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SOPHIE KULEVSKA

Corporate Human Rights Protection in Light of Effective  
Competition Law Enforcement

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# CORPORATE HUMAN RIGHTS PROTECTION IN LIGHT OF EFFECTIVE COMPETITION LAW ENFORCEMENT

By Sophie Kulevska<sup>1</sup>

*Focusing on the implications of the European Union's accession to the European Convention on Human Rights and Fundamental Freedoms, this article scrutinizes and analyzes the investigated companies' human rights protection in light of the European Commission's very wide and discretionary powers. Due to the importance of ensuring the effectiveness of the competition law enforcement within the European Union, it is illustrated, de lege lata, that the European Union legal order does not provide the same level of human rights protection as the European Convention on Human Rights and Fundamental Freedoms. De lege ferenda, it is discussed whether the accession will enhance coherence in human rights protection in Europe, as stated in the Preamble to the Draft Accession Agreement.<sup>2</sup>*

## I. INTRODUCTION

Given the binding character of the Charter of Fundamental Rights of the European Union (CFR) and the European Union's (EU) future accession to the European Convention on Human Rights and Fundamental Freedoms (ECHR), the relationship between these parallel European legal systems is highly topical.<sup>3</sup> The broader focus in this article originates from the conflict of interests between the EU competition law enforcement system and the investigated companies' rights of defense. The former is concerned with the effective functioning of the European Commission's<sup>4</sup> powers to investigate companies under Regulation 1/2003<sup>5</sup>. The latter addresses the private protection of the companies under scrutiny. Which interest should prevail, the public or the private? The crucial question is striking a fair balance between these competing interests.

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1 Reporting Clerk at the Administrative Court of Appeal in Gothenburg and former Blue Book Trainee at the European Commission, Cabinet of EU Commissioner Cecilia Malmström. This article is a revised and updated version of my LL.M. thesis with the same title, submitted at Lund University in June 2011 and awarded the Swedish Competition Authority's 2012 Prize for best competition law thesis.

2 See the Preamble to the Draft Accession Agreement of 10 June 2013: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) (last visited 9 November 2014).

3 The official proceedings on the EU's accession to the ECHR began on 7 July 2010.

4 Hereinafter referred to as 'the Commission'.

5 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] (2003) OJ L 1/1. Hereinafter referred to as 'Regulation 1/2003'.

With reference to the aforementioned conflict, the purpose of this article is to examine whether and to what extent the Commission's extensive and discretionary investigative powers comply with the due process standards enshrined in the ECHR, more exactly, the investigated companies' right against self-incrimination. The existing tension will be illustrated through the lens of the EU Courts' case law – in light of the case law of the European Court of Human Rights (ECtHR) – with a particular focus on the legitimacy of the Commission's investigative powers. The central question is whether the protection afforded by the EU Courts corresponds to that afforded by the ECtHR. To be able to answer this question it is of crucial importance to examine whether the ECHR is applicable to companies at all, and if so, to what extent. Do they enjoy the same level of protection as individuals? Particular emphasis will be put on the changes introduced by the Lisbon Treaty, including the EU's future accession to the ECHR. Will it pave the way for the investigated companies' human rights grievances before the ECtHR?

## 2. HUMAN RIGHTS STANDARDS IN THE EU LEGAL ORDER

### 2.1 DEVELOPMENT OF HUMAN RIGHTS IN THE EU COURTS' CASE LAW

Due to concerns raised against the lack of human rights guarantees in the EU legal order, the *general principles of EU law* have been developed through the case law of the Court of Justice of the European Union (CJEU), in particular the *proportionality principle* and the *fundamental rights principle*.<sup>6</sup> They are binding on the EU institutions and provide autonomous human rights standards inspired by the “constitutional traditions common to the Member States” and international treaties to which the Member States have acceded, in particular the ECHR.<sup>7</sup> The importance of ensuring the *rights of defense* as a fundamental principle during the Commission's enforcement proceedings has been frequently emphasized by the EU Courts, especially where sanctions may be imposed.<sup>8</sup> In the *Treuhand* case, for instance, the General Court clearly stated that “it has no jurisdiction to assess the lawfulness of an investigation under competition law in light of the provisions of the ECHR, inasmuch as those

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6 Jones, Alison; and Sufrin, Brenda, *EU Competition Law: Text, Cases and Materials*, 4th Edition, 2011, p. 103.

7 See, e.g., Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR I 125, para 4; and Case 4/73, *Nold v Commission* [1974] ECR 491, para 13.

8 In Case C-511/06 P, *Archer Daniels Midland Co. v Commission* [2009] ECR I- 5843, para 84, the CJEU stated that “in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defense is a fundamental principle of [EU] law which must be complied with even if the proceedings in question are administrative proceedings”. See Jones and Sufrin, p. 1038.

provisions do not form part of [EU] law”.<sup>9</sup> However, it added, since the ECHR form part of the general principles of EU law, “it has special significance in that regard”.<sup>10</sup> By that statement, the General Court confirmed the position previously taken by the CJEU and the protection of fundamental rights developed in its case law, such as *Stauder*, *Internationale Handelsgesellschaft*, *Nold*, *Rutili*, *National Panasonic* and *Schmidberger*.<sup>11</sup>

The CJEU’s fundamental rights judgments lead to the question whether the then European Community (EC) should accede to the ECHR. In its *Opinion 2/94 on the accession by the EC to the ECHR*, the CJEU affirmed the ECHR’s special position among the international treaties, but ruled that an accession to the ECHR was impossible – the EC lacked competence to do that without first amending the EC Treaty.<sup>12</sup> In light of the above-mentioned cases, human rights protection was ‘indirectly’ introduced into the EU legal order by means of the general principles of EU law.<sup>13</sup> They appear to be the first step towards a vertical relationship between the CJEU and the ECtHR in respect of their human rights protection.<sup>14</sup>

## 2.2 ECTHR’S ‘INDIRECT REVIEW’ OF EU ACTS

The relationship between EU law and ECHR law has also been considered by the ECtHR. Since the EU is not yet a party to the ECHR, the ECtHR’s case law in this respect can be regarded as an ‘indirect review’ of the EU acts.<sup>15</sup> In the *Matthews* case the ECtHR examined the compatibility of EU acts with the ECHR. It held that the general principles of EU law, and the role played by the ECHR within that context, secured a level of EU law protection that

9 Case T-99/04, *AC-Treuhand AG v Commission* [2008] ECR II-1501. The General Court considered the procedural aspects of competition law.

10 This is confirmed by Article 6(3) Treaty on European Union (TEU) and reaffirmed by the fifth recital of the CFR’s Preamble, as well as Articles 52(3) and 53 CFR. See T-99/04, *AC-Treuhand AG v Commission*, para 45, which refers to Case T-112/98, *Mannesmannröhren-Werke v Commission* [2001] ECR II- 729, paras 59f., and the case law cited therein. See Jones and Sufrin, p. 103.

11 Case 29/69, *Stauder* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft*; Case 4/73, *Nold*; Case 36/75, *Roland Rutili v Ministre de l’intérieur* [1975] ECR 1219; Case 136/79 *National Panasonic* [1980] ECR 2033; and Case C-112/00, *Schmidberger* [2003] ECR I-5659.

12 The CJEU particularly pointed to the EC’s lack of “general power to enact rules on human rights”; see *Opinion 2/94, Re Accession of the Community to the ECHR*, paras 27 and 35. See also Chalmers, Damian; Davies, Gareth; and Monti, Giorgio, *European Union Law*, 2nd Edition, 2010, p. 262; and Craig, Paul; and De Búrca, Gráinne, *EU Law: Text, Cases and Materials*, 4th Edition, 2008, p. 405.

13 Ovey, Clare; and White, Robin C.A., *Jacobs and White, The European Convention on Human Rights*, 4th Edition, 2006, p. 516.

14 Andreangeli, *EU Competition Enforcement and Human Rights*, 2008, p. 11.

15 Craig and De Búrca, p. 420. A thorough analysis of the ECtHR’s case law on the compatibility of EU fundamental rights with the ECHR is beyond the scope of this article.

is ‘comparable’ to that of the ECHR.<sup>16</sup> The subsequent *Bosphorus* case concerned the seizure of an aircraft in Ireland leased to Bosphorus Airways from JAT Yugoslav Airlines, pursuant to an EU Council Regulation implementing a United Nations Security Council Resolution obliging States to confiscate all aircraft belonging to or operating from Yugoslavia.<sup>17</sup> In determining whether this seizure violated the ECHR, the ECtHR affirmed that the level of human rights protection in the EU was ‘equivalent’<sup>18</sup> to that of the ECHR. It indicated that the EU Member States – bound by EU law – act within the scope of the ECHR.<sup>19</sup> The ECtHR only intervenes if it considers that the human rights protection has been ‘manifestly deficient’. In this case the ECtHR held that the action taken in compliance with EU law met the ECHR requirements.<sup>20</sup> It has been held that the *manifestly deficient test* is much weaker than that applied to the Contracting States to the ECHR.<sup>21</sup> What is lacking is a ‘control system’ that could hold the EU institutions liable for violations of the ECHR. As will be elaborated on further on in this article, an important question regarding the applicability of the ECHR in EU competition law cases is the *character* of the Commission’s enforcement procedures.

## 2.3 HUMAN RIGHTS SITUATION AFTER THE LISBON TREATY

### 2.3.1 EU CHARTER OF FUNDAMENTAL RIGHTS<sup>22</sup>

In 2000 the CFR was ‘solemnly proclaimed’ by the Council, the Parliament and the Commission as a political declaration.<sup>23</sup> It is a mixture of classical political and civil rights as well as progressive, far-reaching economic and social rights, which previously only could be found in the EU Courts’ case law as

16 App. No. 24833/94, *Matthews v United Kingdom*, 18 February 1999, para 32.

17 App. No. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland*, 30 June 2005. See Aslam, Imran; and Ramsden, Michael, *EC Dawn Raids: A Human Rights Violation?*, Competition Law Review, Volume 5, Issue 1, December 2008, p. 82.

18 By ‘equivalent’ the ECtHR meant ‘comparable’; see *Bosphorus*, paras 155 and 165.

19 The ECtHR made a presumption that, if the EU provides ‘equivalent protection’, the EU Member State – Ireland in this case – applying EU law, has not departed from the ECHR requirements; see *Bosphorus*, paras 156 and 165. It is thus a *presumption of compatibility* between EU human rights and the ECHR.

20 *Bosphorus*, paras 156 and 166. This case upheld in broad terms the CJEU’s previous Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications* [1996] ECR I-3953.

21 Chalmers et al., p. 261.

22 The purpose of the CFR is to make fundamental rights more visible at EU level. In most relevant aspects it mirrors the ECHR. See Kerse, Christopher; and Khan, Nicholas, *EC Antitrust Procedure*, 5th Edition, 2005, p. 126.

23 In December the same year it was politically approved by the Member States at the Nice European Council Summit.

general principles of EU law.<sup>24</sup> When the Lisbon Treaty entered into force on 1 December 2009, the CFR became legally binding and part of the EU constitutional order; Article 6(1) of the Treaty on European Union (TEU) gives the CFR the same legal value as the EU Treaties.<sup>25</sup> It may be argued that the binding character also gives it greater legitimacy, as compared to the general principles of EU law. In any case, it builds on these principles, refers to them, and is to be interpreted in light of them.<sup>26</sup>

Article 52(3) CFR deals with the relationship between the CFR and the ECHR, and sets out the scope of the fundamental rights protection – it shall not prevent EU law from providing more extensive protection. The rights enshrined in the ECHR are thus to be seen as ‘minimum standards’.<sup>27</sup> The *Explanations relating to the Charter of Fundamental Rights* clearly states that “the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the [ECtHR]”.<sup>28</sup> Article 52(3) CFR also mirrors the CJEU’s case law, according to which the ECHR has a special status in EU law.<sup>29</sup> Acts of the Commission therefore are to be reviewed by the EU Courts against Article 6(1) ECHR, pursuant to Articles 7, 47(2) and (3) CFR, as well as Article 52(3) CFR. Nevertheless, as the law stands today, it cannot be deduced that the CFR provides more extensive protection than the ECHR – this remains to be seen in the EU Courts’ case law.

### 2.3.2 EU’S ACCESSION TO THE ECHR

Article 6(2) TEU establishes the legal basis for the EU’s accession to the ECHR. It will be possible to challenge acts carried out by the EU institutions for their violation of the fundamental rights before the ECtHR. The ECHR

24 In Case C-540/03, *European Parliament v Council (Re: Right to Family Reunification)* [2006] ECR I-5769, para 38, the CJEU cited the CFR for the first time. See Andreangeli, p. 8; and Jones and Sufrin, p. 103.

25 Ameye, Evelyne M., *The Interplay between Human Rights and Competition Law in the EU*, *European Competition Law Review*, 2004, Volume 25, Issue 6, pp. 335f.; Aslam and Ramsden, p. 64; and Forrester, Ian S., *A Challenge for Europe’s Judges: The Review of Fines in Competition Cases*, *European Law Review*, Volume 36, Issue 2, April 2011, p. 200.

26 Chalmers et al., p. 232.

27 Andreangeli, p. 9; and Killick, James; and Berghe, Pascal, *This Is Not the Time to be Tinkering with Regulation 1/2003 – It Is Time for Fundamental Reform – Europe Should Have a Change We Can Believe In*, *Competition Law Review*, Volume 6, Issue 2, July 2010, p. 272. Note that the rights and freedoms recognized by the CFR may be limited if the requirements in Article 52(1) CFR are fulfilled.

28 *Explanations relating to the Charter of Fundamental Rights*, Article 52 CFR; see: [http://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf) (last visited 9 November 2014).

29 Chalmers et al., p. 243.

will also be directly applicable before the EU Courts.<sup>30</sup> Although the EU is not yet a party to the ECHR, and thus not bound by the ECtHR's case law as such, Article 6(3) TEU provides that "fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of [EU] law". Consequently, EU primary law states that the ECHR provisions must be given effect as general principles of EU law.<sup>31</sup>

Even though the human rights situation has changed since the CFR became legally binding, inconsistencies will not be satisfactorily resolved until the EU becomes a party to the ECHR. On the one hand, the EU Courts will become formally bound by the ECtHR's judgments, which private parties will be able to invoke before them.<sup>32</sup> On the other hand, the ECtHR will review acts of the EU institutions as the 'final adjudicator' over the human rights protection in the EU legal order.<sup>33</sup> The fact that it is now the CJEU that interprets the ECHR in the EU has been held to be unsatisfactory.<sup>34</sup>

### 3. PUBLIC ENFORCEMENT IN EU COMPETITION LAW

#### 3.1 ROLE OF THE COMMISSION UNDER REGULATION 1/2003

An important role of the Commission is the enforcement of EU competition law, having its legal basis in Regulation 1/2003.<sup>35</sup> It pursues the legitimate aim of protecting free competition, and thereby the economic well-being of the EU. Although the procedure is essentially administrative, Regulation 1/2003 provides extensive investigative powers.<sup>36</sup> When enforcing EU competition law, the Commission enjoys a *wide margin of discretion*; it can choose when and to whom it will bring its proceedings.<sup>37</sup> The investigations are often force-

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30 Therefore, the ECHR plays a central role in the European human rights discourse; it has been a key source of inspiration for the EU Courts, as well as for the CFR's drafters. See Andreangeli, p. 9; Ameye, pp. 335f.; and Aslam and Ramsden, p. 64.

31 Chalmers et al., p. 232.

32 Aslam and Ramsden, p. 63; and Killick and Berghe, p. 284.

33 Killick and Berghe, p. 284.

34 Harris, David; O'Boyle, Michael; and Warbrick, Colin, *Law of the European Convention on Human Rights*, 2nd Edition, 2009, pp. 28f.

35 Article 105 TFEU stipulates that the Commission shall ensure the application of the principles laid down in Articles 101 and 102 TFEU.

36 Jones and Sufrin, pp. 1027f. In the *Communication from the Commission on the functioning of Regulation 1/2003* the Commission held that Regulation 1/2003 has brought about a landmark change in the way the EU competition law is enforced. The Commission has become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way.

37 Jones and Sufrin, p. 1038. This discretion may be compared to that given to national public authorities by the ECtHR.

fully and intrusively conducted without a prior warrant, as the Commission acts on its suspicions.<sup>38</sup> Although Regulation 1/2003 contains few restrictions in this context,<sup>39</sup> there are a number of procedural rights and guarantees that companies enjoy, which limit the investigative powers conferred to the Commission. For instance, under Article 18 the Commission can make requests for information only “in order to carry out the duties assigned to it by [Regulation 1/2003]”.<sup>40</sup> In addition, such a request “shall stipulate the legal basis and purpose of the request”.<sup>41</sup> These procedural guarantees imply that the request must identify “with reasonable precision” the suspected infringement of the competition rules.<sup>42</sup> Furthermore, and according to its Recital 37, Regulation 1/2003 “respects the fundamental rights and observes the principles recognized in particular by the [CFR] [...] accordingly, [Regulation 1/2003] should be interpreted and applied with respect to those rights and principles”. This means that EU competition law formally recognizes the CFR.<sup>43</sup>

### 3.2 INVESTIGATIVE AND FACT-FINDING STAGE<sup>44</sup> – REQUESTS FOR INFORMATION

Two major investigatory powers are given to the Commission under Articles 18 and 20 of Regulation 1/2003, namely the *right of request for information*

38 Aslam and Ramsden, p. 61. These powers are conducted during the initial, preliminary fact-finding stage of the enforcement procedure. During the second stage – which will not be dealt with in this article – the Commission makes its objections known through a ‘statement of objections’, before a final decision is taken. See Andreangeli, p. 2; and Wils, Wouter P.J., *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, World Competition, Volume 34, Issue 2, June 2011, pp. 3f. and 27ff.

39 The principal limitation is the demand for a relationship between the information requested and the infringement being investigated. See Kerse and Khan, p. 131.

40 See Article 18(1).

41 See Article 18(2) and (3).

42 This can be made only if “the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place”. See Wils, *Efficiency and Justice in European Antitrust Enforcement*, 2008, pp. 12f.; and Wils (2011), pp. 12f.; referring to Advocate General Jacobs in Case C-36/92 P, *SEP v Commission* [1994] ECR I-1911, paras 21 and 30.

43 Ameye, p. 336; and Kerse and Khan, p. 127.

44 According to Article 2(3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to [Articles 101 and 102 TFEU] (2004) OJ L 123/18, the Commission may exercise its investigative powers, i.e., its fact-finding procedures, *before* initiating proceedings. This is vital, since the Commission may not be in a position to issue a statement of objections before it has carried out an investigation. See Jones and Sufrin, p. 1043.



and the *right of inspection of business premises, records, etc.*<sup>45</sup> Both articles are independent procedures, which implies that an Article 18 request is not precluded by the fact that the Commission has already carried out an Article 20 inspection.<sup>46</sup> Article 18(1) gives the Commission the power to obtain “all necessary information” from companies, which must either hand over existing documents or provide written answers to questions.<sup>47</sup> It is for the Commission to decide whether the information sought is necessary to define the scope of the infringement, its duration, the identity of the parties, etc. Necessary information is simply such information that is requisite for the Commission to establish the applicability of Articles 101 and 102 TFEU. It has been held that “the relationship must be such that the Commission could reasonable suppose, at the time for the request, that the document would help it to determine whether the alleged infringement had taken place”.<sup>48</sup>

Under Article 18(2) the Commission may request information from companies that may be given the opportunity to supply the requested information voluntarily in response to a written *simple request for information*. Except for the object of the inspection, the request must state the legal basis and its purpose, which must be indicated with “reasonable precision”. If not, it would be impossible to determine whether the information is necessary. In practice, however, it is sufficient for the Commission to identify the suspected infringement.<sup>49</sup> Even though there is no legal obligation for companies to comply with a simple request for information, the consequences for refusing to do so may be serious.<sup>50</sup> Article 23(1)(a) provides the Commission with the power to impose fines up to one per cent of the company’s total turnover in the preceding business year for “incorrect or misleading” information supplied either intentionally or negligently.

If the investigated companies do not comply with a simple request for information, the Commission may take a *decision requiring information* to be sup-

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45 Regardless of the type or form of the investigation, the investigated companies are expected to cooperate to an extent consistent with their fundamental rights. This was first stated in Case 374/87, *Orkem v Commission* [1989] ECR 3283, and later reiterated in Joined Cases C-204–205/00 P, etc., *Aalborg A/S and Others v Commission* [2004] ECR I-123, paras 62ff. See Kerse and Khan, pp. 125f. For a thorough analysis of Article 20, its compatibility with Article 8 ECHR, and the related case law, I refer to my LL.M. thesis.

46 This was held by the CJEU in *Orkem*, para 14. See Kerse and Khan, p. 133.

47 The power can be used at any stage of the Commission’s procedure and is not limited to the fact-finding stage. See Wils (2008), p. 3.

48 *SEP*, para 21.

49 Kerse and Khan, p. 134.

50 Kerse and Khan, p. 135.

plied to it under Article 18(3).<sup>51</sup> The same formalities apply as under Article 18(2), with the additional requirement that the Commission must inform the companies of their rights to have the decision reviewed by the CJEU.<sup>52</sup> Notable is that a request under Article 18(3) does not have to follow a prior Article 18(2) request, as the Commission enjoys a considerable discretion to choose the way of information gathering.<sup>53</sup> Regarding the purpose of an Article 18(3) decision, which is legally binding, it is sufficient that the Commission sets out the information required.<sup>54</sup> If a company intentionally or negligently supplies incorrect, incomplete or misleading information, or does not supply information within the required time-limit, the Commission can either impose (i) a fine not exceeding one per cent of the company's total turnover in the preceding business year under Article 23(1)(b) or (ii) a periodic penalty payment not exceeding five per cent of the average daily turnover "in order to compel them" to supply complete and correct information under Article 24(1)(d).<sup>55</sup>

### 3.3 JUDICIAL REVIEW

Articles 261 and 263 TFEU are crucial in relation to the enforcement of EU competition law.<sup>56</sup> In practice, many of the CJEU's functions are exercised by the General Court – subject to appeal to the CJEU on points of law.<sup>57</sup> Accordingly, only a *review of the legality* of the Commission's decisions is exercised by the CJEU, not a full review on the merits.<sup>58</sup> In order for a court to have *full*

51 See Case T-39/90, *SEP v Commission* [1991] ECR II-1497, para 29, where the General Court held that the notion of 'necessary information' must be interpreted in accordance with the purposes of the Commission's investigative powers. In Case C-36/92 P, *SEP v Commission* the CJEU upheld the General Court's finding and reiterated that there must be a correlation between the Commission's request for information and the presumed infringement.

52 The lawfulness of a decision is only subject to this review, as no prior court warrant is needed under Article 18.

53 Kerse and Khan, p. 134.

54 *National Panasonic*, para 11. If the Commission sets out in detail its suspicions and arguments, and thereby complies with the obligation under Article 18, a company cannot complain. See Kerse and Khan, p. 137.

55 Wils (2008), pp. 3f.

56 Kerse and Khan, p. 53.

57 Kerse and Khan, p. 52.

58 Forrester, *Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures*, *European Law Review*, Volume 34, Issue 6, December 2009, p. 821. According to Forrester's own words, the question "what is lawful?" rather than "what is wrong?" describes the current standard of review. Article 263 TFEU enumerates the following grounds of review: *lack of competence; infringement of an essential procedural requirement; infringement of the [TFEU] or of any rule of law relating to its application; and misuse of powers*. A stay of execution may be made under Article 278 TFEU – without suspensory effect. It seems, however, unlikely that the CJEU would do that when an inspection decision is impending. See Killick and Berghe, p. 276.

*jurisdiction* within the meaning of the ECHR, the ECtHR has held that it must have “the power to quash in all respects, on questions of fact and law, the decision”.<sup>59</sup> Only in respect of penalties does the CJEU enjoy full, or ‘unlimited’, jurisdiction, which is provided for by Article 261 TFEU supplemented by Article 31 of Regulation 1/2003.<sup>60</sup>

## 4. COMPANIES’ RIGHTS OF DEFENSE DURING THE COMMISSION’S INVESTIGATIONS

### 4.1 RIGHTS OF DEFENSE AS A ‘DUE PROCESS’ STANDARD

Already in the *Hoffmann-La Roche* case the CJEU held that a fundamental principle of EU law is the respect of the rights of defense in administrative proceedings that may lead to the imposition of sanctions. It has also held that companies’ rights of defense extend to the Commission’s preliminary investigation procedures.<sup>61</sup> Nevertheless, the EU Courts did not take such issues seriously in competition law cases until the proclamation of the CFR in 2000.<sup>62</sup> Generally, only individuals can invoke the protection of human rights enshrined in the ECHR, but certain rights are extended to companies.<sup>63</sup> As to the legal basis, Article 1 ECHR protects ‘everyone’. However, corporate human rights protection cannot be based exclusively on that provision.<sup>64</sup> According to paragraph 36(1) of the Rules of Court, which refers to Article 34 ECHR, companies have a right to allege that public authorities have breached their human rights.

59 App. No. 34619/97, *Janosevic v Sweden*, 23 July 2002, para 81. See Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, *World Competition*, Volume 33, Issue 1, March 2010, p. 15. This was reiterated in Case C-501/11 P, *Schindler v Commission*, 18 July 2013, paras 34f. The CJEU referred to the ECtHR’s *Menarini* judgment – see Chapter 4.2 below – and held that it does not conflict with the ECtHR’s case law that an administrative authority makes a decision imposing fines if there is a right to full judicial review.

60 Wils (2011), p. 14; Forrester, “A Bush in Need of Pruning: The Luxuriant Growth of ‘Light Judicial Review’”, *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* [Ehlermann, C-D.; and Marquis, M. (eds)], 2011, pp. 37f.; and Forrester (2011), *A Challenge for Europe’s Judges: The Review of Fines in Competition Cases*, pp. 186ff.

61 Joined Cases 97–99/87, *Dow Chemical Ibérica* [1989] ECR 3165, para 12; and Case 85/87, *Dow Benelux v Commission* [1989] ECR 3137, para 26. That may become particularly relevant in the event of an appeal, otherwise the company will have no right to raise them as procedural issues and claim that their rights of defense have been infringed during the administrative procedure. See Kerse and Khan, p. 190; and Berghe, Pascal; and Dawes, Anthony, “Little pig, little pig, let me come in”: *An Evaluation of the European Commission’s Powers of Inspection in Competition Cases*, *European Competition Law Review*, Volume 30, Issue 9, 2009, p. 418.

62 Ameye, p. 333.

63 See App. No. 37971/97, *Société Colas Est and Others v France*, 27 February 1992.

64 Nevertheless, read in light of the preparatory works, companies are entitled to human rights protection; see Emberland, Marius, *The Human Rights of Companies – Exploring the Structure of ECHR Protection*, 2008, pp. 34f.

Article 34 ECHR itself states that “the Court may receive applications from [...] non-governmental organization”. Companies fall within the scope of such ‘non-governmental organization’ according to the ECtHR’s case law.<sup>65</sup> Nevertheless, the human rights provisions most frequently invoked by companies are surrounding a small area of ECHR provisions, including the right against self-incrimination.<sup>66</sup> Regarding the justification of the rights of defense given to companies, the *rule of law* constitutes a ‘yardstick’. Thanks to the objective nature of the rule of law, it makes no difference between corporate and individual human rights protection.<sup>67</sup>

Decisions under Articles 18 of Regulation 1/2003 may be taken by the Commission without having to afford the investigated companies the right to be heard. In the *National Panasonic* case the CJEU held that there is a “substantive difference” between *procedural decisions*, taken in the exercise of investigatory powers, and *infringement decisions*, taken to terminate an infringement.<sup>68</sup> Companies must be given the right to be heard only regarding the latter. The rights of defense in respect of procedural decisions are not affected the same way, since the Commission is merely concerned with the “collection of the necessary information”.<sup>69</sup> However, this does not necessarily mean that due process principles cannot be recognized in Article 18 procedures. In light of the *administrative due process standards* enshrined in the ECHR, it will be examined whether there are procedural rights and safeguards available to the investigated companies. Article 6(1) ECHR is particularly relevant in respect of the Commission’s competition law enforcement procedures.<sup>70</sup> The extent to which the ECtHR and the EU Courts, respectively, protect the right against self-incrimination will be analyzed in this article.

#### 4.1.1 ECHR AND THE RULE OF LAW

Evident from the ECHR’s Preamble is that the ECHR is based on some underlying values. The procedural rights enshrined in Article 6(1) ECHR constitute “characteristics of a democratic society”. *Democracy* is a precondition for the legitimate interference with such rights by public authorities. The right to a *fair*

65 Emberland, pp. 4 and 14.

66 Emberland, p. 14. Note that also Article 47 CFR applies to ‘everyone’.

67 Andreangeli, p. 128; and Emberland, pp. 42f.

68 *National Panasonic*, para 21. This explains why Article 27(1) of Regulation 1/2003, providing for the *right to be heard*, makes no reference to Article 18. Such a right is only provided for in those provisions under which the Commission may take decisions in the exercise of its ‘judicial powers’; companies are given greater rights of defense protection in relation to those more important decisions. See Kerse and Khan, pp. 137f.

69 Kerse and Khan, p. 191.

70 Killick and Berghe, p. 272.

*administration of justice* is crucial in a democratic society, implying that a restrictive interpretation does not correspond to the ‘democratic purpose’ of Article 6(1) ECHR.<sup>71</sup> Another underlying value of the ECHR and explicitly referred to in its Preamble is the rule of law – constituting an essential part of the democracy concept.<sup>72</sup> Rooted in the common law system, the rule of law is an important fundamental principle for the ECtHR in its teleological interpretation of the ECHR.<sup>73</sup> The rights protected by Article 6(1) ECHR play a central role in the system surrounding the ECHR and are basic elements of the rule of law.<sup>74</sup> 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”.<sup>75</sup> The aim is to strike a fair balance between an effective administration and a secure and reliable protection of individual rights, where the absence of arbitrariness and intrusiveness reflects the essence of the principle.<sup>76</sup>

Also the EU Courts have been influenced by the rule of law when creating standards on administrative fairness. Article 41 CFR establishes a *right to good administration*, which refers to everyone’s right “to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the [EU]”. It has been argued that an analogy can be drawn from the right to a fair trial under Article 6(1) ECHR to Article 41 CFR, as the right to good administration includes a right to be heard.<sup>77</sup>

#### 4.1.2 ARTICLE 6(1) ECHR AND THE RIGHT AGAINST SELF-INCRIMINATION

While the Commission is not a ‘tribunal’ within the meaning of Article 6(1) ECHR,<sup>78</sup> it is during the administrative procedure obliged to observe the gen-

71 One of the most important aspects of the rule of law is the *access to a fair trial* as provided for by Article 6(1) ECHR. Cf. Emberland, pp. 43ff. and 142.

72 See the fifth recital of the Preamble. Democracy constitutes the ‘spiritual bedrock’ of the ECHR, while the rule of law constitutes an ‘objective value’, which is applicable to all forms of exercise of public power. See Andreangeli, p. 16; and Emberland, pp. 40ff. and 135f.

73 This was first explained in App. Nos. 5100/71, etc., *Engel and Others v the Netherlands*, 8 June 1976, para 69, where the ECtHR held that the entire ECHR has been inspired by the rule of law. See Emberland, p. 141.

74 Andreangeli, p. 128; and Emberland, pp. 42f.

75 The rule of law is therefore a crucial tool of interpretation, just like the democracy concept. It focuses on legal procedures and institutions, as a ‘formal’ rather than ‘substantial’ principle. See Andreangeli, p. 127; and Emberland, pp. 42f.

76 Andreangeli, pp. 56f.; and Emberland, pp. 141 and 175.

77 Andreangeli, p. 32ff.

78 Article 47(2) and (3) CFR corresponds to Article 6(1) ECHR, however, the scope is wider but the meaning the same; see the *Explanations relating to the Charter of Fundamental Rights*, Article 52 CFR: [http://www.europarl.europa.eu/charter/pdf/O4473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/O4473_en.pdf) (last visited 9 November 2014). Article 52(3) CFR provides that where the CFR contains rights corresponding to those

eral principles of EU law, including the rights of defense.<sup>79</sup> The protection provided for by Article 6(1) ECHR begins when a person is “charged with a criminal offense”.<sup>80</sup> Several terms in that provision, including the notion of a ‘criminal charge’, are *autonomous* and need to be interpreted by the ECtHR. The ECtHR thus defines the scope of the ECHR protection.<sup>81</sup>

Although Article 6(1) ECHR does not explicitly provide for a right against self-incrimination, it has been recognized by the ECtHR as “lying at the heart of the notion of fair procedure under Article 6 [ECHR]”.<sup>82</sup> Since the right against self-incrimination is aimed at preventing public authorities from compelling the accused to produce inculpatory evidence – which would be impossible to obtain without the accused’s cooperation – it is directly linked to the *presumption of innocence*.<sup>83</sup> Given the nature of the infringements, as well as the nature and degree of the severity of penalties imposed, the CJEU held in the *Hüls* case that the principle of the presumption of innocence enshrined in Article 6(1) ECHR was applicable to competition law procedures, which might result in the imposition of fines. Thereby, the CJEU emphasized the significance of the ECHR and the ECtHR’s case law.<sup>84</sup> The right against self-incrimination constitutes a safeguard mechanism available to the investigated companies.<sup>85</sup> It only applies when the Commission is compelling a response, meaning that a company may only rely on it when it is required to supply

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enshrined in the ECHR, their meaning and scope shall be *at least* the same. That implies that the level of human rights protection afforded by the ECHR and as interpreted by the ECtHR should be implemented in EU law.

79 See, e.g., Joined Cases 100–103/80, *Musique diffusion française v Commission* [1983] ECR 1825, para 8; reiterated in Case T-21/99, *Dansk Rørindustri A/S v Commission* [2004] ECR II-1681, para 155. The EU Courts have recognized that the rights of defense include the right to be heard, the right of access to the file, the right to good administration (codified in Article 41 CFR), the right against self-incrimination, and the legal professional privilege. See Kerse and Khan, pp. 187f.

80 A ‘charge’ has been defined as “the official notification given to an individual by the competent authority of an allegation that he [or she] has committed a criminal offense”. See Ovey and White, p. 162.

81 *Engel*, para 81. See Ovey and White, p. 158.

82 The right against self-incrimination constitutes an internationally recognized human rights standard that historically responded to the need to protect *individuals* subjected to criminal proceedings from the compulsion exercised by public authorities seeking to force them to give evidence that may incriminate themselves, or even confess to the crime of which they had been accused. The principle is primarily a fair trial requirement, but obviously relates to the Commission’s regulatory proceedings. See App. No. 19187/91, *Saunders v United Kingdom*, 17 December 1996, para 68. See also Andreangeli, p. 124.

83 Andreangeli, p. 125.

84 Case C-199/92 P, *Hüls v Commission* [1999] ECR 4287, paras 149f. Cf. Case T-132/07, *Fuji Electric Co. Ltd v European Commission* [2011] REG II-4091, para 6.

85 Aslam and Ramsden, p. 67.

information by decision under Article 18(3) of Regulation 1/2003. Nevertheless, an investigated company has the right to refuse to answer questions if that would lead to an admission of an infringement.<sup>86</sup>

#### 4.2 ADMINISTRATIVE OR CRIMINAL NATURE OF THE INVESTIGATIONS

Ever since the adoption of the EU competition rules, its genuine nature – *administrative* or *criminal* – has been debated. The rights enshrined in Article 6(1) ECHR are guaranteed regardless of the procedure's classification, however, a wider range of safeguards is offered in criminal proceedings.<sup>87</sup> It is therefore important to decide whether the Commission's investigation procedures are of administrative or criminal nature.<sup>88</sup>

In the *Engel* case, the ECtHR held that a matter would be classified as 'criminal' if the three so-called *Engel criteria* were fulfilled: 'domestic classification', 'nature of the offence', and 'nature and severity of the potential penalty'.<sup>89</sup> According to the ECtHR the 'domestic classification' criteria is the least important and never determinative.<sup>90</sup> In respect of competition law, the two other requirements are the most relevant and would lead to the conclusion that EU competition law should be treated as criminal.<sup>91</sup> The 'nature of the offence' criterion includes matters such as whether the legal norm is generally applicable, whether the sanctions have deterrent or punitive character, whether the proceedings are instituted by a public body with enforcement powers, and whether the penalty is dependent on a finding of guilt. The 'nature and severity of the potential penalty' criterion takes the maximum penalty for the offense into account.<sup>92</sup> Although legislation may classify EU competition law as administrative, it might thus be of criminal nature within the meaning of Article 6(1) ECHR.<sup>93</sup> This conclusion can be drawn despite the fact that decisions

86 Berghe and Dawes, p. 419.

87 Article 6(1) ECHR states that "in determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing". It has been held that the crucial question is related to the *consequences* rather than the *classification* of the procedure. See Killick and Berghe, p. 264.

88 Jones and Sufrin, pp. 1039f.; and Kerse and Khan, 128.

89 The term 'criminal charge' was here defined for the first time. See Kerse and Khan, p. 129. In App. No. 34619/97, *Janosevic v Sweden*, 23 July 2002, para 67, the ECtHR emphasized that the *Engel criteria* are alternative and not cumulative.

90 *Engel*, paras 80f. See Killick and Berghe, p. 266.

91 The ECtHR has also held that the matter is to be classified as criminal if a penalty is imposed to deter or punish infringements, rather than compensate for damage. See App. No. 12547/86, *Bendenoun v France*, 24 February 1994.

92 Jones and Sufrin, pp. 1039f.

93 Killick and Berghe, p. 270.



imposing fines for competition law infringements “shall not be of a criminal nature” according to Article 23(5) of Regulation 1/2003.<sup>94</sup>

In light of the increasing awareness of the *quasi-criminal nature* of the competition law proceedings and the increasing level of fines, Advocates General Vesterdorf and Léger have argued that the Commission’s enforcement proceedings have “a criminal law character” in the terms of the ECHR.<sup>95</sup> The ECtHR’s *Société Stenuit* judgment is of particular importance in this regard.<sup>96</sup> It concerned the French Competition Authority’s imposition of a fine under French competition law for a company’s participation in a cartel. The law had characteristics of criminal law, namely the ‘general interests of the society’. In addition, as the fine was a penalty, it was held to be criminal in nature. Accordingly, there had been a breach of Article 6(1) ECHR, and the argument that this provision could not protect companies was dismissed in light of its fundamental role.<sup>97</sup> The fact that the French competition law enforcement possessed a “criminal aspect [...] for the purpose of the [ECHR]” supports the argument that EU competition law enforcement can be considered to be criminal in nature.<sup>98</sup> In its subsequent *Jussila* judgment the ECtHR recalled that the notion of a ‘criminal charge’ within the meaning of Article 6(1) ECHR had expanded beyond the traditional categories of criminal law. It mentioned competition law as an example: “There are clearly ‘criminal charges’ of differing weight [...] the autonomous interpretation adopted by the [ECHR] institutions of the notion of a ‘criminal charge’ by applying the *Engel criteria* have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example [...] competition law”. Accordingly, the guarantees within Article 6(1) ECHR might not apply with full stringency to cases that are deemed ‘criminal’ within the autonomous meaning of the ECHR, but not belonging to the ‘hard core’ criminal law cases.<sup>99</sup>

94 Due to the concentration of the *investigating, prosecuting, decision-making and enforcing* functions within one single institution, it is argued that the Commission’s enforcement powers do not comply with Article 6(1) ECHR. See Andreangeli, pp. 23 and 51. Also note the criminal formulation in Article 23(3) of Regulation 1/2003: “In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement”.

95 See Opinion of Advocate General Vesterdorf in Case T-7/89, *SA Hercules Chemicals v Commission* ECR II-1714; and Opinion of Advocate General Léger in Case 185/95, *Baustahlgewebe v Commission* ECR I-8422; para 31.

96 App. No. 11598/85, *Société Stenuit v France*, 27 February 1992.

97 The ECtHR never gave a judgment in this case, since the company withdrew its application. See Kerse and Khan, p. 128.

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

99 App. No. 73053/01, *Jussila v Finland*, 23 November 2006, para 43. This judgment concerned



The ECtHR took a new step in September 2011 when it delivered its *Menarini* judgment.<sup>100</sup> Menarini challenged a fine of six million Euros imposed by the Italian Competition Authority<sup>101</sup> for its participation in a cartel, where it had fixed prices and allocated the market of certain products. According to Menarini the fine had to be considered a criminal sanction within the meaning of Article 6(1) ECHR. Given that the Italian courts on appeal had not reviewed the Italian Competition Authority's decision closely enough, Menarini invoked the fair trial principles under Article 6(1) ECHR, that is, the lack of access to an independent and impartial court with full jurisdiction.<sup>102</sup> The ECtHR agreed with Menarini that the Italian competition law fine, because of its severity, amounted to a criminal sanction within the meaning of that provision. However, on the merits, it found that the Italian Competition Authority could lawfully impose a criminal sanction within the meaning of Article 6(1) ECHR, as long as the decision was subject to review by a court having 'full jurisdiction' to examine it. When the ECtHR looked at the review undertaken by the national courts it found that they had gone beyond a 'simple legality control'. Great emphasis was put on the fact that the courts enjoyed 'full jurisdiction' to change the amount of the fines imposed on the company.<sup>103</sup>

Although the EU Courts have not yet expressly defined competition law proceedings as criminal, the General Court has referred to the ECtHR's case law concerning administrative proceedings that are 'criminal in nature'.<sup>104</sup> More importantly, given that the Commission is engaged in criminal proceedings once a company has a "criminal charge against it" and becomes aware that it is being "seriously investigated", Article 6(1) ECHR is relevant at the early stage of the

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whether EU competition law fines fall within or outside the 'hard core' of Article 6(1) ECHR.

100 App. No. 43509/08, *A Menarini Diagnostics S.R.L. v Italy*, 27 September 2011. See Bronckers, Marco; and Vallery, Anne, *Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?*, European Competition Journal, August 2012, p. 283.

101 The Italian Competition Authority's investigation powers are similar to those conferred to the Commission. The *Menarini* case therefore raises the question whether the Commission's investigation powers would stand a review by the ECtHR.

102 *Menarini*, para 56. The administrative court of first instance dismissed the complaint with reference to its legality review of administrative decisions. The appeal court confirmed that the appeal process was limited to a legality review. The highest administrative court did not change the lower courts' judgments.

103 *Menarini*, paras 63ff.

104 Case T-67/00, *JFE v Commission* [2004] ECR II-2501, para 178. The General Court held that, with respect to the reach of the presumption of innocence in EU competition proceedings, this principle applies in particular to the proceedings relating to infringements of the competition rules, which may result in the imposition of fines. See Andreangeli, pp. 27f. In light of the ECtHR's judgment in *Société Stenuit*, the General Court generally recognizes that fines have a criminal character. See Kerse and Khan, p. 129.

Commission's investigation procedures.<sup>105</sup> Nevertheless, in the area of administrative decision-making "a right to due process at some stage of the proceedings, but not necessarily at the outset" is enshrined in Article 6(1) ECHR.<sup>106</sup> Since the EU is not yet a party to the ECHR, appeals brought against the Commission's decisions on grounds of violation of Article 6(1) ECHR has been dismissed.

The possibility of successfully invoking Article 6(1) ECHR, in order to challenge a competition law decision, has also been denied by the CJEU. Implemented in Article 47 CFR, the CJEU did not find it necessary to refer to Article 6(1) ECHR in its *KME* and *Chalkor* judgments,<sup>107</sup> delivered shortly after *Menarini*.<sup>108</sup> It focused on its own jurisprudence, avoiding the ECtHR's case law. It held that the legality review in Article 263 TFEU, supplemented by the unlimited jurisdiction to review fining decisions in Article 31 of Regulation 1/2003, provide for an effective remedy before a tribunal according to Article 47 CFR.<sup>109</sup> In *KME* the company complained, on appeal to the CJEU, that the General Court had left too much discretion to the Commission. It had been fined almost 40 million Euros for its participation in a cartel. Even though EU competition law proceedings do not belong to the 'hard core' of criminal law within the meaning of *Jussila*, Advocate General Sharpston argued that they fall within the 'criminal head' of Article 6(1) ECHR.<sup>110</sup> The CJEU, by contrast, focused on Article 47 CFR and concluded that the EU Courts provide effective judicial protection within the meaning of that provision, since the CJEU has 'unlimited jurisdiction' to review the Commission's fines. Delivered on the same day, the CJEU reached the same conclusion in *Chalkor*. Based on the finding that Article 47 CFR "implements" the protection afforded by Article 6(1) ECHR in EU law, the CJEU dealt with the company's claim regarding a violation of Article 6(1) ECHR exclusively by reference to Article 47 CFR. No reference was made to the ECtHR's case law.<sup>111</sup>

105 This guarantees a due process at all stages of the procedure, even at the administrative stage. See Kerse and Khan, p. 129. In addition, the ECtHR held in *Saunders*, para 67, that "an administrative investigation is capable of involving the determination of a 'criminal charge' in light of [the ECtHR's] case law concerning the autonomous meaning of that concept".

106 App. Nos. 7299/75, etc., *Albert & LeCompte v Belgium*, 10 February 1983, para 29. According to this stance, the Commission's investigative proceedings do not necessarily have to be protected by due process standards. See Andreangeli, pp. 52f. and 57; and Jones and Sufrin, pp. 1040f.

107 Case C-272/09 P, *KME Germany AG v Commission*, 8 December 2011; and Case C-386/10 P, *Chalkor AE Epexergasis Metallon v Commission*, 8 December 2011.

108 *Chalkor*, paras 50f.

109 *KME*, para 106; and *Chalkor*, para 67. That a subsequent control by a court having full jurisdiction observes the procedural guarantees laid down by the enforcement regulations, has been held before. See Andreangeli, p. 23.

110 Opinion of Advocate General Sharpston in *KME*, paras 65ff.

111 *Chalkor*, paras 51f.

## 4.3 RIGHT AGAINST SELF-INCRIMINATION AS INTERPRETED BY THE COURTS

### 4.3.1 CASE LAW OF THE ECtHR

In the *Funke* case it was confirmed that Article 6(1) ECHR contains a right to silence and a right not to incriminate oneself. The ECtHR examined the extent to which the French custom officials enjoyed a right to carry out searches and seizures to acquire evidence under compulsion.<sup>112</sup> Mr. Funke held that his criminal conviction for refusal to provide the officials the documents sought in their investigation, had violated his right to a fair trial, more exactly his right not to give evidence against himself.<sup>113</sup> Since the public authorities had “secured [his] conviction in order to obtain certain documents” his right against self-incrimination had been violated.<sup>114</sup> In the subsequent *John Murray* case, Mr. Murray alleged that there had been a violation of his right to silence and his right not to incriminate himself. The ECtHR held that the right to silence was *not absolute*, but regard should be had to all the “circumstances of each case”.<sup>115</sup>

The *Saunders* judgment was more detailed and nuanced than *Funke*, which it overruled.<sup>116</sup> It concerned the use of evidence – the inspector’s transcripts of interviews – in the subsequent criminal proceedings.<sup>117</sup> Although not explicitly mentioned in Article 6(1) ECHR, the ECtHR recalled that the right to silence and the right not to incriminate oneself are generally recognized international standards, which “lay at the heart of the notion of a fair procedure under Article 6 ECHR”.<sup>118</sup> However, it limited the scope of the right against self-incrimination significantly by excluding materials that may be obtained through compulsory powers. It held that “the right not to incriminate oneself is primarily concerned [...] with respecting the will of an accused person to remain silent”. In other words, material having an existence *independent* of the will of the suspect – documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing – fall outside the scope of the right against self-incrimination.<sup>119</sup> Accordingly, the right

112 App. No. 10828/84, *Funke v France*, 25 February 1993, paras 30f.

113 *Funke*, para 44.

114 Andreangeli, p. 136.

115 The ECtHR concluded that there had been no violation of Article 6(1) and (2) ECHR; see App. No. 18731/91, *John Murray v United Kingdom*, 8 February 1996, paras 40f. and 47.

116 Kerse and Kahn, p. 140. *Funke* continues to be cited by the ECtHR in relation to Article 8 ECHR.

117 Mr. Saunders complained of the fact that statements made by him under compulsion to the inspectors during their investigation were used as evidence against him. See *Saunders*, paras 57 and 60.

118 *Saunders*, para 68; referring to *Funke*, para 44; and *John Murray*, para 45.

119 *Saunders*, para 69. Such ‘pre-existing documents’ will not be elaborated on in the following discussion; only regarding factual questions there is a divergence between the case law of the

against self-incrimination aims at respecting the *will* of the accused to remain silent. It is therefore necessary to protect the accused from providing evidence contrary to that will.<sup>120</sup> Important to note is that it is the way in which the evidence obtained through compulsory methods is used in subsequent criminal proceedings that determines whether it is to be considered as incriminating or not.<sup>121</sup> The ECtHR concluded that even such statements not actually incriminating in nature, undermined Mr. Saunders's right to a fair trial.<sup>122</sup>

Although the right against self-incrimination is an established principle inherent in the fair trial concept, its reach may still be doubted. In light of *Funke* and *Saunders*, it can be concluded that whether there is a breach of the right against self-incrimination is dependent on the "circumstances of each case". Nevertheless, the approach taken in *Saunders* seems most likely to provide a 'rule of thumb' when determining the scope of that right.<sup>123</sup> More recently, the ECtHR re-examined the scope in the *O'Halloran and Francis* case. It referred to its previous case law and adopted an approach largely built on *Saunders* regarding the assessment of potential infringements.<sup>124</sup> The United Kingdom submitted that the right against self-incrimination was not absolute and could be limited by reference to other legitimate aims in the public interest.<sup>125</sup> The ECtHR reiterated that the interpretation of the fair trial concept could not be subject to a single, unvarying rule.<sup>126</sup> Having regard to the circumstances of the case, the ECtHR found no violation of Article 6(1) ECHR.<sup>127</sup>

#### 4.3.2 CASE LAW OF THE EU COURTS

With reference to the above-analyzed cases, it is evident that the ECtHR so far has dealt with only individual applicants who have been exposed to coercive

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ECtHR and the EU Courts.

120 *Saunders*, paras 68f.

121 *Saunders*, para 71. See Andreangeli, p. 128.

122 The statements had been read directly to the jury, despite Mr. Saunders's objection as part of his defense, and had thus contributed to the strength of the prosecutor's case. Consequently, Mr. Saunder's credibility had been adversely affected; *Saunders*, para 72. See Andreangeli, p. 139. The question whether the use of such statements is an unjustified infringement of the right against self-incrimination must be examined in light of "the circumstances of [each] case".

123 Andreangeli, pp. 138 and 142.

124 App. Nos. 15809/02 and 25624/02, *O'Halloran and Francis v United Kingdom*, 29 June 2007, paras 45ff.; referring to *Funke*, para 44; *John Murray*, para 46; and *Saunders*, paras 67ff. See also App. No. 31827/96, *JB v Switzerland*, 3 May 2001; App. No. 48539/99, *Allen v United Kingdom*, 5 November 2002; App. No. 38544/97, *Weh v Austria*, 8 April 2004; and App. No. 54810/00, *Jalloh v Germany*, 11 July 2006.

125 *O'Halloran and Francis*, para 37.

126 *O'Halloran and Francis*, para 53.

127 *O'Halloran and Francis*, para 62.

measures by public authorities potentially resulting in criminal proceedings. The crucial question is whether the ECtHR's case law on the right against self-incrimination is applicable to legal persons, such as investigated companies accused of having infringed the EU competition rules.

Although the *effet utile* of Article 18 of Regulation 1/2003 must be preserved, that is, the effectiveness of the Commission's investigative powers, a limited form of the right against self-incrimination – constituting a general principle of EU law – was recognized in the *Orkem* case.<sup>128</sup> The companies' rights of defense should not be undermined by a Commission decision, which had been adopted under the then equivalent provision to Article 18(3).<sup>129</sup> The existence of a right against self-incrimination as an essential element of the right to a fair trial during the Commission's preliminary fact-finding procedures was thereby recognized, limiting the Commission's investigative powers.<sup>130</sup> Moreover, Recital 23 of Regulation 1/2003 explicitly states that the Commission cannot use its powers under Article 18 to force companies to admit to an infringement of Article 101 and 102 TFEU, due to the need of safeguarding their rights of defense.<sup>131</sup>

In *Orkem* the CJEU made a distinction between *providing answers to questions* and *producing documents*. As to the latter, the CJEU did not limit the Commission's powers – companies must disclose documents that already exist and relates to the subject matter of the inspection, even if the Commission will use

<sup>128</sup> Even if the CJEU accepted that investigated companies may rely on Article 6(1) ECHR, it denied the recognition of the right not to give evidence against itself, as neither the wording of that provision, nor the ECtHR's judgments indicate that such a right exists therein. See Case 374/87, *Orkem SA v Commission* [1989] ECR 3283, para 30. Note that the *Orkem* judgment was delivered in 1989, whereas the ECtHR's *Funke* and *Saunders* judgments were given later, in 1993 and 1996, respectively.

<sup>129</sup> The case concerned the rights of defense in relation to the exercise of the Commission's powers under the now repealed Council Regulation (EEC) No 17/62 of 6 February 1962: First Regulation implementing [Articles 101 and 102 TFEU] (1962) OJ P 013.

<sup>130</sup> *Orkem*, paras 18f., 27f. and 32; and Joined Cases 47/87 and 227/88, *Hoechst AG v Commission* [1989] ECR 2859, paras 14f. It was claimed that the Commission's decision, adopted in accordance with Article 11 of Regulation 17/62 (equivalent to Article 18 of Regulation 1/2003) requesting information for an alleged breach of the competition rules, infringed their right not to incriminate themselves. See Andreangeli, p. 129.

<sup>131</sup> Recital 23 reads as follows: "When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them [...] the existence of an infringement". See *Orkem*, paras 32ff. See also Wils (2008), p. 13; and Wils (2011), p. 25.

them to establish the existence of an infringement.<sup>132</sup> Regarding questions, on the contrary, the Commission was allowed to ask *factual* ones, in contrast to those relating to the *purpose* of an action and the *objective* pursued by the measure in question. A right to remain silent only exists against the latter type of questions.<sup>133</sup> As a consequence of the Commission's power to require investigated companies to provide information that is purely factual and relates to the subject matter of the investigation, they are obliged to actively cooperate with the Commission.<sup>134</sup> Except from requesting evidence concerning the purpose and the objective of an action, the limited protection against self-incrimination only prevents the Commission officials from asking *leading questions*. Factual questions and requests regarding pre-existing documents are in compliance with the rights of defense, as they would not compel the investigated company to admit to the alleged violation of Articles 101 and 102 TFEU.<sup>135</sup> Due to the fact that also purely factual questions may be damning, this separate treatment of different kinds of questions is questionable.<sup>136</sup> It is also questionable whether the CJEU's position taken in *Orkem* can be sustained in light of the ECtHR's *Funke* and *Saunders* judgments given in the meantime, as that would imply acceptance of a situation that is incompatible with the ECHR.<sup>137</sup>

The findings in *Orkem* have been confirmed by the EU Courts' subsequent case law.<sup>138</sup> By acknowledging that companies enjoy the rights of defense also during the Commission's preliminary fact-finding stage of the proceedings, the CJEU recognized a limited right against self-incrimination, at the same time

132 Berghe and Dawes, p. 419. However, the Commission's right to obtain documents will not be elaborated on in the following analysis.

133 *Orkem*, paras 30f., 37f. and 41. The CJEU concluded that although the Commission has a right to compel a company to provide all necessary information regarding facts that are known to it, it may not compel it to admit to an infringement, i.e., to provide a self-incriminating answer, which is incumbent upon the Commission to prove; see paras 34f. This was later restated by the General Court in Case T-112/98, *Mannesmannröhren-Werke AG v Commission* [2001] ECR II-729, para 71; and Case T-446/05, *Amann & Söhne* [2010] ECR II-01255, para 325. See Kerse and Khan, p. 139.

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

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

136 Andreangeli, p. 132.

137 Aslam and Ramsden, p. 69.

138 See, e.g., *Mannesmannröhren-Werke*; Case C-301/04 P, *Commission v SGL Carbon* [2006] ECR I-5915; and Joined Cases C-238/99, etc., *Limburgse Vinyl Maatschappij v Commission (PVC II)* [2002] ECR I-8375.

as it preserved the effectiveness of the Commission's investigative powers.<sup>139</sup> In the *Mannesmannröhren-Werke* case, the General Court upheld the CJEU's judgment in *Orkem* and confirmed a narrow interpretation of the right against self-incrimination.<sup>140</sup> An absolute right to silence "would go beyond what is necessary in order to preserve [companies' rights of defense], and would constitute an unjustified hindrance to the Commission's performance of its duties", namely to ensure the application of the competition rules within the EU's internal market according to Article 105 TFEU.<sup>141</sup> This argument fails to take the ECtHR's case law into consideration.<sup>142</sup> It has been suggested that the view of the General Court can be read as "a signal to the effect that the CJEU's interpretation of certain rights in competition law proceedings do not have to coincide exactly" with the standards developed by the ECtHR in respect of criminal proceedings against individuals.<sup>143</sup> Referring to the general principles of EU law, the General Court declared that they offer 'equivalent protection' to the ECHR.<sup>144</sup> It concluded that "the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defense or impair the right to a fair legal process".<sup>145</sup> As the General Court was unable to provide effective protection to the investigated companies its judgment has been strongly criticized.<sup>146</sup> With the sole exception of leading questions, no limits are placed on the Commission's investigative powers.

Subsequently, the EU Courts adopted a more 'defendant-friendly approach'.<sup>147</sup> In the *PVC II* case the CJEU indicated that, since the ECtHR's case law had evolved since *Orkem* – through *Funke* and *Saunders* – it might adopt this new stance.<sup>148</sup> It held that "the protection of [the right against self-incrimination] means that [...] it must be determined whether an answer from the [investiga-

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139 Andreangeli, p. 132.

140 *Mannesmannröhren-Werke*, paras 59ff.

141 *Mannesmannröhren-Werke*, para 66. Neither in the subsequent Case C-57/02 P, *Acerinox v Commission* [2005] ECR I-6689, nor in Case T-59/02, *Archer Daniels Midland Co. v Commission* [2006] ECR II-3627, did the EU Courts find an infringement of the right against self-incrimination. See also *Amann & Söhne*, para 326.

142 *Aslam and Ramsden*, p. 70. Consequently, a right to silence only exists in relation to questions that might involve an admission of an infringement.

143 Andreangeli, p. 144.

144 *Mannesmannröhren-Werke*, para 77.

145 *Mannesmannröhren-Werke*, para 78.

146 Andreangeli, p. 133.

147 *Berghe and Dawes*, p. 419.

148 *PVC II*, para 274.



ted company] is in fact equivalent to the admission of an infringement, such as to undermine the rights of defense”.<sup>149</sup> The CJEU acknowledged that there is a general principle of EU law ensuring the protection against intervention by public authorities in the ‘private sphere’ of either natural or legal persons.<sup>150</sup> No infringement of the right against self-incrimination was found in the case, due to the fact that it concerned a simple request for information, to which there is no obligation to answer.<sup>151</sup> Although the EU’s standard of protection is not equivalent to that afforded by the ECtHR, the CJEU confirmed its previous position expressed in *Orkem* in the *SGL Carbon* case. In addition to the investigated companies’ obligation to cooperate with the Commission, the CJEU held that the ECtHR’s case law after *Orkem* should have no influence on the EU Courts’ position regarding the scope of the right against self-incrimination.<sup>152</sup>

Accordingly, the EU Courts’ more recent case law suggests that potentially self-incriminating questions contained in a simple request for information are not sufficient to establish a violation of the right against self-incrimination. There must be an ‘actual interference’ with a company’s right to a fair legal process.<sup>153</sup> As the evidence obtained by the Commission was later relied upon to prove a violation of Articles 101 and 102 TFEU, the *actual interference condition* was interpreted in *PVC II* as requiring the company to prove that the illegality of the simple request for information had affected the lawfulness of the final decision.<sup>154</sup> In *SGL Carbon* the CJEU followed Advocate General Geelhoed concerning companies’ rights of defense in relation to the production of documents. It held that the investigated companies could claim another meaning of these documents than that ascribed to them by the Commission, either during the administrative procedure or in the subsequent procedure before the EU Courts.<sup>155</sup>

## 5. CONCLUDING REMARKS

### 5.1 IS THE EU COURTS’ INTERPRETATION OF THE RIGHT AGAINST SELF-INCRIMINATION COMPATIBLE WITH THAT OF THE ECTHR?

The difficulties with applying traditional human rights standards in a corporate context are particularly shown by the companies’ claims for the right against

149 *PVC II*, para 273.

150 *PVC II*, para 252.

151 *PVC II*, para 279.

152 *SGL Carbon*, paras 40ff.

153 *PVC II*, para 275; and *Mannesmannröhren-Werke*, para 77. See Andreangeli, p. 134.

154 *PVC II*, para 282.

155 *SGL Carbon*, para 49.



self-incrimination in relation to the Commission's investigations.<sup>156</sup> The fact that the EU Courts have not applied the ECHR and the ECtHR's case law directly, but relied on its own general principles of EU law, has led to some discrepancy between the EU Courts' and the ECtHR's interpretations.<sup>157</sup>

The ECtHR favors an interpretation of the right against self-incrimination as constituting an essential element of the fair trial concept. It functions as a safeguard against coercive measures towards the accused in criminal investigations.<sup>158</sup> The EU Courts, by contrast, have consistently held that the investigated companies are obliged to actively cooperate with the Commission. An absolute right to silence in competition law investigations "would go beyond what is necessary in order to preserve [companies' rights of defense] and would constitute an unjustified hindrance on the Commission's performance of its duties".<sup>159</sup> By use of compulsory powers, the Commission is permitted to seek out documents and ask questions when carrying out investigations into potential infringements – regardless of the use of such information as evidence in subsequent proceedings. The only reason being that competition law proceedings concern legal persons, as opposed to individuals in the ECtHR's case law.

Even though the context in which the ECtHR has given a wider interpretation differs significantly from the Commission's investigation procedures, I argue that factual questions should fall within the scope of the right against self-incrimination in the EU legal order – approaching the level of human rights protection provided by the ECtHR. In light of *Saunders*, where it was held that factual questions might be incriminating, it is evident that the distinction between factual and leading questions does not provide for a sufficient degree of protection in respect of companies' rights of defense.<sup>160</sup> Answers given under compulsion and later used by the Commission to prove an infringement of the EU competition rules should not be permitted – regardless of the type of question. As I interpret the ECtHR's case law, and the fact that the ECHR constitutes a 'living instrument', corporate human rights might, and should be, protectable in the 21<sup>st</sup> century. Society has changed since the ECHR was adopted 60 years ago, when the legislators had only individuals in mind.

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<sup>156</sup> Compare with the *right to inviolability of the home* in Article 8 ECHR, which is afforded almost the same protection by the ECtHR and the CJEU.

<sup>157</sup> Forrester (2009), p. 822. See also Emberland, p. 164; and Andreangeli, p. 145.

<sup>158</sup> Andreangeli, p. 142.

<sup>159</sup> *Mannesmannröhren-Werke*, para 66.

<sup>160</sup> It is questionable whether it is compatible with Article 6(1) ECHR and the ECtHR's case law that the Commission may ask questions of factual nature under the threat of imposing a fine or periodic penalty payment where companies refuse to answer. Cf. Andreangeli, p. 143.

As the law stands today, the public interest prevails over the private interests; the Commission's investigative powers outweigh the investigated companies' right against self-incrimination. The crucial question therefore is whether the EU Courts' approach constitutes a proportionate and justified interference with the companies' right against self-incrimination in light of the ECtHR's case law. If the answer is in the affirmative, it seems unlikely that the ECtHR will reconsider this stance when it gains competence to review the compatibility of the Commission's powers with the ECHR. The necessity of a wide margin of discretion is considered to be greater in relation to 'commercial matters', indicating that companies enjoy lesser human rights protection than individuals.<sup>161</sup> The right against self-incrimination may thus be limited to pursue legitimate aims in the public interest, due to the importance of a well-functioning internal market for the economic development of the EU.

Since the EU Courts' restrictive approach towards an absolute right against self-incrimination questions the actual effectiveness of that right, corporate human rights must, according to me, be given more prominence in a democratic society. The investigated companies should be afforded stronger protection against the Commission's arbitrary and intrusive powers. However, given that the EU Courts consistently have found that a subsequent right of appeal is sufficient when it comes to human rights protection against public arbitrariness, such a scenario seems unlikely. I leave it to the EU legislators to introduce new and more balanced enforcement mechanisms.

## 5.2 WHAT IMPACT ON CORPORATE HUMAN RIGHTS WILL THE CHANGES INTRODUCED BY THE LISBON TREATY HAVE?

Regarding the relationship between EU law and ECHR law, the Lisbon Treaty provides for the obligation for the EU to accede to the ECHR. Besides the already binding character of the CFR, this accession will bring about the main change to the human rights protection in Europe; the ECtHR will obtain the power to review acts adopted by the EU institutions, while the ECHR and the ECtHR's case law will be directly applicable before the EU Courts.<sup>162</sup> From my

<sup>161</sup> The ECtHR's case law on legal persons shall be restricted to an assessment whether an actual interference with the company's rights of defense is *justified* and *proportionate*. Cf. Emberland, p. 164.

<sup>162</sup> See the hearing on the institutional aspects of the EU's accession to the ECHR, where it was held that the accession would confirm "[an EU] based on law": [http://www.assembly.coe.int/CommitteeDocs/2010/intervention\\_Holovaty\\_%20E.pdf](http://www.assembly.coe.int/CommitteeDocs/2010/intervention_Holovaty_%20E.pdf) (last visited 9 November 2014). See also Grousot, Xavier, et al., *EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14 December 2011*, Policy Paper, Fondation Robert Schuman, European Issues No. 218, 7 November 2011, pp. 4 and 10.

point of view, the adoption of this ‘external control system’ is the most important feature of the future accession. The EU institutions will be subject to the same external review as the Contracting States currently are, and the *principle of legal certainty* will consequently be strengthened. Hence, a new remedy will be provided. Any natural or legal person, including the companies accused of having infringed the EU competition rules, will be able to directly challenge acts by the EU institutions before the ECtHR. It will enable the ECtHR to review their compatibility with the rights set out in the ECHR. Since the current case law of the EU Courts reveals that corporate human rights protection during EU competition law procedures do not have to completely correspond to the human rights standards developed by the ECtHR vis-à-vis individuals, the question remains: what will the legal situation look like if the ECtHR takes the same approach towards companies as it currently does towards individuals in respect of the right against self-incrimination?<sup>163</sup>

As to the admissibility requirements, the same will apply when the EU is the defendant, that is, the exhaustion of ‘EU remedies’. This means that a company must challenge the alleged violation by the Commission before the General Court – and then the CJEU. Following an eventual unsuccessful appeal before the EU Courts, it can bring the case before the ECtHR.<sup>164</sup> The CJEU will thus continue to have the main responsibility over the human rights protection in the EU legal order, whereas the ECtHR will have the role of the ‘external supervisor’ in order to ensure the “minimum common standards” guaranteed by the ECHR.<sup>165</sup> The possibility for investigated companies to bring their claims before the ECtHR will thereby create an ‘additional safeguard’. In my opinion, this is the best solution to bring the parallel European systems together without impinging on the CJEU’s competence under the TFEU.

Regarding the ‘internal control’, the crucial question is related to the CJEU’s *willingness* to take the ECtHR’s case law into consideration. Over the past 40 years the EU Courts have referred to the significance of the ECHR and


163 To clarify, the EU’s accession to the ECHR will provide similar human rights protection to EU citizens – and possibly companies – before the ECtHR vis-à-vis the conduct of the EU institutions and the EU Member States in the fulfillment of their *EU obligations*, as they currently enjoy vis-à-vis the conduct of their Member States in the fulfillment of *domestic affairs*. Cf. Ameye, p. 335.

164 The Presidents of the CJEU and the ECtHR have suggested that a procedure be put in place to ensure that the CJEU may carry out an ‘internal review’ before the ECtHR carries out the ‘external review’ of any EU act on fundamental rights grounds. Cf. Grousot, et al., pp. 6 and 14.

165 See the hearing on the institutional aspects of the EU’s accession to the ECHR; supra note 162. In addition, Article 6(2) TEU states that the EU’s accession to the ECHR shall not affect the EU’s competence as it is defined in the EU Treaties, i.e., it shall not affect the CJEU’s competence under Article 267 TFEU over the interpretation of EU law.

the ECtHR's case law. The ECtHR's principles of interpretation are therefore likely to have an influence on how the EU competition law procedure will be treated in relation to the ECHR. In the unlikely event of the CJEU's unwillingness to adhere to the ECtHR's case law, the subsequent question is whether the CJEU will be *bound* by the ECtHR's interpretation – like any other national constitutional or supreme court. As the EU will become a party to the ECHR, and thereby a legal person with rights and obligations, the ECtHR's case law will logically bind the CJEU. I am therefore confident that this will result in more corresponding case law from Luxembourg and Strasbourg in respect of the right against self-incrimination.

Before the accession agreement enters into force, numerous procedural obstacles will need to be overcome.<sup>166</sup> Until then, it must be emphasized that the EU Courts are bound by the CFR's provisions like any other Treaty article. Article 52(3) CFR makes it clear that, in so far as the rights in the CFR correspond to the rights guaranteed by the ECHR, their meaning and scope shall be the same. If the EU judiciary does not afford a higher level of human rights protection, the content of the rights in the CFR must in principle be *identical* to that under the ECHR. The doctrine of 'equivalent protection' is therefore no longer sufficient. Identical protection is required, and only upward deviation from the ECHR standards is permissible under the CFR.<sup>167</sup> Article 52(3) CFR has thereby changed the balance to the advantage of the ECHR and its central role within this context.<sup>168</sup>

Since the EU's 'human rights agenda' will be even more visible when the ECHR becomes directly applicable before the EU Courts, the EU's accession to the ECHR is likely to result in greater accountability of the Commission. It is my firm belief that it will enhance coherence in human rights protection in Europe – including corporate human rights. 

<sup>166</sup> In accordance with their respective constitutional requirements, each EU Member State as well as all 47 Contracting States to the ECHR – including the 28 EU Member States in their capacity as parties to the ECHR – will have to approve the accession agreement. Cf. Groussot, et al., p. 17.

<sup>167</sup> Lindh, Pernilla, *Europe cannot exist without human rights*, Europarättslig tidskrift, Volume 15, Issue 1, 2012, p. 23. See also Killick and Berghe, pp. 261 and 276.

<sup>168</sup> Schmauch, Magnus, *Europadomstolens rättspraxis 2011 – är detta slutet på presumptionen att EU respekterar Europakonventionen?*, Europarättslig tidskrift, Volume 15, Issue 1, 2012, p. 14.