Procedural fairness in the European Commission's competition procedure – recent case-law on the ECJ's review of inspections

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1. Introduction

Limitations on the exercise of fundamental rights must be provided for by law and respect the essence of those rights. Limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union.[1] As the Union is founded on the rule of law and respect for human rights, the efficiency output of the Commission's antitrust procedure cannot alone justify the enforcement system. It requires a complementary system providing for the protection of justice, due process or procedural fairness[2]. As it is well known, the antitrust procedure consists of two stages, the so-called fact-finding phase and the *inter partes* phase. Under Regulation 1/2003,[3] the rights of defence of the parties concerned shall be fully respected in the proceedings.[4] Nonetheless, the right of defence comes to its full potential after the Statement of Objections (SO) is sent to the parties. Before that *inter partes* phase, undertakings have limited possibilities to exercise their right of defence. The fact-finding phase is the phase where evidence is collected against the undertakings concerning the alleged violation and the most efficient instrument in the toolbox of the Commission, besides leniency and request for information, is the inspection. This is the most high profile and widely reported power of the Commission.[5] This article aims to discuss some aspects of the limited right of defence during inspections.

The article is structured as follows. In the first section, an overview of normative law on inspections is provided to contextualise the case-law. Against this background, three recent cases, *Deutsche Bahn*, *Nexans France* and *Orange* merit a careful examination. In the most recent *Deutsche Bahn* judgment, the Court found irregularities and, hence, the inspection decisions were annulled, despite the GC judgment having rejected the claim. The judgment of the Court is analysed in light of the Opinion of Advocate General Wahl, who claimed that the Commission circumvented the rules on inspection, according to which the Commission should specify in its decision the subject matter and purpose of the inspection. Another claim of Deutsche Bahn was the infringement of its fundamental right to the inviolability of private

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[1] Charter of Fundamental Rights of the European Union, Article 52 (1): Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. OJ C 326, 2012.10.26.

[2] See the literature on due process. Ivo Van Bael: *Due Process in EU Competition Law Proceedings*, Kluwer Law International, 2011, Arianna Andreangeli: *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing, 2008, *Kerse &Khan on EU Antitrust Procedure*, Sweet &Maxwell, 2012, Koen Lenaerts: *Due process in competition cases* http://www.ikk-2013.de/pdf/Lenaerts.pdf

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1-25.

[4] Article 27 (2). The content of the right is not specified. "It constitutes a general clause invoked to fight various forms of procedural fairness." Krystyna Kowalik Bańczyck: *An elusive convergence- rights of defence in competition matters in the jurisprudence of the CJEU in Procedural Fairness in Competition Proceedings* (edited by Paul Nihoul and Tadeusz Skoczny), Edward Elgar, 2015. pp.182-208., p. 182.

[5] Faull & Nikpay: *The EU Law of Competition*, Oxford University Press, 2014, p.1172.

premises by reason of the lack of prior judicial authorisation of the inspection. That claim was rejected by both the GC and the Court of Justice. The second case, *Nexans France*, is about the obligation of the Commission to set out the subject matter of the inspection in its decision. The crux of the case is how precisely the subject matter should be determined in an inspection decision. The third case, *Orange* concerns a different setting. After 2014, under the decentralised application of EU competition rules, there is a risk of double jeopardy, where the Commission and a national competition authority act against the same behaviour of the same company. In theory, Regulation 1/2003/EC excludes the competence of national competition authorities to act if the Commission has initiated its own proceedings. However, what happens, if the national competition authority acts first and closes its procedure without inspection, on the basis of facts and evidence collected via information request? Does the Commission have the competence to dawn raid the premises of the company afterwards? The *Orange* judgment gives green light for the Commission to proceed.

2. Rules on inspections

Inspections by their nature interfere with the right to privacy. Inviolability of home and business premises form part of that right and are therefore protected under Article 7 of the EU Charter of Fundamental Rights[6] and Article 8 of the European Convention on Human Rights[7]. On the one hand, under the Convention, interference is justified if it is in accordance with the law and is necessary in a democratic society in the interest of the economic well-being of the country or the prevention of crime. Under the Charter, any limitation on the exercise of rights and freedoms must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[8]

In Union law legality and proportionality requirements flow from the wording of Regulation 1/2003 and the jurisprudence interpreting it. Regulation 1/2003 requires that the Commission decision ordering an inspection must specify the subject matter and purpose of the inspection. Furthermore, it must contain the date it is to begin, the penalties for non-compliance and the fact that the decision may be challenged.[9] Any document or information collected in the course of an inspection must be used only for the purpose for which it was acquired. Documents of a non-business nature are not covered by the inspection.[10] Undertakings have the duty to cooperate with the Commission during inspection; the refusal to submit to an inspection decision is sanctioned with a fine.[11]

Under the jurisprudence of the ECJ, the Commission is obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation relates.[12] On the other hand, the Commission is not required to communicate to the addressee of a decision all

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[6] Charter of Fundamental Rights of the European Union, OJ C 326, 2012.10.26., Article 7 (Respect for private and family life): Everyone has the right to respect for his or her private and family life, home and communications. Article 42:

[7] Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 4.11.1950. Article 8 (Right to respect for private and family life) (1): Everyone has the right to respect for his private and family life, his home and his correspondence. (2.) There 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 wellbeing 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.

[8] Article 52 (1), OJ C 326, 26.10.2012, p.391-407.

[9] Article 20 (4) of Regulation 1/2003

[10] Case C-155/79. AM&S Europe v Commission [1982] ECR 1575, para 16.

[11] Under Article 23 (1) (c) and 24 (1) (e)

[12] Case T-135/09. Nexans France SAS and Nexans SA v Commission, ECLI:EU:T:2012:596.

the information at its disposal or to define precisely the relevant market, to set out the exact legal nature of the infringement or to indicate the time period. The only requirement is that the Commission clearly indicates the presumed facts which it intends to investigate.[13] The Commission is also required to state in a decision ordering an inspection the essential features of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement in the infringement of the undertaking concerned, as well as the powers conferred on the European Union investigators.[14]

In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected.[15] *Kerse* and *Khan* commented on the case-law and noted that "the Court does not demand extensive reasoning: 'very often, the Commission's decision to carry out an inspection will necessarily be based on uncorroborated grounds of suspicion.'[16]

The reason for that is that the information collected during the inspection will make it possible for the Commission to establish the legal character of the antitrust infringement. The undertakings are required to understand their duty of cooperation from the limited preliminary information available in the inspection decision and their rights of defence will be preserved.[17]

During inspections, the officials are allowed to search in a comprehensive manner the contents of offices or binders, even in cases where there would be no clear indication that information concerning the subject matter of the investigation is located there. The GC acknowledged in *Deutsche Bahn* that it is not always possible for the Commission's agents to immediately determine the relevance of a document so, of necessity, they carry out a relatively broad search.[18] During a wider search, it is more likely that the Commission will find evidence sought under the inspection decision, but there is a chance that evidence not related to the inspection will be found as well.

In 1989, the ECJ allowed the Commission to use information it happened to find by chance during another investigation. With its *Dow Benelux* judgment,[19] the Court went beyond the limits set out in the Regulation confining the subject matter of the inspection. According to the Court the Regulation does not bar the Commission from initiating an inquiry in order to verify or supplement information which it happened to find by chance during another previous investigation, if such information indicates the possible existence of another infringement. The Court, however, obliged the Commission to open a new investigation in which the undertaking can exercise its right of defence. The underlying reason for the establishment of the *Dow Benelux* exception is to protect the powers of the Commission during inspections where there is information asymmetry between the investigated and the

[13] Case C-5/85. AKZO Chemie BV and AKZO Chemie UK Ltd. v Commission (2) [1986] ECR 2585, para 20, Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859, para 41. Confirmed on appeal by PVC II judgement Joined Cases C-238/99. Limburgse Vinyl Maatschappij and other v Commission [2002] ECR I-8375, C-94/00 Roquette Frères [2002] ECR I-9011., para 47-48.

[14] Case 136/79. National Panasonic v Commission [1980] ECR 2033, para. 26, and Roquette Frères, para 81, 83 and 99, Case T-340/04. France Telecom v Commission [2007] ECR II- 573, Joined Cases T-289/11, T-290/11 and T-521/11. Deutsche Bahn AG v Commission, ECLI:EU:T: 2013:404, para 170.

[15] Nexans para 43.

[16] *Kerse &Khan on EU Antitrust Procedure*, Sixth Edition, Sweet &Maxwell, 2012, p. 151.

[17] Case T-23/09. Conseil national de l'ordre des pharmaciens and other v Commission [2010] ECR II-5291, para 68. according to which the Court had to take account of the preliminary nature of the inspection.

[18] GC in Deutsche Bahn, para 140.

[19] Case C-85/87. Dow Benelux NV v Commission [1989] ECR 3137.

public enforcer of the rules. Without the *Dow Benelux* judgment, an unnecessary hindrance would be created on the investigative powers of the Commission. The *Dow Benelux* exception was confirmed for example in the *Spanish banks* judgment where the ECJ stated in relation to the competence of national competition authorities that Member States are not required to ignore the information disclosed to them and thereby undergo acute amnesia.[20]

Internal and external checks of the Commission's wide-ranging powers should provide a balance with the right of defence of the investigated. Internally, the Hearing Officer of the Commission has the competence and obligation to step up against misuse of powers in the antitrust procedure. Pursuant to its mandate extended in 2011,[21] the Hearing Officer shall safeguard the effective exercise of procedural rights throughout the competition proceedings, meaning that his competence extends to the investigation phase of the procedure as well. [22] The Officer is attached, for administrative purposes, to the Competition Commissioner, but in exercising his functions, he shall act independently. He can present observations on any matter directly to the Competition Commissioner. The parties to the proceedings offering commitments may also call upon the hearing officer at any stage of the procedure in order to ensure effective exercise of their procedural rights. [23]

More importantly, inspection decisions can be challenged at the GC. If the decision was annulled, the Commission would in that event be prevented from using, for the purposes of proceedings in respect of an infringement of the EU competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the ECJ.[24]

3. The *Deutsche Bahn* case

As mentioned above, the modernisation regulation requires the Commission to specify in a decision the subject matter and purpose of the inspection. Any document or information collected in the course of an inspection must be used only for the purpose for which it was acquired. The *Deutsche Bahn* case provides an excellent example of the ECJ's supervision of the Commission's power of inspection. On 14 March 2011, the Commission adopted its decision ordering Deutsche Bahn to submit to an inspection due to potentially unjustified preferential treatment given by its subsidiary, DB Energie GmbH, to other subsidiaries within the company group. The first inspection took place from 29 to 31 March 2011. In the meanwhile, on 30 March 2011 the Commission adopted a second inspection decision concerning Deutsche Bahn and potential practices implemented by another of its subsidiaries, DUSS, in order to gain an advantage over the group's competitors operating in Germany by making terminal access more difficult for them. Under the second decision, the inspection took place on 30 March and 1 April. More than three months later the Commission adopted a

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[20] Case C-67/91. Asociación Espanola de Banca Privada (AEB) and others v Commission [1992] ECR I-4785., para 39.

[21] Decision 2011/695/EU of the President of the Commission 13 October 2011 on the functions and terms of reference of the hearing officer in certain competition proceedings, OJ L 275/29, 20.10.2011.

[22] Pieter Van Cleynenbreugel called this development as the pinnacle of institutional translation of the right to be heard and more generally of an adversarial decision-making system. Pieter Van Cleynenbreugel: *Institutional Assimilation in the Wake of EU Competition Law Decentralisation* (2012) 8 (3) CompLRev pp 285-312, p.298

[23] In Arianna Andreangeli's terms the Hearing Officer plays the role of 'neutral chair', charged with the overall 'fainess' of each case. Arianna Andreangeli: *The public enforcement of Articles 101 and 102 TFEU under Council Regulation No 1/2003: due process considerations* in *Handbook on European Competition Law. Enforcement and Procedure*. Edited by Ioannis Lianos and Damien Geradin, Edward Elgar, 2013, pp. 138-180, p. 144-145. See also Wouter P.J. Wils: The Role of the Hearing Officer in Competition Proceedings before the European Commission (2012) 35 *World Competition*, Issue 3, pp. 431–456

[24] Case 85/87. Dow Benelux v Commission [1989] ECR 3137, para 18.

third inspection decision based on the identification of a potentially anti-competitive system of strategic use of the infrastructure managed by companies within the group aimed at preventing, complicating or increasing the costs of the activities of the group's competitors in the area of rail transport, for which access to the DUSS terminals is essential. The third inspection decision was adopted on 26 July 2011.

Deutsche Bahn lodged actions before the GC, seeking annulment of the contested decisions. The company put forward several pleas in law in support of its actions, alleging, amongst others, first, the infringement of its fundamental right to the inviolability of private premises by reason of the lack of prior judicial authorisation and, second, the infringement of the rights of the defence due to irregularities vitiating the conduct of the first inspection.

The GC dismissed the actions in their entirety,[25] but the appellants were successful on appeal before the Court of Justice regarding their third head of claim, violation of the right of the defence.[26]

These judgments will be presented in the following, including the very interesting Opinion of Advocate General Wahl.[27]

3.1. Inviolability of the home because the inspection was not preceded by a judicial warrant

Deutsche Bahn argued that by conducting the inspection without a prior judicial warrant the Commission breached its right to the inviolability of the home as guaranteed under Article 7 of the Charter of Fundamental Rights of the European Union (the Charter) and under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). The GC and the Court of Justice agreed that the lack of prior judicial authorisation is not capable of rendering the inspection measure unlawful. They relied extensively on the case-law of the European Court of Human Rights (ECtHR)[28] and pointed out that *ex ante* and *ex post* guarantees exist to respect the fundamental right of companies, in which case the interference by a public authority could go further for commercial premises than private homes. The Courts highlighted as an *ex ante* guarantee the provisions of Regulation 1/2003 on the power of Commission's agents and the power of national courts to authorise the assistance of police when the undertaking opposes an inspection. It is to be noted that the power of national courts is limited in this context. National courts may not call into question the necessity for the inspection and the decision ordering an inspection is subject to review only by EU court.[29]

Concerning the *ex post* guarantees, the ECJ recalled that under the jurisprudence of the ECtHR the absence of prior judicial authorisation might be counterbalanced by a post-inspection review covering both questions of fact and questions of law. The GC listed five categories of safeguards against arbitrary interference with the fundamental right. These relate to, first, the statement of reasons on which inspection decisions are based, second, the limits imposed on the Commission during the conduct of inspections, third, the impossibility for the Commission to carry out an inspection by force, fourth, the intervention of national

[25] Case T-289/11, T-290/11. and T-521/11. Deutsche Bahn and others v Commission, ECLI:EU:T:2013:404
[26] Case C-583/13. P. Deutsche Bahn and others v Commission, ECLI:EU:C:2015:404
[27] ECLI:EU:C:2015:92
[28] Niemetz v Germany, 16 December 1992, Series A No 251-B, Bernh Larsen Holding AS and others v Norway, no. 24117/08, 14 March 2013, Harju v Finland, no.56716/09, 15 February 2011, Heino v Finland, no.56720/09, 15 February 2011)
[29] Articles 20 (8) and 21 (3) of Regulation 1/2003 and Case C-94/00. Roquette Frères v Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes [2002] ECR II-4677.

authorities and, fifth, the existence of *ex post facto* remedies.[30] The GC considered that all five categories of safeguards mentioned above were guaranteed in the present case.

Ad 1. Concerning the statement of reasons on which inspection decisions are based, the Court reiterated its position that the decision must specify the subject-matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for, as well as the right to have the decision reviewed by the Court of Justice. According to the case-law, the statement of reasons must also state the suppositions and presumptions that the Commission wishes to investigate.[31] Nonetheless, the Commission does not have to set out the exact legal nature of the alleged infringements, communicate to the undertaking all the information at its disposal, or indicate the period during which the suspected infringement was committed.[32]

However, in order to ensure that the undertaking is able to exercise its right of opposition, the inspection decision must contain a description of the features of the suspected infringement, by indicating the market thought to be affected and the nature of the suspected competition restrictions, as well as the sectors covered by the alleged infringement, the supposed degree of involvement of the undertaking concerned, the evidence sought and the matters to which the investigation will relate.[33]

The function of the statement of reasons is twofold. In light of it, undertakings can exercise their right of defence and acknowledge their obligation to cooperate with the Commission. On the other hand, the review of the statement of reasons allows the courts to ensure that the principle of protection against arbitrary and disproportionate interventions and the rights of defence are respected, while bearing in mind the need for the Commission to retain a certain leeway, without which the provisions of Regulation No 1/2003 would be rendered redundant.

Ad 2. As to limits imposed on the Commission during the conduct of inspection, the Court established the following.

First, documents of a non-business nature, that is to say documents not relating to the activities of the undertaking on the market, are excluded from the scope of the Commission's investigatory powers. Second, undertakings are entitled to receive legal assistance or even to preserve the confidentiality of lawyer-client correspondence, although the latter safeguard does not apply to information exchanged between the undertaking concerned and a lawyer bound to it by a relationship of employment. Third, although Regulation No 1/2003 imposes an obligation of active cooperation on an undertaking subject to inspection, the Commission may not compel the undertaking concerned to provide it with answers that might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove. Fourth, mention must be made of the existence of the explanatory notes notified to undertakings together with inspection decisions. These explanatory notes describe the methodology that the Commission has bound itself to apply when conducting an inspection.[34] They usefully define the content of the principle of respect for defence rights and the principle of good administration, as they are perceived by the Commission. The explanatory notes explain how certain stages of the inspection should be conducted.

Ad 3. In the third place, the Commission does not have excessive coercive measures at its disposal that would invalidate the possibility, in practice, of opposition to the inspection.

First, it has been held that, during an inspection, Commission officials have, inter alia, the power to be shown the documents they request, to enter such premises as they choose, and

[30] GC judgment, para 74.
[31] GC judgment, para 75.
[32] GC judgment, para 76.
[33] GC judgment, para 77.
[34] A sample is available at http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf

to be shown the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking.

Second, the body of rules governing the statement of reasons on which inspection decisions are based and the conduct of inspections enable undertakings to exercise effectively their right to oppose when the inspectors arrive, when the inspection decision is notified, or at any other time during the inspection. Representatives of the undertakings under inspection are able to record any alleged irregularities which occur during the inspection or any objections they may have in a report, without formally opposing the inspection within the meaning of Article 20(6) of Regulation No 1/2003, and to use all means at their disposal to preserve tangible evidence of such irregularities.

Third, upon arriving at the premises of the undertaking, the Commission inspectors must allow the undertaking a reasonable, but brief, period of time to examine the inspection decision, with the assistance of its lawyers. As regards the applicants' argument that the infringement of its fundamental rights occurred when the officials of the Commission entered the undertaking, the Court shared the opinion of the Commission that under no circumstances did the inspection begin before notification of the decision and that the mere act of entering the undertaking for the purpose of that notification does not constitute an infringement of fundamental rights. During the inspection, the Commission must also allow the undertaking a brief period of time to consult its lawyers before taking copies, affixing seals or requesting oral explanations.

Fourth, the Commission can only apply the penalty mechanism provided for in Article 23 of Regulation No 1/2003 in cases of clear obstruction or abusive exercise of the right to oppose. The Commission cannot therefore use this penalty mechanism as a threat in order to obtain concessions from undertakings which go beyond the strict confines of their duty to cooperate. In that regard, it is to be noted that all decisions taken may be reviewed by the Courts of the European Union.

Ad 4. In the fourth place, as regards the safeguards offered by the opposition procedure provided for in Article 20(6) of Regulation No 1/2003, the Commission is under the obligation to seek assistance from the national authorities of the Member State where the inspection is to be carried out. That procedure triggers the application of the review mechanisms specific to the Member State concerned, mechanisms which may be of a judicial nature. If the assistance of the competent national authority has been requested, the Member State concerned must ensure that the Commission's action is effective and must respect the various general principles of EU law, in particular the protection of natural and legal persons against arbitrary and disproportionate interventions by public authorities in the private sphere.

The competent national body, whether judicial or non-judicial, must consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject matter of the investigation. The national court with jurisdiction to authorise the coercive measures may refer a question for a preliminary ruling to the Court of Justice. Furthermore, Articles 95 and 105 of the Rules of Procedure of the Court of Justice enable national courts to refer an anonymous question for a preliminary ruling pursuant to an expedited procedure. Finally, national courts may decide, in certain circumstances, to stay warrant proceedings until such time as the Court of Justice has answered the question referred for a preliminary ruling.

Ad 5. In the fifth place, the limits on the interference constituted by an inspection are also founded on the *ex post facto* review, by the European Union Courts, of the legality of the decision ordering the inspection. The existence of an *ex post facto* comprehensive judicial review of both fact and law is particularly important, as it is capable of counterbalancing the absence of a prior judicial warrant. The applicants can also obtain a stay of the

implementation of an inspection decision by lodging an application for interim relief under Article 278 TFEU at the same time as an action for annulment, possibly coupled with a request in terms of Article 105(2) of the Rules of Procedure. Finally, the second paragraph of Article 340 TFEU provides a basis for legal action for the non-contractual liability of the European Union.

In its appeal, Deutsche Bahn contended that the five safeguards do not ensure sufficient protection of its rights of defence. This contention was rejected by the Court of Justice, which took into account not only the existing jurisprudence of the ECtHR at the adoption of the Commission's decision, but also the recent judgment given by the ECtHR in *Delta Pekárny* in October 2014.[35] The Court of Justice pointed to the fact that the lawfulness of the Commission decision is subject to review. This review is an in-depth review of the law and the facts based on the evidence adduced by the applicant in support of the pleas in law put forward.[36] The ECJ rejected the argument of the appellant to consider the implication of the ECtHR judgments in *Ravon*[37] and *Canal Plus*[38] to the inspection of the Commission and the following ECJ review of that inspection. In *Ravon,* the ECtHR ruled under Article 6 of the Convention that notwithstanding the prior judicial authorisation, it was also required to ensure judicial control that was effective in fact as well as in law, which would enable an irregularity to be dealt with during the inspection or afterwards. French law in the course of investigations of tax evasion, provided for judicial review, but it was limited to cassation and did not allow examination of the facts. In *Canal Plus,* the ECtHR repeated its judgment concerning a French investigation on suspicion of violation of national and EU competition law. For the Advocate General and the ECJ these cases had be distinguished as the judgments were based on Article 6 (right to a fair trial) instead of Article 8 (right to respect for private and family life).[39]

Coming to the question of compatibility with Article 8 ECHR, legal commentators were divided on whether the EU enforcement system is compatible with the Convention. As in *Delta Pekárny* the ECtHR required an ex ante judicial control of national inspections on suspicion of violation of national competition law; probably each Member State will introduce soon such a prior control. Having established prior national controls, the likeliness of compatibility of the EU regulation on inspections probably will be increased. Kerse & Khan themselves tend to argue for compatibility given that 'the ECHR adopts a low intensity or lenient approach to review state acts, which augurs in favour of Roquette providing sufficient safeguards against arbitrary interference with undertakings' Article 8 right'.[40]

3.2. Right of defence

The second head of claim of Deutsche Bahn was the violation of its rights of defence. The Commission acknowledged that the Commission staff conducting the inspection had been informed beforehand that there was a complaint alleging another infringement of the

[35] Delta Pekárny a.s v the Czech Republic (No. 97/11, 2 October 2014)
[36] Paras 33 & 34.
[37] No.18497/03, February 21, 2008.
[38] No.29408/08, December 21, 2010.
[39] Kerse & Khan are hesitant as to whether the EU system is compatible with the requirements of Article 6 of the Convention. They point to the fact the EU system provides for a prior control at the level of national courts and ex post control at the level of the ECJ. The ex ante control is flowing from national law, thus there could be cases where it is missing. The powers of the national courts are restricted by the Roquette Freres judgement. As to the ECJ review they claim that ' it is difficult to exercise effectively the right to bring an action under Article 263 TFEU; urgent relief is not easily available and it might be argued in some circumstances that, in practice, the recourse available against an inspection decision does not satisfy Article 6 (1) ECHR. pp 159-160.
[40] Despite the wide ranging powers to seek documentary evidence and ask questions, p.160-161.

competition rules by Deutsche Bahn and that the officials were notified of the existence of the complaint involving DUSS immediately prior to the inspection.[41] In the appellant's view, that renders the inspection irregular, because the Commission did not find 'by chance' documents outside of the scope of the first inspection decision, but they had intentionally searched for other documents not related to the first inspection decision.

The GC rejected this plea by stating that the Commission had valid reasons for providing the officials with general background information on the case.[42]

At the Court of Justice the appellant argued that the GC erred in designating the DUSS documents discovered during the first inspection as 'found by chance' within the meaning of *Dow Benelux*. Advocate General Wahl looked into the *raison d'être* of the rules enshrined in Regulation No 1/2003[43]. He pointed out that the powers of the Commission are so extensive, the discretion so ample and the decision-making subject to so few prior controls, that it is for the EU Courts to ensure that the rights of the undertakings and citizens involved in an investigation are fully respected.[44] The crux of the case for AG Wahl was whether the Commission circumvented the rule of Regulation 1/2003 according to which the Commission should specify in its decision the subject matter and purpose of the inspection.[45] After finding that the subject matter of the two inspections was different and the subsidiary committing the violation was also different, the AG came to the conclusion that the Commission circumvented the rules governing the inspections, using an inspection to look for documents which concerned another, unrelated, matter.[46]

The AG acknowledged the fact that the Commission is free to investigate two distinct lines of conduct allegedly committed by the same undertaking, if all the safeguards are duly respected. In this case, the Commission should have adopted two inspection decisions addressed to the same company against which the undertaking can bring an action for annulment.[47]

The conclusion of the AG Opinion was that the Commission had violated the appellants' rights of defence which resulted in a manifest breach of the right to the inviolability of private premises.[48]

The ECJ followed the path paved by its Advocate-General, although with less robust and more pragmatic reasoning.

The Court stressed that the Regulation requires the Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose and that this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence.[49]Another guarantee fundamental for the right of defence is that information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision. The right of defence would be seriously endangered if the

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[41] Furthermore, according to the applicants the Commission officials themselves admitted that there was a problem linked to the fact that the first inspection decision did not mention the conduct of DUSS. Para 119.
[42] GC judgment, para 171.
[43] Opinion of Advocate General Wahl, ECLI:EU:C2015:92
[44] AG Opinion, para 63.
[45] AG Opinion, para 66.
[46] AG Opinion, para 79.
[47] AG Opinion, para 80.
[48] AG Opinion, para 83. According to the Colas Est v France judgment (Société Colas Est v France, No.3791/97, para 41.) the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises. In Roquette Frères (Case C-94/00 [2002] ECR I-9011.), the ECJ followed this judgement.
[49] Para 56.

Commission were able to rely on evidence against undertakings which was obtained during an investigation but was not related to the subject matter or purpose thereof.

On the other hand, the Court pointed out that it could not conclude therefrom that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market and identifying infringements of Articles 101 TFEU and 102 TFEU (*Dow Benelux*).[50]

The efficacy of an inspection requires the Commission to have provided the agents responsible for the inspection with all the information that could be useful to them for understanding the nature and scope of the possible infringement of the competition rules as well as information relating to the logistics of the inspection; all that information must nevertheless relate solely to the subject-matter of the inspection ordered by the decision.[51]

The prior information on the second complaint, which was not part of the general background information on the case but rather pertained to the existence of a separate complaint, is unrelated to the subject matter of the first inspection decision. Accordingly, the lack of reference to that complaint in the description of the subject matter of that inspection decision infringes the obligation to state reasons and the rights of defence of the undertaking concerned.[52]

Therefore, the first inspection was vitiated by irregularity since the Commission's agents, being previously in possession of information unrelated to the subject matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision.[53]

The ECJ came to the conclusion that the GC erred in law in holding that the fact that the Commission told its officials about the existence of the complaint about DUSS before the first inspection decision was based on valid reasons for providing the officials with general background information on the case, without, moreover, providing reasons, when it is manifestly clear that such provision of information does not fall within the subject-matter of the first inspection decision and therefore disregards the safeguards forming the framework for the Commission's powers of inspection.

It should be noted that the ECJ's expressions were not as harsh as were AG Wahl's. While for the AG the case was about the misuse of the Commission's already ample powers, the ECJ preferred to label it as an irregularity in the conduct of inspections.

The neglected question: What happens with the decision if it was based on documents acquired unlawfully?

The AG dealt with this question and stated that a procedural error cannot be cured by the adoption of a new inspection decision. The contrary view would deprive the guarantee in the Regulation (general bar on any use of information) of its effectiveness.[54]The Commission so far has not withdrawn any decision yet, because the investigation in Deutsche Bahn I and II were closed by one commitment decision. The Deutche Bahn III case was closed without any

[50] Para 59.
[51] Para 62.
[52] Para 63.
[53] Para 66.
[54] Paras 114-115.

decision. In the Deutsche Bahn I and II decisions the Commission found margin squeeze and accepted the commitment offered by the parties.[55]

The question arises whether the Commission should withdraw the commitment decision in Deutsche Bahn I-II on the ground that the second inspection decision was set aside by the ECJ on grounds of infringement of the rights of defence. The answer depends on the existence of evidence obtained by the Commission outside the ambit of the inspection. If the Commission had enough evidence without those found during the inspection to build up its preliminary assessment in the commitment procedure, the decision should not be repealed. Otherwise, it would be contrary to the rule of law to uphold the decision, because the parties had made their commitments with the knowledge of evidence gathered by the Commission against them. It should be pointed out that Deutsche Bahn did not refer the matter to the Hearing Officer during the administrative procedure and did not claim either that the second and third inspections were vitiated by errors, as the Final Report of the Hearing Officer states that he did not receive any complaint in this procedure.[56]

4. *Nexans France* and the scope of inspections

In another case, the GC was more careful in examining the right of defence of the company during inspections. In the *Nexans France* judgment,[57] the GC ruled that the Commission should have limited itself to search for documents relevant to high voltage underwater and underground high voltage cable as indicated in the decision ordering inspection and not to all electric cables.

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[55] Summary of Commission Decision of 18 December 2013 to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.39678/AT.39731 — Deutsche Bahn I/II) OJ C 86/4, 25.3.2014.

The commitments accepted were the following:

"On 1 July 2014, DB Energie will introduce a new pricing system for traction current with separate supply prices for electricity and separate grid access fees, the latter as approved by the competent German regulatory authority (Bundesnetzagentur). On the same day, DB Energie will offer access to its traction current network for third party energy providers so that they can supply traction current to railway undertakings, in competition to DB Energie.

- In this new system, DB Energie will charge the same price for electricity to all railway undertakings without volume- or duration-based discounts.
- DB Energie will pay to railway undertakings in Germany not belonging to the DB Group a one-time payment of 4 % of their yearly traction current invoice, based on the period of one year before the entry into force of the new pricing system.
- DB will provide each year the necessary data for the Commission to assess if the price levels for traction current and transport services charged by the DB Group could lead to a margin squeeze. DB Energie will also notify to the Commission in advance any changes to its electricity price.
- The commitments will last for five years after the notification of the Commission's decision or until 25 % of traction current volumes purchased by competitors of the DB Group are sourced from third party electricity providers.
- DB will appoint a trustee to monitor its compliance with the commitments."

[56] Final Report of the Hearing Officer, OJ 2014/C 86/03

[57] Case T-135/09. Nexans France SAS and Nexans SA v Commission, ECLI:EU:T:2012:596. Case C-37/13. P., ECLI:EU:C:2014:2030 and Case T-140/09. Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v Commission, ECLI:EU:T:2012:597. The literature welcomed the judgement. Javier Ruiz Calzado and Gianni de Stefano claimed that the CJEU by 'invariably endorsing the dawn raid decisions does not give the Commission any incentive to pay sufficient attention to such issues when crafting dawn raid decisions, which are the only elements available to their addressees in order to decide, within minutes, how best to co-operate with the inspectors without compromising their defence.' Javier Ruiz Calzado and Gianni de Stefano: *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements in Constitutionalising the EU Judicial system: Essays in Honour of Pernilla Lindh* (editied by Pascal Cardonnel, Allan Rosas, Nils Wahl), Hart Publishing, 2012, pp.423-439, at p. 429.

GC in its judgment struck the balance correctly between the efficiency of the investigation and the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society.[58] The GC stressed that the Commission cannot search with the ultimate aim of detecting an infringement which might have been committed by that undertakings.[59] That would be incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society. Consequently, the GC annulled the decision insofar as it concerned electric cables other than high voltage underwater and underground. Legal commentators pointed out that the approach of the Commission to define the subject-matter of inspections widely 'often reflects practical considerations, namely the need for inspectors to avoid being constrained in their practical work on the spot (e.g. discussions of interpretation with the undertaking's representatives about whether a given document falls within the precise scope of the investigation, which may become clearer in light of the full document examined in isolation on site) rather than by the temptation to use evidence gathered during a preliminary investigation in a given sector in order to launch a fishing expedition.'[60] On the other hand, practising lawyers often claim that the decision ordering inspections is 'typically very brief and rests on information submitted by an immunity applicant.'[61] The dilemma after *Nexans France* the Commission faces is the following. By defining the subject matter of the inspection widely, the Commission fails to fulfil the requirement of the case-law to indicate as precisely as possible the matters to which the investigation must relate. On the other hand, deeper Court review can lead to a policy in which the Commission tends to define the subject matter rather broadly.

As a final point, the scope of judicial review was exactly the central question of the *Orange* judgment. The facts of the *Orange* judgment should be viewed in the context of decentralised application of antitrust rules, where both the Commission and national competition authorities have the competence to conduct an inspection related to the same violation and committed by the same undertaking. Under the case allocation notice,[62] each ECN network member (Commission and the national competition authorities) retain full discretion in deciding whether or not to investigate a case.[63] In most instances, the authority that receives a complaint will remain in charge of the case. In *Orange*, contrary to the Notice, the French Competition Authority first dealt with the case under a complaint and did not consider it necessary to order an inspection; later the Commission acting on a complaint concerning the same suspected violation ordered inspection of the business premises of French telecom operator Orange.

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[58] On the point of whether the extensive protection granted by the ECtHR is desirable in the context of multi-national companies see: Albert Sanchez Graells and Francisco Marcos: *'Human rights' protection for corporate antitrust defendants: are we not going overboard?* in Procedural Fairness in Competition Proceedings (edited by Paul Nihoul and Tadeusz Skoczny), Edward Elgar, 2015, pp. 84-107. The authors claim that 'given the difficulties authorities face in finding and proving the violations of competition prohibitions, the complex assessment they need to make, and the strategic advantages that infringing parties generally have, it is necessary to allow investigations to proceed with relatively lenient procedural guarantees and also to lower the standard of proof of violations.' at p.102.

[59] Para 65.

[60] Faull &Nikpay: *The EU Law of Competition*, Oxford University Press, 2014, p.1178.

[61] Javier Ruiz Calzado and Gianni de Stefano: *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements in Constitutionalising the EU Judicial system*: Essays in Honour of Pernilla Lindh (editied by Pascal Cardonnel, Allan Rosas, Nils Wahl), Hart Publishing, 2012, pp.423-439, at p.428. The authors also claim that decisions can be considered at best as one-sided and at worse as unreliable, subjective and potentially just plain wrong. The Courts have always rejected the claims put forward by applicants, who often argued that the statement of reasons was insufficient.

[62] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004.

[63] Para 5.

It should be recalled that under Article 11 (6) of the modernisation regulation the initiation by the Commission of proceedings for the adoption of a decision shall relieve the competence of Member States' competition authorities. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.[64]

5. *Orange* and the scope of the inspection decision's judicial review in the decentralised enforcement regime

The GC adopted its judgment in November 2014 in the case *Orange* in which it examined the reasoning of the Commission decision ordering an inspection against Orange.[65] The particularity of that case was that within the framework of decentralised application, a competitor of Orange lodged a complaint with the French Competition Authority, believing that Orange had abused its dominant position. After considering the information voluntarily submitted by the suspected company, the French Competition Authority found in 2012 that the practices alleged against Orange were not substantiated or did not constitute an abuse of a dominant position. Concerning one part of the complaint, Orange has offered commitments to alleviate the concerns of the national competition authority. The commitments were rendered binding by the French Competition Authority. In parallel, the Commission had opened a procedure against Orange into highly similar practices and ordered an inspection in 2013.

Orange contended in its claim before the GC that the Commission's decision ordering an inspection was neither proportionate, nor necessary and that the principle of good administration was violated.[66] The GC pointed out that the Commission is not bound by decisions taken by a national court or authority and that the Commission may take at any time decisions, even if they conflict with a national decision.[67] While this statement is certainly true, it has to be remembered that it is very unusual that the Commission picks up a case after the national competition authority has started to act on a file. According to practice, the Commission refuses a complaint when a national authority has already been dealing with a case.[68] The GC found it unfortunate that the Commission opted for an inspection without first examining the information obtained by the national competition authority, but did not declare the decision illegal on that ground. In other words, the Commission has the competence to order inspection in spite of the fact that the national authority had refused to order it. The reference by the company to the violation of the principle of *ne bis in idem* did not succeed either because the GC approached that principle with formalism. As in a commitment decision, neither the legality nor the illegality of a conduct is established; the suspected undertaking cannot successfully rely on that principle. The GC acknowledged that according to settled case-law, the principle *ne bis in idem* must be observed in proceedings for the imposition of fines under competition law. That principle thus precludes, in the sphere of competition, an undertaking being found liable or proceedings being brought against it afresh

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[64] Article 11 (6).

[65] Case T-402/13. Orange v Commission, ECLI:EU:T:2014:991

[66] Article 41 (1) of the EU Charter: Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

[67] Case C-344/98. Masterfoods and HB, EU:C:2000:689, para 48, Case T-339/04. France Télécom v Commission, EU:T:2007:80, para 79, Case T-271/03. Deutsche Telekom v Commission, EU:T:2008:101, para 120.

[68] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp.1-25. Article 13 (1): The Commission may reject a complaint on the ground that a competition authority of a Member State is dealing with the case. Article 13 (2): Where the Commission has received a complaint, which has already been dealt with by another competition authority, it may reject it.

on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged.[69]

The scope of the principle of *ne bis in idem* is significantly reduced under the reasoning of the Court. In the modernised application of EU competition rules, only the Commission has the competence to declare that EU rules were not violated. This exclusive competence is set out in Article 10 of Regulation 1/2003[70] and the Commission can exercise it on its own initiative in the public interest of the Union. In judgment *Tele2Polska* the ECJ ruled that national competition authorities have no competence to issue a decision stating that there is no breach of Article 101-102.[71] Furthermore, it should be highlighted that the Commission itself has never adopted such a positive decision.[72] Contrary to inapplicability decisions, commitment decisions are regularly adopted by the Commission and the national competition authorities.[73] Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision shall conclude that there are no longer grounds for action by the Commission.[74] The operative part of the decision neither sets out that the conduct before the commitments were made had violated EU competition rules, nor that after the implementation of the commitments the market behaviour is in line with them. As recent statistics shows, the number of decisions adopted during the past ten years pursuant to Article 9 (commitments) exceeds the number of Article 7 (prohibitions) decisions.[75]

To come back to the *Orange* case, under the GC reasoning there is no violation of the principle of *ne bis in idem*, if the case was not closed by a prohibition decision. Should the French Competition Authority adopt a prohibition, the Commission would have been prevented from starting its own investigation against that particular conduct.

In addition, the GC in *Orange* also interpreted the applicant's arguments as disputing the appropriateness of the inspection on the grounds that the Commission had been informed of the draft decision of the authority[76] and had not exercised the power under Article 11(6) of that regulation to initiate proceedings itself, relieving the authority of its competence. The applicant inferred from this that the Commission took the view, either that the authority's

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[69] Para 29 of the judgment. The GC referred to Case C-17/10. Toshiba Corporation and Others, EU:C:2012:72

[70] Finding of inapplicability: "Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied. The Commission may likewise make such a finding with reference to Article 82 of the Treaty."

[71] C-375/09. Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA [2011] ECR 3055.

[72] Communication from the Commission – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453, 9.7.2014) and Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014), paras 192-193.

[73] According to the Report of the Commission roughly 1/3 of the antitrust cases are closed by a commitment decision. See Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453, 9.7.2014) and Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014), page 56, Figure 14., roughly 68% of the cases (leaving aside cartels) are closed by commitment decisions.

[74] Article 9 of Regulation 1/2003

[75] Para 185. of Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014)

[76] Pursuant to Article 11(4) of Regulation No 1/2003.

decision was consistent with Article 102 TFEU or that no importance was to be attached to the case.

In the GC's view it does not follow from EU law that if the Commission does not share the assessment relating to the application of Articles 101 TFEU and 102 TFEU set out in the draft decision notified by the competition authority of a Member State, or if the Commission has doubts in that regard, it is necessarily bound to initiate proceedings or that the non-initiation of proceedings precludes it from conducting its own investigation at a later stage in order to lead to a result other than that arrived at by the competition authority.[77]

The Commission is entitled to give differing degrees of priority to the complaints brought before it and, for that purpose, it has discretionary power. The GC considered that the same is true for the application of Article 11(6) of Regulation No 1/2003.[78] Thus, non-intervention by the Commission under Article 11(6) of Regulation No 1/2003 cannot be regarded as acceptance of the merits of the authority's decision under Article 102 TFEU.[79]

In consequence, no conclusions on the appropriateness of an investigation conducted by the Commission can be drawn from the fact that the latter did not exercise the power conferred on it by Article 11(6) of Regulation No 1/2003 following notification of a draft decision of a national competition authority covering a similar subject matter.[80]

The claim that the inspection was not proportionate was also rejected by the GC. Orange contended that disclosure of the national competition authority's file could have been a less onerous alternative to the inspection. The GC responded that the principle of proportionality applies only in cases where the alternative is as efficient as an inspection. In this case, the examination of the file was not an alternative to an inspection, since the national authority had not carried out any inspection.[81] In conclusion, when the contested decision was adopted, it was reasonable for the Commission to consider that there was no less onerous alternative.

It can be concluded that under the jurisprudence the principle of proportionality would be violated, if the Commission had ordered the inspection after the national competition authority had inspected the premises searching for evidence related to the same infringement. Under these circumstances, the Commission would be obliged to ask the national competition authority for disclosure of information in its file and to use it as evidence.

The second claim submitted by Orange was that the Commission's decision was arbitrary and that the GC should ascertain whether the information the Commission had in its possession was sufficiently reliable and detailed so as to justify the adoption of the decision.

In the GC's view, the purpose of the judicial review of inspection decisions is to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.[82] Specification of the subject matter and purpose of the inspection constitutes a fundamental guarantee of the rights of defence of the undertakings concerned and, consequently, the scope of the duty to state the reasons for inspection decisions may not be limited by reference to considerations relating to the effectiveness of the investigation.[83]The GC has confirmed that is has the competence to examine whether the Commission possesses

[77] Para 36 of the judgement

[78] The GC has also relied on paragraph 54(b) of its Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43), according to which such Commission intervention is envisaged only when a notified draft decision is obviously in conflict with consolidated case-law.

[79] Para 39 of the judgment

[80] Para 40.

[81] Para 56.

[82] Para 79.

[83] Para 80.

sufficiently reliable information before adopting an inspection decision, but pointed out that such an examination is not the only way it can ascertain that the decision was not arbitrary. It referred to the effectiveness of the investigation to be protected.

> *At the stage of the preliminary investigation the Commission cannot be required to indicate, besides the putative infringements it intends to investigate, the evidence, that is to say, the indicia leading it to consider that Article 102 TFEU has possibly been infringed. Such an obligation would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.*[84]

> *Only when a request to that effect is brought before the Court and the undertakings to which a decision under Article 20(4) of Regulation No 1/2003 is addressed have put forward certain arguments liable to cast doubt on the reasonableness of the grounds on which the Commission relied in order to adopt that decision may the Court take the view that it is necessary to carry out such a determination.*[85]

To put it differently, the GC is not willing to engage in the examination of the indicia the Commission has relied on if the undertaking made a general statement on the arbitrariness of the inspection decision. The suspected entity has to put forward specific arguments liable to cast doubt on the reasonableness of the grounds the Commission has relied on. The difficulty with this approach is that the Court did not specify what kind of arguments would cast doubt on the reasonableness of the grounds the Commission relied on and in practice the undertaking does not have the information the Commission relies on (the company is in an informational asymmetry condition vis-à-vis the Commission).

By rejecting the examination of the information possessed in the particular case, the GC has changed the nature of the arbitrariness test and transformed it into the verification of the reasoning of the inspection decision. The GC stated that there is no need for the examination of the information possessed by the Commission if the non-arbitrary nature of the decision can be deduced from the sufficiently precise nature of the explanation of the alleged facts that the Commission intends to investigate.

In the specific case, the GC found that the nature of the suspected restriction of competition was defined in sufficiently precise and detailed terms and thus there was no need to examine the information in the Commission's possession at the date of the adoption of the decision.

6. Final remarks

This paper has explored the attitude of EU courts supervising the Commission's broad powers during inspections. Addressing this question through the lenses of the most important recent judgments, it has to be admitted that the conclusions are mixed. It is argued that from *Deutsche Bahn* (right to respect private life, right to a fair trial) and *Orange* (access to evidence held by the Commission before ordering an inspection) the traditional European approach is visible under which the institutional setting of EU competition law, being it the central or decentralised level, is untouchable for the courts. In *Orange* the GC has applied a rather formalistic interpretation of the *ne bis in idem* principle, possibly leading to double jeopardy of inspection in case a national competition authority has closed its proceedings with a commitment decision. In these cases, it cannot be excluded that the Commission, which is

[84] Para 81.
[85] Para 88. Reference is made to the Nexans and Prysmian judgements.

not bound by the commitment decision, can initiate its proceedings later than the adoption of the commitment decision and resort to a fresh inspection. In these cases, it is not required that the Commission first examines the information obtained by the national competition authority and later, if information is still missing, orders the inspection.

Perhaps more importantly, it can be seen from *Deutsche Bahn* (irregularity during the procedure) and *Nexans France* that the Court is more mindful of procedural fairness considerations where the specific facts of the case necessitate that. In these cases, EU courts have become more receptive of the right of defence argument, the reason for that probably being the full judicial review requirement following from the ECtHR's jurisprudence.[86] The Court was looking at the safeguards forming the framework for the Commission's powers of inspection and, was willing to follow AG Wahl and declare that the irregularity in the conduct of inspections results in annulment of the inspection decisions.

For AG Wahl the breach of the rights of defence resulted in a manifest breach of the right to the inviolability of private premises but the Court used a moderate tone by stating that procedural irregularity has taken place. *Nexans France* makes for an even clearer message to the Commission to stick to the subject matter of its inspection decision.

It may be concluded that the ECJ has marked cautious but significant progress towards the protection of right of defence during inspections. Despite the lenient attitude of the GC in *Orange,* the GC noted the following:

> *In this case, it may indeed appear at the very least unfortunate that the Commission should at the outset have opted for an inspection without first examining the information obtained by the authority in relation to similar conduct.*

Nevertheless, the principle of good administration was not violated because examination of the file in the authority's possession was not an alternative to an inspection, since the authority had not carried out any inspection at the applicant's premises and its decision had therefore been taken on the sole basis of the information voluntarily provided by the applicant. Thus, the conclusion of the GC was that the necessity of an appropriate effective inquiry was capable of justifying recourse to an inspection, for that was the only measure enabling the Commission to collect information which, by its very nature, had perhaps not been voluntarily produced by the applicant in the course of the procedure before the authority. In conclusion, this case was not the right one to put the decentralised rules to a test based on fundamental rights.[87]

This article has shown the changing attitude of EU courts towards the competence of the Commission in exercising its powers of inspections. This welcome development shows that the Courts will not shy away from exercising their unlimited jurisdiction to scrutinise not only final Commission decisions, but also decisions to order inspections. This question is of particular relevance after 2009, when the EU Charter of Fundamental Rights became binding. Although the EU will not be a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms in the recent future due to the Opinion 2/13 of the Court[88], Article 53 of the EU Charter of Fundamental Rights will continue to be applied.[89]

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[86] Judgment of the European Court of Human Rights, Case of A. Menarini Diagnostics S.R.L v Italy, App. No. 43509/08, Judgements of the European Court of Justice in C-389/10. P. KME Germany AG, KME France SAS, KME Italy SpA v Commission, [2011] ECR I-13125 and C- 386/10. P. Chalkor AE Epexergasias Metallon v Commission [2011] ECR I-13085

[87] It should be noted that the Commission is paving the way for the harmonisation of national procedural law. See the Commission Staff Working Document "Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues" accompanying the Communication from the Commission (SWD(2014 231 final).

[88] Opinion 1/13, ECLI:EU:C:2014:2454.

According to that provision, the level of protection provided by the Charter should not go below the level of protection provided by the Convention. One might hope that this positive development of EU Courts will continue and procedural fairness will be posited at the centre of the fact-finding phase of the antitrust procedure as well.

[89] Article 53 of the EU Charter: "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 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."