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ENFORCEMENT OF EU COMPETITION LAW: LIMITS ON THE INVESTIGATING ROLE OF THE COMMISSION

Master thesis

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TABLE OF CONTENTS

INTRODUCTION 3
1. ENFORCEMENT OF THE EUROPEAN UNION COMPETITION LAW 7
1.1. Former Enforcement Under Regulation 17/62 8
1.2. Enforcement Under Regulation 1/2003 13
2. INVESTIGATIVE POWERS OF THE COMMISSION 17
2.1. Inspections 19
2.2. Power to Inspect Other Premises 22
2.3. Requests for Information 25
2.4. Power to Take Statements and Interview 27
3. LIMITATIONS TO THE INVESTIGATIVE POWERS OF THE COMMISSION 29
3.1. Legal Professional Privilege 32
3.2. Right not to Incriminate One-self or Privilege Against Self-incrimination 38
3.3. Right to a Private Life 46
3.4. Right to be Heard 52
3.5. Access to the Commission's File 62
CONCLUSIONS AND RECOMMENDATIONS 69
REFERENCES 72
SUMMARY 82
SANTRAUKA 83

INTRODUCTION

Enforcement of the European Union (hereinafter - EU) competition rules rests primarily with the Commission. The Commission is the executive branch of the EU, and is entrusted with the tasks of ensuring that the provisions of the Treaty[1] and the regulations, directives and decisions of the EU institutions, are applied and submitting proposals to the Council for legislative action.[2] Thus, as the Commission plays the preponderant role in the development and enforcement of the EU competition law, it has the power to investigate and to adopt decisions requiring the termination of infringements of the rules on competition. The main legal act that entitles the Commission to execute investigative powers is Regulation 1/2003[3] that replaced prior Regulation 17/62[4] and broadened the Commission's powers of investigation. However, such an extension of powers of investigation, with particular reference to those relating to the collection of information needed to carry out proceedings, raises significant concerns in relation to the protection of general principles of EU law and human rights. Therefore, as it is indicated, two different interests emerge: on one hand, Regulation 1/2003 must ensure that the Commission can effectively monitor undertakings' compliance with EU competition law; on the other hand, the provisions of the regulation and their implementation by the Commission must not jeopardize the fundamental rights and guarantees enjoyed by natural persons and legal entities on the basis of EU law provisions and principles.[5]

The significance of the general principles and fundamental rights as of the limits of the investigative powers of the Commission has not been extensively analysed in Lithuania. Therefore the **novelty of the topic** is reflected on having only several scholars[6] who briefly presented the matter of the above-mentioned principles and rights in the EU law, however without the connection to the Commission's investigative powers. The EU competition law inevitably affects Lithuanian undertakings and National Competition Authorities, in particular it can be inflicted by the recent investigations[7] executed by the Commission in the territory of Lithuania. Therefore, as the

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[1] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01

[2] Ivo Van Bael,Van Bael & Bellis (Firm). *Competition law of the European Community*. Fourth Edition, Kluwer Law International, 2005, p. 6

[3] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1

[4] Council Regulation (EEC) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13

[5] Squitieri. M. The use of Information in EU Competition Proceedings and the Protection of Individual Rights. *Georgetown Journal of International Law*. 2011, 42: 449 - 489

[6] Balčiūnaitė, J., Štarienė, L. Right to Privacy v. European Commission’s Expanded Power of Inspection According to Regulation 1/2003. *Jurisprudencija.* 2010, 3(121): 115–132; Balčiūnaitė, J. EB konkurencijos teisės procedūrų pobūdis: ar turėtų būti taikomas EŽTK 6 straipsnis šių procedūrų metu? *Socialinių mokslų studijos.* 2010, 1(5): 253–270

[7] Lithuanian Competition Council Press Release. *KONKURENCIJOS TARYBOS PAREIGŪNAI PADĖJO ATLIKTI PATIKRINIMĄ EUROPOS KOMISIJAI.* Available at: http://www.konkuren.lt/index.php?show=news_view&pr_id=826 [Access time: 05 03 2012];

undertakings of Lithuania are equally potential subjects of the investigative powers of the Commission as any other undertakings in any other Member State of the EU the author deems that master thesis corresponds to the relevancy of present legal environment.

In relation to the above-mentioned the **problem** arises, whether the aim to secure and protect competition environment in the EU is balanced with the limits of the investigative powers of the Commission. Therefore the **object** of the master thesis is the theoretical and practical peculiarities of the limits of the investigative role of the Commission in the procedures of investigating the infringements of the EU competition law. The author intends to note that competition law of United States of America or Member States of the EU, except Lithuania, shall not be analysed. Nevertheless, it is important to accentuate that Lithuania shall be presented only from the EU competition law point of view, thus the analysis of the Lithuanian competition law shall not be presented. Such approach is purposely chosen in order to analyse the investigative role of the Commission comprehensively.

The **goal** of the master thesis is to disclose peculiarities of the limits of the investigative role of the Commission through the analysis of legal implementation, legal doctrine and case-law.

For the goal to be reached the following **tasks** are raised:

1. To analyse the case-law of the EU courts, the European Court of the Human Rights and the Lithuanian Supreme Administrative Court on the considered issue in detail and to systematically present the essential aspects of the subject.
2. In consideration of the given analysis of legislature, legal doctrine and case-law to present the essential problems regarding the limits of the investigative role of the Commission.
3. In consideration of the presented problems and in regard to legal enforcement of the investigative role of the Commission to propose possible solutions of the excluded problems.

Defending statements:

1. The investigative powers that the Commission is entitled to, in order to ensure the effective protection of the EU competition law, compromise the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

European Commission Press Release. *Antitrust: Commission confirms unannounced inspections in rail freight sector*. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/152&format=HTML&aged=0&language=EN&guiLanguage=en [Access time: 05 03 2012];
Lithuanian Competition Council Press Release. *KONKURENCIJOS TARYBOS PAREIGŪNAI PADĖJO ATLIKTI PATIKRINIMĄ EUROPOS KOMISIJAI.* Available at: http://www.konkuren.lt/index.php?show=news_view&pr_id=915 [Access time: 05 03 2012];
European Commission Press Release. *Antitrust: Commission confirms unannounced inspections in the natural gas sector.* Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/641&format=HTML&aged=0&language=EN&guiLanguage=en [Access time: 05 03 2012]

2. The fundamental rights and general principles of the EU law ensured to natural persons in EU competition procedures are not of equal nature in comparison to the rights and principles guaranteed to legal persons.
3. The investigative proceedings of the EU competition law, is not of the administrative but of the quasi-criminal nature.

In collecting and processing the necessary information for this paper these **methods** were employed:

1. In this paper the most commonly used method is descriptive-analytical. The given analysis is based on legislature, legal doctrine and case-law that defines and substantiates analysed issues of this paper.
2. Relevant provisions were presented using the method of systemic analysis. Pursuant to this method application of the relevant provisions and essential problems, relating to the investigative powers of the Commission, were analysed and presented.
3. Essential for the analysis of legislature and legal doctrine is empirical method. Pursuant to this method, researches of the respective scholars were analysed. Moreover, in the usage of this method, EU competition legislature, relevant Lithuanian legal acts and relevant case-law, were analysed.
4. With a view to disclose problems of the limits of the investigative role of the Commission comparative method was used, according to which peculiarities of the enforcement of the EU competition rules were disclosed.
5. Important method used to achieve the aim and the goals of this master thesis, to present the respective conclusions, especially the conclusions and recommendations in regard to the whole master thesis, is the method of generalisation.

This paper has theoretical as well as practical value. In course of the analysis, no researches of Lithuanian scholars analysing the limits of the investigative role of the Commission were present. Therefore, the comprehensive analysis of the case-law of EU courts and Lithuanian Supreme Administrative Court together with the analysis of the legislature and doctrine will fulfil the legal doctrine of Lithuania and will verify whether the enforcement of the investigative role of the Commission encounters imperfections. The conclusions and recommendations of this paper might assist in course of uniform application of the EU competition rules in respect to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Businesses may as well use it for assessing their defence possibilities.

The first part of this master thesis presents the enforcement system of the EU competition law and outlines the similarities and differences in the EU competition legislation according to prior Regulation 17/62 and currently applicable Regulation 1/2003. Second part of this master thesis

analyses the powers of investigation that the Commission is entitled to and introduces the complexity of difficulties undertakings, the subjects of the investigation, are encountering or might encounter. Third part of this master thesis analyses the limits of the investigative powers of the Commission and discusses whether the powers, the Commission is entitled to, compromise the fundamental rights and guarantees enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. ENFORCEMENT OF THE EUROPEAN UNION COMPETITION LAW

European Union competition policy was designated in the Treaty of Rome, which established the European Economic Community (EEC), and the competition rules, which were originally adopted as the Articles 85 and 86, came into force in 1958.[8] However, the Community institutions did not enforce the EEC competition rules until Regulation 17/62 was passed.[9] Therefore, since 1962 the European Commission (hereinafter - the Commission) has had the task of enforcing the competition rules under the Treaty establishing European Economic Community (EEC and then the EC).[10] This task encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.[11]

Nonetheless, the European Union competition rules from 1962 were subject to certain changes, however, we would intend to concentrate on the most recent ones. On 1 December 2009 the Treaty of Functioning of the European Union (hereinafter - TFEU) came into force, according to which the European Union (EU) replaced the European Communities (EC), and which now contains the competition rules, respectively Articles 101 and 102.

Another important change of the legislation is the adoption of Regulation 1/2003 that replaced Regulation 17/62. According to Regulation 1/2003 the EU competition rules enforced were fundamentally changed. The system has been transformed so that the Commission now shares the task of enforcing Articles 101 and 102 with the National Competition Authorities (hereinafter - NCAs) of the Member States.[12] However, although Regulation 1/2003 imposes duties and confers powers to the NCAs (including the application of Article 103 (3)), the Commission retains what may be said to be a "leading role", or *primus inter partes*, in the enforcement of the EU competition rules. A role which is further enhanced by the fact that as a matter of European Union law, decisions of the Commission have a special status as far as national courts are concerned.[13]

Thereby, subject to the current system of EU antitrust enforcement, the Commission combines the investigative and prosecutorial function with the adjudicative or decision-making function.[14] The

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[8] Monti, G. *EC Competition Law. Law in Context*. Cambridge: Cambridge University Press, 2007, p. 3.
[9] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Second Edition. Oxford: Oxford University Press, 2004, p.1138
[10] Bellamy & Child. *European Community Law of Competition.* Sixth Edition. Oxford: Oxford University Press, 2008, p. 1182
[11] Ibidem
[12] Ibidem, p. 1183
[13] Ibidem
[14] Wils, W.P.J. The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2004, 27(2): 201

Commission receives its powers under Article 105 of TFEU. Under this Article, the Commission is charged with the duty of ensuring the application of Articles 101 and 102 of TFEU and of investigating suspected infringements of these Articles.[15] According to the legislation it is for the Commission to adopt, subject to review by the General Court and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations.[16]

The fundamental change under Regulation 1/2003 shall be presented below, however we would intend to indicate the opinion of Giorgio Monti[17] who underlined the reform under Regulation 1/2003 as the spontaneous convergence of national laws that minimized the risk of application of stricter national competition law, so creating a feasible level of playing field of decentralized competition law enforcement.[18]

Therefore, in respect to the significant review of the commentaries regarding the fundamental changes upon Regulation 1/2003, it might be stated that on the one hand the ambition of decentralized enforcement was to allow competition law to advance more rapidly than it would in a centralized system, since multiple courts and authorities are able generate more case-law than a centralized system can, thus on the other hand the question is raised whether the ambition reached its goal. The divergence of such views will be analysed below.

1.1. Former Enforcement Under Regulation 17/62

Surprisingly enough, however, the fundamental procedural rules for the application of Articles 101 and 102 of the TFEU, which were contained in Regulation 17/62, have remained unchanged for almost forty years.[19] Therefore, it is not unforeseen that the Commission was pondering a number of suggestions for the reform of the EU competition policy, including the procedural rules. The need for the reform can be accentuated subject to especially a lot of criticism to the rules of procedure of the enforcement of EU competition law under Regulation 17/62.[20]

In course of the reform, Frank Montag[21] accentuated that the protection of free competition

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[15] Craig, P. and Burca, G. *EU LAW, Text, Cases and Materials*. Oxford: Oxford University Press. 2003, p. 1064

[16] Case C-119/97 P, *Ufex and Others v Commission* [1999] ECR I-1341, para. 88

[17] Professor of Competition Law at European University Institute, Joint Chair of Robert Schuman Centre for Advanced Studies.

[18] Monti, G. *EC Competition Law. Law in Context*. Cambridge: Cambridge University Press, 2007, p. 403

[19] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 819-820

[20] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 820; Riley, A.J. Competition Procedures Re-evaluated: The House of Lords Report. *E.C.L.R.* 1997, 15(247); Levitt, M. Access to the File: The Commission's Administrative Procedures in Cases Under Articles 85 and 86. *Common Market. Law Review.* 1997, 34:1413; Kerse, C.S. The Complainant in Competition Cases: A Progress Report. *Common Market. Law Review.* 1997, 34: 213.

[21] Recently named "Global Competition Lawyer of the Year" by *The International Who's Who of Business Lawyers*, Dr Frank Montag is a senior partner in Freshfields Bruckhaus Deringer's antitrust, competition and trade (ACT) group,

within the European Union has always been considered one of the fundamental principles of the European Union law, therefore in order to put this principle into practice, it was of fundamental importance to have a system of rules that guarantee an effective enforcement procedure.[22] Thus, as the need for the change is indicated so widely, we shall hereby present the system that eventually became a subject to a change.

Upon Regulation 17/62 the system was set up whereby an agreement falling within Article 101(1) could only escape via Article 101(3) if it was exempted.[23] The granting of the exemption was understood as a constitutive act.[24] There were two ways of obtaining an exemption and the first possibility was to bring the agreement within a block exemption regulation.[25] However, as only a small number of agreements were covered by the block exemptions adopted by the Commission, there were an enormous number of cases pending before the Commission. Nonetheless, we would intend to note, that such a procedure, even after the fundamental change or as otherwise the modernization, is still operating, and block exemptions remains important part of the system upon Regulation 1/2003 as well.

Secondly, the parties were able to obtain an individual exemption from the Commission, according to which an agreement had to be notified to the Commission in order to obtain a declaration that, pursuant to Article 101(3) of TFEU, the prohibition of Article 101(1) was inapplicable to a particular agreement, decision or concerned practice.[26] The Commission was the only body capable of granting exemptions upon the Article 103(3) of TFEU. Therefore, regarding these provisions a monopoly of the enforcement of EU competition law was created solely for the Commission thus creating an enormous consequences.[27] It is important to note, that nevertheless the failure to notify an agreement did not itself attract any penalties and was not a breach of any duty but it generally ruled out the possibility of the grant of individual exemption.[28] However, due to the Commission's limited resources, it was practically impossible for it to deal with all these notifications in the way prescribed by Regulation 17/62.[29] The Commission was unable issue decisions granting an exemption or negative clearance to all agreements notified to it; it granted a formal decision to a very small percentage of the

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based in the Brussels office. Dr Frank Montag is a member of the Cologne and Brussels bars, his practice focuses on European and German competition and trade law.

[22] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 820

[23] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p.1138

[24] Ibidem

[25] Ibidem

[26] Bellamy & Child. *European Community Law of Competition*. Sixth Edition. Oxford: Oxford University Press, 2008, p. 1184

[27] Ibidem, p. 1138

[28] Ibidem, p. 1184

[29] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 826

notifications that it received.[30] As a result, the Commission adopted its practice of issuing so-called "comfort letters" instead of formal exemption decisions. "Comfort letters" enabled the Commission to deal with the numerous notifications it received whilst allowing it to give greater priority to cases, which received greater concern from the European Union perspective.[31] Though, the use of comfort letters rather than formal decisions meant that for many years prior to 1 May 2004, when Regulation 1/2003 was implemented, the notification-and-exemption procedure did not operate in real life as had been intended by Regulation 17/62.[32]

Therefore, as under Regulation 17/62 the Commission was a sole body granting the individual exemptions, this meant that undertakings preferred to complain to the Commission rather that bring private proceedings before the national courts. The net result was that Commission's limited resources were spent dealing with the exemptions for essentially innocuous agreements leaving less available for the detection and prohibition of more serious violations of the rules.[33]

As regards the investigative powers, following the Articles 11 and 14 of Regulation 17/62, the Commission was entitled to request for information as well as to conduct the inspections. The Commission was enabled to request all the necessary information from the competent authorities in the Member States as well as from undertakings and associations of undertakings.[34] Such procedure was exercised either by a simple request or by a formal decision. Formal request for information was obligatory and undertakings were concerned to supply the requested information as the Commission was enabled to compel warnings and the fixing of coercive payments. If the requested information was not supplied within the time limit or if information was incorrect, the Commission was able to impose a fine. However, as the request for information was deemed to be insufficient[35] the Commission was entitled to use its investigatory powers and undertake inspections under a simple written order or by a formal decision. In addition, the Commission was enabled to ask the NCAs of Member States to undertake inquiries that were considered necessary for investigations under the Article 14 of Regulation 17/62.[36] Following the provisions of Regulation 17/62 undertakings were not entitled to commit to the investigations, however, in case they decided to tolerate them, they were supposed to provide all of the necessary information. Otherwise the fines could have been imposed. Under the

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[30] White Paper on modernization of the rules implementing articles 85 and 86 [now 101 and 102] of the EC Treaty [1999] OJ C132/1, 5 CMLR 208, para. 34

[31] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Second Edition. Oxford: Oxford University Press, 2004, p.1138

[32] Ibidem, p. 1140

[33] Ibidem, p. 1141

[34] Dannecker, G.,Jansen, O. *Competition law sanctioning in the European Union: the EU-law influence on the national law system of sanctions in the European area*. Hague: Kluwer Law International, 2004, p.10

[35] Ibidem, p. 11

[36] Article 13 of Regulation17/62

formal request of information undertakings were in a different legal situation where existed the duty to tolerate the investigations. Infringements of such duty lead to the imposition of fine.[37]

Under antitrust infringement procedures upon Regulation 17/62, undertakings were frequently given the impression that their defences have not been heard because the wording of the Commission's final decisions was often almost identical to the wording of the Commission's statements of objections.[38] According to Frank Montag such practice raised serious doubts as to the practical value of the parties' rights of defence in proceedings before the Commission.[39] Although, according to the Article 19 of the Regulation 17/62 undertakings had a right to an oral hearing, the practice showed that it was extremely difficult for the Hearing Officer to influence the position of the case handlers within Directorate General.[40] Similar difficulties encountered on having influence to the Commissions decisions by submission of the written answers to the statement of objections. The fundamental reason for this problem, according to the Frank Montag, was the fact that the Commission officials handled infringement cases functions both as investigators and as those responsible for drafting the final decision.[41] Therefore, we can generally state that upon the Regulation 17/62 the procedural framework was not sufficiently safeguarding an undertaking's rights. We as well intend to note, that Regulation 17/62 did not include any provisions subject to the access of the Commission's file. Although the General Court after an adequate amount of time explained such right in *Soda Ash* cases,[42] the scope of this right, however, was still unclear.[43] The cases handled by the Commission as well undertook a sufficient amount of time, for example as long as nine years and three months,[44] seven years and ten months[45] and six years and six months[46] to make decisions.[47] As a result, undertakings began to challenge Commission decisions before then the General Court, alleging that proceedings of undue duration are contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR, the Convention).[48]

In consideration of the information indicated above, herein we present the characteristics of Regulation 17/62, which are the following:

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[37] Article 15(1)(c) of Regulation 17/62

[38] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 823

[39] Ibidem

[40] Ibidem

[41] Ibidem, p. 824

[42] Case T-30/91, *Solvay v. Commission* [1995] E.C.R. 11-1775, [1996] 5 C.M.L.R. 57; Case T-36/91, *Imperial Chemical Industries v. Commission* [1995] E.C.R. 11-1847

[43] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 825

[44] *Eurocheque* [1992] Commission Decision No. 92/212/EEC, O.J. L 95/50

[45] *Tetra Pak II* [1992] Commission Decision No. 92/163/EEC, O.J. L 72/1

[46] *Wood pulp* [1985] Commission Decision No. 85/202/EEC, O.J. L 85/1

[47] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3): 825

[48] Ibidem

a) an agreement falling within Article 101(1) was subject to exemption only via Article 101(3) and the Commission was the only body capable of granting exemptions;
b) due to non-performance of the exemption system, the Commission used to issue "comfort letters", which actually meant that notification-and-exemption procedure did not operate as it was indented under Regulation 17/62;
c) as of the powers of investigation, the Commission was entitled to request for information as well as to undertake inspections;
d) request for information was performed by a simple request or by a formal decision, only formal decision was obligatory;
e) inspection was performed under a simple written order or by a formal decision, only formal decision was obligatory;
f) there was a great doubt on whether the Commission respected the defences of the subjects of the infringement of the competition law as the final decision and statement of objections issued by the Commission were often almost identical;
g) the Commission was criticized for acting both as the investigator and the one responsible for drafting the final decision.

Thus, we can certainly underline, that the Commission under Regulation 17/62 undertook a substantial amount of powers, however the practice showed that such system was not effective. The Commission's decisions were challenged before the General Court; various scholars as well widely criticized[49] the existing methods and the system itself. Therefore, it is not surprising that it was set to undertake the reform. Nevertheless, it is noteworthy that the reform, by decentralizing certain powers to the NCAs and judicial institutions of the Member States, as well granted the Commission with even broader powers of investigation.

As regards Lithuania and Regulation 17/62 we deem it is important to note, that nonetheless for the period of enforcement of Regulation 17/62 Lithuania was not yet a Member State of the EU, the Lithuanian competition rules, provisions and regulations were in the course of harmonization to the EU policy of competition law. In 1995 when Lithuania was appointed as a candidate to become the EU Member State,[50] the step of harmonizing competition policy as well began. Therefore, it might be stated that nonetheless, Regulation 17/62 was not directly applicable in Lithuania, the Law of

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[49] Montag, F. The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View. *Fordham International Law Journal*. 1998, 22(3); Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Second Edition. Oxford: Oxford University Press, 2004; Monti, G. *EC Competition Law. Law in Context*. Cambridge: Cambridge University Press, 2007; Riley A.J., Competition Procedures Re-evaluated: The House of Lords Report. *E.C.L.R*. 1997, 15(247); Riley, A.J. EC Antitrust Modernization: the Commission does very nicely - thank you! Part 1: Regulation 1 and the notification burden. *E.C.L.R*. 2003, 24(11)

[50] In 1995 Lithuania signed the Europe Agreement (as well known as the Association Agreement) that came into force in 1998.

Competition of the Republic of Lithuania that was amended in 1999 was adapted to the EU competition rules.

1.2. Enforcement Under Regulation 1/2003

The modernisation or the van Miert[51]-Monti[52] reform[53] began in 1999 as the Commission adopted a White Paper[54] on modernisation rules implementing Articles 101 and 102. The Commission had been considering the need for changes to the enforcement mechanisms for some time and has been promoting greater decentralization of enforcement through the national courts and competition authorities.[55] Notwithstanding the fact that the Commission had consistently resisted the idea of conferring the power to grant the individual exemption to the NCAs, however, the White Paper anticipated a far more comprehensive and crucial change. The proposal was to abolish notification procedure, render Article 101(3) as a directly applicable exemption and decentralize the application and enforcement of the competition rules. Nevertheless, as indicated above, the Commission demonstrated disapproval, yet the proposal was accepted. Thus beyond the concept of empowerment few additional objectives of the reform, in our opinion, should be noticed. Such objectives include the creation of the European Competition Network ("ECN") aiming for the implementation of close cooperation between the Commission and NCAs. The strengthening of the Single Market, or as Abel M. Mateus[56] designated, a "more level playing field for business operating cross-border as all competition enforces apply the EU antitrust rules to cases that affect trade between Member States".[57]

Reform, aiming for the above-mentioned objectives was indicated as the most comprehensive reform since 1962.[58] The Commission itself has described the significance and accentuated the importance of the Regulation 1/2003 “as ambitious and fundamental overhaul of the antitrust rules implementing Articles 81 and 82 of the Treaty”.[59] However other authors,[60] particularly Alan Riley[61]

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[51] Karel Van Miert from 1993 till 1999 served as vice-chairman of the European commission and was responsible for competition policy.
[52] Mario Monti from 1995 to 1999 was appointed as a European Commissioner with responsibility for the Internal Market, Services, Customs and Taxation. From 1999 to 2004 he was responsible for Competition.
[53] Mateus A.M. Ensuring a more level playing field in competition enforcement through the European Union. *E.C.L.R.* 2010, 31(12): 514
[54] White Paper on modernization of the rules implementing Articles 85 and 86 [now 101 and 102] of the EC Treaty [1999] OJ C132/1, 5 CLMR 208
[55] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p. 1141
[56] Professor of Economics at New University of Lisbon. Abel M. Mateus was the first President of the Portuguese Competition Authority; he as well served as the Deputy Governor of the Banco de Portugal, Member of the Monetary Committee and Member of the Economic Policy Committee of the European Commission.
[57] Mateus A.M. Ensuring a more level playing field in competition enforcement through the European Union. *E.C.L.R.* 2010, 31(12): 514
[58] From the date when the Regulation 17/62 came into force.
[59] European Commission, Directorate-General for Competition, European Union Competition policy – XXXIInd Report on Competition policy (2002) (32rd Report), p. 19

argues that the Commission had in fact made no fundamental changes only created, or as the author indicates "orchestrated" a political masterstroke. Alan Riley argues that the Commission had given the impression of radical reform to the Member States by abolishing the notification procedure and offered decentralization provision largely based under existing and under-used NCA and national courts notices, which in no way undermine its central role in the development of EU competition policy or the enforcement of EU competition law. Under Regulation 1/2003 the NCAs appear to have no escape from the European Union jurisdiction and potential Commission take over of a restrictive practice case if it has an effect on trade between Member States.[62] ECJ itself declares that *"[t]he Commission in effect has very wide powers of investigation under Regulation No 1/2003 and is in any event entitled to decide to initiate proceedings relating to an infringement, which entails removing the case from the Member States' competition authorities. The Commission thus retains a leading role in the investigation of infringements."*[63] In addition it is indicated that the Commission's existing powers have been upgraded and made more legally secure, and its investigatory powers have been increased.[64]

The Commission and Council prior to the date Regulation 1/2003 came into force on the other hand stated that the supplementary powers the Commission has been granted in order to fulfil its responsibilities and additionally indicated that that those powers are going to be exercised with the utmost regard for the co-operative nature of the Network (ECN).[65] However, Alison Jones[66] and Brenda Sufrin[67] implies that in competition cases the Commission has always played the parts of a law-maker, policeman, investigator, prosecutor, judge and jury, subject only to review by the ECJ. And additionally indicates that the situation, which has been widely criticized but fiercely defended by the Commission, was not changed by modernization.[68] Moreover, the authors accentuated that the accumulation of functions in the Commission and the limited role of the Court have human rights implications,[69] especially addressing to the fact that the Court itself has held that the Commission has a margin of discretion to set priorities in enforcing the competition rules.[70]

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[60] Alan Riley, Abel M. Mateus, Alison Jones and Brenda Sufrin, Pascal Berghe, Anthony Dawes.

[61] Professor Alan Riley is the solicitor of the Supreme Court of England and Wales. Professor Riley is one of the leading scholars in the United Kingdom. He co-founded and chairs the European-wide Competition Law Scholars Forum and is co-editor of the Competition Law Review.

[62] Riley, A.J. EC antitrust modernization: the Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden. *E.C.L.R*. 2003, 24(11): 604

[63] Case T-339/04, *France Télécom SA v Commission of the European Communities* [2007] ECR II-521. para. 79

[64] Riley, A.J. EC antitrust modernization: the Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden. *E.C.L.R*. 2003, 24(11): 604

[65] Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities. Brussels, 10 December 2002

[66] Professor of Law at King's College London and a solicitor at Freshfields Bruckhaus Deringer LLP.

[67] Professor of law at Bristol University.

[68] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p. 1137

[69] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p. 1138

[70] Case T-24/90, *Automec Srl v. Commission (Automec II)* [1992] ECR II-2223

Regulation 1/2003 is criticised for creating a fundamentally unstable situation, where actually the Commission is the principal if not sole beneficiary of the powers under Regulation 1/2003, according to which the uniform application of EU competition law over national competition law in respect of Article 101 is ensured in almost all major cases in all Member States. As a result therefore, the Commission obtains significant supervisory powers over the NCAs, including the right to be informed of proceedings; copies of draft decisions and crucially the right to take over NCAs proceedings.[71] Thus, following the critique, in our opinion, it might be stated that Articles 18 and 19 of the Regulation 1/2003 regarding the power to obtain information, the power to interview and the power to carry out inspections in private premises has actually created a legal status rendering the Commission to act more legally secure.

Another author that as well designates the change as a fundamental is David J. Gerber[72] who indicates that the deliberative process of modernization represents a clear "success" for the Commission.[73] Author accentuates that Commission managed to achieve its primary goals, by which the idea is established that Member States are primarily responsible for application of competition law and that the Commission takes enforcement actions only under limited circumstances.[74] According to the author Commission decided that it would be desirable (in terms of "necessary") to require that EU competition law be applied to all conduct that had a European dimension. Thus, actually it was a fundamental change which radically strengthened the position and role of the Commission where Member States throughout Europe would generally apply EU law in all cases except where the conduct and its effects were basically limited to one Member State.[75]

Hence, despite stirring discussions the Council adopted Regulation 1/2003 on 16 December 2002 and it has applied since 1 May 2004. The date of the application is the same date Lithuania with 9 other countries became a Member State of the EU. It is agreed that Regulation 1/2003 did not considerably changed Lithuanian competition policy[76] or that the change was not anticipated to be too painful[77] as in course of the becoming the Member State of EU Lithuania already harmonized its competition policy to be compatible to the EU competition law. Nonetheless, the change we intend to

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[71] Riley, A.J. EC antitrust modernization: the Commission does very nicely – thank you! Part 2: between the idea and reality: decentralization under Regulation 1. *E.C.L.R.* 2003, 24(12): 671
[72] Professor of Law at ITT Chicago-Kent College of Law and Co-Director of the Program in International and Comparative Law.
[73] Gerbert J. D. Two Forms of Modernization in European Competition Law. *Fordham International Law Journal*, 2008, 31(5): 1242
[74] Ibidem
[75] Ibidem
[76] Research of the Lithuanian Free Market Institute. Competition Law and its Application in Lithuania. 21.06.2006, p. 18 Available at:
http://www.lrinka.lt/index.php/analitiniai_darbai/analize_konkurencijos_teise_ir_jos_taikymas_lietuvoje/3407.
[Access time: 09 03 2012]
[77] Pajarskas, S. Modernisation of Regulation 17: impact on Lithuania. *E.C.L.R.* 2003, 24(7): 313

note is that Lithuanian Competition Council became the official NCA implementing competition policy in Lithuania together with the granted power to directly apply Articles 101 and 102 of TFEU.

Thereby, in consideration of the foregoing information, we present the main characteristics of Regulation 1/2003, which are the following:

a) article 101(3) became directly applicable exemption and the notification procedure was abolished whereby, as the Commission itself indicates, it was enabled to focus its resources on the important fight against cartels and other serious violations of the antitrust rules;[78]
b) the European Competition Network (ECN) was created, aiming for the close cooperation between the Commission and the NCAs, due to which the Commission is entitled to the supervisory powers over the NCAs;
c) more level playing field for businesses operating cross-border was created as all competition enforcers, including the national competition authorities and national courts, are obliged to apply EC antitrust rules to cases that affect trade between Member States;
d) the Commission's existing investigatory powers were upgraded by granting the Commission additional powers to inspect other premises and to interview and take statements;
e) the respect for the fundamental rights and freedoms was directly indicated in Regulation 1/2003,[79]
f) nonetheless the above-mentioned, the Commission is still indicated as the law-maker, policeman, investigator, prosecutor, judge and jury, subject only to review by the ECJ.[80]

Therefore, from the views presented above we assume it is definite that Regulation 1/2003 is subject to extremely different opinions and commonly is indicated as a fundamental, thus not a modern step regarding the competition policy in the EU. Nonetheless, we intend to note that the change most scholars indicate is the reform of the investigative powers of the Commission. Upon this reform the further analysis of this master thesis is founded.

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[78] Communication from the Commission to the European Parliament and the Council - Report on the functioning of Regulation 1/2003, COM/2009/0206 final

[79] The Commission indicated the respect to the fundamental rights and freedoms in the Recital (37) of Regulation 1/2003

[80] Such exact indication is made in the book of Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p. 1137

2. INVESTIGATIVE POWERS OF THE COMMISSION

It might seem that the Commission's investigative powers under Regulation 1/2003 in comparison to the Regulation 17/62 appear to be very similar or that the Commission continues to have broad powers of investigation. The impression of such similarity or continuance, in our opinion, in particular might be accentuated by the Commission's power to obtain information by decision and power to carry out on the spot inspections. However, there are in fact a number of significant extensions on the scope of the Commission's investigatory powers[81] and those powers are an increasingly topical issue, as it can be seen from a number of recent developments.[82]

Thus, in course of the analysis of the investigative powers of the Commission, we believe, there is a need to briefly comment on the Commission's proceedings of initiating its actions. Such issue is significant as the powers the Commission is entitled to might be executed prior to the respective procedures.

The initiation of proceedings is a formal act by the Commission[83] by which the Commission indicates its intention to adopt a decision under Regulation 1/2003.[84] However, as it was already mentioned, the Commission may exercise its powers of investigation even before the respective formal intention. The legal ground for such action is laid down under Article 2(3)[85] of Regulation 773/2004.[86] The initiation of such proceedings by the Commission relieves the NCAs of their competence to apply Articles 101 and 102[87] in the case, as it is indicated under Regulation 1/2003. Therefore, the estimation of Alison Jones and Brenda Sufrin has to be presented where such legal provisions are criticised since they create a situation where the NCAs are not relieved of their competence but in fact they (NCAs) may not take a decision running counter to one adopted by the Commission. The NCAs in the case undergo a position where they must also avoid giving decisions which would contradict with a decision contemplated by the Commission.[88]

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[81] Riley, A.J. EC antitrust modernization: the Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden. *E.C.L.R*. 2003, 24(11): 604

[82] Berghe P.,Dawes A. "Little pig, little pig, let me come in": an evaluation of the European Commission's powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9): 407

[83] Case 48/72, *SA Brasserie de Haecht v. Wilkin Janssen* [1973] ECR 77 para. 16.

[84] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Fourth Edition. Oxford: Oxford University Press, 2011, p. 1042

[85] Article 2(3) of the Regulation 773/2004 indicates that the Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

[86] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.4.2004

[87] Art. 11(6) of Regulation 1/2003

[88] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Fourth Edition. Oxford: Oxford University Press, 2011, p. 1043

The procedure of execution of powers has already been argued in ECJ, thus the Court has drawn distinction between the two stages of the administrative procedure and upheld the actions of the Commission. The Court declared that the first stage, covering the period up to notification of the statement of objections,[89] begins on the date on which the Commission, exercising the powers conferred on it by Articles 11 and 14 of Regulation 17/62[90] in the context of a preliminary investigation, takes measures involving a complaint that an infringement has been committed and having a significant impact on the situation of the suspected undertakings.[91]

In *Nederlandse Federatieve Vereniging*[92] ECJ additionally upheld its position, stating that the administrative procedure may involve an examination in two successive stages, each corresponding to its own internal logic. The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by the European Union legislature, takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the infringement concerned.

Therefore, we would like to additionally note that an inspection does not constitute the opening of proceedings and the fact that the same matter is being considered by a NCA in the relevant Member State, does not affect the Commission's discretion as to whether to carry out an inspection. ECJ declares that "*the Commission must, a fortiori, be able to carry out an inspection [...] A decision ordering an inspection is a step that is merely preparatory to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003; an inspection decision does not in itself demonstrate the Commission's intention to adopt a decision on the substance of the case. Recital 24 in the preamble to Regulation No 1/2003 also states that the Commission should be empowered to undertake such inspections as are necessary to detect any infringement of Article 82 EU, and Article 20(1) of that regulation expressly provides that, in order to carry out the duties assigned to it by that regulation, the Commission may conduct all necessary inspections.*"[93]

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[89] A formal step in the Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them.
[90] As from 1 May 2004, Articles 18 and 19 of the Regulation 1/2003.
[91] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV v. Commission* [2002] ECR I-8357, paras. 181-3
[92] Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission of the European Communities* [2006] ECR I-8725, paras. 37-8
[93] Case T-339/04, *France Télécom SA v Commission of the European Communities* [2007] ECR II-521. para. 79

Thus, as we presented the procedure, further we deem important to present the powers that the Commission is entitled to. According to the Regulation 1/2003 the investigatory powers of the Commission might be designated as follows:

a) power to conduct inspections;
b) power to inspect other premises;
c) power to request information;
d) power to interview and take statements.

The Commission already, under Regulation 17/62, was entitled to request for information and undertake inspections, therefore, the crucial reform of such power broadened by the Regulation 1/2003 was the power to inspect other premises. The other entirely new power granted for the Commission is to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.[94] These powers to the Commission are critical when undertakings do not intend to provide information voluntarily. However, it must be noted that such powers are often contested by the undertakings subject to them.

Thus, we would like to indicate, that the Commission was, and continues to be, entitled to investigate possible infringements of Articles 101 and 102 and, where appropriate, impose penalties on undertakings and associations of undertakings.[95] And as it was the case under Regulation 17/62, the investigative powers set out in Regulation 1/2003 apply only the Commission, while the NCAs and national courts, required to apply Articles 101 and 102 of the TFEU, might use only those powers of investigation that prescribed by national law.

2.1. Inspections

The Commission is empowered to conduct all the necessary inspections of undertakings and associations of undertakings to perform its duties. The legal framework for such actions of the Commission is indicated in the Article 20 of Regulation 1/2003, the Article that codifies Article 14 of Regulation 17/62. As ECJ accentuates *"the powers given to the Commission [...] thus contributes to the maintenance of the system of competition intended by the Treaty with which undertakings are absolutely bound to comply; [...] the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations "as are necessary" to bring to light any infringement of Articles 85 or 86[96]".*

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[94] Article 19 of Regulation 1/2003

[95] Freshfields Bruckshaus Deringer. Powers of investigation and enforcement under Regulation 1/2003. 2004, p.9. Available at: http://www.freshfields.com/publications/pdfs/practices/8325.pdf [Access time: 05 01 2012]

[96] Articles 101 and 102 of the TFEU

The wording "all the necessary" is often criticized,[97] thus as such power for the Commission was already granted by the Regulation 17/62, ECJ as well stated its position on the matter. The Court declared that the scope of investigations might be very wide. In that regard it was stated, that the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings.[98] Notwithstanding the above-mentioned, the General Court later as well indicated that "*the applicant cannot justly complain that the Commission attempted to broaden its investigatory powers, visiting premises belonging to a company other than the addressee of the decision* [...] *even after ascertaining that the premises they were visiting belonged to ETA* (note: the Company not under investigation) *and not to Minoan* (note: the company under investigation)*, the Commission was entitled to take the view that they should be treated as premises used by Minoan for the conduct of its business and that, therefore, they could be treated as being the business premises of the undertaking to which the investigation decision was addressed. It should be borne in mind in this connection that the Court has held that the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings. In the exercise of its investigatory powers, therefore, the Commission was entitled to take into account in its reasoning the fact that its chances of finding proof of the supposed infringement would be higher if it were to investigate the premises from which the target company in fact conducted its business as a matter of practice."*[99] Therefore, it can inevitably be stated, that hereby the ECJ created an exception, according to which the Commission was enabled to even broader powers than Regulation 1/2003 empowers it to.

Following the appreciable amount of discretion the Commission is able to pursue, Article 20 of Regulation 1/2003 has to be presented, according to which the Commission is entitled to carry out the inspections by officials and “other accompanying persons authorized by the Commission”. The officials or the accompanying persons are entitled:

"a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

c) to take or obtain in any form copies of or extracts from such books or records;

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[97] Jones A., Sufrin B., Berghe P, Dawes, A., Andersson, H., Legnerfalt, E., Aslam, I., Ramsden, M.

[98] Joined cases 46/87 and 227/88 *Hoechst AG v. Commission of the European Communities* [1989] ECR 2859, para. 26

[99] Case T-66/99, *Minoan Lines SA v. Commission of the European Communities* [2003] E.C.R. II-5515, paras. 84 and 88

d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers."[100]

According to Regulation 1/2003 the officials can carry out the inspection at the premises simply under the "written authorization".[101] They may either give an advance notice of their arrival or come without warning, although they have to give notice in good time before the inspection to the NCA of the Member State in whose territory the inspection is conducted.[102] As long as the inspection is carried out under the Article 20(3) (the "authorization") an undertaking has no legal obligation to submit to the inspection. As otherwise in case of inspection under Article 20(4) (the decision), when an undertaking must submit to procedures ordered by the Commission. In case the inspection is conducted under the Article 20(4) the Commission is obliged to adopt a decision, thus in the same time creating an obligation for an undertaking not only to submit to the inspection but as well to actively cooperate. It must be noted that in both cases the Commission has to specify the subject matter and purpose of the investigation, and needs to set out the time of the inspection and penalties that apply for non-performance.[103] This constitutes a key element of right of defence of an undertaking, as it enables judicial review of inspection.

The ECJ in *National Panasonic*, which was upheld by *Roquette Frères*, indicated that the Commission is obliged to state in its decision, as precisely as possible, what it is looking for and the matters to which investigation relates:

"This is a fundamental requirement, designed not merely to show that the proposed entry onto premises of the undertakings concerned is justified but also to enable the undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence."[104]

As it was already mentioned, in case the inspection takes place under written authorisation undertaking is under no obligation to cooperate. Therefore, it may oppose an inspection without fearing any sanction despite the general obligation to cooperate actively in the investigative measures, as developed by the ECJ in *Orkem SA (formerly CdF Chimie SA) v. Commission.*[105] Nonetheless it

[100] Article 20(2) of Regulation 1/2003
[101] Article 18(2) of Regulation 1/2003
[102] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Fourth Edition. Oxford: Oxford University Press, 2011, p. 1043
[103] Art. 20(3) and (4) of Regulation 1/2003
[104] Joined cases 46/87 and 227/88 *Hoechst AG v. Commission of the European Communities* [1989] ECR 2859, para. 29 and Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011, para. 47
[105] C-374/87, *Orkem SA (formerly CdF Chimie SA) v. Commission of the European Communities* [1989] ECR 3283, paras. 22 and 27

must be noted, that an undertaking is in no position to submit to an inspection only partially, the obligation to cooperate applies fully. In particular, Article 20(3) provides that an undertaking might be fined in case it provides misleading or incomplete information in the course of inspection.[106]

The inspections under the decision are often informally referred to as a "dawn raids"[107] since in the case the Commission may execute an unannounced inspection. And nonetheless it is implied that the Commission is the guardian of the TFEU in regard of the competition rules and it is held that it has to obtain its capacity and have broad powers, however the investigatory powers might not be without limits. Therefore, ECJ established a fundamental requirement and stated that dawn raids may not be performed without suspicion of wrongdoing. Hence, fishing expeditions were thus not allowed.[108]

The first unannounced inspection took over in the case of the *National Panasonic* when the fundamental rights and the principle of proportionality were raised into question as the defencing arguments of an undertaking.

Whereas, as regards Lithuania, the Lithuanian Competition Council has announced that it had already helped for the Commission to conduct several unannounced inspections. It is not yet announced which specific companies where inspected, nonetheless it is know that inspections were taken over in the rail freight sector[109] and in the natural gas sector.[110]

2.2. Power to Inspect Other Premises

Inspection of premises other than that of an undertaking may only be carried pursuant to a decision and only after the prior authorization of the judicial authorities of the Member State concerned.[111] Article 21(1) provides that if a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection and which may be relevant to prove

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[106] Berghe P.,Dawes A. "Little pig, little pig, let me come in": an evaluation of the European Commission's powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9): 410

[107] Authors such as Jones A. and Suffrin B., Andersson, H., Legnerfalt, E., Berghe, P., Dawes, A., Bellamy & Child.

[108] Andersson, H., Legnerfalt, E. Dawn raids in sector inquires – fishing expeditions in disguise. *E.C.L.R.* 2008, 29(8): 441

[109] Lithuanian Competition Council Press Release. *KONKURENCIJOS TARYBOS PAREIGŪNAI PADĖJO ATLIKTI PATIKRINIMĄ EUROPOS KOMISIJAI.* Available at: http://www.konkuren.lt/index.php?show=news_view&pr_id=826 [Access time: 05 03 2012]
European Commission Press Release. *Antitrust: Commission confirms unannounced inspections in rail freight sector*. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/152&format=HTML&aged=0&language=EN&guiLanguage=en [Access time: 05 03 2012]

[110] Lithuanian Competition Council Press Release. *KONKURENCIJOS TARYBOS PAREIGŪNAI PADĖJO ATLIKTI PATIKRINIMĄ EUROPOS KOMISIJAI.* Available at: http://www.konkuren.lt/index.php?show=news_view&pr_id=915 [Access time: 05 03 2012]
European Commission Press Release. *Antitrust: Commission confirms unannounced inspections in the natural gas sector.* Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/641&format=HTML&aged=0&language=EN&guiLanguage=en [Access time: 05 03 2012]

[111] Article 21(3) of Regulation 1/2003

serious violation of Articles 101 or 102 are being kept in premises, land and means of transport, the Commission may by decision order an inspection to be conducted on those premises, land or other means of transport.[112] Or in other words it might be stated, that the Commission's power to execute dawn raids in regard to Regulation 17/62 expanded to private premises, homes and vehicles of the directors and employees of an undertaking. The reasoning of such expansion of powers of the Commission is explained in recital 26 of the Regulation 1/2003 which states that the *"experience has shown that there are cases where business records are kept in the homes of the directors or other people working for an undertaking"*.

Yet national courts of the Member States are enabled to authorize and to query the actions of the Commission, however such powers are limited. As in the case of Article 20(8) according to which national judicial authorities may not call into question the necessity of the inspection. In *Roquette Frères* ECJ held that "*if the scope of the review to be carried out by the competent national court is to be meaningful, and if proper account is to be taken of the invasion of privacy that recourse to law-enforcement authorities entails, it must be acknowledged, with regard to such a measure, that the national authority cannot carry out its review of proportionality without regard to factors such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought. It follows that, for the purposes of enabling the competent national court to satisfy itself that the coercive measures sought are not arbitrary, the Commission is required to provide that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned".*[113] ECJ as well indicated that the authorities of the Member States cannot be provided with the information in the Commission's file as "*it must be borne in mind that the physical transmission to the competent national authorities of the various items of factual information and evidence held in the Commission's file could give rise to other risks as regards the effectiveness of the action taken by the European Union, especially in cases involving parallel investigations to be carried out simultaneously in more than one Member State."*[114] According to the provisions of Regulation 1/2003, in controlling that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive, the national courts should have regard to "the importance of the evidence sought"[115] and "the reasonable likelihood

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[112] Bellamy & Child. *European Community Law of Competition*. Sixth Edition. Oxford: Oxford University Press, 2008, p. 1182

[113] Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, para. 61

[114] Ibidem, para. 66

[115] Article 21(3) of Regulation 1/2003

that business books and records relating to the subject matter of the inspection are kept in the premises for which authorization is requested”[116].

Inspections under Article 20 and inspections of private premises under Article 21 are subject to respective differences, therefore it is noteworthy that the inspection on private premises (Article 21) does not include the provisions for sealing private premises, or for questioning the persons whose premises are being searched. In respect to inspection under Article 21 penalties can not be imposed for opposing the inspection: there is no provision in Article 23 for fining the undertaking concerned and nothing in Regulation 1/2003 puts any liability on individuals. However, the position as regards forcible entry (if provided for in national law) is the same in respect of investigation under Article 20.

The first dawn raid on a private home under Article 21 was carried out on 2 May 2007 in the United Kingdom (hereinafter - UK) in connection with the investigation in the *Marine Hoses Cartel*.[117] The cartel that was also under prosecution in the USA. In the course of investigation John Fingleton, the Chief Executive of the Office of Faire Trading, said that *“the OFT*[118] *is committed to making full use of our criminal enforcement powers to investigate allegations of serious cartel conduct. Cartels are not limited to national boundaries, and our coordinated work with the European Commission and the US Department of Justice illustrates our determination to investigate international and national cartels alike”*.[119] As it is seen from the position indicated above and the press releases of the Commission,[120] by concurring such cartel the accentuation to the Regulation 1/2003 and the empowerment it provided was indicated. Nonetheless, there were no notices whether the usage of the Article 21 came to the exceptional discoveries and the substantial impact to the outcome of the investigation. The European Commission has imposed a total of EUR 131 510 000 fines on five groups – Bridgestone, Dunlop Oil & Marine/Continental, Trelleborg, Parker ITR and Manuli – for participating in a cartel for marine hoses between 1986 and 2007 in violation of the ban on cartels and restrictive business practices in the EU Treaty (Article 101) and the EEA Agreement (Article 53).[121] Yokohama that also participated in the cartel was not fined because it revealed the existence of the cartel to the Commission. Therefore, this case as well serves as the example of the effect and

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[116] Article 21(3) of Regulation 1/2003

[117] From 1986 to 2007, the producers of marine hoses operated a worldwide cartel. The European market for this product was worth on average €32 million per annum between 2004 and 2006. Bridgestone, Yokohama, Dunlop Oil & Marine, Trelleborg, Parker ITR and Manuli regularly met to fix prices and exchange sensitive market information. These meetings took place in several locations in Europe, East Asia and the US. Cartel members referred to some markets as their "*private markets*" and agreed upon a dozen or so pages of detailed "*cartel rules*" to limit their conduct on the market.

[118] The Office of Fair Trading, United Kingdom.

[119] The statement of the OFT Chief Executive John Fingleton is available at: http://www.oft.gov.uk/news-and-updates/press/2007/70-07 [Access time: 19 02 2012]

[120] European Commission press release. *Antitrust: Commission fines marine hose producers € 131 million for market sharing and price-fixing cartel.* Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/137&type=HTML [Access time: 19 02 2012]

[121] Ibidem

performance of the amended leniency notice.[122] In regard to *Marine Hoses Cartel* investigation in the UK, we as well would like to indicate that not only criminal enforcement powers were used, but the defendants as well received criminal sentences.[123] In UK such measures were implemented for the first time.

2.3. Requests for Information

Article 18 of Regulation 1/2003 provides that the Commission "may, by simple request or by decision, require undertakings and associations of undertakings to provide all the necessary information"[124] including the power to seek the disclosure of documents[125] containing that information. The Commission may require undertakings and associations of undertakings for the information by choosing from two forms of its requests: a simple request or a decision. It is important to note that under Regulation 17/62 the Commission powers, in regard to such actions were under limitation, i.e. the Commission could use a decision only after the undertaking had refused to answer a simple request. However, under Regulation 1/2003 the Commission, as already presented above, has a choice either to use the request, or use the decision from the outright.

An undertaking or association of undertakings is not obliged to respond to a simple request,[126] as it is informal (non-binding). Only when the undertaking, having voluntarily agreed to participate, intentionally or negligently, provides the incorrect or misleading information, it might be penalised by the Commission under Article 23(1)(a) of Regulation 1/2003 with a fine up to 1 per cent of its total turnover in the preceding business year. Undertaking must be warned of these penal actions with the request which must as well specify the subject matter (legal-basis) and purpose of a request for information,[127] indicate what information is required, fix the time within the information must be provided. According to ECJ this is a "*fundamental requirement both in order to show that the information requested of the undertakings concerned is justified and also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence. It follows that the Commission is entitled to require the disclosure only of information which*

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[122] Commission Notice on Immunity from fines and reduction of fines in cartel cases. OJ C 298, 8.12.2006

[123] The defendants Allison, of Cleethorpes, Lincolnshire, and Whittle, from Louth, Lincolnshire, were each jailed for three years and Brammar, of Humberston, received two and a half years. Information is available at: http://www.guardian.co.uk/business/2008/jun/12/corporatefraud.ukcrime [Access time: 19 02 2012]

[124] Article 18(1) of Regulation 1/2003

[125] C-374/87, *Orkem SA (formerly CdF Chimie SA) v. Commission of the European Communities* [1989] ECR 3283, para. 14

[126] Wils, W.P.J. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law. *World Competition* 2006, 29(1): 5

[127] Case T-34/*93, Société Générale v. Commission* [1995] ECR. II-545, para. 40

may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information".[128]

On the other hand, the compliance with the decision requiring information is mandatory, i.e. binding. Thus, despite the different legal obligation it sets forth, decision is subject to merely the same formal requirements as a request. Although it is important to accentuate that only the mandatory form of the request, i.e. the decision, is subject to possible review by the General Court. ECJ indicates that the decision or a request of the Commission is as a safeguard of the right of the defence of an undertaking in both cases, i.e. power to request information and power to inspect the premises of an undertaking. Therefore, it must be envisaged that the ECJ undertakes to safeguard the notorious[129] actions of the Commission by accentuating the possibility for an undertakings to defence.

As it was already indicated above, the Commission under Article 18(6) is entitled to receive and the governments of the Member States and the NCAs have to supply the Commission with all the necessary information it requests. The meaning of the wording "necessary information" was considered by the Court in *SEP*.[130] The Court stated that the term "necessary information" must be interpreted by reference to the purposes for which the powers of investigation in question were conferred upon the Commission. The Court as well accentuated the importance of the decision according to which the Commission is entitled to require the disclosure only of information that may enable it to investigate putative infringements, which justify the conduct of the inquiry and are set out in the request for information. As ECJ itself indicates and A. Jones and B. Suffrin emphasizes, the requirement for a correlation between the request for information and the presumed infringement is met, if at this stage of the procedure, the request can be legitimately considered to be related to the presumed infringement.[131] Although it is not easy to show that the information requested is outside leeway allowed to the Commission, it does nonetheless mean, that the Commission cannot go on a complete fishing expedition and that the Court would be prepared to hold in an appropriate case that the request was excessive.[132]

We as well would like to note, that procedures under Article 18 and 20 are understood as strictly different and according to ECJ might not be collated and that there shall not be any possibility to preclude the actions of the Commission in this regard. EJC accentuates that "*the fact that an investigation under Article 14*[133] *has already taken place cannot in any way diminish the powers of*

[128] Case T-39/90, *SEP v Commission* [1991] ECR II-1497, para. 25
[129] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Fourth Edition. Oxford: Oxford University Press, 2011, p. 1044
[130] Case T-39/90, SEP v. Commission [1991] ECR II-1497, para. 25
[131] Ibidem, para. 29
[132] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Fourth Edition. Oxford: Oxford University Press, 2011, p. 1044
[133] The equivalent of the Article 20 of Regulation 1/2003

investigation available to the Commission under Article 11.[134] No consideration of a procedural nature inherent in Regulation No. 17 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 or extract when carrying out a previous investigation".[135]

The cases upon which undertakings may withhold documents from the Commission on the ground that they are legally privileged, ant to what extent they can refuse to supply information on grounds of self-incrimination shall be analysed in the third section of this master thesis.

2.4. Power to Take Statements and Interview

The Commission is entitled to take statements from natural and legal persons for the purposes of collecting information related to the subject matter of the investigation.[136] This investigative technique was not available to the Commission under Regulation 17/62, thus was implemented under Article 19 of Regulation 1/2003.

Unlike with the other investigative techniques previously described, the Commission is not entitled to adopt a decision to compel a person to give information. Rather, the Commission is entitled to take a statement only if the addressee of the request gives his or her consent. Although, it is important to note that the Commission is not required to inform an undertaking that is the subject to investigation that the statement is being taken, even where the interviewee is also the employee of that undertaking.[137] However, the Commission can only collect information in relation to the subject matter of an investigation. The interviewee, according to Regulation 1/2003, is free not to accept the Commission's invitation to be interviewed, as the interview is voluntary. Such right remains also in the case of the absence of his lawyer. However, as regards the Commission, in the course of such actions when an interview is conducted on the premises of an undertaking, it must inform Member State in whose territory the interview takes place.[138] In case the Commission executes this power, at the beginning of the interview, the Commission must state the legal basis and the purpose of the interview, and recall its voluntary nature.[139] It must also inform the person interviewed of its intention to make record of the interview.[140] While the Commission may record the statements by the persons

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[134] The equivalent of the Article 18 of Regulation 1/2003

[135] C-374/87, *Orkem SA (formerly CdF Chimie SA) v. Commission of the European Communities* [1989] ECR 3283, para. 14

[136] Art. 19(1) of Regulation 1/2003

[137] Freshfields Bruckshaus Deringer. Powers of investigation and enforcement under Regulation 1/2003. 2004, p.13. Available at:http://www.freshfields.com/publications/pdfs/practices/8325.pdf [Access time: 05 01 2012]

[138] Art. 19(2) of Regulation 1/2003

[139] Art. 3(1) of Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123

[140] Ibidem

interviewed in any form, it must take a copy of any recording available for the person interviewed for approval.[141] As already disclosed above, the interviewee is free not to accept the Commission's invitation to be interviewed, as there is no sanction for the supply of incorrect or misleading information.[142] Such provision comes in line with the approach of Regulation 1/2003 of not providing for penalties on individuals (except if they are undertakings).[143]

It is important to note, that during the interview the person concerned can refuse to answer questions, refuse to give reasons for refusal and need not to find any documents.[144] As the performance of this power is in sharp contrast to the power of the Commission under Article 20(2)(e) (explanations on facts) it may be essential for an undertaking to ascertain, when an inspection is taking place, whether an employee is being questioned under Article 19 or Article 20(2)(e).[145]

The Commission in its Report[146] declares it has used Article 19 regularly but "experience has shown that the absence of penalties for misleading or false replies may be a distinctive to provide correct and complete statements". Undertakings may find it problematic that the Commission can now take statements from natural persons, such as unsatisfied employees, however undertakings have no right to any copy or record of the interview, nevertheless, there appears no reason why an undertaking cannot instruct its employees not to accept invitations to interviews.[147]

[141] Art. 3(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123

[142] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1058

[143] Recital 8 of Regulation 1/2003

[144] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1058

[145] Ibidem

[146] Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 COM(2009) 206 final, supra n. 65, para. 12

[147] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1058

3. LIMITATIONS TO THE INVESTIGATIVE POWERS OF THE COMMISSION

Having provided with an investigatory powers of the Commission in the second part of this master thesis, in the third part we shall address to the question of whether these powers comply with the rights of the undertakings provided by the legislature and case-law of the European Union and with the fundamental rights recognized by the Convention. The issue of whether the rights of undertakings are effective enough is raised by the most of the scholars[148] as well as by the undertakings themselves, thus commonly unsuccessfully.[149] As such approach is highly discussed it as well has the different perspectives. Wouter P.J. Wils[150] accentuates that actually there are number of procedural rights and guarantees that circumscribe or limit the use of powers of investigation of the Competition authorities.[151] The author accentuates such position by evidently giving "just a few examples"[152] stipulated in the Article 18 of Regulation 1/2003. Whereas others, for instance Helene Anderson and Elisabeth Legnerfalt,[153] question the legality of Commission's actions,[154] especially in the case of dawn raids, where the Commission interfere to undertakings even without any suspicion or wrongdoing.[155] However, although the case-law of the European Court of Human Rights (hereinafter - ECtHR) under the ECHR is not binding to the European Union Courts, i.e. *the Court of First Instance[156] has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law,*[157] the protection of the fundamental rights underlined in the provisions of the Convention is utmost always raised into question when the limitations of the powers of investigation of the Commission are discussed.[158] Such insight originates

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[148] Aslam I., Ramsden M., Jones A., Suffrin B., Weiss W., Gippini-Fournier E., Andersson H., Legnerfalt E., Frese J. M.
[149] Wils, W.P.J. The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2004, 27(2): 208
[150] Wouter P.J. Wils was educated both as an economist and as a lawyer at Louvain, Utrecht and Harvard. He was a référendaire for Advocate-General Van Gerven at the EC Court of Justice. Since 1994, he has been a member of the European Commission's Legal Service, where he has been working mainly in the fields of competition, intellectual property and consumer protection. He has represented the European Commission in more than 300 cases before the EU Court of Justice and the General Court and the EFTA Court. He has lectured at the universities of Tours and Utrecht, and in 2004 became a Visiting Professor at King's College London.
[151] Wils, W.P.J. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law. *World Competition*. 2006, 29(1): 14
[152] Ibidem
[153] Helene Andersson and Elisabeth Legnerfalt are Senior Associates, at the Advokatfirman Delphi, Stockholm
[154] Andersson, H., Legnerfalt, E. Dawn raids in sector inquires – fishing expeditions in disguise. *E.C.L.R.* 2008, 29(8): 439
[155] Ibidem
[156] As of 1 December 2009 the General Court
[157] Case T-112/98, *Mannesmannröhren-Werke AG v Commission of the European Communities*. [2001] ECR II-729, para. 59
[158] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008; Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials.* Second Edition. Oxford: Oxford University Press, 2011; Benjamin, V. O. The application of EC competition law and the European Convention on Human Rights. *E.C.L.R.* 2006, 27(12); Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1); Berghe P.,Dawes A. "Little pig, little pig, let me come in": an evaluation of the European Commission's

from the Opinion 2/94 on Accession by the Community to the ECHR[159] where it was indicated that fundamental rights form an integral part of the general principles of Community law whose observance the European Union Courts ensure.[160] The formulation of the general principles was accentuated by the above mentioned opinion, where the Court indicated, that it *"draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".*[161] In that regard, the Court has stated that *the European Convention on Human Rights has special significance*[162] and *the European Union cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.*[163] Article 6(3) of the Treaty on European Union declares that the Union shall respect the fundamental rights protected by the Commission, as they result from the constitutional traditions common to Member States. Article 6(2) of the above-mentioned Treaty declares that the Union shall accede to the Convention and that such accession shall not affect the Union's competences as defined in the Treaties. Therefore, as the Lisbon Treaty created the legal ground for the European Union to accede the Convention, the scope of the protection under the Convention and the significance of the ECtHR shall be raised into question and analyzed in this master thesis, as such analysis has a great a great significance to the future policy of the European Union competition law.

The respect to the human rights is as well accentuated in the Recital (37) of Regulation 1/2003, where it is declared that *Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*. Accordingly, it is indicated that the Regulation *should be interpreted and applied with respect to those rights and principles.*[164] In practice, the European Union Courts frequently have regard to the case-law of the ECtHR in assessing whether the acts of the Community institutions have been consistent with those general principles.[165] Nevertheless, ECtHR thus play an important role in determining the procedural rights and guarantees applicable to information collected and used by the Commission, via the case-law of the European Union courts, the possibilities for the undertakings concerned to bring a claim

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powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9); Wils, W.P.J. Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2006, 26(4); Ameye, E. M. The interplay between human rights and competition law in the EU. *E.C.L.R.* 2004, 25(6); Wils, W.P.J. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law. *World Competition*. 2006, 29(1), ect.

[159] Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights [1996] ECR I-1759

[160] Ibidem, para. 33

[161] Opinion 2/94 on the Accession by the Community to the European Convention on Human Rights [1996] ECR I-1759, para 33

[162] Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others.* [1991] ECR I-2925, para. 41

[163] Ibidem

[164] Recital (37) of Regulation 1/2003

[165] Bellamy & Child. *European Community Law of Competition.* Sixth Edition. Oxford: Oxford University Press, 2008, p. 1193

alleged violation of their fundamental rights directly before the ECtHR appear extremely limited.[166] Such limitation evolves from the fact that at the moment European Union is not a signatory to the ECHR, despite the above-mentioned legal ground for it to accede to the ECHR.

And nonetheless the ECHR thus plays an important role in the case-law of European Union Courts, as Wouter P.J. Wils indicates, it is not knowledgeable of any judgement in which Court of Justice has relied on the Charter of Fundamental Rights of the European Union,[167] notwithstanding the fact, that the Charter under the Treaty of Lisbon became legally binding.

The general principles of EU law to which the European Union Courts have regard include both procedural and substantive rights.[168] Christopher Bellamy[169] and Graham D. Child[170] present the most extensive indication of the rights and principles recognized by the European Union Courts as protected by the European Union law. The authors designate the above-mentioned rights and principles as following:

a) a right of privacy, in terms of guarantees against unreasonable or disproportionate searches of premises for documents;
b) the privilege against self-incrimination;
c) attorney/client privilege, in terms of the protection of the confidentiality of communications with independent lawyers;
d) *non bis in idem*, that is the principle that an undertaking should not be punished twice for the same conduct;
e) that legislation, particularly that which imposes penalties, should not be imposed with retroactive effect;
f) the legitimate expectations should be respected;
g) the principle of equal treatment;
h) the principle of proportionality;
i) the principle of sound administration; and

[166] Wils, W.P.J. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law. *World Competition*. 2006, 29(1): 18
[167] Ibidem
[168] Bellamy & Child. *European Community Law of Competition.* Sixth Edition. Oxford: Oxford University Press, 2008, p. 1194
[169] Sir Christopher Bellamy QC was President of the Competition Appeal Tribunal until February 2007 when he returned to private practice. After qualifying as a barrister, he practised mainly in the fields of competition law, EU law and public law. He was appointed Queen's Counsel in 1986. From 1992-1999 he was a judge of the Court of First Instance of the European Communities.
[170] Resident partner at Slaughter and May (regarded as one of the most prestigious law firms in the world) Frankfurt 1993-1995, visiting fellow in Euro competition law Lincoln College Oxford 1995-2002, visiting prof. Faculté de droit Univ. of Paris II 2000-2002.

j) the rights to have a decision taken, and judicial proceedings resolved, within a reasonable time.[171]

There are as well some additional rights expelled, such as according to the Wouter P.J. Wils - the presumption of innocence as set out in Article 6(2) of the ECHR or, as according to the Alison Jones and Brenda Sufrin, the right to be heard and the principle of confidentiality. However, we shall not discuss all the above-mentioned rights and principles, as the extent of this master thesis is limited. We shall focus on the rights and principles that are most highly discussed in relation to Regulation 1/2003 and therefore described as the most ambiguous. The rights and principles that will be analysed are the following:

a) legal professional privilege;
b) privilege against self-incrimination or the right not to incriminate oneself;
c) right to a private life;
d) right to be heard;
e) access to the Commission's file.

As regards Lithuanian case-law and researches of scholars in relation to the interpretation and analysis of the Commission's powers of investigation, we intent to indicate, that there are barely few sources yet. Thus it could be explained by the fact that Lithuania is a Member State of the European Union only for 7 years. The only source possible yet is the *Mažeikių nafta*[172] case, where Regulation 1/2003 was analysed not only subject to penalties, as in the common cases under the case-law of Lithuania,[173] but regards the limitations of the powers of the Commission as well. The Supreme Administrative Court of Lithuania in the case accentuated the importance of the general principles of the EU competition law designated in Regulation 1/2003 and the case-law of the ECJ.[174] The case in respect to applicable limitations shall be presented below.

3.1. Legal Professional Privilege

The rule of legal professional privilege finds its rationale in the role of the lawyer in society governed by the rule of law.[175] Legal professional privilege is an established principle by English law.

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[171] Bellamy & Child. *European Community Law of Competition.* Sixth Edition. Oxford: Oxford University Press, 2008, p. 1195

[172] Decision of the Supreme Administrative Court of Lithuania. 8 December 2008 *Competition Council of the Repuvlic of Lithuania v Mažeikių nafta, UAB and other privies.* (Case No A-442-715-08)

[173] Supreme Administrative Court of Lithuania in the Decision of 11 May 2006 (Case No A1-686/2006) stated that the calculation of fines is a complicated process therefore the courts may be entitled to the different position than the Lithuanian Competition Council.

[174] Supreme Administrative Court of Lithuania. Decision of 11 May 2006. (Case No A1-686/2006)

[175] Berghe P.,Dawes A. “Little pig, little pig, let me come in”: an evaluation of the European Commission’s powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9): 420

According to the Police and Criminal Evidence Act 1984[176] the meaning of "items subject to legal privilege" is as following:

(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means —

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(c) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice; or

(i) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.[177]

However, notwithstanding the above-mentioned, legal professional privilege cannot be interpreted directly upon reliance to the English law. Mauro Squitieri[178] indicates that legal professional privilege grounds the protection of documents and communications between lawyers and client on the right to obtain expert advice from skilled professionals, for which purpose the client has to be free to inform the adviser of all relevant facts, without the authorities being able to use such information in trial.[179] In relation to the powers of the Commission, the most powerful instrument in obtaining incriminating evidence is perhaps the power to conduct inspections in the business premises of undertakings and to obtain copies or extracts from books or records related to the business.[180] As Michael J. Frese[181] accurately points out, nowadays this means that email inboxes can be examined

[176] Police and Criminal Evidence Act of the United Kingdom [1984] is available at: http://www.legislation.gov.uk/ukpga/1984/60/section/10?view=plain [Access time: 24 02 2012]

[177] Ibidem, Article 10

[178] Mauro Squitieri is a PhD Candidate in Bocconi University, Italy. He is the member of ICC Young Competition Scholars Programme in Queen Mary University of London. Mauro Squitieri has the expertise in International and European Business Law, Antitrust and Trade Regulation, International and European Law, International Trade Law. His education & professional qualifications include LL.M. of the Fordham University (Magna Cum Laude) and LL.M. of the University of Essex.

[179] Squitieri, M. The use of Information in EU Competition Proceedings and the Protection of Individual Rights. *Georgetown Journal of International Law*. 2011, 42: 460

[180] Article 20. Regulation 1/2003

[181] Michael J. Frese is a PhD fellow at the Amsterdam Centre for European Law and Governance (ACELG) and the Amsterdam Centre for Law and Economics (ACLE) at the University of Amsterdam.

and correspondence can be copied and taken.[182] Therefore, in the scope of limitations of the powers of the Commission, the concept of legal professional privilege will be presented.

Despite the importance of such right, accentuated by the different authors[183] and despite the fact that ECtHR has ruled that interferences with the confidentiality of communications between lawyer and client entail a violation of Article 8 of the ECHR, which can be permitted only in exceptional circumstances,[184] neither Regulation 17/62 nor Regulation 1/2003 indicate whether the right to legal professional privilege is guaranteed by the EU law.[185] It was therefore left to the ECJ to expand on this issue in *Australian Mining & Smelting Europe Ltd (AM&S) v. Commission of the European Communities*.[186] In the *AM&S* ECJ stated that *"the rights of the defence may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights. In those circumstances, such protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure under Regulation No. 17 which may lead to a decision on the application of Articles 85 and 86 of the Treaty[187] or to a decision imposing a pecuniary sanction on the undertaking. It must also be possible to extend it to earlier written communications which have a relationship to the subject-matter of that procedure."[188]* Hence, the Court acknowledged the protection of legal professional privilege and demonstrated contribution to the requirement that everyone should be able to consult a lawyer without restraint to obtain independent legal advice.[189] The scope of legal professional privilege since *AM&S* has been extended further to cover both internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing[190] "*legal advice [...] if it had been received from independent legal advisers by way of written communication"[191]* and *"preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of*

[182] Frese J. M. The development of general principles for EU competition law enforcement - the protection of legal professional privilege. *E.C.L.R.* 2011, 32 (4): 196
[183] Berghe P.,Dawes A, Sufrin B., Jones A., Frese J. M.
[184] Squitieri, M. The use of Information in EU Competition Proceedings and the Protection of Individual Rights. *Georgetown Journal of International Law*. 2011, 42: 460
[185] The Deringer Report prepared in the course of the consultation of the European Parliament, had proposed that a right to lawyer-client confidentiality be included in the text of Regulation 17/62. September 7, 1961. Doc. No. 57, European Parliament
[186] Berghe P.,Dawes A. “Little pig, little pig, let me come in”: an evaluation of the European Commission’s powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9): 420
[187] Articles 101 and 102 of the TFEU
[188] Case 155/79, *Australian Mining & Smelting Europe Ltd (AM&S) v. Commission of the European Communities* [1982] ECR 1575, para. 23
[189] Squitieri, M. The use of Information in EU Competition Proceedings and the Protection of Individual Rights. *Georgetown Journal of International Law*. 2011, 42: 460
[190] Berghe P.,Dawes A. “Little pig, little pig, let me come in”: an evaluation of the European Commission’s powers of inspection in competition cases. *E.C.L.R.* 2009, 30(9): 420
[191] Case T-30/89, *Hilti Aktiengesellschaft v Commission of the European Communities* [1990] ECR II-163, para. 17

seeking legal advice from a lawyer in exercise of the rights of the defence".[192]

According to the *AM&S* communications between the lawyer and the client ought to be protected for the purposes and in the interests of the client's rights of defence.[193] However, as ECJ accentuates such communications may emanate only from independent lawyers, that is to say, lawyers who are not bound to client by a relationship of employment.[194] Following such interpretation, the in-house lawyers are excluded from the possibility for the undertaking to use the legal professional privilege as the right for defence. In addition we would like to indicate that according to the case-law of the Court not only independent lawyers are the guarantee of the right of defence, but as well only the lawyers who are entitled to practice their profession in one of the Member States.[195]

Thus in regard to the legal implementation of the legal professional privilege in the EU competition law, in case we analyse the efficiency of the legal professional privilege versus the efficiency of the enforcement of antitrust, as Wouter P.J. Wils indicates, the topical question, whether the ruling in *AM&S* that the Commission cannot use its powers of investigation to take or to compel the production of certain lawyer-client communications should be extended so as to cover not only independent lawyers but also in-house legal counsel, arises.[196] It is argued that there cannot even be the consideration that the possibility to consult in confidence an independent lawyer would not be sufficient guarantee of the rights of defence. There is a wide choice of independent lawyers undertakings could turn to and as the author indicates, the undertakings that can afford to have in-house counsel can undoubtedly also afford to pay an independent lawyer.[197] In addition there is accentuated that the extension of legal professional privilege to in-house lawyers may lead to less protection of the fundamental rights of defence, as in that it may lead large undertakings to use only in-house counsel, thus reducing the availability of independent lawyers, to the detriment of smaller companies that cannot afford in-house counsel.[198] Alongside the position of the Wouter P.J. Wils there goes Michael J. Frese stating that the expansion of legal professional privilege to the in-house lawyers would disregard the balancing exercise between the undertakings' rights of defence and the authority's powers of investigation.[199] The author as well relies on the Gippini-Fournier by adding that such balancing requirement between the undertakings and the authorities begs for caution even when

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[192] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* [2007] ECR II-3523, para. 123

[193] Case 155/79, *Australian Mining & Smelting Europe Ltd (AM&S) v. Commission of the European Communities* [1982] ECR 1575, para. 23

[194] Ibidem, para. 13

[195] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* [2007] ECR II-3523, para. 25

[196] Wils, W.P.J. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law. *World Competition*. 2006, 29(1): 20

[197] Ibidem

[198] Ibidem

[199] Frese J. M. The development of general principles for EU competition law enforcement - the protection of legal professional privilege. *E.C.L.R.* 2011, 32 (4): 197

appraising the personal scope of privilege. As according to Gippini-Fournier[200] *"decision about the appropriate personal scope of legal privilege cannot stop at the functional overlap between the in-house and external counsel. Because access to part of the truth is sacrificed at the altar of legal privilege, a careful analysis of systematic incentives and disincentives is required. And the incentives and disincentives faced by an external lawyer and an employed one are undoubtedly different".*[201] Michael J. Frese argues that any conclusion leading to the expanding the scope of legal professional privilege would appear inadequate; therefore the general principle of legal professional privilege has to be balanced against the investigatory powers of the Commission.[202] According to the author, any expansion would necessarily lead to a limitation of the Commission's statutory powers. Therefore the question is raised: do the administration of justice and the protection of the rights of defence requires the privilege of communications emanating from the in-house counsel? Up right the author presents the answer and indicates that the question cannot be answered positively without calling into question the services of "independent lawyers".[203]

However, considering the fact that the scope of the legal professional privilege is understood in the different views, we deem necessary to present the reasoning of Bo Vesterdorf. The former president of the General Court suggests that the scope of professional privilege should be defined solely on the basis of the allegiance on the part of the lawyer to binding rules of ethics.[204] In addition he declares that the approach envisaged by the order could bring evident benefits, first of all, in terms of effective compliance with competition law.[205] In fact, it would prevent disclosure of communications provided by employed counsel in the course of the legal self-assessment of practices giving rise to *prima facie* anti-competitive concerns.[206] Furthermore, Arianna Andreangeli[207] adds, that the suggested definition would improve legal certainty across the EU, in as much as it would ensure that communications will not be disclosed if they originate from counsel bound by rules of ethics in the country in which he or she is authorized to practice, regardless of the existence of a link of employment with the client.[208] As a result, the in-house counsel could effectively exercise his or her

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[200] Member of The European Commission’s Legal Service

[201] E. Gippini-Fournier. Legal Professional Privilege In Competition Proceedings Before the European Commission: Beyond the Cursory Glance" *Fordham International Law Journal*. 2004, 28(4): 1014

[202] Frese J. M. The development of general principles for EU competition law enforcement - the protection of legal professional privilege. *E.C.L.R.* 2011, 32 (4): 198

[203] Ibidem, p. 197.

[204] Order of the president of the Court of First Instance, dated 30 October 2003, available at: http://curia.europa.eu/juris/document/document.jsf?Docid=48395&mode=req&pageindex=3&dir=&occ=first&part=1&text=legal+professional+privilege&doclang=EN&cid=1284986 - ctx1 [Access time: 01 03 2012]

[205] Ibidem

[206] Ibidem

[207] Dr Arianna Andreangeli is a Lecturer in Competition Law at the University of Edinburgh. Her education & professional qualifications include Laurea in Giurisprudenza (note: equivalent to LLM) (Rome, LUISS Guido Carli), LLM (Dublin, University College), PhD (University of Birmingham).

[208] Arianna Andreangeli. The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer

function as a "facilitator" in achieving autonomous compliance with the law.[209] Gavin Murphy[210] as well agrees with such a position and indicates that justifying the narrow application of the privilege doctrine on vague notions of professional conduct creates a sweeping and negative generalization about the legal ethics of in-house lawyers after all, in-house lawyers can be just as skilled, dedicated and scrupulous and those in independent practice.[211]

Thus it can be stated that the scope of legal professional privilege causes a lot of radically different opinions, however we would like to note, that after 25 years, in the *Akzo*[212] case the General Court declined to extend the scope of the ruling in *AM&S* or either to cover communications with employed lawyers who are members of a professional Bar or more generally.[213] The Court therefore concluded its decision in *Akzo* by declaring *"that, contrary to what the applicants and certain interveners submit, the Court in its judgment in AM&S defined the concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment, rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The Court thus laid down the test of legal advice provided 'in full independence', which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice".*[214]

The above cited decision was appealed, however on 14 September 2010 the ECJ reached a decision and together by additionally accentuating the legal professional privilege as a substantially important right of defence for an undertakings the Court as well stated that *"the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers".*[215]

In Lithuanian legal acts, in particular the Law on Competition,[216] there are no provisions regarding the legal professional privilege. Though in the Decision of the Supreme Administrative

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and Client: one step forward, two steps back? *Competition Law Review*. 2005, 2(1): 41

[209] Ibidem

[210] Gavin Murphy is legal adviser to the International Joint Commission in Ottawa, Ontario, Canada. He was previously editor of the Commonwealth Law Bulletin in London and counsel with the Criminal Law Policy Section and International Development Group of the Department of Justice of Canada. He also worked at Canada's Competition Bureau and at the United Kingdom's Office of Fair Trading. Gavin Murphy is a graduate of Ottawa's Carleton University and the University of Ottawa Law School. He holds a Master of Law in International and European Legal Studies from Durham University, England.

[211] Murphy G. Is it time to rebrand legal professional privilege in EC competition law? [2009] E.C.L.R., 30(3), p. 132

[212] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* () [2007] ECR II-3523

[213] Ibidem, para. 171

[214] Ibidem, para. 168

[215] Case C 550/07 P, *Akzo Nobel Chemicals Ltd v Commission of the European Communities* [2010] ECR 00000, para. 44

[216] Law on Competition of the Republic of Lithuania (lastly amended on 2011-09-29). *Official Gazette*. 2011, No. 123-5815 (Note: The last official version with the amendments came into force on 13 10 2011)

Court of Lithuania in the case of *Mažeikių nafta*[217] the Court did not expressly interpreted the principle of the legal professional privilege, it nonetheless indicated that the principles of the EU competition law have to be followed. Hence, following such clear introduction of the EU principles, we assume that the Court in regard to the principle of the legal professional privilege would follow the case-law of the ECJ.

Following the above disclosed reasoning it can be stated that the scope of the legal professional privilege is still subject under discussion and that there is no direct or clear opinion to follow. Though, in our opinion, the reasoning of Bo Vesterdorf should be taken into account and the lawyers should be defined not by the relations of the employment but by the professional standards and ethics. Such a characterization, in our opinion, would create an adequate understanding of the profession of the lawyer, together creating a right of the defence for the undertaking to be protected by the in-house lawyer having evidently more expertise of the undertakings field of business.

However despite the broad discussions, the scope of legal professional privilege in the EU law was expanded neither by the General Court, nor by the ECJ. European Court of Justice explained such course of decision by indicating that *"the legal situation in the Member States of the European Union has not evolved, since the judgment in AM&S Europe v Commission was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege".*[218]

3.2. Right not to Incriminate One-self or Privilege Against Self-incrimination

Privilege against self-incrimination, which provides for a right to silence and a right not to incriminate oneself, lies at the heart of a fair criminal procedure and underlies the legal principle that a person is innocent until proven guilty.[219] And unlike the professional privilege, the privilege against self-incrimination is clearly recognized by Regulation 1/2003,[220] which affirms that: "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 or against another undertaking the existence of an infringement."[221] Such formulation was founded when the question regarding the privilege against self incrimination was raised in 1989, in *Orkem* decision, where the

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[217] Decision of the Supreme Administrative Court of Lithuania. 8 December 2008 *Competition Council of the Repuvlic of Lithuania v Mažeikių nafta, UAB and other privies.* (Case No A-442-715-08)
[218] Case C 550/07 P, *Akzo Nobel Chemicals Ltd v Commission of the European Communities* [2010] ECR 00000, para. 76
[219] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 67
[220] Squitieri, M. The use of Information in EU Competition Proceedings and the Protection of Individual Rights. *Georgetown Journal of International Law*. 2011, 42: 464
[221] Recital (23) of Regulation 1/2003

Court of Justice declared that *"As far as Article 6 of the European Convention* (for the Protection of Human Rights and Fundamental Freedoms) *is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself."*[222] The Court of Justice as well held that the Commission *"may not, by means of decision calling for information, undermine the rights of defence of undertakings concerned",* and therefore*, "may not compel an undertaking to provide it with answers which might involve an admission on its part of existence of an infringement it is incumbent upon the Commission to prove".*[223] And nevertheless by the above mentioned decision the Court of Justice found that the Commission made a breach in regards to the privilege against self-incrimination, in its decision it as well stated that *"[i]n general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law."*[224]

In Lithuanian legislature and case law, the principle against self-incrimination is also determined. Although, in the Lithuanian Law on the Competition, the right is not expressed literally, in Article 27(1) it is nevertheless declared that undertakings suspected of having violated the Law on Competition shall have the right to lodge a complaint with the Competition Council against the illegal actions of the authorised investigating officials. In the case law, the Supreme Administrative Court of Lithuania explained the right not to incriminate oneself more widely. Court indicated,[225] that the undertaking under investigation has no right to refuse to provide the information, on the grounds that it might be incriminating, however the Competition Council is as well not entitled to ask questions that would require undertaking to submit to the violation of competition law. In addition Court indicated that such interpretation follows from the EU competition law and case-law, whereby the scope of the right against self-incrimination in competition cases is narrower than in the criminal proceedings.

Therefore the question is raised whether the privilege against self-incrimination is ensured enough or there is a lack of EU recognition? Jones A. and Sufrin B., Imran Aslam[226] and Michael

[222] C-374/87, *Orkem SA (formerly CdF Chimie SA) v. Commission of the European Communities*. [1989] ECR 3283, para. 30
[223] Ibidem, para. 34 and 35
[224] Ibidem, para. 29
[225] Decision of the Supreme Administrative Court of Lithuania. 8 December 2008 *Competition Council of the Republic of Lithuania v Mažeikių nafta, UAB and other privies.* (Case No A-442-715-08)
[226] Imran Aslam is Trainee Solicitor at Sidley Austin (one of the world's largest law firms). Previously he was a Case Officer (Temporary) at Office of Fair Trading (UK). His education & professional qualifications include University of Cambridge (LLM, EU and International Law), College of Europe, Bruges (LLM in EU Law, EU and Competition Law), King's College London, London (LLB with European Legal Studies).

Ramsden[227] raise such question in relation to the fact that nevertheless the Commission powers ensured by then Regulation 17/62 and now under Regulation 1/2003 does not require the undertaking to admit to the infringement of competition rules, however, the Commission is empowered to ask questions, or demand the production of documents, by means of which it can establish an infringement.[228] Thus it is declared that the ECJ developed a limited form of the privilege against self-incrimination.[229] Such outcome, according to the above mentioned authors, arises from the Article 6 of the ECHR and the subsequent developments by the ECtHR.

The first sentence of the Article 6(1) provides the entitlement to a hearing before an independent and impartial tribunal and applies for both civil and criminal proceedings. Article 6(2) and 6(3) provide further rights in criminal proceedings.[230] The first issue that arises is the distinction for the purposes of Article 6 between civil and criminal proceedings.[231] It is well established by the case law of ECtHR that the notion of "criminal charge" is an autonomous concept which is a matter of Convention law.[232] Jones A. and Sufrin B. identifies that the principles laid down by the ECtHR for identifying a criminal charge were presented in the case of *Engel v. The Netherlands* and are known as the "*Engel* criteria".[233] The criteria are:

a) the classification of the offence under national law;
b) the nature of the offence; and
c) the nature and severity of the potential penalty.

On the other hand Imran Aslam and Michael Ramsden for deciding whether a measure is civil or criminal for the purpose of Article 6[234] proposes the case of *Bendenoun v France,*[235] the more recent ruling, according to which the measures were reconsidered and the criteria were stated as following:

a) the applicable law must be imposed by a general rule and applicable to everyone;
b) there must be penalties in the event of non compliance with the law;
c) the act must be seen as punishment to deter re-offending; and

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[227] Prof. Ramsden Michael is Assistant Professor of the Faculty of Law of the Chinese University of Hong Kong. Michael Ramsden teaches administrative law, public international law, mooting and has coached the university's *Philip C. Jessup International Law Moot Court* team since 2008. His education & professional qualifications include LL.B (King's College, London) (First Class Honours), LL.M (University of California, Berkeley), Barrister (The Honourable Society of Lincoln's Inn), Certificate at Social & Political Science (University of Oxford).
[228] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1058
[229] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 68
[230] Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).
[231] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1039
[232] Ibidem, p. 1040
[233] *Engel v. The Netherlands* Series A, No.22 (1979-80) 1 EHRR 647
[234] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 71
[235] *Bendenoun v France* Series A, No.284, [1994] 18 EHRR 54

d) the penalties/sanctions must be substantial.[236]

As we intend to present relevant analysis, we shall rely upon the criteria designated in the case of *Bendenoun v France.*

Firstly, EU competition law as a general rule is applicable all, as Article 3 of Regulation 1/2003 requires that the European Union competition law be applied by all NCAs and national courts in place of national competition law where an agreement has an effect between Member States.[237] Secondly, the breach of the EU competition law or the non-compliance with the procedure leads to imposition of financial sanctions.[238] Third, as the Commission guidelines has outlined, penalty is intended to have a sufficiently deterrent effect not only in order to sanction the undertakings concerned but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 101 and 102 of the TFEU and therefore to punish the perpetrators.[239] Fourth, the fines imposed by the Commission for substantive offences can be up to 10 per cent of the undertaking's turnover in the previous year, therefore can run into billions of Euros and serve as both a sanction and a deterrent.[240]

All these factors substitute the criteria of *Bendenoun v France* case, therefore we have to agree with Imran Aslam and Michael Ramsden stating that the inescapable conclusion is that, for the purposes of the ECHR, the procedures and penalties in the EU competition law are criminal in nature[241] and the natural consequence of this is that those legal persons who are charged with a criminal offence under Article 6(1) should be able to avail themselves of the privilege.[242] Vincents Okechukwu Benjamin[243] upholds such view and declares that ECtHR has held that the general right of fair hearing applies to companies as well.[244] The author relies upon the ruling *Dombo Beheer B.V. v. The Netherlands*[245] where the ECtHR stated that *"[i]f a party to proceedings was a legal person, then the rule disqualifying a party as a witness applied to any natural person who was to be identified with the legal person concerned. A natural person was identified with a legal person if he had acted in the proceedings as its representative, or if he was empowered by law or by its statutes to act as its legal*

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[236] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 71

[237] Riley, A.J. EC Antitrust Modernization: the Commission does very nicely - thank you! Part 1: Regulation 1 and the notification burden. *E.C.L.R*. 2003, 24(11): 606

[238] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 71

[239] Ibidem

[240] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1041

[241] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 71

[242] Ibidem, p. 72.

[243] Vincents Okechukwu Benjamin is Barrister and Solicitor in the Law Society of Upper Canada. His education & professional qualifications include PhD (National University of Singapore), LL.M (Uppsala University, Sweden), LL.M (Lund University, Raoul Wallenberg Institute of Human Rights and Humanitarian Law), BL (Nigerian Law School), LL.B (University of Nigeria).

[244] Benjamin, V. O. The application of EC competition law and the European Convention on Human Rights. *E.C.L.R.* 2006, 27(12): 695

[245] *Dombo Beheer B.V. v. The Netherlands* Series A, No.274, [1993] 18 EHRR 213

representative."[246] Thus, according to this discourse, in our opinion, the privilege against self-incrimination has to be applied in the EU competition law. Especially if we follow ECtHR which indicated that *"the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings".*[247]

However, some commentators argue that the scope of protection should be different depending on whether legal or natural persons are involved.[248] Wouter P.J. Wils indicates that it is not obvious that the ECtHR would grant the same scope of protection under the privilege against self-incrimination to legal persons in proceedings such as those under Regulation No 17/62 or Regulation No 1/2003, to the extent that these proceedings can only lead to the imposition of fines on legal persons.[249] The author accentuates that all the judgments of the ECtHR concerned questions put to natural persons in investigations potentially leading to those natural persons being convicted imprisonment or other sanctions in criminal trials.[250] And as regards the accordance of the proceedings of the Commission to the notion "criminal", the author states that it appears difficult to deny that the application of the criteria set out in the case law of the ECtHR leads to the conclusion that proceedings based on Regulation 1/2003, leading to decisions in which the Commission finds violations of Articles 101 and 102, orders their termination and imposes fines relate to the "determination of criminal charge" within the meaning of Article 6 ECHR.[251] Regardless to the notion of that the Commission combines the investigative and prosecutorial with adjudicative functions and that such functions of the Commission cannot be qualified as an independent and impartial tribunal, Wouter P.J. Wils indicates that this does not make the current system incompatible with Article 6(1) ECHR.[252] Furthermore, the author as well accentuates, that the Commissions' decisions are subject to review before the General Court and that such possibility manifestly provides the full guarantees of Article 6(1) ECHR.[253] However, Imran Aslam and Michael Ramsden strongly disagree to such course of interpretation and declare that in the case of Commission's investigative powers it is as interference with an omission on behalf of a legal

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[246] *Dombo Beheer B.V. v. The Netherlands* Series A, No.274, [1993] 18 EHRR 213, para. 25
[247] *Saunders v United Kingdom* [1997] 23 EHRR 131, para. 74
[248] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 72
[249] Wils, W.P.J. Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2006, 26(4): 577
[250] Ibidem
[251] Wils, W.P.J. The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2004, 27(2): 208-209
[252] Ibidem, p. 209
[253] Ibidem

person.[254] It is where the undertaking fails to do something in a certain way that the Commission imposes its intrusive and coercive powers on the undertaking.[255] Moreover, it is the criminal sanctions that come attached with the failure to act in a way that is problematic: refusal to co-operate could bring fiscal and criminal sanctions.[256] Imran Aslam and Michael Ramsden predicate that with such invasive powers it is unconvincing to argue that the lower standard of protection ought to prevail.[257]

The issue of the EU competition's law incompatibility with the ECRH arises from the case law of ECtHR. The rulings that are mostly accentuated are *Funke*[258] and *Saunders*[259], where the measures taken against the defendants were found infringing Article 6(1) of the ECHR. In *Funke* ECtHR held that a person *"charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6)"*[260] has the right "*to remain silent and not to contribute to incriminating himself*".[261] This was held to include the production of documents and in *Funke* meant that there was an infringement of the Article 6(1) because the French authorities fined the applicant for failing to produce bank statements, evidence of whose existence they had uncovered when searching his house under warrant.[262] In *Saunders* the ECtHR held that *"although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6)".*[263] The ECtHR held that the applicant had been subject to compulsion to give evidence and additionally explained that *"[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused".*[264] The presumption of compulsion was made because the applicant refused to answer the questions, which would have lead to a fine or sanction of two years imprisonment. The ECtHR underlined explicitly that "*the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as*

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[254] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 72
[255] Ibidem
[256] Ibidem
[257] Ibidem
[258] *Funke v France*, Series A, No. 256-A, [1993] 16 EHRR 297
[259] *Saunders v United Kingdom* [1997] 23 EHRR 131
[260] *Funke v France*, Series A, No. 256-A, [1993] 16 EHRR 297, para. 44
[261] Ibidem
[262] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1060
[263] *Saunders v United Kingdom* [1997] 23 EHRR 131, para. 68
[264] Ibidem

exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility."[265] And thus according to Imran Aslam and Michael Ramsden such line of explanation and interpretation underlines the clear rejection of the *Orkem* principle presented by the ECJ, which established that only direct incrimination was unlawful; questions concerning facts that could establish an infringement were permissible.[266] In *Saunders* the ECtHR noticed that extensive use was made of the oral statements during the criminal proceedings, and, in these circumstances, there was a breach of Article 6(1) regardless of whether the statements made were directly incriminating or not.[267] The ECtHR confirmed that the *Saunders* principle applied equally to the documents as to oral explanations in *JB v Switzerland*.[268]

However, it has to be noticed that in *Saunders* case the ECtHR as well held that the principle of self-incrimination *"does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."*[269] Therefore the conclusion can be made that the concept of "independent existence" is complicated and following *Funke*, *Saunders* and further case law of ECtHR[270] the position as regards self-incrimination and Article 6(1) can best be described as confused.[271]

It is agreed that traditionally, criminal sanctions were seen only to be imposed to natural persons,[272] however now such view cannot be invoked. Imran Aslam and Michael Ramsden state that:

"This approach fails to understand properly the notion of corporate personality, where individual shareholders form a company. If the company is unable to avail itself of the full protection of the privilege, it will just seek out a shareholder to challenge its sanctions before the ECtHR, thereby avoiding the rule, where the shareholder must show that he is directly affected by the government interference (*Eckle v Germany* [1983] 5 EHRR 1). However, this is a very difficult threshold to overcome when the interference is aimed at a company. Where the threshold in not met, only the company can bring a challenge before the ECtHR (*Agrotexim Hellas SA* v Greece [1996] 21

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[265] *Saunders v United Kingdom* [1997] 23 EHRR 131, para. 71
[266] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 69
[267] Ibidem, p. 69
[268] *JB v Switzerland* [2001], Reported in 3 ITL Report 663
[269] *Saunders v United Kingdom* [1997] 23 EHRR 131, para. 69
[270] Such as *JB v Switzerland* [2001] Reported in 3 ITL Report 663 and *Heaney and McGuinness v Ireland* [2001] 33 EHRR 12
[271] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1060
[272] Aslam, I. and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 72

EHRR 250). More importantly, this view fails to take into consideration single-individual-operated entities. In these cases, the single professional can either bring a claim in his name or on behalf of the company. Where he does so as a natural person, there is no reason why he should not be granted the full set of rights."[273]

Imran Aslam and Michael Ramsden as well put into attention the legal assessment of the Article 20(2)(e) and oral questions, according to which the Commission is entitled to ask questions of staff members of the undertaking under investigation. Whereas Wouter P.J. Wils indicate that such powers of the Commission does not appear relevant subject to self-incrimination given that Regulation 1/2003 does not allow any penalty to be imposed to such staff members, ant that the information thus obtained by the Commission could not under Article 12 of the Regulation 1/2003 be used in evidence by national authorities to impose on natural persons custodial sanctions or any other sanction of a nature which would make the stricter case law of the ECtHR applicable.[274] However, it fails to account for the intricate relationship between the individual and the company.[275] The view is that where individuals are authorised to speak in behalf of undertakings, their acts can then be imputable to the undertaking, so, when an individual responds to a question, it is though the undertaking is "speaking".[276] Therefore the assumption is made that where a fine is imposed on the undertaking for refusing to "speak", the undertaking should avail itself on the privilege.[277] And nevertheless it is thought that the privilege pronounced in *Orkem* for documents should apply by analogy, it is as well indicated that those principles do not conform ECHR rights.[278] The privilege defined by *Funke* and *Saunders* should apply equally to Article 20(2)(e).[279] *Saunders* makes it clear that those principles equally apply to oral remarks. In that case, Article 20(2)(e) in another example of the Commission's powers being contrary to the ECHR.[280]

Alison Jones and Brenda Sufrin also agree with the criticism and additionally indicate that the Commission's actions may not be in line with the interpretation by the ECtHR.[281] However, as far as the EU law is concerned of the principle of self-incrimination, the General Court reviewed it in *Mannesmannröhren-Werke AG v Commission*[282] in 2001 and restated the decision adopted in *Orkem* case. Even though the General Court held that that Commission's requests about the purpose of the

[273] Aslam, I. and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 73
[274] Wils, W.P.J. Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition.* 2006, 26(4): 578
[275] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 73
[276] Ibidem
[277] Vesterdorf, B. Legal Professional Privilege and the Privilege Against Self-incrimination in EC Law: Recent Developments and Current Issues. *Fordham International Law Review*. 2004, 28 (1179): 724
[278] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 73
[279] Ibidem
[280] Ibidem
[281] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1060
[282] Case T-112/98, *Mannesmannröhren-Werke AG v Commission* [2001] ERC II-729

meetings and the decisions adopted (note: the meetings and the decisions of the defendant with another companies and the agreements thereof) *"may compel the applicant to admit its participation in an unlawful agreement contrary to the Community rules on competition"* however, the rest of the decision subject to the request of other additional information was upheld.

Thus, in our opinion, the EU institutions should not avoid to determine the scope of the principle indeed accurately having in mind the gravity of the EU competition law and clear misunderstanding that at the moment exists. The created legal ground for the EU to accede to the ECHR underline the importance of the need of the extensive interpretation of the principle according to the EU law. As it is indicated in the reasoning above, the view of the ECJ and the ECtHR of the principle is different. The ECtHR tend to apply the principle for the legal persons as well, notwithstanding the other differences disclosed above. Therefore, having in mind the fact that the ECJ in some cases avoid the interpretation due to the reasons of different legal and/or factual situations, we believe, that not necessarily ECJ but the institutions of the EU should intend to provide the extensive interpretation and explanation of the principle, clearly disclosing the subject of the principle as well as the content itself.

3.3. Right to a Private Life

Right to a private life is enshrined in the Article 8(1) of the ECHR. The Article states that *"everyone has the right to respect for his private and family life, his home and his correspondence"* and that there shall be no interference justifiable unless it *"is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"*. Thus we shall analyse the applicability of this fundamental principle in respect to the EU competition law.

The right of privacy indicated in the Article 8(1) of the ECHR often arises in the case of the dawn raids in business premises as well as in the private premises as it is now lawful according to Regulation 1/2003. As already indicated in the second part of this master thesis, under Articles 20 and 21 of Regulation 1/2003, the Commission may carry out inspections at, respectively, premises of undertakings concerned or premises of any director, manager or other member of staff of the undertaking concerned.[283] In course of the interpretation of the Article 21 of Regulation 1/2003 the right to protect one's home is reflected as it allows inspection only in case of reasonable suspicion that records related to the business and to the subject matter of the inspection which may be relevant to

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[283] Peter, R.Q.C. Ensuring that Effectiveness of Enforcement Does Not Prejudice Legal Protection. Rights of Defence. Fundamental Rights Concerns. *European Competition Law Annual*. 2006, 627: 633

prove a serious violation of EU competition law are being kept in any other premises.[284] Furthermore, the prior authorization from the national judicial authority of the Member State concerned is required.[285] It might firstly appear that the right of the Article 8(1) of the ECHR is ensured, however, when the ECJ first encountered itself with the principle of the inviolability of the home underlined in Article 8(1) of the ECHR, ECJ acknowledged that such interference is permissible and that the Commission did not infringed the rights of private life, since such actions were in accordance with the law and necessary in democratic society in the interests of the well being of the European Union.[286] Therefore, the Court held the rights of the applicant were not in breach.

The issue of the applicability of the Article 8(1) came up again with the case *Hoechst AG v. Commission*[287] where the ECJ took very similar approach as in the case of *Orkem* by ruling that the Article 8(1) applies only to natural persons and that the applicability of such right to legal persons "*is not true [...] because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities"*.[288] The Court held that "*the protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises"*.[289] Thus, in our opinion, it might be stated that ECJ went ahead to apply other criteria by which any intervention by public authorities in the private activities of both natural and legal persons, must be justified by law. It went ahead to consider grounds for protecting undertakings from arbitrary and disproportionate intervention.[290] As Vincents Okechukwu Benjamin concludes, the Court yet again showed the unwillingness to render its analysis in human rights terms. As in regards of the protection of human rights and the General Court's and ECJ's unwillingness to follow such rights, A. Jones and B. Sufrin accentuates that in the case of *Niemietz*[291] the ECtHR subsequently said that there is "*no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."*[292] Moreover it was stated that "*to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to*

[284] Weiss, W. Human Rights and EU antitrust enforcement: news from Lisbon. *E.C.L.R.* 2011, 32(4): 193
[285] Ibidem
[286] Case 136/79 *National Panasonic (UK) Limited v Commission of the European Communities* [1980] ECR 2033, para. 19
[287] Joined cases 46/87 and 227/88 *Hoechst AG v. Commission of the European Communities* [1989] ECR 2859
[288] Ibidem, para. 17
[289] Ibidem, para. 18
[290] Benjamin, V. O. The application of EC competition law and the European Convention on Human Rights. *E.C.L.R.* 2006, 27(12): 698
[291] *Niemietz v Germany*, Series A, No. 251-B, [1993], 16 EHRR 97
[292] Ibidem, para. 29

protect the individual against arbitrary interference by the public authorities".[293] In the *Niemietz* case the ECtHR held that a lawyer's office has to be protected. The ECtHR upheld that its interpretation was necessary since otherwise unequal treatment could arise, in that self-employed persons may carry on professional activities at home and private activities at their place of work.[294] It is important to note that in *Société Colas Est*[295] the ECtHR confirmed that *Niemietz* applies not only to certain professional or business activities or premises but also to legal persons in general. The ECtHR held that "*the Convention is a living instrument which must be interpreted in the light of present-day conditions [...] Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises"*[296] Therefore, we should follow the opinion of Imran Aslam and Michael Ramsden and state that the argument that Article 8 of the ECHR does not apply to business premises is no longer defensible. The question that Imran Aslam and Michael Ramsden raise is whether it can be said that the actions of the Commission are proportionate within the meaning of its being necessary in a democratic society.[297] The authors in this regard follow the ECtHR which underlines the criteria of the provisions accordance with the law within the meaning of Article 8 (2). It requires:

a) for the applied measure to have some basis in domestic law;
b) the law in question has to refer to the quality. It has to be accessible to the person concerned, who must moreover be able to foresee its consequences for him; and
c) has to compatible with the rule of law.[298]

Thus following these criteria, firstly, the EU competition law has to fit into the category of domestic law. According to the ECtHR the laws of the EU are found as *"generally applicable" and "binding in its entirety" so that it applied to all Member States, none of which could lawfully depart from any of its provisions",*[299] therefore, the first requirement is confirmed. A second criterion is satisfied as the case-law of EU as well as the legal acts are published in the Official Journal of the EU, which is accessible to all. Third requirement is satisfied as well, as the clear reading of Regulation 1/2003 shows the clarity of when and where the Commission can act.[300]

The second question that needs to be confirmed according to Imran Aslam and Michael Ramsden is whether the laws of EU antitrust pursue a legitimate aim? As the authors indicate and the

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[293] *Niemietz v Germany*, Series A, No. 251-B, [1993], 16 EHRR 97, para. 31
[294] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1055
[295] *Société Colas Est and Others v. France* [2004], 39 EHRR 17, para. 40
[296] Ibidem, para. 41
[297] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 75
[298] *Huvig v. France* [1990] A176-B, 12 EHRR 528, para. 26
[299] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* [2006] 42 EHRR 1, para. 145
[300] Aslam, I. and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 76

case-law of the ECJ confirms, that the legitimate aim of the proceedings under the EU competition law is "*to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers",*[301] thus to ensure the protection in the EU. If we follow the ruling of the ECtHR of the *Société Colas Est* the Court underlines, that the interests of law has to cover *"both "the economic well-being of the country" and "the prevention of crime",*[302] therefore EU competition laws fall into this category as well.

The last question raised by the authors is the necessity of the competition rules to the democratic society or in other words, whether it corresponds to a pressing social need and is proportionate to the aim pursued.[303] Imran Aslam and Michael Ramsden indicate that the actions of the Commission have to be found violating the Article 8 of the ECHR, on the grounds that:

a) the Commission enjoys broad powers under Article 20 of Regulation 1/2003;
b) the Commission as not a judicial authority at its own right grants itself powers to conduct on-the-spot investigations;
c) the Commission is empowered to conduct dawn raids even without prior judicial authorization.

However, Mr Advocate General Mischo argues that the powers granted to the Commission do not infringe the Article 8 of the ECHR.[304] According to Mr Advocate General Mischo, undertakings are entitled to refuse to the inspections conducted by the Commission in respect of the written authorization. Mr Advocate General Mischo declares that undertakings are as well protected by their national judicial authorities where "*the national court is able to legitimately refuse to grant the authorisation requested if the Commission decision did not contain any of the elements mentioned above, or if the description of the conduct complained of is so imprecise, or lacking, that it renders impossible any assessment of the possibly excessive or arbitrary nature of the measures envisaged, or, again, if the subject-matter of the investigation is worded in terms which are manifestly too vague (for example, to ascertain whether an undertaking has engaged in anti-competitive practices') to enable it to carry out the review entrusted to it."*[305] Subject to indications above Advocate General comes to the conclusion that there is no infringement of the Article 8 of the ECHR. However, he as well accentuates that it is important to uphold resolutely the principle that the assessment of the justification, that is to say, of the necessity, for the investigation cannot be a matter for the national court as the position is different in European Union law, where, in that case, review of the necessity for the search is a matter

[301] Case 136/79 *National Panasonic (UK) Limited v Commission of the European Communities* [1980] ECR 2033, para. 20
[302] *Société Colas Est and Others v. France* [2004], 39 EHRR 17, para. 44
[303] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 76
[304] Opinion of Mr Advocate General Mischo delivered on 20 September 2001. Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011, para. 34-39
[305] Ibidem, para. 68

for the Court of Justice, and it alone.[306] Such assessment, in our opinion, does not show the legitimacy, but yet again creates a misunderstanding where the actions of the Commission and the rights provided to the national judicial authorities contradict to the legitimacy of the proceedings the Commission is entitled to.

It is concluded that the first point excluded by Advocate General has to be rejected since up to and until the point where the undertaking does not oppose to the investigation, the Commission's inspection remains invalid "duo to its not being authorised by an independent judicial authority".[307] Imran Aslam and Michael Ramsden in addition add that as Article 20(8) provides, the national court authorising a judicial warrant cannot call into question the legality of the Commission's decision.[308] It is important to mention that Advocate General, who legitimizes the powers of the Commission, inter alia as well indicates the same limit that national judicial authorities are subject to, thus he however does not indicate it neither as the limitation to the national judicial authorities, nor as the breach of the Article 8 of the ECHR.

The second point that is provided as legitimizing the powers of the Commission "seems to neglect the fact that national judicial authorities can only review the legality of the inspection *after* the search takes place".[309] Whereas, according to the ECtHR in the case of *Société Colas Est* it was explicitly indicated that the judicial warrant is required *prior* to the investigation.[310] Furthermore, whilst officials of the relevant NCA may accompany the Commission, this does not equate to having a senior police officer present.[311] Nevertheless Advocate General points out that the General Court will annul the decision and the Commission will be prohibited from using any documents it has photocopied and also any information it has obtained orally from the undertaking's employees.[312] However, it has to be indicated that a judicial authorization emphasized by Regulation 1/2003 in Article 20(6) is not prescribed as a general prerequisite, nor recognized as a general principle of EU, it is necessary only for the enforcement if such authorisation is required by national rules (Article 20(7), Regulation 1/2003).[313] In several EU Member States domestic law does not even require judicial authorisation, which means, that in case international rules do not call for the judicial authorisation,

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[306] Opinion of Mr Advocate General Mischo delivered on 20 September 2001. Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011, para. 58-60
[307] Aslam, I. and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 77
[308] Ibidem
[309] Ibidem
[310] *Société Colas Est and Others v. France* [2004], 39 EHRR 17, para. 49
[311] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 77
[312] Opinion of Mr Advocate General Mischo delivered on 20 September 2001. Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-9011, para. 60
[313] Weiss, W. Human Rights and EU antitrust enforcement: news from Lisbon. *E.C.L.R.* 2011, 32(4): 194

inspection could be enforced by the officials of NCAs or by policemen.[314] Therefore Wolfgang Weiss[315] indicates that such actions that the Commission is entitled to could and, as we believe, collide with the requirement of proportionality[316] since according to the case law of ECtHR the exceptions of Article 8 of the ECHR have to be interpreted narrowly and they must convincingly be established.[317] Thus, nonetheless the judicial authorization of the Member State concerned is in some cases needed (in case the Member State national law requires it), there is still a breach of the Article 8 of the ECHR.

In respect of proportionality it needs to be indicated, that the limitation upon which the national judicial authorities are under, can be revealed by the fact that not only the decisional powers are limited, but the documents on the basis of which the national courts may carry out the control may therefore be limited.[318] For the Commission it is enough to give a precise account of its suspicion, it does not need to indicate the nature of the evidence on which its suspicions are based.[319] ECJ admits that *"it is not indispensable that the information communicated should precisely define the relevant market, set out the exact legal nature of the presumed infringements or indicate the period during which those infringements were committed."*[320] Finally, the Commission need not to transmit the information on the competition case to the national court in writing but may merely provide an oral answer to the national court.[321]

Therefore, in our opinion, such regulation of the powers of the Commission cannot be indicated as ensuring the rights of the defence for the undertakings. Such conclusion follows from the fact that on the one hand the scope of the rights of defence depends on the national legislation, i.e. whether the judicial authorization is needed or not, and on the other hand - the protection under national legislation is limited, i.e. in case the authorization is needed, the national judicial authorities have limited grounds to oppose to the Commission.

Nevertheless the ECtHR adapted its case law to the nowadays circumstances and renewed the criteria for the protection of fundamental rights, the General Court in the *PVC cartel II*[322] case stated that "*[t]he fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since the judgments in Hoechst [...] it has no*

[314] Weiss, W. Human Rights and EU antitrust enforcement: news from Lisbon. *E.C.L.R.* 2011, 32(4): 194

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[316] Weiss, W. Human Rights and EU antitrust enforcement: news from Lisbon. *E.C.L.R.* 2011, 32(4): 194

[317] *Société Colas Est and Others v. France* [2004], 39 EHRR 17, para. 47

[318] Ameye, E. M. The interplay between human rights and competition law in the EU. *E.C.L.R.* 2004, 25(6): 340

[319] Ibidem

[320] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, para. 82

[321] Ameye, E. M. The interplay between human rights and competition law in the EU. *E.C.L.R.* 2004, 25(6): 341

[322] Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV v Commission of the European Communities* [1999] ECR I-931

direct impact on the merits of the solutions adopted in those cases."[323] We would intend to accentuate, that on the appeal of this case the ECJ found it was not necessary to rule on this matter.[324] The change of the case law of the ECJ was set out in the case *Roquette Frères*[325] where ECJ finally decided to underline the importance of the ECHR and stated that *"for the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst."*[326] However, Imran Aslam and Michael Ramsden indicate that the "triumph was shortly lived",[327] as after the adoption of Regulation 1/2003 the extension of the powers of investigation of the Commission to the homes of directors and employees of undertakings was expressly provided.[328] Therefore it remains to be seen whether the ECJ will continue to limit its analysis to the nature and scope of the European Commission's powers of investigation conferred by Regulation 1/2003.[329] And in respect to such view, we believe, that the opinion we indicated above remains to be actual and relevant.

As regards Lithuanian competition law and the case-law, none of them indicate any of the provisions or interpretations regarding such right at all. Therefore, in our opinion, the assumption has to be made, that in case such question arises, it should be covered following the EU legislature and ECJ case-law, since the Supreme Administrative Court of Lithuania expressly indicated that the principles of EU have to be followed.

3.4. Right to be Heard

It is indicated that although the scope of individuals' right to be heard is flexible and must be determined in relation to the context in which it must be exercised, at a minimum it must confer a right to know the case against them, to be acquainted with the relevant evidence and to be given an opportunity to refute it.[330] Regulation 17/62 did not expressly provide the right to be heard,[331] nonetheless in Recital 32 of Regulation 1/2003 it is directly stated that "[t]he undertakings concerned

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[323] Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV v Commission of the European Communities* [1999] ECR I-931, para. 420

[324] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1055

[325] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011, para. 29

[326] Ibidem

[327] Aslam, I and Ramsden, M. EC Dawn Raids: A Human Rights Violation? *Competition Law Review*. 2008, 5(1): 77

[328] Benjamin, V. O. The application of EC competition law and the European Convention on Human Rights. *E.C.L.R.* 2006, 27(12): 698

[329] Ameye, E. M. The interplay between human rights and competition law in the EU. *E.C.L.R.* 2004, 25(6): 341

[330] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 33

[331] According to the Article 19(1) of Regulation No 17/62 the principle was applied that required the Commission to deal in its final decision only with those objections on which the undertakings and associations of undertakings concerned have had the opportunity to put their case.

should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised."[332] Accordingly Article 27 of Regulation 1/2003 states that the undertakings concerned must be afforded the opportunity to be heard on the allegations of anti-competitive conduct raised by the Commission against them.[333] Thus we deem important to indicate that the Commission must grant for the undertakings the right to be heard on matters to which the Commission has taken objection before taking decisions finding an infringement, taking interim measures, or imposing fines or periodic payments. Therefore, in order for the undertakings to perform such right in the competition procedures, the Commission does not have to be in course of taking a final decision; such right might be performed even if the Commission is still in the course of investigation phase.[334] As it was underlined in the second part of this master thesis "*the competition rules prescribe two successive but clearly separate procedures: first, a preparatory investigation procedure, and secondly, a procedure involving submissions by both parties initiated by the statement of objections."*[335] Nevertheless the Court indicates that only after having carried out an investigation the Commission is able to decide whether or not to initiate the infringement procedure by issuing the statement of objections, the Court as well accentuates that it does not, however, follow that after issuing the statement of objections the Commission is prevented from continuing with its investigation, inter alia by sending requests for further information.[336] Therefore the Commission, according to the case-law, is perfectly entitled, to take account of the arguments or other evidence put forward by the undertakings concerned and to continue with its fact-finding after the adoption of the statement of objections with a view to withdrawing certain complaints or adding others as appropriate. In particular, provided that the information requested is relevant, those provisions do not restrict the power of the Commission to send requests for information after the statement of objections has been issued.[337] Accordingly, the mere fact that the Commission continues its investigation after issuing the statement of objections by sending requests for further information cannot in itself affect the validity of the statement of objections.[338]

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[332] Recital (32) of Regulation 1/2003

[333] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 35

[334] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1071

[335] Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* [2003] ECR II-3275, para. 110-112

[336] Ibidem

[337] Ibidem, para. 118

[338] Ibidem, para. 120

At the end of the investigative phase the Commission may decide to close the case or to proceed to a commitments decision[339] if the parties are offering commitment at that stage.[340] In case the Commission finds an infringement and the undertakings do not offer any commitments, it begins a formal procedure.[341] If at the end of the proceedings the Commission finds that the competition rules have been infringed it may adopt a decision under Regulation 1/2003, Articles 7 or 8, and may impose a penalty under Article 23.[342]

Therefore we shall analyse the right to be heard that the undertakings are entitled to before the Commission executes the decision.

The right to a fair hearing, as Dr. Themistoklis Giannakopoulos[343] indicates, implies two basic elements: first, an undertaking must be made aware of the case against it; second, it must be given a reasonable opportunity to make its views on the case known.[344] Or in other words, the undertaking must be heard. Such right in all proceedings initiated against persons that are liable to culminate in a measure adversely affecting that person is a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question.[345] The ECJ in *Transocean Marine Paint*[346] held that this right *"applies as the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known"*.[347] It is important to note, that the principle was soon followed in *Hoffmann-La Roche & Co. AG v Commission*[348] although the Court used more restrictive terminology in referring to "the right to be heard before a sanction or penalty" is inflicted.[349] Such interpretation that Jaime Flattery[350] indicates as "formalistic" was repeated in *Hoechst AG,*[351] however,

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339 Regulation 1/2003 contains a new power whereby the Commission, without taking a final decision finding an infringement, may nevertheless render undertakings given by the parties binding upon them. The Commission may wish to do this where it has identified competition concerns but the parties are willing to give commitments to the Commission about their future conduct in order to avoid a finding of infringement. It is not suitable where the Commission intends to impose a fine and is unlikely to be used in cases of hardcore cartels. (Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1084) The Commitments decisions are regulated under the Article 9 of the Regulation 1/2003.

340 Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1070

341 Ibidem, p. 1071

342 Ibidem

343 Dr. Themistoklis Giannakopoulos is Junior Partner at Avramopoulos & Partners (Consistently ranked among Greece's top law firms). He is a former stagiaire at DG IV-Competition of the European Commission. His education & professional qualifications include LL.B. (University of Athens Law School), LL.M. (University of Kent at Canterbury, U.K.), Ph.D. (European University Institute Florence).

344 Giannakopoulos, T. The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures. *World Competition*. 2001, 24(4): 541

345 Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1071

346 Case 17-74 *Transocean Marine Paint Association v Commission of the European Communities* [1974] ECR 1063

347 Ibidem, para. 15

348 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para. 9

349 Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review*. 2010, 7(1): 55

350 Flattery, J. B. is a trainee solicitor at Matheson Ormsby Prentice, Dublin. His education & professional qualifications

was soon abandoned and the courts began to adopt more liberal position whereby a measure only had to adversely affect or even significantly affect person's interests.[352] Expansion thus granted the right to be heard to complainants and other interested parties in the infringement proceedings, however we shall not analyse this subject matter in detail, as the extent of this master thesis is limited.

Right to be heard in Lithuanian Law on Competition is determined in the Articles 32 and 36(3) whereby it is stated, that the undertakings are entitled to submit their opinion in writing when notified in writing of the conclusions of the Competition Council and that the resolution of the Competition Council must be based only on those conclusions and facts and circumstances of the investigation with respect to which the person suspected of the infringement of the Law on Competition has been afforded an opportunity to provide explanations. It has to be noted that Lithuanian case-law notably follows the EU case-law.

Thus, as regards EU law, the right to be heard is embedded in the Article 27 of Regulation 1/2003 and the case-law of ECJ. However, it must be noted that until Regulation 1/2003, the right to be heard was not understood as a duty of the Commission in case the Commission was replacing a decision ruled invalid for procedural defects at the final, authentication stage with another which relies on the same evidence as that which was annulled.[353] According to the EU competition rules, the Commission satisfies the requirement of such right by sending for the undertakings statement of objections (hereinafter - SO), to which undertakings may then make submissions in reply and are offered the opportunity of an oral hearing.[354] The procedures are now set out in Commission Regulation 773/2004.[355]

Thus, in order to analyse the right to be heard thoroughly, the SO has to be defined. As the ECJ has consistently indicated, the SO must satisfy minimum requirements as regards its contents.[356] In *Boehringer Mannheim GmbH v Commission*[357] the ECJ stated that SO "*shall set forth clearly albeit succinctly the essential facts on which it relies and that in the course of the administrative procedure it shall supply the other details which may be necessary for the defence of the persons concerned*."[358] In

include LLM at Université de Luxembourg.

[351] Joined cases 46/87 and 227/88 *Hoechst AG v. Commission of the European Communities* [1989] ECR 2859, para. 15

[352] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 55

[353] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1071

[354] Ibidem

[355] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123

[356] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 36

[357] Case 45-69 *Boehringer Mannheim GmbH v Commission of the European Communities* [1970] ECR 769

[358] Ibidem, para. 9

later case-law, for example in *Atlantic Container Line AB and Others v Commission*[359] the General Court as well indicated that *"[a]ccording to the case-law, regard for the rights of the defence requires that the undertaking concerned shall have been able to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based*.[360] Consequently, in principle only the documents cited or mentioned in the statement of objections are admissible evidence as against the addressee of the statement of objections.[361] Moreover, as far as the documents not mentioned statement of objections are concerned, they may, according to the case-law, be used in the decision as against the addressee of the statement of objections only if that person could reasonably infer from the statement of objections the conclusions which the Commission intended to draw from them. As the General Court indicated, *"[i]n order to ascertain whether the applicants could reasonably infer the conclusions which the Commission drew from the documents in question in the contested decision, it is necessary to take account not only of the content of the statement of objections but also of subsequent circumstances from which such conclusions could be inferred - in the present case, the terms of the requests for information which led to the disclosure of the documents in question and the content of those documents.* [362] Therefore the General Court stated, that not only the SO itself has to correspond to certain requirements, the undertakings are as well are entitled to know the evidence the Commission relies upon. The requirement to issue the SO is underlined in the Regulation 773/2004, Article 10(1). Additionally to the requirements set out for the issuance and according to the *SA Musique Diffusion française and others v Commission*[363] the Commission is required to state in the SO the duration of the alleged infringement. Article 10(2) of Regulation 773/2004 states that the parties are entitled to reply to the SO within an indicated time limit. It is noteworthy that the Commission is not entitled to impose a fine on an undertaking or an association of undertakings without having previously informed the party concerned,[364] therefore without the indication of its intentions in the SO. Following the case law, according to which the situation when the Commission imposes a fine on an undertaking without first having informed it of the objections relied on against, is held to be unlawful.[365] It is noteworthy that the Commission cannot fine an undertakings for its direct and personal involvement in an infringement if the SO has referred

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[359] Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* [2003] ECR II-3275

[360] See also: Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25

[361] See also: Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, para. 21; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, para. 55; and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, para. 34.

[362] Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission of the European Communities* [2003] ECR II-3275, para. 162 and 173

[363] Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities* [1983] ECR 1825, para. 21

[364] Joined cases T-25/95 and others *Cimenteries CBR and Others v Commission of the European Communities* [2000] ECR II-491, para. 480-481

[365] Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG and Others v Commission of the European Communities* [2010] OL C 134 ECR I-7191, para. 37

only to its liability as a parent company for the conduct of its subsidiary as if an undertaking does not know the capacity in which it is alleged to have committed an infringement its ability to defend itself is compromised.[366]

However, Supreme Administrative Court of Lithuania states, that subsidiaries are subject to the investigation, nonetheless indicated in the issued document or not, as the subsidiaries are subject to the direct influence of the undertaking.[367] The only exception in case the Court deems to release the responsibility of the subsidiary is when subsidiary is capable to prove that it operated without under any of the influence of the undertaking, i.e. independently.

Nonetheless, we deem important to note that it is not sufficient for the Commission to rely on items of evidence annexed to the SO which are not expressly referred to in the body of the SO as that infringes the rights of defence. The addressees of the SO are as well entitled to exercise their rights to inspect the file, yet only to the documents that are accessible. The right to access the file shall be presented in the following section of this master thesis.

SO is not an act that can be challenged before the Courts,[368] therefore an action for annulment cannot be brought, as it is only a preparatory act and can be challenged in an action brought against the act concluding the proceedings[369], i.e. decision. Nevertheless, it is noteworthy that in case new facts or evidence arise and there is a fresh investigation, this will necessitate a new SO.[370] Moreover, an inadequate SO amounts to a breach of an essential procedural requirement and so is a ground for annulment under Article 263.[371] The views set out by the Commission in the SO are not binding upon it and it is inherent in the nature of the SO being merely provisional.[372] According to the ECJ the Commission is free to depart from the standpoint it has taken in the SO as *"[t]he Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned."*[373] Therefore, the Commission is not obliged to maintain the factual or legal

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[366] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1072

[367] Decision of the Supreme Administrative Court of Lithuania. 8 December 2008 *Competition Council of the Repuvlic of Lithuania v Mažeikių nafta, UAB and other privies.* (Case No A-442-715-08)

[368] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 61

[369] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1072

[370] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 61

[371] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1071

[372] Case C-328/05 P *SGL Carbon AG v Commission of the European Communities* [2007] ECR I-3921, para. 62

[373] Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels*

assessments set forth in SO. On the contrary, it must give as reasons for its ultimate decision its final assessments based on the situation existing at the time the formal proceedings are closed.[374] Furthermore, the Commission is not obliged to explain any differences with respect to its provisional assessments set out in the statement of objections.[375]

Lithuanian case-law as well follows such assessment of the EU courts. According to the Article 26(4) of the Lithuanian Law on Competition, authorized officials of the Competition Council are entitled produce a document issued by the Competition Council confirming their powers, the purpose and time limits of the investigation, thus the equivalent to the SO. The Supreme Administrative Court of Lithuania by following EU case-law indicates that the Competition Council in the issued document has to invoke only the main factual and provisional assessments of the investigation, since the Competition Council is entitled to change the issued document in course of the investigation.[376] The Court underlines such reasoning by indicating that the issued document is only a procedural and a preparatory act.

Arianna Andreangeli indicates that the oral hearing has gained increasing importance as a means to clarify and test the arguments and the evidence for and against the case made by the Commission in its SO.[377] Article 12 of Regulation 773/2004 gives the parties to whom an SO has been addressed the right to an oral hearing, if they request it in their written submissions.[378] Implementing Regulation 773/2004, the Notice on Access to File[379] and the Commission Decisions[380] which established and defined the role of the Hearing Officer, according to whom the oral hearing is controlled and supervised, are the points of reference in defining the extent of this right. It is noteworthy that the last Decision of the Commission, regarding the Hearing Officer and released in 2011, was adopted after the consideration of the Best Practice in competition proceedings[381] and as Jamie Flattery indicates, in response to strong criticism from applicants, lawyers, politicians, academics and even judges.[382] Decisions were introduced in order to show that the Commission is

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Association (Impala) [2008] ECR I-4951, para. 63

[374] Ibidem, para. 64

[375] Ibidem, para. 65

[376] Decision of the Supreme Administrative Court of Lithuania. 8 December 2008 *Competition Council of the Repuvlic of Lithuania v Mažeikių nafta, UAB and other privies.* (Case No A-442-715-08)

[377] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 47

[378] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1080

[379] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 OJ C 325

[380] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings OJ L 162 , 19/06/2001, replacing the earlier Terms of reference in Decision 94/810/ECSC, EC; Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings OJ L 275, 20/10/2011

[381] Best Practices in proceedings concerning articles 101 and 102 TFEU, OJ C 308, 20.10.2011

[382] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 59

"*willing to listen to stakeholders, learn from experience and make improvements, while maintaining efficient procedures."*[383] According to Decisions of the Commission, the Hearing Officer (hereinafter - HO) is "the guardian of fair proceedings"[384] before the Commission. However, we intend to note, that the HO is not equivalent to the judge nor the hearing before him equals to a trial. HO does not adopt any kind of decision, nevertheless he is obliged to report that the Competition Commissioner on the hearing and the conclusions to be drawn from it in respect of the rights to be heard.[385] This report is not made available to the parties. Nevertheless, the HO makes a final report which is attached to the draft decision submitted to the of Commissioners and which is made known to the addressees of the decision and is published in the Official Journal together with the decision.[386] However, despite the fact that final reports are made available, in the *Hoechst GmbH*[387] the General Court maintained that:

"It should be noted at the outset that the hearing officer's report constitutes a purely internal Commission document, which is not intended to supplement or correct the undertakings' arguments and which therefore does not constitute a decisive factor which the Community judicature must take into account when exercising its power of review."[388]

Nevertheless, the Commission in its Decision[389] underlines that "Hearing Officer has been generally perceived as an important contribution to the competition proceedings before the Commission due to the independence and expertise",[390] however the HO is still regarded as a Commission's official, is remunerated by and has his office in the same buildings as DG competition.[391] Therefore, we have to agree to the position Jamie Flattery indicates, that regardless of personal integrity of HO character, the position does not even remotely attract the same degree of impartiality in the eyes of the parties as a neutral judge would posses.[392] It is noteworthy, that Regulation 772/2004, Article 14(5) provides that the lawyers may assist the persons being heard. However, it does not say *represented by* since it is considered necessary that someone from the undertaking itself (although it can be an in-house lawyer) is present to provide relevant information

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[383] Press release (IP/11/1201): Commission reforms antitrust procedures and expands role of Hearing Officer. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1201&format=HTML&aged=0&language=EN&guiLanguage=en [Access time: 05 03 2012]

[384] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings OJ L 162, 19/06/2001

[385] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1073

[386] Ibidem

[387] Case T-161/05 *Hoechst GmbH v Commission of the European Communities* [2009] ECR II-3555

[388] Case T-161/05 *Hoechst GmbH v Commission of the European Communities* [2009] ECR II-3555, para. 176; Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV v. Commission* [2002] ECR I-8357, para. 375

[389] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings OJ L 275, 20/10/2011

[390] Ibidem, Reference (5)

[391] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 59

[392] Ibidem, p. 59-60

about the organization.[393] Nevertheless on 2011 the Decision of the Commission was released, according to which, for example, the HO is enabled:

a) to intervene during the investigatory phase of proceedings (whereas previously, parties were entitled to refer disputes to the HO only following the issue of the SO);
b) to resolve issues regarding the confidentiality of communications between companies and their external lawyers (parties will also be able to refer a matter to the HO if they feel that they should not be compelled to reply to questions that might force them to admit to an infringement) .

However, these improvements, in our opinion, should not be underlined as radical step forewords the right of defence. There still is no separation of functions within the case team between those who investigate and those who decide, the final decision is continued to be taken by political appointees; there is no hearing by a decision maker confronted by contrasting views of the facts.

Thus as the nature of the Hearing Officer's role is limited, the question of whether competition procedure complies with Article 6(1) of the ECHR is relevant. In addition there has to be noted, that considerable problems as well arise over the content of the rights of defence during these procedures, particularly where the rights of undertakings to know the case against them conflict with the Commission's duty to preserve the confidentiality of business secrets.[394]

The general EU law principle of the right to be heard is reflected in the now legally binding Charter of Fundamental Rights of the European Union.[395] Article 41 of the Charter states that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union". Most importantly this includes "the right to every person to be heard, before any individual measure which would affect him or her adversely is taken". In this sense the rule has developed into an objective standard of good administration it not only serves the individual interest, but also the common interest by its observance of procedural requirements in the administrative process.[396] The Court's attempts to define and expand the scope of the right to a fair hearing have also been borne out of the development of overlapping principles, such as the "principle of care" and "the principle of good administration".[397] Therefore, in addition to the merging principles towards common concept of "fairness", the convergence of fundamental rights standards in the EU with those of ECHR is important for the assurance of the

[393] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1073
[394] Ibidem, p. 1071
[395] Charter of Fundamental Rights of the European Union attached to the Treaty of Lisbon (TFEU) OJ 2000 C 364
[396] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 54
[397] Ibidem

defence rights in competition cases.[398] Undertakings repeatedly appeal against Commission decisions on the ground that the competition procedures are contrary to Article 6(1) of the ECHR[399] which provides that "in the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal". The ECJ has held that the Commission cannot *"be classed as a tribunal within the meaning of article 6 of the European Convention for the Protection of Human Rights"*[400] as its decisions are those of an administrative authority. However, recent Opinion of Advocate General Bot indicates that the procedures of the Commission "*might be described as 'quasi-criminal' proceedings in which the Commission enjoys a very broad discretion and where judicial review is restricted."*[401] Therefore, in our opinion, the protection of the right to be heard has to be ensured in the relevant approach as to the Article 6 of the ECHR. The element, though, that is missing in application of the Article 6 of the ECHR is the requirement of the independent tribunal. The General Court has held that *"the Commission cannot be described as a "tribunal" within the meaning of Article 6 of the ECHR. The applicant's argument that the Decision is unlawful simply because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions is therefore irrelevant. The Court emphasises, however, that the Commission is required, during the administrative procedure before it, to observe the procedural guarantees provided for by Community law."*[402] The Court as well held, that the rights of the parties to challenge Commission decisions in the Court satisfy the requirements of Article 6(1). Following such observation, the General Court indicated itself to be an independent and impartial court *"established in order particularly to improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts."*[403]

Although, Arianna Andreangeli states that the scope resulting from the EU legislation and the case-law, is to be considered as well established legal standard binding the European Union institutions in exercising their powers.[404] Whereby she additionally assesses that European Union

[398] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1):55-57
[399] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Second Edition. Oxford: Oxford University Press, 2004, p. 1144
[400] Joined cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980] ECR 3125, para. 81
[401] Opinion of Advocate General Bot delivered on 2 April 2009. Joined Cases C 322/07 P, C 327/07 P and C 338/07 P *Papierfabrik August Koehler AG, Bolloré SA, Distribuidora Vizcaína de Papeles, SL v Commission of the European Communities* [2009] ECR I-7191, para. 84
[402] Case T-348/94 *Enso Española SA v Commission of the European Communities* [1998] ECR II-1875, para. 56
[403] Ibidem, para. 63
[404] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 60

legislation and Courts demonstrated the scope and safeguards are consistent with the standards in the light of the principles enshrined in Article 6(1) of the ECHR, if not even extensive.[405]

However, we intend to state, that even though the Commission shows the wish to protect the right to be heard, as the Commission adopted the Decision on authorising the Hearing Officer to broader powers, the right is not yet sufficiently enough secured. The proceedings of the Commission despite having been identified as "administrative", might as well be presupposed as criminal,[406] therefore it requires respective guarantees for the parties exercising their rights of defence. Therefore, we deem important to note, that the role of the Hearing Officer is yet not enough developed to be compatible with the Article 6(1) of the ECHR. As we already indicated, we deem important to yet again note, that the European Union should follow the ECtHR as the Treaty of Lisbon creates a legal ground to accede to the ECHR. Consequently, the ECJ and the Commission itself should undertake measures harmonizing the EU competition policy to be in line with the provisions of ECHR. In our opinion, the view of the right to be heard should be more extensive by making the Hearing Officer an independent officer, in any way related to the Commission.

3.5. Access to the Commission's File

The right to access the Commission's file is enshrined in the EU legal acts,[407] the case-law of the European Union courts and the Charter of Fundamental Rights of the European Union.[408] The significance of such right might be reflected by the fact that the access to the Commission's file formulates one of the rights of the defence to the undertakings. However, as Alison Jones and Brenda Sufrin indicate, there is a problem about how far parties, subjects of the investigation, are entitled to examine all the evidence in the Commission's file on which the statement of objections is based, so that they may know the case against them.[409]

According to the Commission Notice on Access to the File (hereinafter - the Notice),[410] the Commission file comprises of all documents, which have been obtained, produced and/or assembled

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[405] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 60

[406] Opinion of Mr Vesterdorf acting as Advocate General delivered on 10 July 1991. Case T-1/89 *Rhône-Poulenc v Commission* 1991 ECR II-867, p. 885

[407] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325, Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of Regulation 773/2004.

[408] Article 41 of the Charter of Fundamental Rights of the European Union

[409] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1073

[410] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325

by the Commission Directorate General for Competition, during the investigation.[411] However, not all documents in the Commission's file might be accessible for the parties of investigation. According to Regulation 1/2003 and Regulation 773/2004 access to the Commission's file cannot be provided in case of business secrets or other confidential information including internal documentation of the Commission and NCAs correspondence.

As Alison Jones and Brenda Sufrin indicate, confidential information is a significant issue in the context of competition proceedings because of the highly sensitive information which the Commission may obtain during investigation.[412] The definitions for the terms of business secret and the other confidential information are defined in the Notice, whereby it is indicated that:

a) business secrets constitutes information about an undertaking's business activity disclosure of which could result in a serious harm to the same undertaking;[413]
b) other confidential information includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking.[414] This includes matters that would identify "whistleblowers", complainants, or other third parties who have a justified wish to remain anonymous.[415]

We deem important to note, that the duty of confidentiality is laid down even in the Article 339 of TFEU. The Article provides that the members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. Regulation 1/2003 as well sets out provisions on "professional secrecy" and states that information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired and that the publication of the decisions and other relevant information shall have regard to the legitimate interest of undertakings in the protection of their business secrets. The EU courts presented the interpretation of the concept of confidential information in the case of *Hoffmann-La Roche,*[416] whereby the Court held that the duty not to disclose documents or other information is "of the kind covered by the obligation of professional secrecy",[417] and that the Commission has to guarantee that such

[411] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325, para. 8
[412] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1077
[413] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325, para. 18
[414] Ibidem, para. 19
[415] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1077
[416] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461
[417] Ibidem, para. 13

documents "are not jeopardized".[418] However, the ECJ as well emphasized, that such obligation is not absolute and therefore must be reconciled with the rights of defence of the investigated parties.[419]

As regards business secrets, the General Court presented its view in the case of *AKZO* where it was held that business secrets "*are thus afforded very special protection"*[420] and as well added "*that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets."*[421] Therefore the Court made it clear on what kind of subjects are able to use the right to access the Commission's file and indicated that third parties cannot be granted with the same access to the file as the alleged infringers.

The rights of the third parties are now embodied in Article 27 of Regulation 1/2003 and in the Notice, according to which it is indicated that "complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties."[422] Nonetheless, we deem important to indicate, that a complainant who has been informed of the Commission's intention to reject its complaint, may request access to the documents on which the Commission has based its provisional assessment,[423] but cannot have access to the confidential information or business secrets of the firm complained about, or any third parties, which the Commission has acquired in the course of its investigations.[424]

The concept of the right to access the file itself has evolved from rather restrictive to a more lenient approach vis-à-vis the undertakings concerned.[425] In the case of *SA Hercules Chemicals*[426] the General Court stated *"that the Commission has an obligation to make available to the undertakings involved in Article 101(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved"*.[427] Moreover, the General Court as well indicated that as the "*Commission imposed on itself*

[418] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para. 14
[419] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 70
[420] Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities* [1986] ECR 1965, para. 28
[421] Ibidem
[422] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C 325, para 30
[423] Ibidem, para. 31
[424] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1080
[425] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 67. The author bases such approach on the Cases 56 and 58/64, *Consten & Grundig v Commissiom* [1966] ECR 299. Jones A. and Sufrin B. as well indicate Cases 43 and 63/82, *VBVB and VBBB v. Commission* [1984] ECR 19.
[426] Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECR II-1711
[427] Ibidem, para. 54

rules exceeding the requirements laid down by the Court of Justice",[428] and therefore it "*may not depart from rules which it has thus imposed on itself".*[429]

The other important case that provided interpretation of the right to access to the Commission's file is the case of *Solvay*.[430] In this case, the General Court annulled the Commission's decision because of the Commission's failure to disclose to the parties documents, which might have been used in their defence. The General Court stated important that the undertakings have disclosed documents, which tend to exonerate them (exculpatory documents) as well as the documents, which tend to incriminate them (inculpatory documents).[431] And the Court therefore indicated *"that it was not for the Commission to decide on its own whether the documents seized in the investigation of the present cases were exculpatory or not".*[432] In the case of *Solvay* the General Court as well explained and stated, that according to the general principle of equality of arms:

> *"it is not acceptable for the Commission alone to have had available to it, when taking a decision on the infringement, the documents marked "V", and for it therefore to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence."*[433]

However, the breach of the principle laid down is *Solvay* will not always lead to the annulment of the decision,[434] or as Arianna Andreangeli states, the impact of *Solvay* judgement cannot be underplayed.[435] Arianna Andreangeli emphasizes that the principles laid down do not allow the investigated parties to engage in any "fishing expeditions": in principle the scope of the right to access the file should be commensurate to the right to be heard and cannot be interpreted as entailing any obligation on the Commission indiscriminately to hand over a firm's internal business records to its rivals.[436] Therefore, the situation is created where the parties have to be entitled to the right to access the Commission's file, while on the other hand, the confidentiality has to be secured.

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[428] Case T-7/89 *SA Hercules Chemicals NV v Commission of the European Communities* [1991] ECR II-1711, para. 53
[429] Ibidem
[430] Case T-30/91 *Solvay SA v Commission of the European Communities* [1995] ECR II-1775
[431] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1074
[432] Case T-30/91 *Solvay SA v Commission of the European Communities* [1995] ECR II-1775, para. 101
[433] Ibidem, para. 83
[434] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1075
[435] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 68
[436] Ibidem

In *BASF v Commission*[437] the General Court emphasized the need to strike a fair balance between these competing interests[438] and as well stated that "*the Commission must draw up a sufficiently detailed list of the documents which are not annexed to the statement of objections to enable the undertaking to which that statement is addressed to request access to specific documents likely to be useful in its defence"*[439] and *where appropriate, for it to object to the fact that the Commission had not sent it documents [...] containing business secrets of other undertakings, whether involved in the proceeding or not."*[440] Therefore, the right to access the file depends on whether, in the Court's view, the undertaking's ability to defend itself was prejudiced.[441]

In the case of *Aalborg Portland*[442] the Court restated its position on the right to access the file. The Court repeated the decision of *Solvay* and as well additionally stated that the Commission's failure to communicate a document constitutes a breach of rights of the defence only if the undertaking concerned shows:

a) that the Commission relied on that document to support its objection concerning the existence of an infringement; and
b) that the objection could be proved only by reference of that document.[443]

The Court thereby indicated that in case the parties were aware of the documentary evidence against them, the fact that incriminating documents were not communicated to the party does not affect the validity of the objections upheld in the contested decision.[444] Therefore it was stated, that the right and obligation to prove there was a breach of a principle to access to the file relies upon the undertaking. The Court stated that an *"undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission".*[445] Nevertheless it has to be noted, that any shortcoming in the disclosure of the documents contained in the file cannot be rectified at a later stage and especially not during the judicial proceedings before the General Court, which enjoys limited jurisdiction and cannot substitute its own assessment for that of the administrative decision.[446]

Jamie Flattery as well indicates that the Commission's refusal to grant access to the file to a

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[437] Case T-175/96 *BASF Lacke + Farben AG v Commission of the European Communities* [1999] ECR II-1581
[438] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 68
[439] Case T-175/96 *BASF Lacke + Farben AG v Commission of the European Communities* [1999] ECR II-1581, para. 46
[440] Ibidem, para. 50-51
[441] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1075
[442] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission of the European Communities* [2004] ECR I-123
[443] Ibidem, para. 71
[444] Ibidem, para. 72
[445] Ibidem, para. 73
[446] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 69

target party can only be challenged *ex post* in the course of annulment proceedings of the final decision.[447] However, the General Court explains such stipulation by indicating that *"until a final decision has been adopted, the Commission may, in view, in particular, of the written and oral observations of the parties, abandon some or even all of the objections initially made against them. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so, so that the addressees of the SO have a further opportunity to express their views, in full knowledge of the facts, on the objections notified to them."*[448]

The annulment of the Commission's decision was reached in the cases of *AEG-Telefunken*[449] and *Solvay* where in the first case the decision was annulled because of the failure to disclose to the undertakings an inculpatory evidence, in the other - failure to disclose exculpatory evidence. In *Solvay* case the Court stated that "*the applicant's defence was affected in a general way by the unlawful failure to disclose the certain documents which [...] might have been useful in defence"*[450] and therefore the decision was annulled.

It is noteworthy that Hearing Officer has its role in the right of the access to the Commission's file as well. He is responsible for adopting decisions concerning the request for disclosure of the documents held in the Commission's file. As Arianna Andreangeli indicates, such role emerged as an additional safeguard for the objectivity in the proceedings of competition law.[451] The HO also has the jurisdiction to determine whether or not particular documents fall within the documents of the protected category,[452] i.e. confidential documents, business secrets, Commission's internal documents and those of NCAs correspondence. In case the Commission and the undertaking or other parties cannot agree on the right to accessible and non-accessible (protected) information, the claim is dealt by the Hearing Officer. However, the determinations of the Hearing Officer are not subject to the judicial review by the General Court. And hereby the inconsistency appears with the ECtHR. In the *Fortum*[453] case, regarding national competition proceedings, the ECtHR presented the principle of the equality of arms and held that the failure of the competent national court to deal on its judgement with the applicant's pleas that his right to access the file had been violated infringed Article 6(1) of the

[447] Flattery, J. Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *Competition Law Review.* 2010, 7(1): 63

[448] Joined cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR SA, Blue Circle Industries plc, Syndicat Nationale des Fabricants de Ciments et de Chaux and Fédération de l'Industrie Cimentière asbl v Commission of the European Communities* [1992] ECR II-2667, para. 47

[449] Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities* [1983] ECR 3151

[450] Case T-30/91 *Solvay SA v Commission of the European Communities* [1995] ECR II-1775, para. 97

[451] Arianna Andreangeli. *EU Competition Enforcement and Human Rights*. Cornwall: Edward Elgar Publishing Limited, 2008, p. 88

[452] Jones A., Sufrin B. *EC Competition Law: Text, Cases, and Materials*. Fourth Edition. Oxford: Oxford University Press, 2011, p. 1078

[453] *Fortum Corp v Finland*, [2004] 38 EHRR 36

ECHR.[454]

Therefore, in our opinion, it might be stated that the right of the access to the Commission's file, according to the European Union competition law is inconsistent with Article 6(1) of the ECHR, especially if we note, that the ECtHR has favoured a broad reading of such right.[455] The inconsistency as well might be accentuated by the fact that according to the European Union's competition law the judicial review over the decisions of the HO is not granted.

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[454] *Fortum Corp v Finland*, [2004] 38 EHRR 36, para. 41
[455] See: *Jasper v United Kingdom*, [2000] 30 EHRR 41, *McMichael v United Kingdom*, [1995] Series A, No. 308, 20 EHRR 205, *Olsson v Sweden*, [1989] 11 EHRR 259

CONCLUSIONS AND RECOMMENDATIONS

In conclusion, we may state that after the analysis of existing case-law, legal acts and legal doctrine the goal and the tasks have been successfully implemented: we revealed the concept of investigative powers of the Commission, distinguished the limits of the investigative powers in practice as well as determined the modernization of the competition law reform that was introduced with Regulation 1/2003. Therefore, the following **conclusions** have been made:

1. Regulation 1/2003 radically changed the procedures of the application of the EU competition law and established decentralised enforcement. However, the modernisation brought within Regulation 1/2003 is called fundamental change rather than modernisation. As a result, the so-called fundamental change that entitled the Commission to respectively more powers of investigation raised concern of the protection of the fundamental rights and general principles of both natural and legal persons.
2. Nevertheless, the EU law evidently expresses that the fundamental rights and general principles have to be respected and protected, however at the same time the Commission is empowered to unannounced inspections, power to obtain information and the sanctioning of the infringements of the EU competition rules, the judicial review of the Commission's decisions is limited as well.
3. The limited judicial review is reflected by the fact that national court can only validate the authenticity of the Commission's decision and verify that the coercive measures envisaged are neither arbitrary nor excessive, considering the seriousness of the alleged infringement, the importance evidence sought, the involvement of the undertaking concerned and the reasonable probability that the documents are located at the premises for which authorisation is sought. However, national courts can neither call into question the necessity of the investigations ordered by the Commission, nor can demand to be provided with information included in the Commission's file. Moreover, it is neglected that home inspections involve natural persons, who, though bound by relationship with the company under investigation, enjoy autonomous rights and guarantees.
4. Nonetheless, it is essential to ensure effective judicial protection over Commission's decision involving individuals. However, the judicial review outlined in Regulation 1/2003 does not satisfy maximum degree of personal guarantees, which arises when coercive and authoritative acts impact the fundamental rights and guarantees of individuals. National judge possess only the *ex ante* power to review the act of the Commission and the Court of Justice, having the *ex*

post control, has the power to question only the legitimacy of the acts. Therefore, the judicial review outlined in Regulation 1/2003 is incompatible with the fundamental freedoms and guarantees enshrined in the Article 8 of ECHR.

5. According to the Regulation 1/2003 the Commission in case of investigation has to specify the subject matter and purpose of the inspection, and its measures must never be arbitrary or disproportionate, however, in case the Commission does not follow some of the requirements the Commission is deemed to have acted within its competence and the decision is deemed to be lawful.
6. Undertakings have to be aware of being the target of the Commission. Nonetheless, the Commission's inspections and inquiries might not reveal infringements of the competition law, however, being targeted often causes a great damage to the reputation of the undertaking.
7. Since no judicial supervision is ensured over the decisions of the Hearing Officer, it may as well be doubted that limits to access the Commission's file are adequately balanced with the guarantees enshrined in the ECHR Article 6(1).
8. Lithuanian Competition Council and the Lithuanian Supreme Administrative Court rely on the European case-law and their approach towards the powers of the Commission and the powers of the National Competition Authorities. Therefore we may conclude that the application of Regulation 1/2003 in Lithuania is similar to the one applied by the European Commission and EU courts.

RECOMMENDATIONS

1. The analysis of the case *Colas Est* has shown that the ECtHR recognizes the application of Article 8 of the ECHR equally to legal and natural persons. Therefore the same notion should be adopted in the EU competition procedures.
2. For the performance of the right to be heard to be compatible with the fundamental rights and principles of the ECHR, we suggest that the Hearing Officer should not be employed by the Commission and should be made an independent officer, not related to the Commission in any way whatsoever.
3. As the procedures the Commission is entitled to are of the quasi-criminal nature, the highest standards of protection of the fundamental rights and guarantees has to be imposed and the EU courts should embrace their power and obligation to interpret the law by developing a more coherent set of standards relating to the fundamental rights and guarantees enshrined in the ECHR. Therefore, at the moment, it is safe to conclude that much of a conflict exists between

the reasoning of the EU courts and the ECtHR.

4. EU courts should adopt a more exact definition of the legal professional privilege or even rebrand it as the *privilege of the independent lawyer and the client*. In our opinion, it would help to uphold the correct scope of the privilege that the EU law and the case-law provide. With the clarity of the scope of the exact EU legal professional privilege, the application of it would be more accurate and less arguable.

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SUMMARY

ENFORCEMENT OF EU COMPETITION LAW: LIMITS ON THE INVESTIGATING ROLE OF THE COMMISSION

Keywords: competition, investigation, legal professional privilege, right to be heard, right to a private life, access to the Commission's file, privilege against self incrimination, European Union, European Union Law.

Summary Content

This paper analyses limits of the investigative role of the Commission in comparison to the fundamental rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paper is based on the analysis of the case-law of the European Union Courts and the European Court of Human Rights, the analysis as well included legal acts and legal doctrine.

Summary

This master thesis is based on the analysis of the powers the European Commission is entitled to in the competition law procedures by the European Union law and the limits to those powers. The author founded its work by analysing the rights guaranteed by the European Union law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The main focus is based on the legal professional privilege, right to be heard, right not to incriminate oneself and the right to a private life as well including the right to access the Commission's file. The author analyses those rights through the case - law of the European Union courts and the European Court of Human Rights together analysing legal acts and legal doctrine. Paper discusses whether the powers the Commission is entitled to are equally balanced with the limits to the Commission's investigating role. Author accentuates the differences of the case-law of the European Union Courts and the European Court of Human Rights and analyses whether the approach the European Union Courts are forthcoming is in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such approach is accentuated due to the fact that Lisbon Treaty discusses the possibility of accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paper as well slightly discusses the view of the European Competition Law in the case-law of the Supreme Administrative Court of the Republic of Lithuania.

SANTRAUKA

ES KONKURENCINĖS TEISĖS ĮGYVENDINIMAS: KOMISIJOS ĮGALIOJIMŲ ATLIEKANT TYRIMUS RIBOS

Pagrindinės sąvokos: konkurencija, tyrimas, profesinė paslaptis (advokato ir kliento bendravimo apsauga), teisė būti išklausytam, teisė į privatų gyvenimą, teisė susipažinti su Komisijos byla, teisė neduoti parodymų prieš save, Europos Sąjunga, Europos Sąjungos teisė.

Santraukos turinys

Šiame magistro baigiamajame darbe yra analizuojamos Komisijos įgaliojimų ribos lyginant jas su pagrindinėmis teisėmis ir laisvėmis užtikrinamomis Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija. Magistro baigiamasis darbas yra pagrįstas Europos Sąjungos teismų ir Europos žmogaus teisių teismo praktika bei teisės aktų ir teisinės doktrinos analize.

Santrauka

Magistro baigiamajame darbe analizuojami Europos Komisijos įgaliojimai, kuriuos jai suteikia Europos Sąjungos konkurencijos teisė, bei šių įgaliojimų ribos. Darbas pagrįstas teisių, garantuojamų Europos Sąjungos teisės bei Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos, analize. Daugiausia dėmesio skiriama profesinės paslapties (advokato ir kliento bendravimo apsauga), teisės būti išklausytam, teisės neduoti parodymų prieš save, teisės į privatų gyvenimą, taip pat ir teisės susipažinti su Komisijos byla, analizei. Autorė, nagrinėdama minėtas teises, tyrė Europos Sąjungos teismų bei Europos žmogaus teisių teismo praktiką, teisės aktus ir teisinę doktriną. Magistro baigiamajame darbe aptariama, ar Komisijai suteikti įgaliojimai yra proporcingi šių įgaliojimų riboms. Autorė akcentuoja Europos Sąjungos teismų ir Europos žmogaus teisių teismo praktiką bei analizuoja, ar Europos Sąjungos teismų formuluojama praktika atitinka Europos žmogaus teisių ir laisvių konvenciją. Tokia darbo kryptis pasirinkta atsižvelgiant į tai, kad Lisabonos sutartyje yra aptarta ir numatyta Europos Sąjungos prisijungimo prie Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos galimybė. Darbe taip pat trumpai aptariamas ir Lietuvos Aukščiausiojo administracinio teismo požiūris į Europos konkurencijos teisę.