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9th ASCOLA Conference Warsaw 2014 on
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The colorful spectrum of fundamental rights in EU competition law procedures: overcompensation or undercompensation of fundamental rights protection? A case study on the right to be heard

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Draft Paper.
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The colorful spectrum of fundamental rights in EU competition law procedures: overcompensation or undercompensation of fundamental rights protection? – A case study on the right to be heard

Elsbeth Beumer

1. Introducing the colorful spectrum of fundamental rights in the EU

The right to be heard is the cornerstone of a fair administrative proceeding and of a fair trial. For the purpose of this article, the right to be heard includes the right to an oral hearing and the right to access documents. The right to be heard has long been 'deeply entrenched' in the EU legal order as a general principle of law.[1] Since the entry into force of the Treaty of Lisbon[2], the right to be heard has been introduced into the EU legal system as a binding fundamental right (or principle). Article 41 of the Charter of Fundamental Rights of the European Union ("Charter") on the right to good administration has been qualified as the 'benchmark' for the interpretation and application of the right to be heard.[3]

The Charter requires, however, that the meaning and scope of the rights of the Charter shall be the same as the corresponding provisions of the European Convention on Human Rights, "ECHR" (and as interpreted by the European Court of Human Rights, "ECtHR").[4] Basically this means that the minimum standard of protection of fundamental rights protection is set by the ECHR, while at the same time EU law can offer greater (procedural) protection than the ECHR. It is therefore 'fundamentally' important to assure that the defence rights under EU law complies with the ECHR, more particularly with article 6 of the ECHR. Although the text of article 6 ECHR speaks of a fair 'trial' (and not of a fair 'administration') I will demonstrate that also merely administrative procedures enjoy the protection of a fair hearing as prescribed by article 6 ECHR.

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[1] J. Flattery, 'Balancing efficiency and justice in EU competition law: elements of procedural fairness and their impact on the right to a fair hearing', *Competition Law Review* 7 (2010), p. 54.

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

[3] I. Rabinovici, 'The right to be heard in the Charter of Fundamental Rights oft he European Union', *European Public Law* 18 (2012) 1, p. 150.

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

In this paper, I will analyse the scope of the right to be heard from the perspective of different fundamental rights angles (the ECHR, Charter and general principles of law). The analysis consists of three parts. First, I will determine the standard of the ECHR on the right to be heard. Second, I will discuss the jurisprudence of the Court of Justice of the European Union ("CJEU") on the right to an oral hearing and the right to access documents. Third, I will analyse whether the current administrative competition law proceeding complies with the standards set by the Strasbourg Court on the right to be heard. In the conclusion, I will not only answer the question related to the conformity of the current competition law procedure with the right to be heard, but I will also address the more fundamental question whether the application of the different fundamental rights sources leads to an overcompensation or undercompensation of fundamental rights protection in the EU legal order.

2. The scope of article 6 ECHR

2.1 The criminal charge qualification

As stated above, the minimum level of fundamental rights protection in EU competition law procedures is set by the ECHR. The main provision on the right to a fair trial is article 6 ECHR. Article 6 ECHR applies to two different types of procedures. First, it covers procedures where there is a dispute about **civil rights & obligations**. Second, it offers protection to procedures leading to **criminal charges**. [5] The first category, civil rights & obligations, is under the 'sole' protection of article 6, para 1, ECHR, whereas the second category, involving criminal charges, is also protected by the fundamental rights that are listed in article 6, paras 2 and 3, ECHR (examples of these rights are the right to cross-examine witnesses, the right to be informed about the accusations, etc.).

The ECtHR gives a very broad autonomous interpretation of the term 'criminal'. The rationale underpinning this autonomous interpretation is that in the case where the classification of an offence in the law of the contracting parties were regarded as decisive, a state would be free to avoid the Convention obligation to ensure a fair trial in its discretion.[6] In the case *Engel*, the

[5] Such a distinction can also be found in the Charter. The equivalent provision of article 6 ECHR in the Charter, article 47, does not make such a distinction. *A contrario*, articles 48 (presumption of innocence and rights of defence) and 49 (principles of legality and proportionality of criminal offences and penalties), Charter, solely apply to persons 'who has been charged'.

[6] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on human rights* (2nd edn, OUP 2009), p. 205.

ECtHR laid down three conditions for the classification of a charge as criminal under article 6 ECHR: (a) the classification of the offence as criminal under national law; (b) the nature of the offence; and (c) the degree of severity of the penalty. The first condition carries only a formal and relative value. If an offence is criminal under national law, it is also criminal under article 6 ECHR. But if an offence is not criminal under national law, the domestic classification of the offence is 'no more than a starting point'.[7] Under this condition it is therefore irrelevant that EU prescribes that the penalties for competition law infringements shall not be of a criminal nature.[8] In cases where the offence is not classified as criminal in national law, the other two conditions listed above come into play. These two conditions are alternative and not cumulative; a cumulative approach may be adopted where neither condition by itself is conclusive.[9] As to the nature of the offence, the purpose of the offence must be deterrent, punitive and not compensatory and must have a general application. With respect to the third condition, the ECtHR emphasized the importance of the nature and severity of the possible - not the actual - punishment. Therefore, the 'relative lack of seriousness of the penalty' cannot deprive an offence of its criminal nature.[10]

In order to enjoy the full protection of article 6 ECHR, one should also assure that there is a 'charge'. According to jurisprudence of the ECtHR the charge starts when 'an official notification is given to an individual by the competent authority of an allegation that he has committed a criminal offence' or follows from some other act which carries 'the implication of such an allegation and which likewise substantially affects the situation of the suspect'.[11] Article 6 ECHR covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence.[12]

2.2 Application of the criminal charge criteria to EU competition law proceedings

Under these criteria, it is not surprising that the jurisprudence of the ECtHR has been expanding the scope of the criminal safeguards in article 6 ECHR to a wide range of

[7] *Engel v Netherlands* (1976) Series A no 22, para 82.
[8] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU [2003] OJ L1/1 ("Regulation 1/2003"), article 23 (5) 5.
[9] *Janosevic v Sweden* (2002) 38 EHHR 473, para 67; *Ezeh and Connors v the United Kingdom* (2004) 39 EHRR 1, para 86; *Bendenoun v France* (1994) Series A no 284, para 47; *Lauko v Slovakia* (1998) 33 EHRR 994, para 57; *Garyfallou AEBE v Greece* (1997) 28 EHRR 344, para 33.
[10] *Öztürk v Germany* (1984) Series A no 73, para 54. See also *Lutz v Germany* (1987) Series A no 123, para 55.
[11] *Deweer v Belgium* (1980) Series A no 35, para 46; *Eckle v Germany* (1982) Series A no 51, para 73; *Foti e.a. v Italy* (1982) Series A no 56, para 52; and *Quinn v Ireland* (2000) 33 EHHR 264, para 41.
[12] *Phillips v United Kingdom* (2001) ECHR 2001-VII.

administrative proceedings such as competition law proceedings. In the case *Menarini*, the ECtHR reaffirmed[13] that competition law proceedings are under the full protection of article 6 ECHR.[14] In EU competition law procedures[15] this protection starts at the moment when the European Commission ("Commission") informs the concerned undertakings in writing of the objection raised against them. With respect to the informal enforcement procedures (commitment, settlement and leniency procedures) one could, however, debate whether (and to what extent) there are criminal charges involved.

Commitment procedures

Article 9 of regulation 1/2003 provides for the adoption of decisions by the Commission whereby undertakings make legally-binding commitments as to their future behaviour. One of the main advantages of this procedure is that the Commission will close its file without making a finding of an infringement. The commitment procedure is a formal one that will be initiated by the Commission by sending a 'preliminary assessment' of the case (in contrast to a statement of objections) to the undertakings involved. The undertakings have a period of time to respond and to offer draft commitments.[16] These commitments cannot qualify as criminal charges, because they (i) do not have a general application; and (ii) lack the qualification of a deterrent and punitive sanction (the commitments are **voluntarily** offered by the undertaking).

The commitment can, however, fall under the first category of article 6 ECHR (civil rights & obligations). The ECtHR held in several occasions that the key determinant in cases involving state action is whether the right or obligation in question is pecuniary in nature or has pecuniary consequences for the applicant.[17] According to the ECtHR, the right to property is clearly a right with a pecuniary character, which means that state action that is directly decisive for property rights is determinative of civil rights and obligations, and hence governed by article 6 ECHR.[18] The same applies to the right to engage in a commercial activity which similarly has a pecuniary

[13] See for example the decision of the European Commission of Human Rights in case *Société Stenuit v France* (1992) Series A no 232-A.

[14] *Menarini Diagnostics S.R.L. v Italy* App no 43509/08 (ECtHR, 27 September 2011), paras 40-45. The criminal character of competition law fines has been accepted by the CJEU. See the following judgments: case C-199/92 P, *Hüls AG v Commission* (1999) ECR p. I-4287, para 150; joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri v Commission* (2005) p. ECR I-5425, para 202.

[15] In this paper the term 'EU competition law procedures' denotes article 101/102 procedures.

[16] R. Which & D. Bailey, *Competition Law*, Oxford: Oxford University Press 2012, p. 257.

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

[18] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *supra* note 6, p. 214.

character.[19] On the basis of these cases it can be assumed that commitments, such as the divestiture of assets, have a pecuniary character. In addition, for article 6 ECHR to apply there must be a dispute between the undertaking and the state (i.e. competition authority). A dispute may concern a question of fact of law[20] and if is not necessary that the dispute relates to the actual existence of a right (it may also related to its scope).[21] Given that the commitment procedure is voluntary, it is unlikely that there will be such a dispute on the substance of an article 9 decision. The consequence of this is that the commitment procedure falls completely outside the scope of article 6 ECHR. Illustrative is the case *Commission v Alrosa* in which the CJEU held that article 9 procedures are based on considerations of procedural economy.[22]

Leniency procedures

Another 'informal' procedure is the leniency procedure. Under the leniency procedure, the European Commission will grant immunity from any fine to an undertaking that is the first to blow the whistle.[23] An undertaking that does not meet the conditions of the Commission may be eligible to benefit from a reduction of a fine.[24] One of the conditions to determine whether a procedure is *criminal* is the nature and severity of the **possible** punishment. The possible punishment for a leniency applicant is, throughout the whole administrative procedure, the imposition of a fine of maximum 10% of the total turnover.[25] The promise of the Commission to grant immunity is conditional (it depends on the leniency applicant' cooperation during the administrative procedure[26]) and becomes final once the Commission adopted its decision.[27] In this respect the position of the leniency applicant equals the position of any other (cartel) participants in an administrative procedure. The point at which article 6 ECHR starts to apply is

[19] *Benthem v Netherlands* (1985) Series A no 97.
[20] *Albert and Le Compte v Belgium* (1983) Series A no 58.
[21] *Le Compte, Van Leeuven and De Meyere v Belgium* (1981) Series A no 43.
[22] Case C-441/07 P, *Alrosa v Commission*, not yet reported.
[23] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/11 ("Leniency Notice"), paras 8 (a), 8 (b), 10 and 11. The undertaking applying for immunity must provide the Commission with information (such as a corporate statement) and evidence of its participation in the alleged cartel. Immunity will not be granted if, at the time of the submission, the Commission had already sufficient evidence to carry out an inspection or had already carried out such an inspection.
[24] *Ibid.*, paras 23 and 24. In order to qualify for a reduction, the undertaking must provide the Commission with evidence that represents "*significant added value*" with respect to the evidence already in the Commission's possession.
[25] Regulation 1/2003, *supra* note 8, article 23 (2).
[26] See paras 12 (a) of the Leniency Notice.
[27] Illustrative is the case *Deltafina* where the European Commission withdrew her (conditional) promise to grant immunity. The practice of the European Commission has been confirmed by the General Court, case T-12/06, *Deltafina v Commission*, not yet reported.

not when the Commission sends its statements of objections, but once leniency applicants decide to admit the infringements and contact the Commission. From that moment onwards the position of the undertaking (c.q. leniency applicants) is 'substantially affected'.[28]

The position of the leniency applicants differs from an 'ordinary' cartel participant once the leniency applicant decides to appeal the decision of the Commission. Since the 'punishment' has lost its qualification as deterrent and punitive (with the decision to grant immunity) the leniency applicant cannot rely anymore on the full protection of article 6 ECHR. A similar conclusion can be drawn with respect to leniency applicants that received a reduction of fines. Although undertakings receiving a fine reduction still have to pay a (punitive) fine, one could argue that the conviction became final once the leniency applicant admitted the infringement before the European Commission. For that reason they [the leniency applicants] cannot invoke the extended protection of article 6 ECHR in an appeal procedure. As will be illustrated below there is another reason why leniency applicants cannot rely upon the full protection of article 6 ECHR in the administrative phase of the procedure.

Settlement procedure

The essence of the settlement procedure is that the undertakings, having heard the objections of the Commission, acknowledge their involvement in the cartel. In exchange the Commission reduces the fine that it would otherwise have imposed on them by 10%.[29] In line with leniency applicants that received a reduction of fine, one could argue that once the 'settlement applicant' admitted the infringement, and the decision of the Commission becomes final, the settlement applicant cannot rely anymore on the whole package of legal protection of article 6 ECHR. In addition, with respect to the administrative procedure one could also argue that the article 6 ECHR guarantees should not apply with its full stringency (see the paragraph below).[30]

2.3 The Jussila distinction

The conclusion that competition law fines are to be considered criminal under the ECHR is not without problems: the autonomous interpretation of the notion of a *criminal charge* has

[28] At that moment the undertakings has 'learnt of the investigation or begun to be affected by it'. See *Eckle v Germany*, *supra* note 11, para 74.

[29] Commission Regulation 622/2008 of 30 June 2008 amending Regulation773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171/3 ("Settlement Regulation").

[30] In this context it is interesting to note that the Commission, in contrast to leniency procedures, already provided for procedural effiencies. See Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU [2004] OJ L123/18 ("Regulation 773/2004"), article 10 (a) (2).

underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties.[31] Due to the significant enlargement of the area of criminality under article 6 ECHR, the ECtHR made in the case *Jussila* a distinction between hardcore and non-hardcore criminal offences, using competition law as an example of a field of law that falls within the periphery of criminal law.[32]

> "*Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight*."[33]

Following the ECtHR the criminal-head guarantees laid down in article 6 ECHR do not necessarily apply with their full stringency to cases belonging to the periphery of criminal law. The ECtHR used the severity of the sanction and the stigma attached to the offence in order to conclude that certain fields of law, such as competition law, fall outside the hard core of criminal law.[34]

In *Jussila,* the ECtHR dealt with the question whether the lack of an oral hearing before the court lead to an infringement of article 6 ECHR. In this case the difference between hardcore and softcore criminal charges was decisive for the outcome of the case as the ECtHR held that exceptional circumstances in cases not belonging to the traditional categories of *criminal charges* may justify the dispense of such a hearing:[35]

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[31] *Jussila v Finland* (2007) 45 EHRR 39, para 43.

[32] See, *a contrario,* the judgment of the EFTA Court in a case that concerned a decision of the EFTA Surveillance Authority sanctioning Norgen Poste for an abuse of a dominant position and imposing a fine of EUR 12.89 million. In its judgment the EFTA Court held: "*Having regard to the nature and the severity of the charge at hand, the present case cannot be considered to concern a criminal charge of minor weight. The amount of the charge in this case is substantial and, moreover, the stigma attached to being held accountable for an abuse of a dominant position is not negligible. Thus, while the form of administrative review provided under Article 36 SCA may influence, with regard to several aspects, the way in which the guarantees provided by the criminal head of Article 6 ECHR are applied, this cannot detract from the necessity to respect these guarantees in substance".* Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* (EFTA Court, 18 April 2012), para 90. For more on this case see: J. Temple Lang, 'Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA Courts: The Norway Post Judgment', *European Law Review* (2012) 37, p. 464-480.

[33] *Jussila v Finland*, supra note 31.

[34] Note that this categorization of criminal offences under art 6icle has no basis in the Convention. See the partly dissenting opinion of judge Loucaides, joined by judges Zupančič and Spielmann under the case *Jussila v Finland*, *supra* note 31.

[35] The ECtHR considered that a normal criminal trial (i.e. cases falling within the hardcore of criminal law) requires fundamental guarantees in the form of publicity, such as a public hearing. In other cases (i.e. administrative) cases, the ECtHR accepted that in such proceeding the lower instance may not qualify as independent and impartial

"there may be proceedings in which an oral hearing may not be required, for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials".[36]

The ECtHR emphasized that the **national authorities** may have regard to the **demands of efficiency and economy** in deciding whether or not to hold an oral hearing.[37]

In both leniency procedures and settlement procedures, where undertakings admit their contribution to an infringement, there are no (or substantially less) issues of credibility[38] or contested facts. The leniency and settlement applicants have throughout the whole proceedings the possibility to contact the Commission and to clarify certain facts. As a consequence, a potential more limited legal protection in leniency and settlement procedures seems completely in line with case of the ECtHR.

2.4 Conclusion

With the exception of the 'classic' fining procedure, it is not abundantly clear that informal enforcement procedures can be qualified as criminal charges. In addition, it is not self-evident that the procedural rights fully apply to informal enforcement procedures. Below I repeat for each type of enforcement procedure what level of procedural rights should be guaranteed (see the schedule).

Type of enforcement procedure	**Level of procedural guarantees during the administrative phase of the procedure**	**Level of procedural guarantees during the trial phase of the procedure**
Fining procedure	Article 6, paras 1, 2, 3	Article 6, paras 1, 2, 3
Commitment procedure	-	Article 6, para 1

tribunals and that the hearing before them may not be public. See in this respect also the following case: *Societe Bouygues Telecom v France* App no 2324/08 (ECtHR, 5 April 2012), para 71.

[36] *Jussila v Finland*, *supra* note 31, para 41.

[37] *Ibid*, para 42.

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

Leniency procedure (immunity)	Article 6, paras 1, 2, 3, but Jussila	Article 6, para 1
Leniency procedure (reduction)	Article 6, paras 1, 2, 3, but Jussila	Article 6, paras 1, 2, 3, but Jussila
Settlement procedure	Article 6, paras 1, 2, 3, but Jussila	Article 6, paras 1, 2, 3, but Jussila

3. The right to be heard under article 6 ECHR

3.1 The right to an oral hearing

It is perhaps important to stress that the right to a fair hearing has an 'open-ended, residual quality'. A number of specific rights have in fact been read into article 6 ECHR through the medium of its fair hearing guarantee.[39] One of them is the right to an oral hearing in one's presence[40], which offers protection against arbitrary decisions.[41] The term 'oral hearing' is somewhat confusing as it can refer to the right to a public hearing and the right an oral hearing in one's presence.[42] For the purpose of this paper I will only discuss case law on an oral hearing.

With respect to criminal procedures, the ECtHR stipulated that there is a general right of the accused to attend the hearing.[43] Although the right to be heard is particularly relevant for criminal procedures (where the witnessing and monitoring of proceedings are of great importance[44]) it also extends to certain kind of civil procedures. The right to be heard in civil procedures mainly applies to cases where the 'personal character and manner of life's of the party concerned is directly relevant to the decision'[45], or where the applicant's conduct need to be

[39] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *supra* note 6, p. 246.
[40] *Colozza v Italy* Appl no 9024/80 (ECtHR, 12 February 1984), para 27. In this case the ECtHR held: 'though this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing'.
[41] *Pretto and others v Italy* (1983) Series A no 71.
[42] Also the ECtHR has sometimes difficulties with making a distinction between those two subrights of the more abstract right to an oral hearing. See for example *Ekbatani v Sweden* Appl no 10563/83 (ECtHR, 26 may 1988); and *Moser v Austria* Appl no 12643/02 (ECtHR, 21 september 2006).
[43] *Hermi v Italy* Appl no 18114/02 (ECtHR, 18 October 2006), para 58; *Lala v the Netherlands* (1994) Series A no 297, para 33; *Poitrimol v France* (1993) Series A no 277, para 35; and *De Lorenzo v Italy* (dec.) Appl no 69264/01 (ECtHR, 12 February 2004).
[44] D. Harris, M. O'Boyle, E. Bates & C. Buckley, *supra* note 6, p. 247. In criminal procedures the right to an oral hearing follows from the rights that are listed in article 6 (3) (c), (d) and (e) ECHR. The ECtHR recalled that the principle of an oral and public hearing is particularly important in the criminal context, where the accused must generally be able to attend a hearing at first instance (*Tierce and Others v San Marino* ECHR 2000-IX, para 94.
[45] *X v Sweden* (dec.) Appl no 434/58 (ECtHR, 30 June 1959).

assessed[46].[47] With respect to other cases, it might be sufficient that there is a hearing at which the party is represented by a lawyer.[48]

Exceptions

The right to be heard in civil procedures is not absolute; the question whether the applicant has a right to an oral hearing depends on the nature of the issues to be decided.[49]In several social security cases the ECtHR concluded that, due to the highly technical nature of the case, the case was better dealt with in writing than in oral argument.[50] An oral hearing is neither required in cases where only non-complex legal questions are being discussed[51] or where oral statements will not have any added-value to the outcome of the case[52].

Also in criminal proceedings the right to an oral hearing is limited. The case discussed above, *Jussila*, illustrates that an oral hearing may not be necessary in procedures (such as competition law procedures) belonging to the periphery of criminal law. In the case *Jussila* the ECtHR refused to give the applicant a right to an oral hearing, because it was not persuaded that in this particular case any issues of credibility required an oral hearing (the issues of fact and law could be adequately addressed in, and decided on the basis of, written submissions).[53] In the aftermath of *Jussila* the ECtHR not only followed the same line of reasoning[54], but also crystallized its previous case law by underlining that

> *'the character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file.'*[55]

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[46] *Muyldermans v Belgium* Series A no 214, para 64.
[47] One exception is the case *Georgiadis* where the ECtHR held that 'a procedure whereby civil rights are determined without ever hearing the parties' submissions cannot be considered to be compatible with Article 6 para. 1'. See *Georgiadis v Greece* Appl no 21522/93 (ECtHR, 29 May 1997), para 40.
[48] *X v Switserland* (dec.) Appl no 7370/76 (ECtHR, 28 February 1977).
[49] See for example *Miller v Sweden* Appl no 55853/00 (ECtHR, 8 february 2005).
[50] *Schuler-Zgraggen v Switserland* Appl no 14518/89 (ECtHR, 24 june 1993); and *Döry v Switserland* Appl no 28394/95 (ECtHR, 12 november 2002).
[51] *Valová, Slezák and Slezák v Slovak Republic* Appl no 44925/98 (ECtHR, 1 june 2004).
[52] *Pursiheimo v Finland* Appl no 57795/00 (ECtHR, 25 november 2003). See, *a contrario*, the case *Göç* where the 'personal nature of the applicant's experience [related to his detention], and the determination of the appropriate level of compensation, required that he be heard'. See *Göç v Turkey* Appl no 36590/97 (ECtHR, 11 july 2002).
[53] *Jussila v Finland*, *supra* note 31, para 47.
[54] *Oy and Karanko v Finland* Appl no 61557/00 (ECtHR, 17 july 2007); *Lehtinen v Finland* Appl no 32993/02 (ECtHR, 22 july 2008); and *Kallio v Finland* Appl no 40199/02 (ECtHR, 22 july 2008).
[55] *Suhadolc v Slovenia* (dec.) Appl no 57655/08 (ECtHR, 17 may 2001). See also *Berdajs v Slovenia* Appl no 10390/09 (ECtHR, 27 march 2003).

The ECtHR concluded in the case *Flisar*, on the basis of the nature of the issue[56], that the local court could not have properly determined the facts or the applicant's guilt without a direct assessment of the evidence at an oral hearing. In this case the applicant contested the conviction and challenged certain factual aspects of the case, including the credibility of certain police statements concerning his conduct (in contrast to the case *Suhadolc* which concerned evidence obtained by means of an objective method). [57] This case underlines the importance of an oral hearing in criminal procedures when it can put the credibility of statements or facts to the test.[58]

Moment of the oral hearing

A related question is whether, in case there has been an oral hearing at first-instance[59] (for example during the administrative proceedings), the appeal court should also provide for an oral hearing. The ECtHR approached this question by reiterating that where a public hearing has been held at first instance, the absence of such a hearing may be justified at the appeal stage.[60] This holds particularly for: (1) appeal proceedings involving only questions of law[61]; and (2) appeal procedures where the court has full jurisdiction to examine both point of law and of fact.[62] With respect to the latter category, (appeal court has full jurisdiction) the ECtHR clarified its case law and held that an oral hearing might anyway be required when the appeal raises any questions of fact or law which cannot be adequately resolved on the basis of the case-file.[63]

3.2 The right to access documents

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

[57] *Flisar v Slovenia*, Appl no 3127/09 (ECtHR, 29 september 2001).

[58] See also *Milenovič v Slovenia* Appl no 11411/11 (ECtHR, 28 February 2013), para 32.

[59] An applicant can waive his/her right to an oral hearing, provided that the waiver is made 'of his own free will, either expressly or tacitly', is 'established in an unequivocal manner', is 'attended by minimum safeguards', and does 'not run counter to any important public interest'. See D. Harris, M. O'Boyle, E. Bates & C. Buckley, *supra* note 6, p. 247 and case *Sejdovic v Italy* ECHR 2006-II, para 86.

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

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

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

[63] *Jan Åke Andersson v Sweden* Appl no 11274/84 (ECtHR, 29 October 1991), para 29; *Fejde v Sweden*, *supra* note 60, para 33; and *Rolf Gustafson v Sweden* Appl no 23196/94 (ECtHR, 1 July 1997).

Equal to the right to oral hearing, the right to access documents is not explicitly included in article 6 ECHR. The right to access documents follows from the notion of equality of arms and the right to an adversarial procedure.[64] The right to an adversarial proceedings means that parties should have knowledge of, and should be able to, comment on all evidence adduced or observations filed with a view to influencing the court's decision.[65] In a similar context the principle of equality of arms requires that each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[66] Basically, this implies that a party should have access to documents that the opponent filed or to documents which (otherwise) places the opponent in a substantial advantage.

With respect to civil procedures the ECtHR confirmed that the parties have only a limited right to access documents. It can only require disclosure of documents that can actually influence the judgment of the court. In the case *Yvon*, the ECtHR formulated this as follows:

> *'In its opinion, the adversarial principle, thus defined, does not require that each party in civil cases must transmit to its opponent documents which, as in the instant case, have not been presented to the court either.'*[67]

The right to have access to documents that are in the possession of the court/administrative authority, and which can influence the outcome of the case, is not absolute (as will be discussed below). An infringement of the right of fair hearing will take place when a respondent State, without good case, prevents parties from gaining access to documents in its possession which would have assisted them in defending their case.[68]

In contrast to civil procedures, criminal procedures should guarantee a much broader right to access documents, meaning that the right should extend to all incriminating and exculpating documents that are in the file of the prosecutor.[69] The unlimited access to documents is, according to the ECtHR, a very important safeguard in criminal procedures and assures 'the

[64] The requirements of equality of arms and adversarial procedure apply to criminal and civil procedures, but its actual scope is not exactly the same. As the ECtHR stated: 'This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6[…]. Thus, although these provisions have a certain relevance outside the strict confines of criminal law […] the Contracting States have greater latitude when dealing with civil cases than they have when dealing with criminal case.' See *Dombo Beheer v Netherlands* (1993) Series A no 274, para 32. See also *Albert and Le Compte v Belgium*, *supra* note 20, para 39; and *Levages Prestations Services v France* Appl no 21920/93 (ECtHR, 23 October 1996).

[65] *Vermeulen v Belgium* Appl no 19075/91 (ECtHR 20 February 1996), para 33.

[66] *Dombo Beheer v Netherlands*, *supra* note 64, para 33; and *Brandstetter v Austria* (1991) Seres A no 211, para 66.

[67] *Yvon v France* Appl no 44962/98 (ECtHR, 24 April 2003), para 38.

[68] *McGinley and Egan v the United Kingdom* Appl nos 21825/93 and 23414/94 (ECtHR 9 June 1998), paras 86 and 90.

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

confidence of the parties of criminal proceedings in the workings of justice'.[70] Whether the judge will (or will not) use these documents in its assessment is irrelevant. According to the ECtHR it is not the task of the prosecutor to assess whether the collected documents are relevant for the outcome of the case[71], leave alone that the prosecutor may decide, on its own motion, to withhold documents for or against the accused.[72]

Exceptions

As said above, the entitled of disclosure of relevant evidence is limited; the fact that certain documents are not in the possession of one party will not automatically result in an infringement of article 6 ECHR. In the case *Dowsett*, the ECtHR reiterated its case law where it held that in criminal proceedings[73] there may public interests (e.g. national security, the need to protect witnesses or the need to keep secret police methods of investigating crime) that justify the non-disclosure of evidence. Another legitimate reason to withhold certain evidence from the defense is the preservation of a fundamental right of another individual. [74] A restriction on the right to access documents is, however, only permitted when (i) it is strictly necessary; and (ii) the difficulties caused to the defense are sufficiently counterbalanced by the procedures followed by the judicial authorities.[75] Specifically regarding the latter condition (the existence of adequate procedural safeguards) the ECtHR rendered several judgments in which it held that the accused should be able to make an objection against the decision (to withhold certain documents) before a court that will balance the different interests.[76] Only when national law provides for such procedural guarantees, then the non-disclosure of documents might not violate article 6 ECHR.

3.3 Preliminary conclusion

In contrast with the other guarantees in article 6 (1) ECHR, the right to a fair hearing contains several sub-rights which are not explicitly mentioned in article 6 ECHR. Two of them are the right to an oral hearing in one's presence and the right to access documents. Both of them are not absolute rights, meaning that domestic practice might deviate from one of these rights in

[70] *M.S. v Finland* Appl no 46601/99 (ECtHR, 22 March 2005).
[71] *Nautinen v Finland* Appl no 21022/04 (ECtHR, 31 March 2009).
[72] *Rowe and Davis v United Kingdom* Appl no 28901/95 (ECtHR, 16 February 2000).
[73] With respect to civil proceedings the ECtHR held that the scope of the right to access documents (including ist restriction) depends on the specifics of each case. *Hudakova and other v Slovac Republic* Appl no 23083/05 (ECtHR, 27 april 2010), paras 26-27; and *Stepinska v France* Appl no 1814/02 (ECtHR, 15 June 2005).
[74] *Dowsett v United Kingdom* Appl no 39482/98 (ECtHR, 26 June 2006), para 41. See also *Doornson v the Netherlands* ECHR 1996-II, para 70.
[75] *Van Mechelen and others v the Netherlans* ECHR 1997-III, paras 54-58.
[76] *Rowe and Davis v United Kingdom, supra* note 72; *Dowsett v United Kingdom* Appl no 39482/98 (26 April 2003); and *Chadwich v United Kingdom* (dec.) Appl no 54109/00 (ECtHR 18 November 2003).

order to protect public interests or fundamental rights of others (in case of disclosure request) or when the nature of the issue can be assessed on the basis of written materials (in case of an oral hearing). It seems that the ECtHR is specifically lenient with respect to the need of an oral hearing in procedures belonging to the periphery of criminal law. As explicitly mentioned in the case *Kammerer* it is not excluded that such a differentiated application of procedural safeguards also applies to other procedural issues covered by article 6 ECHR. [77] With respect to the right to access documents it seems that parties should (as a minimum safeguard) at least receive the documents that are part of the decision of the court/administrative authority. As illustrated by the grounds of exceptions, the question of whether or not access should be granted to documents (due to demands of efficiency and economy) seems beyond discussion.

4. The right to be heard under EU law

4.1 The right to an oral hearing

Standard EU legal order

The right to be heard under EU law is splintered over several legal sources. The main provision is article 41 Charter (the right to good administration) which provides that every person has the right to be heard before any individual measure which would affect him or her adversely. In contrast to the other provisions in the Charter[78], article 41 Charter only applies to measures taken by the EU institutions. The provisions sets two conditions for the application of the right. First, it should concern an 'individual measure', which means that the right to be heard does not apply to legislative or regulatory measure. Second, the measure should 'adversely affect' someone (see below).[79]

According to the Explanations, article 41 Charter 'is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined good administration as a general principle of law.' The results of my study on this case-law show that the general principle of defense (and not of good administration) is, in most

[77] *Kammerer v Austria* Appl no 32435/06 (ECtHR, 12 May 2010), para 27.
[78] The other Charter provisions also applies to national measure that come within the scope of EU law. See for example the case C-671/10, *Akerberg Fransson*, not yet reported.
[79] I. Rabinovici, *supra* note 3, p. 150.

of the cases, guiding the CJEU when assessing a case under article 41 Charter.[80] On the applicability of the general principle to be heard (as a sub-condition of the right of defense) the case-law illustrates that, in line with article 41 Charter, a person has the right to an oral hearing in administrative proceedings when a proceeding was initiated against him/her and might adversely affect a person[81]; the right to an oral hearing is, therefore, not limited to sanction proceedings.[82] The right to a hearing requires that the natural or legal person has the opportunity to make known its view on the truth and relevance of the facts, charges, and circumstances relied on by the decision-maker.[83]

Application competition law proceedings

The specific requirements of the right may differ depending on the type of proceedings. In competition law proceedings the Commission must give the undertakings the opportunity of being heard on the allegations raised by the Commission against them. The right to an oral hearing only relates to Commission' decisions provided for in articles 7, 8, 23 and 24 (2) of regulation 1/2003. [84] These provisions concern the finding of an infringement, the imposition of interim measures, the imposition of a fine, and the definitive fixing of a period penalty payment. In the written submissions the undertakings concerned should request an oral hearing.[85] In settlement procedures, the parties must agree that they will not request an oral hearing unless the Commission does not reflect their settlement submissions in the statement of objections and the decision.[86] An independent administrative officer[87], the Hearing Officer, will organize such an

[80] In the case *Kuhner the* CJEU distinguished the general principle of good administration from more specific rights of defence. The CJEU held that only the latter were capable of conferring subjective rights on individuals. See joined cases 33/79 and 75/79, *Kuhner v Commission* (1980) ECR 1677, para 25.
[81] Case 17/74, *Transocean Marine Paint Association v Commission* (1974) ECR 1063, para 15; case 40/85, *Belgium v Commission* (1986) ECR 2321, para 28; and case T-450/93, *Lisrestal v Commission* (1994) ECR II-1177, para 42.
[82] Case 85/76, *Hoffmann la Roche v Commission* (1979) ECR 461, para 9. In this case the CJEU limited the right to be heard to persons upon which sanctions may be imposed. This formula is reserved for antitrust cases in which normally sanctions are imposed. See I. Rabinovici, *supra* n 3, p. 157.
[83] *Hoffman la Roche v Commission*, *supra* note 82, paras 9 and 11.
[84] Regulation 1/2003, *supra* note 8, article 27 (1). Regulation 773/2004 helps to define the extent of this right. See Regulation 773/2004, *supra* note 30, articles 10, 11, and 15.
[85] Regulation 773/2004, *supra* note 30, article 12.
[86] Commission Regulation 622/2008 of 30 June 2008 amending Regulation 773/2004 as regards the conduct of settlement procedures in cartel cases (2008) OJ L 171/3.
[87] Decision of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011) OJ L 275/59.

oral hearing. His task is to safeguard the effective exercise of procedural rights throughout the whole administrative procedure.[88]

4.2 The right to access documents

Standard EU legal order

An essential precondition of an effective exercise of the right to be heard is the right to access documents.[89] Article 41 Charter includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.' The Charter limits this right to 'one's file', thereby excluding access to files of *other* parties.[90] Third parties that would like to request access to the file of the Commission could do so by means of article 42 Charter.[91]

Application competition law proceedings

Undertakings are, in principal, entitled to have access to the Commission's file,[92] for the purpose of preparing representations in its own defence.[93] In competition proceedings the CJEU have made it clear that

> *'the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections'.*[94]

As illustrated by the cited case law above, the Commission has an obligation to make available all documents to the undertakings, whether in their favour or otherwise, which were

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

[89] K. Lenaerts & J. Vanhamme, 'Procedural rights of private parties in the community administrative process', *Common Market Law Review* 34 (1997), p. 541.

[90] K. Kanska, 'Towards administrative human rights in the EU. Impact oft he Charter of Fundamental Rights', *European Law Journal* 10 (2004) 3, p. 318.

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

[92] Regulation 1/2003, *supra* note 8, article 27 (2).

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

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

being obtained during the course of the investigation.[95] It is up to the undertakings to determine (on the basis of a list of all documents[96]) which documents are relevant. In no case can the Commission exercise discretion in withholding certain documents, because the Commission considers them of no interest to the undertakings concerned. [97] A similar policy applies to settlement procedures, with the minor differences that the Commission decides when she will grant access to documents and the parties in settlement procedures only receive access before their settlement submissions have been reflected by the statement of objections.[98]

The requirement to disclose the file may, however, come into conflict with the confidentiality of certain documents and the obligation of the Commission to keep those documents secret.[99] Here one could see a clear tension between the two principles (disclosure versus confidentiality). On the one hand, the Commission should disclose all the documents that are collected during the administrative proceeding. On the other hand, the Commission may not disclose confidential information (it will not come as a surprise that competition law files contain a lot of confidential information). The case law accords confidential status to the following categories of documents: confidential documents belonging to third parties (such as business secrets and correspondence between undertakings and their lawyers), internal documents of the Commission, and correspondence between the Commission and national competition authorities.[100] Business secrets are afforded 'very special protection'.[101] Third parties may never be given access to documents containing business secrets,[102] unless the Commission (or, ultimately, the EU Courts) decides that the rights of defence and the public interest in the administration of justice outweighs the protection of business secrets.[103] In the *Soda-Ash* cases

[95] *Ibid*.
[96] Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections, listing all the documents in the file and indicating documents or parts thereof to which they may have access. See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004 (2005) OJ C 325/07 ("Notice on the rules for access to the Commission file"), para 45.
[97] Case T-30/91, *Solvay SA v Commission* [1995] ECR II-1775, para. 81; and case C-199/99 P, *Corus UK v Commission* [2003] ECR I-11177, para 125.
[98] The parties to settlement discussions may be informed by the Commission of its objections to their behaviour, the evidence used to determine those objections, non-confidential versions of relevant documents; and the range of potential fines. See Regulation 773/2004, *supra* note 30, article 10 (a) (2).
[99] Article 339 TFEU on professional secrecy.
[100] Regulation 1/2003, *supra* note 8, article 27 (2).
[101] T. Tridimas. *The general principles of EU law*, Oxford: Oxford University Press 2006, p. 389.
[102]. See case 53/85, *AKZO Chemie v Commission* (1986) ECR 1965, para 28; and joined cases 142/84 and 156/84, *BAT and Reynolds v Commission* (1987) ECR I-44787, para 21.
[103] Notice on the rules for access to the Commission file, *supra* note 96, para 24.

the General Court made it clear that the Commission must protect the business secrets of an undertaking in such a way as to cause the least possible interference with the right to a hearing, for example, by preparing a non-confidential version of the documents.[104]

4.3 Preliminary conclusion

For many years, the general rights of defence forms part of the EU legal order. The right of defence applies to administrative proceedings which are initiated against a person and which may adversely affect that person. Basically, this limits the application of the rights of defence to the undertakings that are addressees of a statement of objection of the Commission. One of the sub-rights is the right to be heard. The right to be heard is limited to infringement decisions; commitment procedures are explicitly excluded and settlement procedures have their own procedural framework. The other sub-right of the general right of defence, the right to access documents, applies to all procedures, whereby, again, an exception is provided for settlement procedures.

5. Analysis

The law on the defense rights of undertakings in EU competition law proceedings is still in development. The EU Courts play an important role in this connection, as they must specify the precise contours of the defense rights in the particular contexts of a case. Although legislation exists (article 41 Charter), the EU Courts rely mainly on previous case law on the general rights of defense. This is in line with the Explanation to the Charter which explicitly mentions that article 41 Charter is a 'mere' codification of existing case law. Since the EU Courts have the obligation to safeguard the minimum level of protection provided for by the ECHR, it is, however, surprising that the EU Courts do not assess these cases under article 6 ECHR. [105] Having the EU Courts deciding 'autonomously' upon the interpretation of the fundamental rights

[104] Case T-30/91, *Solvay v Commission* (1995) ECR II-1775 ; and Case T-36/91, *ICI v Commission* (1995) ECR I-1847.

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

is not an issue as long as the interpretation of the EU Courts leads to convergence or, perhaps better, progression of fundamental rights protection.

In the second part of this paper I confirmed my assumption that the level of procedural guarantees should correspond with the level of punishment. Only with respect to the 'classic' fining procedure, an undertaking (not leniency applicant) can rely upon the full protection of article 6 ECHR. This means that an undertaking should have a right to an oral hearing, and access to the complete file of the Commission. In EU competition law proceedings, such an undertaking has, indeed, the right to request an oral hearing. In addition, the undertaking can request all the documents included in the file of the Commission. The exceptions of the right to access documents (confidentiality) differ, however, from ECtHR case law which only accepts as a legitimate exception (i) the protection of public interests, or (ii) the protection of fundamental rights of others. Basically, this means that accepting the confidentiality of documents in EU competition law proceedings could run counter to the general right of adversarial proceedings and the principle of equality of arms.

With respect to the informal enforcement proceedings (leniency, settlement and commitment), the ECtHR case law illustrates that a lower level of fair trial protection suffices. Specifically in commitment procedures, the Commission is not obliged to offer an oral hearing or to grant full access to the file. Both are not the case in EU competition law proceedings as the oral hearing is limited to infringement decisions and the right to access documents is limited to the undertakings to whom the Commission sends a statement of objections.[106] In settlement procedures, the Commission may, due to demands of efficiency and economy, offer a less stringent application of procedural rights (see discussion of the *Jussila* distinction). It is interesting to note that settlement proceedings, with the prospect of achieving procedural efficiencies, already provide for such limited rights of defense. Assuming that the case does proceed to a settlement, the parties will not seek an oral hearing, nor will they request access to the file after receiving the statement of objections. The case-law of the ECtHR does require that such a waiver of procedural rights takes places in an unequivocal manner.[107]

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

[107] See text note 59.

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

6. Conclusion

To some extent, the present-day standards of the right to be heard (that is granted to undertakings in EU competition law procedures) complies with the legal standards of the ECHR. Regarding two types of enforcement procedures, the 'classic' fining procedures and the leniency procedures, one can (to a certain degree) observe a possible undercompensation respectively overcompensation of fundamental rights protection. Both developments can be problematic. The undercompensation of fundamental rights protection runs counter to the procedural legitimacy of the public enforcement of EU competition law and the basic notions of the rule of law. The overcompensation of fundamental rights protection may be at cross-purposes with the goals of "effective enforcement". It is well known that the Commission and the General Court face difficulties with adjudicating cases within a reasonable time. Giving leniency applicants the possibility to start interim litigation on alleged infringements of procedural rights will delay the proceedings even more. The latest *Gascogne* and *Kendrion* judgments illustrate that a delay of the reasonable time requirement might trigger undertakings to start damage actions against the EU.[108] These judgments touch upon a very delicate question: how to reconcile effective public enforcement with fundamental rights? [109] One way is to use colorful spectrum of fundamental

[108] Case 40/12 P, *Gascogne Germany*, not yet reported; case C-50/12 P, *Kendrion*, not yet reported; and case C-58/12 P, *Gascogne*, not yet reported.
[109] See for example A. Scordamaglia-Tousis, *EU cartel enforcement – reconciling effective public enforcement with fundamental rights*, Alphen aan de Rijn: Wolters Kluwer 2013.

rights more in accordance with its original purpose (protecting *human* rights) and not to confer more procedural rights to undertakings (in informal enforcement proceedings) than required by the ECHR.