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Abbrevations

CFI	Court of First Instance
CML Rev.	Common Market Law Review
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention of Human Rights
ECLR	European Competition Law Review
E.C.R.	European Court Reports
ECSC	European Coal and Steel Community
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
OJ	Official Journal
SEA	Single European Act
TEU	Treaty of the European Union
YEL	Yearbook of European Law

1 Introduction

1.1 Background

The importance and impact of fundamental rights in the European Community have been developed in the case law of the European Court of Justice, as the constitutional foundations of the European Communities contain no express recognition of such rights. The reason for this silence is that it did not appear to be within the scope or the aim of the European Communities, as they were founded with the intention of creating a co-operation in the economic area. However, as early as in the late 1950s, it became clear that fundamental rights were indeed going to be made topical.[1] The case law development that started in the late 1950s, have over the years created and refined a Community version of protection for human rights in the Community. As will be demonstrated, that case law development is still in progress today in the EC courts. Whether this is sufficient or not is however an interesting and much debated question.

Over the years, the areas where an impact of EC Law can be seen have been increased. An example is penal law, where the EC according to the treaties have no jurisdiction. Despite this, as will be seen in this thesis, this is not an absolute truth anymore. As a consequence of the Treaty of Amsterdam the Community is also moving towards expanded powers in relation to Justice and Home Affairs.[2] The geographical field of application of the EC-Law has been extended as new Member States have joined the EU. There are also a number of states that in the near future are likely to join the European Union. In the future, the Union may no longer consist only of western European states with their firm tradition of protection for human rights. These current developments might have brought with them a need for a stronger protection of fundamental rights in the European Union. The European Union has been criticised for its human rights policy containing a paradox.[3] It has been stated that even though the Union is a firm defender of human rights both in internal and external affairs, there is a lack of comprehensive and coherent policy at both levels. Also within the institutions of the Community have the human rights protection been discussed for many years.

An interesting feature of the EC competition law is the direct enforcement of the rules that is executed by the Commission. Competition law is maybe the field above all where the Community exercises its powers most directly on individuals

[1] Lammy Betten & Delma Mac Dewitt, The Protection of Fundamental Social Rights in the European Union, page 3
[2] Philip Alston & J.H.H. Weiler, An 'Ever Closer Union' in Need of a Human Rights Policy, European Journal of International Law, vol. 9 no.4 (1999), page 673
[3] Philip Alston & J.H.H. Weiler, supra note 2, page 661

and legal entities.[4] Extensive powers have been granted to the Commission, due to the importance a free competition is deemed to have for the realisation of the common market. Undertakings subjected to investigations and accused of infringements of the competition rules have often been invoking before the ECJ the rights contained in the European Convention of Human Rights and Fundamental Freedoms. The rights most frequently invoked are the Articles 8 and 6. Such proceedings have inevitably involved an element of interpretation of the said articles. As will be demonstrated, the interpretation is not necessarily the same in the ECJ as in the Court of Human Rights. The Council of Europe was the institution that created a protection for human rights for Europe by the Convention for Human Rights in 1950. The Court in Strasbourg took up its practice in 1959 at a time when Europe was in many ways very different to what it is now. The protection of human rights through the case law of the Community courts that eventually took place has meant that the ECHR is subjected to interpretation both in Strasbourg and in Luxembourg.

1.2 Purpose of the Thesis

What I intend to investigate in this thesis, is a few problematic fields in the scenario I have described above. In the first chapter the history of human rights protection is investigated together with the sources and current developments in this field. The question I wanted to seek an answer to was in which way and to which extent human rights are protected in the European Community. The first chapter is intended to serve as a background to the following chapters where human rights in the competition law procedure are investigated.

In the following two chapters I have chosen to analyse the powers granted to the Commission in competition cases. A connection is made to two Articles in the ECHR concerning the right to privacy and procedural rights. The extensive powers that have been granted to the Commission in this field contributes to the relevance of the connection that is made between competition law and the ECHR. I have concentrated on the Articles 8 and 6 of the said convention as they are, according to my opinion, the most important in regard to the analysed field. By this I hope to add a certain depth to how human rights are applied in the EC law today. This is analysed also by means of cases from the ECJ and the European Court of Human Rights. I have also investigated whether the Articles 8 and 6 have been subjected to conflicting interpretations by the two courts. In the following chapter 5 the compliance of the procedure in EC competition cases with the Articles 8 and 6 is investigated. The analysis is focused on if the so-called dawn-raids are in breach of a right to privacy and the fact that the high amounts of fines that can be imposed in EC competition law, might have the consequence that

[4] Francis G. Jacobs, European Community Law and the European Convention on Human Rights, in Deirdre Curtin & Ton Heukels (Eds.), Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, vol. II, page 567

the procedures in practice are criminal instead of administrative as intended by the Treaty.

Chapter 6 is concerned with the parallel systems of courts that exist in Europe today and the future development as regards fundamental rights protection in the European Union. As has been described above also the Community Courts and their predecessors eventually have come to have under their jurisdiction many cases where fundamental rights are at stake. The Court of Human Rights and the Community Courts are interpreting the same instrument, namely the ECHR, with sometimes opposite results as will be shown. Is this the ultimate system for Human Rights protection in Europe or is it desirable with a change in some other direction? The last chapter is a summary of the thesis where also a few final observations are made.

1.3 Methods

The material used for writing this thesis consists mainly of cases from the European Court of Justice. For describing the case law development of fundamental rights protection in the EC a number of cases have been chosen. The cases referred to in this thesis are not all the cases where fundamental rights have been mentioned, but have in some way changed the practice of the ECJ or were the first of their kind. They have been spotted either through database research or through references in literature on the topic. Searchwords that were used were mainly “Human Rights” and “EC”.

Literature on the topic has been studied and compared. Also periodic articles have been used to a large extent, as they may contain more recent material. The method for finding the articles has been by dictionary references regarding each case. Regulations have been studied and compared. Also knowledge obtained through academic law courses, both at the University of Lund in Sweden and at the University of Antwerp in Belgium, has been used as background material.

2 The Human Rights in the European Community

As has been stated before, this chapter is concerned with the development of human rights until today within the Community legal order. Case law and the action by the other Community institutions are examined.

2.1 Development through case law

In the first cases where fundamental rights was at issue the court simply refused to recognise fundamental rights as such and rejected claims of violation of fundamental rights on the basis that such rights could not take precedence over clear requirements of community law. An example of this early case law is the *Stork*[5] case where the court rejected arguments that were based on human rights provisions of national law. It has been suggested that the explanation might be the way the cases were presented to the court.[6] When an applicant was trying to rely directly on rights protected by his national constitution, the court reacted by re-asserting the supremacy of Community law over national law, even over the constitutional laws of the Member States. However, in 1969 came the *Stauder*[7] case where the court actually overruled its own case law. The case was also put somewhat different before the court; an administrative judge in Germany asked the court whether a certain requirement was compatible with "the general principles of Community law". There was no question of whether the requirement corresponded with fundamental rights in the national law.
The court stated in an *obiter dictum* that

> *"The provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the court"*.

The idea that despite the lack of express reference, the protection of fundamental human rights was implicit in the general principles that are part of the Community law was something new. According to article 164, it is the task of the court to ensure that "the law" is observed in the interpretation and application of the Treaty. This also now included fundamental rights.

In the case *Internationale Handelsgesellschaft*[8] a step further was taken as regards the recognition of fundamental rights in Community law. The fundamental rights protection was here put in the forefront when a German court asked for a preliminary ruling concerning whether certain provisions in Community law ran

[5] *Stork*, case 1/58, [1959] E.C.R.17
[6] L.Neville Brown & Tom Kennedy, The Court of Justice of the European Communities, page 333
[7] *Stauder v City of Ulm*, Case 29/69 [1969] E.C.R. 419
[8] *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*, Case 11/70 [1970] E.C.R. 1125

counter to the German Constitution. The court stated in *Internationale Handelsgesellschaft* that:

> *"Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community".*

It was however also stated that Community law takes precedence even over national constitutions. The German court was not content with the reply and referred the case to the Constitutional Court. In a later overruled judgement the German Constitutional Court ruled that as long as there were no fundamental rights catalogue in Community law, a rule of Community law could not be applied by German authorities if it was incompatible with the German basic law and the protection for fundamental rights therein.[9] As will be described below, this challenge of the supremacy of Community law and thereby also the uniform application made the Community institutions to take to action in regard to this topic. The judgement has even been said to contain a threat to the whole existence of the Community.[10]

In the *Stauder* case it was stated almost parenthetically, but in the *Internationale Handelsgesellschaft* case there can be read a more certain acknowledgement of the status of fundamental rights. From this judgement one can however also draw the conclusion that fundamental rights are not considered to be untouchable norms in the EC legal order. They are to be interpreted in the light of the structure and objectives of the Community and are therefore not always considered the highest law.[11]

In the case *Nold*[12] the court for the first time referred to international treaties of Human Rights. The court stated that beside the inspiration from constitutional traditions common to the Member States when protecting fundamental rights also international treaties could be regarded.[13] The court did however not expressly refer to the ECHR in the case, probably because of the fact that France was not yet a party to the convention at the time. The protection of fundamental rights can through this case be regarded as extended, through the mentioning of international treaties as additional sources of inspiration.

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[9] Bundesverfassungsgericht, 29 May 1974, 1974 2 C M L R 540

[10] Lammy Betten & Delma Mac Dewitt, supra note 1, page 5

[11] Andrew Clapham, Human Rights and the European Community: A Critical Overview, page 48

[12] *Nold v Commission*, Case 4/73, [1974] E.C.R. 491

[13] The international conventions that have been taken into consideration by the ECJ include, apart from the ECHR, also The European Social Charter and conventions of the International Labour Organization.

A few years later the *Rutili*[14] case became the first case in which the court specifically referred to the ECHR and some articles therein. The case concerned control of aliens and the court held that certain limitations of the powers of the Member States by Community law was in fact manifestations of a more general principle enshrined in Articles 8, 9, 10, and 11 of the ECHR. The limitations included that public policy exceptions to the freedom of movement for workers could not be invoked due to a person's exercise of rights that were a consequence of membership of trade unions.

The first case in which the ECJ in detail considered a provision of the ECHR was in the *Hauer*[15] case. The provision in question was Article 1 of the 1st Protocol and the case has ever since been seen as a basis for the recognition of property rights in the EC. It is also an example of a provision of the ECHR used as Community standard[16], as the court deemed the provision to reflect a concept common to the constitutions of the Member States. The court did however not rule on the status of the ECHR in Community law. Another new course of action that is to be seen in this judgement is the citing of national constitutional law. The ECJ here cites, besides the article from the Protocol to the ECHR, specific provisions of the Basic law and of the Irish and Italian constitutions. The reason for this is to show that the regulation in question was not subject to limitations, other than those generally allowed with regard to the public interest. This practice, that before the *Hauer* case had never appeared, might have been an attempt to convince national courts fearing that the primacy of Community law was threatening their fundamental principles, that in practice such rights were taken into account.[17]

Another case that deserves to be mentioned in this context is the *Kent Kirk*[18] case. It can be regarded as a watershed as the court here almost directly applied an article of the ECHR to Community law.[19] In this case the court for the first time by its own initiative considered an article of the convention. Neither of the parties nor the Advocate General had introduced article 7 in the case. Also the decision in the case was taken partly on basis of the provision in question.

In the previous case law, the court has limited itself to review the validity of Community acts. A recent development is that the court now does not restrict itself to Community acts. It now seems to be the guardian of fundamental rights rather than just respecting them as was the first position taken. In the *Wachauf*-case[20] the court held that where a Community provision contains the protection of

[14] *Rutili v Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219
[15] *Hauer v Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727
[16] Nigel Foster, The European Court of Human Rights and The European Convention for the Protection of Human Rights, Human Rights Law Journal, vol 8 (1987), page 247
[17] J.A. Usher, Right of Property: How Fundamental ? E L Rev. vol. 5 (1980), page 209
[18] *R v Kent Kirk*, Case 63/83 [1984] E.C.R. 2689
[19] Nigel Foster, supra note 16, page 259
[20] *Wachauf*, Case 5/88, [1989] E.C.R. 2609

a fundamental right, the implementing national measure must be made in such a way that the fundamental right is ensured. Also when a Member State relies on derogation from the treaty in order to restrict a Treaty right the same is true.[21] In the *Wachauf* case, the ECJ for the first time applied fundamental rights principles to national acts issued for the purpose of implementing Community legislation. It is not entirely clear how far the jurisdiction extends. The court has ruled that "it has no power to examine the compatibility with the ECHR of national legislation *lying outside the scope of Community law*".[22] This is however hardly clarifying as it still remains to be decided which matters that actually are lying outside the scope of Community law. The interpretation of this limit is far from self-evident. For example, should it be understood as exclusively or as mainly outside the scope of Community law?[23]

Recently in the *Kremzow*[24] case the ECJ confirmed its case law by stating that it could not give interpretative guidance to the national court concerning whether the national legislation was in conformity with the fundamental rights whose observance the court ensures. In the *Kremzow* case was the national legislation at issue namely concerned with a situation that did not fall within the application of Community law. Where a preliminary ruling concerns national legislation that falls within the field of application of Community law, the court must however give such guidance for the assessing of the compatibility of the legislation with fundamental right as laid down in particular in the ECHR.

The development of the case law with regard to Human Rights can be said to have been as follows: in the first cases the court were dealing more with the position of fundamental rights in Community law and with sources of law. Next generation of cases were, as one could expect, more concentrated on the development and definition of particular individual rights.[25] If one looks to the nature of the rights that were put in focus, a tendency can be seen with the content that initially the court dealt with civil and political rights whereas protection of economic and social rights became topical in the mid-1980s.[26] The review by the courts of the compliance with human rights has developed from review of Community measures adopted by the Community institutions themselves, to review of measures adopted by Member States when implementing Community measures. Most recently it seems to have developed into comprising also

[21] Francis G. Jacobs, European Community Law and the European Convention on Human Rights, supra note 4, page 563
[22] *Cinéthéque*, Case 60-61/84, [1985] E.C.R. 2627 and *Demirel*, Case 12/86, [1987] E.C.R. 3754
[23] Rick Lawson, Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg, in Rick Lawson & Matthijs de Blois (Eds.), The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G. Schermers, vol. III, page 225
[24] *Kremzow v Austria*, Case C-299/95, [1997] E.C.R. I-2629
[25] Manfred A. Dauses, The Protection of Fundamental Rights in the Community Legal Order, 6 E.L.Rev. (1985), page 398
[26] Lammy Betten & Delma Mac Dewitt, supra note 1, page 4

measures adopted by Member States that in one way or the other fall within the scope of Community law.[27]

2.2 Action by other Community Institutions

As has been mentioned before, the German Constitutional Courts ruled in 1974 that German authorities could not apply a community rule if that rule came in conflict with a German constitutional rule concerned with the protection of fundamental rights, *as long as*[28] there was no adequate protection supplied by the Community. In this judgement the German court challenged the supremacy of the Community law and thereby also the uniform application of Community law. While the decision was modified later, according to some authors, it anyhow made visible that in this way the whole existence of the Community was facing a threat, as the uniform application by the Member States is a fundamental principle of Community law.[29] In my opinion, this principle today seems somewhat modified. The approach to integration is becoming more flexible as Member States that wish to proceed further have the possibility and are even encouraged to do so. This is called "Europe at different speeds" and is embodied in the Treaty of Amsterdam.

The *So-Lange case* was a very criticised decision, but it had the effect of drawing the attention to and reinforcing concern at Community level for the protection of fundamental rights within the Community legal order.[30] It has even been suggested that this judgement was the impulse that started the whole development of Community doctrine of Human Rights.[31] Apart from the development in the ECJ with the decisions in the *Nold, Rutili and Hauer* cases, other Community institutions also took to action in regard to this topic.

In 1974 the European Council[32] decided to investigate the conditions under which the citizens in the Member States could be given special rights as members of the Community. Two years later, in 1976, the Commission published a report where it discussed but rejected the idea of a Community catalogue of fundamental

[27] Francis G. Jacobs, supra note 4, page 564
[28] The judgement has been called the first *So Lange*-Case after the German expression of *"as long as"*.
[29] Lammy Betten & Delma Mac Dewitt, supra note 1, page 4. The authors however also notes that recently this uniform application has been challenged on a larger scale, as protocols have been added to the treaties allowing states to refrain from participating on certain parts. An example is that United Kingdom opted out on the Maastricht Protocol and Agreement on Social Policy.
[30] L. Neville Brown & Tom Kennedy, supra note 6, page 335
[31] Peter Wessman, The Protection of Human Rights in European Community Law, page 35
[32] The Heads of State or Governments of the Member States are meeting under this name.

rights.[33] It also ruled out the necessity of accession as such by the Community to the ECHR. It considered that the protection through the case law of the ECJ was preferable to all other options, as it was a flexible solution. Changing circumstances and needs could easier be regarded with a case law protection. A political declaration was made jointly by the European parliament, the Council and the Commission in 1977.[34] They stressed the paramount importance they considered the protection of fundamental rights to have and stated that in the carrying out their duties they respected and would continue to respect such rights, in the pursuance of the aims of the European Communities. This applied especially to the rights derived from the ECHR and national constitutions.[35] The European Council endorsed the joint declaration in 1978. The Declaration is not a legally binding instrument. Its political and moral influence has however been pointed out in the literature.[36]

Formal accession was first proposed from the Commission to the Council in 1979. This year a memorandum was issued where the question was discussed.[37] The Commission here appears to have changed its mind since the report from 1976 and found now that in principle the best solution would be the creation of a Community Bill of Rights. In the short term this solution did not appear to the Commission as possible, due to the diverging opinions of the Member States on the definition of economic and social rights. The report stated however that at the present stage, the best way to meet the need of reinforcing protection of fundamental rights would be the adhering of the Community to the ECHR. Also this matter was deemed to be complex and time-consuming which needed to be further discussed.

The European Parliament has on various occasions expressed statements in favour of accession. In 1982 they requested the Commission to put forward to the Council a proposal on accession. The Commission was not willing to do so unless there was support for accession in the Member States, which it at this time was not. A few years later, in 1985, the matter was brought up once again in the Parliament in order to investigate whether any progress had been achieved in the

[33] 'The protection of fundamental rights as Community law is created and refined', Report of the Commission of 4 February 1976 submitted to the European Parliament and the Council, Bulletin of the European Communities, Supplement 5/76

[34] Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977

[35] It can be added that the German Constitutional Court in 1986 in the *Wünsche Handelsgesellschaft*-case (Bundesverfassungsgericht, 22 October 1986, 1987 3 C.M.L.R. 225) declared that fundamental rights now were sufficiently protected within the Community, They based their conclusion on an analysis of the case law of the court (especially the cases *Nold*, *Rutili* and *Hauer*) and also of this joint Declaration from 1977. Consequently this case has been called the *Second Solange*-case, as it overruled the *First Solange*-case.

[36] Manfred A. Dauses, supra note 25, page 414

[37] Memorandum on the Accession of the Communities to the European Convention on the Protection of Human Rights and Fundamental Freedoms, adopted by the Commission on 4 April 1979, Bulletin of the European Communities, Supplement 2/79

mean time. The Commission however stated that this was not the case and many Member states still opposed accession. A number of resolutions have been issued from the Parliament on the topic.[38] Moreover, the Parliament has also issued a catalogue of fundamental rights in 1989, which however is not a legally binding instrument.[39] In 1990 the Commission did propose to the Council to request accession by the Community to the ECHR, a proposal that was not adopted by the Council. Three years later, in 1993, the Council took the decision to request an opinion from the ECJ of the compatibility of an accession with the EC Treaty. Also the Economic and Social Committee have been urging for incorporation of fundamental rights.[40] The main emphasis has naturally been on the economic and social rights. Some result was achieved when eleven Member States out of twelve signed the Community Charter of Fundamental Social Rights of Workers in 1989. Nor this instrument is a legally binding document, but a mere political statement.

2.3 The Protection in the Community today

The Single European Act enacted in 1986 was the first Community instrument that contained an endorsement of fundamental rights. The Member States declared in the Preamble that they were:

> *"determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States (and) in the Convention for the protection of human rights and fundamental freedoms."*

In 1992 the continuing importance of fundamental rights can be seen in the Preamble to the Maastricht treaty. Also the article F of the Treaty on the European Union refers to fundamental rights. Article F (2) states that the union shall respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. The article establishes fundamental rights as "general principles" of Community law. The language used is clearly inspired by the judgements of the court in the cases *Internationale Handelsgesellschaft* and *Nold*. [41] It has been suggested that this article F have the intention to add binding standards to the protection of human rights. [42] However, article F was formally not included among those articles that

[38] A recent example is the Resolution of 18 January on Community accession to the ECHR, which was adopted on the basis of a report of the Committee on Legal Affairs and Citizen's rights. (OJ 1994 C 44, p. 32)

[39] The European Parliament's 1989 Declaration of fundamental rights and freedoms OJ C 120/51-52 of 16 May 1989

[40] Lammy Betten & Delma Mac Dewitt, supra note 1, page 9

[41] L. Neville Brown & Tom Kennedy, supra note 6 , page 368

[42] Giorgio Gaja, The Protection of Human Rights under the Maastricht Treaty, in Deirdre Curtin & Ton Heukels (Eds.), Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, vol. II, page 549. There are even some authors that have considered that binding standards existed before the TEU. This has been based either on

amended the existing treaties and thus also outside the scope of the jurisdiction of the court.[43] This seemed to mean that the court should continue its review but ignore the written norm in the article. [44] Formally, it also meant that the basis for protection of fundamental rights in the Community remained the case law of the courts.[45]

The treaty of Amsterdam in 1997 brought with it a clarifying and a slight strengthening of the fundamental rights protection.[46] The commitment to protection of rights is clear as it proclaims that

> *"the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law".*[47]

An amendment to the article L states that the ECJ has jurisdiction as regards compliance of the acts of the institutions with article F (2). The article lays down the current position arrived at in the case law of the court.[48] However, there can not be read into the article incorporation of clauses from the ECHR into the EC treaty or the TEU, nor is protection of human rights made a Community objective. A new article F (1) was also introduced, that allows the Council to determine that a Member State has committed a serious and continuing violation of the principles of liberty, democracy, respect for human rights and fundamental freedoms on which the Union is founded. The Council shall act unanimously, save the vote of the Member State in question, with the consent of the Parliament. It was stressed during the negotiations that the intended field of application is extreme circumstances only, such as the collapse in one Member State of the democratic government. Possible sanctions are for example increased financial contributions or waiving of the right to take up Presidency.[49]

The fundamental rights protected by Community law can be relied upon when challenging directly applicable measures of Community law or implementing national measures on the grounds that these measures conflict with the right. This could either be done directly by virtue of article 173 (Article 230) or indirectly through a request for a preliminary ruling from a national court.[50]

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the article 234 or on the consideration that the Community succeeds the obligations and rights of its Member States.

[43] Giorgio Gaja, supra note 42, page 553

[44] Giorgio Gaja, supra note 42, page 553

[45] Lammy Betten & Delma Mac Dewitt, supra note 1, page 12

[46] Sally Langrish, The Treaty of Amsterdam-Selected Highlights, E L Rev. vol. 23 (1998)

[47] Article 6 TEU as amended by the Treaty of Amsterdam

[48] See most recently Case C-299/95, *Kremzow v. Austria*, supra note 22

[49] Sally Langrish, supra note 46, page 15

[50] A.C. Geddes, Protection of Individual Rights under EC Law, page 106

The ECJ has recently held in Opinion 2/94 on the accession by the Community to the ECHR that an accession is not possible in the light of Community law today. There is no provision in the treaty that could serve as the legal basis for adoption of such a decision. The Community has therefore no competence in regard to this matter and the only way it could be realised is through treaty amendment.[51] A consequence of this opinion might be that the option of keeping the protection in the Community the way it is has been enhanced. It is possible that the Opinion 2/94 reflects a wish from the ECJ not wanting to be bound by the European Court of Human Rights. The ECJ has always been a very dynamic institution, which has contributed on a large scale to the development and integration of the European Community. An accession is likely to decrease their freedom of action.

2.4 Conclusions

The principal source of law for protection for fundamental rights that exist in the Community today is that they form part of the general principles of law, the observance of which the court ensures. When carrying out this duty the court draws inspiration from constitutional traditions common to the Member States. The court does not have to look for the lowest common denominator but can select the most suitable solution in relation to the Treaty objects.[52] Also international treaties on which the Member States have collaborated or are signatories to, supply guidelines for this purpose. The court has also stated that the ECHR has special significance in this regard.[53] The position of fundamental rights in the Community hierarchy of norms is not entirely clear. There is no doubt that fundamental principles take precedence over secondary law. More disputable is the relation between the general principles of law and primary law.

Moreover, apart from the general principles with origin in the ECHR and national constitutions, the ECJ has developed certain additional general principles. All Community legislation as well as administrative decisions must comply with these Community principles.[54] They include the principles of proportionality, legal certainty, equality and legitimate expectations as well as due process and the rights of natural justice. This clearly shows that to a large extent, it is the courts that direct the development and protection of fundamental rights in the Community.

[51] Opinion 2/94 [1996] E.C.R. I-1759
[52] C. S. Kerse, E.C. Antitrust Procedure, page 305
[53] See in particular, *Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] E.C.R. 1651
[54] A C Geddes, supra note 50, page 107

3 The Right to Privacy

In this chapter I will begin with describing the right to privacy as it is manifested in the European convention. Relevant aspects of the Article with regard to competition law investigations will be dealt with. After this the provisions in Community law regulating the investigation procedure will be described. Finally, a comparison will be made of two cases where the Court of Human Rights and the ECJ have made a different interpretation of the Article 8.

3.1 Article 8 of the ECHR

Article 8 of the ECHR contains the following right:

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

2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The rights contained in Article 8 are very comprehensive and hard to define. Its feature of being quite wide makes it possible to assign many phenomenons under the scope of the article.[55] Only through examining case law can the scope be more clearly defined.[56] Many articles in the convention can be said to touch upon the right to privacy. The article 8 is aimed only at those aspects of privacy that are not caught by the other articles in the convention.

Public Authorities shall refrain from interfering in the protected right except in cases where their action can be justified under the exceptions in article 8(2). However, public authorities are also to some extent under a duty to take measures to protect the rights enshrined in the article. Such measures can consist of legislative action or different kinds of protection against abuse.

[55] The ECHR does in principle only protect the traditional human rights, often referred to as civil and political rights. Social, economical and cultural rights are not included. However, it can be argued that article 8 because of the wide notion "private life" can be given the interpretation of comprising some social rights of particular importance for the life of persons to be acceptable. An example of this was the claims from a disabled person, that the public should through certain facilities make it possible for him to use a public beach. Did the omission of this mean that his right to privacy had been violated? In this particular case the European Commission said no. (Case 21439/9 Botta v Italy, Report of the Commission 15.10.1996)

[56] Hans Danelius, Mänskliga Rättigheter i Europeisk Praxis-En Kommentar till Europakonventionen om de Mänskliga Rättigheterna, page 220

In order for an interference to be in accordance with the convention, it has to fulfil the three conditions in article 8(2):

1. It has to be in accordance with the law
2. It has to be designated to pursue the private or public interests in article 8(2); national security, public safety, the economic well-being of the country, prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
3. It has to be necessary in a democratic society. The court has held that necessary in this context shall not be understood as indispensable. Rather, there shall be a pressing social need. The restraints of the right must also be proportionate in relation to the aim pursued.

The protection of the home is an important aspect of the right to privacy. Interference with this right may for example take the form of searches. Searches that are carried out in a person's domicile are no doubt a serious interference of the right to privacy and the inviolability of the home. More debatable is the question whether this also includes, or should include, the premises of undertakings. In order to investigate this matter a comparative analysis of cases regarding the scope of the article 8 ECHR from both the European Court of Human Rights and the ECJ will be made.

3.2 Relevance in Competition Cases

As a necessary background to the understanding of the Community aspects of Article 8 ECHR some articles in the Regulation 17/62 must be examined in detail. The Regulation 17/62 is the most important instrument for enforcement of the competition Law of the Community. It was issued in order to uniform the application and interpretation of the EC competition rules.[57] In the Regulation 17 the Commission has been given power from the Council to enforce the competition rules and exclusive competence to grant exemptions from article 85. The treaty articles 85 and 86 regarding competition are not very detailed and therefore leave considerable discretion in their application.[58] Among other procedural articles, the regulation contains provisions regarding the inspections that can be carried out at the premises of undertakings, as part of the investigation procedure of the Commission in competition cases.

When the Commission opens a case, the information may have come to its knowledge through a complaint or through a notification made. It can however also act on its own initiative, thereby having received information through media or trade journals, or having received a parliamentary question.[59] In order to be able to duly consider the case the Commission might have to obtain more information

[57] Valentine Korah, An Introductory Guide to EC Competition Law and Procedure, page 125
[58] Valentine Korah, supra note 57, page 125
[59] Valentine Korah, supra note 57, page 126

about the case. In Regulation 17 there are two possibilities for this, under article 11 the Commission can make a request for information and under article 14 inspections can be carried out.

Article 11 states that the Commission may obtain all necessary information from the Governments and competent authorities of the Member States. Furthermore, it may also request information from undertakings or groups of undertakings. The Commission has the power to obtain all *"necessary information"*. This quite vague criterion makes the discretion of the Commission wide. In the case *National Panasonic*[60] the court ruled that when deciding this, the proportionality principle should be taken into consideration. This means that the information requested shall be qualitative as well as quantitative necessary for the handling of the case.[61] There is probably no sanction if the undertaking does not supply any information.[62] The supplement of false information, be it deliberately or negligently, can however result in the imposing of a fine.[63] If no information is provided or not enough in comparison with the request, a decision requesting the information under article 11(5) may be adopted. As will be analysed in the next chapter, although the EC law does not acknowledge a right to remain silent, restrictions as regards incriminatory questions have been established in the case law of the ECJ.[64] The decision shall specify the requested documents and set a time limit for their supply. If this decision is not complied with, fine or daily penalties may be imposed.[65] The Commission can demand the answering to questions as well as the handing out of specific documents.

It has been stated that a main feature of the EC competition Law is the far-reaching powers of the Commission to investigate infringements of the rules. [66] In particular the inspections (often called dawn-raids due to the usual execution hour) carried out at the premises of undertakings have then been taken into consideration. On this subject the ECJ has stated that the aim of the powers given to the Commission is to ensure that the rules of Competition are duly applied. The function of those rules is to prevent competition from being distorted to the detriment of public interest, individual undertakings and consumers. These powers therefore contribute to fulfil the provisions of the Treaty.[67] Article 14(1) provides that *"the Commission may undertake all necessary investigations into undertakings and associations of undertakings"*. The condition "necessary" means that the investigation must be requisite in order to establish the applicability of the articles 85 and 86. The margin of discretion here for the Commission is

[60] *National Panasonic v Commission*, Case 136/79, [1980] E.C.R. 2033
[61] Karl-Johan Dhunér & Jens Hedström, Förfarandet i Konkurrensrätten-EGs och Sveriges Konkurrenslagstiftning i Praktisk Tillämpning, page 78
[62] Valentine Korah, supra note 57, page 130
[63] Article 15(1)(b)
[64] *Orkem v Commission*, Case 374/87, [1989] E.C.R. 3283
[65] Article 15(1)(b) and 16
[66] See e.g. Karl-Johan Dhunér & Jens Hedström, supra note 61, page 80
[67] *Hoechst AG v Commission*, Joined Cases 46&227/88, [1989] E.C.R. 2859

indeed considerable.[68] Moreover, the investigating power is not limited to those undertakings suspected of having infringed the articles 85 and 86, but comprises also third party undertakings. The officials of the Commission shall be able to present to the undertaking an authorisation in writing of the action, which shall be issued of the General Director of the DG IV. The authorisation shall also contain information of the persons that are empowered to inspect the undertaking, the subject-matter and the purpose of the investigation as well as the sanctions provided for in article 15(1)(c) if incomplete information is given.[69] The Commission is not obliged to start an investigation with a request for information under article 11, as the two procedures are completely independent of each other. Article 11 can therefore be used before or after inspections.

There exists two alternatives of executing an inspection under Article 14 and the Commission may choose between them in the light of the special features of each case.[70] Either the inspection can be ordered by a decision under article 14(3) or the Commission officials does not hold such a decision, but may still exercise the powers conferred by article 14(1) by virtue of the written authorisation. The article 14(1) empowers the officials authorised by the Commission to:

(a) to examine the books and other business records;
(b) to take copies of or extracts from the books and business records;
(c) to ask for oral explanations on the spot;
(d) To entry any premises, land and means of transport of undertakings.

The documents that can be investigated and copied include all business records, official as well as unofficial. The wide term "books and other business records" therefore also includes the diaries, drawers, bookshelves and briefcases etc. of individual employees.[71] Also more technical means of information storage is comprised.[72] The inspection of documents is moreover not limited to the business premises, as Article 14(1)(d) does not restrict Article 14(1)(a). The undertaking shall provide the books and business records required by the inspectors. A duty for the undertaking to co-operate has been established in the case law from the court.[73] The Commission is not permitted to examine circumstances outside the alleged infringement. This is determined through the statement of the purpose and subject matter of the investigation in the written authorisation or the decision. A mere "fishing expedition" is not allowed.[74] The powers under Article 14(1) are indeed extensive but do not amount to a search as such.[75]

[68] C.S.Kerse, supra note 52, page 112
[69] Article 14(2) of Reg. 17/62
[70] *National Panasonic v Commission*, supra note 60
[71] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 82
[72] The undertaking is probably obliged to give the Commission the opportunity and the means necessary to examine the contents of tape, micro-film, disc, back-up tapes etc.
[73] *Orkem v Commission*, supra note 64
[74] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 83
[75] C.S.Kerse, supra note 52, page 123

It is not entirely clear exactly what kind of oral information that can be requested under Article 14(1)(c). The question is whether it is limited to explanations of the content of the documents that can be obtained under article 14(1)(a) and 14(1)(b), or whether any questions regarding the investigation and its subject matter are permitted. The procedure contained in Article 11 is of some importance in concluding this matter. If the power is too extensive under Article 14(1)(c), the protection and rights afforded to the undertaking in article 11 become rather meaningless.[76] It appears from the judgement in the *National Panasonic* case[77], although not dealing with the matter directly, the court seems not to restrict the power only to the narrower interpretation. In any case, if not the safeguards of Article 11 shall be undermined, questions must at least be specific and capable of being answered in the circumstances of the investigations.[78]

Article 14(1)(d) merely gives the power to entry business premises in order to execute the powers conferred in Articles 14(1)(a), (b) and (c). It does not authorise the Community officials to make a forcible entry or to carry out searches without the consent of the undertaking. It appears to be reasonable that the officials may entry the premises enumerated in the authorisation or decision.[79] However, it is only the undertaking's premises, land and means of transport that can be subject to inspections. Although relevant document may be found at other places, such as the premises of the solicitor or accountant of the undertaking, such an inspection can never be carried out by virtue of Article 14.[80]

Article 14(3) states that the decision must specify the subject-matter and purpose of the investigations, the execution date and indicate sanctions and the right to have the decision reviewed by the court. The time limit for the review under article 173 is two months. If an appeal is lodged it will not be enough to suspend the investigations.[81] A separate application for stay of execution under article 185 has to be made. Whilst an appeal to the court is not in itself sufficient to stop an inspection from taking place, the court might prohibit the use of evidence obtained during an unlawful inspection or outside the scope of the decision under article 14(3).[82] Undertakings are under a duty to submit to the investigations that have been decided by the Commission. If the undertaking concerned opposes the investigations, a fine can also be imposed under article 15(1)(c) or daily penalties under article 16(1)(d). No sanction can however be imposed on undertakings that refuse to co-operate before a formal decision has been issued. However, it may not be reasonable to deny the Commission entry to execute an investigation. The Commission may then become more suspicious and deduce that the undertaking

[76] C.S.Kerse, supra note 52, page 125
[77] *National Panasonic v Commission*, supra note 60
[78] C.S.Kerse, supra note 52, page 126
[79] C.S. Kerse, supra note 52, page 128
[80] C.S.Kerse, supra note 52, page 128
[81] C.S. Kerse, supra note 52, page 119
[82] C.S.Kerse, supra note 52, page 119

has something to hide. On the basis of already contained information, adverse findings of facts may be made.[83] If the undertaking does submit to the inspection without a decision, there is a duty to supply complete required documents. A fine sanctions this duty.[84] The inspection can then furthermore not be brought to an end unilaterally.

It is becoming increasingly common that inspections are carried out without prior notice.[85] When the inspectors arrive unexpectedly they have probably already obtained a decision under article 14(3). A difference to the request for information made under article 11 is namely that the Commission does not first have to try to execute the inspection with the consent of the undertaking.[86] The Commission might not want to give prior notice of its visit due to fear that evidence might in the mean time be removed, or that on an earlier occasion the undertaking refused to co-operate. As a response to this line of conduct, undertakings often instruct their employees as to what kind of information that may be stored and how to store it.[87]

As has been stated above there is no direct power under Community law to enter premises.[88] Article 14 does not enable the Commission officials to forcibly entry premises or break into cupboards. A possible way for the Commission of bringing pressure on opposing undertakings is to take a further decision imposing fine[89] or periodic penalties[90] for refusal to submit to an investigation ordered by a decision. Should not this be enough, Article 14(6) compensates the lack of coercive power and requires national authorities to assist if the undertaking opposes the inspection. National law and authorities shall therefore assist the Commission to pursue the investigation in these cases. Member States authorities are not in the position of questioning the legality of the inspection as such. It is for the ECJ exclusively to decide on such matters.[91] An essential case recently dealing with the nature and scope of the Commission's information-collecting and investigation powers under Articles 11 and 14 of the Regulation 17 is the *Hoechst*-case.

[83] Valentine Korah, supra note 57, page 133
[84] Article 15(1)(c) of Reg. 17/62
[85] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 81
[86] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 84
[87] Sven Norberg, Director of DG IV, at a Seminar in Lund 16 October 1998
[88] Valentine Korah, supra note 57, page 132
[89] Article 15(1)(c) of Reg. 17/62
[90] Article 16(1)(d) of Reg. 17/62
[91] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 84

3.2.1 The Hoechst case[92]

3.2.1.1 Factual Background

A number of decisions were adopted in January 1986 pursuant to Article 14(3) of Reg. 17 ordering Hoechst AG and undertakings in the Dow group to submit to inspections at their premises. Hoechst AG denied the Commission's inspectors entry. The undertaking was of the opinion that the realisation of the decision would in fact amount to a *search*, which the Commission was not empowered to carry out. Only by virtue of a judicial authorisation could this legally take place at the premises of Hoechst AG. As a response to this reaction the Commission in a decision of 3 February imposed a periodic penalty payment of 1000 ECU for each day of delay.[93] Hoechst in its turn had turned to the German administrative court (*Verwaltungsgericht Frankfurt)* and asked them to prohibit the *Bundeskartellamt (BKartA)* from executing the search on behalf of the Commission without a search warrant. On 23 January this request was granted. Consequently, when *BKartA* sought to obtain a search warrant this request was turned down by the *Amtsgericht Frankfurt a.M.* on 12 February 1987. As the German national Competition Authority, the *BKartA* is through Article 14(6) obliged to afford the necessary assistance if the undertaking in question opposes investigations. Hoechst then turned to the European Court of Justice and asked for the annulment of the decisions ordering the investigations and the penalty payments. They also requested interim measures to suspend these decisions. The request for interim measures was turned down on 26 March 1987.[94] A few days later, on 31 March 1987, the *BKartA* succeeded in obtaining the search warrant in favour of the Commission, after application at the *Amtsgericht Frankfurt a. M.* The Commission then accomplished the investigation on 2 and 3 April 1987. The total amount of the periodic penalty payment was set to 55 000 ECU, which means that 1000 ECU had to be paid for each day between 6 February and 1 April.[95]

Hoechst challenged the decision of the Commission concerning the inspection on, inter alia, the following grounds:

1. The decision authorised the Commissions officials to take measures that were to be regarded as a search. This was not within the scope of Article 14 of Reg.17 and it was also an infringement of the fundamental rights protected by Community law. If Article 14 was to be interpreted as comprising searches Hoechst argued in the alternative that the decision was unlawful due to its incompatibility with fundamental rights. In particular the decision was violating the right to a fair hearing and the right to inviolability of the home. With due

[92] *Hoechst AG v Commission*, supra note 67
[93] This decision was taken under Article 16(d) of Reg. 17/62
[94] Order of the President of the Court in Case 46/87R, [1987] E.C.R. 1549
[95] This decision was taken on 26 May 1988 and was also subject to challenge by Hoechst.

respect taken to these rights, a search could only be carried out on the basis of a court order obtained in advance.

2. The decision did not have a sufficient precise statement of reasons as required by Article 190 and Article 14(3) of Reg.17

3.2.1.2 Reasoning of the court

Regarding the alleged lack of sufficient reasoning of the decision the court held that the information required was contained. Formally the conditions of Article 14(3) had been fulfilled as both the subject matter as well as the purpose of the investigation had been stated. The court did however criticise the decision because of its general terms and said that it *"would have benefited from being more precise"*.[96] The court pointed out that there is an obligation for the Commission to clearly indicate what it is trying to establish through the inspection. The Commission is however not under a duty to communicate all information at its hands to the opposite party, nor is there an obligation to legally classify the suspected infringements.

The first argument was somewhat more benevolently received. The court started by stressing that Article 14 of Reg.17 cannot be interpreted in a way that would lead to results that were incompatible with the general principles of Community law and in particular with fundamental rights.[97] The court also referred to its earlier case law on the subject fundamental rights.[98] The court then went on by stating that there existed in the Community legal order a right to the inviolability of the home. This right was recognised as a common principle in the laws of the Member State in relation to private dwellings of natural persons. In regard to undertakings the right did not apply because of the considerable divergences between the nature and degree of protection afforded to business premises against intervention by public authorities in the Member States.[99] The court also made a reference to Article 8 in the ECHR. The way the court interpreted this article its protective scope was the development of man's personal freedom and did not extend to business premises.[100] There was furthermore no case law from the European Court of Human Rights on the subject. In different forms there exists protection against arbitrary and disproportionate intervention by public authorities in all the Member States. Intervention in the sphere of natural and legal persons must have a legal basis and be justified on the grounds laid down by law. The court recognised the need for this kind of protection as a general principle of Community law.

[96] Para. 42 of *Hoechst*
[97] Para. 12 of *Hoechst*
[98] On this subject, see Chapter 2.
[99] Para. 17 of *Hoechst*
[100] Para. 18 of *Hoechst*

In the case *San Michele and Others v Commission*[101] the court ruled that it has the power to determine whether measures by the Commission under the ECSC Treaty are excessive.[102] The powers given to the Commission under Article 14 were recognised by the court as being very wide. The reasons for this is to ensure that the Competition rules are applied the way intended by the Treaty. The right to enter premises is of particular importance and would be of no use if the Commission had to identify required documents in advance. The court stated however that in order to safeguard the rights of investigated undertakings certain conditions have to be fulfilled when the wide powers under Article 14 are executed. The Commission is obliged to state the subject matter and purpose of the investigation. The conditions for the executing of the investigative powers of the Commission vary according to the procedure chosen, the attitude of the investigated undertaking and the intervention of the national authorities.

Article 14 deals in the first place with investigations carried out with the co-operation of the undertaking concerned. The officials may for example require to be presented documents, to be shown contents of furniture and enter indicated premises. On the other hand, the Article does not authorise access to premises or furniture by force and searches cannot be carried out without permission from the management of the undertaking. If the undertaking opposes an investigation the situation is entirely different.[103] Article 14(6) provides for the possibility to search for any information necessary for the investigation. National authorities are required to afford the necessary assistance for the performance of the tasks of the officials. Each Member State decides the conditions under which this assistance will be carried out. The procedural rules that ensure the rights of the undertaking are those laid down in the national law. The Member States must however ensure that the action by the Commission is effective.[104] Consequently, if the Commission intends to carry out an investigation assisted by national authorities without the consent of the undertaking, procedural guarantees in national law must be respected.[105] The national authority is not competent to review the need for the investigation ordered. This can only be done by the ECJ. What the national authority can do is to consider whether the measures of constraint are arbitrary or excessive in relation to the subject matter of the investigation. It can also see to that the procedural safeguards in national law are complied with.[106]

The outcome of the case was in essence that the measures ordered by the decision were within the scope of Article 14. The Commission had misinterpreted the Article in that they before the court argued that searches could be carried out under inspections without respecting procedural guarantees in national law and

[101] Joined Cases 5-11&13-15/62 *San Michele and Others v Commission* [1962] E.C.R. 449
[102] Para. 19 of *Hoechst*
[103] Para. 32 of *Hoechst*
[104] Para. 33 of *Hoechst*
[105] Para. 34 of *Hoechst*
[106] Para. 36 of *Hoechst*

assistance of national authorities. This misinterpretation had however no impact of the lawfulness of the decision.[107]

3.2.1.3 Analysis of the case

The ECJ did not identify a principle common to the laws of the Member State giving legal persons a right to claim inviolability of the domicile. The Article 8 was given an interpretation that did not include business premises. The ECJ also said that there was no case law from the European Court of Human Rights on the subject whether the right should be granted also to business premises or only to private dwellings. Does this mean that the ECJ then should have been prepared to take into account a judgement to the contrary from the European Court of Human Rights?[108] Since the judgement in the Hoechst case the European Court of Human Rights has established in the *Niemietz case*[109] that also business premises falls within the scope of Article 8.

In the Order of the President in the interim proceedings there was no mentioning or hint of any restriction of the powers of the Commission as was later pronounced. In the final judgement it was held that the Commission and the national authorities couldn't insist of entry to an undertaking opposing investigation, unless they have complied with relevant national safeguards regarding searches. It has been submitted that this was due to a change of mind of the court, apt to infuse constitutional confidence into German judges in particular.[110] Although the Commission cannot force an undertaking to submit to an investigation unless national procedural safeguards have been complied with, it may still impose periodic penalty payment from the day of notification of the decision imposing the penalty. It has been submitted that this contains a certain contradiction but as long as not declared invalid by the Court, all measures adopted by Community institutions should be regarded as fully operative.[111] The court distinguished between investigations carried out with the co-operation of the undertaking and those where the undertaking concerned opposed the investigation. Only in the latter case has the Commission to comply with national procedural safeguards. It does not seem clear why opposing undertakings are more deserving or in need of national procedural safeguards than one that submits to an investigation.

It was deemed as a general principle in Community law that protection should be granted against arbitrary and disproportionate conduct on the part of public

[107] Para. 37 of *Hoechst*
[108] Rick Lawson, Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg, supra note 23, page 229
[109] *Niemietz v Germany*, Judgement of 16 December 1992, Series A no. 251 (1993)
[110] Josephine Shaw, Recent Developments in the Field of Competition Procedure, E L Rev. vol. 15 (1990), page 329
[111] Josephine Shaw, supra note 110, page 334

authorities.[112] The court considered that adherence to this principle by the Commission in the course of an investigation is best safeguarded through procedural rules in the national law.[113] It could be argued that the danger of Community law not being enforced uniformly in the Community is considerable.[114] Furthermore, this means that Community law in some way is contingent on national law, which might encroach upon the principles of the autonomy and supremacy of Community law.[115] In order to prevent the problems mentioned above it should be enough to include such provisions in Reg. 17. A problem would naturally be to agree on the level of protection to be afforded.

3.2.2 The Niemietz Case[116]

The case was taken to the European Court of Human Rights after a search that was carried out at the applicant's law office. The purpose of the investigation was to obtain information about the origin of a certain letter that related to a pending case concerning insulting behaviour. The letter was insulting, as well as an attempt to bring pressure on a judge in the case. A warrant to search the office premises was issued. Mr Niemietz alleged that the search had been a breach of Article 8 of ECHR.

The Commission of Human Rights expressed the unanimous opinion that there had been a breach of Article 8 attaching particular weight to the confidential relationship that exists between lawyer and client.[117] In its judgement the court declared on the understanding of the notion *"private life"* that although an exhaustive definition was neither possible nor necessary, it should not be restricted not to include relationships with other human beings. There was furthermore no reason why activities of a professional or business nature should be excluded. Account must be taken to that for a majority of people, maybe the greatest opportunity to establish and develop relationships with the outside world and other persons, is in the course of their working life. There cannot always be distinguished a clear dividing line between which of a persons activities that form part of the private life and those forming part of the professional and business life.[118] In some professions, it might be impossible to know in which capacity a person is acting in a given moment.[119] The outcome of this reasoning was that the protection afforded by Article 8 could not be denied on the ground that the measure at issue related to professional activities.[120]

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[112] Para. 19 of *Hoechst*
[113] Para. 33 of *Hoechst*
[114] Josephine Shaw, supra note 110, page 333
[115] Josephine Shaw, supra note 110, page 333
[116] *Niemietz v Germany*, supra note 109
[117] The court did not agree to that this factor could serve as workable criterion for delimiting the scope of Article 8, as almost all professional activities involve confidential matters.
[118] Para. 29 of *Niemietz*
[119] Para. 29 of *Niemietz*
[120] In an earlier case the Court did not exclude applicability of Article 8 under the head of "private life", on the ground that a search was directed solely to business activities. (See

The court noted that the notion *"home"* in Article 8 in some Contracting States comprised also business premises. Furthermore, in the French version of the convention the word "domicile" is used. It has a broader connotation than the English "home", and extends to for example a professional person's office.[121] Also here it may be very difficult to draw distinctions as professional activities can be exercised from a person's private residence and activities not related to the profession may be carried on in an office or commercial premises.

It was held by the court that an interpretation of "private life" and "home" as including certain professional or business activities or premises would be in agreement with the object and purpose of Article 8, which is to protect the individual against arbitrary interference by public authorities.[122] An interpretation to the contrary could also lead to inequality of treatment if protection would only be granted where professional and non-professional activities were so intermingled that they could not be separated. The same applies to a narrow interpretation of the notion "home". The court also noted that as the possibility to interfere to extent allowed by paragraph 2 of Article 8 retains, the interpretation would not unduly encumber the Contracting States. It was also implied that the scope of Article 8(2) would be more far- reaching where professional or business activities were involved than otherwise.

After this reasoning the Court established that the search of the law office was an interference with the applicant's rights under Article 8. Although the search was lawful and it had a legitimate aim, it was not "necessary in a democratic society". The court attached weight to the fact that the warrant was drafted in very broad terms as it simply ordered a search for and seizure of "documents" without any limitation. Also that the search encroached in a disproportionate way on professional secrecy and that the publicity must have affected the applicants professional reputation was decisive.

3.2.3 Analysis of the case

The Court of Human Rights interpreted Article 8 as including also a protection of the applicant's law firm. The scope of the Article is therefore not limited to private dwellings. The private life of Mr Niemietz was interpreted to comprise also his occupational activities, which put them under the protective scope of the Article. When his law firm was searched, this was a violation of his private life. The notion "home" was also interpreted to extend to business premises. It also seems reasonable if one considers the growing trend and possibilities to carry out one's profession from the private residence. The court did not establish that legal

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Chappel v the United Kingdom, Judgement of 30 March 1989, Series A no. 152 (1989), pp. 12-13, § 26 and pp.21-22, § 51)

[121] Para. 30 of *Niemietz*

[122] Para. 31 of *Niemietz*

persons as such have a right to privacy, but this was not to be expected since the applicant was an individual.[123] The court did however find that certain professional or business activities or premises are included in Article 8. The court explicitly referred to the judgements of the ECJ in the *Hoechst* and *Dow*-cases. The cases were not commented, but it is likely to see the *Niemietz* case as a reaction to those judgements and their interpretation of the Article 8.

3.3 Conclusions

Before *Hoechst* the ECJ seemed to be ready to apply Article 8 to undertakings subject to competition proceedings in the case *National Panasonic*[124]. The demands of Article 8(2) were however met, as the court found that the powers of the Commission were in accordance with the law and pursued in the interest of, inter alia, the economic well-being of the society. Thus, the court found the requirement in the ECHR of a legitimate aim fulfilled. Whether also "necessary in a democratic society" was left unanswered. In *Hoechst* and the *Dow*-cases the application of Article 8 to legal persons was dismissed when the court examined the right more closely.[125]

A more refined analysis was made in *Hoechst*, based on the idea of protection against arbitrary and disproportionate conduct on part of public authorities. This principle was to be found in the legal orders of the Member States and deemed to be a general principle of Community law. Due to divergences between the Member States in regard to the protection afforded, the principle of the inviolability of the home was not extended to business premises. Article 8 was therefore interpreted not to include business premises. It also seems quite hard to expect the court to award undertakings a right to inviolability of the premises, without case law or Member States practice. In my opinion, the same reasons for a right to privacy do not apply for legal persons as for natural persons. An undertaking is in no need of a private life. What it could benefit from is protection against arbitrary interference.

If one turns to the previous case law of the Court of Human Rights, the *Chappell* [126]case concerns an investigation that had been carried out at the premises of a company. During the search the authorities also entered the bedroom of the owner of the company, which was located in the same building, and seized private correspondence. It has been argued that the ECHR institutions already in this case extended the protection of Article 8 to legal persons. This is however probably to stretch the judgement too far, as it was mainly the private life of the applicant that was at issue.[127] However, the applicability of Article 8 was not

[123] Rick Lawson, supra note 23, page 243
[124] *National Panasonic v Commission*, supra note 60, para. 19-20
[125] Rick Lawson, supra note 23, page 241
[126] *Chappell*, supra note 119
[127] Rick Lawson, supra note 23, page 241

excluded on the ground that the search was directed against business activities. In the *Niemietz* case the court did not establish that legal persons as such have a right to privacy.[128] The court did however find that certain professional or business activities or premises are included in Article 8.

Obviously, there is a difference between the interpretations of the Article 8 made by the two courts. It needs however to be added that the ECJ adopted its interpretation before the Strasbourg organs had ruled on the protection to be afforded. Before the *Niemietz* case Article 8 have been looked upon as dealing with protection of private dwellings only. The response of the Community Courts remains to be seen. It has been submitted that the "teleological" method used by both courts is the reason conflicting interpretations occur.[129] The ECJ applied the provisions with regard to undertakings in the context of competition proceedings thereby also having regard to the objectives and rules of EC Competition law. The Court of Human Rights applied and interpreted the same provisions in criminal proceedings regarding individuals and in accordance with the objectives of the ECHR.[130] The aim of the ECHR is to protect the individual as a human being, whereas the Community's aim is to further economic and social integration. Also the relatively vague wording of Article 8 may contributes to the possibility of different interpretations.

The core question for undertakings is the level of protection actually afforded, although diverging interpretations for example have the impact of harming the credibility of the ECJ as regards human rights protection. According to the *Hoechst* case, the Commission has to comply with national procedural safeguards only if an undertaking opposes to an investigation. It is submitted that this should have to be done in the course of every investigation. This would probably mean the issuing of search warrants in many occasions. An alternative would be to set up rules of procedure that would have to be followed throughout the Community. A harmonisation would avoid unnecessary delay and promote the equal treatment of undertakings. A way of strengthening the safeguards against arbitrary interference that has been suggested is a system of "European search warrants" issued by Community courts. In principle this seems to be a good idea, but with the centralised system of courts of today it would probably prevent the Commission from efficient executing of the competition rules due to the time this practice would need. Instead, the requirement to obtain a search warrant from competent national authorities could together with other safeguards be laid down in Community law as procedural rights for undertakings under investigation.

[128] Rick Lawson, supra note 23, page 243
[129] A.G.Toth, The European Union and Human Rights: The Way Forward, C M L Rev. vol. 34 (1997), page 499
[130] A.G.Toth, The European Union and Human Rights: The Way Forward, supra note 129, page 500

4 Procedural Rights

In the first part of the chapter Article 6 and its interpretation will be described. Its relevance in competition procedures will be outlined together with the provisions in Community law relevant for this analysis. As in the previous chapter, a closer examination will be made of two cases, where the Article has been interpreted differently by the Court of Human Rights and the ECJ.

4.1 Article 6 of the ECHR

Article 6 of the ECHR is the most frequently invoked Article before the Strasbourg organs. The case law is therefore extensive.[131] The content of the Article is sometimes referred to as the right to a fair trial. More specific, the Article deals with two kinds of proceedings. The Article is applicable when someone's civil rights and obligations are determined or when criminal charges are pressed against someone. Article 6(1) can be invoked in both kinds of proceedings whereas Article 6(2) and 6(3) only in the latter.

Article 6(1)of the ECHR has the following wording:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*[132]

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[131] Hans Danelius, supra note 56, page 123

[132] *Art.6 (2). Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

Art.6 (3). Everyone charged with a criminal offence has the following minimum rights:

a. to be informed properly , in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The fundamental right in Article 6(1) is the right to a fair trial. In sum, everyone has the right to a fair and public hearing within reasonable time by an independent and impartial tribunal. The tribunal shall be established by law. The main rule is that the judgement shall be pronounced publicly. Article 6(2) contains the presumption of innocence and Article 6(3) contains additional minimum guarantees for criminal proceedings.

In the determination of someone's "civil rights", Article 6(1) is applicable if the dispute is genuine and of a serious nature. The disputed right shall have its origin in national law and the right shall be able to be classified as "civil". It is not decisive how the right is classified in national law. Instead, the approach of the court is to look at the substance of the right. The notion shall be given an autonomous interpretation rather than a derivative or formal one. The European Court has therefore found Article 6(1) applicable in many cases where national law classified the right as being of administrative nature rather than civil.[133] The kind of authority handling the case is also of minor importance.

Also "criminal charges" shall be interpreted in an autonomous way, which means that the interpretation shall be independent and generally applicable. How the act is classified in national law is a starting point, but is not decisive. Of greater importance are the nature of the offence and the degree of severity of the penalty.[134] When determining a criminal charge in the meaning of Article 6(1), it shall also be considered if the provision infringed is of a general nature and a prohibition against an act that may be committed by anyone. If addressed to a particular group, it shall apply to all citizens with the particular characteristic. The court has held that the purpose of the sanction for criminal charges is both deterrence and reparation, not only compensation in money.[135] Comprised by the Article are trials that results in a determination of whether a person is guilty of a crime charged and the subsequent establishment of a penalty if this is the case. The Article does not comprise other kinds of criminal proceedings like detention and searches or pardon. Furthermore is offences subjected to disciplinary proceedings not comprised.[136] It shall also be borne in mind that in the case law of the Court of Human Rights it has been stated that a restrictive interpretation of the Article would be against the object and the purpose of the provision.[137]

The requirements inherent in the concept of "fair hearing" of Article 6(1) are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. The court has stated that the Contracting States have greater latitude when

[133] Hans Danelius, supra note 56, page 129
[134] *Case of Engel and Others*, Judgement of 8 June 1976, Series A no. 22 (1977), para.82
[135] *Öztürk*, Judgement of 21 February 1984, Series A no. 73 (1984); *Bendenoun*, Judgement of 24 February 1994 no. 284 (1994)
[136] Hans Danelius, supra note 56, page 136
[137] *Sunday Times case*, Judgement of 26 April 1979, Series A no. 30 (1979), paragraph 55.

dealing with cases concerning civil rights and obligations than they have when dealing with criminal cases.[138]

A principle enshrined in the right to a fair trial, at least where there are criminal charges, is the right not to incriminate oneself. This was established in the *Funke*[139] case as will be seen below. The person accused of having committed a crime does not have to contribute to the investigation of the alleged crime. He does not have to supply evidence or make statements. It is for the prosecutor to prove the guilt of the accused. The accused has a right to remain silent and does not have to contribute in any way to the investigation.[140]

4.2 Relevance in Competition cases

According to the case law of the Court of Human Rights, administrative decisions which modify, annul, suspend or directly interfere with a civil right will be subject to Article 6, but recommendations, reports or advice will not. [141]Article 6 is of importance also for the EC institutions when they are acting in their respective field of competence. The Community courts have established the right to a fair hearing as a fundamental principle of Community law. The applicability is however confined to proceedings which are initiated against a person and are liable to culminate in a measure unfavourable affecting that person.[142] Applicants in Competition law matters have invoked the Article in several cases before the ECJ, arguing that EC antitrust procedure does not meet the requirements of the Article. In the cases *Fedetab*[143] and *Pioneer*[144] it was argued from the applicants that the decisions of the Commission were unlawful as Article 6 had been infringed. They considered that the Commission was not "an independent and impartial tribunal" in the words of the ECHR, as it combines the functions of prosecutor and judge. The court considered that the provision did not apply since the proceedings in the Commission are administrative and the Commission could not be considered as a "tribunal" within the meaning of Article 6 of ECHR.

[138] See e.g. *Dombo Beheer B.V. v The Netherlands*, Judgement of 27 October 1993, Series A no. 274 (1994)
[139] *Funke and Others v France*, Judgement of 25 February 1993, Series A no. 256 (1993)
[140] Hans Danelius, supra note 56, page 189
[141] This is due to the distinction between decisions that only have indirect or incidental consequences of a purely factual nature for civil rights and those proceedings where the result is decisive for private rights and obligations. Only the latter kind is covered by Article 6. See *Ringeisen*, Judgement of 23 July 1973, Series A no. 16 (1973), para. 94
[142] Koen Lenaerts & Jan Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process, C M L Rev. vol. 34 (1997), page 535
[143] *Heinz van Landewyck Sarl v Commission (Fedetab)*, Joined Cases 209-215 & 218/78 [1980] E.C.R. 3125
[144] *SA Musique Diffusion Francaise and Others v Commission*, Cases 100-103/80 [1983] E.C.R. 1825

However, as will be discussed later, this reasoning is now questionable after the judgement of the Commission of Human Rights in the case *Stenuit v France*[145].

In Article 19 of Reg. 17 it is stated that the parties have a right to present their view of the case before the Commission takes its decision regarding an agreement or imposes a fine. This right is referred to as the right to be heard. Also third parties have this right, if they can show a sufficiently strong interest. The hearing regulation 99/63 has been protecting the right to be heard, as it deals with the hearing of parties in certain proceedings under Articles 85 and 86. It has recently been replaced by the new hearing regulation 2842/98 in order to improve certain procedural aspects. The new hearing regulation entered into force in February 1999. The application rules of the Articles 85 and 86 prescribe two separate procedures. First, a preparatory investigation procedure takes place with the purpose to obtain information and documents necessary to examine existence and scope of a possible infringement. When this stage is completed, a statement of objections may be sent to the undertaking thus initiating the inter partes procedure ruled by Reg. 2842/98.[146]

The "Statement of Objections" contains the principal objections of the Commission, details of the alleged infringement and the time-period under which they occurred. It is not necessary for the Commission to elaborate the document in great detail. The essential facts on which the Commission relies must however be clearly stated.[147] The parties are then invited to reply to this document within a certain time limit, normally two months. If the Commission later submits further statements of infringements, a new statement of objections will have to be drawn up, with a new time limit for replies. The document is said to be a means to enable undertakings to exercise their right to a fair hearing.[148] Although not required to, the Commission normally also provides the undertaking with a list of document in its possession.[149] The parties are entitled to access to all documents save those drawn up by officials for the case and those being of a confidential nature in order to prepare their reply.[150] Article 20 of Reg. 17 lays down the "professional secrecy" rule. Article 20(2) states that the Commission and the competent authorities of the Member States, their officials and other servants are under a duty not to disclose information acquired under Reg. 17 and covered by

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[145] *Société Stenuit v France*, Judgement of 27 February 1992, Series A no. 232 (1992), para. 72-74

[146] *National Panasonic v Commission*, supra note 60

[147] *ACF Chemiefarma v Commission*, Case 41/69, [1970] E.C.R. 661

[148] *BAT&Reynolds v Commission*, Case 142&156/84, [1987] E.C.R. 4487

[149] Valentine Korah, supra note 57, page 139

[150] The courts have recognised as confidential documents those containing business secrets, internal documents of the Commission, correspondence between the Commission and the Member States, correspondence between undertakings and their lawyers and correspondence between the Commission and third-party undertakings which fear reprisals from the investigated undertaking. Valentine Korah, supra note 57, page 140

professional secrecy.[151] Disclosed information shall not be communicated if it contains business secrets of any party, or else is of a confidential nature. The undertaking in question may reply to everything contained in the statement of objections. They may also submit documents and request the hearing of persons to confirm their assertions.[152] Submitted material that is of a confidential nature shall be identified, and a separate non-confidential version shall be provided. If this is not done, the Commission may assume that the documents contain no confidential information.[153] The right to access to the file has been developed in the case law of the ECJ. It is seen as the essential precondition of the right to be heard.[154] In the so-called *Soda-Ash cases*[155] the CFI ruled that it is not the Commission unilaterally that decides which documents that are useful for the defence. Seen otherwise, the Commission could justify the non-disclosure of documents by arguing that none of them could exculpate the undertaking. Access to the file is therefore not limited to document the Commission considers to be relevant to an undertaking's right of defence. It was also held that the general principle of equality of arms requires that the knowledge of the file used in the proceedings, shall be the same for the Commission and the undertaking concerned.

The new hearing regulation 2842/98 has enhanced the possibilities for parties of being heard orally. If a party to which the Commission has raised objections request an oral hearing in their written comments, this shall be granted.[156] Previously, a sufficiently strong interest had to be shown and the Commission was not obliged to hear persons orally after they have had the opportunity to submit written observations, if they did not intend to impose a fine or a penalty payment.[157] Applicant and complainants may also request oral hearings in their written comments, but here the Commission has discretion as to whether this should be granted or not.[158] The new hearing regulation also explicitly states that the Commission shall make appropriate arrangements for allowing access to the file, whereas Reg.99/63 was silent on this topic.

Article 10 of Reg. 2842/98 states that oral hearings shall be conducted a special hearing officer. This office was created in 1982 in order to contribute to the objectivity of the procedure and also to ensure that the rights of the defence are

[151] Article 20(1) deals with restriction on the use of information. It provides that information acquired under Reg. 17 shall only be used for the purpose of the relevant request or investigation.
[152] Article 4(2) of Reg. 2842/98
[153] Article 13(1)&(2) of Reg. 2842/98
[154] Koen Lenaerts & Jan Vanhamme, supra note 142, page 541
[155] *Solvay v Commission*, Case T-32/91, [1995] E.C.R. 1775 and four other cases relating to the Soda Ash decisions.
[156] Article 5 of Reg. 2842/98
[157] Article 7(1) of Reg. 99/63
[158] Article 8 of Reg. 2842/98

respected.[159] He has the decision power with regard to if oral hearings shall take place and ensures the proper conduct of the process if it is instituted. In 1994 new terms of reference was published. The major change was that the role of the hearing officer was extended to the whole of the Commission's administrative procedure.[160] Among other duties, he is responsible for ensuring that proper access to the file is granted. In the Mandate of the Hearing officer, he is described as an independent person intended to contribute to the objectivity, transparency and efficiency of the Commission's competition proceedings.

The hearing officer is responsible for the preparation of the oral hearing and conducts the hearing itself. The hearing is not public and regard shall be taken to the interest of the undertakings of protecting their business secrets.[161] There are no specific rules for how the hearing shall be carried out but usually the hearing starts with the case handler stating the facts and issues as seen by the Commission. The undertaking in question then gives its view on the case and thereafter the officials of the Commission may ask questions to the undertaking. Also the competent authorities are invited to ask questions and thereafter the parties may give final observations. The hearing seldom lasts for more than a day.[162] Statements made by persons heard will be recorded on tape, an invention of Reg. 2842/98.[163] Before a decision is taken in the case, an Advisory Committee consisting of national competition authorities must be consulted. The decision may only be based on infringements that the undertaking has had the opportunity to give its view on.[164] A report of the hearing is made which contains the views and conclusions of the hearing officer. The report is not available to the parties, as it is an internal document of the Commission.

It is for the Commission to establish an infringement of the Competition rules. Once evidence has been presented to the CFI, the parties shall prove its inadequacy or that conclusions drawn therefrom are incorrect.[165] The burden of proof of the Commission is not defined in a certain way or to a certain level, but is considered to be high. According to some authors, this is to be explained by the characteristics of penal law that the procedure in Competition cases contains.[166]

[159] Marc van der Woude, Hearing Officers and EC Antitrust Procedures;The Art of Making Subjective Procedures More Objective, C M L Rev. vol. 33 (1996), page 541
[160] Marc van der Woude, supra note 159, page 540
[161] Article 12(3) of Reg. 2842/98
[162] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 95
[163] Article 12(2) of Reg. 2842/98
[164] Article 2 of Reg. 2842/98
[165] Valentine Korah, supra note 57, page 137
[166] Karl-Johan Dhunér & Jens Hedström, supra note 61, page 91

4.2.1 The Orkem Case[167]

The background of the case was that the Commission had carried out an investigation referred to in Article 14 of Reg. 17 of Orkem. Subsequent to the investigation, information had unsuccessfully been requested under Article 11(1). A decision was issued on 9 November 1987 requiring the company to answer a number of questions in accordance with Article 11(5) of Reg.17. The request of information contained two types of questions; questions relating to factual information and questions relating to the participation of the undertaking in forbidden agreements or concerted practices. Orkem challenged the decision before the ECJ on three grounds. First, it was argued that the decision in reality amounted to a statement of objections, on which they had not had an opportunity to comment. Secondly, Orkem complained that the Commission had misused its power to obtain information. The Commission had endeavoured to obtain documents that only could be required by virtue of Article 14. Furthermore, they considered that the Commission had breached the principle of proportionality by trying to obtain unnecessary information. The third argument was that the Commission had infringed the rights of the defence. Orkem claimed that the Commission used the contested decision to force it to incriminate itself by confessing to an infringement of the competition rules. This was contrary to Community law insofar as the right not to incriminate oneself is a principle upheld by the ECHR and the ICCPR.[168] The first two arguments were dealt with quite briskly by the ECJ. The court held that the decision was not to be considered as a statement of objections. It was also confirmed that the two procedures under Article 11 and Article 14 are completely separate from each other. Information may therefore be requested after an inspection, to clarify or complete information already obtained. Furthermore, the court held that the requested information did not exceed what could be regarded as necessary in the light of the purpose of the investigation. The court also reminded of its previous case law stating the broad discretion of the Commission in these matters. Consequently there had been no unlawful use of Article 11.[169] The third argument put forward by Orkem was partly accepted by the court. The ECJ began by looking at Regulation 17. The court held that there was not embodied any right in the regulation to remain silent. On the contrary, it imposes an obligation to co-operate actively. The undertaking must submit all information about the subject matter of the investigation. Thereafter it was considered whether the general principles of Community law recognised a right to remain silent.[170] In a comparative analysis of the law in the Member States the court found that the right not to give evidence against oneself was only granted to natural persons in criminal proceedings. Legal persons could not rely upon such a principle in relation to infringements in the economic

[167] *Orkem v Commission*, supra note 64
[168] Para. 18 of *Orkem*
[169] Para. 13-17 of *Orkem*
[170] Para. 27-28 of *Orkem*

sphere.[171] As regards Article 6 of the European Convention, it could be relied upon by undertakings investigated for infringements of competition law. The court stressed however that

> *"neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself".*[172]

The need to safeguard the rights of the defence being a fundamental principle of Community law, the court found it necessary to consider limitations on the Commission's powers of investigation.[173] The court elaborated its earlier case law by establishing that although certain rights of the defence were only of importance for the contentious proceedings after the delivery of the statement of objections, other rights had to be respected already at the stage of the preliminary inquiry.[174] The Commission is entitled by virtue of Article 11 to compel an undertaking to provide all necessary information concerning facts known to it and disclose documents, even if those documents may be used to establish the existence of anti-competitive conduct. However, the rights of the defence may not be undermined and therefore the Commission may not compel an undertaking to answer questions that might involve admissions of infringements. It is the task of the Commission to prove the existence of such infringements.[175] With regard to the different categories of questions this means that questions relating to factual information are admissible whereas questions relating to participation is not. The part of the decision that consisted of questions that had the effect of requiring Orkem to admit infringements of the competition rules was annulled.

4.2.2 Analysis of the case

In this case the court refused to recognise a right not to give evidence against oneself. In the opinion of the ECJ, such a right could neither be derived from Article 6 of ECHR or from a comparative analysis of the administrative laws of the Member States. This judgement also contains the ECJ's first ever reference to the ICCPR.[176] The Regulation 17 contains no right to remain silent and instead imposes a duty of active collaboration on undertakings. The essential outcome of the case is that there is as such no right to protection against self-incrimination. The Commission may however not in the preliminary investigations formulate its questions in a way that would jeopardise the right to a fair hearing in later stages. Although the information requested under Article 11 may be used to establish

[171] Para. 29 of *Orkem*
[172] Para. 30 of *Orkem*
[173] Para. 32 of *Orkem*
[174] Para. 33 of *Orkem*
[175] Para. 34-35 of *Orkem*
[176] The International Covenant of Civil and Political Rights was seen as non-applicable because of its reference to persons accused of criminal offences in court proceedings only.

anti-competitive conduct, the Commission may not compel undertakings by means of decisions under Article 11(5) to submit information that involve admissions to such conduct. On the other hand, there seems to be no restrictions of the requiring of incriminatory documents.[177] The distinction between the two categories of questions may be hard to make in some cases. Just as in the *Hoechst* case, subsequent case law from the European Court of Human Rights shows that the court in Strasbourg interprets the European Convention differently.

In *Orkem* the ECJ stated that Article 6 may be relied upon by an undertaking subjected to an investigation relating to competition law. This statement was not specified as regards any particular paragraph of the provision. It has been suggested that this mean that the earlier rulings where the court held that the Commission could not be classified as a tribunal have lost their importance.[178]

4.2.3 The Funke Case[179]

Mr Funke was of German nationality but lived and worked in France. The French customs authorities visited his home on 14 January 1980 and asked for information about his assets abroad. He admitted having bank accounts abroad but denied having bank statements at his home. The customs officers then carried out a search in the house of Mr Funke. In the search bank statements and chequebooks were found and seized. The officers asked for statements for the previous three years for certain banks in Germany, Poland and Switzerland, documents that Mr Funke did not submit. The customs authorities then initiated proceedings against Mr Funke based on the Customs Code for his refusal to produce the documents. The Strasbourg police court fined him and sentenced him also to a further daily penalty until such time he had produced the documents. The Court of Appeal confirmed the judgement and the Supreme Court later dismissed the appeal holding that Article 6 of ECHR did not restrict the collection of evidence in this case.

Mr Funke applied to the Commission of Human Rights arguing, inter alia, that his rights under Article 6(1) and 6(2) had been infringed because he had been compelled to co-operate in a prosecution against himself. Nothing had prevented the customs authorities to seek international assistance and in this way obtain the necessary evidence. In the opinion of the Commission there had been no breach of the aforementioned articles. They reached their conclusion mainly on the basis of an assessment of the special features of the investigation procedure in business

[177] Josephine Shaw, supra note 110, page 332
[178] Walter B.J. van Overbeek, The right to Remain silent in Competition Investigations: The Funke Decision of the Court of Human Rights Makes Revision of the ECJ's Case Law Necessary, ECLR vol. 3 (1994), page 132
[179] *Funke and others v France*, supra note 139

and financial matters. Regard was particularly taken to its aim of protecting the county's vital economic interests.[180]

The European Court of Human Rights delivered its judgement on 25 February 1993. The French government argued that the Customs Code did not require taxpayers to be systematically investigated. Instead, there was a duty for taxpayers to keep certain papers and make them available on request. The government also explicitly referred to the *Orkem* judgement when they asserted that an obligation to inform the authorities was not contrary to a fair hearing.[181] The court quashed this line of reasoning. The court noted that when the customs authorities were not able, or not willing, to obtain the documents by some other means, they attempted to compel the applicant to produce them. This means that Mr Funke was to provide the evidence for the offences he allegedly had committed. The French Customs Code did contain the authorisation of the conduct of the customs officers. The court held however that the special features of customs law could not justify the infringement of the right of anyone *"charged with a criminal offence"*, within the autonomous meaning of this expression, to remain silent and not to contribute to incriminating himself that had taken place.[182] Consequently, the court ruled that Mr Funke's rights under Article 6(1) had been violated.[183]

4.2.4 Analysis of the case

The Funke case clarifies the scope of the Article 6(1) to include a right to remain silent and not to incriminate oneself, at least where there are criminal charges.[184] This judgement was the first where the Court of Human Rights has explicitly established the above principle. With regard to its earlier case law, it was maybe not such a surprising finding of the court. The court held in the *Sunday Times*[185] ruling that a restrictive interpretation of Article 6 *"would not be consonant with the object and purpose of the provision"*. An interesting point is that the Court of Human Rights found the Article 6 applicable not only in criminal procedures in the strict sense, but also in administrative procedures like the Funke case, which concerned enforcement proceedings of French customs law. This is in line with the case law of the court concerning the autonomous interpretation of the notion "criminal charge".[186]

[180] Para. 43 of *Funke*
[181] Para. 42 of *Funke*
[182] Para. 44 of *Funke*
[183] The court held that there was no reason to investigate also whether his rights under Article 6(2) had been violated.
[184] Walter B.J. van Overbeek, supra note 178, ECLR vol. 3 (1994), page 129
[185] *Sunday Times case*, supra note 137, para. 55
[186] Walter B.J. van Overbeek, supra note 178, page 130

4.3 Conclusions

The Court of Human Rights went much further in the *Funke* case than the ECJ did in *Orkem*. Whereas ECJ held that there was no right to remain silent and to not supply factual information, the Court of Human Rights included the right to remain silent under Article 6 and consequently also for Mr Funke.[187] If the Commission should comply with the case law of the European Court of Human Rights, this would preclude them from requiring answers even to questions relating to factual information. Reading the judgement in the *Funke* case, this might however only be necessary if competition proceedings are qualified as being of a criminal nature. It has been suggested in the literature that if the *Funke* judgement was to apply to competition matters, it would oblige the Commission to rely much more on their powers to carry out on-the-spot investigations.[188] According to Strasbourg case law, the use of coercive measures for acquiring documents is not a violation of the privilege against self-incrimination.[189]

In the *Orkem* case the ECJ can be said to have defined a Community Principle. In finding that there was neither a right to remain silent nor a right not to incriminate oneself, the ECJ seems to have wanted to ensure the efficient enforcement of competition law. On the other hand, these considerations have been balanced against the interest of protecting the fairness of the procedure.[190] The restrictions on permissible questions that were established show the adjustment made. It is possible that investigations have been the preferred alternative for obtaining information as a consequence of this judgement. The duty to co-operate actively still remains and there are no limitations for requiring the undertaking to provide incriminatory documents during investigations. It is also established case law that the officials of the Commission do not have to identify precisely in advance the documents required, but "fishing expeditions" are not allowed.[191] This is certified through the obligation of the Commission to specify the subject matter and purpose of the investigation.

Consequently, also Article 6 has been subjected to diverging interpretations by the ECJ and the Court of Human Rights. This is probably due to the same reasons as the different interpretations of Article 8. ECJ interpreted the Article in accordance with the objectives of the Community. It is likely that the interest of efficient enforcement of competition law influenced its interpretation of Article 6. As the subsequent *Funke* judgement was the first where Article 6 was interpreted to include a right to remain silent and not to incriminate oneself, it is however not to be expected that the ECJ should read this into the article on its own initiative.

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[187] Walter B.J. van Overbeek, supra note 178, page 130
[188] Walter B.J. van Overbeek, supra note 178, page 130
[189] *Saunders v The United Kingdom*, Judgement of 17 December 1996, no. 24 (1996-VI), para. 69
[190] Walter B.J. van Overbeek, supra note 178, page 132
[191] *Hoechst AG v Commission*, supra note 67, para. 27

5 Does the Competition Law Procedure comply with the Articles 8 & 6 ?

In this chapter I will make an attempt to evaluate the competition procedure of the European Community with regard to if the requirements of the Articles 8 and 6 in the ECHR are met. The connection I hereby make between human rights and undertakings might seem strange at first sight. A traditional apprehension of the human rights protection sees natural persons as the only subjects of such rights, a fact shown by their concept as *human* rights. However, neither the wording of the convention nor the Strasbourg case law seems to make any distinction between natural persons and legal persons.[192] Naturally, some of the rights by definition cannot be applied to legal persons. An example of such rights directed specifically to human beings is the right to life.[193]

The Court of Human Rights cannot today review action by Community institutions, due to lack of jurisdiction. The Strasbourg court will therefore not deal with possible violations of Article 8 or 6 by these organs. It is however to be expected in the future that for example the Commission increasingly will have to delegate and decentralise its actions to national authorities.[194] Decentralisation as a consequence of an enlargement of the European Community is a very likely perspective for the 21st century. If national authorities enforce Community law a review by the Court of Human Rights is possible. Also for example a future accession of the Community to the Council of Europe may make such a review possible.

5.1 Compliance with Article 8

In the *Hoechst* case the ECJ refused to apply Article 8 to business premises. However, protection against arbitrary or disproportionate intervention shall be granted also to legal persons, as it was considered to be a general principle of Community law. As the Court of Human Rights was ready to include in the

[192] Article 34 of the ECHR provides: "The Court may receive applications from *any person, non-governmental organisation or group of individuals* claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention or of the protocolas thereto."(emphasis added) In the case *Stenuit v France* (supra note 145), the Commission of Human Rights accepted that Article 6 is may be invoked by corporations. Another example is *Dombo Beheer B.V. v The Netherlands* (supra note 138).
[193] Rick Lawson, supra note 23, page 236
[194] A tendency in this direction can already be seen, see for example "Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty" (93/C 39/05)

protective scope of the Article also business premises, it might still be interesting to analyse whether the competition procedure is in agreement with the Article 8. Interference with the rights contained in Article 8(1) are permissible if the conditions in Article 8(2) are fulfilled. It has been stated in the case law of the Court of Human Rights that the exceptions contained in Article 8(2) shall be interpreted narrowly. The need for their applicability must be convincingly established in every case.[195] This line of reasoning was partly used by the ECJ in the *National Panasonic* case, where it held that the inspection carried out had a legitimate aim, as the rules of Reg. 17 contributes to the maintenance of the competition policy.[196]

The *Funke, Crénieux, Miailhe and Dobberlin*[197] cases previously analysed in regard to Article 6, also concern an aspect of Article 8. The European Court of Human Rights ruled that the searches that had been carried out at the houses of the applicants, with the aim of obtaining information about their assets abroad, had been a violation of Article 8. It was therefore considered whether the exception in Article 8(2) was applicable. The court held that the legislation and practise concerning house searches and seizure did not provide adequate and effective protection against abuse. The customs authorities had very wide powers in that they had exclusive competence to assess expediency, number, length and scale of inspections. The legislation did contain conditions and restrictions, but they appeared too low and full of loopholes, in the absence of a requirement of a judicial warrant. Therefore the interference with the applicants rights were disproportionate in relation to the aim pursued.[198]

Investigations are today carried out by virtue of Article 14 in Reg. 17 without prior judicial control. The Commission has exclusive competence in deciding when and where to act. No reasonable grounds for carrying out inspections have to be shown. As stated above, interference with the rights contained in Article 8 are permissible if the requirements in Article 8(2) are met. That the investigations are in accordance with Community law is indisputable. As regards a "legitimate aim" it could be argued, as in *National Panasonic* case, that for example the aim is the economic well-being of the "country". The last condition, that the interference shall be "necessary in a democratic society", is more a question of interpretation as it is a relatively vague criterion. The interference shall also be proportionate in relation to the aim pursued.

The judgement in the *Funke* case may imply that if the EC Antitrust Procedures should fully correspond with the ECHR, prior judicial control is needed before an

[195] *Klass and Others v Germany*, Judgement of 6 September 1978, Series A no. 28 (1979), para. 42
[196] *National Panasonic v Commission*, supra note 60, paras. 19-20
[197] *Funke and Others v France*, supra note 139
[198] *Funke and Others v France*, supra note 139, para. 57

investigation is executed.[199] It was held by the court that it was not necessary to determine if Article 8 contains the requirement that house searches and seizures should be judicially authorised in advance, as the interferences in the Funke case were clearly incompatible with the Article in other respects.[200] The ECJ seems however not to think this is necessary. In the case *Dow Chemical Ibérica*[201] the ECJ held that the opportunity to contest decisions before the court and to apply for suspension through an interim order is equivalent to a judicial warrant issued in advance.[202] In the *Hoechst* case it was suggested by the Advocate General Mischko that an "European search warrant" should be issued by the ECJ prior to investigations. The reason for his suggestion was a fear that the mechanisms of Article 14(3) would become unworkable in practice due to increased opposition and the Commission therefore in many cases will have to apply for a search warrant in compliance with national procedural safeguards anyway. Also in the literature has it been suggested that the ordering of "dawnraids" should be subjected to independent jurisdiction.[203]

5.1.1 Conclusion

Whether the investigations under Article 14 are in accordance with Article 8 seem to be a question of interpretation of the exceptions in Article 8(2) compared to the competition procedure. It should however be noted that the wide powers of the Customs authorities and the absence of a judicial warrant which made the interference disproportionate in relation to the aim pursued in the Funke case, are features that also can be seen in the practice of the Commission's enforcement of the competition law.

5.2 Compliance with Article 6

To guarantee the rights of a contradictory nature contained in Article 6 in the competition procedure is a quite delicate task. The competition procedure is administrative and inquisitorial in nature. When applying the treaty's competition rules the Commission is furthermore bound to use the procedural rules in Reg. 17/62. The regulation predates to a large extent the case law from the European Court of Human Rights and the ECJ on fair proceedings and rights of the defence.[204] The nomination in 1982 of an independent hearing officer has been one of the means to soften this contradiction.[205]

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[199] Denis Waelbroek & Denis Fosselard, Should the Decision-Making Power in EC Antitrust Procedures be left to an Independant Judge?-The Impact of the ECHR on EC Antitrust Procedures, Y E L, vol. 14 (1994), page 138
[200] *Funke and Others v France*, supra note 139, para. 50
[201] *Dow Chemical Ibérica SA and Others v Commission*, Joined Cases 97-99/87, [1989] E.C.R. 3165
[202] *Dow Chemical Ibérica SA and Others v Commission*, supra note 201, para. 8
[203] Denis Waelbroek & Denis Fosselard, supra note 199, page 138
[204] Marc van der Woude, supra note 159, page 532
[205] Marc van der Woude, supra note 159, page 532

5.2.1 The Rights of the Defence

Except from the rights contained in the Regulation 17/62 and the Hearing Regulation 2842/98 there are a number of other rules that the Commission must respect in competition proceedings. They are usually referred to as the rights of the defence.[206] The expression has been said to equate with the concept of the right to a fair hearing.[207] The ECJ has stated that basically the rights of the defence in competition cases consist of the obligation of the Commission to make its case known to the undertakings concerned and the right of the undertaking to reply.[208]

In the *Hoechst* case it was held that already during investigations certain rights of the defence must be respected. Legal assistance may be utilised during the investigation and in the *AM&S*[209] case the privileged nature of correspondence between lawyer and client, the so-called legal privilege, was recognised. Also the latter right must be respected at preliminary inquiry stage. To some extent there is also a protection against self-incrimination, in that undertakings may not be compelled to answer questions involving admissions of infringements. This was established in the *Orkem* case. When the statement of objections has been delivered there is a right for the undertaking to be heard on the subject of the Commission's objections.[210] Also other natural or legal persons may be heard.[211] In its final decision the Commission may only rely on objections to which the undertaking has been offered to give their view.[212] During the procedure, the Commission shall supply the undertaking with the information necessary for the defence.[213] There is also a right to have access to the file. The Commission is not under a duty to give access to the entire file, as has been mentioned before. The confidential material can however not be used as evidence.[214] At the stage of the oral hearing, the hearing officer shall ensure that the rights of the defence are respected. This includes that the bodies involved in the decision-making shall be correctly informed about the undertaking's arguments.

5.2.2 Application of Article 6

Even though Article 6 applies within the Community legal order, does the competition law procedure fall within the scope of that provision? There appears

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[206] R.H. Lauwaars, Rights of Defence in Competition Cases, in Deirdre Curtin & Ton Heukels (Eds.), Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, vol. II, page 497
[207] Koen Lenaerts & Jan Vanhamme, supra note 142, page 534
[208] *Consten&Grundig v Commission*, Cases 56&58/64 [1966] E.C.R. 299
[209] *AM&S Europe Ltd v Commission*, Case 155/79, [1982] E.C.R. 1575
[210] Article 19(1) of Reg. 17/62
[211] Article 19(2) of Reg. 17/62
[212] Article 2(2) of Reg. 2842/98
[213] *SA Musique Diffusion Francaise and Others v Commission*, supra note 144, para 14
[214] R.H. Lauwaars, supra note 207, page 502

to be different opinions on this matter.[215] As has been stated earlier, consistent case law from the ECJ and the CFI rejects the view that Article 6 might be infringed by the decision-making process in antitrust matters. The reason for their opinion is that the Commission is not considered being a tribunal within the meaning of that Article. Article 6(1) provides that its provisions shall be observed in any procedure relating to *"the determination of civil rights and obligations or of any criminal charge"*. The wording of the article indicates that it is rather the nature of the proceedings than the status of the investigating body that is decisive.[216] On two occasions has the Commission of Human Rights classified antitrust procedures resulting in the imposition of fines as having a criminal character within the meaning of Article 6, most recently in the *Stenuit case*[217].

In the *Stenuit* case the Commission of Human Rights observed that the definition of a criminal offence must be based on objective criteria. The practical effect of Article 6 might be lost if the contracting states could at their own discretion classify offences as disciplinary or criminal. The Court of Human Rights has based their decisions on the provision defining the offence, the nature of the offence and the degree of severity of the penalty at stake. The fact that the fines that could be imposed in the case amounted to 5% of the annual turnover showed that the penalty was intended to be deterrent. The fine had to be regarded as a criminal penalty. The Commission also stated that corporate bodies might claim the protection of Article 6 when a criminal charge has been made against them.[218] The Court of Human Rights unfortunately never tried the case as the French legislation was modified, with the result that *Stenuit* withdrew its complaint.

Although Article 15(2) of Reg. 17 states that fines imposed under the regulation shall not be of a criminal law nature, the fact that those fines may amount to 10% of the world-wide turnover implies the opposite together with their clearly deterrent character. Competition law procedures not leading to the imposition of fines, such as decisions concerning mergers or joint ventures, may still be covered by Article 6(1) because they concern the freedoms of undertakings to carry on their business and thus also the determination of civil rights and obligations.[219] It should however be noted that the scope of action is greater for cases dealing with civil cases concerning civil rights and obligations. On the XVIIth congress of FIDE[220] that was held in Berlin 1996, the topic was "Procedures and Sanctions in Economic Administrative Law". Among other issues, sanctions against private parties were discussed. In the report of the congress a division was made between compensatory and punitive sanctions. Compensatory sanctions have the

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[215] See for example: R.H.Lauwaars, supra note 207, page 508, for a negative answer and Denis Waelbroek & Denis Fosselard, supra note 199, page 117, for an affirmative.
[216] Denis Waelbroek & Denis Fosselard, supra note 199, page 117
[217] *Société Stenuit v France*, supra note 145, See also *M & Co. v Germany*, Decision of the Commission of Human Rights of 9 February 1990, 33 YEHCR (1990)
[218] Denis Waelbroek & Denis Fosselard, supra note 199, page 120-121
[219] Denis Waelbroek & Denis Fosselard, supra note 199, page 125
[220] "FIDE" stands for the Fédération internationale de droit européen.

aim of eliminating the injury caused by the illegal behaviour. Punitive sanctions, on the other hand, inflicts a loss on the wrongdoer, and are mostly used for the enforcement of competition rules. Even though the sanctions in Community competition law clearly have a punitive character, it was stressed that Community sanctions are not of a criminal law nature and must be enforced according to the national rules of civil procedure.[221] The view has been expressed that antitrust offences are in practice, although not in theory, criminal offences. This is due to the powers granted to the Commission and the criminal nature of the sanctions. The analogous application of a number of general principles of criminal law and procedure has also been taken to support this view.[222]

5.2.3 Implications

If Article 6 is accepted as a standard for judging the procedure in competition cases, what would be the implications? In antitrust procedures the Commission combines the roles of investigator, prosecutor and judge. This precludes a classification of the Commission as an "independent and impartial tribunal", a fact that is confirmed by the case law from the ECJ. Decisions of the Commission may be challenged before the Community Courts. The parties are therefore not deprived of "a fair and public hearing…by a independent and impartial tribunal". In the case *Le Compte v Belgium*[223] the Court of Human Rights held that the requirements of Article 6 are met if jurisdictional organs which do not themselves comply with the demands in Article 6, are subjected to subsequent control by a judicial body having full jurisdiction and meeting all the requirements of Article 6.[224] The persons concerned by a decision may appeal to the CFI under Article 173 of the EC Treaty. The court does however only review the decisions of the Commission to ensure they are not in error. It may not annul decisions imposing fines or penalty payments, only modify them. Has the CFI then really a full jurisdiction on appeals against Commission decisions in competition cases? The term a "full jurisdiction" does not necessarily refer to the power of remaking decisions entirely as there are two opposing definitions. The more limited one implies only review of the legality.[225] The Court of Human Rights has not explicitly stated the scope of the review necessary for the purpose of Article 6. It has stressed that the question will only be dealt with in the circumstances of each case. The judgement in the *Zumtobel*[226] case, seem however to indicate that it is sufficient for meeting the requirements of Article 6 if a tribunal carries out a review of all facts and submissions.[227]

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[221] Koen Lenaerts, General Report of the 17th Congress of FIDE, vol. II Procedures and Sanctions in Economic Administrative Law, page 538
[222] Christine Van den Wyngaert, Professor of (international) criminal law and procedure, University of Antwerp, Belgium
[223] *Le Compte, Van Leuven and De Meyere*, Judgement of 23 June 1981, Series A no. 43 (1981)
[224] Denis Waelbroek & Denis Fosselard, supra note 199, page 127
[225] Denis Waelbroek & Denis Fosselard, supra note 199, page 128
[226] *Zumtobel*, Judgement of 21 September 1993, Series A no. 168 (1993)
[227] Denis Waelbroek & Denis Fosselard, supra note 199, page 131

Even if it is concluded that the CFI exercises full jurisdictional control over the decisions of the Commission, there are other doubtful questions as regards the compatibility of the competition procedure with Article 6. The "reasonable time" within which a hearing should be held begins to run from the moment the private party has been targeted by the administrative authority, according to Strasbourg case law.[228] In EC antitrust procedures considerable time lapses between moment when a charge is made, i.e. a Statement of Objections, and the hearing. It might also be argued that the principle of "equality of arms" embodied in Article 6(1) is not fully respected as undertakings involved in competition proceedings do not have access to the entire file.[229]

5.2.4 Conclusion

When sanctions in the EC Competition cases are touching upon the definition of being criminal sanctions for criminal offences the thought of creating the same kind of protection as contained in the ECHR for every other criminal charge arises. The opinion of the European Community is however clear, they are not criminal sanctions. With regard to the lack of competence of the Community in criminal law this is understandable. Instead, a community version of safeguards has been created; a set of procedural rights referred to as the rights of the defence. Some are written rules, whereas others are not. For reasons of clarity and legal certainty it would be better to compile these rules and write them down in regulations. One example of such conduct is the right of access to the file, which now is mentioned in the new Hearing Regulation 2842/98[230], but before was only laid down in a Commission Notice.[231] A recognition of the need for a revision of Reg. 17/62 in order to protect the rights of undertakings developed in the case law of the courts, can also bee seen in the literature.[232] Although the rights of Article 6 apply within the Community legal order, it is not certain whether the competition law procedure falls within the scope of the article. In my opinion the ECHR can be applied to the Commission's procedure due to the fact that the offences are in practice of a criminal nature. I do not consider that the review carried out by the CFI amounts to a 'full jurisdiction'. Should this however be the case, there are a number of other questionable features of such proceedings in relation to Article 6. The best way to mitigate this problem is maybe the introduction of an independent

[228] Koen Lenaerts & Jan Vanhamme, supra note 142, page 567
[229] In the case *Dombo Beheer B.V. v The Netherlands* (supra note 137) the Court of Human Rights stated that "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case and his evidence under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.
[230] Article 13(1) of Reg. 2842/98
[231] Commission Notice 97/C 23/03 on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86EC, Articles 65 and 66 ECSC
[232] Frank Montag, The Case for a Radical Reform of the Infringement Procedure under Regulation 17, ECLR, vol 8 (1996), page 434

tribunal before which the Commission may act as prosecutor, as suggested by the German and Italian national competition authorities.[233]

[233] Valentine Korah, supra note 57, page 150

6 The Community Courts and the Court of Human Rights-The Way Forward

In Europe today there exists one fundamental rights convention and two interpreting supranational courts. Each of the two judicial bodies, The European Court of Justice and the European Court of Human Rights, is the supreme authority in its own field. As they both eventually have come to deal with human rights cases, a number of proposals have over the years been discussed for the future protection of fundamental rights in Europe. The most recent contribution to the development is the Opinion 2/94 from the ECJ.

6.1 At Present: The Autonomous Concept of Fundamental Rights of the ECJ

It seems to be quite clear that the ECJ allows itself considerable margin of interpretation when applying and identifying fundamental rights. Human Rights conventions and national constitutions supply guidelines and sources of inspiration.[234] Fundamental rights are a special category of general principles of Community law and are a much wider notion than human rights. In the *Heylens*[235] case, for example, the free access to employment was given the status of being a fundamental right, and it is reasonable to assume that the free market freedoms can be translated into this kind of rights also.[236] The ECJ has stated the special position of the ECHR, but the ECJ has never really specified its position towards the Strasbourg case law.[237] Formally, the Community is not bound by the ECHR and the case law of the Court of Human Rights as it is not a party to the convention. In the analysed cases in this thesis, the ECJ has taken its decision *before* the Court of Human Rights has interpreted the provision in relevant circumstances.

A clear advantage of the above-mentioned system is of course its flexibility. Human Rights can be fitted into the legal order of the EC in a very smooth way. The constant development of the EC and changing needs and objectives can be taken due account to. The ECJ becomes a very powerful institution as it in this way develops and identifies fundamental rights of EC law. The greatest disadvantage is the unpredictability of the present system. Judgements that operate only *ex post facto* do not fulfil the requirement of legal certainty. An

[234] Rick Lawson, supra note 23, page 227
[235] *UNECTEF v Heylens*, Case 222/86, [1987] E.C.R. 4097, para. 14
[236] Jason Coppel & Aidan O'Neill, The European Court of Justice:Taking Rights Seriously?, C M L Rev. vol. 29 (1992), page 689
[237] Rick Lawson, supra note 23, page 228

uncodified system also has the feature of being developed in capricious way, as the court has no control over the types of cases that are to be decided by it.[238] Even though some rights, such as procedural rights, are laid down in regulations this is not generally the case. The system is suffering from a lack of security as the sources the court will use and their exact status is not decided once and for all. Another argument against maintaining the present system is that measures taken by the Member States are subject to supervision by the Strasbourg organs. With expanding activities of the Community, Member States activities are replaced by Community measures, which are not. On the other hand, the principle of subsidiarity has always been of great importance and an enlargement of the Community will probably also result in an increase of the decentralisation as regards the implementation of Community policy and law.[239] It is the practice of the Strasbourg organs to declare inadmissible complaints of human rights violations committed by EC institutions as the Community is not a party to the ECHR. Thus, there is no remedy available if the ECJ fails to live up to the standards of the convention.[240]

The divergences that have been analysed in this thesis are due to the fact that the judicial bodies are interpreting the convention from different point of views. The different objectives of the two courts, protection of the individual vis-à-vis further economic and social integration, are one reason why these differences occur.[241] In competition law the relevant entities are undertakings that may need a different kind of protection than individuals. Conflicting interpretations are likely to harm legal certainty and the authority of the courts. In the long run it does not seem to me to be a sustainable solution to maintain the present system. As the integration proceeds in Europe and the scope of "EC-law" thus widening, these differences are likely to occur more often.

6.2 A Community Catalogue of Fundamental Rights ?

An option that has been discussed is the drawing up of a separate catalogue of fundamental rights.[242] An obvious advantage is that it could be designed to meet the special requirements of the Community.[243] It will be possible to include other rights than those enumerated in the ECHR, for example social and economic rights which are of particular importance to the Communities, to shape an even higher standard within the Community legal order. The flexibility could also be

[238] A.G. Toth, supra note 129, page 495
[239] Francis G. Jacobs, supra note 4, page 567
[240] Rick Lawson, supra note 23, page 231
[241] A.G. Toth, supra note 129, page 499
[242] See for example: Koen Lenaerts, Fundamental Rights to be included in a Community Catalogue, E L Rev. Vol.16 (1991)
[243] A.G. Toth, supra note 129, page 501

maintained if the catalogue is drafted in a not exhaustive way.[244] The enactment of a "bill of rights" would be a considerable step towards a formulation of a European Constitution.[245]

If this solution is realised the authority and need for the ECHR might be questioned, especially with the impending enlargement of the Community. On the other hand, many Central and Eastern European states have previously joined the Council of Europe and have thereby ratified the ECHR. At present there are 40 Member States, which of course has enhanced the role of the convention. The design of a new catalogue would also be of importance with regard to a future role of the ECHR. If drafted in a very similar way, this would diminish the role and authority of the ECHR. The greatest problem that would have to be overcome is to reach a consensus among the Member States on the contents of the catalogue, something that at least before was deemed very hard and even unattainable.[246] Especially with regard to social and economic rights it might be hard to agree on the protection to be afforded, due to different constructions of socio-economic benefits in the Member States.[247] The legal basis would also be a problem in the light of Opinion 2/94.[248] Without a treaty amendment the Community has probably no competence to enact such a catalogue.[249]

6.3 Accession to the European Convention ?

Opinion 2/94 has established that in order for this option to be realised a Treaty amendment is necessary. Article 235 was suggested as the legal basis, an Article that would require a unanimous decision.[250] The court stated however that accession to the Convention on the basis of Article 235 was not possible with regard to the constitutional significance such a decision would have.[251] If an accession would be realised, the Community would adhere to an already existing catalogue of rights, which have been subjected to interpretation during the years. Legal certainty would clearly benefit from this option. It would strengthen the protection of fundamental rights in the Community and clarify the legal basis for the ECJ applying fundamental rights.[252] It would also be an important signal that the Community is determined to improve the protection of human rights by

[244] Koen Lenaerts, supra note 242, page 384
[245] Manfred A. Dauses, supra note 25
[246] See Memorandum on the Accession of the Communities to the European Convention on the Protection of Human Rights and Fundamental Freedoms, adopted by the Commission on 4 April 1979, supra note 37
[247] Manfred A. Dauses, supra note 25
[248] A.G. Toth, supra note 129, page 502
[249] Para. 27 of Opinion 2/94 (supra note 51) states that "No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field."
[250] A.G. Toth, supra note 129, page 502
[251] Opinion 2/94, supra note 51, para. 35
[252] A.G. Toth, supra note 129, page 503

binding itself to an international convention, not just by making political declarations.[253] If one turns to the external affairs of the Union, states seeking admission must satisfy human rights requirements. Also states wishing to enter into co-operation agreements with the Union or to receive aid must commit to respect human rights.[254] With this in mind, it might seem inconsistent that the Union itself is not a party to the human rights convention for Europe.

A great disadvantage is that the ECHR was not drawn up with the special needs of the Community in mind. Some provisions of the convention are hardly relevant for Community law as it now stands while others that would are missing. Another problematic question would be the compatibility with the role of the ECJ as the supreme interpreter of Community law as laid down in Article 164 and Article 164) of the EC Treaty. It has been stated that it would not be sensible to undertake the procedure of accession without also accepting the Strasbourg jurisdiction, as otherwise no practical implications will follow.[255] A scenario where the Court of Human Rights will be called upon to establish, possibly after an exhaustion of local remedies that includes the Community Courts, whether a Community rule or practice is compatible with the ECHR is very likely.[256] An accession will therefore have the effect that the ECJ will pay more attention to the case law of the Court of Human Rights.[257] There is however a not inconsiderable danger that the Court of Human Rights will not take due account to the objectives of the Community when interpreting Community law.[258] The analysed cases *Hoechst* and *Orkem* would probably have been decided differently if the ECJ had to abide by a preferential right of interpretation of the articles of the Court of Human Rights. Institutional and technical problems would also arise that probably will require changes to be made of the ECHR. Examples are the participation of the Community in the Court of Human Rights and the requirement of exhaustion of domestic remedies.[259] A suggested solution to avoid these problems is to simply incorporate the ECHR in the Community's legal order, without including the constitutional and procedural aspect of the convention.[260] The problems of adapting the provisions to the special characteristics of the Community and the authoritative interpretation would still have to be solved though.

[253] Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 37
[254] Philip Alston & J.H.H. Weiler, supra note 2, page 662
[255] Francis G. Jacobs, supra note 4, page 565
[256] A.G. Toth, supra note 129, page 503
[257] Giorgio Gaja, Opinion 2/94, CML Rev. vol. 33 (1996), page 987
[258] A.G. Toth, supra note 129 page 503
[259] A.G. Toth, supra note 129, page 504
[260] Lammy Betten & Delma Mac Dewitt, supra note 1, page 25-26

6.4 Conclusions

The future relationship between Community law and the European Convention on Human Rights is very hard to predict and there are also uncertainties about the future shape and directions of European Organisations. A current trend is the rapidly widening membership of the Council of Europe. The entry of new Member States from Central and Eastern Europe has increased the number of Member States to 40. The Community will probably grow more gradually, as its membership has more far-reaching consequences.[261] In the future the Member States of the Council of Europe will have to act in accordance with the interpretations of the Court of Human Rights, if they shall not themselves suffer the risk of being judged for violations of the ECHR. Their course of action will affect the laws and when the Community Courts are comparing the laws in the Member States before deciding a case, the rulings of the Court of Human Rights might indirectly influence also the judgements of the Community Courts. If this will be the case, the element of conflict will not be very prominent.

Although the present system of fundamental rights protection in the Community has a number of advantages, it does not seem to be the best possible solution for the Community either today or in the future. The development of the European Community that has taken place since the founding Treaties were entered into has increased the need for protection of fundamental rights. Mentioning have been made of the enlargement of the Community, materially as well as geographically. Diverging interpretations are likely to be to the detriment of fundamental rights protection in Europe, and they will probably occur more often in the future if status quo is maintained. The authority of the courts as well as the convention itself will be undermined. So far, any real conflict between the courts has not taken place. It might be easier to reach a conclusion at this stage than in the future.

In my opinion the best solution would be to enact a Community catalogue of fundamental rights. This option has the great advantage of enhancing the legal certainty in the Community. I consider this to be very important for successful co-operation in Europe in the future. It will create confidence in the Member States for further collaboration and integration. The civil and political rights of ECHR could be completed with economic and social and cultural rights, relevant for Community purposes. The flexibility of the present system could also be maintained, as a possibility to add further fundamental rights could be included in the system. The problem of diverging interpretations would have to be solved still though. An accession of the ECJ to the interpretation of the Court of Human Right as regards the provisions of the ECHR would be preferable, given the long period of time that interpretation has already been taking place in Strasbourg. As regards future cases in the Community courts dealing with the rights contained in

[261] Francis G. Jacobs, supra note 4, page 570

the ECHR, preliminary rulings could be obtained from the Court of Human Rights. However, a more extensive protection of fundamental rights than the Court of Human Rights provides would be no problem. Only a lower protection in the Community would be ruled out, as the convention is a minimum code which does not prevent even its contracting states from going beyond the rights contained therein.

In practice the above-mentioned system would have many similarities with an accession of the Community to the Council of Europe. A difference would however be that the Court of Human Rights would have no jurisdiction over the action of the Community institutions. Also the Commission has suggested the enactment of a catalogue of rights as the most suitable solution. However, in short term the Commission deemed an accession as more feasible.[262] In my opinion the results of the enactment of a Community catalogue shall be assessed in order to decide the future course of action. The future regulation of human rights in Europe is a very complex matter and it is hard to foresee all the consequences of a suggested alternative.

It remains to be seen what will take place as regards fundamental rights protection in Europe. In my opinion the powerful Community courts will probably work towards maintaining the status quo, a tendency in this direction can be seen in Opinion 2/94. What this will amount to might be decisive for the development. No further steps could probably be taken without Treaty amendments. Therefore the real and most challenging problem is to find a solution that can be agreed upon by the Member States, something that might be easier now than after an enlargement has taken place.

[262] Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 37

7 Summary and Final Observations

Human Rights protection in the European Union has been developed in the case law of the Community Courts. The reason for this is that the Community was founded with the aim of economic integration. During the years it became clear that the constant development of the dynamic Community has made the subject important. The most suitable way of meeting the growing demands of recognition of Human Rights protection was through the case law. The Community Courts are today protecting fundamental rights, which is a more comprehensive concept than Human Rights. The protection of fundamental rights form part of the general principles of law, the observance of which the courts ensures. Thereby the courts draw inspiration from constitutional traditions common to the Member States and international treaties. However, the courts have also identified several other fundamental rights without such connections. A recent trend is that the courts take on a more active role in the protection of rights. They have become more of a guardian of fundamental rights in the Community, as they have stressed that implementing national measures must comply with fundamental rights. If one looks at the written law of the European Union, both the SEA and the TEU stated that the union should respect fundamental rights. The Treaty of Amsterdam also codifies the existing case law position by putting under the jurisdiction of the court review of the acts of the institutions in this regard.

Article 8 of the ECHR has been invoked by many undertakings subjected to inspections in the course of competition proceedings. Traditionally, the Article has been considered as dealing with protection of private dwellings only. The enforcement of Community competition law is regulated in Reg. 17/62. Here relatively wide powers are conferred on the Commission due to the importance a free competition is deemed to have for the realisation of the common market. In Article 14 of the said convention, the powers to undertake investigations at the premises of undertakings are laid down. The Article does however not authorise the Commission to forcibly entry premises. In the *Hoechst* case it became clear that if an undertaking objects to an investigation and denies the officials of the Commission entry, national procedural safeguards have to be complied with. This may for example mean that a warrant has to be obtained. The *Hoechst* case also involved an interpretation of Article 8 of the ECHR. After a comparison of relevant laws in the Member States, it was interpreted not to include business premises. Protection against arbitrary and disproportionate conduct on behalf of the authorities was however deemed as a general principle of Community law. After the judgement in the *Hoechst* case, the Court of Human Rights ruled in the *Niemietz* case that Article 8 protected also the law firm of the applicant. Hence, the court found that certain professional or business activities or premises are included in Article 8.

Also Article 6 in the ECHR have been subjected to different interpretations by the two courts. The right to a fair hearing has been given the status of being a fundamental right within the Community legal order. Article 19 of Reg. 17 is of importance in this regard as it is provides for the hearing of the parties and third persons. A special hearing regulation regulates the procedure. In the *Orkem* case the ECJ stated that neither the wording nor the case law from the Court of Human Rights indicated that a right not to incriminate oneself is embodied in the Article 6. It was held that there is on the contrary a duty to co-operate actively for undertakings under investigation for infringement of EC competition law, in that they must make available all information relating to the subject matter. The Commission may however not compel an undertaking to answer questions that involve admissions of infringements. It is incumbent upon the Commission to prove the existence of such infringements. The line of interpretation of Article 6 of the ECJ was not taken up by the Court of Human Rights in the *Funke* case. It may be assumed that the ECJ by their interpretation of Article 6 wanted to ensure the efficient enforcement of competition law. The *Funke* case was however the first judgement where it has been stated explicitly that Article 6(1) comprises a right to remain silent and not to incriminate oneself. The Court of Human Rights has however before declared that the Article shall be given an extensive interpretation. Although the *Orkem* case established restrictions on questions that may be asked in the course of requests for information under Article 11, there are no limitations for requiring incriminatory documents during investigations.

A difference that can be observed between the analysed cases from the European Court of Justice on one hand and the European Court of Human Rights on the other is the subject alleging an infringement. In the *Funke* and *Niemietz* cases it is individuals who are the complainants whereas in the *Hoechst* and *Orkem* cases the relevant entities are legal persons. The fact that *Hoechst* and *Orkem* are legal persons can be explained by the nature of the relevant field of law. The subjects to such competition law enforcement are naturally undertakings. Even though organisations may complain before the Court of Human Rights, such complaints appear to be more rare. Hence, also in the *Funke* and *Niemietz* cases are the complainants private persons.

The Court of Human Rights cannot today review action by the Community institutions. The convention is however still an important standard and the future development might bring the action of Community institutions under the jurisdiction of the Strasbourg court. In the *Hoechst* case the ECJ did not include business premises under the protective scope of the article. If the *Niemietz* case is taken into account the compatibility with article 8 however becomes questionable. The investigations that may be carried out at undertakings might still be justified by virtue of Article 8(2). As these exceptions are quite vague it is hard to make a certain conclusion. The Court of Human Rights has not explicitly stated that a prior judicial control is required, but it was taken into account in the *Funke* case as one of the reasons why the interference was not proportionate with

regard to the aim pursued. If one turns to the compatibility of the competition procedure with article 6, the article has been invoked in many antitrust procedures before the Community courts. The courts have however refused to apply the article to procedures before the Commission as they have held that the Commission cannot be considered as a tribunal within the meaning of the article. It is however quite likely that at least the antitrust procedures where fines may be imposed fall within the autonomous concept of criminal charges in Article 6, due to the deterrent character of such fines. There is no doubt that the Commission cannot be classified as an independent and impartial tribunal. The possibility of lodging an appeal to the CFI may however remedy this problem. Other doubtful questions as regards compatibility with article 6 are the conditions "within a reasonable time" and the principle of equality of arms.

In Europe of today there exists two supranational courts interpreting the ECHR. The relation between them is not entirely clear as regards for example preferential right of interpretation. Until now no real conflicts have taken place, but as can be seen in this thesis diverging interpretations do exist. At present it seems as it is the Community courts that direct the case law development that take place within the EU. It can be argued that in identifying fundamental rights and general principles the court allows itself considerable freedom. An example is the free access to employment that in the *Heylens* case was given the status of being a fundamental right. Critique has been directed against this practice, as it has been seen to devalue the notion fundamental rights. The way forward for human rights protection in the European Union has been discussed for many years now. The present system does not seem to be a sustainable solution for the future. A number of options have been suggested. An accession by the Community to the Council of Europe and the enactment of a "bill of rights" are examples of suggested solutions. The latest development is the Opinion 2/94 where the ECJ rules out an accession to the Council of Europe without Treaty amendments, due to lack of legal basis. In my opinion the preferable solution would be the enactment of a Community catalogue of fundamental rights, an opinion also given by the Commission. An analysis of exactly how this should be realised is however outside the aim of this thesis.

When investigating the competition law procedure of the European Community in relation to the requirements of the ECHR the need to modernise the procedural rules are striking. It seems like time has made a revision of Regulation 17 necessary. This is also shown by the mere fact that the issue of the compatibility with fundamental rights is raised. If the rules were modernised with the aim of protecting the rights of undertakings developed in the case law, this might also result in stronger credibility for the Community system of protection of the rights of undertakings. If the competition law procedure also shall be brought in accordance with the requirements of the ECHR, the introduction of an independent tribunal would be recommendable.

Appendix A

Text from Regulation 17[263]

Article 11

Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.
2. When sending a request for information to an undertaking or association, the Commission shall at the same time forward a copy of the request to the competent authority of the member States in whose territory the seat of the undertaking or association of undertakings is situated.
3. In its interest the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for the supplying incorrect information.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.
5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.
6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 14

Investigating powers of the Commission

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;
(b) to take copies of or extracts from the books and business records;
(c) to ask for oral explanations on the spot;

[263] 1. J.O. 1962, 204; O.J. Spec.Ed. 1959-1962, 87; the regulation came into force on 13 March 1962

(d) to enter any premises; land and means of transportation of undertakings

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigations and of the identity of the authorised officials.
3. Undertakings and associations shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice
4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made
5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.
6. Where an undertaking opposes an investigation ordered pursuant to this article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

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