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EC Dawn Raids: A Human Rights Violation?

*Imran Aslam and Michael Ramsden**

Pursuant to Regulation 1/2003 the European Commission has extensive powers to enforce and regulate competition law within the European Community. This paper examines whether the 'Dawn Raid' procedure, as embodied in the Regulation, is consistent with two rights protected by the European Convention on Human Rights and Fundamental Freedoms: the privilege against self-incrimination (Article 6 ECHR) and the right to privacy (Article 8 ECHR). This paper argues that the protection provided by the European Court of Justice falls far short of protection necessary to undertakings. On this basis, it will analyse what available source(s) of judicial remedy an undertaking has in order to avail itself of ECHR rights.

1. INTRODUCTION

An important role of the European Commission (Commission) is to enforce and maintain competition law within the European Union (EU). Regulation No 1/2003[1] (Regulation), which came into force on 1 May 2004,[2] makes a provision for competition rules pursuant to Articles 81 and 82 of the EC Treaty. In furtherance of European-wide competition, Chapter V of the Regulations enables the Commission to carry out 'dawn raids';[3] it can request information, enter business and private premises, copy and take written information and ask individuals on-the-spot questions. This is often conducted without a warrant and by the means of coercion, compulsion and threats of pecuniary sanctions.

The use of dawn raids by the Commission acts as a powerful tool in finding and eliminating infringements of competition law. With these powers, the Commission can intrusively and forcefully act on its suspicions. In the past year, the Commission have

* LL.B (Hons) (London), LL.M (College of Europe), LL.M (Cambridge), and LL.B (Hons) (London), LL.M (Berkeley), Barrister-at-Law (Lincoln's Inn), Assistant Professor, Faculty of Law, The Chinese University of Hong Kong, respectively. We are grateful to our friends and colleagues for commenting on earlier drafts. All mistakes are ours.

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJL 1 of 04.01.2003, p 1.

2 This replaced Reg. 17/62. Reference will be made to case-law decided under the old regulation, where this remains good law.

3 Technically, a dawn raid occurs when the Commission arrives at the undertaking's premises and conducts an inspection. For the purposes of this article, the term is used to encompass generally the Commission's powers of investigation under Chapter V of the Regulation.

used their dawn raid powers to investigate pharmaceutical companies,[4] airlines[5] and agricultural businesses, among others.[6] In addition to extensive investigative powers, the Commission can also impose substantial fines on undertakings.[7] In 2007, the Commission accumulated €3.3 billion in fines.[8]

The purpose of this article will be to consider the extent to which these extensive Chapter V powers are consistent with the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The central question of this article is whether the protection afforded by the European Court of Justice (ECJ) against arbitrary use of Chapter V is equivalent to the protection provided by the European Court of Human Rights (ECtHR). Two ECHR rights will be considered in this context: the Article 6 privilege against self-incrimination and the Article 8 right to privacy.

At the outset, the ensuing discussion must be understood in the general context of the fragmented European legal order primarily based on 'national, supranational and international legal systems'.[9] Only States, and not international organisations such as the EU, can be brought before the ECtHR. Set against this background, it is therefore important that the EU should try as far as possible to equally adhere to ECHR principles, as there may not be any other recourse to justice.

The first section therefore outlines the fragmented European Legal Order and the problem that arises with it. The second section provides for the Commission's investigative powers and section three discusses the main part of this paper: whether the protection afforded to undertakings by the Commission under its dawn raid procedure is compatible with the ECHR. Finally, the last section discusses whether any institutional reform is essential to ensure that the Commission and other EU bodies are subject to the same level of judicial control in the protection of fundamental rights as that found to be the case as a contracting party of the ECHR.

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4 http://www.guardian.co.uk/business/2008/jan/16/pharmaceuticals (last accessed 23 July 2008), http://www.hhlaw.com/files/Publication/17835dd7-e9fe-4ad9a9b3491a19f77ac/Presentation/Publication Attachment/206dba00-76a1-475a-b1ba- 399a06c96805/McDavid.pdf (last accessed 23 July 2008).

5 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/158&format=HTML&aged=1& lang age=EN&guiLanguage=en (last accessed 23 July 2008)

6 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/496&format=HTML&aged =0&language=EN&guiLanguage=en (last accessed 23 July 2008)

7 For example, the Commission imposed a €38 million fine on E.ON for breach of a seal during an inspection: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108&format=HTML&aged=1&language N&guiLanguage=en (last accessed 23 July 2008).

8 http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf (last accessed 23 July 2008)

9 Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25(1) ELRev 3.

2. THE EUROPEAN LEGAL ORDER

States are not only members of the European Union but, as a condition of their membership to the EU, they also have to be parties to the ECHR.[10] The corollary of this position is that the EU, being an International Organisation (IO), is not party to the ECHR. Only States can be.[11] This creates a legal vacuum whereby no action can be brought against the EU before the ECtHR, nor can one formally rely upon the Convention and ECtHR's case-law before the Luxembourg Courts, as was evidenced in *Mannesmannrohren-Werken*.[12]

In redressing this legal accountability gap, the EU has developed a way for fundamental rights to be part of the *acquis communautaire* through the development of general principles in ECJ case-law and enactment of a number of treaties.[13] Treaties providing some measure of human rights protection include the Single European Act of 1986, Article 6(2) of the EU Treaty and the Charter of Fundamental Rights. The Charter of Fundamental Rights initially held the promise of more extensive protection than the ECHR. As Article 52(3) of the Charter states:

> [I]nsofar 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 said Convention. This provision shall not prevent Union law providing more extensive protection

However, the Charter, like other EU human rights measures, does not go far enough. It is not binding on States; it only has persuasive value. An argument has been made for the EU to accede to the ECHR in order to address the problem.[14] However, in 1996, the ECJ rejected such an approach for the reason that the EU lacked the competence to join the ECHR, which could only be brought by treaty amendment.[15]

However, there have been some recent developments of significance. The Lisbon Treaty was signed and adopted on 13 December 2007.[16] Article 6(1) of the Treaty makes it clear that the Charter of Fundamental Rights will have 'the same legal value as the treaties', and Article 6(2) commits the EU to accede to the Convention. The

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[10] Copenhagen Criteria, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en

[11] Article 1 ECHR.

[12] See Section IV

[13] Case C-260/89 *ERT v DEP* [1991] ECR I-2925. See also *Orkem v Commission* [1989] ECR 3283 and *Mannesmannrohren-Werke AG* v *Commission* [2001] ECR II-729.

[14] Witte, 'The Past and Future Role of the ECJ in the Protection of Human Rights', in Alston, *The EU and Human Rights*, at 859 (OUP 1st Edition 1999); Weiler and Alston, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in Alston, *The EU and Human Rights*, at 3. (OUP 1st Edition 1999)

[15] *Opinion 2/94 on Accession of the Community to the ECHR* [1996] ECR I-1759.

[16] OJ C 306 Vol 50 of 17/11/2007, p 1.

Charter will now have 'a constitutional basis and render it legally binding'.[17] The ECHR jurisprudence would be directly applicable before the ECJ. Likewise, challenges can be brought before the ECtHR for infringements committed by the EU. From a competition law perspective, this ability of legal persons to access the ECtHR will lead to greater accountability of the European Commission[18].

Whilst these developments are to be welcomed, they are, nonetheless, a longer term project. The future of the Lisbon Treaty, of course, remains in doubt. The Treaty still needs to be ratified, and the no-vote from the Irish populace has further dampened the chances for realisation of the Treaty. Although the Charter will have legal status, the full text does not appear in the Lisbon Treaty, and the British opted-out of the Charter applying to them in cases before the Luxembourg Courts.[19] In other words, there is a considerable way to go before all this happens. As a result of the ever-existing legal vacuum, it is therefore ever more imperative that the EU does not try and act beyond the scope of the ECHR principles.

3. CHAPTER V POWERS

Before assessing the ECHR compatibility of the dawn raid procedure, it is necessary to outline the relevant powers. This article will focus on three powers: the power to request information, the power to inspect and the power to enter private premises.

3.1 Power to request information

Under Article 18 of the Regulation, the Commission can request that undertakings provide all necessary information or written answers to their questions.[20] The Commission may do this either by a simple request[21] or by decision.[22] Where the Commission chooses to send a simple request, the undertaking is under no obligation to respond. The undertaking comes under an obligation not to provide incorrect or misleading information if and when it voluntarily submits to such a request.[23] Failure to uphold this obligation could lead to the imposition of a fine not exceeding 1% of the total turnover in the preceding year.[24]

Where a request is made by a decision, undertakings have an obligation to respond to it.[25] The Commission may impose a fine not exceeding 1% of the total turnover where the undertaking, intentionally or negligently, supplies incorrect, incomplete or

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[17] Ameye, 'The interplay between human rights and competition law in the EU' [2004] ECLR 332 at 335-336.

[18] *Ibid.*

[19] http://news.bbc.co.uk/1/hi/world/europe/6901353.stm (last accessed 23 July 2008).

[20] Art 18(1).

[21] Art 18(2).

[22] Art 18(3).

[23] Art 18(2).

[24] Art 23(1)(a).

[25] Art 18(3).

misleading information or where it refuses to answer the questions.[26] Furthermore, the Commission may impose a penalty payment not exceeding 5% of the average daily turnover *'in order to compel them'* to supply complete and correct information.[27]

3.2 Power to conduct 'all necessary inspections'

Under Article 20, the Commission has the power to 'conduct all necessary inspections of undertakings',[28] and, when doing so, it must specify the subject matter and purpose of the inspection.[29] The Commission can conduct these inspections in one of two ways: either on the basis of an authorisation[30] or pursuant to a decision.[31]

On the basis of an authorisation, the undertaking has the right to refuse the inspection without threat of financial sanction.[32] Where pursuant to a decision, the undertaking is required to submit to inspections and could incur a fine of 1% of their total turnover if it refuses to do so.[33] Further, the Commission could impose a penalty payment up to 5% of the average daily turnover to compel it to submit to an inspection that has been ordered by a decision.[34]

These powers of inspection, either pursuant to an authorisation or a decision, empower the Commission to:

i) enter business premises;[35]

ii) examine and copy business records;[36]

iii) seal business premises and records for a period and to the extent necessary for inspection;[37] and

iv) ask any staff member on-the-spot questions. Failure to answer correctly, truthfully or to respond at all on any facts relating to the subject matter can lead to the imposition of a fine not exceeding 1% of the total turnover.[38]

Additionally, the Commission may be assisted by the Member State (State) in its investigations. National Competition Authority (NCA) officials may assist the Commission, where this is requested either by the Commission or the NCA. Where

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26 Art 23(1)(b).

27 Art 24(1)(d).

28 Art 20(1).

29 Art 20(3), (4).

30 Art 20(3).

31 Art 20(4)

32 Art 20(3).

33 Art 20(4), 23(1)(c).

34 Art 24(1)(d).

35 Art 20(2)(a).

36 Art 20(2)(b), (c).

37 Art 20(2)(d).

38 Art 20(2)(e), 23(1)(d).

they do so, NCA officials act under the Commission's powers of investigation under the Regulation, as opposed to their powers under national law.[39]

Where the Commission conducts an inspection pursuant to an authorisation, it must 'in good time' give a notice of the investigation to the NCA,[40] whereas the Commission must consult with the NCA before conducting an inspection based on a decision.[41] Where an undertaking opposes an inspection to which it is required to submit under a decision, the State 'shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent authority, so as to enable them to conduct their inspections'.[42] If judicial authorisation is required for such 'assistance' under national law, then it must be applied for.[43]

Article 20(8), which codifies the *Roquette Freres* judgment,[44] sets out the scope of the review that a national court can undertake in authorising the assistance. It entitles the court to verify that the Commission's decision is authentic and that the coercive measures asked for are neither arbitrary nor excessive. In order to ensure proportionality, the national court may ask the Commission for its reasons for suspecting a breach of competition law, the seriousness of the infringement and the nature of the undertaking's involvement. However, it may neither question the necessity for the inspection nor demand the information in the Commission's file.[45] Only the ECJ can review the legality of the Commission's decision.[46]

3.3 Power to enter private premises

One of the most controversial aspects of the dawn raid procedure is the Commission's right to enter private premises of members of the undertaking. Article 21(1) provides that the Commission may enter 'any other premises, land and means of transport, including homes of directors, managers and other members of staff of the undertakings'. The Commission can only do so if it has a reasonable suspicion that business-related records that may prove a violation of the competition rules are being kept on those premises.[47] The Commission does not have powers equivalent to those when conducting investigations on business premises. Whilst it can enter private premises, examine the records and make copies, it cannot seal the premises or ask on-the-spot questions.[48]

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[39] Art 20(5). Also note Art 22(2), which outlines that the Commission can request the NCA to conduct a dawn raid on its behalf. The NCA and the officials who do so exercise such powers according to national law.

[40] Art 20(3).

[41] Art 20(4).

[42] Art 20(6).

[43] Art 20(7).

[44] Case 94/00 *Roquette Freres SA* v *DGCCF* [2002] ECR I-9011.

[45] Art 20(8).

[46] Ibid.

[47] Art 21(1).

[48] Art 21(4).

Entering private premises must be based on a decision, which can only be made after national authorities have been consulted.[49] The decision must include the subject matter and purpose of the inspection, and it must inform the applicant that it can be reviewed by the ECJ.[50] Most importantly, the Commission cannot execute the decision 'without the prior authorisation from the national judicial authority'.[51] Similar to Article 20(8) above, the national court plays a central role in authorising inspections.[52] However, 'as the measures are more intrusive, it is likely that the proportionality test carried out by the national judge will be stricter'.[53]

4. COMPATIBILITY OF CHAPTER V WITH ECHR

Having provided an introduction to the basic regulatory framework, this article will now address the question of whether these powers comply with fundamental rights as recognised by the ECHR. In this respect, two rights will be considered: the privilege against self-incrimination and the right to privacy.

4.1 Privilege against self-incrimination

The 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.[54]

Looking first at the Commission's power to request information under Article 18 of the Regulation,[55] the ECJ case *Orkem*[56] illustrates the lack of EC recognition of a privilege against self-incrimination. The undertaking in *Orkem* challenged a Commission decision compelling it, via the threat of sanctions, to produce documents that would confess infringements of competition rules. The ECJ held that the privilege against self-incrimination did not exist under the Regulation. The privilege was available 'only to a natural person charged with an offence in criminal proceedings' as opposed to 'legal persons in the economic sphere'.[57] In considering Article 6 ECHR, the ECJ found that neither the wording of the article nor ECtHR decisions provided for the privilege.[58]

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[49] Art 20(2).

[50] *Ibid.*

[51] Art 21(3).

[52] Art 20(3).

[53] Dekeyser and Gauer, 'The New Enforcement System for Article 81 and 82 and the Rights of Defence', in *2004 Annual Proceedings of the Fordham Corporate Law Institute*.

[54] C Ovey and R White, *Jacobs & White European Convention on Human Rights* (Oxford, 3rd edn, 2002), at 174.

[55] Some of the old case-law will refer to Article 11 under the old Reg 17/62. Art 11 preceded Art 18, so references to Art 11(2) and 11(5) are equivalent to Art 18(2) and 18(3) of the new Regulation respectively.

[56] Case 374/87 *Orkem v Commission* [1989] ECR 3283.

[57] *Orkem* at 29.

[58] *Orkem* at 30.

In *Orkem*, the ECJ did, however, develop a limited form of the privilege against self-incrimination. A distinction was made between compulsion to provide factual information and compulsion directly admitting a violation of competition law.[59] With respect to the former, the ECJ held that the Commission could 'compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, *even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct'* (factual/indirect incrimination).[60] The ECJ concluded that 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement' (direct incrimination).[61]

Subsequent developments by the ECtHR have cast doubt on the *Orkem* court's reasoning. In *Funke,*[62] French customs officers, having raided the applicant's domicile, asked the applicant to produce further documents. The French authorities imposed a fine for his failure to do so. The applicant argued that his right not to incriminate himself under Article 6 had been violated - he either produced the documents or he faced being fined. The Court was in total agreement with the applicant:

> The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence' … to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6(1).[63]

The ECtHR further elaborated on the scope of the privilege in *Saunders.*[64] This case concerned a takeover investigation by the Department of Trade and Industry ('DTI'). During investigations, the DTI inspectors took witness statements from individuals at the company concerned. These statements later 'formed a significant part of the prosecution's case'.[65] The applicant challenged the case before the ECtHR.

In deciding the case, the ECtHR noted that, even though it is not explicitly mentioned in Article 6, 'the right to silence and the right not to incriminate oneself are generally recognised international standards that *lie at the heart of the notion of fair procedure under Article 6'*.[66] This was because it protected the accused against improper compulsion and miscarriages of justice, and it was for the prosecution to prove its case against the accused without resorting to finding evidence through the use of compulsion and oppression in criminal cases.[67]

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[59] Jones and Sufrin, *EC Competition Law: Text, Cases and Materials* (OUP 3rd Edition 2007) at 1174.

[60] *Orkem* at 34 [Emphasis Added].

[61] *Orkem* at 35.

[62] *Funke v France* [1993] I CMLR 897.

[63] *Funke* at 44.

[64] *Saunders v United Kingdom* (1997) 23 EHRR 313.

[65] *Saunders* at 61.

[66] *Saunders* at 68. Confirmed in *Murray* v *UK* (1996) 22 EHRR 29.

[67] *Saunders* at 68. Confirmed in *Serves* v *France* (1999) 28 EHRR 265.

The ECtHR held that the applicant had been subject to compulsion to give evidence because, had he refused to answer the questions, he would either have been fined or sanctioned to two years' imprisonment.[68] In addition, the Court added that the right not to incriminate oneself:

> [C]annot reasonably be confined to statements of admission or wrong doing or to remarks which are directly incriminating.[69] Testimony obtained under compulsion which appears on its face to be of 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, 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.[70]

This is a clear rejection of the *Orkem* principle. *Orkem* established that only direct incrimination was unlawful; questions concerning facts that could establish an infringement were permissible. *Saunders* rejects this proposition. 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.[71]

The ECtHR confirmed that the *Saunders* principle applied equally to documents as to oral explanations in *JB v Switzerland.*[72] In that case, the tax authorities had compelled the applicant, with the threat of a criminal sanction, to submit certain tax documents. The ECtHR held that this infringed the applicant's privilege under Article 6 ECHR.[73] This would not have been the case if the information coerced had an existence independent of the individual involved.[74]

EU case-law subsequent to ECHR developments

In 1989, the ECJ in *Orkem* could be forgiven for taking the view that there was neither a right to silence nor a privilege against self-incrimination. At that time, neither *Funke*, *Saunders,* nor *JB,* had been delivered. Consequently, if the ECJ continued to apply the *Orkem* principle, this would imply acceptance of a situation that is not compatible with the ECHR.[75]

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[68] *Saunders* at 70.

[69] i.e direct incrimination.

[70] i.e. indirect incrimination. *Saunders* at 71 [Emphasis Added].

[71] *Saunders* at 72. Riley remains critical of the Court's judgment, on the basis that too much respect is given for human dignity and autonomy; see: Riley, 'Saunders and the power to obtain information in Community and United Kingdom Competition Law' (2000) *ELR* 264 at 278.

[72] *JB v Switzerland* (App. No.31827/96), Judgment of 3/05/2001.

[73] *JB v Switzerland* at 66.

[74] *Ibid.*

[75] Van Overbeek, 'The right to remain silent in competition investigations: the Funke decision of the Court of Human Rights makes revision of the ECJ's case law necessary' (1994) *ECLR* 127 at 132.

The Court of First Instance (CFI) in 2001 was asked to rectify the conflict that existed between the two institutions in *Mannesmannrohren-Werke.*[76] In this case, the applicant refused to answer questions put to it under a request for information pursuant to a decision. As a result, the Commission imposed a daily penalty of €1,000. The applicant argued that this breached Article 6 ECHR.

Rather than relying on the ECtHR case-law under Article 6 ECHR, as *Orkem* implicitly said it could, the CFI denied itself the jurisdiction to apply the ECHR when reviewing investigations under competition law on the grounds that 'the Convention is not part of community law'.[77] As Willis said, '… the CFI has moved the goalposts: before the ECHR held that Article 6 of the Convention conferred a right of silence in *Funke* and *Saunders*, the ECJ was prepared to concede that Article 6 applied to competition proceedings; once the ECHR held Article 6 to include that right, the Court of First Instance held that Article 6 did not apply'.[78] No reasons were given by the CFI for moving the goalposts, but Willis suggests that 'the CFI appears to have made a conscious policy decision not to extend to Commission investigations the safeguards against self-incrimination provided by Article 6 of the ECHR'.[79]

Overall, the EU's standard of protection is not equivalent to the ECHR, and it is urged that it should be. In spite of such objections, the ECJ finally confirmed its approach in *SGL Carbon.*[80] The argument that the ECtHR's standard of protection would 'constitute an unjustified hindrance'[81] to the Commission's powers of investigation fails to take into account ECtHR's jurisprudence. The privilege, contrary to what the EU Courts believe, is not absolute. As *Saunders* pointed out, an individual can be compelled to hand over documents if they are requested under a warrant.

The problem at the moment is that a Commission decision is not a warrant, as it is not granted by judicial authorisation. The Commission, not being a court, grants itself a decision. Therefore, the 'unjustified hindrance' would no longer exist if the EU were to change their system so that the Commission's decision was pre-authorised by a judicial court granting it a warrant.[82]

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[76] Case T-112/98 *Mannesmannrohren-Werke AG* v *Commission* [2001] ECR II-729.

[77] *Mannesmannrohren-Werke, at* 60 [Emphasis Added].

[78] Willis, 'You have the right to remain silent ...or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions' (2001) *ECLR* 313 at 319.

[79] *ibid* at 313.

[80] C-308/04 *SGL Carbon* v *Commission* CMLR [2006] 10. In Cases C-238, 244-245, 247, 250, 251-252 and 254/99 P, *LVM v Commission* [2002] ECR I-8375 (*PVC II*), the ECJ opened up the possibility that a challenge to an Article 18(3) request 'must take in account' the jurisprudence of the ECtHR under Article 6 ECHR (para 274). However, the ECJ in *SGL Carbon* held the ECJ in *PVC* II 'had not reversed its previous case-law on the point' and that *Orkem* remained good law (para 45). The ECJ in *PVC II* also had to determine whether Article 11(2) breached the privilege. But it held, correctly, that as a simple request for information was voluntary, it could not be contrary to the privilege.

[81] *Mannesmannrohren-Werke* at 66

[82] Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' (2002) *ICLQ* 51 1 (55) at 64.

Legal persons in the economic sphere

The *Orkem* objection to applying the privilege on the basis that it does not apply to corporate entities involved in the economic sphere is no longer valid. It is now settled by the ECtHR that the ECHR applies to undertakings and individuals alike.[83]

According to the Regulation, the dawn raid procedure is regarded as civil and administrative in nature.[84] It would follow that the privilege under Article 6 ECHR would not apply.[85] However, it does not follow that classifying the dawn raid procedure as a civil sanction will be decisive for the purpose of the ECHR and Article 6.[86] The ECtHR's criterion for deciding whether a measure is civil or criminal for the purpose of Article 6 was enunciated in *Bendenoun* v *France*:[87]

(i) the applicable law must be 'imposed by a *general rule*…and applicable to *everyone';*

(ii) there must be '*penalties* in the event of non-compliance' with the law;

(iii) the act must be seen as 'punishment to *deter* re-offending'; and

(iv) the penalties/sanctions must be '*substantial*'.[88]

Applying these criteria, 'the inescapable conclusion is that, for the purposes of the ECHR, the procedures and penalties are criminal in nature.'[89] First, competition law is imposed as a general rule applicable to all.[90] The aim of competition law is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers'.[91] Second, non-compliance with the procedure leads to

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[83] See, for example, *Societe Stenuit* v *France* (1992) 14 EHRR 509, para 66; *Church of X* v *United Kingdom* (App. No.3798/68) Decision of 17/12/1968; *Niemietz* v *Germany* (1993) 16 EHRR 97; *JA PYE (Oxford)* v *UK*, (App. No.44302/02) Judgment of 30/08/2007; (1994) 18 EHRR 1; *Demuth* v *Switzerland* (2004) 38 EHRR 20; *Comingersoll SA v Portugal* (2001) 31 EHRR 772.

[84] Art 25(3) of the Regulation, which states that fines imposed due to the dawn raids 'shall not be of a criminal law nature.'

[85] Benjamin, 'The application of EC competition law and the European Convention of Human Rights' (2006) *ECLR* 693 at 695-696 argues that there is no need to classify the dawn raid procedure as criminal as, according to the words of Article 6, the privilege against self-incrimination also applies to civil obligations. However, this is a misinterpretation of Article 6. The whole notion of the right to remain silent 'applies only within the context of *criminal proceedings* […] There can be no doubt that the privilege does not apply outside the criminal law – a fact evidenced by the very term self-in*crim*ination.' For this view, see Trechsel, *Human Rights in Criminal Proceedings* (OUP 1st Edition, 2005) at 349. This has been confirmed in *Funke* and *Saunders* and discussed below.

[86] *Engel* v *The Netherlands* 1 EHRR 647; *Neumeister* v *Austria* (1979-80) 1 EHRR 971; *Ozturk* v *Germany* (1984) 6 EHRR 409, para 49; *Jusilla v Finland* (App. No.73053/01) Judgment of 23/11/2006, para 43.

[87] (1994) 18 EHRR 54.

[88] *Ozturk* and *Engel* used similar but not identical criteria, restated in Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) *World Competition* 120-121.

[89] Riley at 63; Waelbroeck and Fosselard, 'Should the Decision-making power in EC Antitrust Procedures be left to an Independent Judge? – The impact of the European Convention of Human Rights on EC Antitrust Procedures' (1994) *Yearbook of European Law* 14 at 111.

[90] *Ibid* at 63.

[91] C-136/79 *National Panasonic* v *Commission* [1980] ECR 2033 at 20.

the imposition of financial sanctions. Third, as the Commission guideline has outlined,[92] this penalty is intended to deter and punish the perpetrators.[93] Fourth, the fines that the Commission can impose can amount to anything up to 5% of the company's turnover. In *Societe Stenuit,*[94] this amount was considered substantial enough to be considered a criminal sanction. In this case, the French Economic Minister imposed a fine of FF50,000 on the applicant company for violating competition law. The company argued that the fine was a breach of its right to a fair trial, as it amounted to a criminal charge under Article 6. The Court found that the fine imposed was criminal: it was a substitute for a criminal court judgment, the amount imposed was not in itself negligible, and the Minister could have imposed a fine up to 5% of the company's takeover which was intended to act as a deterrent.[95]

Therefore, the dawn raid procedure is criminal for the purposes of Article 6. 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.

However, instead of using this argument to deny the application of the privilege to the undertakings, some commentators argue that the scope of protection should be different depending on whether legal or natural persons are involved. Wils notes that, since 'all judgments of the ECtHR concerned questions put to *natural persons*' as such, 'it is not obvious that the ECtHR would grant the same scope of protection under the privilege against self-incrimination to *legal persons*'.[96] Traditionally, criminal sanctions were seen only to be imposed on natural persons. Corporate entities rarely felt the stigma of criminality attached to them, and this is why there is a lack of case-law before the ECtHR.[97] However, today this is no longer the case. Corporate entities cannot only

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92 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210 1/9/2006, pg 2.

93 Riley at 63.

94 *Societe Stenuit v France* (1992) 14 EHRR 509.

95 *Societe Stenuit* at 62-64. The case was settled out of court and it never reached the ECtHR.

96 Wils, 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition* 567-588 at 577. This line of argument stems from the cases such as *Markt Intern Verlag GmbH & Klaus Bermann* v *Germany* [1990] 12 EHRR 161 and *Casado Coca* v *Spain* [1994] 18 EHRR 1 where the ECtHR suggested that where commercial information is involved the member states have a far greater margin of appreciation to interfere with restricting such information under Article 10 ECHR than if it were other ideas and information. However, this objection – that the protection afforded under the ECHR can be of a lower standard to legal persons than to natural persons – has no value in relation to the main discussion of this paper. These cases dealt with the type of commercial information a legal person could or could not provide i.e. it is a positive act that the Court is interfering in. Whereas, in the case of the Commission's investigative powers it is an interference with an omission on behalf of the legal person. 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. Moreover, it is the criminal sanctions that come attached with the failure to act in a way that is problematic: refusal to cooperate could bring fiscal and criminal sanctions. With such invasive powers it is unconvincing to argue that the lower standard of protection ought to prevail.

97 Benjamin at 695.

be imposed with criminal responsibility, but they can also claim the rights of defence when criminally charged.[98]

Furthermore, this approach fails to understand properly the notion of corporate personality, where individual shareholders form the 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.[99] 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.[100]

Article 20(2)(e) and oral questions

According to Wils, the fact that, under Article 20(2)(e) of the Regulation, the Commission can ask questions to staff members of the undertaking or association being investigated does not appear relevant, given that the Regulation does not allow any penalty to be imposed on such staff members.[101] On its face, this approach seems correct: as the individual does not incur a pecuniary sanction, no element of compulsion exists. However, it fails to account for the intricate relationship between the individual and the company. A better view is that, where individuals are 'authorised to speak' on behalf of undertakings, their acts can then be 'imputable to the undertaking,' so, when an individual responds to a question, it is as though the undertaking is 'speaking'. Where a fine is imposed on the undertaking for refusing to 'speak', the undertaking should avail itself of the privilege.[102] Van Gerven believes that the privilege as pronounced in *Orkem* for documents will apply by analogy.[103] However, those principles do not conform to ECHR rights. The privilege as defined by *Funke, Saunders* and *JB* should apply equally to Article 20(2)(e). *Saunders* makes it clear that

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[98] See generally A Ashworth, *Principles of Criminal Law* (OUP 4th Edition 2003). Also see the English case of *Rio Tinto Zinc* v *Westinghouse Electric* [1978] AC 547, where the court held that companies could rely on the privilege.

[99] 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 is not met, only the Company can bring a challenge before the ECtHR (*Agrotexim Hellas SA v Greece* (1996) 21 EHRR 250). See generally Emberland, *The Human Rights of Companies: Exploring the Structure of the ECHR Protection* (OUP 1st Edition 2006) at 67.

[100] Venit and Luoko, 'The Commission's New Power to Question and Its Implications on Human Rights. Recent Developments and Current Issues' (2005) *2004 Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy* at 675.

[101] Wils at 577-578.

[102] Vesterdorf, 'Legal Professional Privilege and The Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues' (2005) 2004 *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy* at 724.

[103] Van Gerven, Regulation 1/2003: Inspections (Dawn Raids) and the Rights of Defence at 337/338, http://www.wilmerhale.com/files/Publication/df146630-ba12-49ed-b112-2f997c80c2c4/Presentation/PublicationAttachment/642e3f0e-8a30-437e-ae6a-339b8e1d37e4/VanGerven_Regulation1_2003InspectionsDawnRaids.pdf

those principles equally apply to oral remarks. In that case, Article 20(2)(e) is another example of the Commission's powers being contrary to the ECHR.

4.2 Right to privacy

Article 8(1) ECHR states that 'everyone has the right to respect for his *private and family life*, *his home* and *his correspondence'*, unless interference is justifiable under Article 8(2), where a measure 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 freedom of others.

Business premises

As was the case for the privilege against self-incrimination, it was the ECJ who first addressed whether Article 8 ECHR could extend to business premises.[104] In *Hoechst,*[105] the applicant challenged a decision imposing a penalty upon it for failing to submit to a Commission investigation, arguing that the search was contrary to Article 8 ECHR as it was not carried out under a judicial warrant.[106] Using similar language to that in *Orkem,* the Court denied that Article 8 applied to the business premises.[107] It found that Article 14 of Regulation 17/62 (now Article 20 of the Regulation) could not be construed in such a way as to run contrary to fundamental rights.[108] Despite this, the ECJ held that Article 8 did not apply to business premises, only private dwellings of natural persons.[109] Furthermore, the ECJ refused to extend the protection to businesses because there was no ECHR case law on the matter.[110]

As with the development of the privilege, subsequent developments in this context have been made by the ECtHR. In *Niemietz,*[111] the ECtHR extended Article 8 to apply to business premises. The applicant argued that the search of his office was contrary to Article 8. Teleologically the applicant seemed to have a weak case. Article 8 ECHR deals with respect for one's privacy for his home and family life. However, the ECtHR stated that:

> [R]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings … there appears, furthermore, to be no reason of principle why this understanding of this notion of

[104] This section only applies to an Article 20(4) Commission decision to enter business premises, as it is mandatory. It does not apply to an Article 20(3) authorisation, as that method is voluntary and therefore can be refused by the undertaking.

[105] *Hoechst AG* v *Commission* [1989] ECR 2859 at 10.

[106] *Hoechst* at 10.

[107] Cf. Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137.

[108] *Hoechst* at 13.

[109] *Hoechst* at 17 [Emphasis Added].

[110] *Hoechst* [Emphasis Added].

[111] *Niemietz,* op cit, n 83.

> '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. This view is supported by the fact that … it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not.[112]

The ECtHR confirmed that *Niemietz* also applied to legal persons in *Societe Colas Est.*[113] According to the Court, the Convention is a 'living instrument',[114] and it must be given a 'dynamic interpretation'.[115] On this basis, the Court concluded 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 premises*'.[116] It then held that the French NCA (DGCCRF), which undertook dawn raids on 56 companies and seized thousands of documents under French legislation allowing them to do so without any judicial authorisation, breached Article 8(1).

As a result, the Court had to decide whether the interference was justified. First, the Court concluded that, as the DGCCRF was granted its power under French legislation, the interference was in accordance with the law as it has 'some basis in domestic law'.[117] Secondly, the DGCCRF was pursuing the legitimate aim of 'the economic well-being of the country' and 'the prevention of crime'.[118] However, the Court could not be persuaded that the DGCCRF dawn raid procedure was necessary in a democratic society, as it did not provide for adequate and effective safeguards against abuse. This was because 'the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them *exclusive competence* to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place *without any prior warrant being issued by a judge* and *without a senior police officer being present*'.[119]

The argument that Article 8 does not apply to business premises is no longer tenable. Following *Niemietz* and *Societe Colas Est*, an exercise of the Commission's power to enter premises under Article 20 would be an infringement of Article 8(1). The crux of the matter is whether the dawn raid procedure is justifiable under the criteria of Article 8(2), and, more centrally, whether it can be said to be proportionate within the meaning of its being necessary in a democratic society.

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[112] *Niemietz* at 29. In addition, the Court added that in the French version of the ECHR, the term 'domicile' is used, which has a broader meaning than the word 'home' and includes a professional office.

[113] *Societe Colas Est* v *France* (2002) ECHR 421. See *Buck* v *Germany* (2006) 42 EHRR 21 for a recent confirmation.

[114] *Societe Colas Est* at 41.

[115] *Ibid.*

[116] *Ibid* [Emphasis Added].

[117] *Societe Colas Est* at 43.

[118] *Societe Colas Est* at 44.

[119] *Societe Colas Est* at 49 [Emphasis Added].

Is it in accordance with the law?

Under Article 8(2), the Regulations must meet a three-part test:[120] (i) the measure must have some basis in domestic law; (ii) it must refer to the quality of the law; and, (iii) its consequences must be foreseeable and compatible with the rule of law. Applying the criteria to the dawn raid procedure, the following can be concluded:

a) The procedure is in accordance with the law as it is 'carried out on the basis of Article 81 EC … and on the basis of the Regulation'.[121] Whilst this test is formulated with 'domestic law' in mind, given that EU law forms part of domestic law[122] and is constitutionally supreme,[123] EU law can be said to fit into this category. This has been confirmed in *Bosphorus Airways,* where the ECtHR confirmed that an EU Regulation is law for these purposes as it is 'generally applicable' and 'binding in its entirety' on the Member States.[124]

b) Case-law from the Community is published shortly afterwards in the Official Journal of the EU, which is accessible to all.

c) The test for foreseeability requires that the law be 'sufficiently clear to give citizens an adequate indication as to the circumstances in and the conditions on which public authorities were empowered to resort to such measures'.[125] A clear reading of the Regulation shows the clarity of when and where the Commission can act.

Does it pursue a legitimate aim?

The procedure pursues the legitimate aim of protecting free competition in the European Union.[126] As in *Colas,* this falls within the public interest exception of 'economic well-being of the country'.[127]

Is it necessary in a democratic society?

The key question that needs to be addressed is whether the EC dawn raid procedure is necessary in a democratic society. In other words, whether it corresponds to a 'pressing social need' and is 'proportionate to the aim pursued'.[128] According to Rizza and Lang, 'the Commission's practice appears unlikely to be distinguished from the procedure

[120] *Huvig v France* (1990) 12 EHRR 528.

[121] AG Mischo in *Roqutte Freres* at 39.

[122] Case 6/64 *Costa v Enel* [1964] ECR 585.

[123] Case 26/62 *Van Gend en Loos v Nederlandse Administratie* [1963] ECR 1.

[124] *Bosphorus Airways* v *Ireland* (2005) 42 EHRR 1 at 145.

[125] *Kopp* v *Switzerland* (1998) ECHR 18 at 55.

[126] C-185/95P *Baustahlgewebe v Commission* [1998] ECR I-8417. Cf. *National Panasonic.*

[127] More precisely 'the economic well-being of the EU'.

[128] *Silver* v *UK* (1983) 5 EHRR 347.

followed by the DGCCRF in the *Colas* case, which the ECtHR found to violate Article 8'.[129]

It is difficult to disagree with their conclusion. First, the Commission enjoys broad powers under Article 20. The Commission, not a judicial authority in its own right, grants itself powers to conduct on-the-spot investigations under Articles 20 and 20(4)(a).[130] Second, the Commission conducts dawn raids without prior judicial authorisation.[131] Dekeyser and Gauer argue that there is no problem in this respect as (i) the undertaking can oppose the dawn raid, and, when that occurs, national judicial authorisation is required; and (ii) the EU Courts can, nonetheless, review the legality of the Commission's decision permitting the dawn raid.[132]

The first point does not appreciate that, up to and until the point where the undertaking does not oppose the dawn raid, the Commission's inspection remains invalid due to its not being authorised by an independent judicial authority. In addition, as Article 20(8) provides, the national court authorising a judicial warrant cannot call into question the legality of the Commission's decision; it should rather concern itself with whether the Commission's decision is 'authentic and the coercive measures are neither arbitrary nor excessive'.[133] This clearly is not a true grant of a real judicial authorisation.[134]

Their second point seems to neglect the fact that Community Courts can only review the legality of the inspection *after* the search takes place. This is contrary to *Societe Colas Est,* where the ECtHR stated that a *prior* judicial warrant is required.[135] Finally, whilst officials of the relevant NCA may accompany the Commission, this does not equate to having a senior police officer present.[136]

In light of the conflict between the ECHR and the EU, the ECJ finally decided, in *Roquette Freres*, to endorse Strasbourg's position.[137] However, the triumph was short-lived because the Regulation adopted in 2004 superseded the case-law.

Private dwellings

It is clear from both the wording of Article 8(1) and jurisprudence of the ECtHR that private homes fall within the scope of this Article.[138] Against this background, it was

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[129] Rizza and Lang, 'Case Comment: Stes Colas Est v France' (2002) ECLR 413 at 415.

[130] *Ibid.*

[131] *Ibid.*

[132] AG Mischo in *Roqutte Freres* advocates the same position.

[133] Article 20(8) of the Regulation.

[134] Rizza at 416.

[135] *Ibid.*

[136] *Ibid.*

[137] The ECJ held '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 ECtHR subsequent to the judgment of Hoechst'. *Roqutte Freres* at 29.

surprising when Commission powers were extended to the private premises of the members of the undertakings.[139] As with business premises, the issue is whether interference with an individual's home is 'necessary in a democratic society'.

Inspections conducted in private homes are in accordance with the law and pursue legitimate aims for the same reasons mentioned above. However, whether a measure in this context is 'necessary in a democratic society' involves a slightly different analysis. In N*iemietz,* the ECtHR said that the interference under Article 8(2) 'might well be more far-reaching where professional or business activities or premises are involved than otherwise be the case'.[140] By contrast, the private home is probably accorded greater protection.[141]

In *Funke*, the ECtHR established that a Contracting State has the right to conduct house searches and seizures in order to obtain evidence of offences, provided that these measures are proportionate.[142] The first aspect of proportionality requires that the legislative measures enforced must afford 'adequate and effective safeguards against abuse'.[143]

The absence of a judicial warrant is of particular concern in this respect.[144] In *Funke* and *Camezind,* the ECtHR was 'particularly concerned about the absence of a judicial warrant'.[145] In itself, this factor is not decisive. For example, in *Niemietz,* the ECtHR was unable to justify interference, even where the authorities were granted a warrant pursuant to a prior judicial authorisation, because:

> 'the warrant was drawn in broad terms, in that it ordered a search for and seizure of "documents", without any limitation, revealing the identity of the applicant … The search impinged on professional secrecy to an extent that appears disproportionate in the circumstances'.[146]

The second aspect requires that the ECtHR must consider the particular circumstances of each case in order to determine whether the interference was proportionate to the aim pursued.[147] The ECtHR takes into account a number of criteria when determining proportionality:

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[138] *Gillow* v *UK* A.109 (1986) 11 EHRR 335; *Buckley* v *UK* (1996) 23 EHRR 101.

[139] Art 21 of the Regulation.

[140] *Niemietz* at 31. Cf. *Societe Colas Est,* para 49 and *Verein Netzwerk* v *Austria* (App. No.32549/96) Admissibility decision of 29/06/1999, to the same affect.

[141] Buyse, 'Strings Attached: the concept of 'home' in the case law of the European Convention of Human Rights' (2006) *European Human Rights Law Review* 294 at 304.

[142] *Funke* at 56; Confirmed in *Cremieux* v *France* (1993) 16 EHRR 332 and *Miahille* v *France* 16 EHRR 357.

[143] See *Camenzind* v *Switzerland* (1997) 28 EHRR 458 at 45.

[144] *Cronin* v *UK* (App. No.15848/03) Admissibility decision of 06/01/2004, 6.

[145] *Ibid.*

[146] *Niemietz* at para 37. The opposite is also true. In *Camenzind* the ECtHR found that the measure in that case was justifiable under Article 8(2) even though no warrant had been produced (at 45-47).

[147] *Camenzind* at 45.

> [T]he severity of the offence in connection with which the search and seizure was effected, the manner and circumstances in which the order had been issued, in particular further evidence available at that time, the content and scope of the order, having notably regard to the nature of the premises searched and the safeguards taken in order to confine the impact of the measure to reasonable bounds, and the extent of possible repercussions on the reputation of the person affected by the search.[148]

It follows from this that Article 21 of the Regulation seems to provide the necessary safeguards. First, before a dawn raid can be conducted, a judicial authorisation from a national court, based on a Commission decision, is required.[149] Second, the Commission can only make such a decision where it has a reasonable suspicion that business documents may be found in the private home concerned. Third, the Commission's decision must also state the reasons that have led the Commission to conduct an inspection, pursuant to Article 20(8) of the Regulation. Fourth, the Commission's powers to inspect documents are restricted to business records[150] and are subject to legal professional privilege. Fifth, whilst the national court has a similar review power as mentioned above, it has some additional powers as well. According to Article 21(3) of the Regulation, in reviewing a Commission decision to enter private premises, the national court can also consider 'the importance of the evidence sought … and the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises'.

Whilst the extension of the safeguards in respect to private premises is a welcome improvement, it does not go far enough. First, in granting authorisation for the Commission to conduct inspections on private premises, the national court cannot 'call into question the necessity of the inspection nor demand that it be provided with the information in the Commission's file'.[151] In this regard, it cannot be said that the national court gives an *authentic* authorisation for the Commission to enter private homes. Second, there is no requirement for a 'police officer',[152] 'independent observer',[153] or 'public officer'[154] to be present to ensure that the Commission officials act within its powers.

Moreover, it is likely that the ECtHR would find excessive the Commission's inspection powers of the 'homes of *directors, managers and the other members of staff*'.[155] The

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[148] *Buck v Germany* at 45.

[149] Art 21(3) of the Regulation.

[150] Art 21(4) of the Regulation. Cf. *Niemietz* at 37 and *Camenzind* at 46.

[151] Art 21(3) of the Regulation. Cf. *Cronin,* where the court implicitly concluded that were the police to withhold information or fail to provide the judges with fuller information when requested, such actions would be disproportionate in the circumstances.

[152] *Societe Colas Est* at 49.

[153] *Niemietz* at 37.

[154] *Camenzind* at 46.

[155] Art 21(1).

extension of the Commission's powers stretches the limit of what competition investigations are about: finding infringements of competition law committed by undertakings. It could be argued that to extend these powers to apply to the senior officials of the undertaking is permissible, but to extend them to anyone who works for the undertaking is too broad in scope.

5. REMEDY

This article so far has highlighted two human rights concerns facing the dawn raid procedure. It has stated that the ECtHR would provide a greater level of protection than the ECJ in this respect. The problem, of course, is that those undertakings that have been subjected to arbitrary and intrusive treatment cannot claim redress before the ECtHR. The fragmented European legal order hinders legal persons from challenging the compatibility of Commission acts with fundamental rights.[156] A legal person cannot challenge the European Commission before the ECtHR, nor can he formally rely on ECHR jurisprudence before the ECJ.[157] So what can the undertaking do?

5.1 Individual State responsibility: attribution, *ratione personae* and *materiae*

As change to the fragmented European legal order is unlikely to be forthcoming, it is instructive to assess other avenues for undertakings to take in challenging the legality of the Commission's acts. In this respect, the international rules on state responsibility and attribution can, tangentially, provide undertakings with an indirect method by which to challenge the ECHR-compatibility of the Commission's acts. The separate question dealt with here, therefore, is whether the undertaking can take action against a State (individually or collectively), as a member of the ECHR, for complying with its EU obligations that are contrary to the Convention.[158]

The case-law on whether the ECtHR has competence to entertain cases against individual States, as opposed to an international organisation, 'is not straightforward'.[159] According to *Behrami,*[160] the ECtHR must first decide whether an act is attributable to the international organisation or the State before it can determine whether it has competence, *ratione personae* and *materiae*, to adjudicate the matter. According to the Court, an act can only be attributable to the international organisation where it 'retained ultimate authority and control' so that it can only be said that the international organisation delegated its powers.[161] This case arose out of challenges issued by the

[156] A prime example of the fragmented European legal order is evidenced by the fact that to accede to the European Union, States must be a party of the ECHR (Copenhagen Criteria, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en. However, the EU is not party to the ECHR. Only States can secede to the ECHR.

[157] As evidenced in *Mannesmannrohren-Werken.*

[158] Willis at 319.

[159] Craig and De Burca, *EU Law: Text, Cases, and Materials* (OUP 4th Edition 2008) at 242.

[160] *Behrami and Behrami v France* and *Saramati v France*, *Germany and Norway* (2007) 45 EHRR SE10.

[161] *Behrami* at 133. For an application of this test, see the UK case of *Al-Jedda* v *Secretary of State for Defence* (2007) UKHL 58.

applicants against UN-mandated peace maintenance operations in Kosovo. In this case, the ECtHR held that the failure of UNMIK (a subsidiary UN organ responsible for civil affairs) to remove cluster bombs and the act of KFOR (a NATO-led security force) in detaining one of the applicants were attributable to the UN, as opposed to the States involved in UNMIK and KFOR. This was because KFOR was operating under powers delegated to it under Chapter VII of the UN Charter and UNSC Resolution 1244.[162] UNMIK's acts were already attributable to the UN because it was the UN's subsidiary organ.[163] Since the acts were attributable to the UN, as opposed to the States, the ECtHR did not have any competence *ratione personae* to adjudicate on that matter.

Whether the ECtHR will apply a detailed test of attribution in the EU context is debatable. The case-law suggests that there is an automatic presumption of attribution to States that act because of their EU obligations. Early case-law of the ECtHR confirms this approach. Although the ECtHR did not have the *ratione personae* to consider challenges taken directly against the EU because it is an international organisation, it nonetheless had the *ratione personae* to take action against the States, for, when they transferred their powers to the EU, it did 'not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be derived of their peremptory character'.[164] The ECtHR here did not apply a substantive test of attribution as it did in *Behrami*. Rather, it was assumed that acts arising out of States' EU obligations could be attributed to the States themselves, because the underlying rationale in the EU-State relationship is that:

> [T]he institutions of the EC/EU exercise powers which are delegated to them … and are comparable to certain powers traditionally exercised by the legislative, administrative and judicial authorities of the Member States. Without such attribution of powers to the EU/EC, the exercise of these powers by the authorities of the Member States would have been subject to review by the ECtHR for its conformity with the ECHR.[165]

In the early cases, the issue turned on whether the ECtHR had competence *ratione materiae*. In determining this, the case-law suggests that the ECtHR focused on the discretion the State had in implementing the EU act.[166] In the case of no discretion, such as where the State implements an ECJ judgment,[167] the ECtHR had no *ratione materiae* to adjudicate on the matter. If the States had discretion, such as in

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[162] *Behrami* at 132-141.

[163] *Behrami* at 142-143.

[164] *M&CO* (1990) DR 138. See also *Matthews* v *UK* (1999) 28 EHRR 361, para 32.

[165] Van Dijk, 'European Commission for Democracy Through Law (Venice Commission): Comments on the Accession of the European Union / European Community to the European Convention of Human Rights', CDL (2006) 096, 12 October 2007, Strasbourg at 3. Available at: http://www.venice.coe.int/docs/2007/CDL(2007)096-e.asp

[166] *Craig and De Burca* at 424.

[167] *M&Co*, op cit, n 164.

implementing primary law, into which States are free to enter,[168] or where they have discretion to implement a directive,[169] then the ECtHR had *ratione materiae* to entertain the case on its merit.

The case of *Bosphorus*[170] implicitly confirms that there is an automatic presumption that acts arising from States' EU obligations can be attributed to the States themselves, and it adopts a 'more systematic approach' in dealing with whether the ECtHR has competence to adjudicate such matters.[171] *Bosphorus* concerned the seizure of the applicant's aircraft pursuant to an EC Regulation implementing a UN Security Resolution obliging States to confiscate all aircraft belonging to or operating from Yugoslavia. As the planes were bought from Yugoslavia, the Irish Minister of Transport had them impounded. Under a test of attribution, it cannot really be said that the acts were attributable to the Irish Minister because in reality he was only acting in the manner in which he was obliged to under the EC Regulation.[172] In reality, these acts were attributable to the EU. However, the ECtHR did not apply a test of attribution. Rather, it assumed that the acts were attributable to Ireland.

Instead, the ECtHR focused on whether it had the competence to entertain the case. In determining whether the case was admissible, the ECtHR deemed that the notion of 'jurisdiction' under Article 1 of the Convention 'is considered primarily territorial'.[173] In this case, as the seizure of the plane was implemented by the Irish State in Ireland pursuant to a decision made by the Irish Minister, the 'primarily territorial' test was satisfied. Consequently, the elements of *ratione loci, personae* and *materiae* had been satisfied.[174] This approach allowed the ECtHR to overcome 'the practice of the ECtHR to declare applications that are connected to Community acts inadmissible *ratione materiae'*.[175] By adopting the 'primarily territorial' test, the ECtHR in effect allowed all challenges against States' acts arising from their Community obligations as admissible because it would not be incorrect to say that all such acts will occur in the territorial jurisdiction of the State through some act of a State organ. In the case of a dawn raid, this will be equally so. The dawn raid only takes place in the territory of the State with the knowledge or the co-operation of the NCA,[176] and, where the dawn raid is

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[168] *Matthews v UK*, op cit, n 164.

[169] *Cantoni* v *France*, (App. No.17862/91) judgment of 15/11/1996.

[170] *Bosphorus*, op cit, n 124.

[171] *Hoffmeister, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v Ireland,* App. No. 45036/98*, AJIL,* Vol 100, No 2 (Apr, 2006), 442-449 at 446.

[172] Costello, 'The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred distinctions in Europe' (2006) *HRLR* 87 at 100.

[173] B*osphorus* at 136.

[174] B*osphorus* at 137.

[175] Kuhnhert, 'Bosphorus – Double Standards in European Human Rights Protection?' *Utrecht Law Review*, Vol 2, Issue 2 (December 2006) at 184 - http://www.utrechtlawreview.org

[176] Art 20(3) and (4) of the Regulation.

opposed, it is the national court that has the final decision in authorising the procedure in its territory.[177]

Despite *Behrami*, it is argued here that the correct approach to be adopted in the EU-State obligations is the one outlined in *Bosphorus*. It is important to remember that the EC Regulation adopted in *Bosphorus* was adopted pursuant to a UNSC Resolution. The ECtHR could have ruled that the case was inadmissible because it was adopted under a UNSC Resolution, but it did not. Rather, it side-stepped that issue, seemingly on purpose, to create a systematic test that could be applied in the EU context. Moreover, the ECtHR itself in *Behrami* distinguished *Bosphorus* in this way. The ECtHR in *Behrami* confirmed that the Court in *Bosphorus* had competence *ratione personae* because the seizure of the aircraft had been carried out by the Irish Authorities in Ireland following a decision of the Irish Minister. In *Behrami,* the acts and omission of UNMIK and KFOR could not have been attributed to the States, did not take place in their territory and were not undertaken pursuant to a decision of one of its authorities,[178] thereby re-affirming the 'primarily territorial' jurisdiction test. The ECtHR made this distinction even more explicit when it stated 'there exists, in any event, *a fundamental distinction* between the nature of the international organisation and of international cooperation with which the Court was there concerned [in *Bosphorus*] and those in the present cases'.[179] *Bosphorus* concerned a case arising out of the EU context, whereas *Behrami* arose out of the UN, 'an organisation of universal jurisdiction fulfilling its imperative collective security objective'[180] under Chapter VII and Article 103 of the UN Charter. It would not be stretching too far to say that whilst the ECtHR regards itself as equal to the EU, and therefore deems itself able to oversee acts flowing from the EU, it does not hold the same opinion of the UN. It is as though it regards the UN as being of a higher status, as though it sits at top of a pyramidal structure in the international legal system because of Article 103[181] and the political implications that flow from this. *Behrami* and *Bosphorus* should be seen in this light.

Equivalence

Adopting a *Bosphorus* approach poses little problem concerning whether the ECtHR has the competence to adjudicate a case against an individual State. Rather, the focus will be on whether the second part of the *Bosphorus* doctrine is satisfied. According to *Bosphorus*, acts undertaken pursuant to the States' international legal obligations will have to be reviewed to determine whether the substantive guarantees and judicial supervision

[177] Arts 20(6), (7) and (8) of the Regulation. In the case of private premises, it is the national court that gives the final judicial authorisation.

[178] *Behrami* at 151.

[179] *Ibid.*

[180] *Ibid.*

[181] Which states 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

offered can be considered at least equivalent to that of the ECHR.[182] By equivalence, the Court meant 'comparable'[183] as opposed to 'identical'.[184]

In case the international organisation does provide for equivalence, there will be a presumption that the State complies with the Convention. However, this presumption can be rebutted if 'in the circumstances of a particular case, it is considered that the protection was manifestly deficient'.[185]

In *M&CO*, the applicants challenged the execution of an ECJ judgment by the German authorities on the basis that it breached the principle of presumption of innocence under Article 6(2). The ECtHR concluded that no infringement would occur if the international organisation provided for rights with equivalent protection. In this case, the Court concluded as such without going into detail concerning whether that was the case. The difference in *Bosphorus* was that the ECtHR undertook a substantially detailed analysis of the EU's system for protecting human rights as a whole. In particular, it noted that case-law and subsequent treaties took into account fundamental rights. More importantly, the EU's mechanisms of control are very substantial and include annulment actions, actions against the Community and the possibility of bringing action in damages for non-contractual liability. Moreover, national courts played a significant role in protecting individual rights through the concepts of supremacy, direct effect, state liability and the Article 234 preliminary reference. In this light, the ECtHR concluded that the protection was equivalent, and the presumption arose that Ireland did not infringe its Convention rights.[186]

It is difficult to see how the result will be any different in the context of EC competition proceedings. Undertakings have recourse to the very same EU system that the ECtHR declared equivalent. As a result, States will be presumed to have acted in accordance with the ECHR, unless they can somehow bring the case through the 'back door'[187] by alleging that, in their particular case, the rights afforded were manifestly deficient. What this means is unclear. No guidelines were given by the court. If 'manifestly deficient' is taken to mean that the EU must apply substantially the same standards of human rights as enshrined in the ECHR, then the preceding chapters are evidence of manifest deficiency. This was the view taken by several of the concurring Judges. In defining 'manifestly deficient', they concluded that 'it seems all the more difficult to accept that Community law could be authorised, in the name of 'equivalent protection', to apply standards that are less stringent than those of the ECHR when we

[182] B*osphorus* at 155.

[183] *Ibid.*

[184] *Ibid.*

[185] B*osphorus* at 156.

[186] B*osphorus* at 159-165.

[187] Hoffmeister at 447.

consider that the latter were formally drawn on the Charter of Fundamental Rights of the EU'.[188]

However, if manifestly deficient is understood to mean deficiencies in the *procedural* mechanism of control that provide for the protection, then undertakings will seem to have relatively little chance of success. This is the view taken by *Bosphorus* and previous case-law. In *Bosphorus*, the ECtHR held that no manifest deficiency had occurred because it was clear that 'there was no *dysfunction of the mechanisms of control* of the observance of the Convention rights'.[189] Previous case-law also suggests that where there is a lack of or an ineffective judicial remedy, an infringement may be found.[190] In *Matthew*s, the court relied heavily on this fact when concluding that there had been an infringement of Article 3 of Protocol 1 – the right to vote. This was because the UK, pursuant to an EU treaty, denied people in Gibraltar from voting in European Parliament elections. The Court reached this conclusion because the Treaty that was entered into could not have been challenged before the ECJ because it was not an act of the Community, but rather a Treaty of the Community.[191] In other words, in this case there was a *dysfunction of the mechanism of control* (i.e., of the judicial remedy) that was established to protect the ECHR rights.

5.2 Collective State responsibility

It has been argued that an undertaking involved in a dawn raid procedure should sue States collectively for self-executing acts.[192] As all States have transferred their powers to the EU, they should, as 'the authors of the act',[193] be collectively responsible for all subsequent acts committed by the EU. However, an undertaking seeking to challenge the Commission's power is unlikely to benefit from this approach. The doctrine of equivalence that was adopted in *Bosphorus* will almost certainly apply *mutatis mutandis*. As was illustrated above, in the EU context, the ECtHR will presume that the EU/EC system of human rights protection is compatible with the ECHR.

5.3 National courts

The only other possibility for undertakings to avail themselves of their rights is to hope that the national court, in allowing investigations to take place on its territory, takes into

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[188] B*osphorus* at 53.

[189] B*osphorus* at 166 [Emphasis Added].

[190] King, 'Ensuring Human Rights review of Intergovernmental acts in Europe' (2000) *ELR*79 at 85. See generally Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25(1) *ELRev* 3.

[191] Para 33-34. Compare to *M & CO* and *Waite and Kennedy* v *Germany* (App. No.26083/94) Judgment of 18/02/1999, where judicial remedy existed and therefore the cases were dismissed.

[192] Hoffmeister at 448; Wellens, 'Fragmentation of International Law', *Michigan Journal of International Law* (2004) Vol 25 at 11-16. Also see *Senator Lines* v *15 EC Member States* (2004) 39 EHRR SE3, where an undertaking challenged a Commission decision against all 15 States before the ECtHR. The case never reached Strasbourg, as the applicants won their original appeal before the ECJ.

[193] Craig and De Burca at 242.

account the ECHR. According to Article 20(6) of the Regulation, the State should provide the Commission with the necessary assistance, including a police officer, where an undertaking opposes a Commission investigation pursuant to an authorisation. Article 20(7) further provides that if *authorisation* for the assistance is required *from a judicial authority,* then it should be applied for *according to national rules*. However, as argued above, it was the lack of a police officer and of judicial authorisation that were contributing factors concerning why the Commission's powers infringed Article 8 ECHR. Accordingly, if legal persons want to avail themselves of procedural rights lacking in the dawn raid procedure, this may be one method of doing so.

From a substantive law perspective, Article 53 ECHR provides that 'nothing in this Convention shall be construed as *limiting or derogating* from any of the human rights and fundamental freedoms which may be ensured under the laws of any *High Contracting Party or under any other agreement to which it is a Party*' [Emphasis added]. This supports the proposition that the national court, in providing its judicial authorisation under national rules, must ensure that the undertaking's ECHR rights are not infringed.[194] As Callewaert confirms, 'in respect of the rights of defence, this means that the Strasbourg standards are to be applied also by domestic courts in the field of community law'.[195] Besselink goes further and suggests that the rights afforded by national law can only be of a higher standard.[196]

Willis, however, contends that the scope of Article 20(8) of the Regulation limits the extent to which the national court can review a Commission decision to investigate.[197] Article 20(8) only allows the national court to determine whether the Commission measures are neither excessive nor arbitrary with regard to the subject matter of the inspection. In *Roquette Freres*, the ECJ outlined that the arbitrary element of the test meant that the national court could not question the need for the investigations, but the Commission should illustrate to the national court that it has evidence of an infringement, from which the Court can decide whether a reasonable suspicion exists that the undertaking violated competition law.[198] As for the excessive element, the ECJ said that the national court must ensure that the 'measures *do not constitute … a disproportionate and intolerable interference'*.[199]

Contrary to what the authors advocate above, could the national court not, when determining the proportionality elements of its review, take into account Convention case-law (as Article 53 ECHR states it should) and come to the same conclusion as the

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[194] Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *CMLRev* 629 at 656-657.

[195] Callewaert, 'The Privilege against Self-Incrimination in European Law: An Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe' *ERA FORUM*, 4/2004, 2004 Issue 4 at 497, p 497.

[196] Besselink at 657.

[197] Willis at 320.

[198] *Roquette Freres* at 60-61.

[199] *Ibid* at 76.

ECtHR that such investigations are disproportionate under Article 8 ECHR? Whether the national court has the courage to go against the doctrine of EC law supremacy and apply ECHR principles, even armed with Article 53 ECHR, is another matter. As O'Neill notes, a State acting in this manner 'is arguably acting in breach of Community law (and may conceivably open up the governments to claims of *Francovich* damages)'.[200]

6. CONCLUSION

A tension exists in the jurisprudence between the ECJ and ECtHR, which has cast a major shadow of doubt on the legitimacy of the Commission's powers of investigation. This is quite unfortunate, considering that it would only require a small amount of tinkering with the Commission's powers of investigation to bring them into conformity with the ECHR. For example, if a request for information under an Article 18(3) decision were adopted pursuant to a judicial warrant, the Commission would be standing on a firm legal base to compel the undertaking to produce documents. However, the EU remains staunch in its approach, and the fact that EC Regulation 1/2003 was adopted with full knowledge of the potential infringements on human rights law tells its own story. Whilst human rights in Strasbourg evolve, human rights in Luxembourg remain tied to an outdated and outmoded vision from the 1980s. This is quite unfortunate for undertakings that have no recourse to a judicial remedy for their legitimate human rights grievances against the EU. The sooner the EU accedes to the ECHR, the sooner equality amongst all people (and undertakings) can be attained.

[200] O'Neill, 'Fundamental Rights and the constitutional supremacy of Community law in the United Kingdom after devolution and the Human Rights Act' (2002) *PL* 724 at 732 and may conceivably open up the governments to claims of *Francovich* damages.