

## EU accession to the ECHR: Bringing about an aggiornamento for EU case law? Overview of ECHR and EU case law

**Procedures, ECHR, Rights of Defence, Criminal sanctions, Foreword, Legal privilege, All business sectors**

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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Would it be unfair to depict the relationship between the European Convention on Human Rights (ECHR) and the EU Treaties and the relationship between the Luxembourg Court and its Strasbourg counterpart with the well-known formula : “*je t’aime, moi non plus*”?

Things are not so clear. [1]

At the heart of the topic of this article is a tension between, on the one hand, the principles of efficient enforcement of competition law, and on the other hand, the idea of due process which includes respect of the rights of defence and equality of arms. Added to this tension between competing objectives is a potential conflict over the interpretation of rights by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR): obviously, the judges belonging to each institution may have their own idea about which court should have the last say in matters concerning fundamental rights.

It is against this background that the ECHR’s role in the EU legal order must be appraised, i.e. not one set in stone, but one which has shown interesting evolutions ever since the signing of the Treaty of Rome until what is now the European Union (EU).

For example, it appears that in the earlier days of EU case law, the ECHR served as a source of guidance (I). Then, from 2009 – when the Charter of fundamental rights was injected into the EU legal order – a new reinforced role appeared to be given to fundamental rights, although the Charter appears as a somewhat ersatz version of the ECHR (II). Lastly, the contemplated EU accession to the ECHR will undoubtedly bring changes to the role played by fundamental rights in the context of EU competition enforcement (III).

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## I. THE ECHR AS A SOURCE OF GUIDANCE

Fundamental rights were gradually introduced in the Treaties, from the Maastricht Treaty onwards. [2] The CJEU had already started to integrate these rights as general principles of EU law, from as early as the *Internationale Handelsgesellschaft* case. [3] The ECHR was soon integrated into EU case law, with the *Rutili* case of 1975, [4] and the ECHR's "special significance" was emphasized in various subsequent CJEU cases. [5] However and interestingly enough, in Opinion 2/94, [6] the Court of Justice considered that, in spite of the ECHR's specific status as an instrument of fundamental rights, the Treaty would need to be amended in order for the European Community to accede to the ECHR. In substance, the EC would need to fit within a distinct international institutional system while the ECHR provisions would have to be implemented into the EC legal order. [7]

The Charter turned the ECHR principles first into non-binding law and then, after the entry into force of the Lisbon Treaty in 2009, into primary law setting a specific standard of protection modelled after the ECHR standard. Indeed, the Charter expressly models the level of protection after that provided by the ECHR as interpreted by the Strasbourg court. [8] When trying to interpret the rights laid down in the Charter, the EU Courts naturally sought guidance from their Strasbourg counterparts, whose rich case law had been nourishing EU case law for a long time.

A peculiar example of this reference to the ECHR and of its consequences is the recent debate regarding the compatibility of the EU system for imposing fines for competition infringements with the fair trial principles enshrined in Article 47 of the Charter, largely inspired by Article 6 ECHR. [9] One of the arguments put forward by litigants was that because competition fines now meet the "Engel characteristics" of a criminal sanction, [10] the procedural guarantees attached to the criminal field should apply, and in particular the need for the sanction to be either imposed by a tribunal, or at least reviewed by a tribunal having full power of jurisdiction. [11] The EU Courts' unease with handling this issue [12] was partly solved with the ECtHR ruling in *Menarini*. In that case, the ECtHR confirmed that competition fines were criminal within the meaning of Article 6 ECHR, [13] and that the imposition of such fines by the Italian competition authority - which was not a tribunal within the meaning of that provision - was acceptable because in the case at hand, the decisions of that body had been subjected to judicial control by a tribunal having full jurisdiction. [14] Although the ECtHR had only ruled on the specific circumstances of the case, the EU Courts promptly found, in *KME* and *Chalkor*, that the review exercised by them amounted to a full review as required by the ECtHR in *Menarini*, and that therefore the EU competition fining system was immune from criticism in that regard. [15] Whether *Menarini* marks the beginning or the end of this debate remains to be seen. [16] At least, this shows that the ECtHR may act as a focal point for the CJEU.

However, the Court of Justice has to date only partially taken into account the ECtHR case law. As shown below, the Kirchberg judges do not appear to have fully aligned their case law with that of their Strasbourg counterparts.

## II. THE CHARTER - A FAITHFUL SUBSTITUTE OR AN ERSATZ ECHR?

The Charter was no doubt intended to be the equivalent of the ECHR within the EU, when it was proclaimed in 2000. However, until the Lisbon Treaty entered into force, the Court of Justice refused

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to acknowledge that the Charter could have any kind of binding impact on the EU legal order. [17] Reference to the ECHR was the Court of Justice's preferred option, it being understood that the Convention did not have the status of a binding norm but rather was a mere source of inspiration which the Luxembourg judges were free to interpret. [18]

After the Lisbon Treaty came into force, there appears to have been a change of tack, as the EU Courts increasingly refer to the Charter as an exclusive source of law, to the detriment of the ECHR. The *Otis* case - which will be discussed later - illustrates this trend: addressing the principle of effective judicial protection, the CJEU held that "*Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47*". [19] According to empirical research conducted by legal scholars, this "Charter-centrism" has also come at the expense of other international sources of law, which the Court sometimes referred to in the past. [20]

Various reasons may explain the Court's current attitude to the ECHR. First, the Court may wish to avoid addressing difficult questions regarding the compatibility of EU law with the ECHR, [21] such as the possibility to dispense with any oral debate before EU Courts. Second, the ECHR is not yet a binding source of law in the EU, as aptly recalled by recent case law. [22] Third, the EU Courts could be guided by the idea that the Charter should be an "autonomous" legal instrument and as such should not necessarily be interpreted in the light of the Strasbourg case law. [23]

Be that as it may, the CJEU's exclusive reference to the Charter appears objectionable in many regards, not least because it entails a risk of legal uncertainty. The Court's approach also appears to be at odds with Article 6(1) TEU, which places the Charter on the same footing as the general principles of EU law which stem from the common constitutional traditions of the Member States, as well as from international human rights instruments, including the ECHR. It is probably no accident that the TEU maintained the reference [in Article 6(1)] to other sources of law, alongside the Charter. [24] In addition, by considering the Charter as a kind of "veil" casting a shadow over other sources of fundamental rights, the CJEU runs the risk of "freezing" the interpretation of fundamental rights which are protected in the Charter, which are at risk of no longer evolving with time. [25] This seems to be inconsistent with the ECtHR's long-standing conception of the Convention as a "living instrument". [26] In our view, the Court's attitude is difficult to justify : indeed, the fact that the ECHR is not a binding source of EU law (not unlike many constitutional rights which may be common to certain Member States) does not explain why it cannot be used by the EU Courts as a source of interpretation.

Moreover, given that it is inevitable that the EU will accede to the ECHR, thereby causing EU law to be subject to the full scrutiny of the ECtHR, the CJEU ought already to be taking full account of the ECHR, in order to mitigate the future risk of having to accept a painful reversal of existing (and probably recent) case law.

### III. WOULD ACCESSION TO THE ECHR MAKE A DIFFERENCE?

Article 6(2) TEU leaves the EU with no choice: "[t]he Union shall accede to the *European Convention on Human Rights*". The EU is nevertheless still a long way from accession. After more than three years of negotiations, a "Draft Revised Agreement on the Accession of the EU to the ECHR" has been finalized. [27] This is however only the beginning of a legal marathon: indeed, the CJEU now

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has to give its opinion on that text, which also needs to be unanimously approved by the Council of the EU (i.e.: each of the 28 EU Member States), and of course also by each of the 47 members of the Council of Europe.

In spite of these legal hurdles, the EU will, at some point, become bound by the ECHR system. Not only should this prompt the ECtHR to end the preferential status allowed to the EU in the *Bosphorus* case, but it will also call for a reassessment of the handling of some aspects of competition enforcement.

## A. The end of the Bosphorus presumption

At a time when no EU accession to the ECHR was foreseeable, the ECtHR had to deal with situations where Member States could potentially breach their own legally binding commitments vis-à-vis the ECHR through their implementation of obligations stemming from EU law. In the *Bosphorus* case, Ireland was accused of breaching the right to private property of the owners of an airplane which had been seized in implementation of an EU Regulation which required the freezing of assets that could be used in connection with the armed conflict in the former Yugoslavia. [28] The Strasbourg judges considered that State action taken in compliance with international obligations is justified “as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”. [29] Having assessed the protection of fundamental rights afforded by EU law, the ECtHR concluded that this protection could be considered, at the relevant time, as equivalent to that provided in the Convention system. The Bosphorus doctrine was effectively perceived as a way of shielding the application of EU law by Member States from ECtHR scrutiny, as long as the EU had not acceded to the ECHR.

This is, of course, a simplification, for the purposes of this analysis. In any event, EU accession will necessarily bring the *Bosphorus* exception/privilege [30] to an end. The presumption, which aimed to accommodate both the EU and ECHR legal orders, will lose its *raison d’être* since the EU legal order will have to “fit into” the ECHR one, instead of just offering “equivalent protection” [31]. The EU will become as accountable as other members of the Council of Europe. The CJEU ought therefore to no longer be able to hide behind the *Bosphorus* veil, because in accordance with ECHR provisions, it will just become one among the many supreme courts of the Contracting Parties.

## B. Selected issues where EU accession to the ECHR could make a difference

### 1. The equality of arms principle

The *Otis* case [32] epitomises the limits of the CJEU’s “self-assessment” of the compatibility of the EU system with fundamental rights. [33] In that case, the Commission had inflicted a fine on companies that had engaged in a cartel in the lift sector. [34] Following that decision, the Commission brought a claim for damages against the same liftmakers before the Brussels Commercial Court, which referred two questions to the CJEU. The first question related to the Commission’s competence to act on behalf of the other EU institutions which had suffered damage as a result of the cartel. The second question, which is of interest here, asked whether the Commission’s action was in line with the fair trial principles laid down in Article 47 of the Charter

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and Article 6 ECHR. The Court of Justice replied in the affirmative.

Before engaging with the issues, the CJEU demonstrated its “Charter-centrism” in the following statement: *“the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter. [...] Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47”*. [35]

The Court of Justice dismissed the claim according to which the Commission acted as judge and a party to the dispute, for reasons which need not be developed here.

The Court then engaged with the key question of whether the principle of equality of arms had been breached by the fact that the Commission had itself conducted the investigation into the infringement and then brought an action for damages. The defendants pointed out that the Commission was in a privileged situation which enabled it to gather and use confidential information to which the defendants before the national court did not have access. The Court of Justice dismissed this argument on three grounds. First, the Commission had indicated that it had only used before the national court the information available in the public version of the infringement decision. Second, no such confidential information had been used by the Commission before the national court. Third, the Commission is not allowed to use information gathered in the context of investigations for any other purposes. [36] The Court concluded that, against such background, Article 47 of the Charter did not preclude the Commission from bringing an action for damages against the same undertakings and in respect of the same infringement for which it had previously imposed fines. [37]

One may justifiably doubt the orthodoxy of the Court’s assessment from an ECHR perspective.

In a nutshell, the CJEU does not seem to have fully accepted all the implications of the so-called “theory of appearances”. [38] This theory, which was developed by the ECtHR in cases such as *Kress*, [39] implies that breach of the equality of arms may arise from mere suspicion of bias in the eyes of the public, even if no actual harm resulted for any party. As expressed in a well-known aphorism, “*justice must not only be done, it must also be seen to be done*”. In the present case, the mere fact that the Commission, which had fined the parties, was acting as a claimant against same parties, could reasonably have created in the mind of the “average citizen” a suspicion of improper interference with justice. The CJEU unfortunately did not address this point.

The Advocate General hinted at the CJEU’s reluctance to espouse this theory: “[a]lthough the case-law of the Court of Justice does not appear to have adopted the so-called ‘doctrine of appearances’ too enthusiastically and in most cases requires evidence of actual harm as a consequence of imbalance between the parties, the fact is that the level of protection is essentially the same as that of the ECHR”. [40] The beginning of this sentence is self-explanatory: the CJEU is not a proponent of the theory of appearances. The end of this sentence seems to imply that at least for now, the *Bosphorus* presumption is alive and well. The middle of this sentence requiring evidence of actual harm for there to be a breach of the equality of arms principle seems to be rather at odds with the very logic of the theory of appearances as applied by the ECtHR, which applies regardless of the existence of actual harm – although the fear of impartiality needs to be justified.

The Court’s assessment was essentially premised on the fact that the Commission was legally bound

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not to use information collected in the context of an investigation for other purposes, and so was presumed not to have used such information. It is remarkable that although this case was rendered about a year after the *Chalkor* case and its claim for an “effective judicial protection”, [41] the Court did not even question whether in practice appropriate firewalls and safeguards had been implemented. [42] Such “presumption of legality” of the Commission’s behaviour thus appears like an obvious illustration of the general imbalance facing parties dealing with the Commission.

Would the Court have given the same ruling if the EU had already been a member of the ECHR? In view of the risk that the parties might have brought their case before the Strasbourg Court, one could reasonably have expected the CJEU to at least explain in further detail why in practice there appeared to be no bias on the side of the Commission. [43]

## 2. The “right to silence”

Speech is silver but silence is golden, says the proverb. While the Strasbourg case law translates this into a legal principle, the CJEU’s approach could appear tantamount to criminalizing silence. [44]

In a nutshell, EU law does not acknowledge a general right not to testify against oneself and gives a narrow scope to the right not to self-incriminate. In the *Orkem* case, the CJEU considered that neither the wording of Article 6 ECHR, nor the case law of the ECtHR, indicate that Article 6 ECHR implicitly contains a general right not to testify against oneself. [45] The CJEU however accepted that while an undertaking had a duty to cooperate with the Commission, it may refuse to answer questions of a self-incriminating nature. This position was constantly restated in later cases, such as *SGL Carbon*, [46] although not incorporated into applicable legislation. [47]

In contrast, the ECtHR not only considered that a general right to silence existed, but also gave this right a very wide scope. The *Funke* case [48] gave the ECtHR a chance to read into Article 6 ECHR a full “right to remain silent” – which might be regarded as audacious given the lack of express reference to this right in the text of the Convention itself [49] although such rights has already been applied for many years in many other “civilized legal systems”. [50] As the Court made clear in *Saunders* (in a way clearly at odds with the CJEU doctrine), this right “cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating”. [51]

Companies have of course been quick to argue before the EU Courts that EU law fell foul of ECHR requirements. This did not however prompt any change in the Luxembourg case law, as the CJEU firmly closed the door to any review of the *Orkem* principle. [52] As a consequence of this strict position, undertakings can be sanctioned for failure to cooperate with the Commission, either through a fine or through an aggravating circumstance when calculating the final fine. [53]

With EU accession to the ECHR, one should expect the *Orkem* principle to be “Strasbourg-tested” regarding in particular the scope of the right not to self-incriminate. The only point of convergence in both courts’ case law relates to the protection of existing documents, i.e. documents which objectively exist regardless of any oral statement: the CJEU’s refusal to acknowledge any protection for these documents [54] could find support in the ECtHR case law. [55] Besides such limited convergence at least two questions will have to be addressed. First, whether legal persons enjoy a right to silence. [56] Second, in what circumstances can silence have negative consequences for the

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accused. [57]

### 3. The right to an oral debate

One of the elements of a fair trial under Article 6(1) ECHR is that everyone “*is entitled to a fair and public hearing*”.

Until recently, applicants before the EU Courts were entitled to a hearing, in which they could set out their pleas orally and in public. Following recent amendments to the procedural rules governing EU Courts, this is no longer the case, and applicants must provide specific reasons for oral hearings to be held, without any guarantee that the judges will accede to their request. [58] In addition, over the past two years, the Court of Justice summarily dismissed certain appeals in competition cases, without holding any oral hearing, although the issues raised in those cases could have deserved further consideration. [59]

This seems hard to justify in the face of the literal requirements of Article 6(1) ECHR, which expressly require that a hearing take place. The case law is however more nuanced. As a matter of principle, a public hearing contributes to the achievement of the aim of Article 6(1) ECHR [60]. The ECtHR generally requires a hearing to be held before courts of first instance, except on certain technical matters. [61] Things are however different at the appeal stage: no hearing is required in civil cases, and the ECtHR does not automatically require that an oral hearing be held at the appeal stage in criminal cases, if the appeal court only has to rule on points of law. [62] On this reading, it would be tempting for the CJEU to justify the absence of hearings on the ground that it only has jurisdiction on points of law. This would however clearly bypass the CJEU’s own admission in *KME* and *Chalkor* according to which the Court of Justice must assess whether the General Court exercised its jurisdiction over both facts and law. [63]

Be that as it may, renouncing such a key feature of due process (like others which have been proposed recently) [64] would have to be at least seriously assessed following EU accession to the ECHR.

### 4. The exclusion of attorney-client privilege regarding in-house counsel

The legal privilege of attorney correspondence is a long-standing component of fair trial principles, as acknowledged by both the Strasbourg and Luxembourg Courts. [65] Legal privilege can be related to the right to private life (Article 8 ECHR) and the rights of defence (Article 6(3) ECHR). While the CJEU has opted to deal with it from the perspective of Article 6 ECHR, it appears that the ECtHR has also addressed the issue from a private life angle.

The personal scope of legal privilege has been the subject of some debate before the EU Courts. In *AM & S*, the Court of Justice considered that legal privilege was granted to attorney correspondence under two conditions: first, it had to relate to the exercise of the client’s rights of defence; second, the exchange had to emanate from “independent lawyers”, i.e. lawyers who are not bound to the client by a relationship of employment. [66] The Court was asked, in *Akzo Nobel*, to reconsider its position in the context of an in-house counsel which was also a member of the Netherlands Bar and therefore subject to professional ethical obligations. The Court categorically declined to amend its views, and described a test according to which “*the concept of independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also*

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*negatively, that is to say, by the absence of an employment relationship*". [67]

The Court of Justice repeated its stance in the *PUKE* case, [68] which did not concern the issue of legal privilege but rather the issue of the quality of a lawyer to represent a party before the Court. It held that the Polish Office for Telecommunications could not be represented before the CJEU by a lawyer who was employed by that administration, even though the lawyer was bound by specific professional ethical rules. [69]

This approach is not necessarily shared by all Member States. By way of example, the Brussels Court of Appeal recently considered that legal advice provided by in-house counsel as well as related correspondence was legally privileged. [70] The Belgian Competition Authority had seized documents at Belgacom's premises, including documents sent to/by in-house counsel. The Court of Appeal considered that the Belgian legislature had intended to grant legal privilege to these documents, which meant that no interference within the right to private life could be justified in that case. [71]

The ruling came as a defeat for the Belgian Competition Authority, which had claimed that the *Akzo Nobel* rule was to apply in national competition procedures, in spite of the literal wording of applicable Belgian legislation, which expressly granted legal privilege to legal opinions of in-house counsel. [72]

The Belgian judges also clearly excluded the applicability of the *Akzo Nobel* rule to national competition proceedings, based on Article 22 of Regulation (EC) No 1/2003, whereby when national competition authorities investigate on behalf of the European Commission, they exercise their powers in compliance with national rules. Interestingly, the Belgian judges simply ignored the notion of "independence" as described by the CJEU in *Akzo Nobel*. It considered that the principle laid down in *Akzo Nobel* was relevant at the EU level, due to the variety of national regimes and to the lack of a common position towards in-house counsel correspondence; in contrast, since the Belgian legislature had opted to protect this type of correspondence, the *Akzo Nobel* rule was not relevant.

Given that the Belgian judges only ruled on Article 8 of the ECHR, one should not deduce that seizure of in-house counsel correspondence would necessarily be in breach of Article 6 ECHR. One notes that in *Akzo Nobel*, the CJEU did not refer to either of these provisions, let alone any provision of the Charter.

In any event, this ruling may reopen the debate at the EU level, since the Brussels Court of Appeal derived in-house legal privilege from Article 8 ECHR - which, by the way, makes no difference between civil, administrative or criminal law. [73] The ECtHR should remain open to the possibility of granting legal privilege to in-house counsel correspondence based upon a fair interpretation of the meaning of due process as well as the right of defence. To the best of our knowledge, the ECtHR has never addressed the applicability of legal privilege to in-house counsel correspondence. Neither has it dismissed it, and moreover, certain cases could point to a somewhat open attitude of the ECtHR on this issue, albeit in relation to Article 6 ECHR rather than Article 8 ECHR. [74]

## Conclusion

The variations in the interpretation of fundamental rights and concepts derived from them may surprise an external observer, in particular as they come in contrast with the relative homogeneity

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between the Council of Europe Contracting Parties and the EU Member States. However, the differences between the subject-matter and the parties which characterize the disputes submitted to the jurisdictions of each institution may at least explain in part such variations. Moreover, it must be recognized that the underlying body of law applied by each group of judges was clearly meant to pursue quite specific ends and has been allowed to develop independently this pursuit for more than half a century. Now that the EU is to accede to the ECHR in the rather near future and to fully incorporate its case law, it will be forced into an “aggiornamento”, following the one already made in 2009 with the inclusion of the Charter into the EU legal order.

Are we making a mountain out of a molehill? Or rather, will this apparently simple adjustment engender a major upheaval of the role played by fundamental rights in the context of EU competition enforcement, not unlike the smooth and simple “aggiornamento” announced by Pope John XXIII at the beginning of the Vatican II council, which eventually resulted in a major upheaval for the Roman Catholic Church? Time – and the courts – will tell.

*The authors would like to thank Matt Evans (partner, Jones Day) for his many insightful comments on an earlier version of this article.*

[1] The complexity of this relationship was recently exposed, for instance, by J.-P. Costa, “La Cour européenne des droits de l’homme, Des juges pour la liberté”, *Dalloz*, 2013, pp. 237-244.

[2] Following the Maastricht Treaty revision, article F of the TEU (which became Article 6(2) following the Treaty of Amsterdam), introduced an express reference to “*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*”.

[3] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[4] Case 36/75 *Rutili* [1975] ECR 1219.

[5] See for instance: Case C-274/99 P *Connolly* [2001] ECR I-1611, paragraph 37; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41

[6] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

[7] See paragraphs 34-35:

*“34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.*

35 Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article

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235. It could be brought about only by way of Treaty amendment.”

[8] Article 52(3) of the Charter states that : “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same as those laid down by the said Convention.** This provision shall not prevent Union law providing more extensive protection*” (emphasis added).

It is complemented by Article 53 of the Charter, according to which : “*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including **the European Convention for the Protection of Human Rights and Fundamental Freedoms**, and by the Member States’ constitutions*” (emphasis added).

[9] This topic was the subject of last year’s Editorial. See [Christopher Bellamy, ECHR and competition law post Menarini : An overview of EU and national case law, 5 juillet 2012, Bulletin e-Competitions ECHR, Art. N° 47946](#).

[10] ECtHR, 8 June 1976, *Engel and others v Netherlands*, Nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, paragraphs 82-83.

[11] This is what the ECtHR expressly required in cases such as *Schmautzer v Austria* (ECtHR, 23 October 1995, *Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro et Pfarmer v Austria*, Nos 15523/89, 15527/89, 15963/90, 16713/90, 16718/90, paragraphs 34-37). For a recent summary of this case law, please refer to N. Hauger and C. Palzer, “Investigator, Prosecutor, Judge... and Now Plaintiff? The Leviathanian Role of the European Commission in the Light of Fundamental Rights”, *World Competition Law and Economics Review*, 2013, Vol. 36, Issue 4.

[12] By way of example, in the *Schindler* case, the General Court summarily dismissed arguments alleging the insufficiency of the EU Courts judicial review (Case T-138/07 *Schindler* [2011] ECR II-4819, paragraphs 55-56), see [Richard Burton, The EU General Court reduces fine on a company and rejects other appeals in lifts and elevators cartel \(Schindler\), 13 juillet 2011, Bulletin e-Competitions July 2011, Art. N° 41092](#).

[13] The ECtHR did not engage, however, with the question whether those fines belong to the “hard core” of criminal law which same court had alluded to in the *Jussila* case (ECtHR, 23 November 2006, *Jussila v Finland*, No 73053/01, paragraph 43).

[14] ECtHR, 27 September 2011, *Menarini Diagnostics v Italy*, No 43509/08, paragraphs 38-44 (on the characterization of a criminal charge) and 57-67 (on fair trial requirements).

[15] Case C-386/10 P *Chalkor AE Epexergasias Metallon* [2011] n.y.r., paragraphs 52-67; Case C-272/09 P *KME Germany AG* [2011] n.y.r., paragraphs 91-106. See [Anthony Dawes, Ian Forrester, Angélique Trouche, Stratigoula Sakellariou, The ECJ Advocate General Sharpston voices opinion on the standard of judicial review over fines in cartel cases \(KME\), 10 février 2011, Bulletin e-Competitions ECHR, Art. N° 47909](#) and [Damien Gerard, The ECJ Advocate General Sharpston addresses the scope of the EU Courts’ jurisdiction over antitrust cases and fines \(KME](#)

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[Germany\), 10 février 2011, Bulletin e-Competitions ECHR, Art. N° 47908.](#)

[16] It has been suggested that *KME* and *Chalkor* should not be read as providing blanket-immunity for the EU competition fining system, but rather as a call on the EU Courts to fully exercise their review (M. Van der Woude and R. Wesseling, “The Lawfulness and Acceptability of Enforcement of European Cartel law”, *World Competition Law and Economic Review*, 2012, Vol. 35, Issue 4, p. 573). Others have suggested that *Chalkor* and *KME* were a missed opportunity for the EU Courts, which should have taken steps to exercise in practice the full review that they had exposed in theoretical terms (E. Morgan de Rivery, E. Lagathu and E. Chassaing, “EU Competition Fines and Fundamental Rights: Correcting the Imbalance”, *European Law Reporter* 7-8/2012, p. 190).

[17] As summarized by Advocate General Kokott, “[a]lthough the charter as such does not yet have any binding legal effect comparable to that of primary law, as a source of legal guidance it sheds light on the fundamental rights guaranteed by Community law; on that issue, see also Case C 540/03 *Parliament v Council* [2006] ECR I-5769 (‘Family reunification’), paragraph 38, and point 108 of my Opinion in that case, and, further, Case C 432/05 *Unibet* [2007] ECR I-2271, paragraph 37” (Opinion in Case C-8/08 *T-Mobile Netherlands and others* [2009] ECR I-4529, paragraph 92, footnote 78), see [Richard Burton, The ECJ Advocate General Kokott gives opinion on standard of proof with regard to anti-competitive concerted practices \(T-Mobile Netherlands\), 19 février 2009, Bulletin e-Competitions February 2009, Art. N° 43789.](#)

[18] See in particular: Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I 1759, paragraph 33; Case C-274/99 P *Connolly* [2001] ECR I 1611, paragraph 37.

[19] Case C-199/11 *Otis* [2012] n.y.r, paragraphs 46-47, see [Emanuela Matei, The EU Court of Justice confirms the Commission’s authority to represent the EU in bringing an action for damages before a national court based on an infringement of the Article 101 TFEU \(Otis, Kone, Schindler and ThyssenKrupp\), 6 novembre 2012, Bulletin e-Competitions November 2012, Art. N° 49681, Philipp Werner, Lionel Lesur, Louise-Astrid Aberg, The European Court of Justice rules that the EU Commission can bring follow-on actions for damages on behalf of the EU in cartel cases \(Otis\), 6 novembre 2012, Bulletin e-Competitions November 2012, Art. N° 49458 and Magdalena Jozwiak, The EU Court of Justice rules that the principle of effective judicial protection does not preclude the Commission from bringing on behalf of the European Union an action for damages before a national court \(Europese Gemeenschap/Otis\), 6 novembre 2012, Bulletin e-Competitions November 2012, Art. N° 58759.](#)

[20] G. De Burca, “After the EU Charter of Fundamental Rights : the Court of Justice as a Human Rights Adjudicator ?”, *New York University Working Paper* No. 13-51; J. Polakiewicz, “EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?”, Working Paper available on SSRN <http://papers.ssrn.com/sol3/papers....> (last accessed on 27 November 2013).

[21] As suggested, for instance, by A.-L. Sibony, Case note on Case C-272/09 P, *KME Germany and others v Commission*, Judgment of the Court of Justice (Second Chamber) of 8 December 2011, *Common Market Law Review* Vol. 49, Issue 6, pp. 1977-2002.

[22] See for instance Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] n.y.r., paragraph

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44: “it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law”.

[23] G. De Burca, “After the EU Charter of Fundamental Rights : the Court of Justice as a Human Rights Adjudicator ?”, *New York University Working Paper* No. 13-51.

[24] As suggested by O. de Schutter, “Les droits fondamentaux dans l’Union européenne”, *Journal de droit européen*, 2012, p. 114.

[25] *Ibid.*

[26] ECtHR, 25 April 1978, *Tyler v UK*, No 5856/72, paragraph 31: “[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions”.

[27] The draft agreement, which was adopted on 5 April 2013, is available here: <http://www.coe.int/t/dghl/standards...>008rev2\_EN.pdf.

[28] ECtHR, 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, No 45036/98.

[29] *Ibid.*, paragraphs 155-156.

[30] Albeit given an expressly reviewable basis, as the ECtHR itself acknowledged that “any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection” (paragraph 155 of the *Bosphorus* ruling).

[31] De Schutter, *op.cit.* ; J. Polakiewicz, *op.cit.*

[32] Case C-199/11 *Otis* [2012] n.y.r.

[33] The case was most recently commented by N. Hauger and C. Palzer, “Investigator, Prosecutor, Judge... and Now Plaintiff? The Leviathanian Role of the European Commission in the Light of Fundamental Rights”, *World Competition Law and Economics Review*, 2013, Vol. 36, Issue 4.

[34] Commission decision of 21 February 2007, Case COMP/E-1/38.823 - *Elevators and escalators*, see [Vanessa Eline Post, Andrés Font Galarza, Gyula Cserey, René Plank, The European Commission fines cartel in the elevators and escalators sector \(Otis, KONE, Schindler and ThyssenKrupp\), 21 février 2007, Bulletin e-Competitions February 2007, Art. N° 36176.](#)

[35] Paragraphs 46-47 of the *Otis* ruling.

[36] The CJEU referred to Article 28(1) of Regulation (EC) No 1/2003 and Article 339 TFEU.

[37] Paragraph 73 of the *Otis* ruling.

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[38] As suggested by A. Vallery, “Otis: Can the Commission be a Victim in Addition to Acting as a Police officer, a prosecutor and a Judge?”, *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 3.

[39] ECtHR, 7 June 2001, *Kress v France*, No 39594/98, paragraph 85, regarding the presence of the Government Commissioner (the equivalent of the Advocate General) at the French Council of State’s deliberations, see [Thomas Perroud, The impact of Art. 6.1 ECHR on competition law enforcement in France and the United Kingdom, Bulletin e-Competitions September 2008, Art. N° 21954](#).

[40] Paragraph 59 of Advocate General Cruz Villalon’s Opinion.

[41] *Chalkor*, op.cit., paragraph 67; see also *KME*, op.cit., paragraph 106.

[42] This is criticized by N. Hauger and C. Palzer, op.cit.

[43] This was noted by : A. Vallery, op.cit.; L. Robert, “Le contentieux indemnitare de la concurrence à l’épreuve du process equitable”, *Revue Lamy de Droit des Affaires*, No 79, February 2013, p. 47.

[44] For a more detailed assessment, please refer to E. Morgan de Rivery and E. Chassaing, « Le droit au silence dans les procédures de concurrence », *L’Observateur de Bruxelles*, juillet 2011, n° 85, p. 44.

[45] Case 374/87 *Orkem* [1989] ECR 3283, paragraph 30.

[46] Case C-301/04 P *SGL Carbon* [2006] ECR I-5915, paragraphs 39-44.

[47] Only Recital 23 of Regulation 1/2003 restates the *Orkem* principle, see [Céline Gauer, Eddy de Smijter, Lars Kjolbye, Dorothe Dalheimer, The Council of the EU adopts a new regulation on the implementation of Articles 81 and 82 of the EC Treaty \(Regulation 1/2003\), 16 décembre 2002, Bulletin e-Competitions December 2002, Art. N° 38924](#).

[48] ECtHR, 25 February 1993, *Funke v France*, No 10828/84, paragraph 44.

[49] The Strasbourg court has not been very consistent in identifying to which branch of Article 6 the right to silence belonged: in some cases, the Court made a general reference to Article 6 ECHR (ECtHR, 17 December 1996, *Saunders v UK*, No 19187/91, paragraph 68; ECtHR, 8 February 1996, *Murray v United Kingdom*, No 18731/91, paragraph 45); in other cases, reference was made to the fair trial principles enshrined in Article 6(1) ECHR (ECtHR, *Funke*, paragraph 44), or to the presumption of innocence laid down in Article 6(2) ECHR (ECtHR, 20 March 2001, *Telfner v Austria*, No 33501/96, paragraphs 15-20).

[50] In the United States, for instance, any accused is entitled to “Miranda rights”, i.e. a warning given by police to criminal suspects in police custody (or in a custodial interrogation) before they are interrogated to preserve the admissibility of their statements against them in criminal proceedings. In *Miranda v. Arizona*, the Supreme Court held that the admission of an elicited incriminating statement by a suspect not informed of these rights violates the Fifth and the Sixth Amendment right to counsel.

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[51] *Saunders*, op.cit., paragraph 71.

[52] Case T-112/98 *Mannesmann-Rohrenwerke* [2001] ECR II-729, paragraphs 62-68 ; Joined cases C-238, C-244, C-245, C-247, C-250 to C-252 and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) and others* [2002] ECR I-8375, paragraphs 274-276.

[53] Article 23(1) of Regulation 1/2003; paragraph 28 of the Commission Fining Guidelines.

[54] Undertakings must provide existing documents, even if these may be used in view of establishing the existence of an infringement (*SGL Carbon*, paragraph 44).

[55] The ECtHR stated in *Saunders* that: “[t]he right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing” (paragraph 69 of *Saunders*).

[56] Some have suggested that the ECtHR case law, which was applied only to natural persons, cannot be extended to legal entities (W. Wils, “Self-Incrimination in EC Antitrust Enforcement : A Legal and Economic Analysis”, *World Competition Law and Economic Review*, 2003, Vol. 26, Issue 4, p. 567, at pp. 575-576).

[57] In the *Murray* case, the national court, which had to apply a specific counter-terrorist legislation, had taken into account the silence of the accused during police interviews as a circumstance that would corroborate other elements pointing to the liability of the accused. The ECtHR accepted that in those circumstances, no breach of Article 6 had occurred (ECtHR, 8 February 1996, *Murray v UK*, No 18731/91, paragraphs 55-57).

[58] See Article 76 of the new Rules of Procedure of the European Court of Justice adopted on 25 September 2012.

[59] Case C-494/11 P *Otis* [2012] n.y.r. ; Case C-421/11 P *Total SA and Elf Aquitaine SA* [2012] n.y.r.

[60] ECtHR, 8 December 1983, *Axen v Federal Republic of Germany*, No 8273/78, paragraph 25.

[61] ECtHR, 24 June 1993, *Schuler-Zraggen v Switzerland*, No 14518/89, paragraph 58, where the Court admitted that a social security case did not necessarily require that a hearing be held.

[62] *Axen v Germany*, op.cit., paragraph 28.

[63] See for instance paragraph 67 of *Chalkor*: “[t]he review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine”.

[64] It is understood that some Members of the European Parliament are considering the

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introduction of fees on claimants, in particular in competition cases (MLex, 27 November 2013, “EU courts should charge fees for competition cases, lawmakers say”).

[65] For the Court of Justice, see Case 155/79 *AM & S Europe Limited* [1982] ECR 1575, paragraph 18. To our knowledge, the earliest ECtHR case is that of 28 November 1991, *S. v Switzerland*, No 12629/87, 13965/88, paragraph 48. The ECtHR recently summarized its position in the *Michaud* case:

*“while Article 8 protects the confidentiality of all “correspondence” between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves.”*

(ECtHR, 6 December 2012, *Michaud v France*, No 12323/11, paragraph 118).

[66] *AM & S, op.cit.*, paragraphs 21 and 22.

[67] Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* [2010] ECR I-8301, paragraph 45. See [Martin Favart, The ECJ Advocate General Kokott advises against the extension of legal professional privilege to in-house lawyers \(Akzo Nobel\), 29 avril 2010, Bulletin e-Competitions April 2010, Art. N° 41554](#) and [Frederic Depoortere, James S. Venit, The European Court of Justice holds that in-house lawyers are not protected by legal professional privilege in antitrust investigations \(Akzo\), 14 octobre 2010, Bulletin e-Competitions October 2010, Art. N° 45408](#).

[68] Joined Cases C-422/11 P and C-423/11 P *Prezes Urzędu Komunikacji Elektronicznej(PUKE)* [2012] n.y.r. See [Gavin Murphy, The ECJ dismisses an appeal and rules that in-house lawyers should not be permitted to appear before EU courts \(Polish Electronic Communications Office\), 6 septembre 2012, Bulletin e-Competitions September 2012, Art. N° 51092](#).

[69] Article 19 of the Statute of the Court of Justice requires that “[o]nly a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court”.

At paragraph 24 of the ruling, the Court stated in particular that “the requirement of independence of a lawyer implies that there must be no employment relationship between the lawyer and his client”, citing Joined Cases C-74/10 P and C-75/10 P, order in *European Renewable Energies Federation ASBL (EREF)* [2010] ECR I-115). This was criticized, inter alia, by E. Morgan de Rivery and A. Noël-Baron, “L’arrêt PUKE: une manière inquiétante de concevoir et de dire le droit de l’Union?”, *La Semaine Juridique Edition Générale*, No 48, 28 November 2012, p. 2156.

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[70] Brussels Court of Appeal, 5 March 2013, 18th Chamber, RG No 2011/MR/3, *Belgacom c/ Auditorat près le Conseil de la concurrence*. See: [Valérie Lefever, Johan Van Acker, The Brussels Court of Appeal recognises legal professional privilege to in-house lawyers \(Belgacom\), 5 mars 2013, Bulletin e-Competitions March 2013, Art. N° 51812](#). We understand that an appeal has been lodged by the Belgian Competition Authority.

[71] Article 8(2) ECHR states that “[t]here shall be no interference by a public authority with the exercise of this right except such as 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”.

[72] According to the ruling, Article 5 of the Act of 1 March 2000 states that : “Opinions given by in-house counsel, for the benefit of his/her employer and in the context of his/her professional activity as legal counsel, are confidential” (free translation from the French version: “Les avis rendus par le juriste d’entreprise, au profit de son employeur et dans le cadre de son activité de Conseil juridique, sont confidentiels”).

[73] Authors have pointed to the potential reopening of a debate at EU level (see for instance : L. Donnedieu de Vabres-Tranié and J. Bombardier, « La cour d’appel de Bruxelles condamne la saisie de correspondances émanant de juristes d’entreprises », *Revue Lamy de la concurrence*, juillet-septembre 2013, No 36, p. 110).

[74] In *A.B. v Netherlands*, the ECtHR stated that neither the Convention, nor the then applicable rules of the ECHR required that the client’s representatives be practising lawyers (ECtHR, 29 January 2002, *A.B. v Netherlands*, No 37328/97, paragraph 77).

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