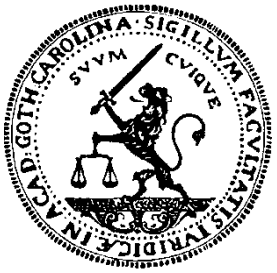

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Corporate Human Rights Protection in Light of Effective Competition Law Enforcement

With a focus on the implications of the European Union's accession to the European Convention on Human Rights and Fundamental Freedoms – as provided by the Lisbon Treaty – this thesis scrutinizes and analyzes the investigated companies' human rights protection in the light of the European Commission's very wide and discretionary powers. Due to the importance of ensuring the effectiveness of the competition law enforcement within the European Union, it is illustrated that the European Union legal order does not provide the same level of human rights protection as the European Convention on Human Rights and Fundamental Freedoms.

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Contents

Summary

The aim of this thesis originates from the existing conflict of interests between the enforcement of European Union (EU) competition law and the companies' human rights grievances. The former is concerned with the effective functioning of the European Commission's powers to investigate companies under Articles 18 and 20 of Regulation 1/2003. The latter addresses the rights of defense of the companies under scrutiny, as provided for by Articles 6(1) and 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Articles 18 and 20 of Regulation 1/2003 provide the Commission with very wide investigative powers, namely to request information from companies and to inspect their business premises. The aim is to maintain effective competition within the EU's Internal Market, however sometimes to the detriment of the investigated companies. The crucial question therefore is whether these companies enjoy sufficient safeguards.

Articles 6(1) and 8 ECHR constitute the relevant provisions that may be invoked as protection against the Commission's discretionary enforcement of the EU competition rules. Although not yet directly applicable within the EU legal order, these provisions – as interpreted by the European Court of Human Rights (ECtHR) – have played a crucial role for the development of corporate human rights protection in the EU Courts' case law. Nevertheless, this thesis illustrates that the *general principles of EU law* do not reach the same level of protection as that provided by the rights enshrined in the ECHR. This is particularly the case in respect of the companies' protection against self-incrimination, where the ECtHR does provide full protection, in contrast to the EU Courts. Consequently, the investigated companies are not sufficiently protected from incriminating themselves during the Commission's investigation procedures. The importance of ensuring the effectiveness of the EU competition law enforcement seems to prevail.

When the Lisbon Treaty entered into force, the EU Charter of Fundamental Rights became legally binding. It may be inferred that greater legitimacy was given to the fundamental rights within the European Union legal order, however more interestingly in respect of the future human rights protection in the EU is the accession to the ECHR. An interesting question is whether that accession will pave the way for the investigated companies' human rights grievances before the ECtHR, instead of the EU Courts. That question, besides other related issues, is being scrutinized and analyzed in this thesis.

Sammanfattning

Syftet med den här uppsatsen har sitt ursprung i den intressekonflikt som råder mellan upprätthållandet av den Europeiska unionens (EU) konkurrensregler, å ena sidan, och företagens klagomål över att deras mänskliga rättigheter kränkts, å andra sidan. Närmare bestämt handlar det om att väga effektiviteten av den Europeiska kommissionens befogenheter att undersöka företag enligt artiklarna 18 och 20 i förordning 1/2003 mot dessa företags rätt till försvar enligt artiklarna 6(1) och 8 i Europakonventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna.

Artiklarna 18 och 20 i förordning 1/2003 ger kommissionen mycket omfattande undersökningsbefogenheter, såsom att begära ut information från företag samt att undersöka deras lokaler. Syftet med dessa befogenheter är att upprätthålla effektiv konkurrens på EU:s inre marknad, ibland till nackdel för de undersökta företagen. Den avgörande frågan är därför om dessa företag åtnjuter tillräckligt rättighetsskydd.

Artiklarna 6(1) och 8 i Europakonventionen utgör de tillämpliga bestämmelserna som kan åberopas som skydd mot kommissionens godtyckliga undersökningar. Även om dessa bestämmelser inte går att tillämpa direkt inom EU, har de spelat en avgörande roll för utveckligen av företagens rättighetsskydd i EU-domstolarnas rättspraxis. Likväl visar den här uppsatsen på att EU:s allmänna principer inte garanterar samma skyddsnivå som Europakonventionen. Detta är framförallt fallet beträffande företagens skydd mot att anklaga sig själva under kommissionens undersökningar. Till skillnad från Europadomstolen ger EU-domstolarna inget fullständigt skydd. Vikten av att säkerställa ett effektivt upprätthållande av EU:s konkurrensregler väger därmed tyngre än företagens mänskliga rättigheter.

När Lissabonfördraget trädde i kraft blev EU:s stadga om de grundläggande rättigheterna juridiskt bindande. Man kan därmed sluta sig till att större legitimitet gavs åt dessa rättigheter inom EU. Intressantare ur rättighetsskyddssynpunkt är dock EU:s framtida tillträde till Europakonventionen. En avgörande fråga är huruvida detta tillträde kommer att leda till att de undersökta företagen vänder sig till Europadomstolen – istället för till EU-domstolarna – när de vill klaga över att deras mänskliga rättigheter kränkts. Denna och andra närliggande frågor granskas och analyseras i förevarande uppsats.

Preface

With this thesis I finish six years of law studies. I have had the opportunity to study and practise both in Sweden and abroad, which have given me friends from all over the world.

First of all, I would like to thank my supervisor, Professor Hans Henrik Lidgard, for our initial talks and your guiding advice when it comes to addressing the purpose of this thesis.

Furthermore, I would like to address my deepest gratitude to my parents and sister, who have always been there for me and come with good advice both regarding my studies and thoughts about my future career, but most importantly life in general.

Finally, I would like to address a big thank you to my friends who have proofread this thesis: Axel Hedberg, Katharina Diener and Sunny Lee.

Last but not least, Henrik thank you for believing in me and cheering me on during this process. Your encouraging words always give me that extra energy!

Eslöv in June 2011,
Sophie Kulevska

Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECN	European Competition Network
ECtHR	European Court of Human Rights
EU	European Union
NCA	National Competition Authority
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNSC	United Nations Security Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 General

When I came across the problems relating to the European Commission's[1] extensive investigative powers in the corporate human rights context, it immediately caught my interest. I am interested in human rights related issues, but was unaware of the corporate ones. Since I have been specializing in EU law in the past few years, a combination of both my interests – human rights in the EU – was a perfect match. Given the EU's prospective accession to the ECHR, the relationship between these two legal systems is highly topical.[2]

The broader focus in this thesis originates in the conflict of interests that exists between the EU competition law enforcement system and the investigated companies' rights of defense. The former is concerned with the effective functioning of the Commission's powers to investigate companies under Regulation 1/2003 with the aim of '*[preventing] competition from being distorted to the detriment of the public interest, individual companies and consumers*'.[3] The latter addresses the private protections of the companies under scrutiny. Which interest should prevail; the public or the private one? The crucial question is striking a fair balance between these competing interests.

1.2 Purpose and Question Formulation

With reference to the aforementioned conflict of interests, my purpose is to examine whether and to what extent the current EU competition law enforcement system, that is, the Commission's extensive and discretionary investigative powers under Regulation 1/2003, complies with the due process standards enshrined in the ECHR, more exactly, the companies' rights of defense as provided for by Articles 6(1) and 8 ECHR. With a special focus on the legitimacy of the Commission's investigative powers, I intend to illustrate the existing tension through the lens of the EU Courts' case law, in the light of the ECtHR's case law. A central question therefore is whether the protection afforded by the EU Courts against the Commission's investigative powers, in terms of the companies' rights of defense, corresponds to the protection provided for by the ECtHR. To be able to answer the question formulation, it is of crucial importance to examine whether the ECHR is applicable to companies *at all* and if so, to what extent. Do they enjoy the same level of protection as individuals?

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[1] Hereinafter only referred to as the *Commission*.
[2] Negotiations on the EU's accession to the ECHR started on 7 July 2010. The process is likely to take one or two years. See Wils (2011), page 20; and Forrester (2011, *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*), page 199.
[3] See, e.g., Case 136/79, *National Panasonic*, para 20.

Particular emphasis will be put on the changes introduced by the Lisbon Treaty, particularly the potential implications that the EU's accession to the ECHR will bring about, such as the future relationship between the ECtHR and the EU Courts, for example.

1.3 Method and Material

A traditional legal method has been applied, which in my case includes an investigation of the current EU and ECHR legal orders. In respect of primary EU law, I refer to the TEU, the TFEU and the CFR, now having the same legal value as the EU Treaties. When it comes to secondary EU law, I refer to Regulation 1/2003, more exactly Chapter five. In respect of the ECHR law, both the ECHR as such and the related case law from the ECtHR have been scrutinized and analyzed.
Since no judgments on the right against self-incrimination and the right to inviolability of the home have been delivered with reference to the CFR in the corporate context, only the EU Courts' own sources of fundamental rights – the *general principles of EU law* – will be referred to when analyzing their case law. A comparison between that case law and the ECtHR's jurisprudence on the corresponding rights enshrined in the ECHR has been conducted.

In addition to the above-mentioned sources, both legal doctrine and articles relating to the question formulation under scrutiny have been studied.
Furthermore, the question formulation has been investigated from a law and politics perspective, with focus on the underlying interests that are – or should be – protected in a democratic society, where the rule of law prevails and only legitimate interferences with protected interests are permitted.

1.4 Delimitations

Due to the limited scope provided for, considerable delimitations have been made. First of all, this thesis only focuses on the enforcement procedures in respect of the EU's *antitrust*[4] provisions, that is, Articles 101 and 102 TFEU, not the merger regulations. In respect of Regulation 1/2003, only the provisions dealing with the *first, preliminary fact-finding stage* of the Commission's enforcement proceedings will be dealt with, namely Articles 18 and 20.[5] The enforcement procedure under Article 21 will only be introduced briefly. Given the aim of this thesis, only business premises will be dealt with. In addition, there are safeguards surrounding Article 21, in contrast to Articles 18 and 20 under which the Commission enjoys

[4] *Antitrust law* will be referred to as *competition law* throughout the thesis.
[5] Consequently, other aspects of the right to a fair trial that are closely connected to the issues examined here, such as the notion of *'an independent and impartial tribunal established by law'*, are beyond the scope of this thesis, as they relate to the *second, adjudication stage* of the proceedings.

considerable investigative powers. In relation to the latter provisions, it can be mentioned that very high fines may be imposed on the obstructing companies. Determining the amount of fines is a matter of discretion for the Commission. However, a more detailed analysis of such penalties is beyond the scope of this thesis, but it may be stressed that they considerably strengthen the Commission's enforcement powers to the detriment of the investigated companies.

Although my initial intention was to make a thorough analysis of the investigated companies' possibility to make an appeal against the Commission's decisions, the limited scope provided for had to be decisive. Nevertheless, it is an interesting question from a rule of law perspective as it can be asked whether an existing, however limited, access to judicial review by the EU Courts is *sufficient* in due process terms. This issue is related to the discussion on the different roles played by the Commission as investigator, prosecutor, decision-maker and enforcer, which may be argued to impair the investigated companies' right to a fair trial.[6] Initially, I intended to examine that particular aspect as well, but due to the reason given above only a general view of the judicial review system is given, to make the picture of the companies' human rights protection more complete. In that way, the reader will be able to put this related problem into context and perhaps continue the research where I ended it.
Another intention was to make a comparable analysis of EU law/ECHR law and US law, however I quickly realized that the scope of this thesis would not permit such an extensive analysis. Nevertheless, it would have been an interesting comparison as the American companies, in general, enjoy lesser constitutional rights under the Bill of Rights than their European counterparts do under the ECHR.[7] Accordingly, only the relationship between EU law and ECHR law will be examined here, no domestic legislation. The exchange of information between the NCAs within the ECN will not be studied either.

1.5 Outline

This thesis is organized as follows. Chapter two deals with the development of the EU's own human rights standards, through the EU Courts' case law. This is, however, not solely a retrospective chapter, but also a forward-looking one. The changes introduced by the Lisbon Treaty which impact on the human rights situation in the EU, will be presented here, that is, the now legally binding CFR and the EU's prospective accession to the ECHR.
A brief overview of the companies' right to judicial review is given in Chapter three. More importantly though, this chapter provides the reader with a thorough examination of the public enforcement of the EU competition rules. Chapter four focuses on the compliance of these

[6] Andreangeli, pages 1ff; and Jones and Sufrin, page 1131.
[7] In US law the right against self-incrimination and the right against unlawful searches and seizures are only enjoyed by *natural persons*, not legal ones. See Forrester (2009), page 820 and footnote 8.

enforcement provisions with the investigated companies' rights of defense. These competing interests will be discussed with reference to the divergence between the case law of the EU Courts and the ECtHR. Accordingly, this chapter covers a comparable analysis of the case law of the different courts.
Lastly, Chapter five contains my analysis and conclusions of the corporate human rights protection within the EU competition law field. It is divided into two parts. The first one covers a *de lege lata* analysis of the current legal situation in respect of the companies' rights of defense. In the second part a *de lege ferenda* discussion is being conducted, that is, what the legal situation will probably look like when the EU has acceded to the ECHR.

2 Human Rights Standards in the EU Legal Order

2.1 Development of Human Rights in the EU Courts' Case Law

Due to concerns raised against the lack of human rights guarantees within the EU legal order, the *general principles of EU law* have been developed through the CJEU's case law, in particular the *proportionality* principle and the *fundamental rights* principles.[8] They are binding on the EU institutions and provide autonomous human rights standards inspired by the *'constitutional traditions common to the Member States'* and international treaties to which the Member States have acceded, in particular the ECHR.[9] The importance of ensuring the *rights of defense* as fundamental principles during the Commission's enforcement proceedings has been frequently emphasized by the EU Courts, especially where sanctions may be imposed.[10] In the *Treuhand* case, for instance, the General Court clearly stated that *'it has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of the provisions of the ECHR, inasmuch as those provisions do not form part of [EU] law'*.[11] However, since the ECHR form part of the general principles of EU law, it added that the ECHR has *special significance* in that regard.[12] By that statement the General Court confirmed the position previously taken by the CJEU and the protection of fundamental rights developed in its case law. In the *Stauder* case, the CJEU held for the first time that it had competence to rule on the matter.[13] It recognized that the general principles of EU law include fundamental rights.[14] That finding was later developed in the *Internationale Handelsgesellschaft* case, where the CJEU held that *'respect for fundamental rights forms an integral part of the general principles of law*

[8] Jones and Sufrin, page 103.

[9] See, e.g., Case 11/70, *Internationale Handelsgesellschaft*, para 4; and Case 4/73, *Nold*, para 13. By acknowledging the general principles of EU law the CJEU provided a degree of human rights protection in the EU legal order inspired by principles enshrined in domestic constitutions. See Andreangeli, pages 7f; and Jones and Sufrin, page 103.

[10] In Case C-511/06 P, *Archer Daniels Midland*, para 84, referring to, e.g., Case C-328/05 P, *SGL Carbon*, para 70, the CJEU stated that *'in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defense is a fundamental principle of [EU] law which must be complied with even if the proceedings in question are administrative proceedings'*. See Jones and Sufrin, page 1038.

[11] Case T-99/04, *AC-Treuhand AG v Commission*. The General Court here considered the procedural aspects of competition law.

[12] This is confirmed by Article 6(3) TEU and is reaffirmed by the fifth recital of the CFR's Preamble, as well as Articles 52(3) and 53 CFR. See T-99/04, *AC-Treuhand AG v Commission*, para 45, which refers to Case T-112/98, *Mannesmannröhren-Werke v Commission*, paras 59f and the case law cited therein. See also Jones and Sufrin, page 103.

[13] Case 29/69, *Stauder*, para 7.

[14] Ovey and White, page 514.

protected by the [CJEU]. 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 [EU]'.[15] In the *Nold* case the CJEU later confirmed that statement and added that *'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of [EU] law'*.[16] This was the first time the CJEU made a direct reference to international treaties to which the Member States are parties for the protection of fundamental rights.[17] But it was not until its *Rutili* judgment that the CJEU referred to and expressly recognized the significance of the ECHR. It held that a particular provision of EU law was a *'specific manifestation of the more general fundamental principles of [EU] law which could be found in the ECHR'*.[18] The CJEU's decisions on respect for fundamental rights lead to the question whether the EU should accede to the ECHR. In its Opinion 2/94 on the accession of the then EC to the ECHR, the CJEU affirmed the ECHR's special position among the international treaties, but ruled that an accession to the ECHR was not possible, as the EC lacked competence to do that without first amending the EC Treaty.[19]
In the light of the above-mentioned cases, human rights protection was 'indirectly' introduced into the EU legal order by means of the general principles of EU law.[20] Although it could be argued that the result is the same as if the EU was bound by the ECHR, it will later be discussed whether that is always the case.

2.2 ECtHR's 'Indirect Review' of EU Acts

A thorough analysis of the ECtHR's case law concerning the compatibility of the EU fundamental rights with the ECHR is beyond the scope of this thesis. It can be said, however, that the above-mentioned cases appear to be the first step towards a *'vertical relationship between the CJEU and the ECtHR'* in respect of the human rights protection.[21] Nevertheless, also the ECtHR has considered the relationship between EU law and ECHR law. This may be held to constitute an 'indirect review' of the EU acts, as the EU is not yet a party to the ECHR.[22] The *Bosphorus* case, for instance, concerned the seizure of an aircraft in Ireland leased to Bosphorus Airways

[15] Case 11/70, *Internationale Handelsgesellschaft*, para 4. Consequently, the CJEU held that it was the only competent institution that could interpret what the general principles of EU law were.
[16] Case 4/73, *Nold*, para 13.
[17] Ovey and White, page 514.
[18] Case 36/75, *Rutili*, para 32. This has been reiterated in the subsequent Case 139/79, *National Panasonic*; and Case C-112/00, *Schmidberger*.
[19] The CJEU particularly pointed to the EC's lack of *'general power to enact rules on human rights'*; see Opinion 2/94, *Re Accession of the Community to the ECHR*, paras 27 and 35. See also Chalmers et al., page 262; and Craig and De Búrca, page 405.
[20] Ovey and White, page 516.
[21] Andreangeli, page 11.
[22] Craig and De Búrca, page 420.

from JAT[23], which was made pursuant to an EU Council Regulation implementing a UNSC Resolution obliging States to confiscate all aircraft belonging to or operating from Yugoslavia.[24] In determining whether that seizure violated the ECHR, the ECtHR affirmed that the level of human rights protection within the EU was *'equivalent'*[25] to that of the ECHR, as it indicates that the EU Member States – bound by EU law – act within the scope of the ECHR.[26] The ECtHR only intervenes if it considers that the human rights protection has been *'manifestly deficient'*. In this case, however, the ECtHR held that the action taken in compliance with EU law met the ECHR requirements.[27] It has been held that this *'manifestly deficient'* test is much weaker than that applied to the States that are parties to the ECHR.[28] Also in the earlier *Matthews* case the ECtHR examined the compatibility of EU acts with the ECHR and held that the general principles of EU law, and the role played by the ECHR within that context, secured a level of EU law protection that is *'comparable'* to that of the ECHR.[29] What is lacking though, is a 'control system' that could hold the EU institutions liable for violations of the ECHR.[30] As will be elaborated upon further, an important question regarding the applicability of the ECHR in competition law cases is the *character* of the enforcement procedures.[31]

2.3 Human Rights Situation after the Lisbon Treaty

2.3.1 EU Charter of Fundamental Rights[32]

In 2000 the CFR was *'solemnly proclaimed'* by the Council, the Parliament and the Commission as a political declaration.[33] It is a mixture of classical political and civil rights and progressive, far-reaching economic and social rights, which previously only could be found in the case law as general

[23] Abbreviation of *Yugoslav Airlines*.
[24] Aslam and Ramsden, page 82.
[25] By *'equivalent'* the ECtHR meant *'comparable'*; see Appl. No. 45036/98, *Bosphorus v Ireland*, paras 155 and 165.
[26] The ECtHR made a *presumption* that, if the EU provides equivalent protection, the EU Member State – Ireland in this case – applying EU law, has not departed from the ECHR requirements; see *Bosphorus*, paras 156 and 165.
[27] *Bosphorus*, paras 156 and 166. This case upheld in broad terms the CJEU's previous Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications*. See Ovey and White, page 31.
[28] Chalmers et al., page 261. As will be discussed later, the EU's accession to the ECHR might change the ECtHR's reasoning, as the EU then will be treated like any other member of the ECHR, that is, today's Contracting States.
[29] Appl. No. 24833/94, *Matthews v United Kingdom*, para 32. See Andreangeli, pages 12f. This was later confirmed in the *Bosphorus* case.
[30] As the law stands today the EU is not a party to the ECHR. Consequently, the ECtHR lacks jurisdiction over cases involving alleged violations of the ECHR by an EU institution.
[31] See Chapter 4.2.1.1.
[32] The purpose of the CFR is to make fundamental rights more visible at EU level. In most relevant aspects it mirrors the ECHR. See Kerse and Khan, page 126.
[33] In December the same year it was politically approved by the Member States at the European Council summit in Nice.

principles of EU law. It has been held to constitute the culmination of the consolidation of the 'fundamental rights process', which started with the CJEU's early fundamental rights judgments.[34] When the Lisbon Treaty entered into force on 1 December 2009, the CFR became legally binding and part of the EU constitutional order; Article 6(1) TEU gives it the *'same legal value as the [EU Treaties]'*.[35] It may be argued that this binding character also gives it greater legitimacy, as compared to the general principles of EU law. No matter how, the CFR builds on these principles, it refers to them and is to be interpreted in the light of them.[36]

Article 52(3) CFR deals with the relationship between the CFR and the ECHR and sets out the scope of the fundamental rights protection. It states that *'insofar as [the CFR] contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by [the ECHR]. [Article 52(3)] shall not prevent [EU] law providing more extensive protection'*. The rights enshrined in the ECHR therefore are to bee seen as 'minimum standards', as the CFR may provide stricter standards than those enshrined in the ECHR.[37] Accordingly, it has been held that the EU will not find it difficult to meet the ECHR's standards when the latter becomes part of EU law.[38] The *Explanations relating to the Charter of Fundamental Rights* clearly states that *'the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the [ECtHR]'*.[39] Article 52(3) CFR also mirrors the CJEU's case law, where it has been held that the ECHR has a special status in EU law.[40] Future acts of the EU institutions, including the Commission's decisions, will be reviewed by the EU Courts against Articles 6(1) and 8 ECHR, pursuant to Articles 7, 47(2) and (3) as well as 52(3) CFR. Nevertheless, as the law stands today, it cannot be deduced that the CFR provides more extensive protection than the ECHR. This remains to be seen in the EU Courts' case law from now on. As the level of protection provided for by the CFR therefore can be said to coincide with that of the ECHR, this thesis will primarily focus on the latter and the related case law. Finally, it can be anticipated that, the changes made to the human rights protection within the EU will have an influence on competition law enforcement as well. Here, like other fields of law, it must not be forgotten that the rights and freedoms recognized by the CFR may be limited if the requirements in Article 52(1) CFR are fulfilled.

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[34] The importance of the CFR has been reflected in the EU Courts' case law. In Case C-540/03, *European Parliament v Council (Re: Right to Family Reunification)*, para 38, the CJEU cited the CFR for the first time. See Andreangeli, page 8; and Jones and Sufrin, page 103.

[35] Ameye, pages 335f; Aslam and Ramsden, page 64; and Forrester (2011, *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*), page 200.

[36] Chalmers et al., page 232.

[37] Andreangeli, page 9; and Killick and Berghe, page 272.

[38] See the speech of the Commissioner responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding, delivered on 18 February 2010: http://ec.europa.eu/commission_20102014/reding/pdf/speeches/speech_20100318_1_en.pdf

[39] *Explanations relating to the Charter of Fundamental Rights*, Article 52; see http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

[40] Chalmers et al., page 243.

2.3.2 EU's Accession to the ECHR

Article 6(2) TEU establishes the legal basis for the EU's accession to the ECHR.[41] It will be possible to challenge acts carried out by the EU institutions for their violation of the fundamental rights before the ECtHR. The ECHR will also be *directly applicable* before the EU Courts.[42] The accession will thereby be important as a *complement* to the already legally binding CFR.[43] Due to the Commission's increased investigative powers under Regulation 1/2003, the EU's accession to the ECHR is likely to result in greater accountability of the Commission.[44]
As mentioned above, the rights enshrined in the ECHR was part of EU law prior to the entry into force of the Lisbon Treaty by way of constituting general principles of EU law. Even though the EU is not yet a party to the ECHR, and thus not bound by the ECtHR's case law as such, Article 6(3) TEU provides that *'fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'*. Consequently, EU primary law states that the ECHR provisions must be given effect as general principles of EU law.[45]

Even though the human rights situation has changed since the CFR became legally binding, any inconsistency will not be satisfactorily resolved until the EU becomes party to the ECHR. Then, EU acts will be challengeable before the ECtHR, which will rule on human rights issues arising within the EU. The fact that it now is the CJEU – and not the ECtHR – that interprets and applies the ECHR within the EU has been held to be unsatisfactory.[46]
As the EU Courts will become formally bound by the ECtHR's judgments, private parties will be able to rely upon them before the EU Courts.[47] In addition, the ECtHR will review acts of the EU institutions as the 'final adjudicator' over the human rights protection within the EU legal order.[48]
Finally, it may be clarified that the EU's accession to the ECHR will provide similar human rights protection to EU citizens – and possibly companies – before the ECtHR vis-à-vis the conduct of the EU institutions and the EU Member States in the fulfillment of their *EU obligations*, as the EU citizens currently enjoy vis-à-vis the conduct of their Member States in the fulfillment of *domestic affairs*.[49]

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[41] The Commissioner responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding, delivered a speech on this matter on 18 February 2010, see http://ec.europa.eu/commission_20102014/reding/pdf/speeches/speech_20100318_1_en.pdf
[42] Therefore, the ECHR plays a central role in the European human rights discourse; it has been a key source of inspiration for the EU Courts as well as the CFR's drafters. See Andreangeli, page 9; Ameye, pages 335f; and Aslam and Ramsden, page 64.
[43] The Commissioner responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding, delivered a speech on this matter on 18 February 2010, see http://ec.europa.eu/commission_20102014/reding/pdf/speeches/speech_20100318_1_en.pdf
[44] Ameye, page 336.
[45] Chalmers et al., page 232.
[46] Harris, O'Boyle and Warbrick, page 28f.
[47] Aslam and Ramsden, page 63; and Killick and Berghe, page 284.
[48] Killick and Berghe, page 284.
[49] Ameye, page 335.

3 Public Enforcement in EU Competition Law

3.1 Role of the Commission under Regulation 1/2003

An important role of the Commission is the enforcement of EU competition law, having its legal basis in Regulation 1/2003.[50] Although the procedure is essentially *administrative*, Regulation 1/2003 provides extensive investigative powers, which apparently are to make the competition rules complied with to a greater extent.[51] They are often forcefully and intrusively conducted without a prior warrant, as the Commission acts on its suspicions.[52] In addition, the Commission has the power to impose fines on companies. This will, however, not be elaborated on more than in relation to such fines that may be imposed while obstructing the Commission's inspections.[53]

Regulation 1/2003 is, according to its Recital 37, bound to respect *'the fundamental rights and observe the principles recognized in particular by the [CFR]'. Accordingly, [Regulation 1/2003] should be interpreted and applied with respect to those rights and principles'*. Recital 37 thus demonstrates that the EU competition law formally recognizes the CFR.[54]

Regarding the Commission's priorities when enforcing EU competition law, it enjoys a *wide margin of discretion*, which means it can choose when and to whom it will bring its proceedings.[55] The provisions that give the Commission its extensive investigatory powers are enshrined in Chapter five of Regulation 1/2003.[56] They contain few restrictions on the

[50] Even though Regulation 1/2003 fundamentally changed the Commission's powers, previous case law, still applies. The Commission may begin the proceedings following a complaint, on a request, transfer from an NCA or simply by acting on its own initiative. See Kerse and Khan, pages 37f.

[51] Jones and Sufrin, pages 1027f. In the *Communication from the Commission on the functioning of Regulation 1/2003* it held that Regulation 1/2003 has brought about a landmark change in the way the European competition law is enforced. Furthermore, it was held that the regulation has significantly improved the Commission's enforcement of now Articles 101 and 102 TFEU. The Commission has been able to become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way.

[52] Aslam and Ramsden, page 61. These powers are conducted during the first, preliminary fact-finding stage of the investigation procedures. During the second one – which will not be analyzed here – the Commission makes its objections known through a *'statement of objections'* before a final decision is taken. The Commission's investigative powers are exercised in close cooperation with the NCAs within the ECN. See Andreangeli, page 2; and Wils (2011), pages 3f and 27ff.

[53] See Chapter 3.2.2.3.

[54] Ameye, page 336; and Kerse and Khan, page 127.

[55] Jones and Sufrin, page 1038. This discretion may be compared to that given to the national public authorities by the ECtHR.

[56] Throughout the thesis, I refer to Regulation 1/2003 if nothing else is mentioned.

Commission's powers in this context.[57] Nevertheless, there are a number of procedural rights and guarantees that the companies enjoy, limiting the Commission's investigative powers. Under Article 18, for instance, the Commission can make requests for information only *'in order to carry out the duties assigned to it by [Regulation 1/2003]'*.[58] In addition, such request *'shall stipulate the legal basis and purpose of the request'*.[59] These procedural guarantees imply that the request must identify *'with reasonable precision'* the suspected infringement of the competition rules.[60]

3.2 Investigative and Fact-Finding Stage[61]

Two major investigatory powers are given to the Commission under Articles 18 and 20, namely the *right of request for information* and the *right of inspection of business premises, records etc*.[62] Articles 18 and 20 are independent procedures, which implies that an Article 18 request is not precluded by the fact that the Commission has already carried out an Article 20 inspection.[63] In addition to the powers to obtain information and carry out inspections, the Commission has the power to *take statements* under Article 19, with the consent of the person that shall be interviewed. This provision will, however, not be elaborated on.

It can here also be mentioned that the Commission during its investigation procedures may take *procedural decisions*. Failure to comply with such decisions may lead to a *new decision* imposing a fine and/or periodic penalty payment.[64] To order the termination of competition law infringements the Commission must, however, take *final decisions*, that is, *infringement decisions*.[65]

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[57] The principal limitation is the demand for a relationship between the information requested and the infringement being investigated. See Kerse and Khan, page 131.
[58] See Article 18(1).
[59] See Articles 18(2) and (3).
[60] This can be made only if *'the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place'*. See Wils (2008), pages 12f, footnote 49; and Wils (2011), pages 12f; referring to AG Jacobs in Case C-36/92 P, *SEP v Commission*, paras 21 and 30.
[61] According to Article 2(3) of Regulation 773/2004 the Commission may exercise its investigative powers, i.e., its fact-finding procedures, *before* initiating proceedings. This is vital, since the Commission may not be in a position to issue a *'statement of objections'* before it has carried out an investigation. See Jones and Sufrin, page 1043.
[62] Either type of measure may take one of two forms: where information is sought by a *simple request* or by a *decision*. Regardless of the type or form of the investigation, the investigated companies are expected to cooperate to an extent consistent with their fundamental rights; this was first stated in Case 374/87, *Orkem v Commission*, and later reiterated in Joined Cases C-204-205/00 P, etc., *Aalborg A/S and Others v Commission*, paras 62ff. Actual cooperation does not, however, absolve the companies from the duty to reply to requests under Article 18. See Kerse and Khan, pages 125f.
[63] This was held by the CJEU in *Orkem*, para 14. See Kerse and Khan, page 133.
[64] See Articles 23 and 24.
[65] Kerse and Khan, page 39.

3.2.1 Article 18 – *Requests for Information*

Even though information can be sought from companies not suspected for competition law infringements, that is, third parties,[66] this will not be examined here, due to the scope of the thesis.

Article 18(1) gives the Commission the power to obtain *'all necessary information'* from companies, which must either hand over existing documents or provide written answers to questions.[67] It is for the Commission to decide whether the information sought is *necessary* to define the scope of the infringement, its duration, the identity of the parties etc. Necessary information is simply such information that is requisite for the Commission to establish the applicability of Articles 101 and 102 TFEU. It has been held that *'the relationship must be such that the Commission could reasonable suppose, at the time for the request, that the document would help it to determine whether the alleged infringement had taken place'*.[68] Although the Commission's decisions are subject to the General Court's judicial review, the risk is that there may be little real control.[69]

Under **Article 18(2)** the Commission may request information.[70] Companies may be given the opportunity to supply the requested information *voluntarily* in response to a written *simple request for information*. If they do not comply with such a request, the Commission may take a *decision requiring information* to be supplied to it under Article 18(3).[71] According to the case law, these provisions provide that the Commission *'may, by simple request or by decision, require undertakings […] to provide all necessary information'*. Accordingly, Article 18 is a flexible provision, as it provides the Commission with a right to choose between a *simple request* and a *request by decision*. Except for the *object* of the inspection, the request must state the *legal basis* and its *purpose*, which must be indicated with *'reasonable precision'*. Otherwise, it will be impossible to determine whether the information is necessary. In practice, however, it is sufficient for the Commission to *identify* the suspected infringement.[72] Even though there is no legal obligation for companies to comply with a simple request for information, the consequences for *not* doing so may be serious.[73] Article 23(1)(a) provides the Commission with the power to impose fines up to one per cent of the company's total turnover in the preceding business year for *'incorrect or misleading'* information supplied either intentionally or

[66] Kerse and Khan, page 130.

[67] The power can be used at any stage of the Commission's procedure and is thus not limited to the fact-finding stage. See Wils (2008), page 3.

[68] Case C-36/92 P, *SEP v Commission*, para 21.

[69] The General Court will see whether the information requested exceeded what might be rejected as necessary in the light of the investigation. See, e.g., Case 734/87, *Orkem*, paras 15f; and Case C-94/00, *Roquette Frères v Commission*. See also Kerse and Khan, page 131.

[70] Jones and Sufrin, page 1043.

[71] See Case T-39/90, *SEP v Commission*, para 29, where the General Court held that the notion of *'necessary information'* must be interpreted in accordance with the purposes of the Commission's investigative powers. In Case C-36/92 P, *SEP v Commission* the CJEU upheld the General Court's finding and reiterated that there must be a correlation between the Commission's request for information and the presumed infringement.

[72] Kerse and Khan, page 134.

[73] Ibid., page 135.

negligently. Although the majority of requests are being complied with *voluntarily*, it is noticeable that the Commission favors dawn raids when initiating its investigation procedures. Article 18 is thus being used as a *supplement* to the information already obtained through an inspection under Article 20.[74]

Article 18(3) provides the same formalities as Article 18(2), with the *additional* requirement that the Commission must inform the companies of their rights to have the decision reviewed by the CJEU. Notable is that a request under Article 18(3) does not have to follow a prior Article 18(2) request, as the Commission enjoys a considerable discretion to choose between the two types of information gathering.[75] As regards the *purpose* of an Article 18(3) decision, it is sufficient that the Commission sets out the information required and need not go any further.[76] In comparison to Article 18(2), requests made by decision are legally binding and the companies have an *obligation* to respond to it. If the company intentionally or negligently supplies incorrect, incomplete or misleading information, or does not supply information within the required time-limit, the Commission can impose either: (i) a fine not exceeding one per cent of the company's total turnover in the preceding business year under Article 23(1)(b), and/or (ii) a periodic penalty payment not exceeding five per cent of the average daily turnover *'in order to compel them'* to supply complete and correct information under Article 24(1)(d).[77] Furthermore, it must be mentioned here that, due to the *'substantive difference'* between decisions taken by the Commission during its investigation procedures and those taken to terminate an infringement, there is no right to a formal hearing in relation to Article 18(3) decisions.[78]

Although **Article 18(4)** places the responsibility to supply information on senior personnel, this provision is not supported by sanctions against them. If they supply incorrect information the undertaking as such may be fined.[79] Since the information given binds the investigated company, properly authorized officials within the particular company, or its lawyers, are often given the right to provide answers to questions.[80]

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[74] Kerse and Khan, page 136.
[75] Ibid., page 134.
[76] Case 136/79, *National Panasonic*, para 11. If the Commission in its decision sets out in detail its suspicions and arguments, a company cannot complain, since the Commission complies with the obligation in Article 18. See Kerse and Khan, page 137.
[77] Wils (2008), page 3f.
[78] *National Panasonic*, para 21. This explains why Article 27(1), providing for the *right to be heard*, makes no reference to Articles 18 or 20. Such a right is only provided for in those provisions under which the Commission may take decisions in exercise of its 'judicial powers'. Companies are thus given greater rights of defense protection in relation to those more important decisions. See Kerse and Khan, pages 137f.
[79] Kerse and Khan, page 132.
[80] Ibid., page 133.

3.2.2 Article 20 – *The Commission's Powers of Inspection*[81]

There are several obligations enshrined in Article 20. Most importantly, an investigation must be *necessary*, that is, requisite to establish the applicability of Articles 101 and 102 TFEU.[82] Furthermore, in accordance with Article 20(2) the Commission officials have the power to conduct *'all necessary inspections'* on a company's premises, to examine all business-related records and to take or obtain copies or extracts in whatever form they are maintained.[83] Although the Commission is bound by the by the general principles of EU law, such as the *proportionality* principle and the respect of *fundamental rights*, Article 20 provides an appreciable margin of discretion to decide whether to carry out an inspection or not.[84] However, the Commission's investigative powers must be neither arbitrary nor excessive and should be exercised with a limited measure of intervention.[85]

3.2.2.1 Two Types of Inspections

Article 20 provides for two different types of investigation, namely inspections carried out by a *simple authorization*[86] under Article 20(3) and those *ordered by decision*[87] under Article 20(4). The CJEU has explained that *'the two procedures do not necessarily overlap, but constitute two alternative checks and choice of which depends upon the special features of each case'*.[88] On the basis of a *simple authorization* under **Article 20(3)**, the company has the right to refuse to comply with the inspection without the threat of financial sanctions. If the company chooses to submit to the inspection *voluntarily*, however, it has an obligation to actively cooperate. Fines may then be imposed for intentionally or negligently producing the required information in an incomplete form.[89]
If the inspection is *ordered by decision*, by contrast, there is a *legal obligation* for the company to comply with it and actively cooperate with

[81] The right against self-incrimination is potentially relevant to inspections as well. Nevertheless, the human rights concerns related to inspections are here concentrated on matters that arise *in addition* to that right. The right against self-incrimination will therefore only be examined in relation to decisions requiring information under Article 18.
[82] The restriction relates to the *purpose* of the investigation. As in the case of Article 18 it is important to note the initial words: *'in order to carry out the duties assigned to it by [Regulation 1/2003]'*.
[83] The powers are not greater or more extensive when the inspectors are acting under a decision than under a simple request. See Kerse and Khan, page 160.
[84] Berghe and Dawes, page 409.
[85] In other words, the *proportionality* principle must be taken into account. See Kerse and Khan, pages 157f.
[86] Such an authorization must contain the same or equivalent matters as required in respect of requests for information under Article 18(2). It defines in broad terms the scope of the inspection and it evidences the authority of the particular inspectors.
[87] Such a decision must contain the same or equivalent matters as required in respect of decisions under Article 18(3).
[88] In other words, a written authorization does not constitute a compulsory, first stage before ordering a decision by way of decision. See *National Panasonic*, paras 9 and 12.
[89] Article 23(1)(c). See Kerse and Khan, page 39.

the Commission.[90] **Article 20(4)** enables the Commission to conduct inspections without the company's agreement and prior warning. The most notorious form of the Commission inspections is the so-called *dawn raid*, where the Commission officials arrive at the business premises with a decision.[91] If the company refuses to comply with it, the Commission may take a further decision and impose a fine of one per cent of the total turnover in the preceding business year and/or a periodic penalty payment not exceeding five per cent of the average daily turnover.[92]

Since one of the principal aims of Regulation 1/2003 is the concentration of the Commission's enforcement action against cartels operating across the EU's Internal Market, the Commission is increasingly initiating its investigation procedures through dawn raids in cases where the Commission does not already have any evidence.[93] The CJEU has been generous to the Commission in accepting that it does not have to be *very* specific in its decisions, since it is impossible to know in advance which documents it is expected to find.[94] Whichever procedural choice the Commission makes, it must always specify the *subject matter* and *purpose* of the inspection. This constitutes a fundamental requirement, safeguarding the companies' rights of defense, since it enables judicial review of the inspections.[95] The object of such specification not only shows that the inspection is *justified*, but also enables the company to assess the scope of its obligation to cooperate.[96] In addition to such specifications, the documents that serve as the legal basis for the inspection must specify the inspectors' powers, the date of the inspection (only decisions) and the applicable penalties. Nevertheless, the Commission may impossibly know exactly what documents it will find and therefore it may also confiscate documents not specified in advance.[97] This obviously strengthens the Commission's investigative powers.

3.2.2.2 Obligation to Cooperate with the Commission

To secure the *effectiveness* of the inspections, the companies are obliged to cooperate with the Commission.[98] The refusal to do so, or the obstruction of the inspections, may constitute a *procedural infringement*, subject to a fine

[90] Kerse and Khan, page 159.
[91] Jones and Sufrin, page 1046.
[92] Articles 23(1)(c) and 24(1)(e). See Aslam and Ramsden, page 65.
[93] Kerse and Khan, pages 161 and 164.
[94] It appears from the *Hoechst* and *Roquette Frères* cases that it is sufficient if the *essential information* is given. There is no need to specify precisely the relevant market, the exact legal nature of the presumed infringements or the period during which the infringements were committed. See Kerse and Khan, pages 162f.
[95] See Articles 20(3) and (4). In particular, the Commission must indicate the presumed facts that it intends to investigate as well as the evidence sought. This is also the case for requests for information. Important to note is that *simple authorizations* are not judicially reviewable as they lack binding force. See Berghe and Dawes, page 409.
[96] As regard the *justification* for the decision, it must state the reasons on which it is based. Then the requirements of Article 296 TFEU will be met. See Joined Cases 46/87 and 227/88, *Hoechst AG v Commission*, paras 29 and 41.
[97] Berghe and Dawes, page 409. It can be mentioned that so-called *'fishing expeditions'* are not allowed.
[98] *Orkem*, paras 22 and 27.

of up to one per cent of the company's total annual global turnover in the preceding business year and/or a periodic penalty payment not exceeding five per cent of the average daily turnover.[99] Whether the Commission had the right to carry out an inspection or whether the company was entitled to oppose it, are ultimately decided by the EU Courts.[100] While a company has no right to oppose an inspection *ordered by decision* – provided that the decision is legal and that the Commission stays within its boundaries – it *does* have the right to require the Commission to show the decision and the authorizations ordering and delimiting the scope of it. That is part of the company's rights of defense.[101]

Under Article 23(1)(c), the Commission has the power to sanction a company's intentional or negligent opposition to an inspection by opening an independent proceeding and imposing a distinct fine. This is a matter of discretion for the Commission. However, before adopting such a fining decision the companies must be given the opportunity to be heard on the matters to which the Commission has taken objection.[102] Unlike for *substantive infringements*, no guidelines have been adopted in respect of the level of fines for *procedural* ones. Consequently, the Commission enjoys considerable discretion in determining the amount of fines.[103] The imposition of a *procedural fine* may act as a greater deterrent than an increase of a substantial one, as it sends out a clear signal to other companies that the Commission will aggressively pursue any obstruction of its inspections.[104] However, the level of fines must also be in agreement with the general principles of EU law, particularly the principles of *proportionality* and *non-discrimination*.[105]

3.2.2.3 Article 20(2)

Article 20(2) enumerates the Commission's different *inspection powers*. Under **Article 20(2)(a)** the Commission officials have the power to *'enter any premises, land and means of transport of the undertaking'* – with the company's consent.[106] Since the provision as such does not give the Commission inspectors the right to make a forcible entry, they must rely on the company's cooperation and information given by it. However, opposition to the Commission's inspection allows the Commission to

[99] Articles 23 and 24.

[100] Berghe and Dawes, page 415. This will be analyzed further under Chapter 4 in relation to companies' rights of defense.

[101] This is simply because the company would otherwise be unable to assess whether the inspectors remain within the boundaries of their competence. See Berghe and Dawes, pages 412f.

[102] Companies must also be given access to the Commission's file. See Berghe and Dawes, page 416.

[103] The only 'limits' on that discretion are the fact that maximum one per cent of the total turnover in the preceding business year may be imposed and the gravity and duration of the procedural infringements must be taken into account.

[104] That was what happened in the *E.ON* case; see under the next chapter.

[105] Berghe and Dawes, pages 416f.

[106] It refers to *any* premises, indicating that the inspectors have a right to access all the premises specified in the relevant decision or authorization and to all parts of those premises. However, the CJEU has held that there are places where evidence is normally to be found; see *Hoechst*, para 26. See also Jones and Sufrin, pages 1053f.

invoke the assistance of the NCA to carry out the inspection by force, if necessary.[107]

Article 20(2)(b) gives the Commission officials the power to *'examine books and other records, irrespective of the medium on which they are stored'*. This is a broad term and includes all papers, official or unofficial, relating to the company's business. Together with the obligation to actively cooperate, as stated in the *Orkem* case,[108] it indicates that the company cannot deny the inspectors access to the machines necessary to check the contents of tapes, microfilms etc.[109] The company must also provide the required documents.[110] However, the Commission cannot simply pass over the main burden of investigation to the investigated company. The CJEU has acknowledged that it is in principle for the Commission, and not for the company as such, to decide whether a document must be produced to it or not.[111]

Under **Article 20(2)(c)** the Commission officials have the power to *'take copies of books or records'*. If such copies are taken and the company believes they are not related to the subject matter of the investigation, it can ask the Commission to return them.[112]

Article 20(2)(d) gives the Commission officials the power to *'seal any business premises and books or records […]'* to the extent it is necessary for the inspection. Due to the risk that incriminating documents may be removed overnight, it permits a more extensive inspection to be conducted.[113] *'Books and records'* shall be given a broad interpretation both under Articles 20(2)(b) and (d), including also computers.[114] According to Article 23(1)(e) the Commission can impose a fine on the company for breaching a seal under an inspection, which happened in 2008 for the first time. The Commission imposed a fine of €38 millions on E.ON Energie AG, a decision which later was upheld by the General Court. The seal had been affixed overnight to the door of a room in which the inspectors had placed documents. E.ON explained that the seal had been damaged by, for

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[107] The power to enter a company's premises does not give a right to enter the premises of its solicitors, accountants or bank, for example, although they may hold *'books or other business records'*. There is, however, nothing to prevent the inspectors from entering the office of the company's in-house legal. An examination of the legal professional privilege is, however, beyond the scope of this thesis.

[108] *Orkem*, paras 22 and 27.

[109] Accordingly, it is thought that the Commission interprets the words *'to examine'* as including the right of reasonable access to and use of necessary facilities for the examination and copying of such records. See Kerse and Khan, pages 170f.

[110] *Orkem*, para 27.

[111] See, e.g., *Hoechst*, para 31; and *Orkem*, para 15. However, the principle may be subject to exceptions, e.g., as regards documents subject to the legal professional privilege for lawyer-client communications; see Case 155/79, *AM&S v Commission*, and the more recent Case C-550/07 P, *Akzo Nobel Chemicals Ltd. v Commission*. See also Kerse and Khan, page 173.

[112] The Commission is, however, unlikely to return them if they remain relevant for the purpose of the investigation. See Kerse and Khan, pages 174f.

[113] Recital 25 suggests that seals should *'normally not be affixed for more than 72 hours'*. It is, however, not clear whether this guideline implies that seals should not be continuously affixed for more than 72 hours, or that seals should not be affixed overnight for more than three nights.

[114] Kerse and Khan, page 175.

instance, aggressive cleaning products and the cleaning lady wiping it with a damp cloth.[115] Through its fining decision the Commission alleged that E.ON *'negligently at least'* infringed Article 23(1)(e).[116] The former Commissioner for Competition, Neelie Kroes, held that *'the Commission cannot and will not tolerate attempts by companies to undermine the Commission's fight against cartels and other anti-competitive practices by threatening the integrity and effectiveness of [the Commission's] investigations […]. [The E.ON] decision sends a clear message to all companies that it does not pay off to obstruct the Commission's investigations'*.[117]

Under **Article 20(2)(e)** the Commission officials are empowered to *'ask any representative or member of the staff for explanations on facts or documents relating to the subject-matter and purpose'* of the inspection, so-called *'on-the-spot questions'*. This provides the Commission with a wide power to ask questions. The purpose of the inspections also tends to be stated in fairly general terms.[118] If the staff members refuse to answer, or give incorrect or misleading explanations, it may result in a fine under Article 23(1)(d).[119]

3.2.3 Article 21 – *Inspection of Other Premises*

Article 21 is easily one of the most controversial aspects of the dawn raid procedure[120] and empowers the Commission officials to inspect *'other premises'*, that is, *private premises* such as homes of companies' directors, managers and employees. Neither Article 21 nor Articles 23 or 24 provide the Commission with the power to impose fines and/or periodic penalty payments in relation to inspections on private premises. Thus, an individual's conduct in relation to an Article 21 investigation cannot make the company liable to pay procedural fines.[121] In contrast to inspections on business premises, the Commission can neither seal private premises, nor ask 'on-the-spot' questions.[122] However, as a pre-requisite, there must exist a *'reasonable suspicion'* that business-related records, which may violate Article 101 or 102 TFEU, are being kept on those premises.[123]

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[115] T-141/08, *E.ON Energie AG v Commission*, para 84. On 25 February 2011 E.ON brought an appeal before the CJEU against the General Court's decision.

[116] See the summary of the Commission Decision: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:240:0006:0007:EN:PDF

[117] See the Commission's Press Release IP/08/2008 from 30 January 2008: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108&format=HTML&aged=0&language=EN&guiLanguage=en; and the summary of the Commission Decision: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:240:0006:0007:EN:PDF

[118] Kerse and Khan, pages 176f.

[119] Important to remember is that Regulation 1/2003 does not provide for any sanction to be imposed on the members of staff for failing to provide correct and complete answers; only the company as such can be held responsible and liable for fines and/or periodic penalty payments under Articles 23 and 24. See Jones and Sufrin, pages 1053f; Kerse and Khan, page 179; and Wils (2008), page 4.

[120] Aslam and Ramsden, page 66.

[121] Kerse and Khan, page 184.

[122] Article 21(4). See Wils (2008), pages 5f; and Jones and Sufrin, pages 1043 and 1057.

[123] Wils (2008), page 5.

An *additional* safeguard provided by Article 21 is that the Commission's inspections must be based on a *decision*, however more importantly; according to Article 21(3) the Commission needs a prior *judicial authorization* by the national judicial authority to be able to execute such decisions.[124] This requirement enables a control of such Commission decisions, which must be authentic, but also protective against arbitrary and excessive measures. The safeguards provided by Article 8 ECHR also apply to Article 21. However, due to the fact that the lawfulness of the Commission's inspection decisions may be reviewed by the CJEU, it is submitted that such inspections do not violate Article 8 ECHR.[125] It can, however, be argued that the extension of the Commission's powers to *'anyone'* who works for the company, is too broad in scope and stretches the limit of what competition investigations are about, namely finding infringements of competition law committed by *companies*.[126] This is an interesting discussion, but has to be continued somewhere else, as the scope of this thesis is limited to *business premises*.

3.3 Judicial Review of the Commission's Inspection Decisions

As no prior court warrant is needed under Articles 18 and 20, the lawfulness of such decisions is only subject to a *posterior* judicial review by the CJEU. In practice, however, many of the CJEU's functions are exercised by the General Court – subject to appeal to the CJEU on *points of law*.[127] Both Articles 261 and 263 TFEU are important in relation to the enforcement of EU competition law.[128] In order for a court to have *full jurisdiction* within the meaning of the ECHR, the ECtHR has held that it must have *'[…] the power to quash in all respects, on questions of fact and law, the decision […]'*.[129] However, the General Court has only got full – or 'unlimited' – jurisdiction in respect of penalties, which is provided by Article 261 TFEU and Article 31 of Regulation 1/2003.[130]
Article 20(4) provides that the inspection decisions must specify the right to have the decision reviewed by the General Court under Article 263 TFEU. It has the competence to *review the legality* of decisions taken by the EU institutions, however without the possibility to replace the Commission's

[124] Kerse and Khan, page 182.
[125] This is, of course, subject to the condition that the Commission officials exercise their investigative powers in compliance with the requirements laid down in Regulation 1/2003, and attempt to cause as little disturbance as possible in the homes of the persons concerned.
[126] Aslam and Ramsden, page 80. It has also been questioned whether Article 21 sufficiently limits the Commission's investigative powers and leaves sufficient autonomy to the national court to ensure compliance with the *necessity* and *proportionality* principles, as regards the interference with fundamental rights; see Kerse and Khan, page 183.
[127] Kerse and Khan, page 52.
[128] Ibid., page 53.
[129] Appl. No. 34619/97, *Janosevic v Sweden*, para 81. See Wils (2010), page 15.
[130] Wils (2011), page 14; Forrester (2011, *A Bush in Need of Pruning: The Luxuriant Growth of 'Light Judicial Review'*), pages 37f; and Forrester (2011, *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*), pages 186ff.

decisions by its own.[131] It may therefore be argued that the right to appeal to the General Court is not remedying potential flaws of the Commission's investigation procedures. Given the fact that the EU Courts are legally bound to respect the CFR's provisions like any other Treaty article, it may also be argued that the EU Courts should adopt a stricter level of review in order to respect the principles set out in the ECtHR's case law. This aspect, besides the obligation to offer full judicial review of decisions in criminal competition law cases, would imply a step forward in due process terms.[132] As the law stands today, a considerable margin of discretion is given to the Commission and seen in the light of the General Court's limited judicial review, that margin indicates that the current judicial protection needs to be improved to reach the same level of procedural guarantees set out in the ECHR.[133] It may be emphasized that only a review of the legality of the Commission's decisions are exercised by the EU Courts, not a full review on the merits.[134]

As will be analyzed more thoroughly later in connection to the investigated companies' rights of defense, the EU Courts have so far not applied the ECHR and the ECtHR's case law directly, but instead relied on its own general principles of EU law. This has led to some discrepancy in how the EU Courts and the ECtHR, respectively, apply the human rights principles.[135] Until the ECHR becomes EU law, however, it can be hoped that the EU Courts will continue to draw inspiration from the ECtHR's case law. In its recent *Ravon* judgment, for instance, the ECtHR emphasized the need for effective judicial review of inspection decisions and stressed that Article 6(1) ECHR requires the existence of an appeal procedure not limited to points of law.[136] It is argued that this judgment is applicable to EU competition law proceedings, not only because the French Tax Administration's investigative powers are similar to those enjoyed by the Commission, but also because companies have a right to bring an action for annulment of investigation decisions before the General Court, even in the absence of subsequent infringement decisions.[137] That is because of the distinction made between the reviews of inspection decisions *as such* and their *execution*. An inspection decision ordering information or authorizing the inspection is in itself open to judicial review, independently of any final infringement decision. However, when the limitation period for challenging

[131] Article 263 TFEU enumerates the following grounds: *lack of competence*; *infringement of an essential procedural requirement*; *infringement of the [TFEU] or of any rule of law relating to its application*; and *misuse of powers*. A stay of execution may be made under Article 278 TFEU, however without suspensory effect. It is, however, unlikely that the CJEU would do that when an inspection decision is impending. See Killick and Berghe, page 276.

[132] Killick and Berghe, pages 278 and 281; and Kerse and Khan, page 52.

[133] Berghe and Dawes, page 421; and Forrester (2011, *A Bush in Need of Pruning: The Luxuriant Growth of 'Light Judicial Review'*), page 14.

[134] Forrester (2009), page 821. According to his own words, the question *'what is lawful?'*, rather than *'what is wrong?'*, describes the current standard of review.

[135] Forrester (2009), page 822.

[136] Berghe and Dawes, page 421.

[137] Appl. No. 18497/03, *Ravon v France*. The Tax Administration's search and seizure powers were held to be contrary to Article 6(1) ECHR. See Berghe and Dawes, page 421.

such a decision has expired, the decision becomes definitive and the company has lost its right to challenge the legality of it as part of an appeal against the final decision. Nevertheless, the way inspections are carried out pursuant to an inspection decision, that is, the execution of an inspection may be brought up when the company appeals against the final decision. If the company claims that the inspection infringed its right against self-incrimination, for example, that can be part of an appeal against such a decision if it relies on evidence obtained during the inspection, in breach of that right.[138] Hence, if the General Court finds the Commission's execution of an inspection to be illegal, evidence obtained during the inspection will also be considered illegal and the Commission will accordingly be prevented from basing its final infringement decision on such evidence.

[138] Kerse and Khan, page 180.

4 Companies' Rights of Defense during the Commission's Investigations

4.1 Rights of Defense as a 'Due Process' Standard

Already in *Hoffmann-La Roche* the CJEU held that a fundamental principle of EU law is the respect of the *rights of defense* in administrative proceedings that may lead to the imposition of sanctions. It has also held that companies' rights of defense extend to the Commission's *preliminary investigation procedures*.[139] Nevertheless, the EU Courts did not take such issues in competition law cases seriously before the proclamation of the CFR in 2000.[140] Generally, only *individuals* can invoke the protection of human rights enshrined in the ECHR. Nevertheless, certain ECHR rights are extended to *companies*.[141] As to the legal basis, Article 1 ECHR protects *'everyone'*, however the corporate human rights protection cannot be based exclusively on that provision.[142] According to paragraph 36(1) of the Rules of Court, which refers to Article 34 ECHR, companies have a right to allege that public authorities have breached their human rights.[143] Article 34 ECHR itself states that *'the Court may receive applications from […] non-governmental organization […]'*. Companies fall within the scope of such *'non-governmental organizations'* according to the ECtHR's case law.[144] Nevertheless, the human rights provisions most frequently invoked by companies are surrounding a small area of ECHR provisions, principally the right against self-incrimination and the right to inviolability of the home.[145]

Decisions under Articles 18 and 20 may be taken by the Commission without having to afford the investigated companies the right to be heard. In the *National Panasonic* case the CJEU held that there is a *'substantive difference'* between such decisions taken in the exercise of *investigatory powers* and those taken to *terminate an infringement*.[146] Companies must be

[139] Joined Cases 97-99/87, *Dow Chemical Ibérica*, para 12; and Case 85/87, *Dow Benelux v Commission*, para 26. That may become particularly relevant in the event of an appeal, otherwise the company will have no right to raise them as procedural issues and claim that their rights of defense have been infringed during the administrative procedure. See Kerse and Khan, page 190; and Berghe and Dawes, page 418.
[140] Ameye, page 333.
[141] See Appl. No. 37971/97, *Société Colas Est and Others v France*.
[142] However, read in the light of the preparatory works, companies are entitled to human rights protection; see Emberland, pages 34f.
[143] See http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_June2010.pdf. See also Emberland, page 14.
[144] Emberland, page 4.
[145] Ibid., page 14.
[146] *National Panasonic*, para 21.

given the right to be heard only regarding the latter. The rights of defense in respect of investigatory decisions are not affected in the same way, since the Commission is merely concerned with the *'collection of the necessary information'*.[147] This does not necessarily mean that due process principles cannot be recognized in Articles 18 or 20 procedures. Both in respect of the right against self-incrimination and the right to inviolability of the home, it will be examined whether there exist procedural rights and safeguards available to the investigated companies, in the light of *administrative due process* standards enshrined in the ECHR. Articles 6(1) and 8 ECHR are particularly relevant in respect of the Commission's competition law enforcement procedures.[148] The extent to which the ECtHR and the EU Courts, respectively, protect these rights of defense will be analyzed.

4.2 Right Against Self-Incrimination

Although Article 6(1) ECHR does not *explicitly* provide for a right against self-incrimination, it has been recognized by the ECtHR as *'lying at the heart of the notion of fair procedure under Article 6 [ECHR]'*.[149]
Since the right against self-incrimination is aimed at preventing public authorities from compelling the accused to produce inculpatory evidence – which would be impossible for the public authority to obtain without the accused's cooperation – it is directly linked to the notion of the *presumption of innocence*.[150] Given the nature of the infringements and the nature and degree of the severity of penalties, the CJEU held in the *Hüls* case that the principle of the presumption of innocence enshrined in Article 6(1) ECHR was applicable to competition law procedures, which might result in the imposition of fines. Thereby, it emphasized the significance of the ECHR and the ECtHR's case law.[151] The right against self-incrimination thus constitutes a *safeguard mechanism* available to the investigated companies.[152] Nevertheless, this right only applies when the Commission is *compelling* a response, which means that a company may only rely on it when it is required to supply information *by decision* under Article 18(3). The right against self-incrimination is however limited, due to the obligation to cooperate with the Commission. Nevertheless, an investigated company has the right to refuse to answer questions if that would lead to an admission to an infringement.[153]

[147] Kerse and Khan, page 191.
[148] Killick and Berghe, page 272.
[149] The right against self-incrimination constitutes an internationally recognized human rights standard that historically responded to the need to protect *individuals* subjected to *criminal proceedings* from the compulsion exercised by *public authorities* seeking to force them to give evidence that may incriminate himself/herself, or even confess to the crime of which they had been accused. The principle is primarily a *fair trial* requirement, but obviously relates also to the Commission's regulatory proceedings. See *Saunders*, para 68. See also Andreangeli, page 124.
[150] Andreangeli, page 125.
[151] Case C-199/92 P, *Hüls v Commission*, paras 149f.
[152] Aslam and Ramsden, page 67.
[153] Berghe and Dawes, page 419.

4.2.1 Article 6(1) ECHR / Article 47(2) and (3) CFR[154]

Although the Commission is not a *'tribunal'* within the meaning of Article 6(1) ECHR, it is during its administrative procedure obliged to observe the general principles of EU law, including the rights of defense.[155] The protection provided by Article 6(1) ECHR begins when a person is *'charged with a criminal offense'*.[156] The rights protected by Article 6(1) ECHR play a central role in the system surrounding the ECHR and are also basic elements of the rule of law. Many of the terms in that provision, including the notion of a *'criminal charge'*, are *autonomous* and need to be interpreted by the ECtHR.[157] Accordingly, the ECtHR defines the scope of the ECHR protection.

4.2.1.1 *'Criminal or Civil'* Nature of the Investigations

Ever since the adoption of the EU competition rules, its genuine nature – *administrative* or *criminal* – has been debated. The rights enshrined in Article 6(1) ECHR are guaranteed no matter if the proceeding is to be classified as *civil* or *criminal*.[158] It has been held, however, that the crucial question is related to the *consequences* rather than the classification.[159] Nevertheless, a wider range of safeguards is offered in criminal proceedings and it is therefore important to decide whether the Commission's investigation procedures are of civil or criminal nature.[160]
In the light of the increasing awareness of the *quasi-criminal* nature of the competition law proceedings and the increasing level of fines, both Advocates General Vesterdorf and Léger have argued that the Commission's enforcement proceedings have *'a criminal law character'* in the terms of the ECHR.[161] The ECtHR's *Société Stenuit* judgment is of

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[154] Article 47(2) and (3) CFR correspond to Article 6(1) ECHR, however the scope is wider, but the meaning the same; see the *Explanations relating to the Charter of Fundamental Rights*, Article 52: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. Article 52(3) CFR provides that where the CFR contains rights corresponding to those enshrined in the ECHR, their meaning and scope shall be *at least* the same. This implies that the level of human rights protection afforded by the ECHR and as interpreted by the ECtHR should be implemented in EU law.
[155] See, e.g., Joined Cases 100-103/80, *Musique diffusion française v Commission*, para 8; reiterated in Case T-21/99, *Dansk Rørindustri A/S v Commission*, para 155. The EU Courts have recognized that the rights of defense include the right to be heard, the right of access to the file, the right to good administration (codified in Article 41 CFR), the right against self-incrimination and the legal professional privilege. See Kerse and Khan, pages 187f.
[156] A *'charge'* has been defined as *'the official notification given to an individual by the competent authority of an allegation that he [or she] has committed a criminal offense'*. See Ovey and White, page 162.
[157] Appl. Nos. 5100/71, etc., *Engel and Others v the Netherlands*, para 81. See Ovey and White, page 158.
[158] Article 6(1) ECHR states that *'in determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing […]'*.
[159] Killick and Berghe, page 264.
[160] Jones and Sufrin, pages 1039f; and Kerse and Khan, 128.
[161] See the Opinion of AG Vesterdorf in Case T-7/89, *SA Hercules Chemicals v Commission*; and Opinion of AG Léger in Case 185/95, *Baustahlgewebe v Commission*;

particular importance in this regard.[162] It concerned the French Competition Authority's imposition of a fine under French competition law for the company's participation in a cartel. The law had characteristics of criminal law, namely the *general interests of the society*. In addition, as the fine was a penalty, it was held to be criminal in nature. Accordingly, there had been a breach of Article 6(1) ECHR and the argument that this provision could not protect companies was dismissed in the light of its fundamental role.[163] The fact that it was held that the French competition law enforcement possessed a *'criminal aspect […] for the purpose of the [ECHR]'* supports the argument that that EU competition law enforcement can be considered to be criminal in nature.[164] Although the EU Courts have not yet expressly defined competition law proceedings as criminal, the General Court has referred to the ECtHR's case law concerning administrative proceedings that are *'criminal in nature'*.[165] More importantly, given that the Commission is engaged in criminal proceedings once a company has a *'criminal charge against it'* and becomes aware that it is being *'seriously investigated'*, Article 6(1) ECHR is relevant at the early stage of the Commission's investigation procedures.[166] Despite this, the ECtHR has constantly dismissed appeals brought against the Commission's decisions on grounds of violation of Article 6(1) ECHR, since the EU is not a party to the ECHR. Due to the same reason, the possibility of successfully invoking that provision, in order to challenge a competition law decision, has also been denied by the CJEU. It has been held that a *subsequent control* by a court having full jurisdiction and providing the guarantees of Article 6(1) ECHR, observes the procedural guarantees lay down by the enforcement regulations.[167] As mentioned above, this question may be discussed. The ECtHR's case law indicates that in the area of administrative decision-making, the ECtHR has interpreted Article 6(1) ECHR as enshrining *'a*

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para 31. That has also been recognized by the CJEU and the ECtHR. See Andreangeli, page 26.

[162] Appl. No. 11598/85, *Société Stenuit v France*.

[163] The ECtHR never gave a judgment in this case, since the company withdrew its application. See more on the 'criminal aspect' in Chapters 4.2.1.1 and 4.2.1.2. See also Kerse and Khan, page 128.

[164] This was held by the now-defunct *European Commission on Human Rights*; see *Société Stenuit*, paras 56ff. See also Andreangeli, page 25.

[165] Case T-67/00, *JFE v Commission*, para 178. Here, the General Court held that, with respect to the reach of the presumption of innocence in EU competition proceedings, this principle applies in particular to the proceedings relating to infringements of the competition rules, which may result in the imposition of fines on companies. See Andreangeli, pages 27f. In the light of the ECtHR's judgment in *Société Stenuit*, the General Court generally recognizes that fines have a criminal character; see Kerse and Khan, page 129.

[166] This guarantees a due process at *all* stages of the procedure, even at the administrative stage. See Kerse and Khan, page 129. In addition, the ECtHR held in Appl. No. 19187/91, *Saunders* (para 67) that *'an administrative investigation is capable of involving the determination of a "criminal charge" in the light of [the ECtHR's] case law concerning the autonomous meaning of that concept'*.

[167] Andreangeli, page 23.

right to due process at some stage of the proceedings, but not necessarily at the outset'.[168]

4.2.1.2 '*Engel* Criteria'

In the *Engel* case, the ECtHR held that a matter would be classified as *criminal* if the three so-called '*Engel* criteria' were fulfilled.[169] According to the ECtHR the *'domestic classification'* criteria is the least important and never determinative.[170] In respect of competition law matters the two other requirements are the most relevant and would lead to the conclusion that EU competition law should be treated as criminal.[171] As regards the *'nature of the offence'* criterion, that includes matters such as whether the legal norm is *generally* applicable, whether the sanctions have deterrent and/or punitive character, whether the proceedings are instituted by a public body with enforcement powers and whether the penalty is dependent on a finding of guilt. The '*nature and severity of the potential penalty'* criterion takes the maximum penalty for the offense into account.[172]
Although legislation may classify EU competition law as *administrative*, it might be of *criminal* nature within the meaning of Article 6(1) ECHR.[173] This conclusion can be drawn from the *Engel* case, despite the fact that Article 23(5) is stating that decisions imposing fines for competition law infringements *'shall not be of a criminal nature'*.[174] It can, however, be questioned whether the characterization of EU competition law proceedings as criminal matters in the light of Article 47 CFR, now forming part of primary EU law.[175]

4.2.2 Case Law of the ECtHR

In the *Funke* case it was confirmed that Article 6(1) ECHR includes a right to silence and a right not to incriminate oneself. The ECtHR examined the extent to which the French custom officials enjoyed a right to carry out searches and seizures to acquire evidence.[176] Mr. Funke held that his criminal conviction for refusal to provide the officials with the documents sought in their investigation had violated his right to a fair trial, more

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[168] Appl. Nos. 7299/75, etc., *Albert & LeCompte v Belgium*, para 29. According to this stance, the Commission's investigative proceedings do not necessarily have to be protected by due process standards. See Andreangeli, pages 52f and 57; and Jones and Sufrin, pages 1040f.
[169] The term *'criminal charge'* was here defined for the first time. See Kerse and Khan, page 129.
[170] *Engel*, paras 80f. See Killick and Berghe, page 266.
[171] The ECtHR has also held that the matter is to be classified as criminal if a penalty is imposed to deter and/or punish infringements, rather than compensate for damage. See Appl. No. 12547/86, *Bendenoun v France*.
[172] Jones and Sufrin, pages 1039f.
[173] Killick and Berghe, page 270.
[174] Due to the concentration of *investigating, prosecuting, decision-making* and *enforcing* functions within one single institution, it is argued that the Commission's enforcement powers do not comply with Article 6(1) ECHR. See Andreangeli, pages 23 and 51.
[175] Killick and Berghe, page 271.
[176] Appl. No. 10828/84, *Funke v France*, paras 30f.

exactly his right not to give evidence against himself.[177] Accordingly, his right against self-incrimination had been violated, since the public authorities had *'secured [his] conviction in order to obtain certain documents'*.[178] In the later *John Murray* case, Mr. Murray alleged that there had been a violation of his right to silence and his right not to incriminate himself. The ECtHR held that the right to silence was *not absolute*, but regard should be had to all the *'circumstances of each case'*.[179]
The *Saunders* judgment was more detailed and nuanced than *Funke*, which it overruled.[180] It concerned the use of the inspector's transcripts of interviews in the subsequent criminal trial.[181] Although not explicitly mentioned in Article 6(1) ECHR, the ECtHR recalled that the right to silence and the right not to incriminate oneself are generally recognized international standards, which *'lay at the heart of the notion of a fair procedure under Article 6 ECHR'*.[182] The ECtHR, however, limited the scope of the right against self-incrimination significantly by excluding materials that may be obtained through compulsory powers. It held that *'the right not to incriminate oneself is primarily concerned […] with respecting the will of an accused person to remain silent'*.[183] In other words, material having an existence *independent* of the will of the suspect – for instance, breath, blood and urine samples – falls outside the scope of the right against self-incrimination.[184] It has even been suggested that the *Saunders* judgment goes as far as to prevent the Commission from asking questions *'on such subjects as the operation of the business and economic questions'*.[185] Accordingly, the right against self-incrimination aims at respecting the *will* of the accused to remain silent and therefore it is only necessary to protect the accused from providing evidence contrary to that will.[186] Important to note is that it is the way in which the evidence obtained through compulsory methods is used in a subsequent criminal trial that determines whether it is to be considered as incriminating or not.[187] The ECtHR concluded that even such statements not actually incriminating in nature, undermined Mr Saunders's right to a fair trial.[188]

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[177] *Funke*, para 44.
[178] Andreangeli, page 136.
[179] The ECtHR came to the conclusion that there had been no violation of Article 6(1) and (2) ECHR; see Appl. No. 18731/91, *John Murray v United Kingdom*, paras 40f and 47.
[180] Kerse and Kahn, page 140. The *Funke* case continues, however, to be cited by the ECtHR in relation to Article 8 ECHR. See more about that under Chapter 4.3.2.
[181] Mr Saunders complained of the fact that statements made by him under compulsion to the inspectors during their investigation were used as evidence against him. See Appl. No. 19187/91, *Saunders v UK*, paras 57 and 60.
[182] *Saunders*, para 68; referring to *Funke*, para 44; and *John Murray*, para 45.
[183] *Saunders*, para 69.
[184] *Saunders*, para 69.
[185] Kerse and Khan, page 141.
[186] *Saunders*, paras 68f.
[187] *Saunders*, para 71.
[188] That was so because the statements had been read directly to the jury, despite Mr Saunders's objection as part of this defense, and had thus contributed to the strength of the prosecutor's case. Consequently, Mr Saunder's credibility had been adversely affected; *Saunders*, para 72. See Andreangeli, page 139. The question whether the use of such statements is an *unjustified* infringement of the right against self-incrimination must be examined in the light of *'the circumstances of [each] case'*.

Although the right against self-incrimination is an established principle inherent in the fair trial concept, its reach can still be doubted. In the light of the *Funke* and *Saunders* cases, it can be concluded that whether there is a breach of the right against self-incrimination is dependent on the *'circumstances of each case'*. Nevertheless, the approach taken in *Saunders* seems most likely to provide a 'rule of thumb' when determining the scope of that right.[189] Recently, the ECtHR re-examined its scope in the *O'Halloran and Francis* case. It referred to its previous case law and adopted an approach largely built on *Saunders* regarding the assessment of potential infringements.[190] In addition, it reiterated that the interpretation of the fair trial concept depends the *'circumstances of each case'* and cannot be subject to a single, unvarying rule.[191] Having regard to the circumstances of the case, the ECtHR found no violation of Article 6(1) ECHR.[192] The United Kingdom here submitted that the right against self-incrimination was not absolute and could be limited by reference to other legitimate aims in the public interest.[193]

According to these above analyzed cases, it is evident that that the ECtHR so far only has dealt with *individual* applicants who have been exposed to coercive measures by public authorities potentially resulting in criminal proceedings. The crucial question therefore is whether the ECtHR's case law is applicable to *legal persons*, such as investigated companies suspected of breaching the EU competition rules?

4.2.3 Case Law of the EU Courts

Here, the EU Courts' interpretation of the right against self-incrimination will be examined in the light of the ECtHR's case law.

Although the *effet utile* of Article 18 must be preserved, that is, the *effectiveness* of the Commission's investigative powers by which it can compel the investigated companies to disclose the information and provide the documents sought, a limited form of the right against self-incrimination, as constituting a general principle of EU law, was recognized in the *Orkem* case.[194] The companies' rights of defense should not be undermined by a Commission decision, which had been adopted under the then equivalent provision to Article 18(3).[195] The existence of a right against self-

[189] Andreangeli, pages 138 and 142.

[190] Appl. Nos. 15809/02 and 25624/02, *O'Halloran and Francis v UK*, paras 45ff; referring to *Funke*, para 44; *John Murray*, para 46; and *Saunders*, paras 67ff.

[191] *O'Halloran and Francis*, para 53.

[192] *O'Halloran and Francis*, para 62.

[193] *O'Halloran and Francis*, para 37.

[194] Even if the CJEU accepted that investigated companies may rely on Article 6(1) ECHR, it denied the recognition of the right not to give evidence against itself, as neither the wording of that provision nor the ECtHR's decisions indicate that such a right exists therein. See *Orkem*, para 30. Note that the *Orkem* decision was delivered in 1989, whereas the ECtHR's *Funke* and *Saunders* judgments were given later, in 1993 and 1996, respectively.

[195] The case concerned the rights of defense in relation to the exercise of the Commission's powers under Regulation 17/62. The Commission may not compel a company to admit to

incrimination as an essential element of the right to a fair trial during the Commission's preliminary fact-finding procedures was thereby recognized, however limiting the Commission's investigative powers.[196] Also Recital 23 explicitly states that the Commission cannot use its powers under Article 18 to force companies to admit to an infringement of Article 101 or 102 TFEU, due to the need of safeguarding their rights of defense.[197] In *Orkem* the CJEU made a distinction between *providing answers to questions* and *producing documents*. As to the latter, the CJEU did not limit the Commission's powers. Companies must disclose documents that already exist and relates to the subject matter of the inspection, even if the Commission will use them to establish the existence of an infringement.[198] Regarding questions, on the other hand, the Commission was allowed to ask *factual* ones, in contrast to those relating to the *purpose* of an action and the *objective pursued* by the measure in question. A right to remain silent only exists against the latter type of questions.[199] As a consequence of the Commission's power to require investigated companies to provide information that is purely factual and relates to the subject matter of the investigation, such companies are in the light of the *Orkem* judgment obliged to actively cooperate with the Commission.[200] Accordingly, the limited protection against self-incrimination only prevents the Commission officials from asking *leading* questions and requesting evidence concerning the objective and purpose of an action. Factual questions and requests regarding pre-existing documents are in accordance with the rights of defense, as they would not compel the investigated companies to admit to the alleged violation of Articles 101 or 102 TFEU.[201] Due to the fact that also purely factual questions may be damning, this separate treatment of

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an infringement, which it is incumbent on the Commission to prove. See *Orkem*, para 34. See also Andreangeli, pages 131f.

[196] *Orkem*, paras 18f, 27f and 32; and *Hoechst*, paras 14f. It was claimed that the Commission's decision, adopted in accordance with Article 11 of Regulation 17/62 (equivalent to Article 18 of Regulation 1/2003) requesting information for an alleged breach of the competition rules, infringed their right not to incriminate themselves. See Andreangeli, page 129.

[197] Recital 23 reads as follows: '*when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish [a substantive infringement]'*. See *Orkem*, paras 32ff. See also Wils (2008), page 13; and Wils (2011), page 25.

[198] Berghe and Dawes, page 419. The Commission's right to obtain documents will not be elaborated on in the following analysis.

[199] *Orkem*, paras 30f, 37f and 41. The CJEU concluded that although the Commission has a right to compel a company to provide all necessary information regarding facts that are known to it, it may not force it to give answers relating to the existence of an infringement that is incumbent upon the Commission to prove; see paras 34f. That was later restated by the General Court in Case T-112/98, *Mannesmannröhren-Werke AG v Commission*, para 71. See Kerse and Khan, page 139.

[200] *Orkem*, paras 22, 27 and 37f. That includes information such as the dates of the meetings, the names of the persons attending those meetings, the subjects discussed etc.

[201] Accordingly, the General Court annulled the Commission's decision in those parts where the Commission had obliged the company to answer questions in relation to the purpose of the meeting to which it had taken part and the decisions adopted in the course of them. See *Mannesmannröhren Werke*, para 71. See also Andreangeli, page 133.

different kinds of questions is questionable.[202] It is also questionable whether the CJEU's position taken in *Orkem* can be sustained in the light of the ECtHR's *Funke* and *Saunders* judgments given in the meantime, as that would imply acceptance of a situation that is not compatible with the ECHR.[203] Nevertheless, the findings in *Orkem* have been confirmed in the EU Courts' subsequent case law.[204] By acknowledging that companies enjoy the rights of defense also during the Commission's preliminary fact-finding stage of the proceedings, the CJEU recognized a limited right against self-incrimination, at the same time as it preserved the effectiveness of the Commission's investigative powers.[205] In the *Mannesmannröhren-Werke* case, the General Court upheld the CJEU's judgment in *Orkem* and thereby confirmed a narrow interpretation of the right against self-incrimination.[206] An absolute right to silence would go *'beyond what is necessary in order to preserve [companies' rights of defense] and would constitute an unjustified hindrance on the Commission's performance of its duties'*, namely to ensure the application of the competition rules within the EU's Internal Market according to Article 105 TFEU.[207] This argument fails to take the ECtHR's case law into consideration.[208] It has been suggested that the view of the General Court can be read as *'a signal to the effect that the CJEU's interpretation of certain rights in competition law proceedings did not have to coincide exactly'* with the standards developed by the ECtHR in respect of criminal proceedings against individuals.[209] With the sole exception of leading questions, no limit was placed on the Commission's powers. The General Court concluded that *'the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defense […]'*.[210] As the General Court was unable to provide effective protection to the investigated companies its decision in *Mannesmannröhren-Werke* has been strongly criticized.[211]

Subsequently, the EU Courts adopted a more 'defendant-friendly approach'.[212] In the *PVC II* case the CJEU indicated that, as the ECtHR's case law had evolved since *Orkem* – through the *Funke* and *Saunders* judgments – it might adopt this new stance.[213] It held that *'the protection of*

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[202] Andreangeli, page 132.
[203] Aslam and Ramsden, page 69.
[204] See, e.g., *Mannesmannröhren-Werke*, *SGL Carbon* and *PVC II*.
[205] Andreangeli, page 132.
[206] *Mannesmannröhren-Werke*, paras 59ff.
[207] *Mannesmannröhren-Werke*, para 66. Neither is the subsequent Case C-57/02 P, *Acerinox v Commission*, nor in Case T-59/02, *Archer Daniels Midland Co. v Commission*, did the CJEU or the General Court find an infringement of the right against self-incrimination.
[208] Aslam and Ramsden, page 70. Consequently, a right to silence *only* exists in relation to questions that might involve an admission to an infringement on the company's side, which it is for the Commission to prove.
[209] Andreangeli, page 144.
[210] *Mannesmannröhren-Werke*, para 78.
[211] Andreangeli, page 133.
[212] Berghe and Dawes, page 419.
[213] Joined Cases C-238/99, etc., *PVC II*, para 274.

[the right against self-incrimination] means that […] it must be determined whether an answer from the [investigated company] is in fact equivalent to the admission of an infringement, such as to undermine the rights of defense'.[214] The CJEU acknowledged that there is a general principle of EU law ensuring the protection against intervention by public authorities in the 'private sphere' of either natural or legal persons.[215] No infringement of the right against self-incrimination was found in the case, due to the fact that it only concerned a *simple request* for information, which companies are not obliged to answer.[216] Although the EU's standard of protection is not equivalent to that provided for by the ECtHR, the CJEU confirmed its previous position expressed in *Orkem* in the *SGL Carbon* case. In addition to the investigated companies' obligation to cooperate with the Commission, the CJEU held the ECtHR's case law after *Orkem* should not have an influence on the EU Courts' position regarding the scope of the right against self-incrimination.[217] Accordingly, the EU Courts' more recent case law suggests that potentially self-incriminating questions contained in a simple request for information are not sufficient to establish a violation of the right against self-incrimination. There must be an *'actual interference'* with a company's right to a fair legal process.[218] As the evidence obtained by the Commission was later relied upon to prove a violation of Articles 101 and 102 TFEU, the *'actual interference'* condition was interpreted in *PVC II* as requiring the company to prove that the illegality of the simple request for information had affected the lawfulness of the *final decision*.[219] The CJEU followed its Advocate General in *SGL Carbon* concerning companies' rights of defense in relation to the production of *documents*. It held that the investigated companies could claim another meaning of those documents than that ascribed to them by the Commission, either during the administrative procedure or in the subsequent procedure before the EU Courts.[220]

4.2.4 Is There Consistency between the ECtHR's and the EU Courts' Interpretation?

As the right against self-incrimination is not absolute, the ECtHR has emphasized that it makes a new assessment with regard to *'the circumstances of each case'*.[221] Accordingly, it is difficult to completely establish the scope of that right, which leads to legal uncertainty for the parties involved. As the ECtHR favors an interpretation of the right against self-incrimination as constituting an essential element of the right to a fair trial, it functions as a *safeguard* against coercive measures against the

[214] *PVC II*, para 273.
[215] *PVC II*, para 252.
[216] *PVC II*, para 279.
[217] Case C-328/05 P, *SGL Carbon*, paras 40ff.
[218] *PVC II*, para 275; and *Mannesmannröhren Werke*, para 77. See Andreangeli, page 134.
[219] *PVC II*, para 282.
[220] *SGL Carbon*, para 49.
[221] See, e.g., *O'Halloran and Francis*, para 62.

accused in criminal investigations.[222] The CJEU, by contrast, has consistently reiterated that the investigated companies are *obliged to cooperate* with the Commission during the preliminary fact-finding stage of the competition law proceedings. In other words, they are obliged to hand over incriminating documents to the Commission and respond to their requests. Despite that, the EU Courts have held that the investigated companies do not have to incriminate themselves by admitting to infringements of the competition rules, however not without the Commission's power ask questions where the information given may be used as evidence leading to the *establishment* of competition law infringement in subsequent proceedings.[223]

Although the right against self-incrimination is capable of protecting the investigated companies from coercive forms of questioning, the current notion of the right against self-incrimination within the EU legal order only protects the investigated companies from answering leading questions.[224] In the light of the *Saunders* judgment, where it was held that also factual questions might be incriminating, it can be concluded that such a distinction between *factual* and *leading* questions does not provide for a sufficient degree of protection in respect of the investigated companies' rights of defense.[225] Also with regard to the decisions given by the EU Courts after *Orkem*, the right to a fair procedure is not absolute. It may be limited to pursue legitimate aims in the public interest, such as the protection of *'the economic well-being of the EU'* and the prevention of disorder and crime.[226] Therefore, the crucial question is whether the EU Courts' approach constitutes a *proportionate interference* with and *justifiable restriction* on the scope of the right against self-incrimination in the light of the ECHR and the ECtHR' case law.[227] The necessity of a wide margin of discretion is considered to be greater in relation to 'commercial matters', clearly indicating that companies enjoy lesser human rights protection than individuals.[228] A restrictive view of the right against self-incrimination against companies in the context of effective competition law enforcement within the EU may therefore constitute a legitimate aim also with respect to

[222] Andreangeli, page 142.
[223] The only exception is answers to questions potentially involving an admission of an infringement, which it is for the Commission to prove. This was held in the *Orkem* case, paras 34f and 66. See Andreangeli, pages 142f; and Jones and Sufrin, page 1058.
[224] Kerse and Kahn, pages 141ff; and Andreangeli, page 147.
[225] Andreangeli, page 143. It is questionable whether it is compatible with Article 6(1) ECHR and the ECtHR's related case law that the Commission may ask questions of factual nature under the threat of imposing a fine and/or periodic penalty payment where companies refuse to answer.
[226] Andreangeli, page 144. In other words, at the same time as the CJEU recognized a limited right against self-incrimination, it preserved the effectiveness of the Commission's investigative powers.
[227] Andreangeli, page 144.
[228] Andreangeli, pages 145f; and Emberland, page 164. The ECtHR's case law on legal persons shall be restricted to an assessment whether an actual interference with the company's rights of defense is *justified* and *proportionate*.

the ECHR.[229] Therefore, it may be argued that the EU Courts' view is not *completely* inconsistent with that of the ECtHR.[230]
The EU Courts' approach raises several questions as to the actual effectiveness of the right against self-incrimination constituting a right of defense.[231] In *Mannesmannröhren-Werke* the General Court held that an absolute right to silence in competition law investigations *'would go beyond what is necessary in order to preserve companies' rights of defense and would constitute an unjustified hindrance to the Commission's performance of its duty'* in the application of the competition rules.[232] This statement implicitly means that competition law procedures do not have to exactly agree with the ECHR.[233] The reason is simply because competition law proceedings concern legal persons, whereas ECtHR's case law, such as *Saunders*, concerned the use of incriminating evidence in criminal proceedings against individuals.[234] In view of the aforementioned, and with the EU Courts' restrictive interpretation in mind, it can be concluded that more extensive protection is provided for within ECHR legal order, where also factual questions may be incriminating if obtained under compulsion, as it might subsequently be used as evidence in criminal proceedings.[235] It could therefore be argued that the Commission's questions of a purely factual nature also should fall within the scope of the right against self-incrimination recognized in *Saunders*, although the context in which the ECtHR gave a wide interpretation differs significantly from an investigation procedure under Regulation 1/2003.[236]

In contrast to the above, it may also be doubted whether the EU Courts' application of a more lenient standard towards companies' right against self-incrimination is consistent with the *PVC II* and *SGL Carbon* cases. Here, the CJEU required proof of coercion exercised by the Commission on the investigated companies. In addition, the use of evidence obtained during the preliminary fact-finding stage of the procedures in the Commission's final infringement decisions, indicates an *'actual interference'* with the investigated companies' right to a fair legal process in competition law proceedings. Accordingly, this position seems to prefer an interpretation of the right against self-incrimination that is increasingly consistent with the *Saunders* judgment.[237] This more recent case law of the EU Courts may therefore be interpreted as a signal towards more consistency between the scope of the right against self-incrimination recognized as a general principle of EU law and that enshrined in Article 6(1) ECHR. As to the applicable rules, the CJEU held in *Orkem* that companies could not invoke Article 6(1) ECHR in order to refuse to incriminate itself during the

[229] Andreangeli, page 146.
[230] Emberland, 164; and Andreangeli, page 145.
[231] Andreangeli, page 135.
[232] *Mannesmannröhren-Werke*, para 66.
[233] Andreangeli, page 144.
[234] Wils (2003), page 577.
[235] *Saunders*, para 71. See Andreangeli, page 128.
[236] Kerse and Khan, page 143. Note that Recital 23 of Regulation 1/2003 states that parties must provide documents *'even if this information may be used to establish against them'*.
[237] Andreangeli, page 146.

Commission's investigation. Instead, they have to rely on the rights of defense as constituting general principles of EU law.[238] With reference to these principles the General Court in *Mannesmannröhren-Werke* declared that they offer *'equivalent protection'* to that guaranteed by Article 6(1) ECHR.[239] Nevertheless, it is important to note that even if the right against self-incrimination has been recognized as a general principle of EU law by the CJEU in its case law, it does not *entirely* comply with the degree of protection against self-incrimination afforded by Article 6(1) ECHR. Accordingly, the EU Courts have not yet *fully* applied the procedural safeguards enshrined in that provision. In addition, the notion of *'equivalent protection'* may have to be revisited given the wording of Article 52(3) CFR requiring at least the same level of protection within the EU legal order – Article 47(2) and (3) CFR – as provided for by the ECHR.[240]

4.3 Right to Inviolability of the Home

4.3.1 Article 8 ECHR / Article 7 CFR[241]

As regards the Commission's powers to carry out inspections at premises under Articles 20 and 21, the guarantee of *'the inviolability of the home'* in Article 8 ECHR is crucial.[242] Article 8(1) ECHR defines the right, while Article 8(2) ECHR lies down the conditions upon which a public authority might *legitimately interfere* with the enjoyment of that right. In its application of Article 8 ECHR, the ECtHR has taken a *flexible approach*, resulting in a broad scope of the provision.[243] Article 8 ECHR is thus one of the most *open-ended* provisions of the ECHR, as it covers a very wide range of circumstances. The term *'home'*, for instance, has been interpreted as including business premises as well.[244]

4.3.1.1 Article 8(1) ECHR – Business Premises as 'Corporate Homes'

Although there is no clear authority from the ECtHR, the Commission's inspection powers under Article 20 raise questions about its compatibility with the right to respect for private and family life under Article 8 ECHR.[245] According to Article 8(1) ECHR *'everyone has the right to respect for his private and family life, his home and his correspondence'*. Prior to the ECtHR's extension of the *home* protection to business premises, the ECtHR consistently held that the *'object and purpose'* of Article 8 ECHR was the

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[238] *Orkem*, para 35.
[239] *Mannesmannröhren-Werke* case, para 77. See Andreangeli, page 144.
[240] Killick and Berghe, page 266.
[241] Article 7 CFR corresponds to Article 8 ECHR; see the *Explanations relating to the Charter of Fundamental Rights*, Article 52: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf
[242] Jones and Sufrin, page 1039.
[243] Harris, O'Boyle and Warbrick, page 361.
[244] See, e.g., Appl. No. 13710/88, *Niemietz v Germany*, para 30. See also Ovey and White, pages 241 and 249.
[245] Emberland, page 113; and Kerse and Khan, page 168.

protection of *individuals* against arbitrary interference by public authorities.[246] A central argument against the inclusion of business premises within the home concept is that it does not fit with that 'object and purpose'.[247] The crucial question therefore is whether the Commission's power to raid business premises conflicts with the right to inviolability of the home.[248]

4.3.1.2 Article 8(2) ECHR – *'Necessary in a Democratic Society'*

As mentioned above, the right enshrined in Article 8(1) ECHR is limited by the exception in Article 8(2) ECHR, which allows for interference by a public authority when *'it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'*.[249] Since it provides for an *exception* to a right guaranteed by the ECHR, the ECtHR has held that Article 8(2) ECHR must be *narrowly interpreted*.[250] Several safeguards are, however, enshrined in Article 8(2) ECHR. First of all, any interference with the right to inviolability of the home must be *'in accordance with the law'*, implying that it must be based on accessible legal rules, which are *sufficiently foreseeable* in their application.[251] Even though that criterion is formulated with *domestic law* in mind, EU law is applicable, given the fact that it forms part of domestic law and is constitutionally supreme.[252] That was confirmed in the *Bosphorus* case, where the ECtHR held that an EU regulation is *'generally applicable'* and *'binding in its entirety'* on the Member States.[253] Secondly, any interference must have a *'legitimate aim'*. The Commission's investigation procedures fall within the 'public interest' exception as it pursues the legitimate aim of protecting free competition and consequently the *'economic well-being of the EU'*. Central to this determination is the proportionality of the interference in securing the legitimate aim.[254] What is difficult to determine is the third criterion, namely whether the interference goes *beyond* what is *'necessary in a democratic society'*.[255] It must be shown that the restrictive action was taken in response to a *'pressing social need'* and is *'proportionate to the legitimate aim pursued'*.[256] The *proportionality test* indicates that the interference with the rights protected

[246] Emberland, page 115.
[247] Ibid., page 114.
[248] Ibid., page 113.
[249] Consequently, in addition to being *lawful* and pursuing a *'legitimate aim'*, the restriction must be *'necessary in a democratic society'*.
[250] Appl. No. 5029/71, *Klass v Germany*, para 42.
[251] The greater degree of interference, the greater precision is sought with the law defining the limits of the interference.
[252] See Case 26/62, *Van Gend en Loos*; and Case 6/64, *Costa v ENEL*.
[253] *Bosphorus*, para 145. See Aslam and Ramsden, page 76.
[254] Aslam and Ramsden, page 76.
[255] Harris, O'Boyle and Warbrick, page 10; and Ovey and White, page 222.
[256] See Appl. No. 10465/83, *Olsson v Sweden*, para 67, where the ECtHR referred to its established case law.

shall not be greater than is necessary to address that pressing social need. The justification of those limitations is said to arise because of the need to balance the severity of the restriction placed on the private side against the importance of the public interest.[257] It has been argued that in order for any interference to be *'necessary in a democratic society'*, adequate and effective protection against abuse must be available, for example, the requirement of a court warrant as a pre-requisite to such interferences.[258]

It is clear that inspections under Regulation 1/2003 satisfy the requirements of being *'in accordance with the law'* and pursuing a *legitimate aim*. Whether Article 20 guarantees that the inspections permitted thereunder always are *'necessary in a democratic society'* is more problematic.[259] When applying Article 8(2) ECHR in the context of Commission investigations, the ECtHR in the *Niemietz* case acknowledged that interference with the companies' rights under Article 8(1) ECHR would be *more justifiable* than with that of individuals.[260] The ECtHR has accepted that public authorities have a *margin of appreciation* with respect to actions taken under Article 8(2) ECHR, which might be broader where business activities or premises are involved.[261]
Finally, it can be added that it has been held to be surprising that the Commission's power also cover private premises, such as the homes of directors etc., as it is clear from the wording of Article 8(1) ECHR and the ECtHR's case law that homes fall within the scope of the provision. The crucial issue relating to Article 21 is the same as for Article 20; whether interference with an individual's home is '*necessary in a democratic society'*. In contrast to business premises, private premises probably enjoy greater protection. This conclusion may be drawn as the ECtHR in *Niemietz* held that interference with Article 8(2) ECHR *'might well be more far-reaching where professional or business activities or premises are involved than otherwise be the case'*.[262]

4.3.2 Case Law of the ECtHR

Although the ECtHR's has said that the 'object and purpose' of Article 8 ECHR is to protect individuals against public authorities' arbitrariness, it also reveals a possible extension of the home protection to business premises. However, a broad approach of the provision is not favored.[263]
In *Chappell v UK* the ECtHR held that searching a company's premises, which were also the home of the company's only shareholder, had interfered

[257] Ovey and White, pages 219 and 232. The relationship between human rights and public interest exceptions is one of the most important issues in today's human rights jurisprudence.
[258] Kerse and Khan, page 166. This is not the case regarding Article 20 inspections.
[259] Ibid., pages 167f.
[260] Ibid., page 166.
[261] *Niemietz*, para 31. See Emberland, pages 176f; and Ameye, page 340.
[262] Aslam and Ramsden, page 78.
[263] Emberland, pages 114ff.

with the right to respect for his home.[264] The ECtHR found Article 8 ECHR applicable due to the impossibility to distinguish his private residence from his business premises.[265] Similar findings were made in *Niemietz v Germany*, where the ECtHR held that the right to respect of private and family life extends to *'certain professional or business activities or premises'*.[266] The search of Mr. Niemietz's law office constituted an interference with his rights under Article 8(1) ECHR. The ECtHR also held that such an interpretation is consistent with the essential 'object and purpose' of Article 8 ECHR, namely to protect individuals against public authorities' arbitrary interference.[267] It thus relied upon its previous case law when it held that a lawyer's 'home office' should be protected against searches and seizures carried out by the police when investigating a case involving one of the lawyer's clients. Due to the lawyer's personal interests the protection of his home was extended to comprise his office as well.[268] In *Niemietz* a court warrant had been given, however in broad terms as it gave a right for the public authorities to search for and seize documents *'without any limitation'*.[269] The search of Mr. Niemietz's office constituted an interference with his rights under Article 8(1) ECHR.[270] Notwithstanding, the ECtHR held – similar to other Article 8 ECHR cases – that the interference was *'in accordance with the law'* and *'pursued aims that were legitimate'*, namely *'the prevention of crime'* and *'the protection of other's rights'*.[271] As regards the *'democratic necessity'* requirement, however, the search of Mr. Niemietz's premises in quest of documents to be used in criminal proceedings was *disproportionate* to the aim of preventing crime and protecting the rights of others, even though it took place under the authority of a judicial warrant.[272]

Also the above-analyzed *Funke* case is relevant in the context of Article 8 ECHR, as it involved the consideration of the legitimacy of the search of Mr. Funke's home. According to the ECtHR, the aim was legitimate as it was in the interest of the *'economic well-being of the country'*.[273] Similar to *Niemietz*, the issue was to determine whether the interference was *'necessary in a democratic society'*. Mr. Funke held that it was not, as it went beyond what was required in the public interest.[274] The ECtHR, on the other hand, stressed that public authorities enjoy a certain margin of appreciation in assessing the need for interference. However, it also referred

[264] Appl. No. 10461/83, *Chappell v UK*, paras 26 and 63. See also Appl. No. 37971/97, *Colas Est v France*, para 40(2), which refers to the paragraphs in *Chappell*.
[265] Emberland, pages 147f.
[266] *Niemietz*, para 31.
[267] The ECtHR interpreted it this way because unequal treatment would otherwise arise, due to the fact that self-employed persons may carry on professional activities at home and vice versa. See Jones and Sufrin, page 1055.
[268] *Niemietz*, para 31. It was not until *Colas Est* that the ECtHR considered the question whether business premises could be regarded as 'corporate homes'.
[269] *Niemietz*, para 32. See Emberland, page 175.
[270] *Niemietz*, para 33.
[271] *Niemietz*, paras 35f.
[272] Ovey and White, page 287; and Harris, O'Boyle and Warbrick, page 411.
[273] *Funke*, para 52.
[274] *Funke*, para 53.

to its previous case law in that exceptions are to be interpreted narrowly.[275] Mainly due to the custom authorities' very wide powers, the ECtHR found no adequate safeguards against abuse.[276] The searches and seizures were not justified under Article 8(2) ECHR and the ECtHR emphasized particularly the lack of a prior judicial authorization.[277]

When considering that *legal persons* may invoke Article 8 ECHR *'under certain circumstances'* the ECtHR conducted a *dynamic interpretation*, implying that it is not bound by its previous judgments.[278] Such an interpretation – indicating that the ECHR is a *'living instrument, which must be interpreted in light of present-day conditions'*[279] – is in compliance with the ECtHR's *teleological approach*, which implies that human rights protection must be evaluated in accordance with the developments of the society.[280] The ECtHR's case law thus reveals a *rule of law inspired teleology*. Of particular interest in that regard is the *Colas Est* case, where the investigated companies, suspected of anti-competitive practices, claimed that the arbitrary inspections conduced by the French Competition Authorities had infringed their right to respect for their home.[281] The ECtHR referred to its earlier *Niemietz* judgment, where it had stressed that individuals' privacy in the workplace should be treated equally to privacy at home; a distinction between individual and business activities cannot always be drawn in the context of the home protection under Article 8 ECHR.[282] Consequently, freedom from arbitrariness is both a cornerstone of the rule of law principle and an important object of the Article 8 ECHR protection.[283] According to the ECtHR, the searches and seizures were *'in accordance with the law'*.[284] The crucial question was whether the requirements for a legitimate interference with the company's premises by the public authorities were *'necessary in a democratic society'*.[285] Except for the fact that the inspections took place without any prior court warrant, the ECtHR paid attention to the competition authorities' very wide powers – similar to the Commission's – and explained that *additional safeguards* against abuse are needed, which must *'be strictly proportionate to the legitimate aim pursued'*.[286] The ECtHR found a violation of Article 8 ECHR

[275] It also stressed that the need for such exceptions must be *'convincingly established'*. See *Funke*, para 55; referring to *Klass*, para 42.
[276] *Funke*, paras 56f; referring to *Klass*, para 50. See Ovey and White, page 287.
[277] *Funke*, paras 57ff. See Harris, O'Boyle and Warbrick, page 411.
[278] *Colas Est*, para 41; referring to *Niemietz*, para 30. See Emberland, pages 23 and 133.
[279] *Colas Est*, para 41.
[280] This is supported by the third and fifth recitals of the ECHR's Preamble. See Emberland, page 152. The ECtHR interpreted the right guaranteed by Article 8 ECHR as including the right to respect for a company's registered office, branches or other business premises.
[281] *Colas Est*, paras 28 and 35-39. See Emberland, pages 132f.
[282] The reason is simply that business activities may be conducted from a person's private residence and vice versa. See *Colas Est*, para 40(1); and *Niemietz*, paras 29 and 30(2). See Emberland, pages 138f and 147f. Before *Colas Est*, only premises where an *individual* had carried out an occupation had been dealt with.
[283] Emberland, page 141.
[284] *Niemietz*, paras 34f.
[285] *Colas Est*, para 43. See Emberland, pages 172f.
[286] The interference had pursued legitimate aims as they had been carried out in the interests of *'the economic well-being of the country'* and *'the prevention of crime'*; *Colas Est*, paras 32 and 44; referring to *Funke*, para 52. See also *Colas Est* paras 48f; citing *Funke*, paras

and held that the *'democratic necessity'* requirement had not been met, even though interference might be *'more far-reaching'* when business premises are being inspected.[287] By introducing such a *leniency element*, the *Colas Est* judgment implies a *lenient standard of judicial review* with regard to public authorities' interference with business actors' privacy under Article 8 ECHR.[288] The CJEU adopted this leniency element in its *Roquette Frères* judgment delivered the same year.[289]

4.3.3 Case Law of the EU Courts

Similar to the right against self-incrimination, it was the CJEU that first addressed the question whether the right to inviolability of the home extends to companies as well.[290] However, the CJEU's traditional response has been that Article 8 ECHR is directed at *individuals*, who should be protected against arbitrary or disproportionate intervention by public authorities into their private sphere.[291] It has held that *'the protective scope of [Article 8 ECHR] is concerned with the development of man's personal freedom and may not therefore be extended to business premises'*.[292] Similar to the *Orkem* case, regarding Article 6 ECHR, the CJEU in *Hoechst* denied that Article 8 ECHR applied to business premises. It held that the Commission's wide powers were necessary to obtain evidence of competition law infringements. If the Commission officials only were allowed to ask for documents or files that could be identified precisely in advance, it would be impossible for the Commission to obtain the information necessary to carry out the investigations, if the companies refused to cooperate.[293] Relying on the lack of ECtHR case law on corporate human rights protection, at the time of the judgment, it was easy for the CJEU to draw the conclusion that Article 8(1) ECHR was aimed at protecting individual human rights and not be extended to corporate premises subject to the Commission's dawn raids.[294] The CJEU held that it is necessary to safeguard the rights of defense *'from being irredeemably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be*

56f. The ECtHR thus applied the '*Funke* test' and recalled that legislation providing for a legal basis in respect of searches and seizures *'should afford adequate and effective safeguards against abuse'*, but also that the searches and seizures must *'be regarded as strictly proportionate to the legitimate aim pursued'*. See Emberland, pages 172f.

[287] *Colas Est*, para 42.

[288] *Colas Est*, paras 30, 33 and 49f. See Emberland, pages 172f; and Chapter 4.5 below.

[289] Case C-94/00, *Roquette Frères SA v Directeur Général de la Concurrence de la Consommation et de la Répression des Fraudes*, para 29.

[290] *Hoechst*, para 10. See Aslam and Ramsden, page 74.

[291] *Hoechst*, para 19.

[292] *Hoechst*, para 18. It added that there was no case law from the ECtHR on the matter at the time of the judgment. See Kerse and Khan, page 165.

[293] *Hoechst*, para 27.

[294] *Hoechst*, para 18. This was in line with the CJEU's judgment in *National Panasonic*, where it had rejected the claim that an unannounced investigation had infringed the company's fundamental rights, relying on Article 8 ECHR. Is was not until 2002, in the *Colas Est* case (para 41), that the ECtHR expressly extended the right guaranteed in Article 8 ECHR to companies as well.

liable'.[295] The CJEU thus relied on a general principle of EU law, which required that any intervention must have a legal basis, be justified on grounds laid down by law, and not be arbitrary or disproportionate in its application.[296] The CJEU also stressed that the scope of the Commission's obligation to specify the *subject matter* and *purpose* of the investigation, cannot be restricted due to considerations related to the *effectiveness* of its investigations. Accordingly, that obligation constitutes a fundamental guarantee of the companies' rights of defense; it not only shows that the investigations are *justified*, but also enables the companies to assess the scope of their *obligation to cooperate*.[297]

The ECtHR made subsequent developments in the corporate context, which was reflected in the CJEU's subsequent case law. In the *Roquette Frères* case, the CJEU was again concerned with the question on public authorities' arbitrary and disproportionate intervention with corporate premises.[298] *By decision*[299] the Commission had ordered the company to submit to an inspection, assisted by the French Competition Authorities. They had obtained an order under French competition law permitting them to enter Roquette's premises and to seize documents. Roquette cooperated in the investigation under protest and sought the annulment of the French court's order. Since this was a *preliminary ruling* the CJEU answered the French *Cour de Cassation* that the Commission is expected to provide very detailed information to satisfy the national court that the decision is not arbitrary or a disproportionate interference.[300] Roquette did not require the CJEU to decide whether an inspection decision under Article 20(4) must be validated by a *judicial warrant*.[301] Instead, the case concerned the right to inviolability of the home. The CJEU accepted that it is not limited to private homes. In the light of the conflict between the ECHR and the EU, it further stated that to be able to determine the scope of the protection against arbitrary and disproportionate intervention by public authorities in the sphere of business premises, it is necessary to take account of the

[295] *Hoechst*, para 15.
[296] *Hoechst*, para 20. See Ovey and White, page 516.
[297] *Hoechst*, paras 29 and 41. Although the Commission is not required to communicate *everything* to the investigated companies, it must clearly indicate the presumed facts that it intends to investigate.
[298] Jones and Sufrin, page 1055.
[299] The current analysis only applies to *mandatory* Article 20(4) decisions.
[300] The Commission's brief description of the nature of the suspected cartel, its affirmation that the decision was the most appropriate way of gathering evidence about suspected secret meetings and general reference to the books and business records appear to have been considered sufficient to satisfy these requirements. See *Roquette Frères*, paras 88f. See also Kerse and Khan, pages 167f.
[301] In suggesting that recourse should be had to Article 20(7) if there were grounds for seeking the assistance of a national court, it seems clear that the CJEU does not consider that respect for fundamental rights requires a judicial warrant as proof of the necessity of the interference entailed by an Article 20(4) inspection. Therefore, I will not elaborate on such a requirement in the following analysis, even though it may be argued that a lesser degree of legitimacy is provided for when a court warrant is absent. In any case, not all EU Member States require a judicial warrant to provide assistance to the Commission to enable it to enforce its inspection decisions.

development of the ECtHR's case law post-*Hoechst*.[302] In accordance with the ECtHR's case law, the CJEU held that the public authorities' power to interfere might be *'more far-reaching'* in relation to business premises.[303] In the light of *Colas Est*, where the ECtHR held that Article 8 ECHR had been violated due to the French Competition Authorities' inspections, which had been *'disproportionate to the legitimate aim pursued'* and violated the *'democratic necessity'* requirement, the CJEU held that the Commission's inspections did not comply with Article 8 ECHR.[304]

4.3.4 Is There Consistency between the ECtHR's and the EU Courts' Interpretation?

With regard to the ECtHR's case law, the protective scope of Article 8 ECHR has extended gradually, on a case-by-case basis. The ECtHR has invoked prior decisions in analogous cases to substantiate its later decisions. As the issues do not concern comparable issues, the ECtHR has used earlier arguments for a new reading of the ECHR provisions, particularly Article 8 ECHR.[305] There is, for instance, a substantial difference between Mr. Niemietz's law office in his private home and the companies' business office in *Colas Est*. In *Niemietz* the ECtHR stressed the need for equal treatment of *individuals'* privacy at home and in their workplace. The indistinguishable relationship between an individual's private residence and his business premises was decisive for finding Article 8 ECHR applicable also in *Chappell*.[306] Although holding that Article 8(1) ECHR might extend to *'certain professional or business activities or premises'*, the ECtHR in *Niemietz* held that interferences with companies' human rights are *more justifiable* than with those of individuals. This is particularly shown by the fact that legal persons may invoke Article 8 ECHR *'under certain circumstances'*, which indicates a *dynamic interpretation*. It is likely to result in weaker protection of the rule of law in the context of investigated companies' protection against public arbitrariness – and ultimately their rights of defense. By stating that interference might be more far-reaching when business premises are being inspected, the ECtHR in *Colas Est* introduced a *lenient standard of review*, which was later upheld by the CJEU in *Roquette Frères*, where it stressed the importance of taking the ECtHR's case law into account, as it had evolved after *Hoechst*.

For obvious reasons, the ECtHR has not yet ruled on the matter regarding the scope of the Commission's inspection powers. However, due to the fact

[302] Here, the ECtHR had held that the protection of the home under Article 8 ECHR, may *'under certain circumstances'* be extended to cover business premises; see *Roquette Frères*, para 29; referring to *Colas Est*, para 41.
[303] *Niemietz*, paras 29 and 31; and *Colas Est*, paras 40f and 49. See *Roquette Frères*, para 29. See also Kerse and Khan, pages 165f; and Jones and Sufrin, page 1055.
[304] The *Colas Est* case was a turning point for the CJEU, which until the ECtHR's judgment had relied on a restrictive interpretation of business premises' home protection.
[305] Emberland, page 151.
[306] *Chappell*, paras 96ff. See Emberland, page 148.

that the French Competition Authorities' inspection powers in *Colas Est* were very similar to those enjoyed by the Commission,[307] the *Colas Est* judgment raises the question as to whether the Commission's inspection powers under Article 20 would stand a review by the ECtHR. When comparing the CJEU's case law with that of the ECtHR's, the Commission's powers to raid business premises may constitute an infringement of the companies' rights enshrined in Article 8(1) ECHR. However, the crux of the matter is whether it is *justifiable* under Article 8(2) ECHR, more exactly whether it pursues the *legitimate aim* of protecting free competition and the *'economic well-being of the EU'* and thus being proportionate within the meaning of being *'necessary in a democratic society'*.[308] When approaching the ECtHR's case law regarding the right to inviolability of the home, the CJEU has so far relied upon the rights of defense, constituting general principles of EU law.
When looking at the Article 8 ECHR case law in the context of the *legitimacy* of inspections of private as well as business premises, it may be concluded that the public interest weighs more than the private one. Nonetheless, the circumstances of each case are decisive, perhaps leading to legal uncertainty for the companies acting on the relevant markets.

4.4 ECHR and the *Rule of Law*

Evident from the ECHR's Preamble is that it is based upon some *underlying values*. Regarding the enjoyment of human rights protection, *democracy* is a precondition.[309] That is also the case for a legitimate interference with such rights by public authorities.[310] Democracy therefore constitutes a general principle for the interpretation of the ECHR. Public interference must be *'necessary in a democratic society'*, according to Article 8(2) ECHR. Consequently, a lot of emphasis is put on the *'democratic legitimacy'* requirement of an interference with the human rights protected by Article 8 ECHR.[311] Also, the procedural guarantees enshrined in Article 6(1) ECHR are *'characteristics of a democratic society'*.[312] The right to a *'fair administration of justice'* is crucial in a democratic society, implying that a restrictive interpretation does not correspond to the 'democratic purpose' of Article 6(1) ECHR.[313] Another underlying value of the ECHR and explicitly referred to in its Preamble is the *rule of law*, also constituting an essential

[307] The Commission may, e.g., decide on the number and scale of the inspections. It does not need a warrant to conduct the inspection, but a Commission decision ordering the inspection is sufficient. The *lawfulness* of the Commission's inspection decision is only subject to a *posterior* judicial review by the CJEU; see Article 20(4).
[308] Aslam and Ramsden, page 75; and *Colas Est*, para 49.
[309] See the fourth recital of the Preamble.
[310] Emberland, pages 36ff and 186.
[311] Ibid., page 43.
[312] Ibid., page 40. The due process principles provided for in Article 6(1) ECHR constitute important aspects of the rule of law, besides the safeguard mechanisms against arbitrary interference provided for in Article 8(2) ECHR, namely the requirements of *legality*, *purposefulness* and *proportionality*.
[313] One of the most important aspects of the rule of law is the *access to a fair trial* as provided for by Article 6(1) ECHR. See Emberland, pages 43ff and 142.

part of the democracy concept.[314] Rooted in the *common law* system, the rule of law is an important fundamental principle for the ECtHR in its *teleological interpretation* of the ECHR.[315] Thanks to its *objective nature*, the rule of law makes no difference between corporate and individual human rights protection and constitutes a 'yardstick' regarding the justification of the rights of defense given to companies.[316] The applicability of human rights on companies may therefore be justified in relation to the rule of law, which ensures that action taken by public authorities must be *'subjected to law in order to prevent arbitrary exercise of power and to secure equality and foreseeability*.[317] The aim is to strike a fair balance between an *effective administration* and a *secure and reliable protection of individual rights*, where the absence of arbitrariness and intrusiveness reflects the essence of the principle.[318] Elements of a *rule of law inspired teleology*, that is, the absence of arbitrariness and intrusiveness, were relied upon in *Colas Est* when the ECtHR interpreted the home protection extensively to cover companies *'under certain circumstances'*.[319]
The rule of law principle has influenced the EU Courts when creating standards on administrative fairness.[320] Article 41 CFR establishes a *right to good administration*, which refers to everyone's right *'to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the [EU]'*. It has been argued that an analogy can be drawn from the right to a fair trial under Article 6 ECHR to Article 41 CFR, as the right to good administration includes a right to be heard.[321] This is, however, beyond the scope of this thesis and will not be elaborated on.

4.5 ECtHR's Teleological Interpretation and Lenient Standard of Review

The ECtHR's principles of interpretation are of crucial importance when it arrives at different conclusions concerning human rights issues, and particularly corporate ones. Since the Lisbon Treaty provides that the EU shall accede to the ECHR, these principles are likely to have an influence on how the competition law procedure will be treated in relation to the ECHR. That is why they will be presented here and also analyzed in the following chapter.

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[314] See the fifth recital of the Preamble. Democracy constitutes the *'spiritual bedrock'* of the ECHR, while the rule of law constitutes an *'objective value'*, which is applicable to all forms of exercise of public power. See Andreangeli, page 16; and Emberland, pages 40ff and 135f.
[315] This was first explained in *Engel*, para 69, where the ECtHR held that the entire ECHR has been inspired by the rule of law. See Emberland, page 141.
[316] Andreangeli, page 128; and Emberland, pages 42f.
[317] The rule of law is therefore a crucial tool of interpretation, just like the democracy concept. It focuses on legal procedures and institutions, as a 'formal' rather than 'substantial' principle. See Andreangeli, page 127; and Emberland, pages 42, 44f and 47.
[318] Emberland, pages 141 and 175; and Andreangeli, pages 56f.
[319] Ibid. As to the statement *'under certain circumstances'*, such circumstances seem to have been present in that case. See *Colas Est*, para 41.
[320] Andreangeli, page 32.
[321] Ibid., page 34.

The aim of ensuring compliance with the rule of law, and thereby the protection of the values enshrined in the ECHR, constitutes an integral part of the ECtHR's *teleological interpretation* of the ECHR.[322] Thereby, the ECtHR complies with Article 31(1) VCLT, which states that the text of the ECHR must be read *'in the light of [its] object and purpose'*, to which guidance can be found in its Preamble.[323] The protection of individual human rights is the principal 'object and purpose' of the ECHR.[324] However, it is clear that it also recognizes public interests. It is therefore evident that ECHR aims at protecting individual and public interests at the same time.[325] The *necessity* and *proportionality* principles as well as the *margin of appreciation* doctrine play a crucial role when the ECtHR balances these competing interests against each other.[326]

When it comes to the *necessity* principle, public authorities' interference with private companies must be *'necessary in a democratic society'*, as stated by Article 8(2) ECHR. In addition, such interference must correspond to a *'pressing social need'*, which implies a fairly strict standard.[327] Nevertheless, it is an exception and therefore must be *'narrowly interpreted'*,[328] which is in line with the object of the ECHR to protect individual human rights and fundamental freedoms. The same provision also holds that public interference must be proportionate to the legitimate aim pursued.[329] The ECtHR's lenient standard of review of public interference can therefore also be said to have its origin in the application of the principle of *proportionality*, which implies that *'a "fair balance" must be struck between the right of the individual applicants and the general interests of the public'*, that is, between private and public interests.[330] However, it is not within the proportionality discussion *as such* that the ECtHR reveals its reluctance to prefer the companies' arguments to those of the public authorities, that is, its lenient approach towards corporate human rights protection.[331] Instead, it is necessary to consider the *margin of appreciation* doctrine – and the place of the proportionality principle *within* that doctrine. The proportionality principle helps the ECtHR to decide

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[322] Emberland, page 141.

[323] It has also to be interpreted in the light of *'the present-day conditions'* in which the ECHR provisions are to be applied. See Andreangeli, page 15; and Emberland, pages 21f.

[324] See, e.g., Appl. No. 14038/88, *Soering v UK*, para 87.

[325] It has been held that the ECHR is not only *'an instrument for the protection of individual human rights'*, but also *'an instrument designed to maintain and promote the ideals and values of a democratic society and the rule of law'*.

[326] Emberland, page 157.

[327] Ibid., page 160.

[328] *Klass v Germany*, para 42.

[329] *Olsson v Sweden*, para 67.

[330] The tension between public and private interests is primarily solved through the application of the proportionality principle. In the *Soering* case (para 89) the ECtHR held that *'inherent in the whole of the [ECHR] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'*. Reliance on the proportionality principle is therefore most evident in those provisions where human rights restrictions are allowed. See Harris, O'Boyle and Warbrick, page 10.

[331] The lenient standard of review has been developed by the ECtHR in its interpretation and application of Article 8(2) ECHR. See Emberland, pages 175 and 182f.

whether the public authorities have overstepped their margin of appreciation in assessing the need for interference.[332] As regards the doctrine's role within the *necessity assessment*, public authorities have the right to decide whether a '*pressing social need*' exists, and within the *proportionality assessment*, whether there is proportionality between the interference and the legitimate aim pursued.[333]

In respect of the enforcement of the EU competition rules, particularly the Commission's dawn raid procedure, it is not entirely clear how the scope of the corporate human rights protection should be regulated, as the granting of a wide margin of discretion to public authorities, such as the Commission, apparently benefits public interests, since a functioning market is likely to benefit the common good, the competitors on the relevant markets, and ultimately the consumers.[334] In *Colas Est*, the ECtHR found that the competition authorities' searches and seizures pursued a legitimate aim of restricting the company's human right for the purpose of '*the economic well-being of the country*'.[335] As a legitimate factor when balancing competing interests against each other, the ECtHR has thus accepted the *raison d'état* principle. This means that public interests sometimes must override individual ones.[336]

[332] Emberland, page 161. The margin of appreciation doctrine plays a crucial role in the interpretation of the ECHR and implies that public authorities are allowed a certain *measure of discretion* when taking legislative, administrative or judicial actions in the human rights context; see Harris, O'Boyle and Warbrick, page 11. The ECtHR has consistently held that the exceptions in Article 8(2) ECHR must be '*interpreted narrowly*' and the need for them must be '*convincingly established*'; see *Colas Est*, para 47.
[333] Emberland, page 160.
[334] It is all about balancing fundamental values such as *non-arbitrariness*, *legality* and *proportionality*, on the one hand, and public interests, on the other. See Emberland, page 196; and Andreangeli, pages 20ff.
[335] *Colas Est*, para 44. See Emberland, page 195.
[336] Emberland, pages 180f and 194.

5 Analysis and Conclusions of Corporate Human Rights Protection

5.1 Current Situation of Companies' Rights of Defense Protection

Effective competition law enforcement is what should be strived for when interpreting Regulation 1/2003. However, it is also necessary to ensure that the investigated companies' rights of defense are not being impaired.[337]
As to the right to inviolability of the home protected by Article 8 ECHR, its 'object and purpose' is – like all other ECHR provisions – to protect *individuals* against public authorities' arbitrary interference. Nevertheless, the ECtHR's case law reveals a possible extension of the home protection to *business premises*. The crucial question is whether the Commission's power to raid business premises conflicts with the companies' right to inviolability of the home. Important to remember in this respect is the fact that the ECtHR does *not* recognize Article 8 ECHR as an absolute right, since interference with the rights protected in Article 8(1) ECHR are allowed as long as they fulfill the Article 8(2) ECHR requirements. The reason why such interference may be justified is a consequence of the need to balance the interest of the public good of having a competitive market, on the one hand, and the need to respect the companies' 'private sphere', on the other. When considering that companies may invoke Article 8 ECHR 'under certain circumstances' the ECtHR conducted a dynamic interpretation, indicating that it is not bound by its previous judgments. Consequently, the ECtHR's case law is only binding on the parties of the particular case, which implies legal uncertainty for other companies, as there are no binding precedents. It is likely to result in weaker protection of the rule of law in the corporate human rights context.

When the ECtHR in 2002 for the first time acknowledged that a distinction between private and business premises cannot always be made in relation to the home protection under Article 8 ECHR, it also stressed that interference might be more far-reaching when business premises are being inspected. Difference between rights enjoyed by individuals and companies was therefore evident. This lenient standard of review was later the same year adopted by the CJEU into EU law. In respect of the right to inviolability of the home it can thereby be concluded that there seems to be consistency between the case law of the two different courts, as the CJEU has been willing to take the relevant case law of the ECtHR into consideration. Accordingly, EU law may be held to have reached the same level of

[337] Andreangeli, page 151.

corporate human rights protection as provided for by ECHR law in respect of the right to inviolability of the home. As long as the restrictions of the companies' rights of defense only apply to *legal persons*, the importance of ensuring the 'economic well functioning of the EU', among other public interests that may be necessary to preserve in a democratic society, seems to prevail. When the CJEU adhered to the ECtHR's case law regarding the fact that companies may also enjoy the right to inviolability of the home, it held in a similar vein that the Commission's power to interfere might be more far-reaching in relation to business premises. However, the companies are not without safeguards. The rule of law constitutes a fundamental principle of interpretation for the ECtHR, also when it comes to the justification of companies' rights of defense. Applicability of the human rights on companies may therefore be justified in relation to the rule of law, as it provides for protection against arbitrary and intrusive interference by public authorities, such as the Commission during its dawn raid procedures.
When approaching the ECtHR's case law on the right to inviolability of the home, the CJEU has so far relied on the general principles of EU law, since the ECHR does not yet formally form part of EU law. Even though it has not *directly* recognized that investigated companies may invoke the rights enshrined in the ECHR, it may be argued that it has reached almost the same level of protection as that provided for by the ECtHR, but with reference to those general principles instead. Accordingly, that constitutes the main difference between the two courts when it comes to the legal basis of the right to inviolability of the home.[338]

Considering the above, the right to inviolability of the home is afforded almost the same protection by the CJEU as the ECtHR. Companies' claims for their rights of defense therefore seem to be more noteworthy in respect of the right against self-incrimination. The difficulties with applying traditional human rights standards in a corporate context are particularly shown by companies' claims for that right in connection to the Commission's investigations.[339] The rest of this discussion will accordingly concentrate on the right against self-incrimination.
As the right against self-incrimination, just like the right to inviolability of the home, is held *not* to be absolute and thus may be limited by reference to legitimate aims in the public interest, the scope of the right is difficult to fully establish. With reference to the ECtHR's overall judgment of the 'circumstances of each case', the ECtHR's case law may in terms of the rule of law be held to be varying to the detriment of the parties. Similar to the right to inviolability of the home, that may be held to result in legal uncertainty for the parties concerned. Accordingly, when the ECtHR gains the competence to review EU law matters, the Commission's acts are in some cases likely to be considered consistent with Article 6(1) ECHR and in some cases not, depending on the particular circumstances. Even though such dynamic interpretation in theory would provide for the ECtHR to broaden the protective scope of the right against self-incrimination in the corporate context, so that it would be as comprehensive as the right to

[338] That is the case also for the right against self-incrimination.
[339] Andreangeli, pages 17ff.

inviolability of the home, the chances do unfortunately not look good, as the Commission enjoys a very wide margin of discretion. In any case, the fact that the ECHR constitutes a 'living instrument' indicates that it would be able to protect corporate human rights in all aspects, as society has changed since the ECHR was adopted 50 years ago and the legislators at the time of the adoption only had individuals in mind.

As to the distinction between factual and leading questions in EU law, it can be concluded that companies are not sufficiently protected from incriminating themselves during the Commission's investigation procedures. Only in respect of providing answers to leading questions can it be held that the companies' rights of defense weigh more than the Commission's investigative powers. Factual questions, by contrast, are permissible even though the answers may be used by the Commission to prove an infringement of the EU competition rules committed by the accused companies. The unwillingness on the part of the EU Courts to provide a right against self-incrimination in respect of factual questions is likely to remain, as they could already have altered their narrow interpretation to be more consistent with that of the ECtHR, but have chosen not to. Instead, they have consistently held that that the investigated companies have an obligation to actively cooperate with the Commission and that an absolute right to silence would go *'beyond what is necessary in order to preserve [companies' rights of defense] and would constitute an unjustified hindrance on the Commission's performance of its duties'*.[340] In any case, the EU Courts' restrictive approach towards an absolute right against self-incrimination is not surprising in the light of the Commission's extensive powers under Regulation 1/2003 to enforce EU competition law, as well as the aim *'to prevent competition from being distorted to the detriment of the public interest, individual companies and consumers'*.[341] The question remains, however, what the legal situation would look like if the ECtHR had taken the same approach towards companies as it does towards individuals. Would it be as generous to companies as it is to individuals? In addition, when the ECtHR later will have competence to review the Commission's acts, will it maintain its present stance, or will it extend it to cover companies' claims for not incriminating themselves too?

Just like the discussion on justifiable interference with the right to inviolability of the home, the crucial question here is whether a more restrictive approach taken by the EU Courts – given the importance of a well functioning Internal Market for the economic development of the EU – could be seen as a proportionate and legitimate interference with the companies' right not to incriminate themselves? If the answer is yes, namely that the companies' limited human rights protection would be justified with regard to the public interest, it is unlikely in my view that the ECtHR will reconsider its case law when the EU accedes to the ECHR and then have competence to review the compatibility of the Commission's powers with the ECHR. On the other hand, as long as the ECHR does not form part of

[340] *Mannesmannröhren-Werke*, para 66.
[341] *National Panasonic*, para 20.

EU law, the EU Courts will probably not extend its case law to provide an absolute right to silence for companies. So, if the ECtHR will judge on the matter *before* the ECHR becomes EU law, perhaps the EU Courts would reconsider its restrictive stance and find that also factual questions might fall within the scope of the right against self-incrimination. Until then, the companies' human rights protection is unlikely to prevail within the EU legal order. Consequently, the EU Courts' restrictive interpretation raises several questions as to the actual *effectiveness* of the right against self-incrimination. Due to the wide margin of discretion given to the Commission, it can be asked whether such extensive and discretionary powers are, in fact, necessary. I argue that corporate human rights protection should be given more prominence in a democratic society. Perhaps the Commission could introduce another way of enforcing EU competition law, where the companies would be given stronger protection against the arbitrary and intrusive investigative powers? For obvious reasons, it is not likely to happen, especially since the EU Courts have several times found that a subsequent right of appeal is enough when it comes to human rights protection against public arbitrariness. Furthermore, and more importantly, the EU Courts' case law reveals that corporate human rights protection during EU competition law procedures do not have to completely correspond to the human rights standards developed by the ECtHR vis-à-vis individuals. That is closely connected to the fact that companies, until the Lisbon Treaty entered into force and the CFR became legally binding, have only had recourse to the general principles of EU law – not entirely corresponding to the degree of protection afforded by Article 6(1) ECHR to individuals. Fairly similar conclusions have been reached, but not entirely.

In my view, it is clear that ECHR law provides stronger corporate human rights protection than EU law, even though the CJEU has consistently referred to the ECHR, and subsequently to the ECtHR's case law. However, the fact that the ECtHR has not yet delivered any judgments on companies' claims for a right against self-incrimination must not be overlooked. Nevertheless, it can be concluded that the CJEU has complied with the ECtHR's case law to a greater extent in respect of the to inviolability of the home than the right against self-incrimination. The protection against self-incrimination is thus much weaker within the EU legal order. In an overall assessment, it may therefore be concluded that the striving for effective EU competition law enforcement seems to prevail over the companies' rights of defense protection within the EU legal order.

5.2 Impact of the EU's Accession to the ECHR for the Rights of Defense Protection

As to the relationship between EU law and ECHR law, the Lisbon Treaty provides an obligation for the EU to accede to the ECHR. That implies the main change to the human rights protection within the EU, besides the already binding character of the CFR. Until the EU's accession to the ECHR

becomes reality, Europe will continue to have two independent systems, which protect human rights differently. The legitimacy of the Commission's extensive investigative powers may according to that discrepancy be questioned. However, the question is whether the EU's accession to the ECHR will bring about a significant change when it comes to the investigated companies' possibility to claim their rights of defense? Will the CJEU be more *willing* to take the ECtHR's case law into consideration and modify its own case law? Probably yes, even though the CFR now forms part of EU primary law and expressly prevents the EU Courts from adopting lower human rights standards than those provided for by the ECHR.[342] The EU's 'human rights agenda' will arguably be more visible when the ECHR becomes EU law and thereby directly applicable before the EU Courts.

If the CJEU will *not* be more willing to adhere to the ECtHR's case law, the crucial question is whether the EU's accession to the ECHR implies that the CJEU will be *bound* by the ECtHR's interpretation, like any other national constitutional or supreme court? As the EU, like all of its Member States, will become party to the ECHR when the EU accedes to it, and thereby a legal person with both rights and obligations, the ECtHR's case law will logically bind the CJEU. That will probably result in more corresponding case law from the two different courts. In addition, as the CFR contains at least the same level of human rights protection as that provided for by the ECHR, it seems unlikely that the EU Courts would ignore the ECtHR's case law when reviewing the Commission's alleged violation of the companies' human rights, particularly as the CJEU has during the last 40 years referred to the significance of the ECHR when it has developed its own human rights standards, and later also to the ECtHR's case law. A related question is whether that implies that the ECtHR – rather than the CJEU – will review the Commission's acts in the future? The answer may here be twofold; it is clear that a new remedy will be provided for, as it will be possible to bring an action before the ECtHR against the Commission, but it has also been held that the CJEU will continue to have the main responsibility over the human rights protection within the EU legal order, whereas the ECtHR mainly will have the role of an 'external supervisor' in order to ensure the 'minimum common standards' that are guaranteed by the ECHR.[343] Consequently, it may be expected that the ECtHR will refrain from intervening in the discussion on corporate human rights protection as long as the CJEU reviews the Commission's acts with the aim of ensuring the respect of those human rights standards during the Commission's investigation procedures.

[342] See Article 52(3) CFR. At the time of the writing the EU Courts have not yet expressly applied a higher CFR standard in any case. See Killick and Berghe, pages 261 and 276.

[343] See the hearing on the institutional aspects of the EU's accession to the ECHR: http://www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf. In addition, Article 6(2) TEU states that the EU's accession to the ECHR must not affect the EU's competence as it is defined in the EU Treaties. That means that it should not affect the CJEU's competence under Article 267 TFEU over the interpretation of EU law.

To sum up, the most important change introduced by the Lisbon Treaty with regards to corporate human rights protection is that the Commission's decisions will be reviewable by the ECtHR and an external control system will thereby be introduced.[344] So, if the CJEU does not fully comply with the human rights standards – either as protected by the ECHR or the CFR – the possibility for the investigated companies to bring their claims before the ECtHR, which will constitute a 'supervising authority' over EU acts, will create an *additional* safeguard within the EU legal order. Perhaps the investigated companies, accused of having infringed the competition rules, will obtain a higher level of protection when it comes to their right not to incriminate themselves by answering factual questions? Accordingly, I believe that when it comes to the companies' rights of defense during the Commission's investigation procedures, one of the main tasks for the ECtHR will be to define the extent to which the investigated companies enjoy protection against self-incrimination under Article 6(1) ECHR. Nevertheless, as indicated above, the exact relationship between the CJEU and the ECtHR remains to be seen. Nothing can be stated with certainty in advance, as the ECtHR may also choose to follow its *Bosphorus* ruling, where it held that it only intervenes if it considers that the human rights protection has been *'manifestly deficient'*.

[344] See the hearing on the institutional aspects of the EU's accession to the ECHR: http://www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf, where it was held that the accession would confirm *'[an EU] based on law'*. This would accordingly strengthen the principle of legal certainty, as the EU institutions will be subject to the same external review as the Member States are today.

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