

The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: the Case of the Right to Be Heard

by

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CONTENTS

1. Introduction
2. The scope of Article 6 ECHR
 - 2.1. The criminal charge qualification
 - 2.2. The Jussila distinction
 - 2.3. Application of the criminal charge criteria to EU competition law proceedings
 - 2.3.1. “Classic” fining procedure
 - 2.3.2. Commitment procedures
 - 2.3.3. Leniency procedures
 - 2.3.4. Settlement procedures
 - 2.4. Preliminary conclusions
3. The right to be heard under Article 6 ECHR
 - 3.1. The right to a fair hearing of Article 6 ECHR
 - 3.2. The right to an oral hearing
 - 3.2.1. The scope of the right
 - 3.2.2. The exceptions
 - 3.2.3. The moment of the oral hearing
 - 3.3. The right to access documents
 - 3.3.1. The scope of the right
 - 3.3.2. The exceptions
 - 3.4. Preliminary conclusions
4. The right to be heard under EU law

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- 4.1. The right to an oral hearing
 - 4.1.1. The standard of the EU legal order
 - 4.1.2. The application of the right to competition law proceedings
- 4.2. The right to access documents
 - 4.2.1. The standard of the EU legal order
 - 4.2.2. The application of the right to competition law proceedings
- 4.3. Preliminary conclusion
5. Analysis
6. Conclusion

Abstract

This paper analyses the jurisprudence of the European Court of Human Rights on the rights of defence as enshrined in Article 6 of the European Convention on Human Rights. In particular, it assesses Strasbourg jurisprudence on the right to be heard and on the right to access documents. The paper considers whether the practice in EU competition law procedures complies with the fair trial standards that follow from Strasbourg judgments. Based on this assessment, the paper provides an answer to the question whether there is an overcompensation or undercompensation of fundamental rights protection in EU competition law procedures.

Résumé

Cet article analyse la jurisprudence de la Cour européenne des droits de l'homme sur les droits de la défense stipulés dans l'article 6 de la Convention européenne des droits de l'homme. Principalement, il fait une évaluation de la jurisprudence sur le droit d'être entendu et le droit d'accès aux documents. L'article considère si la pratique prévue par le droit de la concurrence de l'UE est en conformité avec les normes d'un procès équitable qui découlent de la jurisprudence de Strasbourg. En basant sur cette évaluation, cet article répond à la question s'il y a une surcompensation quant à la protection des droits fondamentaux dans les procédures en droit de la concurrence, ou plutôt le contraire.

Classifications and key words: article 6 ECHR; article 47 Charter; article 41 Charter; fundamental rights as a general principle of EU law; public enforcement; defence rights; right to be heard; right to access documents

1. Introduction

The right to be heard is the cornerstone of fair administrative proceedings and of a fair trial. In the broader sense of the word, the right to be heard includes the right to an oral hearing and the right to access documents. One could even argue that both rights are intertwined as an oral hearing allows parties to develop their arguments (based on the written allegations made against them).

The right to be heard has long since been “deeply entrenched” in the EU legal order as a general principle of law¹. Since the entry into force of the Treaty of Lisbon², the right to be heard has been introduced into the EU legal system as a binding fundamental right. Article 41 of the Charter of Fundamental Rights of the European Union (hereafter: Charter) concerning the right to good administration has been qualified as the “benchmark” for the interpretation and application of the right to be heard³. Article 41 (2) (a) stipulates: “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”. With respect to the scope of this right, the Charter requires that it shall be the same as the corresponding provisions of the European Convention on Human Rights, (hereafter: ECHR) and as interpreted by the European Court of Human Rights (hereafter: ECtHR)⁴. This means, in essence, that the minimum standard of safeguarding fundamental rights protection is set by the ECHR. At the same time, however, EU law can offer greater (procedural) protection than the ECHR.

The purpose of this paper is to analyse whether the right to be heard under EU law complies with the ECHR, more particularly with Article 6 ECHR. Although the text of Article 6 ECHR speaks of a fair “trial” (and not of fair “administration”), it will be shown that merely administrative procedures also enjoy the protection of a fair hearing as prescribed by Article 6 ECHR. The

¹ 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 *Competition Law Review* 54. See e.g. C-32/95 P *Commission v Lisrestal* [1996] ECR I-5387, para 21.

² See Art. 6 paras 1 and 2 TEU. The Lisbon Treaty resulted in the Charter becoming equivalent to primary EU Treaties and binding on all EU institutions and in the accession of the Union to the ECHR. Such accession shall not, however, affect the Union’s competences as defined in the Treaties.

³ I. Rabinovici, “The right to be heard in the Charter of Fundamental Rights of the European Union”, (2012) 18(1) *European Public Law* 150.

⁴ The “conformity clause” in Art. 52 para 3 of the Charter states that “*In so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*”.

analysis consists of three parts. First, the standard of the ECHR on the right to be heard will be determined. Second, the jurisprudence of the EU judiciary on the right to be heard will be discussed. Third, an analysis will be conducted whether current administrative competition law proceedings comply with the standards set by the Strasbourg Court. In conclusion, the question will be answered on the conformity of the current competition law procedure with the right to be heard. In addition, the question will be addressed whether the application of the different sources of fundamental rights leads to an overcompensation or undercompensation of fundamental rights protection in the EU legal order.

2. The scope of Article 6 ECHR

2.1. The criminal charge qualification

As stated, the minimum level of fundamental rights protection in EU competition law procedures is set by the ECHR. Article 6 ECHR represents the main provision on the right to a fair trial. It applies to two different types of procedures. First, it covers procedures where there is a dispute about civil rights & obligations. Second, it offers protection to procedures leading to criminal charges⁵. The first category, civil rights & obligations, remains under the “sole” protection of Article 6, para 1, ECHR. The second category, involving criminal charges, is at the same time protected by fundamental rights listed in Article 6, paras 2 and 3, ECHR (such as: the right to cross-examine witnesses, the right to be informed about the accusations, etc.).

The ECtHR gives a very broad, autonomous interpretation of the term “criminal”. The rationale underpinning this autonomous interpretation is that in a case where the classification of an offence in the law of the contracting parties was regarded as decisive, a state would be free to avoid the Convention’s obligation to ensure a fair trial⁶. In the *Engel* case, the ECtHR laid down three conditions for the classification of a charge as criminal under Article 6 ECHR: (a) the classification of the offence as criminal under national law; (b) the nature of the offence; and (c) the degree of severity of the penalty.

⁵ Such a distinction can also be found in the Charter. Art. 47 of the Charter, which is equivalent to Art. 6 ECHR, does not make such a distinction. *A contrario*, Art. 48 (presumption of innocence and rights of defense) and Art. 49 (principles of legality and proportionality of criminal offences and penalties), solely apply to a person “who has been charged”.

⁶ D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the European Convention on human rights*, Oxford OUP 2009, p. 205.

The first condition carries a formal and relative value only. If an offence is criminal under national law, it is also criminal under Article 6 ECHR. But if an offence is not criminal under national law, the domestic classification of the given offence is “no more than a starting point”⁷. Under this condition, it is therefore irrelevant that the EU prescribes that the penalties for competition law infringements shall not be of a criminal nature⁸.

In cases where the offence is not classified as criminal in national law, the other two conditions listed above come into play. These two conditions are alternative and not cumulative; a cumulative approach may be adopted where neither condition by itself is conclusive⁹. As to the nature of the offence its purpose must be deterrent, punitive and not compensatory. In addition the offence must have a general application. With respect to the third condition, the ECtHR emphasized the importance of the nature and severity of the possible – not the actual – punishment. Therefore, the “relative lack of seriousness of the penalty” cannot deprive an offence of its criminal nature¹⁰.

In order to enjoy the full protection of Article 6 ECHR, one should also make sure that there is a “charge”. According to the jurisprudence of the ECtHR, the charge starts when “an official notification is given to an individual by the competent authority of an allegation that he has committed a criminal offence” or follows from some other act which carries “the implication of such an allegation and which likewise substantially affects the situation of the suspect”¹¹. Article 6 ECHR covers the whole of the proceedings, including appeal proceedings and the determination of the sentence¹².

2.2. The Jussila distinction

The conclusion that competition law fines are to be considered criminal under the ECHR is not without problems. The autonomous interpretation

⁷ *Engel v Netherlands* (1976) Series A no 22, para 82.

⁸ Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU [2003] OJ L1/1 (“Regulation 1/2003”), Art. 23 para 5.

⁹ *Janosevic v Sweden* (2002) 38 EHRR 473, para 67; *Ezeh and Connors v the United Kingdom* (2004) 39 EHRR 1, para 86; *Bendenoun v France* (1994) Series A no 284, para 47; *Lauko v Slovakia* (1998) 33 EHRR 994, para 57; *Garyfallou AEBE v Greece* (1997) 28 EHRR 344, para 33.

¹⁰ *Öztürk v Germany* (1984) Series A no 73, para 54. See also *Lutz v Germany* (1987) Series A no 123, para 55.

¹¹ *Deweier v Belgium* (1980) Series A no 35, para 46; *Eckle v Germany* (1982) Series A no 51, para 73; *Foti e.a. v Italy* (1982) Series A no 56, para 52; and *Quinn v Ireland* (2000) 33 EHRR 264, para 41.

¹² *Phillips v United Kingdom* (2001) ECHR 2001-VII.

of the notion of a *criminal charge* has underpinned a gradual broadening of the classification as criminal to cases not strictly belonging to the traditional categories of criminal law, for example administrative penalties¹³. Due to the significant enlargement of the area of “criminality” under Article 6 ECHR, the ECtHR made in the *Jussila* case a distinction between hardcore and non-hardcore criminal offences, using competition law as an example of a field of law that falls within the periphery of criminal law¹⁴.

“Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly ‘criminal charges’ of differing weight”¹⁵. Following the ECtHR, the criminal-head guarantees laid down in Article 6 ECHR do not necessarily apply with their full stringency to cases belonging to the periphery of criminal law. The ECtHR used the severity of the sanction and the stigma attached to the offence in order to conclude that certain fields of law, such as competition law, fall outside the hard core of criminal law¹⁶.

In *Jussila*, the ECtHR dealt with the question whether the lack of an oral hearing before the court lead to an infringement of Article 6 ECHR. In this case the difference between hardcore and softcore criminal charges was decisive for the outcome of the case. The ECtHR held here that exceptional circumstances in cases not belonging to the traditional categories of *criminal charges* may justify dispensing of such a hearing¹⁷: “there may be proceedings in which an oral hearing may not be required, for example where there are

¹³ *Jussila v Finland* (2007) 45 EHRR 39, para 43.

¹⁴ See, *a contrario*, the EFTA Court judgment in a case that concerned a decision of the EFTA Surveillance Authority sanctioning Norgen Poste for an abuse of a dominant position and imposing a fine of EUR 12.89 million. The EFTA Court held therein that fines for competition law infringements belong to hardcore criminal charges. Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* (EFTA Court, 18.04.2012), para 90. For more on this case see: J. Temple Lang, “Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA Courts: The Norway Post Judgment”, (2012) 37 *European Law Review* 464-480.

¹⁵ *Jussila v Finland* (2007) 45 EHRR 39.

¹⁶ Note that this categorization of criminal offences under Art. 6 has no basis in the Convention. See the partly dissenting opinion of Judge Loucaides, joined by Judges Zupančič and Spielmann under the case *Jussila v Finland* (2007) 45 EHRR 39.

¹⁷ The ECtHR considered that a normal criminal trial (i.e. cases falling within the hardcore of criminal law) requires fundamental guarantees in the form of publicity, such as a public hearing. In other cases (i.e. administrative), the ECtHR accepted that the lower instance may not qualify as independent and impartial tribunals and that the hearing before them may not be public. See in this respect also: ECtHR judgment of 5 April 2012 in case *Societe Bouygues Telecom v France* App no 2324/08, para 71.

no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials"¹⁸. The ECtHR emphasized that national authorities may have regard to the demands of efficiency and economy in deciding whether or not to hold an oral hearing¹⁹.

2.3. Application of the criminal charge criteria to EU competition law proceedings

2.3.1. "Classic" fining procedure

It is not surprising by looking at the *Engel*-criteria that the jurisprudence of the ECtHR has been expanding the scope of criminal safeguards provided in Article 6 ECHR to a wide range of administrative proceedings, such as those concerning competition law. In the *Menarini* case, the ECtHR reaffirmed²⁰ that competition law proceedings are under the full protection of Article 6 ECHR²¹. In EU competition law procedures²² this protection starts when the Commission informs the concerned undertakings in writing of the objection raised against them. For Article 6 ECHR to apply, it is therefore not necessary that there is a "trial".

Neither ECHR jurisprudence nor academic literature have so far touched upon the question whether criminal charges are also involved where an undertaking does not get a fine (for example in a commitment procedure²³)

¹⁸ *Jussila v Finland* (2007) 45 EHRR 39, para 41.

¹⁹ *Jussila v Finland* (2007) 45 EHRR 39, para 42.

²⁰ See e.g. the decision of the European Commission of Human Rights in case *Société Stenuit v France* (1992) Series A no 232-A.

²¹ ECtHR judgment of 27 September 2011 in case *Menarini Diagnostics S.R.L. v Italy* App no 43509/08, paras 40-45. The criminal character of competition law fines has been accepted by EU courts e.g.: C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para 150; C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri v Commission* [2005] ECR I-5425, para 202.

²² In this paper the term "EU competition law procedures" denotes Art. 101 and 102 procedures.

²³ The Hearing Officer of the Commission, Wouter Wils, does however see a fundamental difference between cases where the Commission imposed fines for infringements of Art. 101 and 102 TFEU and cases where one should decide whether or not to accept commitments pursuant to Art. 9 of Regulation 1/2003. According to Wils, it is this difference that makes it legitimate for EU courts to leave the Commission with a broad margin of discretion and endorse the manifest error-test when ruling upon commitment procedure cases. See W.P.J. Wils, "The compatibility with fundamental rights of the EU antitrust enforcement system in which the European Commission acts both as investigator and as first-instance decision maker", (2014) 37(1) *World Competition* 14-16.

or where an undertaking receives a fine reduction (under the settlement procedure or the leniency procedure). It remains unclear whether all of the procedural rights of Article 6 ECHR should apply in their full grandeur with respect to such cases.

2.3.2. Commitment procedures

The first procedure which might fall outside the scope of Article 6 ECHR is the commitment procedure. Article 9 Regulation 1/2003 provides for the adoption of decisions by the Commission whereby undertakings make legally-binding commitments as to their future behaviour. One of the main advantages of this procedure is that the Commission will close its file without making a finding of an infringement. This is a formal procedure that will be initiated by the Commission by sending a “preliminary assessment” of the case (in contrast to a statement of objections) to the undertakings involved. The undertakings have a given period of time to respond and to offer draft commitments²⁴. These commitments cannot qualify as criminal charges because they (i) do not have a general application; and (ii) lack the qualification of a deterrent and punitive sanction (the commitments are voluntarily offered by the undertaking).

The commitment can, however, fall under the first category of Article 6 ECHR (civil rights & obligations). The ECtHR held on several occasions that the key determinant in cases involving state actions is whether the right or obligation in question is pecuniary in nature or has pecuniary consequences for the applicant²⁵. According to the ECtHR, the right to property is clearly a right with a pecuniary character. This means that a state action which is directly decisive for property rights is determinative of civil rights and obligations, and hence governed by Article 6 ECHR²⁶. The same applies to the right to engage in a commercial activity which similarly has a pecuniary character²⁷. On the basis of these cases, it can be assumed that commitments, such as the divestiture of assets, have a pecuniary character.

However, in order for Article 6 ECHR to apply there must be a dispute between the undertaking and the state (i.e. competition authority). A dispute may concern a question of fact or a question of the law²⁸; it is not necessary that the dispute relates to the actual existence of a right (it may also be related

²⁴ R. Which & D. Bailey, *Competition Law*, Oxford OUP 2012, p. 257.

²⁵ *Editions Periscope v France*, Series A no 234-B (1992); and *Stran Greek Refineries and Stratis Andreadis v Greece*, Series A no 301-B (1994).

²⁶ D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the...*, op. cit., p. 214.

²⁷ *Bentham v Netherlands* (1985) Series A no 97.

²⁸ *Albert and Le Compte v Belgium* (1983) Series A no 58.

to its scope)²⁹. Given that the commitment procedure is voluntary, such dispute on the substance of an Article 9 decision is thus unlikely. As a result, the commitment procedure falls completely outside the scope of Article 6 ECHR. Illustrative here is the *Commission v Alrosa* case where the CJ held that Article 9 Regulation 1/2003 procedures are based on considerations of procedural economy³⁰.

2.3.3. Leniency procedures

The leniency procedure is another procedure to which, possibly, not all procedural safeguards of article 6 ECHR apply. The usage of the phrase “leniency procedure” is, however, somewhat confusing as it is not a different type of procedure (in contrast to the standard fining procedure, commitment procedure and the settlement procedure) – leniency applicants may or may not be involved both in the standard fining procedure and in the settlement procedure³¹.

Under the leniency procedure, the Commission will grant immunity from fines to an undertaking that is the first to blow the whistle³². An undertaking that does not meet the conditions of the Commission may be eligible to benefit from a fine reduction³³. One of the conditions to determine whether

²⁹ *Le Compte, Van Leuven and De Meyere v Belgium* (1981) Series A no 43.

³⁰ C-441/07 P *Alrosa v Commission*, [2010] ECR I-05949, para 35.

³¹ See on the leniency procedure i.e. W.P.J. Wils, “Leniency in antitrust enforcement: theory and practice”, (2007) 30(1) *World Competition* 25-64; P. Billiet, “How lenient is the EC Leniency Policy? A matter of certainty and predictability”, (2009) 30(1) *European Competition Law Review* 14-20; J Sandhu, “The European Commission’s leniency policy: a success?”, (2007) (28)3 *European Competition Law Review* 148-157; J.M. Griffin & K.R. Sullivan, “Recent Developments in Leniency Policy and Practices in Canada, the European Union and the US”, Paper presented at the ABA *Advanced International Cartel Workshop* in San Francisco, 30 January–1 February 2008; D. Arp & C.A. Swaak, “A tempting offer: immunity from fines for cartel conduct under the European Commission’s new leniency notice”, (2003) (24)1 *European Competition Law Review* 9-18; S. Blake & D. Schnichels, “Leniency following modernization: safeguarding Europe’s leniency programmes”, (2004) (25)12 *European Competition Law Review* 765-770; and C. Hodges, “Competition enforcement, regulation and civil justice: what is the case?”, (2006) 43 *Common Market Law Review* 1382-1407.

³² Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/11 (“Leniency Notice”), paras 8 (a), 8 (b), 10 and 11. The undertaking applying for immunity must provide the Commission with information (such as a corporate statement) and evidence of its participation in the alleged cartel. Immunity will not be granted if, at the time of the submission, the Commission had already sufficient evidence to carry out an inspection or had already carried out such an inspection.

³³ Leniency Notice paras 23 and 24. In order to qualify for a fine reduction, the undertaking must provide the Commission with evidence that represents “significant added value” with respect to that already in the Commission’s possession.

a procedure is *criminal* is the nature and severity of the possible punishment. The possible punishment for a leniency applicant is, throughout the whole administrative procedure, the imposition of a fine of maximum 10% of its total turnover³⁴. The promise of the Commission to grant immunity is conditional (it depends on the leniency applicant's cooperation during the administrative procedure³⁵) and becomes final once the authority adopted its decision³⁶. In this respect the position of the leniency applicant equals, as said above, the position of any other (cartel) participants in an administrative procedure.

There are, however, three important differences. One difference relates to the moment starting from which a leniency applicant can enjoy the protection of Article 6 ECHR. Unlike in the standard fining procedure, this moment is not when the Commission sends its statements of objections to the investigated undertakings, but once leniency applicants decide to admit that they had committed the infringement and contact the Commission. From that moment onwards the position of the undertaking (c.q. leniency applicants) is "substantially affected"³⁷.

The second difference touches upon the fact that the undertaking, whilst applying for leniency, actually admits its participation in the alleged anti-competitive behaviour. For that reason there are no (or substantially less) issues of credibility or contested facts that require the use of certain defence rights³⁸. Nevertheless, during the stage of informal discussions with the Commission, leniency applicants have the possibility to hear the allegations of the Commission, the classification of the facts of the case, the gravity and duration of the alleged cartel, etc. These discussions already enable leniency applicants to assert their views and to straighten out certain facts. A reduced application of certain defence rights in leniency procedures seems therefore completely in line with ECtHR jurisprudence where the Strasbourg Court held that a less stringent application of procedural rights is possible when there are no contested facts that demand, for example, an oral hearing³⁹.

³⁴ Regulation 1/2003 Art. 23 para 2.

³⁵ Leniency Notice para 12 (a).

³⁶ Illustrative is the *Deltafina* case where the Commission withdrew its (conditional) promise to grant immunity. The practice of the Commission has been confirmed by the General Court: T-12/06 *Deltafina v Commission*, not yet reported.

³⁷ At that moment the undertakings have "learnt of the investigation or begun to be affected by it". See *Eckle v Germany* (1982) Series A no 51, para 74.

³⁸ At least from the perspective of the leniency applicant. The other undertakings might want to contest the credibility of the statements by cross-examining the leniency applicant. See for a discussion A.E. Beumer, "The cross-examination of leniency applicants in EU cartel proceedings", (2013) *Concorrenza e Mercato*, 5-26.

³⁹ See the discussion of the *Jussila* case above.

The third difference concerns the position of the leniency applicants during a possible appeal procedure. In contrast to an “ordinary” appeal procedure where an undertaking appeals the fine imposition, an appeal procedure started by a leniency applicant has lost its qualification as deterrent and punitive when the Commission decided to grant that undertaking immunity from fines. As a consequence, the leniency applicant can no longer rely on the full protection of Article 6 ECHR. A similar conclusion can be drawn with respect to leniency applicants that received a fine reduction. Although undertakings receiving a fine reduction still have to pay a (punitive) fine, one could argue that the conviction became final once the leniency applicant admitted to committing the infringement in order to get lenient treatment. For that reason, it is legitimate to argue that the leniency applicants cannot invoke in an appeal procedure the extended protection provided by Article 6 ECHR.

2.3.4. Settlement procedures

The essence of the settlement procedure is that the undertakings, having heard the objections of the Commission, acknowledge their involvement in the cartel. In exchange, the Commission grants them a 10% reduction in the fine that it would have otherwise imposed upon them⁴⁰. In line with the argumentation presented about leniency applicants that received a fine reduction, one could argue that once the settlement applicant admitted its involvement in the infringement, it can no longer rely on the whole package of legal protection provided by Article 6 ECHR. This applies both to the administrative phase of the procedure as well as to the possible appeal procedure. It is interesting to note in this context that the Commission, unlike in the leniency procedures, provides for certain procedural efficiencies already during the administrative procedure⁴¹. These procedural efficiencies take place once the settlement discussions are successful and the parties make a formal settlement submission where they admit to their participation in the infringement and waive their further rights to be heard (access to the file and an oral hearing) after the statement of objections⁴². Such a waiver of procedural rights is not a problem

⁴⁰ Commission Regulation 622/2008 of 30 June 2008 amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171/3 (“Settlement Regulation”). See also Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Articles 7 and 23 of Council Regulation 1/2003 in cartel cases [2008] OJ C 167/1 (“Settlement Notice”).

⁴¹ See Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 & 102 TFEU [2004] OJ L123/18 (“Regulation 773/2004”), Art. 10(a)(2).

⁴² Settlement Notice paras 17-22.

according to ECtHR jurisprudence provided it is voluntary (e.g. there should be no improper compulsion)⁴³.

2.4. Preliminary conclusions

The three paragraphs above discussed the jurisprudence of the ECtHR on the notion of a criminal charge and applied that jurisprudence to the EU competition law procedure. With the exception of the “classic” fining procedure, it can be concluded that it is not absolutely clear that informal enforcement procedures can be qualified as criminal charges. In addition, it is not obvious that procedural rights fully apply to these procedures. The above analysis showed diverging levels of procedural rights depending on the procedure. The outcome of this analysis can be found in the table below.

Type of enforcement procedure	Level of procedural guarantees: administration	Level of procedural guarantees: trial
Fining procedure	Art. 6 paras 1, 2, 3	Art. 6 paras 1, 2, 3
Commitment procedure	-	Art. 6 para 1
Leniency procedure (immunity)	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 para 1
Leniency procedure (reduction)	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 paras 1, 2, 3 but Jussila
Settlement procedure	Art. 6 paras 1, 2, 3 but Jussila	Art. 6 paras 1, 2, 3 but Jussila

3. The right to be heard under Article 6 ECHR

3.1. The right to a fair hearing of Article 6 ECHR

After concluding on the basis of the Strasbourg jurisprudence that there could be diverging levels of procedural rights protection in EU competition law procedures, it is interesting to execute this model by means of a case study. This paper will use as a case study the right to be heard, which is part

⁴³ In addition, as mentioned by Wils, the undertaking should be fully aware of the conditions and consequences of a settlement. W.P.J. Wils, “The use of settlements in public antitrust enforcement: objectives and principles, (2008) 31(3) *World Competition* 348-351.

of the wider right to a fair trial provided by Article 6 ECHR. It is important to stress that the right to a fair trial of Article 6 ECHR has an “open-ended, residual quality”. A number of specific rights have in fact been read into Article 6 ECHR through the medium of its fair hearing guarantee⁴⁴. One of them is the right to an oral hearing in one’s presence⁴⁵, which offers protection against arbitrary decisions⁴⁶. The term “oral hearing” is somewhat confusing as it can refer to the right to a public hearing and the right of an oral hearing in one’s presence⁴⁷. For the purpose of this paper, discussed will only be jurisprudence on oral hearings (paragraph 3.2) Another right which is not explicitly mentioned in Article 6 ECHR is that of access to one’s file (paragraph 3.2).

3.2. The right to an oral hearing

3.2.1. The scope of the right

With respect to criminal procedures, the ECtHR stipulated that there is a general right of the accused to attend the hearing⁴⁸. Although the right to be heard is particularly relevant for criminal procedures (where the witnessing and monitoring of proceedings are of great importance⁴⁹), it also extends to certain kinds of civil procedures. The right to be heard in civil procedures mainly applies to cases where the “personal character and manner of life’s

⁴⁴ D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the...*, op. cit., p. 246.

⁴⁵ ECtHR judgment of 12 February 1984 in case *Colozza v Italy* Appl no 9024/80, para 27. In this case the ECtHR held: “though this is not expressly mentioned in para 1 of Article 6, the object and purpose of that Article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing”.

⁴⁶ *Pretto and others v Italy* (1983) Series A no 71.

⁴⁷ Also the ECtHR has sometimes difficulties with making a distinction between those two subrights of the more abstract right to an oral hearing. See e.g. ECtHR judgment of 26 May 1988 in case *Ekbatani v Sweden* Appl no 10563/83; and ECtHR judgment of 21 September 2006 in case *Moser v Austria* Appl no 12643/02.

⁴⁸ ECtHR judgment of the 18 October 2006 in case *Hermi v Italy* Appl no 18114/02, para 58; *Lala v the Netherlands* (1994) Series A no 297, para 33; *Poitrimol v France* (1993) Series A no 277, para 35; and ECtHR judgment of 12 February 2004 in case *De Lorenzo v Italy* (dec.) Appl no 69264/01.

⁴⁹ D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the...*, op. cit., p. 247. In criminal procedures the right to an oral hearing follows from the rights that are listed in Art. 6 para 3 sub c, d and e ECHR. The ECtHR recalled that the principle of an oral and public hearing is particularly important in the criminal context where the accused must generally be able to attend a hearing at first instance (*Tierce and Others v San Marino* ECHR 2000-IX, para 94).

of the party concerned is directly relevant to the decision”⁵⁰, or where the applicant’s conduct need to be assessed^{51,52}.

3.2.2. The exceptions

The right to be heard in civil procedures is not absolute; the question whether the applicant has a right to an oral hearing depends on the nature of the issues to be decided⁵³. The ECtHR concluded in several social security cases that due to the highly technical nature of the case, the case was better dealt with in writing than in oral argument⁵⁴. An oral hearing is not required in cases where only non-complex legal questions are being discussed⁵⁵, neither it is necessary where oral statements will not present any added-value to the outcome of the case⁵⁶.

The right to an oral hearing is limited also in criminal proceedings. The aforementioned *Jussila* case illustrates that an oral hearing may not be necessary in procedures (such as those relating to competition law) belonging to the periphery of criminal law. In *Jussila*, the ECtHR refused to give the applicant the right to an oral hearing because the judiciary was not persuaded that this particular case posed any issues of credibility that required an oral hearing (the contested issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions)⁵⁷. In the aftermath of *Jussila*, the ECtHR not only followed the same line of reasoning⁵⁸ but also crystallized its previous jurisprudence by underlining that “the character of the circumstances which may justify dispensing with an oral hearing essentially

⁵⁰ ECtHR judgment of 30 June 1959 in case *X v Sweden* (dec.) Appl no 434/58.

⁵¹ *Muyldermans v Belgium* Series A no 214, para 64.

⁵² One exception is the *Georgiadis* case where the ECtHR held that “a procedure whereby civil rights are determined without ever hearing the parties” submissions cannot be considered to be compatible with Art. 6 para 1. See ECtHR judgment of 29 May 1997 in case *Georgiadis v Greece* Appl no 21522/93, para 40.

⁵³ See for e.g. ECtHR judgment of 8 February 2005 in case *Miller v Sweden* Appl no 55853/00.

⁵⁴ ECtHR judgment of 24 June 1993 in case *Schuler-Zgraggen v Switzerland* Appl no 14518/89; and ECtHR judgment of 12 November 2002 in case *Döry v Switzerland* Appl no 28394/95.

⁵⁵ ECtHR judgment of 1 June 2004 in case *Valová, Slezák and Slezák v Slovak Republic* Appl no 44925/98.

⁵⁶ ECtHR judgment of 25 November 2003 in case *Pursiheimo v Finland* Appl no 57795/00. See, *a contrario*, the case *Göç* where the “personal nature of the applicant’s experience [related to his detention], and the determination of the appropriate level of compensation, required that he be heard”. See ECtHR judgment of 11 July 2002 in case *Göç v Turkey* Appl no 36590/97.

⁵⁷ *Jussila v Finland* (2007) 45 EHRR 39, para 47.

⁵⁸ ECtHR judgment of 17 July 2007 in case *Oy and Karanko v Finland* Appl no 61557/00; Judgments of the ECtHR of 22 July 2008 *Lehtinen v Finland* Appl no 32993/02 and *Kallio v Finland* Appl no 40199/02.

comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file”⁵⁹.

The ECtHR concluded in the *Flisar* case, on the basis of the nature of the issue⁶⁰, that the local court could not have properly determined the facts or the applicant’s guilt without a direct assessment of the evidence at an oral hearing. In this case, the applicant contested the conviction and challenged certain factual aspects of the case, including the credibility of certain police statements concerning his conduct (in contrast to the *Suhadolc* case which concerned evidence obtained by means of an objective method)⁶¹. This case emphasizes the importance of an oral hearing in criminal procedures when it can put the credibility of given statements or facts to the test⁶².

3.2.3. The moment of the oral hearing

A related question is whether, where an oral hearing took place at first-instance⁶³ (for example during the administrative proceedings), the appeal court should also ensure an oral hearing. The ECtHR approached this question by reiterating that where a public hearing has been held at first instance, its absence may be justified at the appeal stage⁶⁴. This holds particularly for: (1) appeal proceedings involving only questions of law⁶⁵; and

⁵⁹ ECtHR judgment of 17 May 2001 in case *Suhadolc v Slovenia* (dec.) Appl no 57655/08. See also ECtHR judgment of 27 March 2003 in case *Berdajs v Slovenia* Appl no 10390/09.

⁶⁰ Aside from the nature of the issues, the ECtHR attached importance to domestic regulations concerning the right to an oral hearing. According to the ECtHR, problems under Art. 6 ECHR will arise when the absence of an oral hearing flows from domestic law itself. ECtHR judgment of 3 October 2006 in case *Karahanoglu v Turkey* Appl no 74341/01, paras 36-39; ECtHR judgment of 6 December 2007 in case *Súsanna Rós Westlund v Iceland* Appl no 42628/04, para 40; and ECtHR judgment of 4 March 2008 in case *Hüseyin Turan v Turkey*, Appl no 11529/02, paras 34-35.

⁶¹ ECtHR judgment of 29 September 2001 in case *Flisar v Slovenia*, Appl no 3127/09.

⁶² See also ECtHR judgment of 28 February 2013 in case *Milenovič v Slovenia* Appl no 11411/11, para 32.

⁶³ An applicant can waive his/her right to an oral hearing, provided that the waiver is made “of his own free will, either expressly or tacitly”, is “established in an unequivocal manner”, is “attended by minimum safeguards”, and does “not run counter to any important public interest”. See D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the...*, op. cit., p. 247 and case *Sejdovic v Italy* ECHR 2006-II, para 86.

⁶⁴ *Fejde v Sweden* (1991) Series A no 212, paras 27 and 31; and *Kremzow v Austria* (1993), Series A no 268, para 58-59.

⁶⁵ ECtHR judgment of 19 February 1996 in case *Botten v Norway* Appl no 16206/90, para 39. See also *Axen v Germany* (1983) Series A no 72, paras 27-28; *Kremzow v Austria* (1993), Series A no 268, paras. 60-61; and ECtHR judgment 19 February 1998 in case *Allan Jacobsson v Sweden* (nr. 2) Appl no 16970/90, para 49.

(2) appeal procedures where the court has full jurisdiction to examine both points of law and of fact⁶⁶. With respect to situations where the appeal court has full jurisdiction, the ECtHR clarified that an oral hearing might anyway be required when the appeal raises any questions of fact or law which cannot be adequately resolved on the basis of the case file⁶⁷.

3.3. The right to access documents

3.3.1. The scope of the right

Like with respect to the right to an oral hearing, the right to access documents is not explicitly included in Article 6 ECHR. The right to access documents follows from the notion of equality of arms and the right to an adversarial procedure⁶⁸. The right to an adversarial proceeding means that parties should have knowledge of, and should be able to, comment on all evidence adduced or observations filed with a view to influencing the court's decision⁶⁹. In a similar context, the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent⁷⁰. Basically, this implies that a party should have access to documents that the opponent filed or to documents which (otherwise) places the opponent at a substantial advantage.

With respect to civil procedures, the ECtHR confirmed that parties have only a limited right to access documents. It can only require disclosure of documents that can actually influence the judgment of the court. In the *Yvon* case, the ECtHR formulated this rule as follows: "In its opinion, the adversarial principle, thus defined, does not require that each party in civil

⁶⁶ *Idem*. See also *Fejde v Sweden* (1991) Series A no 212, para 33.

⁶⁷ ECtHR judgment of 29 October 1991 in case *Jan Åke Andersson v Sweden* Appl no 11274/84, para 29; and ECtHR judgment of 1 July 1997 in case *Rolf Gustafson v Sweden* Appl no 23196/94.

⁶⁸ The requirements of equality of arms and adversarial procedure apply to criminal and civil procedures, but their actual scope is not exactly the same. The ECtHR stated: "This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 [...]. Thus, although these provisions have a certain relevance outside the strict confines of criminal law [...] the Contracting States have greater latitude when dealing with civil cases than they have when dealing with criminal case". See *Dombo Beheer v Netherlands* (1993) Series A no 274, para 32. See also *Albert and Le Compte v Belgium* (1983) Series A no 58, para 39; and ECtHR judgment of 23 October 1996 in case *Levages Prestations Services v France* Appl no 21920/93.

⁶⁹ ECtHR judgment of 20 February 1996 in case *Vermeulen v Belgium* Appl no 19075/91, para 33.

⁷⁰ *Dombo Beheer v Netherlands* (1993) Series A no 274, para 33; and *Brandstetter v Austria* (1991) Series A no 211, para 66.

cases must transmit to its opponent documents which, as in the instant case, have not been presented to the court either”⁷¹.

The right to have access to documents that are in the possession of the court/ administrative authority, and which can influence the outcome of the case, is not absolute (as will be discussed below). An infringement of the right to a fair hearing will take place when a respondent State, without good cause, prevents parties from gaining access to documents in its possession which would have assisted them in defending their case⁷².

By contrast to civil procedures, criminal procedures should guarantee a much broader right to access documents, meaning that the right should extend to all incriminating and exculpatory documents that are in the file of the prosecutor⁷³. According to the ECtHR, unlimited access to documents is a very important safeguard in criminal procedures – it assures “the confidence of the parties of criminal proceedings in the workings of justice”⁷⁴. Whether the judge will (or will not) use these documents in his /her assessment is irrelevant. According to the ECtHR, it is not the task of the prosecutor to assess whether the collected documents are relevant to the outcome of the case⁷⁵. This means that the prosecutor may not decide, on his/her own motion, to withhold documents for or against the accused⁷⁶.

3.3.2. The exceptions

As said above, the entitlement to disclosure of relevant evidence is limited; the fact that certain documents are not in the possession of one party will not automatically result in an infringement of Article 6 ECHR. In the *Dowsett* case, the ECtHR reiterated its jurisprudence where it had held that in criminal proceedings⁷⁷ public interests may exist (such as: national security, the need to protect witnesses or the need to keep secret police methods of investigating crime) that justify the non-disclosure of evidence. Another legitimate reason to withhold certain evidence from the defence is the preservation of

⁷¹ ECtHR judgment of 24 April 2003 in case *Yvon v France* Appl no 44962/98, para 38.

⁷² ECtHR judgment of 9 June 1998 in case *McGinley and Egan v the United Kingdom* Appl nos 21825/93 and 23414/94, paras 86 and 90.

⁷³ *Edwards v United Kingdom* (1992) Series A no 247, para 46.

⁷⁴ ECtHR judgment of 22 March 2005 in case *M.S. v Finland* Appl no 46601/99.

⁷⁵ ECtHR judgment of 31 March 2009 in case *Nautinen v Finland* Appl no 21022/04.

⁷⁶ ECtHR judgment of 16 February 2000 in case *Rowe and Davis v United Kingdom* Appl no 28901/95.

⁷⁷ With respect to civil proceedings, the ECtHR held that the scope of the right to access documents (including its restriction) depends on the specifics of each case. ECtHR judgment of 27 April 2010 in case *Hudakova and other v Slovak Republic* Appl no 23083/05, paras 26-27; and ECtHR judgment of 15 June 2005 in case *Stepinska v France* Appl no 1814/02.

a fundamental right of another individual⁷⁸. A restriction on the right to access documents is, however, only permitted when (i) it is strictly necessary; and (ii) the difficulties caused to the defense are sufficiently counterbalanced by the procedures followed by the judicial authorities⁷⁹. Regarding specifically the existence of adequate procedural safeguards, the ECtHR rendered several judgments where it had held that the accused should be able to make an objection against the decision to withhold certain documents before a court that will balance the different interests⁸⁰. Only when national law provides for such procedural guarantees might the non-disclosure of documents not violate Article 6 ECHR.

3.4. Preliminary conclusions

The right to a fair hearing provided by Article 6 ECHR contains several sub-rights which are not explicitly mentioned. Two of them are the right to an oral hearing in one's presence and the right to access documents. Both of them are not absolute rights, meaning that domestic practice might deviate from one of these rights in order to protect public interests or fundamental rights of others (in case of a disclosure request) or when the nature of the issue can be assessed on the basis of written materials (in case of an oral hearing). It seems that the ECtHR is specifically lenient with respect to the need of an oral hearing in procedures belonging to the periphery of criminal law. As explicitly mentioned in the *Kammerer* case, it is not excluded that such a differentiated application of procedural safeguards also applies to other procedural issues covered by Article 6 ECHR⁸¹. With respect to the right to access documents it seems that parties should (as the minimum safeguard) at least receive those documents that are part of the decision of the administrative authority or court.

⁷⁸ ECtHR judgment of 26 June 2006 in case *Dowsett v United Kingdom* Appl no 39482/98, para 41. See also *Doomson v the Netherlands* ECHR 1996-II, para 70.

⁷⁹ *Van Mechelen and others v the Netherlands* ECHR 1997-III, paras 54-58.

⁸⁰ ECtHR judgment of 16 February 2000 in case *Rowe and Davis v United Kingdom* Appl no 28901/95; *Dowsett v United Kingdom* Appl no 39482/98 (26 April 2003); and ECtHR judgment of 18 November 2003 in case *Chadwich v United Kingdom* (dec.) Appl no 54109/00.

⁸¹ ECtHR judgment of 12 May 2010 in case *Kammerer v Austria* Appl no 32435/06, para 27.

4. The right to be heard under EU law

4.1 The right to an oral hearing

4.1.1 The standard of the EU legal order

The above paragraph illustrates the stance of the ECtHR towards the right to be heard under Article 6 ECHR. The EU right to be heard is spread over several legal sources. Article 41 of the Charter (the right to good administration) is the main provision in this context which states that every person has the right to be heard. In contrast to other provisions in the Charter⁸², Article 41 only applies, in principle, to measures taken by EU institutions⁸³. However, it is also relevant, as a general principle, when the behavior of Member States falls within the scope of EU law⁸⁴. The provision sets out two conditions for the application of the above right. First, it should concern an “individual measure” – this means that the right to be heard does not apply to legislative or regulatory measure. Second, the measure should “adversely affect” someone (see below)⁸⁵.

According to the Explanations, Article 41 of the Charter “is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined good administration as a general principle of law”. The study of the aforementioned cases shows that when assessing a case under Article 41 of the Charter the European judiciary is usually guided by the general principle of defence (and not of good administration)⁸⁶. With respect to the applicability of the general principle to be heard (sub-category of the right of defence), jurisprudence shows that, in line with Article 41 of the Charter, a person has the right to an oral hearing in administrative proceedings when a proceeding was initiated against him/her

⁸² The other Charter provision also applies to national measures that come within the scope of EU law. See e.g. C-671/10 *Akerberg Fransson*, not yet reported.

⁸³ C-482/10 *Cicala*, not yet reported.

⁸⁴ C-277/11 *M.M.*, not yet reported. In this case, one can read an applicability of Art. 41 of the Charter to Member States with respect to the right to be heard in asylum cases. See also case C-604/12 *H.N.*, not yet reported, paras 49-50. See also the opinion of Advocate General Bot of 7 November 2013 in C-604/12, *H.N.*, para 36.

⁸⁵ I. Rabinovici, “The right...”, op. cit., p. 150.

⁸⁶ In the *Kuhner* case, the ECJ distinguished the general principle of good administration from more specific rights of defense. The Court held that only the latter were capable of conferring subjective rights on individuals. See joined cases 33/79 and 75/79 *Kuhner v Commission* [1980] ECR 1677, para 25.

and might adversely affect a person⁸⁷. The right to an oral hearing is, therefore, not limited to sanction proceedings⁸⁸. The right to a hearing requires that the given natural or legal person has the opportunity to make its view known on the truth and relevance of the facts, charges, and circumstances relied upon by the decision-maker⁸⁹.

4.1.2. The application of the right to competition law proceedings

The specific requirements of the right may differ depending on the type of proceedings. In competition law cases, the Commission must give the undertakings the opportunity of being heard on the allegations raised by the authority against them. The right to an oral hearing only relates to Commission decisions under Articles 7, 8, 23 and 24 (2) Regulation 1/2003⁹⁰. These provisions concern the finding of an infringement, the imposition of interim measures, the imposition of a fine, and the definitive fixing of a period penalty payment. The undertakings concerned should request an oral hearing in their written submissions⁹¹. In settlement procedures, parties must agree that they will not request an oral hearing unless the Commission does not reflect their settlement submissions in its statement of objections and the resulting decision⁹². The Hearing Officer, as an independent administrative officer, will organize such an oral hearing⁹³. His task is to safeguard the effective exercise of procedural rights throughout the whole administrative procedure⁹⁴.

⁸⁷ 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, para 15; 40/85 *Belgium v Commission* [1986] ECR 2321, para 28; and T-450/93 *Lisrestal v Commission* [1994] ECR II-1177, para 42.

⁸⁸ 85/76 *Hoffmann la Roche v Commission* [1979] ECR 461, para 9. In this case, the ECJ limited the right to be heard to persons upon which sanctions may be imposed. This formula is reserved for antitrust cases in which normally sanctions are imposed. See I. Rabinovici, “The right...”, *op. cit.*, p. 157.

⁸⁹ 85/76 *Hoffmann la Roche v Commission* [1979] ECR 461, paras 9 and 11.

⁹⁰ Regulation 1/2003, Art. 27 para 1, Regulation 773/2004 helps to define the extent of this right. See Regulation 773/2004, Arts. 10, 11, and 15. See on the oral hearing: W.P.J. Wils, “The oral hearing in competition proceedings before the European Commission”, (2012) 35(3) *World Competition* 397-430.

⁹¹ Regulation 773/2004, Art. 12.

⁹² Settlement Regulation.

⁹³ Decision of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011) OJ L 275/59.

⁹⁴ See for more information about the role of the Hearing Officer W.P.J. Wils, “The role of the Hearing Officer in competition proceedings before the European Commission”, (2012) 35(3) *World Competition*; and N. Zingales, “The Hearing Officer in EU competition law proceedings: ensuring full respect for the right to be heard?”, (2010) 7(1) *Competition Law Review*.

4.2. The right to access documents

4.2.1. The standard of the EU legal order

An essential precondition of an effective exercise of the right to be heard is the right to access documents⁹⁵. Article 41 of the Charter includes “the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy”. The Charter limits this right to “one’s file”, thereby excluding access to the files of *other* parties⁹⁶. Third parties that would like to request access to the Commission’s file could do so by means of Article 42 of the Charter⁹⁷.

4.2.2. The application of the right to competition law proceedings

Undertakings are, in principal, entitled to have access to the Commission’s file⁹⁸ for the purpose of preparing a representation in their own defence⁹⁹. In competition proceedings, the European judiciary has made it clear that “the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission’s file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections”¹⁰⁰.

The Commission has thus an obligation to give access to undertakings to all documents, both those in their favour or otherwise, which had been obtained during the course of the investigation. It is up to the undertakings to determine (on the basis of a list of all documents¹⁰¹) which documents are

⁹⁵ K. Lenaerts & J. Vanhamme, “Procedural rights of private parties in the community administrative process”, (1997) 34 *Common Market Law Review* 541.

⁹⁶ K. Kanska, “Towards administrative human rights in the EU. Impact of the Charter of Fundamental Rights”, (2004) 10(3) *European Law Journal* 318.

⁹⁷ Art. 42 of the Charter provides that any natural or legal person has a right to access documents of EU institutions. See also Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43. However, the legal bases of those rights are different. The general right of access to documents (Art. 42) is derived from the democracy principle, whereas the right to access to one’s file is an administrative procedural right. See H.P. Nehl, *Principles of administrative procedure in EC law*, Oxford Hart Publishing 1999, p. 60.

⁹⁸ Regulation 1/2003, Art. 27 para 2.

⁹⁹ C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, para 25; T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389, para 21; and T-161/05 *Hoechst v Commission* [2009] ECR II-3555, para 160.

¹⁰⁰ Case T-24/07 *ThyssenKrupp Stainless v Commission* [2009] ECR II-2309, para 247.

¹⁰¹ Undertakings are informed of the contents of the Commission’s file by means of an annex to the statement of objections that lists all the documents in the file and indicating

relevant. In no case can the Commission exercise discretion in withholding certain documents because it considers them of no interest to the undertakings concerned¹⁰². A similar policy applies to settlement procedures with the minor difference that the Commission decides when to disclose the documents and the parties only receive access before their settlement submissions have been reflected in the statement of objections¹⁰³.

The requirement to disclose the file may, however, come into conflict with the confidentiality of certain documents and the obligation of the Commission to keep those documents secret¹⁰⁴. A clear tension can be seen here between two principles – disclosure versus confidentiality. On the one hand, the Commission should disclose all documents that are collected during its administrative proceedings. On the other hand, it may not disclose confidential information; it is not surprising that competition law files contain a lot of confidential information. EU law accords confidential status to the following categories of documents: confidential documents belonging to third parties (such as business secrets and correspondence between undertakings and their lawyers), internal documents of the Commission, and correspondence between the Commission and NCAs¹⁰⁵. Business secrets are afforded “very special protection”¹⁰⁶. In the *Soda-Ash* cases, the General Court made it clear that the Commission must protect the business secrets of an undertaking in such a way as to cause the least possible interference with the right to a hearing, for example, by preparing a non-confidential version of the documents¹⁰⁷. Third parties may never be given access to documents containing business secrets¹⁰⁸ unless the Commission (or, ultimately, the EU judiciary) decides that the rights of defence and the public interest in the administration of justice outweigh the protection of business secrets¹⁰⁹. Particularly interesting is the discussion

documents or parts thereof to which they may have access. See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004 (2005) OJ C 325/07 (“Notice on the rules for access to the Commission file”), para 45.

¹⁰² Case T-30/91 *Solvay SA v Commission* [1995] ECR II-1775, para 81; and C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, para 125.

¹⁰³ Parties to settlement discussions may be informed by the Commission of its objections to their behavior, the evidence used to determine those objections, non-confidential versions of relevant documents; and the range of potential fines. See Regulation 773/2004, Art. 10(a)(2).

¹⁰⁴ Art. 339 TFEU on professional secrecy.

¹⁰⁵ Regulation 1/2003, Art. 27 para 2.

¹⁰⁶ T. Tridimas. *The general principles of EU law*, Oxford OUP 2006, p. 389.

¹⁰⁷ T30/91 *Solvay SA v Commission* [1995] ECR II1775; and T-36/91 *ICI v Commission* [1995] ECR I-1847.

¹⁰⁸ 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, para 28; and 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR I-44787, para 21.

¹⁰⁹ Notice on the rules for access to the Commission file, para 24.

to what extent leniency documents can be protected from disclosure to third parties who wish to use those documents in an action for damages¹¹⁰. During such an action a third party could perhaps successfully claim access those documents in light of its general “human” right of defence¹¹¹.

4.3. Preliminary conclusion

The general right of defence has long since been part of the EU legal order. The right of defence applies to administrative proceedings which are initiated against a person and which may adversely affect that person. As such, this rule limits the application of the right of defence to the addressees of a Commission’s statement of objection. The right to be heard is a sub-right of the right of defence. The right to be heard is limited to infringement decisions; commitment procedures are explicitly excluded from its ambit and settlement procedures have their own procedural framework. The right to access documents is another sub-right of the general right of defence. It applies to all procedures although an exception is provided for settlement procedures.

5. Analysis

The law on the defence rights of undertakings in EU competition law proceedings is still under development. The EU judiciary plays an important role in this context as it must specify the precise contours of the defence rights. Although legislation exists (Article 41 of the Charter), the EU judiciary rely mainly on previous jurisprudence on the general rights of defence. This is in line with the Explanation to the Charter, which explicitly mentions that Article 41 of the Charter is a “mere” codification of existing jurisprudence. Since the EU has the obligation to safeguard the minimum level of protection provided for by the ECHR, it is, however, surprising that the EU judiciary

¹¹⁰ See on this discussion the following judgments: *C-360/09 Pfeleiderer AG v Bundeskartellamt* [2011] ECR I-5161; and *C-536/11 Bundeswettbewerbsbehörde v Donau Chemie AG and others*, not yet published.

¹¹¹ According to the proposed Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM (2013) 404), corporate statements of leniency applicants are, however, documents which are protected from disclosure at all times.

does not assess these cases under Article 6 ECHR¹¹². Having the EU judiciary to decide “autonomously” upon the interpretation of fundamental rights is not a problem as long as their interpretation leads to convergence or, perhaps better, progression of fundamental rights protection.

In the second part of this paper, the assumption was confirmed that the level of procedural guarantees should correspond with the level of punishment. Only with respect to the “classic” fining procedure, an undertaking (not leniency applicant) can rely upon the full protection of Article 6 ECHR. This means that an undertaking should have a right to an oral hearing and access to the complete file of the Commission. In EU competition law proceedings undertakings have indeed the right to request an oral hearing. In addition, they can request access to all documents held in the file of the Commission. Exceptions to the right to access documents (confidentiality) differ, however, from ECtHR jurisprudence since the latter only accepts as a legitimate exception (i) the protection of public interests, or (ii) the protection of fundamental rights of others. This means, in essence, that accepting the confidentiality of documents in EU competition law proceedings could run counter to the general right of adversarial proceedings and the principle of equality of arms.

With respect to informal enforcement proceedings (leniency, settlement and commitment), ECtHR jurisprudence shows that a lower level of fair trial protection suffices. Specifically in commitment procedures, the Commission is not obliged to offer an oral hearing or to grant full access to the file. Both are not the case in EU competition law proceedings as an oral hearing is limited to infringement decisions and the right to access documents is limited to those to whom the Commission sends a statement of objections¹¹³. The Commission may offer a less stringent application of procedural rights (see discussion

¹¹² In the future, acts of the Commission would be reviewable by the ECHR as undertakings can lodge a complaint with the ECtHR against the EU. There is an on-going debate on whether the EU courts would preserve its responsibility for ensuring the respect of fundamental rights in the EU’s legal order. See the debate on the Bosphorus-case where the ECtHR held that the ECJ provided protection for human rights equivalent to that given by the ECtHR: *Bosphorus Airways v Ireland* (2006) 42 EHHR 1. For more on this subject, see: L.F.M. Besselink, *The Protection of Fundamental Rights Post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (General Report of the XXV FIDE Congress Tallinn 2012).

¹¹³ In commitments procedures, once the Commission is convinced of the undertakings’ genuine willingness to propose commitments, the Commission will send a Preliminary Assessment in which it summarizes the main facts of the case and identifies its competition concerns. The Preliminary Assessment serves as a basis for the parties to put forward appropriate commitments or to better define previously discussed commitments. See F. Wagner-Von Papp, “Best and even better practices in commitment procedures after *Arosa*: the dangers of abandoning the struggle for competition law”, (2012) 49 *Common Market Law Review* 929-970.

of the *Jussila* distinction) in settlement procedures because of demands of procedural efficiency and economy. It is interesting to note that settlement proceedings, with the prospect of achieving procedural efficiencies, already provide for such limited rights of defence¹¹⁴. The jurisprudence of the ECtHR does require that a waiver of procedural rights takes places in an unequivocal manner¹¹⁵.

It is surprising that one cannot find procedural efficiencies in leniency procedures where, similar to settlement procedures, undertakings voluntarily decide to cooperate with the Commission while the latter grants them a fine reduction as a means of compensation. This is even more peculiar as fine reductions in leniency procedures can be much more rewarding than in settlement (10% for settlement versus up to 100% for leniency). In addition, the fact that a leniency application can trigger the start of an investigation (whereas settlement applications are submitted at a later stage of the investigation) does not mean that a leniency applicant needs an oral hearing to “contest the credibility of the facts” (citing *Jussila*). The same applies to the leniency applicant’s right to access documents, which can be limited in time (only allowing access until the Commission sends a statement of objection) and in scope (limiting access to the documents that the Commission used to substantiate the infringement).

6. Conclusion

The present-day standards of the right to be heard granted to undertakings in EU competition law procedures complies with the legal standards of the ECHR. Regarding two types of enforcement procedures, the “classic” fining procedures and the leniency procedures, one can observe a potential undercompensation respectively overcompensation of fundamental rights protection. With respect to the “classic” fining procedure one could question the refusal of access to documents for reasons of confidentiality. Here one could, however, rebut this argument by claiming that such a refusal is justified on the ground that it protects the fundamental right of privacy.¹¹⁶

¹¹⁴ As discussed above, assuming that the case does proceed to a settlement, the parties will not seek an oral hearing, nor will they request access to the file after receiving the statement of objections.

¹¹⁵ See text note 64.

¹¹⁶ Art. 8 ECHR. In the case *Societe Colas Est* the ECtHR held that Art. 8 ECHR may be construed as including the right to respect for a company’s registered office, branches or other premises. See *Societe Colas Est v France* EHRR 2004-17.

The potential “overcompensation” of fundamental rights protection relates to leniency procedures where, in line with the Strasbourg jurisprudence, certain procedural efficiencies could be implemented. Both developments can be problematic. Undercompensation of fundamental rights protection runs counter to the procedural legitimacy of public enforcement of EU competition law and the basic notions of the rule of law. Overcompensation of fundamental rights protection may conflict with the goals of effective enforcement. It is well known that the Commission and the General Court face difficulties to adjudicate cases within a reasonable time frame. Giving leniency applicants the possibility to start interim litigation on alleged infringements of procedural rights will delay the proceedings even more. The latest *Gascogne* and *Kendrion* judgments illustrate that a delay of the “reasonable time requirement” might trigger undertakings to start damage actions against the EU¹¹⁷. These judgments touch upon a very delicate question: how to reconcile effective public enforcement with fundamental rights¹¹⁸? One way is to interpret the fundamental rights in a more flexible manner (*Jussila!*) and prevent the bestowal of more procedural rights on undertakings than actually required by the ECHR.

¹¹⁷ 40/12 P *Gascogne Germany*, not yet reported; C-50/12 P *Kendrion*, not yet reported; and C-58/12 P *Gascogne*, not yet reported.

¹¹⁸ See e.g. A. Scordamaglia-Tousis, *EU cartel enforcement – reconciling effective public enforcement with fundamental rights*, Alphen aan de Rijn 2013.