

## THE INFLUENCE OF THE ECtHR ON THE CJEU WITH RESPECT TO THE INTERPLAY BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS: THE CASE OF THE RIGHT TO PRIVACY\*

This paper aims at examining the influence played by the case law of the European Court of Human Rights (the “ECtHR”) on the reasoning of the Court of Justice of the European Union (the “CJEU”<sup>1</sup>) concerning the interplay between competition law and fundamental rights in the European Union (the “EU”). More specifically, the focus of the paper will be on the right to privacy, which is one of the rights of the defence of companies involved in competition proceedings before the European Commission (the “Commission”) for alleged breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).

There are two main reasons that explain the choice of this paper’s subject. First, the issue of the respect of the fundamental rights of the companies involved in competition proceedings before the Commission is extremely topical, particularly due to the high level of the fines imposed for infringements of competition law and, more generally, due to the severe consequences on a company’s life that may typically result from a finding of antitrust liability. Second, there is indeed a “privileged connection” between the ECtHR and the CJEU, that stems from both the current EU legislative framework (and thus appears to be a specific will of the “contemporary” EU legislator) and the traditional status of fundamental rights within the EU legal order as general principles of law (which, on the CJEU’s part, has made the fact of referring to the Court of Strasbourg’s case law a useful tool to further corroborate the results of the interpretative process). Therefore, analysing the (possible) role played by the ECtHR in influencing the case law of the CJEU in this particular field of law may contribute to the general assessment of the status, within the EU legal order, of the respect of the fundamental rights of companies subjected to competition proceedings. With this respect, due to the wide scope of the subject in question, this analysis will be carried out through a case study, *i.e.*, as mentioned, the right to privacy of companies *vis-à-vis* the Commission’s powers of inspection.

Accordingly, this paper will be structured as follows.

First, **Section I** will analyse the legislative framework of the current relationship between the ECtHR and the CJEU. **Section II** will then examine the relevance of fundamental rights in the context of EU competition proceedings, by providing an overview of the main procedural steps that the Commission must follow in order to reach an infringement decision and outlining the most important rights enjoyed by the companies subject to such proceedings. **Section III** will go from theory to practice, and present the most recent judgments delivered by the CJEU on the issue of the right to privacy of companies *vis-à-vis* the Commission’s powers of inspection in competition proceedings, in order to highlight the presence (or absence) of references to the case law of the ECtHR. Finally, against this background, **Section IV** will draw some conclusive remarks on the status of the relationship between the ECtHR and the CJEU in this field of law, by discussing both the formal and the substantial role of the case law of the latter.

### I. The relationship between the ECtHR and the CJEU: a legislative framework

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<sup>1</sup> In this paper, unless specified otherwise, the term “CJEU” will be used to refer broadly to both the Court of Justice (“CJ”) and the General Court (“GC”).

With a view to assessing the relationship existing between the ECtHR and the CJEU (and, more precisely, the role played by the former in the case law of the latter), two provisions of EU law are of particular significance.

The first relevant provision is Article 6 of the Treaty on the European Union (TEU), which has been introduced by the Treaty of Lisbon and marks a crucial step in promoting the protection of fundamental rights within the EU. Article 6 comprises three main important points.

Firstly, Article 6(1) TEU provides that the Charter of Fundamental Rights of the EU (the “Charter”) shall have “*the same legal value as the Treaties*”. Accordingly, the rights, freedoms and principles set out in the Charter now rank among the primary sources of EU law, after having been for decades “*the creature of judicial lawmaking*”,<sup>2</sup> *i.e.*, general principles of law. Apart from the obvious legal consequences, the “promotion” of the Charter has also a clear political value, given that it has provided the EU with a written and binding catalogue of fundamental rights.

Secondly, Article 6(2) TEU lays down an obligation for the EU to accede to the ECHR, while affirming that “[s]uch accession shall not affect the Union’s competences as defined in the Treaties”. This provision has been at first welcomed by a wave of enthusiasm, especially in light of its seemingly prescriptive wording. However, as it is known, the infamous Opinion 2/13 delivered by the CJEU essentially blocked the accession process *sine die*.<sup>3</sup> As things currently stand, and as clarified by the CJEU, the ECHR “*does not constitute, as long as the [EU] has not acceded to it, a legal instrument which has been formally incorporated into [EU] law*”.<sup>4</sup> Having said this, its relevance within the EU legal order is unquestionable.

Thirdly, Article 6(3) TEU specifies that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. This provision reflects the important (from a historical standpoint) role of the ECHR (and of the case law of the ECtHR) within the EU legal order. Indeed, even before the adoption of the Charter and its promotion to primary law, this instrument constituted a main source of fundamental rights, which (as mentioned) could only be invoked as general principles of EU law.<sup>5</sup>

The second relevant provision, when it comes to the relationship between the CJEU and the ECtHR, is Article 52(3) of the Charter. Pursuant to this provision, in so far as the Charter “*contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]*”. In any case, EU law is not prevented from providing “*more extensive protection*”.

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<sup>2</sup> See K. Lenaerts and J. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, 2014, p. 1559.

<sup>3</sup> Opinion of the CJ of 18 December 2014, 2/13, EU:C:2014:2454, in which the CJ held that the Draft Agreement on the accession of the EU to the ECHR does not safeguard the specific characteristics of the EU legal order, and accordingly declared it incompatible with the EU Treaties.

<sup>4</sup> Judgment of the CJ of 26 February 2013, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, § 88.

<sup>5</sup> S. Peers and S. Prechal, *Article 52*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, 2014, p. 1490.

According to the explanatory note on Article 52(3), the latter is intended to ensure the necessary consistency between the Charter and the ECHR, while safeguarding the autonomy of both EU law and the CJEU *vis-à-vis* the ECHR, on the one hand, *and* the Strasbourg court, on the other. Indeed, given that the meaning and the scope of the rights laid down by these two instruments is largely determined by the case law of, respectively, the CJEU and the ECtHR, this provision should be intended as enshrining a reference to the case law of both courts, as a primary source of interpretation of the instruments themselves.

As for the first limb of Article 52(3), it is clear that it refers only to those rights which correspond to rights guaranteed by the ECHR, as listed in the explanatory note. The latter include rights “*where both the meaning and the scope are the same as the corresponding Articles of the ECHR*” (such as, *e.g.*, the right to privacy, enshrined in Article 7 of the Charter and Article 8 ECHR), and rights “*where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider*” (such as Article 47(2) and (3) on the right to an effective remedy and a fair trial, which corresponds to Article 6(1) of the ECHR, but “*the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation*”).

The second limb of Article 52(3) has been generally interpreted as justifying a more generous interpretation of a Charter right than the corresponding standard contemplated in the ECHR.<sup>6</sup> Indeed, it sets out a floor for all Charter rights, meaning that the ECHR (as interpreted by the ECtHR<sup>7</sup>) should lay down the minimum acceptable degree of protection of the fundamental rights enshrined in the Charter. It has been argued that such provision aims at preventing the Member States from being subjected to two different standards of human rights protection when implementing EU law.<sup>8</sup>

The above sets out the theoretical framework of reference for the relationship between the CJEU and the ECtHR, *i.e.*, the rules of the game. However, it does not clarify how, in practice, this relationship will unfold, from the standpoint of the CJEU. An answer to this question may be found only through an analysis of the case law of the CJEU, which, as already mentioned, will be carried out (with specific reference to the field of the right to privacy of companies *vis-à-vis* the Commission’s powers of inspection in competition proceedings) in Section III.

## **II. The relevance of fundamental rights in EU competition proceedings**

In order to understand the importance of fundamental rights in EU competition proceedings, it is first necessary to briefly summarize the relevant sources.

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<sup>6</sup> See, *e.g.*, opinion of AG Sharpston of 18 October 2012 in C-396/11, *Radu*, EU:C:2012:648, § 80; of AG Kokott of 14 April 2011 in C-109/10, *Solvay v Commission*, EU:C:2011:256, § 258; of AG Mengozzi of 2 September 2010 in C-279/09, *DEB*, EU:C:2010:489, § 98.

<sup>7</sup> See K. Lenaerts and J. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, cited above, p. 1581. Not all authors agree on this interpretation of Article 52(3) of the Charter: according to some, when interpreting the Charter (even those provisions which “*correspond to rights guaranteed by the [ECHR]*”, as stated by Article 52(3)), the CJEU is not bound by the case law of the ECtHR – not even as a minimum floor of protection: see T. Lock, *The ECJ and the ECtHR: The Future Relationship Between the Two European Courts*, in *The Law & Practice of International Courts and Tribunals*, 2009(8)3 p. 11 ff.

<sup>8</sup> T. Lock, *The ECJ and the ECtHR: The Future Relationship Between the Two European Courts*, cited above, p. 9.

As it is known, Articles 101 and 102 TFEU<sup>9</sup> are implemented by Regulation (EC) No 1/2003, which provides the framework for the practical enforcement of such rules by the Commission.<sup>10</sup> Accordingly, this Regulation sets out in detail the procedural steps that the Commission must follow in order to ascertain the existence of an infringement of Articles 101 and 102 TFEU and to possibly impose a fine on the undertaking(s) involved in the infringement.

Broadly speaking, the Commission's investigative procedures in competition cases may be divided into three stages: (i) investigation, (ii) prosecution, and (iii) decision-making.

The investigative phase allows the Commission to gather all the relevant facts, in order to develop a detailed understanding of the potentially anticompetitive practices. This may be done through surprise inspections and written requests for information.

Once the Commission has reached a sufficient knowledge of the case to establish the elements of an infringement of competition law, it issues the so-called "Statement of Objections" ("SO"), which sets out the Commission's objections to the defendant's behavior and marks the beginning of the prosecutorial stage. Defendants have the right to reply in writing to the Commission's objections. Following receipt of the SO, the companies involved in proceedings have a right to access the Commission's case-file (except for documents containing third parties' business secrets and the Commission's internal deliberations) and may request the holding of an oral hearing.

Although the opening of formal proceedings does not prejudge the outcome of an investigation, as the Commission may decide that there are no grounds to continue and close proceedings accordingly, it may also decide to end proceedings by identifying infringements of Articles 101 and 102 TFEU, ordering the companies involved to bring them to an end and (possibly) imposing administrative fines. Such infringement decisions may be appealed before the EU courts, namely, GC in first instance, and the CJ in second (and last) instance. The EU courts review the lawfulness of the Commission's findings of competition law

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<sup>9</sup> Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

According to Article 101(2) TFEU, agreements or decisions which fall within the scope of the above prohibition "*shall be automatically void*".

Article 101(3) TFEU foresees the possibility of exempting a conduct from the application of the aforementioned rules, provided that, on the one hand, it "*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*", and, on the other hand, it does not "*(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*".

Article 102 TFEU provides that "[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) 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."

<sup>10</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25).

infringements (with a certain amount of deference to the Commission’s discretion on complex economic matters) and have unlimited jurisdiction with respect to fines.

It must be noted that fines imposed by the Commission may be extremely burdensome, given that they may reach up to 10% of the worldwide turnover achieved in the last financial year by the consolidated group to which the infringing undertaking belongs.<sup>11</sup>

This is not without consequences. Also due to the possible significant amount of antitrust fines, in the course of the proceedings the Commission is bound at all times to the respect of the rights of defence of the companies involved. This is currently clearly stated by Recital 37 of Regulation (EC) No 1/2003, which provides that the latter “*respects the fundamental rights and observes the principles recognized in particular by the [Charter]*” and that, accordingly, it should be “*interpreted and applied with respect to those rights and principles*”.

However, the issue of whether EU competition proceedings may be considered “*criminal*” and, therefore, subject to the wider protection offered by Article 6 ECHR (which applies both to civil rights & obligations and procedures leading to criminal charges, but provides for additional protection for the latter)<sup>12</sup>, has formed the object of a heated debate in the last years.

In its seminal *Engels* judgment of 1976, the ECtHR put forth a test for assessing whether a charge could be classified as “*criminal*”. With this respect, three factors are relevant, *i.e.*, (i) the categorization of the offence as criminal by the legal system of the relevant State; (ii) the nature of the offence; and (iii) the severity of the penalty.<sup>13</sup> Subsequently, the case law of the ECtHR expanded the scope of criminal-head guarantees provided in Article 6 ECHR to a number of administrative proceedings. Later, in *Jussila*, the ECtHR introduced a distinction between “*hardcore*” and “*non-hardcore*” criminal charges, in which the requirements of Article 6 ECHR would “*not necessarily apply with their full stringency*”.<sup>14</sup>

Interestingly, among the examples of fields of law falling at the periphery of criminal law, the ECtHR cited competition law. However, years before, in *Société Stenuit v France*, the ECtHR had adopted a more open approach (although only as a preliminary position, given that the case was ultimately withdrawn) to the possibility that fines for infringements of competition law could fall within the scope of the *Engels* criteria, thereby triggering the safeguards laid down by Article 6 ECHR.<sup>15</sup> Consistently with this approach, in *Menarini* the ECtHR concluded that the fine imposed on an Italian company by the national competition

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<sup>11</sup> For instance, in its 2016 decision concerning a cartel between trucks producers, the Commission imposed fines amounting to €2.93 billion (see Case AT.39824 – *Trucks*). Very recently, in June 2017, Google was fined €2.42 billion for abusing its dominant position as search engine by giving illegal advantage to own comparison shopping service (see Case AT.39740 – *Google Search (Shopping)*).

<sup>12</sup> Interestingly, Article 47 of the Charter, which corresponds to Article 6 ECHR, does not contemplate this distinction.

<sup>13</sup> Judgment of the ECtHR of 8 June 8 1976, *Engel and Others v The Netherlands*, Application No 5100/71, § 82.

<sup>14</sup> Judgment of the ECtHR of 23 November 2006, *Jussila v Finland*, Application No 73053/01, § 39.

<sup>15</sup> Decision of the European Commission of Human Rights of 11 July 1989, *Société Stenuit v France*, Application No 11598/85.

authority was criminal in nature, by referring to the *Engels* criteria but not, remarkably, to the distinction introduced with the *Jussila* jurisprudence.<sup>16</sup>

Against this background, and although Regulation (EC) No 1/2003 clearly states that the Commission's decision imposing fines "*shall not be of a criminal law nature*",<sup>17</sup> the question of whether the safeguards put forth by Article 6 ECHR may apply to EU competition proceedings cannot be easily ruled out, as shown by the references to this point that may be found in some of the Advocates General opinions.<sup>18</sup>

In any case, as already mentioned, since the entry into force of the Treaty of Lisbon, a catalogue of binding fundamental rights has been introduced in the EU legal order. Several Charter provisions contemplate rights that may have a specific relevance in the field of EU competition proceedings, such as, e.g., Article 7 ("*Respect for private and family life*"), Article 41 ("*Right to good administration*"), Article 42 ("*Right of access to documents*"), Article 47 ("*Right to an effective remedy and to a fair trial*"), Article 48 ("*Presumption of innocence and right of defence*") and Article 50 ("*Right not to be tried or punished twice in criminal proceedings for the same criminal offence*").

Although it is clear that most of these rights have been historically conceived as protecting physical persons, the possibility to apply them to legal persons has long been recognized by the CJEU.<sup>19</sup> Moreover, some provisions of the Charter explicitly mention legal persons as their addressees (see, for instance, Article 42).

Besides, it must be noted that (even before being made binding as primary law) the Charter was a relevant term of reference for the EU courts, *inter alia* in antitrust cases, as shown by the Opinion delivered in 2005 by Advocate General Kokott in *FEG*, where she recognized that the Charter should be taken into account in cartel proceedings.<sup>20</sup>

### III. The case law of the CJEU: the right to privacy

As already mentioned, the issue of the respect of the companies' right to privacy may become relevant within EU competition proceedings in the context of the so-called "dawn raids", *i.e.*, the inspections carried out by the Commission pursuant to Article 20 of Regulation (EC) No 1/2003.<sup>21</sup>

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<sup>16</sup> Judgment of the ECtHR of 27 September 2011, *Menarini v Italy*, Application No 43509/08, §§ 40 ff.

<sup>17</sup> Article 23(5) of Regulation (EC) No 1/2003.

<sup>18</sup> See Opinion of AG Kokott in C-109/10 P, *Solvay v Commission*, EU:C:2011:686, § 256.

<sup>19</sup> See, e.g., judgment of the CJ of 7 June 1983, Joined Cases C-100/80 to 103/80, *Musique Diffusion française v Commission*, EU:C:1983:158.

<sup>20</sup> See Opinion of 8 December 2005 in case C-105/04 P, *FEG v Commission*, EU:C:2005:751.

<sup>21</sup> Article 20 provides the following: "1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorized by the Commission to conduct an inspection are empowered: (a) to enter any premises, land and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

This provision, while granting the Commission pervasive investigative powers in order to gather factual information on possible infringements of EU competition law, lays down some procedural guarantees in favor of the companies which are subject to the inspections. The latter mainly concern, on the one hand, the need that the Commission act on the basis of a decision specifying “*the subject matter and purpose of the inspection*” and, on the other hand, the right of the companies to obtain an *ex post* judicial review of this decision by the CJEU (Article 20(4) of Regulation (EC) No 1/2003).<sup>22</sup> However, at the same time, companies are under a legal obligation to submit to the inspections, and may be fined if they provide incorrect or misleading answers and/or hand over incomplete documents (Article 20(3) of Regulation (EC) No 1/2003). Moreover, as mentioned, the judicial review of the decision occurs only after the inspection has taken place, while there is no requirement that the Commission obtains a prior judicial authorization in order to carry out the dawn raids.

Pursuant to a well-established case law, the rights of the defence of companies subject to competition proceedings must be observed by the Commission not only in administrative procedures which may lead to the imposition of penalties, but also in the course of preliminary investigation procedures, given that “*it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in*

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3. *The officials and other accompanying persons authorized by the Commission to conduct an inspection shall exercise their powers upon production of a written authorization specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.*

4. *Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.*

5. *Officials of as well as those authorized or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorized by the Commission. To that end, they shall enjoy the powers set out in paragraph 2*

6. *Where the officials and other accompanying persons authorized by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.*

7. *If the assistance provided for in paragraph 6 requires authorization from a judicial authority according to national rules, such authorization shall be applied for. Such authorization may also be applied for as a precautionary measure.*

8. *Where authorization as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles [101 TFEU and 102 TFEU], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.”*

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According to the case law (judgment of the CJ of 22 October 2002, C-94/00, *Roquette Frères*, EU:C:2002:603, § 54), in the course of this review, the CJEU “*must satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned*”.

*particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable*".<sup>23</sup>

More specifically, the right to privacy is a general principle of EU law<sup>24</sup> and is now enshrined in Article 7 of the Charter, which states that "[e]veryone has the right to respect for his or her private and family life, home and communications". Article 8 ECHR is framed almost identically, but puts forth a number of requirements for an interference in one's right to privacy by a public authority to be justified, *i.e.*, if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". As for possible limitations to the EU provision, Article 52(1) of the Charter provides for similar requirements.<sup>25</sup>

While having long been applied to legal persons by the CJEU,<sup>26</sup> the right to privacy of companies *vis-à-vis* Commission's inspections has been recently examined by the CJEU in *Nexans France*<sup>27</sup> and in *Deutsche Bahn*.<sup>28</sup> Both cases are interesting because they allow to understand what is the CJEU's approach to the case law of the ECtHR in such matters.

*i. Nexans France*

The French company Nexans France and its subsidiary ("Nexans"), both active in the electric cable sector, were subjected in 2009 to an inspection by the Commission, in the context of an investigation concerning alleged agreements and/or concerted practices in relation to the supply of electric cables (including underwater and underground cables) and related material. In the course of the inspection, the inspectors seized a large amount of e-mails and documents by removing copies of the hard drive of one of the employees' computer, which was also interviewed.

Against this background, Nexans then brought proceedings before the GC, asking that the inspection decision be annulled, that the Commission's decision to remove copies of the hard drive of the employee's computer for review at its offices in Brussels be declared unlawful (together with its decision to interview that employee), and that the Commission be ordered to return to Nexans all documents and evidence obtained pursuant to such decisions.

Nexans argued that the inspection decision infringed Article 20(4) of Regulation (EC) No 1/2003, as well as a number of its fundamental rights (including the right to privacy),

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<sup>23</sup> Judgment of the CJ of 21 September 1989, Joined cases C-46/87 and C-227/88, *Hoechst v Commission*, EU:C:1989:337, § 15.

<sup>24</sup> See, *e.g.*, CJ, *Hoechst v Commission*, § 19; judgment of the CJ of 17 October 1989, C-85/87, *Dow Benelux v Commission*, EU:C:1989:379, § 30; of 17 October 1989, Joined cases C-97/87, C-98/87 and C-99/87, *Dow Chemical Ibérica and Others v Commission*, EU:C:1989:380, § 16.

<sup>25</sup> More precisely, "[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

<sup>26</sup> CJ, *Roquette Frères*, § 27.

<sup>27</sup> Judgment of the GC of 14 November 2012, T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596.

<sup>28</sup> Judgment of the GC of 6 September 2013, T-289/11, *Deutsche Bahn and Others v Commission*, EU:T:2013:404; judgment of the CJ of 18 June 2015, C-583/13 P, *Deutsche Bahn and Others v Commission*, EU:C:2015:404.

alleging, first, the overly broad and vague product scope of the inspection decision and, secondly, the overly broad geographical scope of that decision.<sup>29</sup>

With this respect, the GC first recalled that “*the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal*”, apart from constituting a general principle of EU law, is now enshrined in Article 7 of the Charter.<sup>30</sup>

Moreover, it restated the principle according to which “*the inspections carried out by the Commission are intended to enable it to gather the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which it already possesses certain information*”.<sup>31</sup> While this principle cannot result in an obligation to delimit precisely the market covered by the investigation, the Commission is nonetheless required to provide sufficient information on the subject-matter of its investigation, so as to allow both the company involved “*to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement*”, and the CJEU “*to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes*”.<sup>32</sup>

On this basis, the GC held that, while the Commission was under an obligation, in order to adopt the inspection decision, to have reasonable grounds to justify an inspection at Nexans’ premises covering *all* their activities in relation to electric cables, it did in fact have such grounds only with respect to high-voltage underwater and underground cables. Accordingly, the GC annulled the inspection decision insofar as it related to other cables.<sup>33</sup>

This being said, however, the GC held that Nexans’ request to annul the Commission’s decisions to take copy of the employee’s computer files and to request from him explanations of documents found during inspection was inadmissible, given that the contested acts could not be regarded as “*actionable measures*”. The only available remedy, apart from challenging the final decision pursuant to Article 101 TFEU, would have been an action against the Commission for non-contractual liability.<sup>34</sup>

Finally, as for the request that the Commission return the evidence obtained pursuant to the above decisions, the GC held that it did not have jurisdiction under Article 263 TFEU to issue declaratory judgments ordering the Commission to comply with its rulings and, therefore, rejected the plea.<sup>35</sup>

ii. *Deutsche Bahn*

In 2011, the German company Deutsche Bahn AG and its subsidiaries, active in the rail transport sector, were subjected to three inspections carried out by the Commission at their premises in order to investigate possible misconduct in violation of Article 102 TFEU and Article 54 of the EEA Agreement. The companies did not, at the time, oppose the inspections or raise objections for the lack of a prior judicial authorization. However, they

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<sup>29</sup> GC, *Nexans France and Nexans v Commission*, § 33.

<sup>30</sup> *Id.*, § 40.

<sup>31</sup> *Id.*, § 43.

<sup>32</sup> *Id.*, § 45.

<sup>33</sup> *Id.*, §§ 67 and 91-94.

<sup>34</sup> *Id.*, §§ 132-133.

<sup>35</sup> *Id.*, § 136.

later brought proceedings before the GC, essentially asking for the annulment of the three inspection decisions, contesting the validity of Article 20 of Regulation (EC) No 1/2003 on the basis of a plea of illegality and asking that the Commission be ordered to return all the copies of documents made during the inspections.

The companies raised two main arguments. On the one hand, they argued that the absence of a requirement for prior judicial authorization regarding the Commission's decisions to carry out inspections infringed their fundamental right to the inviolability of their private premises, pursuant to Article 7 of the Charter of Article 8 ECHR. On the other hand, they argued that the lack of such requirement, as well as the lack of comprehensive judicial review of the inspection decisions, both from a factual and legal point of view, infringed their fundamental right to an effective legal remedy pursuant to Article 47 of the Charter and Article 6 ECHR.

As the GC put it, given that the exercise of the Commission's powers of inspection "*constitutes a clear interference with the [company]'s right to respect for its privacy, private premises and correspondence*", the issue was therefore "*whether the lack of a prior judicial warrant automatically renders the administrative interference illegal and, as the case may be, whether the system established by Regulation No 1/2003 offers sufficient safeguards in the absence of prior judicial authorisation*".<sup>36</sup>

In brief, both the EU courts (*i.e.*, the GC and then on appeal the ECJ) rejected such pleas, finding that (i) the absence of prior judicial authorization is compatible with Articles 7 of the Charter and 8 ECHR and, therefore, (ii) with Articles 47 of the Charter and 6 ECHR.<sup>37</sup>

As for the first plea, the GC recalled the recent case law of the ECtHR concerning inspections,<sup>38</sup> and gave relevance to the circumstance that such case law "*clearly laid down the principle that the absence of prior judicial authorisation may be counterbalanced by a comprehensive post-inspection review*", thereby implying that the lack of such requirement cannot, *per se*, lead to a finding of illegality.<sup>39</sup>

Moreover, the GC referred to the ECtHR's case law stating that an acceptable level of protection against interferences with rights under Article 8 of the ECHR entails a legal framework and strict limits.<sup>40</sup> On this basis, it proceeded to examine whether the system established by Regulation (EC) No 1/2003 offered appropriate safeguards *vis-à-vis* the Commission's powers of inspections, identifying and analysing five of such safeguards, *i.e.*, (i) the requirement that the decision include a statement of reasons; (ii) the limits imposed on the Commission's conduct during the inspections; (iii) the impossibility for the Commission to carry out an inspection by force; (iv) the intervention of national authorities if a search is opposed, with the requirement that a national body consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation; and (v) the existence of *ex post facto* remedies, namely, the judicial review carried out by the

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<sup>36</sup> GC, *Deutsche Bahn and Others v Commission*, § 65.

<sup>37</sup> GC, *Deutsche Bahn and Others v Commission*, §§ 66-67, 112; CJ, *Deutsche Bahn and Others v Commission*, §§ 30-36, 41-48.

<sup>38</sup> Judgments of the ECtHR of 15 February 2011, *Harju v Finland* and *Heino v Finland*, Application No 56715/09 and 56716/09, §§ 40 and 44.

<sup>39</sup> GC, *Deutsche Bahn and Others v Commission*, §§ 66-67.

<sup>40</sup> ECtHR, *Harju v. Finland* and *Heino v Finland*, §§ 39 and 40; judgments of of 21 December 2010, *Société Canal Plus and Others v France*, Application No 29408/08, § 54; of 1 April 2008, *Varga v Romania*, Application No 73957/01, § 70.

CJEU.<sup>41</sup> Against this background, the GC rejected Deutsche Bahn’s plea of illegality concerning Article 20 of Regulation (EC) No 1/2003.<sup>42</sup>

As for the second plea, once again relying on the case law of the ECtHR, the GC held that the applicants had misinterpreted such judgments, given that they showed that the key issue (as for the respect of Article 6 ECHR) “*is the intensity of the review and not the point in time when it was carried out*”, provided that it “*cover[s] all matters of fact and law and provide[s] an appropriate remedy if an activity found to be unlawful has already taken place*”.<sup>43</sup> In light of the circumstances that (i) Article 263 TFEU allows for a comprehensive *ex post* judicial review, and (ii) the Commission cannot use the information gathered during the inspection, in case of a finding of irregularity, the GC concluded that the second plea had to be rejected as well.<sup>44</sup>

However, the CJ also held that, in the specific circumstances of the case, the Commission had overstepped the boundaries of its discretionary powers. In fact, the first inspection was vitiated by irregularity since the Commission’s agents, being previously in possession of information unrelated to the subject-matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision.<sup>45</sup>

Nonetheless, as for the request to return all the copies of documents made during the inspections, the GC observed that, by asking to rule on the consequences of annulling the inspection decisions, Deutsche Bahn was seeking a declaration on the effects of a possible judgment ordering annulment and a direction to the Commission as regards how that judgment is to be complied with, which was outside the scope of the GC’s jurisdiction in the context of a review of legality pursuant to Article 263 TFEU. Therefore, it declared such request inadmissible.<sup>46</sup>

Apart from this last point (which will be addressed below, in Section IV), what is interesting is that in *Deutsche Bahn*, both the GC and the CJ heavily relied on the case law of the ECtHR, which had been (in the first place) extensively referenced by the applicants. Thus, the EU courts engaged in an analysis of the relevant precedents of the ECtHR, assessing the compatibility of the EU framework for inspections in competition proceedings against the background of the case law of the Court of Strasbourg.

#### IV. Conclusions

The analysis of the CJEU’s case law concerning the right to privacy of companies subjected to the Commission’s inspections in the context of competition proceedings, carried out in Section III above, allows for some observations on the relevance of the ECtHR in shaping that case law.

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<sup>41</sup> GC, *Deutsche Bahn and Others v Commission*, §§ 74-101. Regarding the fact that such safeguards are not, in practice, sufficient to restrict the Commission’s powers, see A. Steene, *Nexans, Deutsche Bahn, and the ECJ’s Refusal to Follow ECHR Case Law on Dawn Raids*, in JECLAP, 2016(7)3, pp. 183-184.

<sup>42</sup> *Id.*, § 102.

<sup>43</sup> *Id.*, § 110.

<sup>44</sup> *Id.*, §§ 111-114.

<sup>45</sup> CJ, § 66.

<sup>46</sup> GC, *Deutsche Bahn and Others v Commission*, § 227.

First, it appears that, where expressly engaged on the point, the CJEU is willing to examine the case law of the ECtHR, in order to assess whether it is applicable or not to the case pending before it. Thus, at least from a formal standpoint, the CJEU uses the ECtHR as a term of reference. However, in *Nexans France*, the applicants asked that two judgments of the ECtHR (specifically dealing with the compatibility of inspections with Article 8 ECHR), delivered after their reply had been lodged and which they submitted were relevant for the purposes of the examination of the admissibility of their action, be placed in the file. The request was granted, and the GC asked the Commission to submit observations on those judgments.<sup>47</sup> The fact that the judgment of the GC does not include any reference to such case law, which had been very likely extensively quoted and discussed by Nexans, is not easy to understand.

Second, from a substantial standpoint, as seen in the *Deutsche Bahn* case, the CJEU does not seem willing to transpose the case law of the ECtHR to the cases pending before it. This tendency to autonomously interpret the provisions of the Charter may hide the fear of losing autonomy. However, undoubtedly, the long stream of case law of the ECHR regarding fundamental rights, although generally referred to physical persons, can provide useful elements (with the necessary adjustments) also when it comes to the companies involved in competition proceedings before the Commission. From this point of view, such case law constitute a precious source of material for the CJEU, which is widely known, as the recurring references to judgments of the ECtHR made by applicants before the EU courts show.

On the other hand, the specificities of EU competition law, together with the provision of Article 52(3) of the Charter (which, as mentioned, opens the door to a more generous interpretation of fundamental rights than that stemming from the ECHR, as interpreted by the ECtHR), may also justify a wide recourse to autonomous interpretation of the Charter by the CJEU. What is certain is that the case law of the ECtHR marks the minimum level of protection, which must be in any case ensured by the CJEU with respect to provisions of the Charter corresponding to rights granted under the ECHR.

As it was rightly observed, in the case of the right to privacy, the refusal of the CJEU, in both *Deutsche Bahn* and *Nexans France*, to return the companies the documents seized by the Commission (even when they had been seized on the basis of unlawful inspection decisions, as in *Nexans France*), is worrying.<sup>48</sup> In fact, this point seems to sit uneasily with the case law of the ECtHR, and especially its recent judgment in *Delta Pekárny*,<sup>49</sup> which – interestingly enough – was expressly quoted by the CJ in *Deutsche Bahn*,<sup>50</sup> and has clarified that there must be rules on the destruction of improperly seized material.<sup>51</sup> Similarly, in *Vinci*, the ECtHR stated that “*it is up to the Judge, when faced with allegations that seized documents were unrelated to the investigation or legally privileged, to rule after a specific*

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<sup>47</sup> GC, *Nexans France and Nexans v Commission*, § 17.

<sup>48</sup> A. Steene, *Nexans, Deutsche Bahn, and the ECJ's Refusal to Follow ECHR Case Law on Dawn Raids*, cited above, 185 ff.

<sup>49</sup> Judgment of the ECtHR of 2 October 2014, *Delta Pekárny a.s. v the Czech Republic*, Application No 97/11.

<sup>50</sup> CJ, *Deutsche Bahn and Others v Commission*, § 32.

<sup>51</sup> ECtHR, *Delta Pekárny a.s. v the Czech Republic*, § 92.

*review of proportionality, and where, appropriate, order return [of the documents]” or their destruction.*<sup>52</sup>

In any case, overall, *Deutsche Bahn* and *Nexans France* show an evolution in the approach of the CJEU towards a stricter scrutiny of inspection decisions.<sup>53</sup> Having said this, it is indeed a shame that the CJEU did not take the chance offered by *Deutsche Bahn* to reflect on its increasing departure from the ECtHR case law.<sup>54</sup>

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<sup>52</sup> Judgment of the ECtHR of 2 April 2015, *Vinci Construction et GTM Génie Civil et Services v France*, Applications No 63629/10 et 60567/10, § 79.

<sup>53</sup> G. Di Federico, *The appeal judgement in Deutsche Bahn AG (C-583/13 P): some reflections on the standard of the protection of the rights of defense in antitrust proceedings*, in Eurojus.it, 23 June 2015, p. 4.

<sup>54</sup> A. Steene, *Nexans, Deutsche Bahn, and the ECJ’s Refusal to Follow ECHR Case Law on Dawn Raids*, cited above, p. 193.