

# Confusion and Conflict?

## Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg

Rick Lawson\*

### 1. Introduction

In a *Liber* dedicated to Professor Henry Schermers, it seems appropriate to address one of the topics in which he himself has always taken special interest: the relationship between the European Convention on Human Rights (the ECHR) and the legal order of the European Community. Having closely followed the development of the three Communities from their very inception, and having been a member of the European Commission of Human Rights since 1981, Schermers is one of the first scholars to stand at the crossroads where these two legal systems meet.

He has moreover had a clear vision of the issues lying ahead: when he left the University of Amsterdam in order to take up his post in Leiden, his farewell lecture dealt with the possibilities of ensuring that the Community would respect human rights.<sup>1</sup> Having discussed several options, Schermers spoke out in favour of the Community's accession to the ECHR. This was 1978, some time before the EC Commission issued the Memorandum in which it arrived at the same conclusion.<sup>2</sup>

It is 1993. Schermers has delivered another farewell lecture and the question whether the Community should accede to the ECHR has still not been settled. Following the 1979 Memorandum, no action was taken. In 1990, the Commission explicitly asked the Council to approve a mandate for formal negotiations

---

\* R.A. Lawson is a lecturer at the Europa Instituut, University of Leiden, the Netherlands.

1. H.G. Schermers, *De binding van de Europese Gemeenschap aan mensenrechten*, farewell lecture at the Europa Instituut, University of Amsterdam, 29 June 1978; reprinted as 'The Communities under the European Convention on Human Rights', in *Legal Issues of European Integration (L.I.E.I.)* 1978/1, pp. 1-8.
2. Memorandum of 4 April 1979, *Bulletin of the European Communities* 4-1979 (no. 1.3.1) and Suppl. 2/79.

with the Council of Europe.<sup>3</sup> Again the Member States seemed to ignore the issue and it appears that some of them, or at least some policy makers, maintain their traditional reluctance.<sup>4</sup>

To some extent, the accession debate has been obfuscated by the European Court of Justice (ECJ). It was argued in the early 1970's, that the protection of human rights in the legal order of the Community was insufficient. In a more or less improvised response, the ECJ expressed its willingness to consider fundamental rights as general principles of Community law, the observance of which it ensures. The ECJ was thus able to protect fundamental rights in individual cases, despite the absence of specific human rights provisions in the constituent Treaties. This '*solution de dépannage*'<sup>5</sup> has in turn led some commentators to the rather paradoxical conclusion that, since human rights are protected, Community accession to the ECHR is only of theoretical interest, without much practical relevance.<sup>6</sup>

It is the purpose of this contribution to investigate the validity of this assertion. After a summary of the ECJ's case-law regarding human rights and the scope of its review (§ 2), attention will focus on the freedom which the ECJ enjoys in interpreting the provisions of the ECHR (§ 3). Subsequently, some recent cases will be examined in which the ECJ was directly confronted with specific human rights claims. We will see the extent to which the response of the Court, and its Advocates General, has been in conformity with the case-law of the bodies specifically entrusted with the task of interpreting and protecting

- 
3. Notice SEC(90)2087 def. of 19 Nov. 1990; see *Bulletin of the European Communities* 10-1990, p. 76 (no. 1.3.218) and 11-1990, p. 72 (no. 1.3.203). The European Parliament expressed its support: Resolution on respect for human rights in the European Community (annual report of the European Parliament), *O.J.* 1993, C 115/180, at § 9.
  4. See for a recent discussion in the UK: House of Lords Select Committee on the European Communities, *Human Rights Re-examined*, 23 June 1992, with evidence by various experts; see also the comments by a Danish official in a recent panel discussion in The Hague, reported in R.A. Lawson, 'Human Rights Protection in Europe: The Court of Justice of the European Communities and the European Court of Human Rights', in R. Lefeber (ed.), *Proceedings of the Second Joint Conference of the American Society for International Law and the Nederlandse Vereniging voor Internationaal Recht* (to appear early 1994).
  5. This term was coined by R. Lecourt, former President of the ECJ, 'Cour européenne des Droits de l'Homme et Cour de justice des Communautés européennes', in F. Matscher & H. Petzold (eds.), *Protecting Human Rights: The European Dimension (Essays in honour of G.J. Wiarda)* (1988), pp. 335-340, at p. 336.
  6. See for example the House of Lords Select Committee on the European Communities, *supra* note 4, at p. 28. § 71. The Community's unwritten but judicially discovered 'Bill of Rights' may, of course, be more attractive to a common law country than to continental lawyers.

the rights of the ECHR: the European Commission and Court of Human Rights (§ 4). This exercise may enable us to state whether it is true that Community accession to the ECHR would be without much practical relevance as the ECJ already ensures adequate protection (§ 5).

## 2. The Protection of Fundamental Rights by the European Court of Justice

In this section, the sources of fundamental rights as applied by the ECJ and the scope of its review will be briefly discussed. As will be seen, the case-law of the ECJ has developed gradually with respect to both issues and may not yet have reached maturity. As a preliminary point, it should be remarked that this review is limited to the rights guaranteed in the ECHR.

### 2.1. The Sources of Fundamental Rights

In 1970, respect for fundamental rights as such was recognized by the ECJ as forming 'an integral part of the general principles of law protected by the Court of Justice'. The Court added that '[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework and objectives of the Community'.<sup>7</sup> Four years later, the ECJ addressed this matter again in the *Nold* case. The relevant passage is worth quoting for the purpose of our review:

In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>8</sup>

- 
7. Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1134, following a famous *obiter dictum* in case 26/69, *Stauder* [1969] ECR 425. Implicitly the ECJ referred to Art. 164 EEC as the legal basis for its position. See on this aspect: M.H. Mendelson, 'The European Court of Justice and Human Rights', in *Yearbook of European Law (Y.E.L.)* vol. 1 (1981), pp. 125-165, at pp. 152-162. Hilf mentioned a proposal in 1975 to change the text of Article 164 into: 'The Court of Justice shall ensure that in the interpretation and application of the Treaty the law and especially the fundamental rights of the citizens are observed'; see M. Hilf, 'The Protection of Fundamental Rights in the Community', in F.G. Jacobs (ed.), *European Law and the Individual* (1976), pp. 145-160, at p. 146.
  8. Case 4/73, *Nold v. Commission* [1974] ECR 507. It is interesting to note that the

It is commonly considered that these judgments were prompted, at least to a certain extent, by anxiety in some Member States about the allegedly inadequate protection of human rights at Community level.<sup>9</sup> By providing for human rights review by itself, the ECJ attempted (largely successfully) to prevent national courts from assessing Community acts for human rights compliance, as that would threaten the supremacy and integrity of Community law.<sup>10</sup> But whatever may have sparked *Internationale Handelsgesellschaft* and *Nold*, the ECJ continued to develop its human rights case-law in the 1970's and 1980's. In response to claims made by litigants and requests for preliminary rulings, it has been prepared to refer<sup>11</sup> to fundamental rights recognized in the

---

English translation of the judgment speaks of 'treaties'. This is similar to the German version, the official language of the case, which refers to 'die international Verträge'. By contrast, the French text, used in the internal deliberations of the Court, refers to 'les instruments internationaux' and the Dutch version to 'internationale wilsverklaringen'. The English/German translation of course is more restrictive as it seems to exclude non-binding instruments such as the Universal Declaration of Human Rights and the texts adopted in the framework of the Conference on Security and Cooperation in Europe (CSCE). It is submitted that the more extensive expression should be followed as there are no *a priori* reasons why the ECJ should be unable to take the principles enshrined in non-binding texts into account. In other situations, the ECJ has indeed been prepared to use non-binding rules of public international law: see H.G. Schermers & D. Waelbroeck, *Judicial Protection in the European Communities* (5th ed., 1992), pp. 100-102.

9. This concern was expressed especially by the German and Italian Constitutional Courts; see for a comment from those days: A.Z. Drzemczewski, 'Fundamental Rights and the European Communities: Recent Developments', in *The Human Rights Review* vol. II, nr. 1 (Spring 1977), pp. 69-86. See for a contemporary comment: H.G. Schermers, 'The Scales in Balance: National Constitutional Court v. Court of Justice', in *Common Market Law Review (CML Rev.)* vol. 27 (1990), pp. 97-105.
10. See e.g. J.H.J. Weiler, 'Methods of Protection: Towards a Second and Third Generation of Protection', in J.H.J. Weiler, A. Cassese & A. Clapham (eds.), *Human Rights and the European Community* (1991), vol. II, pp. 555-642, at p. 580.
11. It has often been noted that most of the ECJ's references to human rights merely support a conclusion already reached on other grounds. To my knowledge, no claims based on human rights alone have been upheld by the ECJ. Coppel & O'Neill submit that *Wachauf* was decided 'on fundamental rights grounds' (J. Coppel & A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', in *CML Rev.* vol. 29 (1992), pp. 669-692, at p. 676) but at the same time they express their regret that in this case fundamental rights 'were treated as no more than a principle of interpretation (...) and only to the extent that this is compatible with the wording of the Community legislation' (at pp. 683-684).

constitutions of the Member States,<sup>12</sup> to specific provisions of the ECHR<sup>13</sup> and, to a lesser extent, to other human rights treaties.<sup>14</sup>

The way in which *Nold* was phrased suggests that human rights treaties are of less importance to the ECJ than the constitutions of Member States. With hindsight, however, it appears that there were mainly historical reasons for the very careful and indirect reference to, essentially, the ECHR. Indeed, it emerges from the more recent case-law that the European Convention holds a special place as a source for the Court's catalogue of fundamental rights.<sup>15</sup> This shift of emphasis has been confirmed in Article F § 2 of the Treaty on European Union:

The Union shall respect 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.<sup>16</sup>

- 
12. See for example case 155/79, *AM & S Europe Ltd. v. Commission* [1982] ECR 1610-1611 and joined cases 46/87 & 227/88, *Hoechst AG v. Commission* [1989] ECR 2924.
  13. See for example case 36/75, *R. Rutili v. Minister for the Interior* [1975] ECR 1232; case 44/79, *Hauer v. Land Rheinland Pfalz* [1979] ECR 3744; case 63/83, *Kent Kirk* [1984] ECR 2718 and case 222/86, *Heylens* [1987] ECR 4117.
  14. See for a reference to the European Social Charter: case 24/86, *Blaizot* [1988] ECR 403; for a reference to the International Covenant on Civil and Political Rights: case 374/87, *Orkem v. Commission* [1989] ECR 3351; and for references to ILO Conventions: case 43/75, *Defrenne* [1976] ECR 473 and case C-158/91, *Ministère public et Direction du travail et d'emploi v. J.C. Levy*, judgment of 2 August 1993, not yet reported in ECR.
  15. See for example case 222/84, *Johnston* [1986] ECR 1682, *Hoechst*, *supra* note 12, at p. 2923, and case C-260/89, *ERT* [1991] ECR I-2963. The ECJ was apparently encouraged by the support for its approach as expressed in the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977, *O.J.* 1977, C 103/1 (referring 'in particular' to the ECHR) and the third paragraph of the preamble to the Single European Act, *O.J.* 1987, L 169/1 (referring to both the ECHR and the European Social Charter); see case 249/86, *Commission v. Germany* [1989] ECR 1290.
  16. It is revealing that the 1991 draft treaty, as proposed by the Netherlands presidency, did not even refer to the constitutional traditions at all: Art. G § 2 read: 'The Union shall respect the rights and freedoms as recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (see *Europe Documents* No. 1746/1747 of 20 Nov. 1991, p. 3). It has been argued that Art. F § 2 TEU in its final form fails to codify the ECJ's case-law adequately. No reference have been made to either the Protocols to the ECHR or other human rights treaties like the European Social Charter (in contrast to the SEA, *supra* note 15). See G. Gaja, 'The Protection of Human Rights under the Maastricht Treaty', in D. Curtin & T. Heukels (eds.),

## 2.2. *The Scope of the ECJ's Fundamental Rights Review*

In developing its fundamental rights case-law, the ECJ initially limited itself to reviewing the validity of Community acts. However, in recent years the case-law has gone rather further in a direction not reflected in Article F § 2. Incrementally, the ECJ is prepared to accept and even extend the position taken by Advocate General Jacobs in the *Wachauf* case:

(...) it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for human rights, as the Community legislator.<sup>17</sup>

It may appear self-evident, but in fact this step completes the circle. Initially the ECJ introduced fundamental rights as general principles of Community law derived from the human rights commitments of the Member States, apparently in response to the fear that human rights protection at Community level was inadequate. Now the ECJ is told to observe that the Member States live up to what in fact were once their own standards. Be that as it may, the Court explicitly held in *Wachauf* that 'the requirements of the protection of fundamental rights in the Community legal order' are 'also binding on the Member States when they implement Community rules'.<sup>18</sup> The ECJ's assumption of competence for human rights review not only vis-à-vis the Community institutions, but also vis-à-vis the Member States, results in a situation where the Community may be said to have moved from 'respecting' to 'ensuring' human rights.<sup>19</sup>

The extent to which Member State action can be reviewed has not yet been fixed. *Wachauf* showed that the ECJ considers itself competent to review

---

*Institutional Dynamics of European Integration* (the triplet volume of this *Liber amicorum*), and the Dutch section of the International Commission of Jurists, NJCM, in its comments on the Treaty, *NJCM-bulletin/Nederlands Tijdschrift voor de Mensenrechten* (*NJCM-Bulletin*) vol. 17 (1992), pp. 711-713.

17. Case 5/88, *H. Wachauf v. Germany* [1989] ECR 2629. This approach was advocated by J.H.H. Weiler, 'The European Court at a Crossroads: Community Human Rights and Member State Action', in F. Capotorti et al. (eds.) *Du droit international au droit de l'intégration (liber amicorum Pierre Pescatore)* (1987), pp. 821-842.
18. *Wachauf*, *ibidem*, at p. 2639.
19. Compare Art. F § 2 TEU, referring to 'respect', and the terms used by the EP in its Resolution on respect for human rights in the European Community: the EP 'stresses that the Community must ensure that human rights are respected in the Member States in order to lend maximum credibility to its commitment to human rights in the rest of the world' (*supra* note 3, at § 11, emphasis added).

measures of national authorities for human rights compliance where they act in fact as the executive of the Community, e.g. by enforcing an agricultural levy system.<sup>20</sup> A similar approach is taken in cases where national authorities act in a field which is regulated by Community law, e.g. when implementing a Directive.<sup>21</sup> But the scope of the ECJ's human rights review is broader still. Thus, if national authorities restrict one of the fundamental freedoms under the EEC Treaty, the ECJ holds that in order to be justified, the restriction should comply *inter alia* with the provisions of the ECHR. It can be argued that the 1975 *Rutili* case is an early example of this position; it was in any event confirmed in very plain terms in the 1991 *ERT* judgment.<sup>22</sup>

More controversial is the question how far the jurisdiction of the ECJ extends with respect to national measures which are not, to use the words of the Advocate General in *Wachauf*, 'in pursuance of powers granted under Community law'. One limit was set in *Cinéthèque* and *Demirel*:

Although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation *lying outside the scope of Community law*.<sup>23</sup>

This may seem self-evident but the question remains, of course, which matters actually fall (exclusively? mainly?) outside the scope of Community law. In the recent *Konstantinidis* case, Advocate General Jacobs proposed a far-reaching answer. He submitted that any human rights violation inflicted upon a *civis europeus*, i.e. a migrating Community national who benefits from the free

20. See also case 201/85, *Klensch* [1986] ECR 3507.

21. See *Johnston*, *supra* note 15, and *Commission v. Germany*, *supra* note 15.

22. *Rutili*, *supra* note 13; *ERT*, *supra* note 15, p. 2964. The same position was already defended by AG Trabucchi in case 118/75, *Watson & Belmann* [1976] ECR 1207. See also the Opinion of AG Van Gerven in case C-159/90, *Grogan* [1991] ECR I-4722 and, for an implicit example, *Heylens*, *supra* note 13. The Dutch 'media' cases are remarkable as the Netherlands government sought to rely on Art. 10 ECHR to defend restrictions applying to broadcasting corporations; see, *inter alia*, case 353/89, *Commission v. the Netherlands* [1991] ECR I-4097.

23. Case 12/86, *Demirel* [1987] ECR 3754, emphasis added, which slightly changed the dictum in joined cases 60-61/84, *Cinéthèque* [1985] ECR 2627; compare *ERT*, *supra* note 15, p. 2964 and *Grogan*, *supra* note 22, at p. 4733. See for critical remarks on this aspect of the *Cinéthèque* case: Weiler, *supra* note 17, and on the *Demirel* case: J.H.H. Weiler 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique', in *European Journal of International Law* vol. 3 (1992), pp. 65-91.

movement provisions, would *as such* be a violation of Community law.<sup>24</sup> In its judgment the ECJ did not react to the submissions of the Advocate General, so it is still uncertain whether 'the scope of Community law' includes this very broad category of situations. Fortunately it is not the purpose of the present contribution to attempt to solve this enigma.<sup>25</sup>

One last remark relates to the intensity of the review of national actions. When Advocate General Trabucchi suggested, in 1976, that the ECJ should review whether Italian rules, relating to the registration of foreigners, complied with the ECHR, he immediately added that the Court could not to look into an infringement of a fundamental right by a State body 'to the same extent to which it could do so in reviewing the validity of Community acts'.<sup>26</sup> This suggests that the ECJ's fundamental rights test should not be equally demanding when national measures are under review. It does not appear from the more recent case-law, however, that the ECJ is prepared to make such a distinction. The formulation of *Wachauf* and *ERT*, echoing *Nold* ('the Court cannot accept measures ...'), does not leave much room for separate methods of testing Community and national acts. On the other hand, the ECJ has been willing to grant the State authorities 'an area of discretion' when restricting for example the free movement of workers under Article 48(3).<sup>27</sup>

As a general conclusion it may be stated that the ECJ will review legislative and administrative acts of the Community institutions on the one hand and measures adopted by the Member States on the other hand, either (a) 'when they implement Community rules' or (b) when they, in one way or another, fall 'within the scope of Community law'. This may be a rough sketch, but it enables us to presume that the gradual expansion of the ECJ's human rights review will necessarily lead to an increase in the number of human rights cases

- 
- 24. Opinion in case C-168/91, *Konstantinidis* [1993] 3 C.M.L.R. 401, not yet reported in ECR; cf. F.G. Jacobs, 'The Protection of Human Rights in the Member States of the European Communities: The Impact of the Case law of the Court of Justice', in J. O'Reilly (ed.), *Human Rights and Constitutional Law (Essays in Honour of Brian Walsh)* (1992), pp. 243-250. One cannot escape the impression that this AG applies a fine piece of salami tactics here; compare this case to his position in *Wachauf*, *supra* note 17.
  - 25. See, inter alia, J. Temple Lang, 'The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles', in *L.J.E.I.* 1991/1 pp. 23-35.
  - 26. Opinion in *Watson & Belmann*, *supra* note 22, p. 1207.
  - 27. See e.g. case 41/74, *Van Duyn v. Home Office* [1974] ECR 1350 and case 30/77, *R. v. Bouchereau*, [1977] ECR 2014. See, however, joined cases 115 & 116/81, *Adoui & Cornuaille v. Belgium* [1982] ECR 1707-1708.



before it and thus to a proliferation of rather delicate and politically sensitive issues to be decided by the Luxembourg Court.

### 3. Interpreting Rights: The Fundamental Freedom of the ECJ

It will be clear that the ECJ allows itself considerable freedom when applying fundamental rights. As we have seen, the Court considers itself bound to draw 'inspiration' from constitutionally guaranteed rights whereas human rights treaties can supply 'guidelines'. Ulysses may have tied himself to the mast, but this time he has made sure that the knots remain within his own reach. By definition the ECJ will not apply human rights as they have been interpreted by either national courts or international supervisory bodies. Rather, these interpretations will assist the Court in its task of defining, or re-creating, fundamental rights (the Court always refers to 'fundamental', not human, rights) as a special category of general principles of Community law.<sup>28</sup>

The advantage of this manner of proceeding is that the ECJ can fit human rights requirements to the Community legal order, which of course has its special characteristics. This may seem strange since human rights are usually seen as the highest values of human civilization, which cannot be adapted *ad libitum* to the demands of convenience. However, the actual judicial application of human rights shows that far from representing absolute and static notions, human rights are always interrelated to the societies where they are applied.<sup>29</sup>

---

28. In *Nold*, *supra* note 8, the ECJ held that the rights on which the applicant sought to rely 'should, if necessary, be subject to certain limitations justified by the overall objectives pursued by the Community' (p. 508). See also *Wachauf*, *supra* note 17, which repeated *Nold* although the English translation this time remained closer to the, more restrictive, French version of *Nold*: 'International treaties concerning the protection of human rights (...) can also supply guidelines to which regard should be had in the context of Community law ['des indications dont il convient de tenir compte'] (...) The rights recognized by the Court are not absolute, however, but must be considered in relation to their social function' (emphasis added, p. 2639). In case 136/79, *National Panasonic v. Commission* [1980] ECR 2057, the ECJ seemed to go a little further by stating that it ensures the observance of fundamental rights 'in accordance with' human rights treaties. See also AG Van Gerven in *Grogan*, *supra* note 22, p. 4722.

29. One could point to the second paragraph of Arts. 8-11 ECHR, which allow for restrictions, provided of course that certain criteria are met. Likewise, the right to liberty (Art. 5) is subject to a number of restrictions. And even the interpretation of the seemingly absolute prohibition of torture and inhuman or degrading treatment or punishment is influenced in practice by prevailing convictions: see e.g. European Court of Human

A more serious drawback of the ECJ's autonomous concept of fundamental rights seems to be the unpredictability of its interpretation. This is an obvious obstacle for the subjects of Community law who have a basic right to know what their rights actually are. One might add that since the ECJ's fundamental rights 'have virtually no legal certainty at all (...) it is hard to believe that they have any conditioning effect whatsoever on public authorities in the Community'.<sup>30</sup>

When we turn specifically to the interpretation of the ECHR, it will hardly come as a surprise to find that the ECJ considers itself by no means obliged to follow the case-law of the European Commission and Court of Human Rights. Advocate General Darmon summarized this position in the *Orkem* case.

(...) I must not fail to remind the Court that, according to its case-law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities. (...) The most authoritative commentators on the judgments of this Court also emphasise that the Court's position regarding the European Convention on Human Rights consists in most cases 'in using it merely as a reference' even though it 'goes as far as possible in that direction' and that, by doing so, it develops 'directly or indirectly its own case-law interpreting the Convention'.

This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.<sup>31</sup>

---

Rights, *Tyrer* judgment of 25 April 1975, Series A No. 26, pp. 15-16, § 31 and compare *Costello-Roberts* judgment of 25 March 1993, Series A No. 247-C, pp. 59-60, §§ 30-33 to the joint dissenting opinion of four of the nine judges, p. 64. See on the concept of *human* rights, as distinct from other entitlements: R. Dworkin, *Taking Rights Seriously* (1991), esp. pp. 184-205, and several publications of J. Donnelly, e.g. 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', in *American Political Science Review* vol. 76 (1982), pp. 303-316.

30. Ph. Allott in his Memorandum presented to the House of Lords Select Committee on the European Communities, *supra* note 4, p. 39. See already Mendelson, *supra* note 7, p. 164.

31. *Orkem*, *supra* note 14, at pp. 3337-3338. See for a similar position AG Trabucchi in *Watson & Belmann*, *supra* note 22, p. 1207, and A. Drzemczewski, 'The Domestic Application of the European Human Rights Convention as European Community Law', in *International and Comparative Law Quarterly* vol. 30 (1981), pp. 118-140, at p. 134. Note that the AG in *Orkem* is careful: an ECJ interpretation does not have to coincide 'exactly' with the Strasbourg case-law. What about a *radical* difference? Would there

The ECJ did not react to this specific submission of the Advocate General. In fact, it has never specified its position vis-à-vis the Strasbourg case-law. In the *Hoechst* case, when asked to rule on the scope of Article 8 ECHR, the ECJ first observed that no inference was to be drawn from the text of that provision and then continued: 'Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject'.<sup>32</sup> One could infer from this that the ECJ is prepared to take into account case-law from Strasbourg (another 'guideline'?), but no further elaboration is yet possible.

This situation is not without its dilemmas. If the ECJ interprets the contents of a fundamental right in a way different from the European Court of Human Rights, there is a real risk of the authority of either the Strasbourg or the Luxembourg Court being undermined. It would be rather painful for the Strasbourg Court if its case-law were ignored by the ECJ and the national legal practice in the EC Member States followed the Luxembourg Court. Conversely, the ECJ runs the risk of being criticized if it gives a restrictive interpretation of the ECHR, especially if the complaint is directed against a Community institution; and if it gives a more extensive ruling in response to a request for a preliminary ruling, it will force the national courts to apply a higher standard than that to which they are bound on the basis of their direct obligations under the ECHR.<sup>33</sup>

Should we take this problem seriously? The system of the ECHR presupposes that there are many (national) courts implicated in the protection of human rights; hence it is inevitable that there will be different interpretations of the rights and principles involved.<sup>34</sup> This is particularly true for the dualist States parties to the ECHR, which have not incorporated the Convention, as the national judiciary is not obliged (and formally speaking even unable) to apply the Convention as interpreted by the Commission and Court.<sup>35</sup> This is

---

be any legal objection?

32. See *Hoechst*, *supra* note 12, p. 2924; see for a similar remark *Orkem*, *supra* note 14, p. 3350. We will come back to *Hoechst*, and to the correctness of the ECJ's observation, in § 4.1.

33. Cf. R. Lecourt, *supra* note 5, p. 338.

34. Cf. the contribution of M. de Blois to this *Liber*, 'The Fundamental Freedom of the European Court of Human Rights', pp. 35-59.

35. One should however not exaggerate the consequences of dualism; see H. Danelius, 'The European Convention on Human Rights in the Case-law of the Supreme Court of Sweden', in this *Liber*, pp. 113-121. With respect to the UK, or at least England, see *Allgemeine Gold und Silberscheideanstalt v. Customs & Excise Commissioners* [1980] 2 W.L.R. 561. See also European Court of Human Rights, *Vermeire* judgment of 29 November 1991, Series A No. 214-C, pp. 82-83, § 25: 'It cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from

not necessarily a problem. The ECHR only defines minimum standards; national authorities are free to apply a higher level of protection. Moreover, the Convention - a 'living instrument which must be interpreted in the light of present day conditions' - may even be said to benefit from the dialectics between the courts involved in its application.<sup>36</sup> But having said that, at the end of the day it is Strasbourg which has the ultimate authority to give a binding interpretation of the provisions of the ECHR. If an applicant is not satisfied with the application of the ECHR by the national courts, he can exhaust local remedies and have his claim finally adjudicated by the European Commission and eventually the European Court of Human Rights.

The crucial difference with respect to the ECJ's human rights case-law is that this correction mechanism is missing. According to the current practice of the European Commission of Human Rights, a complaint against a decision of one of the Community institutions will be declared inadmissible *ratione personae* as the Community as such has not (yet) formally acceded to the ECHR.<sup>37</sup> Likewise, to date, all complaints against Community Member States implementing EC decisions (including judgments of the ECJ) which allegedly violated human rights, have been declared inadmissible.<sup>38</sup> Thus, if the ECJ

---

complying with the findings of the Marckx judgment'.

36. The quotation is taken from *Tyrer*, *supra* note 29, p. 15, § 31. See with specific reference to the ECJ's potential input, M.H. Mendelson, 'The Impact of European Community Law on the Implementation of the European Convention on Human Rights', in *Y.E.L.* vol. 3 (1983), pp. 99-126, at pp. 121-125. Indeed, it can be observed that the Strasbourg bodies refer relatively often to the ECJ's case-law; see e.g. European Court of Human Rights, *Marckx* judgment of 13 June 1979, Series A No. 31, p. 26, § 58, and the cases referred to in § 4.1 *infra*.
37. See, inter alia, Appl. No. 8030/77, *C.F.D.T. v. European Communities*, Dec. 10.7.1978, *D.R.* 13, p. 231; Appl. No. 13539/88, *Dufay v. European Communities*, Dec. 19.1.1989. See on the *C.F.D.T.* case: E.A. Alkema, 'The EC and the European Convention on Human Rights - Immunity and Impunity for the Community?', in *CML Rev.* vol. 16 (1979), pp. 498-508 and Mendelson, *supra* note 36, pp. 112-121.
38. See notably Appl. No. 13258/87, *M. & Co.*, Dec. 9.2.1990, *D.R.* 64, pp. 138-145. This unfortunate decision is the second paradoxical result of the ECJ's human rights case-law (cf. note 6 *supra*) as it fended off the scrutiny of the ECHR organs in the short term as well: the ECJ's human rights case-law was an important aspect in the decision of the European Commission of Human Rights to declare inadmissible *ratione materiae* complaints against Community Member States implementing EC decisions which allegedly violated human rights (see *M. & Co.* p. 145). See for a recent and general review of the Commission's case-law vis-à-vis the Community and its Member States: L. Weitzel, 'La Commission européenne des Droits de l'Homme et le Droit communautaire', in R. Ergec et al. (eds.), *Présence du Droit public et des Droits de l'Homme (Mélanges offerts à Jacques Velu)* (1992), pp. 1391-1406.

fails to live up to the minimum standards guaranteed in the ECHR, no remedy would be available. The Member States might face difficulties at domestic level and perhaps, if the European Commission of Human Rights were to change its position,<sup>39</sup> also with respect to their international obligations. However, as the law stands, the Community as such, despite its growing powers, enjoys an immunity which one would not expect in post-Berlin Wall Europe.

These observations support the view that it cannot be maintained that the Community as such is *bound* by the human rights provisions in national constitutions or by treaties like the ECHR, despite assertions to the contrary. In the 1970's, the EC Commission, while submitting its observations on cases before the ECJ, explicitly suggested that the ECHR was legally binding upon the Community.<sup>40</sup> The ECJ ignored the invitation to pronounce on the issue. In fact, if the concept of 'being bound' is to have any meaning, the arrogated freedom of the ECJ in combination with the lack of remedies<sup>41</sup> in Strasbourg plead against the assumption that the ECHR is binding upon the Community, despite the avowed willingness of its institutions to abide by its substantive provisions.

Does this mean that the ECHR is binding only if there is a possibility to raise a complaint in Strasbourg? Of course, a State can ratify the ECHR, and thus be bound by it, without accepting the competence of the Human Rights Commission to receive individual complaints.<sup>42</sup> So apparently, a State (or an international organization like the Community) can be bound by the ECHR although actual enforcement measures may be lacking. One should not overlook, however, the possibility of an inter-State complaint which is not depend-

---

39. See on this H.G. Schermers, 'The European Communities Bound by Fundamental Human Rights', in *CML Rev.* vol. 27 (1990), pp. 249-258, at pp. 257-258. The *M. & Co.* decision has been criticized by the President of the European Court of Human Rights(!): R. Ryssdal, 'On the Road to a European Constitutional Court', in *Collected Courses of the Academy of European Law* Vol. II Book 2 (1991), p. 12. See also the contribution of G. Cohen-Jonathan to this *Liber*, 'Les rapports entre la Convention européenne des Droits de l'Homme et les autres traités conclus par les Etats Parties', pp. 79-111.

40. See case 48/75, *Royer* [1976] ECR 506-507 and *Watson & Belmann*, *supra* note 22, p. 1194.

41. See on the importance of legal remedies also the Opinion of AG Van Gerven in case C-70/88, *European Parliament v. Council* [1990] ECR I-2061.

42. See Art. 25 ECHR. All parties to the ECHR have now accepted the individual right to complain and this can be considered as the *acquis* of the ECHR; but see on the Turkish 'declaration' under Art. 25: Appl. No. 15318/89, *Loizidou v. Turkey* (Commission Report adopted on 8 July 1993; the case is now pending before the Court, having been brought before it by Cyprus pursuant to Art. 48 (b) ECHR).

ent upon separate acceptance upon ratification (Article 24 ECHR). This complaint mechanism, although seldom used, might be seen as the specific expression of international responsibility for violations of international obligations.

*This brings us to the essence of the argument. The international obligation is lacking. Neither the Community nor its Member States have ever declared that they considered the Community bound to the ECHR. Hence, the 'consent to be bound', within the meaning of the Vienna Convention on the Law of Treaties, is lacking. Article F § 2 of the Treaty on European Union, which at first sight settles the human rights issue, is another unilateral declaration that the Union will respect 'fundamental' rights 'as general principles of Community law'.*

*The question has been raised whether it is still necessary to express the consent to be bound, as most States creating the Community were already bound by the ECHR. As Pescatore said, relying on the concept of state succession: 'On n'adhère pas à ce qui est déjà en vigueur'.<sup>43</sup> One counter-argument against this proposition is that it is apparently not shared by the ECJ, nor, as we have just seen, by the European Commission of Human Rights.<sup>44</sup> On a more theoretical level, it should be observed that his submission could only explain that the Community is bound to the human rights obligations which were in existence in the 1950's, when the Communities were created. The different legal regimes then applying to the Member States (in terms of reservations, acceptance of the right of individual complaint and jurisdiction of the Court; France had not yet ratified the Convention) would thus raise a problem. And what about the Protocols to the Convention which were adopted at a later date? Moreover, the position taken by Pescatore fails to answer the question whether the *interpretation* of the ECHR by the European Commission and Court of Human Rights is also binding on the Community. Yet, it is precisely*

- 
43. See P. Pescatore, 'La Cour de Justice des Communautés européennes et la Convention européenne des Droits de l'Homme', in Matscher & Petzold, *supra* note 5, pp. 441-455 at p. 441. See for similar arguments H.G. Schermers, *supra* note 39, at p. 251 and the comments on the Commission's accession proposal by the Dutch section of the International Commission of Jurists, NJCM, *NJCM-bulletin* vol. 16 (1991), pp. 697-735 at p. 700. Lenaerts submits that the Community is bound by the ECHR, but he does not indicate on which ground and he seems to have a rather broad understanding of this term as he explains his statement as follows: 'The Community is indeed no party to the ECHR, but considers itself bound by it inside its own legal order' (K. Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue', in *European Law Review (E.L.R.)* vol. 16 (1991), pp. 367-390 at p. 373, note 24; emphasis added).
44. Interestingly, Pescatore limits his submission to 'les dispositions matérielles de la Convention', without explaining why the procedural provisions are not included in the Community's heritage.

this - dynamic - case-law which has given the ECHR its distinctive impact and character.<sup>45</sup>

Could one say that the Community would be bound by the ECHR if both the ECJ and the European Commission of Human Rights were to adopt different attitudes, i.e. if the ECJ were to accept expressly the authority of the Strasbourg interpretations and the Human Rights Commission would in turn consider complaints brought against the Community? The Community could then be considered to be bound *de facto* by the ECHR and the problems mentioned in this paragraph would by and large disappear. However, even this, hypothetical, situation could be simply reversed by a new decision of one of the judicial bodies involved. Only accession to the ECHR would unequivocally resolve the issue.<sup>46</sup>

But the accession proposal has not yet been adopted, and the ECJ has never explicitly accepted the authority of Strasbourg interpretations. Against this background, it is worthwhile to recall the *ERT* judgment where the ECJ ruled:

(...) where [national] rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.<sup>47</sup>

Thus the situation may occur, and indeed does occur, that the ECJ is called upon to interpret a provision of the ECHR. The resulting judgment may be at variance with the Strasbourg case-law. Yet, the national court will be obliged to follow the ruling of the ECJ.<sup>48</sup>

45. Obviously, the interpretation of the Convention has evolved since the 1950s; see e.g. the *Marckx* case, *supra* note 36, pp. 19-20, § 41; *Tyrer* case, *supra* note 36, pp. 15-16, § 31 and *B. v. France* judgment of 25 March 1992, Series A No. 232-C, pp. 48-49, §§ 46-48.

46. Much has been written on the advantages and disadvantages of accession. See for two recent discussions: F.G. Jacobs, 'European Community law and the European Convention on Human Rights', in Curtin & Heukels, *supra* note 16, and J.P. Jacqu  , 'The Convention and the European Communities', in R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), pp. 889-907.

47. *ERT* judgment, *supra* note 15, p. 2964. I cannot resist emphasising the word 'derive'.

48. A preliminary ruling is binding on the national court hearing the case for which the decision is given; see Schermers & Waelbroeck, *supra* note 8, p. 439, referring to case 29/68, *Milchkontor v. Hauptzollamt Saarbr  cken* [1969] ECR 180. See also A.G. Toth, 'The Authority of Judgments of the ECJ: Binding Force and Legal Effects' in *Y.E.L.*

If we combine this observation and the conclusion of § 2, i.e. that the number of human rights cases brought before the ECJ has expanded and is likely to increase, it is obvious that we have a potential problem here. We will return to this in § 5. Let us first see whether it is realistic at all to speculate about diverging interpretations of the ECHR.

#### 4. Diverging Interpretations? Recent Case-law Examined

Comparisons between the ECJ's human rights case-law and the Strasbourg jurisprudence have been made before. Indeed, on several occasions it has been claimed that the Luxembourg interpretation of Convention provisions deviated from that in Strasbourg.

It was argued, for example, that the ECJ misinterpreted Article 7 ECHR in the case of several Spanish fishermen.<sup>49</sup> The House of Lords Select Committee on the European Communities, an unimpeachable authority in this respect, considered that the ECJ's ruling in *Musique Diffusion Française* was 'inconsistent with the jurisprudence of the European Commission and Court of Human Rights' in so far as it held that the EC Commission is not subject to Article 6 ECHR when acting in the field of competition law.<sup>50</sup> In the *Orkem* case, the ECJ rejected the claim that Article 6 ECHR includes the right not to give evidence against oneself, a position which recently appeared to conflict with the Strasbourg point of view.<sup>51</sup> Finally, in the well-known *Grogan* case, the Irish High Court requested a preliminary ruling on the question whether an injunction, prohibiting the dissemination of information about lawful abortion facilities abroad, would be compatible with Community law. Advocate General Van Gerven reviewed the question both under Community law *strictu sensu* and under Article 10 ECHR. He held that an injunction would not be in breach

---

vol. 4 (1984), pp. 1-79.

49. R.R. Churchill & N.G. Foster, 'Double Standards in Human Rights? The Treatment of Spanish Fishermen by the European Community', in *E.L.R.* vol. 12 (1987), pp. 430-443.
50. House of Lords, *supra* note 4, p. 33, referring to joined cases 100-103/80, *SA Musique Diffusion Française a.o. v. Commission* [1983] ECR 1880. See for an extensive discussion M.B.W. Biesheuvel, 'Artikel 6 ECRM en het gemeenschapsrecht', in *S.E.W.* vol. 11 (1988), pp. 659-705 and, recently, X.A. de Mello, 'Droit de la concurrence et droits de l'homme', in *RTDE* vol. 29 (1993), pp. 601-633.
51. Compare *Orkem*, *supra* note 14, at p. 3350, and European Court of Human Rights, *Funke* judgment of 25 February 1993, Series A No. 256-A, § 44. See D. Curtin, 'Constitutionalism in the European Community - The Right to Fair Procedures in Administrative Law', in O'Reilly, *supra* note 24, pp. 293-317.



of Article 10. The ECJ, however, avoided giving a substantive ruling.<sup>52</sup> Subsequently it appeared, in the case of *Open Door Counselling*, that the Advocate General's opinion not only contrasted with the conclusions of the Human Rights Commission (adopted before the Opinion) but also with the judgment of the Court (delivered after the ECJ judgment).<sup>53</sup> The issues at stake in the two cases were so similar that they cannot be distinguished from a normative point of view. Given the nature of the issues involved, it is perhaps hardly surprising that the Advocate General and Strasbourg arrived at different conclusions. Nevertheless, the Irish abortion cases provide another example of diverging interpretations of the Convention.

Even this brief review could lead to the conclusion that divergencies apparently occur. Even assuming that the ECJ is willing to follow the interpretation of the European Court of Human Rights, divergencies are possible when the ECJ is asked to rule on a provision of the ECHR of which no Strasbourg interpretation is available yet.

In 1987, the conclusion could still be drawn that 'really very little reliance has actually been made on the ECHR'.<sup>54</sup> However, as we have seen, the case-law of the ECJ has developed considerably over the last few years. It is therefore worthwhile periodically reviewing whether the coexistence of two European courts, each involved in the application (and necessarily the interpretation) of the ECHR, leads to any new complications. The following section will examine two situations in which more or less comparable cases came before the ECJ and the Convention organs. All cases related to the interpretation of Article 8 of the Convention, but they differed profoundly as to the substantive issues involved. In § 4.1 the right to privacy for companies in competition law procedures is at stake; in § 4.2 we shall focus on the right of a migrating Community national to have his name spelled correctly.

---

52. *Grogan*, *supra* note 22, at pp. 4727 (AG) and 4740 (ECJ).

53. Report of the European Commission of Human Rights, Appl. No. 14234/88 and 14235/88, adopted 7 March 1991; European Court of Human Rights, *Open Door and Dublin Well Woman* judgment of 29 October 1992, Series A No. 246-A. See for a more extensive review of the cases and the comments: R.A. Lawson, 'The Irish Abortion Cases: European Limits to National Sovereignty?', to appear in *European Journal of Health Law* vol. 1 (1994).

54. N. Foster, 'The European Court of Justice and the European Convention for the Protection of Human Rights', in *Human Rights Law Journal* vol. 8 (1987), pp. 245-272, at p. 270.

#### 4.1. Legal Persons and the Scope of the Right to Respect for Private Life

Regulation No. 17 of 1962<sup>55</sup> gives the EC Commission relatively wide powers in order to supervise compliance with the rules of competition law. For obvious reasons, the gathering of information is of crucial importance for the EC Commission in this context. Under Article 11 of Regulation No. 17, companies can be obliged to submit information at the Commission's request and, according to Article 14, the Commission can inspect the premises and the archives of companies. If the company does not cooperate, Article 14 § 6 even allows the Commission to carry out a search in cooperation with the national authorities. The following discussion will focus upon the ECJ's response to those companies which sought to rely on the right to respect for private life (Article 8 ECHR) as a means of limiting the Commission's power to conduct searches in the business premises.

At first sight, it may seem strange that companies try to invoke *human* rights. Nevertheless, legal persons have complained in Strasbourg comparatively frequently and often successfully.<sup>56</sup> Admittedly, some rights by definition do not apply to legal persons as they are directed specifically to the human being. The right to life is an obvious example. Likewise, it is not to be expected that two companies, wishing to merge, invoke the right to marry. However, there are other rights, such as the right to peaceful enjoyment of one's property, which are more suitable for application to legal persons. The better position therefore would seem to be that the applicability of a given right depends on the nature of the person and that of the right.<sup>57</sup> Moreover, in contemporary Western society, many human rights norms are developing into general stan-

---

55. *OJ*, Special English Edition 1959-1962, p. 87. See in general P.J. Kuyper & T.P.J.N. van Rijn, 'Procedural Guarantees and Investigating Methods in European Law, with Special Reference to Competition', in *Y.E.L.* vol. 2 (1982), pp. 1-55.

56. Art. 25 ECHR provides that 'any non-governmental organization' can petition the Commission. See for a famous example, among many others, European Court of Human Rights, *Sunday Times* judgment of 26 April 1979, Series A No. 30. In the *Open Door* case, Open Door Counselling Ltd. did not only complain (successfully) under Art. 10, but also under Art. 8 - see the Commission's Report annexed to the Court judgment, *supra* note 53, p. 54, § 40. The Commission observed that 'Open Door Counselling Ltd. itself had not made out a case that it had any private life which fell within the protection of Article 8 ECHR or with which there had been any interference' (p. 61, § 64). The complaint was not declared inadmissible *ratione materiae* but the Commission concluded that Art. 8 had not been violated in respect of the company. The possibility that Art. 8 applied was thus explicitly left open.

57. See already K. Vasak, *La Convention Européenne des Droits de l'Homme* (1964), p. 77.

dards of good governance. The right to a fair trial, as protected by Article 6 ECHR, is a case in point. These standards apply to any government action and the question whether the object of this action is a human being or a legal person acquires secondary importance. The question to be addressed is thus whether the right to privacy lends itself to application to companies.<sup>58</sup>

In 1979, the EC Commission inspected the premises of the United Kingdom subsidiary of *National Panasonic*. The inspection lasted some seven hours, and was, for a large part, carried out in the absence of the company's solicitor. Before the ECJ, Panasonic relied, inter alia, on the right to privacy as protected by Article 8 ECHR.<sup>59</sup> It submitted that this right imposes upon the Commission the duty to give advance notice of its intention to carry out an investigation. The Commission expressed some doubts as to whether the right to privacy also applied to legal persons. But even assuming that it did, the Commission found that it did not include a right to prior notice of an investigation. Any prior warning would of course risk jeopardising the effectiveness of the investigation. The Commission emphasised that the effects of the inspections were not as drastic and damaging as Panasonic had suggested, as 'inspectors decide nothing and draw no conclusions'.<sup>60</sup>

In his Opinion, Advocate General Warner recalled the early *Brescia* case in which, on his reading, the ECJ had 'clearly considered that the right to privacy extends to business premises, whether those of an individual or of a company'.<sup>61</sup> But he agreed with the Commission that a right to advance notice of an investigation could not be derived from Article 8 ECHR. He remarked

---

58. This question has been disputed in the past; compare H. Guradze, *Die Europäische Menschenrechtskonvention* (1968), p. 118 ('Träger des rechts kann nur eine natürliche Person sein') and J. Velu, 'The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications', in A.H. Robertson (ed.), *Privacy and Human Rights* (1973), pp. 12-128, at p. 19 ('This statement seems to me too categorical. (...) a building in which a trading company has its registered office, its management and its offices is considered its home'); repeated in J. Velu & R. Ergec, *La Convention Européenne des Droits de l'Homme* (1990), p. 532; J.A. Frowein & W. Peukert, *Europäische MenschenRechtsKonvention* (1985), p. 207 ('Dagegen können Betriebsräume, anders als im deutschen Verfassungsrecht, nicht zur Wohnung gezählt werden').

59. *National Panasonic*, *supra* note 28, at p. 2044.

60. *Ibidem*, at p. 2046.

61. *Ibidem*, p. 2068, referring to case 31/59, *Acciaieria e Tubificio di Brescia v. High Authority* [1960] ECR 80. In fact, the ECJ merely referred, almost in passing, to 'inspections, capable of affecting the area of individual liberty and of departing from the principle of the inviolability of private premises', without making any further comments.

that it was 'somewhat unusual' that the Commission was 'empowered to proceed without any sort of warrant from a judicial authority', whereas the laws of most Member States require officers of a public authority be in possession of a warrant before they enter private premises. He did not, however, draw any conclusions from this observation. In its judgment, the ECJ repeated its familiar *Nold* formula and held:

In this respect it is necessary to point out that Article 8 (2) of the European Convention, *in so far as it applies to legal persons*, whilst stating the principle that public authorities should not interfere with the exercise of the rights referred to in Article 8 (1), acknowledges that such interference is permissible to the extent to which it is 'in accordance with the law and is necessary in a democratic society for the economic well-being of the country (...)'.<sup>62</sup>

In this instance, as follows from the seventh and eighth recitals of the preamble to Regulation No. 17, the aim of the powers given to the Commission by Article 14 of that regulation is to enable it to carry out its duty under the EEC Treaty of ensuring that the rules on competition are applied in the common market. The function of these rules is (...) to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of the powers given to the Commission by Regulation No. 17 contributes to the maintenance of the system of competition intended by the Treaty which undertakings are absolutely bound to comply with. In these circumstances, it does *therefore* not appear that Regulation No. 17, by giving the Commission the powers to carry out investigations without previous notification, infringes the right invoked by the applicant.<sup>62</sup>

The ECJ thus left undecided whether a legal person could rely on the right to privacy. More importantly, it applied a very general and abstract test to determine if the Commission had respected this right. In fact, the ECJ merely argued that the interference with the (assumed) private life of Panasonic had a 'legitimate aim', as required by the ECHR. Whether the investigation had actually been 'necessary in a democratic society' was left unanswered. As a separate issue, the ECJ did entertain the complaint that the investigation had been disproportionate, but dismissed it on essentially the same ground as the complaint under Article 8 ECHR:

Considering that the contested decision *aimed* solely at enabling the Commission to collect the necessary information to appraise whether there was any infringement of the Treaty, it does not *therefore* appear that the Commission's action in this instance was

---

62. *Ibidem*, p. 2057, emphasis added.

disproportionate to the objective pursued and therefore violate the principle of proportionality.<sup>63</sup>

Again, the Court applied a very general and abstract test. Apparently, the way in which the search was actually executed was not a relevant factor in its assessment. A similar approach was followed in the *AKZO* case, a few years later. In that case, the applicant company relied on Article 8 ECHR, but limited its argument somewhat surprisingly to the position that this provision requires the Commission to comply with the requirements of Article 14 of Regulation No. 17 itself. The Court had no great difficulty in dealing with this rather superfluous claim: as it had already found that Regulation No. 17 itself had been complied with, the submission could easily be rejected.<sup>64</sup>

A more convincing claim under Article 8 ECHR was made in the *Hoechst* case. As the Commission suspected that agreements concerning the fixing of prices and delivery quotas for certain plastics were being executed, it decided to carry out an investigation into several undertakings in January 1987, including Hoechst. However, Hoechst refused to cooperate with the inspection which it considered unlawful given the lack of a warrant. As the company persisted in its refusal, the Commission imposed a fine of Ecu 1000 for each day of delay. The search was finally carried out in April 1987, after the *Bundeskartellamt* had obtained a search warrant from the local *Amtsgericht*.

Before the Court, Hoechst sought to rely on the right to inviolability of the home, as protected by Article 8 ECHR.<sup>65</sup> Hoechst submitted that for a search to be lawful, it was necessary that the Commission have a court order, issued by the ECJ and specifying the limits of the search in detail. The Commission expressed no doubts as to the scope of Article 8 and accepted 'that, in principle, it also applies to the business premises of legal persons, that any encroachment on that right by the public authorities must be provided for by law and that, in principle, searches can be made only on the basis of a court decision'. The Commission argued, however, that the court review could also take place *after* the investigation.<sup>66</sup>

---

63. *Ibidem*, p. 2060, emphasis added.

64. Case 5/85, *AKZO Chemie v. Commission* [1986] ECR 2612-2613. In his Opinion, AG Lenz came to the same conclusion. He added, apparently on its own motion, that 'Article 8 of the Convention does not require that the interference by a public authority with the exercise of that right should have been previously authorized by another, independent body' (*ibidem*, p. 2603).

65. *Hoechst*, *supra* note 12, at p. 2868.

66. *Ibidem*, p. 2870. The Commission had already accepted that Art. 8 can apply to legal persons in *AKZO*, *supra* note 64, at p. 2603.

Advocate General Mischo, after having reviewed Member State practice in relation to the protection of the home and the extent to which this right includes business premises, observed 'a general trend in the national legal systems towards the assimilation of business premises to a home' and he invited the Court to expressly accept that there is a fundamental right at Community level to the inviolability of business premises.<sup>67</sup> At the same time, he acknowledged that the protection afforded to business premises is not equal to that of a private dwelling; in the present case he did not find a violation. He expressed his support for the suggestion of Hoechst, that the Commission should avail itself of a 'European search warrant', to be issued by the ECJ prior to an investigation. He referred in this respect to the comparable procedure under Article 81 of the Euratom Treaty. In its judgment of September 1989, the ECJ held:

(...) it should be observed that, although the existence of [the fundamental right to the inviolability of the home] must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergencies between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.

No other inference is to be drawn from Article 8(1) of the European Convention on Human Rights which provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject.

However, the Court continued:

None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit it in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law.<sup>68</sup>

---

67. *Hoechst*, *supra* note 12, p. 2893.

68. *Ibidem*, p. 2924. The same consideration can be found in the related judgments in case 85/87, *Dow Benelux NV v. Commission* [1989] ECR 3157 and joined cases 97-99/87, *Dow Ibérica SA and Others v. Commission* [1989] ECR 3185-3186. The Commission distinguished the latter case as Dow 'had submitted to the investigation without the slightest objection' (p. 3176).

In the following considerations, the ECJ on the one hand stressed the 'very wide' powers of the Commission's officials, but on the other hand defined certain conditions to which investigations are subjected. One of the requirements is that the decision taken under Article 14(3) specifies the subject matter and purpose of the investigation to 'enable those undertakings to assess the scope of their duty to cooperate while at the same safeguarding the rights of the defence'. Other requirements depend on the attitude of the company and the procedure adopted by the Commission in response.

The question to be pursued here is of course: was the Court right in its interpretation of Article 8? The absolute exclusion of companies from the scope of protection of Article 8 could be considered as a departure from the existing case-law: *Panasonic* had left the matter open, but with some imagination the early *Brescia* case could be seen as extending the right to privacy to legal persons. For the purpose of the present review, however, it is not so much the consistency of the ECJ's own case-law, but its relationship with the jurisprudence of the Strasbourg organs which is of interest. Indeed, shortly after the *Hoechst* judgment, the ECJ was criticized for having overlooked the *Chappell* case, which had been decided by the European Court of Human Rights a few months earlier.<sup>69</sup>

In *Chappell*, a surprise investigation was carried out in the premises of a company, distributing video cassettes which had been made in breach of copyright. During the search, the authorities also entered the bedroom of the company's owner which happened to be located in the same building, and allegedly seized private correspondence. Before the Commission and Court of Human Rights, Mr Chappell complained of a violation of Article 8. In the proceedings, the UK government accepted that there had been an 'interference' with the exercise of the applicant's right to respect for his 'private life' and 'home'.

It has been submitted in the literature that the ECHR organs in this case extended the protection of Article 8 to legal persons.<sup>70</sup> That statement, however, appears to be too optimistic: although the search was directed against Mr Chappell's company, and the ECHR bodies also examined the search in so far as it affected the company, it was basically the applicant's own private life and home which formed the heart of the complaint.<sup>71</sup> The judgment nevertheless is relevant for our present discussion, as the Court explicitly held that it

69. European Court of Human Rights, *Chappell* judgment of 30 March 1989, Series A No. 152.

70. See I.G.F. Cath, 'Hebben ondernemingen recht op bescherming van de privésfeer? De zaken Hoechst en Chappell vergeleken' in *NJCM-bulletin* vol. 16 (1991), pp. 28-54.

71. This is especially clear from the Commission's Report, annexed to the Court's judgment, *supra* note 69, p. 29, § 96.

'entertains no doubt that the actual grant of the order [permitting the surprise investigation] was a necessary step in the effective pursuit by [two film companies and two copyright bureaus] of their copyright action'.<sup>72</sup> This finding confirms the ECJ's 1980 *Panasonic* judgment, discussed above, when it had refused to accept that the right to privacy includes a right to prior warning of an inspection. Finally, the *Chappell* judgment is important because the Court did not satisfy itself with an abstract review of the legal system relating to searches: it also examined whether the actual execution of the order was 'necessary in a democratic society' and, in particular, whether it was proportionate to the legitimate aim pursued. On the facts of the case, the Court found no violation of Article 8, although it expressed some hesitations.

Much stronger arguments that the ECJ had misinterpreted Article 8 in *Hoechst* were provided a few months later, when the Strasbourg Court delivered its *Niemietz* judgment. In this case the German authorities had instituted criminal procedures against a person who, under a false name, had written an insulting letter to a trial judge. Hoping to find indications of the author's identity in the law office of Mr Niemietz, the Public Prosecutor's Office requested and obtained a warrant to search his office. Both the Human Rights Commission and the Court were unanimous in finding a violation of Article 8. After having cited the ECJ's judgment in *Hoechst*, the Court held with respect to the applicability of Article 8:

(...) it would be too restrictive to limit the notion [of 'private life'] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. (...) There appears, furthermore, to be no reason or principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature (...) As regards the word 'home', appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany (...), it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word '*domicile*' has a broader connotation than the word 'home' and may extend, for example, to a professional person's office (...). More generally, to interpret the words 'private life' and 'home' as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities (...). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to 'interfere' to the extent permitted by paragraph 2 of Article 8; that entitlement might well be more far-reaching where

---

72. *Ibidem*, p. 25, § 59.



professional or business activities or premises were involved than would otherwise be the case.<sup>73</sup>

The Court did not say that legal persons *as such* have a right to privacy - a question which was not relevant to the case as the applicant was an individual. Nevertheless, the observation that Article 8 includes 'certain' professional or business activities or premises comes close to the *de facto* recognition of a right to privacy for legal entities.

When reviewing the execution of the search in Mr Niemietz' office, the Court held that the interference was not 'necessary in a democratic society', and was therefore in violation of Article 8. Both the warrant and the way in which the search was actually carried out were considered disproportionate for reasons which are highly relevant to the ECJ's case-law as well:

the warrant was drawn in broad terms, in that it ordered a search for and seizure of 'documents' without any limitation, revealing the identity of the author of the offensive letter; this point is of special significance where, as in Germany, the search of a lawyer's office is not accompanied by any special procedural safeguards, such as the presence of an independent observer. More importantly, having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that appears disproportionate in the circumstances; it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention. In addition, the attendant publicity must have been capable of affecting adversely the applicant's professional reputation, in the eyes both of his existing clients and of the public at large.

The easiest conclusion to be derived from the above is that the ECJ was plainly wrong in *Hoechst* when it concluded 'somewhat hastily'<sup>74</sup> that the protective scope of Article 8 'is concerned with the development of man's personal freedom and may not therefore be extended to business premises'. The Strasbourg Court explicitly cited, and implicitly criticized, these considerations in its *Niemietz* judgment.<sup>75</sup>

---

73. European Court of Human Rights, *Niemietz* judgment of 16 December 1992, Series A No. 251, pp. 33-34, §§ 29-31.

74. G. Cohen-Jonathan, 'Respect for Private and Family Life', in R.St.J. Macdonald, F. Matscher & H. Petzold, *supra* note 46, pp. 405-444, at p. 428. But see the annotation of M.R. Mok (*S.E.W.* vol. 38 (1990), pp. 381-397), stating that there is no reason to assume that the Strasbourg Court will extend the notion of 'home' to professional premises (at p. 396).

75. It will also be noted that in *Niemietz* the absence of legal steps against the lawyer,

To a large extent, however, this play on words is not the genuine issue. What really matters is the level of protection actually offered. After all, in *Hoechst* the ECJ declined to apply Article 8 to companies, but at the same time it was prepared to afford 'protection against arbitrary or disproportionate intervention' as a general principle of Community law. The question to be solved is thus, whether this general principle would satisfy the test of *Niemietz*. It is submitted that this is at least doubtful. In *Niemietz*, the Court found the search disproportionate as a result of three factors, at least two of which appear to be inherent in searches carried out by the EC Commission under Regulation No. 17:

- (1) *the warrant was drawn in broad terms, in that it ordered a search for and seizure of 'documents' without any limitation.* It appears that similarly broad investigation orders are used by the EC Commission. In the *Panasonic* case, the Commission decision only stated that 'a decision must be adopted requiring National Panasonic (UK) Ltd. to submit to an investigation and to produce the requisite business records'.<sup>76</sup> Apparently this was not an exceptionally drafted decision. In *Hoechst*, Advocate General Mischo observed that in general 'the terms of the decisions ordering the investigations contain no precise details as to the *specific* documents which the Commission's officials are to examine. Reference is made solely to "business documents related to the subject of the enquiry"'.<sup>77</sup> Common sense dictates that the authorities can hardly foresee exactly which documents will be found. Nevertheless, the very general terms used by the Commission do not seem to offer sufficient guarantees against 'fishing expeditions', and may therefore not pass the *Niemietz* test.
- (2) *the search was not accompanied by any special procedural safeguards, such as the presence of an independent observer.* The same is true for Community investigations. As we have seen, the inspection in *Panasonic* was even carried out to a large extent in the absence of the company's solicitor. If a company opposes a Commission visit, Article 14 § 6 of Regulation No. 17 provides that the Commission officials may nevertheless search for information 'with the assistance of the national authorities'.

---

following the search of his office, was not a factor in determining whether there was a violation of the Convention. 'The inspectors decide nothing and draw no conclusions', the EC Commission submitted in *Panasonic*, *supra* note 60, but from the perspective of Art. 8 that is not particularly relevant.

76. *Ibidem*, p. 2063.

77. *Hoechst*, *supra* note 12, p. 2878. In its judgment, the ECJ criticized the Commission's decision providing for the inspection; the Court held that the Commission is required to 'clearly indicate the presumed facts which it intends to investigate' (*ibidem* at p. 2930).

Whether 'an independent observer' will attend the search will vary from country to country, as it is for each Member State to determine the conditions under which assistance to the Commission's officials will be afforded.<sup>78</sup> I do not think, however, that, for example, the presence of two members of the *Bundeskartellamt* as in the *Hoechst* case (or a representative of the Dutch government, as in the *AKZO* case) would satisfy the requirements of the *Niemietz* case.

- (3) 'more importantly', the search impinged on professional secrecy to an extent that appeared disproportionate in the circumstances, taking into account that a lawyer was involved. These aspects were specific to the case and they might, generally speaking, not be present when an 'ordinary' company is searched. It should also be taken into account that the law office of Mr Niemietz was very small; one could imagine that the right to privacy can be restricted to an extent proportionate to the size of the company involved.

The relative weight of these three factors requires further clarification. But it may safely be assumed that the level of protection offered under Community law as interpreted by the ECJ in *Hoechst* is a danger of falling below the requirements of Article 8 ECHR. A fourth element not explicitly mentioned in *Niemietz* follows from the very way in which the Human Rights Court reviewed the case. It did not limit itself to examining the legal system of searches in general and the aims the search was intended to serve. As in *Chappell*, the Court reviewed the actual execution of the search as well. By contrast, to date, the ECJ has refrained from reviewing the conduct of the Commission's officials.

It could be argued that the *Hoechst* judgment, even if it was not entirely correct, may not have posed insurmountable difficulties for the company involved. However, its broader implications should not be overlooked. Quite apart from the interests involved in competition cases in general, this particular branch of law is one of the areas where the EC Commission enjoys relatively wide powers. This makes strict compliance with the ECHR standards all the more important.

*Niemietz*, it might be added, was not a slip of the pen. In February 1993, the Strasbourg Court adopted an identical position in three French cases.<sup>79</sup> In each of the cases the Court held:

---

78. *Ibidem*, p. 2928.

79. European Court of Human Rights, *Funke*, *Crémieux* and *Mialhe* judgments of 25 February 1993, Series A Nos. 256-A, 256-B and 256-C respectively.

Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognizes that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange control offences and, where appropriate, to prosecute those responsible. Nevertheless the relevant legislation and practice must afford adequate and effective safeguards against abuse (...).

This was not so in the instant case. At the material time (...) *the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of an requirement of a judicial warrant, the restrictions and conditions provided for in law (... appear too lax and full of loopholes for the interferences in the applicant's right to have been strictly proportionate to the legitimate aim pursued.* (emphasis added)

Thus it can be concluded that the submission of Hoechst, that Article 8 requires prior judicial permission to conduct a search, appears to find support in the new Strasbourg case-law.<sup>80</sup> The EC Commission in this respect is answerable to no one: like the French custom authorities, it does not have to show in advance that it has reasonable grounds for carrying out an inspection but rather enjoys exclusive competence in deciding when and where to act. As a system of 'European search warrants' has never been created, the question can be raised whether Community law in this respect offers adequate safeguards against arbitrary interferences, satisfying the ECHR requirements.<sup>81</sup>

Diverging interpretations? The ECJ's interpretation of Article 8 of the ECHR has proved to be incorrect on some points and doubtful on others. At the same time, it should be realised that the ECJ adopted these interpretations *before* the ECHR bodies gave their authoritative rulings. It is therefore not submitted that the ECJ deliberately tried to apply too low a level of human rights protection. It will of course be very interesting to see what the ECJ's reaction to the new Strasbourg case-law will be. The remark in *Hoechst* that there was no relevant

---

80. Likewise, the remark of Advocate General Lenz in *AKZO*, *supra* note 64, does not seem to be justified. The *Hoechst* judgment was criticized as 'neither very coherent nor very satisfying', especially on the point of prior judicial review of inspections, by I.S. Forrester & C. Norrall, 'Competition Law', in *Y.E.L.* vol. 9 (1989), pp. 271-314, at p. 303.

81. See, by way of analogy, on the importance of effective safeguards against arbitrary interference with privacy (*in casu* telephone tapping): European Court of Human Rights, *Klass* judgment of 6 September 1978, Series A No. 28, pp. 22-28, esp. § 56 and *Kruslin* judgment of 24 April 1990, Series A No. 176, pp. 22-25, §§ 30-36.

case-law of the European Court of Human Rights may indicate that the ECJ is prepared to follow the new jurisprudence. But it is equally possible that there will be a certain amount of pressure to water down some of the new Strasbourg principles in order not to risk to impair the effectiveness of the Commission's powers. After all, rights 'should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community'.<sup>82</sup>

Be that as it may, the observation, in 1982, that one 'may conclude without much hesitation that the rights of anyone affected by an anti-trust decision are adequately guaranteed at a procedural level'<sup>83</sup> is no longer justified.

#### 4.2. *The Right to a Name*

Christos Konstantinidis, or rather Χρήστος Κωνσταντινίδης, was a Greek national established in Germany. He was engaged in a rather Kafka-esque dispute with the German authorities: they decided to change his name.

When Mr Konstantinidis married a German national, his name was entered in the local marriage register as 'Konstadinidis', i.e. with a [d] instead of a [nt]. He applied to the registry office for the entry of his surname to be rectified. As German legislation demands that the name entered in the marriage register corresponds to the name on the birth certificate, the authorities decided to have his Greek birth certificate translated by a qualified translator. The outcome was not quite what Mr Konstantinidis had expected. The translator, applying a system for transliteration pursuant to a treaty to which both Germany and Greece are parties, decided that his name should be spelled as 'Hrēstos Kōnstantinidēs'. Subsequently, the competent authorities not merely refused the request of Mr Konstantinidis but determined instead that his entry should be brought in conformity with the newly obtained transliteration. Mr Konstantinidis objected strongly to these developments and applied to the local *Amtsgericht*. This court considered that his rights under Community law might be infringed if he were compelled to write his name in a distorted way and therefore decided to refer the matter for a preliminary ruling.

Advocate General Jacobs did not show great sympathy for the transliteration system that led in the case of Mr Konstantinidis to 'an insulting, unpronounceable parody of his name'.<sup>84</sup> Even if he had not actually suffered prejudice resulting from the obligatory transliteration - or deformation - of his name, 'the inconvenience and unpleasantness thus inflicted on him are sufficient to entitle him to invoke the prohibition laid down by the Treaty'. Quite apart from the

---

82. As the ECJ held in *Nold*, *supra* note 8, p. 508.

83. *Kuyper & Van Rijn*, *supra* note 55, p. 26.

84. *Konstantinidis*, *supra* note 24.

The European Court of Justice are conscientiously applying the Convention and the 'acquis' which flows from it. (...) there is no conflict between Community law and the European Convention. None of our witnesses was able to point convincingly to a single case where an individual had been denied justice in terms of the ECHR on complaining of a Community action. This evidence tended to confirm our assessment in 1980 that in the Community "the immediate practical gains of accession are likely to be limited" and that accession would not significantly benefit the individual.<sup>93</sup>

The present review does not support these observations. But, with respect, it could be asked whether the Select Committee answered the right question. Should we really wait until there is manifest confusion or a direct conflict between Strasbourg and Luxembourg? Would it not be preferable to settle the relationships between the two Courts, to create a system of judicial co-operation<sup>94</sup> on human rights issues, before they adopt overtly opposing views and prestige becomes a major barrier to any solution? The preceding pages have illustrated that at the very least the *possibility* of diverging interpretations is real.

As Schermers said: 'Every State, every nation, in Europe has its own standard of morality. In that sense, we do not have an integrated Europe, but we do have some common basis. There would be no Europe at all if there were not some common features, some basic standards, which are the same in all countries'.<sup>95</sup> These 'basic standards', enshrined in the Convention and interpreted by the European Commission and Court of Human Rights, should apply *a fortiori* to the Community - a Community which derives its very existence from the European countries sharing these standards.

---

93. House of Lords, *supra* note 4, p. 28.

94. See M.W. Janis, 'Fashioning a Mechanism for Judicial Cooperation on European Human Rights Law Among Europe's Regional Courts', in this *Liber*, pp. 211-217.

95. Address before the Court as delegate of the European Commission of Human Rights in the *Lingens* case, European Court of Human Rights Series B No. 86, p. 137.

more or less technical Community law aspects, the Advocate General maintains that the treatment of Mr Konstantinidis amounts to a violation of his fundamental rights, notably the right to respect for a given name. This should not be taken too lightly. 'To strip a person of his rightful name', Mr Jacobs submits, 'is the ultimate degradation'. He refers in this respect to several human rights instruments and the constitutions of some of the Member States which provide for an express recognition of the right to a name. With respect to the ECHR, the Advocate General expresses his surprise about the omission of a specific reference to the individual's right to his name and personal identity. He limits his position to the remark that 'it ought to be possible, by means of a broad interpretation of Article 8 ECHR, to arrive at the view that the Convention does indeed protect the individual's right to oppose unjustified interference with his name'.

The judgment of the ECJ was drafted in a less emotive style. The ECJ held that Community law is violated

if the law of the State of establishment obliges a Greek national to use for professional purposes a spelling of his name resulting from transliteration in the registers of civil status if that spelling is such that the pronunciation of the name is misrepresented and such distortion exposes him to a risk of confusion of identity on the part of his potential clients.<sup>85</sup>

It will be noted that the Court does not examine the substantive result of a particular transcription system. Rather, the 'risk of confusion of identity on the part of potential clients' determines whether Community law has been violated. The judgment is remarkably terse. Whereas in cases like *Cinéthèque*, *Demirel* and *Grogan* the ECJ at least expressly refused to deal substantively with the human rights aspects of the case, it ignored this dimension completely in the *Konstantinidis* case.

How would the European Commission and Court of Human Rights have reacted had the case been submitted to them? Was the position of the Advocate General with respect to Article 8 ECHR correct? The provision does not refer expressly to the right of individuals to respect for their name. Yet, as was illustrated in § 4.1, the supervisory organs of the ECHR have often been prepared to extend the scope of this provision. In fact, Article 8 was invoked in a series of cases raised by transsexuals.<sup>86</sup> The applicants had undergone gender change treatment but were denied legal recognition of their new sexual

85. Judgment of 30 March 1993, *ibidem*, § 16.

86. European Court of Human Rights, *Rees* judgment of 17 October 1986, Series A No. 106; *Cossey* judgment of 27 September 1990, Series A No. 184; and *B. v. France*, *supra* note 45.

identity; it proved, inter alia, impossible to have their name adapted to their new appearance. When they brought a complaint before the Strasbourg organs, neither the Commission nor the Court doubted that Article 8 was applicable to these cases. In *B. v. France*, the Court held that 'the refusal [of the French authorities] to allow the applicant the change of forename requested by her was a relevant factor from the point of view of Article 8' and that the inconveniences suffered by B. in her everyday life 'reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8'. On the basis of the facts of the case the Court considered Article 8 to be violated.<sup>87</sup>

In a recent series of cases, the European Commission of Human Rights was directly confronted with the question of the extent to which the ECHR protects the right to respect for a name. For a variety of reasons, individuals had been trying to have their name changed. Having been unable to persuade their national authorities to allow them to do so, they applied to the Commission claiming a violation of Article 8. After some unsuccessful initial attempts,<sup>88</sup> two recent cases met with more success. In *Burghartz and Schnyder Burghartz v. Switzerland*, the Commission explicitly held that 'the right for private life as enshrined in Article 8 § 1 ECHR ensures a sphere within which everyone can freely pursue the development and fulfilment of the personality. The right to develop and fulfil one's personality necessarily comprises the right to identity and, therefore, to a name'.<sup>89</sup> The Commission observed that in many countries stability in the use of surnames is considered important and agreed that the right to change such names is restricted, but at the same time accepted 'that there could be exceptional cases where the carrying of a particular name creates such suffering or practical difficulties that the right under Article 8 is affected'.<sup>90</sup>

It should be noted that all these cases concern individuals who themselves wanted a change of name. In contrast, in *Konstantinidis* it was the authorities

---

87. *B. v. France*, *ibidem*, pp. 52-54, §§ 58-63.

88. Appl. No. 8042/77, *Hagmann-Husler v. Switzerland*, Dec. 15-12-1977, *D.R.* 12, p. 202 and Appl. No. 16878/90, *Boij v. Sweden*, Dec. 29-6-1992, not yet reported in *D.R.*

89. European Commission of Human Rights, Appl. No. 16213/90, *S. Burghartz and A. Schnyder Burghartz v. Switzerland*, Report adopted on 21-10-1992 (i.e. before AG Jacobs delivered his Opinion in the *Konstantinidis* case), § 47; the case is now pending before the Court. The analysis was supported by 18 votes to 1 and was confirmed by the Commission in Appl. No. 18131/91, *Sjterna v. Finland*, Report adopted on 8-7-1993.

90. *Sjterna v. Finland*, *ibidem*, §§ 63-64. As to the merits of the case, a majority of the Commission (12 votes to 9) found no violation of Article 8. The Commission emphasized that *as a general rule* a right to change one's surname is not protected by Article 8 ECHR; cf. Appl. No. 18806/91, *B. v. the Netherlands*, dec. of 1-9-1993.



who decided to impose a new transcription on an existing name - a most obvious interference with the individual's rights under Article 8. Moreover, in testing whether this interference could be justified under the ECHR, the Convention organs would not follow the predominantly economic approach of the European Court of Justice. They would of course examine the extent to which daily inconveniences occur, but they would not narrow the scope of the issue by requiring the applicant to prove any specific injury in the exercise of his profession. One can thus safely assume that Mr Konstantinidis would have had a very strong case in Strasbourg.

Diverging interpretations? The remarks of the Advocate General with respect to Article 8 ECHR were certainly not wrong but appear to be over-careful; the latest developments of the Strasbourg case-law were not referred to. Nor did the Court misinterpret Article 8 - it simply did not apply this provision at all. It can be concluded that by emphasising the economic aspects of the case, the ECJ did not afford as high a level of protection to Mr Konstantinidis' rights as the Convention organs would do.

## 5. Concluding Remarks: Confusion and Conflict?

In *Watson & Belmann*, the UK government defended the position that the ECJ should not review national measures for their compliance with human rights standards. It submitted the following observation:

*Any exercise of overlapping jurisdiction by the institutions established by the Convention and by the Court of Justice of the European Communities could give rise to confusion and conflict.* The generalized and somewhat imprecise language of the Convention and of the exceptions to which most of the rights set out in Section I thereof are subject can give rise to questions of construction which fall within the ultimate jurisdiction of the institutions created by the Convention. Similarly, it is for those institutions alone to make a ruling on a national measure which is contrary to the Convention but compatible with Community law.<sup>91</sup>

The intervention of the UK government proved, in the long run, unsuccessful. But this does not necessarily imply that the fear expressed by the UK was ill-founded. On the contrary: 'confusion and conflict' may not as yet have occurred, but this review of the ECJ's human rights case-law has confirmed existing evidence that there are inconsistencies with the Strasbourg jurisprudence - inconsistencies which can occur of course just as easily when the ECJ

---

91. See *Watson & Belmann*, *supra* note 22, p. 1191; emphasis added.

reviews national measures as when Community acts are under review. Of course, it cannot be maintained that the ECJ has deliberately interpreted the Convention in a diverging sense. The *Hoechst/Niemietz* comparison shows, however, that divergencies can easily occur when the ECJ interprets the Convention before the Strasbourg bodies have given their opinion.

The *Konstantinidis* case may be rather exotic, but it is important in three ways. First, it shows that it is difficult for Luxembourg to keep fully up-to-date with the ever expanding Strasbourg case-law. Second, it illustrates the variety of cases now submitted to the ECJ. The Court of Justice is expected to protect human rights; the Court's repeated remark that 'it cannot accept measures which are incompatible with fundamental rights'<sup>92</sup> is apparently taken seriously. But, and this is the third observation, the ECJ does not, or cannot, always live up to these high expectations. It has, as one might expect, a clear tendency to approach cases from a common market point of view. The ECJ is only prepared to investigate human rights complaints if, and to the extent that, they have a sufficiently strong link with (economic) activities falling 'within the scope of Community law'. As a consequence, the ECJ refused to entertain allegations of human rights violations in *Cinéthèque*, *Demirel* and *Grogan*, or ignored them, as in *Konstantinidis*.

These cases have another common element: the human rights complaints were directed against national measures. This means that there was still a remedy left. The complainants could exhaust local remedies and bring their case before the European Commission of Human Rights. Any misinterpretation by the domestic courts, possibly as a result of a preliminary ruling of the ECJ, could then be corrected.

This solution does not exist, however, where an action is brought against one of the Community institutions. In these circumstances, diverging interpretations present a more serious problem. The cases referred to in § 4.1 illustrate this. The impossibility of submitting, for example, the *Hoechst* case to Strasbourg resulted in a claim under the Convention being rejected on grounds which a few years later appear to be wrong.

In 1992, the House of Lords Select Committee on the European Communities demonstrated that it did not share the position expressed by the UK government in *Watson & Bellmann*. While re-examining the protection of human rights in the Community legal order and discussing the advantages and disadvantages of Community accession to the ECHR, the Select Committee observed that

---

92. See e.g. *Nold*, *supra* note 8, p. 507 *Wachauf*, *supra* note 17, p. 2639 and *ERT*, *supra* note 15, p. 2964.