Procedural Rights in EU Antitrust Proceedings

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1 Introduction

In the European Union (EU), the rights of parties to antitrust proceedings before the Commission are dispersed in a jungle of legal instruments. Some are enshrined in statutory instruments: the founding Treaties (Treaty on the European Union (hereafter, TEU) and the Treaty on the Functioning of the European Union (hereafter TFEU),[1] the Charter of Fundamental Rights of the EU (hereafter Charter),[2] the European Convention on Human Rights (hereafter ECHR))[3] and EU secondary legislation (in particular Regulation 1/2003[4] and the Implementing Regulation 773/2004).[5] Those instruments do not necessarily have equal legal value. Others can be found in the case-law of the EU Courts[6] and of the European Court of Human Rights (hereafter ECtHR). They often stem from general principles of law or from the legal traditions and case-law of the Member States. Finally, several important procedural rights originate from the EU Commission's administrative practice. Those rights are usually described in soft law instruments, such as Communications, notices, best practices, manuals, etc.

With this background, this paper makes a detailed inventory of the procedural rights of undertakings subject to formal antitrust proceedings, *i.e.* proceedings related to the *ex post* enforcement of Art. 101 TFEU (coordinated conduct) and/or Art. 102 TFEU (unilateral conduct). Its ambition is to bring clarification into – and assist readers, firms and their counsels navigate – the thick and misty maze of EU competition rights. A right that is ignored is indeed an ineffective right. And as Forrester once coined it, there is good reason to believe that the bush of EU competition procedure is in need of pruning.[7]

This paper thus approaches procedural rights from a granular and itemized perspective. It strays from the conventional presentation which presents procedural rights in broad and abstract categories, and comes up with a larger list of ten competition rights,[8] which

[1] See Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

[2] See Charter of Fundamental rights of the European Union, 18 December 2000, 2000/C 364/01.

[3] See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[4] See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty [2003] O.J. L 1/1 (hereafter "Regulation 1/2003"), in particular Preamble at Recital 37.

[5] See Commission Implementing Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty (O.J. L 123/18).

[6] In this Chapter we use CJEU and GC, to refer also to cases dealt by the former ECJ and CFI. We use EU Courts to refer to both CJEU/ECJ and GC/CFI rulings.

[7] See Forrester (2010), 13–16.

[8] *Ibid.* This paper does not specifically address the role of the Hearing Officer or the controversial issues generated by the fact that the EU Commission acts as investigator, prosecutor and judge.

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comprises: the right to assistance, the right to have cognizance to all material of importance for the resolution of the case, the right of expression, the right to have a decision within a reasonable time, the right to integrity, the right to be presumed innocent, the right to silence, the right to professional secrecy, the right to an explanation and the right to consistency and predictability in decision-making.

Before considering each of those rights in further detail, the reader ought to be reminded that the EU is not yet a member of the ECHR. Additionally, the case law of the CJEU seems to exclude the application of Art. 6 ECHR to the EU Commission (hereafter "the Commission") on the ground that the Commission is no "*tribunal*". However, the EU case law is not entirely consistent. Some rulings have seemed to hold that Art. 6 ECHR could be applicable in EU competition proceedings.[9] Moreover, the Commission is bound to respect general principles of Union law which themselves originate from the common constitutional traditions of the Member States.[10] Through this channel, several rights protected by the ECHR indirectly permeate EU competition proceedings. All this commands paying heed to the ECtHR case-law in the discussion that follows.

This paper is organised as follows. We review each procedural right in turn. For each right, we discuss content, legal basis, specific features, and scholarly debates that took place in the legal literature.[11] To keep the paper as *user friendly* as possible, we also explain if, and what, practical consequences arise when those rights are infringed (not all violations of procedural rights give rise to judicial annulment).

2 Right to assistance (also called right to participate effectively to antitrust proceedings)

Content and legal basis

Any firm subject to competition proceedings must be able to participate in an effective manner to the procedure. This principle, which sounds trite, concretely means that a suspected firm must have the possibility to be present at key moments of the procedure (through its legal representatives or representatives authorised by their constitution),[12] and to be assisted by a lawyer. To that end, firms can appoint an external counsel.[13]

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[9] See C-347/87, *Orkem* v *Commission*, [1989] ECR 3283, para 30.

[10] See T-348/94, *Enso Española SA* v *Commission*, [1998] ECR, 1998, II-1875, para 60 and C-341/06 P and C-342/06 P, *Chronopost SA and La Poste* v *UFEX*, [2008] ECR, I-04777, paras 44–45: "*The right to a fair trial, which derives inter alia from Art. 6(1) of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Art. 6(2) EU. That right to a fair trial means that everyone must be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Such a right is applicable in the context of proceedings brought against a Commission decision*".

[11] See *ibid.*

[12] See C-155/79, *AM & Europe Limited* v *Commission*, [1982] ECR 1575, paras 18–27.

[13] See C-85/87, *Dow Bénélux* v *Commission*, [1987] ECR 3150, para 27. The ECJ has recognized the role of the lawyer as collaborating in the administration of justice by the courts and as being required to provide the independent legal assistant the client needs without any constraints. See also Case 94/00 *Roquette Frères*, [2002] ECR I-9011, para 46; Case 155/79 *AM & S Europe Limited* v *Commission*, [1982] ECR 1575, paras 18–27. Suspected firms can also dispense with external counsels, and use their in-house lawyers or other corporate executives to represent themselves directly before the Commission. What matters is that firms swiftly come forward with a representative who may act on their behalf during the inspection. EU law does not mention the precise identity of the persons entitled to assist undertakings during the proceedings.

The right to effectively participate to proceedings is provided for at Art. 47(2) of the Charter, and in the case-law of the EU courts. It is an offshoot of the right to be heard and of the right to a fair trial set out in Art. 6 ECHR.[14]

Assistance of a lawyer

In the scholarship, most discussions on the right to effectively participate to competition law proceedings focus on the assistance of lawyers.[15] A first debate exists in relation to the Commission's practice of requesting oral explanations from undertakings' employees in the context of investigations (for instance, during a dawn raid, a Commission official apostrophes an employee).[16] Oral explanations may only be valid if the person under interrogation has benefited from the assistance of a lawyer. This is because addressees of such requests can be held personally liable for their declarations pursuant to national law. This is in particular the case in Member States which provide for individual sanctions (criminal or administrative) for antitrust infringements.

However, one may conversely argue that since the questioned person is an employee of the firm, the standard safeguards provided to the firm in antitrust proceedings should be deemed to protect its employees. The assistance of a lawyer would then not be a prerequisite for the validity of these interviews.[17] In addition to this, Art. 12(3) of Regulation 1/2003 limits the possibility for national competition agencies to use evidence obtained by the Commission in order to impose custodial sanctions on natural persons.[18] The risk of subsequent individual penalties on employees pursuant to national competition law is thus limited. Finally, if the Commission opens formal proceedings following the investigation, national agencies are in principle barred from pursuing the infringement pursuant to Art. 11(6), thereby limiting this risk even further.

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[14] See Art. 18(4) of Regulation 1/2003 which provides that: "*The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading*". Even if the right to participate effectively to antitrust proceedings is not included in Regulation 1/2003, we pinpoint that Art. 27 is dedicated to the right to be heard. Before taking decisions of imposing a fine or periodic penalty payments, of ordering interim measures and finding infringement, the Commission shall give the undertakings which are the subject of the proceedings "*the opportunity of being heard on the matters to which the Commission has taken objection*". After mentioning the right to be heard, Regulation 1/2003 states more generally "*the right of defence of the parties concerned shall be fully respected in the proceedings*". This can imply a right of the accused participate in an effective manner in a criminal or administrative-sanctions procedure.

[15] See for example Ortiz Blanco (2013), 336–337; Lianos and Geradin (2013), 153; Chalmers, Davies and Monti (2010), 927; Van Gerven (1966), 355.

[16] See Ortiz Blanco (2013), 336–337.

[17] It seems nonetheless appropriate to give the employee the opportunity to consult a lawyer where there is a clear risk of self-incrimination and surely in case the employee has explicitly requested this. This would ensure the protection of the employee's rights of defence.

[18] See Art. 12(3) of Regulation 1/2003: "*Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where: (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Art. 81 or Art. 82 of the Treaty or, in the absence thereof, (ii) the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions*".

Legal privilege

A second debate concerns the confidentiality of the documents exchanged between a firm and its legal counsels.[19] According to the CJEU, those documents are out of the Commission's reach. This principle, known as "*legal professional privilege*", stems from the EU courts' case-law in *AM&S*.[20] Its rationale is to encourage a client to tell his lawyer the entire truth without any fear of disclosure so that the lawyer is able to represent his client in the most effective way.

In *AM&S*, the Court set two criteria for documents to be protected by legal privilege. First, the document must have been made for the purpose and in the interest of the client's rights of defence. Second, the document must emanate from an "*independent lawyer*".[21] Under the so-called *AKZO* procedure, the Commission is allowed only to take a look at the header of the document, in order to verify whether those conditions are met.[22]

The legal professional privilege covers all written communications exchanged following the initiation of antitrust proceedings, as well as earlier written communications, but only where these are drawn up "*for the exclusive purpose*" of seeking legal advice from a lawyer in exercising rights of defence.[23] For instance, documents prepared with a lawyer in the context of a compliance program are excluded from legal professional privilege, for such programmes "*often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence*".[24] Likewise, the mere fact that a document has been discussed with an independent lawyer is, in itself, not sufficient to bring it under the protective umbrella of legal professional privilege where there is no proof that it was drawn up for the exclusive purpose of seeking legal advice.[25]

The notion of what constitutes an "*independent lawyer*" has been a bone of contention in antitrust scholarship. In *AM&S* and later in *AKZO*, the Court expressly excluded in-house lawyers from the privilege. Unlike external lawyers, in-house lawyers are not bound by professional ethical obligations. Moreover, they are subject to a hierarchical employment

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[19] See Boykin (2006), 19–21 (available at: http://www.hugheshubbard.com/ArticleDocuments/Boykin_article%20_2.pdf).

[20] See C-155/79, *AM & S* v *Commission*, [1982] ECR 1575, para 18: "*Community law, which derives not only the economic but also the legal interpretation of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client*". This principle is itself derived from national case-law in criminal cases.

[21] See C-155/79, *AM & S* v *Commission*, [1982] ECR 1575, para 21: "*Apart from these differences, however, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment*". See also Order of the General Court, T-30/89, *Hilti Aktiengesselschaft* v *Commission*, [1990] ECR II-163; Joined Cases T-125/03 and 253/03, *Akzo Nobel Chemicals Ltd et Ackros Chemicals Ltd* v *Commission*, [2007] ECR II-3523, para 117. The Court of Justice has confirmed the GC ruling. See C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *Commission*, [2010] ECR I-8301.

[22] See Joined Cases T-125/03 and 253/03, *Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd* v *Commission*, [2007] ECR II-3523, para 134.

[23] See *ibid.*, para 128.

[24] See *ibid.*, para 127.

[25] Documents prepared in the context of a compliance program are excluded from legal professional privilege. See Joined Cases T-125/03 and 253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *Commission*, [2007] ECR II-3532, para 124.

relationship.[26] Hence the Court has taken the view that in-house counsels cannot be deemed independent.

In-house lawyers have criticized this case-law.[27] Their concern is that their role in the procedure – which includes the free choice of a lawyer (in-house or external) to provide legal advice – might be marginalized. The Court has to some extent heard those concerns, and recognized that two types of documents prepared by in-house attorneys may exceptionally benefit from the privilege. Those documents are, first, the internal notes for the purpose of seeking external legal advice in the exercise of the undertaking's rights of defence[28] and, second, the preparatory documents established exclusively for the purpose of seeking legal advice from an external lawyer in exercise of the rights of defence.[29]

Sanctions

The right to effectively participate to proceedings is not absolute. Whilst in practice the Commission consistently allows firms to consult a lawyer and/or ask for its presence, the Court has long held that the presence of a lawyer is not a requirement for the validity of inspections.[30] As already explained, uncertainties remain on whether employees have the right to be assisted by a lawyer. These uncertainties presumably explain that legal assistance during inspections is neither regulated in Regulation 1/2003 nor in Regulation 773/2004.

3 Right to have cognizance to all material of importance for the resolution of the case (also called right of access to file)

Content and legal basis

The right of access to file means that the undertaking under investigation has to receive the opportunity to examine all documents held in the Commission file, including those that can be useful for its defence. This is key to ensure that the suspected firm is on equal footing with the Commission.[31]

The right of access to file can be found in the Charter,[32] in the ECHR, in secondary legislation,[33] in the case-law[34] and in Commission's Guidelines.[35] In the Commission's view it is "*one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of defence*".[36] This twin rationale also pervades the case-law of the EU courts. On the one hand, the Court of Justice has stated that the right to have access to the

[26] See *ibid.*, para 44.
[27] See Coen and Roquilly (2014).
[28] See Order of the General Court, T-30/89, *Hilti Aktiengesselschaft* v *Commission*, [1990] ECR II-163.
[29] See Joined Cases T-125/03 and 253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *Commission*, [2007] ECR II-3532, para 123.
[30] See C-136/79, *National Panasonic* v *Commission*, [1980] ECR 2033, para 19.
[31] See T-37/91, *Imperial Chemical Industries plc.* v *Commission*, [1995] ECR II-1901, para 64.
[32] See Art. 41 ECHR.
[33] See Art. 27 para 1 of Regulation 1/2003 and Art. 15 and 16 of Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty (hereafter "Regulation 773/2004").
[34] See C-62/86 *AKZO Chemie BV* v *Commission* [1991] ECR I-3359; Joined Cases T-25, 26, 30–32, 34–39, 42–46, 48, 50–56, 68–71, 87, 88, 103 & 104/95 *Cimenteries CBR and Others*, [2000] ECR II-491.
[35] See Notice on Access to file; see also Commission notice on best practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU, O.J. C 308/6–32 (hereafter "Best Practices Guidelines"), paras 92 and ff.
[36] See Commission Notice on the Rules for Access to the Commission File in Cases pursuant to Arts. 101 and 102 TFEU, Arts. 53, 54 and 57 of the EAA Agreement and Council Regulation (EC) No. 139/2004, [2005] O.J. C 325/7, (hereafter "Notice on Access to file"), Art. 1.

Commission's file is "*a procedural safeguard intended to protect the rights of defence*" and "*an essential precondition of the effective exercise of the right to be heard*"[37] which allows the undertakings to express their views on the preliminary conclusions reached by the Commission in its SO.[38] On the other hand, the Court has also held in the *Sweden and API* case that this right forms a part of the principle of equality of arms, which is is no more than a corollary of the very concept of a fair hearing.[39]

From a practical standpoint, the right of access to file means that the parties concerned should be in a position to present their observations on the complaints/objections raised against them before the final decision.[40] Under Art. 27(2) of Regulation 1/2003 and Arts. 15 and 16 of Commission Regulation 773/2004[41] the Commission must disclose to the addressees of the SO the documents it intends to rely upon in its final decision. Moreover, the parties should be informed about the facts on which these complaints/objections are based.[42]

This, however, does not mean that the entire file is rendered accessible to the undertaking concerned. For instance, the Commission decision will not be annulled if the requested document consists in publicly available information. For instance, a refusal to disclose market information that supports a finding of dominance does not vitiate a Commission decision since the suspected firm cannot fail to be aware of that information.[43] As AG Vesterdorf once stated, the right to have access to file only requires that parties "*have cognizance to all material of importance for the resolution of the case*" and be sure "*that no further material exists which might be relevant*".[44]

[redacted]*Limitations*

The right of access to file has some limits. First, under Regulation 773/2004, "*the right of access to file shall not extend to confidential information*". This limitation stems from the general right to professional secrecy protected at Art. 339 TFEU, and implemented in Art. 28 of the Regulation.

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[37] See T-161/05, *Hoechst GmbH* v *Commission*, [2009] ECR II-3555, para 160; C-51/92 P, *Hercules Chemicals NV* v *Commission*, [1999] ECR I-4235, para 76; Joined Cases T-191/98, T-212/98 to 214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, para 334; T-161/05 *Hoechst GmbH* v *Commission* [2009] ECR II-3555, para 160.

[38] See T-10/92, *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, para 38: "*The procedure for access to the file in competition cases is intended to allow the addressees of an SO to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by the Commission in its SO on the basis of that evidence. Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Art. 19(1) and (2) of Regulation No. 17 and Art. 2 of Regulation No. 99/63 can be exercised effectively. It follows that the right of access to the file compiled by the Commission is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections made against them in the SO*".

[39] See C-514/07 P, C-528/07 and C-532/07 P, *Sweden and API* v *Commission*, para 88.

[40] See CJEU, Joined Cases 56 and 58–64, *Etablissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH* v *Commission*, [1966] ECR 299, 338.

[41] See Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty (hereafter "Regulation 773/2004").

[42] The SO sent to the parties will meet this requirement, whereas it will include the facts alleged against the undertaking, the legal classification of those facts, the legal arguments and evidence the Commission relies upon, and the factors taken into consideration to set the fine: see Case C-45/69, *Boehringer Mannheim* v *Commission*, [1970] ECR 769, para 9; CJEU, C-136/79, *Atlantic Container Line* [1980] ECR 2033, paras 172–173.

[43] See T-36/91, *Imperial Chemical Industries* v *Commission*, [1995] ECR II-1847, paras 216 and ff.

[44] See Opinion of AG Vesterdorf, T-1/89, *Rhone-Poulenc SA* v *Commission*, [1991] ECR II-867, II-884.

Second, "*the right to access to file shall not extend to internal documents of the Commission or the competition authorities of the Member States*".[45] This is important to preserve the ability of the competition agencies to carry out their tasks, and in particular to unearth anti-competitive practices.[46]

[redacted]*Confidentiality*

Disputes regarding access to file[47] often relate to business secrets or to protection of internal documents from disclosure.[48] That said, even if the Commission believes that access should be restricted, it must attempt to grant access in the form of a non-confidential version of the original information.[49] Moreover, information shall only be classified as confidential where the person or undertaking in question has made a claim to this effect and the Commission has accepted this claim.[50] Furthermore, the person or undertaking has to provide reasons for the document to be classified as confidential.[51]

[redacted]*Sanctions*

The consequences attached to a violation of the right of access to file were first established in *Soda Ash*. In this case, the Commission had fined Solvay for anti-competitive agreements and abuse of dominance in the soda ash market. The General Court upheld the fine, but granted a 25% reduction. Solvay further appealed before the Court of Justice. The CJEU annulled the GC judgment confirming the decision, finding that the Commission had failed to grant access to file and had even lost a number of documents. The Court found that had such documents been disclosed to Solvay, the outcome of proceedings might have been different.[52] Hence, in case of illegal refusal to grant access to exculpatory documents, the remedy is the annulment of the contested decision.[53]

In *Hercules*,[54] the Court of Justice gave further precision on the circumstances in which a breach of the right of access to file might give rise to annulment. It ruled that

> breach of those general principles of Community law in the procedure prior to the adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed. In such a case, the infringement committed is not remedied by the mere fact that access was

[45] See Art. 15 of Regulation 773/2004.

[46] See C‑506/08 P, *Sweden* v *Commission*, [2011] ECR, I-06237, paras 9 and ff. See also Notice on Access to file, para 12.

[47] Disputes between the parties and the Commission over the access to file are under the Authority of the Hearing Officer. His main responsibilities in ensuring the effective right to be heard is to ensure that the SO meets the minimum requirements to inform the undertaking of the allegations raised against it and that it is consistent with the grounds relied on by the Commission in its final decision: see Art. 7(1) and 7(2) of the Hearing Officer's Mandate.

[48] See *infra* Section 9. The right to professional secrecy. See also Bernatt (2010), 53–70 (available at: www.ssrn.com).

[49] See Notice *on Access to file*, para 17.

[50] See *ibid.*, para 21.

[51] See *ibid.*, para 22.

[52] See C-110/10 P, *Solvay SA* v *Commission*, [2011] ECR I-10439.

[53] In *Soda Ash*, the Commission had moreover failed to provide a comprehensive list of documents in its possession, considering that it was of no use for the case. The Commission had also considered that a non-confidential summary of the documents was not possible (European Commission decision, *Soda-ash – Solvay, CFK*, 13 December 2000, COMP/M 33.133-B). The GC took the view that it is not up to the Commission to decide which evidence should be made available to the concerned parties and could consequently be useful for their defence (T‑58/01 *Solvay* v *Commission*, [2009] ECR II‑4781).

[54] See T-7/89, *SA Hercules Chemicals NV* v *Commission*, [1991] ECR II-1711.

> made possible at a later stage, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought. However, such an infringement does not bring about the annulment of the decision in question unless the undertaking concerned shows that it could have used the documents to which it was denied access for its defence.[55]

Hence, *Hercules* set a standard for subsequent cases according to which it is not for the Commission alone to appreciate and decide what kind of document is of use for the undertaking's defence.[56]
In sum, failure to comply with the duty to grant access to file can, in principle, lead to the annulment of the contested decision. However, this is only the case if (i) the undertaking concerned can prove that the Commission relied on that document in support of its objections and (ii) the final decision would have been different had the requested document been disclosed.[57]

4 The right of expression (also called right to be heard)[58]

Content and legal basis

Any firm subject to antitrust proceedings must have the opportunity to present its views on the veracity of the objections raised against it, be it on factual or legal grounds.[59] This includes a right to respond in writing, and a right to an oral hearing.[60]

This right to be heard is rather a right to express, formulate or verbalize observations (regardless of whether someone hears). It was first developed in the *Transocean Marine Paint* case-law, absent a specific legal basis.[61] It is now a fundamental principle of EU law, deeply rooted in several textual instruments such as Regulation 1/2003,[62] Regulation 773/2004,[63] the Best Practices Guidelines[64] and the Charter.[65]

Article 27 of Regulation 1/2003 gives more details on the right to be heard. The Commission must give to suspected undertakings the opportunity to be heard on the objections raised against it. It must do so before taking a decision imposing a fine or ordering the termination of the infringement.[66] Moreover, the Commission can only base its decisions on objections on which the undertakings concerned have been able to comment. The

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[55] See *ibid.*
[56] See Joined Cases T-305–307/94, T-313–316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission*, [1999] ECR II-931. The ECtHR has nevertheless held that compliance with the adversarial principle of access to file relates only to judicial proceedings before a tribunal. There is no general, abstract principle that the parties must in all instances have the opportunity to attend the interviews carried out or to receive copies of all the documents taken into account in the case of other persons.
[57] See Van Bael (1993), 742.
[58] When considering the possible discussion or debates concerning the right to be heard and to make submissions before a public authority we inevitably relapse to the discussion on the merger of powers in the hands of one single authority. This was excluded from the paper. See *supra*: Section 1. For more information on this issue, see Fox (1997), 76, cited by Wils (2004), 201–224.
[59] See Best Practices Guidelines, para 78.
[60] See Best Practices Guidelines, paras 81, 99–103, 106–108.
[61] See C-17/74, *Transocean Marine Paint Association* v *Commission of the European Communities*, [1974] II-1063, para 15.
[62] See Art. 27(1) of Regulation 1/2003.
[63] See Art. 12 of Regulation 773/2004.
[64] See Best Practices Guidelines, paras 99-103 and paras 106 and ff.
[65] See Art. 41 ECHR.
[66] See Art. 27 of Regulation 1/2003.

Commission is therefore obliged, if the parties request it, to organise an oral hearing. At the oral hearing, the undertakings have the opportunity to (try to) reverse the Commission's findings.[67]

Publicity of hearings (or lack of?)

The organisation of the oral hearing has garnered criticism. The Commission sought to address them in 2011, by publishing new Guidelines on the function and term of reference of the Hearing Officer, in addition to the Best Practices Guidelines.[68]

Practitioners remain however critical. They believe the hearing is ineffectual. Unlike in a courtroom, the hearing is not public. Moreover, the hearing does not take place before the College of Commissioners, which is the organ that adopts final decisions. From a legal standpoint, the EU hearing is thus said to fall short of the standards of the right to a fair hearing set out in Art. 6 ECHR.[69]

Moreover, the limited role of the Hearing Officer is in discussion. The Hearing Officer is not a judge. His role consists in drafting an interim report on the extent to which the right to be heard has been respected during the proceedings. This document is then sent over to DG Competition and to the Competition Commissioner. But at this stage, findings of irregularities do not necessarily lead to formal consequences.

Sanctions

The CJEU may annul decisions adopted in breach of the right to a hearing. In *Transocean Marine Paint Association*, the Court stressed that any person whose interests "*are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known*". In turn, the CJEU partially annulled an exemption decision because the parties to the agreement had not been granted the opportunity to formulate observations regarding the conditions to which the exemption was subordinated. With the annulment, the Commission was given a new "*opportunity to reach a fresh decision (…) after hearing the observations or suggestions of the members of the association*".[70]

5 Right to have a decision within a reasonable time

Content and legal basis

Suspected firms have a right to expedient proceedings. The Commission must not leave them in a state of enduring legal uncertainty.[71] This right has often been invoked when the Commission takes excessive time to make a decision (in particular in cases related to rejection of complaints).[72] It has also been invoked when the Commission makes a decision public prior

[67] This right is normally exercised in writing by way of reply containing observations on the accuracy of the facts and the validity of the arguments. The undertaking may also adduce evidence of its own in support of its defence.

[68] See Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings.

[69] See Forrester (2009), 833. See also Killick and Berghe (2010), 273; Huyue Zhang (2011), 630–663 (available on www.ssrn.com); Flatery (2010), 54.

[70] See Case 17–74, *Transocean Marine Paint Association* v *Commission of the European Communities*, [1974] II-1063, paras 15 and 21.

[71] See C-185/95 P, *Baustahlgewebe GmbH* v *Commission*, [1998] ECR I-08417, para 21; Joined Cases C-341/06 and C-342/06 P, *Chronopost and La Poste* v *UFEX and others*, [2008] ECR I-4777, para 45.

[72] See Art. 47 of the Charter; C-282/95 P, *Guérin automobiles* v *Commission*, [1997] ECR I-1503, para 38.

to notifying it to its recipients.[73] In this variant, the Commission is tardy in making the decision known to its addressees.

The leading case on this is *SCK/FNK*.[74] This judgment (and subsequent ones) finds that the right to expedient proceedings stems from the principle of effective judicial protection.[75] How indeed can victims of anti-competitive infringements be effectively protected by the legal system if the latter is slow in remedying violations of the law? The right to expedient proceedings is also a derivative of the duty of good administration. Article 6(1) ECHR establishes that every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time.[76] Article 47 of the Charter embodies a similar principle.

The Court has not defined what constitutes a "*reasonable time*".[77] In its view, the assessment must be made on a case-by-case basis, according to the specific circumstances of each case.[78] The assessment is not blind though. The Court uses an analytical grid of four criteria (they are not exhaustive) to assess whether the duration of proceedings is reasonable: (i) importance of the case for the person concerned; (ii) complexity of the case; (iii) conduct of the applicant; and (iv) of the competent authorities.[79] The assessment of the reasonableness of the period in question does not require a systematic examination of the circumstances of the case in the light of each of the four above-mentioned criterions where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant alone may be deemed to justify a *prima facie* excessive duration. Conversely, the time taken may be regarded as longer than is reasonable in the light of just one criterion, in particular where its duration is caused by the conduct of the competent authorities.[80, 81]

Two phases

The right to expedient proceedings applies to the period which starts with the adoption of a SO and ends with a final decision. Before this, the Commission can take as much time as it wants to investigate a case, in search for evidence. This is because an investigation is not in

[73] See Joined Cases 96–102, 104/82, 105/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, para 16; Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, [2008] ECR II-01739 and T-62/98 *Volkswagen* v *Commission*, [2000] ECR II-2707, para 281.

[74] See Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, [2008] ECR II-01739.

[75] See C-432/05 *Unibet* [2007], ECR I-2271, para 37; Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat international Foundation* v *Council and Commission*, [2008] ECR I-0000, para 355; C-47/07 P, *Masdar (UK)* v *Commission*, [2008] ECR I-0000, para 50.

[76] See Art. 6(1) ECHR.

[77] See T-276/04, *Compagnie Maritime Belge* v *Commission*, [2008] ECR II-01277, paras 41 and ff.

[78] See C-254/99, *LVM* v *Commission*, [1999] ECR II-00931, paras 192 and ff.

[79] See C-185/95 P, *Baustahlgewebe GmbH* v *Commission*, para 29; see, by analogy, the judgments of the European Court of Human Rights in the cases of Erkner and Hofauer of 23 April 1987, Series A No. 117, para 66; Kemmache of 27 November 1991, Series A No. 218, para 60; *Phocas* v *France* of 23 April 1996, Recueil des arrêts et décisions 1996-II, 546, para 71, and *Garyfallou AEBE* v *Greece* of 27 September 1997, Recueil des arrêts et décisions 1997-V, 1821, para 39.

[80] See Joined Cases T-305–307/94, T-313–316/94, T-318/94, T-325/94, T-328/94, T329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission*, [1999] ECR II-931, para 188.

[81] In contrast, "*if the authorities have taken prompt and appropriate remedial action to manage the temporary unpredictable overload of the courts, the longer processing time of some cases may be justified*". See Albers (2007), 10 (available at: http://www.eipa.eu/modules/EuroMedJustice/Conferences/Istanbul_16_19Apr07/speeches/1_Speech_PIM_ALBERS_TheManagementJudicialTime.pdf).

itself capable of adversely affecting the rights of the defence since the undertakings concerned are not subject of any formal accusation until they receive the SO.[82]

This notwithstanding, the CJEU admitted that in certain circumstances, an excessive duration during the investigative phase may reduce the effectiveness of the rights of defence in the second phase. For instance, if the investigation is protracted, the Commission may be able to adduce a rich body of inculpatory evidence. This in turn, elevates the burden of proof on the suspected firm at the post SO stage, and its ability to defend itself within a strict timeframe.[83] In addition, if the internal organisation of the suspected firm changes over time, key individuals familiar with the case may no longer be present after the adoption of the SO. Likewise, many changes can affect a business organisation over the course of time. Delays in the investigatory phase could adversely reduce the odds for the parties to find exculpatory evidence relating to the infringements.[84]

Sanctions

The case-law of the EU courts is reluctant to find that the Commission takes too much time to decide cases. The Court has often dismissed allegations of excessively inexpedient proceeding, on the sole ground that one of the above four criteria was met.[85]

Moreover, even if the Court finds the duration of proceedings unreasonable, it is hesitant to annul Commission decisions on this ground.[86] According to the EU Courts, a failure to adjudicate within a reasonable time can constitute a ground for annulment of infringement decisions only where the delay has adversely affected the ability of the concerned undertakings to defend themselves (for instance, if evidence has disappeared).[87]

The same is true in relation to annulment proceedings before the GC. Applicants for annulment have a right to a prompt handling of their application by the GC. However, where the failure to pass judgment within a reasonable time has no effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of

[82] See Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV* v *Commission*, [2003] ECR II-05761, paras 77–80.

[83] See C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV* v *Commission*, [2006] ECR I-8725, paras 49–51. Furthermore, the ECtHR pointed out that the ECHR places a duty on the Member States to organize their legal systems to allow the courts to comply with the requirements of Art. 6(1), including that of a trial within a reasonable time: see Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission* [2008] ECR II-01739, para 56; Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij and Others* v *Commission*, [1999] ECR II-931, paras 120 and ff.; T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paras 276 and ff. and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektronisch Gebied* v *Commission*, [2003] ECR II-5761, paras 73 and ff.

[84] See C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV* v *Commission*, [2006] ECR I-8725, paras 49–51. Furthermore, the ECtHR had pointed out that the ECHR places a duty on the Member States to organize their legal systems so as to allow the courts to comply with the requirements of Art. 6(1), including that of a trial within a reasonable time: see Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission* [2008] ECR II-01739, para 56; Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, para 120 and ff.; T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, para 276 and ff. and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektronisch Gebied* v *Commission* [2003] ECR II-5761, paras 73 and ff.

[85] See Joined Cases T-305–307/94, T-313–316/94, T-318/94, T-325/94, T-328/94, T329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission*, [1999] ECR II-931.

[86] See T-62/98, *Volkswagen* v *Commission*, [2000] ECR II-2707, para 270.

[87] See C-254/99, *LVM* v *Commission*, [2002] ECR, I-08375 para 122.

the principle of effective legal protection.[88] Rather, the Court considers the applicant that has suffered harm can still seek financial compensation on the basis of Art. 268 and 340 TFEU.[89] But this solution is curious because the application for financial compensation must be lodged before the General Court itself, the one court that was too slow in handling the initial application for annulment. A better alternative would have been for the CJEU to reduce the fine imposed, as a sort of quid pro quo.[90] Moreover, this would have sparred further legal proceedings (and costs) on the initial applicant.[91] Yet, the CJEU dismissed this possibility. No reduction of the fine can be granted since "*the need to ensure that EU competition rules are complied with*" cannot allow an appellant to reopen the question of the amount of a fine where all of its pleas directed against the amount of that fine have been rejected by the GC.[92]

6 Right to integrity (also called, right to have the private life, home and communications respected)

[redacted]*Content and legal basis*

In antitrust investigations, the Commission has the power to enter the premises of business organisations and to seize evidence.[93] In some circumstances, the Commission can also inspect the private premises of directors, managers and other members of staff of the undertakings.[94] Finally, the Commission can request any information, subject to hefty fines. Those prerogatives are one of the Commission's most spectacular means to secure information about possible infringements.[95] They come, however, with a drastic limitation: the right of undertakings to have their private life, home and communications respected.

The right to integrity is found in the ECHR, the Charter and in Regulation 1/2003. Article 8 ECHR and Art. 7 of the Charter provide that everyone has the right to respect for his private and family life, his home, and his correspondence.[96] Article 8(2) ECHR however brings a derogation to this right. Public interference is tolerated if (i) there is a legal basis[97]; (ii) it is

[88] See Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektronisch Gebied and Technische Unie BV* v *Commission*, [2003] ECR II-5761, paras 78–79.
[89] See C-238/12 P, *FLSmidth & Co. A/S* v *European Commission*, paras 116–117 (unpublished).
[90] This solution was previously applied in C-185/95 P, *Baustahlgewebe GmbH* v *Commission*, *ECR* 1998 I-08417, para 48 where the CJEU held that a fine reduction should apply for "*reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind*".
[91] On the preference for a fine reduction solution, see Opinion of AG Wathelet, C-580/12 P, *Guardian Industries Corp.* v *Commission*, paras 106 and ff.; Scheidtmann (2014) (available at: https://www.competitionpolicyinternational.com/haste-makes-waste?utm_source=July+24%2C+2014&utm_campaign=April+30%2C+2013&utm_medium=email); Beumer (2013) (available at: http://europeanlawblog.eu/?p=2093 #sthash.X98P8Okm.dpuf).
[92] See C-50/12 P, *Kendrion NV* v *Commission*, para 87 (unpublished) and C-385/07, *Der Grüne Punkt – Duales System Deutschland GmbH* v *Commission*, [2009] ECR I-6155, paras 193 and ff.
[93] See Art. 20 of Regulation 1/2003.
[94] See Art. 21(1) of Regulation 1/2003: "*If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Art. 81 or Art. 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport*".
[95] See Chalmers, Davies and Monti (2010), 927.
[96] The Reading guide of the Charter (available at http://www.coe.int/t/ngo/Source/reading_guide_charter_en.pdf) makes reference to the ECHR. The same interpretation can therefore be used.
[97] On the principle of legality and its corollaries, See Van Bael (2011), 104.

necessary[98] to achieve a legitimate aim – *e.g.* crime prevention or economic progress. This derogation is subject to the classic principle that exceptions must be interpreted narrowly.[99]

Natural and legal persons

The right to integrity was first interpreted by the ECtHR. Whilst Art. 8 embodies a right for individuals, the ECtHR held in *Niemetz* v *Germany*, that the right to integrity includes business premises when necessary to protect individuals against arbitrary interference of public authorities.[100] This interpretation was further refined in *Société Colas Est and Others* v *France* where the ECtHR stressed that judicial authorisation is required prior to any inspection of business premises, so as to avoid risks of abuses.[101]

This case-law was later transplanted in the EU legal system, but only in part. Like the ECtHR, the CJEU held in *Roquette Frères* that the protection of the home provided for in Art. 8 ECHR may in certain circumstances be extended to business premises.[102] However, the CJEU strayed from the ECtHR case law, in holding that the possibility of public interference established by Art. 8(2) ECHR "*might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case*".[103] According to the CJEU, business premises can be submitted to a weaker protection than private homes.

Moreover, the CJEU further departed from the ECtHR case law. It held that judicial authorisation is not a necessary prerequisite for inspections, unless national law so requires. *Roquette Frères* was later codified in Regulation 1/2003.[104]

Sanctions

Violations of the right to integrity can lead to the annulment of the infringing measures. In *Nexans*, for instance, the General Court annulled the Commission's decision ordering an inspection. It found that the Commission had not precisely delineated the products targeted by the investigation. According to the Court, the Commission can only order inspections if it has a sound legal basis. A decision that is too abstract does not meet that standard[105]. With this, risks of "*fishing expeditions*" have decreased.[106] Unfortunately, however, the Court did not elaborate on the status of the evidence that has been illicitly collected.

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[98] To be considered as necessary, there should be a correlation between the request for information and the alleged infringement. See Van Bael (2011), 130-131.

[99] See Ortiz Blanco (2013), 32. See also Van Bael (2011), 139-141, who stresses that the Commission can only invoke a right to search in case the undertaking under investigation does not cooperate with the inspectors. This means in practice that a right balance must be struck between the inspectors' interest in monitoring and overseeing the investigative procedure and the undertaking's interest in pursuing its business operations.

[100] See Case *Niemetz* v *Germany* (Application No. 13710/88) 16 December 1992 [1992] ECHR A-251-B.

[101] See Case *Société Colas Est and Others* v *France* (Application No. 37971/97) 16 April 2002 [2002] ECHR 418, para 49.

[102] See C-94/00, *Roquette Frères*, [2002] ECR I-9011.

[103] See *ibid.*, para 29.

[104] Article 20 paras 7, 8 and Art. 21 of Regulation 1/2003. See Art. 21(3) of Regulation 1/2003. This requirement was included for the investigation to be in accordance with the principle of inviolability of the home. See Joined Cases 46/87 and 227/88, *Hoechst AG* v *Commission*, [1989] ECR 2859.

[105] On the obligation to specify the subject-matter and the purpose of the inspection, see Van Bael (2011), 134-135.

[106] See T‑135/09, *Nexans* v *Commission*, [2012].

7 Right to be presumed innocent

Content and legal basis

This right is self-explanatory. Anyone subject to legal proceedings is presumed innocent until proven guilty.[107] In competition law, the presumption of innocence has three declinations: (i) any suspected firm is deemed innocent until its liability for an infringement has been established in a formal decision (presumption of innocence *sensu stricto*);[108] (ii) any doubt should benefit to the suspected firm;[109] and (iii) a suspected firm has the right not to incriminate itself.[110]

The presumption of innocence *sensu stricto* stems from Art. 6 ECHR and Art. 48 of the Charter. Both Arts. state that "*everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law*".[111] It is itself predicated on the theoretical idea that in a free society, guilt can only be established if a public authority proves it, and citizens should not be requested to prove their innocence in the first place.[112] In practice, the right to be presumed innocent prevents the Commission from revealing, leaking, or suggesting the existence of an infringement to the public before the adoption of a formal decision.[113]

Threshold

The presumption of innocence applies to all procedures relating to infringements of competition law that may result in the imposition of serious fines and periodic penalty payments.[114] In those cases, the Commission must adduce sufficiently precise and consistent evidence of an infringement, on pain of breaching the presumption of innocence.[115] It is, however, unclear what the EU Courts consider as "*sufficient*" evidence.[116]

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[107] See T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, [2007] ECR II-4231, para 76. It is prohibited to make formal findings of liability against a natural or legal person without granting that person the benefit of all guarantees inherent to the exercise of the rights of the defence. See Ortiz Blanco (2013), 25; T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, [2007] ECR II-4231, paras 75–77; T-174/05 *Elf Aquitaine SA* v *Commission* [2009] ECR II-183, para 196. In the same vein, the indictment or formal charge against any person is not an evidence of guilt. See Ortiz Blanco (2013), 24.

[108] See C-199/92 P, *Huls* v *Commission*, [1999] ECR I-4287, para 150; T-62/98, *Volkswagen* v *Commission*, [2000] ECR II-2707, para 281.

[109] See T-62/98, *Volkswagen* v *Commission*, [2000] ECR II-2707, para 281; Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp.* v *Commission*, [2004] ECR II-2501, para 177; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission*, [1975] ECR 1663, paras 203, 304, 359 and 363 and Case 27/76 *United Brands* v *Commission* [1978] ECR 207, para 265, Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission*, [1991] ECR II-867, II-954.

[110] The first two rights are discussed thereafter. The right not to incriminate oneself is described in a separate title. See *infra*, section 8 "The Right to silence".

[111] See Art. 6(2) ECHR.

[112] See T-110/07, *Siemens AG* v *Commission*, [2011] ECR II-00477, para 46; and *Minelli* v *Switzerland* (Application No. 8660/79) 25 March 1983 [1983] ECHR A62. Same goes for the Commission: see Opinion of Advocate General Sir Gordon Slynn in Joined Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825, 1914; C-185/95 P, *Baustahlgewebe* v *Commission* [1998] ECR I-8417, para 58; C-49/92 P, *Commission* v *Anic Partecipazioni*, [1999] ECR I-4125, para 86.

[113] See Petit and Rato (2008).

[114] See C-199/92 P, *Huls* v *Commission*, [1999] ECR I-4287, paras 149–150.

[115] See Joined Cases C‑89/85, C‑104/85, C‑114/85, C‑116/85, C‑117/85 and C‑125/85 to C‑129/85 *Ahlström Osakeyhtiö and Others* v *Commission*, [1993] ECR I‑1307, para 127; C-407/08 P, *Knauf Gips KG* v *Commission*, [2010] ECR I-06375, para 47; "*The Commission must produce firm, precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those*

Sanctions

In *Volkswagen*,[117] a Commission official had disclosed its personal views on the proposed findings to the press and informed the public about the level of fines envisaged while those findings had been submitted to the Advisory Committee and the College of Commissioners for deliberation.[118] The Court lambasted the Commission. It held that this was a blatant violation of the presumption of innocence, and added that the Commission had disregarded its duty to respect business secrecy and its duty of good administration. The Court however did not go as far as to annul the Commission's decision. It found that the content of the decision would not have differed if that irregularity had not occurred.

8 The right to silence

Content and legal basis

The threat of sanctions can lead firms to self-incriminate themselves, even if they are not guilty of infringement. For instance, a public authority may issue a request for information (RFI) that asks for answers which might involve an admission of the existence of an infringement. The threat of fines for inadequate replies may prompt the addressee of such RFI to concede that it is guilty of infringement. More indirectly, a public authority may design, phrase, and organize its questions so as to frame an addressee of a request for information.

The right to silence has no express legal basis. The CJEU considers that it derives from the rights of defense, and the Court held it to be a fundamental principle of the Community legal order.[119]

In practice, the right to remain silent is relevant in relation to two investigative instruments. First, Art. 18 of Regulation 1/2003 allows the Commission to require information by means of a simple request or of a formal decision. These measures must satisfy certain requirements in terms of content, legal basis, purpose, amount of information required and time limit. Second, Art. 19 of Regulation 1/2003 empowers the Commission to interview any natural or legal person who consents for the purpose of collecting information relating to the subject-matter of an investigation.[120]

Balance

The right to remain silent is not absolute. Whilst no undertaking can be forced to admit liability for infringement, all have the obligation to cooperate actively to investigations.[121]

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criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement". On the use of presumptions and the burden of proof in antitrust cases, see Volpin (2014), 1159–1186.

[116] This question is still to be discussed in EU case-law since the rules governing the standard of proof are not legally codified. See Joined Cases C-310/98 and C-406/98, *Hauptzollamt Neubrandenbrug* v *Leszek Labis and Sagpol SC Transport Miedzynarodowy i Spedycja*, [2000] ECR I-1797, para 29.

[117] See T-62/98, *Volkswagen* v *Commission*, [2000] ECR II-2707.

[118] See *ibid.*, para 281.

[119] See Joined Cases T-305–307/94, T-313–316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission*, [1999] ECR II-931, paras 444 and ff. The undertaking's right against self-incrimination, is sometimes also said to be protected under Art. 18(2) of Regulation 1/2003. See Chalmers, Davies and Monti (2010), 925.

[120] See Art. 19 of Regulation 1/2003.

[121] See T-34/93, *Société Générale* v *Commission*, [1995] ECR II-545, para 72. This means that an undertaking will need to answer factual questions and has to provide documents, even if this information could be used to establish the existence of an infringement.

The ECtHR case-law casts lights on the subtle articulation between the right to remain silent and the duty to assist investigations. In *Saunders*, the ECtHR explained that whilst the investigated party could refrain from providing incriminating statements, the right to remain silent does not extend to documents

> which may be obtained from the accused through the use of compulsory powers but which [have] an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[122]

In *O'Halloran*, the Court further noted that a certain degree of compulsion is possible within certain limits, so as to protect the public interest.[123]

In the EU legal system, *Orkem* is the leading precedent.[124] In this case, an undertaking was seeking annulment of a Commission RFI. The applicant argued that the RFI infringed "*the general principle that no one may be compelled to give evidence against himself*".[125] In its judgment, the CJEU noted preliminary that the right against self-incrimination can only be invoked by natural persons in criminal proceedings, and not by legal persons in competition law proceedings. However, the Court went on to hold that the Commission's power to request information was not limitless.[126] In particular, it stated the Commission could not compel undertakings to admit their liability for an infringement of Art. 101 and/or 102 TFEU. According to the Court, Art. 6 ECHR gives an investigated firm the right to a limited degree of silence.[127]

Later, in *Mannesmannröhren-Werke*, the GC drew the practical consequences of *Orkem*. It held that an undertaking can confine itself to address questions of a factual nature. In contrast, the Commission is not entitled to ask for opinions or assessments, or to invite the applicant to make assumptions or draw conclusions.[128]

The notion of what constitutes a factual question, distinct from an incriminating query has been discussed in the scholarship.[129] In *PVC II*, the Court sought to offer guidance on this. It reaffirmed that any undertaking under investigation is "*under a duty of active cooperation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission (…) even if the documents that are in its possession may be used to establish, against it or another undertaking, the existence of anti-competitive conduct*".[130] However, the Commission "*may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove*".[131] Hence, it has been held in the literature that the Commission cannot, for instance, ask the parties how many meetings they had, but only factual information, such as details of those taking part in talks, and documents

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[122] See Case 43/1994/490/572, *Saunders* v *United Kingdom*, [1997] 23 EHHR 313, paras 68–69.

[123] See C-179/93, *O'Halloran* v *Council and Commission*, paras 55–57 (publication information unavailable).

[124] See C-347/87, *Orkem* v *Commission*, [1989] ECR 3283, para 18.

[125] See *ibid.*, para 18.

[126] See *ibid.*, para 33.

[127] See C-347/87, *Orkem* v *Commission*, [1989] ECR 3283, para 34: "*Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Art. 11(2) and (5) of Regulation No. 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defense of the undertaking concerned*".

[128] See T-112/98, *Mannesmannröhren-Werke AG* v *Commission*, [2001] ECR II-00729, paras 25, 59 and ff.

[129] See Chalmers, Davies and Monti (2010), 925–926.

[130] See Joined Cases T-305–307/94, T-313–316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission*, [1999] ECR II-931, paras 444–445.

[131] *Ibid*., para 447.

already in existence, such as copies of invitations, agendas, minutes, internal records, reports, etc.[132]

With this background, the Commission can only compel undertakings to provide two types of information: (i) documentary evidence already in the possession of the undertaking; and (ii) purely factual information.[133] At the other side of the spectrum, undertakings can resist to requests for information on grounds of right to silence if: (i) the RFI explicitly or implicitly is a request to admit the existence of a competition law infringement; and (ii) they are compelled to answer.[134] In 2012, the Commission's Antitrust Manual of procedures codified those principles.[135]

[redacted]*Leniency*

It has been argued that the EU leniency programme infringes the right to remain silent.[136] Firms that apply for leniency are nudged to self-incriminate in order to avoid a fine.

The General Court has dismissed this argument. In the Court's view, undertakings that provide information under the leniency programme choose to do so freely, and there is no infringement of the rights of defence in this context.[137]

[redacted]*Sanctions*

Violations of the right to remain silent typically lead to annulment of the Commission's decision. Absent self-incrimination, the outcome of proceedings might have been radically

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[132] See Commission decision COMP/36.571/D-1, *Austrian Banks* [2002] O.J. L 56/1, para 488; Chalmers, Davies and Monti (2010), 925–926.

[133] See Art. 18(3) of Regulation 1/2003.

[134] Hence, the right to remain silent cannot be invoked against decisions taken on the basis of information delivered while the undertaking had no duty to reply. See C-407/04 P, *Dalmine SpA* v *Commission* [2007] ECR I-835, paras 33–36. See also Manproc, Module 6, para 72.

[135] See Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Arts. 101 and 102 TFEU March 2012, (hereafter "Manproc"). The text is made available on the internet: http://ec.europa.eu/competition/antitrust/information_en.html. In this Manual, the Commission commits to respect established case-law. The Manuel forbids officials from asking questions that may force undertakings to admit the existence of an infringement of EU competition law. See Manproc, Module 6, para 71. The Commission expresses that it is only entitled to ask questions intended to secure factual information. See Manproc, Module 6, para 71–73: "*The privilege against self-incrimination protects undertakings against the obligation to reply to self-incriminating questions, i.e. to admit the existence of an infringement of EU competition law (in which they participated). According to the case-law as established in Orkem16 an undertaking can only invoke the privilege against self-incrimination if two conditions are fulfilled: (1) the undertaking was asked to admit the existence of an infringement of EU competition law (in which it participated) and (2) it was compelled to answer the question. However, the Best Practice Guidelines and the Hearing Officer's Mandate foresee the possibility for undertakings to raise concerns with DG Competition (Case 374/87, Orkem v. Commission [1989] ECR 3283) and the Hearing Officer about self-incrimination already when they are the addressees of request for information pursuant to Art. 18(2), in order to settle discussions at the earliest stage. The privilege against self-incrimination does not apply when answering questions asked in the context of requests made under Art. 18(2) (simple requests for information, interviews, simple inspections). This is due to the fact that the undertaking is not compelled to answer these questions. It replies on a voluntary basis. If an undertaking replies in a self-incriminating manner to questions that it is not compelled to reply to (i.e. a reply which goes beyond the Commission's investigatory powers) that reply may be considered as spontaneous cooperation on the undertaking's part capable of justifying a reduction in a possible fine outside the scope of the Leniency Notice*".

[136] Schwarze and Bechtold (2008), (available at: http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf).

[137] See T-322/01, *Roquette Frères SA* v *Commission*, [2006] ECR II-3137, para 266.

different. In the case-law, several decisions of the Commission have been quashed on this ground "*in so far as [they] relate*" to questions that the Commission should not have asked.[138]

9 The right to professional secrecy

Content and legal basis

The right to professional secrecy is a clear example where the Commission has to strike a fine balance between the private and the public interest. Firms involved in competition proceedings want their confidential information to be protected against disclosure in order to avoid any substantial damage to their commercial interests. However, requests for the protection of confidential information delay the operation and impoverish the substance of competition proceedings. The right to professional secrecy is protected at Art. 339 TFEU, and implemented in Art. 28 of the Regulation.[139]

Business secrets and other confidential information

Information covered by professional secrecy consist in business secrets or other confidential information. Business secrets are "*information of which not only disclosure to the public but also mere transmission to a person other than the one that provides the information might seriously harm the latter's interests*". For instance, business secrets are information about undertakings' know-how, business relations (supply sources, customers and distributors list), marketing plans, costs, price structure, etc.[140]

The category "*other confidential information*" includes all information other than business secrets, the disclosure of which could significantly harm a person or undertaking. This covers for instance letters from suppliers or customers of undertakings subject to competition proceedings, since their disclosure might easily expose the authors to the risk of retaliatory measures.[141] This notion also protects company-unrelated information like the identity of informants,[142] military secrets, etc.

Interestingly, the main difference between confidential information and business secrets may be that the latter are not subject to time obsolescence. Confidential information ceases to be confidential once it falls in the public domain or when it loses commercial importance (for instance, due to the passage of time).[143] As a rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information is no

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[138] See T-112/98, *Mannesmannröhren-Werke AG* v *Commission*, [2001] ECR II-00729, paras 25, 59 and ff.

[139] See Art. 339 TFEU: "*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. See also Art. 28(2) TFEU: The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

[140] See Art. 28 of Regulation 1/2003.

[141] See T-65/89, *BPB Industries and British Gypsum*, [1993] ECR II-389; C-310/93P, *BPB Industries and British Gypsum*, [1995] ECR I-865.

[142] See Case 145/83, *Stanley Adams* [1985] ECR 3539, para 34.

[143] By way of illustration, the Commission has indicated by way of example a series of information, which it does not consider as business secrets. See Notice *on Access to file*, para 23: "*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

longer confidential after 5 years.[144] In contrast, the value of business secrets is not affected by the passage of time, but depends on how well the secret is preserved. Hence, the protection granted to business may potentially be infinite.

[redacted]*Confidentiality claims versus access to file*

The Commission cannot invoke the duty to protect business secrets to refuse to give access to its file to firms suspected of infringement.[145] The Commission must balance, on a case-by-case basis, the private interests of protecting confidentiality with the public interest of having an open and transparent procedure.[146]

In practice, the Commission can reconcile those conflicting principles, by redacting the sensitive passages from the copies to which the applicant seeks access,[147] or by indicating in indexes of documents that some consist in "*correspondence on confidentiality claims*", to allow parties to understand why a given document is inaccessible.[148]

[redacted]*Sanctions*

Violations of the right to professional secrecy generally do not lead to annulment. The disclosure of protected information can hardly impact the outcome of administrative proceedings. At worst, it will deprive the concerned undertaking from a strategic advantage. If harm follows, the victim of a breach of confidentiality can seek damages before the General Court pursuant to Art. 268 and 340 TFEU.

10 Right to an explanation (also called right of the addressees to obtain the reasons of the measure adopted)

[redacted]*Content and legal basis*

In the competition field, the Commission must state the reasons for its decisions, be they decisions to launch an inspection, to impose commitments, to adopt interim measures, to fine a company, etc. The Commission's duty to provide an explanation for its decisions is all the more important given their serious economic consequences in markets, and the need of guidance of market players – including their addressees – who seek to comply with the law. It is also key from a political standpoint. Given the large margin of discretion enjoyed by the Commission, an appropriate explanation helps ensure the legitimacy of competition enforcement. Finally, from a legal standpoint, the duty to state reasons entitles EU Courts to discharge an effective judicial review of Commission decisions.[149]

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[144] See Notice *on Access to file*, para 23.

[145] See T-36/91, *Imperial Chemical Industries* v *Commission*, [1991] ECR 1995 II-01847, para 102.

[146] See T-198/03, *Bank Austria Creditanstalt* v *Commission*, [2006] ECR II-1429, para 71; T-474/04 *Pergan Hilfstoffe fur industrielle Prozesse* v *Commission*, [2007] ECR II-4225, para 65.

[147] See Notice *on Acces to file*, para 25: "*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

[148] See Manproc, Module 12, para 34.

[149] See C-110/81, *SA Roquette frères* v *Council*, [1982] ECR I-3159, para 24; T-59/99 *Ventouris Group Enterprises SA*, [2003] ECR II-5257, para 124; T-65/99, *Strintzis Lines Shipping SA*, [2003] ECR II-5433, para 44.

The requirement to state reasons can be found in Art. 296 TFEU.[150] The Court often recalls that it is a derivative of the principle according to which administrative measures must be lawful,[151] as well of the principle of legality of administrative proceedings.[152]

Scope and extent

In providing explanations, the Commission must fully set out the considerations of fact and law underpinning its decision.[153] The Commission's decision must go beyond the provision of a mere summary of the relevant facts. However, the Commission's decision must not necessarily be exhaustive. It is sufficient for the decision to articulate conclusive factual information and legal findings.[154]

In practice, the duty to state reasons fluctuates on a case-by-case basis. The length, accuracy and depth of the explanations depends on a whole host of factors: nature of the act;[155] existence of previous decisions from the Commission; margin of discretion held by the Commission;[156] content of the measure in question; interest which the addressee of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.[157]

Fines

The right to an explanation has been specifically discussed in relation to fines.[158] The EU Courts consider that the Commission fulfils its duty to state reasons as long as it indicates which factors it took into account to decide on the gravity of the offence. No further requirement is imposed on the Commission (for instance, the Commission must not provide more detailed figures for the calculation of fines).[159] This explains that, in most fining decisions, the Commission simply refers to the Guidelines on the calculation of fines and gives indication of the duration and the gravity of the infringement.[160]

Discretion

The obligation to state reasons has also been specifically discussed in relation to decisions to reject complaints. The Commission enjoys a wide margin of discretion to reject complaints. It

[150] See Art. 296 para 2 TFEU: "*Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties*".
[151] See C-350/88, *Delacre and Others* v *Commission* [1990] ECR I-395, para 15; T-504/93, *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, para 149.
[152] See Art. 296 TFEU, Art. 7(1) ECHR and Art. 49(1) of the Charter.
[153] See T-150/89, *GB Martinelly* v *Commission*, [1995] ECR II-1165, para 65; C-367/95 P, *Commission* v *Sytraval and Brink's France*, [1998] ECR I-1179, para 63.
[154] See Joined Cases 8 to 11–66, *Société anonyme Cimenteries C.B.R.* v *Commission*, [1967] ECR 93; T-62/98, *Volkswagen AG* v *Commission*, [2000] ECR II-2707, para 269.
[155] A decision concerning the substance of the case will require more explanation than one based on procedural issues.
[156] See C-46/87 and C-227/88, *Hoechst* v *Commission*, [1989] ECR I-2859, paras 41–42; Case 73–74, *Groupement des fabricants de papiers peints* v *Commission*, [1975] ECR 1491.
[157] See T-24/05, *Alliance One International and others* v *Commission*, [2010] ECR II-5329, para 149; T-117/07 and T-121/07, *Areva and others* v *Commission*, [2011] ECR II-633, para 88.
[158] See e.g. Van Bael (2011), 104.
[159] See C-279/98 P, *Cascades* v *Commission*, ECR [2010] I-9693, paras 38–47.
[160] See T-220/00, *Cheil Jedang Corp.* v *Commission*, [2003] ECR II-2473, para 218; Joined cases T-236/01, 239/01, T-244/01–T 246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and others* v *Commission*, [2004] ECR II-1181, para 252.

can in principle dismiss complaints on the sole ground that there is a lack of "*community interest*".

Because of a perceived tension with the right of the addressees to obtain the reasons for the rejection of their complaint, the GC identified three criteria to assess the existence – or lack thereof – of a Community interest, namely:

> the significance of the alleged infringement as regards the functioning of the internal market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Arts. [101 and 102] of the Treaty are complied with.[161]

In *IEEC*, however, the CJEU strayed from the GC. It held that if the Commission does not escape from the obligation to state reasons in a decision to reject a complaint, "*the assessment of the Community interest raised by a complaint depends on the circumstances of each case*" and the Commission "*should not be limited in the number of criteria of assessment to which it may refer nor, conversely, should it be required to have recourse exclusively to certain criteria*".[162] Following this ruling, the criterions that explain a decision to reject a complaint remain muddied in the water.[163]

Sanctions

The EU Courts draw variable consequences from violations of the right to an explanation. If, on the one hand, the Commission's decision falls within a well-established line of decisional precedents, then the reasons stated to support the decision do not need to be comprehensive. If, on the other hand, "*it goes appreciably further than the previous decisions, the commission must give an explicit account of its reasoning*".[164] Decisions that are not sufficiently reasoned may be annulled.[165]

11 Right to consistency and predictability in decision-making (or right to rely upon previous Commission decisions)

Content and legal basis

The right to consistency and predictability in decision-making means that the Commission must decide in line with previous decisional interventions, if legitimate expectations have been created.[166] For instance, if the Commission has previously solved cases X and Y under principle 1, it cannot solve a similar case Z under principle 2. Legitimate expectations arise if a natural or legal person has received sufficiently precise assurances in respect of its legal situation, and has thus entertained precise, unconditional and consistent expectations from a

[161] See T-24/90, *Automec* v *Commission*, [1992] ECR II-02223.
[162] See C-450/98 P, *IECC* v *Commission,* [2001] ECR, I-03947, para 84.
[163] An often-heard joke in Brussels is that it is so discretionarily easy for the Commission to reject a complaint, that the drafting of such decisions is delegated to young trainees that have just left the law school.
[164] See Case 73/74, *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, [1975] ECR 1491, para 31.
[165] See Case 73**–**74, *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, [1975], ECR, 1491, paras 30 and ff.
[166] See T-115/94, *Opel Austria GmbH* v *Council*, [1997] ECR II-39, para 93.

reliable and authorized source.[167] Vague contacts or general statements by a Commission official are not sufficient to create such expectations.[168]

The right to consistency and predictability in decision-making originates can be traced back to the case-law of the EU courts. It is itself a derivative of the general principle of legal certainty. In the EU Court's view, it is a general principle of EU law.[169] Some have also bridged it to public international law principles, such as *pacta sunt servanda* or the Estoppel doctrine.

Fines

The power of the Commission to set fines is curtailed by the principles of proportionality and equal treatment. Accordingly, the Court held in *Walt Wilhelm* that equity and the *Non bis in idem* principles necessitate that any earlier sanction must be taken into account to determine the amount of a subsequent sanction.[170] Additionally, the Commission must not treat comparable situations differently and must not treat different situations in the same way, unless it can be objectively justified.[171]

Yet, the General Court considers that these and the right to consistency and predictability do not prevent the Commission from raising fines above the levels applied in previous decisions. On the contrary, the effective application of EU competition law requires giving to the Commission some discretion to adjust the level of fines.[172]

By parity of reasoning, the legitimate expectations that firms entertain pursuant to the Leniency Notice is limited to an assurance that their fines will be reduced by a given percentage. But the Leniency Notice gives rise to no legitimate expectation in terms of the method applied to set fines and, *a fortiori*, in terms of a specific fine level when leniency applicants cooperate with the Commission.[173]

Sanctions

To our best knowledge, the right of consistency and predictability has never led to the annulment of a Commission decision. Yet, the right of consistency and predictability has been repeatedly affirmed in the case-law of the EU courts. In *Hercules Chemicals*, the General Court held that "*once the Commission, going beyond what is required by observance of the rights of the defence, has established a procedure for providing access to the file in competition cases, it may not depart from the rules which it has imposed on itself*".[174] Moreover, several other judgments suggest that if the Commission generates legitimate expectations regarding the application of a specific rule, any inconsistent decision adopted

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[167] See T-29/05, *Deltafina SpA* v *Commission*, [2010] ECR II-4077, para 427; T-13/03 *Nintendo Co Ltd, Nintendo Europe GMBH* v *Commission* [2009] ECR II-975, paras 202 and ff.

[168] See T-190/95 and T-45/96, *Sodima* v *Commission* [1999] ECR II-3617, para 25; T-195/95 P, *Guérin Automobiles* v *Commission*, [1996] ECR II-679, para 20; T-213/95 and T-18/96, *SCK FNK* v *Commission*, [1997] ECR II-1739, para 83.

[169] See T-65/98, *Van den Bergh Foods* v *Commission*, [2003] ECR II-4653, para 192.

[170] See Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] ECR, 1.

[171] See Van Bael (2011), 104-105.

[172] See Joined Cases C-181/86 to 184/86, *Del Plato and Others* v *Commission*, [1987] ECR 4991, para 10; Joined Cases C-189/02 P, 202/02 P, 205/02 P – 208 /02 P and C-213/02 P, *Dansk Rorindustri A/S* v *Commission*, [2005] ECR I-5425, paras 209–211; C-397/03 P, *Archer Daniels Midland and Archer Daniels Midlands Ingredients* v *Commission*, ECR [2006] I-4429, para 91.

[173] See *ibid*.

[174] See T-7/89, *SA Hercules Chemicals NV* v *Commission*, [1991] ECR II-1711. The GC however dismissed the application for annulment, because on the facts, access to file had been effectively given.

later may be annulled on this ground.[175]

12 Conclusions

The rights of defence of parties to competition cases have been gradually affirmed by the EU Treaties and in the case-law. This process has inevitable shortcomings. In particular, most of these rights remain embodied in a variety of instruments, their precise content is somewhat obscure, and the consequences attached to their violations are unclear.[176]

With this paper, we have sought to provide clarifications on this, by presenting competition rights under a granular and itemized perspective. In so doing, our inventory of competition rights shows that the conventional formulation of those rights is not always in line with their true content. In our opinion, it would be helpful to align form and substance, including if this requires changing the label attached to certain competition rights.

Moreover, we believe that a more systematic presentation (in a soft law instrument for instance) of the consequences attached to violations of procedural rights would be helpful. Annulment is not a systematic outcome. Reductions of fines no longer make good procedural wrongs.[177] In some cases, damages and other remedies may be adopted (letters of apology from the Commission, flat payments as compensation for moral damage, organization of a series of internal training sessions).[178]

By providing guidance on this, the Commission would help parties to antitrust proceedings assess what procedural infringements are worth litigating. In the long run, this would reduce the risk of opportunistic appeals.

Much has been done so far regarding procedural rights. Much can still be done. The elaboration of an inventory, a code or a bill of competition law rights could be a good opportunity to improve the current landscape.

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[175] See Case 148–73, *Louwage* v *Commission*, [1974] ECR, 00081, para 12*;* C-189/02 P, *Dansk Rørindustri and Others* v *Commission*, [2005] ECR I-05425, paras 453 and ff.

[176] See Ortiz Blanco (2013), 17; T-44/00, *Mannesmanröhren – Werke AG* v *Commission*, [2004] ECR II-2233, para 55; T-62/98, *Volkswagen* v *Commission*, [2000] ECR II-2707, paras 279–83. Not all breaches of the rights of defence give rise to annulment. Rather, as explained previously, annulment only happens if the condemned undertaking can show that absent the irregularity, the decision would have been different. Moreover, depending on the scale of the violation, the annulment may be complete or partial.

[177] See C-385/07, *Der Grune Punkte – Duales System Deutschland GmbH* v *Commission*, [2009] ECR I-06155, para 195.

[178] European Ombudsman, Overview 2012, 3.

References

Albers P (2007) The management of judicial time. Council of Europe, http://www.eipa.eu/modules/EuroMedJustice/Conferences/Istanbul_16_19Apr07/speeches/1_Speech_PIM_ALBERS_TheManagementJudicialTime.pdf

Bernatt M (2010) Right to be heard or protection of the confidential information? Competing guarantees of procedural fairness in the proceedings before the competition authority. Yearbook of Antitrust and Regulatory Studies 3(3):53–70

Beumer E (2013) The recent landmark cases on the reasonable time requirement: is the court caught between Scylla and Charybdis? European Law Blog

Boykin JH (2006) Legal privilege – the debate. The In-House Perspective 2(1):19–21

Chalmers D, Davies G, Monti G (2010) European Union Law. Cambridge University Press, Cambridge

Coen P, Roquilly C (eds) (2014) Company lawyers: independent by design. ECLA White Paper, LexisNexis

Flatery J (2010) Balancing efficiency and justice in EU competition law: elements of procedural fairness and their impact on the right to a fair hearing. The Competition Law Review 7(1):53–81

Forrester I (2009) Due process in EC competition cases: a distinguished institution with flawed procedures. European Law Review 34:817–843.

Forrester I (2010) Due process in competition proceedings. Concurrences 3:13–16

Fox E (1997) Decision making at the centre – working paper IV. In: Ehlermann CD, Laudati LL (eds) (1996) Robert Schuman Centre Annual on European Competition Law. Kluwer Law International, The Hague, p 71–78

Huyue Zhang A (2011) The enforcement of the Anti-Monopoly Law in China: an institutional design perspective. The Antitrust Bulletin 56(3):630–663

Killick J, Berghe P (2010) This is not the time to be tinkering with Regulation 1/2003 – it is time for fundamental reform – Europe should have change we can believe in. The Competition Law Review 6(2):259–285

Lianos I, Geradin D (2013) Handbook on European Competition Law. Edward Elgar Publishing Limited, Cheltenham

Ortiz Blanco L (2013) EU Competition Procedure. Oxford University Press, Oxford

Petit N, Rato M (2008) From hard to soft enforcement of EC Competition law – a bestiary of "sunshine" enforcement instruments. In: Gheur C, Petit N (eds) Alternative enforcement techniques – a new paradigm of EC Competition Law. Bruylant, Brussels, p 183–220

Scheidtmann A (2014) Haste makes waste (?) – some reflections on the European Court of Justice's approach to remedying infringements of the General Court regarding the right to be heard within a reasonable time. CPI, p 1–6

Schwarze J, Bechtold R (2008) Deficiencies in European Community Competition Law, critical analysis of the current practice and proposals for change. Gleiss Lutz

Van Bael I (1993) Insufficient control of EC Competition Law enforcement. Fordham Corporate Law Institute

Van Bael I (2011) Due process in EU Competition Proceedings. Kluwer Law International

Van Gerven W (1966) Principes du droit des ententes de la Communauté Economique européenne. Bruylant, Bruxelles

Volpin C (2014) The ball is in your court: evidential burden of proof and the proof-proximity principle in EU Competition Law. Common Market Law Review 51:1159–1186

Wils W (2004) The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis. World Competition 27(2):201–224

List of Abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	General Court of the European Union
Manproc	Antitrust Manual of Procedures
RFI	Request For Information
SO	Statement of Objections
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union