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RIGHT TO PRIVACY V. EUROPEAN COMMISSION'S EXPANDED POWER OF INSPECTION ACCORDING TO REGULATION 1/2003

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Abstract. *Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty set out that in carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the officials authorized by the EU Commission were empowered inter alia to enter any premises, land and means of transport of undertakings. 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 has expanded Commission's powers stating that Commission can by decision order an inspection to be conducted in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned. Such an expansion of the investigative powers of the Commission raises a question of the balance between effectiveness of the EU competition law and a person's right to privacy, which is guaranteed to everyone by the Article 8 of the European Convention on Human Rights. Nevertheless this right is not absolute and the conditions for the possible limitations of the exercise of it are enshrined in paragraph 2 of the same article. For this reason the aim of this article is to find out whether Commission's power to carry out searches in private homes meet the requirements set in Article 8(2) of the Convention, i.e., whether the Commission's power*

to conduct such searches could be justified under the ECHR Article 8(2). In this study, the authors analyse the Commission's extended investigative powers, clarify what is covered by the concept of "privacy", evaluate the requirements set in Article 8(2) of the Convention, analyse conditions of exercising Commission's extended investigative power and thus qualify if the latter satisfies the requirements set in Article 8(2) of the ECHR.

Keywords: EU competition law, Regulation 1/2003, inspection of private premises, right to privacy, in accordance with the law, legitimate aim, necessary in a democratic society, proportional to the pursuit of the goal.

Introduction

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 Treaty¹ (hereinafter – Regulation 1/2003)² has extended the Commission's right to carry out searches, not only in business premises but also in their managers or other staff private homes. Given that the European Union Court of Justice (hereinafter – ECJ) refused to recognize that the EU competition law is of criminal law nature³, a balance between the effectiveness of the EU competition law and a person's right to privacy, guaranteed to everyone by Article 8 paragraph 1 of the European Convention on Human Rights (hereinafter – ECHR or Convention), poses a particularly serious issue.

The right to privacy can only be limited if the conditions existing in paragraph 2 Article 8(2) of the ECHR are satisfied. Therefore, the explanation of these conditions in the jurisprudence of the European Court of Human Rights (hereinafter – ECtHR or Court) is important to ascertain whether the Commission carries out the inspections in accordance with these conditions, in other words, whether they can be justified under Article 8(2) of the ECHR.

It should be mentioned that neither the ECtHR, nor the ECJ has had an opportunity to deal with cases where individuals would complain that their right to privacy was violated because of the Commission's inspection carried out in their private premises. The ECJ, however, while dealing with complaints appealing Commission's inspections carried out in the business offices has never acknowledged that such searches have breached the right to privacy.

Foreign legal experts usually examine various Commission's rights, extended by Regulation 1/2003 (Gerhard Dannecker and Oswald Jansen, G. Hirsch, F. Montag and F. J. Säcker), but when referring to Article 21 of the Regulation 1/2003, which embodies

1 After 2009-12-01 Articles 81 and 82 EC Treaty became Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter – Articles 101 and 102 TFEU).

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. [2003] OJ L1/1.

3 Case C-338/00 P, *Volkswagen v. Commission*, [2003] ECR I-9189, § 96–97.

Commission's right of private premises inspection, there is usually only a rhetorical calling of the question, whether such power does not violate a person's right to privacy. Nevertheless, a few authors (James S. Venit, Tero Louko, and Evelyne M. Ameye) have examined some issues of Commission's extended powers and their implications on human rights. Meanwhile, the aim of this study is very concrete: to find out whether Commission's power to carry out searches in private homes meet the requirements set in Article 8(2) of the Convention, i.e., whether the Commission's power to conduct such searches could be justified under the ECHR Article 8(2). This issue is of great importance: the Lisbon Treaty has entered into force on the 1st of December, 2009 and the 14th Protocol of the ECHR – on the 1st of June 2010. Therefore, the EU will soon become responsible for the violations of human rights protected by the ECHR. Attention has to be drawn to the fact that in the Lithuanian legal literature, these issues have not been analysed as of yet.

In the first part of this article, extended powers granted to Commission by Regulation 1/2003 are outlined. In the second part, the authors clarify what is covered by the concept of "privacy", enshrined in Article 8(1) of the ECHR by examining the practice of ECtHR. The third part examines the conditions embodied in Article 8(2) of the ECHR; the authors also analyse the conditions for exercising Commission's inspection powers and thus assess the correlation of these conditions with the requirements of Article 8(2) of the ECHR.

1. The Commission's Powers in the EU Law

Article 14(1)(d) of Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (hereinafter – Regulation No 17)⁴ set out that in carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission could carry out all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission were empowered *inter alia* to enter any premises, land and means of transport of undertakings (so called *on-site investigations* or *dawn raids*). When conducting an on-site investigation, whether under authorization or ordered by decision, the Commission investigators could 1) enter premises, 2) examine and copy information and 3) request oral explanations. The investigators could not use force to enter premises, unless the undertaking opposes the investigation. They had no right to enter private homes⁵.

Regulation 1/2003 set out an analogous provision stating that officials and other accompanying persons authorized by the Commission to conduct an inspection are empowered *inter alia* to enter any premises, land and means of transport of undertakings and associations of undertakings.⁶

4 Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty. [1962] OJ 13/204.

5 Dannecker, G.; Jansen, O. *Competition Law Sanctioning in the European Union*. Hague: Kluwer law international, 2004.

6 Art. 20(2)(a).

„This power not only refers to private rooms but also to premises of solicitors, accountants or banks working for the undertaking subjected to the inspection. The power of inspection is not geographically restricted to undertakings as mentioned in the written authorization for inspection or in the decision ordering an inspection, because stating the location is not part of information required by Art. 20(3) and (4). The right to enter is not limited to premises of the undertaking or the undertaking's property. Therefore, any of the premises, real property and means of transport of affiliated companies belonging to the undertaking is covered.”⁷

Commission's extended investigation powers set out in this Regulation are even wider. As of now Commission has the power to take statements – “the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject – matter of an investigation”⁸, “to seal any business premises and books or records for the period and to the extent necessary for the inspection”⁹, “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”¹⁰ (by contrast, Article 14(1)(c) of the Regulation No 17 provided the possibility to request oral explanations related to the books and records under examination, which was often interpreted to mean that the Commission had no right of interview (please refer also to *National Panasonic v. Commission*, *supra* note 11, Para. 15))¹¹.

But probably the most significant extended power of the Commission is embodied in Article 21(1), which states that the Commission can order an inspection to be conducted in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Articles 101 or 102 TFEU, are being kept in such other premises, land and means of transport.

Such a right was not included in Regulation 17/62, but this extension was based on experience gained in recent cases where it appeared that company employees kept relevant documents in their private homes. Evidence was found suggesting that incriminatory documents were deliberately stored in private homes. Under the existing rules, this enabled companies to undermine the Commission's inspections. To ensure that the effectiveness of inspections against secret infringements was maintained, it was therefo-

7 Hirsch, G.; Montag, F.; Säcker, F. J. *Competition Law: European Community Practice and procedure. Article-by-Article Commentary*. First edition. London: Sweet & Maxwell, 2008.

8 Art. 19 and recital 25.

9 Art. 20(2)(d).

10 Art. 20(1)(e).

11 Venit, J. S.; Louko, T. The Commission's new power to question and its implications on human rights. *Annual proceedings of the Fordham Corporate Law Institute. International Antitrust Law & Policy*. 2005: 675–700.

re necessary to extend the powers of the Commission inspectors to search private homes of companies' personnel, where professional documents are likely to be kept.¹²

On the other hand, directors, managers and other members of staff of the undertakings enjoy a right to privacy regarding their private premises, which is guaranteed to everyone by the Article 8(1) of the ECHR. It is obvious that the inspections mentioned above can interfere with this right. It is therefore necessary to define the right to privacy and its limitations, justifiable by the Article 8(2) of the Convention.

2. Right to Respect for Private Life

The right to respect for private life is not easily understood because the right is indefinite. The ECtHR has acknowledged that it extends beyond the “right to privacy, the right to live, as far as one wishes, protected from publicity”¹³, but has consistently declined to define it further. Instead, it insists that it is “a broad term not susceptible to exhaustive definition”¹⁴, and repeats several broad statements about the nature of the interest. According to the Court, “private life” includes “activities of a professional or business nature”¹⁵, the “right to establish and develop relationships with other human beings and the outside world”¹⁶, “a zone of interaction of a person with others even in a public context”¹⁷, the “physical and psychological integrity of a person”¹⁸, “the right to...personal development”¹⁹, and “the right to establish details of their identity as individual human beings”²⁰. Interests as diverse as the right to live as a gypsy, to change one's name and to be free from environmental pollution, as well as more traditional “privacy” rights such as protection against dissemination of personal information and images fall within the sphere of “private life”.²¹

Numerous case-law of the ECtHR shows that it is a breach of Article 8(1) to search an individual's residential premises: in some cases searches are treated as a breach of

12 Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (“Regulation implementing Articles 81 and 82 of the Treaty”), COM(2000) 582 final, 2000/0243 (CNS).

13 *X v. Iceland*, 18 May 1976, D.R. 5, p. 86.

14 *Peck v. United Kingdom*, no. 44647/98, §57, ECHR 2003-I; see also *PG and JH v. United Kingdom*, no. 44787/98, §56.

15 *Niemietz v. Germany*, 16 December 1992, §29, Series A no. 251-B;. See also *Rotaru v. Romania* [GC], no. 28341/95, §43, ECHR 2000-V; and *Amann v. Switzerland* [GC], no. 27798/95, §65, ECHR 2000-II.

16 *Peck v. United Kingdom*, no. 44647/98, §57, ECHR 2003-I. See also *X v. Iceland*, 18 May 1976, D.R. 5, p. 86.

17 *von Hannover v. Germany*, no. 59320/00, §50, ECHR 2004-VI.

18 *Pretty v. United Kingdom*, no. 2346/02, §61, ECHR 2002-III.

19 *Peck v. United Kingdom*, no. 44647/98, §57, ECHR 2003-I. See also *X v. Iceland*, 18 May 1976, D.R. 5, p. 86.

20 *Goodwin v. United Kingdom* [GC], no. 28957/95, §90, ECHR 2002-VI.

21 Moreham, N. A. The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination. *European Human Rights Law Review*. 2008, 1: 44–79.

the right to respect for “private life” (*Gillan and Quinton v. The United Kingdom*²²), in others – as an interference with “home” (*Sallinen v. Finland*²³, *Buck v. Germany*²⁴, *Smirnov v. Russia*²⁵, *Taner Kiliç v. Turkey*²⁶) or as a breach of the right to respect for both “private life” and “home” (*Funke v. France*²⁷, *Iya Stefanov v. Bulgaria*²⁸, *Babylonová v. Slovakia*²⁹).

Moreover, it should be mentioned that at the time not guided by any precedents from the ECtHR, the ECJ in *Höchst* case, which addressed dawn raids conducted by the Commission, recognized the protection against arbitrary and disproportionate intervention as general principle of Community law, but also said that the right to privacy under Article 8 ECHR did not extend to business premises.³⁰ Nevertheless, later on the ECtHR concluded that the workplace is also protected in this sense on the basis that there is “... [n]o reason of principle why...” “private life” should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world”.³¹ The extension of the word “home” to include the workplace has been held to be consistent with the use of the word “domicile” in the French version of the Convention.³² However, the ECtHR has acknowledged that Member States’ rights under Article 8(2) “might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case”.³³ Still, it should be stressed that according to the ECtHR the right to privacy under Article 8 ECHR applies not only to private, but also to business premises. Finally, in *Roquette Freres*, the EJC decided to endorse the position of the ECtHR:

*For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises.*³⁴

In sum, it can be concluded that the Commission’s inspections conducted according to Article 21(1) of the Regulation 1/2003 in any private premises, land and means of transport, including the homes of directors, managers and other members of staff of the

22 *Gillan and Quinton v. The United Kingdom*, no. 4158/05, §65.

23 *Sallinen v. Finland*, no. 50882/99, §71.

24 *Buck v. Germany*, no. 41604/98, §32, ECHR 2005-IV.

25 *Smirnov v. Russia*, no. 71362/01, §36.

26 *Taner Kiliç v. Turkey*, no. 70845/01, §40.

27 *Funke v. France*, 25 February 1993, §48, Series A, no. 256-A.

28 *Iliya Stefanov v. Bulgaria*, no. 65755/01, §34.

29 *Babylonová v. Slovakia*, no. 69146/01, §50, ECHR 2006-VIII.

30 Cases 46/87 and 227/88, *Höchst AG v. Commission* [1989] ECR 2859, §18–19.

31 *Niemietz v. Germany*, 16 December 1992, §29, Series A no. 251-B.

32 *Petri Sallinen and others v. Finland*, no. 50882/99, §70, see also *Buck v. Germany*, no. 41604/98, §31, ECHR 2005-IV.

33 *Reiss v. Austria*, 6 September 1995.

34 Case C-94/00, *Roquette Frères SA*, ECR I-9011, §29.

undertakings and associations of undertakings would be an interference with a right to respect for private life, home or both. Therefore it is important to clarify if this interference might be justified under Article 8(2) of the Convention.

3. Justifications of the Interference

Once it is established if the dispute concerns private or family life, home or correspondence, the ECtHR examines the substance of the complaint under Article 8(2). To be consistent with the Convention, any interference with the rights protected by Article 8(1) must fulfil all the criteria listed in paragraph 2 of the provision. In particular, the interference must be:

- in accordance with the law,
- it must pursue one of the legitimate aims listed in Article 8(2) of the Convention,
- it must be necessary in a democratic society or proportionate to the pursuit that aim.³⁵

It was concluded earlier that the Commission's power of inspection conducted according to Article 21(1) of the Regulation 1/2003 would interfere with the right, protected by Article 8(1) of the Convention. To see if this interference might be justified under paragraph 2 the settlement, the powers of the Commission should be scrutinized; it should be determined whether they fulfil the three above mentioned criteria.

3.1. In Accordance with the Law

The ECtHR should first ascertain whether the interference complained of was “in accordance with the law.” A measure will be in accordance with the law if it satisfies three conditions. First, it must have some basis in domestic law. Second, the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case. Finally, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences, which a given action may entail.³⁶

The ECtHR reiterates that the expression “in accordance with the law” in Article 8(2) of the Convention essentially refers back to national law and states the obligation to conform to the substantive and procedural rules.³⁷ In accordance with the case-law of the Convention institutions, in relation to Article 8(2) of the Convention, the term

35 Kilkelly, U. The right to respect for private and family life. A guide to the implementation of article 8 of the European Convention on Human Rights. *Human rights handbooks, No. 1*. From *European Court of Human Rights* [interactive]. [accessed 16-04-2010]. <www.echr.coe.int>.

36 *Onoufriou v. Cyprus*, no. 24407/04, §93; *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 47 and 49, Series A no. 30.

37 *Panteleyenko v. Ukraine*, no. 11901/02, *mutatis mutandis*, *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 667.

“law” is to be understood in its “substantive” sense and not its “formal” one. In a sphere covered by written law, the “law” is the enactment in force as the courts have interpreted it.³⁸ In this respect, the ECtHR reiterates that its power to review compliance with domestic law is limited – it being in the first place for the national authorities, notably the courts, should interpret and apply that law.³⁹ In principle, therefore, it is not for the Court to express an opinion contrary to that of the domestic courts, which found that the search and seizure were based on the provisions of the domestic law.⁴⁰

With regard to the accessibility of the law according to the case-law of the Convention institutions, the measure complained of was “in accordance with the law” within the meaning of Article 8(2) of the Convention, when the law was published and available to all the people concerned and the general public.⁴¹

It can be concluded thus that since Commission’s power to conduct the inspections is clearly established in Article 21(1) of the Regulation 1/2003, which is a rule of law of the European Union and the EU law forms part of the domestic law⁴² and is constitutionally supreme⁴³, the EU law can be said to fit into the “domestic law” category. This was confirmed in case *Bosphorus Airways v. Ireland* where the ECtHR stated that an the EU Regulation is law for these purposes as it is “generally applicable” and “binding in its entirety” on the Member States.⁴⁴ In addition, the Regulation 1/2003 was published in the Official Journal, accessible in all languages of the Member States, so the first two conditions of the criteria “in accordance with the law” is obviously satisfied – inspections have the basis in the domestic law, which is accessible to all citizens of the European Union.

The expression “in accordance with the law”, however, also relates to the quality of the law in question. This implies that the persons concerned must be able to foresee consequences of the law for themselves. Finally, the law must be compatible with the rule of law, which implies that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by Article 8(1) of the Convention. If a law confers discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject-matter.⁴⁵

The ECtHR emphasizes that search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a “law” that

38 *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III

39 *Chappell v. United Kingdom*, 30 March 1989, § 54, Series A no. 152-A.

40 *Petri Sallinen and others v. Finland*, no. 50882/99, §78.

41 *Campbell v. United Kingdom*, 12 July 1990, §51, Commission Report 31; *McCallum v. United Kingdom*, 4 May 1989, §45, Commission Report 31.

42 Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585.

43 Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

44 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, § 145.

45 *Evcon v. Netherlands*, 3 December 1997.

is particularly precise.⁴⁶ Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such measures.⁴⁷ A law, which confers discretion must indicate the scope of that discretion. The ECtHR, however, has already recognized the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity. Many laws are inevitably formulated in terms which, to a greater or lesser extent, are vague, and interpretation and application of which are questions of practice.⁴⁸ Nevertheless, if that law does not indicate with sufficient clarity the circumstances in which privileged material could be the subject to search and seizure, the Court concludes that in such case the person is thus deprived of the minimum degree of protection to which he was entitled under the rule of law in a democratic society.⁴⁹ For instance, the ECtHR does not consider that the domestic law gives sufficient clarity to provide adequate protection against the abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State if the law does not, as required by the ECtHR's case-law, set out in a form accessible to the public any indication of the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material.⁵⁰

First, it must be noted that not every infringement of Articles 101 or 102 TFEU empowers the Commission to conduct an inspection under Article 21 of the Regulation 1/2003. An inspection of private premises can be conducted only if a reasonable suspicion arises that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a *serious violation* of Articles 101 or 102 TFEU, exist. There is no regulation about when a serious infringement occurs, but the ones mentioned in the Guidelines of the Commission on the method of assessing fines, especially horizontal price-fixing, market sharing and output limitation agreements, can represent serious infringements within the meaning of Article 21. An evaluation of the seriousness in each specific case is required; nevertheless, due to the serious impact on the fundamental rights of the individual, the requirement of a serious infringement must be interpreted narrowly.⁵¹

Moreover, the Commission's decision, which is a basis for inspection, first, can be issued after the consultation with the competition authority of the Member State where the inspection is to be conducted.⁵² The subject-matter and purpose of the inspection, the date for the start of the inspection must be specified and it must be referred to the right to have the decision reviewed by the ECJ. In particular, the decision must state

46 *Petri Sallinen and others v. Finland*, no. 50882/99, §90.

47 See *mutatis mutandis*, *Kopp v. Switzerland*, 25 March 1998, §64, Reports 1998-II; *Liberty and Others v. the United Kingdom*, no. 58243/00, §62.

48 *Onoufriou v. Cyprus*, no. 24407/04, §94.

49 *Sorvisto v. Finland*, no. 19348/04, §120.

50 *Liberty and Others v. the United Kingdom*, no. 58243/00, §69.

51 Hirsch, G.; Montag, F.; Säcker, F. J., *supra* note 7.

52 Art. 21(2) sentence 3.

the reasons, which led the Commission to conclude that a suspicion of a serious infringement of Articles 101 or 102 TFEU exists.⁵³ The ECJ emphasized the importance of the subject-matter and purpose of the investigation, stating that “the Commission’s obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned. It follows that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation”.⁵⁴ In other words, the Commission is not permitted to invoke considerations such as the confidentiality of its sources of information to avoid motivating its investigations. The statement of the subject-matter and the purpose of the investigation are particularly important because it is only by reference to their description in the decision that the undertaking concerned can assess (and be judged upon) its compliance with the decision.⁵⁵

Furthermore, there must be justified suspicion that books or other business related records, which could provide evidence for serious infringement, are being kept on the premises, land or means of transport mentioned in the decision.⁵⁶ Finally, a decision ordering an inspection under Article 21 can only be executed with the prior authorization from a national court,⁵⁷ which has to control that Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive considering the seriousness of the suspected infringement, the importance of the evidence sought, the involvement of the undertaking concerned and the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorization is requested.⁵⁸

It can thus be concluded that Article 21 of Regulation 1/2003 is a law, which indicates the scope of the discretion of the Commission, and sets out the circumstances in which privileged material could be subject to search with sufficient clarity. It also defines the appeal procedure of the Commission’s decision; therefore, persons subjected to such measures are not deprived of the minimum degree of protection to which they are entitled under the rule of law in a democratic society. It was already concluded that two conditions of the criteria “in accordance with the law” in case of Article 21 of Regulation 1/2003 are satisfied it has to be acknowledged that the Commission’s power of inspection of “other premises” is fully in accordance with the law in relation to Article 8(2) of the Convention.

53 Art. 21(2) sentence 1.

54 Cases 46/87 and 227/88, *Höchst AG v. Commission* [1989] ECR 2859.

55 Dannecker, G.; Jansen, O., *supra* note 5.

56 Art. 21(3) sentence 2.

57 Art. 21(3) sentence 1.

58 Art. 21(3) sentence 2.

3.2. Interference Must Pursue one of the Legitimate Aims Listed in Article 8(2) of the Convention

Once interference is found to be in accordance with the law, the ECtHR will proceed to question whether it pursues a legitimate aim under Article 8(2) of the ECHR. This paragraph contains the list of the aims upon which the state can rely: interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

The Court could be said to pay little attention to the aims invoked by the State as a basis for its actions and often condenses the aims, such as the protection of health and morals and the protection of the rights and freedoms of others, into one.⁵⁹ Thus, in most cases, the ECtHR will accept that States were acting for a proper purpose. The ECtHR has also rarely if ever rejected the legitimate aim or aims identified, even where this may be disputed by the applicant.⁶⁰

In one case on the searches of the premises made by national competition authorities, the Court concluded that the purpose of the interference with the applicant companies' right to respect for their premises was to obtain evidence of unlawful agreements. Therefore, the interference was manifestly in the interests of both "the economic well-being of the country" and "the prevention of crime"⁶¹. As the purpose of inspections of „other premises“ conducted by the Commission is the same, that is, to obtain evidence of unlawful agreements, it is clear that the said inspections also pursue legitimate aims listed in the second paragraph of Article 8 of the Convention.

3.3. Necessary in Democratic Society

The central question in this case is whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society". It must be recalled that this requirement under paragraph 2 of Article 8 raises a question of procedure as well as one of substance.⁶²

To determine whether these measures were "necessary in a democratic society", the ECtHR has to explore the availability of the effective safeguards against the abuse or arbitrariness under domestic law and check how those safeguards operated in the specific case under examination. The elements taken into consideration in this regard are the severity of the offence in connection with which the search and seizure have been effected, whether they have been carried out pursuant to a warrant issued by a judge or a judicial officer – or subjected to after-the-fact judicial scrutiny –, whether the warrant was based on the reasonable suspicion and whether its scope was reasonably limited. The Court must also review the manner in which the search has been executed, and – if a lawyer's

59 *Open door counseling v. Ireland*, 29 Oct 1992, Series A no. 246-A.

60 *Kilkelly, U.*, *supra* note 35.

61 *Soci t  Colas Est and others v. France*, no. 37971/97, §44, ECHR 2002-III.

62 *Pauli  v. Croatia*, no. 3572/06, §40.

office is concerned – whether it has been carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed. The ECtHR must finally take into account the extent of the possible repercussions on the work and the reputation of the persons affected by the search.⁶³

It must be reminded that the decision of the Commission ordering an inspection under Article 21 can only be executed with prior authorization from the appropriate judicial authority in the Member State.⁶⁴ In practice, this requires the assistance of the national competition authority, which in any event participates in the procedure, because of the necessity of a consultation before making a decision.⁶⁵ The national authority normally applies for the necessary judicial approval, e.g. the search warrant.

The mere fact, however, that an application for a warrant has been subject to judicial scrutiny will not in itself necessarily amount to a sufficient safeguard against the abuse. The ECtHR says that it must rather examine the particular circumstances and evaluate whether the legal framework and the limits on the powers exercised were an adequate protection against the arbitrary interference by the authorities.⁶⁶

According to the ECtHR's case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within the reasonable bounds.⁶⁷ Therefore, if neither the application for its issue nor the warrant itself specifies what items and documents were expected to be found in the applicant's office, or how they would be relevant to the investigation, the Court finds that, in the circumstances, the warrant was drawn in overly broad terms and was thus not capable of minimizing the interference with the applicant's Article 8 rights and his professional secrecy.⁶⁸

In this regard it should be stressed that nevertheless the existence of a requirement to grant prior authorization from the appropriate judicial authority, the extent of the national court's power of control under Article 21 of Regulation 1/2003 is very limited. This control consists only in verifying whether the Commission's dawn raids are neither arbitrary, excessive, nor disproportionate. In particular, the court must ensure that the coercive measures envisaged are neither arbitrary nor excessive, taking into account the seriousness of the suspected infringement, the importance of evidence sought, the involvement of the undertaking and the reasonable likelihood that the business books and records relating to the subject-matter of the inspection are kept in the premises for which the authorization is requested.⁶⁹

In the application for approval, the Commission must reason why there is a presumption that the person, whose premises it would like to search keeps evidence in these premises. The national judicial authority can ask the Commission, directly or through the Member State competition authority, for detailed explanations for these elements,

63 *Iliya Stefanov v. Bulgaria*, no. 65755/01, §38.

64 Art. 21(3), sentence 1.

65 Art. 21(2), sentence 3.

66 *Iliya Stefanov v. Bulgaria*, no. 65755/01, §39.

67 *Van Rossem v. Belgium*, no. 41872/98, §45.

68 *Iliya Stefanov v. Bulgaria*, no. 65755/01, §41.

69 Art. 21(3), sentence 2.

which are necessary to allow its control of the proportionality of the intended coercive measures. The national judge decides whether the Commission has met its duty to provide detailed explanations and whether it has explained sufficiently that there is a „reasonable likelihood“ for the records relating to the subject-matter of the inspection to be kept in the private home.⁷⁰

However, national courts may not call into question the necessity of the inspection nor demand that it be provided with information on the file of the Commission. The lawfulness of the Commission decision is subject to review only by the Court of Justice⁷¹.

In addition, with respect to the arbitrariness check, the ECJ has recognized that the Commission should be able to guarantee the anonymity of certain sources of information and that it is often difficult for the Commission to physically transmit evidence to the national courts due to the danger for “uncertainties and delays that may affect such transmission and the different procedural rules with which they may have to comply under the legal systems of the Member States concerned, as well as the time which the authorities in question may need to consider potentially complex and voluminous documents”.⁷²

The documents on the basis of which the national court carries out the control may therefore be limited. The ECJ found that it is enough that the Commission gives a precise account of its suspicions to the national courts. It does not need to indicate the nature of the evidence on which its suspicions are based. With respect to the proportionality check, the ECJ admits that it is not indispensable that the information communicated to the national courts provides a precise definition of the relevant market sets out the exact legal nature of the presumed infringements or indicates the period during which those infringements were committed. Finally, the Commission needs not transmit the information on the competition case to the national court in writing, but may merely provide an oral answer to the national court.⁷³

On the other hand, in *Hoechst* the ECJ acknowledged that “the Member States are required to ensure that the Commission’s action is effective, while respecting the general principles set out above. It follows that, within those limits, the appropriate procedural rules designed to ensure respect for undertakings’ rights are those laid down by national law. Consequently, if the Commission intends, with the assistance of the national authorities, to carry out an investigation other than with the cooperation of the undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law permitted to ensure that national procedural safeguards are satisfied”.⁷⁴ In particular, these might be expected to include national rights of defence, to the extent that they are more protective than those recognized by the ECJ.

70 Hirsch, G.; Montag, F.; Säcker, F. J., *supra* note 7.

71 Art. 21(3), sentences 4, 5.

72 Case C-94/00, *Roquette Frères SA*, ECR I-9011, §66.

73 Ameye, E. M. The Interplay between Human Rights and Competition Law in the EU. *European Competition Law Review*. 2004, 25(6): 332–341.

74 Cases 46/87 and 227/88, *Höchst AG v. Commission* [1989] ECR 2859, §33–34.

Mischo AG in *Roquette*, however, saw the role of the national court as being merely to ensure that the correct formalities are observed, rather than to impose or guarantee substantive procedural safeguards. In his opinion, the “procedural guarantees laid down by national law“, referred to in *Hoechst*, were the national rules designating the competent court and the form, in which the court must adopt its decision. Therefore, the national court may not:

- require the disclosure of the information or evidence on which the Commission based its decision ordering an investigation, nor may it review the veracity and relevance of that material; nor
- refuse to grant the requested authorization unless the subject – matter and purpose of the investigation are not indicated in the Commission’s decision or are described in a manner, which is manifestly too imprecise to enable the court to carry out the review of proportionality with which it is entrusted.⁷⁵

Despite the limits of the national court’s control, embodied in Regulation 1/2003 and explained in the jurisprudence of the ECJ, national court granting a search warrant namely is the one which must ensure that an inspection conducted by Commission would not exceed the principle of proportionality and thus would not violate the rights protected by the Article 8 of the ECHR. Therefore, national court following the case-law of the ECtHR and bearing in mind the proceeding limits must find a way to ascertain that there is a reasonable suspicion of severe offence, also to draw a reasonably limited scope of a warrant (the application for its issue or the warrant itself must specify what kinds of items and documents were expected to be found in the applicant’s home, or how they would be relevant to the investigation) and – if a lawyer’s office is concerned – to make sure that an inspection has been carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed. In other words, namely the national court is the body upon which depends whether the Commission’s inspection of a private premises will not exceeded the principle of proportionality.

To sum up, it has to be emphasized that if the Commission’s inspections of a private premises are in accordance with the law, have a legitimate aim, and are proportional to the aim pursued, it depends on the national court consequently namely on the national court depends if the Commission’s extended power granted by the Regulation 1/2003 is justified under article 8(2) of the ECHR.

Conclusions

1. Article 21 of the Regulation 1/2003 empowers the Commission to carry out investigations in private premises, nevertheless according to the case-law of the European Court of Human Rights, explaining the notion of „private life“, such investigations interfere with the right, guaranteed in Article 8(1) of the ECHR. Therefore, for such inves-

75 Dannecker, G.; Jansen, O., *supra* note 5.

tigations to be justified under paragraph 2, it is necessary to meet all the requirements of this paragraph namely, the inspections have to be carried out in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

2. As far as Regulation 1/2003 is a law, accessible to all, and Article 21 of this regulation indicates the scope of Commission's discretion, with sufficient clarity sets out the circumstances in which privileged material could be subject to search and also enshrines the possibility for appeal, it has to be acknowledged that the Commission's power of private premises inspection is fully in accordance with the law. i.e., it has a basis in „domestic law“, which is adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct.

3. The purpose of inspections of private premises conducted by the Commission should be identified as being in the interests of “the economic well-being of the country” and “the prevention of crime.” Therefore, it has to be acknowledged that they pursue legitimate aims listed in the second paragraph of Article 8 of the Convention.

4. Whether the Commission's inspection of a private premises will not exceed the principle of proportionality depends on the national court, because despite very limited control possibilities, namely this court must ascertain the availability of effective safeguards against abuse or arbitrariness and check how the safeguards operate in the specific case under examination.

5. As far as Commission's inspections of a private premises are in accordance with the law, have a legitimate aim and are proportional to the aim pursued, it depends on the national court, and consequently the national court determines whether the Commission's extended power granted by the Regulation 1/2003 is justified under article 8(2) of the ECHR. The national court will have to estimate the question of proportionality very thoroughly, because otherwise this will lead to the EU (as a member of the ECHR) bearing responsibility for violation of human rights.

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TEISĖ Į PRIVATUMĄ V. EUROPOS KOMISIJOS TEISĖ ATLIKTI PATIKRINIMUS PAGAL REGLAMENTĄ 1/2003

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Santrauka. Reglamentas Nr. 17 – pirmasis reglamentas, įgyvendinantis 85 ir 86 straipsnius, įtvirtino, kad atlikdama pareigas, pavestas jai pagal Sutarties 89 ir 87 straipsnius priimtas nuostatas, Europos Komisija (toliau – Komisija) gali atlikti visus būtinius įmonių ir įmonių asociacijų tyrimus. Tam įgaliotiems Komisijos pareigūnams suteikiama teisė inter alia patekti į visas įmonių patalpas, žemę ir transporto priemones. 2002 m. gruodžio 16 d. Europos Tarybos reglamentas (EB) Nr. 1/2003 dėl konkurencijos taisyklių, nustatytų Sutarties 81 ir 82 straipsniuose, įgyvendinimo, išplėtė tokią Komisijos teisę. Šiame teisės akte buvo numatyta, kad Komisija gali savo sprendimu nurodyti atlikti patikrinimą kitose patalpose, teritorijoje arba transporto priemonėse, įskaitant įmonių arba įmonių asociacijų direktorių, vadovų ir darbuotojų namus. Toks Komisijos tyrimo teisių išplėtimas kelia abejonių dėl Europos Sąjungos konkurencijos teisės efektyvumo ir asmens teisės į privatumą, įtvirtintos Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos (toliau – Konvencija) 8 straipsnyje, tinkamo balanso. Be abejonės, asmens teisė į privatumą nėra absoliuti. Konvencijos 8 straipsnio 2 dalyje yra numatyti naudojimosi tokia teise apribojimo pagrindai. Dėl to šio straipsnio tikslas yra išsiaiškinti, ar Komisijos teisė atlikti patikrinimą ne įmonei, bet privačiam subjektui priklausančiose patalpose atitinka tuos Konvencijos 8 straipsnio 2 dalyje įtvirtintus apribojimo pagrindus. Kitaip tariant, straipsnyje tiriama, ar minėta Komisijos teisė atlikti patikrinimus, gali būti pateisinama Konvencijos 8 straipsnio 2 dalimi. Šiuo tikslu straipsnio autorės pirmiausia pristato Reglamentu 1/2003 išplėstas Komisijos tyrimo teises, išaiškina, ką remiantis Europos Žmogaus Teisių Teismo praktika apima teisė į privatumą, tuomet analizuoja Konvencijos 8 straipsnio 2 dalyje numatytus apribojimo pagrindus, nagrinėja Europos Komisijos teisės atlikti patikrinimus įgyvendinimo sąlygas ir taip įvertina, ar ši Komisijos teisė atitinka Konvencijos 8 straipsnio 2 dalyje įtvirtintus apribojimo pagrindus. Šis klausimas yra itin reikšmingas, nes Lisabonos Sutartis įsigaliojo jau 2009 m. gruodžio 1 d., o Konvencijos 14 protokolais – 2010 m. birželio 1 d., tad labai greitai Europos Sąjunga taps Konvencijos dalyve, atsakinga už jos garantuojamų žmogaus teisių pažeidimus.

Reikšminiai žodžiai: Europos Sąjungos konkurencijos teisė, Reglamentas 1/2003, privačių patalpų tikrinimas, teisė į privatumą, numatyta teisėje, būtina demokratinėje visuomenėje, proporcinga siekiamam tikslui, teisėtus tikslus.

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