The Interaction between the ECHR and EC Law
A Case Study in the Field of EC Competition Law

Hester Scheer*

Table of Contents

* Hester Scheer, Meester (Master of Laws), Amsterdam

A. Introduction

The Member States of the Council of Europe decided in 1950 to set up a system of collective protection of fundamental rights. This resulted in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) which entered into force in 1953. According to Article 1 of the ECHR 'a party to the ECHR is under the obligation to ensure the effective protection of the rights and freedoms guaranteed by the Convention to everyone within their jurisdiction'. The Member States of the current European Union are all parties to the ECHR. As such they are all formally bound by this provision. Moreover, the European Court of Human Rights (hereinafter: ECrtHR) was established as a watchdog ensuring the compliance of the contracting states with the ECHR and its Protocols. Being a self-referential system, the ECrtHR operates independently from the ECHR members' national courts. As it is not a 'fourth instance' tribunal, the ECrtHR interprets contested domestic law or practice of contracting parties exclusively with regard to its compatibility with the ECHR. However, the ECrtHR has no jurisdiction to review laws of the contracting parties in abstract. Only concrete cases brought before it by individuals alleging a violation of their ECHR-rights or, in rare cases, by one or more contracting parties accusing another contracting state of having done so can be reviewed.[1]

As the European Communities have not signed the ECHR, no such external mechanism of supervision exists within the European Union. Thus, European nationals confronted with direct actions of EC institutions violating their human rights do not have the possibility to bring complaints against the European institutions directly before the ECrtHR. Because of that it is the European Court of Justice (hereinafter: ECJ) which finally rules on the level of human rights protection in the European Union.[2]

Nevertheless, a commitment to the ECHR by the EU is imbedded in Article 6 (2) of the Treaty of the European Union (hereinafter: TEU) read in conjunction with Article 220 EC Treaty. The ECJ uses the provisions of the ECHR as general principles of Community law when called upon to review the acts of the European institutions. However, this express reference does not necessarily guarantee that the standards of protection developed by the ECrtHR will be applied as general principles of Community law as well. In practice it would seem that the judicial protection of fundamental rights of individuals and undertakings is subordinated to the objectives of the European legal order.

As no written human rights guarantees are directly enforceable before the ECJ, it is difficult to predict to what extent the ECJ will take human rights standards into

1 *Gommien/Zwaak*, Law and practice of the European Convention on Human rights and the European Social Charter, Council of Europe publishing Strasbourg 1996, 18, 19.

2 The direct procedures under Article 230-233 of the EC Treaty.

account in any particular case and furthermore to ascertain what standard will be applied.[3] Although most of the rulings of the ECJ are in line with the interpretation given by the ECrtHR, divergences in the interpretation of the provisions of the ECHR do occur. This implies that natural and legal persons within the European Union are confronted with different levels of human rights protection, depending on whether they are the addressees of direct acts of the European institutions or of acts of the Member States. The fact that individuals are increasingly turning to the ECrtHR with applications which essentially concern questions of Community law illustrates the lack of a formal commitment to the ECHR and the divergent interpretation and application of ECHR law.[4]

From the point of legal certainty it is not very satisfying that two courts are developing autonomous interpretations of the same provisions.[5] Therefore, in light of the concept of legal certainty and in order to investigate whether the in effectiveness of human rights protection within Europe could be enhanced, the objective of this article is to analyse whether there are grounds in order to claim a binding effect of the ECHR and the ECrtHR case law on the European Communities. The implications of binding character of the ECHR will be analysed *inter alia* by examining EC competition law cases. The field of EC competition law is an outstanding example as it is an area of law where natural and legal persons are directly confronted with actions of the European Commission. This implies that there is a direct interference of an EC institution with the fundamental rights of natural and legal persons. Moreover, EC competition law is of such a nature that the assurance of the EC objectives often conflicts with human rights protection. Consequently, in EC competition law divergences between the interpretation of ECHR provisions by the ECJ and the ECrtHR are likely to occur.

B. Binding effect from the ECJ/CFI Perspective

1. ECHR Integration In The European Union

Despite the absence of any reference in the EEC Treaty regarding the protection of human rights, in the late 1960s the ECJ began to affirm that the respect for human rights was part of the legal heritage of the Community.[6] In fact, the ECJ realised that the absence of fundamental rights protection in the EC Treaties and

3 *Cooper/Pillay*, Through the Looking Glass; Making Visible Rights Real, in Feus (ed), The EU Charter and fundamental rights, Federal Trust for Education and Research, 2000, p. 111.

4 For example *Bosphorus Hava v Ireland*, Decision on admissibility 13-9-2001.

5 *Lawson*, Het EVRM en de Europese gemeenschappen: Bouwstenen voor een aansprakelijkheidsregime voor het opterden van Internationale organisaties, Kluwer Deventer 1999, p. 19.

6 Case 29/69, *Stauder v City of Ulm*, (1969) ECR 419.

the fact that the European Communities were not members of the ECHR could threaten the uniformity and primacy of Community law as it became clear that Member State courts would judge Community law by fundamental rights enshrined in their national constitutions.[7] Therefore, the ECJ acknowledged in its case law that the ECHR is a source of inspiration when reviewing Community law acts[8] and Member States' acts falling within the scope of Community law.[9] Moreover, the doctrine developed by the ECJ with regard to human rights protection covers the entire field of Community law. The ECJ did not only establish human rights as a standard to review acts of Community institutions but also those of Member States when acting within 'the scope of Community law',[10] i.e. when they implement Community rules[11] or rely on a derogation from and thereby restrict the exercise of one of the Common market freedoms.[12] It follows that all acts of Community institutions and Member States within the framework of EC law may be reviewed by the ECJ with regard to the observance of human rights as enshrined in the ECHR and applied as general principles of Community law.

2. A Legal Basis for the Judicial Development

Despite the efforts of the ECJ to integrate the ECHR into the Community legal order, it did not silence the discussion for the EU becoming a formal party to the ECHR. The most efficient protection of human rights within the European Union would be realised by acceding to the ECHR as this would guarantee a uniform interpretation of the ECHR by the ECrtHR. In the 1990s a Commission proposal concerning the accession of the European Communities to the ECHR was made. In its *Opinion 2/94*, delivered under Art. 300 (6) EC on behalf of the Council of the European Union, the ECJ pointed out that 'as the Community law now stood the Community had no competence to accede to the Convention.

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7 See the cases BVerfGE 37, p. 271, *(Solange I)*, 2 BvL 52/71; BVerfGE 73, p. 339 *(Solange II)* 2 BvR 199/83; BVerfGE 89, p. 155, *(Brunner v European Union Treaty)*, 2 BvR 2159/92, and BVerfGE 102, p. 147, *(Bananas)*, 2 BvL 1/97. In the event that the fundamental rights protection by the ECJ would be below the German Constitutional standard the German Constitutional Court claims an ultimate review competence for EC acts.

8 Case 4/73, *Nold KG v Commission*, (1974) ECR 491.

9 Case C-260/89, *ERT*, (1991) ECR I-2925. "As the court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court 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. The European Convention on Human Rights has special significance in that respect.", para 41.

10 *De Witte*, The past and future role of the European Court of Justice in the protection of Human Rights, in Alston (ed.), The EU and Human Rights, 1999, p. 868.

11 Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, (1989) ECR 2609 para 18.

12 Case C-260/89, *ERT*, (1991) ECR I-2925 paras 42, 43.

Accession to the ECHR could only be brought by way of Treaty amendment because of its constitutional significance'.[13]

Given the political reality and voting requirements of Treaty amendments, this decision ended the discussion on a possible accession.[14] It must be noted that under the present situation accession to the ECHR is back on the political agenda. The Draft Constitution for Europe opens the door for membership to the ECHR as the future as Article 7 of this Constitution provides for the accession of the European Union to the ECHR.[15] But as the ECHR is currently only open to States and since the EU is an international organisation, the Council of Europe Treaty and the ECHR would have to be amended before the EU could accede. As such, Article 7 of the Draft Constitution must be regarded as a first step in a long-term process.[16]

Nevertheless, as at that time the accession to the ECHR was not an option, a formal unilateral commitment to the ECHR was made in order to ensure the observance of the ECHR within the EU. In Article 6 (2) TEU the doctrine developed by the ECJ was codified.[17]

This is the situation as it stands today within the European Union. The EU is not formally bound by the ECHR, only a formal commitment to the values enshrined in the ECHR has been pronounced. However, it can be argued that this commitment and the approach of the ECJ regarding the ECHR do generate a material binding effect of the ECHR on the EU. The following paragraph will outline the approach of the ECJ with regard to the special status of the ECHR within the European Union.

3. Direct Application

The ECJ has recognised and developed a variety of rights as principles of Community law in its jurisprudence. As already mentioned above the ECJ used the ECHR initially as a 'source of inspiration' in this respect. Nowadays, the text of the ECHR is cited in many cases by the ECJ as evidence for the existence of fundamental rights which are to be incorporated into the General Principles of Com-

13 Opinion 2/94 (1996) ECR I-1759. Accession by the Communities to the European Convention for the protection of Human rights and Fundamental Freedoms.

14 *Weiler/Fries*, EC & EU Competences and Human Rights, in Alston (ed), The EU and Human Rights, 1999, p. 150.

15 Draft Treaty establishing a Constitution for Europe, OJ (2003), C 169.

16 The Draft Constitution will be further discussed in Chapter 3.

17 Article 6 paragraph 2 TEU; "The Union shall respect the fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as General Principles of Community Law."

munity law. The following cases provide examples of the ECJ's activism in this field.

In the *Carpenter* case[18], which concerned a decision of the UK government to deport Mrs Carpenter, a national of the Philippines married to a UK national, the ECJ referred directly to the ECHR. According to the ECJ the decision of the UK government to deport Mrs Carpenter interfered with Mr. Carpenter's family life within the meaning of Article 8 ECHR. According to the ECJ Article 8 ECHR is among the fundamental rights which are protected within the Community.[19] Article 8 (2) ECHR enables the Member State to restrict the right of respect for family life if this restriction is in accordance with the law and necessary in a democratic society in the interests of certain objectives of the public order. However, the ECJ came to the conclusion that the decision of the UK government denying Mrs. Carpenter a right of residence did not meet these cumulative conditions and thus violated Art. 8 ECHR. It follows that the ECJ had directly applied the ECHR within the European Union.[20]

In the *Baustahlgewerbe* case[21], the appellant argued that the length of proceedings before the CFI rendered its judgement excessive and consequently violated Article 6 ECHR enshrining the right to a fair trial. The ECJ agreed with the appellant and indeed applied Article 6 ECHR. Moreover, it cited expressly the jurisprudence of the ECrtHR regarding the length of proceedings.[22]

It follows from these cases that the ECHR is more than a source of inspiration to the ECJ. In practice the ECJ is indeed interpreting and applying the ECHR. This implies that applying the ECHR as 'general principles' can no longer be distinguished from applying it *per se*.[23] Hence, the ECHR must be considered to be an integral part of the Community legal order.[24]

A next step was made in the *Schmidberger* case[25]. In a preliminary procedure under Article 234 EC the ECJ had to adjudicate upon the question whether demonstrators blocking a road and thus obstructing the free movement of goods could rely

18 Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, (2002) ECR I-6279.

19 Ibid. para 41.

20 The direct application of Article 8 of ECHR has been repeated in Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, (2002) ECR I-7091, para 72.

21 Case C-185/95, *Baustahlgewerbe v Commission*, (1998) ECR I-8417.

22 Another example in this respect is Case C-185/95, *Montecatini v Commission*, (1999) ECR I-4539.

23 See for a discussion on the status of general principles of Community law: *Douglas-Scott*, Constitutional law of the European Union, 2002, p. 452, 453.

24 *Lavranos*, Decisions of International Organisations in the European and Domestic legal orders of selected EU Member States, 2004, p. 169.

25 Case C-112/00, *Eugen Schmidberger International Transporte und Planzüge v Republik Österreich*, (2003) ECR I-5659.

on the freedom of expression and freedom of assembly as protected by Article 10 and 11 ECHR in order to justify their acts. The ECJ decided in favour of the demonstrators. [26]

It follows from the *Schmidberger* case that the ECHR is not only part of the Community legal order but that the ECHR may even prevail over primary EC law. Consequently, a hierarchic subordination of EC law to the ECHR can be deduced and the latter may be regarded as the highest binding source of law within the European Community, at least with regard to fundamental rights protection. As the ECrtHR was established by the ECHR and interprets the rights guaranteed *ex tunc*, it must be assumed that the case law of the ECrtHR forms an integral part of the meaning and scope of the rights enshrined in the ECHR.[27] To this extent, the hierarchic subordination of EC law to the ECHR as illustrated above also implies the subordination of EC law to ECrtHR's case law.

4. Locus Standi

As EC competition law does not set out detailed procedural rules regarding human rights protection, it is the ECJ and the CFI, when called upon under Article 230 EC Treaty by natural or legal persons who are affected in their (human) rights by direct actions of the Commission, to rule on the level of human rights protection. It must be noted that natural or legal persons who would like to challenge direct actions of Community institutions must comply with the conditions for *locus standi* as set out in Article 230 (4) EC Treaty. One of the conditions set out there is that measures must be of a 'direct and individual concern' to the applicant for the action in order to be admissible.[28] Over the years the ECJ applied this condition restrictively and recently, the ECJ reaffirmed this once more to be the correct approach.[29] This leads to the consequence that it is *de facto* almost impossible for individuals to challenge regulations as those concern measures of general application because they cannot substantiate the claim of being 'directly and individually concerned'. However, the CFI openly criticised the system of *locus standi* under Article 230 (4) EC Treaty. The CFI contended in the *Jégo-Quéré* case[30] that a more liberal approach to *locus standi* under Article 230 EC Treaty would be appropriate in light of the Articles 6 and 13 ECHR. The CFI proposed that a non-privileged individual applicant should be regarded as being individually concerned by a measure of general application if it affects his legal posi-

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26 Ibid. paras 73, 74.

27 *Lenaerts/de Smijter*, A Bill of Rights for the European Union, CMLRev 2001, p. 296.

28 Case *Plaumann v Commission*, (1963) ECR 95.

29 Case C-50/00, *Unión de Pequeños Agricultores v Council*, (2002) ECR I-6677.

30 Case T-177/01, *Jégo-Quéré*, (2002) ECR II-2365.

tion in a manner which is both definite and immediate by restricting his rights or imposing obligations on him. However, despite the efforts of the CFI the ECJ rejected this ruling on appeal. The ECJ reiterated that the Treaty has established a complete system of legal remedies and procedures designed to ensure the review of the legality of acts of the institutions.[31] Even if it could be shown that the applicable national procedural rules did not allow the individual to challenge the disputed Community measure, an individual should not be able to seek the annulment of a measure under Article 230 EC Treaty if it did not distinguish him individually in the same way as an addressee.[32] It follows from this ruling that the ECJ has acknowledged that in some cases applicants might be deprived from their right to an effective remedy.[33]

Nevertheless, it must be noted that the Draft Constitution provides for a relaxation of the conditions for *locus standi* before the ECJ. According to Article III-270 (4) 'a natural or legal person may institute proceedings against a regulatory act which is of a direct concern to him' (instead of a direct and individual concern). It follows that under the Draft Constitution the content of the conditions for *locus standi* has been adjusted to the requirements of an effective remedy as guaranteed by the ECHR. Thus, the long-term prospect is promising.

Therefore, considering the relaxation of the conditions under the Draft Constitution regarding *locus standi* it is likely that in the future Commission Regulations in the field of competition law could be challenged more easily. As such, it is expected that the ECJ will have more opportunities to rule on ECHR questions in this area of law, and thus will be in a better position to keep up with ECHR developments made by the ECrtHR.

5. Conclusion

Initially the ECJ was reluctant to enter into the field of human rights but this reluctance diminished and the ECJ developed a variety of rights as principles of Community law, using the ECHR as a standard. Gradually, as the studied case law showed, the ECHR became more than a helpful tool to the ECJ. The ECJ referred directly to the ECHR in questions concerning human rights. As such it has become an integral part of the EC legal order. Today the integration of the ECHR into the EC legal order is still growing stronger. Since the *Schmidberger* judgement, the ECHR might be even considered to be the highest binding source of law with-

31 C-263/02, *Jégo-Quéré*, Judgement of 1-4-2004, para 30.

32 *Arnull*, April shower for Jégo-Quéré (2004) 29 ELRev, p. 287, 288. Reference can be made to case T-338/02, *Segi v Germany*, which reflects the issue of inadequate judicial protection within the EU due to the EC law-EU law system. See also on this topic *Bröhmer*, Terrorismus und freier Kapitalverkehr, (2002) 12 EuZW, p. 353.

33 Ibid.

in the European Community concerning human rights. Because of this hierarchic subordination of EC law to the ECHR the EC institutions are legally bound by the ECHR.

C. Binding effect from the ECrtHR Perspective

1. The ECrtHR Enters into the Field of Community Law

The ECrtHR and the at that time still existing European Commission on Human Rights (hereinafter the EComHR) were hesitant to enter into the field of Community law just as the ECJ was initially reluctant to enter into the field of human rights. Therefore, complaints concerning EC law violating human rights were declared inadmissible on the ground that the Community was not party to and thus not bound by the ECHR.[34] However, in 1990 the EComHR was called upon to clarify its relation with the European Community. In the *M&Co* case[35] the EComHR nuanced its position concerning the human rights protection in the European Community. The EComHR observed:

> "The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and the purpose of the convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Therefore the transfer of powers to an international organisation is not incompatible with the convention provided that within that organisation fundamental rights will receive an equivalent protection."[36]

Although the EComHR declared this case inadmissible, it can be deduced from the wording that a Member State's responsibility under the ECHR for Community acts is not at all to be excluded. Sometimes States have indeed a responsibility to check whether acts of the EU are reconcilable with the ECHR.[37] However, it seems that as long as the EC legal order provides for a standard of protection comparable to that of the ECHR, the EComHR should and will not interfere.[38]

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34 Case 8030/77, *CFDT*, (1978) 13 D.R 231.

35 Case 13258/87, *M&Co v FGR*, (1990) 64 D.R 138.

36 Ibid. para 44.

37 *Van de Velde*, Grenzen aan het toezicht op de naleving van het EVRM, diss Leiden, 1997, p. 173.

38 Comparable to the *Solange I-II* cases of the German Federal Constitutional Court (fn. 7).

That the European Community was indeed considered to fulfil this condition follows from the next case, a situation in which the ECrtHR had refrained from interfering with EC law up to then.

In the *Pafitis* case[39] the ECrtHR considered a complaint by Mr Pafitis (and others) against the State of Greece concerning the length of proceedings allegedly infringing Article 6 (1) ECHR. In these proceedings the national court had referred questions to the ECJ for a preliminary ruling under Article 234 EC Treaty. During the intervening period the proceedings were stayed, prolonging them by more than two years and seven months. The ECrtHR decided not to take this period into account as this would adversely affect the system instituted by Article 234 EC Treaty but not because it was *a priori* incompetent to do so.[40] It follows from this case that the ECrtHR has confidence in the system and the level of human rights protection guaranteed by the ECJ within the European Community. Moreover, it shows respect for the independence of the EC legal order and its supranational nature.

However, in the *Cantoni* case[41] the ECrtHR's point of view differed. In this case the ECrtHR examined whether a provision of the French Public Health Code, which itself was based word for word on a Community directive, was contrary to Article 7 ECHR. The ECrtHR ruled that it had the competence to review measures of the contracting states implementing EC law.[42] Thus, the ECrtHR thus implicitly presumed the supremacy of the ECHR over acts in the field of European Community law in the event of conflict between the two legal orders.[43] Moreover, the review of national legislation falling 'within the scope of Community law' by the ECrtHR entailed in fact an indirect review of Community law, as the French Directive is nothing else than the result of the proper implementation of EC law.

The situation is similar in the pending *Bosphorus* case[44]. The ECrtHR is called upon to examine whether the execution of an EC Regulation by Ireland implementing UN sanctions which were issued by a Security Council Resolution violated Article 1 of Protocol 1 of the ECHR. The complaint encompasses both the implementation of the EC Regulation by Ireland and a judgement of the Supreme Court of Ireland executing a preliminary ruling of the ECJ allegedly violating the ECHR. In its preliminary ruling the ECJ had decided that the aim to give full

39 *Pafitis and Others v Greece*, (1998) Reports of Judgements and Decisions 1998-VI.

40 Ibid. para 95.

41 *Cantoni v France*, (1996) Reports of Judgements and Decisions 1996-V.

42 Ibid para 30. The ECrtHR stated that 'the fact that a national provision is based almost literally on EC Directive does not remove it from the ambit of Article 7 ECHR.'

43 Pending proceedings, *Senator Lines v the 15 Member States of the European Union*, 21 HRLJ (2000), p. 117.

44 *Bosphorus Hava v Ireland*, (2001), decision on admissibility 13-9-2001.

effect to the UN Security Council Resolution is of substantial importance. As a result, it rejected the complaint that the EC Regulation violated the ECHR, in particular the right of the applicant to a peaceful enjoyment of its property.[45] It follows that this decision will now also be indirectly reviewed by the ECrtHR for its compatibility with the ECHR.

In the *Matthews* case[46] the ECrtHR went even further. The ECrtHR had to adjudicate upon a complaint against the United Kingdom with regard to the participation in elections to the European Parliament, which were set out in an act of the Community institutions. The Community act, establishing the rules for direct elections, provided that the UK would apply the provisions only in the UK. Mrs Matthews was a UK national living in Gibraltar, a dependent territory of the UK. She sought to register as a voter for the elections to the European Parliament, but was turned down on the grounds that the Community Act did not include Gibraltar for these elections. She contended that this refusal violated her rights under Article 3 of Protocol 1 of the ECHR on free elections. The ECrtHR decided that the UK remained responsible for securing the rights contained in Article 3 of Protocol 1 with regard to Community legislation in the same way as if a restriction had been included in national law. Thus, even though the exclusion of Gibraltar from the elections to the European Parliament was based on an EC Act, the ECrtHR concluded that the UK was responsible for the exclusion and that the UK violated Article 3 of Protocol 1 of the ECHR.

The significance of this case lies in the fact that the ECrtHR has subjected primary EC law to its jurisdiction, not directly – this was explicitly excluded by the ECrtHR – but indirectly, via Member State responsibility.[47] Therefore, it is quite clear cut that the members of the ECHR are not relieved from their responsibility to guarantee the rights contained in the ECHR even when sovereign powers have been transferred to the European Union. Thus, it can be concluded that since *Matthews* the ECrtHR acknowledged its competence to rule on the compatibility of Community law with the ECHR.

2. The Possibility to Challenge Direct Acts of EC Institutions before the ECrtHR

It has been shown that the ECrtHR held Member States responsible for primary EC law and Community acts transformed into national law violating the ECHR. It should be noted that in these cases there was a concrete link between the actual conduct of a specific Member State in the field of EC law and the violation of the ECHR as the individual State gave effect to a Community measure.

45 Case C-84/95, *Bosphorus Hava v Ireland*, (1996) ECR I-3953.

46 *Matthews v UK*, (1999) 30 EHRR 391.

47 Ibid. para 32.

However, there are also examples of proceedings against Member States where the link between Member State behaviour and Community acts violating the ECHR is far less prominent. This concerns procedures against all Member States regarding the direct exercise of powers by the Community institutions themselves infringing the ECHR. In these proceedings the responsibility is solely based on the fact the Member States have signed the Treaties establishing the European Communities and thereby agreed to the creation of European institutions to which powers have been transferred. It must be remembered that Contracting States to the ECHR are liable for alleged violations if they result from acts or omissions "within their jurisdiction" in the sense of Article 1 ECHR. Thus, as Member States exercise their jurisdiction collectively via the Community institutions, they can be held jointly responsible under the ECHR.[48] This line of argument was applied in the *Senator Lines v 15 Member States of the EU* case[49]. In this case, maritime transport companies, Senator Lines and others, were fined by the European Commission for infringing the competition rules of the EC Treaty. In its decision against Senator Lines, the Commission indicated that if the company appealed against the decision of the Commission, the Commission would not enforce its decision during the period of the legal proceedings if Senator Lines provided bank guarantees that cover the amount of the fines plus interest rates. As the fines were quite high and Senator Lines in a difficult financial situation, the company was unable to secure appropriate bank guarantees. In an interim procedure Senator Lines appealed against the requirement to provide bank guarantees as a condition for not having to pay the fine before a final decision in substance had been rendered by the CFI. However, both the President of the CFI[50] and the President of the ECJ[51] rejected the appeal. At the same time Senator Lines had also started an interim procedure before the ECrtHR against all 15 Member States on grounds that its right of access to a Court as protected by Article 6 ECHR had been violated by the European Commission by requiring payment of the fine before the matter had been decided on the merits by the CFI.[52] In the meantime the CFI held that the fines did not need to be paid by Senator Lines.[53] As a consequence the President of the ECrtHR cancelled the hearing in the *Senator Lines* case. While the ECrtHR had no opportunity to rule on the merits, it is nevertheless important to note that the ECrtHR admitted the case. This shows that the ECrtHR was prepared in the first place to review EC acts, thus continuing the line

48 *Peukert*, The importance of the European Convention on Human Rights for the European Union, in: Mahony/Matscher (eds), Protecting Human Rights: the European Perspective, 2000, p. 1111.

49 *Senator Lines v 15 Member States of the EU*, (2000) Application nr. 56672/00.

50 T-191/98 R, *DSR-Senator Lines*, (1999) ECR II-2531.

51 C-364/99 P (R), *DSR-Senator Lines*, (1999) ECR I-8733.

52 *Senator Lines v 15 Member States of the EU*, 2000 Application nr. 56672/00.

53 T-191/98 R, *DSR-Senator Lines*, (1999) ECR II-2531.

of *Matthews*.[54] This indicates that there is indeed a possibility to sue the Member States for direct Community actions.

A case which is expected to be brought before the ECrtHR and which also concerns a complaint against a ruling of the ECJ is the *Emesa Sugar* case[55]. In a preliminary ruling the ECJ explicitly refused to adopt certain principles developed by the ECrtHR with regard to Article 6 ECHR. The ECJ had denied the possibility for parties to submit written observations in response to the Opinion of the Advocate General. However, according to the ECrtHR's case law the applicant's right to adversarial proceedings is violated if he is not permitted to reply to submissions by the legal representatives of public authorities.[56] To this extent Article 6 ECHR guarantees the right to have knowledge of and comment on all evidence or observations that might influence the Court's decision, even if these are filed by an independent member of a national legal service. The ECJ found, referring to the organic and functional link between the Advocate General and the Court, that the case law of the ECrtHR does not appear to be transposable to the Opinion of the Court's Advocate General.[57] It further concluded that the right to adversarial proceedings was adequately safeguarded by the fact that Rule 61 of the Rules of Procedure of the ECJ provided for the reopening of oral proceedings in certain cases. Having regard to the above-cited case law it is arguable that the Netherlands might be held responsible for the fact that the Dutch Courts relied on a judgement delivered in breach of Article 6 ECHR. Alternatively, having regard to the line of reasoning in the *Senator Lines* case a complaint could be lodged against all Member States collectively for having established the ECJ which might have violated Article 6 ECHR by denying the parties the right to written submissions with regard to the Advocate General's statement in the *Emesa Sugar* case.[58]

3. Conclusion

With regard to the judicial developments in the case law of the ECrtHR, it can be assumed that the ECrtHR is prepared to examine the merits of complaints concerning alleged violations of the ECHR by Community acts via individual or collective Member State responsibility. As such, it seems that the ECJ's task under Article 220 EC Treaty, 'to see that the law is observed', is henceforth exposed to a possible indirect review by the ECrtHR in cases involving ECHR rights.

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54 *Lavranos*, (fn. 27), p. 172, 173.

55 Case C-17/98, *Emesa Sugar (Free Zone) NV v Aruba*, (2000) ECR I-665.

56 *Kress v France*, (2001) Reports of Judgements and Decisions 2001-VI.

57 Case C-17/98, *Emesa Sugar Free Zone NV*, (2000) ECR I-665 para 16.

58 *Lawson*, note on *Emesa Sugar*, (2000) 37 CMLRev 990.

If the ECJ is confronted with a request for a preliminary ruling under Article 234 EC Treaty by a national court concerning the observance of the ECHR by national legislation falling within 'the scope of EC law', the ECJ gives all the guidance as to the interpretation necessary to enable the national court to assess the compatibility of that legislation with the fundamental human rights as laid down in the ECHR.[59] However, an aggrieved party may still bring its complaint after the preliminary ruling of the ECJ to the ECrtHR.[60] Hence, the *Cantoni* case showed that the ECrtHR will not refrain from reviewing national legislation even though it essentially puts Community law into operation. It follows that a supplemental indirect remedy against unsatisfactory human rights protection exists. In effect this leads to the consequence that the ECrtHR is the ultimate court regarding human rights interpretation of national legislation falling within the scope of Community law as in theory the effect of the interpretation given in the preliminary ruling by the ECJ to the national courts can be overruled by the ECrtHR.

Under the judicial procedure of Article 230 EC Treaty the ECJ has the sole power to review the legality of direct Community acts, *inter alia* involving human rights.[61] However, in practice it seems that the ECJ may no longer be regarded as the last instance as the ECrtHR might be prepared to provide additional judicial review of direct Community acts. It followed from the *Senator Lines* case that a supplemental indirect review of direct Community acts by the ECrtHR is possible. However, as *Senator Lines* was cancelled, the pending and future cases will show us whether this development continues. If so, this would imply that the ECJ cannot afford any longer to rule below the minimum standard of protection provided for by the ECHR in procedures under Article 230 EC Treaty, or ignore interpretations of the ECrtHR regarding specific provisions in the ECHR without running the risk of being indirectly reviewed by the ECrtHR via the (collective) Member State responsibility. With regard to the autonomous character of the EC legal order, this might be a strong incentive for the ECJ to be well in line with the case law of the ECrtHR.[62]

Thus it can be concluded that the potential provision of supplemental judicial review by the ECrtHR of both direct and indirect EC acts in effect restricts the ECJ in its autonomous interpretation of the ECHR. To this extent the European institutions must consider to be bound by the ECHR.

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59 Case C-299/95, *Kremzow v Austria*, (1997) ECR I-2405.

60 *Schermers*, European remedies in the field of Human Rights, in: Kilpatrick/Novitz/Skidmore (eds), The Future of Remedies in Europe, 2001, p. 208.

61 Article 232 of the EC treaty mirrors this provision where it is an unlawful inaction, which is under review. See *Douglas-Scott*, Constitutional law of the European Union, 2002, p. 343.

62 *Canor*, Primus Inter Pares. Who is the ultimate guardian of fundamental rights in Europe?, (2000) 25 ELRev, p. 20.

D. The ECHR Put into Practice: A Case Study in the Field of EC Competition Law

1. Introduction

It cannot be denied that the ECJ has repeatedly recognised certain human rights as general principles of Community law in favour of natural and legal persons under EC competition law by making tremendous efforts to incorporate the ECrtHR case law on the specific human right issue.[63] However, it is also well known that there are cases concerning human rights in which the ECJ did not apply the interpretation given by the ECrtHR, even though no formal objections existed to transpose the specific ECrtHR jurisprudence to the field of EC law.[64] This leads to the consequence that natural and legal persons increasingly rely directly upon the ECHR when challenging Commission decisions before the ECJ and even try to challenge Commission decisions before the ECrtHR via Member State responsibility.[65]

One of the principles of Community law open to criticism and most commonly invoked in competition matters concerns the right of non self-incrimination.[66] Being part of the right to a fair trial, which is one of the most fundamental principles of the rule of law, the right of non self-incrimination should not be applied restrictively or in uncertain terms. The ECJ, however, has succeeded to apply the right of non self-incrimination quite restrictively within the field of EC competition law for over 15 years.[67] In the light of the ECHR this restrictive application is debatable, especially when one bears in mind that the Commission obtained increased investigative powers under the new competition law regime.[68]

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63 *Groussot*, The general principles of Community law in the creation and development of due process principles in Competition law proceedings: from Transocean Marine Paint (1974) to Montecatini (1999), in: Bernitz/Nergelius (eds), General Principles of Community Law, 2000, p. 200. The author refers to Case C-185/95 P, *Baustahlgewerbe v Commission*, (1998) ECR I-8417 and Case C-235/92 P, *Montecatini v Commission*, (1999) ECR I-4539.

64 For example, the ECJ merely referred to and did not actually apply in case C-114/99, *Roquette et frères*, (2000) ECR I-8823 the extensive interpretation of Article 8 ECHR as given by the ECrtHR in *Stès Colas Est*, (2002) application no. 37971/97. Instead, the ECJ repeated its position given in the earlier case 46/87, *Hoechst*, (1989) ECR 2859.

65 C-364/99 P (R), *DSR-Senator Lines*, (1999) ECR I-8733.

66 Other rights which are commonly invoked are the right to an effective remedy as enshrined in Article 6 ECHR and the right to respect private life, home and correspondence which follows from Article 8 ECHR.

67 Case 374/87, *Orkem SA v Commission*, (1989) ECR 3283.

68 Council Regulation 1/2003 on the implementation of the Rules on Competition laid down in Articles 81 and 82 of the EC Treaty (2003) OJ L 1/1, 25.

2. Legal Context

To ensure the objective of free competition, Article 85 read in conjunction with Article 3 (1) (g) of the EC Treaty charges the Commission with the duty of enforcing the rules of competition within the Common market and to expose any agreement, decision or concerted practice prohibited by Article 81 (1) or any abuse of a dominant position prohibited by Article 82 EC Treaty. In order to comply with this duty, Chapter V of Council Regulation 1/2003 delegates certain investigative powers to the Commission. These powers are laid down in the following provisions. Article 18 of Regulation 1/2003 states that the Commission may obtain all necessary information for the purpose of proceedings in respect of infringements of the rules covering competition. It must be noted that Article 18 is closely modelled after and builds upon Article 11 of the Regulation's predecessor, Regulation 17/62.[69] However, this article broadened the power to seek information as well. Under Article 18, two ways are open to the Commission to obtain information: it can either proceed by request under Article 18 (2) which can be followed up by a decision, similar to the procedure of Article 11 of Regulation 17/62, or, as a second option, it may proceed immediately to a decision under Article 18 (3) requiring that information is provided. As the decision is underpinned by sanctions if an undertaking fails to supply the information within the specified period of time the latter implies that the companies involved are forced to supply the information in a more limited period of time.[70]

Another more significant development of the scope of the Commission's power to obtain information can be found in Article 20 (2) (e) of Regulation 1/2003 extending the power to ask questions during inspections, so-called dawn raids. Under the previous regime the Commission was only allowed to ask for oral explanations on the spot,[71] that is to say questions relating to the documents being examined, for example technical details or abbreviations. The new provision imposes an obligation on the undertaking to answer a broad range of questions on the subject matter of the investigation. That means that any member of staff or representative of the undertaking can be questioned for information related to the subject matter and the purpose of the investigation.[72] It follows that they are expected to answer immediately and are not given time to consider their answers.[73]

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69 Council Regulation 17/62, First Regulation implementing Articles 85 and 86 of the EC Treaty (1962) OJ P 013/204, 211. This Regulation determined for more than 40 years the application of Article 81 and 82 EC Treaty by the Commission. As the enforcement system as spelled out in Regulation 17/62 could jeopardise the effective enforcement of the EC competition rules in an enlarged European Union, it was decided to modernise the system.

70 See Article 23 paragraph 1 (b) of Regulation 1/2003. All decisions leading to impositions of fines may be subjected to a review by the ECJ under Article 31 of Regulation 1/2003.

71 Article 14 paragraph 1 (c) of Regulation 17/62.

72 *Riley*, The ECHR implications of the investigative provisions of the Draft Competition Regulation, (2002) 51 ICLQ, p. 5.

In the case of non-compliance, the undertaking will be held liable and subject to the sanctions as set forth in Article 23 (1) of Regulation 1/2003.

With regard to the limitations the Commission should take into account when applying its power to obtain information, recital 23 of the preamble of Regulation 1/2003 states 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 an other undertaking the existence of an infringement."

This recital reflects the pronounced *Orkem* case.[74] In this case the ECJ was confronted with the issue whether the privilege against self-incrimination operated as a principle of Community law to delimit the application of the at that time applicable Article 11 of Regulation 17/62. In the absence of any provision in the relevant Regulation 17/62 guaranteeing such right during preliminary investigations, the ECJ analysed the national laws of the Member States and the relevant Human Rights Treaties. It took the view that, 'where the privilege against self-incrimination existed in the laws of the Member States, it applied only to natural persons in relation to criminal proceedings'. Furthermore, 'there was no such principle common to the laws of the Member States that could be relied upon by legal persons in the economic sphere, in particular with regard to infringements of competition law'.[75] Finally, the ECJ observed that 'neither the wording of Article 6 ECHR, nor the decisions of the ECrtHR indicated that the Court upheld the right not to give evidence against oneself'.[76] The ECJ came, however, to the conclusion that the right of the defence is a general principle of Community law and must be secured in a preliminary stage as well. As such, the ECJ recognised a right of non self-incrimination to the extent that companies under investigation cannot be compelled to provide the Commission with answers which might involve an admission on its part of an infringement, which is incumbent upon the Commission to prove.[77]

3. The Judicial Developments in Light of the ECHR

At the time the *Orkem* case was decided, the ECJ relied on the fact that 'neither the wording of Article 6 ECHR, nor the decisions of the ECrtHR indicated that

73 *Bourgeois/Humpe*, The Commission's Draft "New Regulation 17", (2002) 2 ECLR, p. 45.

74 Case 374/87, *Orkem SA v Commission*, (1989) ECR 3283.

75 Ibid. para 29.

76 Ibid. para 34.

77 Ibid. para 35.

the Court upheld the right not to give evidence against oneself' when refraining from the application of Article 6 ECHR. About five years later, however, the ECrtHR had acknowledged that Article 6 ECHR does upheld the right of non self-incrimination.[78] In the *Saunders* case[79] the applicant was compelled to make incriminating statements to inspectors appointed by the department of Trade and Industry during the investigation. The use of these statements in the subsequent criminal trial was held to infringe the right not to incriminate oneself as laid down in Article 6 ECHR. The ECrtHR recalled that:

> "Although not specifically mentioned in Article 6, the right to remain silent 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. Their rationale lies 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. The 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. In this sense the right is closely linked to the presumption of innocence contained in Article 6. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.[80]"

The ECrtHR argued that, in order to consider whether the use made by the prosecution of the statements obtained from *Saunders* amounted to an unjustifiable infringement of the privilege, it was necessary to determine whether he had been subject to compulsion to give evidence, and whether the use of this testimony had infringed the basic principles of a fair procedure.[81] It was clear from the Company Act that *Saunders* was indeed subject to legal compulsion to give evidence by answering questions posed by the inspectors of the Department of Trade and In-

78 *Funke and others v France*, Series A No 256-A (1993) 16 EHRR 297.

79 *Saunders*, Reports 1996-VI (1997) 23 EHRR 313.

80 Ibid. para 67.

81 Recently, in the *Luckhof and Spanner v Austria* case the ECrtHR declared a complaint under Article 6 ECHR admissible. It concerns the issue whether the imposition of fines on registered car-owners on the basis of a domestic Motor Vehicle Act, for failure to disclose the driver of their cars, violates the right to silence and the privilege against self-incrimination. According to the applicants they were obliged on payment of a fine to admit to have driven the car at the time when the traffic offence at issue had been committed. In practical terms this amounted to a confession of having committed the offence. The government argued that given the public interest in the effective prosecution of traffic offences, the contested Motor Vehicle Act strikes a fair balance between the public interests and the individual car owner's interest to remain silent and therefore appears to be proportional. The ECrtHR, however, considered that the complaint raised serious issues of law under the ECHR and declared the case admissible. Application nrs. 58452/00 and 61920/00, *Luckhof and Spanner v Austria*, (2004) 39 ECHRR SE2 7.

dustry, as a refusal could result in the imposition of fines or imprisonment. And, according to the ECrtHR, the answers Mr. Saunders had given were in fact of an incriminating nature in the sense that they contained admissions with regard to knowledge of information which tended to incriminate him. The ECrtHR argued that the right could not reasonably be confined to statements or admissions of wrongdoings or to remarks that are indirectly incriminating. Testimony under compulsion, which appears on the face of it to be of a non-incriminating nature such as exculpatory remarks or mere information on questions of fact may later be deployed in criminal proceedings in support of the prosecution case.

Moreover, the ECrtHR made also clear that the general requirements of fairness contained in Article 6 ECHR, including the right not to incriminate oneself, apply to criminal proceedings with regard to all types of criminal offences without distinction, from the most simple to the most complex ones. In line with this extensive application the ECrtHR does not distinguish between natural and legal persons and applies the right to a fair trial to legal persons as well.[82] In this respect, the EComHR has pointed out in the *Société Stenuit v France* case[83] that the Strasbourg organs have consistently emphasised the importance of Article 6 ECHR which reflects the fundamental principle of the rule of law, and that a restrictive interpretation of that Article would not be consonant with the object and purpose of the provision. In light of these considerations the EComHR considered that a corporate body could claim the protection of Article 6 ECHR when a criminal charge has been made against it.

Against the backdrop of this wide interpretation of the right of non self-incrimination, the CFI was confronted with in the *Mannesmannröhren-Werke* case.[84] In this case the applicants alleged that the protection offered by Article 6 (1) ECHR regarding the right of non-self incrimination went appreciable beyond the principles recognised by the ECJ in the *Orkem* case. The CFI, however, ruled that applicants could not invoke the ECHR directly before the European Courts.[85] It declared that under Community law the applicants enjoyed protection equivalent to that guaranteed by Article 6 ECHR without further evaluating the ECrtHR's case law.[86]

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82 *Dombo beheer v Netherlands*, (1993) 18 EHRR 213.

83 *Société Stenuit v France*, Series A No 232-A (1992) 14 EHRR 509. The EComHR never decided on the merits of this case because the parties reached an amicable settlement.

84 Case T-112/98, *Mannesmannröhren-Werke v Commission*, (2001) ECR II-729.

85 Ibid. para 75. This reasoning appears arbitrary having regard to the number of cases in which the ECJ directly refers to the ECHR and the ECHR case law, and having regard to the cases in which applicants have successfully relied upon the ECHR before the ECJ. See in this respect Case C-185/95 P, *Baustahlgewerbe v Commission*, (1998) ECR I-8417.

86 Ibid. para 77.

The ECJ ruled in similar terms in another, more recent case. In the *LVM* case[87] the ECJ was confronted with a request of annulment of a decision of the CFI, the *PVC II* decision, as it was alleged that this decision was based on evidence obtained in breach of the privilege against self-incrimination. The applicants argued on appeal that the CFI had erred in law when examining their plea, alleging a breach of the privilege against self-incrimination resulting from Article 6 ECHR. They complained that the CFI, on the issue of the scope of the right asserted by them, used the same line of argumentation as in the *Orkem* judgement thereby neglecting recent developments in the case law of the ECrtHR which widened the scope of Art. 6.[88] However, according to the ECJ, both the *Orkem* judgement and the recent case law of the ECrtHR require first the exercise of coercion against the suspect in order to obtain information from him, and second, the establishment of the existence of an actual interference with the right they define.[89] Moreover, according to the ECJ the CFI's line of argumentation was accurate, as the questions did not lead to answers constituting admissions or incriminations of third parties since they were countered either by refusals to answer or by denials. Thus, according to the ECJ, the parties were not actually affected in their right to a fair procedure by the questions posed by the Commission.

It follows that despite all the emphasis on human rights issues by the ECJ and the CFI, since *Orkem* no noticeable development has occurred as regards the right of non self-incrimination under EC law. Although the ECJ decided that the *Orkem* ruling and the case law of the ECrtHR are 'equivalent', the ECJ did not go into a detailed analysis of the applicable conditions. Therefore, this statement is not of much value as the interference with one's right to a fair trial is still judged on the basis of the *Orkem* principle. Hence, as indicated above, under EC law an actual interference could only emerge when the person in question is compelled to admit the existence of an infringement. Under the ECHR the assessment of an actual interference can also be made when a person is compelled to provide exculpatory remarks or mere information of facts. So in practice the scope of the right not to incriminate oneself is more limited under EC law as a narrower definition is used in order to asses whether Art. 6 ECHR has been interfered with.

4. Article 6 ECHR and EC Competition Law

Before putting into practice the implications derived from the right not to incriminate oneself as applied by the ECrtHR into the field of EC law, it is necessary to examine whether the preliminary investigation procedure of Regulation 1/2003 is suitable for the purposes of Article 6 ECHR. As the right not to incriminate one-

87 Joined cases C-238/99 P, C-244/99 P,C-245/99 P, C-247/99 P, *LVM v Commission*, (2002) ECR I-8375.

88 Ibid. para 274

89 Ibid. para 284.

self only applies to cases concerning a 'criminal charge' the issue to be considered is whether the investigatory procedures envisaged by Regulation 1/2003, which may lead to the imposition of fines, falls within the term 'determination of a criminal charge' of Article 6 (1) ECHR.[90]

a) Determination of Criminal

The ECrtHR has adopted an autonomous interpretation of the notion of 'criminal charge', independent from the national legal systems. In this respect the ECrtHR developed certain criteria in the *Engel* case[91] in order to identify the 'real' character of a procedure and to determine whether Article 6 ECHR is applicable. The formal classification of the domestic procedure is a starting point. As regards the investigation procedure of Regulation 1/2003, Article 23 (5) of that Regulation expressly states that the fines that the Commission can levy for a substantive infringement of Article 81(1) or 82 of the EC Treaty are 'not of a criminal nature'. However, according to the ECrtHR, such a formal characterisation cannot be decisive.[92] The next criterion relates to the scope and purpose of the penalty. In order to be a criminal offence the scope of the violated norm has to be general and the purpose of the sanction has to be deterrent and punitive.[93] It follows that the violated norm must have a binding character with regard to the general public and not be addressed to one group singled out by specific criteria. With regard to the offences under EC competition law it is clear that the aim of the rules is to protect the general interests of society as the general aim is the protection of the competitive process and the integrity of the single market, and that the rules are of a general application. With regard to fiscal penalties the ECrtHR adopted the position that those penalties which are not compensatory but rather punitive in nature, such as fines and disqualification, give the proceedings a criminal character which renders Article 6 ECHR applicable.[94] Indeed, the fines that can be imposed under Regulation 1/2003 are intended to punish and deter and have no compensatory element.[95] Moreover, the nature and severity of the penalty will be determined by reference to the maximum potential penalty the relevant law pro-

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90 *Funke and others v France*, Series A No 256-A (1993) 16 EHRR 297, para 44.

91 *Engel and others v Netherlands*, Series A No 22 (1976), para 82. Also in *Öztürk v Germany*, (1984) Series A No 73.

92 *Jacot-Guillardmod*, Rights related to good administration of justice (Article 6), in: Macdonald/Matscher/Petzold (eds), European system for the protection of human rights, 1993, p. 400.

93 *Van Dijk/van Hoof*, Theory and Practice of the European Convention on Human Rights, 1998, p. 418.

94 *Salabiaku*, Series A-141-A (1988).

95 Annual Competition Report 1997, The European Commission 1998, para 48.

vides for.[96] The penalty imposed in the case litigated about is relevant to the determination but it cannot diminish the importance of what was initially at stake.[97]

It follows that it appears to be difficult to deny that the application of the criteria as set out in the case law of the ECrtHR leads to the conclusion that proceedings based on Regulation 1/2003 relate to the determination of a criminal charge within the meaning of Article 6 ECHR.[98] In support of this supposition it is of interest that the EComHR indeed held that it was possible that a domestic competition regime, which is based on administrative law, can generate criminal charges for the purpose of the Convention. In the *Société Stenuit v France* case[99] a fine was imposed by the French Minister of Economic and Financial Affairs upon a company for engaging in anti-competitive practices under national competition law. The company alleged that it had been subjected to a criminal charge and that its right to a fair hearing under Article 6 ECHR had been violated. The EComHR applied the *Engel* criteria and put emphasis on the following facts. First, the aim pursued by the national competition law was to maintain free competition within the French market. The law in question affected the general interests of society that are normally safeguarded by criminal law. Second, with regard to the nature and severity of the penalty the EcomHR pointed out that 'the penalty in question was intended to be deterrent'[100]. From the point of view of the EComHR the combination of these factors was sufficient to bring the case within the definition of a criminal charge under Art. 6 ECHR. It follows from the recent *Ezeh and Connors v UK* case[101], where it was held that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge,[102] that this approach is still valid.

b) Determination of Charge

In the *Foti* case[103] the ECrtHR ruled that for the purposes of Article 6 ECHR, a criminal charge must be considered to exist at the moment an individual's right

96 In comparison with Regulation 17/62, the powers of the Commission under Regulation 1/2003 are backed up by even more deterrent fines: under Article 23 (1) of Regulation 1/2003 the maximum potential penalty is 1 percent of the total turnover in the preceding business year.

97 *Ezeh and Connors v UK*, (2004) 39 EHRR 1, para 100.

98 *Wils*, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement; A Legal and Economic Analysis, (2004) 27(2) World Competition, p. 209.

99 *Société Stenuit v France*, Series A No 232-A (1992) 14 EHRR 509, paras 60-67.

100 Ibid. para 64.

101 *Ezeh and Connors v UK*, Application nos. 39665/98 and 40086/98 (2004) EHRR1 2.

102 Ibid. para 86.

is 'substantially affected' by governmental acts founded on a suspicion against him. It follows that the existence of a charge is not always dependent on the timing of the formal filing of charges. It might already occur when measures imply an allegation and likewise substantially affect the situation of the suspect. It follows that from that moment on, all self-incriminating statements infringe the right of non self-incrimination and must be excluded as evidence *per se*.[104]

This does not, however, mean that the use of evidence obtained under compulsion up to this moment can never violate the right against self-incrimination. In this respect it is important to note that in the *Saunders* case the complaint by the applicant concerned the use of the statements obtained by the inspectors of the Department of Trade and Industry, and that the applicant, Mr. Saunders, did not suggest in the pleadings before the ECrtHR that Article 6 ECHR was applicable to the proceedings conducted by the inspectors, or that these proceedings themselves involved the determination of a criminal charge within the meaning of that provision. Nevertheless, the ECrtHR found it necessary to elaborate on this stage of the procedure and the relation to Article 6 ECHR. The ECrtHR pointed out that an administrative investigation is capable of involving the determination of a 'criminal charge' in the light of the Court's case law concerning the autonomous meaning of this concept. Then the ECrtHR referred to its earlier case law where it had held that the functions performed by inspectors of the Department of Trade and Industry, on the basis of the same Companies Act as deployed under *Saunders*, were essentially investigative in nature and that they did not adjudicate either in form or in substance.[105] Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities, be it prosecuting, regulatory, disciplinary or even legislative ones. As stated in that case, a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6 (1) ECHR would in practice unduly hamper the effective regulation of complex financial and commercial activities which is as well in the public interest.[106] It follows from these considerations that for the right of non self-incrimination to be applicable in a pre-trial stage, it is of decisive importance whether the stage is of purely investigative nature or whether there are also adjudicatory elements involved. Thus, it might be deduced that Article 6 ECHR is applicable where the purpose of an investigatory procedure is to provide evidence for a conviction and the investigation and the prosecution are carried out by the same body. According to these criteria, Article 6 ECHR might be applied to a preliminary investigation procedure

103 *Foti and Others*, (1982) Series A No 56.

104 *Stessens*, The obligation to produce documents versus the privilege against self-incrimination; Human rights protection extended too far?, (1997) 22 ELRev, p. 59.

105 *Fayed v UK*, (1994) Series A 294-B, para 47.

106 *Saunders*, Reports 1996-VI (1997) 23 EHRR, p. 313, para 67.

as the Commission is under Regulation 1/2003 indeed charged with both the investigation and the prosecution.[107]

Accordingly, it must be concluded that there is no hindrance to apply Article 6 ECHR to the investigatory procedures as envisaged by Regulation 1/2003.

5. ECHR Implications for the Competition Regime

As there are no formal objections to apply Article 6 ECHR to the EC competition regime, the implications derived from the right of non self-incrimination as interpreted by the ECrtHR on the investigative competition procedure under Regulation 1/2003 will now be analysed.

Under EC law the Commission, when exercising its power to obtain information as laid down in Article 18 and 20 (e) of Regulation 1/2003, is not allowed to ask questions which are aimed at reversing the burden of proof. However, in practice, there is no guarantee that the Commission does not ask leading incriminating questions. Thus, companies being questioned are forced to make a subjective appreciation of what information will indicate their culpability. Such an appreciation is difficult as companies are not in the position to determine the precise nature of the questions posed. However, the reliance on the right of non self-incrimination thus depends exactly on this determination.[108] Especially in case of an obligation on the undertaking under Article 20 (2) (e) of Regulation 1/2003 to answer questions on the subject matter and the purpose of the investigation during a dawn raid, an appreciation of the questions posed is difficult to carry out. The member of staff or representative of the undertaking questioned for information is expected to answer immediately and a failure to answer might result in the imposition of heavy turnover fines.[109] Consequently, they run a greater risk of answering incriminating questions.

Under the ECHR, companies under investigation are not exposed to the risk of providing self-incriminating statements, as a company has simply the right to refuse to provide information, even if that information at the first glance may not even seem self-incriminating. It follows that under the ECHR a request compelling a person under investigation to provide evidence of offences may infringe that person's right to remain silent.[110] This implies that under the ECHR the ability of

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107 See for a discussion *Wils*, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement; A Legal and Economic Analysis, (2004) 27(2) World Competition, p. 201-224.

108 *Kerse*, EC Antitrust Procedure, 1998, p. 125.

109 *Riley*, The ECHR implications of the investigation provisions of the draft Competition Regulation, (2002) 51 ICLQ, p. 71.

110 *Tissot-Favre*, The investigative powers of the European Commission, (2003) ICCLR 14 (10) p. 1-9.

the Commission to use its power to seek information under Article 18 or Article 20 (2) of Regulation 1/2003 against suspect undertakings is seriously undermined. Requiring information by legal compulsion under Article 18 (3) or requiring information during an on the spot investigation under Article 20 (2) (e) of Regulation 1/2003 is likely to be prohibited, even if it concerns exculpatory or factual answers on subjects as the operation of the business or economics. According to the ECrtHR, such remarks or explanations may be used against the person or undertaking under investigation in a later stage of the proceedings to contradict or cast doubts upon statements made by the accused or to undermine his credibility. This leads to the conclusion that, when applying *Saunders* to EC law, the Commission is forced to respect the will of an accused to remain silent and shall be forced to use, instead of evidence the accused was compelled to give, other alternatives to gather information. It follows that the consequences of the ECrtHR's case law are profound and actually imply that the power of investigation needs a remodelling in order to comply with the ECHR.[111]

6. Future Developments

A fascinating question in relation to this case study is whether it is likely that the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) will be of any help in resolving the discrepancy between the case law of the ECrtHR and the case law of the ECJ with regard to the level of protection from being forced to make incriminating statements. Once the Charter has become binding and can be relied upon before the European Courts, both the ECHR and the Charter will constitute the main sources of law for the protection of fundamental rights within the European Union.[112] In the preamble, the Charter explicitly reaffirms the rights contained in the ECHR as they have been interpreted in the case law of the ECrtHR as elements of a common heritage on which the Charter is built. And, indeed, most of the fundamental rights in Chapter I and II of the Charter are based on the corresponding rights in the ECHR, although the structure and wording of the specific provisions differ. Where the ECHR differentiates between the various rights and principles contained in the ECHR by spe-

111 *Riley*, Saunders and the power to obtain information in Community and United Kingdom Competition Law, (2000) 25 ELRev, p. 279. The author suggests that, in order to bring the competition regime in line with the ECHR and to preserve its effectiveness, a solution might be that the investigation and prosecution will have to be kept apart by the adoption of an independent tribunal established by Regulation. The EComHR made clear in *Saunders* that when functions are essentially investigative and have no adjudicative elements, preparatory investigations should not be subject to the guarantees of a judicial procedure as set forth in Article 6 paragraph 1 ECHR.

112 The Convention on the future of Europe has produced a draft EU Constitution with a view to replace the existing EU and EC Treaties. The Charter, being part of the Draft Constitution of the European Union, will be binding when all Member States have signed and ratified the EU Constitution, OJ (2003) C 169, p. 1.

cific limitation clauses, the Charter, on the other hand, does not formulate any specific restrictions for each of the rights contained in the Charter, but entails a general limitation clause in Article 52 (1).[113] In order to preserve consistency in the interpretation or application of the corresponding provisions contained in the different instruments Article 52 (3) states:

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the same Convention. This provision shall not prevent Union law providing more extensive protection."

The Charter may provide a more extensive protection than the ECHR but not a narrower one.

According to the explanations given by the Charter, the legislator, when laying down limitations to those rights, must comply with the same standards as fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and that of the ECJ.[114] Moreover, according to the explanation given, the meaning and scope of the rights are determined not only by the text of those instruments, but also by the case law of the ECrtHR and by the ECJ.[115] Although the wording seems to indicate a harmonious scope of human rights protection within Europe, in practice it might not be so self-evident that under the Charter the meaning and scope of rights will be the same as under the ECHR.[116] The explanatory text of the Charter refers to the case law of both Courts without any distinction as a source for interpreting the scope of specific rights in the Charter. Thus, it seems that it is up to the Court that is called upon in a particular case to decide which case law it takes into account when determining the meaning and scope of the rights contained in the Charter.

In order to illustrate this, reference to the discussed case law of both Courts regarding the right not to incriminate oneself can be made. As shown in paragraph 3 of this Chapter the ECrtHR has recognised the right not to incriminate oneself as an

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113 Article 52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and the freedoms. Subject to the principles of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

114 Council of the EU, Explanations relating to the complete text of the Charter, 2001 European Communities Luxembourg, p. 74.

115 Ibid.

116 See also *Polakiewicz*, The EU Charter and the ECHR; Competition or coherence in fundamental rights protection in Europe, (2002) 14 European Review of Public Law, p. 858.

element of Article 6 (1) ECHR. As Article 6 (1) ECHR corresponds to the right contained in Article 47 (2) of the Charter, the Court which would be called upon to interpret Article 47 (2) may rely on the case law of both the ECrtHR and the ECJ regarding the right not to incriminate oneself as long as it does not give Article 47 (2) a narrower reading than the ECrtHR. As the case study showed, the ECJ decided in a recent case that the conditions for invoking the right of non self-incrimination developed in the case law of the ECJ under *Orkem* are in its opinion equal to those developed by the ECrtHR.[117] Given these considerations, a Court might rely on the *Orkem* ruling, when interpreting Article 47 (2) of the Charter. However, as we have seen, the protective scope of the right not to incriminate oneself is not at all the same under EC law as according to the ECrtHR's case law, because in practice the assessment of an actual interference is based on more restricted grounds.[118]

It follows that it is difficult to determine whether the limitations on the protection of the fundamental rights under the Charter are equal to the ones laid down in the ECHR. This depends, to a certain extent, on the point of view of the ECJ. Thus, the content of Article 52 (3), 'the meaning and scope of the rights in the Charter shall be the same as the rights laid down in the ECHR', should not be overestimated in practice.[119] As divergent interpretations of human rights protection under the Charter is not to be excluded, the Charter, when legally binding, will not substantially change the relation of the European Community to the ECHR.[120] Therefore, it is important that Part 1 Article 7 of the EU Constitution provides a legal basis for the possibility of accession of the European Union to the ECHR. Moreover, this will finally guarantee the European citizens a uniform level of human rights protection, as the acts of European Institutions would be within the jurisdiction and thus scrutinised by the ECrtHR.

7. Conclusion

In Europe, the interest in an effective enforcement of the competition rules seems to prevail over the rights of natural and legal persons. The ECJ and the CFI ensure this by anxiously refusing any references towards the applicability of Article 6

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117 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, *LVM v Commission*, (2002) ECR I-8375.

118 Under EC law the actual interference could only emerge when the person in question was compelled to admit the existence of an infringement. Under the ECHR, the assessment of an actual interference can also be made when a person was compelled to provide exculpatory remarks or mere information of facts.

119 See also *Craig*, The Community Rights and the Charter, (2002) 14 European Review of Public Law 1, p. 216.

120 See also *Sap*, Het EU-Handvest van de grondrechten; De opmaat voor de Europese Grondwet, 2003.

ECHR in EC competition law. In their application of the principle of non self-incrimination, the ECJ and the CFI deny any link with the principle of non self-incrimination as applied by the ECrtHR under Article 6 (1) of the ECHR and, as the studied case law showed, even though no obstacle exists to apply Article 6 ECHR to the investigatory procedures envisaged by Regulation 1/2003. It is clear that if the ECJ recognised that the principle of non self-incrimination flows from Article 6 ECHR, this would imply a recognition of the right to remain silent and would thus constitute a hindrance to the Commission's task of enforcing the competition rules. Therefore, the current practice provides for a situation that is not compatible with the observance of human rights as guaranteed by the ECHR. It is not inconceivable that in the future a human rights claim on the basis of the new competition regime will be successful and thus alter this practice.

E. General Conclusion

In general the ECJ, when deciding on human rights questions, refers to provisions of the ECHR by applying them as general principles of Community law. In this respect, the ECJ is not reluctant to use the ECHR as a direct source of interpretation or to apply the ECHR directly in Community law. Moreover, since the *Schmidberger* judgement the ECHR might be even regarded as the highest binding source of law within the European Community concerning human rights so that both primary and secondary EC law must comply with the ECHR. As this results in a hierarchic subordination of EC law to the ECHR, the EC institutions should be considered to be bound by the ECHR.

The ECrtHR indicates in its case law that it is prepared to review direct Community acts via Member State responsibility. Member State responsibility entails a direct liability of the EU Member States for direct actions of Community Institutions infringing the ECHR. This responsibility is based on the fact that the Member States have signed the Treaties establishing the European Communities and thereby agreed to the creation of European Institutions to which powers have been transferred. The EU Member States, all of them being Contracting States to the ECHR, are liable for alleged violations if they result from acts or omissions "within their jurisdiction" in the sense of Article 1 ECHR. Thus, they can be held jointly responsible under the ECHR regarding a direct exercise of powers by the Community institutions infringing the ECHR. This implies that an additional supplementary review of Community acts exists. Due to this potential review by the ECrtHR, the ECJ is more restricted in its ability to interpret the ECHR autonomously. If this development continues, it could be argued that the imperative character of the ECHR and the ECrtHR case law will be reinforced within the European Community.

Having regard to the above-described binding effect of the ECHR for the European Institutions, and the reinforcing influence of the potential providing of supplemental review of direct Community acts by the ECrtHR, divergent interpretations or application of ECHR rights by the European Courts are not reconcilable with the status the ECHR and the ECrtHR case law command within the European Community. Nevertheless, the case study on the right of non self-incrimination showed that a divergence in the level of human rights protection offered by the ECJ and the ECrtHR does occur. While the ECJ is normally eager to rely on the ECHR and the ECrtHR's case law when adjudicating upon human rights questions, in its application of the principle of non self-incrimination it denies any link with the ECrtHR's interpretation of Article 6 ECHR. This is even more astonishing as no obstacle exists to apply Article 6 ECHR to EC competition law. From the above-mentioned results follows, however, that the ECJ should not be allowed to reserve a right to choose whether to follow the interpretations of the ECrtHR or not. Accordingly, the scope of the right of non self-incrimination should be brought in line with the case law of the ECrtHR.

As in practice a clear distinction exists between exercising effective EC competition policy and protection of fundamental rights, it appears difficult to apply the right of non self-incrimination as interpreted by the ECrtHR without affecting adversely the current effectiveness of Regulation 1/2003. Indeed, the described case study showed that the application of the ECrtHR's interpretation to EC law seriously threatens the legitimacy of the investigative powers of the Commission under Regulation 1/2003. Accordingly, it seems difficult to foresee a swift change in the European Courts' approach towards the ECHR when ruling on questions concerning the right of non self-incrimination. However, resort could be sought in challenging the Member States of the EU before the ECrtHR for being collectively responsible for infringements of the ECHR by the Commission when exercising its powers under Regulation 1/2003.