The Evolution of the Understanding of the Fundamental Rights of Undertakings in Matters of Competition Law in the Case Law of the European Union

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Abstract

This article examines the evolution of the fundamental rights of undertakings in the enforcement of European Union competition law. Although European Union antitrust proceedings are formally administrative, the severity and deterrent character of competition fines have led both the Court of Justice of the European Union and the European Court of Human Rights to recognize their quasi-criminal nature for the purposes of fundamental rights protection. The study analyses how this hybrid character affects the procedural guarantees available to undertakings, particularly in relation to judicial review, the privilege against self-incrimination, and the protection of business premises during inspections. Through a doctrinal and comparative examination of the case law of the CJEU and the ECtHR, the article identifies areas of convergence and divergence between the two legal orders. It argues that while procedural safeguards have progressively strengthened, significant asymmetries persist, reflecting the continuing tension between effective competition enforcement and the protection of fundamental rights within the EU legal order.

***Keywords*:** EU competition law; fundamental rights; self-incrimination; judicial review; dawn raids; procedural safeguards.

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1. Introduction

The protection of fundamental rights in EU competition enforcement presents a constitutional dilemma. Although EU antitrust proceedings are formally

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administrative, the severity and deterrent purpose of competition fines have led both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) to recognize their 'criminal' character for fundamental rights purposes. This creates a structural tension between effective enforcement in the interest of the internal market and the procedural rights of undertakings, and forms part of the broader constitutionalising of EU competition law.[3]

Although fundamental rights were originally conceived to protect natural persons against state interference, jurisprudence has progressively extended certain guarantees to legal persons, including undertakings investigated for competition infringements. This raises difficult questions: to what extent may corporate entities rely on rights associated with criminal justice, such as the privilege against self-incrimination or the inviolability of the home; whether the administrative classification of EU competition proceedings justifies a differentiated standard; and how the balance between enforcement effectiveness and the rule of law should be struck.

These questions are further complicated by the multi-layered constitutional structure of Europe. While the ECtHR has developed a robust doctrine under Article 6 and Article 8 of the European Convention on Human Rights[4] (Convention), the CJEU operates within the autonomous framework of EU law, guided by the Charter of Fundamental Rights[5] (Charter) and the general principles of EU law. Although Article 52(3) of the Charter promotes harmony with the Convention, convergence between Luxembourg and Strasbourg is neither automatic nor complete. The paper argues that EU competition enforcement operates within a hybrid administrative–criminal paradigm: while the CJEU has progressively constitutionalized procedure through enhanced judicial review and proportionality analysis, asymmetries persist, the protection against self-incrimination remains narrow, and investigative powers under Council Regulation 1/2003[6] (Regulation) continue to reflect a strong enforcement-oriented logic.

2. Methodology

The authors adopt a doctrinal and comparative legal methodology based on primary and secondary sources of EU and European human rights law, examining EU primary law, including the Treaty on European Union (TEU)[7], the Treaty on the

[3] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed. (Oxford: Oxford University Press, 2020); Ioannis Lianos, Valentine Korah, and Paolo Siciliani, *Competition Law: Analysis, Cases, & Materials* (Oxford: Oxford University Press, 2019), https://doi.org/10.1093/law-ocl/9780198826545.001.0001

[4] *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights), arts. 6 and 8, November 4, 1950, 213 U.N.T.S. 221.

[5] *Charter of Fundamental Rights of the European Union*, 2012 O.J. (C 326) 391.

[6] Council Regulation (EC) No. 1/2003 of December 16, 2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, as amended by Directive (EU) 2019/1, 2019 O.J. (L 11) 3.

[7] Treaty on European Union, 2012 O.J. (C 326) 13 (October 26, 2012).

Functioning of the European Union (TFEU)[8], and the Charter of Fundamental Rights of the European Union, as well as secondary legislation, in particular Council Regulation No 1/2003 and Commission Regulation No 773/2004[9].

Central to the analysis is a close reading of leading CJEU and ECtHR judgments on the criminal nature of competition fines, the scope of judicial review, the privilege against self-incrimination, and the protection of business premises under Article 8 of the Convention. The method is doctrinal and analytical, and comparative in contrasting the Luxembourg and Strasbourg courts, with particular attention to convergence and divergence between Article 6 of the Convention and Articles 47 and 48 of the Charter in light of Article 52(3). The objective is to assess the constitutional alignment and structural tensions between the two legal orders.

The paper also incorporates normative analysis, assessing whether the enforcement framework under the Regulation strikes an appropriate balance between effective enforcement and the rule of law, informed by scholarship on the constitutionalizing of EU competition law and the hybrid administrative–criminal nature of antitrust sanctions. The decentralised enforcement model introduced by the Regulation has reshaped the institutional framework of enforcement. The interplay between EU regulatory governance and institutional design at multiple administrative levels has been analysed through comparative frameworks that illuminate the structural choices embedded in Union enforcement architecture.[10] Questions of transparency, accountability, and risk allocation in governance structures governed by EU law further inform the normative context of competition enforcement.[11]

Finally, the study situates these developments in their institutional context, considering how the concentration of investigative and decision-making powers within the European Commission influences the intensity of fundamental rights protection.

3. The Rights of Undertakings Under Competition Law

Undertakings enjoy a wide range of rights, and it is therefore necessary to delineate the limits of the application of Competition Law, as well as to ascertain what may effectively be regarded as Fundamental Rights of legal persons, ensuring both their protection and proper regulation. In seeking to understand the legal relationship between Competition Law and the rights of undertakings, it is essential, above all, to bear in mind that Competition Law in Europe constitutes, first and foremost, an

[8] Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[9] Commission Regulation (EC) No. 773/2004 of April 7, 2004, Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) 18.

[10] Teresa Ruel, Noémia Bessa Vilela, Natacha Jesus Silva and Žan Jan Oplotnik, "Intergovernmental Coordination in Portugal," *Studia Iuridica Lublinensia* 32, no. 5 (2023): 31–42, https://doi.org/10.17951/sil.2023.32.5.31-42.

[11] Paulo Morais, José M. A. Matos, Noémia Bessa Vilela, and Žan Jan Oplotnik, "Transparency and Risk Allocation in PPP: Addressing Complex Contracts' Mathematical Formulas in the Portuguese Case," *Lex Localis – Journal of Local Self-Government* 20, no. 2 (2022): 435–453, https://doi.org/10.4335/10.4335/20.2.435-453(2022); Wouter P. J. Wils, "Ten Years of Regulation 1/2003: A Retrospective," *Journal of European Competition Law & Practice* 4, no. 4 (2013): 293–301, https://doi.org/10.1093/jeclap/lpt038.

instrument designed to ensure the proper functioning of the internal market: according to Article 3 TEU, one of the Union's constitutional objectives is that "*the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*"[12].

At present, a degree of scepticism still persists regarding the limits of certain investigative powers exercised by the European Commission in light of the Fundamental Rights of legal persons, such as the inviolability of correspondence exchanged with legal counsel or the right to refuse to testify against oneself[13], commonly referred to as the protection against self-incrimination.

Article 6(1) of the TEU, as amended by the Treaty of Lisbon[14], constitutes the first provision of relevance in the present context. It provides that: *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."* By virtue of this provision, the rights, freedoms and principles enshrined in the Charter are recognized as primary sources of European Union law. In this regard, Article 6(2) TEU further states that: *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."* Moreover, Article 6(3) TEU specifies that: *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...), shall constitute general principles of the Union's law."* Given that the Charter constitutes a primary source of Union law, particular attention must also be paid to Article 52(3) thereof, which provides that: *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, (...) This provision shall not prevent Union law providing more extensive protection."* The final part of this provision justifies a broader interpretation of a Charter right than that afforded by the corresponding provision of the Convention. Articles 101 and 102 of TFEU, which lay down the competition rules applicable to undertakings, are implemented in practice through the Regulation, which establishes the procedural framework for their enforcement by the Commission. Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as

[12] António Menezes Cordeiro, "Defesa da Concorrência e Direitos Fundamentais das Empresas: Da Responsabilização da Autoridade da Concorrência por Danos Ocasionados em Actuações de Inspecção," *O Direito* 136, no. 1 (2004): 43–76.

[13] Bernhard Jansen, "Les pouvoirs d'investigation de la Commission des Communautés européennes en matière de concurrence: Observations au sujet des arrêts de la Cour des 21 septembre, 17 et 18 octobre 1989," *Revue du Marché Commun*, no. 342 (1990): 696–701.

[14] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed 13 December 2007, entered into force 1 December 2009, OJ 2007 C 306/1.

their object or effect the prevention, restriction, or distortion of competition within the internal market.

Pursuant to Article 101(2) TFEU, agreements or decisions prohibited under that provision are automatically void. Article 101(3) TFEU, however, provides for the possibility of exemption where an agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that it does not impose restrictions which are not indispensable to the attainment of those objectives, nor afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. Similarly, Article 102 TFEU provides that: *"Any abuse by one or more undertakings of a dominant position (...) shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.",* making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The legal provisions governing the enforcement of European Union Competition Law and the conduct of proceedings by the Commission are laid down in the Regulation on the implementation of the competition rules laid down in Articles 101 and 102 of the TFEU, and in Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU, together with a substantial body of notices and guidelines, such as the Guidelines on the method of setting fines and the Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency Notice).[15]

Council Regulation 1/2003 establishes the Commission's powers in the field of competition. In accordance with this Regulation, the Commission is responsible for the application of Articles 101 and 102 TFEU and for handling antitrust proceedings within the EU. The Commission's powers of inquiry and investigation are set out in Chapter V of the Regulation, in particular Articles 17 to 21, which govern requests for information addressed to natural or legal persons deemed necessary for the purpose of determining and verifying the possible existence of infringements of the competition rules. The Regulation also empowers the Commission, where appropriate, to conduct inspections of undertakings and to enter and seal business premises during the course of such inspections.

The central issue is that, in the context of these investigative activities, the Fundamental Rights of undertakings, which, as previously noted, constitute foundational values of the European Union, may potentially be infringed. The interpretation of Articles 101 and 102 TFEU has evolved through extensive jurisprudence and scholarly analysis concerning the economic and legal objectives of EU competition policy.[16] Article 23(2) of the Regulation grants the Commission a virtually discretionary power with regard to the imposition of fines on undertakings and associations of undertakings. The mandatory protection of Fundamental Rights in

[15] Wouter P. J. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights," *World Competition: Law and Economics Review* 33, no. 1 (2010): 5–29, https://doi.org/10.54648/WOCO2010002.

[16] Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007).

competition proceedings is laid down in Article 41(1) of the Charter, which states that: *"Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union,"* as well as in Article 47 thereof, which provides that: *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."*

Within the case law of the CJEU, the Court addressed the issue of the effective protection of Fundamental Rights for the first time in *Case 322/81 Michelin v Commission*[17], followed, inter alia, by *Case C-441/07 P Alrosa v Commission*[18]. These judgments demonstrate that decisions of the Commission imposing fines are subject to judicial review by a court vested with unlimited jurisdiction. A significant dispute arose concerning the nature of competition proceedings, leading to examination by the European Commission of Human Rights *in Stenuit v France*[19]. In its opinion, the Commission of Human Rights declared that fines imposed on legal persons possess a criminal character, both in light of the nature of the offence and the severity of the sanction. In this context, the ECtHR developed an autonomous definition of the concept of a 'criminal charge', independent of domestic classifications. According to this approach, the qualification of proceedings as criminal depends on substantive criteria such as the nature and severity of the offence and the penalty, as well as the purpose of the sanction, notably whether it is deterrent and punitive in character. In *Engel and Others v the Netherlands*[20], the ECtHR established the criteria that have since become known as the "Engel criteria", namely: the classification of the offence under national law, the nature of the offence, and the nature and degree of severity of the potential penalty. The Court further clarified, under Article 6 of the Convention, the distinction between serious and minor offences, holding that deprivations of liberty liable to be imposed as punishment ordinarily fall within the criminal sphere, save where their nature, duration or manner of execution renders them insufficiently severe. In *Le Compte, Van Leuven and De Meyere v Belgium*[21], the Court also examined Article 6 of the Convention in relation to administrative proceedings aimed at determining civil rights and obligations, as well as the identification of sanctions that are criminal in nature and therefore cannot be imposed without full observance of criminal procedural guarantees. Through this jurisprudence, the Court developed a substantive conception of "civil rights and obligations" and "criminal charge". Subsequently, arguments advanced in *Stenuit v France*[22] reinforced the Court's earlier position by characterising

[17] Court of Justice of the European Union, *NV Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81, judgment of November 9, 1983, [1983] ECR 3461, ECLI:EU:C:1983:313.
[18] Court of Justice of the European Union, *Commission v. Alrosa Company Ltd.*, Case C-441/07 P, judgment of June 29, 2010, [2010] ECR I-5949, ECLI:EU:C:2010:377.
[19] European Commission of Human Rights, *Stenuit v. France*, application no. 11598/85, decision of February 27, 1992, 14 EHRR CD 99.
[20] European Court of Human Rights, *Engel and Others v. the Netherlands*, applications nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, judgment of June 8, 1976, Series A, no. 22.
[21] European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, applications nos. 6878/75 and 7238/75, judgment of June 23, 1981, Series A, no. 43.
[22] European Commission of Human Rights, *Société Stenuit v. France*, application no. 11598/85, report of

Commission proceedings in antitrust enforcement as criminal in nature. It follows that the Commission's power to impose fines on undertakings must be balanced by strict guarantees of the rights of the defence in administrative proceedings. This requirement emerges clearly from the perspective of the ECtHR, which regards the rights of undertakings as essential standards of administrative justice. This position is further illustrated in *Jussila v Finland*[23] and *A. Menarini Diagnostics S.r.l. v Italy*[24], in which the Court emphasized that even in administrative proceedings involving competition fines, the guarantees of a fair trial under Article 6 of the Convention must be observed with particular rigor, including the availability of full judicial review. Case law of the CJEU further refines the scope of judicial review in competition matters. In *DB v Consob Case C-481/19*[25], the Grand Chamber clarified that Article 47 of the Charter guarantees the right to remain silent in administrative proceedings of a punitive nature. Although the case concerned financial supervision, its reasoning has significant implications for EU competition enforcement, given the acknowledged "criminal" nature of antitrust fines under Article 6 of the Convention. Moreover, in *Pometon SpA v Commission Case C-440/19*[26] the Court examined hybrid settlement procedures and reaffirmed the importance of impartiality and effective judicial scrutiny where sanctions of a punitive character are imposed.

These developments suggest a gradual constitutionalizing of competition procedure under Article 47 of the Charter, strengthening procedural guarantees beyond earlier jurisprudence. As observed by Andreangeli[27], the qualification of antitrust fines as "criminal" for the purposes of Article 6 of the Convention has progressively constitutionalized EU competition procedure. Similarly, Wils[28] argues that the increased severity of EU antitrust fines necessitates enhanced judicial scrutiny under fundamental rights standards.

4. Rights of Defence of Undertakings During the Investigation Phase

In *Hoffmann-La Roche v. Commission*[29], The CJEU has consistently held that respect for the rights of the defence in administrative proceedings capable of leading to the imposition of sanctions constitutes a fundamental principle of European Union law.

May 30, 1991, Decisions and Reports 72.

[23] European Court of Human Rights, *Jussila v. Finland* [GC], application no. 73053/01, judgment of November 23, 2006, ECLI:CE:ECHR:2006:1123JUD007305301.

[24] European Court of Human Rights, *A. Menarini Diagnostics S.r.l. v. Italy*, application no. 43509/08, judgment of September 27, 2011, ECLI:CE:ECHR:2011:0927JUD004350908.

[25] Court of Justice of the European Union, *DB v. Commissione Nazionale per le Società e la Borsa (Consob)*, Case C-481/19, judgment of February 2, 2021, ECLI:EU:C:2021:84.

[26] Court of Justice of the European Union, *Pometon SpA v. Commission*, Case C-440/19 P, judgment of March 18, 2021, ECLI:EU:C:2021:214.

[27] Arianna Andreangeli, "Competition Law and the Opinion 2.13 on the Accession of the EU to the European Convention on Human Rights: Back to Square One?," *Journal of European Competition Law & Practice* 6, no. 8 (2015): 583–585, https://doi.org/10.1093/jeclap/lpv030.

[28] Wils, "The Increased Level of EU Antitrust Fines," 5–29.

[29] Court of Justice of the European Union, *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, Case 85/76, judgment of February 13, 1979, ECLI:EU:C:1979:36.

In its case law, the Court further stated that: *"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of traders' performance, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.* The recognition of procedural safeguards in competition investigations reflects the broader development of administrative due process within EU law.[30] Similarly, the ECtHR has held that the rights of the defence of undertakings extend to the preliminary investigative procedures conducted by the Commission.

Nevertheless, prior to the proclamation of the Charter in 2000, the Union Courts did not consistently afford due consideration to these issues in competition law cases. In general, only natural persons were, until that time, regarded as entitled to invoke the protection of Human Rights enshrined in the Convention. Notwithstanding that general understanding, undertakings are likewise protected by certain Fundamental Rights guaranteed under the Convention. The legal basis for such protection may be found in Article 1 of the European Convention on Human Rights, which provides that: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*," read in conjunction with Article 34 thereof, which states: "*The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*" The distinction lies in the fact that Fundamental Rights are not necessarily synonymous with Human Rights; consequently, there is no inherent reason why such rights should not apply to legal persons. Article 34 ECHR expressly provides that the Court may receive applications from non-governmental organizations. According to the jurisprudence of the ECtHR, undertakings fall within the scope of the notion of "non-governmental organizations".[31]

5. Protection Against Self Incrimination

The human rights provisions most frequently invoked by undertakings concern a limited number of rights enshrined in the Convention, notably the right to protection against self-incrimination and the right to respect for the inviolability of the home and correspondence.[32] Decisions adopted pursuant to Articles 18 and 20 of the aforementioned Regulation may be carried out by the Commission without being required to grant the undertakings under investigation the right to be heard at that stage.

[30] Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999).
[31] John Townsend, Marius Emberland, „The Human Rights of Companies: Exploring the Structure of ECHR Protection", *Human Rights Law Review* 6, no. 3 (2006): 593–597, https://doi.org/10.1093/hrlr/ngl016.
[32] Idem.

In the case of *National Panasonic v Commission*[33], the issue of procedural safeguards during investigative measures was specifically addressed. The CJEU held, in paragraph 21 of this judgment, that there is a "material difference" between decisions adopted in the exercise of investigative powers and those adopted for the purpose of bringing an infringement to an end. In the case at hand, the applicant had been denied the right to be heard prior to the adoption of a decision concerning it. The Court therefore clarified that the exercise of the rights of the defence is primarily incorporated into legal or administrative procedures aimed at terminating an infringement or declaring the incompatibility of an agreement, decision, or concerted practice with Article 85 of the Treaty.

Subsequent jurisprudence has significantly limited the breadth of the Commission's investigative powers under Article 18 of the Regulation. In a series of judgments delivered on 10 March 2016, namely *HeidelbergCement, C-247/14 P*[34]; *Schwenk Zement, C-248/14 P*[35]; *Buzzi Unicem, C-267/14 P*[36]; *Italmobiliare, C-268/14 P*[37], the CJEU annulled several Commission requests for information for lack of sufficient precision and justification. The Court held that requests must clearly define the subject matter and purpose of the investigation, and must satisfy proportionality requirements. These judgments represent an important recalibration of investigative discretion and reinforce undertakings' procedural safeguards at the investigative stage. Such procedural guarantees were, at the time, governed by Commission Regulation No 99/63/EEC of 25 July 1963[38] on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, which established the framework for the exercise of the right to be heard in competition proceedings.[39] Conversely, the investigative procedure provided for in Article 14 of Regulation No 17 was not intended to bring an infringement to an end or to declare that an agreement, decision, or concerted practice was incompatible with Article 85 of the Treaty. Its sole purpose was to enable the Commission to obtain the information necessary to verify the existence and scope of a given factual and legal situation.

Following this line of reasoning, the rights of the defence relating to decisions adopted as a result of investigative procedures are not, as such, adversely affected, since the Commission's objective at that stage is limited to the "collection of the information

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[33] Court of Justice of the European Union, *National Panasonic (UK) Limited v. Commission of the European Communities*, Case 136/79, judgment of June 26, 1980, [1980] ECR 2033, ECLI:EU:C:1980:169.

[34] Court of Justice of the European Union, *HeidelbergCement AG v. European Commission*, Case C-247/14 P, ECLI:EU:C:2016:149.

[35] Court of Justice of the European Union, *Schwenk Zement KG v. European Commission*, Case C-248/14 P, ECLI:EU:C:2016:150.

[36] Court of Justice of the European Union, *Buzzi Unicem SpA v. European Commission*, Case C-267/14 P, ECLI:EU:C:2016:151.

[37] Court of Justice of the European Union, *Italmobiliare SpA v. European Commission*, Case C-268/14 P, ECLI:EU:C:2016:152.

[38] Commission Regulation No. 99/63/EEC of July 25, 1963, on the Hearings Provided for in Article 19(1) and (2) of Council Regulation No. 17, 1963 O.J. 127, 2268.

[39] Commission Regulation No. 99/63/EEC of July 25, 1963, on the Hearings Provided for in Article 19(1) and (2) of Council Regulation No. 17, O.J. English Special Edition, Series I, vol. 1963–1964, 47–49.

necessary".[40] Such a conclusion does not imply that the procedural framework laid down in national legislation should be disregarded; rather, it may require adaptation. The principles to be applied include, in particular, the right to protection against self-incrimination and the right to respect for the inviolability of the home and correspondence. Although Article 6(1) of the Charter does not expressly provide for a right to protection against self-incrimination, this right has been recognized by the ECtHR as lying "*at the heart of the notion of a fair procedure under Article 6*." The right against self-incrimination seeks to prevent public authorities from compelling the accused to produce or provide evidence during investigative proceedings which the authorities would be unable to obtain without that person's cooperation. It is intrinsically linked to the principle of the presumption of innocence.[41]

Having regard to the nature of the infringements and to the nature and severity of the sanctions imposed, the CJEU held in Case C-199/92 P *Hüls AG v Commission*[42], that the principle of the presumption of innocence, as enshrined in Article 6(2) of the Convention, constitutes a fundamental principle of Union law. The Court confirmed that this principle is applicable to competition law proceedings capable of resulting in the imposition of fines, given their punitive nature. In *Hüls*, the Court expressly stated: *"The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order."* This approach thus reflects the convergence between the jurisprudence of the ECtHR and the constitutional principles of the European Union legal order. The right to protection against self-incrimination accordingly operates as a safeguard mechanism available to undertakings subject to investigation. The relationship between the two courts is, however, more complex than straightforward convergence. Tinière has characterised the CJEU's use of ECtHR case law as an exercise in selective instrumentalization rather than genuine normative alignment, arguing that Luxembourg invokes Strasbourg authority when it reinforces autonomous EU constitutional choices while resisting it where more demanding constraints would follow.[43] This procedural guarantee must be understood as a component of the broader commitment to transparency and the rule of law that conditions the exercise of public authority across EU governance structures.[44] European standards of access to justice, as developed in the jurisprudence of the ECtHR, establish that procedural participation must be effective and not merely formal, a standard that applies with particular force

[40] Nicholas Khan, *Kerse & Khan on EU Antitrust Procedure*, 6th ed. (London: Sweet & Maxwell, 2012).
[41] Andreangeli, "Competition Law and the Opinion 2/13," 583–585.
[42] Court of Justice of the European Union, *Hüls AG v. Commission of the European Communities*, Case C-199/92 P, judgment of July 8, 1999, [1999] ECR I-4287, ECLI:EU:C:1999:358.
[43] Romain Tinière, "The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?," *European Papers* 8, no. 1 (2023): 323–330, https://doi.org/10.15166/2499-8249/654.
[44] Noemia Rute Peres de Bessa Vilela, José Caramelo Gomes, Paulo Morais, "Government Transparency: Reality or Mirage?," *Lex Localis – Journal of Local Self-Government* 15, no. 3 (2017): 725–736, https://doi.org/10.4335/15.3.725-736(2017).

where punitive administrative proceedings affect parties' substantive legal positions.[45] However, the precise scope of the right against self-incrimination remains contested. While the CJEU in *Orkem v Commission*[46] established that undertakings may not be compelled to admit an infringement but may be required to provide factual information and existing documents, more recent developments indicate a possible shift. In *DB v Consob, C-481/19*[47], the Grand Chamber recognized that individuals may not be compelled to provide answers capable of establishing their liability in proceedings leading to punitive sanctions. Although the judgment concerned a natural person, its constitutional reasoning under Articles 47 and 48 of the Charter raises important questions regarding the continued validity of the *Orkem* distinction in corporate competition investigations.

The distinction established in *Orkem* between compelled factual information and admissions of wrongdoing has been widely debated in academic literature. Riley examined the compatibility of the Commission's powers to obtain information with the Saunders line of Strasbourg case law, questioning whether the Community framework adequately protected undertakings against compelled self-incrimination.[48] Vesterdorf provided a comprehensive assessment of both legal professional privilege and the privilege against self-incrimination in EC law, identifying the continued tension between effective investigation and fundamental rights protection as a structurally persistent feature of the regime.[49] Veenbrink has subjected this jurisprudence to renewed scrutiny, arguing that the privilege against self-incrimination in EU competition law amounts to a 'deafening silence' and that the CJEU has failed to articulate a coherent and principled framework reconciling enforcement imperatives with Charter standards.[50] The tension between effective enforcement and the protection against compelled self-incrimination therefore remains one of the most structurally unresolved issues within EU competition procedure. Hancox has recently examined the right to remain silent as a general principle of EU law, noting that *DB v Consob* represents a significant step towards extending this right to contexts beyond criminal proceedings strictly defined, with potential consequences for competition enforcement.[51] The question of how competition law procedural requirements interface

[45] Imran Aslam and Michael Ramsden, "EC Dawn Raids: A Human Rights Violation?," *The Competition Law Review* 5, no. 1 (2008): 61–87.

[46] Court of Justice of the European Union, *Orkem v. Commission of the European Communities*, Case 374/87, judgment of October 18, 1989, [1989] ECR 3283, ECLI:EU:C:1989:387.

[47] Court of Justice of the European Union, *DB v. Commissione Nazionale per le Società e la Borsa (Consob)*, Case C-481/19, judgment of February 2, 2021, ECLI:EU:C:2021:84.

[48] Alan Riley, "Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law," *European Law Review* 25, no. 3 (2000): 264–281.

[49] Bo Vesterdorf, "Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues," *Fordham International Law Journal* 28, no. 4 (2004): 1179–1215.

[50] Marc Veenbrink, "The Privilege against Self-Incrimination in EU Competition Law: A Deafening Silence?," *Legal Issues of Economic Integration* 42, no. 2 (2015): 119–142, https://doi.org/10.54648/LEIE2015008; Wouter P. J. Wils, *Principles of European Antitrust Enforcement* (Oxford: Hart Publishing, 2005).

[51] Emily Hancox, "The Right to Remain Silent in EU Law," *The Cambridge Law Journal* 80, no. 2 (2021):

with related regulatory contexts - such as public procurement - reveals that the tension between effective enforcement and procedural fairness is not confined to the Commission's investigative function but extends to the design of EU competition law as a whole.[52] The entry into force of Directive 2019/1 (the ECN+ Directive) has partially addressed these concerns by requiring Member States to ensure that proceedings comply with the Charter and by providing minimum safeguards for the right of defence, though significant harmonisation gaps persist, particularly for undertakings subject to enforcement by national competition authorities.[53]

6. Protection of the Rights of Defence of Legal Persons

Effective enforcement of EU competition law is governed primarily by the Regulation 1/2003. In its implementation, due regard must be paid to the rights of defence of undertakings.[54] With regard to the right to respect for the inviolability of the home, this right, as previously noted, is protected under Article 8 of the Convention, the object and purpose of which is to safeguard individuals against arbitrary interference by public authorities.

The case law of the ECtHR has, however, developed in such a way as to extend, under certain circumstances, the protection of the 'home' to business premises. The crucial question is therefore whether the Commission's power to access commercial premises conflicts with the right of undertakings to respect for their premises under Article 8. It must be recalled in this regard that Article 8 does not enshrine an absolute right. Interference with the right protected under Article 8(1) is permissible where the conditions laid down in Article 8(2) are satisfied, namely where such interference is in accordance with the law and necessary in a democratic society in pursuit of a legitimate aim. This balancing exercise reflects the need to reconcile, on the one hand, the public interest in maintaining effective competition within the internal market and, on the other, the need to respect the 'private sphere' of undertakings.

By accepting that undertakings may, in certain circumstances, rely on Article 8, the ECtHR adopted a dynamic interpretation of the Convention, making clear that it is not rigidly bound by its previous judgments. At the same time, it falls to the CJEU to determine whether to follow or distinguish such precedent. The jurisprudence of the ECtHR is formally binding only upon the parties to the case at issue, which may create a degree of legal uncertainty for other undertakings lacking direct precedent upon which to rely. Such uncertainty may, in turn, affect the level of protection afforded under the rule of law in the corporate human rights context.

228–231, https://doi.org/10.1017/S0008197321000362.

[52] Andrius Puksas, Raimundas Moisejevas, Rūta Petkuvienė, "Competition Law Implications for Joint Bidding during Public Procurement," *Studia Iuridica Lublinensia* 33, no. 2 (2024): 313–326, https://doi.org/10.17951/sil.2024.33.2.313-326.

[53] Marialaura Rea, "New Scenarios of the Right of Defence Following Directive 1/2019," *Yearbook of Antitrust and Regulatory Studies* 12, no. 20 (2019): 111–126, https://doi.org/10.7172/1689-9024.YARS.2019.12.20.4.

[54] Andreangeli, "Competition Law and the Opinion 2/13," 583–585.

When, in 2002, the ECtHR recognized for the first time that a strict distinction between private dwellings and business premises cannot always be maintained under Article 8 ECHR, it nevertheless emphasized that the scope of permissible interference may be broader in the case of inspections of commercial premises. The difference between the protection afforded to individuals and that afforded to undertakings thus becomes apparent. This more flexible approach was subsequently reflected in the jurisprudence concerning EU law. The scope and limits of the Commission's inspection powers have been the subject of extensive scholarly debate, particularly in relation to proportionality and judicial review. In relation to the right to the inviolability of the home, a degree of coherence may therefore be observed between the jurisprudence of the two Courts, as the CJEU has shown itself willing to take relevant Strasbourg case law into account. At present, EU law appears to confer a level of protection broadly equivalent to that provided under the ECHR with regard to business premises.

Recent Strasbourg jurisprudence has reinforced the necessity of meaningful judicial control over competition inspections of business premises. In *UAB Kesko Senukai Lithuania v Lithuania*[55] (2023), the ECtHR found a violation of Article 8 of the Convention due to insufficient judicial review of a competition authority's dawn raid. At the EU level, the CJEU has likewise strengthened procedural safeguards. In *Les Mousquetaires and ITM Entreprises v Commission*[56] *C-682/20 P, 2023*, as well as in *Casino, Guichard-Perrachon*[57] *C-690/20 P* and *Intermarché Casino Achats*[58] *C-693/20 P,* the Court annulled inspection decisions on the basis of insufficient reasoning and failure to comply with procedural guarantees.

The rule of law constitutes a fundamental interpretative principle for the ECtHR, including in matters concerning the rights of defence of legal persons. The applicability of human rights to undertakings may therefore be justified on the basis of the rule of law, which protects against arbitrary and intrusive interference by public authorities, such as the Commission in the context of unannounced inspections. In addressing the Strasbourg case law on Article 8 ECHR, the CJEU relied on the general principles of EU law, since the Convention does not formally form part of EU law. Although it did not explicitly recognize that undertakings may directly invoke the Convention, it effectively achieved a comparable level of protection by reference to those general principles. This constitutes the principal doctrinal distinction between the two Courts regarding the legal basis of the right to respect for premises. Overall, the right to the inviolability of the home appears to be protected by the CJEU to a degree

[55] European Court of Human Rights, *UAB Kesko Senukai Lithuania v. Lithuania*, application no. 19162/19, judgment of April 4, 2023, https://hudoc.echr.coe.int/eng?i=001-223928.

[56] Court of Justice of the European Union, *Les Mousquetaires SAS and ITM Entreprises SAS v. European Commission*, Case C-682/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:170, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0682.

[57] Court of Justice of the European Union, *Casino, Guichard-Perrachon SA and Achats Marchandises Casino SAS v. European Commission*, Case C-690/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:171, https://curia.europa.eu/juris/document/document.jsf?docid=271065&doclang=EN.

[58] Court of Justice of the European Union, *Intermarché Casino Achats v. European Commission*, Case C-693/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:172, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0693.

broadly equivalent to that afforded by the ECtHR. By contrast, claims brought by undertakings in respect of the right to protection against self-incrimination raise more complex issues. The difficulties inherent in applying traditional human rights standards within a corporate context are particularly evident in connection with Commission investigations.[59]

Like the right to respect for premises, the right against self-incrimination is not absolute and may be subject to limitations justified by legitimate public interests. Its precise scope is therefore difficult to delineate exhaustively. Given the ECtHR's emphasis on the 'circumstances of each case', its jurisprudence may appear variable, thereby generating legal uncertainty for the parties concerned.

Should the ECtHR acquire jurisdiction to review EU competition matters, Commission acts may in some instances be considered compatible with Article 6(1) ECHR, while in others particular factual circumstances may justify a different outcome. Although the Convention is regarded as a 'living instrument', capable in theory of expanding the protection of the right against self-incrimination in the corporate context, such an extension appears unlikely in light of the broad discretion afforded to the Commission in competition enforcement. So long as the ECtHR does not form an integral part of EU law, it is equally improbable that the EU Courts will expand their jurisprudence so as to grant undertakings procedural guarantees fully equivalent to those available to natural persons in criminal proceedings. If, however, the ECtHR were to pronounce decisively on this issue prior to the formal accession of the Union to the Convention, the EU Courts might reconsider their more restrictive approach and accept that factual determinations concerning legal persons fall within the scope of the right against self-incrimination. Until such development occurs, the protection of corporate human rights is unlikely to prevail over the objective of effective enforcement within the EU legal order.

The restrictive interpretation adopted by the EU Courts thus raises significant questions as to the practical effectiveness of the right against self-incrimination. In light of the broad discretionary powers conferred upon the Commission, it may reasonably be questioned whether such extensive powers are strictly necessary. From a normative perspective, corporate human rights protection arguably deserves greater prominence within a democratic society. It may therefore be appropriate to consider whether alternative enforcement mechanisms could be developed to ensure a more balanced protection against arbitrary and intrusive investigative powers. As Rousseva argues[60], EU competition enforcement operates within a hybrid administrative–criminal paradigm that remains structurally unstable. The persistent tension between deterrence and due process reflects a broader constitutional dilemma within EU governance.

The jurisprudence of the EU Courts further reveals that the protection of undertakings' human rights in EU competition proceedings does not necessarily have to correspond fully to the standards developed by the ECtHR in relation to individuals.

[59] Andreangeli, "Competition Law and the Opinion 2/13," 583–585.
[60] Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford: Hart Publishing, 2010), https://hdl.handle.net/1814/13498.

Strasbourg jurisprudence approaches Article 8 ECHR through a structured proportionality test requiring legality, legitimate aim, necessity, and effective judicial review. By contrast, the CJEU traditionally framed inspection review under the general principle of proportionality within EU law. However, the 2016 Cement judgments and the 2023 Les Mousquetaires[61] line of cases indicate a shift towards more exacting scrutiny of Commission reasoning. The requirement that inspection decisions clearly define the subject matter and purpose of investigations signals a growing convergence with Strasbourg standards of foreseeability and legal certainty.

Nonetheless, the Commission retains significant ex ante discretion, and judicial review remains predominantly ex post, raising questions as to the practical intensity of protection. It is evident that the ECHR provides, at least in principle, a more robust protection framework for undertakings than EU law currently does. Although the CJEU consistently refers to the jurisprudence of the ECtHR and to the Convention itself, it must also be noted that Strasbourg has not delivered a definitive judgment specifically recognizing an autonomous right of legal persons not to incriminate themselves. Nevertheless, the CJEU has adhered more closely to Strasbourg jurisprudence with respect to the inviolability of the home than in relation to the right against self-incrimination. The latter therefore appears to enjoy a comparatively weaker level of protection within the EU legal order.

Kalintiri[62] emphasises that the proportionality review applied by the EU Courts in inspection cases increasingly resembles a structured evidentiary assessment, particularly following the 2016 Cement judgments; on his turn, Van Cleynenbreugel[63] further argues that the expansion of digital evidence gathering requires a rethinking of procedural safeguards in light of large-scale data seizures during inspections. Also, that the expansion of digital evidence gathering has raised new concerns regarding the proportionality and scope of competition inspections.

7. Conclusions

This paper has examined the position of undertakings in EU competition enforcement through the lens of fundamental rights. EU competition law operates

[61] Court of Justice of the European Union, *Les Mousquetaires and ITM Entreprises SAS v. European Commission*, Case C-682/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:170, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0682; Court of Justice of the European Union, *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v. European Commission*, Case C-690/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:171, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0690; Court of Justice of the European Union, *Intermarché Casino Achats v. European Commission*, Case C-693/20 P, judgment of March 9, 2023, ECLI:EU:C:2023:172, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0693.

[62] Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Oxford: Hart Publishing, 2019), https://doi.org/10.5040/9781509919697.

[63] Nicolas Petit and Pieter Van Cleynenbreugel, "General Report Topic 3: EU Competition Law and the Digital Economy," in *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution*, ed. Daniel Mândrescu, The XXIX FIDE Congress in The Hague, 2020 Congress Publications, vol. 3 (The Hague: Eleven International Publishing, 2020), 27–60, https://www.boomportaal.nl/boek/9789462361300.

within a hybrid paradigm: formally administrative, yet substantively punitive. The recognition of competition fines as 'criminal' for Article 6 ECHR purposes has triggered an incremental constitutionalizing of procedure through the CJEU's reliance on Articles 41, 47, and 48 of the Charter.

The comparison between Luxembourg and Strasbourg reveals both convergence and asymmetry. In judicial review and the protection of business premises, recent case law suggests growing alignment: the CJEU has strengthened its scrutiny of inspection decisions and information requests, reinforcing proportionality and reasoning requirements. Yet structural asymmetries remain. The Commission retains broad investigative discretion under Regulation 1/2003, while undertakings' protection against compelled cooperation remains limited relative to criminal law standards, and the absence of formal EU accession to the ECHR complicates the normative hierarchy. The growth of large-scale data collection and algorithmic market analysis raises further challenges for proportionality review and legal professional privilege.

Overall, the imperative of effective enforcement appears to prevail over the full realization of undertakings' rights of defence. The privilege against self-incrimination remains underdeveloped: the *Orkem* distinction between compelled factual disclosure and compelled admission of wrongdoing continues to structure the Court's reasoning, despite evolving Strasbourg standards on the right to silence in punitive proceedings, generating doctrinal friction that remains unresolved. Veenbrink's annotation of Qualcomm and DB v Consob confirms that while the CJEU took a step towards Strasbourg in recognising the right to silence for natural persons in punitive proceedings, it maintained the Orkem framework for undertakings, thereby perpetuating a normative asymmetry between natural and legal persons.[64] Daly, Pivaty, Marchessi, and ter Vugt have demonstrated that drawing adverse inferences from an accused's failure to answer raises distinct Article 6 concerns that remain underexplored in the corporate competition enforcement context.[65]

The *Orkem* distinction between factual disclosure and admission of wrongdoing, while formally coherent, is conceptually fragile: factual answers may contribute directly to establishing liability, and the separation between "information" and "self-incriminating statement" blurs in cartel investigations where documentary evidence and contextual explanations interact. Recent jurisprudence, particularly *DB v Consob* (C-481/19), suggests a more expansive understanding of the right to silence under Articles 47 and 48 of the Charter. Although it concerned natural persons, its reasoning challenges the continued viability of a narrow corporate interpretation of self-incrimination. The *Orkem* creates a structural imbalance between enforcement and procedural guarantees that remains difficult to reconcile with Strasbourg jurisprudence. The institutional design of EU competition enforcement intensifies this tension: the

[64] Marc Veenbrink, "The Freedom from Self-Incrimination—A Strasbourg-Proof Approach? Cases C-466/19 P *Qualcomm* and C-481/19 P *DB v. Consob*," *Journal of European Competition Law & Practice* 12, no. 10 (2021): 750–752, https://doi.org/10.1093/jeclap/lpab045.

[65] Yvonne Daly, Anna Pivaty, Diletta Marchesi, and Peggy ter Vrugt, "Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence," *Human Rights Law Review* 21, no. 3 (2021): 696–723, https://doi.org/10.1093/hrlr/ngab006.

concentration of investigative, prosecutorial, and decision-making functions within the Commission heightens the importance of procedural safeguards during the investigative phase, since judicial review before the General Court and the CJEU operates primarily ex post. The balance between deterrence and due process therefore remains structurally delicate. The institutional design of EU competition proceedings also raises questions about the role of the Hearing Officer. Wils has examined that function, concluding that while it provides a useful safeguard, it falls short of the independence required by Article 6 ECHR.[66] The normative framework is further complicated by the structural consequences of the ne bis in idem principle across multi-level enforcement systems. Van Cleynenbreugel's analysis of BPost and Nordzucker demonstrates that the CJEU's elaboration of ne bis in idem has significant implications for the procedural rights of undertakings subject to parallel enforcement proceedings.[67] The absence of formal EU accession to the Convention further complicates the landscape: while Article 52(3) promotes harmony, Luxembourg retains interpretative autonomy, allowing flexibility but sustaining uncertainty about the exact scope of corporate defence rights.

Ultimately, the legitimacy of EU competition enforcement depends not only on its effectiveness in safeguarding competition, but on its capacity to reconcile enforcement with the guarantees of the rule of law. A more coherent alignment between punitive sanctions and procedural protection would enhance both the constitutional credibility and the robustness of the regime.

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[66] Wouter P. J. Wils, "The Role of the Hearing Officer in Competition Proceedings before the European Commission." *World Competition: Law and Economics Review* 35, no. 3 (2012): 431–456. https://doi.org/10.54648/WOCO2012032.

[67] Pieter Van Cleynenbreugel, "BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law," *European Constitutional Law Review* 18, no. 2 (2022): 357–374, https://doi.org/10.1017/S1574019622000190.

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