

Dawn Raids Under Challenge
Due Process Aspects on the European
Commission's Dawn Raid Practices

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The Right to Enter

This chapter examines the Commission's right to access company premises. Regulation 1/2003 empowers it to adopt inspection decisions and imposes an obligation on targeted companies to submit to those inspections. The possibilities to refuse entry are virtually non-existent, even in situations where the Commission oversteps the boundaries of its powers.

The difficulty in hindering or postponing the execution of inspections underlines the importance of properly defining and assessing the scope of the Commission's powers. The outcome of any such analysis is dependent on whether Article 7 of the Charter and the right to privacy enshrined therein extends to legal persons. The wording of the Article, its references to the notions of 'home' and 'private and family life' suggest that its aim is to protect natural persons from undue interference by the public. However, as is discussed in section I, legal persons are afforded protection under both the Charter and the ECHR, albeit that they may not necessarily invoke their right to privacy with as much force as natural persons.

The Commission's right to enter company premises also depends on the possible requirement of prior judicial authorisation. Today, the Commission adopts inspection decisions and will only need prior court approval when it contemplates the use of coercive measures. Over the years, targeted companies have challenged this order, arguing that inspection decisions require an *ex ante* control by the courts. Section II examines the merits to these claims and establishes that neither the Strasbourg Court nor the ECJ imposes an absolute requirement of *ex ante* review. However, the absence of judicial review must be counterbalanced by other, effective, procedural safeguards against abuse or arbitrariness.

A recurring topic in the due process debate concerns the Commission's possibilities to go fishing, ie, carrying out dawn raids without any concrete suspicions of wrongdoing. In 2012, the General Court delivered its rulings in *Nexans* and *Prysmian*,¹ both cases dealing with this issue. In its rulings, the General Court partially annulled the inspection decisions on the ground that the Commission had lacked reasonable grounds to suspect the companies of cartel participation in some of the product markets covered by the decisions. This prohibition against fishing expeditions is analysed further in section III.

¹ Case T-135/09 *Nexans France and Nexans v Commission*, EU:T:2012:596; and Case T-140/09 *Prysmian and Prysmian Cavi e Sistemi Energia v Commission*, EU:T:2012:596.

Nexans also concerned the permitted geographical scope of inspection decisions.² The remit of the Commission's powers is limited to the internal market, but the inspection decision had not been limited accordingly. Contrary to what the applicants argued, the ECJ saw no reason why the Commission should limit its investigation to documents relating to the internal market. The ruling confirms the Commission's broad discretion to review and seize information relating to non-EU countries during dawn raids, particularly where it suspects that the cartel is global in nature or may be wholly or partially operated from outside the EU. This stance is discussed in section IV.

A final issue addressed in this chapter concerns the previous handling by national competition authorities. In *Orange*,³ the applicants claimed that the French Competition Authority's previous investigation into a suspected abuse of dominance prevented the Commission from opening an investigation and adopting an inspection decision concerning the same practice. The General Court did not accept this claim and dismissed the application. The court's reasoning will be discussed further in section V.

I. Legal Persons and the Right to Privacy

Article 7 of the Charter states:

Everyone has the right to respect for his or her private and family life, home and communications.

The corresponding Article 8 ECHR reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The wording of the two provisions suggests that only natural persons are protected by the right to privacy, as the articles contain express references to the notions of 'home' and 'family life'. However, the right to privacy has been gradually broadened under both EU and ECHR law, and the two articles now afford protection to legal persons as well.

² Case C-37/13 P *Nexans France SAS and Nexans SA v European Commission*, EU:C:2014:2030.

³ Case T-402/13 *Orange v European Commission*, EU:T:2014:991.

A. A Right to Privacy: The View of the EU Courts

In the early case of *National Panasonic*,⁴ the ECJ, although hesitantly, did not rule out the possibility that Article 8 ECHR also applied to legal persons. In 1979, the Commission had ordered an inspection to be carried out at the company's UK premises as it suspected National Panasonic of restrictive practices contrary to Article 101 TFEU. The inspection was ordered by a formal decision without prior notice to the company, and the Commission's inspectors appeared at the premises without warning. National Panasonic later challenged the inspection decision on a variety of grounds, the essence of the complaint being that the company had had no warning of the investigation.⁵ The failure to give prior warning was characterised by National Panasonic as a breach of fundamental rights and of the principle of proportionality. The fundamental rights invoked were the right to privacy, the right to be heard before an adverse decision is taken and the right to request a stay of such a decision before it is executed.⁶

As for the right to privacy, and the reference made by National Panasonic to Article 8 ECHR, the Court declared that 'in so far as it applies to legal persons, the rights laid down in Article 8 ECHR are not absolute'.⁷ The Court then went on to actually apply Article 8(2) to the circumstances of the case, declaring that the inspections had been carried out in accordance with the law and were necessary in a democratic society, as the powers vested in the Commission through Regulation 17/62 were necessary in order for the Commission to be able to safeguard the application of the EU competition rules.⁸

i. Hoechst

In the classic case of *Hoechst AG v Commission*,⁹ the Court took another approach, declaring that Article 8 ECHR did not apply to legal persons. As the Commission suspected the German PVC producer of cartel participation, it had adopted a decision to inspect its premises. Hoechst refused to submit to the inspection and challenged the Commission's decision. In its application to the Court, it claimed that the dawn raid amounted to a search and that the Commission lacked the power to perform searches under Regulation 17/62. In any event, Hoechst submitted, searches required a judicial warrant issued in advance.¹⁰

⁴ Case 136/79 *National Panasonic v Commission of the European Communities*, EU:C:1980:169.

⁵ Opinion of AG Warner in Case 136/79 *National Panasonic v Commission of the European Communities*, EU:C:1980:119.

⁶ *National Panasonic* (n 4) para 17.

⁷ *ibid* para 19.

⁸ *ibid* para 20.

⁹ Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities*, EU:C:1989:337.

¹⁰ *ibid* para 10.

The Court acknowledged that fundamental rights form an integral part of the general principles of law '[t]he observance of which the Court ensures'.¹¹ It also declared that the right of defence must be respected during preliminary inquiry procedures, including in particular investigations that may be decisive in providing evidence of infringements of the competition rules.¹² The right of defence was thus not considered to be reserved for the adversary stage of a competition case.

As regards the right to privacy, the Court declared that such a right did not extend to legal persons, finding that there were 'not inconsiderable divergences 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'.¹³ There was thus no possibility to rely on a principle common to the laws of the Member States. The Court further declared that no other inference was to be drawn from Article 8(1) ECHR and that there was no case law from the Strasbourg Court dealing with the applicability of Article 8 to undertakings. For many years, it was therefore the view of the Court, and thereby also the law, that companies were not protected by a right to privacy.

However, although the ECJ refused to extend the protection afforded under Article 8 ECHR to undertakings, or rather to acknowledge that the Article should be interpreted in such a broad sense, this did not mean that Hoechst should be deprived of protection from public intervention. Instead of relying on Article 8 ECHR, the Court chose to rely on the principle of proportionality, assessing whether a measure such as the dawn raid was arbitrary or disproportionate. It declared that any intervention by 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. The Court further recognised that the need for protection against arbitrary or disproportionate intervention by public authorities must be recognised as a 'general principle of Community law'.¹⁴

In the case at hand, the Court acknowledged that the Commission had indeed been given wide investigatory powers, but also saw the need for such powers in order to let the Commission detect infringements of Articles 101 and 102 TFEU, thereby establishing both suitability and a proper purpose. As for the necessity, the Court declared that the right of access implied a power not only to search for documents and information already known to the Commission, but also items of information that were not already known or fully identified. Without these powers, the Court declared, it would be impossible for the Commission to obtain the information necessary to carry out the investigation in cases where the undertakings concerned refused to cooperate or adopted an obstructive attitude.¹⁵ No less restrictive means were thus available. Furthermore, the Court declared that

¹¹ *ibid* para 13.

¹² *ibid* para 15.

¹³ *ibid* para 17.

¹⁴ *ibid* para 19.

¹⁵ *ibid* para 27.

Regulation 17/62 provided a number of procedural safeguards in order to ensure that the Commission respected the rights of the targeted companies. As the Court considered the Commission to have acted within its powers, the measures adopted were found to be neither arbitrary nor disproportionate.

ii. Dow Chemical

Just a few weeks after the Court had delivered its ruling in *Hoechst*, it was once again time to rule on the question of whether or not legal persons could rely on a right to privacy. Dow Chemical Ibérica SA was suspected of participation in the same cartel as Hoechst and had received an unannounced visit from the Commission. Unlike Hoechst, Dow Chemical had submitted to the inspection and cooperated with the inspectors during the dawn raid. However, it later challenged the inspection decision on a number of grounds, including infringement of the fundamental right to the inviolability of the home. Not too surprisingly, the Court reached the same conclusion as it had in *Hoechst*, declaring that such a right did not extend to legal persons, but that legal persons were nevertheless protected from arbitrary and disproportionate intervention by the public.¹⁶

iii. Roquette Frères

It was not until 2002 that the Court acknowledged that undertakings also enjoy a right to privacy.¹⁷ In *Roquette Frères*, the French Court of Cassation had requested the ECJ to give a preliminary ruling on the possibilities for a national court to refuse the granting of coercive measures during dawn raids. More specifically, the Court of Cassation wanted to know whether a national court can refuse to authorise the use of coercive measures when it considers that the Commission has failed to provide it with sufficient information or evidence as to provide grounds for suspecting an infringement of Article 101 TFEU, or whether the *Hoechst* judgment prevented such a refusal.¹⁸

In its ruling, the Court reiterated the statement made in *Hoechst* that the need for protection against arbitrary and disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law.¹⁹ However, this time, the Court went further and acknowledged subsequent case law from the Strasbourg Court extending the right to privacy to undertakings. In its ruling, the Court declared that regard should be paid to the recent case law from the Strasbourg Court, according to which legal persons are protected under Article 8 ECHR. However,

¹⁶ Joined Cases 97–99/87 *Dow Chemical Ibérica SA and Others v Commission of the European Communities*, EU:C:1989:380, paras 15–16.

¹⁷ Case C-94/00 *Roquette Frères*, EU:C:2002:603.

¹⁸ *ibid* para 21.

¹⁹ *ibid* para 27.

it also underlined that the jurisprudence from Strasbourg acknowledged that the right of interference established by Article 8(2) might well be more far-reaching when legal persons are involved than would otherwise be the case.²⁰

Thus, through the Court's ruling in *Roquette Frères*, it was now clear that the right to privacy afforded under EU law also extended to legal persons, although the protection may not be as strong as when natural persons are invoking the right.

iv. *Strintzis Lines Shipping*

In the case of *Strintzis Lines Shipping*,²¹ concerning suspected tariff fixing contrary to Article 101 TFEU, the ECJ referred both to its ruling in *Roquette Frères* and to the case law of the Strasbourg Court when declaring that both natural and legal persons are protected from arbitrary and disproportionate intervention by public authorities, and that the right to privacy provided by Article 8 ECHR needs to be respected and extends to corporate premises.²²

v. *Nexans and Prysmian*

The cases of *Nexans*²³ and *Prysmian*²⁴ mark another milestone in the evolution of the right to privacy, as the General Court steered its focus from Article 8 ECHR and instead chose to apply Article 7 of the Charter to the Commission's practices. In their applications, *Nexans* and *Prysmian*—both suspected of participation in an electric cable cartel—challenged the Commission's decisions to carry out inspections at their premises. The two companies argued that the Commission had been imprecise in its delimitation of the products concerned and that it was only in certain of the sectors covered by the decisions that the Commission had reasonable grounds to suspect an infringement of the EU competition rules.

In its rulings, the General Court made explicit reference to Article 7 of the Charter, declaring that when it comes to determining whether or not an investigation is justified, regard must be had to the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private actions of any person, whether natural or legal. This right to privacy constitutes a general principle of EU law which is also laid down in Article 7 of the Charter, the General Court declared.²⁵

²⁰ *ibid* para 29.

²¹ Case C-110/04 P *Strintzis Lines Shipping SA v Commission of the European Communities*, EU:C:2006:211.

²² *ibid* paras 32 and 33, where the Court declared *inter alia* that: 'La protection de la vie privée prévue à l'article 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 (ci-après la "CEDH"), doit être respectée et la protection du domicile est étendue aux locaux commerciaux des sociétés (voir, en ce sens, Cour eur. D. H., arrêt Colas Est e.a.c/France du 16 avril 2002, Recueil des arrêts et décisions 2002-III, § 41, et arrêt *Roquette Frères*, précité, point 29).'

²³ *Nexans* (n 1).

²⁴ *Prysmian* (n 1).

²⁵ *Nexans* (n 1) para 40; *Prysmian* (n 1) para 35.

The General Court also declared that it may review an inspection decision for the purposes of ensuring that it is not arbitrary; that is, that it has not been adopted in the absence of facts capable of justifying an inspection.²⁶ The inspections carried out by the Commission shall enable it to gather the evidence necessary to check the actual existence and scope of a given factual and legal situation about which it already possesses certain information. When reviewing an inspection decision, the General Court must therefore satisfy itself that the Commission had reasonable grounds to suspect an infringement of the competition rules at the time it adopted the inspection decision.²⁷

B. The View of the EU Courts: Conclusions

The rulings referred to above illustrate the fact that EU law is constantly in motion. In *Hoechst*, the Court was not willing to acknowledge that legal persons enjoyed a right to privacy, but nevertheless found a way to afford protection from arbitrary intervention by relying on the principle of proportionality. A decade later, things had changed. In *Roquette Frères*, the ECJ declared that the Strasbourg Court had now acknowledged that Article 8 ECHR also applies to companies, but that the protection afforded to legal persons was not as strong as the protection enjoyed by natural persons. Yet a decade later, the right to privacy is still considered to be enjoyed by both natural and legal persons, but now the EU courts rely on Article 7 of the Charter rather than Article 8 ECHR when defining the boundaries of this right.

In the following, the limits of protection afforded by the Strasbourg Court will be explored. As will be further discussed, the EU and Convention systems appear to afford an equivalent standard of protection, acknowledging that legal persons do enjoy protection, but not necessarily to the same extent as natural persons.

C. A Right to Privacy: The View of the Strasbourg Court

In *Hoechst*, the ECJ declared that there was no case law from the Strasbourg Court dealing with the applicability of Article 8 ECHR to undertakings. However, only three years later, the Strasbourg Court took its first steps towards acknowledging that legal persons also enjoy a right to privacy.

i. Niemietz

In December 1992, the Strasbourg Court delivered its ruling in *Niemietz v Germany*,²⁸ removing some of the doubts as to whether the right to privacy could

²⁶ *Nexans* (n 1) para 43; *Prysmian* (n 1) para 38.

²⁷ *Nexans* (n 1) para 43; *Prysmian* (n 1) para 48.

²⁸ *Niemietz v Germany*, judgment of 16 December 1992, Application No 13710/88.

extend to business premises. The case had its origin in Germany and in a search conducted at the premises of a German lawyer, Mr Niemietz.

In December 1985, a letter was sent by fax from the Freiburg post office to Judge Miosga of the Freising District Court. The letter, signed by a Klaus Wegner—‘possibly a fictitious person’—criticised the pending proceedings against a certain Mr J, who had refused to deduct the church tax from his employees’ salaries. In his letter, Mr Wegner urged Judge Miosga to ‘abandon the path of terrorization’ which he had allegedly embarked upon and to reach the only decision appropriate in the case—acquittal.²⁹

Criminal proceedings were soon initiated against this Mr Wegner for the offence of insulting behaviour. However, attempts to serve a summons on him were unsuccessful. In the context of these proceedings, a warrant was issued to search the premises of Mr Niemietz for documents that would reveal Mr Wegner’s identity. The search of Mr Niemietz’s law offices was carried out in November 1986. Mr Niemietz unsuccessfully appealed against the decision to issue the search warrant all the way up to the German Constitutional Court. Having exhausted all national remedies, he turned to Strasbourg, alleging that the search had violated his right to respect for his home and correspondence, guaranteed by Article 8 ECHR.

The European Commission of Human Rights acknowledged that the search amounted to an infringement of Article 8, attaching particular significance to the confidential relationship that exists between a lawyer and his client. However, the Strasbourg Court did not consider the confidential relationship between a lawyer and his client to serve as a workable criterion for the purposes of delimiting the scope of protection afforded by Article 8, as virtually all professional and business activities may involve confidential matters.³⁰ What the Strasbourg Court chose to focus on were instead the notions of ‘private life’ and ‘home’, as the first paragraph of Article 8 ECHR reads:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The Strasbourg Court saw no reason of principle to exclude activities of a professional or business nature from the notion of ‘private life’ as, in the course of their working lives, the majority of people have significant (if not the greatest) opportunities to develop relationships with the outside world.³¹ The Strasbourg Court declared that it is not always possible to distinguish whether someone’s activities form part of his or her professional life. It considered this to be especially true where someone, such as Mr Niemietz, exercised a liberal profession, ‘as his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know the capacity in which he is acting at a given moment of time.’³²

²⁹ *ibid* para 7.

³⁰ *ibid* para 28.

³¹ *ibid* para 29.

³² *ibid*.

As regards the notion of ‘home’, the Strasbourg Court acknowledged that some Contracting States, including Germany, had extended this notion to cover business premises. It considered this interpretation to be fully consonant with the French text of the ECHR as the French word ‘domicile’ has a much broader connotation than the word ‘home’, and may extend to a professional person’s office. According to the Strasbourg Court, a narrow interpretation of the words ‘home’ and ‘domicile’ could therefore give rise to the same risk of inequality as a narrow interpretation of the notion of ‘private life’.³³

Another factor was added to the above-mentioned general considerations pertaining to the facts of the case at hand, namely that the search covered correspondence, which is explicitly protected under Article 8 ECHR. These factors taken together made the Strasbourg Court reach the conclusion that the search of Mr Niemietz’s office constituted an interference with his rights under Article 8 ECHR.³⁴

However, by no means did the matter end there, as Article 8 contains a sub-paragraph allowing for an interference with the right to privacy:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁵

Three different criteria can be discerned in the above: first, any interference with someone’s privacy shall be in accordance with the law; second, the interference must have a legitimate aim; and, third, the interference needs to be necessary in a democratic society. If these three criteria are fulfilled, then the interference is justified and no infringement may be established.

As for the first criterion, the Strasbourg Court refrained for a long time from any substantial analysis of its meaning. However, in the cases of *Silver v United Kingdom*³⁶ and *Malone v United Kingdom*,³⁷ it finally declared that it is not sufficient that the measure is in accordance with domestic law; more is required. The imposition of additional conditions has been explained on the basis that the phrases not only refer back to a state’s domestic law but also relate to the ‘quality of law requiring it to be compatible with the rule of law that is expressly mentioned in the preamble to the Convention’.³⁸

The Strasbourg Court has thus established that not only does the requirement that a measure should be in accordance with the law mean that it should have

³³ *ibid* para 30.

³⁴ *ibid* para 33.

³⁵ Article 8(2) ECHR.

³⁶ *Silver and Others v United Kingdom*, judgment of 25 March 1983, Application Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75.

³⁷ *Malone v United Kingdom*, judgment of 2 August 1984, Application No 8691/79.

³⁸ *ibid* para 67.

some basis in domestic law, but that the national legislation should also: (i) be accessible to the citizens; (ii) be sufficiently precise to enable them to reasonably foresee the consequences that their actions might entail; and (iii) provide adequate safeguards against arbitrary interference with the right in question.³⁹

In *Niemietz*, however, the Strasbourg Court simply noted that the search had been considered lawful by the national courts as it had been conducted in accordance with the Code of Criminal Procedure.⁴⁰ The second criterion was also considered to be fulfilled as the search had pursued aims that were legitimate under Article 8(2) ECHR, namely the prevention of crime and the protection of the rights of others (the dignity of Judge Miosga).⁴¹ The Strasbourg Court then turned its attention to the third criterion: whether the measures taken by the German authorities were necessary in a democratic society. When applying this criterion, the Strasbourg Court would establish whether the interference has been: (a) attended to by adequate and efficient safeguards against abuse; (b) supported by relevant and sufficient reasons; and (c) proportionate to any legitimate aim pursued.⁴²

In the case at hand, the Strasbourg Court weighed the offence against the measures taken, noting that in Germany, the search of a lawyer's office was not accompanied by any special procedural safeguards, such as the right to an independent observer. However, and even more importantly, the Strasbourg Court took into account the materials inspected and considered that the search impinged on professional secrecy to an extent that appeared disproportionate in the circumstances. It stressed that, where a lawyer was involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 ECHR. In addition, it stressed the fact that a search of Mr Niemietz's premises must have been capable of adversely affecting his professional reputation in the eyes of his existing clients and of the public at large.⁴³ Therefore, it concluded that the measures taken did not meet the proportionality *stricto sensu* test, and a breach of Article 8 ECHR was thus established.⁴⁴

Had *Niemietz* been the only case dealing with Article 8 ECHR and the protection of business premises, the ECJ could easily have limited the scope of the right to privacy, as the ruling in *Niemietz* does not really seem to acknowledge that legal persons are protected by Article 8, but rather that the rights of natural persons extend to their professional activities. However, the subsequent ruling in *Société Colas* leaves no room for such a narrow interpretation.⁴⁵

³⁹ *Kruslin v France*, judgment of 24 April 1990, Application No 11801/85, para 27.

⁴⁰ *Niemietz* (n 28) para 35.

⁴¹ *ibid* para 36.

⁴² See, eg, *Bernh Larsen Holding SA and Others v Norway*, Application No 24117/08, questions to the parties.

⁴³ *Niemietz* (n 28) para 37.

⁴⁴ *ibid* para 38. The proportionality *stricto sensu* test is a balancing test which seeks to determine whether the combination of certain levels of rights-enjoyment combined with the achievement of other interests is acceptable.

⁴⁵ *Société Colas Est and Others v France*, judgment of 16 April 2002, Application No 37971/97.

ii. *Société Colas*

In the case of *Société Colas*, the French Competition Authority had conducted dawn raids at the premises of no less than 56 companies within the framework of an investigation into the conduct of roadwork contractors in local tendering procedures. The dawn raids were carried out under the provisions of applicable French legislation, which did not require any judicial authorisation.

During the inspection, the officials from the French Competition Authority seized various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts targeted by the investigation. Further investigations were subsequently carried out on the basis of these contracts and in a decision of 25 October 1989, the Competition Council imposed fines ranging between 4 and 12 million French francs on the three applicant companies. The decision was upheld by the Paris Court of Appeal. However, the Court of Cassation (Cour de Cassation) quashed the decision on the ground that the calculation of the fine and the assessment of the amounts of the fines made therein had no basis in law. It remitted the case to the Paris Court of Appeal.

At the retrial, relying on Article 8 ECHR, the applicants contested the lawfulness of the searches and seizures carried out by the inspectors without any judicial authorisation. However, this claim was not accepted by the Court of Appeal, which found no violation of Article 8 ECHR, and imposed fines ranging between 3 and 6 million French francs. The companies' appeal to the Court of Cassation was equally unsuccessful.⁴⁶

This led the applicant companies to turn to Strasbourg. In their application to the Strasbourg Court, they relied on Article 8 ECHR and contended that the raids carried out by the French Competition Authority, without any supervision or restrictions, had infringed their right to respect for their home.

The Strasbourg Court noted that the case differed from other cases in that the applicants were legal persons alleging a violation of the right to respect for their 'home' under Article 8 ECHR. However, as it had already done in *Niemietz*,⁴⁷ the Strasbourg Court also pointed out that the French term 'domicile' has a wider meaning than its English equivalent. Furthermore, and perhaps more importantly, it declared that the ECHR is a living instrument which must be interpreted in the light of present-day conditions. According to the Strasbourg Court, the time had come to hold that in certain circumstances, the rights guaranteed by Article 8 ECHR may be construed as including the right to respect for a company's registered office, branches or other business premises.⁴⁸

As from this point, no doubts remain. Article 8 not only protects natural persons, but may also—at least in certain circumstances—extend to legal persons. This has been confirmed by the court on numerous occasions, such as

⁴⁶ *ibid* para 21.

⁴⁷ *Niemietz* (n 28).

⁴⁸ *Société Colas* (n 45) para 41.

in *Vinci Construction*,⁴⁹ where the Strasbourg Court declared that, according to well-established case law, dawn raids carried out at the premises of legal persons are indeed covered by Article 8 ECHR.⁵⁰

However, let us recall what the ECJ concluded in *Roquette Frères*,⁵¹ namely that the right does indeed extend to legal persons, but the possibility for public authorities to interfere with this right is greater when it comes to companies than natural persons.⁵² A recent case from the Strasbourg Court seems to prove the ECJ right on this point. The case in question, *Bernh Larsen Holding*,⁵³ will be discussed in further detail in section II.A.vi and Chapter 8, section IV.A below, and no presentation of the facts will be made under this section. However, it is worth noting already at this point that in this case, the Strasbourg Court made the following statement:

On the other hand, the fact that the measure was aimed at legal persons meant that a wider margin of appreciation could be applied than would have been the case had it concerned an individual.⁵⁴

Thus, the authorities are granted a wider margin of appreciation when it comes to legal persons than if a case concerns the interference with the privacy of an individual. Exactly how much wider appears to be a question for the future.

D. A Right to Privacy: Concluding Remarks

As noted previously in this section, the case law concerning legal persons' right to privacy has evolved over time. Although the courts have not denied legal persons protection from arbitrary or disproportionate intervention by public authorities, it was not until after the turn of the millennium that the ECHR explicitly acknowledged that legal persons enjoy a right to privacy under Article 8 ECHR. By now, the right has been firmly established both by the Luxembourg and Strasbourg Courts. However, the two courts appear to accept that legal persons are granted a somewhat lower standard of protection than natural persons, thereby allowing for flexibility so that the work of the Commission or other competition authorities will not be unduly hampered by applicable fundamental rights protection.

⁴⁹ *Vinci Construction et GTM Génie Civil et Services v France*, Application Nos 63629/10 and 60567/10.

⁵⁰ *Ibid* para 63, where the Strasbourg Court refers not only to the case of *Société Colas*, but also to a number of other cases, including, but not limited to, *Sallinen and Others v Finland*, judgment of 27 September 2005, Application No 50882/99; *Weber and Saravia v Germany*, judgment of 29 June 2006, Application No 54934/00; *Wieser and Bicos Beteiligungen GmbH v Austria*, judgment of 16 October 2007, Application No 74336/01; and *Robathin v Austria*, judgment of 3 July 2012, Application No 30457/06.

⁵¹ *Roquette Frères* (n 17).

⁵² *ibid* para 29.

⁵³ *Bernh Larsen Holding* (n 42).

⁵⁴ *ibid* para 159.