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Corporate Human Rights Protection in EU
Competition Law Enforcement

The Standard of Protection of Companies' Rights in the Light of
ECHR

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*Tamar Khuchua
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Abbreviations

AG	Advocate General
CFI	Court of First Instance (renamed as General Court (GC) by the Treaty of Lisbon)
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EO	European Ombudsman
EU	European Union
GC	General Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning on the European Union

Abstract

The present master thesis concerns the standard of protection of companies' rights in Europe within the field of EU Competition Law. The main question asked is whether the EU competition law enforcement proceedings are in compliance with the standard of protection of companies' rights set by the Strasbourg Court, or shall there be more safeguards provided for the companies in the EU in order to make the standard equivalent to that of the ECtHR's jurisprudence in case the EU accedes to the ECHR or even without the accession. For the question to be answered, firstly the general overview of a current relationship between the EU and the ECHR and respective commentaries will be provided in the introductory part. Secondly, the existing approach taken by the European Court of Human Rights will be discussed in details, this will be done by touching upon the Article 6 ECHR and the case law of the ECtHR related thereto within the context of competition proceedings. Thirdly, the way the issue of applicability of Article 6 ECHR and surrounded matters are approached within the EU will be discussed; moreover, the paper will address the existing legislative framework in relation to the European Commission's role in competition law enforcement with the main focus on the Regulation 1/2003 and its compliance with human rights. Following this, the judicial review of the Commission's decisions conducted by the EU courts will be analysed by addressing the jurisprudence of EU courts concerning Articles 101 and 102 TFEU cases.

Lastly, taking into consideration the current state of affairs discussed in the previous chapters, the analysis will be conducted regarding the relationship between the EU and the ECHR, more precisely, the impact of such affairs will be highlighted especially in the light of the repercussions for the rights of defence of companies. In this regard, the right to a fair trial will be observed in details. As one of the solutions for ensuring due level of fundamental rights' protection of companies, an extension of the role of the European Ombudsman as an external administrative controlling mechanism will be suggested. The final chapter will contain concluding remarks addressing all chapters accordingly.

Keywords:

Fundamental rights, Right to a fair trial, Right to good administration, Undertaking, ECtHR's jurisprudence, EU courts' jurisprudence, EU Competition Law, European Commission, Judicial review by EU courts, European Ombudsman, Maladministration, Accession.

Chapter 1. Thesis Outline

1.1. Introduction

Ever since the early days of European integration there were two equally important concepts: market integration and human rights protection.¹ The concept of market integration was mainly concentrated on four freedoms within the Member States, free movement of goods, right of establishment and freedom to provide services, free movement of workers and free movement of capital. As for the fundamental rights, at first, they were regarded as part of national legal systems, later they became an integral part of EU legal order and were referred to as general principles of EU law.² Court of Justice of European Union (CJEU) has developed its own human rights jurisprudence which has not always gone hand in hand with legislative measures. However, in recent years, the statutory framework has also been achieved. It was being debated for quite long time whether the EU should have had its own constitution. Eventually, it was decided that the EU should have its own bill of rights. Such bill of rights assembled the rights which were previously scattered over different sources, including European Convention on Human Rights and Fundamental Freedoms (the Convention or ECHR) and other international agreements.³ Charter of Fundamental Rights of European Union (the Charter) was adopted in 2000, however, it did not become legally binding until the entry into force of the Lisbon Treaty in December 2009. Since then the CJEU is referring to the Charter articles and is rather reluctant to refer to ECHR⁴ or general principles of EU law.

Meanwhile, companies argue that their rights are often violated in competition proceedings and EU system fails to respect a right to fair trial enshrined in Article 6 ECHR.⁵ One of the main critics is that *“the EU courts fall far short of the protection necessary to undertakings and the system*

¹ H. Andersson, *‘Fundamental Rights and Antitrust Proceedings - A Perfect Match or the Wedding from Hell?’*, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 12.

² The first case when the Court applied general principle regarded as a fundamental right was the *Max Gutmann* concerning the application of *‘Ne Bis in Idem’* principle.

³ H. Andersson, *‘Fundamental Rights and Antitrust Proceedings - A Perfect Match or the Wedding from Hell?’*, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 13.

⁴ Court of First Instance, Case T-112/98, ECLI:EU:T:2001:61—Mannesmann v Commission; Court of First Instance, Case 99/04, ECLI:EU:T:2008:256—AC-Treuhand v Commission.

⁵ See e.g. ECJ, Case 386/10 P, ECLI:EU:C:2011:815—Chalkor v Commission; ECJ, Case 389/10 P, ECLI:EU:C:2011:816—KME v Commission.

where the Commission has the role of investigator, prosecutor and judiciary is incompatible with Article 6(1) ECHR.”⁶ Some argue that the fines in competition proceedings should be imposed by the courts instead and that the Commission should be distanced from adjudicating powers.⁷

However, it is also argued that any such criticism should not ignore the importance of competition law for encouraging fair competition, and trading without barriers, which in turn is linked to the concept of free market and initial idea of the European Union.⁸ Due to this, the issue of stability of internal market cannot be avoided in the discussions regarding the rights of companies.⁹ Market policy is the area that is usually manifested with judicial difference which might be the rational for the Union not to put too heavy burden on the Commission.¹⁰ Thus, the discussions of the issue of compliance of the standard of protection of companies’ rights in competition proceedings with the standard set by the ECtHR will be held in the light of importance of keeping balance between competition law aims which is effective enforcement of the rules that regulate market and on the other hand, the rights of companies.

1.2. Purpose and Delimitation

The purpose of the paper is to overview firstly, current standing of the ECtHR’s jurisprudence in relation to competition law proceedings, secondly, analyse both the EU legislative framework as well as the case law of the European courts in competition law field. The overview of these two legal orders will be focused on examining whether according to the current circumstances companies are given sufficient safeguards in EU competition proceedings or do they face unjustified difficulties that should be eliminated in order to bring the two courts jurisprudence in line, which in turn will ensure legal certainty and pave the way for the accession of the EU to the ECHR. The investigation of this issue will be delimited to the cases involving Articles 101 and 102

⁶ See e.g. I. Aslam and M. Ramsden, ‘*EC Dawn Raids: A Human Rights Violation?*’, *The Competition Law Review*, Vol. 5 Issue 1, December 2008, pp. 61-87, as cited in H. Andersson, ‘*Fundamental Rights and Antitrust Proceedings - A Perfect Match or the Wedding from Hell?*’, *Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012*, p. 14.

⁷ H. Andersson, ‘*Fundamental Rights and Antitrust Proceedings - A Perfect Match or the Wedding from Hell?*’, *Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012*, p. 14.

⁸ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, *Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012*, p. 76.

⁹ *Ibid.*

¹⁰ *Ibid.* pp. 76-77.

TFEU in the light of companies' right to a fair trial enshrined in Article 6 ECHR and Article 47 of the Charter and right to good administration enshrined in Article 41 of the Charter.

1.3. Methodology

The master thesis will be library-based and it will involve systematization and interpretation of law. A traditional legal dogmatic method will be applied in relation to all aspects. The sources addressed will contain EU primary and secondary law, other sources of law as well as academic materials.

The principal method will be descriptive, which will incorporate traditional legal doctrines to formulate and understand 'what the law is'¹¹ (*de lege lata*). In order to describe what the law is comparative method will be used. This will be done on the macro level, meaning that comparative research will include relationships between legal orders,¹² analysing the case law of the Union courts and the ECtHR.

The work will also include normative statements. Such elements will be based on the author's particular views and will reflect a general preference for the coherence of law. This approach will be taken in relation to the Commission's rather broad discretion, i. e. the legal problems and effects of the existing situation will be explored. In relation to this matter the Law and Politics approach will also be applied. This will involve analysing the circumstances that have determined why the certain matters have been regulated in a certain way.

In addition, economic perspective will be of assistance since it will be necessary to identify if the existing rules concerned, help the common good and are welfare enhancing, valuable to economic development and therefore, reasonable and appropriate. Thus, economic and political consequences will be taken into consideration when elaborating the recommendations. While

¹¹ C. Eckes, *European Union Legal Method-Moving Away from Integration*, U. Neergaard, R. Nielsen, European Legal Method, DJØF Publishing, 2013, p. 166.

¹² M. Andenas, D. Fairgrieve, *Intent on making mischief: seven ways of using comparative law*, P. G. Monateri ed. Methods of Comparative Law, 2012, p. 27.

doing so, the weighing and balancing will be conducted meaning that *prima-facie* practical statements which support contradictory conclusions will be weighed and balanced.¹³

¹³ A. Peszenik, '*On Law and Reason*', Kluwer Academic Publishers, 1989, p. 77.

Chapter 2. ECHR and Competition Law Proceedings

2.1. Right to a Fair Trial, ECHR and Rule of Law

From the preamble of the ECHR it can be outlined that, Article 6 ECHR - the right to a fair trial, and the procedural rights enshrined therein, constitute characteristics of a democratic society. The right to a fair administration of justice is a crucial element of a democratic state. Another important value that can be understood from the preamble of the ECHR is the rule of law. The rule of law ensures that actions taken by public authorities are ‘‘*subjected to law in order to prevent arbitrary exercise of power and to secure equality and foreseeability*’’.¹⁴ The aim is to strike a fair balance between a good administration and to ensure consistent protection of individuals’ rights.¹⁵

In order to find out as to who can benefit from the abovementioned articles, it is worth going to primary underlying values of the ECHR. Article 1 ECHR protects ‘everyone’. However, as expressed in the literature ‘‘*corporate human rights protection cannot be based exclusively on that provision.*’’¹⁶ According to Rule 36(1) of the Rules of Court¹⁷, companies are entitled to allege that public authorities have violated their human rights.¹⁸ Companies fall within the scope of non-governmental organization according to the case law of the ECtHR.¹⁹ Additionally, due to the objective nature of the rule of law, there is no difference between corporate and individual human rights protection.²⁰ Consequently, it can be concluded that the guarantees, including the right to a fair trial enshrined in Article 6 ECHR refer to not only individuals but also companies. However, there are discussions held as to what sort of proceedings those individuals or companies shall be part of in order to be able to fully benefit from those guarantees. Therefore, for the purposes of the present paper in the following subsection, the specific nature of the competition proceedings will be discussed which is closely linked to the issue of applicability of the right to a fair trial as stipulated in Article 6 ECHR to the companies involved in EU competition proceedings.

¹⁴ S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 344.

¹⁵ Ibid.

¹⁶ Ibid. p. 342.

¹⁷ Rule 36(1) of the Rules of Court, Strasbourg, 1 January, 2016.

¹⁸ S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 342.

¹⁹ M. Emberland, ‘*The Human Rights of Companies- Exploring the Structure of ECHR Protection*’, Oxford University Press, 2008, pp. 4, 14.

²⁰ A. Andreangeli, ‘*EU Competition Law Enforcement and Human rights*’, Edward Elgar Publishing Ltd, 2008, p. 128.

2.2. Article 6 ECHR and Distinction between Criminal and Administrative Nature of Competition Proceedings

Since the adoption of EU competition rules, their nature - administrative or criminal has been debated. ‘*The rights enshrined in Article 6(1) ECHR are guaranteed regardless of the classification of the procedure.*’²¹ However, when the criminal proceedings are concerned a wider range of safeguards are assured.²² In particular, looking at the case law of ECtHR it can be outlined that fundamental procedural rights apply more strictly, when ‘criminal sanctions’ are imposed, as opposed to the cases containing civil remedies or administrative sanctions.²³

In this respect as Slater notes ‘*the ECtHR has always insisted on the specific nature of criminal proceedings regarding the rights of the defence as well as on ensuring that Article 6 ECHR is not interpreted restrictively so that the rights guaranteed by the provision are not compromised.*’²⁴ ECtHR has preferred to take into account substantive rather than formal elements of the concept of charge in order to avoid circumvention of the application of this provision by parties due to their domestic classification of penalties.²⁵

In the *Engel* case, the ECtHR held that a matter would be classified as ‘criminal’ if the three so-called ‘Engel criteria’ were fulfilled. According to the criteria, the ECtHR relies on:

- The classification of domestic law;
- The nature of the offence;
- The nature and severity of the penalty.²⁶

²¹ S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 346.

²² Ibid.

²³ D. Slater, S. Thomas, D. Waelbroeck, ‘*Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*’ The Global Competition Law Working Papers Series, no. 04/08, p. 3.

²⁴ Ibid. p. 5.

²⁵ Ibid.

²⁶ ECtHR, Case *Engel and others v the Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, see also D. Slater, S. Thomas, D. Waelbroeck, ‘*Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*’ The Global Competition Law Working Papers Series, no. 04/08, p. 6.

“The criteria are not cumulative and they do not carry the same weight”.²⁷ More precisely, the classification under domestic law is a mere starting point and carries less weight than the other criteria.²⁸ Therefore, when it comes to competition law, the nature of the offence and the severity of the penalty are the criteria that are more objective and decisive.²⁹

In a later case law, the ECtHR clarified its second and third criteria being used for determining a ‘criminal charge’ in a following way:

- Whether a specific group is addressed by a norm or if the norm is generally binding for everyone.
- Whether the sanctions imposed do not have just compensatory but also punitive purpose.
- Whether the level of stigma that is attached to the offence is essential.³⁰

Thus, under Article 6 ECHR, ‘criminal charge’ is deterrent in nature and addressed to group of not specific individuals.³¹

The conclusion drawn from such clarification is that although the national legislation may categorise EU competition law as administrative, it might have criminal character within the autonomous meaning of Article 6 ECHR.³² This is so, despite the formulation given in the Article 23(5) of the Regulation 1/2003 that decision imposing fines for competition law infringements ‘shall not be of a criminal nature’.³³

²⁷ D. Slater, S. Thomas, D. Waelbroeck, *‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’* The Global Competition Law Working Papers Series, no. 04/08, p. 6.

²⁸ Ibid.

²⁹ S. Kulevska, *‘Corporate Human Rights Protection in Light of Effective Competition Law Enforcement’*, Juridisk Publikation, no. 2/2014, p. 346.

³⁰ D. Slater, S. Thomas, D. Waelbroeck, *‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’* The Global Competition Law Working Papers Series, no. 04/08, p. 6.

³¹ Ibid. p. 7.

³² S. Kulevska, *‘Corporate Human Rights Protection in Light of Effective Competition Law Enforcement’*, Juridisk Publikation, no. 2/2014, p. 346.

³³ Ibid. pp. 346-347.

2.3. ECtHR's Jurisprudence on the Applicability of Article 6 ECHR to Competition Proceedings

After reviewing as to what is determined as a criminal charge according to the ECtHR, it is interesting to see what the Strasbourg court has said in relation to the possible application of Article 6 ECHR to specific cases, including recent developments.

In case *Bendenoun*³⁴ French tax surcharges were found to be criminal for the purposes of Article 6(1) ECHR.³⁵ The nature of the penalty was discussed in details, in particular, the amount as well as the purpose of the penalty was considered carefully and eventually it was found by the court that the surcharges were deterring in nature rather than for recovering damage.³⁶ The court implicitly stated that according to the 'Engel criteria' the 'charge' was criminal within the meaning of Article 6(1) ECHR, hence the article was applicable.³⁷

In case *Ortenberg*,³⁸ ECtHR held that in principle Article 6(1) applies when the subject matter of an action is 'pecuniary' in nature or (inter alia) where its consequences are decisive for private rights and obligations.³⁹

It maybe concluded that Article 6(1) applies to any administrative proceedings where civil rights and obligations are concerned.⁴⁰ According to Andreangeli '*the Court has adopted a 'composite approach' to assess whether national law complies with the Convention, according to which both administrative and the judicial phase must be taken into account for the purpose of compliance with Article 6(1) ECHR.*'⁴¹

³⁴ ECtHR, Case *Bendenoun v France*, Application no. 12547/86, 24 February 1994.

³⁵ J. Pierce, '*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 71.

³⁶ Ibid.

³⁷ Ibid.

³⁸ ECtHR, Case *Ortenberg v. Austria*, Application no. 33/1993/428/507, 25 October 1994.

³⁹ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 54.

⁴⁰ Ibid.

⁴¹ Ibid.

Whilst there is a lack of direct applicability of ECtHR jurisprudence to competition proceedings at a Union level, in the case *M. & Co.*⁴² regarding competition proceedings in Germany, the ECtHR assumed that ‘*the EU antitrust proceedings in question would fall under Article 6 ECHR had they been conducted by German and not by European judicial authorities.*’⁴³

In a more recent case *Menarini*⁴⁴ the position of the ECtHR has been that penalties imposed in competition proceedings are in fact of criminal nature. The case involved a question whether competition penalties in Italy fell within the criminal nature of competition proceedings. ECtHR followed its previous case law and stated that classification of the proceedings was not significant factor for deciding whether Article 6 ECHR was applicable or not. The Court referred to the function of the Italian competition authority and it concluded that the authority was in charge of protecting the interests of the public. In addition, the nature of the fine was found to be repressive and preventive. Consequently, the Court established that the fines were criminal in nature.⁴⁵

Even though the ECtHR has seemingly expressed its view in favour of the idea that competition proceedings are criminal, it is apparent from the case *Jussila v Finland*⁴⁶ that there might be different levels of ‘criminal’ nature. This, in turn affects the standard of application of Article 6 ECHR.⁴⁷ It was stated in the judgment that it is possible to draw the distinction between ‘hard-core’ criminal law matters and ‘soft-core’ criminal law. The importance of the distinction is that in case of ‘soft-core’ criminal cases, Article 6 ECHR applies on a lower level. Subsequently, the procedural guarantees that Article 6 bears, which contains a right to a fair hearing, might be applied with the lower standard. In particular, the Court has held that the obligation of holding the hearing is not absolute, there might be some cases when an oral hearing is not necessary because some criminal proceedings do not bare any degree of stigma, and moreover, there are criminal charges of different amount.⁴⁸

⁴² ECtHR, Case *M. & Co. against the Federal Republic of Germany*, Application no. 13258/87, 9 February 1990.

⁴³ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 71.

⁴⁴ ECtHR, *A. Menarini Diagnostics S.R.L. v Italy*, Application no 43509/08, 27 September 2011.

⁴⁵ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 72.

⁴⁶ ECtHR, Case *Jussila v Finland*, Application no. 73053/01, 23 November 2006.

⁴⁷ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 73.

⁴⁸ *Ibid.*

2.4. Privilege against Self-incrimination and the Standard of Its Protection Set by ECtHR

After reviewing the Strasbourg Court's understanding of the issue of applicability of Article 6(1) ECHR to the competition proceedings, it is relevant to address the issue even more closely and see what the standard of protection of the privilege against self-incrimination is when the courts are called to pronounce on this matter.

It is important to touch upon this issue since if the proceedings are qualified as criminal, companies are able to invoke Article 6 ECHR and the jurisprudence of the ECtHR.⁴⁹ Privilege against self-incrimination is considered to be a part of Article 6(1) ECHR and is the cornerstone of the fair procedure.⁵⁰ Under the privilege against self-incrimination targeted person, or the company is allowed not to give away the information which will lead to the admission of infringement of a certain rule.⁵¹

Whether the privilege against self-incrimination is the part of the Article 6(1) was discussed in the case *Funke*⁵². The ECtHR examined to what extent the French customs officials had the right to conduct searches and seizures to gain evidence under compulsion.⁵³ Mr. Funke held that him being convicted for refusing to provide the officials the documents searched in the investigations had violated his right against self-incrimination.⁵⁴ However, the Court stated that the right to silence is not absolute and regard should be given to all the details of the case.⁵⁵

The issue of the scope of the right to privilege against self-incrimination was further elaborated in *Saunders v United Kingdom*.⁵⁶ In fact, this case overruled the judgment in *Funke*. The case *Saunders v United Kingdom* is rather interesting.

⁴⁹ P. Makhauri, 'Corporate Human Rights Protection in the Commission's Inspection Procedure', Master Thesis, 2015, p. 30.

⁵⁰ Ibid. p. 27.

⁵¹ Ibid. p. 31.

⁵² ECtHR, Case *Funke v France*, Application no. 10828/84, 25 February 1993.

⁵³ S. Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement', Juridisk Publikation, no. 2/2014, p. 350.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996.

In this case, the Court discussed the issue of obtaining the material via powers such as warrant, breath, blood and urine samples, according to the Court the evidence that exist independent of the will of suspect are permitted.⁵⁷ Hence, the privilege was limited to declarations made by the accused person by its will.⁵⁸

The ECtHR concluded that even though such statements were not directly incriminating in nature, they were used in a manner which sought to incriminate the applicant.⁵⁹ The method the evidence is used in further proceedings determines if it is considered to be incriminating or not.⁶⁰

In *Saunders* differentiation was also made between materials which exist independent of the suspect and which do not exist independently. The *Saunders* judgement made it clear that the right to remain silent, being aimed at protection of human dignity and autonomy of the will of the accused, prevented the use of the evidence in trial ‘generated’ by the individual, but not pre-existing documents obtained as a result of the exercise of compulsory powers as stated above.⁶¹ In other words, the documents that the companies have to create by themselves are not to be submitted, since it is not their obligation.⁶² On the contrary, the judge Martens argued in his dissenting opinion that this type of separation is superficial, he questioned the Court’s rationale and argued as to ‘*why suspect should be free from coercion to make incriminating statements, but not free from coercion to cooperate to furnish incriminating data*’.⁶³ According to Mr. Marten, the Court’s such distinction is not justified since in both cases the will of the suspect is not respected since he is forced to admit his own conviction. In his opinion, the right to be silent and privilege against

⁵⁷ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, para 62.

⁵⁸ Ibid. paras 68- 69.

⁵⁹ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, para 72, see also S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 351.

⁶⁰ S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 351.

⁶¹ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, para 62, see also P. Makhauri, ‘*Corporate Human Rights Protection in the Commission’s Inspection Procedure*’, Master Thesis, 2015, p. 33-34.

⁶² ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, para 69, see also P. Makhauri, ‘*Corporate Human Rights Protection in the Commission’s Inspection Procedure*’, Master Thesis, 2015, p. 34.

⁶³ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, dissenting Opinion of Judge Martens, joined by Judge Kuris, para 12.

self-incrimination are separate but related to each other and both of the immunities allow for limitations.⁶⁴

Conclusion drawn from *Funke and Saunders*, can be that in order to determine if there is a violation of the right against self-incrimination depends on the circumstances of each case. However, the *Saunders* case seems to provide a general rule when determining the scope of that right.⁶⁵

After review of the ECtHR's approach towards the nature of competition law rules, the applicability of Article 6 ECHR to the competition proceedings and the privilege against self-incrimination, the paper moves on to the same matters but framed on an EU level. Hence, the following three chapters will accordingly analyse firstly, how the EU courts pronounce the nature of competition rules, what the trend is in relation to the applicability of Article 6 ECHR to EU competition law cases and what the scope of the privilege against self-incrimination is. Secondly, for the sake of understanding the functioning of competition law enforcement procedure the regulatory framework covering the EU Commission's functions in competition law field will be referred to. Thirdly, the issue of the EU courts' review of the Commission's decisions will be addressed.

⁶⁴ ECtHR, Case *Saunders v the United Kingdom*, Application no. 19187/91, 17 December 1996, dissenting Opinion of Judge Martens, joined by Judge Kuris, para 12, see also P. Makhauri, '*Corporate Human Rights Protection in the Commission's Inspection Procedure*', Master Thesis, 2015, p. 34.

⁶⁵ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 142; S. Kulevska, '*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*', Juridisk Publikation, no. 2/2014, p. 351.

Chapter 3. EU Competition Law Proceedings and Human Rights

3.1. Jurisprudence of EU Courts regarding the Nature of EU Competition Proceedings and Applicability of Article 6 ECHR

It has been held by the European Court of Justice (ECJ) that companies' rights of defence extend to the Commission's preliminary investigation procedures. Already in *Hoffman-la Roche case*⁶⁶ the ECJ held that a fundamental principle of EU law is the respect of the rights of defence in administrative proceedings that may lead to the imposition of sanctions.⁶⁷

Even though the European Courts have not openly defined competition law proceedings as criminal, the General Court (GC) has made a reference to the jurisprudence of the ECtHR in relation to administrative proceedings that might be criminal.⁶⁸ Article 6(1) ECHR becomes relevant at the beginning of the Commission's investigation procedures.⁶⁹ Nevertheless, in the field of administrative decision-making a right to due process is enshrined in Article 6(1) ECHR, furthermore, as long as the EU is not a party to the ECHR, appeals challenging the Commission's decisions on grounds of violation of Article 6(1) ECHR, have been dismissed by GC.⁷⁰

The attempt to invoke Article 6(1) in order to challenge the decision concerning competition law, has also been denied by the ECJ. For example, in cases *KME* and *Chalkor*, the ECJ did not find it necessary to refer to Article 6(1) ECHR since it is implemented in Article 47 of the Charter. The Court focused on its own jurisprudence. In case *KME*,⁷¹ the company was imposed a fine with the amount of almost 40 million Euros for its participation in cartel, subsequently, the company appealed before the ECJ stating that the GC had left too much discretion to the Commission. AG Sharpston argued that the proceedings fell within the scope of Article 6(1) ECHR, meaning that they were criminal in nature. However, the ECJ only focused on Article 47 of the Charter and

⁶⁶ ECJ, Case 85/76, ECLI:EU:C:1979:36—*Hoffman-la Roche v Commission*.

⁶⁷ S. Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement', *Juridisk Publikation*, no. 2/2014, p. 342.

⁶⁸ *Ibid.* p. 348.

⁶⁹ *Ibid.* pp. 348-349.

⁷⁰ *Ibid.* p. 349.

⁷¹ ECJ, Case 389/10 P, ECLI:EU:C:2011:816—*KME v Commission*.

further concluded that the EU courts provide effective judicial protection due to the fact that the Court has ‘unlimited jurisdiction’ to review the Commission’s fines.⁷²

The same was concluded in the case *Chalkor*.⁷³ The company referred to Article 6(1) ECHR, however, the ECJ solely referred to Article 47 of the Charter and reference was not made to the ECtHR’s case law.⁷⁴

In a quite recent case *Deutsche Bahn AG*, where the company was challenging the decision of the GC on an appeal, invoking Article 6(1) ECHR and Article 47 of the Charter at the same time, the ECJ explicitly stated in its judgement that it must be remembered that that fundamental right constitutes a general principle of EU law, as currently expressed in Article 47 of the Charter, which is the equivalent under EU law of Article 6(1) of the ECHR. In the same judgment the Court concluded that there was no infringement of Article 47 of the Charter by the GC.⁷⁵ Thus, it is apparent from this judgment that the Court wants to make it clear that Article 47 of the Charter is stipulating the same fundamental right enshrined in Article 6(1) ECHR and that the Charter is a prior source which the EU courts are referring to within the context of EU law.

To sum up the issue of the qualification of competition proceedings, in particular, if they fall under the hat of hardcore or softcore criminal proceedings, which in turn determines the stringency of applicability of Article 6(1) to competition proceedings, it becomes clear that there is no common approach.⁷⁶ Since the final view has not been expressed by the EU courts, it brings us to the conclusion that every case shall be assessed individually.⁷⁷ As seen in later cases, the CJEU is almost always inclined to deny relying on the Convention but instead refers to the Charter.

⁷² S. Kulevska, ‘Corporate Human Rights Protection in Light of Effective Competition Law Enforcement’, *Juridisk Publikation*, no. 2/2014, p. 349.

⁷³ ECJ, Case 386/10 P, ECLI:EU:C:2011:815—*Chalkor v Commission*.

⁷⁴ S. Kulevska, ‘Corporate Human Rights Protection in Light of Effective Competition Law Enforcement’, *Juridisk Publikation*, no. 2/2014, p. 349.

⁷⁵ ECJ, Case 583/13 P, ECLI:EU:C:2015:404 (paras 47-48)—*Deutsche Bahn and Others v Commission*.

⁷⁶ P. Makhauri, ‘Corporate Human Rights Protection in the Commission’s Inspection Procedure’, Master Thesis, 2015, p. 29.

⁷⁷ *Ibid.*

3.2. Privilege Against Self-Incrimination - EU Courts' Approach

In *Orkem* case the ECJ discusses the right against self-incrimination and whether certain limitations must be considered on the Commission's investigating powers which are implied by the need of safeguarding the rights of defence.⁷⁸ In fact, such an approach has a legislative support. In the recital 23 of the Regulation 1/2003 it is stated that that the companies cannot be forced to admit commitment of infringement of competition law, only factual questions shall be answered even if the answers will lead to establishment of infringement.⁷⁹

In the same case, the ECJ made a distinction between providing answers to questions and producing documents. As to the latter, the ECJ did not limit the Commission's powers, in other words, companies must disclose the documents that are pre-existing and concern the issue of the inspection, even if the Commission will use them for finding the infringement.⁸⁰ As for the questions, the Commission could ask the factual questions in contrast with the ones concerning the aim of the action.⁸¹ The right to remain silent relates to the latter types of questions.⁸² As for the questions that are purely factual, the companies are obliged to collaborate with the Commission and provide the answers. The rationale behind such a distinction is that requests regarding already existing documents and factual questions will not be of such type of a nature as to force the companies to admit the alleged infringement of Articles 101 and 102 TFEU.⁸³

The *Orkem* judgement is rather significant, firstly, by acknowledging that the reach of the rights of defence, extended to the preliminary, fact-finding stage of the proceedings, the ECJ was able to recognise a limited right not to incriminate oneself during competition proceedings, and at the same time to preserve the effectiveness of investigative powers enjoyed by the Commission.⁸⁴

⁷⁸ ECJ, Case 374/87, ECLI:EU:C:1989:387(para 32)—*Orkem v Commission*.

⁷⁹ Recital 23, Council Regulation (EC) 1/2003.

⁸⁰ S. Kulevska, '*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*', Juridisk Publikation, no. 2/2014, p. 352-353.

⁸¹ *Ibid.* p. 353.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 132.

In case *Mannesmannrohren-Werke v Commission*,⁸⁵ the Court of First Instance (CFI) did not depart from the ECJ's conclusion in *Orkem*. After restating that it had no jurisdiction *ratione personae* to apply the Convention, the Court said that even though the right of the defence should not be diminished during the preliminary stage of the procedure, the investigated parties do not have a right to escape from the investigations of the Commission. To the contrary, it was stated that to acknowledge the absolute right to silence would go beyond what is necessary for the protection of the right of defence of companies and would amount to unjustified obstacle for the Commission to fulfill its duty to ensure that competition law rules are properly followed.⁸⁶

Consequently, as Andreangeli mentions '*the protection against self-incrimination could only prevent the Commission officials from asking questions and requesting evidence in relation to the aims of the undertakings' certain actions, since these types of requests could only result in the undertaking being compelled to admit the alleged violation. Purely factual questions and the compliance with a request to deliver pre-existing documents to the Commission officials, instead, would still be compatible with the principle of respect for the rights of defence.*'⁸⁷

In later cases, the Court elaborated on how the infringement of the privilege against self-incrimination should be examined. In the *PVC II*⁸⁸ appeal, the ECJ took the approach that, taking into consideration the case law of the ECtHR, the applicant would have to prove that there has been coercion against the suspect, and the existence of an real interference with the right which they refer to.⁸⁹

A similar conclusion was reached in *SGL Carbon* judgement,⁹⁰ where the ECJ highlighted the duty of active cooperation of companies and also restated that the judgements delivered by the ECtHR after *Orkem*, could not put in question Luxemburg courts' approach regarding the scope of the privilege.⁹¹

⁸⁵ Court of First Instance, Case T-112/98, ECLI:EU:T:2001:61—Mannesmann v Commission.

⁸⁶ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, pp. 132-133; Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 143.

⁸⁷ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 133.

⁸⁸ ECJ, Case 238-99, ECLI:EU:C:2002:582(para275)—LVM NV and Others v Commission.

⁸⁹ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 134.

⁹⁰ ECJ, Case 301/04 P, ECLI:EU:C:2006:432—Commission v SGL Carbon AG.

⁹¹ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 134.

Chapter 4. The Regulation 1/2003 and the European Commission's Role in Competition Proceedings

The Council adopted Regulation 1/2003 in December 2002 which replaced Regulation 17 adopted in May 2004.⁹² Broadly the regulation deals with two matters. First, it renders Article 101(3) directly applicable and lays down the basic framework for the Commission, the National Competition Authorities (NCAs) and the national courts to cooperate in the decentralised system⁹³ and secondly, it provides the powers of the Commission during the investigation of competition issues.⁹⁴ For the purposes of the present paper only the second matter will be addressed.

Hence, when it comes to the Commission's powers throughout the competition law proceedings, As Jones mentions the *'Regulation 1/2003 has brought about a landmark change in the way the EU competition law is enforced. The Regulation has significantly improved the Commission's ability to enforce 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.'*⁹⁵

4.1. Scope of the Regulation 1/2003

Prior to addressing the discretion of the Commission in more details, it is important to determine the scope of Regulation 1/2003. It is accepted that the EU competition law is addressed to undertakings. The term 'undertaking' covers any entity engaged in an economic activity.⁹⁶ Therefore, the decisive element is the nature of the activity performed by the entity.⁹⁷ This is what

⁹² A. Jones, B. Sufrin, *'EU Competition Law'*, Oxford University Press, 5th edition, 2014, p. 927.

⁹³ Recital 4, Council Regulation (EC) 1/2003.

⁹⁴ Recitals 11, 12, 13, Council Regulation (EC) 1/2003.

⁹⁵ A. Jones, B. Sufrin, *'EU Competition Law'*, Oxford University Press, 5th edition, 2014, p. 931.

⁹⁶ ECJ, Case 41/90, ECLI:EU:C:1991:161 (para21)—Klaus Höfner and Fritz Elser v Macrotron GmbH. To the effect of economic activity see: ECJ Case 35/96, ECLI:EU:C:1998:303(para 36)—Commission v Italy (the Court found that offering services in replacement of payment is considered to be an economic activity, such was the activity performed by the customs agent in Italy, which, irrespective of being a public body, was considered to be conducting an activity of an economic nature).

⁹⁷ P. Makhauri, *'Corporate Human Rights Protection in the Commission's Inspection Procedure'*, Master Thesis, 2015, p. 22.

is known as functional approach.⁹⁸ In case *Commission v Italy*, the ECJ stated that according to settled case law the concept of undertaking covers any entity regardless of its legal status and the way in which it is financed.⁹⁹

Natural persons who are engaged in an economic activity can be regarded as undertakings. Therefore, in this regard, it is crucial to know if the workers of the companies can also face competition law responsibilities since they are part of the company.¹⁰⁰ Since employees of the company are not personally responsible for the transactions, they are not considered as independent undertakings as they do not act independently from their employer.¹⁰¹ For this reason, the paper only addresses the undertakings both in relation to their rights and obligations. There are terms known such as ‘company’ or ‘corporation’, however, the term ‘undertaking’ covers all the entities carrying out economic activity.¹⁰² The undertakings as such are the central figures of the present thesis even though the substituting terms ‘company’ or ‘corporation’ can also be found in the paper.

4.2. The Broad Powers of the Commission in Competition Law Field

*“The supervisory task conferred on the Commission by Articles 101 and 102 TFEU not only includes the duty to investigate and punish individual infringements but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down in the Treaty and to guide the conduct of the undertakings in the light of those principles.”*¹⁰³ The Commission can select the cases to investigate. While doing so, it has its own decision-making powers and extensive investigating powers, including the power to carry out inspections on the premises of suspected undertakings and private homes and vehicles. It can impose fines on companies violating EU competition rules. Overall, in the field of EU competition law, the Commission acts as investigator, plaintiff, prosecutor, judge and executor at the same time.¹⁰⁴ It is

⁹⁸ A. Jones, B. Sufrin, *EU Competition Law*, Oxford University Press, 5th edition, 2014, p. 125.

⁹⁹ ECJ Case 35/96, ECLI:EU:C:1998:303(para 36)—*Commission v Italy*.

¹⁰⁰ P. Makhauri, *Corporate Human Rights Protection in the Commission’s Inspection Procedure*, Master Thesis, 2015, p. 23.

¹⁰¹ *Ibid.* p. 24.

¹⁰² A. Jones, B. Sufrin, *EU Competition Law, Text, Cases and Materials*, Oxford University Press, 5th edition, 2014, p. 128.

¹⁰³ *Ibid.* p. 933.

¹⁰⁴ M. Szapiro, *The European Commission, A Practical Guide*, John Harper Publishing, 2013, p. 236.

notable that this situation has been widely criticised and fiercely defended by the Commission. For the purposes of the present paper and for demonstrating the wide margin of discretion of the Commission investigative stage will be discussed in details in the following sub-section.

4.2.1. Investigative Powers of the Commission

In order to accomplish the supervisory and enforcement tasks, two major investigatory powers are given to the Commission under Articles 18 and 20 of the Regulation 1/2003, namely, the right of request for information and the right of inspection of business premises, records, etc.¹⁰⁵ Both Articles are independent procedures, which means that ‘*the fact that an investigation under Article 20 has already taken place cannot in any way diminish the powers of investigation available to the Commission under Article 18. No consideration of a procedural nature inherent in the Regulation thus prevents the Commission from requiring for the purposes of a request for information, the disclosure of documents of which it was unable to take a copy extract when carrying out a previous investigation*’.¹⁰⁶

a. Request for information

Under Article 18(1) of the Regulation the Commission is given the power to obtain ‘all necessary information’ from companies.¹⁰⁷ It is up to the Commission to determine if the information sought is necessary to define the infringement and all the details of it.¹⁰⁸ The concept of necessary information was addressed in case *SEP*, where it was stated by the Court of First Instance that, there must be a connection between the information requested by the Commission and the alleged infringement, to which reference should be made in the request.¹⁰⁹

Pursuant to Article 18(2), when sending a written *simple request for information*, the Commission shall specify legal basis and the purpose, what information is required, the time-limit within which

¹⁰⁵ C. Kerse, N. Khan, ‘*Antitrust Procedure*’, Sweet and Maxwell, 6th edition, 2012, p. 103, see also P. Makhauri, ‘*Corporate Human Rights Protection in the Commission’s Inspection Procedure*’, Master Thesis, 2015, p. 7.

¹⁰⁶ ECJ, Case 374/87, ECLI:EU:C:1989:387(para14)—Orkem v Commission.

¹⁰⁷ Article 18(1), Council Regulation (EC) 1/2003, see also S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 340.

¹⁰⁸ S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 340.

¹⁰⁹ Court of First Instance, Case 39/90, ECLI:EU:T:1991:71(para25)—Samenwerkende Elektriciteits-productiebedrijven (SEP).

the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.¹¹⁰ According to the CFI in *SEP* case the request should entail ‘the legal basis and the purpose of the request’, thus it is utmost important whether the request is made upon the need. Additionally, CFI has stated that the Commission is only entitled to require the disclosure only of the information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information.¹¹¹ The applicant had challenged the decision of the CFI stating that the court had infringed the relevant Article of the Regulation when interpreting the necessary information that the Commission could request, as meaning that there had to be a ‘correlation between the information and the putative infringement.’¹¹²

In his opinion, AG Jacob held that a mere relationship between the document and the alleged infringement is not sufficient to justify the request for disclosure of the document; The degree of the necessity of the document should be rather high, meaning that it shall not be possible to prove the infringement without having the document requested.¹¹³ Subsequently, in AG’s opinion, in this case, the relationship between the requested document and possible infringement (cooperation code) was sufficiently enough to justify the Commission’s request.¹¹⁴ The ECJ has followed the AG’s opinion and established the argument of the appellant unfounded thus upheld the CFI’s decision.¹¹⁵ However, it must be stated that the test set by the AG in this case, is rather simple for the Commission to pass, since it is for the contesting party to prove otherwise.¹¹⁶

Even though companies are not obliged to comply with a simple request for information, they might still face serious consequences in case of not doing so.¹¹⁷ Article 23(1)(a) states that the

¹¹⁰ Article 18(2), Council Regulation (EC) 1/2003, see also S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 340.

¹¹¹ Court of First Instance, Case 39/90, ECLI:EU:T:1991:71(para25)—Samenwerkende Elektriciteits-productiebedrijven (SEP).

¹¹² Case 36/92 P, ECLI:EU:C:1994:205(para 6)—SEP v Commission.

¹¹³ Opinion of AG Jacobs, ECJ, Case 36/92 P, ECLI:EU:C:1994:205(para 21)—SEP v Commission.

¹¹⁴ Ibid. para 22.

¹¹⁵ ECJ, Case 36/92 P, ECLI:EU:C:1994:205(para 21)—SEP v Commission.

¹¹⁶ C. Kerse and N. Khan, ‘*EU Antitrust Procedure*’, Sweet and Maxwell, 6th edition, 2012, p. 114, see also P. Makhauri, ‘*Corporate Human Rights Protection in the Commission’s Inspection Procedure*’, Master Thesis, 2015, p. 8.

¹¹⁷ C. Kerse and N. Khan, ‘*EU Antitrust Procedure*’, Sweet and Maxwell, 6th edition, 2012, p. 135, see also S. Kulevska, ‘*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*’, Juridisk Publikation, no. 2/2014, p. 340.

Commission has the power to impose fines not exceeding one percent of the company's total turnover in the preceding business year for 'incorrect or misleading' information supplied by the undertaking either intentionally or negligently in response to a request.¹¹⁸

In case the companies do not comply with a simple request for information, the Commission may take a *decision requiring information*. As for the consequences of not complying with the decision requiring information, it should be remained that such decision is legally binding and undertakings and associations of undertakings shall submit to the investigations ordered by a decision of the Commission. The decision shall specify the purpose, legal basis of the request and what information is required. It shall also contain the time limit within which the information is to be provided. The undertaking should also be informed about possible penalties in case of not complying with the decision and the right to have the decision reviewed by the Court of Justice.¹¹⁹

b. Inspection of premises

Article 20 of the Regulation empowers the Commission to carry out the inspections, which are more commonly known as 'down raids'. During the inspection, Commission has the wide range of powers, including:

- Entering any premises, land and means of transport;
- Examining the books and other records related to the business irrespective of the medium on which they are stored;
- Taking or obtaining in any form, copies of, or extracts from, books or records;
- Sealing any business premises or records for the period and to the extent necessary for the inspection;

¹¹⁸ Article 23(1)(a), Council Regulation (EC) 1/2003, see also S. Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement', Juridisk Publikation, no. 2/2014, p. 340.

¹¹⁹ Article 18(3), Council Regulation (EC) 1/2003, see also S. Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement', Juridisk Publikation, no. 2/2014, pp. 340-341.

- Asking any representative or member of staff of the undertaking for explanations of facts or documents relating to the subject matter and purpose of the inspection and thereafter recording the answers.¹²⁰

The Commission adopts a decision setting out the subject matter of the inspection, the nature of the inspection, the date of the inspection and the possible penalties under Articles 23 and 24 of Regulation 1/2003 after having consulted with national competition authorities.¹²¹ Officials who undertake the inspection are required to issue a written authorisation, providing the abovementioned information. The Commission should also give a prior notice to the appropriate Member State where the inspection will be conducted.¹²² Under Article 20(6) of the Regulation the NCAs must provide assistance to the Commission within their allocated territories.¹²³

In addition to business premises, under Article 21 the Commission has the power to inspect other premises if a reasonable suspicion exists that books and other records related to a serious violation of Articles 101 and 102 TFEU are being kept in those premises. Such premises include home of directors, managers and other members of staff of the undertakings and associations of undertakings concerned.¹²⁴ An order for such inspection must be made by the decision, which must contain the reasons for existing suspicion. Before an Article 21 inspection occurs, an application must be made for a relevant judicial authority within the Member State.¹²⁵

It can be concluded that the Commission exercises variety of powers and is equipped with a number of tools in order to effectively prevent competition distortions. However, it is highly relevant to point out whether all the competences conferred on the Commission by the Regulation 1/2003 have some human rights implications. It is stated in the recital of the Regulation 1/2003 that this regulation ‘*respects fundamental rights and observes the principles recognised, in*

¹²⁰ Article 20(2), Council Regulation (EC) 1/2003.

¹²¹ Article 20(4), Council Regulation (EC) 1/2003.

¹²² Article 20(3), Council Regulation (EC) 1/2003.

¹²³ Article 20(6), Council Regulation (EC) 1/2003; B. Rodger, A. MacCulloch, ‘*Competition Law and Policy in the EU and UK*’, 2014, p. 43.

¹²⁴ Article 21(1), Council Regulation (EC) 1/2003.

¹²⁵ Article 21(2), Council Regulation (EC) 1/2003; B. Rodger, A. MacCulloch, ‘*Competition Law and Policy in the EU and UK*’, 2014, p. 44.

particular, by the Charter of Fundamental Rights of the European Union’. Accordingly, this regulation should be interpreted and applied with respect to those rights and principles.¹²⁶

In case *Hoechst* the Court held that ‘*fundamental rights are an integral part of law and observance of which the Court ensures in accordance with the constitutional traditions common to the Member States, and the International Treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 is of particular significance in that regard.*’¹²⁷ Therefore, the Court states that the respective article of the Regulation in relation to the inspection of premises ‘*cannot be interpreted in a way that gives rise to results which are incompatible with the general principles of EU law and in particular with fundamental rights.*’¹²⁸ Thus, it can be drawn from the preceding extracts that the Court is concerned with the rights of the company which constitutes the main subject of the inspection.¹²⁹

Article 52 of the Charter provides that where it contains rights corresponding to those in the ECHR, their meaning and scope shall be the same. Additionally, Union law shall not be prevented from providing more extensive protection as the ECHR is taken as a minimum standard.¹³⁰ Moreover, effective judicial protection, as a general principle of EU law is specifically enshrined in the Charter.

The EU courts have frequently emphasised the importance of ensuring that Commission enforcement proceedings respect the rights of the defence as a fundamental principle, for example in *Archer Daniels Midland* case.¹³¹

Despite such considerations, it will be demonstrated in the following chapters that compliance of the Commission’s proceedings with human rights is not always being automatically implied and therefore is often subjected to criticism. This is particularly a matter of discussions since the EU

¹²⁶ Recital 37, Council Regulation (EC) 1/2003.

¹²⁷ ECJ, Joined cases, 46/87 and 227/88, ECLI:EU:C:1989:337(para 13)—*Hoechst v Commission of the European Communities*.

¹²⁸ *Ibid.* para 12.

¹²⁹ B. Rodger, A. MacCulloch, ‘*Competition Law and Policy in the EU and UK*’, 2014, p. 44.

¹³⁰ Article 52, the Charter.

¹³¹ ECJ, Case 511/06 P, ECLI:EU:C:2009:433(para 84)—*Archer Daniels Midland v Commission*.

courts have rather soft approach towards the Commission and the judicial review they undertake is not always considered to be satisfactory. This topic has not fallen off the radar of many commentators and due to its high importance, it will be discussed in the next chapter.

Chapter 5. The Judicial Review of the Commission's Decisions by the EU Courts and the Difference Doctrine

5.1. Limited Judicial Review of the Commission's Decisions

As seen in the previous chapter the European Commission has a number of instruments at hand to enforce the EU competition law. While fulfilling its enforcement function the Commission has a rather wide margin of discretion. Therefore, the Court limits its judicial review to *“verifying whether the relevant rules on procedure and a statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.”*¹³²

As for the concept of ‘the light judicial review’ itself, it is important to understand what this term mean in fact. The definition can be found in the literature, where it is said that *“the nature and the extent of the inquiry the Court will undertake when faced with an appeal concerning a Commission decision”*.¹³³

Even though Article 263 TFEU is a legal basis for the European courts to review the decision of the EU institutions, some critics say that the grounds for review that this article provides are rather limited and constitute hindrance for an appellant.¹³⁴

Speaking from the Court's perspective, it is maintained that the EU courts do not determine the competition law charges stated in the *Statement of Objections*. General Court does not conduct its own analysis of the market, but instead it only verifies that the Commission's findings are correct.¹³⁵ Therefore, the Court is only concerned with the manifest error or misuse of powers. The definition of misuse of power is given in the case *UK v Council*, where it was stated that *“an act of the Union bodies constitutes a misuse of powers if it has been adopted with the exclusive or main*

¹³² A. Murg-Perlmutter, *‘The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?’* Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 25.

¹³³ Ibid. pp. 24-25.

¹³⁴ Ibid. p. 25.

¹³⁵ Ibid.

*purpose of achieving ends other than those stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.’*¹³⁶

Therefore, when the complex economic assessments are concerned the EU courts do not conduct ‘*de novo*’ analysis of the case. Instead, there is a difference between the legal review and the review of the facts that contain complex economic assessments.¹³⁷ It is the latter that is of special interest for the present paper since there is a lack of clarity regarding the concept of complex economic assessment. The determination of the concept is of utmost importance due to the fact that depending on how the contested item in the Commission’s decision is to be identified, in particular whether it will be regarded as the fact or as a complex economic appraisal, the review of the decision by the court will take place accordingly. More precisely, after identifying the matter as complex economic assessment, the difference doctrine will apply.¹³⁸ The first legal basis of difference doctrine was provided in Article 33 of ECSC Treaty.

The expression ‘complex economic assessment’ is rather misleading as long as it is ambiguous when the doctrine applies: in case there is a complexity of the examination conducted or because the assessment is economic. In this regard, some commentators mention that just because the economic assessments are difficult it cannot be supposed that they are automatically complex.¹³⁹ Moreover, economic analysis of the case is central to the Commission’s decision-making process, thus, considering all the economic assessments as complex and therefore, subjecting them without any differentiation to one and the same head of judicial review might be inaccurate.¹⁴⁰ As it seems, the concept of complex economic assessment still remains not clear.

Some judges state that ‘complex economic assessments’ should be understood as ‘*situations where the Commission has to make an economic-based choice of policy*’.¹⁴¹ Sometimes, the Court refers to the inter-institutional balance of the Treaty, in other words, the balance between the

¹³⁶ ECJ, Case 84/94, ECLI:EU:C:1996:431(para 5 of the Summary)—UK v Council, see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’ Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, pp. 25-26.

¹³⁷ A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’ Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 26.

¹³⁸ Ibid.

¹³⁹ Ibid. pp. 26, 27.

¹⁴⁰ Ibid. 27.

¹⁴¹ Ibid.

powers of the administration and the judiciary.¹⁴² From these considerations, it is becoming clear that ‘complex economic assessment’ has to be seen in the light of the ‘margin of discretion’ the Commission enjoys, which is a question of division of powers and policy-making.¹⁴³

5.2. Jurisprudence Involving Article 101 TFEU Cases

One of the early examples of applying the difference doctrine is the case *Geitlig v High Authority*,¹⁴⁴ where the Court referred to Article 33 of the ECSC Treaty stating that ‘*finding by its very nature, difference doctrine comprises the assessment of the situation created by the economic facts or circumstances and accordingly, is partially outside the jurisdiction of the Court*’.¹⁴⁵

The principle of a marginal review was upheld in ground-breaking case *Consten and Grundig*, there the ECJ stated that ‘*the exercise of Commission’s power necessarily implies complex economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and the legal consequences.*’¹⁴⁶

In case *Remia/Nutricia*, it was stated that ‘*the Court must limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.*’¹⁴⁷

In the joined cases *BAT v Commission* the Court has referred to the *Remia/Nutricia* case and maintained that even if the Court has held that as a general rule, it undertakes a comprehensive

¹⁴² A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 27.

¹⁴³ Ibid.

¹⁴⁴ ECJ, Case 13/60, ECLI:EU:C:1961:8(para 439)—*Geitling v High Authority*.

¹⁴⁵ A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012. p. 30.

¹⁴⁶ ECJ, Joined cases 56/64 and 58/64—ECLI:EU:C:1966:41(page 347)—*Consten and Grundig v Commission*.

¹⁴⁷ ECJ, Case 42/84 ECLI:EU:C:1985:327(para 34)—*Remia BV and others v Commission*, see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 31.

review of the questions whether the conditions for the application of Article 85 are satisfied, its review of such appraisals, are necessarily limited to the same scope as defined in *Remia/Nutricia* case.¹⁴⁸ The same principle was upheld by the Court of First Instance in case *Matra Hachette*, where the CFI has stated that where complex economic matters are involved, judicial review of the legal characterisation of the facts is limited to the probability that the Commission has committed a manifest error of assessment.¹⁴⁹

In one of the earliest cases, *SIV v Commission*, the CFI specified that ‘*although the Community court may partially annul a Commission decision in the field of competition that does not mean that the court has the jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence.*’¹⁵⁰

In the case *Spain v Lenzing AG*, the concept of the limited judicial review was pronounced slightly differently, however, the standard was kept at the same level. More precisely, the Court decided that even though ‘*the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community judicature must refrain from reviewing the Commission’s interpretation of an economic nature*’, however, it further held that ‘*Court of First Instance did not substitute its own economic assessment for that of the Commission and in so doing remained within the parameters of the judicial review which the Community judicature can carry out in respect of complex economic assessments.*’¹⁵¹

Another example of modified application of limited judicial review can be outlined from the case *CEAHR v Commission*. The question concerned market definition, which was related to complex economic assessments, therefore, subject to limited judicial review. However, the judgment

¹⁴⁸ ECJ, Joined cases 142 and 156/84, ECLI:EU:C:1987:490(para 62)—British American Tobacco Ltd (BAT) v Commission.

¹⁴⁹ Court of First Instance, Case 17/93, ECLI:EU:T:1994:89(para 104)—Matra Hachette SA v Commission.

¹⁵⁰ Court of First Instance, Joined cases T-68/89, T-77/99, T-78/89, ECLI:EU:T:1992:38 (para 319)—SIV v Commission, see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 31.

¹⁵¹ ECJ, Case 525/04 P, ECLI:EU:C:2007:698(paras 56-61)—Kingdom of Spain v Lenzing AG, see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 34.

reviewed comprehensively the Commission's conclusion and found a manifest error of assessment in relation to market definition.¹⁵²

The concept of the limited judicial review was also extended to 'complex technical assessments'. For example, in *Commission v Trenker SA*. The case concerned withdrawal of marketing authorization for medical products containing amfepramone from Trenker. The Commission's decision was the outcome of complex assessments in the medico-pharmacological field, therefore, the Court held that as long as the Commission's decision is based on complex technical appraisals, those appraisals are subject to limited review by the Court.¹⁵³

As for what can be considered as complex economic matter, as observed in the case law, different aspects of 101 TFEU cases were regarded as being complex in nature. For example, in *Metropole Television*, the CFI found that the assessment of the nature of a specific restrictive agreement involves a complex economic assessment regarding which the Commission enjoys a margin of appreciation and therefore the judicial review is limited.¹⁵⁴ In *Aman und Sohne*, the definition of the product market and geographic market were established to entail 'complex economic appraisals' according to the GC.¹⁵⁵ Assessment of exchange of information concerning price was also considered to be the complex economic appraisal in joined cases *Aalborg Cement and Others v Commission*.¹⁵⁶

¹⁵² General Court, Case 427/08, ECLI:EU:T:2010:517(paras 147-152)—CEAHR v Commission, see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 35.

¹⁵³ ECJ, Case 459/00 P(R), ECLI:EU:C:2001:217(paras 81-83)—Commission v Trenker SA, see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 32.

¹⁵⁴ Court of First Instance, Case 112/99, ECLI:EU:T:2001:215(para 114)—Metropole Television v Commission, see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 33.

¹⁵⁵ General Court, Case 446/05, ECLI:EU:T:2010:165(para 136)—Amann & Söhne v Commission, see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 33.

¹⁵⁶ ECJ, Joined Cases C- 204/00, ECLI:EU:C:2004:6(para 279)—Aalborg Cement and Others v Commission, see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 33.

As observed above, even though the concept of limited judicial review in relation to complex economic matters is upheld in a number of cases, often the term itself - ‘complex economic assessment’ has not always been used in a consistent way but instead some other terminology has been applied. This, in turn, creates even more ambiguity in the area. In this regard, it is worth mentioning that sometimes the term ‘complex’ is omitted, thus, such omission is leading to a question whether the lighter review shall still take place in case the economic appraisals were not necessarily complex.¹⁵⁷

In more recent cases *Chalkor v Commission*¹⁵⁸ and *KME v Commission*¹⁵⁹ the undertakings concerned applied to the GC for the reduction of fines imposed on them. Their application was dismissed by the GC and on appeal the ECJ had to rule on the level of judicial review which the GC must have carried out when reviewing the Commission’s decisions.¹⁶⁰

The ECJ while agreeing with the view of AG that the Court has unlimited jurisdiction when it comes to reviewing fines, dismissed the appeals. It followed the different line of reasoning regarding the review of the finding an infringement. Though, the positive side of the judgement is that the Court acknowledged that the full and unrestricted review is obligatory for the GC. In particular, the Court stated that even though the Commission has the margin of discretion regarding complex economic matters it does not mean that the courts of the EU must refrain from the Commission’s interpretation of the facts of economic nature, ‘*those courts not only must establish among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.*’¹⁶¹ The Court went into more details and stated that ‘*large number of factors requires that the Commission carry out a thorough examination of the circumstances of the*

¹⁵⁷ A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 34.

¹⁵⁸ ECJ, Case 386/10 P, ECLI:EU:C:2011:815—*Chalkor v Commission*.

¹⁵⁹ ECJ, Case 389/10 P, ECLI:EU:C:2011:816—*KME v Commission*.

¹⁶⁰ A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 35.

¹⁶¹ ECJ, Case 389/10 P, ECLI:EU:C:2011:816—*KME v Commission*(para 121), see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 36.

infringement’¹⁶² This in turn results in wide margin of discretion, which GC had referred to, however irrespective of such discretion GC is not stopped it from conducting ‘*the full and unrestricted review, in law and in fact, required of it.*’¹⁶³ Nevertheless, the conclusion made by the Court still implies that the EU courts according to current circumstances provide effective judicial protection within the meaning of Article 47 of the Charter. Such statement is regarded as rather unexpected among scholars and compliance with the case law of ECtHR is also questioned, however, the case law of ECHR will be discussed later on, for now, it is enough mentioning that the Court did find it necessary to refer to Article 6 ECHR but referred to only Article 47 of the Charter.¹⁶⁴

5.3. Jurisprudence Involving Article 102 TFEU Cases

EU courts have extended the limited scope of judicial review to the cases involving abuse of dominant position.

In case *Kish Glass*, the Court of First Instance provided the formula of ‘limited judicial review’. In particular it held that, ‘*although as a general rule, the EU judicature undertakes a comprehensive review of the question whether or not the conditions for the application of competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.*’¹⁶⁵

From such a pronouncement, it is interesting to know what does a mere control of legality mean. In *Selex*, CFI stated that ‘*Community*’ *judicature is not entitled to issue directions to the institutions*

¹⁶² ECJ, Case 389/10 P, ECLI:EU:C:2011:816—KME v Commission(para 125).

¹⁶³ ECJ, Case 389/10 P, ECLI:EU:C:2011:816—KME v Commission(para 136), see also A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 36.

¹⁶⁴ A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 36.

¹⁶⁵ Court of First Instance, Case 65/96, ECLI:EU:T:2001:261(para 64)—Kish Glass & Co. Ltd v Commission, see also in A. Murg-Perlmutter, ‘*The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 37.

or to assume the role assigned to them; In fact, the administration concerned shall adopt the necessary measures to implement a judgement given in proceedings for annulment.”¹⁶⁶

As for ECJ, in a famous case *British Airways*, regarding market and competitive situation the Court has held that, ‘it is not for the Court of Justice, on an appeal, to substitute its assessment for that of the CFI. The appeal must be limited to questions of law. The assessment of the facts... does not constitute a question of law submitted as such for the review by the Court of Justice.’¹⁶⁷

As mentioned in the previous section, in the analysis of Article 101 TFEU cases, the light judicial review covers not only complex economic matters but also complex technical assessments. The same trend applied to the cases concerning Article 102 TFEU. In *Microsoft* case, the Court ruled that ‘in so far as the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the court, which means that the Community courts cannot substitute their own assessment of matters of fact for the Commission’s’.¹⁶⁸

In the cases concerning Article 102 TFEU, there is a relatively bigger number of examples of the issues that were considered to be as complex economic matter, and therefore, the assessments of such matters were subjected to limited judicial review.

¹⁶⁶ Court of First Instance, Case 155/04, ECLI:EU:T:2006:387(para. 28)—SELEX Sistemi Integrati SpA v Commission. (Cases cited therein: Court of First Instance, Case 67/94 ECLI:EU:T:1998:7(para 200)—Ladbroke Racing v Commission; Court of First instance, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 ECLI:EU:T:1998:198(para 53)—European Night Services and Others v Commission), see also A. Murg-Perlmutter, ‘The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 37.

¹⁶⁷ ECJ, Case 95/04 P, ECLI:EU:C:2007:166(para 78)—British Airways plc v Commission, see also A. Murg-Perlmutter, ‘The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 38.

¹⁶⁸ Court of First Instance, Case 201/04, ECLI:EU:T:2007:289(para 88)—Microsoft Corp. v Commission, see also A. Murg-Perlmutter, ‘The Light Judicial Review of Complex Economic Assessments. Too ‘Light’ for European Court of Human Rights’ taste?’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 37.

The investigation of predatory prices was deemed by the Court to contain a 'complex economic assessment', for example in *France Telecom v Commission* case, determining a recovery of costs was also a circumstance which fell under the 'complex economic assessment' category.¹⁶⁹

In the following chapter all topics discussed in the previous chapters will be analysed in details respectively with the main focus on conformity of current EU legal order with the ECHR and the requirements stemming from there.

¹⁶⁹ Court of First Instance, Case 340-03, ECLI:EU:T:2007:22(para 163), see also A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, pp. 37-38.

Chapter 6. The Analysis - Correspondence between the Standard of Protection of Companies' Rights by the ECHR and the EU Legal Order

After reviewing the current situation in terms of companies' rights of defence in the EU recognised by on the one hand, the ECtHR's jurisprudence primality basing its views on ECHR and on the other hand by the European courts mostly focusing its decisions on the Charter, it becomes rather obvious that inconsistencies within these two systems can be found.

The explanatory note on Article 47(2) of the Charter states that it corresponds to Article 6 ECHR- the right to a fair trial.¹⁷⁰ Article 47(2) of the Charter stipulates that everyone is entitled to a public and fair hearing within a reasonable time by an independent and impartial tribunal previously established by law and that everyone shall have the possibility of being advised, defended or represented. It has been also maintained that an analogy from the right to a fair trial enshrined in Article 6(1) ECHR is provided in the Article 41 of the Charter which establishes a right to a good administration, which refers to everyone's right to have his or her affairs handled impartially, fairly and within the reasonable time by the institutions of the EU. Hence, as the right to a good administration includes a right to be heard, Article 6(1) ECHR and Article 41 of the Charter can be considered as being corresponding articles.¹⁷¹

In the following chapter, the analysis will be provided as to what are those inconsistencies viewed from different sides of the discussions. Hence, opposing views will be provided in relation to conformity of a current standing of the EU in the field of fundamental rights of companies within the competition law area and some suggestions will be made as to what can be an effective tool for a higher standard of protection of companies' rights and in turn, for eliminating existing discrepancies.

¹⁷⁰ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), explanations on Article 47.

¹⁷¹ S. Kulevska, '*Corporate Human Rights Protection in Light of Effective Competition Law Enforcement*', Juridisk Publikation, no. 2/2014, p. 344.

6.1. Competition Proceedings - Criminal or Administrative in Nature?

According to the Regulation 1/2003 the fines are not criminal in nature.¹⁷² Nevertheless, since the fines imposed on undertakings are often of a huge amount the nature of the competition law enforcement proceedings is controversial.

In spite of the fact that the Regulation states that fines imposed by the Commission shall not be of criminal nature, a criminal charge has autonomous definition in the jurisprudence of Strasbourg court, in other words, regardless of the type of qualification of the proceedings by the national law the charge might be deemed as criminal.¹⁷³

For many commentators, ‘Engel criteria’ definitely brings EU competition procedures within the scope of Article 6 ECHR.¹⁷⁴ It has been held that due to many of the characteristics, in particular, the nature of the penalties in competition field, more precisely, a deterrent and punitive use of fines, union system of competition proceedings falls under the criminal category.¹⁷⁵

Those who are in favour of the idea that Article 6 ECHR cannot be applied fully to the Commission proceedings definitely see the differentiation between hard-core and soft-core criminal nature, made by the Court in *Jussila* case in favour of the Commission, meaning that, the proceedings of the Commission are of a soft-core criminal nature.¹⁷⁶ Some belonging to this group even argue that the fines imposed on a company should be viewed in the context of a specific company fined. While the amount of the fine might seem large, they might not be automatically disproportionate taking into account a specific individual.¹⁷⁷ However, supporters of the idea of direct applicability of Article 6 ECHR to competition proceedings, suggest that this case is an example of causing difficulty in the Union due to the fact that the ECHR is not binding and the

¹⁷² Article 23(5), Council Regulation (EC) 1/2003.

¹⁷³ C. Kerse and N. Khan ‘*EU Antitrust Procedure*’, Sweet and Maxwell, 6th edition, 2012, p. 109, see also P. Makhaouri, ‘*Corporate Human Rights Protection in the Commission’s Inspection Procedure*’, Master Thesis, 2015, p. 28.

¹⁷⁴ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 71.

¹⁷⁵ *Ibid.* p. 72.

¹⁷⁶ *Ibid.* p. 73.

¹⁷⁷ *Ibid.*

action cannot be brought before the Strasbourg Court that can decide upon the issue.¹⁷⁸ Moreover, unlike tax authorities in *Jussila*, the Commission exercises different function in combination with its wide range of powers. Additionally, often, the amount of fines imposed by the Commission is not ‘minor sums of money’.¹⁷⁹

According to the *Jussila* case and arguments put forward, it can be concluded that competition fines are criminal according to the autonomous meaning of Article 6 ECHR and they are different from the tax surcharges that are discussed in *Jussila* case.¹⁸⁰ Firstly, due to the severity of the fines and secondly, because of the stigma attached to them. Thus, it can be argued that Article 6 ECHR should be applied fully and guarantee the right to oral and public hearing.¹⁸¹

In this regards, it should also be mentioned that even though the EU is not a party to the ECHR, this does not mean that the ECJ ‘*does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.*’¹⁸² Thus, the interpretation made by the ECtHR of the charges being criminal is highly relevant.

6.2. Applicability of Article 6 ECHR to the EU Competition Law Enforcement Proceedings and Non-Accession of the EU to the ECHR- Impediment or not?

After the Charter and the Article 6 TEU came into force there are discussions about the applicability of the ECHR and ECtHR’s case law within the EU competition law field.¹⁸³ In order to delve into the issues of why the applicability of ECHR and the Strasbourg’s Court’s case law

¹⁷⁸ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 73.

¹⁷⁹ Ibid. p. 74.

¹⁸⁰ M. Medzmariashvili, ‘*Case Jussila v Finland; Application No. 73053/01, Date of Judgment, 23 November, 2006*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 86.

¹⁸¹ Ibid.

¹⁸² Joined opinion of AG Darmon, ECJ, Case 374/87, ECLI:EU:C:1989:387—Orkem v Commission as cited in D. Slater, S. Thomas, D. Waelbroeck, ‘*Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*’ The Global Competition Law Working Papers Series, no. 04/08, p. 3.

¹⁸³ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 66.

might be debatable, Article 6 TEU and the discussions related thereto shall be overviewed since the issue of applicability of ECHR, including Article 6 ECHR and Article 6 TEU are certainly interrelated.

Article 6(2) TEU which was introduced by the Lisbon Treaty in 2009 provides that the EU is obliged to accede to the ECHR, with the condition that such accession shall not affect the Union's competences as defined in the Treaties. Before that, in Opinion 2/94¹⁸⁴ the Court had held that the EC Treaties as they stood by that time did not permit the EC to accede to the ECHR but as can be seen from the Article 6(2) TEU, nowadays, there is a legal basis for the accession to happen. Taking into consideration the existence of such an article, beyond any doubt, the most important and interesting pronouncement from the Court of Justice was Opinion 2/13¹⁸⁵ published in 2014, on the compatibility of the Draft Agreement on the EU's accession to the ECHR with the EU Treaties. According to the Opinion, the accession to the ECHR will probably be delayed for many years.¹⁸⁶

The opinion has been criticised among scholars. In particular, it has been argued that even though the human rights situation has changed since the Charter became a legally binding document, inconsistencies will not be fully eliminated until the EU becomes a party to the ECHR. In case the EU accedes to ECHR, the ECtHR will be a final institution when it comes to reviewing the acts of the EU institutions regarding the human rights in the EU, this in turn will trigger consistency between two systems.¹⁸⁷

On the other hand, it has been argued that the accession would have no impact on the mechanisms and procedures for enforcement of Articles 101 and 102 TFEU. This was the view of AG Kokott¹⁸⁸ who in this way has endorsed the position advanced by the Commission and the Council.¹⁸⁹ She

¹⁸⁴ Opinion of the Court, 2/94, ECLI:EU:C:1996:140.

¹⁸⁵ Opinion of the Court, 2/13, ECLI:EU:C:2014:2454.

¹⁸⁶ P. Oliver, T. Bombois, 'Competition and Fundamental Rights,' *Journal of European Competition Law and Practice*, Vol 6, no. 8, 2015, p. 598.

¹⁸⁷ S. Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement', *Juridisk Publikation*, no. 2/2014, p. 338.

¹⁸⁸ View of AG Kokott, Opinion procedure, 2/13, ECLI:EU:C:2014:2475.

¹⁸⁹ P. Oliver, T. Bombois, 'Competition and Fundamental Rights,' *Journal of European Competition Law and Practice*, Vol 6, no. 8, 2015, p. 598.

specifically examined three issues. First, she recalled *Menarini* case¹⁹⁰ and stated that the system where the competition authority is in charge of imposing fines which are subject to a judicial review has been upheld by the ECtHR. Therefore, the fact that the Commission has this competence causes no problem.¹⁹¹ Second, she pointed out that the draft agreement had no connection to the rule against double jeopardy (*ne bis i dem*) since under the draft Agreement, the EU was set to accede only to the ECHR itself and the first Protocol, and this rule is included in Article 4 of Protocol 7.¹⁹² Third, she considered the principle guaranteed in Article 6 ECHR as well as Article 47 of the Charter which provides that proceedings must be conducted within a reasonable time. Although both the Commission and the General Court had been found to have breached this principle in the past, it did not follow that accession would require any institutional alterations.¹⁹³ Subsequently, AG Kokott found the draft Agreement in compliance with EU Treaties subject to certain safeguards. However, the Court has ruled on the contrary.¹⁹⁴

Consequently, as already stated above, it is apparent that the issue of applicability of the ECHR and the ECtHR case law is largely dependent on the relationship between the two European systems that currently exist. Due to the non-accession of the EU to the ECHR and non-binding character of ECtHR jurisprudence to the Union courts' case law, the applicability issue still depends on interpretations made by the CJEU in its case law. Even though the underlying idea of the right to a fair trial coincides in both the ECHR and the Charter, meaning that both the Convention and the Charter ensures the protection of one of the fundamental principles, there are still some important details which come into play when it comes to applicability of Article 6 ECHR to the EU competition proceedings such as the nature of competition proceedings as already overviewed above. Due to such situation, there are divergent opinions expressed in relation to the applicability issue.

¹⁹⁰ ECtHR, *A. Menarini Diagnostics S.R.L. v Italy*, Application no. 43509/08, 27 September 2011.

¹⁹¹ P. Oliver, T. Bombois, 'Competition and Fundamental Rights,' *Journal of European Competition Law and Practice*, Vol 6, no. 8, 2015, pp. 598.

¹⁹² *Ibid.* p. 598.

¹⁹³ *Ibid.* pp. 598-599

¹⁹⁴ *Ibid.*

6.3. Privilege Against Self-Incrimination - Same Concept or not?

Now the question arises how the ECtHR case law regarding the privilege against self-incrimination applies to the companies within the context of competition proceedings, i. e. when they are being accused to have infringed the EU competition rules and therefore subjected to investigation. This question is especially important since the Article 18 of Regulation 1/2003 is focused on effectiveness of Commission's investigating powers and is one of the corner stones of how the Commission ensures to complete its tasks in the competition field.

As seen previously, a limited form of a right against self-incrimination - constituting a general principle of EU law, was recognised in *Orkem* case. There the ECJ accepted that investigated companies may rely on Article 6(1) ECHR, however, it denied the recognition of the right not to give evidence against itself, since neither the wording of that provision, nor the ECtHR's judgements indicate that such a right exists therein.¹⁹⁵ Hereby it should be recalled that *Orkem* judgement was delivered in 1989, earlier than *Funke and Sounders*, which were delivered by the ECtHR later in 1993 and 1996, respectively.

As seen in *Orkem* case, the distinction was made between two types of questions and it was stated that a right to remain silent concerned only those questions regarding the purpose of the investigations. On the contrary, the companies are obliged to cooperate with the Commission and provide all the information that will be of assistance for the Commission in the investigation of the potential infringement.¹⁹⁶

However, such approach, namely, the circumstance that the privilege is only attributable to the answers to 'leading questions', and the factual questions are allowed, can be criticised since even purely factual evidence might be similarly damning.¹⁹⁷ Furthermore, the element which the ECJ indicated as one of the grounds of its decision that the Article 6 ECHR does not entail the privilege

¹⁹⁵ ECJ, Case 374/87, ECLI:EU:C:1989:387(para 30)—*Orkem v Commission*.

¹⁹⁶ *Ibid.* para 27.

¹⁹⁷ A. Andreangeli, '*EU Competition Law Enforcement and Human rights*', Edward Elgar Publishing Ltd, 2008, p. 132.

in itself, raised the question if the Court would reach a different conclusion had the ECtHR already acknowledged the existence of a right against self-incrimination as part of Article 6 ECHR.¹⁹⁸

As already seen previously in Section 2.3., the case law of the ECtHR established after the *Orkem* case recognises the existence of the privilege as an essential element of the right to a fair trial and of the presumption of innocence. However, as seen in later case *Mannesmannrohren-Werke v Commission*, the CFI has reached the same conclusion as the ECJ did in *Orkem*, stating that it had no jurisdiction to apply the Convention, and that absolute right to silence would be an unjustified obstacle for the Commission's investigations.¹⁹⁹ Thus, ECtHR's cases have changed nothing for the ECJ's approach and the answer to the question asked in the previous paragraph if the Court would have reached the same conclusion had there been ECtHR's cases at hand, becomes rather obvious.

The decision in *Mannesmannrohren Werke v Commission* was highly criticised as not ensuring effective protection of the rights of the defence of the investigated undertakings. As Andreangeli states 'by adopting what was termed as a policy decision not to extend the safeguards against self-incrimination to Commission investigations, the CFI confirmed a narrow interpretation of the privilege against self-incrimination which does not place any limit on the Commission's investigative powers with the sole exception of leading questions.'²⁰⁰

The ECJ has also elaborated on this matter and has not found infringement of the privilege on the grounds that first of all, the applicant challenged not a decision but a simple request for information, concerning which there is no obligation to provide answers, therefore CFI had correctly drawn appropriate distinction between a request for information and a decision requiring information,²⁰¹ and second, the legality of the final decision was not affected by the illegality of the questions that were found to be offensive to the privilege by the CFI. In fact, the investigated

¹⁹⁸ A. Andreangeli, *'EU Competition Law Enforcement and Human rights'*, Edward Elgar Publishing Ltd, 2008, p. 132.

¹⁹⁹ Court of First Instance, Case T-112/98, ECLI:EU:T:2001:61(paras 59, 66)—Mannesmann v Commission

²⁰⁰ A. Andreangeli, *'EU Competition Law Enforcement and Human rights'*, Edward Elgar Publishing Ltd, 2008, p. 133.

²⁰¹ ECJ, Case 238/99, ECLI:EU:C:2002:582 (para 279) —Limburgse Vinyl maatschappij and others v Commission, see also A. Andreangeli, *'EU Competition Law Enforcement and Human rights'*, Edward Elgar Publishing Ltd, 2008, p. 134.

parties had either refused to respond to such questions or they had denied the fact on which they had been questioned, hence, no answers were identified that were used by the Commission.²⁰²

Accordingly, the later ruling of the ECJ suggests that in order there to be found a violation of the privilege against self-incrimination there must be evidence that proves coercion on the part of the Commission. Additionally, there must be an ‘actual interference’ with the companies’ right to ‘fair legal process.’²⁰³

Is there uniformity between the Strasbourg and Luxembourg Courts? Perhaps there is not. The scope of the right against self-incrimination is defined in a different way by the European courts. Both Courts recognise that the Commission’s authorities are allowed to request existing documents from companies when conducting investigations, however, it is clear that the protection guaranteed by the Strasbourg Court is wider. The indirectly incriminating questions are permitted by the CJEU, but not by the ECtHR if they will be used against the suspect. The ECtHR also recognises the right of the company to refuse the request of the institutions if it is obliged to produce the documents, however, the EU courts have not made such differentiation.²⁰⁴

It can be concluded that the diversity of opinions and different scope of the privilege against self-incrimination in the two courts’ case law creates the legal uncertainty for everyone who is involved in these proceedings.²⁰⁵ It is not fully clear what is the level of reliance on Article 6 ECHR by the EU Courts.

6.4. European Commission’s Powers and Human Rights

It is hard to leave the Commission’s current powers framed in EU legislation and human rights’ implications without notice. Despite the consideration of human rights within the instruments

²⁰² ECJ, Case 238/99, ECLI:EU:C:2002:582 (para 282) —*Limburgse Vinyl maatschappij and others v Commission*, see also A. Andreangeli, *‘EU Competition Law Enforcement and Human rights’*, Edward Elgar Publishing Ltd, 2008, p. 134.

²⁰³ A. Andreangeli, *‘EU Competition Law Enforcement and Human rights’*, Edward Elgar Publishing Ltd, 2008, p. 134.

²⁰⁴ P. Makhauri, *‘Corporate Human Rights Protection in the Commission’s Inspection Procedure’*, Master Thesis, 2015, p. 35.

²⁰⁵ *Ibid.*

mentioned above, the centralisation of powers within the Commission has made the academics and practitioners question the compliance of the Commission's actions with human rights.²⁰⁶ It is also debated how strongly the fundamental rights are available for the companies and their binding character on the Commission. Some scholars argue that the Court of Justice has not often applied EU fundamental rights against the Commission in a stringent way because according to the Court the law should not constitute the hindrance for the Commission's duty to fight against anticompetitive practice.²⁰⁷

In the meantime, it is also argued that some decisions made by the Court or the Commission might form an obstacle for the companies invoking fundamental rights.²⁰⁸ The accumulation of different functions within the Commission and rather limited role of the EU courts have human rights repercussions.²⁰⁹ It is held that large number of powers vested in the Commission certainly involves conflicts with each other and being bias is highly probable.²¹⁰

As opposed to the critics mentioned above, the Commission considers its procedure as being compatible with minimum standards of rights protection.²¹¹ According to the Commission, the EU enforcement is satisfactory in the light of the Convention.²¹²

However, as Slater mentions, *'the current institutional system can be problematic since the accumulation of investigative, prosecutorial and adjudicative powers by the Commission during the whole proceedings in antitrust cases leads naturally to what is called 'prosecutorial bias', i.e. the case handler will naturally tend to have a bias in favour of finding a violation once proceedings have been commenced.'*²¹³ This means that decision taken by independent body will be free from subjunctive elements in contrast with the Commission.²¹⁴

²⁰⁶ Lund Student EU Law Review, 'Fundamental Rights and EU Competition Law', Special Edition, Fall, 2012, p. 4.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ A. Jones, B. Sufrin, 'EU Competition Law', Oxford University Press, 5th edition, 2014, p. 933.

²¹⁰ H. Andersson, 'Fundamental Rights and Antitrust Proceedings - A Perfect Match or the Wedding from Hell?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall, 2012, p. 23.

²¹¹ Communication from the Commission to the European Parliament and the Council-Report on the Functioning of Regulation 1/2003 {SEC(2009)574}.

²¹² J. Pierce, 'Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 76.

²¹³ D. Slater, S. Thomas, D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' The Global Competition Law Working Papers Series, no. 04/08, p. 33.

²¹⁴ Ibid.

6.5. Judicial Review by the EU Courts - Compliant with ECHR?

As for the concept of limited judicial review by the EU courts of complex economic assessments conducted by the Commission, the question is raised whether the standard of review required by the European Court of Human Rights is complied with.²¹⁵ Even though this is not a new question, the issue acquired importance after the Lisbon Treaty entered into force, both because of the Charter that gained the same legal value as the treaties and also because of the Article 6(2) TEU providing the legal basis for the accession of the EU to the European Convention.²¹⁶

Commentators argue that although the courts must have the ability to review the legality of the decision, they cannot usurp the specific role of the Commission since this institution has definite powers and expertise and subsequently conducts the complex economic assessments which is required by the enforcement of competition law. Therefore, it could be concluded that the division of powers within the EU and the nature of competition proceedings which requires 'complex economic assessments' justify the limited review of the Commissions' assessments exercised by the EU courts.²¹⁷

Nevertheless, this approach might be criticised because it is not always clear what constitutes a 'complex economic assessment', for example when procedural and substantial allegations are so closely related that it becomes hard to outline pleas independently. Moreover, not in all cases does the Commission adopt 'policy decisions' in relation to which a scrutinised judicial review would be suitable. It is also arguable whether such standard of review completely fits the objective nature of the conditions given in Articles 101 and 102 TFEU and the criminal nature of competition proceedings.²¹⁸

²¹⁵ A. Murg-Perlmutter, *'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?'*, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 22.

²¹⁶ Ibid. p. 23.

²¹⁷ A. Andreangeli, *'EU Competition Law Enforcement and Human rights'*, Edward Elgar Publishing Ltd, 2008, p. 167.

²¹⁸ Ibid. p. 168.

6.6. Conclusion

Considering the recent situation in corporate human rights protection within the EU, it becomes apparent that the ECtHR standards described in the previous chapters are different and in case the EU accedes to the ECHR significant reforms will be required to strengthen corporate human rights protection in the EU legal framework. In order to achieve consistency concerning the ECHR standards firstly, it should be made crystal clear what the nature of the competition proceedings are, and drawing the picture from the case law, there is nothing that would suggest that the proceedings are not criminal which in turn shall result in full application of Article 6 ECHR. The fines imposed in competition law area are of huge amount and usually, they are such an economic burden on companies that the imposition of them might result into the companies' liquidation.²¹⁹

Secondly, when it comes to the privilege against self-incrimination, as seen above, even though both Courts' jurisprudence permits the Commission to request existing documents from companies throughout the investigations, the ECtHR offers wider protection against incriminating oneself. Indirectly incriminating questions are permissible by the CJEU, the ECtHR condemns such questions. ECtHR recognises the right of the companies not to obey the request of the administrative authorities if they must generate new documents to satisfy the order, the EU courts do not provide such right.²²⁰ Thirdly, when it comes to the accumulation of functions within the European Commission it is rather hard to see such model of the Commission fully compatible with human rights, therefore, the system would be much more efficient if completely independent organ, possibly the courts would decide upon the fines due to the reasons explained above. However, policy-making arguments and specificity of competition law field might stand as a justification for conferral of such extensive powers on the Commission. Therefore, stronger assessment of the Commission's decisions including the cases where the complex economic evaluations are concerned, by the European courts shall be considered to be a more practical

²¹⁹ D. Slater, S. Thomas, D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' The Global Competition Law Working Papers Series, no. 04/08, p. 12.

²²⁰ P. Makhauri, 'Corporate Human Rights Protection in the Commission's Inspection Procedure', Master Thesis, 2015, p. 35.

solution. The courts should not be discouraged from carrying out their own review even if it might end up in detailed hearings and calling economic witnesses from both parties.²²¹

The next chapter is devoted to the European Ombudsman (EO) that plays an important role in keeping the standard of human rights protection higher and acts as a guardian of the companies' rights in competition proceedings.

²²¹ J. Ratliff, '*Judicial Review in EC Competition Cases before the European Courts: avoiding doublé renvoi*', Wilmerhale, 2009, p. 12.

Chapter 7. The European Ombudsman

7.1. The Role of the European Ombudsman

The European Ombudsman is a mechanism of external administrative control of the decision of EU institutions, therefore it is highly relevant to observe what type of influence it can have within the context of protection of companies' rights. Prior to providing details of EO and its effectiveness in dawn raids the general overview of the EO's functions shall be addressed.

Article 228 TFEU states that the European Ombudsman can receive claimants from any natural or legal person residing or having their registered office in the Union about the maladministration of the Union institutions.²²² Hence, the EO acts as a mechanism of external administrative control.

Under the same Article, Ombudsman shall conduct inquiries for which he finds grounds. If the Ombudsman finds maladministration, he refers the matter to the institutions concerned which are supposed to express their opinions in three months. Afterwards, the Ombudsman sends the report to the European Parliament and informs the applicant about the result of the procedure.²²³

Thus, the basic role of the EO is to guarantee that the right to good administration provided in Article 41 of the Charter²²⁴ is respected.²²⁵ European Ombudsman makes sure that the maladministration does not take place. As for the term maladministration, the EO defined it as a failure to act in a way which is compatible with the Treaties and other acts that are binding on institutions.²²⁶

In the context of ensuring the principles of good administration, the Ombudsman has stated that normally when the public authority exercises a discretionary power, it must explain the reasons as

²²² Article 228, TFEU.

²²³ Article 228, TFEU.

²²⁴ Article 41(1), the Charter.

²²⁵ P. Makhauri, *'Corporate Human Rights Protection in the Commission's Inspection Procedure'*, Master Thesis, 2015, p. 55.

²²⁶ E. M. De Leeuw, *'The European Ombudsman's Role as a Developer of Norms of Good Administration'*, European Public Law 17, no. 2, 2011, p. 352, as cited in P. Makhauri, *'Corporate Human Rights Protection in the Commission's Inspection Procedure'*, Master Thesis, 2015, p. 56.

to why one course of action was chosen over the other.²²⁷ As for the role of the EO in such situations, it initially tries make suggestions to the institution for improving the issues contained in the inquiry.²²⁸ In case the maladministration is not found, the EO issues a *decision* setting out findings.²²⁹ However, if the maladministration continues, then the EO will make appropriate recommendations to the institution and send them to it while asking for the opinion which must be sent by the institution within three months, the EO forwards the opinion to the complainant so that it can submit comments on it within one month.²³⁰ ‘Where the Ombudsman becomes aware that the matter under investigation by the Ombudsman has become the subject of legal proceedings, the Ombudsman shall close the inquiry and inform the complainant and the institution’.²³¹

Even though the findings of the EO are not binding for the EU institutions it is still argued that the role of EO shall not be underestimated as long as it acts as an external administrative mechanism, and has the role of a moral inspector as well, in other words, avoiding recommendations of the EO might question the legitimacy of the findings of the Commission.²³²

7.2. The Effective Mechanism?

It is argued that the European Ombudsman is a better place to investigate infringements of companies’ rights than the courts.²³³ However, it is argued that since the EO’s findings lack legally binding nature it might not be very effective tool for challenging the decisions of EU institutions.²³⁴ In other words, technically, it is absolutely possible for the courts to ignore the

²²⁷ Ombudsman’s decision on complaint 995/98/ OV, para 1.7; P.N. Diamandouros, ‘Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman’, *Journal of European Competition Law & Practice*, Vol. 1, no. 5, 2010, p. 388.

²²⁸ Articles 6(1), Decision of the European Ombudsman adopting implementing provisions; (implementing provisions), see also P. Makhauri, ‘Corporate Human Rights Protection in the Commission’s Inspection Procedure’, Master Thesis, 2015, p. 56.

²²⁹ Article 6(2) Implementing provisions.

²³⁰ Article 6(3), Implementing provisions.

²³¹ Article 6(4), Implementing provisions.

²³² A. Scordamaglia-Tousis, ‘The Role of the European Ombudsman in Competition Proceedings: A Second Guardian of Procedural Guarantees?’, *Journal of European Competition Law & Practice*, Vol. 3, no. 1, 2012, p. 32, see also P. Makhauri, ‘Corporate Human Rights Protection in the Commission’s Inspection Procedure’, Master Thesis, 2015, p. 57;

²³³ J. Pierce, ‘Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?’, *Lund Student EU Law Review*, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 79.

²³⁴ *Ibid.*

decisions of European Ombudsman.²³⁵ However, it must also be stated that European Ombudsman can ‘draw a political attention to a case by making a special report to the European Parliament. The effectiveness of the Ombudsman thus depends on moral authority and for this reason it is essential that the Ombudsman’s work be demonstrably fair, impartial and thorough.’²³⁶

Some of the Ombudsman’s decisions’ closing inquires contain critical and/or further remarks which stand as criticism or suggestions. A critical remark is made upon a finding of maladministration, whereas a further remark is made without such a finding. Each year the Ombudsman publishes a research regarding degree to which EU institutions have observed critical and further remarks, lessons taken therefrom and implemented changes that should make maladministration less possible to occur in the future.²³⁷

In order to demonstrate how effective the work of European Ombudsman has been accepted among the EU institutions, some statistics can be of assistance. In 2014, the EU institutions accepted a total of 15 solution proposals, out of which 13 recommendations were accepted wholly or partially. Three solution proposals were rejected (by the Commission), as were five recommendations (two out of these five, by the Commission). As for the critical remarks, 34 of them were made in 26 decisions and 54 further remarks - in 39 decisions. Responses were received in relation to all the remarks made in 2014 although with a delay in several cases.²³⁸ The statistics for past five years are rather similar to that of the year 2014 regarding considerations of the acceptance and responses made to the European Ombudsman’s actions. Consequently, it can be concluded that EU institutions take into consideration the opinion of the European Ombudsman expressed in recommendations, solutions or critical or further remarks.²³⁹ In this regard, it should be mentioned that it still remains to be true that Ombudsman has not been addressed very frequently and therefore the mechanism has not been utilised to its greater effect by individuals as

²³⁵ J. Pierce, ‘Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 79.

²³⁶ ‘Follow-up given by institutions to critical remarks and further remarks’, <http://www.ombudsman.europa.eu/en/cases/followups.faces> (Last visited on 18 May 2016).

²³⁷ Ibid.

²³⁸ ‘Putting it Right? – How the EU institutions responded to the Ombudsman in 2014’, <http://www.ombudsman.europa.eu/en/cases/followup.faces/en/61644/html.bookmark> (Last visited on 18 May 2016).

²³⁹ Ibid.

a tool for challenging the decisions of the Commission.²⁴⁰ However, the reason for the reluctance to refer to the Ombudsman vastly lies on a non-binding character of the Ombudsman's decisions as already mentioned above. As to what solutions can be found for the European Ombudsman's mechanism to become a more effective instrument for the companies seeking remedies in cases where they claim the occurrence of maladministration will be addressed in the concluding remarks of the thesis.

²⁴⁰ J. Pierce, '*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 79.

Chapter 8. Concluding Remarks

This chapter will summarise the thesis by addressing the topics discussed in each chapter. Firstly, the issue of applicability of Article 6 ECHR to EU competition proceedings will be overviewed and some recommendations will be delivered as related thereto. Secondly, the wide margin of discretion of the Commission will be approached, in connection with the limited judicial review conducted by the European courts. Finally, the role of the European Ombudsman will be highlighted.

As identified in chapter 6 of the thesis inconsistencies can be noticed concerning the applicability of Article 6 ECHR to the competition proceedings as well as the concept of the privilege against self-incrimination contained therein. Even though the protection under Article 6 ECHR is extended to competition proceedings by both European Courts the scope of the right is distinct,²⁴¹ this might be because of the different approach towards the nature of competition proceedings.

When it comes to the privilege against self-incrimination, only leading questions are prohibited in EU, however, factual questions are allowed even if they might turn out to be indirectly incriminating. However, ECtHR ensures broader protection of the right against self-incrimination, by restricting both directly and indirectly incriminating questions.²⁴² As noted above, such discrepancies create ambiguities for the companies.

In order to eliminate mentioned discrepancies and guarantee legal certainty in relation to the rights and principles that are considered to be corresponding, it becomes obvious that direct applicability of Article 6(1) ECHR and the jurisprudence of ECtHR related thereto is the most appropriate solution which is practically impossible to occur without the accession of the EU to the ECHR.

The issue of the due level of corporate human rights protection is especially crucial where, as seen in the chapter 4, rather wide range of powers, in particular, investigating, prosecutorial and decision-making powers are accumulated within the European Commission. It is a matter of

²⁴¹ P. Makhauri, *'Corporate Human Rights Protection in the Commission's Inspection Procedure'*, Master Thesis, 2015, p. 60.

²⁴² Ibid.

discussion whether such a model renders “*lower standard of justice and fairness within the EU*”.²⁴³ Therefore, it can be successfully argued that fines in antitrust cases should be imposed by the courts. However, as a contrary to this argument, one should remember that the Commission’s investigations in competition cases are field specific and there is a need for special assessments to be conducted. This includes the fining phase particularly, since the fines imposed on the companies largely depend on the complex economic analysis of each case and courts are often unable to provide with explicit economic assessments because of the lack of capacity.²⁴⁴ Therefore, according to the current standing, the Commission seems to be the most appropriate body that can precisely define the case circumstances and reach the relevant conclusion.

However, on the other hand, in case the Commission plays a major role in all the phases of the competition proceedings, there should be an effective judicial review of the Commission’s decision by the courts. In other words, in case the Commission’s competences are considerably numerous, then an effective controlling mechanism shall be ensured.²⁴⁵ The concept of the full judicial review was underpinned by the ECHR, however, as it can be seen in the case law of the ECJ, such approach is not widely accepted within the EU, especially when it comes to the cases containing complex economic or technical assessments conducted by the Commission. One might argue that such an approach taken by the courts, in particular, reluctance to highly limit the competences of the Commission, is justified due to the massive need of protection of fair competition and in turn stability of the internal market.²⁴⁶ However, on the contrary, it should be maintained that the fundamental rights are core values of the Union and they cannot be underestimated. They always formed the part of the EU and therefore, any consideration and the policy goals should be achieved under the shadow of the fundamental rights. The most appropriate approach is keeping a fair balance between the interests concerned. In fact, the legislation as well as the jurisprudence of the EU has always tried to stipulate balancing approach towards the controversial issues as evidenced, in particular, the aims of the free market and fundamental rights. The fact of adoption of the EU Charter and giving it the equal legal value as the Treaties have, is a clear indication of fundamental rights being respected on a remarkable level. Nevertheless, when it

²⁴³ J. Flattery, ‘*Balancing Efficiency and Justice in EU Competition Law. Elements of Procedural Fairness and their Impact on the Rights to a Fair Hearing*’, Vol 7, Issue 1, 2010, p. 77.

²⁴⁴ J. Pierce, ‘*Corporate Rights and EU Antitrust Law: A Compatible Incompatibility?*’, Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, pp. 76-77.

²⁴⁵ *Ibid.* p. 77.

²⁴⁶ *Ibid.* p. 76.

comes to corporations, it is obvious that compared to the classical understanding of fundamental rights which primarily referred to humans, extending those rights to companies is a relatively new concept. However, in a modern society, it is no more surprising that companies are the addressees of law and beneficiaries of the fundamental rights. The right to a fair trial can be invoked by companies as evidenced in the case law of the EU courts as well as ECtHR. Due to such implications, there is a significant responsibility resting on a legislator, prosecutorial bodies and the judiciary to keep a balance when the clashing interests are concerned.

In order to maintain the fair balance, considerable steps shall be undertaken. In this regard, it should be asserted that scrutinised judicial review of the Commission's decision shall be ensured. By rehearing the case, the Court should have the ability to replace the decisions made by the administrative bodies.²⁴⁷

Overall, it can be concluded that at present, competition proceedings and effectiveness of investigations are very essential for the EU. However, it must be maintained that the standards set by the ECtHR shall be warily followed. This issue will become remarkably crucial if the accession of EU becomes part of the Union's agenda. Nevertheless, it should be stated that despite the current situation and the absence of binding effect of the ECHR in EU jurisdiction by considering the obligations given in Article 52(3) of the Charter, the scope of the right to a fair trial should be such as to safeguard equivalence between the standards of protection stipulated in Article 6 ECHR and the protection offered in the EU legal order.²⁴⁸

Notably, the role of European Ombudsman is of paramount importance and it is the author's opinion that it should be given more considerable attention than it has nowadays. This advice is first and foremost addressed to the companies themselves. It seems that transformation of the European Ombudsman into a judicial organ is not reasonable since its status is defined by the Treaty and changes in that would require tremendous amount of work,²⁴⁹ hence, the more cases

²⁴⁷ A. Murg-Perlmutter, 'The Light Judicial Review of Complex Economic Assessments. Too 'Light' for European Court of Human Rights' taste?', Lund Student EU Law Review, Fundamental Rights and EU Competition Law, Special Edition, Fall 2012, p. 49.

²⁴⁸ J. Flattery, 'Balancing Efficiency and Justice in EU Competition Law. Elements of Procedural Fairness and their Impact on the Rights to a Fair Hearing', Vol 7, Issue 1, 2010, p. 57.

²⁴⁹ P. Makhauri, 'Corporate Human Rights Protection in the Commission's Inspection Procedure', Master Thesis, 2015, p. 57.

will be addressed to the European Ombudsman the more powerful its actions will become, i. e. creating more precedents will subsequently have an impact on the approach of the EU institutions towards the findings of the European Ombudsman, even though they do not have a legally binding character.²⁵⁰

As it can be evidenced from the paper, there are divergent opinions regarding protection of fundamental rights of companies within the EU and numerous controversies are expressed regarding the level of protection, in particular, whether it is sufficient compared to that ensured by the ECtHR. Since the topic is very delicate nothing in this thesis shall be understood as an ultimate and entirely satisfactory solution for eliminating the mentioned loopholes but in fact the issues analysed are open for further robust discussions.

²⁵⁰ A. Scordamaglia-Tousis, *'The Role of the European Ombudsman in Competition Proceedings: A Second Guardian of Procedural Guarantees?'*, Journal of European Competition Law & Practice, Vol. 3, no. 1, 2012, p. 32, see also, P. Makhauri, *'Corporate Human Rights Protection in the Commission's Inspection Procedure'*, Master Thesis, 2015, p. 58.

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