established in the *Regulation 17*.

To achieve this purpose, it is important to review case law of the Community Courts found on general principles and fundamental rights. It is therefore of great importance to define the application of general principles and fundamental rights in competition proceedings and in what way they apply in the preliminary stage of investigation.

The paper establishes that there are conflicts between opposite interests discussed in the paper. The purpose with establishing those conflicts is to focus on the problematic application of rules and how they can be solved in an efficient and justifiable matter.

## **1.2 Problem**

The conflicts arise because the Commission acts as an investigator and as a decision-maker. Its role is to collect clear and precise evidence of infringements. The investigative power of the Commission is set a certain limit because the procedure is bound with observance of the general principles and fundamental rights. This can create an unbalance of application of general principles, fundamental rights and right of defence in the investigation procedure itself.

Is there a reasonable balance between the power of the Commission to collect evidence and the right of defence? If not, how will this reasonable balance be protected? This paper seeks to provide answers to these problems.

## **1.3 Delimitation**

It is acknowledge that the enforcement system is administrative procedure *in Regulation 1*. In connection with the application of general principles and fundamental rights, the principles established in the Convention of Human Rights have been sources of protection in competition cases. The Court of Human Rights has acknowledged that the Convention applies in competition cases. The ECJ has rejected the direct jurisdiction to apply the Convention of Human Rights in competition cases. The application of the Convention of Human Rights will not be covered, as the focus will be on the Community concept of human rights and fundamental principles that derives from the Convention. It has been debated whether the Commission

enforcement system is of “criminal nature” as it provides power to impose penalties and fines. However, the aspect of this paper is from the Community perspective and the ECJ has made that clear that the Community is not part of the Convention itself and has therefore no jurisdiction.

The *Charter of Fundamental Right of the European Union*<sup>7</sup> will only be mentioned without any legal analysis. The principles found in the Charter must be observed in the enforcement system in *Regulation 1*. A precise analyse of the matter would however be interesting because the Charter establishes clear rules of good and fair administrative procedure in the Community.

The principle of subsidiarity is one of Community’s general principles and it must be observed in application of Regulation 1/2003. It is however not within the subject of this paper to give analysing on the application of the subsidiarity principle. The principle does provide an interesting political and legal discussion, which is not within the field of this paper.

*The Merger Regulation 139/2004 of 20 January 2004*<sup>8</sup> has special provisions of fact-finding and investigation powers. These provisions are very similar and parallel found in *Regulation 1*. No specific analyse will be made on investigation powers established in the merger regulation.

According to, the Icelandic Competition Act no. 8/1993, investigation proceedings are handled by the Competition Authority, which may request any necessary information, conduct inspections and collect evidence. The powers given to inspectors are wide and they need to respect fundamental rights, especially right of defence and right of fair hearing. As the Competition Act is young and the experience is still growing, the Supreme Court of Iceland has given few interesting judgements on the matter. In some way, the system in the Icelandic Competition Act is partly based on the Public Criminal Proceedings Act, no. 19/1991 and therefore providing the inspectors wide powers to request and obtain evidence. A comparison between the systems will not be made in this paper.

In competition proceedings it is the general principle the right to claim damages in case of breach of Community law. The claims of damages are based on Article 288 of the Treaty. The Community can be liable for damages if its institutions “have manifestly and gravely disregarded” the limits on the exercise of its powers. This is however excluded from the defined subject of this paper and will not be discussed further.

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<sup>7</sup> Charter of Fundamental Rights in the European Union, OJ 2000 C364/1

<sup>8</sup> Council Regulation (EC) on the control of concentrations between undertakings (the EC Merger Regulation) *OJ L 24, 29.01.2004, pages 1-22*

## 1.4 Method and material

The method used in this paper is based on descriptive, comparative and analytical method to achieve the purpose and the conclusion. Approach of the subject will be with description of basic historical aspects of competition policy in the Community and further description will be made on the importance and function of the competition rules in Articles 81 and 82 of the EC Treaty (the Treaty)<sup>9</sup>. A short overview will be made on the enforcement system and the powers of the Commission established in *Regulation 1*.

The Community Courts have established considerable case law on the application of the general principles in the Community, the fundamental rights and the right of defence. A judicial analysis is important to establish how the general principles can be applied in preliminary investigation proceedings and if these principles set certain limit on investigation powers.

A literal and contextual interpretation will added in order to establish what powers the Commission has according to *Regulation 1*. Analyse will be added to establish, to what extent this power can be used and how the ECJ and the CFI have ruled on the subject. Certain principles and guidelines have been established through case law for the last 40 years and a parallel analysis will be made with case law based on Regulation 17 and rules established in *Regulation 1*. A short summary will also be provided of the Commissions powers.

Materials used are judgement from the ECJ and the CFI, legislative material from the Community found in Official Journal, decisions from the Commission and reports on competition policy, and explanatory material on *Regulation 1*. A support in writing this paper is found in material written by well-known scholars, listed in the bibliography at the end of this paper.

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<sup>9</sup> Treaty establishing EEC “Treaty of Rome”, 25 March 1958.

## 2 Competition policy

### 2.1 Historical aspects

Since the nineteenth century, industrialisation had been battling with cartels in Europe, in France and Germany, in particular. The purpose of the cartels was to share market, fix prices and impose production quotas. The cartels were operating in important industry, like the steel industry and affected individual companies. In Britain, the government went even to the extent of limitation of surplus capacity and set up a quota and market sharing agreement in the Coal Mines Act 1936 and the Coal Act of 1938. After the World War II, the European Industry continued with its cartels. The culture in Europe was that the cartels were one of the positive manifestations of private interests and for the freedom of trade. This was more positive if the cartels were operating with the objectives of public interest and approved by the authorities.<sup>10</sup>

The ECSC Treaty<sup>11</sup> laid down the first competition policy and became a model for the competition rules in the Treaty of Rome. Single market integration and the elimination of private practices that interfere with integration are the first principles of competition law in Europe.<sup>12</sup> One of the objectives found in competition law is the promotion of effective competition in the Community. It serves to open markets and for the purpose of integration and prevents private industry to set up barriers to free trade.

In the Commissions Report on the Competition Policy, it is stated: “the second fundamental objective of the Community’s competition policy must be to ensure that at all stages of the common market’s development there exist the right amount of competition to meet the Treaty’s requirement and its aims attained.”<sup>13</sup> The Treaty of Rome took effect in 1958 and in 1962; *Regulation 17* introduced specific measures for implementing the competition rules which had been provided for in the Treaty itself.

From that time, the Commission has applied *Regulation 17* without any significant changes made on the enforcement system. According to *Regulation 17*, the Commission had powers to establish the uniform application of Article 81 throughout the Community and to promote market integration by preventing companies from recreating barriers. A body of rules was created and it is now accepted by all Member States as fundamental for the proper functioning of the internal market. The

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<sup>10</sup> Amato, Giuliano, *Antitrust and Bounds of Power. The dilemma of liberal democracy in the history of the market.* (Oxford. 1997), p. 40

<sup>11</sup> The European Coal and Steel Community Treaty 1951

<sup>12</sup> Jones, Clifford A., *Private Enforcement of Antitrust Law in The EU, UK and USA.*, Oxford 1999. p. 25

<sup>13</sup> Commissions 9th. Report on Competition Policy. (Brussel. 1980)

importance of the competition policy today is borne out by the fact that Member States have national competition authorities to enforce both national and Community competition law.<sup>14</sup> In a 40-year development of the internal market, a long experience placed the obligation on the Community to improve the effectiveness of the enforcement system.

## 2.2 Articles 81 and 82 of the Treaty

The Treaty provides the fundamental competition rules, Articles 81 and 82. The two articles must be interpreted parallel with one of the fundamental objectives found in the Treaty, to achieve their purpose. This fundamental objective is in Article 3(g) of the Treaty and expresses that the Community purpose is to create a system ensuring that competition in the internal market is not distorted.

*Article 81* of the Treaty establishes prohibition of practices, which have as their object or effect the prevention, restriction or distortion of competition. The Commission can exempt certain types of arrangement from this prohibition if they have beneficial effects for consumers and do not contain unnecessary or excessive restrictions on competition. Article 81 of the Treaty serves as a shield for competition in all market situations but also protects the individual economic freedom of market participants against restrictions.<sup>15</sup>

*Article 82* of the Treaty prohibits abusive exploitation of a dominant position within the common market as far it restrains trade among the Member States. An undertaking with a dominant position of economic strength can be defined to be in a position to hinder the maintenance of effective competition on the relevant market and can act independently with regards to competitors or consumers.<sup>16</sup>

The ECJ has described the Treaty as “constitutional charter of a Community based on the rule of law.”<sup>17</sup> In the *Van Gend en Loos*<sup>18</sup> case was the first decision by the ECJ on direct effect. Through the ECJ’s ruling on direct

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<sup>14</sup> ”The Commissions White Paper of modernisation of the rules implementing Article [81] and [82] of the EC Treaty”, OJ C132, p. 1, 1999/05/12 - Notice 1999/C132/01, paragraph [2]

<sup>15</sup> Braakman, August J., supra note 3, p. 160

<sup>16</sup> Jones, Clifford A, supra note 12, p. 31

<sup>17</sup> The Opinion 1/1991, *Draft EEA Agreement*, [1991] ECR 6079, paragraph [21]

<sup>18</sup> Case 26/1962, *N.V Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 The case issue was whether Article 12 of the EC treaty was directly effective. The Court’s ruling was that the provision had direct effect with three conditions: 1) Provision clear and unconditional, 2) unconditional and 3) dependent on further action being taken by Community or national authorities.

effect created strategy in introducing new legal principles.<sup>19</sup> Articles 81 and 82 have direct effect and create rights for individuals and the national courts must ensure that those rights are protected.

Domestic competition legislation is found in all Member States. When trade is affected between Member States, the Community rules are applicable and national competition law shall be applied when effects on competition are within the national territory. The systems are complementary and support parallel application with administrative conformity with Competition law.<sup>20</sup> This must be done with respect of the primacy of Community law, as in *Costa v. ENEL*<sup>21</sup> case, that Community law must be given primacy be national courts over any incompatible national law.<sup>22</sup>

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<sup>19</sup> Hartley, T.C. *The foundation on European Community Law*. (Oxford. 2003. 5th. Ed.) p. 200-202.

<sup>20</sup> Fellenious-Omnell, Caroline; Landström, Charlotte and Coyet, Johan, *Modernizing EC Competition Law – Will a system of parallel application of EC and National Competition Law Ensure Convergence?* Fordham Corporate Law Institute 2002, p. 99

<sup>21</sup> Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585, 593

<sup>22</sup> Craig, P. and De Búrca, Gráinne. *EU LAW. Text, cases and materials*. (Oxford 2003) P. 279

# 3 Enforcement of competition rules

## 3.1 Power of the Commission

*Article 85* of the Treaty<sup>23</sup> secures the application of competition rules provided in Articles 81 and 82. This is a fundamental provision for the system of competition procedure of enforcement. Power is conferred to the Commission to investigate infringements and enforce the Community competition rules. There is an obligation on the Commission to give undertakings informal guidance in competition matters and ensure compliance with competition rules.<sup>24</sup>

Today, the Commission is focused on combating the most serious infringements, cross-border cartels and abuses that seriously distort competition within the Community. *Regulation 1* confers extended powers to the Commission to investigate, terminate infringements and impose fines on undertakings. This includes the possibility for the Commission to interview any person who may be in possession of useful information within and the possibility of affixing seals for the necessary period. The Commission will also be able to enter any non-business premises where business records may be kept, including private homes. The Commission may enter non-business premises only if it has reasonable grounds for suspecting that relevant evidence can be found there and based on authorisation from a national court. Such authorisation must be based on the seriousness of the case investigated and the importance of the evidence sought.<sup>25</sup>

## 3.2 Administrative proceedings

The enforcement system in *Regulation 1* is administrative but is actually divided in the investigation stage, the prosecution stage and the decision-

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<sup>23</sup> Article 85 of the Treaty states: (1)“Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.” (2) “If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decisions and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.”

<sup>24</sup> Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) *OJ C 101, 27.04.2004, pages 78-80*

<sup>25</sup>The Commission’s 32nd Report on Competition Policy (Brussel. 2002)

making without any formal separation.<sup>26</sup> To safeguard rights during proceedings, the Commission *Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty*, provides clear rules of the proceedings.<sup>27</sup> The Commission acts in the public interests, *bonum commune*, and proceedings must have certain priorities.<sup>28</sup>

The Commission can require information or conduct inspections to collect evidence according to Articles 17-22 in *Regulation 1*, before initiating a proceeding.<sup>29</sup> The investigation stage of the proceeding is a preliminary stage, evidence is collected, and interviews are taken to have clear and precise facts. The Commission can act on a complaint<sup>30</sup> or on its own initiative (*Ex officio*).

Initiation on a proceeding can be made with the purpose to adopt a decision pursuant to Articles 7-10 of *Regulation 1*. It is vital to inform the undertakings concerned in writing of the objections raised against them. The *statement of objections* shall be notified to each of the undertakings concerned. It is important to give time limits in order for the undertakings to give replies.<sup>31</sup> After the given time limit, the Commission is not obliged to take into account written submissions.<sup>32</sup> In all replies, the undertakings may include all facts known to them that are relevant for their defence and attach any relevant documents as proof of the facts.<sup>33</sup>

Hearing Officer shall ensure balance between the right of defence and effective application of competition rules.<sup>34</sup> The Hearing Officer surveillances the hearing on parties at the decision making stage and ensures application of the right of defence applied in *Regulation 1*. The Hearing Officer does not observe the right of defence during preliminary investigation procedure.

It is for the Commission to establish an infringement and the CFI is now stricter in requiring the Commission to provide clear and precise evidence, which the decision is based on. If evidence is established by the Commission, the undertakings concerned must provide proof for their defence.

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<sup>26</sup> Bellamy & Child. *European Community Law of Competition*. 5th Ed. (London. 2002) paragraph [12-036]

<sup>27</sup> The Commission Regulation 773/2004 of 7 April 2004, OJ L123, p. 18, 2004/04/27. This regulation replaces regulation No 2842/98 on hearings

<sup>28</sup> The Commission Notice on handling complaints by the Commission under Articles 81 and 82 of the Treaty, OJ C101, p. 65, 2004/04/27 – Notice 2004/C101/05

<sup>29</sup> Article 2(3), Regulation 773/2004

<sup>30</sup> Article 5(1), Regulation 773/2004. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of the Regulation 1/2003.

<sup>31</sup> Article 10(1), Regulation 773/2004

<sup>32</sup> Article 10(2), Regulation 773/2004

<sup>33</sup> Article 10(3), Regulation 773/2004

<sup>34</sup> Article 14, Regulation 773/2004

# 4 General principles of law

## 4.1 What are “the general principles”?

General principles play an important role in the Community itself and form a part of Community law. The general principles must be observed when Community law is applied. Then, what are the general principles? It can be described that the general principles are a sphere in Community law in order to achieve the purpose of the law. They can serve as a force in Community measures; they give certain protection of rights and limit the measures of public powers. The general principles aim at preventing misuse of power, infringements on the Treaty provisions or any rule of law, arbitrary conduct of an essential procedural requirements or lack of competence.

The Community Courts have adopted most of the general principles through case law. The purpose is to fulfil their role to ensure that the law is observed.<sup>35</sup> The ECJ must safeguard the legality of Community measures and ensure that the general principles are justifiably applied.<sup>36</sup> In the *Transocean Marine Paint*<sup>37</sup> case, the ECJ gave the recognition to the general principle “that a person whose interest is perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.”<sup>38</sup>

The ECJ has through the years developed in its case law frequently broad principles and values rather than focused on limited rulings about facts in individual cases. The ECJ gives guidance to the Commission in its development of competition policy and this role has not any precedents in the European national competition law systems.<sup>39</sup> *Gerber*, explains that the Community Courts have given the Commission an effective guidance and support in enforcing competition rules, “the Court has began to demand more from the Commission, requiring more detailed evidence concerning

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<sup>35</sup> Article 220 (1) of the Treaty: “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.”

<sup>36</sup> Article 230 of the Treaty: (1) “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB.....” (2) “It shall for this purpose have jurisdiction in actions brought by Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty of any rule of law relating to its application, or misuse of powers.”

<sup>37</sup> Case 17/74 *Transocean Marine Paint v. Commission* [1974]ECR 1063.

<sup>38</sup> *Ibid*, paragraph [15]. The Court establishes also that this is especially important under conditions where considerable obligations are imposed that have far-reaching effects.

<sup>39</sup> Gerber, David J., *Law and Competition in Twentieth Century Europe*, (Clarendon Press., p. 361

actual economic impact of alleged violations of competition law provisions rather than relying on formalistic criteria of anticompetitiveness.”<sup>40</sup>

## 4.2 The Principle of “Fundamental Rights”

### 4.2.1 General

Fundamental rights are one of the general principles found in the Community. Initially, the ECJ applied the principle of fundamental rights protection concerning economic rights, such as the right to property and the freedom to pursue a trade or profession. Fundamental rights are to give legal protection to private rights in the Community, through the application of direct effect of Community law.<sup>41</sup> The Community Courts must ensure that the fundamental rights are observed.

Inspiration of fundamental rights is drawn from the constitutional traditions that are common to the Member States and give certain guidelines found in international treaties for protection of human rights. The Community Courts must make sure that enforcement of public power is in accordance with fundamental rights. In the *Nold*<sup>42</sup> case, the ECJ applied the principle of fundamental rights and said that Community measures, which conflicts with fundamental rights will be annulled.

The Commission must ensure that fundamental rights are observed in the enforcement proceedings. *Regulation 1* provides that fundamental rights are respected and the principles found in the *Charter of Fundamental rights of the European Union*<sup>43</sup> are observed. The principles found in the Charter are based on the same principles found in the *European Convention for the Protection of Human Rights and Fundamental Freedom* (ECHR).<sup>44</sup>

Fundamental rights confer the basic human right protection to Community law. In the ECJ *Opinion 2/94*, the ECJ made respect for human rights clear and is fundamental for the lawfulness of Community acts.<sup>45</sup> The principle of the right of defence and fair legal process are two of fundamental rights that the undertakings can rely on in competition proceedings.<sup>46</sup>

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<sup>40</sup>Ibid. p. 352

<sup>41</sup> Craig, P. and De Búrca, Gráinne, supra note 22, p. 319.

<sup>42</sup> Case 4/1973, *Nold v. Commission*, [1974] ECR 491

<sup>43</sup> The Charter of Fundamental Rights in the European Union, supra note 7.

<sup>44</sup> European Convention for the Protection on Human Rights and Fundamental Freedoms, Rome 4 November 1950.

<sup>45</sup> The Opinion 2/94, [1996] ECR I-1759, paragraph [34]

<sup>46</sup> Case T-112/98, *Mannesmannröhren-Werke AG v. Commission* [2001] ECR II-729, paragraph [77]

## 4.2.2 Human rights in competition proceedings

The European Convention of Human Rights and Fundamental Freedom<sup>47</sup>, has special importance for fundamental rights in the Community. Protection of human rights in the Community is founded on interpretation of the Community Courts. Any application of Community rules must be done with respect of human rights as a general principle of Community law. This has been established in the ECJ jurisprudence.<sup>48</sup>

According to *Hartley*,<sup>49</sup> who points out that there is to be found three situations where application of human rights concept in the Community must be respected. *First*, that Member States are bound to use the concept when interpreting the Treaty or Community legislation, *secondly*, that the concept grants rights to individuals, but those rights can be bound by provisions of derogations on the ground of public policy and *thirdly*, that Member States are bound to apply human right concept when implementing Community rules.<sup>50</sup> According to this, the human rights are important for interpretation of Community law or they can set a limit on Community measures.<sup>51</sup>

The Community Courts have been challenged to apply the Convention of Human Rights, especially in relation to enforcement of competition cases. In, the *Mannesmannröhren-Werke*<sup>52</sup> case, the CFI denied its jurisdiction to apply the Convention of Human Rights when reviewing an investigation under competition law and the CFI made it clear that the Convention itself were not part of Community law.<sup>53</sup> However, some fundamental human rights are safeguarded by the Community Courts.

## 4.2.3 The right to remain silent

During an investigation procedure, the undertakings are obliged to give all information regarding facts in the case. This is based on the cooperation to give information about facts and explain documents and books. This requires the undertakings to have a considerable knowledge about documents and facts of the case under investigation. If the undertakings give any misleading or inaccurate information, they are facing the threat of imposition of fines.

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<sup>47</sup> European Convention of Human Rights, supra note 44.

<sup>48</sup> The *Opinion 2/94*, supra note 45, paragraph [33]

<sup>49</sup> Hartley, T.C., supra note, 19

<sup>50</sup> Ibid, page 145-146

<sup>51</sup> Case 44/79, *Hauer v. Land Rheinland-Pfaltz*, [1979], ECR 3727. In a case involving matters of restriction of property rights in the Community, the Court analyzed in detail relevant provisions of the European Convention of Human Rights.

<sup>52</sup> The *Mannesmannröhren-Werke AG* –case., supra note 46

<sup>53</sup> Ibid, paragraph [59]

The Commission must guide the undertakings about the legal status of given information or documents and cannot ask “*leading*” questions. It depends on to what extent the undertakings will cooperate, as this can affect the application of the “*The Leniency Notice*” and the decision of calculation of fines in competition proceeding.<sup>54</sup>

In the *Orkem*<sup>55</sup>-case, the ECJ acknowledged that *Regulation 17* did not provide the undertakings the right to refuse to give information based on potential harmful evidence against them. On the contrary, the regulation provided an obligation to cooperate on giving information about the subject matter of the investigation. The ECJ made that clear, that a principle of not to give evidence against them selves was applicable on persons in criminal proceedings and were inapplicable in competition proceedings.<sup>56</sup> However, the ECJ established that undertakings investigated according to competition law could rely on the principle found in *Article 6 of ECHR*, but denied that it conferred the right not to give evidence against oneself.<sup>57</sup> In order to protect the right of defence during the preliminary inquiry, the Commission may not compel an undertaking to provide information, “an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.”<sup>58</sup>

The *Orkem*-case clarified what questions were in harmony with the principle found in *Article 6 of ECHR*. The ECJ permitted only questions requiring *factual-information*. These questions could require information about where meetings of producers where held and how often the undertakings attended them. This included requirement to disclose documents relating to the meetings and questions relating to the subject matter and implementation of measures taken in order to determine and maintain price levels.<sup>59</sup> The ECJ did not allow questions that required information of acknowledgement of participation in an infringing agreement. These questions were related to the purpose of the action taken and the objective pursued.<sup>60</sup>

In the *Mannesmannröhren-Werke*<sup>61</sup> case the CFI based its ruling on the principle found in the *Orkem*-case. The CFI denied jurisdiction on the

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<sup>54</sup>Commission Notice on immunity from fines and reduction of fines in cartel cases “*The Leniency Notice*”, OJ 2002 C 45/3

<sup>55</sup> Case 374/87, *Orkem v. Commission*, [1989] ECR 3283

<sup>56</sup> *Ibid.* The Court said in paragraph [29]: “In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.”

<sup>57</sup> *Ibid.* paragraph [30]

<sup>58</sup> *Ibid.*, paragraph [34]-[35]

<sup>59</sup> *Ibid.*, paragraph [37]-[38].

<sup>60</sup> *Ibid.*, paragraph [38]-[41]. See also, Willis, Peter R., “*You have the right to remain silent.... or do you? The privilege against self-incrimination following Mannesmannröhren-Werke and other recent decisions.* ECLRev. 22 (Sweet & Maxwell. 2001)

<sup>61</sup>The *Mannesmannröhren-Werke AG* –case, supra note 46

ECHR when reviewing an investigation under competition law, as the ECHR is not part of Community law.<sup>62</sup> The CFI made clear, that there were no absolute right to remain silent because such right would “go beyond what is necessary to preserve the rights of defence of undertakings” unless the undertaking would be compelled to provide answers which might involve an admission of existence of an infringement.<sup>63</sup> This ruling was a development from the principle established in the *Orkem*-case and gave further clarification of the right to remain silent.

This was also established in the *Tokai Carbon*<sup>64</sup>-case. The CFI pointed out, that in order to ensure the effectiveness of requiring information, the Commission can compel the undertakings to provide all necessary information concerning facts that may be known to them and to disclose to the Commission related documents, even if the latter may be used to establish the existence of anti-competitive conduct.<sup>65</sup> The CFI took into account that the obligation to answer factual questions and to produce documents that already existed. The CFI made clear that this did not constitute a breach of the principle of respect for the right of defence or impair the right to fair legal process “which offer, in specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention.”<sup>66</sup>

In the *Tokai Carbon*-case, information was revealed on behalf of the undertaking of the purpose, what occurred in number of meetings and the results of those meetings. It was then clear that the Commission suspected that the purpose of the meetings was to restrict competition. The same applied to the requests for the protocols of those meetings, the working documents and the preparatory documents, the handwritten notes relating to them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases. The CFI concluded that the Commission's request was of that kind of nature to compel the undertaking to admit its participation in an infringement of the Community competition rules.<sup>67</sup> Such voluntary cooperation on behalf of undertaking to provide information, which could be harmful, will justify a reduction in fine under “*The Leniency Notice*.”<sup>68</sup> The undertaking gave information, which established increased gravity of

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<sup>62</sup> Ibid, paragraph [59]

<sup>63</sup> Ibid, paragraph (66)-[67]

<sup>64</sup> Joint cases T-236, 239, 244-246, 251 & 252/01, *Tokai Carbon Co and others v. Commission*, 29 April 2004

<sup>65</sup> Ibid. Paragraph [403]

<sup>66</sup> Ibid. paragraph [406]

<sup>67</sup> Ibid. Paragraph [407] and [408]

<sup>68</sup> The Commission argued that information were not supplied “voluntarily” but under a request according to Article 11(1) of Regulation 17 and therefore not justifiable reduction of fines under “*The Leniency Notice*” The CFI stated in paragraph [410]: “Accordingly, the fact that a request for information was sent to SGL under Article 11(1) of Regulation No 17 cannot minimise the cooperation provided by that undertaking under point D, paragraph 2, first indent, of the Leniency Notice, especially not as a request for information is a less coercive measure than an investigation ordered by decision.”

the infringement and the risk of larger fines. The Commission could not require the undertaking to provide such and such information. Such voluntarily cooperation should be taken into account in favour for the undertakings.<sup>69</sup> In the *ABB*<sup>70</sup>-case, the CFI mentioned, that a reduction in the fine for cooperation during the administrative procedure could be justified if the conduct of the undertaking made it easier for the Commission to establish an infringement and put it to an end.<sup>71</sup>

The principle of *the right to remain silent* is considered to create hindrance in the Commission investigation and this can have influence on the Commission in requiring undertakings to answer “*leading questions*” related to participation in the infringement itself.<sup>72</sup> The ECJ has established that any unnecessary hindrance on the Commission’s investigation is not appreciated.<sup>73</sup> *Kerse*, points out that the right to remain silent can avoid “*oppressive behaviour*”, but will not stop them from making “*leading questions*.”<sup>74</sup> *Willis*, considers, that an excessive use of the right to remain silent can affect in a way investigation and be “*counter-productive*”, by encouraging inspectors to pursue their investigations further and even make ill-founded conclusions from documents.<sup>75</sup>

#### 4.2.4 The right of privacy

The right of privacy derives from *Article 8 of the ECHR*.<sup>76</sup> In the *Hoechst*-case, the undertaking raised an argument based on *Article 8 of ECHR* and annulment was sought on the Commission decisions for inspection of the undertaking’s business premises. The ECJ responded to that argument, that the protection provided in *Article 8 of the ECHR* is only concerned for “*man’s personal freedom*” and will not be extended to business premises.<sup>77</sup> According to the interpretation from the ECJ, the Community concept of protection of privacy is narrow and does only concern the definition of “*non-business premises*”, especially private premises. What impact this will have with the extended powers of the Commission to conduct inspections of non-business premises provided in *Regulation 1*, will not be discussed further.

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<sup>69</sup> The *Tokai Carbon*-case, supra note 64, paragraph [412]

<sup>70</sup> Case T-31/99, *ABB Asea Brown Boveri Ltd v. Commission*, [2002] ECR II-1881

<sup>71</sup> *Ibid*, paragraph [238]

<sup>72</sup> Riley, Alan R., *Saunders and the power to obtain information in Community and United Kingdom competition law*, 25 EL Rev (2000) p. 264-278

<sup>73</sup> The *Orkem*-case, supra note 55 , paragraph [66]

<sup>74</sup> *Kerse*, C.S. *EC Antitrust Procedure*. 4th Ed. 1998, paragraph [3.14]

<sup>75</sup> *Willis*, Peter R., supra note 60., p. 321

<sup>76</sup> Article 8(1) ECHR provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

<sup>77</sup> Cases 46/1987 & 227/1988, *Hoechst AG v. Commission* [1989] ECR 2859, paragraph [18]

## 4.3 The Right of Defence

### 4.3.1 What is the right?

A right of defence must be respected as a general principle in the Community “*les droits de la défense*.” This is known to English lawyers as the principle of *natural justice* and American lawyers as a *due process*.<sup>78</sup> The Community Courts have established the “*principle of good administration*.”<sup>79</sup> The right of defence must be observed in administrative procedure, which may lead to the imposition of penalties under the rules of Community competition rules.<sup>80</sup>

The presumption of innocence is important in favour of the one investigated and accused of an infringement.<sup>81</sup> In the *max.mobil*<sup>82</sup> case, the CFI quoted the “principle of good administration” and mentioned in *Article 41(1) of the Charter of Fundamental Rights*,<sup>83</sup> which confirms that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. A good administration is founded on the principle of legality. The principle provides that public power in administrative proceedings must act within the limits that are established by the law. Procedural rights and the right of access to the courts is an essential guarantee that administrative authorities observe the law.<sup>84</sup>

*Regulation 1* provides that fundamental rights are respected, the principles in the Charter of Fundamental Rights are observed, and the provisions should be interpreted and applied with respect to those rights and principles.<sup>85</sup>

The Commission is bound to make its case known to the undertakings concerned in order for them to exercise their right of defence. *Regulation 1*

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<sup>78</sup> Hartley, T.C., supra note 19, p. 155

<sup>79</sup> Case T-211/02, *Tideland Signal Ltd. v. Commission* [2002] ECR II-3781, paragraph [37]

<sup>80</sup> Case 322/81, *Michelin v. Commission*, [1983] ECR 3461, paragraph [7]. See Article 27, Regulation 1/2003

<sup>81</sup> Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775, paragraph [73]

<sup>82</sup> Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission* [2002] ECR II-313, paragraph [48]

<sup>83</sup> Article 41 of the Charter states: “[1]. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. [2]. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. [3]. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. [4]. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.” OJ EN C 364/18 18.12.2000 (supra note 7)

<sup>84</sup> Kańska, Klara, supra note 6, p 300

<sup>85</sup> Regulation. 1/2003, supra note 2, Preamble paragraph [37]

provides that the undertakings and third parties shall have the right to be heard by the Commission. They should be able to give their comment on a case. To ensure the right of defence a protection must be provided on the right to access files and the right to confidentiality. To preserve the right of defence, the Commission must allow the undertakings access to files. This is established in *the Commission Notice on access to the file*.<sup>86</sup> This is important during the second stage of the proceedings, “the decision making” stage

In the *Hoechst*<sup>87</sup> case, the ECJ pointed out, that the right of defence must be observed in administrative procedures, which may lead to imposition of penalties. The ECJ acknowledged that it is necessary to prevent those rights from being affected during preliminary inquiry procedure including investigations, which may be decisive in providing evidence of the infringement, engaged by the responsible undertakings.<sup>88</sup> In the *max.mobil*-case, the CFI stated the importance of institutions to give “clear and unequivocal” reasons for measures adopted to enable the concerned persons to ascertain the reasons for the measure in order to defend their rights and to enable the Community judicature to exercise its power of review.<sup>89</sup> In the *Tokai Carbon*-case, the CFI pointed out that when exercising their rights of defence, the undertakings could make that clear in the facts set out in their replies or in the attached documents that given information have a different meaning from that was ascribed to them by the Commission. The CFI stated that this could be done either during the administrative procedure or in proceedings before the Community Courts.<sup>90</sup>

The *Hoechst*- case acknowledges that the right of the undertakings must be protected during preliminary investigation proceedings. *Regulation I* establishes the right to be heard before decision is taken but not before the preliminary investigation. The undertakings merely enjoy the right of fair and good administration in the preliminary stage of the investigation.<sup>91</sup>

### 4.3.2 The right to fair hearing

One of the important principles in the Community is the principle of a right to a fair hearing. The Treaty does not establish a general right to a fair hearing in administrative proceedings.<sup>92</sup> Only in the field of competition,

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<sup>86</sup> Notice on Access to file, supra note 80, OJ [1997] C 23/3 [1997] 4 CMLR 490, Part A.1,

<sup>87</sup> The *Hoechst*-case, supra note 77.

<sup>88</sup> Ibid, paragraph [15]

<sup>89</sup> The *max.mobil* –case supra note 82, paragraph [78]

<sup>90</sup> The *Tokai Carbon*-case, supra note 64, paragraph [406], See also The *Mannesmannröhre-Werke*-case, supra note 46, paragraph [77] and [78]

<sup>91</sup> Case 136/1979, *National Panasonic v. Commission* [1980] ECR- 2033

<sup>92</sup> Article 93(2) of the Treaty, requires the Commission to give” notice to the parties concerned to submit their comments” before declaring a state aid incompatible with the common market.

there has been an established rule on administrative procedure, including the right to a fair hearing.<sup>93</sup>

This principle was first set out in the *Transocean Marine Paint*- case. The ECJ established, that it was a general rule of Community law that “a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.”<sup>94</sup> The ECJ further explained, that this right concerns that persons are informed in advance of the measures exercised by the Commission. The ECJ annulled the decision, as the undertaking had not been given the opportunity to make his point of view known. In the *Listeral*<sup>95</sup>- case, the ECJ stated that the observance of the right to be heard in all proceedings that are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law. The ECJ stated further that this fundamental principle must be guaranteed, even in the absence of any specific rules concerning the proceedings in question.<sup>96</sup>

The right to be heard is not guaranteed during the preliminary investigation stage according to *Regulation 1*. The decisions regarding investigations are not mentioned in *Article 27* of *Regulation 1*, which establishes the right to be heard in the Commissions proceedings. *Article 27* of *Regulation 1*, provides that the undertakings must be given the opportunity to be heard before the Commission takes its decisions, regarding termination of infringement,<sup>97</sup> interim measures,<sup>98</sup> setting fines,<sup>99</sup> and periodic penalty payments.<sup>100</sup>

The Commission *Regulation No 773/2004* relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, establishes rules of the right to be heard in competition proceedings and *Article 27* of *Regulation 1*.<sup>101</sup> This proceeding regulation provides the right to be heard in order to respect the rights of defence of undertakings, before the Commission takes any decisions.<sup>102</sup> The Commission is obliged to give undertakings the opportunity to be heard after the *statement of objection* has been given and before consulting the Advisory Committee, referred in *Article 14(1)* of *Regulation 1*. The Commission is bound in its decisions to deal only with objections where undertakings have been able to comment on them.<sup>103</sup>

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<sup>93</sup> Leanerts, Koen and Vanhamme, supra note 5, p. 553

<sup>94</sup> The *Transocean Marine Paint*- case, supra note 37, paragraph [15]

<sup>95</sup> Case 32/1995 P, *Commission v. Listeral* [1996] ECR I-5373,

<sup>96</sup> Ibid., *Listeral*-case, paragraph [21]

<sup>97</sup> Article 7, Regulation 1/2003

<sup>98</sup> Article 8, Regulation 1/2003

<sup>99</sup> Article 23, Regulation 1/2003

<sup>100</sup> Article 24 (2), Regulation 1/2003

<sup>101</sup> Commission Regulation No 773/2004, supra note 30

<sup>102</sup> Ibid. Preamble paragraph [10]- Chapter V in Regulation No 773/2004 “*Exercise of the right to be heard*”

<sup>103</sup> Article 11, supra note 30

In the *National Panasonic*<sup>104</sup> case, the ECJ states that in investigatory decisions the Commission is solely concerned with the collection of the necessary information and evidence. *The right of defence and the opportunity to be heard must be exercised in relation with decisions taken to terminate an infringement.* It is important to observe fair and good administration during preliminary investigation procedure.<sup>105</sup>

### 4.3.3 The right of legal professional privilege

The legal professional privileged relationship between a client and a lawyer is a general principle in the Community – [*le*] *droit de la défense du client*-. During investigation proceedings, the Commission must respect that certain documents can enjoy a legal professional privilege protection. This means, that any documents that derive from a lawyer-client relationship needs to have protection. The fundamental incentive behind this principle is the obligation of professional secrecy. The undertakings as a client can make a choice if they reveal the documents related to communication with their lawyers or not.

In the *A.M & S*<sup>106</sup>-case, an inspection was a part of a general investigation into alleged anti-competitive practice in the zinc industry. The investigated company refused to produce documents on the ground that they enjoyed legal professional privileged protection. The ECJ stated that a privilege protection of written communication between lawyer and client is based on the very nature of the legal profession and maintenance of the rule of law. Same protection is justified in some Member States as to respect the rights of the defence.<sup>107</sup>

The ECJ interpreted *Regulation 17* as providing confidentiality of written communications between lawyer and client subject to two conditions; *first*, the communications must be made for the purposes and in the interest of the client's right of defence. This includes all communications exchanged after the initiation of proceedings by the Commission under *Regulation 1*. The ECJ has confirmed that this also includes earlier written communications that have a relationship to the subject matter of the case.<sup>108</sup> The *second* condition is that, the communications must be related to independent lawyers.<sup>109</sup> This applies to lawyers who are not bound to their clients

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<sup>104</sup> The *National Panasonic*-case, supra note 91

<sup>105</sup> Kerse, C.S., supra note 74, paragraph [4.02.]

<sup>106</sup> Case 155/1979, *A.M.&S. V. Commission* [1982] ECR 1575.

<sup>107</sup> Ibid, paragraph [20]

<sup>108</sup> *The Hoechst*-case, supra note 77. In the paragraph [16] the ECJ states: “ Consequently, although certain rights of defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and privileged nature of correspondence between lawyer and client [...], *must be respected as from the preliminary-inquiry stage.*” (Emphasize in the quotation added by the author)

<sup>109</sup> *The AM&S* case, supra note 106, paragraph [21] – [22]

through employment.<sup>110</sup> This means that no professional legal privilege protection is provided with staff and in-house lawyers of undertakings.<sup>111</sup> Communications deriving from in-house lawyer, which are reporting statements of an independent lawyer, would possibly enjoy legal professional privilege protection.<sup>112</sup>

As the ECJ has established, that the undertakings can withheld documents that enjoy legal professional privilege. The Commission must have sufficient proof that documents enjoy privilege because this sets certain limits to the investigation powers. Therefore, must the one who claims the privilege, give the Commission sufficient evidence in order to demonstrate that the conditions are fulfilled. In practice, a certain parts of documents could be revealed to provide sufficient evidence. However, the ECJ pointed out in the *A.M & S* case, that “*the principle of confidentiality*” does not prevent the client from disclosing a written communication between him and his lawyer.<sup>113</sup>

*Kerse* points out that the undertakings should be able to apply the principle of confidentiality without a hindrance, apply during the investigation proceedings.<sup>114</sup>

#### **4.3.4 The right to legal representation**

The ECJ has established the “right to a legal representation” as one of the elements in exercising the rights of defence. Legal advice to an undertaking is vital when under investigation. As a fundamental right, a contact with a lawyer is allowed in the beginning of an inspection. It does not make any difference if there is an independent lawyer or an in-house lawyer. An inspection starts immediately if the in-house lawyer is present in order to safeguard the undertakings right of defence. The Commission is obliged to give an undertaking a short time limit to contact its lawyer and such a time limit shall be reasonable.

### **4.4 The Principle of Proportionality**

The ECJ has established the principle of proportionality as one of the general principles of Community law.<sup>115</sup> The principle is expressed in

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<sup>110</sup> The *AM&S case*, supra note 106, paragraph [27]

<sup>111</sup> The Commission decision: *Deere Export: National Farmers' Union v. Cofabel*, OJ [1985] L 35/58 [1985], The Commission relied on a written advice by an in-house lawyer to show that an undertaking had knowledge about his infringement of Article 81 and deserved a heavier fine.

<sup>112</sup> *Kerse*, C.S. supra note 74, paragraph [8.18], see also: Case T-30/89, *Hilti v. Commission*, [1990] ECR II-163

<sup>113</sup> *Ibid*, paragraph [28]

<sup>114</sup> *Kerse*, C.S. supra note 74, paragraph [8.21]

*Article 5 of the Treaty.*<sup>116</sup> The principle itself can be used to challenge Community measures, the legality and the intensity of application. The purpose of the proportionality principle is to establish whether measures were suitable to achieve the desired end; whether they were necessary to achieve the desired end or whether they impose an excessive burden on the persons concerned in relation to the objective to be achieved.<sup>117</sup> If there is a choice between several measures, the least restrictive measure must be attained. All facts must be given a consideration of what is the right and proportionate measure to attain under the certain circumstances.

*Regulation 1* establishes that it does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.<sup>118</sup> The judicial authorities of Member States and the Community Courts have power to review the application of the principle. The ECJ has ruled on the argument that the Community's measures are disproportionate and measures not suitable or necessary to achieve the desired end. In the *Hauer*<sup>119</sup> - case an argument was set forth if measures implemented by a Community regulation were disproportionate to an individual person to exercise his right to property. The ECJ stated in the case, that the objective of measures by the regulation was to protect "general interest pursued by the Community."<sup>120</sup> The ECJ concluded that, as the objective with measures was to protect legitimate, general Community policy and did not place any disproportionate restriction on the individual, it dismissed the argument. In the *Fedesa*<sup>121</sup> case the objective of measures was concerning the common agricultural policy in the Community and it was argued that the measures were "manifestly inappropriate" and the ECJ concluded that they had not succeeded in carrying out this burden.<sup>122</sup> If measures are found to be disproportionate, they will be annulled.<sup>123</sup>

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<sup>115</sup> Case 331/88, *The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex p: FEDESA and others*. [1990] ECR I-4023 The Court states: " By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the propitiatory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." paragraph [13].

<sup>116</sup> "Verhältnismässigkeit" This principle derives from German law and is regarded as underlying certain provisions of the German Constitution. See further: Hartley, T.C. *Supra* note 19, p. 151

<sup>117</sup> Craig & Gráinne, *Supra* note 22, p. 372.

<sup>118</sup> Regulation 1/2003, *supra* note 2, Preamble, paragraph [34]

<sup>119</sup> Case 44/1979, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727,

<sup>120</sup> *Ibid*, paragraph [30].

<sup>121</sup> The *Fedesa*- case, *supra* note 107.

<sup>122</sup> *Ibid*. The ECJ stated in paragraph. [14]: "Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

<sup>123</sup> Case 5/1973, *Balkan-Import-Export* [1973] ECR 1091 at 1112. The Court stated that it was not satisfied the measures in question imposed burden which were "manifestly out of proportion to the object in view."

The principle of proportionality is vital to safeguard rights during preliminary investigation proceedings. The principle provides protection for undertakings from arbitrary or excessive measures during an investigation. It is useful and necessary to use the proportionality principle in setting fines in an enforcement proceeding in order to prevent excessive or arbitrary fines. In the *United Brands*<sup>124</sup>-case the principle was observed in connection with the amount of fine imposed by the Commission, based on the duration and gravity of the infringement and the size of the undertaking. In another competition case, *BMW*<sup>125</sup> the amount of fines on certain dealers was not considered disproportionate in relation to their turnovers. This is just an example on how the proportionality principle applies to the imposition of fines.

In the *Hoechst*<sup>126</sup>-case, the ECJ expressed that the need to protect against arbitrary or disproportionate intervention was considered a general principle of Community law. The ECJ stated further, that it is a fundamental requirement that the Commission is obliged to specify the subject matter and the purpose of the investigation to enable the undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence.<sup>127</sup> The ECJ has established an obligation on the undertakings to cooperate during the investigation procedure.<sup>128</sup> The Commission must always attain the least stringent measure to achieve the objective pursued during investigation proceedings. When reviewing the principle of proportionality it is important to consider what is the subject matter and the purpose with the investigation, is the inspection based on a decision or cooperation and if the inspection is made with notice or unannounced.<sup>129</sup>

In the *Roquette Frères*<sup>130</sup>-case a review of the proportionality principle was made in order to establish if the Commission ordered coercive measures in the investigation in relation to the subject-matter and the required information. The ECJ explained that coercive measures might be requested on a precautionary basis in so far as there are grounds for opposition to the investigation and/or attempts at concealing or disposing of evidence in the event that an investigation ordered is notified to the undertaking. The ECJ stated, “With a review of proportionality of the coercive measures envisaged to the subject-matter of the investigation involves establishing that such measures do not constitute, in relation with the aim pursued by the investigation in question, a disproportionate and intolerable interference.”<sup>131</sup>

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<sup>124</sup> Case 27/1976, *United Brands Company v. Commission*, [1978] ECR 207-315

<sup>125</sup> Cases 32 and 36-82/1978, *BMW Belgium and Others v. Commission*, [1979] ECR 2453

<sup>126</sup> The *Hoechst-case*, supra note 77

<sup>127</sup> Ibid, paragraphs [29] and [33]

<sup>128</sup> Case T-46/92, *Scottish Football Association v. Commission* [1994] ECR II-1039, paragraph [31]

<sup>129</sup> The *National Panasonic-case*, supra note 91

<sup>130</sup> Case 94/2000, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, [2002], ECR I-9011

<sup>131</sup> Ibid. Paragraphs [71]-[76]

The ECJ has established that in order to review if measures were proportionate, the Commission must put forward all necessary information of the suspected infringement. This enables the courts to assess the seriousness, possibly the affected market, the nature of suspected restriction of competition and the degree of involvement of the undertakings.<sup>132</sup>

## 4.5 The principle of legal certainty

The principle of legal certainty has the aim to ensure that all situations and legal relationships with the Community are foreseeable and is one of the Community general principles.<sup>133</sup> This principle provides that Community's measures must be clear to undertakings, for them to be able to take steps or actions according to that. *Advocate General Mischo* in the *Fedesa* case explained the concept this way, that "legal certainty conveys the notion that there must be no doubt as to the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct."<sup>134</sup> In *Regulation 1*, it is established that the principle of legal certainty enforces uniform application of Community competition rules in a system of parallel powers, national competition authorities and the Commission. The competition authorities must avoid conflicting decisions with investigations and decision-making. In accordance with the principle, it must be clear what effects of the Commission's decisions and proceedings have on competition authorities and national courts.<sup>135</sup> In the enforcement proceedings, the Commission must ensure the undertakings with informal guidance to avoid any uncertainty when applying competition rules.<sup>136</sup> *Kerse*<sup>137</sup> points out conflicts in applying the principle of legal certainty in competition proceedings in practice.<sup>138</sup> *Regulation 1* establishes that formal decisions are to be taken in a special procedure and the principle prevents that a measure cannot be replaced by other measures taken by the Commission.<sup>139</sup> However, the Commission has discretion to alter the level of fines in competition proceedings. It could be said that the principle is more a foundation of interpretation as well as a ground for annulment of a Community measure.<sup>140</sup> But as *Kerse*<sup>141</sup> points out, that the Commission's failure or slackness in enforcing the law cannot make an infringement lawful.

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<sup>132</sup> *Ibid*, paragraph [81]

<sup>133</sup> Hartley, T.C. *Supra* note 19, p. 146-147.

<sup>134</sup> The *Fedesa-case*, *supra* note 115, Opinion Advocate General Mischo, 8 March 1990, paragraph [8]

<sup>135</sup> Regulation 1/2003, *supra* note 2, Preamble paragraph [22]

<sup>136</sup> *Ibid.*, Preamble paragraph [38]. Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) *OJ C 101, 27.04.2004, pages 78-80*

<sup>137</sup> *Kerse*, C.S. *Supra* note 74, see paragraph [8.37]

<sup>138</sup> Application of Regulation 17, now Regulation 1/2003

<sup>139</sup> Article 18 and Article 20(4), Regulation 1/2003

<sup>140</sup> Hartley, T.C. *Supra* note 19, p. 149

<sup>141</sup> *Kerse*, C.S. *Supra* note 74

# 5 Regulation 1/2003 - Powers of investigation

## 5.1 General

The Commission enjoys considerable discretion in what way an investigation will be executed. This will vary on the nature of the case and what considerations must be measured before proceeding is initiated. How did the investigation start, with complaints or *Ex officio*.<sup>142</sup> The Commission must define the affected markets and the territory of the infringements. The Commission must consider if there a suspicion of serious infringements and in what degree will the investigation be. The Commission can use any applicable measure required to investigate and put an infringement to an end.<sup>143</sup> The Commission can proceed in an “unannounced” inspection, before requiring for information and vice versa. It is the usual way to request for information before initiating a proceeding and wait for reply. The Commission will value all received information and if the undertaking is prepared to cooperate with the investigation. The spirit of the Commissions power is according to rising problems and difficulties on finding infringements of competition rules<sup>144</sup>

This chapter will describe the Commissions power to collect and obtain evidence according to *Regulation 1* and to what extent is the fact-finding power of the Commission.

## 5.2 Article 18 – Request for information

An investigation proceeding usually starts by requiring all necessary information from the undertakings on a suspected infringement. The Commission is focused on collecting all written evidence and establish clear facts of a case. In order to ensure all information from the undertaking, *Regulation 1* provides an effective enforcement measures. Article 18 provides “two-stage”<sup>145</sup> procedure for obtaining information, either with a simple request or by a decision. If the undertakings reply to a written request, they must give accurate and full information. When requiring information by a decision, the undertakings cannot be forced to admit that they have committed an infringement,<sup>146</sup> but a duty is on the undertakings to

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<sup>142</sup> Article 7, Regulation 1/2003. Initiation of a case with “Notifications” was applied according to Regulation 17, but was removed in the replacement Regulation 1/2003.

<sup>143</sup> Rules of the Commission’s investigative powers are in “Chapter V of Regulation 1/2003” Previous rules of the Commission’s investigation power were Article 11-14 in Regulation 17

<sup>144</sup> Regulation 1/2003, supra note 2, Preamble paragraph [25].

<sup>145</sup> The *National Panasonic-case*, supra note 91, paragraph [10]

<sup>146</sup> Regulation 1/2003, supra note 2, Preamble, paragraph [23]

cooperate with the Commission in the investigation and make available all information relating to the investigation.<sup>147</sup>

## 5.2.1 With written request or decision

When requiring information based on a written request, the Commission must state its legal basis and the purpose of the request. What information is required must be specified and mention the time limits given on providing the information.<sup>148</sup> The Commission has power to impose periodic penalty payment on undertakings for supplying incorrect or misleading information. This measure ensures an effective reply from undertaking to supply complete and correct information in response to the written request.<sup>149</sup>

If the undertakings refuse to supply within the given time limits, the Commission can take a formal decision and require the information to be provided. The Commission must provide the undertakings with the legal base and the purpose of the decision and what information must be supplied before the given time limits.<sup>150</sup> The undertakings must be informed of penalties if incorrect or misleading information are supplied.<sup>151</sup> Any appropriate representative of an undertaking or a lawyer with authorization can supply the requested information to the Commission.<sup>152</sup>

A request made by decision must be parallel sent to the national competition authorities, where the investigated undertakings are situated and where the infringement is taking effect. The Commission can request governments and national competition authorities to provide all necessary information to carry on its investigation.<sup>153</sup>

## 5.2.2 Necessary information

As provided in Article 18, the requested information must be “*necessary*” for the purpose of the investigation. The Commission is facing difficulties in providing sufficient evidence of infringement and all relevant facts. Article 18 gives the Commission a wide discretion to require sufficient information and the burden of what is “*necessary*” lies not on the undertakings themselves.<sup>154</sup> If an undertaking can give good reasons why information is not relevant, the Commission may accept such reasoning.<sup>155</sup>

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<sup>147</sup> The *Orkem-case*, supra note 55, paragraph [27]

<sup>148</sup> Article 18(1), Regulation 1/2003

<sup>149</sup> Article 23(1)(a), Regulation 1/2003

<sup>150</sup> Article 18(2), Regulation 1/2003

<sup>151</sup> Article 23(1)(b) and 24(1)(d), Regulation 1/2003

<sup>152</sup> Article 18(3), Regulation 1/2003

<sup>153</sup> Article 18(5), Regulation 1/2003

<sup>154</sup> The *Orkem-case*, supra note 55, paragraph [15], See also Case 31/59, *Acciaieria di Brescia v. High Authority*, [1960] ECR 71

<sup>155</sup> Korah, Valentine. *EC Competition Law and Practice*. 7th ed. (Hart Publishing. 2000), p. 162

There must be a reasonable link between the information requested and the alleged infringement under investigation. The Commission in the written request or decision can only use all information, which the Commission requires from undertakings, for the intention of the stated purpose set out.

A request unrelated to the application of the Articles 81 and 82 of the Treaty would be improper. Any information sought must relate to the case. All measures must be proportionate in relation to the objectives pursued of the investigation and the seriousness of the alleged infringement.<sup>156</sup> The steps the Commission takes must not only be necessary, carefully adapted and limited to the purpose of the investigation, which must be stated in the request for the information. The request must not be arbitrary or likely to impair the normal operations of the undertakings.<sup>157</sup> The legality of a decision requesting information is subject to review by the Community Courts.<sup>158</sup>

### 5.2.3 Article 28 - Confidentiality documents.

The Commission is obliged to safeguard the rights of confidentiality information.<sup>159</sup> This obligation also extends to the national competition authorities. The Commission may require undertakings to identify the documents or part of a document that they consider to contain business secrets or other confidential information. Undertakings can be required to identify any part of a statement of objections or a decision adopted by the Commission, which in their view contains business secrets. The Commission may assume that the documents or statements concerned do not contain confidential information, if an undertaking fails to comply with this.<sup>160</sup>

According to Article 28 of *Regulation 1*, the Commission, the national competition authorities and their officials and servants, must not disclose information acquired by them and “of the kind covered by the obligation of professional secrecy.”<sup>161</sup> The professional secrecy covers confidential information and business secrets. Business secrets are “information of which not only disclosure to the public but also mere transmission to a

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<sup>156</sup> Case T-39/90, *NV Samenwerkende Elektriciteits-Productiebedrijven (SEP) v. Commission*, paragraph [25]

<sup>157</sup> *Ibid.* Paragraph [51]. The ECJ stated: “What is also necessary is that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry.”

<sup>158</sup> “European Commission Dealing with the Commission notification, complaints, inspections and fact-finding powers under Articles [81] and [82]”, chapter 4.1.- The Commission’s power to request information

<sup>159</sup> Article 28(1), Regulation 1/2003

<sup>160</sup> Article 16, Regulation 773/2004, *supra* note 30

<sup>161</sup> Article 287 of the Treaty has provision of professional secrecy: “The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.”

person other than the one that provided the information may seriously harm the latter's interests."<sup>162</sup> A guidance on what the Commission regards as business secrets, can be found in its "Notice on the Internal Rules of Procedure for processing Request for Access to the File"<sup>163</sup> Whether documents are business secrets or not, the Commission can reach a formal decision on the matter, which can be reviewed by the CFI.<sup>164</sup>

Undertakings can not avoid supplying information only on the ground that information are business secrets, confidential or is subject to the obligation of professional secrecy. In the *SEP*-case an undertaking argued that information that would be sent between the authorities of a Member State would harm his commercial interests.<sup>165</sup>

Article 11 of Regulation 1 provides that national competition authorities and the Commission can exchange information about cases. This can even occur between the national competition authorities themselves in order to have all necessary information for assessment of a case. Article 12 of Regulation 1 establishes power to the Commission and national competition authorities to provide each other with and use in evidence any matter of fact or of law, including confidential information.

## **5.2.4 Article 19 – power to take statements**

The Commission has gained extended power in Regulation 1. This power is to interview any person with their consent in order to require information relating the subject matter of an investigation.<sup>166</sup> The power of the Commission to interview any person is without any power to impose penalties on the persons interviewed. This measure can be used during inspections or after in order to gain further explanations. Any person, who can inform the Commission about facts of a case, is important to the investigation in whole.

## **5.3 Article 20 - Power of inspections**

### **5.3.1 General**

The Commission's power to carry out inspections means all necessary inspection of undertakings for the purpose of collecting information, documents, search premises, land and transport. These are often called "on-spot" investigations and it gives the Commission an opportunity to examine evidence and ask questions/ explanations on the spot. Inspections are necessary to discover any agreement, decision or concerted practice

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<sup>162</sup> Case T-353/94, *Postbank v. Commission* [1996] ECR II-921, paragraph [86]-[87]

<sup>163</sup> Commission Notice on Access to File, OJ 1997 C23/3, supra note 86

<sup>164</sup> Wish, Richard, *Competition Law*, 4th ed. (Butterworth's. 2001), p. 224

<sup>165</sup> The *SEP*-case, supra note 156, paragraph [60].

<sup>166</sup> Article 19(1), Regulation 1/2003

prohibited by *Article 81 of the Treaty* or abuse of a dominant position prohibited by *Article 82 of the Treaty*. In order to carry out inspections, the national competition authorities should cooperate actively in the exercise of inspections.<sup>167</sup>

The Commission can make an agreement with an undertaking that an inspection will be carried out or with a decision, which makes the inspection mandatory. Inspection with a decision can be unannounced investigations, or “dawn-raids.” The Commission must specify what it wants to achieve with “unannounced” inspection and it cannot be “fishing” investigation at the premises.<sup>168</sup> These measures have attracted attention from the public for many years and larger undertakings are aware of the danger of “unannounced” inspections.

There lies no duty on the Commission to attempt a voluntary inspection to begin with. This gives the Commission discretion to choose what is appropriate to the case under investigation.<sup>169</sup> This is especially important where the Commission suspects opposition, destruction or removal of evidence on behalf of the undertaking.

Simultaneous inspection can be carried out in several countries without notifying, if the Commission suspects an international cartel on price fixing or allocate conduct. If inspection is carried out, usually officials from the national competition authority follows for assistance to the inspectors.<sup>170</sup>

The Commission can request that, the officials of the competition authority can assist to carry out inspections. This assistance is to help the Commission to conduct an investigation, scrutinize documents, books and records, make copies, and assist with oral questions and other matters to make the investigation as effective as possible.<sup>171</sup> If an undertaking opposes an inspection, the officials in the competition authorities shall give all necessary assistance provided by national law. The Commission is then provided with all necessary enforcement power, such as police assistance or other effective enforcement authority, in order to enforce their inspection.<sup>172</sup>

National law can provide that the Commission needs to obtain a judicial warrant before entry into premises. This can also be provided as a precautionary measure to prevent undertakings from any kind of opposition of an inspection on the premises. This ensures that officials have complete access of the premises, sealed furniture and locked rooms.<sup>173</sup>

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<sup>167</sup> Regulation 1/2003, supra note 2, Preamble, paragraph [24]

<sup>168</sup> Lister, Charles. *Dawn Raids and other Nightmares: The European Commission's investigatory Powers in Competition Law Matters*. The George Washington Journal of International Law and Economics. 24.1. 1990.

<sup>169</sup> *The National Panasonic-case*, supra note 91, paragraph [8]-[16]

<sup>170</sup> Korah, Valentine, supra note 155, p. 163.

<sup>171</sup> Article 20(5), Regulation 1/2003

<sup>172</sup> Article 20(6), Regulation 1/2003.

<sup>173</sup> Article 20(7), Regulation 1/2003

## 5.3.2 Necessary inspections

*Article 20(1) of Regulation 1*, provides that all inspection must fulfil the condition to be “*necessary*” to reach the purpose of the investigation. This is the same condition given in Article 18, of Regulation 1. The Commission is provided with power to conduct any necessary inspection at the premises of an undertaking. *Article 20 of Regulation 1* provides the Commission considerable power to inspect any undertaking that the Commission considers necessary to investigate. That means not only will inspections be with the undertaking under investigation but can also be with the third party undertakings.<sup>174</sup>

## 5.3.3 The concept of an “undertaking”

The concept of an undertaking is interpreted broadly. Article 20(1) of *Regulation 1*, mentions “*undertakings and associations of undertakings.*” The Treaty does not provide any explanation of the concept of “undertakings.” This can be a complex matter to create a certain definition of who are undertakings. In the *Höfner*<sup>175</sup>-case the ECJ stated:” The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.”<sup>176</sup> For that consideration, a trade association that carries on an economic activity can be an undertaking as long as it is carrying on some commercial economic activity. In addition, can public authorities qualify as undertakings, if they do not conduct activities “in the exercise of official authority”<sup>177</sup> or acting as a “public authority.”<sup>178</sup> The concept refers to “a broader entity covering companies under common economic control.”<sup>179</sup> In the decision of *Vaessen/Moris*, the Commission referred that individuals carrying out commercial activities are considered undertakings.<sup>180</sup>

## 5.3.4 Authorization or decision

### 5.3.4.1 With authorization

The Commission can carry out inspections in the premises of an undertaking with a written authorization. The Commission must specify the subject matter and purpose of the investigation. The undertaking is not under any obligation to comply with such authorization. However, if the undertaking

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<sup>174</sup> Kerse, C.S. *supra* note 74, paragraph [3.18]

<sup>175</sup> Case 41/90, *Höfner and Elser v. Macrotron Gmb*, [1991] ECR I-1979

<sup>176</sup> *Ibid*, paragraph [21]

<sup>177</sup> Case 343/95, *Calie Figli* [1997] ECR I-1547, paragraph [16]-[17],

<sup>178</sup> Wish, Richard,) *supra* note 164, p. 66-76.

<sup>179</sup> , Lidgard, H.H. *Competition Classics, cases & materials.* (Lund University 2003-2004. p. 75 (Unpublished)

<sup>180</sup> The Commission Decision 79/86, *Vaessen/Moris*, OJ 1979 L 19/32, [1979] 1 CMLR 511, paragraph [12]

complies with the Commission, any production of document must be correct and complete. Fines can be imposed for incomplete production of documents, business records or books.<sup>181</sup> The Commission must give a prior notice of the inspection to the national competition authorities, where the inspection is carried out.<sup>182</sup> Authorization is written and specifying the scope of the inspection and the authority of inspectors. This is an important document stating the subject matter of the investigation and therefore creating a base or a limit on the inspectors in their investigation. An authorization must be clear and precise in order for the undertakings to reply in an efficient and correct manner. It also provides the undertakings a protection from arbitrary and excessive investigation on behalf of the inspectors.

#### 5.3.4.2 With a decision

The Commission can conduct inspection based on decision and undertakings are required to obey such decision for inspections. The subject matter and purpose shall be noted in the decision. The decision must state the date, which the inspection shall start and the right of undertaking to have the decision reviewed by the ECJ.<sup>183</sup> It shall also state the penalties imposed if the undertaking refuses to oblige to an inspection.<sup>184</sup> Obligation to notify decisions is provided in *Article 254(3) of the Treaty*.<sup>185</sup> The competition authorities of Member States must be consulted before taking a decision of inspections. This is usually done by an informal way and there is no obligation of providing the authorities with all information, which the decision is based on.<sup>186</sup> Decisions must be notified in advance to the undertaking concerned and takes effect by the delivery of a certified copy unless the investigation is made by a surprise, so called “dawn-raids”.

In the *Hoechst*-case, the ECJ stated, that the Commission is not required inform to the undertakings about all the information concerning the infringements but that the decision must clearly indicate the presumed facts which the Commission intends to investigate.<sup>187</sup> The decision of inspection does not need to specify all details of the investigation but must indicate the facts that are under investigation.

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<sup>181</sup> Article 23, Regulation 1/2003

<sup>182</sup> Article 20(3), Regulation 1/2003

<sup>183</sup> Article 20(4), Regulation 1/2003

<sup>184</sup> Articles 23(1)(c) and 24(1)(e), Regulation 1/2003.

<sup>185</sup> Article 254(3) of the Treaty: “Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.”

<sup>186</sup> Case 5/85, *AKZO Chemie v. Commission* [1986] ECR 2585, paragraph [22]-[24]

<sup>187</sup> The *Hoechst*- case, supra note 77, paragraph [40]-[41]

### 5.3.5 Article 20(2) - The inspectors powers

#### **To enter premises, land or any means of transport.**

The Commission conducts inspections where evidence will normally be found. That is in the premises of the undertakings. To enforce an effective inspection, guidance and cooperation on behalf of the undertakings is important. To enter premises, based on decision, gives the Commission a right to enter in a business premises but does not give the Commission the right to force its way in if the undertaking opposes the inspection. A further assistance can be required from the national competition authorities and even with a judicial warrant.

The *Hoechst*-case is a fundamental case to establish the wide investigation power of the Commission. The ECJ stated that the powers given to the Commission according to *Regulation 17*,<sup>188</sup> is for maintenance of the competition system given in the Treaty and the undertakings are absolutely bound to comply. The Commission must require necessary information and enforce its power of investigation throughout the common market.<sup>189</sup> In the case, it was also mentioned, that the Commission had power to enter any premises, land and means of transport of an undertaking, to obtain evidence of infringements and that such evidence is usually to be found in the business premises of undertakings. This gives the Commission power to search for various items of information, which are not known or fully identified, even if the undertakings refused to cooperate.<sup>190</sup>

The Commissions powers are only to conduct inspection within a premises related to the commercial activity of the undertakings.<sup>191</sup> As in the *AKZO* case, the Commission considered “*offices*” of an undertaking to be “*premises*” to the extent that a business was carried out in them.<sup>192</sup>

#### **To examine books or business records and take copies**

The Commission has wide powers to examine books, documents, business records, minutes, all related to the commercial activity of an undertaking. This can include all notes of internal meetings or with third parties, personal notes of staff and directors, telephone and fax numbers, records of electronic mail and other documents relating all communications. This includes information in record machines and computers, on storage files, diskettes, and CDs. In order to examine such files, the undertaking must provide a reasonable access to files, printing access and a photocopy for copying files.

The Commission must act within a reasonable power given and can not use “*fishing expeditions*”, when investigating. In the *National Panasonic*-case, there was no obligation on the Commission to identify in advance which

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<sup>188</sup> Article 14, Regulation 17, now improved Article 20, Regulation 1/2003

<sup>189</sup> The *Hoechst*- case, supra note 77, paragraph [25]

<sup>190</sup> Ibid. Paragraph [26]-[27]

<sup>191</sup> Exception of this is found in Article 21, Regulation 1/2003.

<sup>192</sup> The *AZKO*- case, supra note 186, paragraph [3].

documents or files it wishes to inspect.<sup>193</sup> A reasonable balance must be established during investigation according to the principle of proportionality.

The inspectors will rely much on cooperation from the undertakings during investigation. The Commission must be able to determine whether documents are relevant or not, for the investigation, because they have the burden of proof. Undertakings must then produce the relevant documents to the inspectors and show the content of the furniture. In the decision *Fabbrica Pisani*<sup>194</sup> the Commission stated that the obligation of an undertaking to produce documents is not satisfied with inviting a general search or providing any documents that might be specially requested. This obligation is also to produce any relevant documents related to the investigation. An undertaking must give a good reason to refuse to produce documents and especially on the ground that they have been destroyed.<sup>195</sup> This is considered a weak argument from the undertaking and this could make the undertaking look suspicious and face the threat of large fine. In practice, many companies delete documents for saving storage space and systematic destruction of old documents.

*Article 20(2) c) of Regulation 1*, provides that the Commission can take or obtain in any form of copies or extracts from books or records. The Commission cannot take any originals of documents during investigation. List of copied documents will be made and the undertaking is entitled to a signed copy of the list.

#### **Seal any business premises, books or records**

In order to safeguard documents, files, databases, and other important evidence, the Commission can seal any business premises, books or records. Inspectors shall use this authorization only as a necessary measure before the inspection or during the inspection. If premises are sealed, all measures must be effective and quick, as *Regulation 1* provides only 72 hours authorization.

#### **Ask for explanation on facts or documents**

The Commission has authorization to ask any representative or staff members of an undertaking for explanations on facts or documents relating to the subject matter and the purpose of the inspection. The answers given can be recorded. This power is to the extent that questions are relevant to the investigation. The obligation lies on the undertakings to give correct and clear answers. They cannot refuse to provide complete answers on facts related to the subject matter and purpose of the investigation. If the undertakings do not cooperate in giving answers, the Commission can

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<sup>193</sup> The *National Panasonic case*, supra note 91, paragraph [21]

<sup>194</sup> Commission Decision, *Community v. Fabbrica Pisani*, 28 CMLR 354, paragraph [33]

<sup>195</sup> Commission Decision, *Pioneer*, 80/256 [1980]. The failure to take minutes of a meeting between a suppliers dealers to discuss cross-frontier trading was treated as evidence of a concerted practice to restrain parallel trade.

impose a fine on them.<sup>196</sup> The Inspectors can access further information on the spot and they must observe fundamental rights and general principles.

This power has been extended in *Regulation 1*,<sup>197</sup> and it includes “facts and documents.” This is to be interpreted that the persons asked, must have knowledge of facts that are under investigation and understanding of documents to give explanations. It is therefore important that the right persons are available when the inspection is conducted. Undertakings must nominate a person most qualified to answer questions on the spot. If persons have been at a specific meeting or recipient of a letter, they can be asked question.<sup>198</sup>

## 5.4 Article 21 – Inspection of non-business premises

Article 21 of *Regulation 1* provides power to the Commission to inspect the non-business premises, land and transport. This includes the power to search the homes or private dwellings of directors, managers and other employees of the undertaking.

The condition is that there must be a *reasonable suspicion* that documents and information or other records related to the business and to the subject matter of the investigation are kept within the non-business premises, which may be relevant to prove a serious violation of Article 81 and 82 of the Treaty.<sup>199</sup> The Commission can order an inspection in non-business premises. The decision must state the subject matter and purpose of the inspection, the date of the inspection and indicate the right to have the decision reviewed by the ECJ. It is important that the decision explains the reason of a suspicion that relevant documents are kept in non-business premises.<sup>200</sup>

Before taking a decision, the Commission must consult with relevant national competition authority. Before entering in non-business premises, the Commission must obtain a judicial authorization of the inspection. The national court can review the decision that it is authentic and that the measures are neither arbitrary nor excessive. Such review is done with consideration to the seriousness of the suspected infringement and to the importance of the evidence sought. In addition, the involvement of the undertakings and the possibility that evidence is to be found in non-business premises of the undertakings is important. The national court cannot question the lawfulness of the Commission decision to inspect non-business

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<sup>196</sup> Article 23(1)(d), Regulation 1/2003

<sup>197</sup> Regulation 17, Article 14(1)c:”to ask for oral explanations on the spot”

<sup>198</sup> Kerse, C.S. supra note 74, paragraph [3.36]

<sup>199</sup> Article 21(1), Regulation 1/2003

<sup>200</sup> Article 21(2), Regulation 1/2003

premises. That is one of the role of the ECJ to review the legality of decisions requesting non-business premises inspections.<sup>201</sup>

In the decision, *SAS/ Maersk Air*<sup>202</sup> the Commission suspected an infringement on notified agreement and submitted an inspection at the company and the parent company. Many documents were not available in the business premises and kept in the home of former employee. The undertaking, Maersk Air, voluntarily submitted the documents a few days later after the inspection. In a response after a request for information, “private file” was sent to the Commission, which were additional files that appeared after the SAS employees returned to work from their summer holidays.

## 5.5 A short summary

Considerable discretion is within the hands of the Commission to decide what information is necessary for the investigation. The Commission can ask the undertakings for all necessary information either with a written request or with a decision. The Commission must require information first before the undertaking is compelled to supply information with a decision. The Commission can impose periodic penalty payments if the undertakings do not supply complete and correct information.

The Commission and its inspectors has power to conduct inspection within business and non-business premises. This includes inspection within land and any means of transport related to the commercial activity of the undertakings. An inspection can begin with a written authorisation or with a decision. It is for the Commission to choose which measure is more effective in order to collect all necessary evidence. The Commission can commence an investigation without announcement to the undertaking, so-called “dawn-raids,” in order to achieve effective inspection at the premises of an undertaking. The undertaking must accept an unexpected inspection or else be in danger of imposition of fines. To give the Commission a reasonable guidance, the principle of proportionality must be respected. The heavy-burden inspections, “dawn-raids” are only used if a suspicion is that documents are being destroyed, concealed or abducted

The Commission and inspectors can examine books, business records, documents, minutes all related to commercial activities of the undertaking. This must be done according to the subject matter and the purpose of the investigation. The inspectors can within the business premises take copies of documents, books and records, print documents from a database and have all personal notes and minutes from meetings. If the Commission needs further protection of documents, it can affix seals of business premises, books or records for 72 hours.

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<sup>201</sup> Article 21(3), Regulation 1/2003

<sup>202</sup> Commission Decision, *SAS/Maersk Air*, OJ 2001/716 EC, 18 July 2001

In addition, any premises can be inspected, business and non-business premises and interviewed any person, that can give useful information about facts of a case.<sup>203</sup>

The Commission can inspect non-business premises if a “*reasonable suspicion*” is that necessary evidence are kept within the non-business premises, land and means of transport. This includes private homes of directors, managers and other members of staff of the undertakings concerned. The Commission must provide a judicial warrant before entering non-business premises.

To be clear on facts, the inspectors can also ask for explanations on facts or documents but cannot ask any “leading questions” which might be harmful for the undertakings. The answers provided can be recorded on tape. The Commission has power to interview the undertaking or any third person, which might supply helpful information.

The Commission must also respect confidentiality documents, which contain business secrets from the undertakings. They cannot reveal confidentiality documents to the third party as that might harm the undertakings concerned. Professional secrecy and business secrets are confidential and the undertaking concerned must identify which documents falls within the category.

The undertakings enjoys the right of legal professional privilege during investigation proceeding. Those documents enjoy that privilege is for the undertakings to proof. In the light of obligation to cooperate, the undertakings can make a choice if they reveal those documents or not. The Commission will decide if sufficient evidence is provided. A decision is taken if the Commission is not convinced of the legal professional privilege of the documents. The undertaking can then appeal that decision to the Community Courts.<sup>204</sup>

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<sup>203</sup> Article 19, Regulation 1/2003

<sup>204</sup> The *A.M. & S case*, supra note 106, paragraph [23]

# 6 Conflicts

## 6.1 General aspects

The enforcement system itself is far from clear and transparent. The ECJ has succeeded in establishing guidelines for the Commission to follow when exercising its public power. No procedural rules have been published on what is the “real” power of the Commission when investigating an infringement. This has been the situation for the last 40 years. As the Commission is investigating serious infringement of competition policy, it is acting on behalf of public interest. It is in the interest of the public that on the internal market is a circulation of free trade of goods, establishment, workers and services. That supports integration and economical welfare in the Community. This affects the consumer itself and his freedom of exercising his economical freedom and access to free competition on the market. It is important to have clear rules, legal certainty and transparency in the enforcement system. *Regulation 1* introduces more clear and precise rules of the power to investigate, competence of authorities, division of power, the administrative process and power to impose fines.

## 6.2 The right of defence – a sphere of justice?

The general principles of Community law create a sphere of protection in administrative proceedings. The ECJ has developed in its jurisprudence an application of the general principles, fundamental rights and right of defence. The Commission has discretionary power on what is necessary to act on and what must be done during the investigations. The Commission must obey that if there is a choice between several measures, the least restrictive measure must be attained according to the proportionality principle. Well, several conflicts must be mentioned, which can arise during preliminary investigation procedure.

The Commission can choose measures according to Article 18 and Article 20-21 of *Regulation 1*. Firstly, in Article 18, a written request for information must be done before a decision is made to compel the undertakings to supply information. However, this is not the case in Article 20-21. It is not necessary to act first on written authorization before a decision is taken to compel an undertaking to have an inspection. Secondly, Article 20-21 provides a much heavier and burdensome measure towards the undertaking and must only be used when it is necessary. There is specially mentioned in Article 21 that an inspection must be based on a *reasonable suspicion*. The conflict is that Regulation 1 does not prevent that the more restrictive measure is used if the Commission consider that “necessary” measure and has “reasonable suspicion.” Without proper safeguards, this

increases the risk of disproportionate measures during preliminary investigations. Judicial control and authorisation is only required in *Regulation 1* in relation to non-business premises inspections.

The Commission can make an inspection if the national court confirms a “reasonable suspicion” that evidence can be found within non-business premises. The Commission must supply enough evidence to prove their “reasonable suspicion.” The rights of undertakings are not provided with any safeguards when the judicial authority is handling the decision of non-premises inspections. Application of the general principles and fundamental rights must be respected at that time and the judicial authority must provide that protection. However, *Regulation 1* does not mention to what extent investigation powers can be used within non-business premises. The surveillance during inspection is based on the discretionary power of the Commission on what is “necessary” for the purpose of the investigation. This conflicts with the principle of proportionality and the principle of legal certainty.

The right of defence is weak during preliminary investigation proceedings. Article 27 of *Regulation 1* does not secure the right to be heard at that preliminary stage. The ECJ has established in its case law the right to remain silent regarding “harmful” information that could lead to admission in an infringement. The undertaking is facing a threat of imposition of fines if inspection is obstructed or if cooperation is not in full during investigation procedure. Any voluntarily given information, especially if the undertaking is not under the obligation, will be in benefit of the undertaking. Such cooperation can affect the application of “*The Leniency Notice*” and in an ECJ review of amount of fines. In that situation, the undertaking is facing a dilemma. As the ECJ has established that, there is no “absolute right” to remain silent.

The Commission relies on fast and effective investigations and inspections. Undertakings are fighting a battle against public power, raising their right of defence and fundamental rights. If a conflict arises between the Commission and an undertaking, during investigation, the Commission has discretionary powers to collect all necessary evidence. This can damage the undertaking’s right of confidentiality. The right of defence is very limited during investigation procedure and protection against arbitrary and disproportionate measures is only for the national courts to ensure. If an undertaking refuses to supply documents or answer questions based on his right of defence, he is still facing the threat of fines and application of the “*The Leniency Notice*” However, a clear obligation lies on the undertaking to cooperate, as established in the case law of the Community Courts.

An unreasonable balance is between the undertakings right and the efficient enforcement system is a fact. This diminishes the undertakings rights of defence and of a fair administrative proceedings during preliminary investigations.

## 7 Conclusions

The Commission is fighting a battle of collecting evidence for more serious infringements and the undertakings are more “aware” of concealing or destruction of evidence. “The experience in the Community confirms that investigations are more difficult and complex and protection of effective competition is harmed.”<sup>205</sup> That is the purpose of the extended powers provided in *Regulation 1*.

Community power acts in public interest because competition policy is one of the objectives named in one of the first provisions in the treaty. *Hartely*, points out that derogation from fundamental rights could be allowed in order to protect public interest.<sup>206</sup> The Community Courts are very careful with ruling measures disproportionate if they are made in public interest. Any derogation from fundamental rights must ensure parallel observance of the principle of proportionality.

The Community Courts have developed a long series of case law regarding application of general principles, fundamental rights and the right of defence. Fair proceedings must be protected, even during preliminary stage of administrative procedure. *The Charter of Fundamental Rights* will be important for the Community in the future as it provides further protection and clarification for fundamental rights. This will be important for future application and gives a reasonable challenge on Community measures. The Charter establishes the principle of “good administration procedure” This could give further awakening by the citizens on their rights in the Community. It is too early to say what influence the Charter will have on case law of the Community Courts.

The Commission acts as an investigator and a decision maker in the enforcement system. The focus is on collecting evidence of a suspected infringement and all necessary measures are within the discretionary powers of the Commission. The responsible role must be efficient and reach its purpose. It has been established that an unreasonable balance is a fact in the enforcement system.

An *impartial surveillance authority* could ensure and observe that the general principles and fundamental rights are protected in preliminary investigation procedure. Such impartial supervisory powers could ensure that interviews, oral questions and seizure of documents during inspections are in accordance with the subject matter and the purpose of the investigation. Impartial supervisory powers therefore create a sufficient safeguard to a reasonable balance. A surveillance authority will provide the Commission guidance, safeguard that measures are in accordance with the aim of the investigation, and prevent disproportionate measures.

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<sup>205</sup> Regulation 1/2003, Preamble, paragraph [25]

<sup>206</sup> *Hartely*, T.C. supra note 19

A surveillance authority would give “*investigation reports*” after preliminary investigation procedure. The reports will state and describe the conduct of the investigation itself, what measures were used and to what extent. The reports will give important evidence if conflicts arise between the Commission and the undertakings. The reports will give evidence on how the general principles were observed and if fundamental rights were secured during the investigation.

It is a fundamental prerequisite that a surveillance authority is impartial and not influenced by the powers of the Commission. *Regulation 1* is providing a close cooperation between the national competition authorities and the Commission in applying Community competition rules. The Commission is providing that the national competition authorities be provided with more powers to enforce the Community competition rules. *Regulation 1* also provides that the roles of national courts are essential in applying the Community competition rules and give judicial safeguards of rights. It is therefore suggested, that each authority would provide representative in the surveillance authority. Investigation shall be carried on within the territory of the suspected infringement. The competition authority of each Member State and a national court within the territory would provide a representative for the surveillance authority during preliminary investigation procedure.

Such structure could ensure the impartial surveillance needed and the knowledge of the case from the national competition authorities and the Commission itself.

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