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9th ASCOLA Conference Warsaw 2014 on
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An elusive convergence – rights of the defence in competition matters in the jurisprudence of the CJEU

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An elusive convergence – rights of the defence in competition matters in the jurisprudence of the CJEU

Krystyna Kowalik-Bańczyk*

I. Introduction

The question of "rights of the defence" is a vast and broadly analysed subject in the EU law of competition. The pleas raising an infringement of the "rights of the defence" are one of the main points in almost every judicial proceeding, where the European Commission' decisions in antitrust matters are questioned. The jurisprudence, where various forms or elements of that notion are exposed and explained, is enormous. Its definition however remains an **open one**, despite the efforts of the European Union's courts to define it. Its openness stems from its character – the so called „rights of the defence" constitute a general clause invoked **to fight various forms of procedural unfairness** towards a party to the proceedings[1].

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[1] It constitutes one of the „classic" problems of EU Competition Law: L. Goffin, *La jurisprudence de la Cour de justice sur les droits de la défense*, 1980 Cahiers de droit européen 140; J. Schwarze, *The administrative law of the Community and the protection of human rights*, 1986 (23) CMLRev. 401; R.H. Lauwaars, *Rights of Defence in Competition Cases* (in:) D. Curtin, T. Heukels (eds.), *Institutional dynamics of European Integration. Essays in Honour of Henry G. Schermers (Vol. II)*, Dordrecht–Boston–London 1994, p. 497; *Droits de la défense et*

The aim of this text is threefold. First objective is to identify broadly what falls under the notion of rights of the defence in the jurisprudence of the General Court (the GC) and the Court of Justice of the European Union (the CJEU) in competition matters. Because of the scope of this paper it concentrates on general trends in this jurisprudence and seeks to settle some categorisation, rather than to provide an extensive description. The second aim is to identify where (and if) those rights of defence, as defined in the jurisprudence, are placed in the Charter of Fundamental Rights of the European Union (the Charter). The third issue to be signalled it the possibility of using those "EU rights of the defence", referred also as EU *acquis* in rights of the defence, in the national competition proceedings within the European Union.

II. The notion of rights of the defence in the jurisprudence of EU Courts

The rights of the defence are mainly a jurisprudential invention. Not a single reference to procedural protection was made in the founding Treaties, so the CJEU started to use a French concept of *droits de la defense* in cases based on art. 263 TFEU (control of decisions of the European Commission)[2] or eventually also in cases based on art. 258 TFEU[3], where a Member State was accused of infringing EU law[4]. This concept was used in situations where

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droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law, Brussels 1994; A. Pliakos, *Les droits de la défense et le droit communautaire de la concurrence*, Brussels 1987; W. Weiß, *Die Verteidingungsrechte im EG-Kartellverfahren. Zugleich ein Beitrag zu den allgemeinen Rechtsgrundsätzen des Gemeinschaftsrechts*, Köln–Berlin–Bonn–München 1996; F. Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17*, 1996 (8) ECLR 428; *Un rôle pour la défense dans la procédure communautaire de concurrences. A role for the defence in community competition procedures. Die rolle der Verteidigung in europäischen Wettbewerbsverfahren*, Brussels 1997; J. Steenbergen, *Decision making in Competition Cases: The Investigator, the Prosecutor and the Judge* (in:) W. Gormley (ed.), *Current and Future perspectives on EC Competition Law: a Tribute to Professor M.R. Mok*, Hague 1997, p. 101; L. Idot, *Les droits de la défense* (in:) F. Sudre, H. Labayle (eds.), *Réalité et perspectives du droit communautaire des droits fondamentaux*, Brussels 2000; D. Slater, S. Thomas, D. Waelbroeck, *Competition Law Proceedings before the European Commission and the right to a fair trial: no need for reform?*, Global Competition Law Centre Working Paper 04/08.

[2] Judgment of the Court of 22 March 1961 S.N.U.P.A.T. v High Authority of the European Coal and Steel Community, joined cases 42 and 49/59, ECLI:EU:C:1961:5; judgment of the Court of 13 February 1979 Hoffmann-La Roche & Co. AG v Commission of the European Communities, 85/76, ECLI:EU:C:1979:36; judgment of the Court of 7 June 1983 SA Musique Diffusion française and others v Commission of the European Communities, joined cases 100 to 103/80, ECLI:EU:C:1983:158, § 9–10; judgment of the Court of 9 November 1983 NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, 322/81, ECLI:EU:C:1983:313; § 7.

[3] Judgment of the Court of 10 July 1986 Kingdom of Belgium v Commission of the European Communities, 234/84, ECLI:EU:C:1986:302, § 27; judgment of the Court of 10 July 1986 Kingdom of Belgium v Commission of the European Communities, 40/85, ECLI:EU:C:1986:305, § 28, 30.

[4] T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford 2006, p. 370, 383. Cf also: K. Lenaerts, J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 (34) CMLRev. 531; K. Lenaerts, *Procedures and Sanctions in Economic Administrative Law, General Report, 17th*

an undertaking or a Member State were facing an accusation for infringement of law, with a risk a being sanctioned for it, and therefore a necessity for defending oneself occurred. Thus, the EU rights of defence were defined not only in antitrust proceedings, but also in cases concerning other issues in EU law.

However, the sheer majority of those cases remains linked with accusations of infringement of art. 101 or 102 TFEU[5]. Thus, the CJEU was very often alone to define the ways, in which the rights of defence are to be protected for participants of an antitrust proceedings[6], creating a certain set of guarantees for procedural protection, referring initially mainly to the general principles of law. In response to this jurisprudence some of the rights were included into the acts of secondary law[7]. Already in the first regulations concerning the antitrust procedure regulation 17/62 and regulation 99/63 were contained certain procedural rules that were supposed to protect the undertakings. Those acts, adopted at the beginning of 60. of XX century provided protection for undertakings that was higher than the protection existing in national rules of that time[8]. However still, the main and principal source of knowledge on what actually falls under the notion of rights of the defence remains the CJEU' jurisprudence.

In the literature based on this jurisprudence, the catalogue of rights falling under the notion of rights of the defence is not really unified. Takis Tridimas encounters among them only: right to be heard, right to legal aid, legal professional privilege (LPP) and a privilege against self-incrimination[9]. So do Jacques Bourgeois and Tristan Baumé[10]. Bartosz Turno perceives those rights in a broader manner, including among them also the right to access to the file[11]. Wolfgang Weiß sees under this notion four guarantees: right to be heard, right to

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FIDE Congress, vol. III, Berlin 1996, p. 506–577; O. Due, *Le respect des droits de la défence dans le droit administratif communautaire*, 1987 CDE 383; L. Goffin, *La jurisprudence de la Cour de justice sur les droits de la défense*, 1980 CDE 127; W.P.J. Wils, *La compatibilité des procedures communautaires en matière de concurrences avec la Convention Européenne des Droits de l'Homme*, 1996 (3–4) CDE 1; J.-P. Tran Thiet, I. Forrester, S. Heather, *Due process in competition proceedings*, 2010 (3) Concurrences s. 10–22; X. Groussot, *General Principles of Community Law*, Groeningen 2006, p. 215.

[5] L. Goffin, *La jurisprudence...*, p. 140; J. Schwarze, *The administrative law of the Community and the protection of human rights*, 1986 (23) CMLRev. 401; R.H. Lauwaars, *Rights of Defence in Competition Cases* (in:) D. Curtin, T. Heukels (eds.), *Institutional dynamics of European Integration. Essays in Honour of Henry G. Schermers (Vol. II)*, Dordrecht–Boston–London 1994.

[6] A. Jurkowska, T. Skoczny (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, Warszawa 2007, p. 28.

[7] T. Tridimas calls it a "formalization" - T. Tridimas, *The General Principles...*, p. 11.

[8] J. Schwarze, *European Administrative...*, p. 1187.

[9] T. Tridimas, *The General Principles...*, p. 373.

[10] J.H.J. Bourgeois, T. Baumé, *Decentralisation of EC Competition Law Enforcement and General Principles of Community Law* (in:) P. Demaret, I. Govaere, D. Hanf (eds.), *30 Years of European Legal Studies at the College of Europe. Liber Professorum 1973-74–2003-04*, Brussels 2005, p. 397–402.

[11] B. Turno, *Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości*, 2009 (3) RPEiS 34.

protect confidential information, freedom from self-incrimination and LPP[12]. Rob Widdershoven[13] while comparing the EU rights of the defence with those existing in Dutch antitrust proceedings, encounters that the following rights are covered: right to legal aid, LPP, freedom of self-incrimination, right to know the objections, access to file, rights to be heard and the guarantee that the information gathered by the European Commission will not be used in national proceedings. On the other hand, Xavier Groussot thinks that the right to be heard is the central right for rights of defence, all other being just *corollary rights*[14].

What are the reasons for this discrepancy of opinions? The answer lies probably in the way that the rights of the defence are identified: it happens over the years due to the development of jurisprudence and only in a secondary and partial way by reference to the secondary law inspired by it. In addition it is a right with a "variable content" [15] as the catalogue of rights is just an open one. The CJEU and the GC concentrated more on the forms of exercise of rights of the defence than on its actual content. And it is completely comprehensible because the issue of breach of rights of defence appears in cases based on article 263 TFEU, where the court examines the legality of a decision adopted by the European Commission and it is not there to define notions (unlike in the preliminary proceedings).

The analysis of jurisprudence of the CJEU on the rights of the defence reveals that there are different categories of procedural guarantees that are covered by this notion in the legality control of decisions issued by the European Commission. It certainly covers. 1) the right to be heard, 2) the right to get to know the objections via the "statement of objections", 3) the right to access one's file, 4) the privilege against self-incrimination, 5) the legal professional privilege, 6) the right to use one's language and 7) the right to have the proceeding finished within a reasonable time. As particular elements of those guarantees are analysed in depth in this conference, we only signal the main points, without any broader description.

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[12] W. Weiß, *Die Verteidigungsrechte im EG-Kartellverfahren. Zugleich ein Beitrag zu den allgemeinen Rechtsgrundsätzen des Gemeinschaftsrechts*, Köln–Berlin–Bonn–München 1996, p. 189–432.

[13] R. Widdershoven, *Dutch Report* (in:) J. Schwarze (ed.), *Le droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Baden-Baden–Brussels 1996, p. 589–590. The lawyers forming ECLF Working Group on Transparency and Process consider that the rights of defence consist of: right to be heard, access to the file, right to good administration, privilege against self-incrimination and the legal professional privilege - ECLF Working Group on Transparency and Process (R. Celli, G. Drauz, M. English, C. Jeffs, S. Kinsella, H. Melin, M.D. Powell, C. Riis-Madsen, P. Rowland), *Transparency and Process: Do We Need a New Mandate for the Hearing Officer?*, 2010 (2) ECJ 476.

[14] X. Groussot, *General Principles...*, p. 220 i n.

[15] *Constant notion with variable content* – E. Barbier de la Serre, *Procedural Justice in the* European *Community Case-law concerning the Rights of Defence: Essentialist and Instrumental Trends*, 2006 (2) EPL 2006 232.

Some of those rights are important for one of the issues for which the rights of the defence are necessary – mainly, the full and active **participation in the proceedings.** The rights falling into this category create a sword for a party to the proceedings. However, some of the other rights falling under the notion of rights of the defence might be compared to a shield, given to a party to an antitrust proceeding. Thus their function is mainly **protective** and not informative. In this line of division, we further briefly present those participatory and protective rights.

2.1. Participation – rights of defence as a sword

The central notion for assuring one's participation in a proceeding is a guarantee for this person that they will be heard[16]. Since the 70. the **right to be heard** is treated as a general principle of law in all cases where a sanction can be imposed on an undertaking[17], particularly in the administrative (pre-judicial) phase of those proceedings[18]. This right should be guaranteed from the very first moment of the proceeding (fr. *dès le stade de la procédure administrative*) so that the 'accused' might usefully present their viewpoint[19]. The party must know that the proceeding takes place[20] and further – to really exercise it, it must possess two other rights necessary to fully participate: it must be able to get to know the **statements of objections** and it must have **access to file**.

Already in the case 48/69 *ICI* the CJEU stated that „*In order to protect the rights of the defence during the course of the administrative procedure, it is sufficient that undertakings should be informed of the essential elements of fact on which the objections are*

[16] M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, p. 217; T. Tridimas, *The General Principles...*, p. 370; J.H.J. Bourgeois, T. Baumé, *Decentralisation of EC Competition Law...*, p. 397; W.B.J. Van Overbeek, *The right to be heard in EC Competition Cases* (in:) *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Brussels 1994, p. 230; I. Van Bael, *Due Process in EU Competition Proceedings*, Hague–London–New York 2011, p. 103; W.P.J. Wils, The Oral Hearing in Competition Proceedings before the European Commission, 2012 vol. 35 (3) WC, www.ssrn.com/abstract=2050453; cf. also: judgment of the Court of 29 June 2010, European Commission v Alrosa Company Ltd., C-441/07 P, ECLI:EU:C:2010:377, § 16, 17.

[17] Judgment of the Court of 23 October 1974, Transocean Marine Paint Association v Commission of the European Communities, ECLI:EU:C:1974:106, § 17-74. Zob. J. Schwarze, *European Administrative...*, p. 1230. A. Pliakos, *Les droits de la défence...*, p. 20; J. Schwarze, *European Administrative...*, p. 1192.

[18] Judgment of the Court of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, 85/76, ECLI:EU:C:1979:36, § 9.

[19] Judgment of the Court of First Instance of 14 May 1998, Sarrió SA v Commission of the European Communities, T-334/94, ECLI:EU:T:1998:97, § 38–39.

[20] A. Jones, B. Sufrin, *EU Competition Law. Text, Cases and Materials*, Oxford 2011, p. 1071.

based"[21]. The statement of objections should clearly indicate what behaviors of an undertaking might constitute an infringement of which an undertaking is accused[22]. But it does not have to indicate who is perceived as a leader of an accussed practise[23]. It should however inform of a will of the Commission to impose a fine[24].

Another element of participation in the proceedings that should guarantee an effective right of defence refers to the access to the file. The access to the file supplements the general right to be heard[25], [26] and forms an element of rights of defence[27]. The initial strategy of the European Commission was not to grant access to the whole file[28] but only to those documents that were invoked in the statement of objections[29]. The judgments in cases *Soda Ash*[30],

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[21] Judgment of the Court of 14 July 1972, Imperial Chemical Industries Ltd. v Commission of the European Communities, 48/69, ECLI:EU:C:1972:70, § 22. Judgment of the Court of 14 July 1972, J. R. Geigy AG v Commission of the European Communities, ECLI:EU:C:1972:73, § 52-69. Por. V. Fauré, *L'apport du Tribunal de première instance des Communautés européennes au droit communautaire de la concurrence*, Paris 2005, p. 109.

[22] Judgment of the Court of First Instance of 14 May 1998, Mo Och Domsjö AB v Commission of the European Communities, T-352/94, ECLI:EU:T:1998:103.

[23] Judgment of the Court of 9 July 2009, Archer Daniels Midland Co. v Commission of the European Communities, C-511/06 P, ECLI:EU:C:2009:433.

[24] Judgment of the Court of 28 June 2005, Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission of the European Communities, ECLI:EU:C:2005:408.

[25] N. Coutrelis, V. Giacobbo, *La pratique de l'accès au dossier en droit communautaire de la concurrence: Entre droits de la défense et confidentialité*, 2006 (2) Concurrences 66; A. Mattfeld, *Access to and Communication of the File* (in:) *Droits de la défense et droits de la Commission dans le droit* communautaire *de la concurrence...*, p. 240; I. Van Bael, *Due Process...*, p. 103; Bellamy & Child, *European Community Law of Competition*, Oxford 2008, p. 1245.

[26] Judgment of the Court of 8 July 1999, Hercules Chemicals NV v Commission of the European Communities, C-51/92 P, ECLI:EU:C:1999:357, § 75–76; judgment of the Court of 17 December 1998, Baustahlgewebe GmbH v Commission of the European Communities, C-185/95 P, ECLI:EU:C:1998:608, § 89; judgment of the Court of First Instance of 18 December 1992, Cimenteries CBR SA, Blue Circle Industries plc, Syndicat Nationale des Fabricants de Ciments et de Chaux and Fédération de l'Industrie Cimentière asbl v Commission of the European Communities, joined cases T-10/92, T-11/92, T-12/92 and T-15/92, ECLI:EU:T:1992:123, § 38; S. White, *Rights of Defence in Administrative Investigations: Access to the File in EC Investigations*, 2009 vol. 2 (1) REAL 59; H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, Hague–London–New York 2001, p. 57; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1073.

[27] Judgment of the Court of 7 January 2004 Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, § 68; judgment of the Court of 2 October 2003, Corus UK Ltd v Commission of the European Communities, C-199/99 P, ECLI:EU:C:2003:531; § 125–128; judgment of the Court of First Instance of 29 June 1995, Solvay SA v Commission of the European Communities, T-30/91, ECLI:EU:T:1995:115, § 81; judgment of the General Court of 16 June 2011, Heineken Nederland BV and Heineken NV v European Commission, T-240/07, ECLI:EU:T:2011:284, § 253.

[28] I. Van Bael, J.-F. Bellis, *Competition Law of the European Community*, Hague–London–New York 2005, p. 1078; N. Coutrelis, V. Giacobbo, *La pratique de l'accès...*, p. 67.

[29] B. Doherty, *Playing Poker with the Commission: Rights of Access to the Commission's file in Competition Cases*, 1994 ECLR 8.

Hercules[31] and *Cimenteries*[32] have led to the codification of the right to access to file –first by guidelines of 1997[33], and then those of 2005[34]. It is broadly agreed that at present the European Commission should grant access to all documents that might be of relevance (Fr. *susceptibles d'être pertinents*) and it is up to the party to decide upon it. The Commission is not allowed to select the documents[35]. Therefore the Commission is obliged to provide at least the list of documents constituting the file (*Solvay*[36] and *ICI*[37]). The party questioning the lack of access should raise not only the fact, that the access was denied, but also that those documents might have been important for the defence[38] - such arguments should be raised in proceedings based on art. 263 TFEU[39].

There is a limitation as far as access to leniency documents (so called *corporate statements)* is concerned, set in the guidelines on leniency[40]. The access is only granted to the "addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below" (point 33). The information may only be

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[30] Judgment of the Court of First Instance of 29 June 1995, Imperial Chemical Industries plc v Commission of the European Communities, T-36/91, ECLI:EU:T:1995:118; § 93, 111; judgment of the Court of First Instance of 29 June 1995, Solvay SA v Commission of the European Communities, T-30/91, ECLI:EU:T:1995:115, § 83, 101. Por. L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (ed.), *EC Competition Procedure*, 2nd ed., Oxford 2006, p. 24; K. Lenaerts, *In Union we trust. Trust enhancing principles of the European Union*, 2004 CMLRev. 325; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1074.

[31] Judgment of the Court of First Instance of 17 December 1991, SA Hercules Chemicals NV v Commission of the European Communities, T-7/89, ECLI:EU:T:1991:75; judgment of the Court of 8 July 1999, Hercules Chemicals NV v Commission of the European Communities, C-51/92 P, ECLI:EU:C:1999:357. V. Fauré, *L'apport du Tribunal de première instance...*, p. 124.

[32] Judgment of the Court of First Instance of 15 March 2000, Cimenteries CBR and Others v Commission of the European Communities, T-25-26/95, 30-32/95, 34-39/95, 42-46/95, 48/95, 50-65/95, 68-71/95, 87-88/95, 103-104/95, ECLI:EU:T:2000:77.

[33] OJ C 23 of 23.01.1997, p. 3.

[34] 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 (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7–15.

[35] Judgment of the Court of First Instance of 29 June 1995, Imperial Chemical Industries plc v Commission of the European Communities, T-36/91, ECLI:EU:T:1995:118; § 81–86, 111; judgment of the Court of First Instance of 29 June 1995, Solvay SA v Commission of the European Communities, T-30/91, ECLI:EU:T:1995:115, § 91–96.

[36] Judgment of the Court of First Instance of 29 June 1995, Solvay SA v Commission of the European Communities, T-30/91, ECLI:EU:T:1995:115.

[37] Judgment of the Court of First Instance of 29 June 1995, Imperial Chemical Industries plc v Commission of the European Communities, T-36/91, ECLI:EU:T:1995:118.

[38] Judgment of the Court of 1 July 2010, Knauf Gips KG v European Commission, C-407/08 P, ECLI:EU:C:2010:389, § 24.

[39] V. Fauré, *L'apport du Tribunal de première instance...*, p. 142.

[40] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22.

used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The same time of limitation on access to file is provided by the Commission in commitment proceedings for those entities that have not participated in negotiations of commitments[41].

2.2. Protection – rights of defence as a shield

An extensive jurisprudence concentrate on the other aspect of rights of the defence – the protection of the accused. Legal aid and mainly the legal professional privilege is considered by some authors as an element of right to be heard[42] or right of defence[43]. Using legal aid certainly belongs to the major elements of the defence[44], but in the antitrust jurisprudence of CJEU it appeared only in two contexts. First, the CJEU analysed if the lawyers should be present during the inspections led by the European Commission. The presence of a lawyer is not a condition for legality of this control[45]. The other aspect consists of the protection of communication with the lawyer, known as *legal professional privilege* (LPP)[46]. The communication is protected if the lawyer is an independent lawyer (not an in-

[41] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1–6), § 35–36. 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 (EC) No 139/2004 (*OJ C 325, 22.12.2005, p. 7–15*), § 27; judgment of the General Court of 16 June 2011, Heineken Nederland BV and Heineken NV v European Commission, T-240/07, ECLI:EU:T:2011:284, § 243.

[42] L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (red.), *EC Competition Procedure...*, p. 23; H.G. Schermers, D.F. Waelbroeck, *Judicial Protection...*, p. 60–61.

[43] M. Król-Bogomilska, *Kary pieniężne...*, p. 218; M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition Law: Procedures and Remedies*, Oxford 2006, p. 81–82.

[44] Judgment of the Court of 7 June 1983, SA Musique Diffusion française and others v Commission of the European Communities, joined cases 100 to 103/80, § 8; judgment of the Court of First Instance of 22 October 1997, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities, joined cases T-213/95 and T-18/96, § 56; judgment of the Court of First Instance of 20 April 1999, Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities, joined cases T-305/94, T-306/94, 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, ECLI:EU:T:1999:80, § 120; judgment of the Court of First Instance of 7 October 1999, Irish Sugar plc v Commission of the European Communities, T-228/97, ECLI:EU:T:1999:246; § 276; judgment of the Court of 21 September 1989, Hoechst AG v Commission of the European Communities, joined cases 46/87 and 227/88, ECLI:EU:C:1989:337, § 16; judgment of the Court of 3 May 2001, Ajinomoto Co., Inc. and The NutraSweet Company v Council of the European Union and Commission of the European Communities, joined cases C-76/98 P and C-77/98 P, § 67.

[45] L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (red.), *EC Competition Procedure...*, p. 24; M. Król-Bogomilska, *Kary pieniężne...*, p. 218; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1056; cf. judgment of the Court of 26 June 1980, National Panasonic (UK) Limited v Commission of the European Communities, 136/79, ECLI:EU:C:1980:169.

[46] A. Winckler, „*Legal Privilege" et droit communautaire de la concurrence* (in:) *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence...*, p. 55–63; in the same book : Y. Brulard, P. Demolin, *Legal Privilege* (in:) *Droits de la défense et droits de la Commission dans le droit communautaire de*

house lawyer) [47], [48]. In order to guarantee fair proceedings, the Commission agreed that all strictly legal papers, prepared for the purpose of legal advice should not be copied or used by the Commission. The Commission has a sole power to assess the character and nature of documents[49]. In 2011 the European Commission précised how LLP is protected during antitrust proceedings, repeating the *acquis* stemming from CJEU jurisprudence[50], ignoring however the input of the ECtHR, where the in-house lawyers are also protected[51]. The privilege applies both to proceedings against an undertaking, as to the proceedings where the information is gathered[52] and covers all possible communication on the presumed infringement (not just the documents that were generated during the proceedings)[53]. The protection covers also documents in which the statements of lawyer are summarised[54].

Another protective measure is the privilege against self-incrimination[55], recognised as an element of fair trial in art. 6 ECHR[56]. In antitrust procedure led before the European

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la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law, Brussels 1994, p. 64–112; M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition Law...*, p. 30; Bellamy & Child, *European Community Law...*, p. 1216–1218.

[47] Judgment of the Court of 18 May 1982, AM & S Europe Limited v Commission of the European Communities, 155/79, ECLI:EU:C:1982:157; order of the Court of First Instance of 4 April 1990, Hilti Aktiengesellschaft v Commission of the European Communities, T-30/89, www.curia.eu; judgment of the Court of First Instance of 17 September 2007, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities, joined cases T-125/03 and T-253/03, ECLI:EU:T:2007:287; judgment of the Court of 14 September 2010, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, C-550/07 P, ECLI:EU:C:2010:512. Por. L. Pais Antunes, *Just Another Brick in the Wall: Communications with In-house Lawyers Remain Unprotected by Legal Privilege at the European Union Level*, JECLP 2011, vol. 2, nr 1, p. 3; I. Van Bael, *Due Process...*, p. 102; B. Turno, *Glosa do wyroku SPI z dnia 17 września 2007 r. T-125/03 i T-253/03*, 2008 (6) EPS.

[48] Judgment of the Court of 18 May 1982, AM & S Europe Limited v Commission of the European Communities, 155/79, ECLI:EU:C:1982:157; Order of the President of the Court of 27 September 2004, Commission of the European Communities v Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd, C-7/04 P(R), ECLI:EU:C:2004:566. Cf. J. Schwarze, *European Administrative...*, p. 1240 i 41; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1064.

[49] Judgment of the Court of 14 September 2010, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, C-550/07 P, ECLI:EU:C:2010:512.

[50] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6–32), § 51–59 i n.

[51] ECtHR judgment of 25 March 1992 *Campbell v. United Kingdom*, appl.no 13590/88, § 48; ECtHR judgment of 20 June 2000 *Foxley v. United Kingdom*, appl. no 33274/96, § 43, cf. I. Van Bael, *Due Process...*, p. 154.

[52] Judgment of the Court of 18 May 1982, AM & S Europe Limited v Commission of the European Communities, 155/79, ECLI:EU:C:1982:157.

[53] Judgment of the Court of 18 May 1982, AM & S Europe Limited v Commission of the European Communities, 155/79, ECLI:EU:C:1982:157; judgment of the Court of 21 September 1989, Hoechst AG v Commission of the European Communities, joined cases 46/87 and 227/88, § 16. M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition Law...*, p. 31.

[54] Order of the Court of First Instance of 4 April 1990, Hilti Aktiengesellschaft v Commission of the European Communities, T-30/89; cf. I. Van Bael, J.-F. Bellis, *Competition Law of the European...*, p. 1070.

[55] T. Jestaedt, *The right to remain silent in EC Competition* Procedure (in:) *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence...*, p. 113–118; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1058; Bellamy & Child, *European Community Law...*, p. 1218–1221; I. Van Bael, *Due Process...*, p. 158–162.

Commission, this organ can ask any information (including the existing documents) at each stage of procedure[57]. Even if an undertaking should provide this information, it does not mean an obligation to incriminate oneself[58]. In the point 23 of the preamble of Regulation 1/2003 it is stated that "The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement." It reflects the *Orkem* case[59], where the CJEU adopted a standard of protection that was lower than the ECHR standard. The *Orkem* case clearly shows that such privilege should apply also in preparatory phase of proceedings[60]. The Commission cannot oblige an undertaking to answer questions that would confirm an infringement of law[61].

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[56] ECtHR judgment of 6 February 1996 *John Murray v. United Kingdom*, appl. No 18731/91; L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (red.), *EC Competition Procedure...*, p. 179; M. Król-Bogomilska, *Kary pieniężne...*, p. 221; I. Van Bael, *Due Process...*, p. 101; K. Lenaerts, *Some thoughts on evidence and procedure in European Community Competition Law*, 2007 (30) FILJ 1463.

[57] B. Turno, *Prawo odmowy przekazania informacji...*, p. 32.

[58] X. Groussot, *General Principles...*, p. 229; cf.: judgment of the Court of First Instance of 20 February 2001, Mannesmannröhren-Werke AG v Commission of the European Communities, T-112/98, ECLI:EU:T:2001:61, § 58; judgment of the Court of First Instance of 29 April 2004, Tokai Carbon Co. Ltd and Others v Commission of the European Communities, joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, ECLI:EU:T:2004:118; judgment of the Court of 8 July 1999, Montecatini SpA v Commission of the European Communities, C-235/92 P, ECLI:EU:C:1999:362.

[59] Judgment of the Court of 18 October 1989, Orkem v Commission of the European Communities, 374/87, ECLI:EU:C:1989:387; judgment of the Court of First Instance of 20 February 2001, Mannesmannröhren-Werke AG v Commission of the European Communities, T-112/98, ECLI:EU:T:2001:61; Judgment of the Court of 15 October 2002; Limburgse Vinyl Maatschappij NV (LVM) (C-238/99 P), DSM NV and DSM Kunststoffen BV (C-244/99 P), Montedison SpA (C-245/99 P), Elf Atochem SA (C-247/99 P), Degussa AG (C-250/99 P), Enichem SpA (C-251/99 P), Wacker-Chemie GmbH and Hoechst AG (C-252/99 P) and Imperial Chemical Industries plc (ICI) (C-254/99 P) v Commission of the European Communities, ECLI:EU:C:2002:582. Cf.: I. Van Bael, J.-F. Bellis, *Competition Law of the European...*, p. 1073–1075; T. Tridimas, *The General Principles...*, p. 374 i n.; M. Król-Bogomilska, *Kary pieniężne...*, p. 222; A. Jones, B. Sufrin, *EU Competition Law...*, p. 1059.

[60] Judgment of the Court of 15 October 2002; Limburgse Vinyl Maatschappij NV (LVM) (C-238/99 P), DSM NV and DSM Kunststoffen BV (C-244/99 P), Montedison SpA (C-245/99 P), Elf Atochem SA (C-247/99 P), Degussa AG (C-250/99 P), Enichem SpA (C-251/99 P), Wacker-Chemie GmbH and Hoechst AG (C-252/99 P) and Imperial Chemical Industries plc (ICI) (C-254/99 P) v Commission of the European Communities, ECLI:EU:C:2002:582, § 275–285; judgment of the Court of 25 January 2007, Dalmine SpA v Commission of the European Communities, C-407/04 P, ECLI:EU:C:2007:53, § 34–35; judgment of the Court of 24 September 2009, Erste Group Bank AG (C-125/07 P), Raiffeisen Zentralbank Österreich AG (C-133/07 P), Bank Austria Creditanstalt AG (C-135/07 P) and Österreichische Volksbanken AG (C-137/07 P) v Commission of the European Communities, joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, § 270–273, 327.

[61] Judgment of the Court of 18 October 1989, Orkem v Commission of the European Communities, 374/87, ECLI:EU:C:1989:387, § 34, 35; judgment of the Court of 7 January 2004, Aalborg Portland A/S (C-204/00 P),

As for the rest, an undertaking has to actively cooperate with the Commission[62], including an obligation to answer questions about facts but not implications of those facts[63], [64], [65].

The last element of rights of defence that might condition the protection of the party, is the accomplishment of the proceeding within a reasonable time[66]. The defence can be effective only if it happens in good time[67], but the EU courts have enforced this guarantee in only limited extend[68]. Only if the time limits are clearly set in the norms, the decision might be invalidated[69]. In competition cases, the Commission should issue the decision within reasonable time[70], so this obligation does not concern only judicial decisions[71]. The unnaturally long time for issuing a decision is not enough to prove an infringement of rights

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Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, §61, 65; judgment of the Court of 25 January 2007, Dalmine SpA v Commission of the European Communities, C-407/04 P, ECLI:EU:C:2007:53, § 34; judgment of the General Court of 28 April 2010, Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission, T-446/05, § 325.

[62] „Une obligation de collaboration active" – judgment of the Court of 7 January 2004, Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, § 65, 207–208.

[63] Judgment of the Court of First Instance of 20 February 2001, Mannesmannröhren-Werke AG v Commission of the European Communities, T-112/98; L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (ed.), *EC Competition Procedure...*, p. 181; B. Verderdorf, *Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Development and Current Issues* (in:) B.E. Hawk (ed.), *International Antitrust Law & Policy, Annual Proceedings of the Fordham Institute*, New York 2004, p. 713.

[64] T. Tridimas, *The General Principles...*, p. 376.

[65] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (*OJ C 308, 20.10.2011, p. 6–32*), § 36.

[66] CJEU refers often to the notion of „good administration" – cf. judgment of the Court of First Instance of 27 September 2006, Haladjian Frères SA v Commission of the European Communities, T-204/03, § 195; judgment of the Court of First Instance of 19 March 2003, CMA CGM and Others v Commission of the European Communities, T-213/00, § 317. Cf. I. Van Bael, *Due Process...*, p. 103, 214.

[67] X. Groussot, *General Principles...*, p. 77, 223–224. Judgment of the Court of 17 December 1998, Baustahlgewebe GmbH v Commission of the European Communities, C-185/95 P, § 29; cf. also ECtHR judgment of 23 April 1987 *Erkner and Hofauer v. Austria*, appl. no 9616/81; wyrok ETPCz z dnia 2 listopada 1993 r. w sprawie *Kemmache p. Francji*, nr skargi 12325/86; ECtHR judgment of 23 April 1996 *Phocas v. France*, appl. no 17969/91; ECtHR judgment of 24 September 1997 *Garyfallou AEBE v. Greece*, appl. no 18996/91, § 39.

[68] Referring to a principle of legal certainty: judgment of the Court of 15 July 1970, ACF Chemiefarma NV v Commission of the European Communities, 41/69, ECLI:EU:C:1970:71, § 19–21; judgment of the Court of 15 July 1970, Buchler & Co. v Commission of the European Communities, 4/69, ECLI:EU:C:1970:72, § 6; judgment of the Court of 15 July 1970, Boehringer Mannheim GmbH v Commission of the European Communities, 45/69, ECLI:EU:C:1970:73; § 6. H.G. Schermers, D.F. Waelbroeck, *Judicial Protection...*, p. 67.

[69] H.G. Schermers, D.F. Waelbroeck, *Judicial Protection...*, p. 49.

[70] Judgment of the Court of First Instance of 22 October 1997, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities, joined cases T-213/95 and T-18/96, § 54–66.

[71] X. Groussot, *General Principles...*, p. 260.

of the defence. What is necessary is also to prove that because of the long time of proceeding, an undertaking has encountered problems with defending itself against the objections of the European Commission[72]. An extensive time of preparatory proceedings (before the statement of objections) might also influence the possibility of defence[73].

This very general presentation of rights of the defence reveals a picture of those rights that is not very coherent. As stems from this jurisprudence, the elements of rights of defence consist of various procedural guarantees given to a party in antitrust proceedings. All authors writing about "rights of the defence" refer to them as to "rights" [74], but the content of the bunch of those rights is defined in various manners. Perhaps a better notion to use would be a notion of a guarantee[75], as we are talking of a set of procedural guarantees that should be at the disposal of the party to antitrust proceedings in any case, regardless of the will of that party to use them or not (therefore they are like a procedural "armour plate", always there, and not an ephemerid set of rights used at party's will). Perhaps an even better expression would be a notion of standards of treatment of an undertaking concerned that guarantee a coherent and fair treatment of all entities that are subjects to antitrust proceedings.

III. The place of rights of the defence in the Charter of Fundamental Rights

The initial jurisprudential status of rights of the defence, as a general principle of EU law, has been changed by the entry into force of the Treaty of Lisbon. The construction of those rights has been influenced by three factors:

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[72] Judgment of the Court of 29 March 2011, ArcelorMittal Luxembourg SA v European Commission (C-201/09 P) and European Commission v ArcelorMittal Luxembourg SA and Others (C-216/09 P), ECLI:EU:C:2011:190, § 118. Similarly: judgment of the Court of 21 September 2006, Technische Unie BV v Commission of the European Communities, C-113/04 P, ECLI:EU:C:2006:593, § 60, 61; judgment of the Court of 21 September 2006, JCB Service v Commission of the European Communities, C-167/04 P, ECLI:EU:C:2006:594, § 64; judgment of the General Court of 14 April 2011, Visa Europe Ltd and Visa International Service v European Commission, T-461/07, ECLI:EU:T:2011:181, § 232; Judgment of the Court of 16 July 2009, Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities, C-385/07 P, ECLI:EU:C:2009:456, § 193. A. Bailleux, *Le salut dans l'adhésion? Entre Luxembourg et Strasbourg, actualité du respect des droits fondamentaux dans la mise en oeuvre du droit de la concurrence*, 2010 46 (1) RTDE 2010 46.

[73] Judgment of the Court of 21 September 2006, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission of the European Communities, C-105/04 P, § 49, § 50–51; judgment of the General Court of 16 June 2011, Heineken Nederland BV and Heineken NV v European Commission, T-240/07, § 286, 295, 302–303.

[74] T. Tridimas, *The General Principles...*, p. 373; W. Weiß, *Die Verteidigungsrechte im EG-Kartellverfahren...*, p. 189; J.H.J. Bourgeois, T. Baumé, *Decentralisation of EC Competition Law...*, p. 397–402.

[75] S. Summers, *Fair Trials. The European Criminal Procedural Traditions and the European Court of Human Rights*, Zurich 2006, p. 178.

1) The legally binding character of the Charter. The Charter of Fundamental Rights of the EU has become legally binding and its provisions can be directly applicable (at least in some circumstances) in front of the national authorities and courts.
2) The possible accession of the European Union to the European Convention on Human Rights, which brings about an assessment if the EU rights of the defence correspond with those included in art. 6 of European Convention on Human Rights (ECHR). In addition the provisions of the Charter have to be interpreted in accordance with the ECHR (art. 52.3 of the Charter).
3) The decentralisation of application of EU Competition law, initiated in 2004, has brought about the questions of the need and possibility of using the rights of the defence in national proceedings.

Apart from those three "external" factors, one is faced with an internal ambiguity in the Charter itself. The jurisprudential notion of rights of the defence resemble namely three of the provisions of the Charter: 1) art. 48.2 containing the guarantee of rights of the defence in criminal proceedings; 2) art. 47 referring to a fair trial understood in a way analogous to art. 6 ECHR and 3) art. 41 introducing the right to good administration. Mainly, as it seems, a certain analogy can be set between the "rights of the defence" in antitrust proceedings before the European Commission and a new notion of "right to good administration" in the Charter. But the rights of the defence can as well be placed under the notion of the right to a fair trial, regulated at present in art. 47 of the Charter. Still, as with art. 48.2, one can have doubts if this provision is to be applied legitimately to the proceedings led in front of competition authorities that are administrative organs and not courts.

3.1. Article 48.2 of the Charter – Rights of the defence

Since 1 of December 2009 the "rights of the defence" is a notion appearing in art. 48.2 of the Charter. The application of this provision to the antitrust proceedings might raise some doubts. First, this right is placed in the Charter in a title entitled "justice", so by a simple interpretation it can be deducted that it is not applicable to proceedings taking place in front of an administrative organ and not a court. Second, it is a right given to a person that could be qualified as an "accused". Thus, the antitrust proceedings in which art. 101 or 102 TFEU are

applied, the criminal or quasi-criminal character[76] of the proceedings has to be proven. The guidelines to the Charter[77] (that are to be followed in a construction of the Charter according to art. 6 TEU) set the parallel between art. 48.2 of the Charter and art. 6.3 ECHR[78], which could limit the scope of application of art. 48.2. The rights of the defence as set in art. 48.2 of the Charter seem to be narrower than the definition stemming from the CJEU' jurisprudence[79]. Therefore, it seems that the existing jurisprudence defining the rights of the defence should still be applicable and used to understand what falls under the notion of rights of the defence, in a way broader than defined in article 48.2 of the Charter. As however the Union is going to accede to the ECHR, the new question is if the rights of the defence should not be interpreted strictly in accordance with art. 6.3 ECHR. Even if some authors perceive the Charter as only a repetition of ECHR[80], the art. 6.3 is only a point of departure for interpretation of art. 48.2, setting a minimum standard of interpretation and not blocking an extensive perception of this provision[81].

As there is an identical notion in art. 6.3 of the European Convention on Human Rights and there is a homogeneity clause in the Charter, requiring a consistent interpretation of the Charter with the ECHR, a rather natural tendency appears to include the elements of rights of defence enlisted in art. 6.3 of the Convention. It is even more so as the EU is on its way to accede the convention.

It can however be doubted if the full application of art. 6.3 to the party of antitrust proceedings occurs. There are two reasons for this. First, the EU antitrust proceeding is in its first phase an administrative proceeding, led by the European Commission acting as an administrative organ. If the case happened in one of the Member States, there are different variations: mainly there are administrative organ, or in case of Austria, Belgium or Sweden there are courts or even depending on the severity of decisions in same cases decisions can only be issued by the courts (in Danemark, Estonia and Malta)[82]. And art. 6 of the Convention concerns the judicial proceedings. However, considering that the actions of administrative

[76] Cf. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Warszawa 2012, p. 293-344.
[77] OJ C 303, 14.12.2007, p. 17.
[78] One can construct the guidelines to the Charter in this way.
[79] E. Barbier de La Serre, *Procedural Justice in the European Community...*, p. 231.
[80] N. MacCormick, *Human Rights and Competition Law: Possible Impact of the Proposed EU Constitution*, SCRIPT-ed 2005, vol. 2, nr 4, p. 448. Differently: W. Weiß, *EU-Kartellverfahren und Grundrechte...*, p. 12.
[81] X. Groussot, *General Principles...*, p. 61.
[82] The administrative organs decide upon antitrust responsability in the following EU countries: Bulgaria, Cyprus, Czech Republic, Spain, Holand, Lithuania, Latvia, Portugal, Romania, Hungary, Italy, Germany, Poland, France, Slovenia, Slovakia, United Kingdom. Some countries provide that some antitrust offences create a criminal responsability: France, Poland, Germany, Slovakia, Slovenia, and United Kingdom.

organs are subject to judicial control, it is allowed in the ECHR jurisprudence to have this type of hypothesis, provided that the judicial control is led by a court that has a full jurisdiction or that the administrative organ is truly independent and impartial. In addition, regardless of which organ leads the preparatory proceeding in the criminal case, the accused or suspected always has rights of the defence.

As a second doubt, the application of art. 6 of the Convention to the EU antitrust proceedings might be doubtful, because one can wonder if we are witnessing a criminal case. One could possibly consider that that kind of proceedings is a criminal proceeding in a broad meaning of this notion. This would allow for reference to art. 6.3 of the Convention and the jurisprudence based thereon with a reservation made by the European Court of Human Rights (ECtHR) itself, that the antitrust matters do not belong to the matters of the "core" of criminal law. This causes that one should very cautiously use the jurisprudence on procedural guarantees of accused in typical criminal proceedings, as they usually are individuals and their justification refers to the human dignity etc., which of course would be of no use in antitrust proceedings.

3.2. Article 47 of the Charter - Right to a fair trial

The fair trial is a value linked with the notion of rights of the defence. They both belong to a broad catalogue of guarantees of effective judicial protection[83] and form a basic legal standard in any judicial proceeding[84]. The fair trial is regulated in art. 47 of the Charter in a way analogous to the art. 6 ECHR[85]. A comparison between the rights of the defence and the fair trial leads to some statements: first, both of those values belong to the basic human rights[86]. Second, in the classic criminal law, the rights of the defence form part of the fair trial, next to the principles of presumption of innocence, equality of arms and other specific guarantees for the accused[87]. Themistoklis Giannakopoulos even considers that those two notions are synonymous[88], however one cannot agree with this position. With no doubt, rights

[83] C. Grabenwarter, *Fundamental Judicial and Procedural Rights* (in:) D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, p. 151.
[84] Z. Kmieciak, *Postępowanie administracyjne w świetle standardów...*, p. 50.
[85] L. Ortiz Blanco, K.J. Jörgens (in:) L. Ortiz Blanco (ed.), *EC Competition Procedure...*, p. 178; M. Król-Bogomilska, *Kary pieniężne...*, p. 215–225; R. Nazzini, *Some Reflections on the Dynamics of the Due Process Discourse in EC Competition Law*, CLRev. 2005, vol. 2, nr 1, p. 5.
[86] M. Hild, G. Cieśla, E. Pache, *Rights vis-à-vis the Administration at the Community Level* (in:) A. Cassesse, A. Clapham, J. Weiler (eds.), *Human Rights and the European Community: Methods of Protection*, vol. II, Florence 1991, p. 455–457, T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, Hague–London–New York 2011, p. lvi..
[87] M. Król-Bogomilska, *Kary pieniężne...*, p. 215.
[88] T.K. Giannakopoulos, *Safeguarding Companies' Rights...*, p. 5.

of the defence form an element of the fair trial, but in an antitrust proceedings it can overstep this notion because there is not a judicial trial, just an administrative proceeding in place and still there are some guarantees to be granted to the party to the proceeding. The fair trial is based on organizational and procedural guarantees. The organizational guarantee is based on a guarantee of access to a court, that itself fulfils some minimum standards (access to an independent and unbiased court, which rulings are executed in an effective manner). The fair trial is assured in a proceeding that 1) takes place in front of an independent and unbiased court; 2) the parties to the proceedings are informed of all the important elements of the proceedings; 3) the parties have equal rights and equal possibilities to protect their reasons; 4) the proceeding should be public (open); 5) the ruling should be based on the proofs that were analysed in the proceedings and the ruling has to be reasoned; 6) there is a guarantee of judicial review (control) of the ruling[89].

The procedural guarantees should lead to a fair and open procedure within the reasonable time limit[90].

However it has to be understood that the rights of the defence in antitrust proceedings occur in a different context than the fair trial. The rights of the defence occur in proceedings in front of an administrative organ (mainly the European Commission) and not in a judicial review of decisions issued by this organ. Even if the rights of the defence are very much inspired by the ideas of fair trial, they are however a specific set of guarantees, separate from those linked with the fair trial. In the jurisprudence of the ECtHR, the situation where the decisions in the first instance are taken by a professional administrative organ are admissible[91], under a condition that such decisions are subject to full judicial control (they are controlled by courts having a full jurisdiction). The fact, that the decisions of the European Commission do not fall under the full jurisdiction of the EU Courts (but for the decisions on sanctions[92]) causes that one cannot perceive the proceeding in front of the European Commission as one fully fulfilling the standards of ECHR.

[89] P. Hofmański, *Konwencja Europejska a prawo karne*, Toruń 1995, p. 238.
[90] C. Grabenwarter, *Fundamental Judicial and Procedural Rights* (in:) D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, p. 160.
[91] ECtHR judgment of 23 June 1981 L*e Compte, Van Leuven i De Meyere v. Belgium*, appl. no 6878/75 and 7238/75, § 51.
[92] Art. 31 of regulation 1/2003

3.3. Article 41 of the Charter - Right to good administration

The right to good administration is probably closest to the jurisprudential notion of rights of the defence, particularly as far as art. 41.1 and 41.2 are concerned[93]. The pivotal element of right to good administration consists of right to be heard – and this element is also central for the rights of the defence[94]. The right to good administration has never beforehand been regulated in any international document on human or fundamental rights[95]. The references to good (or sound) administration occurred in CJEU's jurisprudence in 70. and. 80 of XX century[96], and it has been proclaimed a general principle in the 90[97]. What is surprising about this right, as Jacqueline Dutheil de la Rochère noticed, is that it is not set as a condition for legality of an administrative act but as a set of subjective public rights[98]. Thus, the Charter grants the status of fundamental rights to the procedural guarantees, like: access to the court, access to file, right to petition to the Ombudsman and the right to good administration. The EU legal order is thus constitutionalizing itself[99]. What is an interesting question is if the rights to good administration might be applied to Member States (in art. 41 there is only mention of institutions and bodies of European Union)[100]. This right is a first try to define features of good administration on the European level, based on the rules of law and legality[101], an effort that has been undertaken beforehand by the CJEU. It does not guarantee a party to a proceeding that a decision will contain a favourable solution for this party, but it

[93] X. Groussot, *General Principles...*, p. 251.
[94] T. Tridimas, *The General Principles...*, p. 410.
[95] J. Dutheil de la Rochère, *The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration* (in:) A. Arnull, P. Eeckhout, T. Tridimas (eds.), *Contuinuity and Change in EU Law*, Oxford 2008, p. 168.
[96] Judgment of the Court of 14 July 1977, Jean-Jacques Geist v Commission of the European Communities, 61/76, § 44; judgment of the Court of 29 February 1984, Estel NV v Commission of the European Communities, 270/82, ECLI:EU:C:1984:84, § 15.
[97] Judgment of the Court of First Instance of 18 September 1995, Detlef Nölle v Council of the European Union and Commission of the European Communities, T-167/94, ECLI:EU:T:1995:169; judgment of the Court of 24 October 1996, Commission of the European Communities v Lisrestal - Organização Gestão de Restaurantes Colectivos Ldª, Gabinete Técnico de Informática Ldª (GTI), Lisnico - Serviço Marítimo Internacional Ldª, Rebocalis - Rebocagem e Assistência Marítima Ldª and Gaslimpo - Sociedade de Desgasificação de Navios SA, C-32/95 P, ECLI:EU:C:1996:402; judgment of the Court of First Instance of 20 June 1990, Jean-Louis Burban v European Parliament, T-133/89, ECLI:EU:T:1990:36.
[98] J. Dutheil de la Rochère, *The EU Charter...*, p. 168.
[99] M. Ruffert, *Das Recht auf eine gute Verwaltung: Ein Grundrecht im Zentrum des verwaltungsbezognenen Europäischen Verfassungsrecht* (in:) H. Bauer, C. Calliess (eds.), *Verfassungsprinzipien in Europe. Constitutional Principles in Europe. Principes Constitutionnels en Europe*, Ateny–Berlin–Bruksela 2008, p. 274.
[100] J. Dutheil de la Rochère, *The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration* (in:) A. Arnull, P. Eeckhout, T. Tridimas (eds.), *Contuinuity and Change in EU Law*, Oxford 2008, p. 170.
[101] K. Kańska, *Prawo do dobrej administracji jako prawo podstawowe o randzie konstytucyjnej* (in:) A. Łazowski, R. Ostrihansky (eds.), *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. urodzin Profesora Eugeniusza Piontka*, Kraków 2005, p. 148, 150, 152.

guarantees that this decision will be reached with a certain set of guarantees for the party[102]. The jurisprudential rights of the defence in front of the European Commission are in principle mirroring what is put into art. 41 of the Charter. The right to be heard is the first common guarantee[103] as well as the general rule that the party should take part in a proceeding. Thus, the rights of the defence form part of the right to good administration[104], if is not its embodiment. It has been confirmed in some jurisprudence of CJEU[105].

It seems that the art. 41 of the Charter is in fact the closest provision to the content of the jurisprudential rights of the defence[106]. If the administrative law is there mainly to protect an individual from excesses of power of the administration[107], it should be concerned mainly with the fair procedure[108]. Carol Harlow finds, that the art. 41 of the Charter extends, in a dramatic way, the classic right to fair trial[109], so that it covers also non-judicial proceedings. Also the Advocates General express opinions, that the rights of the defence has been "codified" in art. 41.2 and 48.2 of the Charter[110]. This means that the whole judicial *acquis* defining this notion would have to be applied, also in cases where the national competition authorities apply EU law. Before the entry into force of the Charter, the identification of rights of the defence was much more difficult – it was considered as the general principle of EU law, sometimes next to the general principle of right to be heard (that in fact makes part of the rights of the defence). According to art. 51 of the Charter, the Member States are obliged to apply the Charter when they apply EU law. This leads to an obligation to use the Charter in

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[102] Advocate General Jacobs, refering to this provision, stated: „slow administration is a bad administration",Opinion in case Z v European Parliament, C-270/99 P, § 40; cf. J. Dutheil de la Rochère, *The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration* (in:) A. Arnull, P. Eeckhout, T. Tridimas (eds.), *Contuinuity and Change in EU Law*, Oxford 2008, p. 171.

[103] Judgment of the Court of 11 November 1987, French Republic v Commission of the European Communities, 259/85, ECLI:EU:C:1987:478, § 12.

[104] Judgment of the Court (Fifth Chamber) of 7 January 2004, Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, § 69.

[105] Judgment of the Court of First Instance of 8 March 2005, Mrs Dionysia Eleftheriadis, née Vlachaki v Commission of the European Communities, T-277/03, § 64: "Selon la jurisprudence, le respect des droits de la défense dans toute procédure ouverte à l'encontre d'une personne et susceptible d'aboutir à un acte faisant grief à celle-ci constitue un principe fondamental de droit communautaire et doit être assuré même en l'absence d'une réglementation spécifique. Ce principe, qui répond aux exigences d'une bonne administration, exige que toute personne à l'encontre de laquelle une décision faisant grief peut être prise soit mise en mesure de faire connaître utilement son point de vue au sujet des éléments retenus à sa charge pour fonder ladite décision »

[106] K. Kowalik-Bańczyk, Prawo do obrony…, p. 346.

[107] C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, 2006 17 (1) EJIL 191.

[108] *Ibidem*, s. 192; K. Lenaerts, J. Vanhamme, *Procedural Rights...*, p. 53.

[109] C. Harlow, *Global Administrative Law...*, p. 206–207.

[110] F.i.: Opinion of Advocate General Kokott C-110/10 P Solvay v European Commission, § 19, 48.

national antitrust proceedings with an "EU element", so that the national procedural standard is supplemented by the EU standards, stemming from the Charter.

IV. The application of EU rights of the defence in the national competition proceedings

One of the fundamental advantages of the Charter is the possibility to apply its provisions directly, instead of using the general principles of EU law, stemming from jurisprudence. This enhances the legal certainty of undertaking s concerned[111]. According to some authors, the content of the Charter is not just a repetition of general principles of law or ECHR – as it is much broader that the existing ECHR *acquis* and the existing jurisprudence[112]. This naturally should lead to a possibility (or rather obligation) to apply the Charter, also in its procedural content, in national antitrust proceedings that are of administrative character.

In traditional perception, the procedural solutions of administrative national laws were not often compared or assessed. In private law the commercial practice and cooperation forced a certain mutual influence of the legal systems. In the field of administrative law such needs appeared only in the second half of XX century, because before that time there were hardly any contacts between administrative organs from different member states or there hardly existed cases where an individual would appear in front of administration different then its own[113]. Those presumptions are radically changed in the functioning of the European Union, and particularly as far as decentralized application of EU antitrust law is concerned. Therefore it is legitimate to ask if the EU solutions on rights of the defence should not influence the national provisions on rights of defence in cases where the EU law is applied.

The decentralization of application of EU antitrust law causes that the articles 101 and 102 are mainly enforced by the Member States. The EU law does not regulate the procedural solutions at the national level. The Member States thus retain a procedural autonomy with one limitation – the national procedural provisions cannot hinder an effective enforcement of EU

[111] X. Groussot, *General Principles...*, p. 106.
[112] X. Groussot, *General Principles...*, p. 111; K. Lenaerst, E. De Smijter, *A Bill of Rights for the European Union*, CMLRev. 2001, vol. 41, p. 289.
[113] J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif* (in:) M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe. Nouvelles Perspectives d'un droit commun de l'Europe*, Florence 1978, p. 390–392.

competition law[114]. On the other hand, the general principles of EU law (including the rights of the defence) are there not only as help for interpretation or as a solutions for lacunas in law. They might as well constitute an independent source of law[115]. So the EU rights of the defence might be invoked as the general principles of law. Next to this, the Charter of Fundamental Rights is binding not only for the institutions and bodies of EU, but also for the Member States when they are implementing EU law (art. 51.1 of the Charter). This in this author's opinion should be construed that in cases where the national competition authorities apply EU law[116], the provisions of the Charter, including art. 41, 48 and 47 should also be applied[117].

Of course, those provisions of the Charter cannot be perceived as a breakthrough or radical change in comparison to usual constitutional standards of the Member States, as far as rights of defence are concerned[118]. But this possibility (or even an obligation) to apply the Charter might bring about some clarification as long as for instance legal professional privilege or privilege against self-incrimination are concerned in national antitrust proceedings.

V. Conclusions

The presented jurisprudence of CJEU clearly shows that there is no clear picture of what forms the rights of the defence in the eyes of CJEU. Since the moment of entry into the Communities of the United Kingdom, the CJEU started to raise the necessity to protect rights of the defence in proceedings in front of the European Commission. They form a set of rights attributed to a party to a proceeding taking place in front of an administrative EU organ. Therefore this notion is certainly broader than used in art. 6.3 ECHR, as it concerns *stricte* administrative proceedings, and not only judicial proceedings. This leads to a certain

[114] J.H.J. Bourgeois, T. Baumé, *Decentralisation of EC Competition Law...*, p. 388. Broader : K. Kowalik-Bańczyk, Procedural *Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings*, 2012 vol. 5 (6) Yearbook of Antitrust and Regulatory Studies 215-234.
[115] M. Jaśkowski, *Miejsce podstawowych zasad ogólnych prawa wspólnotowego w hierarchii wspólnotowych źródeł prawa* (in:) C. Mik (ed.), *Zasady ogólne prawa wspólnotowego*, Toruń 2007, p. 56.
[116] D. Miąsik, *Sprawa wspólnotowa przed sądem krajowym*, EPS 2008, nr 9; D. Miąsik, *Sprawa unijna* (in:) A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, wyd. 2, Warszawa 2010, p. 699–722.
[117] As an example one can cite: judgment of the Court of 22 December 2010, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, C-279/09, ECLI:EU:C:2010:811.
[118] I. Van Bael, *Due Process...*, p. 2.

"juridisation" of those proceedings[119], which despite some critique should be perceived in positive manner. The introduction of clear standards of judicial protection of undertakings in such proceedings is the only way to efficient and persuasive antitrust enforcement where those that are accused know what to expect as far as their treatment is concerned.

Pierre Pescatore stated once that the Charter is just a plagiarism of ECHR and some other international instruments on human rights[120]. This radical vision as far as rights of the defence are concerned is not confirmed as the Charter applies to administrative proceedings regardless of the fact if the antitrust proceeding is qualified as a criminal, quasi-criminal or administrative proceeding.

As far as the future use of EU rights of the defence is concerned two tendencies might be presumed to occur. First, a still growing convergence of national procedures with the procedure taking place in front of the European Commission. Second, a growing number of references to the ECHR will certainly appear, both in CJEU' jurisprudence as in national proceedings. Up till present there was no certainty if the judicial *acquis* on rights of the defence developed by CJEU could be used in national proceedings. There is no clear jurisprudence confirming it. There are however arguments, mainly in the Charter of Fundamental Rights, that the EU rights of the defence could be used and protected in national proceedings, particularly those with some EU element. Despite the principle of the procedural autonomy of administration and courts of EU Member States, the differences in procedural guarantees, and in particular in the exercise of rights of the defence, might result in discrimination and lessen the legal certainty for undertaking acting on the European markets.

The overall aim of the research was to underline the need to develop greater convergence between the procedural guarantees available in front of the European Commission and before the National Competition Authorities. In author's opinion the present situation does not mirror this need, thus the title signalling still just an elusive convergence only remains unfortunately very actual.

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[119] K. Kańska, *Prawo do dobrej administracji jako prawo podstawowe o randzie konstytucyjnej* (in:) A. Łazowski, R. Ostrihansky (eds.), *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. urodzin Profesora Eugeniusza Piontka*, Kraków 2005, p. 149.

[120] P. Pescatore, in an introduction to a reprinted version of his own text : *La Cour de justice des Communautés européennes et la Convention européenne des droits de l'homme* (in:) *Protection des droits de l'homme: la dimension européenne. Mélanges Gérard J. Wiarda*, Köln 1988, p. 441–455, reprinted (in:) F. Picod (ed.), *Études de droit communautaire européen 1962–2007*, Brussels 2008, p. 731.