

Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?

by

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Abstract

Is there, in the context of the recent developments related to the Lisbon Treaty, a need for substantial change with respect to the scope and application of legal professional privilege (LPP) and the privilege against self-incrimination (PASI) in competition law proceedings before the European Commission? To answer this question this article first briefly describes the current scope of LPP and PASI in EU competition law enforcement proceedings. This is followed by a presentation

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of the impact that the binding effect of the Charter of Fundamental Rights of the European Union (Charter) and the EU's prospective accession to the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) may have on LPP and PASI. This analysis includes reasons why it may be necessary for the Commission and the EU Courts to reconsider the current scope of the privileges, and examines what could be considered as significant changes in this respect. In the event arguments for radical reform do not find the requisite political support, the article elaborates some nuanced improvements which could be implemented.

Résumé

Dans le contexte des changements récents liés au traité de Lisbonne, est-il nécessaire de procéder à des modifications substantielles par rapport au champ d'application du principe de confidentialité des communications entre avocats et clients (LPP) et du droit de ne pas contribuer à sa propre incrimination (PASI) dans les procédures de concurrence menées par la Commission européenne ? Pour répondre à cette question, le présent article donne d'abord une définition sommaire du champ actuel d'application du principe de confidentialité des communications entre avocats et clients et du droit de ne pas contribuer à sa propre incrimination lors d'une procédure communautaire de concurrence. On présente ensuite l'impact possible que peuvent avoir sur les principes LPP et PASI le caractère juridiquement obligatoire de la Charte des droits fondamentaux de l'Union européenne ainsi que l'adhésion prochaine de l'Union européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. L'analyse tient compte des causes pour lesquelles il peut se montrer nécessaire que la Commission et les juges communautaires révisent le champ actuel d'application des principes susmentionnés et qu'ils étudient ce qui pourrait être considéré comme une modification substantielle en la matière. Dans une situation où les arguments à l'appui d'un changement radical quant à l'approche de ces principes ne trouveraient pas le soutien politique nécessaire, l'article propose certaines « améliorations » susceptibles de mise en œuvre.

Classifications and key words: undertaking's rights of defence; legal professional privilege; privilege against self-incrimination; fundamental rights in EU competition proceedings.

I. Introduction

The entry into force on December 1, 2009 of the Lisbon Treaty¹ made the Charter of Fundamental Rights of the European Union² (hereafter, the Charter) legally binding in accordance with Article 6(1) of the Treaty on European

¹ OJ [2007] C 306/50/1.

² OJ [2010] C 83/02.

Union³ (hereafter, TEU). Article 6(2) TEU also opened up the possibility for the European Union's prospective accession to the Convention for the Protection of Human Rights and Fundamental Freedoms⁴ (hereafter, the Convention). This paper attempts to answer the question whether these developments justify a substantial change in the approach of the European Commission and EU Courts to the rights of defence of undertakings charged with violations of EU competition law, particularly their rights to claim legal professional privilege (hereafter, LPP) and the privilege against self-incrimination (hereafter, PASI).

Enforcement of the EU competition rules, as established in Articles 101 and 102 of the Treaty on the Functioning of the European Union⁵ (hereafter, TFEU), and in particular the effective enforcement of the provisions of EU competition law prohibiting cartels, requires that enforcement organs be equipped with extensive investigative powers⁶. However these wide investigative powers, as established in Regulation 1/2003⁷, are limited by the fundamental rights of the undertakings charged with violations, which now stem from the Charter and previously formed part of the general principles of EU law⁸. One category of such fundamental rights are an undertaking's rights of defence which derive from Article 6 of the Convention (right to a fair trial, also expressly recognised as a general principle of EU law⁹), as well as from Article 48(2) of the Charter. These rights of defence include LPP and PASI¹⁰, which play an especially important role in the investigative phase of the Commission's enforcement proceedings and must be respected already at the preliminary inquiry stage¹¹.

³ OJ [2010] C 83/01.

⁴ Moreover, the EU's accession is foreseen by Article 59 of the Convention, as amended by Protocol no. 14. The latter was recently ratified by all Contracting States (including Russia). On July 7, 2010 official talks started on the EU's accession to the Convention – see press release-545(2010), available at <http://www.coe.int/>.

⁵ OJ [2010] C83/47.

⁶ See, e.g., C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th ed., London 2005, paras. 3.005–3.070.

⁷ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

⁸ W.J.P. Wils, 'EU Anti-trust Enforcement and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter on Fundamental Rights of the EU and the European Convention on Human Right' (2011) 34(2) *World Competition* 207; see also cases e.g., 29/69 *Erich Stauder v City of Ulm*, ECR [1969] 419, para. 7; C-4/73 *Nold*, ECR [1974] 491, para. 13 and C-7/98 *Krombach*, ECR [2000] I-1935, paras. 25–26.

⁹ See, e.g., case C-185/95 P *Baustahlgewebe*, ECR [1998] I-8417, paras. 20–21.

¹⁰ See, e.g., K. Dekeyser, C. Gauer, 'The New Enforcement System For Articles 81 And 82 And The Rights Of Defence', [in:] B.E. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute*, New York 2005, pp. 550–552.

¹¹ Joined cases 46/87 and 227/88 *Hoechst*, ECR [1989] 02859.

II. Current scope of LPP and PASI

In short, LPP amounts to a rule that the Commission cannot exercise its powers to take by force, or compel the production of, lawyer-client communications which: (1) are made for the purpose and in the interest of the undertaking's rights of defence, (2) were exchanged in relation to the subject-matter of the Commission's proceedings under Article 101 or 102 TFEU, (3) emanate from a qualified lawyer (being a member of a Bar or Law Society) who is entitled to practise his or her profession in one of the EU Member States, regardless of the country in which the client operates, and (4) emanate from an external, independent lawyer (not bound to his or her client by a relationship of employment)¹². If these conditions are met the communication remains confidential and the Commission has no access to it. However, under existing rules, in-house lawyers are explicitly excluded from claiming LPP, irrespective of whether they are members of a Bar or Law Society or whether they are subject to professional discipline and Codes of Ethics under national law.

The scope of PASI was defined by the European Court of Justice (hereafter, ECJ) in *Orkem*¹³. The ECJ denied the existence of an absolute right to remain silent; however, it held that Article 6 of the Convention may be invoked by undertakings investigated by the Commission and ruled that an undertaking cannot be compelled by the Commission to admit involvement in an infringement

¹² For the exact scope of the 'EU version of LPP' and the relevant procedures that apply during dawn raids (including 'the sealed envelope procedure') see cases: 155/79 *AM&S*, ECR [1982] 1575, paras. 21–28; T-30/89 *Hilti*, ECR [1990] II-163, paras. 13–16 and 18; T-125/03 and T-253/03 *Akzo and Akcros*, [2007] ECR II-03523, paras. 80–86, 120–123; C-550/07 P *Akzo and Akcros* (not yet reported), paras. 40–50. See also: Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ [2011] C 308/06, paras. 51–58; E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance', [in:] B.E.Hawk (ed.) *Annual Proceedings...*, pp. 587–658; G. Di Federico, 'Case C-550/07P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, Judgement of the European Court of Justice (Grand Chamber) of 14 September 2010' (2011) 48(2) *Common Market Law Review* 581–602. As regards discussion on LPP in Poland see: B. Turno, 'Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji', [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, Warszawa 2006, pp. 172–189; B. Turno, 'Ciąg dalszy sporu o zakres zasady legal professional privilege – glosa do wyroku SPI z 17.09.2007 r. w połączonych sprawach: T-125/03 oraz T-253/03 *Akzo Nobel Chemicals Ltd i Akcros Chemicals Ltd przeciwko Komisji WE*' (2008) 6 *Europejski Przegląd Sądowy* 43–47; B. Turno, 'Prawnik prawnikowi nierówny?' *Rzeczpospolita* of 24 November 2010; M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, pp. 229–235.

¹³ 374/87 *Orkem*, ECR [1989] 3283.

of EU competition rules, as it is incumbent on the Commission to prove that. Nevertheless, the Commission 'is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and if necessary such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or against another undertaking, the existence of anticompetitive conduct'¹⁴. The *Orkem* principle, encompassing not an absolute right to remain silent but a 'restricted' right not to incriminate oneself, has been upheld and subsequently developed by the ECJ¹⁵ and by the General Court of the EU (hereafter, GC)¹⁶. The present state of PASI is summed up in recital 23 of Regulation 1/2003¹⁷.

III. The approach of EU institutions to criticism of the current scope of LPP and PASI (prior to Lisbon Treaty)

For the last few years, the Commission and the EU Courts have been facing mounting criticism regarding the alleged lack of compliance, in the institutional and procedural framework in which fines are imposed, with the Convention and the standards set forth by the European Court of Human Rights (ECtHR)¹⁸. In response, EU institutions have consistently claimed that, regardless of one's

¹⁴ 374/87 *Orkem*, paras. 26-41. See also W.P.J. Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition* 574-578; B. Turno, 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości' (2009) 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny* 31-48; M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 187-191.

¹⁵ Cases: 27/88 *Solvay&Cie*, ECR [1989] 3355, paras. 23-37; C-60/92 *Otto BV v Postbank NV*, ECR [1993] I-05683, paras. 11-12; C-301/04P *SGL Carbon*, ECR [2006] I-5915, paras. 42-49.

¹⁶ Cases: T-34/93 *Société Générale*, ECR [1993] II-545, para. 74; T-305/94 *Limburgse Vinyl Maatschappij*, ECR [1999] II-931, para. 448; T-112/98 *Mannesmannröhren-Werke*, ECR [2001] II-729, paras. 65-67, 77-78; T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, ECR [2004] II-1181, para. 403.

¹⁷ Although the *Orkem* principle seems to be straightforward, its practical application is always extremely problematic - F. Arbault, E. Sakkers, 'Cartels', [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, 2nd ed., 2007, pp. 865-866.

¹⁸ See, e.g., D. Slater, S. Tomas, D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2009) 5(1) *European Competition Journal* 97-143; I.S. Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures' (2009) 34(6) *European Law Review* 817-843; J. Schwarze, R. Bechtold, W. Bosch, 'Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change' September 2008, available at <http://www.gleisslutz.com/en/publications/byyear.html?year=2008&offset=1>; A. Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' CEPS Special Report/January 2010, available at <http://www.ceps.eu>.

views on the development of EU competition law over the last 30 years and the developments in the substantial and largely consistent ECtHR case-law¹⁹, the protection of an undertakings' rights of defence, including the scope of LPP and PASI within EU competition proceedings (which according to EU institutions are administrative in nature, not criminal²⁰), is in compliance with these standards²¹. Thus, so far they have denied that there is a need for any modifications. Moreover, both the Commission and the EU Courts have expressed fears that if a broader scope were granted to these two rights, the Commission's powers of investigation would be jeopardised, making antitrust enforcement at the EU level inefficient²². In addition, the ECtHR in *Bosphorus*²³ concluded that the EU system of protection can be considered

¹⁹ See, e.g., cases: *Engel*, App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 82 and *Öztürk*, App. no. 8544/79, para 53, which established an autonomous meaning of criminal charges; *Niemitz*, App. no. 13710/88, para 29 and *Société Colas Est*, App. no. 37971/97, paras. 40–41, which held that the Convention is applicable not only to natural persons but also to undertakings; *S v Switzerland*, App. no. 12629/87, para. 48, *Campbell*, App. no. 13590/88, para. 46 and *AB v The Netherlands*, App. no. 37328/97, paras. 53, 55, 86, *Nikula v Finland*, App. no. 31611/96, para. 45, in which the ECtHR favoured an extensive scope of protection as regards lawyer-client communications; *Funke*, App. no. 10828/84, paras. 41–44 and *Saunders*, App. no. 43/1994/490/572, paras. 68–69, 71, 74, which allow for an almost absolute (unrestricted) right to remain silent.

²⁰ This issue is central to the dispute between the Commission and undertakings and their counsels. The latter characterise the Commission's competition proceedings as having a criminal law character leading directly to the imposition of criminal sanctions (within the autonomous meaning for the purpose of application of the Convention) – see M. Król-Bogomilska, 'Kary pieniężne w polskim prawie antymonopolowym na tle europejskiego prawa wspólnotowego' (1998) 7 *Państwo i Prawo* 50–53; K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, pp. 98–114; M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 51–59.

²¹ See, e.g., cases: C-301/04 P *SGL Carbon*; T-99/04 *AC-Treuhand* ECR [2008] II-1501, para 113. See also N. Kroes, 'Antitrust and State Aid Control – The Lessons Learned', SPEECH/09/408, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en>, pp. 2–5.

²² See, e.g., cases T-305/94 *Limburgse Vinyl Maatschappij*, para. 274; T-112/98 *Mannesmannröhren-Werke*, para. 78, in which the GC held that 'the Convention is not part of the Community law'; T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, T-252/01 *Tokai Carbon*, para. 406. Analysis of these decisions gave rise to arguments that the lack of clarity as to whether EU courts consider themselves bound by ECtHR interpretations is one of the major drawbacks of the status of the Convention in EU law (at that time). It is argued that EU Courts are inconsistent and their application of the Convention and ECtHR case-law has differed: sometimes the test applied regarding the rights of defence is that established by the ECtHR, other times a more specific EU standard is used – O.J. Einarsson, 'EC Competition Law and the Right to a Fair Trial', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook of European Law*, OUP 2006, pp. 558–559; J. Callewaert, 'The European Convention on Human Rights and European Union: a long way to harmony' (2009) 6 *European Human Rights Law Review* 775.

²³ App. no. 45036/98, paras. 159, 165.

equivalent to that provided for in the Convention²⁴. In *Jussila*²⁵ the ECtHR held that ‘there are clearly criminal charges of different weight’, and that competition law does not belong to ‘traditional categories of criminal law’ but falls outside ‘the hard core of criminal law’. Consequently, it is claimed that ‘criminal-law guarantees will not necessarily apply with their full stringency’ in relation to the protection of rights of defence in the course of the Commission’s competition law enforcement proceedings²⁶. Finally, although the ECtHR has recently confirmed that competition law could be considered penal and subject to the protections afforded by Article 6 of the Convention (with the proviso however that the application of protections may be different than in hard core criminal procedures), it also held that a sufficiently extensive review by an independent court of an administrative competition enforcement system – such as that in operation at EU level – may satisfy the requirements of Article 6 of the Convention²⁷.

IV. Impact of the Charter and the EU’s prospective accession to the Convention on the level of protection with respect to LPP and PASI

Having in mind the above mentioned arguments and case-law, note that the Charter has recently become legally binding in its entirety, and its status has been raised to equal to the Treaties. Also, as a result of the EU’s prospective accession to the Convention, ECtHR case-law will soon become directly applicable by the EU institutions and the Convention will also become part of EU law (and not just part of the general principles of EU law as is now considered)²⁸. Therefore it becomes debatable whether, in this new post-Lisbon legal order, the Commission’s enforcement procedures, and in particular

²⁴ However, it was rightly pointed out that ‘equivalent protection’ to the ECtHR means ‘protection comparable to that which the Convention provides, but not necessarily identical protection’ – J.P. Costa, ‘The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice’, Lecture at KCL, 7th October 2008, available at http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf, p. 6.

²⁵ App. no. 73053/01, paras. 30, 43. See also *Kammerer v Austria* App. no. 32435/06, para. 27.

²⁶ W.P.J. Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 33(1) *World Competition* 5–29; F. Castillo de la Torre, ‘Evidence, Proof and Judicial Review in Cartel Cases’ (2009) 32(4) *World Competition* 567–578, but contra, see A. Riley, ‘The Modernisation...’, pp. 11–16.

²⁷ *Menarini v. Italy*, App. no. 43509/08, see also: M. Bernatt, ‘Prawo do rzetelnego...’, p. 61.

²⁸ See J.P. Costa, ‘The Relationship...’, p. 4.

its approach towards LPP and PASI, comply with the fundamental rights enshrined in Article 48(2) of the Charter and in Article 6 of the Convention.

Nonetheless, comments can be found that nothing has actually changed²⁹ and that the ‘fines that are imposed by the Commission are no more criminal than they were in 1969 when a fine on the first cartel was imposed’³⁰. Moreover, since 2002 Article 6(2) of the TEU³¹ has declared that the Union shall respect the fundamental rights guaranteed by the Convention. Furthermore, although the Charter – prior to the Lisbon Treaty – was not a legally binding instrument, the EU legislature did acknowledge its significance. Its influential role in and impact on both legislation and case-law should not be underestimated inasmuch as it was considered as more than of a purely symbolic value³². As a result, there are a number of legislative acts that refer to the Charter³³ (for instance recital 37 of Regulation 1/2003). Therefore it is claimed that there is nothing new at present which requires substantial improvements with respect to the level of protection of the LPP and the PASI. Moreover, the expectation that the new status of the Charter and the EU’s prospective accession to the Convention will resolve any existing problems with regard to LPP’s and PASI’s compliance with ECtHR standards is rather in the nature of a ‘conventional wisdom’.

In contrast, other commentators point out the changes law-makers and the courts are faced with in light of the entry into force of the Lisbon Treaty. It is argued that many issues now have a different dimension as fundamental rights – for the first time “codified” in EU law – gain a new strength *vis-à-vis* incompatible secondary EU law. Although it is true that before the Lisbon Treaty one could see a correspondence between Community law and the Charter, the Charter had a mere declaratory value from an enforcement perspective. Under the current legal order the Charter has the full status of primary law³⁴ and is legally binding (i.e. of mandatory force) not only on

²⁹ W.P.J. Wils, ‘EU Anti-trust Enforcement...’, p. 202.

³⁰ W.P.J. Wils, ‘The Increased Level...’, p. 18.

³¹ Treaty on the European Union (consolidated text), OJ [2002] C 325/5.

³² See case C-540/03 *Parliament v Council*, ECR [2006] I-5769, para. 38. On the other hand, the GC in cases: T-219/02 and T-337/02 *Lutz Herrera*, ECR [2004] II-1407, para. 88 and T-256/01 *Pyres*, ECR [2005] II-25, para. 66, stressed that the Charter, prior to Lisbon Treaty, was deprived of legal binding force.

³³ R.C.A. White, ‘The Strasburg Perspective and its Effect on the Court of Justice: Is mutual Respect Enough?’, p. 148 and J. Dutheil de la Rochere, ‘The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration’, pp. 157–168, both [in:] A. Arnall, P. Eeckhout, T. Tridimas (eds.), *Continuity and Change in EU Law*, OUP 2008.

³⁴ M. Jaeger (the president of the GC) – from a speech during the conference ‘EU Litigation 2010’ held in Brussels on March 5, 2010 – L. Crofts, ‘EU court’s Jaeger predicts tussle over fundamental rights, leniency policy under new EU treaty’, *MLex*, 5th March 2010, available at <http://www.mlex.com>.

EU institutions, bodies and agencies, but also on Member States when they implement (i.e. transpose, apply, or enforce) EU law (except with respect to those countries which have 'opted out')³⁵. Member States now have to fulfil all the obligations arising from fundamental rights under EU law³⁶. This means that the Charter may be invoked to demand the annulment of acts of EU institutions as well as those of Member States which are deemed to violate fundamental rights³⁷.

Inasmuch as the EU's prospective accession to the Convention entails a further step forward in the protection of fundamental rights³⁸ and the Charter is now set on a par with other EU law, 'this may open up the path to 'revisiting established case law' or 'revisiting old concepts under the new statutes of the Charter. . . the new status of the Charter truly demands a change of perspective'³⁹ also with respect to the relationship between the Convention and the EU, as the Charter goes considerably further than Article 6(2) TEU by referring explicitly to the substantive provisions of the Convention⁴⁰. According to Article 52(3) of the Charter, as regards those rights elaborated in the Charter which correspond to rights guaranteed by the Convention, the meaning and scope of said rights shall be the same as those laid down by the Convention and ECtHR case-law. Moreover, under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general public interest recognised by the EU, or the need to protect the rights and freedoms of others⁴¹.

³⁵ However, it is claimed that Protocol No. 30 to the EU Treaties on the application of the Charter to the UK, Poland and the Czech Republic is an interpretative protocol rather than opt-out, and should not lead to a different application of the Charter in those Member States than in the remaining Member States – W.P.J. Wils, 'EU Anti-trust Enforcement...', p. 209.

³⁶ A. Egger, 'EU-Fundamental Rights in the National Legal order: The Obligations of Member States Revisited', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook of European Law*, OUP 2006, pp. 547–550.

³⁷ L.S. Rossi, 'How fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 78.

³⁸ This results from the obligation of observance, at the EU level, of at least the same standards of protection of fundamental rights as those secured by the Convention – L.S. Rossi, 'How fundamental...', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 78.

³⁹ L. Crofts, 'EU court's Jaeger...'

⁴⁰ J.P. Costa, 'The Relationship...', p. 4.

⁴¹ It is being claimed that effective enforcement of Articles 101 and 102 TFEU constitutes an objective of general interest recognized by the EU. Thus it justifies the limitations on the exercise of the rights and freedoms enshrined in the Charter – W.P.J. Wils, 'EU Anti-trust Enforcement...', p. 202. On the other hand, it is also argued that as regards the conflict between

In addition, although the scope of fundamental rights will remain unchanged, the Charter reduces the discretionary power of the ECJ in deciding what rights are fundamental and raises the level of protection for all fundamental rights by defining the Convention as a minimum standard⁴². Thus, the ECJ ‘may choose to adopt a higher level of protection than the minimum established by the ECtHR in Strasbourg’⁴³. Importantly, inasmuch as EU law is free to offer more extensive protection, ‘it’s very likely that this higher level of protection continues to be adopted in many areas’ and ‘it may be natural that a consensus on a higher level of protection may be more easily reached in Luxembourg than in Strasbourg’⁴⁴. Therefore it is believed that the Charter, having far-reaching consequences for existing rules and in current standards of protection of due process rights, can provide ‘the way forward to the establishment of a new ‘due process’ clause applicable to competition proceedings’⁴⁵. It is submitted that this new due process rule could result in the re-examination or reformulation of the current rules on LPP and PASI, and may call for significant modifications. Finally, it is suggested that the entry into force of the Lisbon Treaty will ensure consistency between EU concepts of LPP and PASI and the Convention standards (mirrored in the Charter), while also contributing to a change in the ECJ’s adamant restrictive stance with respect to the scope of LPP and PASI⁴⁶.

The prospective accession of the EU to the Convention, while reinforcing its status, will also place the EU under the scrutiny of the ECtHR, which is acknowledged as an indication of the EU’s genuine commitment to the protection of fundamental rights within its territory⁴⁷. As a result, all of the Commission’s and National Competition Authorities’ (hereinafter NCA) actions based on EU law, in the context of individual proceedings or cooperation within the European Competition Network⁴⁸, will become amenable to review by the

efficiency and justice in the enforcement system – the former is desirable, the latter is vital – J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the right to a Fair Hearing’ (2010) 7(1) *The Competition Law Review* 67. Moreover, the ECJ in case C-32/95P *Commission v Lisrestal*, ECR [1996] I-5373, paras. 35–37, held that administrative or practical efficiency cannot justify the infringement of a fundamental principle such as the observance of the rights of defence.

⁴² L.S. Rossi, ‘How fundamental...’, p. 78.

⁴³ L. Crofts, ‘EU court’s Jaeger...’.

⁴⁴ L. Crofts, ‘EU court’s Jaeger...’. See also J. Callewaert, ‘The European Convention...’, p. 777 and J.P. Costa, ‘The Relationship...’, p. 4.

⁴⁵ A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, UK/ Northampton, MA, USA, 2008, pp. 227.

⁴⁶ A. Andreangeli, *EU Competition...*, pp. 226–231.

⁴⁷ R.C.A. White, ‘The Strasbourg Perspective...’, pp. 152–153.

⁴⁸ It is rightly observed that regardless of the EU’s accession to the Convention, full compliance with its Article 6 in the course of competition proceedings is required both at national – Polish – level (as the Convention is since year 1993 directly applicable in Poland) and at the

ECtHR against the standards set out in the Convention⁴⁹. It is believed that the ECtHR will ensure the application of the administrative due process rules enshrined in Article 6 of the Convention. Thus, the existing conflicts within the case-law should cease to be of significance, as those undertakings subject to the Commission's enforcement proceedings which consider the standards of protection of fundamental rights to be lower than the Convention's minimum will have an opportunity to bring their case before the ECtHR⁵⁰.

Currently, the lack of external supervision of the EU's interpretation of fundamental rights enshrined in the Convention – which in many instances is narrower than that accepted in certain Member States⁵¹ – creates difficulties for the uniform application and supremacy of EU law, thus reducing protection for undertakings⁵². It is rightly noted that if the protection granted by the ECJ to fundamental rights does not follow that which the Member States have individually undertaken in their commitments under the Convention, then EU-mandated action will be in conflict with Member States' obligations. This may push national judiciary bodies to decide 'that EU law must be 'disapplied' to the extent that compliance with these human rights obligations is required'⁵³. Additionally, in order to comply with EU law obligations Member States may be forced to ignore the obligations imposed by the Convention⁵⁴. As a consequence, if the EU does not replicate the level of protection of fundamental rights that is enshrined in the Convention (e.g. as regards LPP and PASI), a Member State will inevitably come into conflict with its EU obligations when giving effect to Convention standards⁵⁵.

Finally, the binding effect of the Charter and the EU's prospective accession to the Convention requires the EU Courts, Commission, and Member States to acknowledge that obligations related to fundamental rights are not only

European level (according to the EU jurisprudence) – B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, pp. 982–990, 1064–1065, 1084–1088; M. Bernatt, *Sprawiedliwość proceduralna...*, p. 332.

⁴⁹ A. Andreangeli, *EU Competition Enforcement...*, p. 229.

⁵⁰ O.J. Einarsson, 'EC Competition Law...', p. 566.

⁵¹ Such is the case in the UK regarding LPP and PASI as, in comparison to EU law, English law provides for a different technical definition of LPP and for a broader scope of LPP and PASI – see E. O'Neill, E. Sanders, *UK Competition Procedure. The Modernised Regime*, consultant eds. A.Howard & M.Bloom, OUP 2007), pp. 202–212 and 304–305.

⁵² I.de Jesús Butler, O.de Schutter, 'Binding the EU to International Human Rights Law', [in:] P. Eeckhout, T. Tridimas (eds.), *Yearbook...*, p. 279.

⁵³ In this context it is noteworthy to mention case C-402/05 P and C-415/05 P *Kadi*, ECR [2008] I-6351, paras. 301-308, in which the ECJ admitted that there is a possibility that obligations stemming from the UN Charter cannot take precedence over primary law, but might take precedence over secondary legislation.

⁵⁴ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', pp. 287–288.

⁵⁵ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', p. 292.

negative, but also positive in nature. In other words, both EU institutions and Member States (when implementing or applying EU law) will not only have the duty to refrain from violating fundamental rights, but also their actions will need to promote respect for such rights. The positive nature of fundamental rights requires the EU and Member States to take affirmative and effective actions to protect, facilitate, and promote the standards enshrined in the Charter and in the Convention, by, e.g., inserting relevant safeguards into legislation to prevent the risk of violation of fundamental rights. Such actions and acknowledgments would certainly have the consequence of promoting a greater level of protection of fundamental rights in the EU legal order⁵⁶.

V. Proposals for significant changes regarding LPP and PASI – full compliance with ECtHR standards

Having in mind the current deficiencies, i.e. with regard to failure to respect as well failure to protect and promote LPP and PASI at the EU level, as well as the impact that the binding status of the Charter and EU's accession to the Convention may have on the Commission's practice and ECJ's case-law, one can argue that the existing guaranties that undertakings enjoy with respect to LPP and PASI need to be further developed and extended. This view is supported by the suggestion that in the new post-Lisbon legal order relating to protection of fundamental rights, the ECJ should generally follow the ECtHR. It is being said that what is considered a good law in Strasbourg should be taken into account in Luxembourg, especially in the light of the ECtHR's requirement that the EU protects human rights in a manner equivalent to the ECtHR (see *Bosphorus*)⁵⁷. As a result of the irresistible pressure stemming from the above-mentioned developments and requirements, a radical reform of LPP and PASI may be necessary. These proposals for major changes are aimed at bringing the 'EU versions' of LPP and PASI fully in line with ECtHR standards, as the pervasive influence of the latter creates a 'leeway for evolution'. Moreover, it is rightly noted that there is no reason to believe that even if the scope of LPP and PASI is set, it need remain cast in stone forever. Account must be taken of the evolutionary nature of the rights in question, inherent in the EU legal system⁵⁸. It should be also noted that the Commission rules recently adopted with respect

⁵⁶ I. de Jesús Butler, O. De Schutter, 'Binding the EU...', pp. 280–281, 293–294, 296–197, 313–314, 319; A. Egger, 'EU-Fundamental Rights...', pp. 532–533.

⁵⁷ A. Egger, 'EU-Fundamental Rights...', pp. 533 and 552.

⁵⁸ B. Vesterdorf, 'Legal Professional Privilege and The Privilege Against Self-incrimination in EC Law: Recent Developments and Current Issues', [in:] B.E. Hawk (ed.), *Annual Proceedings...*, p. 709.

to hearing officer⁵⁹ do not bring EU rules on LPP and PASI in line with ECtHR standards, as they are neither novel nor profound in their importance. They largely confirm the existing practice and do not bring about any radical change.

With respect to LPP, full compliance with the Convention and ECtHR standards would mean the establishment of an extensive and more generous degree of protection of the confidentiality of lawyer-client communications, as seems to be favoured by ECtHR case law⁶⁰. The major or significant changes would involve, first, expanding the scope of the 'EU version of LPP' at least to include in-house lawyers who, while being members of the Bar or the Law Society and being bound by the ethical obligations (the same as external lawyers), are employed by the undertakings⁶¹. Another significant change would be to expand LPP to include communications prepared, exchanged, or originated within competition law compliance programmes. Thirdly, LPP could be granted to lawyers who are members of the Bar in countries outside the EU (e.g. in the US), since the limitation of the 'EU version of LPP' only to EU lawyers is widely viewed as 'overtly discriminatory'⁶². Thus, communications with in-house lawyers, communications related not only to exercising rights of defence but also for the purpose of compliance programmes, and communications with non-EU lawyers would be covered by the protective scope of LPP⁶³.

However there is a strong opposition, particularly to the first proposal for reform, arising from the existence of conflicting policy objectives, namely the effectiveness of the Commission's powers of investigation vs. undertakings' fundamental right to consult with a lawyer of their choice⁶⁴. The argument against expanding the scope of LPP to in-house counsel is that such a lawyer 'does not

⁵⁹ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ [2011] L 275/29.

⁶⁰ See A. Andreangeli, *EU Competition Enforcement...*, pp. 115–120 and cited case-law.

⁶¹ See A. Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back' (2005) 2(1) *Competition Law Review* 48, 53–54. Even far-reaching proposals regarding the personal scope of LPP are expressed. Some suggest that the EU should accept the 'functional, utilitarian approach', according to which the criterion of membership in the Bar is not decisive for the scope of LPP. Thus all in-house lawyers, irrespective of their membership in the Bar, should be covered by the LPP rule – A. Andreangeli, *EU Competition Enforcement...*, pp. 103–109.

⁶² R. Whish, *Competition Law*, 6th ed., OUP 2009, p. 268.

⁶³ Note that all these changes can be achieved by modifying the Commission's approach to the LPP (in order to bring it in line with ECtHR standards). Otherwise it is very probable that cases related to the scope of LPP will be re-submitted to the EU Courts every two or three years.

⁶⁴ The Commission's opposition to such proposal is at odds with cases: T-610/97 *Carlsen*, ECR [1998] II-00485 and T-92/98 *Interporc*, ECR [1999] II-3521 in which the GC held that the Commission's own in-house legal advice should be protected – P. Boylan, 'Privilege and in-house lawyers' (2007) *Competition Law Insight*, 23rd October 2007, p. 16.

enjoy the same degree of independence from his employer, as a lawyer working in an external law firm does in relation to his client', and is often required to follow work-related instructions issued by his employer. Thus an in-house lawyer cannot deal so effectively with a potential conflict of interest between his professional ethical obligations and the aims and wishes of his employer, on whom the lawyer is financially dependent. Moreover, even if the ethical rules and the provisions of national law do contain safeguards for the independence of in-house counsel, these provisions are not necessarily effective in practice⁶⁵. However, there are counter-arguments to these objections. First, there is no reason for the presumption that the guarantees of independence provided by Member State laws for in-house lawyers do not work in practice. Second, the degree of independence of an in-house lawyer *vis-à-vis* his employer and the independence of an external lawyer working for the employer as his client, or the client of his law firm, is very similar. Both lawyers are dependent economically on the undertaking. It could even be claimed that, where the relationship is with a key client of the firm, the external lawyer is even less independent than the in-house lawyer in relation to his employer. Even if an in-house lawyer followed suggestions by his or her employer, what would really matter are the facts included in the opinion and not necessarily the suggested conclusion, which is to be drawn from the facts by the Commission. It is true that facts can be manipulated, however in the long-term perspective it is not in the interest of an in-house lawyer to manipulate the facts, as such behaviour violates ethical obligations and can subject the lawyer to severe fines or disciplinary procedures by the Bar or Law Society. Lawyers are generally conformists. Thus, instead of following an employer's suggestions, it is much more likely they would prefer to stay on the safe side and indicate all the legal risks associated with an undertaking's behaviour. Thus, arguments related to lack of independence of in-house counsel seem tenuous. Finally, fears that cartel-related documents will be hidden under the LPP label at the premises of an in-house lawyer are ill-founded⁶⁶, as the Commission has enough legal instruments (*e.g.*, financial sanctions under Article 23 of Regulation 1/2003, or referral of disputed documents to the GC or Hearing Officer) to prevent or penalise such 'obstruction of justice'. In light of the foregoing, a less formalistic

⁶⁵ See cases: 155/79 *AM&S*, paras. 21-24 and 27; T-125/03 and T-253/03 *Akzo and Akros*, paras. 166-168; C-550/07 P *Akzo and Akros*, and AG Kokott's opinion of April 29, 2010 delivered in case C-550/07P *Akzo and Akros*, paras. 55-74. As a result of such a narrow approach to LPP, the GC (citing case C-550/07P) has recently dismissed a case on grounds of inadmissibility due to the fact that two Polish legal advisors (members of the Bar) representing the Polish Telecom Authority before the Court were in an employment relationship with this authority thus they were not independent – GC's order of 23 May 2011, case T-226/10 *Prezes UKE v Commission*, available at <http://curia.europa.eu/>.

⁶⁶ See also: J.-F. Bellis, 'Legal professional privilege: An overview of EU and national case law' (2011) No. 39467 *e-Competitions*.

and more flexible case-by-case approach to the question of the independence of an in-house lawyer is recommended.

The second proposal for radical reform is based on the increasing importance and usage of competition law compliance programmes and the Commission's support for such efforts⁶⁷. Given the fact that compliance programmes are not always general in nature and are sometimes connected with a current or future exercise of rights of defence, there is a reason to believe that the Commission should extend LPP to cover communications originating from, or exchanged in relation with, such programmes.

The third proposal for significant change stems from the fact that in the age of globalisation there is no reason for the Commission to assume that a lawyer's independence in countries such as the USA, Canada, Australia or Japan is substantially lower than in the EU. The extension of LPP to include non-EU lawyers could be achieved by bilateral or multilateral agreements between the Commission and the relevant states. Additionally, it should be kept in mind that the Commission does not operate in vacuum. If it refuses to grant the EU version of LPP to documents exchanged with, for example, a US lawyer, especially where such documents would be privileged in the US under US law, then the surrender of the documents may result in loss of the privilege in the US⁶⁸. Moreover, if competition agencies can coordinate their enforcement actions with those of other jurisdictions, why should companies not be allowed to coordinate their defence actions by seeking legal opinions from lawyers from various non-EU jurisdictions? It is rightly pointed out that 'defence rights can no longer be viewed through an entirely Eurocentric lens'⁶⁹. Furthermore, during dawn raids the Commission in practice usually takes a pragmatic view and equates non-EU external lawyers with EU lawyers⁷⁰. This proposal should also be seen in the context of the growing importance of legal advice given by non-EU patent lawyers, who play an important role in patent settlements which are currently under the Commission's scrutiny.

⁶⁷ Commission brochure 'Compliance Matters' issued on 23 November 2011, available at http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf. Also some Member States support in-house corporate programmes designed to detect breaches of competition law. For instance, France in its recently issued settlements guidelines rewards compliance programmes stating that these programmes might mitigate the fine – see L. Crofts, 'New settlement guidelines to reward compliance programmes, says France's Lasserre' *MLex*, 10th February 2012, available at <http://www.mlex.com>.

⁶⁸ J.S. Venit, 'Modernization and Enforcement – The Need for Convergence: On Procedure and Substance', [in:] C.D. Ehlermann, I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford/Portland, Oregon 2006, p. 338.

⁶⁹ J. Joshua, 'It's a privilege. Managing legal privilege in multijurisdictional antitrust investigations' (2007) *Competition Law Insight*, 11th December 2007, p. 16.

⁷⁰ J. Joshua, 'It's a privilege...', p. 14.

With respect to PASI, the most significant step toward assuring consistency between the ECtHR and ECJ would undoubtedly involve abandonment of the *Orkem* principle, and expansion of PASI's scope to the extent of a right to remain silent⁷¹. The latter is generally recognised as an international standard which lies at the heart of the notion of fair procedure under Article 6 of the Convention, and which applies to all types of criminal offences, without distinction, from the most simple to the most complex⁷². It should be noted however that even under the Convention the right to remain silent, as observed in *Saunders*, is not absolute or unlimited. An individual can be compelled to hand over documents if they are requested under a court warrant⁷³. A right to remain silent during the course of the Commission's enforcement proceedings is justified by the fact that the "distinction between 'factual questions' and 'admissions'" of wrongdoing is illusory⁷⁴. Moreover, there may be situations in which an employed individual may, as a result of the undertaking's compelled testimony (e.g., under Article 20(2e) of Regulation 1/2003) be exposed (irrespective of Article 12 of the Regulation) to criminal sanctions in another jurisdiction⁷⁵. On the other hand, there are reasonable fears that in the highly complex, globalised commercial environment an expanded right to remain silent might leave society defenceless in cases of corporate fraud,⁷⁶ including violations of EU competition law. Therefore, to prevent such risks there are proposals to grant the Commission broader investigative powers, e.g., wiretapping or other sophisticated electronic surveillance against the suspect undertaking (the proposed expansion of the scope of LPP could be also accompanied by these modifications). These powers, however, should be subject to an ECJ warrant. High fines and effective leniency programmes can also contribute to overcoming the fears associated with expansion

⁷¹ See, e.g., A. Andreangeli, *EU Competition Enforcement...*, pp. 146–151; A.D. MacCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) *Legal Studies* 232–237; G. Hogan, 'The use of compelled evidence in European competition law cases', in B.E. Hawk (ed.), *Annual proceedings...*, pp. 669–673, who indicates that 'cases such as *Saunders* suggest that the drafters of Regulation 1/2003 will have to think again'.

⁷² *Saunders*, App. no. 43/1994/490/572, paras. 68, 75.

⁷³ I. Aslam, M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5(1) *The Competition Law Review* 70; A. Riley, 'Saunders and the power to obtain information in Community and United Kingdom competition law' (2000) 25(3) *European Law Review* 272–281.

⁷⁴ A.D. MacCulloch, 'The Privilege against...' , p. 237.

⁷⁵ J.S. Venit, T. Louko, 'The Commission's New Power to Question and Its Implications on Human Rights', [in:] B.E. Hawk (ed.), *Annual Proceedings...*, pp. 679–683.

⁷⁶ See dissenting opinion of Judge N. Valticos, joined by Judge F. Gölcüklü, in *Saunders*, App. no. 43/1994/490/572; P. Davies, 'Self-Incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing', [in:] B. Markesinis (ed.), *The Impact of the Human Rights Bill on the English Law*, Oxford/Clarendon 1998, p. 34.

of the right to remain silent⁷⁷. Furthermore, a ‘middle ground’ approach with respect to PASI is also available, as the more expansive case-law of the ECtHR (*vis-à-vis* the right to remain silent) could to be applied only to cases involving ‘an undertaking consisting of an unincorporated business’, whereas the EU version of limited, not absolute, PASI would continue to apply in cases regarding legal undertakings⁷⁸. This more expansive PASI would seldom be applied in Commission proceedings anyhow, as its enforcement proceedings mainly concern large, corporate entities. However, it may apply more often with respect to NCA’s proceedings in the course of which Articles 101 or 102 TFEU are applied simultaneously with the relevant provisions of national competition law.

VI. Proposals for minor improvements to LPP and PASI

The ECtHR’s judgments in *Bosphorus*, *Jussila* and more recently in *Menarini* may suggest that proposals for major, significant changes might not be adopted by the Commission in near future. Therefore, one should also consider a more nuanced approach and minor improvements to LPP and PASI.

First, EU rules regarding waiver of both privileges should be clarified and developed. It is clear that PASI is waived in the case of leniency applications⁷⁹. However, providing a statement to the Commission would rather not be deemed a waiver of the privilege under the 5th Amendment, in the US⁸⁰. It is less clear whether LPP is waived as well. It may be argued whether legal opinions should be submitted to the Commission at all within the leniency process, as they do not constitute direct evidence of anticompetitive behaviour⁸¹. Answering this question may be crucial, as disclosure of documents covered by LPP to the Commission may also result in a waiver of any LPP in the US⁸².

⁷⁷ A. Riley, ‘Saunders...’, pp. 278–281.

⁷⁸ W.P.J. Wils, ‘Self-incrimination...’, p. 577. For criticism of this proposal, see A. Andreangeli, *EU Competition Enforcement...*, pp. 145–149.

⁷⁹ F. Arbault, E. Sakkers, ‘Cartels’, [in:] J. Faull, A. Nikpay (eds.), *The EC Law of Competition*, pp. 835–836.

⁸⁰ J.J. Curtis, D.S. Savrin, B.L. Bigelow, ‘Collateral Consequences of Expanded European Antitrust Investigative Authority For Defendants in U.S. Proceedings’, [in:] B.E. Hawk (ed.), *Annual Proceedings...*, p. 537.

⁸¹ In the US, amnesty applicants are not required to provide the DOJ with legal opinions covered by LPP – S.D. Hammond, ‘Recent Developments Relating to the Antitrust Division’s Corporate Leniency Program’, speech at the 23rd Annual National Institute on White Collar Crime, San Francisco, CA (5th March 2009), available at <http://www.justice.gov/atr/public/speeches/244840.pdf>, p. 5.

⁸² J.J. Curtis, D.S. Savrin, B.L. Bigelow, ‘Collateral Consequences...’, p. 539.

Second, with respect to LPP, it is worth clarifying issues related to the obstruction of justice and the document retention policy in the EU. An important question is: does the EU version of LPP shield lawyer-client communications which involve the destruction of documents being in a client's possession? In the US the 'crime-fraud' exemption applies in such a case, which nullifies the LPP because the lawyer (even if non US-based) and the client engaged in illegal conduct. As a result, LPP is waived⁸³.

Third, in the context of the global activity of many undertakings and the growing internationalisation of competition law, the EU version of LPP should also cover communications exchanged in relation to the subject matter of NCAs' or other competition agencies' (e.g., US Department of Justice) proceedings. Facts assessed in a memorandum may be subject to multiple investigations in many jurisdictions. Therefore, it is not clear why these facts, if assessed (e.g. by mistake) only under UK competition law (and not also under Article 101 or 102 TFEU), would not be covered by the EU version of LPP, as they might in theory lead to the instigation of proceedings by the Commission.

Fourth, it is worth considering whether Regulation 1/2003 should not be amended to indicate that, when carrying out an investigation simultaneously under Article 101 or 102 TFEU and under their national equivalent, the NCAs should follow the EU rules regarding LPP and PASI. As a result of such harmonisation the equal protection of these rights, both at EU and national levels, could be achieved. This proposal has arisen as some NCAs, e.g., Polish Competition Authority, may seem to misunderstand the notion of procedural autonomy⁸⁴ and invoke it to refuse to apply EU rules on LPP and PASI, claiming that these privileges are 'not implemented' in their territories⁸⁵. As a result, the level of LPP and PASI protection substantially differs according to the particular investigating NCA. Note that there is no dispute about an NCA's legal obligation to follow the EU rules regarding the rights of defence in cases involving the application of EU law⁸⁶.

Finally, as the appeal in the *Akzo and Akcros* case⁸⁷ was dismissed, it may be time to stop calling the EU legal privilege 'LPP' as it is not LPP according

⁸³ J.J. Curtis, D.S. Savrin, B.L. Bigelow, 'Collateral Consequences...', pp. 544–545.

⁸⁴ On the right understanding of the notion of procedural autonomy see: P. Craig, G. de Búrca, *EU Law. Text, cases and materials*, 4th ed., OUP 2008, p. 307.

⁸⁵ *Prawo konkurencji. Podstawowe pojęcia*, Warszawa 2007, p. 15. However, it is noteworthy that the Court of Competition and Consumer Protection by order of April 4, 2007 (case XVII Amo 8/06) sent the sealed envelope containing legally privileged documents (seized during inspection) back to the undertaking thus denying the authority's right to include these documents into the case file.

⁸⁶ See, e.g. W.P.J. Wils, 'Powers of Investigation and Procedural Rights and Guaranties' (2006) 29(1) *World Competition* 22–23.

⁸⁷ C-550/07 P.

to the classic English formulation. Thus, LPP should be rebranded in order to avoid confusion. Providing for a new terminology, e.g., ‘independent EU-qualified lawyer-client privilege’, will contribute to an increased awareness and better understanding of the scope of the EU version of LPP⁸⁸.

VII. Conclusions

Fundamental rights in competition law, including defence rights, which limit the Commission’s powers of investigation have always been shaped ‘by a complex and intricate set of mutual influences’⁸⁹. In the post-Lisbon legal order this process may be even more complex. This article demonstrates that the legally binding effect of the Charter, as well as the EU’s prospective accession to the Convention, will inevitably add to the complexity of this process. As a result of these developments, the Commission and ECJ should re-consider their current approach to LPP and PASI. Significant changes regarding the scope of the privileges may seem to be necessary in order to put the current practice in line with ECtHR standards. This means that in-house lawyers who belong to the Bar or the Law Society should not be denied LPP protection, and in the course of the Commission’s enforcement proceedings undertakings should enjoy a right to remain silent. In order to balance the conflict between effective competition enforcement and the protection of fundamental rights, these alternatives could be accompanied by granting the Commission wider powers of investigation. Moreover, if proposals for radical reforms are not welcomed, there are also possibilities to improve defence rights in relation to LPP and PASI by making lesser changes within the existing framework.

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⁸⁸ G. Murphy, ‘Is it time to rebrand legal professional privilege in EC competition law? An updated look’ (2009) 35(3) *Commonwealth Law Bulletin* 459–460.

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