THE RIGHT OF ACCESS TO THE FILE IN THE ENFORCEMENT OF EU COMPETITION LAW: STRASBOURG STYLE V. LUXEMBOURG STYLE

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I. Introduction

A new era of modernisation and decentralisation was brought on by the Council Regulation 1/2003[3], which is considered the keystone in the most comprehensive reform of procedures for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[4] Despite the attempt for decentralisation, the Commission still has a central role in the enforcement of EU competition law. The concentration of several functions in the hands of the Commission raises serious doubts about the compliance of the enforcement system with the due process guarantees and particularly with Article 6 of the European Convention on Human Rights (ECHR).[5] The question of the fairness and objectivity of the administrative proceedings before the Commission has also attracted public interest.[6] The effectiveness of the protection of the rights of defence, which aim at limiting the Commission's powers in the field, has been questioned both in the academic literature and in the Union courts.[7]

This subject becomes even more relevant in the light of the hefty fines imposed on undertakings for infringement of EU competition law. Article 6(3) of the Treaty on European Union (TEU) provides that fundamental rights, as guaranteed by the ECHR and as resulting from the constitutional traditions common to the Member States, shall constitute general principles of the EU law. The ECHR has always played a key role as a special source of inspiration in the case-law developing fundamental rights. The European Court of Justice (ECJ) held that in all proceedings in which sanctions, especially fines or penalty payments may be imposed, observance of the rights of the defence is a fundamental principle of EU law

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[3] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now 101 and 102 TFEU], OJ L1, 04.01.2003, p. 1 (hereafter referred as "Reg. 1/2003" or "the Modernization Regulation").
[4] Communication from the Commission to the European Parliament and the Council, Report on the Functioning of Regulation 1/2003, COM (2009) 206 final, Brussels, 24/04/2009, p. 2.
[5] European Convention on Human Rights, signed on 4th November 1950 <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last accessed 1 April 2011).
[6] The Economist, *Prosecutor, Judge and Jury. Enforcement of competition law in Europe is unjust and must change*, 18th February 2010, <http://www.economist.com/node/15545914> (last accessed 26 April 2011); Alan Riley, "Do Companies Have Human Rights? EU antitrust law may violate due process rules." *Wall Street Journal* (28 July 2009) <http://online.wsj.com/article/SB10001424052970203609204574314333538014034.html> (last accessed 26 April 2011).
[7] See, in general, the bibliography of this paper as well as the list with the case-law of the ECJ.

which must be complied with even if the proceedings in question are administrative.[8] Therefore, even though the Commission is not a "tribunal" within the meaning of Article 6(1) ECHR,[9] during administrative procedures it is still obliged to observe the general principles of EU law, particularly the rights of the defence, which are derived from the common tradition of the Member States and the ECHR.[10]

The right of access to the file has been recognised as a corollary of the rights of the defence.[11] The right of access to the Commission file in competition cases, a fundamental aspect of the right to be heard, enables the defendant undertakings to be apprised with the details of the case against them and to express their views on the allegations put forward by the Commission in the Statement of Objections (SO). Therefore, the right of access to the file is an essential prerequisite for the effective exercise of the rights of the defence and its observance is of fundamental importance for the defendant undertakings. The changes brought on by the Treaty of Lisbon, the envisaged accession of the Union to the ECHR, and also the binding character of the Charter of the Fundamental Rights of the European Union, inflamed the debate whether the protection EU law provides for the undertakings in competition law cases is at the same level as it is in the ECHR.[12] The aim of this paper is to examine whether the right of access to the Commission file in the proceedings for enforcement of Articles 101 and 102 TFEU is effectively protected in the light of Article 6(1) ECHR.

II. Application of Article 6(1) ECHR to the Procedure in Council Regulation 1/2003 Concerning the Enforcement of Articles 101 and 102 TFEU by the Commission

Article 6(1) ECHR is not directly applicable to the EU institutions before the EU's accession to the ECHR. Nonetheless, it should be considered in the interpretation and application of the general legal principles and fundamental rights of EU law which have been

[8] Case C-511/06 P *Archer Daniels Midland Co. v Commission* [2009] ECR I-05843, para. 84; Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, para. 70.
[9] The General Court makes this clear in Case T-11/89 *Shell International Chemical Company Ltd. v Commission* [1992] ECR II-00757, para. 39.
[10] Case T-9/99 *HFB Holding and Others v Commission* [2002] ECR II-01487, paras 390-2.
[11] Case T-58/01 *Solvay v Commission* [2009] ECR II-04781, para. 224.
[12] James Killick, Pascal Berghe, "This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in" (2010) *6 The Competition Law Review 2*, at 259; Wouter Wils "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights" (2010) *33 World Competition 1*, p. 3; Lyubomir Talev, "ECHR Implications in the EU Competition Enforcement", Paper presented at 15th Competition Law Scholars' Forum Workshop "Due Process and Innovation in EU Competition Law", 16 April 2010. Accessible online at <http://www.varadinovlaw.com/bg/?page_id=156> (last accessed 26 April 2011).

relied on.[13] In any procedure relating to the determination of "civil rights and obligations or of any criminal charge" the provisions of Article 6 ECHR should be observed. Hence, to ascertain whether it applies to the administrative procedure before the Commission in competition cases, the nature of the proceedings has to be examined. Although the prevailing opinion is that the proceedings have criminal nature in the sense of Article 6 ECHR, there is still an ongoing debate about the precise definition of their character.[14] What is of utmost importance here is not the correct classification of the proceedings but rather the consequences that follow from that classification. If proceedings are considered to have *criminal* nature for the purpose of the ECHR, greater protection and strict observance of the defendant's procedural rights have to be provided.

The Court in Strasbourg developed its own objective standards for the concept of "criminal charge" to preclude states' attempts to circumvent the due process protection by the national classification of the proceedings.[15] The ECtHR relies on three criteria developed in its case-law which are known as the *Engel* criteria.[16] When determining the character of the proceedings, the Court in Strasbourg looks at the classification of the offence in national law, the very nature of the offence, and finally, the nature and the severity of the penalty. The ECtHR held that these criteria are not cumulative and if only one of them is met, the proceedings will be classified as criminal for the purpose of Article 6 ECHR.[17]

Firstly, states as sovereign entities are free to define as criminal any act they choose, and consequently, an offence will be considered criminal if it is labelled so in national law. This leads to the application of Article 6 ECHR to such offences. According to "domestic" EU law, and particularly Article 23(5) of the Modernisation Regulation, decisions of the Commission which impose financial penalties for violations of competition law "shall *not be of a criminal law nature*".[18] Consequently, the proceedings are classified as administrative in

[13] Case C-109/10 *Solvay SA v Commission*, Opinion of AG Kokott, 14 April 2011, para. 160.
[14] (in favour of hardcore criminal offence) Donald Slater, Sébastien Thomas, Denis Waelbroeck, "Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?" (2008) College of Europe Research Papers in Law 5/2008 <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf> (last accessed 25 April 2011); Libor Drabek, "A Fair Hearing Before EC Institutions" (2001) 9 *European Review of Private Law 4*, p. 532; *Supra* n.16 , Killick, Berghe, p. 270-271; (in favour of minor criminal offences) , *Supra* n.16, Wils, p.15.
[15] ECtHR, *Engel and others v. the Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976, para. 81.
[16] See, in particular, the judgments of the ECtHR in *Engel and others v. the Netherlands*, *Ibid*, para. 82; ECtHR, *Öztürk v. Germany*, Application no. 8544/79, Judgment of 23 October 1984, para. 50; ECtHR, *Jussila v. Finland*, Application No. 73053/01, Judgment of 19 April 2007, para. 30.
[17] ECtHR, *Lutz v Germany*, Application no. 9912/82, Judgment of 25 August 1987, para. 55.
[18] The same statement could be found also in the regulation that preceded the Modernisation Regulation, in particular in Article 15 of Council Regulation (EEC) 17/62 of 21 February 1962 on implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962.

EU law and certainly not as criminal. Nonetheless, the "domestic classification" is not a decisive factor for the nature of the proceedings in relation to Article 6 ECHR and the Court in Strasbourg employs additional criteria.

Moving on to the second criterion about the nature of competition law, the ECtHR assesses both the domestic legislation's scope and the underlying rationale to determine the genuine nature of the proceedings.[19] The ECtHR uses the second criterion predominantly to distinguish criminal sanctions from mere administrative or disciplinary sanctions, which are addressed generally to a specific group or a specific profession.[20] In contrast, criminal offences should come close to a "general prohibition in the public interest".[21] In this respect, Joaquín Almunia, the Commissioner for Competition, stressed that the central objective of EU competition law is the protection of society against welfare loss caused by anticompetitive conduct.[22] Considering the fact that Article 101 and 102 TFEU apply indiscriminately to all undertakings and the underlying reason, without a doubt the main objectives of the anti-trust rules is punishment and deterrence,[23] it could be concluded that the second *Engel* criterion has been met.

With regard to the third *Engel* criterion, it is not only the nature that is relevant, but also the severity of the imposed sanction is considered. As to the nature, fines imposed under Reg. 1/2003 clearly have punitive and deterrent character. This is evident from the wording of the Commission's fining guidelines.[24] When the severity of a sanction is discussed, the ECtHR looks at both the actual penalty and the maximum penalty provided for by the relevant law.[25] Sufficiently serious and high fines may render the proceedings in which they are inflicted criminal. In the current system of enforcement of EU competition law, the

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[19] *Supra* n.16, Killick, Berghe,p. 265.
[20] ECtHR, *Weber v. Switzerland*, Application no. 11034/84, Judgment of 22 May 1990, para. 33.
[21] Karen Reid, *A practitioner's guide to the European Convention of Human Rights* (2nd ed., Sweet & Maxwell, 2004), p. 64.
[22] Speech delivered by Joaquín Almunia, "Staying ahead of the curve in EU competition policy", GCLC's Fifth Evening Policy Talk, Brussels, 19 April 2010, SPEECH/11/291, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/291&format=HTML&aged=0&language=EN&guiLanguage=en> (last accessed 26 April 2011);See also *Supra* n.3, Jones, Sufrin, p. 44; Richard Whish, *Competition Law* (5th ed., Oxford University Press, 2005), p. 17.
[23] Fines imposed on the undertakings for breach of Articles 101 and 102 TFEU have clear deterrent effect as it is clear from the text of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Reg. 1/2003, OJ C 210, 1 September 2006. Nelie Croes, former Commissioner for Competition: *"I do believe that we need to begin changing general perception of the competition rules. […] It is up to us to show that when we break up cartels, it is to stop money being stolen from customers' pockets."* (Speech delivered at IBA European Commission Conference 'Anti-trust reform in Europe: a year in practice', Taking Competition Seriously – Anti-Trust Reform in Europe, Brussels, 10 March 2005).
[24] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Reg. 1/2003, JO C 210, 1 September 2006.
[25] ECtHR, Grand Chamber, *Ezeh and Connors v United Kingdom*, Applications nos. 39665/98 and 40086/98, Judgment of 9 October 2003, para. 120.

Commission is allowed to impose severe fines: up to 10 % of the total turnover of an undertaking for the previous business year,[26] which may lead the undertaking(s) to liquidation.[27] Moreover, it was determined that the financial penalties aim at specific deterrence and there has been also a considerable rise in the amounts of the fines imposed by the Commission. Having regard to both the nature and the severity of the sanctions imposed by the Commission for infringements of EU competition law, it is undeniable that the proceedings are of criminal nature. This view is shared even by Commission officials.[28] As a result, the third *Engel* criterion is also met.

An important issue which also has to be addressed is whether the ECHR, seen as the core human rights instrument in Europe, extends its protection for certain rights also to business undertakings which in most of the cases are legal persons.[29] It is settled case-law of the ECtHR that the Convention applies to individuals as well as to legal persons. However, not all the rights enshrined in the Convention apply to companies. Examples of such rights are the right not to be tortured, the right to marry, and respect for family life. In contrast, "classical" human rights, such as the right to a fair trial as codified in Article 6(1) ECHR, can be extended easily to corporate applicants.[30]

As a result of the application of Article 6(1) ECHR to the administrative proceedings before the Commission, the standard of procedural fairness enshrined in Article 6 ECHR and aiming at safeguarding the defendant's rights has to be secured. The underlying reason is that a conduct subject to criminal sanctions deserves procedures which satisfy criminal standards of rigour, thoroughness and due process.[31] Even though the right of access to evidence is not explicitly codified in the ECHR, it has developed in the case-law of the Court in Strasbourg as an aspect of the right to a fair trial and thus, Article 6(1) implicitly contains it. After the Treaty of Lisbon, the CFREU has the same legal value as the Treaties and it expressly

[26] Article 23(2) of Reg. 1/2003.
[27] In the *District Heating Cartel* case, the Commission imposed such heavy fines that that they led to liquidation the companies Løgstør Rør and Tarco. For more information on the fines see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/917&format=HTML&aged=1&language=EN&guiLanguage=en> (last accessed 26 April 2011).
[28] Wouter Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis" (2004) *27 World Competition 2*, p. 208.
[29] Case C-205/03 P *FENIN* [2006] ECR I-6295, para. 25: "In [EU] competition law the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed." Thus, it is obvious that the definition of "undertaking" is broad and it also encompasses natural persons. See e.g. Commission Decision in RAI v UNITEL OJ [1978] L 157/39 where opera singers were considered to be "undertakings".
[30] Arianna Adreangelli, *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, 2008), p. 17
[31] Ian Forrester, "Due process in EC competition cases: a distinguished institution with flawed procedures" (2009) *34 European Law Review 6*, p. 829.

codifies the right of access to the file in Article 41(2) CFREU. It is again appropriate to reiterate that Article 52(3) CFREU provides that the protection afforded by the CFREU for rights which correspond to rights guaranteed by the Convention must be *at least* equivalent to the guarantees provided by the ECHR. The explanation of the CFREU elucidates that Article 47(2) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply with regard to EU law and its implementation.[32] Therefore, the full protection of Article 6 ECHR applies to EU competition law proceedings and the defendant's right of access to the Commission file should be provided the very same protection as the right of access to evidence in the ECHR.

The scope and the meaning of the right of access to evidence laid down in the ECHR is to be examined before looking at the right of access to the Commission's file and outlining possible divergences in the two standards of protection.

III. Right of Access to Evidence: Strasburg Style

As mentioned above, Article 6(1) ECHR does not explicitly provide for a right to access evidence. Nonetheless, the ECtHR holds that, to ensure the effective and meaningful participation in the administrative proceedings leading to the determination of a "criminal charge" or "civil rights and obligations", parties must be afforded the opportunity to have access to evidence gathered by the authorities so as to be able to influence the outcome of the proceedings.[33] The concepts of equality of arms and adversarial hearings presuppose the access to evidence. The ECtHR states in *Ruiz-Mateos v Spain* that, as a matter of a general principle, the right to a fair adversarial trial means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.[34] The adversarial trial is a fundamental aspect of the right to a fair trial in criminal proceedings where the equality of arms between the prosecutor and the defence has to be respected.[35] Therefore, the Court in Strasbourg reads Article 6(1) ECHR to require that the prosecution disclose all the relevant incriminating *and* exculpatory evidence to the accused. The right to be heard has two basic elements- first, the undertaking should be made aware of the allegations against it, and second, it must be provided a reasonable opportunity to make known its view on these allegations.

[32] Explanations of to the Charter of Fundamental Rights of the European Union, OJ [2007] C 303/17, explanation on Article 52 CFREU.
[33] *Supra* n.39, Adreangelli, p. 87
[34] ECtHR, *Ruiz-Mateos v Spain*, Application no. 12952/87*,* Judgment of 23 June 1993, para. 63
[35] ECtHR, *Jasper v the United Kingdom*, Application no. 27052/95, Judgment of 16 February 2000, para. 51

Important remark is that the right of access to evidence is not an absolute right and it may be restricted under certain circumstances. The ECtHR rules that in some cases it may be necessary to withhold certain evidence from the defendant in order to preserve the fundamental rights of another individual or to safeguard vital public interest.[36] It is a general principle established in the case-law of the ECtHR that the task of the national courts to assess the evidence before them and to decide whether to refuse disclosure.[37] However, in cases where evidence has been withheld from the defendant, the task of the court in Strasbourg is to ascertain whether the decision-making procedure applied in the case complied, as far as possible with the requirements of adversarial proceedings and equality of arms, and incorporated adequate safeguards to protect the interests of the accused.[38]

Consequently, restrictions on the right of access to evidence, in the ECtHR's view, must be accompanied by proper procedural safeguards and especially thorough judicial supervision of the adoption of any such measure in accordance with the principle of equality of arms.[39] Such judicial supervision aims at ensuring effective protection of the defendant's procedural rights and maintaining the adversarial character of the proceedings where the equality of arms is observed. The ECtHR emphasised that the constant judicial review by the trial judge of decisions regarding access to evidence in criminal proceedings is *indispensable* for safeguarding the right of the accused.[40]

IV. Right of Access to the File: Luxembourg Style

It is a fundamental principle of EU law that the right to a fair hearing must be observed in all proceedings leading to the imposition of sanctions including also administrative proceedings.[41] As an integral part of the defence rights, the right to be heard requires that "a person whose interests are perceptibly affected by a decision taken by a public authority be given the opportunity to make his point of view known."[42] Therefore, access to the file is not merely a technicality, but an essential precondition for the exercise of the right to be heard.[43] Moreover, access to the Commission file is one of the procedural guarantees

[36] ECtHR, *Dowsett v the United Kingdom,* Application no. 39482/98, Judgment of 24 June 2003, para. 42
[37] ECtHR, *Edwards and Lewis v. the United Kingdom,* Applications nos. 39647/98 and 40461/98, Judgment of 16 December 1992, para. 32
[38] ECtHR, *Dowsett v the United Kingdom*, para. 43
[39] ECtHR, *Dowsett v the United Kingdom,* para. 43.
[40] ECtHR, *Dowsett v the United Kingdom,* paras. 50-51. (emphasis added)
[41] Case C-550/07 P *Akzo Nobel Chemical and Akcros Chemicals* v *Commission and Others* [2011] ECR 1-00000, para. 92; See also Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, para. 30
[42] Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, para. 15.
[43] Koen Lenaerts, Jan Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process", (1997) *34 Common Market Law Review 3*, p. 541

intended to apply the principle of equality of arms, to protect the rights of the defence, and to ensure ultimately a fair administrative procedure.[44] Drawing a parallel line with the case-law of the ECtHR, the ECJ makes it clear in *Aalborg Portland* that the right of access to the file is neither an abstract principle nor is the access a special distinct procedure from the infringement procedure.[45] Instead, it is a step in the administrative procedure for enforcement of EU competition law. Access to the file is also of considerable practical importance because it enables the undertaking to compare its contentions with the observations submitted by third parties and use them for additional corroboration for the observations on which it relies against the Commission.[46] In a synthesised form, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file save for internal and confidential documents which may be relevant for its defence.

The right of access to the Commission file gradually evolved in the case-law of the Union courts, and is now reflected in Reg. 1/2003 as well as in the Commission Notice on the rules for access to the Commission file of 2005.[47] Access to the Commission's file in proceedings for enforcement of Articles 101 and 102 TFEU is now expressly provided in Article 27(1) and (2) of Reg. 1/2003 as well as in Article 15(1) of the Commission Regulation 773/2004.[48] The practical arrangements for the access to the file are contained in the Commission Notice on access to the file, which is regularly updated, and its last version is from 2005. The Notice reflects the case-law of the Union courts to a significant extent. Besides, the right of access to the file is considered as a fundamental right of the investigated parties in EU law,[49] and is codified in Article 41(2) (b) CFREU.[50]

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[44] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101 and 102 of the TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, 2005/C 325/07, para.1

[45] 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 *Aalborg Portland v Commission* [2004] ECR I-00123, at para. 68-70.

[46] Case C-109/10 P *Solvay SA v Commission*, Opinion of AG Kokott, 14 April 2011, para. 174

[47] Hereafter referred as "2005 Notice".

[48] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102] of the [TFEU], OJ L 123, 27.4.2004, p. 18-24.

[49] Case T-30/91 *Solvay v Commission:*"[r]espect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of [EU] law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings"

[50] Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

-the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

- 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.

A. Scope of the Right of Access to the File. "The File"

As stated in the 2005 Notice, access to the file is given for the purpose of the effective exercise of the defence rights as well as to apply the principle of equality of arms.[51] The principle applies during the administrative procedure before the Commission and not during the proceedings before the Union courts. According to Article 27 of Reg. 1/2003 access to the file is given to the "parties concerned".[52] Apart from that, third parties (complaints) who have "sufficient interest" also have right of access to the case file, but the scope of their right of access the file is rather limited.[53] The *Soda Ash* cases were essential for defining the scope of the right of access to the file. It is well established case-law now that "it cannot be for the Commission alone to decide which documents are useful for the defence".[54] Following the *Soda Ash* cases, the investigated undertaking has a right of access to all the documents which are relevant in principle for its defence. Nonetheless, the investigated parties are not allowed to go on "fishing expeditions" to search for business secrets and other confidential documents of their business rivals. In principle, the scope of the right of access to the file should be commensurate to the right to be heard.[55]

The SO is normally accompanied by the evidence adduced and the documents cited on which the Commission bases its objections.[56] Access to the file is generally granted upon request and normally on a single occasion following the notification of the Commission's SO to the parties.[57] The General Court explained it in *ThyssenKrupp Stainless* that despite in a succinct way, the SO enables the investigated undertakings to identify the conduct complained of by the Commission. Therefore, no access to the file is given prior to the communication of the SO. It is the SO, on the one hand, and access to the file, on the other, that allow the undertakings under investigation to acquaint themselves with the evidence which the Commission has at its disposal.[58] Problems with the right of access to the Commission's file usually occur in cases where several undertakings are involved and they submit different documents. The extent to which each undertaking is given access to the case file differs. In such a situation the undertakings may adopt schemes of self-help and distribute

[51] See the 2005 Notice, para. 44.
[52] See the 2005 Notice, para.3.
[53] For the scope of the right of complainant, see *Supra* n. 58, 2005 Notice, paras. 30-32.
[54] Case T-30/91 *Solvay v Commission*, para. 81; Case T-36/91 *ICI v Commission*, para.91.
[55] Julian Joshua, "Balancing the public interests: confidentiality, trade secret and disclosure of evidence in EC competition procedures" (1994) *15 European Competition Law Review 2*, p.78.
[56] Christopher Kerse, Nicholas Khan, *EC Antitrust Procedure* (5th Ed., Sweet and Maxwell, 2005), p. 235.
[57] *Supra* n. 58, 2005 Notice, para. 27.
[58] Case T-24/07 *ThyssenKrupp Stainless v Commission* [2009] ECR II-02309, para.224.

among themselves relevant information and documents.[59] The problem with access to the file is more acute in cartel cases where the companies normally seek leniency from the Commission. A company will not reveal information that puts it in disadvantageous position vis-à-vis its former allies. However, the defence of an undertaking cannot depend on the good will of another party, which is supposed to be its competitor. For that reason, the General Court makes it clear that the responsibility for the proper investigation of competition cases rests with the Commission and it cannot delegate this task to the undertakings whose economic and procedural interests usually conflict.[60]

Many problems with the definition of the scope of the file come from identifying what actually constitutes "the file". The scope of the right cannot be delineated precisely without first defining which documents and evidence are considered to be part of it.

The 2005 Notice defines "the file" as "all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition (DG COMP), during the investigation."[61] However, the ECJ has interpreted the term "file" more generously to include not only incriminating documents on which the Commission bases its findings of infringement, but also any possible exculpatory documents which may help the undertaking to organise its defence against the Commission's allegations.[62] As a result, "the file" is understood to mean all the documents, which may be relevant for the defence. Notwithstanding the ECJ's approach, many authors criticise the ECJ for its restrictive views on what constitutes the file and advocate for more relaxed definition.[63] The main problem comes from the fact that documents in possession of other directorates of the Commission, which may be relevant for the defence nonetheless, are not considered by the Commission and the courts as part of the file.

B. Accessible and Non-accessible Documents. Limits on the Right of Access to the File

Article 27(2) of Reg. 1/2003 provides that access should be given to all documents comprising the Commission's file with the exception of the Commission's internal documents, business secrets of other undertakings, or other confidential information.[64]

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[59] *Supra n.78*., Kerse, Khan, p. 220.
[60] Case T-36/91 *ICI v Commission*, para. 95.
[61] *Supra* n. 58, 2005 Notice, para.8.
[62] The General Court- Case T-36/91 *ICI v Commission*, para. 91; The ECJ- Case C-407/08 P *Knauf Gips v Commission* [2011] ECR 1-00000, para. 22.
[63] *Supra* n.16, Talev, p. 42; Asa Erlandsson, "The Defendant's Fright of Access to the Commission's File in Competition Cases" (1998) *25 Legal Issues of Economic Integration 2*, p.155-156.
[64] The Commission Notice of 2005 classifies these documents as the "non-accessible" part of the file.

With regard to the internal documents, the 2005 Notice provides examples of such documents and specifies that they cannot be incriminating nor exculpatory.[65] Thus, they are not part of the accessible documents of the file and the reasons put forward by the Commission are that they lack evidential value and it does not rely on them for the assessment of the case. The exclusion of the internal documents from the accessible part of the file was also explicitly recognised in *BPB Industries Plc* and it is now settled case-law of the ECJ.[66] Article 27(2) of Reg. 1/2003 clarifies that correspondence between the Commission and the competition authorities of the Member States falls also under the title of internal documents.[67] Moreover, minutes and notes of meetings with third parties constitute internal documents of the Commission in principle as they reflect its own interpretation of what was said at the meeting.[68] However, if the undertaking in question agrees to such notes or minutes, they will become part of the file on the case. Notwithstanding that internal documents are generally regarded as non-accessible, in certain cases during the judicial stage disclosure may be ordered by the court.[69]

The second ground on which the Commission can refuse disclosure is that the documents constitute business secrets. The legal basis for the protection of business secrets is a general principle of EU law.[70] It is explicitly enunciated in Article 27(2) of Reg. 1/2003 as well as in Article 16 of Regulation 773/2004. In addition, Article 339 TFEU also gives special protection to business secrets.[71]Throughout the years, there has been a problem with the precise definition of business or trade secrets, which was deemed to be intentional.[72] Confidentiality is probably a matter of degree, with legitimate business secrets at the top of a sliding scale.[73] While providing some examples, the 2005 Notice endorses the substantive approach based on the consequences of the disclosure adopted by the General Court in

[65] *Supra* n. 58, 2005 Notice, para. 12.
[66] Case C-310/93 P *BPB Industries plc and British Gypsum Ltd v Commission* [1995] ECR I- I-00865, para. 25; Case C-407/08 P *Knauf Gips KG v Commission*, para. 22; 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 *Aalborg Portland v Commission* [2004] ECR I-00123, para. 68.
[67] The 2005 Notice ,para.15.
[68] *Supra* n. 58, 2005 Notice, para.15.
[69] Joined cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF AG v Commission* [1992] ECR II-00315; Joined cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH v Commission* [1996] ECR II-00537.
[70] *Supra* n.90, Erlandsson, p. 148; Marc Brealey, "Business Secrecy and Confidentiality' in Slynn and Pappas (eds) *Procedural Aspects of EC Competition Law* (EIPA Publication, 1995) p. 67-8.
[71] It obliges members of institutions and committees as well as civil servants and the officials not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.
[72] *Supra* n.77, Joshua, p.72.
[73] Berend Jan Drijber, Claus-Dieter Ehlermann, "Legal protection of enterprises: administrative procedure, in particular access to files and confidentiality" (1996) *17 European Competition Law Review*, p. 377.

Postbank.[74] Business secrets are described in the 2005 Notice as information about an undertaking's business activity that could result in a *serious* harm to the same undertaking. The Commission has been criticised for affording greater protection for confidential information, especially business secrets, at the expense of the rights of defence of the investigated undertakings.[75] In *Soda Ash* cases, the General Court takes a firm stance that the protection for business secrets must be balanced against the rights of the defence.[76] The Court suggests that the balance can be achieved if the Commission either provides copies of such documents from which the passages with the legitimate business secrets are erased or it should provide a sufficiently detailed list of the documents in question to allow the defendant undertakings to ascertain whether the withheld documents are relevant for their defence and if so, non-confidential version of these documents has to be produced.

The third category of documents that are considered as non-accessible is confidential information other than business secrets.[77] There has been always a fundamental tension between the right of the investigated undertaking to be acquainted with the case against it and the Commission's obligation to preserve the confidentiality of its source of information.[78] The threshold for gaining protection for confidential information appears to be lower than that for business secrets as the test the Commission applies is whether there would be any *significant* harm. The 2005 Notice illustrates confidential information with two examples of the case-law of the Union courts. The first one is information provided by third parties about undertakings, which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers.[79] The second instance is information, which identifies the complainants or other third parties where those have a justified wish to remain anonymous. The procedure under which a confidential document or information may be disclosed to the complaints by the Commission was set out by the ECJ in *Akzo Chemie*.[80] However, the confidential character of documents is as a rule not an obstacle

[74] Case T-353/94 *Postbank NV v Commission* [1996] ECR II-00921, para. 87.
[75] *Supra* n.90, Erlandsson, p. 151; *Supra* n.77, Joshua, p.77 and 79; Hans Peter Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, Oxford, 1999), p. 47-8, *Supra* n.101, Drijber, Ehlermann, p.379.
[76] Case T-36/91 *ICI v Commission*, para. 98; Case T-30/91 *Solvay v Commission*, para. 88. Erlandsson argues that the Commission still considers the prohibition of disclosure of business secrets as absolute, *Supra* n.90, Erlandsson, p. 153.
[77] Article 28 of Reg. 1/2003.
[78] The Commission may not otherwise receive information if the informant is not protected against possible retaliation.
[79] This may well be the case when an undertaking provides information for another undertaking which enjoys a dominant position in a market and the fear of retaliation by the strong dominant company is reasonable.
[80] Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission* [1986] ECR 1965, para. 29.

for their disclosure no matter if the information is exculpatory or inculpatory.[81] Furthermore, the confidential character of a part of the file cannot be used to frustrate the rights of the defence and the Commission should try to find a way to communicate the substance of the secret without breaching Article 28(2) of Reg. 1/2003.[82]

C. Consequences of a Violation of the Right of Access to the File

When an undertaking deems that the decision of the Commission is adopted in proceedings where an essential procedural right such as the right of access to the file is violated, it can contest the decision before the General Court on the basis of Article 263 TFEU. It is settled case-law that procedural defects in connection with access to the file in the course of the administrative procedure cause the Commission's decision to be annulled if the rights of the defence have been infringed.[83] However, whether there has been a breach of the rights of the defence must be examined in relation to the specific circumstances of each case and the burden to prove it rests with the concerned undertakings.[84] The alleged failure to give access to the file has to be examined in relation to the substantive objections raised by the Commission to see whether and how the defence of the undertakings concerned was affected by the non-disclosure.[85] In this respect, the Union courts make a crucial distinction between non-disclosure of exculpatory and inculpatory documents.

With regard to inculpatory documents,[86] it has been firmly established that failure to communicate a document constitutes a breach of the rights of the defence if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement, and second, that the objection could be proved only by reference to that document. Thus, it is for the undertaking to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence.[87]

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[81] *Ibid*, para. 27
[82] *Supra n.78*, Kerse, Khan, p.223.
[83] Case C-109/10 *Solvay SA v Commission*, Opinion of AG Kokott, para.158; See also Case C-51/92 P *Hercules Chemical* v *Commission*, p. 78, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, para. 128; Joined cases *Aalborg Portland v Commission*, at para.104.
[84] *Ibid*, *Aalborg Portland v Commission*, at para. 127; Case T-24/07 *ThyssenKrupp Stainless v Commission*, para. 229.
[85] *Supra n.78*, Kerse, Khan, p. 225.
[86] A document is considered inculpatory/ incriminating towards an undertaking only if it is used by the Commission to support its statement as to the existence of an infringement by the undertaking involved. *Supra* n. 57, Lenaerts Vanhamme, p. 545.
[87] Case C-407/08 P *Knauf Gips v Commission,* para. 13, Joined cases *Aalborg Portland v Commission*, at paras 71-3.

As to exculpatory documents, the burden of proof for a breach of the defence rights is less "heavy" in comparison with the burden of proof for inculpatory documents. It is self-evident that if an undertaking had the opportunity to inspect such documents, it would prepare its defence better. Therefore, the Union courts ruled that an undertaking concerned has to establish only that the non-disclosure of exculpatory documents *was able* to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission.[88] In this respect, it is sufficient for the respective undertaking to show that it would have been able to use the exculpatory documents in its defence.[89] Therefore, failure to disclose documents will not automatically lead to the (partial) annulment of Commission decision by the Union courts.

E. The Role of the Hearing Officer and Some Remarks Regarding Challenging His Decisions

Established in 1982, the Hearing Officer (HO) holds an independent position from the DG COMP but reports directly to the Competition Commissioner, and thus, he is a Commission official. Currently there are two Hearing Officers whose major task is to ensure the respect for the right to be heard, the right of access to file, and the fairness of the proceeding.[90] The position of the HO is intended to be a "neutral chair" in the hearing with the aim of increasing the transparency and fairness of the procedure.[91] However, the role of the HO is predominantly reactive, rather than proactive.[92] If after having accessed the file, the investigated undertaking requires knowledge of specific non-accessible information for its defence it may submit a reasoned request to the Commission.[93] If the DG COMP rejects the request, the undertaking has recourse to the HO. He decides on disputes between the parties, the information providers and the Commission in accordance with the 2005 Notice. Important to note here is that, in order to avoid fishing expeditions or unwarranted requests, the undertaking is required to identify sufficiently the documents, which it seeks to examine.[94] Furthermore, it should also show that the non-disclosure might influence the course of the

[88] Case C-407/08 P *Knauf Gips*, para. 23; Case T-24/07 *ThyssenKrupp Stainless v Commission*, para. 274; Case C-109/10 *Solvay SA v Commission*, AG Kokott Opinion, para. 177.
[89] *Ibid*.
[90] European Commission–Competition, "Hearing Officers: Mission", <http://ec.europa.eu/competition/hearing_officers/index_en.html> (last accessed on 28 April 2011).
[91] See Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L162/21.
[92] David Anderson, Rachel Cuff, "Cartels in the European Union: Procedural Fairness for Defendants and Claimants" (2011) *34 Fordham International Law Journal*, p.396.
[93] *Supra* n. 58 2005 Notice, para. 47.
[94] Case T-175/95 *BASF Lacke and Farben AG v Commission* [1999] ECR II-01581, para. 47.

proceedings and might result in different content of the decision including the level of possible fine.[95]

Very peculiar feature of the enforcement procedure before the Commission is that the decisions of the HO regarding access to the file are *not* subject to direct judicial scrutiny of the General Court. Whereas the final decision of the Commission can certainly be challenged on the basis of Article 263 TFEU, the decision of the HO is left without judicial supervision, because it is considered a procedural stage.[96] Kerse and Khan argue that decisions of the HO can be categorised as legal acts, however, they are legal acts of the Officer himself and not of the Commission, and judicial review via the procedure set out in Article 263 TFEU is thus prevented.[97] Consequently, undertakings must wait until a final decision is adopted by the Commission and then to challenge it before the General Court. The reason behind is that during the administrative stage, the Commission may rectify any procedural irregularities, in particular the refusal to give access to certain documents, by subsequently granting access to the file after initially declining to do so. There is no legal certainty, however, for the investigated undertaking as it cannot predict the actions of the Commission. Consequently, in the author's view, the organisation of its defence is impeded. At the judicial stage, the undertaking bears the burden of proof and it has to show that the non-disclosure of certain documents of the file was detrimental for its defence.

V. Conclusion

Although the proceedings for enforcement of antitrust rules by the Commission are considered administrative in EU law, it is now apparent that they have criminal nature in the sense of Article 6 ECHR. Therefore, it is a yardstick according to which the fairness of these proceedings is to be judged. In the light of the recent constitutional developments in the EU, the Commission is obliged to observe and ensure that the protection of the procedural guarantees, particularly the right of access to the file, is at least at the same level as that secured by the ECHR.

Undoubtedly, the right of access to the Commission's file has evolved extensively throughout the years, and it is now firmly established in EU competition law as a procedural guarantee intended to apply the rights of the defence and preserve the principle of equality of arms. *De jure,* the protection of the right of access to the file has to be at the same level as that

[95] Joined cases *Aalborg Portland v Commission*, para. 74
[96] In Case 22/70 *Commission v Council* [1971] ECR 263 *(ERTA case),* see para. 47.
[97] *Supra n.78*, Kerse, Khan, p. 238.

provided in the ECHR. *De facto,* there is a significant divergence between the two standards of protection, which comes from the safeguards provided in case of non-disclosure. Although the right of access to the file has been based on the principle of equality of arms, the interpretation that the Court in Strasbourg gives to this principle differs from that of the Court in Luxembourg. The Court in Strasbourg has advocated a broad interpretation of the principle of equality of arms so as to include the right to seek judicial revision of decisions impinging upon the right to obtain disclose. In contrast, the Court in Luxembourg has denied persistently that the decisions of the HO could be challenged immediately before the General Court. Furthermore, the ECtHR requires that the defendant has access to all the evidence while the ECJ has narrower approach to what constitutes "the file", and undertakings can examine only documents possessed by DG COMP. Such a limited interpretation affects also the extent to which defendants are allowed to exercise their right to inspect evidence and ultimately the fairness of the procedure.

The right is still without a true remedy at the administrative stage, where the Commission is a "judge, jury and prosecutor", and with incomplete one at the judicial stage. The challenge of the final Commission decision before the General Court is not a felicitous alternative. It costs money and time and the defendant undertaking bears the burden of proof to show that the non-disclosure affected adversely its defence or it could have used the evidence in its defence. Therefore, the suggested reform will bring a significant improvement in the system of protection of the right of access to the file. It calls for interlocutory appeal of the decisions of the HO that will eventually enhance the fairness and objectivity of the system of enforcement. In addition, it will prevent abuses of the rights of procedure for substantive annulment of the Commission decisions.

In conclusion, due to the criminal nature of the anti-trust enforcement proceedings in the sense of Article 6(1) ECHR, the present system for protection of the right of access to the file has to be revised and improved in order to guarantee the defendant undertakings a fair trial. Moreover, the reform is necessary to ensure that the system for enforcement of competition law by the Commission complies with the fairness and objectivity required by the ECHR.